NOTICE OF APPEAL AND GROUNDS OF APPEAL.

New Jersey Supreme Court

SYLVESTER FRESCHI, *Plaintiff,* *vs.* ABRAHAM B. MASON, *Defendant.*	*Action at Law.* *Notice of Appeal and Grounds of Appeal.*

To Burlew & Currie, Esqs., attorneys for plaintiff Sylvester Freschi.

TAKE NOTICE that the defendant Abraham B. Mason does hereby appeal from the whole and every part of the judgment entered in the above-entitled cause in favor of the plaintiff Sylvester Freschi for $20,000 damages and costs of suit against this defendant, to the New Jersey Court of Errors and Appeals in the last resort in all causes.

FURTHER TAKE NOTICE that the following are the defendant's grounds of appeal:

1. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously refused to grant a motion of the defendant to non-suit the plaintiff and allowed the defendant an exception to such ruling.

2. Because the learned Judge of the Circuit Court, who tried the case for the Supreme Court, erroneously refused to grant defendant's motion to direct a verdict in favor of the defendant and

against the plaintiff, and allowed defendant an exception to such ruling.

3. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously permitted the reading of depositions of one K. Winfield Ney over the objection of the defendant and allowed the defendant an exception to the ruling permitting the reading of the depositions.

4. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously charged the jury as follows:

> "They have the license permitted by our practice to put any interpretation they may see fit in accordance with the idea as it may benefit or harm the particular client that is being spoken of."

5. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously charged the jury as follows:

> "Now, I have only allowed that phase of the case to come to you because it was suggested by counsel for the defendant and that there is no real merit to this suit at all; * * * The suggestion was that as a matter of fact the plaintiff never would have brought this suit but for the fact that his employer, the Metallurgical Chemical Company, had been paying out moneys under the compensation act. * * * Now therefore, only as that had a bearing upon the credibility that you will accord to a man like Bingham, for example, who appears to have been an employee of the Metallurgical Chemical Company, or any other employee of that company that has been produced here to testify as a witness, I have allowed that phase of the case to come in."

6. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously charged the jury as follows:

> "Now I may say that ordinarily where an occurrence of that sort occurred there is a rule of law which I regard as applicable, and it is this: 'The principle is that when through any instrumentality or agency under the management or control of a defendant or his servants, there is an occurrence injurious to the plaintiff which in the ordinary course of things would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords prima facie evidence that there was want of due care.' Now you are walking along a street or highway and some mason or carpenter or other artisan is working upon the roof of a building and he carelessly throws over something and it comes down upon the sidewalk and hits you and you are injured; the rule of law is that therefore the proof that such a thing happened and hurt you is enough, is prima facie proof of negligence."

7. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously charged the jury as follows:

> "But you have a right to consider the circumstances; men working upon a scaffold, according to the plaintiff, at or above his head; that he was suddenly struck; an injury occurred."

8. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously charged the jury as follows:

> "If under your examination of all the testimony in the case you arrive at the conclusion that there was no causal relation between the plaintiff's injury, that every other thing or cause had been eliminated

except the dropping of the bar, then I charge you you would have a right to consider whether or not the plaintiff had not proven under a fair preponderance of the proof that the proximate cause of his injury was the falling of the bar under the rule that I have given you."

9. Because the learned Judge of the Circuit Court, before whom said cause was tried, erroneously charged the jury as follows:

"And this question of contributory negligence, while a defense, is only to be considered by you where you find the plaintiff has proven the negligence of the defendant as charged under a fair preponderance of the proof."

10. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously charged the jury as follows:

"Contributory negligence is present in a given case when the injured person by his own negligence has contributed to the injury in such a way that but for his own negligence he would have received no injury from the negligence of the other party. Now that is a defense and it must be proven under a fair preponderance of the proof; that is to say, it must appear under all of the evidence in the case, no matter from which side it comes, that the plaintiff was guilty of contributory negligence within the definition I have given you before he can be held responsible therefor. * * * But if he does prove the negligence of the defendant but at the same time it appears under all the testimony in the case, by a fair preponderance of the proof, that the plaintiff himself was guilty of contributory negligence, then again he cannot recover."

11. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously charged the jury as follows:

> "Now that question of contributory negligence centers around the claim of the defendant that the plaintiff had been warned on the day in question on one or more occasions—how many you will recall—that he was working in a dangerous place, to get out from under that operation of the roof where the defendant and his employees were working."

12. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously charged the jury as follows:

> "So that therefore this question is left with you to determine; did the plaintiff have a right to assume, was he charged with knowledge that even if the warnings were given as alleged that something would drop from the roof to his injury, and therefore having that knowledge was he bound to stop work entirely on the ground for his employer because of the warnings that are alleged to have been given by the defendant's employees in this case? It is a question of fact, in my mind, not one of law, and I am leaving it to you to determine."

13. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously charged the jury as follows:

> "Now it has been suggested in this case, for example, that since the plaintiff was employed by the Metallurgical Chemical Company, that that company was bound to provide him with a safe place to work, and since it did not so provide him with a safe place to work the proximate cause of his injury was not the negligence of the defendant, his employee or employees, but the Metallurgical Chemical Company. I am

going to leave that question to you to determine as a fact."

14. Because the learned Judge of the Circuit Court, who tried the case for the Supreme Court, erroneously refused to charge the jury as requested by the defendant in his second request to charge which is as follows:

2.

"Negligence on the part of the defendant must be proved by the evidence. It will not be presumed. There is also a presumption against negligence."

15. Because the learned Judge of the Circuit Court, who tried the case for the Supreme Court, erroneously refused to charge the jury as requested by the defendant in his fourth request to charge which is as follows:

4.

"It is necessary for the plaintiff to give proof as to the cause or thing which was alleged to have been the negligent act which produced the injury or proof of such facts from which the existence of such cause or thing constituted the alleged negligent act, was the only reasonable inference that could properly be drawn."

16. Because the learned Judge of the Circuit Court, who tried the case for the Supreme Court, erroneously refused to charge the jury as requested by the defendant in his fifth request to charge which is as follows:

5.

"The plaintiff must also prove that the negligent cause or thing which produced the injury was in the possession of and under the control or management of the person charged with the negligence or of his servants."

17. Because the learned Judge of the Circuit Court, who tried the case for the Supreme Court, erroneously refused to charge the jury as requested by the defendant in his sixth request to charge which is as follows:

6.

"If you find there is no proof in this case as to what caused the injury to plaintiff then your verdict should be in favor of the defendant."

18. Because the learned Judge of the Circuit Court, who tried the case for the Supreme Court, erroneously refused to charge the jury as requested by the defendant in his fourteenth request to charge which is as follows:

14.

"If you find that the plaintiff was warned by the defendants or his servants to keep away from the place where the defendant's servants were working and that the plaintiff disregarded these warnings, the plaintiff was guilty of contributory negligence and cannot now recover against the defendant."

19. Because the learned Judge of the Circuit Court, who tried the case for the Supreme Court, erroneously refused to charge the jury as requested by the defendant in his fifteenth request to charge which is as follows:

15.

"If the danger existing at the time and place of the accident was a perfectly obvious one and one of which the plaintiff ought reasonably to have been fully aware and if the plaintiff continued to work where he did with full knowledge of the danger, he assumed the risk of such injury as he received and cannot now recover from the defendant."

20. Because the learned Judge of the Circuit Court, who tried the case for the Supreme Court, erroneously refused to charge the jury as requested by the defendant in his sixteenth request to charge which is as follows:

16.

"If the plaintiff continued to work with full knowledge of the obvious and apparent danger which existed at the time and place of the accident, he was guilty of contributory negligence which bars a recovery from the defendant."

21. Because the learned Judge of the Circuit Court, who tried the case for the Supreme Court, erroneously refused to charge the jury as requested by the defendant in his seventeenth request to charge which is as follows:

17.

"The plaintiff was bound to do everything reasonably possible to minimize the effect of the injury and even though your verdict should be for the plaintiff, if you find that the plaintiff at any time omitted to take any measures which would have mitigated the injurious effect of the injury, this must be taken into account by you in estimating the damages to the plaintiff."

22. Because the defendant Abraham B. Mason was not guilty of negligence which was the proximate cause of the accident described in the complaint.

23. Because the Court below erroneously entered a judgment in favor of the plaintiff and against the defendant, whereas the judgment should have been in favor of the defendant and against the plaintiff.

THOMAS BROWN,
Attorney for Defendant.

Notice of Appeal and Grounds of Appeal.

Service of a copy of the within notice of appeal is hereby acknowledged this 6th day of May, 1930.

BURLEW & CURRIE,
Attorneys for Plaintiff.

ORDER DISCHARGING DEFENDANT'S RULE TO SHOW CAUSE.

Filed May 8, 1930

NEW JERSEY SUPREME COURT.

SYLVESTER FRESCHI, *Plaintiff,* *vs.* ABRAHAM B. MASON, *Defendant.*	*Action at Law.* *Order Discharging Defendant's Rule to Show Cause.*

The defendant having taken out a rule to show cause why a new trial should not be granted in this suit, the Court having heard and considered the argument of counsel for both sides submitted under the rule and it finding no cause to disturb the verdict entered, it is therefore on the 8th day of May, 1930, ORDERED, that the rule to show cause granted the defendant in this cause be discharged with costs.

Entered on motion of

BURLEW AND CURRIE,
Attorneys.

OPINION OF SUPREME COURT.

Filed May 1, 1930

NEW JERSEY SUPREME COURT.

No. 25, January Term, 1930.

SYLVESTER FRESCHI, *Plaintiff,*

vs.

ABRAHAM B. MASON, *Defendant.*

Decided April , 1930.

Submitted January 31, 1930.

Defendant's rule to show cause.

Before Justices Parker, Black and Bodine.

For the plaintiff, Burlew & Currie.

For the defendant, Thomas Brown.

PER CURIAM:

The plaintiff at the time of the injury that gave rise to this suit, was a regular employee of the Metallurgical and Chemical Co., Inc., at its plant in Matawan. That company contracted with the Fuller Construction Company to build an additional building of steel frame construction, sheathed and roofed with corrugated iron, and connecting with the existing building. The frame was up, and work on the roof was in progress. At the same time, plaintiff was engaged under direction of his foreman, in laying the concrete foundation of a piece of machinery under, or nearby under a part of the incomplete roof where

workmen of the defendant Mason were at work; and with matters in that situation plaintiff was struck on the head by a heavy metal object which he claimed had been negligently allowed to fall from the roof by some workman of the defendant. Said defendant was a subcontractor of the Fuller Construction Co., for the roofing of the new building. Plaintiff brought suit against defendant, and after two trials resulting in a disagreement of the jury, and a third in which a juror was withdrawn to permit an amendment of the complaint, the jury on a fourth presentation of the evidence returned a verdict in his favor of $20,000 which is before us on the present rule to show cause. Some seventeen reasons are assigned which will be considered so far as they are deemed worthy of discussion.

The first point made is that it was error for the trial court to permit the amendment of the complaint, because said amendment introduced a new cause of action after the statute of limitations had run. It is sufficient to say that none of the seventeen reasons raises this point. We may add that the objection to the amendment at the trial was predicated on surprise, and that objection was met by a continuance. Moreover, there was no exception by defendant to the addition of a new count to the original count. The apparent exception stated in defendant's brief is in fact an exception allowed to plaintiff because the Court struck out the first count of the amended complaint. In short, there was no substantial objection to the amendment at the time, except that of surprise, which, as we have said, was disposed of by the continuance.

The next point is based on reason No. 8 and charges error in permitting the testimony of a

Dr. Ney, of New York, specialist, taken *de bene esse* on notice, to be read to the jury. The objection made to the deposition at the trial was merely that it had been taken to be used at previous "trials" and had lost its efficacy. The Court rejoined that there had never been a trial in the real sense of the word, and this was correct. Rosengarten *v.* Central R. R. Co., 69 N. J. L. 220. Even if there had been such trial, a deposition taken under Sec. 45 of the Evidence Act would be available so long as the action is pending. Wallace, Muller & Co. *v.* Leber & Meyes, *Id.* 312. And mere irregularity will not *ipso facto* vitiate it. C. S. 2236, Sec. 52. As often happens in such cases, the deposition had been taken by consent and in presence of counsel on both sides with full opportunity of cross examination, and all substantial guarantees of fairness and reliability. On the merits there was no error in admitting it, apart from the absence at the trial of objections now urged.

There was no error in permitting the witness Jervis to testify that the Fuller employees worked on another job on the afternoon of the accident. This bore directly on the hypothesis that it may have been a Fuller man and not an employee of defendant, who was to blame for the injury.

The testimony of Bingham about conditions three-quarters of an hour after the accident was neither irrelevant nor immaterial, though its value may have been problematical.

Defendant preferred a number of requests to charge which as his counsel now claims were refused. We find that some were charged, others charged with some added comment not erroneous; others were fully covered. One contained the

proposition that "there is always a presumption against negligence" and error is claimed in not so charging. The Court properly refused so to instruct the jury, as a presumption of negligence arose from the happening of the accident, if the jury believed plaintiff's version of the circumstances. Sheridan *v.* Foley, 58 N. J. L. 230.

The two broad points in the case are that the verdict was against the weight of the evidence, and that it is excessive. We are unable to say that it ought to be set aside in either aspect. According to the evidence for plaintiff, the article that struck him was a tool called a "dollybar" used in riveting, in which occupation defendant's employees were engaged at the time. They naturally owed a duty of reasonable care to other workmen engaged on the same job, of whom plaintiff was one. The fall of this heavy metal implement on plaintiff's head spoke of negligence. The case was carefully and fairly laid before the jury; we have examined the evidence and deem it improper to disturb the verdict.

Nor do we think it excessive in amount. Much of the consequential injury may be attributed to failure to recognize the serious character of the damage at the outset, but the plaintiff is not accountable for that. N. Y. & N. J. Tel Co. *v.* Bennett, 62 N. J. L. 742. It became necessary to remove a section of skull and penetrate through the dura mater to the brain to relieve oedema and congestion consequent to the injury and delayed relief; so that plaintiff, a comparatively young man, has to go through life with the handicap of the immediate and consequential results of a blow on the head which might well have killed him and which in fact destroyed a section of the skull.

The rule to show cause will be discharged.

PER CURIAM.

Filed May 1, 1930.

FRED L. BLOODGOOD,
Clerk.

SUMMONS.

Filed March 27, 1925.

Date of Service March 25, 1925.

The State of New Jersey to Albert B. Mason (first name "Albert" being
(L. S.) fictitious, defendant's real first name being unknown to plaintiff).

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

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the New Jersey Supreme Court, at the State House, Trenton, this twenty-fourth day of March, nineteen hundred and twenty-five.

EDWARD J. KELLEHER,
Clerk.

STOKES & MCDERMOTT,
Attorneys.

COMPLAINT.

New Jersey Supreme Court

MONMOUTH COUNTY.

SYLVESTER FRESCHI,
Plaintiff,

vs.

ALBERT B. MASON (first name "Albert" being fictitious, defendant's real first name being unknown to plaintiff),
Defendant.

Action at Law.

Complaint.

The plaintiff, residing in the Borough of Keansburg, Monmouth County, New Jersey, says:

1. On July 24, 1924, and for a long time prior thereto, the plaintiff was employed as a labor foreman by Metallurgical and Chemical Co., Inc., at the plant of said company at Matawan, Monmouth County, New Jersey, and at about four o'clock in the afternoon of that day was by the direction of his employer engaged in constructing concrete piers within an enclosure known as the Recoveries Craft Building, then in process of construction on the said premises.

2. On or about the said twenty-fourth day of July, 1924, and prior thereto the Tuller Construction Co. was erecting and constructing the said Recoveries Craft Building on the said premises under a contract with the plaintiff's employer aforesaid, and had subcontracted the enclosing

and the roofing of the said building with one, A. B. Mason, the defendant herein, who carries on the business of sheet metal working and who was on that day and at that hour, by his agents, servants and employees, constructing a sheet metal roof on the said Recoveries Craft Building, eighty or more feet above the ground where plaintiff was then and there lawfully employed.

3. At the said time on the said day, the plaintiff was lawfully within the enclosure of the Recoveries Craft Building and was lawfully engaged in the performance of his duties therein and it was the duty of the defendant in the construction of the roof as aforesaid, to provide for the safety and security of the employees of the owner of the premises, lawfully engaged in their work on the ground below.

4. That, yet the defendant by his agents, servants or employees, not regarding his duty, conducted himself so carelessly, negligently and unskillfully in this behalf that he provided an unsecure, defective and unsafe place for the plaintiff and others to perform his and their work in said building in that he did not place proper and sufficient covering over the place where plaintiff and others with him were at work, to prevent pieces of metal and tools from falling down upon the plaintiff.

5. That for want of due care and attention to his duty in that behalf on the day and at the hour and at the place aforesaid, while plaintiff was working on the ground of the said Recoveries Craft Building, lawfully, and as directed by his employer as aforesaid, a tool used by the defendant or his agents, servants or employees, called a dolly chisel, fell from the scaffold on

which they were working more than eighty feet above the ground and by reason of the aforesaid unsafeness, defectiveness and insecurity of the said place where plaintiff was at work, and the absence of a proper and sufficient covering over the place where plaintiff was so at work, the said dolly chisel struck plaintiff on the head whereby plaintiff suffered great bodily injury with accompanying pain so that he became and still continues to be sick, sore and disabled; especially he received a cut on the head which required several stitches to close; he became unconscious for upwards of one hour and remained in a dazed condition for several weeks under a doctor's care at his home, and thereafter was compelled to consult a specialist and was confined at the Polyclinic Hospital in New York where he was operated upon for concussion and post traumatic oedema of his brain, and he has been scarred and disfigured permanently about his face and head and his mind and nervous system has been weakened and he has been unable to resume his work and as he is informed and believes his injuries as aforesaid will be permanent and he will be permanently disabled and caused to suffer continuous pain and inconvenience; and plaintiff has necessarily paid and has become liable to pay for medical and surgical attendance and for nursing and for medicines, and the plaintiff will hereafter incur further expenses of a similar character, all to a very large amount, the exact amount of which he is unable at this time to state, and by reason of the premises plaintiff ever since said injury has been and will be permanently prevented from attending to his usual vocation of labor foreman, and plaintiff's earning capacity has been permanently impaired.

6. The said defendant, through his agents, servants and employees, had due and proper notice of the danger of the plaintiff and knew that he was working on the ground beneath them, and the plaintiff's said injuries were sustained and brought about without any fault or want of care or negligence on the part of the plaintiff.

The plaintiff demands damages for bodily injuries, medical, surgical and hospital expenses, loss of earnings, mental and bodily suffering and permanent disfigurement, fifty thousand dollars.

STOKES & McDERMOTT,
Attorneys for Plaintiff.

ANSWER.

Filed April 13, 1925.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

SYLVESTER FRESCHI,
Plaintiff,

vs.

ALBERT B. MASON (first name "Albert" being fictitious, defendant's real first name being unknown to plaintiff),
Defendant.

Action at Law.

Answer.

Defendant residing in the City of Perth Amboy, County of Middlesex and State of New Jersey, answering plaintiff's complaint says that:

1. He denies each and every allegation contained in the complaint.

FIRST DEFENSE.

1. The plaintiff was thoroughly familiar with the nature of the work which was being performed on the Recoveries Craft Building and was well aware of the dangers connected therewith which were reasonably to be anticipated and which were wholly apparent to the plaintiff and which were incidental to the work in which the plaintiff was engaged, and the plaintiff assumed the risk of any injury which might result to him from the performance of said work on or about the said building.

Answer.

SECOND DEFENSE.

The plaintiff was a fellow servant of the defendant and of the persons alleged to be the agents, servants and employees of the defendant and the defendant is therefore not liable for any injury which resulted to the plaintiff from the alleged negligence of the said agents, servants and employees of the defendant.

THIRD DEFENSE.

The plaintiff was guilty of negligence which contributed to the happening of the alleged injury.

THOMAS BROWN,
Attorney of Defendant.

REPLY.

Filed April 15, 1925.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

SYLVESTER FRESCHI, *Plaintiff,* *vs.* ALBERT B. MASON (first name "Albert" being fictitious, defendant's real first name being unknown to plaintiff), *Defendant.*	*Action at Law.* *Reply.*

The plaintiff, Sylvester Freschi, by way of reply to the answer of the defendant herein, says:

1. He denies each and every allegation contained in the first defense and in the second defense and in the third defense of said answer.

STOKES & McDERMOTT,
Attorneys for Plaintiff.

AMENDED COMPLAINT.

Filed November 20, 1929.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

SYLVESTER FRESCHI, *Plaintiff,* *vs.* ALBERT B. MASON (first name "Albert" being fictitious, defendant's real first name being unknown to plaintiff), *Defendant.*	*Action at Law.* *Amended Complaint.*

The plaintiff, residing in the Borough of Keansburg, Monmouth County, New Jersey, says:

FIRST COUNT.

1. On July 24, 1924, and for a long time prior thereto, the plaintiff was employed as a labor foreman by Metallurgical and Chemical Co., Inc., at the plant of said company at Matawan, Monmouth County, New Jersey, and at about four o'clock in the afternoon of that day was by the direction of his employer engaged in constructing concrete piers within an enclosure known as the Recoveries Craft Building, then in process of construction on the said premises.

2. On or about the said twenty-fourth day of July, 1924, and prior thereto the Tuller Construction Co. was erecting and constructing the said Recoveries Craft Building on the said premises

under a contract with the plaintiff's employer aforesaid and had subcontracted the enclosing and the roofing of the said building with one, A. B. Mason, the defendant herein, who carries on the business of sheet metal working and who was that day and at that hour, by his agents, servants and employees, constructing a sheet metal roof on the said Recoveries Craft Building, eighty or more feet above the ground where plaintiff was then and there lawfully employed.

3. At the said time on the said day, the plaintiff was lawfully within the enclosure of the Recoveries Craft Building and was lawfully engaged in the performance of his duties therein and it was the duty of the defendant in the construction of the roof as aforesaid, to provide for the safety and security of the employees of the owner of the premises, lawfully engaged in their work on the ground below.

4. That, yet the defendant by his agents, servants or employees, not regarding his duty, conducted himself so carelessly, negligently and unskillfully in this behalf that he provided an unsecure, defective and unsafe place for the plaintiff and others to perform his and their work in said building in that he did not place proper and sufficient covering over the place where plaintiff and others with him were at work, to prevent pieces of metal and tools from falling down upon the plaintiff.

5. That for want of due care and attention to his duty in that behalf on the day and at the hour and at the place aforesaid, while plaintiff was working on the ground of the said Recoveries Craft Building, lawfully, and as directed by his employer as aforesaid, a tool used by the de-

fendant or his agents, servants or employees, called a dolly chisel, fell from the scaffold on which they were working more than eighty feet above the ground and by reason of the aforesaid unsafeness, defectiveness and insecurity of the said place where plaintiff was at work, and the absence of a proper and sufficient covering over the place where plaintiff was so at work, the said dolly chisel struck plaintiff on the head whereby plaintiff suffered great bodily injury with accompanying pain so that he became and still continues to be sick, sore and disabled; especially he received a cut on the head which required several stitches to close; he became unconscious for upwards of one hour and remained in a dazed condition for several weeks under a doctor's care at his home, and thereafter was compelled to consult a specialist and was confined at the Polyclinic Hospital in New York where he was operated upon for concussion and post traumatic Oedema of his brain, and he has been scarred and disfigured permanently about his face and head and his mind and nervous system has been weakened and he has been unable to resume his work and as he is informed and believes his injuries as aforesaid will be permanent and he will be permanently disabled and caused to suffer continuous pain and inconvenience; and plaintiff has necessarily paid and has become liable to pay for medical and surgical attendance and for nursing and for medicines, and the plaintiff will hereafter incur further expenses of a similar character, all to a very large amount, the exact amount of which he is unable at this time to state, and by reason of the premises plaintiff ever since said injury has been and will be permanently prevented from attending to his usual vocation of

labor foreman, and plaintiff's earning capacity has been permanently impaired.

6. The said defendant, through his agents, servants and employees, had due and proper notice of the danger of the plaintiff and knew that he was working on the ground beneath them, and the plaintiff's said injuries were sustained and brought about without any fault or want of care or negligence on the part of the plaintiff.

SECOND COUNT.

1. On July 24, 1924, and for a time prior thereto, the plaintiff was employed as a labor foreman by the Metallurgical and Chemical Co., Inc., at the plant of said company at Matawan, Monmouth County, New Jersey, and at about four o'clock in the afternoon of that day was by the direction of his employer engaged in constructing concrete piers within an enclosure known as the Recoveries Craft Building, then in process of construction on the said premises.

2. At the aforesaid time and place the Tuller Construction Co., was erecting and constructing the said Recoveries Craft Building on the said premises under a contract with the plaintiff's employer aforesaid, and had sub-contracted the enclosing and the roofing of the said building with one A. B. Mason, the defendant herein, who at the aforesaid place, time and hour, by his agents, servants and employees was constructing a sheet metal roof on the said Recoveries Craft Building over and above the ground and place where plaintiff was lawfully engaged on the premises.

3. It was the duty of the defendant at the aforesaid time and place to hire, procure and

employ careful, competent, prudent and experienced servants, agents or employees to carry out and perform the work for which the defendant had contracted; and it was the duty of the servants, agents or employees of the defendant to use reasonable care in handling tools and materials used by them in the work in which they were engaged, to make and see that all tools and materials belonging to them or the defendant and not in use, were safely secured so that they would not fall, to refrain from dropping any tools or materials used by them, to carry on the work in which they were engaged in such a manner as to not injure other persons who were employed upon the same premises.

4. The defendant, however, engaged, hired and allowed careless, inexperienced and incapable servants, agents or employees to carry on said work and entrusted to them tools and materials; and his servants, agents, or employees, wrongfully, carelessly and negligently carried on said work; they did not use due and proper care in handling the said tools and materials with which they were working; they did not use due and proper care in securing said tools and materials in their custody; they did not use due and proper care in securing said tools and materials which they brought upon the roof; they did not use due and proper care in preventing said tools and materials from falling; they wrongfully, carelessly and negligently dropped or permitted to drop some of their tools or materials; they wrongfully, carelessly and negligently secured their said tools and materials which they brought upon the roof; and in divers other respects carried on said work so carelessly, negligently and recklessly that they dropped or permitted to fall a piece of their said

tools or materials so as to strike this plaintiff upon the head while he was working upon the premises.

5. By reason of the negligent acts of the defendant and his servants, agents or employees as aforesaid the plaintiff suffered severe bodily injuries to wit: severe injury to his head with accompanying pain so that he became and still continues to be sick, sore and disabled; especially he received a cut on the head which required several stitches to close; he became unconscious for upwards of one hour and remained in a dazed condition for several weeks under a doctor's care at his home, and thereafter was compelled to consult a specialist and was confined at the Polyclinic Hospital in New York where he was operated upon for concussion and post traumatic oedema of his brain, and he has been scarred and disfigured permanently about his face and head and his mind and nervous system has been weakened and he has been unable to resume his work and as he is informed and believes his injuries as aforesaid will be permanent and he will be permanently disabled and caused to suffer continuous pain and inconvenience; and plaintiff has necessarily paid and has become liable to pay for medical and surgical attendance and for nursing and for medicines, and the plaintiff will hereafter incur further expenses of a similar character, all to a very large amount, the exact amount of which he is unable at this time to state, and by reason of the premises plaintiff ever since said injury has been and will be permanently prevented from attending to his usual vocation of labor foreman, and plaintiff's earning capacity has been permanently impaired.

Plaintiff demands as damages for bodily injuries, medical, surgical and hospital expenses,

loss of earnings, mental and bodily suffering and permanent disfigurement, under either the first or the second count or under both the first and the second counts the sum of fifty thousand dollars ($50,000.00).

BURLEW & CURRIE,
Attorneys for Plaintiff.

ANSWER.

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

SYLVESTER FRESCHI, *Plaintiff,* *vs.* ALBERT B. MASON (first name "Albert" being fictitious, defendant's real first name being unknow to plaintiff), *Defendant.*	*Action at Law.* *Answer.*

Defendant residing in the City of Perth Amboy, County of Middlesex and State of New Jersey, answering plaintiff's amended complaint says that:

1. He denies each and every allegation contained in the amended complaint.

The defendant to each and every allegation contained in the amended complaint makes the following separate defenses:

FIRST DEFENSE.

1. The plaintiff was thoroughly familiar with the nature of the work which was being performed on the Recoveries Craft Building and was well aware of the damages connected therewith which were reasonably to be anticipated and which were wholly apparent to the plaintiff and which were incidental to the work in which the plaintiff was engaged, and the plaintiff assumed the risk of any injury which might result to

him from the performance of said work on or about the said building.

SECOND DEFENSE.

1. The plaintiff was a fellow servant of the defendant and of the persons alleged to be the agents, servants and employees of the defendant and the defendant is therefore not liable for any injury which resulted to the plaintiff from the alleged negligence of the said agents, servants and employees of the defendant.

THIRD DEFENSE.

1. The plaintiff was guilty of negligence which contributed to the happening of the alleged injury.

FOURTH DEFENSE.

1. The plaintiff was guilty of contributory negligence in that he continued to work in a zone or place of danger well knowing the likelihood of being injured in the manner that he was injured.

FIFTH DEFENSE.

1. The plaintiff assumed the dangers and causes which resulted in injury to the plaintiff and the risks thereof were assumed by the plaintiff in his employment.

SIXTH DEFENSE.

1. Suit on the cause of action set forth in the second count of the complaint is barred by the provisions of an act entitled, "An Act for the limitation of Actions," C. S. 1910, pages 3162 and 3164; sections 1, 2 and 3.

3. Said cause of action arose at such time that suit thereon is barred by the provisions of the Statute aforesaid.

THOMAS BROWN,
Attorney for Defendant.

REPLY.

Filed December 6, 1929.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

SYLVESTER FRESCHI, *Plaintiff,* *vs.* ALBERT B. MASON (first name "Albert" being fictitious, defendant's real first name being unknown to plaintiff), *Defendant.*	*Action at Law.* *Reply.*

The plaintiff, Sylvester Freschi, replying to the allegations set forth in the answer filed by the defendant in this cause, says that:

1. He denies the allegations set forth under the head of "First Defense."

2. He denies the allegations set forth under the head of "Second Defense."

3. He denies the allegations set forth under the head of "Third Defense."

4. He denies the allegations set forth under the head of "Fourth Defense."

5. He denies the allegations set forth under the head of "Fifth Defense."

6. He denies the allegations set forth under the head of "Sixth Defense."

BURLEW & CURRIE,
Attorneys for Plaintiff.

POSTEA.

Filed December 6, 1929.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

SYLVESTER FRESCHI, *Plaintiff,* *vs.* ALBERT B. MASON (the first name fictitious and proven at the trial to be Abraham B. Mason), *Defendant.*	*Action at Law.* *Postea.*

This case was tried before Judge Rulif V. Lawrence with a jury at the Monmouth Circuit on November 25, 26 and 27, 1929.

The jury rendered a general verdict against the defendant Abraham B. Mason and in favor of the plaintiff for Twenty Thousand Dollars ($20,000.00).

RULIF V. LAWRENCE,
Judge.

RULE TO SHOW CAUSE.

Filed November 30, 1929.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

SYLVESTER FRESCHI, *Plaintiff,* *vs.* ALBERT B. MASON (first name "Albert" being fictitious, defendant's real first name being unknown to plaintiff), *Defendant.*	*Action at Law.* *Rule to Show Cause.*

The attorney for the defendant Abraham B. Mason, entitled in the cause as Albert B. Mason, making application for this rule in due time,

It is Ordered that the plaintiff Sylvester Freschi show cause before the New Jersey Supreme Court at the State House, in the City of Trenton, on the third Tuesday in January next, why the verdict in the above-entitled cause in favor of the plaintiff Sylvester Freschi for $20,000.00 against the defendant Abraham B. Mason should not be set aside and a new trial granted.

Further ordered that the exceptions of the defendant Abraham B. Mason to the refusal of the Court to grant a non-suit to the defendant Abraham B. Mason and to direct a verdict in favor of the defendant Abraham B. Mason and the exceptions of the said defendant to the charge of the Court be and they hereby are expressly reserved as grounds of appeal in the said cause.

Rule to Show Cause.

It is further ordered that execution be and the same is hereby stayed until the further order of this court.

Let this rule be entered in the minutes.

RULIF V. LAWRENCE,
Circuit Court Judge.

Rule dated November 29, 1929, on motion of

THOMAS BROWN,
Attorney for Defendant.

Service of a copy of the within rule to show cause is hereby acknowledged this 29th day of November, 1929.

BURLEW & CURRIE,
Attorneys for Plaintiff.

REASONS.

Filed December 3, 1929.

NEW JERSEY SUPREME COURT.

SYLVESTER FRESCHI, *Plaintiff,* *vs.* ALBERT B. MASON (first name "Albert" being fictitious, defendant's real first name being unknown to plaintiff), *Defendant.*	*Action at Law.* *Rule to Show Cause.* *Reasons.*

The defendant, Abraham B. Mason, hereby assigns the following reasons for a new trial in the above-entitled cause:

1. Because the verdict in favor of the plaintiff and against the defendant Abraham B. Mason was against the weight of the evidence.

2. Because the verdict in favor of the plaintiff and against the defendant is contrary to the law of the State of New Jersey.

3. On the ground that plaintiff did not prove that the defendant Abraham B. Mason violated any duty owing to the plaintiff.

4. On the ground that the verdict in favor of the plaintiff was excessive.

5. The verdict is against the greater weight of the evidence.

Reasons.

6. The verdict is in other respects illegal and unlawful.

THOMAS BROWN,
Attorney for Defendant.

Service of a copy of the within reasons is hereby acknowledged this 2nd day of December, 1929.

BURLEW & CURRIE,
Attorneys for Plaintiff.

ADDITIONAL REASONS.

NEW JERSEY SUPREME COURT.

SYLVESTER FRESCHI, *Plaintiff,* *vs.* ALBERT B. MASON (first name "Albert" being fictitious, defendant's real first name being unknown to plaintiff), *Defendant.*	*Action at Law.* *On Rule to Show Cause.* *Additional Reasons.*

The defendant Abraham B. Mason hereby assigns the following additional reasons for a new trial in the above-entitled cause:

7. Because the trial judge over the defendant's objection permitted Harry Jervis, a witness sworn on behalf of the plaintiff, to testify that men employed by the Tuller Construction Company were working on other jobs of said company on the day that the plaintiff is alleged to have been injured.

8. Because the trial judge over the defendant's objection permitted the reading of the depositions of Dr. K. Winfield Ney.

9. Because the trial judge permitted Vincent Bingham, a witness called in rebuttal on behalf of the plaintiff, to testify to the condition and position in which he found the scaffolding and roofing from one-half to three-quarters of an hour after the plaintiff was alleged to have sustained his injuries.

Additional Reasons.

10. Because the trial judge refused to charge the following request of the defendant:

(2) "Negligence on the part of the defendant must be proved by the evidence. It will not be presumed. There is also a presumption against negligence."

11. Because the trial judge refused to charge the following request of the defendant:

(4) "It is necessary for the plaintiff to give proof as to the cause or thing which was alleged to have been the negligent act which produced the injury or proof of such facts from which the existence of such cause or thing constituted the alleged negligent act, was the only reasonable inference that could properly be drawn."

12. Because the trial judge refused to charge the following request of the defendant:

(5) "The plaintiff must also prove that the negligent cause or thing which produced the injury was in the possession of and under the control or management of the person charged with the negligence or of his servants."

13. Because the trial judge refused to charge the following request of the defendant:

(6) "If you find there is no proof in this case as to what caused the injury to plaintiff then your verdict should be in favor of the defendant."

14. Because the trial judge refused to charge the following request of the defendant:

(14) "If you find that the plaintiff was warned by the defendant or his servants to keep away from the place where the defendant's servants were working, and that the plaintiff disrgarded these warnings, the

plaintiff was guilty of contributory negligence and cannot now recover against the defendant."

15. Because the trial judge refused to charge the following request of the defendant:

(15) "If the danger existing at the time and place of the accident was a perfectly obvious one and one of which the plaintiff ought reasonably to have been fully aware and if the plaintiff continued to work where he did with full knowledge of the danger, he assumed the risk of such an injury as he received and cannot now recover from the defendant."

16. Because the trial judge refused to charge the following request of the defendant:

(16) "If the plaintiff continued to work with full knowledge of the obvious and apparent danger which existed at the time and place of the accident, he was guilty of contributory negligence which bars a recovery from the defendant."

17. Because the trial judge refused to charge the following request of the defendant:

(17) "The plaintiff was bound to do everything reasonably possible to minimize the effect of the injury and even though your verdict should be for the plaintiff, if you find that the plaintiff at any time omitted to take any measures which would have mitigated the injurious effect of the injury, this must be taken into account by you in estimating the damages to the plaintiff."

THOMAS BROWN,
Attorney for Defendant.

(Served on plaintiff's attorneys, December 26, 1929.)

MOTION FOR NON-SUIT.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

SYLVESTER FRESCHI, *Plaintiff,* vs. ABRAHAM B. MASON, *Defendant.*	*Action at Law.*

Freehold, N. J., November 11, 1929.

MOTION FOR NON-SUIT.

Before Hon. R. V. LAWRENCE, Judge, and a jury.

Appearances:

For plaintiff, Messrs. Burlew & Currie and Messrs. McDermott, Finegold & Hartshorne.

For defendant, Thomas Brown, Esq.

Mr. Brown: May it please your Honor, this is a motion for a non-suit in this case. I have three separate grounds, and if your Honor will give me the ruling on each ground, in case it is necessary I shall argue the three one after the other without asking you to determine them separately at this time.

The first ground for a non-suit is that it appears now beyond peradventure, according to the testimony of Mr. Freschi, the plaintiff in this case, that he knew of the danger that ex-

isted in the place that he was working, and that notwithstanding his knowledge of that danger, although with his experience around construction work for many years and the fact that he said that he knew that something was likely to fall, that he admits that he paid no attention. We contend, may it please the Court, that this is an unqualified statement of contributory negligence on his part, knowing of the danger and then paying no attention. That is one.

2. Then again we say that in this instance there is absolutely no negligence proved against the defendant. In order to appreciate all of the reasons for a non-suit I desire to call your Honor's attention particularly to the pleadings in this case and the theory of the suit. The first paragraph of the pleading charges that on July 24, 1924, the plaintiff was employed by the Metallurgical Chemical Company at a plant at Matawan, and that in the afternoon of that day, by the direction of his employer, the plaintiff engaged in constructing concrete piers within an enclosure known as the Recoveries Building. That is the substance of paragraph one.

Paragraph two is that on the 12th day of July, 1924, and prior thereto the Tuller Construction Company was erecting the Recoveries Craft Building on the said premises under a contract with the plaintiff's employer aforesaid, and had subcontracted the enclosing and the roofing of the said building with one A. B. Mason, the defendant herein, who carries on the business of sheet metal working and who was on that day and that hour by his agents, servants and employees, constructing a sheet metal roof on the said Recoveries Craft Building, eighty or

more feet above the ground where plaintiff was then and there lawfully employed.

Paragraph 3—and here is where they charge the negligence and the theory of negligence.

"At the said time on the said day, the plaintiff was lawfully within the enclosure of the Recoveries Craft Building and was lawfully engaged in the performance of his duties therein and it was the duty of the defendant in the construction of the roof as aforesaid, to provide for the safety and security of the employees of the owner of the premises, lawfully engaged in their work on the ground below."

He charges that it was our duty to provide, you might say, a safe place for the employees of the Metallurgical Chemical Company to work. That is what the charge is; it cannot be anything else.

The Court: You need not argue that point. I concede it was not the duty.

Mr. Brown: The theory is not in any way negligence in the course of our work.

The Court: Not as to that particular paragraph.

Mr. Brown: "Paragraph 4. That, yet the defendant by his agents, servants or employees, not regarding his duty, conducted himself so carelessly, negligently and unskillfully in this behalf that he provided an unsecure, defective and unsafe place for the plaintiff and others to perform his and their work in said building in that he did not place proper and sufficient covering over the place where plaintiff and others with him were at work, to prevent pieces of metal and tools from falling down upon the plaintiff."

The theory there is that first we were charged with the duty of providing a safe place to work, then they alleged a breach, which they say in this behalf, that he provided an insecure and defective and unsafe place for the plaintiff and others to perform their work. That is the whole charge, that it was our duty to provide a safe place to work, and he says, in language just as plain as English can make it, that we failed, and we provided an insecure, defective and unsafe place for the plaintiff and others to perform his and their work.

The Court: How many counts are there there?

Mr. Brown: There is only one. Then the charge is: "That for want of due care and attention to his duty in that behalf on the day and at the hour and at the place aforesaid, while plaintiff was working on the ground of the said Recoveries Craft Building, lawfully, and as directed by his employer as aforesaid, a tool used by the defendant or his agents, servants or employees, called a dolly chisel, fell from the scaffold on which they were working more than eighty feet above the ground and by reason of the aforesaid unsafeness, defectiveness and insecurity of the said place where plaintiff was at work, and the absence of a proper and sufficient covering over the place where plaintiff was so at work."

Now, if your Honor please, here is a case:

The Court: I had assumed that this complaint just charged general negligence, as would arise, for example, in a case where a pedestrian was walking on the sidewalk and something was thrown from the roof? Has there been no amendment to this complaint?

Mr. Brown: There has been no amendment or nothing. This is the third trial.

The Court: Now I see that the theory—not only the testimony but the theory of the case, and the testimony is directed to it—

Mr. Brown: It is not a case where they bring in witnesses and show to your Honor and the jury that we negligently built that scaffolding.

The Court: I will say this to you, Senator Brown: I will hear the other side on it. If the theory of this case is that it was the duty of the defendant, Mason, an independent contractor entirely, and who was not the employer of the plaintiff, to provide the plaintiff with a safe place, then apparently it would be a wrong theory. If it were merely a case of negligence, where Mason and his men were working on the roof and negligently allowed a tool to fall which hit some one, as in this case the plaintiff, who was employed by either the owner of the building or some one else, I should say that would be an ordinary, simple case of negligence for which an action would lie. But if the gravamen of the complaint is that it was the duty of the defendant Mason to provide the plaintiff with a safe place to work, who was in the employ, not of Mason but of the owner of the building—

Mr. Brown: Well, that is right in the language. I read it to your Honor.

The Court: I supposed this was a simple, straight charge of simple negligence.

Mr. Brown: Not only that, but the testimony in this case, there is absolutely no testimony in this case by bringing in competent men to show that we were doing our work negligently.

The Court: Oh, well, I think that so far as that is concerned the doctrine of *res ipsa loquitur* would apply there. I think that might well be that if it appeared that if these men were working there and it was none of the employees of Mason that were working there, then I think there is a question of whether *res ipsa loquitur* applies. And I would like to ask the other side what they have to say as to the form of this complaint, if they have any authority that the duty was on Mason to provide a safe place for these men to work who were not employed by him, I would like to hear it. As a matter of fact, starting with this theory that so far as the employer and the plaintiff was concerned, therefore the question arises whether that employer was not obliged to provide Freschi, the plaintiff, with a reasonably safe place in which to work.

(Further argument.)

Mr. Brown: Both on the facts and on the law in this case and on the principle of presenting the issues in this case, we say that our motion should prevail; that there should not be any further vexatious litigation. If it were not for the fact, coupled with my motion, that this case has already been submitted to the jury twice and they have not agreed—

The Court: I don't see that that makes any difference at all. In other words, the fact that the case has not been finally disposed of by a court and jury does not bar the door of the court to the plaintiff under a proper pleading.

Now as I see this complaint, section three, it is alleged that it was the duty of the defendant, that is, Mason, in the construction of the roof, to provide for the safety and security of

the employees of the owner of the premises. Well, that is not my understanding of the legal obligation at all.

Then again it is repeated in paragraph four, "By his agents, servants or employees, not regarding his duty, conducted himself so carelessly, negligently and unskillfully in this behalf that he provided an insecure, defective and unsafe place for the plaintiff and others to perform his and their work in said building."

Mr. Currie: I wish to amend the complaint by adding a count, and if your Honor wishes me to dictate the count I will do so now. The count would be:

1. On July 24, 1924, the plaintiff, Sylvester Freschi, as an employee of the Metallurgical Chemical Corporation, was at their plant located in the Township of Matawan, in the County of Monmouth and State of New Jersey, engaged in the erection and completion of certain concrete foundations located between the Harris Building and the Recoveries Crafts Building or in a place known as the leanto, in a lawful, careful and legal way.

2. At the aforesaid time and place the defendant, Abraham S. Mason, either personally or through his servants or agents, was engaged as a sub-contractor of the Tuller Construction Company in the erection and construction of a roof over said leanto in a careless, reckless and negligent manner. It was the duty of the said Abraham S. Mason, the defendant, or his servants or agents, to use reasonable care in the erection and construction of this roof to see that tools used by them in doing this work were kept from falling from the scaffold on which they were or from the roof. It was the duty

of Mason's men to make sure that no injury would be suffered by any one who was working underneath them, and they were otherwise obliged at said time and place to carry on their work in a careful, reasonable and secure manner so that no one would be injured by reason of the way they carried on their work, so that persons lawfully employed upon the premises should not be injured by the negligent manner in which defendant or his employees conducted and carried on his work, and this duty they owed to this plaintiff and to all other persons lawfully in said premises.

3. Notwithstanding this duty the plaintiffs at the time and place aforesaid did not use reasonable care to see that tools used by them were not dropped from their possession, failed to make proper observation for people working under them, failed to take proper precautions to safeguard people working under them, failed to see that tools not in use by them were securely fastened so that they would not fall, and in divers other respects so carelessly, negligently and recklessly carried on their work that a tool or bar used by them in the erecting of this roof fell, striking this plaintiff and seriously injuring him.

4. By reason of the negligent act of the defendant, his servants or agents, as aforesaid, this plaintiff was seriously injured.

The Court: Then you, of course, would follow with the remaining paragraph 5 as alleged in the complaint?

Mr. Currie: As alleged in the first count.

Mr. Brown: Well, if your Honor please, this has taken me by surprise, and as I said before,

both as to the evidence and the theory of the case and to meet this new amendment.

Adjourned till November 26, 1929, at 10 A. M.

Freehold, N. J., November 26, 1929.

Trial of the cause resumed at 10 A. M.

Mr. Brown: Your Honor will allow me an exception to each of the grounds that I have made for a non-suit?

The Court: You may have an exception.

(Objection noted for defendant as ground of appeal.)

The Court: With regard to the motion made for a non-suit on the ground of contributory negligence of the plaintiff, I incline to the view that there is a prima facie situation here under the evidence, particularly with reference to the amended pleading—which has not yet been made, as a matter of fact—that would lead the court to deny the motion for that reason. In other words, the court being of the opinion that there is evidence here which indicates that it is a question of fact as to whether the plaintiff was guilty of contributory negligence, rather than one of law, and for that reason the motion in that respect will be denied. This ruling, however, is perhaps futile, for the reason that the Court is about to withdraw a juror and order a mistrial and permit an amendment of the complaint in the respects indicated.

(Counsel and the Court return to the court room.)

The Court: In view of a technical situation that has developed in this case with regard to

the status of the complaint and a motion that was made in behalf of the defendant, the Court has reached the conclusion that the complaint and the proofs under it show a variance; in other words, that the proofs thus far received do not support, legally speaking, the complaint as formerly filed. The Court is further of the opinion, however, that the plaintiff is entitled to his day in court upon an amended complaint of a nature and character that has been suggested by the Court to counsel on the argument. That being so, I have permitted the plaintiff to formulate a new complaint upon which the issues may be raised and the case tried thereon. In order that there may be no unnecessary delay in the circumstances I have further directed that the case be again brought to trial on Monday, November 25th, which will be especially assigned for the trial of the case on the amended complaint. That is done because of the surprise that counsel for the defendant alleges by reason of the amendment which the Court has permitted. In the circumstances juror number twelve will be withdrawn, a mistrial declared and the case retried on the amended complaint on November 25th. That disposes of the case for the moment.

Discussion.

TESTIMONY.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

SYLVESTER FRESCHI, *Plaintiff,* vs. ABRAHAM B. MASON, *Defendant.*	*Action at Law.*

Freehold, N. J., November 25, 1929.

Before Hon. R. V. LAWRENCE, Judge, and a Jury.

Appearances:

For plaintiff, Messrs. Burlew & Currie and Messrs. McDermott, Finegold & Hartshorne.

For defendant, Thomas Brown, Esq.

Mr. Brown: May it please the Court, I want it to appear in this case that on the third trial of this case, that is to say, on the second day of the last trial, at the conclusion of the plaintiff's case I moved for a non-suit on the complaint as it then existed on the ground, among others, that the complaint charged that it was the duty of the defendant in the construction of the roof as aforesaid referred to in the complaint to provide for the safety and security of the employees of the owner of the premises; and in the fourth paragraph that it is alleged that the defendant provided an insecure, defective and unsafe place for the plaintiff and others to perform his and their work in said building; and

then in the fifth paragraph that by reason of the aforesaid unsafeness, defectiveness and insecurity of the said place where plaintiff was at work, and in the absence of a proper and sufficient covering over the place where plaintiff was so at work, that the plaintiff was injured by the falling of a piece of steel. The latter is stated generally.

Now at the conclusion of my motion, that was one of the grounds and there were some others; and without repeating the other—I think it was about that the negligence was not shown—sufficient negligence was not shown to hold us responsible under that complaint for any negligence on our part or any failure on our part as alleged in the complaint; that is to say, there were two reasons advanced: first, that it was not our duty to supply a safe place for these men to work; and secondly, that the negligence in the case of the owner of the premises in that complaint as it then existed did not show negligence on our part. Your Honor, as I remember it, denied the motion with the proviso there, and I think this is the word your Honor used, that the plaintiff in the case would have leave to amend within ten days, I think it was, and that he should serve upon me a copy of his amended complaint. Now I do not say this what I am going to say now with any feeling of disappointment as much as I do in order to get the record straight. At the trial of the case, if your Honor remembers, I questioned who was the attorney of record. My reason for that was that Stokes and McDermott first appears as attorneys of records, and I was informed by them orally, at least if not in writing, that they were no longer attorneys of record, and there-

after a man by the name of Merz, an attorney of this county, assumed by correspondence with me to be the attorney of record, and I learned later that some one else was attorney of record, and then finally, at the trial of the case, Mr. Currie, of Messrs. Burlew & Currie, appeared. And I pointed out to your Honor that the record was not clear in the matter, and no order of substitution entered on that date, there was no such order entered, and your Honor directed and counsel promised that they would see that that was done.

Now after my motion, two or three days afterward, or maybe a day or two afterwards—I have forgotten which—but anyway it was within a short while, there was mailed to me an amended complaint by Mr. Currie. I returned it to Mr. Currie stating that I regarded that it was not proper for me to acknowledge service of this amended complaint until he had first entered his order of substitution, which he had not done to my knowledge. I received no notice, received no copy of an order of substitution until today. When I came in court today I again apprised your Honor of it and today Mr. Currie handed me a copy of his amended complaint.

Now my motion is directed to the amended complaint at this time, to strike out the first count, because it clearly appears now that all that was done is to add another count to the complaint, and I submit, if your Honor please, that in order to have a proper issue and in order to carry out or comply with the order that was heretofore indicated by your Honor, that permitting this first count to prevail is adding nothing but confusion to the case, and I say at this time, before we again venture on the trial, we

should have a ruling upon that count being either in or out of the complaint.

(Mr. Currie replies.)

The Court: You need not go any farther. This case came on to trial when, how long ago?

Mr. Brown: November 12th was the last trial.

The Court: On November 12th, of the present month, no motion had been made at any such litigation about striking the complaint, which at that time, as it seems to me, clearly failed to allege a legal duty on the part of the defendant or his employees with reference to providing the plaintiff with a safe place in which to work, there being no contractual relation whatever between them. The case, however, was tried and at the conclusion a motion was made for a direction on the ground that the proofs did not support the allegation of the complaint, particularly of the alleged duty cast upon the defendant and said to be due and owing to the plaintiff. The Court thereupon, conceding that no legal duty such as that pleaded existed under the evidence in the case, permitted an amendment to be made by the plaintiff so as to allege an act of negligence in a more or less simple and straight form as against the defendant and his employees, and directed that that amendment be made. Objection was made to the Court's action, alleging surprise, and therefore, in order to enable the counsel for the defendant to meet the amended complaint it has been suggested, the Court withdrew a juror and stated that it would allow the case to be retried on the amended complaint. This was in accordance with the rule, as the Court understands it, that where surprise is claimed by an amendment permitted during the progress of a trial that the Court, in the exercise of a sound discretion, is

Discussion.

permitted to allow a continuance to the end that the litigants affected by the amendment may be prepared to meet it. That accordingly was done and the case continued until November 25th, the present date, with the idea that it was merely a continuance of the former trial, but in view of the time that elapsed between February 12th and the present date the Court felt that it was unwise to compel the sitting of the jury in the case and therefore exercised what it deemed its discretion and provided for the impanelling of a new jury at the present term. That has now been done and the case is again moved for trial under the amended complaint.

I incline to the view that the issue now presented under the complaint must be confined to the second count, or the count which has been added as an amendment to the complaint; and the result will be that the case will be tried upon that theory, that merely the second count is involved, just as though there was no other count in the complaint, and the jury will be so instructed and the Court apprehends that no difficulty will be encountered in submitting the real issue to the jury.

With regard to the point made by counsel for defendant as to the substitution of attorneys, it does appear that the present attorneys, namely, Burlew & Currie, have now been formally substituted by the original attorneys of record, which substitution has been filed with the clerk of the Supreme Court. In the circumstances it seems to me that the defendant can take nothing of the situation which develops with reference to the several attorneys that appear at one time or another to have been either under substitution or interested in the case in behalf of the plaintiff.

Discussion.

Mr. Brown: Now, if your Honor please, I will file with the clerk of the court my answer to the second count of the complaint, and I have given my adversary the answer.

The Court: Counsel for the defendant will be permitted to join issue on the amended complaint under the second count and file an appropriate answer which will join issue thereon.

Mr. Currie: Now, if your Honor please, will you allow me an exception to the striking of the first count, for the purpose of the record?

The Court: I will allow you an exception to the present ruling of the Court and the case will go to the jury on the second count rather than on both counts. You may have an exception, certainly.

(Objection noted for plaintiff as ground of appeal.)

Mr. Currie: I assume permission to file with the clerk my reply to the answer of the defendant.

The Court: That is just a joining of issue.

Mr. Brown: We have got no objection.

The Court: Certainly.

(Mr. Currie opens for the plaintiff and Mr. Brown opens for the defendant.)

(Adjourned till November 26, 1929, at 10 A. M.)

Freehold, N. J., November 26, 1929.

Trial of the cause resumed at 10 A. M.

VINCENT BINGHAM, sworn for plaintiff.

Direct examination by Mr. Currie.

Q Mr. Bingham, where do you live? A In Keyport.

Q Are you connected with the Metallurgical Chemical Company? A Not now.

Q Were you connected with them in July, 1924? A I was.

Q At that time what plant were you connected with? A Matawan plant.

Q And how long had you been connected with that at that time? A About two years.

Q In what capacity were you employed there? A I was in charge of any construction, new machinery, putting in new machinery.

Q Was any new construction going on at the Metallurgical plant in Matawan township on July 24, 1924? A Yes, erecting a new building.

Q Just what type of building was this? A There was an existing building and they put up another large building with a portion which we call a leanto reaching from one to the other.

Q What was the name of the existing building? A The Harris Building.

Q And of what construction was that? A Of galvanized sheet and steel work.

Q What was the name of the new building? A The Recovery.

Q And how far from this new building was the Harris Building? A About twenty-five feet.

Q And of what construction was the Recovery Building? A Just steel work and galvanized sheet.

Q And what size was the Recovery Building? A The leanto was 60 feet long and 25 feet wide. The main building, the Recovery Building, was 110 feet long and 32 feet wide.

Q Now directing your attention to this leanto, you have told us that that was how wide? A 25 feet wide.

Q And how long? A 60 feet long.

Q And what kind of a roof did that have? A Galvanized sheet roof.

Q And what way was the roof laid? I mean what angle? A About thirty degrees pitch.

Q Thirty degrees pitch? A Right.

Q Does this diagram here on the board represent the true condition of the leanto and the Harris Building and the Recoveries Craft Building? A Not at all, sir.

Mr. Currie: May I be empowered, your Honor, to erase this?

Mr. Brown: Yes, I will join in the request to have it erased, because I do not profess to be an artist. It was only a general description.

Q Now, Mr. Bingham, what was the height of the lowest part of the roof on this leanto? A I should say about 25 feet.

Q And against what building was that? A That is the Harris Building.

Q And what was the height of the highest part of the leanto? A 35 feet.

Q And against what building was that? A The Recovery Building.

Q Now what was this leanto constructed of? A The leanto was of steel I-beam and channel irons and galvanized sheets.

Q Now, Mr. Bingham, directing your attention to July 24, 1924, did you know A. B. Mason and his men? A Yes.

Q And did you know what they were doing there, if anything, on that date? A Why, they were sheeting on this leanto in question.

Q And what part of the leanto were they sheeting? A At what time?

Q In the morning of that day? A They started on the first bay.

Q And how many bays were there in this leanto? A Three bays.

Q And how wide were those bays? A 20 feet, 25.

Q And you saw them there that morning? A I did.

Q And what part of the leanto did they start to work on? A On the railroad end.

Q And which direction did they work? A Working towards these foundations.

Q Well, is that towards the center of the leanto? A Towards the center of the leanto.

Q Away from the railroad? A Right.

Q Now were you in charge of Mr. Freschi on that date? A I was.

Q And did you give him work to do on that date? A I did.

Q What work did you give him to do? A I gave him some foundations which came in the leanto.

Mr. Brown: Objected to as not material.

The Court: He may answer as to the nature of the work he was called upon to do.

Q Now, Mr. Bingham, where were these foundations located? A The foundations were located under the second bay of this leanto.

Q And was that near where Mason's men started to work? A About twenty-five feet away.

Q And did you notice him working there during the day? A I put him to work there in the morning, saw him start in, and I didn't see him till the afternoon.

Q When did you next see Mr. Freschi? A When he was hurt.

Q And where was he then? A He was in the laboratory.

Q And what condition was he in then? A Pretty severe condition.

Q Well, just describe to us what you saw. A Well, he was unconscious and he had got a bad scalp wound and was bleeding very heavily.

Q Now when you saw him there in the laboratory were there any other people there with him? A Well, there were several men there.

Q Do you know whether or not any of Mason's men were there? A I believe so.

Q Do you know whether or not there was any instrument in the laboratory? A Yes, because I asked the question—

Mr. Brown: I object, if your Honor please, as not binding upon us. It is hearsay testimony.

(Question repeated.)

The Court: You don't have to anticipate the defense in this case.

Mr. Currie: We are not trying to, your Honor; we just want to show that the bar was there at the same time Mr. Freschi was.

Mr. Brown: I move that that be stricken out. What counsel said is not evidential.

Mr. Currie: I didn't intend it to be evidential, just simply to explain it.

The Court: The objection is sustained as immaterial.

Q Now, Mr. Bingham, did you know Mr. Freschi before the accident? A Yes.

Q Do you know in what capacity he was employed there? A Yes.

The Court: I may say that you may come in on rebuttal with proof of that nature.

A Foreman laborer.

Q Do you know how much he earned a week? A Thirty or thirty-five dollars, I couldn't say for sure.

Q Do you know how long he had been working there, Mr. Bingham? A I think he had been working about eight or nine months.

Q When you saw him in the laboratory do you know whether or not he received any medical treatment there? A Yes, he did.

Q Do you know whether or not he regained consciousness there? A Not properly.

Mr. Brown: I move that be stricken out. He is not a judge of the man's condition.

(Question repeated.)

Mr. Brown: I move that the answer be stricken. He is not qualified to testify about the man's physical condition.

The Court: Oh, he may give actual symptoms, not necessarily subjective symptoms. He may answer.

(Objection noted for defendant as ground of appeal.)

The Court: Of course he must qualify as to what he means by that.

Q Do you know whether or not he regained consciousness there? A I don't think so.

The Court: Strike it out. That is not a proper answer.

Q How long was he there, Mr. Bingham? A I should say about three-quarters of an hour.

Q Do you know where he was taken from there? A Yes, he was taken home.

Q Now, after that, Mr. Bingham, did you see him again? A Yes. Not that day, some time afterward.

Q Where did you see him? A At the works.

Q And what was he doing there then? A We gave him a—he was supervising.

Q And how long after the accident was that? A I should say about six weeks.

Q And how long did he work there supervising? A Only a day.

Q And why didn't he work longer? A Because he was not capable.

Mr. Brown: I move that be stricken out.

The Court: Strike it out as a conclusion.

Q What did you observe about his work when he returned after this injury? A He was dizzy—

Mr. Brown: I object and ask to have it stricken out. That is a conclusion.

The Court: Yes, strike it out. What did he do? Did he stagger, for instance?

A He seemed nervous.

Mr. Brown: No, I ask to have it stricken out.

The Court: Strike it out. You can give objective symptoms.

Q Was he able to do the work to which you had assigned him? A No.

Q What did you do with him? A Sent him home.

Q Did he return to work there while you were there? A No, sir.

Q After this accident to Mr. Freschi did you go to the scene of the accident? A I did.

Q When you got there what did you observe in connection with the roof? A I observed that they were working right overhead where the man—

Mr. Brown: I object. Immaterial. This was after the accident.

The Court: Was this witness there at the time of the accident?

Mr. Currie: He was there immediately after, and I can show that later.

The Court: If you are going to connect it properly I will allow you to proceed. Do we know anything about the accident? Why don't you prove the accident first?

Mr. Currie: I think we have had that testified to, and Mr. Bingham told of seeing the man immediately after.

Q Do you know whether or not Mr. Freschi was hurt there on July 24th?

Mr. Brown: I object.

The Court: Overruled. I will allow it.

A Yes.

Q How do you know? A Because I saw Freschi after the accident.

The Court: No, strike it out. You have witnesses who were there at the time. Do not clutter up your record with matters that may not be at all competent.

Mr. Currie: With your Honor's permission I will withdraw this witness.

Cross examination by Mr. Brown.

Q You say that he was taken to his home; you don't know that? A Yes, I do. I sent one of our men with him.

Q Is all your testimony along that line, where somebody else did something— A I was in charge and I could not leave the factory to take that man home.

Q But you cannot swear of your own knowledge whether he was taken home or not? A Certainly I can.

Q How do you know? A I sent him with another fellow.

The Court: All he knows is that he directed certain things to be done by others; whether they were done or not is for those others to testify. I would not waste time upon it.

Q You say the foundations were twenty-five feet away from what? A Twenty-five feet from where the Mason's men started in the morning.

Q How do you know where they started? A I saw them.

Q Do you remember testifying in this case on November 14, 1927? A Yes.

Q Do you remember this question being asked and this answer given—this is on page 26—"You had not seen them working there since early in the morning?" and was not your answer "No"? A If it is there I suppose I said "No."

Mr. Currie: I object to intimidating the witness. There is no discrepancy there.

The Court: You don't have to argue. He says that in the morning he saw them there and he did not see them after that.

Q Didn't you answer you had not seen them working there since early in the morning? Was not your answer "No"? A I had not seen them since early in the morning.

Q How early in the morning did you see them? A About 8:30.

Q How far were you from the place where Mason's men were working? A When I saw them? Twenty-five feet.

Q Were you in the building? A Yes.

Q In the leanto? A Yes.

Q You are an engineer? A Yes.

Q Where did you get your degree? A In London.

Q From what place? A The University of London.

Q You knew, did you, as a engineer of how many years' experience? A About twenty-three years.

Q You knew it was dangerous to have Freschi working in that place? A Not in the

morning where I started him. The men were working twenty-five feet away from him.

Q You say you saw Mason's men working there early in the morning? A Twenty-five feet away.

Q You knew they were going to work towards Freschi? A I did but I thought there was plenty—

Q Didn't you know it would be dangerous for Freschi to work there? A It would have been dangerous for him to work right underneath, certainly.

Q Tell the Court and jury what you did to warn Freschi. A Nothing.

Q It was your responsibility as a representative of your company, to see that Freschi had a safe place to work? A Yes.

Q What did you do as a representative of your company to safeguard Freschi from being injured? A Nothing.

Q Then you did not see Mason's men on this building after 8:30 in the morning? A No.

Q So your view of Mason's men was at 8:30 in the morning for how many minutes? A A few minutes.

Q And then they were twenty-five feet away from Freschi? A Right.

Q These foundations you mention were four in number? A Right.

Q Eighteen inches square? A Right.

Q And were to be made of concrete? A Right.

Q They were foundations for some machinery that was to be put upon them? A Right.

Q They were laid eight feet one way and four feet the other way? A Right.

Q And the eight feet was the longitudinal direction of the building from the railroad eastward, was it not? A Right.

Q How near the old building? A Approximately ten feet from the first foundations.

Q They were extended so that building would be near the smokestack? A Yes.

Q The first bay is twenty-five feet wide? A Yes.

Q Freschi must have been working in the first bay nearest the railroad? A In the second bay.

Q Mr. Bingham, the piers nearest the first bay or the piers that were nearest the first bay were what distance from it? Do you understand that? A I should say about four feet.

Q Four feet? A Yes, there is the first bay and a set-off, and the second bay is four feet.

Q That is twenty-four feet from the end of the building. There is an iron channel that divides the bay, is there not? A An I-beam.

Q An I-beam? A Right.

Q And then dropping a plumb down over that you say the first piers were about eight feet from that? A The first four feet, I said, this way, that is, the lengthways way of the building, four feet, and the next pier eight feet.

Q Now, you have, of course, a diagram design of the piers and the whole layout of those buildings? A I brought it the last time but you didn't want to see it.

Mr. Brown: I move that be stricken out.

The Court: Yes, strike it out.

Q Have you such a diagram? A Not here.

Q Is that one of the diagrams? (Diagram shown witness.) A Yes, that is one of the erector's diagrams.

Q No, I am asking you if this is one of the diagrams. A Yes.

Q Is that the diagram that the men worked by on that building? A Yes, the erector's diagram, right, sir.

Q Does it show the piers? A It does.

Q Have you got your measurements with you, your scale? A No, I haven't, but I think the main dimensions are mentioned in there.

Q I don't want you to mention anything until you are asked for it. Now will this diagram give the correct dimension of the buildings and the— A Right, it does.

Q And the leanto? A Yes, that is a correct drawing.

Q And the height? A Right.

Q And this is a correct diagram of the construction of the building? A Right.

Q And does it give the size of the piers? A I don't think it does on this one. No, it doesn't on this one.

Q It doesn't give the size of the piers? A No.

Q Does it give the location of the smokestack? A No.

Mr. Brown: Can we have this marked for identification?

The Court: It may be marked for identification.

(Paper marked Exhibit A for identification.)

Q I show you here a photograph and ask you if that is a general view of the construction

work that was being carried on and the character of the building? A Not on that day, sir.

Q I am not asking about that day. A Yes, that is a photograph of the condition of the building.

Q Does that show where the smokestack was on that day, its position, I mean as to location? A Yes, it does.

Mr. Brown: May we have this marked, if your Honor please?

The Court: Yes, it may be marked for identification.

(Photograph marked Exhibit B for identification.)

Q You don't know what Mr. Freschi's salary was, do you? A I say $30 a week, $30 or $35. I am not quite sure.

The Court: Why deal with that, Senator? There are people here who can speak for that. Don't waste time on it.

Q Do you remember being asked the question about the distance Freschi was from the Mason men in your testimony November 14, 1927, and didn't you answer that they were at least twenty-five or thirty feet away? A That is true, yes.

Q Now which is true? It is here. The paging is 27. Were they thirty feet away? A Twenty-five or thirty feet, as I mentioned this morning.

Q You mentioned twenty-five this morning and said nothing about thirty, as I remember. Do you want to change that? A No, let it go.

Q Which will you have now, twenty-five or thirty?

The Court: Twenty-five feet.

A Twenty-five feet, sir.

Q How far were you from Freschi, or these piers, rather, at the time you saw Freschi, when he was injured? A I didn't see him injured.

The Court: He didn't see him. The only time he saw him was when he was in the laboratory, was his answer; he didn't see him at the scene of the accident at all.

Q I don't mean that you actually saw him injured, but you saw the injuries to him? A Right.

Q When you saw the injuries to Mr. Freschi how far were you away from the piers? A Oh, when he was there perhaps 300 or 400 feet away.

Q So if anything happened at the piers or the scene of the accident you were at least three or four hundred feet away from him? A I was not to the scene of the accident at all; I didn't see the accident.

Q I am not saying you were; I am asking you if an accident did happen in the leanto or around where the piers were, you were at least three or four hundred feet away from that? A Right.

Q How long did you say that Mr. Freschi worked upon his return? A A day.

Q Do you remember in your testimony of November 14, 1927, page 39, being asked this question or those questions, and making the answers: "Q He therefore came back to seek

employment at this place? A He came back to seek employment. We started him in but he was not in good condition to carry out that work. We gave him very light work, but I didn't think it was at all correct to keep him on that. Q How long was he on that? A I think at least a week or ten days." A That is true, it must have been so, but I didn't know it was as long as that.

Q Why did you say those things that you didn't know anything about? A If you were in charge of a big corporation and in charge of big construction work, with about two hundred men, it is very difficult just to watch every man for every minute.

Q Now you are still connected with this company? A No, sir.

Q You are not working at that plant? A No, sir.

Q Where are you working? A National Lead Company in Brooklyn.

Q The National Lead Company purchased the Metallurgical? A I am not working at that plant, I haven't been working there for eighteen months.

Q The company that you were working for is the same company that purchased this plant? A Yes, not the Metallurgical.

Q No, it was the Metallurgical, and the National was purchased by the Metallurgical? A Yes.

Q You went with the new company? A Yes.

Q The one that absorbed this company? A Yes, but I am not working there, not at that actual plant.

Q You say that Mr. Mason was making so much salary. How do you know that? A Mason was—

Q Or Mr. Freschi? A How do I know?

Q Yes.

The Court: Well, why waste time on it, Senator?

Mr. Brown: Well, just preliminary to another question.

The Court: I wouldn't waste time on non-essentials. The question is how you know.

Q How do you know? A By the rates, the men's rates.

Q You have charge of that? A No.

Q Did you have charge of Freschi there, whether he was employed or was not employed? A Yes.

Q And you took care when he was injured to see that he was taken care of, I mean the doctor was there? A Right.

Q And you sent him home? A I did.

Q And you took care also of his compensation? A No.

Q Aren't you interested in this case? A No.

Q Hasn't your company served or caused to be served upon Mason a notice that if a judgment is recovered in this case that they will seek to have the money paid to them they have paid Mason for compensation?

Mr. Currie: Objected to as immaterial.

The Court: Objection overruled. It is merely admitted for the purpose of showing interest, that is all. I will tell the jury

about the relation of that law to this case. The objection is overruled. You may have an exception. It is not for the purpose that counsel has in mind, solely for the purpose of showing interest of this witness, to affect his credibility, that is all.

(Objection noted for plaintiff as ground of appeal.)

Q Were you subpoenaed in this case? A Yes.

Q Produce your subpoena. A I haven't got it with me.

The Court: Anything more?

Mr. Brown: Nothing else.

By Mr. Currie.

Q Mr. Bingham, did you have a subpoena in your coat? A It is in my other suit. I didn't expect to be in court today.

The Court: No, he will have to go back and get another suit. This can't wait while he is getting his suit.

ARTHUR ACKER, sworn for plaintiff.

Direct examination by Mr. Currie.

Q Mr. Acker, where do you live? A Port Monmouth.

Q And what is your occupation? A At the present time?

Q Yes. A Bus driver.

Q On July 24, 1924, where were you employed? A The Metallurgical Chemical Corporation.

Q And what were your duties there, Mr. Acker, on that day? A Laborer.

Q And did you see Mr. Freschi there that day? A Yes, I did.

Q And where did you see him first that day? A Why, he was working in the building there.

Q Well, now, what building was he working in when you saw him? A Why, the new building.

Q How close to the Harris building was he working, the old building? A Oh, about twenty or thirty feet. That is built right onto it.

Q Did you see him there more than once that day? A Several times.

Q And did you see him lying there on the ground prostrate that day? Did you see him lying there injured that day? A I went over and picked him up.

Q Just tell us what you saw and what you did then. A We was rolling lead in and out through that building there and come back and we seen—

Mr. Brown: I object, if your Honor please, to Mr. Acker using the personal pronoun "we" and ask that he be instructed to testify by himself.

By the Court.

Q Do you mean we? Anybody with you at the time? A Yes, there was another man with me. There were four or five men around there with wheelbarrows going in and out.

Q All right. Tell what you did. A We went through the building there and come back.

Q Were the men with you at the time? A There were four or five.

Q You were sure they were with you? A Yes.

Q You are sure of the fact they were with you? A Yes; and come back and seen the man lying there.

Q Where was he lying? A Where he was working.

Q And where was he working? A In the new building.

Q And where in the new building? A Where these forms were being built.

Q And where were the forms, on the roof or on the ground? A No, on the ground.

Q What were they for? A Cement forms.

Q In reference to the forms where was he lying? A Why, he was laying right near the forms.

Q How near? A I don't know how near.

Q If you don't know, say so. What you don't know indicate.

By Mr. Currie.

Q What time was that, Mr. Acker? A It was in the afternoon.

Q Can you tell us what time in the afternoon? A Around three o'clock.

Q And during the day did you see any men working there on that building? A Yes.

Q And where were they working? A Well, there was men working all over.

Q Did you notice when you saw Mr. Freschi there whether there were any men working above him on the roof?

Mr. Brown: Objected to as being leading.

A Yes, there were men working there.

Q What can you tell us about men working over Mr. Freschi when you saw him lying there? A I can't tell you anything. I didn't take any notice to it.

Q What did you do with Mr. Freschi after you saw him there?

Mr. Brown: I object to that as leading. As I understand it he didn't do anything.

The Court: Well, that can't be leading, what did you do with Freschi?

Mr. Brown: That is assuming he did something with him.

A Took him to the laboratory.

By the Court.

Q Did you help pick him up? A Yes.

Q Carry him to the laboratory? A Yes.

Q And as you were carrying him what was his condition? A Why, he was dazed, unconscious, whatever you call it.

Q Was he bleeding? A Yes.

Q You could see that, couldn't you? A Yes.

Q Where was he bleeding? A From his head.

By Mr. Currie.

Q Did you stay there in the laboratory, Mr. Acker? A For a period of twenty or thirty minutes, something like that.

Q Did you see any of Mason's men there? A I don't remember.

Mr. Currie: Cross examine.

Cross examination by Mr. Brown.

Q Mr. Acker, you remember being asked in your examination on July 13, 1926, in the trial of this case the following question and making the following answer: "Q Now were there any men working on the building at that time?" And your answer was "I don't recall that." Isn't that true?

The Court: That is what he just said, he said he didn't see them.

A I didn't see them.

Q "In the afternoon you don't recall whether any men were working on the building? A I don't recall." That was your answer? A That is right.

Q And didn't you also make the following answer to the question: "Q Was it while you were a few feet away from the door that you saw Freschi? A On my return trip I was just coming around there and I seen a bunch of men gathered there and I rushed in there." That is true? A Yes.

Q So there were other men there before you? A Yes.

Q A bunch of men? A Yes.

Q Around Freschi? A Yes, sir.

Q Were those the men that were working there with Freschi, do you know? A I don't know who they were.

Q You don't know who they were? A They were working throughout the plant there. There were men all over the plant.

Q How many men were there there before you got there? A Oh, several men.

Q What were they doing? A Working around there.

Q Well, I mean when you got there Freschi was in the midst of them, wasn't he? A He was lying there, yes.

Q Weren't they doing anything to him? A Didn't seem to be doing very much, no.

Q I see. That is all.

Mr. Currie: That is all, Mr. Acker.

CLARENCE McCANN, sworn for plaintiff.

Direct examination by Mr. Currie.

Q Mr. McCann, what is your occupation? A Plant foreman.

Q Where are you employed now? A Belleville Chemical Company.

Q On July 24, 1924, where were you employed? A Metallurgical Chemical Company.

Q And at what plant? A Lead works.

Q And where is that located? A In Matawan.

Q Do you know whether or not Sylvester Freschi was injured there that day? A I do.

Q And what were your duties at the plant on the day he was injured? A Transferring lead and loading lead and handling the lead of the plant.

Q What was your official title with the company? A Plant foreman.

Q And was Mr. Freschi under you? A Yes, sir.

Q And was he working for you that day? A He was early in the morning.

Q And for whom was he working at the time he was injured? A Mr. Bingham.

Q And what was the occasion or how was it that he came to be working for Mr. Bingham and not you? A Mr. Bingham asked for some men to do some work.

Q Do you know what work he was doing for Mr. Bingham? A I believe foundations.

Q And do you know where those foundations were located? A In the Recovery Building.

Q Now, Mr. McCann, just what kind of a building was this Recovery Building? A It was a steel structure covered with corrugated iron.

Q And was it near any other building? A Yes.

Q What building? A Harris Building.

Q Was there any connection between the Recovery Building and the Harris Building? A They both connected.

Q And how were they connected? A Well, joined on.

Q And is that what is sometimes referred to as the leanto? A Yes.

Q Now where were these foundations being constructed? A In the leanto and the new Recovery Building.

Q Now did you see Mason's men there that day? A I did.

Q Did you know Mason's men? A Some of them.

Q And where did you see them, Mr. McCann? A Working on the roof.

Q And did you see where they started on the roof? A Yes.

Q And where did they start? A On the westward end of the building.

Q And is that the end towards the railroad? A It is.

Q And which direction did they work, towards Mr. Freschi or away from him? A Towards him.

Q Did you notice them working there during the day? A I did.

Q Can you tell us what progress they had made up to the time of the accident?

Mr. Brown: I object to it if he didn't see the accident.

By the Court.

Q When did you last see them working on the roof on the day in question? A I seen them there in the afternoon.

Q Up to what hour? A About two, half-past two.

Q And when you last saw them on what portion of the roof were they? A Of the second bay.

The Court: Go on.

By Mr. Currie.

Q Now, Mr. McCann, how did they lay this roof? Did they complete one bay before another or just tell us how they finished this. A They worked in sections.

Q Well, now, what do you mean? A Well, they would lay a few sheets at the bottom and then continue on and then stop and then continue on up with the rest of it.

Q When you say working in the second bay, that is how far had the work progressed in that bay when you last saw it about two-thirty?

Clarence McCann, for Plaintiff, direct.

By the Court.

Q Was it completed? A No, about half.

Q Half completed? A Yes, sir.

By Mr. Currie.

Q And when you say half do you mean that they worked from the bottom half way up? A Just from the bottom half up.

Mr. Brown: That is extremely leading, if your Honor please.

Mr. Currie: I withdraw the question.

The Court: That is extremely leading. After all this is an accident case, a negligence case, and the proofs can be confined within very narrow compass, logically.

Mr. Brown: Well, doesn't your Honor see the effect of that question?

The Court: No, the only difference is he should have said, "What do you mean by that?" instead of "Do you mean."

Mr. Brown: No, not that, but he tells him how the sheets were laid.

The Court: That is the only difference as I see.

Mr. Brown: Not only that, but the amount of the progress is for some other testimony.

The Court: That is for you to tell the jury.

Mr. Brown: All right. Your Honor will give me an opportunity to do it?

The Court: I will give it to you. But I do feel that the case should be limited and tried on its merits.

Clarence McCann, for Plaintiff, direct.

Q Did you notice how this roof was being attached to the building, I mean how it was fastened there? A Why, the sheet metal was just simply fastened by straps that went on the beams and channel irons.

Q How were the straps held to the metal? A Put on with rivets.

Q How would the men put those rivets in? A Simply one man on top and one man underneath the scaffold held a bar while the other man was riveting.

Q What kind of scaffold was the man on underneath, Mr. McCann? A Plank scaffold.

Q And how was that held up? A By ropes.

Q What would the man underneath hold against the rivets?

Mr. Brown: Objected to as leading, if your Honor please.

The Court: Don't lead, Mr. Currie.

Mr. Currie: Well, if your Honor—

The Court: Never mind. Don't argue it and waste time.

(Question repeated.)

The Court: Yes, that is leading. Reframe it.

Q What would the man underneath do?

By the Court.

Q What did you see him do? If you didn't see him say so? A I didn't see him.

Q You didn't see him? A No.

The Court: Then he is not competent to answer.

By Mr. Currie.

Q You didn't see him fastening the rivets?

Mr. Brown: Objected to.

A No, sir.

Q Did you see him fastening the rivets?

Mr. Brown: Objected to as leading.

By the Court.

Q Did you see him working on the roof? What was he doing? If you didn't see him working what did you see him doing?

By Mr. Currie.

Q At the time of the happening of the accident where were you? A In the scale house.

Q What, if anything, did you do after the accident happened? A I was notified of the accident.

Q Well, what did you do after you were notified? A I went to the building.

Q What building? A Recovery Building.

Q What did you see there? A Men carrying a man out.

Q And who were they carrying out? A Mr. Freschi.

Q And where did they take him? A To the lab.

Q Did you go over there? A I did.

Q Were you in the laboratory? A A few minutes.

Q Did you notice what condition Mr. Freschi was in? A He was in a chair and he didn't seem to know any one, and his head bleeding.

Q Tell us anything else about his condition? A No, sir; I didn't stay.

Q What did you do after you were in the laboratory? A Back to the scale house.

Q And when you were going back to the scale house did you meet any one? A I did.

Q Who did you meet? A One of Mason's men or two.

Q Which, one or two? A A man by the name of Mr. Tiedge.

Q Did he have anything in his hand? A He did.

Q What did he have in his hand? A He had a bar.

Q What kind of a bar? A What we call a dolly-bar.

Q Do you know, Mr. McCann, whether Mr. Freschi worked there after the accident at that plant? A Some time after he did for a while.

Q Did he work under your supervision? A No, sir.

Mr. Currie: Cross examine.

Cross examination by Mr. Brown.

Q Mr. McCann, you have been a witness in this case on four different trials, haven't you? A Yes, sir.

Q And you remembered better on the first trial, the second, third or fourth? A About the same.

Q About the same? A Yes.

Q You have just identified Mr. Tiedge, have you not, in your testimony, as seeing him coming from the laboratory? A He was going to the laboratory.

Q Going towards the laboratory? A Yes.

Q You are sure of that? A Yes.

Q Do you remember on July 13, 1926, being asked the question, in referring to Mr. Tiedge: "Q Well, did you, yes or no, on that day? A Well, yes, I saw him, yes. Q You did see him? A Yes. Q Where? A I can't say." Don't you remember testifying that way? A Well, probably I did.

Q Now, wasn't your memory better then, when it was so close to the accident, than it is today, almost five years or over after the accident? A Well, I wouldn't say.

Q What is it? A Probably so.

Q So then you are not sure that you saw Mr. Tiedge coming, as you say today? Did you say that Freschi was working for you in the morning? A Yes.

Q Mr. Bingham just testified that he was working for him. Which was he working for? A He was working for me first in the morning.

Q First in the morning? A Yes.

Q How long did that last? A Till eight o'clock.

Q And then he worked for Bingham? A Yes.

Q Do you know when he went in this building to build a foundation, what hour? A Why, after he left me I don't know anything about him.

Q How far were you away from the leanto at the time that you first heard or learned that Freschi was injured? A About 100 feet.

Q About 100 feet? A Yes.

Q You were inside the building at that time, weren't you? A No, sir.

Q Outside the building? A In the scale house, outside.

Q In the scale house? A Yes, in the yard.

Q You were not looking to where Freschi was? A No, sir.

Q Did anything obstruct your view? A Yes.

Q So that you couldn't see Freschi? A No, sir.

Q Did somebody come and tell you that Freschi was injured? A Yes.

Q That is all you knew? A Yes.

Q And you went to where Freschi was in the leanto part; is that it? A Yes.

Q And you found him about thirty feet from where he was working? A They were carrying him out.

Q Was he in the leanto then? A No, he was in the old building, coming through.

Q Did you see Freschi working there that day at all? A I believe I did once or twice during the day.

Q Why do you say you believe you did? You are not sure? A Well, on my runs through the building I noticed men working there. I didn't particularly pick a man out.

Q What men did you notice working there? A Several different men.

Q Where were they working? A Around the building.

Q Where? A In the building and on the building.

Q In and on the building? A Yes.

Q What men were they? A Several different men were there.

Q What? A Several different men.

Q Can't you tell whose men they were? A I was not acquainted with all the men.

Q Well, tell us those that you were acquainted with. Will you please tell the Court and jury the men that were up on the roof and working on that building at that time? A I saw Mr. Mason's men working there and the sheet metal,

and that is all I took notice to on the building, and our own men working downstairs in the building.

Q Why do you hesitate about telling who was there?

Mr. Currie: I object to that, your Honor.

The Court: He doesn't need protection. He will say, "Because I don't know." If that is your answer say so.

A I don't know.

Q You don't know? Were Tuller's men there? A That I couldn't say.

Q Why do you say that, that you can't say?

Mr. Currie: I object to that; the same question as before.

The Court: He will say he doesn't know. If you don't know say you don't remember.

A I don't remember.

Q All right, Mr. McCann. And on July 13, 1926, weren't you asked this question and didn't you make this answer: "Q Will you say there were not other men working on that building?" and didn't you answer, "Why, some of Tuller's men were there. Q The iron men? A Yes"? Didn't you so answer? A Yes.

Q And isn't that why you are hesitating now, that you don't want to testify that way? A I didn't remember.

Q Why, two weeks ago I called this to your attention, didn't I, in the other court room, in the trial of this case? Isn't that true? A I recall that you did.

Q Now, have you forgotten this from two weeks ago until today that you had seen three of Tuller's men there? A Yes.

Q Is that the reason why you didn't testify that Tuller's men were working up on the roof of that building and said you didn't remember, in order to help Freschi in this case? A No.

Q What reason did you have then? A I didn't just remember.

Q The men were working from the railroad eastward, weren't they, on the roof? A Yes.

Q And where were Tuller's men working? A I don't know. In the building.

Q You say that you saw Freschi at what hour? A I don't just recall the hour.

Q Why, you told Mr. Currie two or half-past. A At the time of the accident.

Q Yes. Well, was that when you saw him? A Yes.

Q Then it was that you saw the bay half finished? A Yes.

Q And you saw that the bay was finished half way up, half way as indicated by counsel or half way from east to west? A Half way from east to west.

Q I thought so. What time in the morning did you see Mason's men before that, before two or half-past? A They were on the building during the entire day.

Q What time in the morning did you see Mason's men when you saw Freschi working there? A In the morning?

Q Yes. A Ten o'clock.

Q Would you say it was eleven o'clock? A No.

Q Are you sure it is ten? A Somewheres around that neighborhood.

Q Around that neighborhood? A I didn't just exactly look at the clock.

Q Where was Freschi then? A Working inside of the building on the foundation.

Q And where were Mason's men then? A Working on the roof of the building.

Q How far away from Freschi? A About twenty-five or thirty feet.

Q Do you remember saying thirty feet in your testimony on July 26th? A I just said twenty-five or thirty feet.

Q Were you talking to Mr. Tiedge on this day when you say that you saw him going towards the laboratory? A Yes, sir.

Q I have already called to your attention, have I not, the fact that you said you didn't notice any of Tiedge's men, or that is, you couldn't identify Tiedge?

Mr. Currie: I object to that, your Honor. There is no testimony that he couldn't identify Tiedge or that he didn't know Tiedge.

The Court: The witness may answer.

Mr. Brown: I think Mr. Currie is right about it.

The Court: Question withdrawn.

Q Didn't you just admit that you testified on July, 1926, that you couldn't say whether you saw Tiedge? A I said in the yard.

Q Why, just a few minutes ago, Mr. McCann, I called attention to your testimony on July 13, 1926, and referring to Mr. Tiedge, "Did you see him? A Yes. Q Where? A I can't say." Didn't you admit that? A Yes.

Q Well, why do you testify now that you saw him going towards the laboratory? A I recall that he stopped and spoke to me.

Q When did you recall that? A The last trial here two weeks ago.

Q What is that? A The last trial here about two weeks ago.

Q So that it took you five years to figure that out, did it? A No.

Q Well, from the time of the accident down to two weeks ago is over five years, isn't it? A Yes.

Q And it took you all that time to remember that? A I wouldn't say so.

Q Then your memory grows better as we get along, is that so? Do you remember being asked in July, 1926, whether you saw Mr. Tiedge going one way or the other, that is to say, to or from the laboratory and didn't you answer this: "I couldn't say. I think they went towards the laboratory"? A Yes, sir.

By the Court.

Q You did so testify, did you? A Yes, sir.

By Mr. Brown.

Q As Mr. Freschi's foreman—how many foremen did he have over him anyway? A Mr. Freschi?

Q Yes. A I was his foreman.

Q Well, what was Mr. Bingham? A Superior foreman.

Q Well, he had two foremen then, did he? A Yes.

Q And what did you do as a foreman to direct Freschi where he was working? A I had nothing to do with him after he was transferred from my department.

Q Well, as a foreman there, foreman over him, didn't you see the danger that was apparent

there, working where other men were working? A Well, that didn't interest me because my work was different, and the man who has charge of the man is the man to take care of him.

Q You said that you were there at half-past ten? A Yes.

Q And you saw Freschi there at half-past two and you were in and out all day? A Yes.

Q Is that right? A Yes, sir.

Q And you saw this man working there? A Yes, sir.

Q And you saw other men working up on the roof? A Yes.

Q And with men over him you knew the danger, didn't you, of something happening? A Well, I didn't attach any danger to it and it wasn't up to me to interfere with another man's work.

Q All right. Didn't you think it was your duty to tell Freschi of the danger that was there?

The Court: He says he didn't.

Mr. Currie: I object. What he thought or might have thought is not relevant.

The Court: He says he didn't do anything in that respect.

Q What did you do to protect Freschi? A Nothing.

Mr. Brown: That is all.

Mr. Currie: That is all.

HARRY JERVIS, sworn for plaintiff.

Direct examination by Mr. Currie.

Q Mr. Jervis, where do you live? A Red Bank.

Q In July, 1924, by whom were you employed? A Tuller Construction Company.

Q Who was the Tuller Construction Company? A A construction company that operated out of Red Bank.

Q And on that date did they have any operation at the Metallurgical Chemical Corporation plant? A They did.

Q What was the operation? A Erecting some steel work for a building.

Q And what was your job with them? A Timekeeper.

Q And on July 24th were you at the Metallurgical Chemical Corporation plant in Matawan? A I was.

Q Did you take the time of Tuller's men there that day? A I did.

Q How many men were working there that day? A Four or five.

Q Now do you have with you your original time book which you made on that date? A I have.

Q Will you produce it, please? A I will get it. It is in my coat.

Q Well, get it.

(Witness produces book.)

Q Now, Mr. Jervis, under what circumstances was that book compiled? A The first thing in the morning—

Mr. Brown: Objected to as immaterial, thus far. It doesn't seem that there is any necessity that this witness prove the time.

Mr. Currie: To corroborate his testimony.

Mr. Brown: He hasn't testified to anything yet.

By the Court.

Q Do you know what Freschi was working?

Mr. Brown: He is not testifying to Freschi.

The Court: What do you want to show?

Mr. Currie: I want to show what men were working on that roof. I am not referring to time.

Q Can you tell us of your own recollection, independent of the book, how many of Tuller's men were working there that day?

Mr. Brown: Objected to. He is getting in just what we don't want in. He says by referring to this book.

The Court: This witness was employed by Tuller?

The Witness: Yes.

By the Court.

Q What was your position with Tuller? A Time keeper.

Q And were you a time keeper at or about the time of the accident we are talking about? A Yes, sir.

Q On July 24, 1924? A Yes, sir.

Q And what was your duty? A To check up all men to see that they were there and take the time, the number of hours they worked.

Q You did do that? A By going there once in the morning and in the afternoon.

Q So that when you went there in the morning you discovered what men were working? A Yes, sir.

Q And then you would go in the afternoon what time? A Well, it depends a great deal on what I had to do, sometime during the afternoon.

Q Between what hours? A Any time that was convenient to me.

Q All right. Then you made the notations of the men who were working at the time? A Yes.

Q And prepared that time sheet there? A Yes, sir.

Q In your handwriting? A Yes, sir.

Q And can you tell us who were working for the Tuller Construction Company on this job at this time? A Yes, sir.

Mr. Brown: I object to the testimony. If he can tell without the book he can tell it.

Q Well, are you able to tell without the book, without referring to it? A That would be hard to say now.

Q But it was made by you at the time? A Yes.

Q Now the question is, what men were working on the Tuller job on July 24th, and if so, when? You may refer to your book and refresh your memory. A Five men.

Harry Jervis, for Plaintiff, cross.

By Mr. Currie.

Q When were they working there, Mr. Jervis? A In the morning.

Q Did they work there in the afternoon? A They did not.

Q Now, Mr. Jervis, you made out this book and these entries each day? A Yes, sir.

Q And was that your duty? A Yes, sir.

Q And what did you do with the book? A Turned it back into the office.

Mr. Currie: Now, your Honor, I offer the book.

The Court: You don't have to.

Mr. Brown: I object to the admission of the book. He merely used it to refresh his memory.

The Court: You don't have to offer it.

Mr. Currie: May I have an exception?

The Court: You may.

(Objection noted for plaintiff as ground of appeal.)

Mr. Currie: Cross examine.

Cross examination by Mr. Brown.

Q Then your men were working there that day, four or five of them? A Yes, sir.

Q And they worked during the day after, didn't they?

Mr. Currie: I object to that as immaterial. The question is what happened on that day.

The Court: Oh, it may have some bearing, I suppose, if it is there. You are both

right and both wrong. I am going to allow it. It may have some bearing upon the general circumstantial situation.

Q What is your answer? A May I use the book to look at the next day?

The Court: You may, yes; use the book.

A Yes, sir; they were.

The Court: Going to corroborate the testimony.

Q And they kept on working there for how many days? A The rest of that week, and they ended Wednesday.

By the Court.

Q Now how is it they were not working there on the afternoon of July 24th? How do you know that? A By their time here. The time doesn't show they were working.

Q So that they were paid for that portion of the day; is that right? A That is correct, yes.

By Mr. Brown.

Q How many men did you have there? A Five men.

Q Did you have a foreman there? A Yes, sir.

Q You didn't have to keep his time, did you? A Yes, sir.

Q Isn't he paid by the week? A But I keep his time.

Q Isn't he paid by the week? A Yes, sir.

Q And did he remain there working? A That I don't know.

Q You don't know how many men remained there working after you left, do you? A No, sir.

Q You went there about noon time, didn't you? A Yes, sir.

Q Can you tell why it is that you had your men working on that roof up to noon time and not working in the afternoon during the accident and have them working thereafter? Can you tell why that omission there during the hours of the accident? A As I recall it rained in the afternoon.

Q Is that your best reason? A That is my best reason, yes, sir.

Q Don't you know as a fact that there was no rain that day and Mason and the rest of the men kept on working and everybody else there? A No, sir; I can't say that I do.

Q You may be mistaken about that? A Yes, I may be mistaken.

By the Court.

Q But does your time book show that they worked all the afternoon? A It does not, sir.

By Mr. Brown.

Q What time in the afternoon did you get there? A Between one and half-past one

Q Were the men working then? A No, sir.

Q Well, then, they had quit before you got there? A Yes.

Q How do you know they had quit? A Mr. Titus, the foreman, told me so.

Q Where is Mr. Titus at? A I couldn't say.

Q Where are those men at? A I don't know.

Q Do you know their names? A By referring to the book.

Q Yes. A William Scott, William Hasseman, Paddy Dolan.

Q Do you know where any of those men are? A No, sir.

Q You don't even know where Titus is? A No, sir.

Q How many records do you have of keeping time? A The time book, the main one, and a daily report that I make out.

Q Where is the daily report that you make out?

Mr. Currie: I think I can supply that, your Honor, to the counsel.

Mr. Brown: If counsel will please let the witness testify. I am asking where is the daily report at.

A I haven't it with me.

Q Who makes that out? A I do.

Q When did you make the entries in the book that you are talking about or referring to? A The same date.

Q Then why did you make a daily report if you put it in that book? A I have to report progress of different jobs, material needed and that kind—

Q Where do you make the entries, at the office? A No, sir; generally on the job.

Q What did you do that day? A Made that on the job.

Q And made the reports on the job that day, too? A No, sir; I generally make the reports out at night.

Q Not generally what you do but what you did that day, do you know? A No, sir.

Mr. Brown: That is all.

The Court: That is all.

Re-direct examination by Mr. Currie.

Q Mr. Jervis, did you have another job in that vicinity on that day? A Yes, sir.

Q Where was that?

Mr. Brown: Objected to as being immaterial.

The Court: I am not so sure, in reference to the men not working in the afternoon of the 24th.

By the Court.

Q Can you tell us, Mr. Jervis, whether or not these men worked in the afternoon of that day on the other job?

Mr. Brown: Objected to as immaterial to this case.

The Court: Objection overruled. He may answer.

(Objection noted for defendant as ground of appeal.)

A They did.

Q How do you know? A I was there.

Q Did you take their time? A I did.

Q Does your time book show it? A Yes.

Q How many men of the Tuller Construction Company worked on the other job? Refer to your book. A Thirteen.

Q Thirteen men? A Yes, sir.

Q Does it indicate what part of the day they were working? A All day.

Q What was that job, by the way, the other job? A Building a bulkhead job.

Q Where? A Cliffwood Beach.

Q How far away from this plant? A Probably three miles.

By Mr. Brown.

Q None of the men that worked on the Mason job worked over there, did they? A No, sir.

Mr. Brown: That is all.

Mr. Currie: That is all.

FRANK VECCO, sworn for plaintiff.

Direct examination by Mr. Currie.

Q Where do you live, Mr. Vecco? A Matawan, New Jersey.

Q How long have you lived there? A Twenty-seven.

Q In 1924, in July of that year, for whom were you working? A The Metallurgical Chemical Company.

Q Now at that time, Mr. Vecco, in July, 1924, how long had you then been working for them? A Started March.

Q At the time of the accident how long had you been working for them? A The first I worked, you mean?

Q Yes. A March.

Q What kind of work did you do? A Everything, worked in the yard, cement work and everything.

Q Who was your boss? A Sylvester.

Q Sylvester who? A Freschi, what is his name?

The Court: Sylvester Freschi.

Q What was Mr. Freschi's work? A Working inside the building.

Q And what was Mr. Freschi doing there? A Put the foundation, cement foundation.

Q You said you were working with Mr. Freschi or for him? A I work the other side of the yard and he call me in the afternoon.

Q Now in the morning, Mr. Vecco, where were you working? A On the yard, the other side.

Q Now in the afternoon where were you working? A I work putting cement foundations.

Q Well, who was the boss where you were working? A Freschi.

Q He was your boss? A Yes.

Q And you were working there in the afternon of July 24th? A Yes, sir.

Q Now when you were working there, Mr. Vecco, did you see any other men working on the roof? A Only the men working on the roof.

Q On the roof? A On the roof, yes.

Q What were they doing on the roof? A Put the roof in.

Q And how would they put the roof in? A Well, have a man with a piece of iron like a bar—I don't know what they call it at that time—and they pull that up, the man on top hammer and keep the rivet down.

Q Now what did the man underneath stand on, if anything?

Mr. Brown: Objected to as leading.

The Court: Yes.

By the Court.

Q How did they work? A The man that holds the bar.

Q Describe how the work was done.

By Mr. Currie.

Q How did the man underneath work? A He have a board and stand on top of the board.

Q Did he have more than one board? A I don't remember whether he had one or two; he had no more than that.

Q Can you tell us how the boards are held up? A Had a rope tied on to the boards and hold him up.

Q Did you see the men working there just before the accident? A I ain't been there right away.

Q I don't think we got that question and answer. In the afternoon when you went there, Mr. Vecco, did you see the men working there on the roof? A Yes, sir.

Q Now did an accident happen that afternoon? A Yes, sir.

Q And were you there when the accident happened? A Yes, sir.

Q Now just before the accident happened did you see the men up on the roof? A Yes, sir.

Q Now were they near where you were working? A Pretty near, yes.

Q How near? A Well, I don't know how near. He was pretty near on the top.

Q Now when you say pretty near on the top, Mr. Vecco, what do you mean? A The top and the man work on the bottom. He was working on the bottom.

Q What man working on the bottom? A Me and the other man, Freschi.

Q Then they were pretty near, were they—

Mr. Brown: Objected to as leading, and grossly leading, if your Honor please.

The Court: Never mind.

Mr. Brown: I know, but this is—

The Court: But I am not going to allow any errors to be made here knowingly.

Mr. Brown: I know, but if your Honor please—

The Court: Don't get excited. Just be calm.

Mr. Brown: Just look at the viciousness of that question.

The Court: Of course I can't characterize it as you do. You are out there and I am here.

Mr. Brown: May we have the question read?

The Court: Yes, repeat the question. Let him describe it as best he can.

(Question repeated.)

The Court: Strike it out.

By the Court.

Q Did anything happen that afternoon? A In the afternoon.

Q At about what time? A I can't tell what time.

Q What was it happened? A A piece of iron dropping.

Q And where did it drop? A Right on the head.

Q On whose head? A On Sylvester's head.

Q On Mr. Freschi? A On Mr. Freschi.

Q And at that time what was Freschi doing? A Leveling the cement.

Q How was he doing it? A Well, I used to hand him the shovel and level it up.

Q And then what would he do? A He had a trowel in his hand.

Q What would he do? A Level it up.

Q He leveled it up? A Yes.

Q How did he level it up? A With a trowel.

Q Did he get down? A Down on his knees to level it with a trowel.

Q Now did something happen while he was doing that? A Something dropped.

Q And then what happened? A And dropped on the head and he fall down.

Q What happened to him? A Dropped the piece of iron.

Q And he fell right down? A Fell right down.

Q Now at the time that something fell were the men working on the roof? A Yes.

Q And where were they working on the roof? A On top.

Q Did you see them? A Yes.

Q And how near over where you were working with Freschi? A I don't know how high it is.

Q No, but where were they, what part of the roof? A Right this way. (Indicating.)

Q Right over you? A Yes, right over us.

Mr. Brown: If your Honor please, that is the thing that I have been bucking in three trials, and your Honor sustained me right along on the question that it was right over him, and he said he couldn't tell.

By Mr. Currie.

Q Now, Mr. Vecco, you saw the man working there and saw the man working underneath. What kind of a tool did he have in his hand? A A piece of bar, piece of iron, round.

By the Court.

Q Who? A A piece of iron dropped.

Q Did you see the piece of iron? A It struck alongside of my foot.

Q You saw it? A Yes.

Q What kind of iron was it? A I don't know, about that long. (Indicating.)

The Court: A long bar, square on each end.

By Mr. Currie.

Q Now, Mr. Vecco, you saw the bar that struck Mr. Freschi? A I seen him.

Q Was it like the one you saw the man have in his hand up there? A I didn't see. As soon as the accident come I go out the other side to get help. As soon as the man drop I go out the other side.

Q Just a minute before you tell us about that. You saw the man working there before Mr. Freschi got hurt? A Yes.

Mr. Brown: Objected to as leading.

The Court: Put it the other way. Did you see the men working?

A Yes.

Q Go on. How many men were working on the roof? A I don't know how many.

Frank Vecco, for Plaintiff, direct.

Q What was he working with? What was he doing? A Putting the roof in.

Q What was he working with? A Put the roof in.

Q Did he have any machinery or tools? A No, no machine, only that bar.

Q Did you see the bar in his hand? A Yes.

Q Where? A On top of the board, when he go in.

Q When what? A When he go inside. I see the man work, he have a bar in his hand.

Q How long was that before the accident? A I don't know.

Q In the afternoon? A In the afternoon, yes.

Q How long before the accident? A Well, I can't tell what time.

Q Now you say that there was something dropped? A Yes.

Q You looked at it? A Yes, sir.

Q It struck your foot? A On the side.

Q And you say it was a bar? A Yes.

Q You have indicated how long it was? A I can't tell nothing.

Q And square on both ends? A Yes.

By Mr. Currie.

Q Was that similar, was it like the bar which you saw the man above have in his hand?

Mr. Brown: Objected to as calling for a conclusion.

The Court: Yes, strike it out.

By the Court.

Q Did you ever see a bar like that anywhere else? A No.

Q Now after Mr. Freschi was hurt what did you do? A As soon as he got hurt I went out the other side to call McCann.

Q Did Mr. McCann come? A He come with a man to pick him up.

By Mr. Currie.

Q Did you see Freschi after that? A They take him in the laboratory.

Q Did you see how he was injured? A I tried to go in and they wouldn't let me go in.

Q Did you see his injuries as he laid there on the ground before you left? A Yes, I left him on the ground.

Q What did you see? A I seen a hole in his head this way and it was all blood.

Q Around his face? A Yes, sir.

Q Was he close to the foundations when he laid there? A He laid on top of the foundation.

Mr. Currie: Cross examine.

Cross examination by Mr. Brown.

Q You were not there in the morning, were you? A In the afternoon.

Q What time in the afternoon did you go there? A I no have no watch to look.

Q Well, without a watch tell the Court and jury what time. A It was in the afternoon; I don't know what time it is.

Q You can tell everything else in this case that has been asked of you by Mr. Currie. A Well, I say two o'clock.

Q Then you got there at two o'clock, did you? A Yes.

Frank Vecco, for Plaintiff, cross.

Q Have you talked with anybody about this case? A I ain't talked to nobody.

Q Haven't you talked with Freschi about this case? A No, sir.

Q Haven't you ridden up and down in Freschi's automobile to this court every day? A Well, I was there a couple days, I never talk to him.

Q No, for four trials haven't you been with Mr. Freschi up and down in his automobile? A I have been in an automobile, yes.

Q Didn't you talk about this case with him? A No, I ain't talked about this case.

Q Not a word? A No, never got nothing to do with him about the case.

Q And you came up yesterday from Keansburg with him? A No, sir.

Q From Matawan? A No, sir.

Q From where? A I left him down at the station and go home.

Q Yes, he brought you up here, didn't he, yesterday morning? A I no drive up here. I ain't got any car. I says, "Give me a ride."

Q I know, but didn't Mr. Freschi bring you up? A You ain't got nothing to do.

Q I am asking you if that is so. A You ain't got nothing to do. I have been here three or four or five times and same story all the time.

Q But I am asking you now didn't you ride up with Mr. Freschi in his automobile? A You ain't got nothing to do with that.

Mr. Brown: If your Honor please—

The Court: He may answer.

By the Court.

Q Did you come up with Freschi this morning? A Yes, sir.

By Mr. Brown.

Q On every trial? A Just this morning.

Q And yesterday? A And yesterday, that is all.

Q And you didn't talk to Freschi at all? A No use to talk.

Q No use to talk? A No.

Q What did you do to help Freschi when he was hit? A What did I do? I tell you a while ago I go out the other side.

Q You ran away, didn't you? A Run away to call help.

Q Why did you run away? A I don't know, to call help, to come pick him up.

Q Why didn't you help Freschi? A I can't help him alone.

Q Why did you run away? A I was scared myself, I can't pick him up.

Q You and Freschi were quarreling, weren't you? A No, sir.

Q Sure of that? A Sure.

Q Did you see the bar? A I see the bar, yes.

Q Why didn't you pick it up? A I can't pick it up, I tried to help the man up. He pretty near dead.

Q You told me that you didn't pick Freschi up, you ran away. A Run away to call a man up.

Q Why didn't you pick up the bar? A I can't pick the bar up.

Q You didn't pick the bar up? You didn't help Freschi, did you? A I go for the other man. I can't pick him up myself. I can't pick him up, a dead man.

Q Why didn't you pick the bar up?

The Court: He has answered three times; he said he went to get help, and he couldn't pick the man up alone, and he didn't pick the bar up because he went to get help. That is his answer.

Q You don't know how many men were on that roof that day, do you? A How many times I have to tell you about it?

Q Well, when you get ready and you are pleased to tell the Court and jury—

The Court: I know. Of course the witness is entitled to some protection. He doesn't feel at all comfortable under your examination. I am not surprised at him because you are hammering him pretty hard. You have a right to, I don't mean to say that. Don't shout at him because that gets his reaction.

Mr. Brown: All right. We will do that.

The Court: Go ahead now. There is no use for this confusion. Let's try this case in a progressive way, and if counsel will curb their voices, both of you, when the time comes some day I will let you shout your heads off. We are not making any progress by making so much noise.

By the Court.

Q How many men were working on the roof at the time? A I saw one on the bottom, on the board, and I don't know how many on top. I see more under the first time.

Frank Vecco, for Plaintiff, cross.

By Mr. Brown.

Q Do you remember of being questioned on the first trial of 1926, Mr. Vecco? A Yes, sir.

Q And you were asked this question and made this answer: "Q How many men were up there, do you know? A I don't know. I can't tell." A I say the same way.

Q You can't tell, can you? A No, sir.

Q Do you remember being asked this, too: "Q Well, would you say— A In the afternoon, I come in the afternoon, I don't know what time, see? I don't know what time he got hurt. I don't know what time in the afternoon." Didn't you say that? A Yes.

Q And didn't you make this answer, too? "Q Now this piece of iron that you have referred to, did you see the men on the roof working with that iron? Did you see the piece of iron that fell, you say, near your foot? Did you see the men that were laying the roof working with that iron? A I no see him. Somebody says it belonged to him." Didn't you say that? A Yes.

Q Is that true, Vecco, "I no see him"? Is that your answer? A I see him at work.

Q I am not asking you that. Was it not so that you didn't see him, in answer to the question that I have just read?

By the Court.

Q When you were here before? A Yes.

Q Did you so testify? A Yes.

By Mr. Brown.

Q And is that true, what you said before? What is your answer? A That is just the same as I said before.

Q Well, is what you said before true? A What about I said before?

Q I have just read it.

By the Court.

Q Now before you were asked whether you didn't say—

By Mr. Brown.

Q This was the question: "Q Now this piece of iron that you have referred to, did you see the men on the roof working with that iron? Did you see the piece of iron that fell, you say, near your foot? Did you see the men that were laying the roof working with that iron? A I no see him. Somebody says it belonged to him." Is that true? A Yes.

Q Did you see any men working up on the roof besides Mason's men? A No.

Q Didn't you see the iron men working there? A No, nobody works.

Q Do you remember answering this: "Q Any other man there besides you and Freschi? A No, only men that worked on top, only men that handled the iron on top, some kind of work on top." A I meant roofing.

Q No, I am asking if you didn't answer that way? A I mean the roof.

Q I am not asking you about roofs, I am asking if you didn't say iron men. A I say iron roof.

Q And on that trial weren't you asked: "Q Now what was the man on the roof doing?" And didn't you answer, "Putting the roof in. I don't know what he was doing, nobody know what he was doing. He put the roof in." A Well, that is all right.

Q You didn't see the iron, Mr. Vecco, that had struck Mr. Freschi, did you? A No, no see it.

Q You are sure of that? A Sure; I no see it.

Q All you saw was something hit Mr. Freschi? A Yes.

Q And then you ran away? A Run to call help.

Q Did you go right away as soon as it struck Freschi? A Go right away, yes.

Q You didn't stop for anything? A No, sir.

Q Do you remember being asked on the trial of July 13, 1926, this question: "Q Did you see this bar after it hit your foot, this iron bar? A After it hit me I go out the other side to call the man. I never bother about the bar. When I came back I never see that bar at all." A Yes.

Q And didn't you answer this: "Q You can't describe the bar?" And didn't you answer, "No"?

By the Court.

Q Did you state that before? You were asked, "Can't you describe the bar?" and you said, "No" on the other trial. A No, I say all the time it was a piece about so long.

By Mr. Brown.

Q I am asking you if you didn't answer, "You can't describe the bar?" and wasn't your answer "No"? A I told the bar all the time.

Q Didn't you say that you didn't see the iron coming down? You didn't see the iron coming down, did you? A I no see it when it come down.

Q You don't know where the iron came from, do you? A It come on the top.

Q You didn't see the iron coming down?

The Court: He says he didn't.

Q You didn't see the iron coming down? A How many times I have to say that?

The Court: The sooner you say yes or no—

A I say yes, I didn't see him when it was coming down.

The Court: He didn't see it coming down but he did see the drop.

The Witness: Drop on the head.

Q Isn't it a fact that the first time you saw this iron is when it hit your foot? A Yes, sir.

Q Freschi was down on one knee? A Yes, sir.

Q Working with a trowel? A Yes.

Q And you were bending over him? A Leveling off with a shovel.

Q And after it hit your foot you ran away? A Run away to call help.

Re-direct examination by Mr. Currie.

Q Mr. Vecco, you rode up in my automobile, didn't you? A Yes.

Q Not in Mr. Freschi's? A That is what I tried to tell you that time.

By Mr. Brown.

Q And yesterday you rode up with Mr. Freschi, didn't you? A Who drive the car?

The Court: Now you see how those things develop.

Mr. Brown: He has testified both ways.

The Court: The fact is, that Currie drove the car and it was Currie's car and Vecco was in it and Freschi was in it, both together in the same car.

Mr. Currie: That is all.

SYLVESTER FRESCHI, sworn for plaintiff.

Direct examination by Mr. Currie.

Q Mr. Freschi, you are the plaintiff in this suit? A Yes, sir.

Q And on July 24, 1924, where were you working? A Metallurgical Chemical Corporation.

Q And whereabouts was that plant located? A Matawan.

Q What was your position there? A Labor foreman.

Q How long had you been working there prior to July 24, 1924? A About nine months.

Q And what were your weekly earnings? A $30.80 a week.

Q Did you work steadily up to July 24th? A I did.

Q What had your health been prior to July 24, 1924? A Perfect.

Q On July 24th, Mr. Freschi, was there any construction work going on there at the Metallurgical Corporation plant? A There was.

Q And what construction was going on there? A They were pouring—making concrete foundations.

Q Was there any building being erected there? A The Recovery building was practically all erected.

Q What kind of building was the Recoveries building? A Why, it is a building constructed out of structural steel and steel girders.

Q Was that building connected with any other building? A With the Harris building.

Q And how was it connected with the Harris building? A Just joined together by I-beams.

Q And is that what is called the lean-to? A Yes.

Q Now on the morning of July 24th who was your superior? Who was over you? A Mr. Bingham.

Q And had Mr. Bingham been over you the day before? A No, Mr. McCann.

Q And you reported to Mr. Bingham that morning? A I did.

Q Did Mr. Bingham give you some work to do? A He laid out some work for me to do on that day.

Q Where was that work? A It was in the lean-to between the Harris building and the Recovery building.

Q What did that work consist of? A Why, it was filling excavations with concrete.

Q Did you see any men working on that lean-to that day? A I did.

Q Who did you see working there? A Men laying the roof.

Q Did you know those men? A Yes, I knowed them by sight.

Q Did you know them by name? A From what I have heard of their names in court.

Q Well, did you have any conversation with them prior to that day? A No, they were strangers to me.

Q As a matter of fact, Mr. Freschi, hadn't you spoken to them about the employment of another man?

Mr. Brown: Objected to as leading.

A I did, yes.

The Court: Well, of course that may not indicate he knew them.

Q Did that man secure employment with them?

Mr. Brown: Objected to.

A I got employment for him, yes.

The Court: I don't see how it is material.

Q When you were laying this foundation did you see those men there? A Yes.

Q And where did you first see them? A They were working up on the roof.

Q And what part of the roof were they working on? A They were working on the railroad end.

Q What were they doing on that roof? A They were laying corrugated sheets of iron.

Q How did they lay those sheets? A Well, they were coming this way.

Q When you say they were coming this way what do you mean, were they going towards you or away from you? A No, they were coming in my direction.

Q And how did they fasten the sheets to the roof? A Why, they used rivets and straps.

Q And how did the men work that were fastening them? A Well, one man would be there standing or sitting on a swaying scaffold and another man on the top driving the rivet, while the man underneath held a bar against the rivet.

Q What kind of a bar did this man underneath hold against this rivet? A Steel bar about that long (indicating).

Mr. Currie: Indicating about twelve inches.

Q Did you see the man there prior to the accident? A Yes, working on the roof.

Q Did you see the scaffold there prior to the accident? A I did, yes.

Q What kind of a scaffold was it? A Why, it was a swinging scaffold, 2 by 8 planks, 16 to 18 to 20 feet long, hanging on rope slings.

Q Was the man standing or sitting on that scaffold? A At times they would stand and other times they would sit.

Q Were the rivets put in hot or cold? A Cold.

Q Now, Mr. Freschi, as you worked there what were you doing? A I was on my hands and knees floating the concrete.

Q Did you see any other men working on that roof that afternoon? A No, but I did in the morning.

Q Who was working there in the morning? A Some structural concern workers in the morning were working there.

Q You didn't see those men in the afternoon?

Mr. Brown: Objected to.

Mr. Currie: I withdraw the question. He has already testified.

Mr. Brown: I know he has already. You are testifying for him.

Q Did you see these men there in the afternoon? A No.

Q Now, Mr. Freschi, just what were you doing at the time of the accident? A I was on my hands and knees floating concrete. I remember getting struck a terrific blow on the head.

Q Will you just show the Court and jury how you were spreading that concrete at the time you were hit? A I had one knee down this way and the other knee this way, and I was bent in this position, my head in this position, with my right here floating this concrete. Mr. Vecco stood two feet away with a left-handed shovel and as the men dumped it into the hole he would push it towards me with the shovel and I would float it with a float.

Mr. Currie: Did you get the position?

The Court: You don't have to do that. The jury has seen it. All you need put on the record is indicating how it was done. That is all the record will show.

Q While you were in that position you were hit? A Yes.

Q You don't know what hit you?

Mr. Brown: Objected to.

The Court: Put it the other way.

By the Court.

Q Do you know what hit you? A Only after I come to.

By Mr. Currie.

Q Where were you when you came to, Mr. Freschi? A I found myself in the laboratory.

Q Did you receive any medical treatment there? A Yes.

Q What treatment did you receive? A The doctor was there.

Q And what happened to you after that? A I was brought home.

Q Did you receive medical treatment after you were home? A Yes.

Q How often did you receive that treatment? A Oh, for a few days or so.

Q What did the treatment consist of? A Merely standing me up and having me walk a distance of eight to ten feet.

Q Did you receive any medicines? A No, only what I asked for to help myself, and I paid for them out of my own pocket.

Q Now, Mr. Freschi, after you were hurt did this doctor who was treating you effect a cure for it? A No.

Q What did he do for you? A Didn't do anything. I says, "Doctor, am I all right? I want to go back to work." I says, "Let me have a certificate to that effect that I am all right." He says, "It is not necessary. You don't need it."

Q Well, did you return to work? A Yes, because I had to work.

Q And where did you return to work? A I went back to the Metallurgical plant.

Q Did you secure a position there? A I asked them to help me out and give me something to do.

Q What were you doing after you returned there to work? A Just walking around trying to supervise.

Q How long did you keep that position? A A few days or so.

Q What happened to you then? A Well, I got so dizzy I would fall down. My head would spin around, and I would have to sit on a box and I couldn't do anything.

Q What happened to you after that? A I got so bad that my sister—

By the Court.

Q Well, you were taken to a doctor in New York, Freschi, were you?

Mr. Currie: If your Honor please, I call attention to the witness.

A Yes.

By Mr. Currie.

Q Now, Mr. Freschi, can you tell us what happened to you in New York? A They opened up my head.

Q Where did they do that? A Here (indicating).

Q Was it at a hospital or at the doctor's office? A At the hospital.

Q What hospital? A New York Polyclinic Hospital.

Q How long were you there, Mr. Freschi? A Ten days or more.

Q And after that what did you do? A I came home.

Q Were you able to return to work? A No, I couldn't.

Q Have you since returned to work? A To this place?

Q To any place? A Yes, I have tried hard to work, yes.

Q What work have you tried? A All kinds of work.

Q And have you been able to do it? A No, they laid me off.

Q Are you working now? A Yes, I was working, yes.

Q Where were you working? A Selling aprons that my wife would make to help me along.

Q Are you still doing that? A Yes, she is making them, yes, to this day.

Q How much do you earn a week at that, Mr. Freschi? A Sometimes four, sometimes five, sometines nine, according to how many I can sell.

Q Have you been able to go back to your old trade as labor foreman? A No, I have tried.

By the Court.

Q What were you making at the time of the accident? What were your wages? A $30.80 a week.

Q And how long had you been making at that rate? A Ever since I started to work there.

Q How long had that been? A About nine months or more.

Q What had you been making for a year or so and six months before this accident? A I was making on an average of $25 to $30 a week.

The Court. All right. Proceed.

By Mr. Currie.

Q Now, Mr. Freschi, you were operated on at the Polyclinic Hospital? A Yes.

Q Do you know who operated on you? A Dr. Ney.

Q And have you any evidence of that operation? A Yes.

Q What evidence have you? A An opening of my skull.

Q And what kind of an opening is that? A It is as big as that, half a dollar.

Q Now, Mr. Freschi, does that bother you now? A It does, yes.

Q How does it bother you? A It pains me.

By the Court.

Q When?

By Mr. Currie.

Q Well, is there any particular time it pains you? A Yes.

Q When? A On and off.

Q Is there any particular position that you get in that it pains you any? A No, I try to stoop over and when I put my head back this way (indicating).

Q What happens then? A It pains.

Q Are you still under doctor's treatment? A I am taking Dr. Ney's medicine today.

Q Do you have any guard or anything which is necessary which you use? A Yes.

Q Have you got the guard with you? A I have. This is what I use (indicating).

Q When do you use that? A When I am in crowded jitney buses or railroad trains or on crowded streets.

Q Do you know how much your operation cost, Mr. Freschi?

Mr. Brown: Objected to.

A Dr. Ney charged—

Mr. Brown: Just one minute.

The Court: Well, of course you would have to connect that properly to show that it was necessary and reasonable, whatever it was.

Q Now, Mr. Freschi, does anything else happen to that opening in your head when you do anything else? A Yes.

Q What is that? A It bulges and it hurts me.

Q When does it do that? A When I cough, sneeze or lay down. I can't sleep on that side of my head.

Q Do you have that sensation of pain now? A I have, yes.

Q And what kind of a pain do you have? A A burning pain.

Q And where do you have that? A Right in that soft spot.

Q Do you notice anything about your equilibrium when you walk? A At times I get dizzy, yes.

Q Are you able to walk well? A No, not at all times.

Q Will you just step down, Mr. Freschi, and show the jury the wound in your head? A Right there (exhibits to jury).

Q Will you cough for the jury?

(Witness coughs.)

A It hurts me.

Q That is all. I guess they have seen it. Did the bar strike you around where the—

Mr. Brown: Objected to.

Q Where did the bar—

Mr. Brown: I object to that again.

Q Where were you struck?

Mr. Brown: Objected to.

Mr. Currie: He has not indicated where.

The Court: He doesn't know what struck. He indicates a spot on his head where a wound was.

Mr. Currie: I don't think he has.

Q Is that where you were struck? A Right there.

The Court: I understand what he said a number of times. He doesn't know what hit him.

Cross examination by Mr. Brown.

Q The last time you were here you testified to being a salesman for the sale of some radio and radio equipment, didn't you? A Everything wherever I can make a dollar.

Q And you also testified to working with a concern and different places? A Trying, yes.

Q And that you were making $9 or more a week. A To support my family.

Q I know that. Now you say that you use that apparatus when you are riding in a railroad train? A All the time.

Q You didn't use it coming up in the automobile, did you? A I didn't need it because I was in a safe place.

Q That automobile was going at least forty-five or fifty miles an hour, wasn't it? A I don't know.

Q Well, you passed Mr. Mason and me on the road, didn't you? A I don't remember.

Q Well, you can ride in an automobile going fifty miles an hour without that thing, can't you?

By the Court.

Q Do you know how fast Senator Brown was driving his car when you passed him? A I don't know, your Honor.

By Mr. Brown.

Q You can ride fifty miles in a car without that apparatus on, can't you? A No.

Q When you went to Dr. Gesswein for treatment you were sent there by the company, were you not? A I went myself.

Q You went yourself? A And paid for it myself.

Q All right. He was the doctor that you selected; is that right? A Yes, because he took care of me when I got hurt.

Q Never mind because. Then he treated you? A I picked him to treat me.

Mr. Brown: May we have the witness' answer?

The Court: Yes, did he treat you?

A With my consent.

Mr. Currie: I think he has answered. He says "I picked him to treat me."

Mr. Brown: Just as soon as I begin with Mr. Freschi and Mr. Vecco they both get hostile.

The Court: Why get hostile, Senator?

Q Mr. Freschi, when you went to Dr. Gesswein he treated you, did he not? A With my consent.

The Court: Don't answer that way.

A Yes, sir.

The Court: You see you are fencing with him now and there is nothing makes a lawyer more belligerent than when you fence with him.

A He wouldn't treat me. I want the jury to know my condition.

By the Court.

Q Did he treat you? A Yes.

Q You went and asked him to do it? A And paid him.

By Mr. Brown.

Q Dr. Ney treated you, too, didn't he? A After the operation, yes.

Q And didn't Dr. Ney tell you to forget about your injury and go to work? A Yes, and I tried hard to go to work.

Q I don't want that. Didn't Dr. Ney tell you and Dr. Gesswein, too, tell you, that your condition is a mental condition, that if you would go to work you wouldn't have any trouble? A Dr. Gesswein told me to try to work and I said I would and I did.

Q And Dr. Ney told you to work, too, didn't he? A For my own good, yes, and support my family.

Q No, did he tell you because of your mental condition? A No, he didn't.

Q Didn't Dr. Ney tell you that as long as you were getting compensation from the company that you must try and overcome the idea that you had that you were not getting compensation enough or that somebody should give you more money? A No.

Q Did he talk to you about it at all? A No.

Q You have been getting for the last five years— A But I am not getting it now.

Q Haven't you been getting $17.50 for over five years? A When I have fought for it to support my family, yes.

Q Yes, but you have been getting it? A Not all the time.

Q Didn't your own doctor tell you that you have gotten yourself into a mental state that because you are getting this money and because you think that somebody owes you something, that you must snap out of it and forget about the money? A No, that is not so.

Q But, nevertheless Dr. Ney and Dr. Gesswein both told you to go to work, didn't they? A Well, I wanted to work to help my family

in my critical condition. Who was going to help me if I didn't help myself?

By the Court.

Q Did the doctor tell you to go to work? A And I did, your Honor.

Q Did they tell you to go to work? A Yes, and I tried to and I couldn't.

By Mr. Brown.

Q Now Dr. Gesswein, after he got through with you, told you to go back to work? A Yes, and I tried to, yes.

Q And you went back for ten days? A But nobody keeps me.

Q I am not asking you that. You went back to work for ten days, didn't you? A I don't remember, two months.

Q And then after that you went to work? A When I was going to New York to work?

Q No, you went there to be operated on, didn't you? A My sister brought me there.

Q You didn't consult your own doctor about going there, did you, Dr. Gesswein? A Yes, I did consult Dr. Gesswein.

Q Didn't Dr. Gesswein tell you that all you had to do was to work and get used to stooping over and back and that pain would pass? A No, he didn't.

Q Dr. Gesswein didn't open your head, did he? A He didn't know how to do that work.

Mr. Brown: I move that be stricken out.

The Court: Yes, strike that out. It is not responsive.

By the Court.

Q He didn't perform the operation, did he? A No, I wouldn't let him, your Honor. I would have been in my grave if I had stopped with Dr. Gesswein.

Mr. Brown: I move that be stricken out.

The Court: Strike it out.

By Mr. Brown.

Q You went to the New York doctor then, didn't you? A My sister took me there.

Q Your sister took you there and you didn't consult any of your own physicians about going there? A Yes, Dr. Gesswein.

Q Did he tell you to go here? A He said I didn't need any operation.

Q But notwithstanding what he told you you went there and had your head opened, didn't you? A I was going insane. I had to go.

Q And you had a doctor to cut that scar that appears on the side of your head, didn't you? A Yes.

Q Now that scar on the side of your head and the opening in your head, that was done by the doctor in New York, wasn't it? A Yes.

Q Mr. Freschi, you say that you were a foreman working on this job? A Yes.

Q How many men did you have under you? A Several men.

Q What did you do that day for those men that were under you to protect them from anything that might fall from up above? A My men was on my work, what I had to do.

Q I am not asking you that. I am asking you as a foreman what you did to protect the

men who were working under you from anything that might fall from men that were working up on the roof. A When I started to work there was nobody over my head.

Q I am not asking you that.

By the Court.

Q Did you do that? A I don't understand. My men is on the outside.

Q Did you do anything to protect the other men against anything falling? A My own workmen, you mean?

By Mr. Brown.

Q Yes. A Only had one man with me.

Q I thought you just said you had several men there? A On that particular work one is all I had there.

Q Did you have them on other work? A Yes, wheeling concrete.

Q How many? A Two, I guess.

Q How many did you have altogether? A I don't know; about eight, I guess.

Q I mean in that job, working around. A I had, I think, two wheeling and one with me and one on the concrete mixer and two putting in the material.

Q Then what did you do to have those men protected from anything that might fall from above? A These men were out of the building most of the time.

Q I am asking about the men that were in the building, bringing in the concrete and bringing in the cement; what did you do to protect them from anything falling from above? A I didn't make no protections.

Q Well, didn't you think it was necessary? A No, I didn't at the time I was working there, no.

Q Didn't you know there was danger there? A When I started to work, no.

Q No, but any time during the day didn't you know there was danger there? A Not over my head at the time I started to work, no.

Q You remember being examined in this case before, do you not? Do you remember being examined and saying that you knew there was danger there? A In other parts of the plant?

Q No, but in this part of the plant?

The Court: Where you were working.

Q In this part where you were working. A Not in the morning I don't know, no.

Q Any time during the day, did you know it? A No, I don't know.

Q You saw those men around on the roof, did you not? A Yes, in the morning, yes.

Q Well, didn't you see them there in the afternoon? A Yes.

Q Well, then why do you say the morning? A Because they wasn't over my head in the morning.

Q They were not over your head in the afternoon either, were they? A They must have been when they hit me with that bar.

Q Didn't you say on the last trial they were at least ten feet away from you when you got struck? A I don't know whether I said that, so long. My mind is not like yours.

By the Court.

Q Do you remember where they were when you last saw them? A A few feet past my

head, your Honor, ten, ten or five feet, I don't just remember. They were close to me, I know that.

By Mr. Brown.

Q In the examination before trial in this case on May 25, 1925—that is over four years ago—you were asked this question and did you not make this answer: "Q You knew that it was possible that tools or pieces of iron that they were working with and bolts, might be dropped, didn't you? A I presume so. Q You knew that? A I presume so"? You made that answer, didn't you? A I don't remember that. If it is there, but I don't remember it, so many years ago.

Q You did know that before? A I am suffering with my head, I don't know. You examined me so many times, I don't know. I am half crazy.

Q How is it you didn't bother with Mr. Currie when he was examining you? A I don't know. My mind changes. Just as soon as I get asked a question any of the time I don't remember.

Q But you seemed to get along with Mr. Currie all right.

Mr. Currie: I object to the characterization, because as a matter of fact, he broke down while I was examining him.

Mr. Brown: Of course he did. Of course he broke down.

Mr. Currie: I move, your Honor, to strike out that last remark of my adversary.

The Court: I didn't hear it. I can't strike it out if I didn't hear it. A publication doesn't mean anything unless you hear it. I don't think the jury heard it. And moreover you will have a chance to reply.

RECESS TILL 1:10 P. M.

Trial of the cause was resumed at 1:10 P. M.

SYLVESTER FRESCHI, resumed.

By Mr. Brown.

Q Mr. Freschi, you paid no attention to the men who were working above you, did you? A Yes, I saw them working up there.

Q Do you remember being asked on July 13, 1926, in the trial of this cause, about the men being up above, and were you asked this question: "And you knew that when you went in there in the afternoon, didn't you? A I paid no attention." Did you answer that way? A If it is there I did.

Q Well, the fact of the matter is that you didn't pay any attention to the men working over you or near you; isn't that true? A I paid attention, yes.

Q Why did you say on the previous trial that you didn't pay attention.

Mr. Currie: If your Honor please, I want to object. That calls for the operation of the witness' mind. If it is a fact he said otherwise that is a fact that is hard—

The Court: Well, I think Senator Brown has his answer both ways. It is open to him in the circumstances to argue that he testified to the contrary on a previous trial. He doesn't have to question the witness' mind as to why he did it.

Mr. Currie: That is my objection, your Honor.

Q Do you remember being asked this question on that trial, November 19, 1927; that is, how far from where they were up there, from the point where you were working. Your answer was, "About ten feet, more or less." Is that right? A Yes, I said that this morning, ten feet, more or less.

Q Do you know, Mr. Freschi, that the Employers' Liability Assurance Corporation has served notice upon the defendant in this cause that any moneys that are recovered in this case shall be paid to them up to the amount of the compensation?

Mr. Currie: I object, your Honor.

A I don't know anything about it.

The Court: He says, "I don't know anything about it."

Mr. Currie: I want to enter my objection that it is immaterial and irrelevant.

The Court: I shall tell the jury about it. Counsel seems to think that because such a relation existed between the employer and the employee, namely, the plaintiff in this case, and that apparently the act has been resorted to and that the employer in that

case has given notice, that therefore there is no reason why the present plaintiff prosecutes this suit excepting that he is being urged on to do so by the former employer, and the theory of it is that because of that alleged fact that the witness' credibility as a witness is now to be more or less affected if not discredited by that fact. That is the theory of it and that is the only theory upon which I am allowing it to come in; and I will tell the jury exactly what the law is on that subject.

Mr. Brown: Then the other angle, that the doctor says that the present condition is due to the very fact of the litigation pending.

The Court: That is one of the things I intimated that go to the credibility of the witness. I shall tell the jury as to the significance of that phase.

(Objection noted for plaintiff as ground of appeal.)

Q I show you here a photograph and ask you if the chimney that is shown in that photograph was the chimney near which you were working on the day in question? A Yes.

Q And is that chimney in the same position as shown in that photograph as it was on the day that you were working there? A I don't remember that. I can't say.

Q Well, has the chimney been moved, as far as you can tell, or is it about in the same place? A I knew that stack was there. That is the foundation for it.

Q Wasn't there a stack up? A I don't recall.

Q Would you say a foundation was where it is now in that photograph? A I think it was. I won't say for sure.

Mr. Brown: That is all.

Mr. Currie: That is all, Mr. Freschi.

The Court: That seems to be all, Mr. Freschi.

Mr. Currie: Now, if your Honor please, I wish to offer the depositions of Dr. Ney.

The Court: Yes, they may be offered and read.

Mr. Brown: I have objected and notified counsel that I will insist upon the cross-examination of the doctor before this jury.

The Court: I am going to allow these depositions to be read. They were taken, I assume, upon notice, and the defendant was represented at the examination?

Mr. Currie: Both examinations, your Honor.

The Court: Are there two of them?

Mr. Currie: Yes.

The Court: And it appears at this time that the defendant was represented and cross examined. Dr. Ney, being a non-resident of the state, was not subject to compulsory process requiring his attendance at the trial and therefore, as provided by our practice act, his examination has been taken in another state under deposition on notice. The practice makes such deposition eligible to be used and read at a subsequent trial of the case.

Mr. Brown: May I enter my objection on this ground: that the depositions which are referred to were taken, one on December 18, 1925, and the other on July 1, 1927; that those depositions were taken upon notice to be used at trials that were had heretofore; and my objection is now that in order that they be used at this trial it must be by consent or upon new notice; that you cannot take the testimony of a witness at a previous trial, whether it is by deposition or whether it is sworn to in court, and have it read in court at a subsequent trial; and the parties are entitled, if they so insist, upon the reappearance of the witnesses and to have them sworn and testify, not only for the reason that their previous testimony is not evidential at the present trial, but also to test their veracity on what they said on some previous occasion. Otherwise, if that were not so, all of the witnesses on a previous trial would not have had to appear here; we could simply have read their testimony.

The Court: That is not exactly the situation, as I understand it. The Court will take judicial notice of the fact that this case has never been tried to a finality; that is to say, to such a verdict as it might be said that the depositions referred to could relate only to that particular trial. I am not aware that there has ever been any verdict in this case at the hands of a jury, but for one cause or another the trial has gone over. And I regard, therefore, that the depositions taken—which, by the way, can only have effect as to the time to which the

testimony relates—would still be subject to introduction in this trial. Therefore the objection is overruled and you may have an exception.

Mr. Brown: I pray an exception.

(Objection noted for defendant as ground of appeal.)

(Depositions read by Mr. McDermott (direct examination) and Mr. Brown (cross examination) as follows:

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY.

SYLVESTER FRESCHI,
Plaintiff,

vs.

ALBERT B. MASON (first name, "Albert", being fictitious. Defendant's real name being unknown to plaintiff.)
Defendant.

Summons issued March 24, 1925.

New York City, Dec. 18, 1925.

DEPOSITION OF DR. K. WINFIELD NEY.

Taken before Hon. Samuel C. Coward, Supreme Court Commissioner, at the Wyoming Apartments, 55th street and Seventh avenue,

New York City, on December 18, 1925, at one o'clock P. M.

Appearances:

Messrs. Stokes & McDermott, attorneys for plaintiff. By William Hartshorne, Esq., of counsel.

Thomas Brown, Esq., attorney for defendant. By William M. McConnell, Esq., of counsel.

DR. K. WINFIELD NEY, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Hartshorne.

Q Dr. Ney, you are a practicing physician and surgeon? A Yes.

Q You reside in the City of New York? A Yes.

Q And have your office there? A Yes.

Q Are you a specialist? A Yes, I specialize in surgery of the brain.

Q How long have you been practicing as a specialist in surgery of the brain? A Well, I have done nothing else for a period of about ten years.

Q Does your work include hospital work? A Yes.

Q What hospitals do you operate in? A I am Professor of Neuro-surgery (that is brain surgery); and Dean of the New York Polyclinic Hospital.

Q And do you know the plaintiff in this case, Sylvester Freschi? A I do.

Q Under what circumstances did he come to you? A As a patient.

Q Can you tell me when and about the condition you found him in? A He was brought to my office August 5, 1924.

Q What condition did you find him in at that time? A I will just look over my records here that were made at that time, (referring to documents).

He had a laceration of the scalp about two inches long, which had been sutured, I judge, but had recently healed. The patient was dazed at the time; examination of the eye-ground showed increased intracranial pressure. He had markedly exaggerated physiological mystagmus with past pointing to the left and vertigo to the right. He had a fine-intention tremor in both hands; all reflexes markedly exaggerated with an abortive ankle-clonus.

In view of these findings a spinal puncture was recommended and he went to the hospital for that spinal puncture.

Q May I interrupt you now to ask you to denote the hospital? A He went to the New York Polyclinic Hospital.

The spinal puncture revealed old bloody spinal fluid. A diagnosis then was made of a post-traumatic increase of intracranial pressure, due to edema of the brain. An operation advised.

Now, on August 8, 1924, a left sub-temporal decompression was done. This was just at the point anterior to the injury, where the injury was in his scalp. It was done under local anaesthesia. A piece of bone about the size of a silver dollar was removed in the decompression. The dura was tense under pressure. Puncture of the dura, that is the outside covering of the brain, was followed by a spurt of fluid two inches high, which indicates the degree of pressure.

The dura was then opened, revealing a congested brain without pulsation. A brain spatula passed under temporal lobe and about two ounces of yellow fluid removed. The yellow fluid is the result of blood.

After this fluid was evacuated the brain pulsated freely. A rubber drain was placed under the temporal lobe and the wound closed in the usual manner.

Now, in the post operative course, the first two days, the dressings were saturated with a profuse discharge of cerebro-spinal fluid, after which it gradually subsided. The brain was then removed; the wound healed by primary intension and the patient began to show marked improvement in regard to heavy dizziness and vertigo.

Now, in the original findings—if I might say explanatorily here, if you want it to appear there, all right.

Q Yes, you go ahead and tell all about it. A For instance, dizziness and vertigo are covered here in the past pointing and all of that, which are purely technical things, but that refers to a dizziness and vertigo which always accompany those things but which I may not have mentioned, because of the difference to the lay mind may not appreciate that. So that he was relieved.

Now, the conclusions after the discharge from the hospital: An examination on September 5th, one month later, showed the intracranial pressure relieved.

The Commissioner: 1924?

The Witness: 1924.

The Commissioner: Showed intracranial pressure?

The Witness: Showed intracranial pressure relieved, with marked improvement of his general condition and a gradual clearing up of the neurologic symptoms. Now, that covers the hospital.

The Commissioner: Examination and treatment?

The Witness: Yes.

Q How long was he in the hospital? A I cannot tell you exactly from these records. He was probably there a week or eight days; seven or eight days after his operation, which was August 8th. I judge that he was in the hospital between ten and twelve days. I would have to get the records directly from the hospital to cover that point.

Q Have you seen him since September 1924? A Yes, he has reported here on several occasions. The dates I cannot give you without going through my books, and looking for them.

Q Can you tell us approximately when the last time was? A Not without going through my records for that. I do not keep an individual record of the call of patients unless they are charged for them; otherwise, they just appear in the records, and I would have to go through them. Is it particular? Do you want the last time he was here definitely?

Q What I am going to try to develop is, what his condition is and how he is progressing and what degree of permanency there is. A Well, I think I can give you that. Now, I saw him—it was either during the summer or this fall, was the last time I saw him; at least I believe it was during the summer or early in the fall.

Q Approximately a year after the operation? A Approximately. I have seen him several

times. Now, his condition—this part, I am very, very well familiar with—he shows what ordinarily we call a post-traumatic sycosis, with general nervousnes and all that, which is due to a brain traumatism in the first place; that is, fundamentally due to that; and to the second place, the man is feeling that he has not been treated or accorded the attention of treatment that he deserved from the people who apparently he holds responsible for his care following the accident. The conditions existing now are neurologic conditions, and have almost entirely cleared up, and he has now just the after effects that a patient has very often when they have had a fairly severe brain injury.

Q In your opinion—not in your opinion, but in your experience, how long a time does this post condition remain with a man? A The condition that is present now?

Q Yes. A Or after?

Q Yes, this present condition, of his extreme nervousness, inability to appreciate things in their normal value? A Fifty per cent. of cases are that way permanently.

Mr. McConnell: What was that?

The Witness: Probably fifty-five per cent. I think our more recent statistics indicate that perhaps fifty-five per cent. of the patients are more or less permanently disabled, as a result of injuries of this kind.

Q Does that incapacity prevent him from the normal manual labor that a man of his experiense would undertake? A Not from manual labor, but it does from a standpoint of concentration and reliability.

Q You mean by that that he could not be trusted to complete a job satisfactorily? A That is about it, yes.

Mr. Hartshorne: Did you hear that, Mr. McConnell?

Mr. McConnell: No.

Mr. Hartshorne: I asked him if he could be trusted to complete a job accurately, and he says he could not have been.

The Commissioner: You say "no"?

The Witness: No, he loses the sense of responsibility, largely. Many of these patients, as a result of their war experience, where we saw a great number of them, have never yet become adjusted since the war, from injuries of just this type. They spend the rest of their lives, or many years, until something happens that helps them to become adjusted. They spend their life without really accomplishing things.

Q Do you say, then, that no further treatment of any kind would be of benefit to the man? A This man could be helped considerably under certain conditions. If his mental condition was satisfied, in that he felt that he was to be cared for and was not unjustly treated, if that was not involved, that would help somewhat; but the important thing is this: Every case of this type of brain injury that is not operated on, where there is a hemorrhage, within the first, say twenty-four or thirty-six hours, has a chance of having this. If they are allowed to go ten days or more after an injury, it takes many times longer to get adjusted afterwards. The pressure on the brain lasting for several days is a

great deal more serious than a pressure lasting for several hours. It seems to throw out certain parts of the brain from—it seems to throw them out of commission.

In the next place, when that pressure is relieved, patients very often, after these injuries, find difficulty in doing any kind of hard work, in stooping or exertion. They feel dizzy, they develop vertigo, and they are nervous. They can very often do light work; they can never do hard work until they make the definite effort of exertion and stand the consequence of it, the pain, the discomfort and disagreeable condition. Often for a period of three months, if they will just do hard work, and stand the pain and the disagreeable features of it, they can very often readjust themselves in that time. Apparently, so far as we can determine, there is no other way of doing it. I do not think there is anything in the way of treatment. It is largely by the individual's effort that he adjusts himself afterwards.

Q You find that his mind is not of the kind that would— A He tells me that he has made efforts to do that. I have impressed this on him very plainly, the necessity of it, and he tells me that he is making efforts, but as I say, many of these patients seem to lack the will power to do these things. And I think that his salvation, in the first place, would have been in giving him a type of employment to keep his mind occupied, which did not require a great deal of exertion, and he stated that he had asked for that, but they refused to use him in any capacity, and that if he could have done that in the meantime, and then after a few months, if he could have gone back to his hard work, it would have been very much easier.

The great difficulty in these cases is the cause of our compensation laws on the question of treatment. The patient is not kept busy from the beginning; they are allowed to stay away from work for a certain length of time. We learned during the war that in these brain conditions the sooner we could get them to work and exercise the more rapid would be their recovery, and if they waited six months, it is very difficult to get them started; and if they wait a year it is more difficult; and if they wait five years, it is almost impossible to ever get them started again.

So I wrote, I believe, letters to that effect. I do not know whether I have copies of them here or not. I explained it to him, and I was under the impression that I had. (Referring to documents.) No, perhaps I did not.

Q Whatever would have been best to try to get him to do to secure the improvement, do you say he would have suffered great pain in undertaking it? A He would suffer pain, yes. He would have had pain, and he would have more or less vertigo, and dizziness, which he had at the time of the operation. Those things come with the readjustment. They have got to go pretty much back over the course, as we might say, from the standpoint of symptoms before they get adjusted.

Q And it is a small percentage, you say, that do overcome those difficulties. A I say perhaps forty-five per cent. of them do get over that; sometimes it takes a long time.

Q And fifty-five per cent. never do? A Fifty-five. I think approximately fifty-five per cent. are permanently disabled.

Q Do you know how old the patient is? A Age 36; his occupation at the time was a fore-

man-laborer. Oh, he was discharged from the hospital on the 15th of August.

The Commissioner: 1924?

The Witness: 1924. Entered August 5, 1924, and discharged on the 15th.

Mr. McConnell: What was that last?

The Witness: Discharged on August 15, 1924. Now, I do not know whether you are interested in the question of history; that is, what the patient told me, I do not know whether that applies or not, or whether it is ruled out.

The Commissioner: His family history?

The Witness: It is the history regarding—

The Commissioner: The history of himself?

The Witness: Yes, that he gave me.

The Commissioner: It is up to them.

Mr. McConnell: Of course it would be hearsay evidence.

The Witness: It is just what he said.

The Commissioner: Do you want it?

The Witness: The only thing is, that this took place, judging by the calls that came from the company here inquiring about his condition, they evidently were aware that he was injured, because several times someone called up from the company and wanted to know his progress, the progress that he was making and how he was getting along in the hospital and such as that. The only thing, he states that a piece of steel fell about thirty-five feet striking him a glancing blow on the left side of the head. That is

the part that appears in our records that is important.

Q Dr. Ney, what expenses was he to, so far as your bill is concerned? A He paid me $200.

Q Do you know what the expenses were in the hospital? A No, I do not.

Q That was the total of your charges, or were there more? A That was the total of my charges which I made in consideration of his circumstances. Ordinarily the fee in this work—

The Commissioner: Does that include the operation?

Mr. Hartshorne: He says that was everything for him.

The Witness: Ordinarily, the fee for this is a thousand dollars.

The Commissioner: Did you perform the operation?

The Witness: Yes. But under his circumstances, as he said he had to pay it himself, that he was not being helped at all, under those conditions, why, that was all he could pay, and I think someone else paid it for him. I believe that some relative—he didn't pay it himself—I know the other man paid it.

Mr. Hartshorne: That is all I have. Now, do you want to cross examine and ask him any questions?

Mr. McConnell: I want to ask a few questions.

DR. K. WINFIELD NEY, being cross examined by Mr. McConnell, further testified as follows:

Q That statement from which you are reading, when was that statement written; this statement from which you were reading the record of his case? A Well, extracts were written at the time they occurred at the hospital.

Q By whom? A By myself, for my assistants.

The Commissioner: You mean memoranda were made?

The Witness: Yes, we make memoranda.

Mr. McConnell: I did not quite get you, doctor.

The Witness: Yes, the memoranda are made from time to time, how patients in the hospital are getting along. It was all made during that interval.

Q And that entire statement was dictated by yourself? A This is dictated by myself, yes.

Q At the time each of the events that are spoken of in the statement took place? A Yes.

Q You spoke of letters that you had written to someone; who were those letters written to? A Now, I have an idea that I wrote them, but I am not sure. I do not find records here. (Referring to documents.) Now it may be that—I have got the impression that I had one here. Oh, here is one. I do not know to whom it was sent, but it is just a brief record, dated on December 3rd.

Q What year?

The Commissioner: 1925?

The Witness: 1924.

A (Continued.) This is "To Whom it may concern: This is to certify that I examined Mr. Sylvester Fresche. The patient is showing gradual improvement since his operation. He is still nervous and irritable. I recommend moderately heavy work for a period of about three months, after which he should be in a position to do his regular heavy work."

This is what I had in mind. I have a copy of it here, but it was just "To Whom it may concern"; not addressed to anyone definitely.

Q Do you know to whom that letter was given or sent? A It was mailed to him.

Q To Mr. Freschi? A Yes.

The Commissioner: Do you want him to produce that and offer it in evidence, Mr. Hartshorne, or Mr. McConnell?

Mr. Hartshorne: The original of that is in the possession of Mr. Freschi, I suppose.

The Witness: I don't know; he wanted to have it for the company, I believe, or someone. I think he was trying to get a position back, or something of that kind, and I remember the incident quite well: That he wanted to get a light form of work, according to my recommendations, for a while, and he asked me to write them that.

Q At the time you examined him last fall or summer, whenever it was, would you say that he was unable to do any kind of physical work? A When he first came?

Q No, last fall or summer. I understand you to state— A Oh, in this last examination?

Q Yes. A Yes, I should think he could do light work, but I think he could do even more than

light work if he could stand the pain for a while, that it caused. He could do that, but I doubt whether he would be very reliable.

Q Well, what do you mean by "reliable"? A He has what we call a post-traumatic sycosis.

The Commissioner: Traumatic?

The Witness: Post-traumatic. That means following an injury. That means changes in character, instability of character and all of that, which very often follows head injuries.

Q If his duties were only those of an ordinary laborer, would he be affected in the performance of such duties by this injury now? A For the time being he would, yes. That is, he would probably overcome that in time if you could get his will power in a condition that would permit him to go through the ordeal. It is going to be painful to him at first; he is going to have headaches; he is going to be dizzy when he stoops over.

Q If he had undertaken to go back to work as soon as he could have, after he was discharged from the hospital, would it have made it any easier for him? A Made it easier, yes.

Q About how long a period would he have suffered from pains if he had gone back doing work then? A Well, if they had put him immediately to doing light work so that his mind would have been occupied and not dwelling on his condition, he would have, within three months, have been able to go back, probably, to his regular work, and he should have been able to start his work within six weeks from the time he left the hospital.

Q In other words, he left the hospital, I believe you said, on the 15th of August? A 15th of August. By the first of October—

Q Then, by the end of September he should have been able to go back doing light work? A Light work.

Q And continued doing light work for about three months and by that time he would have been able to resume the performance of his regular tasks? A Of his regular work, yes.

Q If they consisted merely of ordinary laboring work, which he states is what he had been doing? A Yes.

Q And at the end of that time you say that he should have been in a position to assume the ordinary responsibilitites of such work? A Well, now, I don't know. He would of the ordinary laborer, but I understood he was a laborer-foreman.

Q Yes, he was a laborer-foreman; that is right. A Now, a foreman, I judge, requires the realization of certain responsibilities, and he is not very responsible, and was not even at that time afterwards; it is that condition.

Q Would his condition normally improve so that he would get to the point where he could? A Oh, yes.

Q (Continued.) Assume responsibility and direct the work of other laborers under him? A Yes.

Q And would you say that he should get to the point where he would have recovered his full capacity in that direction? A Yes, but that might take—it is awfully difficult to estimate that in an individual, but it might be a couple of years or so.

Q Well, of course, we can only suppose the speed of the average. A The average. I think the average individual is, perhaps, incapacitated more or less for—oh, I would say most of them two years, before they began to see marked changes in recovery, in that respect, if there has been a severe head injury, and in this man's case there is no doubt of it.

Q When he first came to you, from your examination of him, without having his own story as to what happened to him, were you able to form an opinion as to what caused the injury? A What had caused the injury?

Q Yes. A No. The only thing, we could not see the wound. The wound had been repaired, I think; perhaps sutured, but it looked as though it had been cut, lacerated. It could have readily been caused in the way that he explained. There was no question which came up as to whether it was or not.

Q Might it have been caused by any kind of a blow from any hard implement of any sort? A Well, that is hard to judge, because I do not know what the surgeon did to it when he repaired it.

Q Would you say that the wound might have been caused by a blow from a wooden tool or implement? A I could not tell at this stage.

Q What is that? A I could not tell at this stage; this is ten days afterwards.

Q You say the wound was just over the left ear? A Yes.

Q Or the right ear? A No, it was on the left side; but I think it was in the parietal region. When I point here (indicating), I am figuring as the man faces me, you see. Yes, parietal region; that would be over the ear.

Q On the side; that is, down— A On the left side.

Q Below the top? A Oh, yes, down on the left side below the top, down in here(indicating), because this is almost immediately over the speech center.

The Commissioner: Just above the temple?

The Witness: Yes. We made this decompression down (indicating), to get away from a speech center. Ordinarily we always do that on the right side in a right-handed individual, and we consider very seriously before doing a decompression on the left side, because of the nearness of the speech center; but all of his symptoms indicate that the injury was right here, and that we would probably find a collection of fluid, which we did; so that caused us to do that, to go in on that side.

Q Do you remember which way the cut ran; that is, whether it ran— A I think it ran up and down.

Q It was a cut running this way (indicating)? A Yes.

Q From the top of the head down toward the neck? A Yes, as I remember it.

Q And it was about two inches long, I believe you say? A Yes, I think about that.

Q And as I understand it, the brain conditions have been competely cleared up? A The pressure?

Q The pressure, yes. A That is all.

Q That is, he is no longer suffering from anything except general nervousness now? A That is not quite correct. We have relieved the pres-

sure on the brain. That is all surgery can do. The damage that resulted from this pressure, or the damage resulting from the injury of the brain that caused the hemorrhage, we are not considering. You see, we cannot do anything for that, but we have simply stopped the result of the bleeding.

Q What is that? A The result of the bleeding there, the hemorrhage.

Q You stated that fifty-five per cent. of the persons injured in this manner are permanently disabled; to what extent do you mean they are permanently disabled? A From the standpoint of doing the work that they were accustomed to do efficiently. Now, a large per cent. of those (I cannot tell you how large), but quite a large per cent. are never able to earn a living afterwards.

Q Well, now, would you say that this patient would be one of these fifty-five per cent. of the people who are permanently disabled? A I do not think there is any way to tell. Now, I have told the patient, from the standpoint of constitution and all of that, that he was going to be perfectly all right, and that it was a question of using effort, helping himself all he could. Now, that is the idea that we want to give to the patient; we want to give favorable suggestions, and we rather force that, and if the insurance companies and all those people would take that attitude with the patients, as well as the doctors, the disabilities would be cut down a great deal in brain injuries. I have used that with him, but it was ten days too late to relieve the pressure, and while I have used this right along and he apparently has made a certain amount of effort (I do not know how much), yet he has not had enough will-power to stick to it.

Q You think that he would have been better off if he had not been under the general care, so to speak, of the insurance company, do you? A He would have been very much better off, because he would not have been expecting anything there, to start with. Now, this applies to all compensation cases, practically all of them. They are expecting something; they are expecting help, and when anyone expects help, they rarely exert themselves to help themselves. It is just human nature.

The Commissioner: The Lord help those who help themselves.

The Witness: Right.

The Commissioner: That is what the Bible says.

The Witness: Right. That is the great trouble with the compensation cases, compensation work here.

Q If this operation had been performed within twenty-four or thirty-six hours after the accident, would he have been able to resume his full duties within a reasonably short length of time? A Yes, probably within three months.

Q And that he would have been able to go back? A Yes.

Q And be fully responsible for the duties of laborer-foreman? A He probably would. Most of the patients who have immediate operations, unless the brain injury is very, very severe, are able to do that. Now, I have handled cases in Jersey, I believe, for compensation cases. I have one in mind, and it is one of the most severe brain injuries I have seen to recover.

Q What is that? A One of the most severe brain injuries I have seen to recover. There were hemorrhages, blood clots all through the brain, where we did not expect anything from the man. I think he finally got a fifty per cent. settlement, but even in that case his operation was done, I think, within twenty-four or forty-eight hours and while he is more or less nervous, I think he is working today.

Q How would you class this injury with reference to its severity? A Severe.

Q You say it is severe? A Yes, it is severe, because it has done this: It has been severe enough to produce hemorrhage and a pressure on the brain. Hemorrhage is a serious thing, very serious, and if it is not corrected, they do not get over it. They will go on, they are invalids for the rest of their lives.

Q Has the pressure been permanently relieved? A Permanently relieved.

Q There should be no possibility of his ever suffering from it? A Not a recurrence of the pressure, no. Now, in order to relieve that pressure, it is necessary to make an opening in the skull, and when there is an opening in the skull, and a man stoops down, there is a soft spot. Now, that soft spot affects the man in two ways: It produces a sort of instability in stooping over, or straining. It moves and he can feel that there is a soft spot and feel it moving, but it is absolutely essential. There is no way to avoid it. And that sometimes worries people.

With soldiers, now, where we had nothing else to consider except that. We occasionally had them where they were worried very much about a soft spot in their head. It is perfectly strong, but they worried about that, and they very

often complained that when they attempted to stoop over, when attempted to lift they felt dizzy. Now, that is the history of a majority of those cases, and that is what Freschi is going through.

Q Does that soft spot eventually heal up? A It hardens up pretty well, yes. It is protected just as well as when there was a bone there, I think. I have never seen an injury occurring there.

Q About how long does it take? A Oh, it is pretty well protected now.

Q You mean in his case? A Yes. It still moves, of course; and he still has that change of—well, how shall I express it—it is a sort of instability there, so that when you stoop over it moves, presses out when you cough or strain, and that changes the pressure in the brain and that produces some dizziness. Now, that is the thing that they have got to adjust themselves to. The only way they can adjust themselves to it is doing it until they are accustomed to it. It is purely adjustment and it does not hurt them to try, but it causes them pain, and a man has got to have a certain amount of will power to do it, and if his will power is affected, why, then you have a sort of vicious circle there. That is the position that most of these men are in.

Now, in treating these cases: For instance, if Freschi had simply had a spinal puncture at the time, his chances would have been very much better for it, but he had no treatment directed along these lines, so far as we could judge.

Now, that is no reflection on the doctor that took care of him, because these things are highly specialized. They are often not recognized, and even in an institution like Polyclinic, where we

probably have the largest—certainly, the largest service in America of this kind, our interns (the young doctors) often fail to recognize some of these things. Of course, the others who are in this work all the time, they get them right along. But, his conditions were very definite there, there is no question about that side of it, about his injury and all that.

Q About how large is this hole or opening in the skull? A I think about the size of a silver dollar, or it was originally. It has contracted down some now, of course, by the growth of the bone from the edges and all that.

Q Aside from the pain, the headaches that are caused when becoming readjusted, is there any other danger from the presence of this hole? A No, none at all. Practically all patients who are operated upon have that—brain operations.

Mr. McConnell: I guess that is all.

(Upon re-direct examination by Mr. Hartshorne, the witness testified as follows:)

Q Dr. Ney, I want to ask one more question: What are the probabilities of his life as a result of this operation; is he likely to live a normal length of time, or will it be short? A No, I do not think it will affect—

The Commissioner: The length of his days?

The Witness: No. This man is affected with a certain amount of scar there in the brain, and the slight amount of danger from the pressure has not affected any of the vital things that should shorten life.

Q Then the damage is irreparable, what there is of it? A So far as we know. There is always a period of adjustment that takes place. We cannot judge that.

Taken and sworn to before me this 18th day of December, 1925, in the City and County of New York.

SAMUEL C. COWART,
Supreme Court Commissioner
for New Jersey.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

Pursuant to agreement between the attorneys for the respective parties the testimony of Dr. K. Winfield Ney was taken at his offices in the Wyoming Apartments at 55th street and Seventh avenue, New York City, on Friday, December 18th, A. D., 1925, in the presence of William Hartshorne, Esq., representing Messrs. Stokes & McDermott, the attorneys for the plaintiff, and in the presence of William M. McConnell, representing Thomas Brown, Esq., attorney for the defendant; the testimony being taken in my presence by N. M. George, as stenographer appointed by me and duly sworn to take the said testimony stenographically and to reproduce the same in typewriting according to the best of his skill and ability:

SAMUEL C. COWART,
Supreme Court Commissioner
for New Jersey.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.*

I, N. M. GEORGE, do hereby certify that I am stenographer with offices at 15 Park Row, New York City; that I was appointed by Samuel C. Cowart to take the testimony in the foregoing deposition stenographically and to reproduce the same in typewriting according to the best of my skill and ability.

(Signed) N. M. GEORGE.

Taken and sworn to before me this 18th day of December, 1925, in the City and County of New York.

SAMUEL C. COWART,
Supreme Court Commissioner
for New Jersey.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

SYLVESTER FRESCHI,
Plaintiff,

vs.

ALBERT B. MASON, (First name, "Albert", being fictitious, defendant's real name being unknown to plaintiff),
Defendant.

Summons issued March 24, 1926.

New York, N. Y., July 1, 1927, 1 P. M.

DEPOSITION OF DR. K. WINFIELD NEY.

(Continued pursuant to consent.)

Appearances:

Stokes, McDermott & Hartshorne, Esqs., attorneys for plaintiff (by William Hartshorne, Esq.).

Thomas Brown, Esq., attorney for defendant.

DR. K. WINFIELD NEY, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination by Mr. Hartshorne.

Q Dr. Ney, on December 18, 1925, you made a deposition in this cause which it is desired that you shall continue from now on. Will you state when you have seen Mr. Freschi since that time?

A On April 12th I made a complete examination

and gave a report, and that report covers everything, and it says that (reading) "This will certify that on April 12, 1927, I examined Sylvester Freschi at my office, whose condition showed considerable improvement since last examination. There is no sign of increased intracranial pressure but there are, however, certain atrophic discharges which testify to a partial atrophy of the optic nerve, the result of pressure, which was relieved by operation. The disability now consists of a cranial defect in the left temporal region, with the usual symptoms of cerebral instability, namely, vertigo and dizziness on changing posture, and particularly when stooping or straining; other than this defect the patient is normal. Because of a persistent disturbance caused by the cranial defect, a repair of the same is suggested." That is practically the whole thing. He is normal other than for these characteristic symptoms of cranial defect.

Q What correction do you suggest? A What we do is to put in a celluloid plate, which protects the brain and gives it stability in stooping or straining and all of that, because now if he coughs or strains or stoops down it will bulge at this point and make him dizzy.

Q An operation such as you suggest would eliminate all that defect? A Yes, it would eliminate it. We say it will—well, it usually does. It is a simple procedure which is done with but very little risk.

Q What did you find with Freschi's nervous condition? A Organically: all of his nervous symptoms have disappeared, all of his objective nervous symptoms have disappeared; subjectively: he complains of vertigo and dizziness and instability when stooping, straining, coughing, and

so forth. His mental condition is one of anxiety and irritability. This is largely due to the fact that he has a cranial defect which produces the above symptoms.

Q Dr. Ney, on page 7 of your original deposition you stated that probably fifty-five per cent. of the patients are more or less permanently disabled as a result of injuries of this kind. Does Mr. Freschi come within that fifty-five per cent.? A He does at the present time, yes; and he will unless this is corrected.

Q If, however, the operation that you have suggested is performed, then do you say that he will be entirely normal and fit to carry on his usual occupation? A Yes, with this exception: that his nervous system has sort of been shot to pieces by all this worry. When I examined him I found that his emotional reactions are intense, but organically there is nothing wrong except this defect, so far as we can determine by neurological examinations.

Q As you saw Freschi on April 12, 1927, did you find him in the condition to work as a normal man? A No, he would not be able to do lifting or straining. It would be unsafe to work up in the air, I mean in an elevated position where he would have to climb.

Q Assume that he were gardening or mowing lawns, or doing work of that character, would he suffer pain? A He would suffer dizziness when he had to stoop over or do any lifting.

Q Has his physical strength been reduced any by this long period of worry? A I think that indirectly it might, because he probably has not been getting any exercise, you see, although before that he was doing vigorous exercises; so I would say indirectly it has.

Q Is he in such condition, as you found from your examination, that he could work continuously all of the day, for instance, and several days in succession? A That depends entirely upon the type of work he has to do. If he has to do straining or lifting probably would not be able to. If he could do some work in which it was not necessary for him to stoop over or do any straining, he probably could work continuously, and I see no reason why he should not. Since leaving the hospital when he had his original operation for a brain injury—this operation was August 8, 1924—he has shown a gradual improvement; so that he is practically normal except for the symptoms resulting from the cranial defect.

DR. K. WINFIELD NEY, being cross examined by Mr. Brown, further testified as follows:

Q Since taking your deposition on December 18, 1925, from your examination of Mr. Freschi on April 12th have you found that his progress has been normal and what you would expect from a successful operation? A Now, I do not remember his condition at the time I made that deposition, but I can say this: that this last examination showed him to be free from any organic nervous condition excepting the cranial defect.

Q As I understand this cranial defect and the nervousness that is now experienced by the patient, it is one that comes through imagination more than it does through any reality or actuality? A No; it is a definite thing due to move-

ment of the brain when the patient coughs or strains.

Q Well, on your last examination, in December, 1925, you testified, as I remember it, that the patient would experience those dizzy symptoms that you are now speaking about, but if he would overcome the thought that those who were responsible for his treatment were not giving him or according him proper treatment—if he would overcome the initial pain or dizziness that he would experience by stooping, that he would soon lose that fear and nervousness. A No. There is an element there. Now, this is a different thing that I am referring to. He has overcome, I think, to a great extent, his headaches; the vertigo that comes from ordinary work; he has overcome definitely all of his neurological symptoms: his exaggerated reflexes, his vertigo, his past pointing, his intention tremors and exaggerated reflexes and ankle-clonus, with the congestion of the retinal veins—all of these have disappeared. Now, when I referred to vertigo, as a result of overcoming certain things, I referred then to a vertigo not induced by stooping or straining but to a vertigo which one might have when they are more or less inactive. That is overcome. All of those things have entirely disappeared.

Q Then is it a fact or is it not that on the last examination you did testify that this patient experienced dizziness and this fear of injuring himself when he stooped, and that if he would exercise or do some stooping and overcome that fear, why, he would not have that dizziness and fear? A No, that will not have any effect of overcoming the results of a cranial defect. It overcomes the nervouse symptoms which are associated with a cerebral injury.

Q Well, may we say this: that his nervous symptoms that come naturally from that injury have passed? A Yes.

Q They have gone? A Yes.

Q That is number one. And the last time you stated, for instance, on page 26 the question was propounded (reading): "Q Aside from the pain, the headaches that are caused when becoming readjusted, is there any other danger from the presence of this hole? A No, none at all." A There is no danger.

Q So that if the headaches have passed and the pain has passed, then, as far as his case is concerned, he is cured? A Not necessarily in so far as his case is concerned; that is so far as the general rule is concerned.

Q Under the question that I propounded to you and the answer that I stated that you made at that time, it would appear that aside from the pain and the headache that are caused when becoming readjusted, you said there was no other danger. Now I understand that headache and pain are gone. A Of course, I can only rely on what the patient tells me on pain and headache; they are subjective symptoms. The last time I saw him, Freschi told me he had practically no pain unless the pressure was on this point.

Q That was in April? A April 12th.

Q Well, the operation has been a successful one and his recovery has been a good one, has it not? A Yes, so far as—now, when I say this I am not depending upon subjective symptoms—the objective symptoms have cleared up.

Q Doctor, you testified on page 24 of your deposition taken in this cause to a question (reading): "Does that soft spot eventually heal up?"—your answer was (reading): "It

hardens up pretty well, yes. It is protected just as well as when there was a bone there, I think." That is the result of this case? A Well, the point is this: It is not hard; it is a soft protection, but that soft protection, while it is capable of moving and expansion, gives good protection to the brain so far as an injury is concerned.

Q And so far as your past experience is concerned, you have never known of an injury, have you— A I have never seen an injury taking place there, but these symptoms that he has are due to changing the pressure of the brain suddenly; they are not due to an injury. It is due to changing the pressure of the brain when he stoops over, or coughs, or sneezes, or anything like that; but it does not injure the brain when he does it, but it gives him an uncertain mental feeling.

Q Just for the moment that it is happening? A Yes, yes.

Q That is a momentary inconvenience then? A A momentary inconvenience. During that time he might fall and things sort of get black before him.

Q Is that a subjective or objective symptom? A Subjective, entirely; because many patients do not complain of it at all and do not notice it.

Q In your last examination there you stated, when you were interrogated about this man doing hard work—you said (reading): "They can very often do light work; they can never do hard work until they make the definite effort of exertion and stand the consequences of it, the pain, the discomfort and disagreeable condition. Often for a period of three months, if they will just do hard work and stand the pain

and the disagreeable features of it, they can very often readjust themselves in that time." In view of that testimony, will you say now that Mr. Freschi has completely readjusted himself to his condition? A He has, entirely, excepting this defect and the peculiar symptoms characteristic to it.

Q When you say "this defect" you mean when he stoops over or coughs? A Yes.

Q So that may the whole condition be reduced to this: that Mr. Freschi is now suffering, if he does suffer, from a subjective symptom that he tells you about, that causes him to become dizzy momentarily, or to experience a vertigo dizziness or condition, when he stoops over or coughs? A Or strains.

Q Or strains? A Yes. If I may make this statement—

Q Yes, doctor. A These symptoms are characteristic in many cases of cranial defects, and these symptoms he describes accurately. I do not believe that there is on his part an exaggeration in this, no matter how other things might be; it is so definite and exact that I believe it is correct. I do not believe it is emotional. Although it is subjective, it follows the rule.

Q Now, doctor, you testified at the last hearing to that much of his nervous condition and lack of readjustment and complaint especially, that the irritability and nervousnes were due to the fact that those who were responsible for his compensation under the Compensation Law were not treating him as he thought he should be treated? A Yes.

Q Has that condition all passed? A No, he still harbors that.

Q He still harbors that sort of an hallucination, we might call it? A Yes.

Q That is a neurological symptom, is it? A Well, it is what is commonly called a "compensation neurosis."

Q That means that he is imagining that something is happening to him that is not happening at all—that is, it may be so? A Well, that is a pretty hard thing to say.

Q All right. May we get it this way: as I understand it, your idea about Mr. Freschi's case and the condition that causes this fretfullness, or irritability and nervousness, is that if the persons who were responsible for paying the compensation would not encourage the dependency of the injured person—Freschi in this case—that he would be likely to recover more quickly? A No, I do not quite think that, but I do think this, judging from what he says: that if he did not have this cranial defect which reminds him of his disability every time he stoops over, and if he had a settlement of the case, so that there is nothing uncertain about it, so that it is finished, one way or the other, he might be better off.

Q All right, doctor. The last time you testified that his irritableness and nervousness and unsettled condition particularly was not due to the case then pending in the court, but due to the compensation feature of his employment at the place where he was injured; that is to say, that the Compensation Law permitting this compensation to be paid created a dependency in the mind of the patient, and, having that dependency, if the case or the compensation did not go just the way he wanted it, it would create this lack of readjustment? A It does cre-

ate that. I do not think there is any question about it. There is an element of uncertainty which exists in anyone in a case of that kind.

Q As distinguished from the law case—I am referring to the compensation relationship between him and his master. A I think if that were adjusted one way or another, favorably or unfavorably, that he would be in a better condition, because he is worrying over that a great deal, I know.

Q Well, now, aside from that worrying, as I understand it, his condition then is normal and his recovery is good, except—and this is the only exception in the case, as I understand the testimony—that when he stoops over he is apt to become a little dizzy, or if he coughs or strains he will get this dizzy feeling, and this is not because of any injury to the brain but because of that sudden motion? A Yes, an instability.

Q An instability occurs? A Yes. Now, with that there is this: these changes are so great that I have seen patients, when they stoop over or cough, they would get dizzy and they have actually fallen. Now, he feels that with this he is unable to do any heavy work; he feels that he is unable to do the work that he has had before, and he feels that he might always be that way. That is the way he expressed it to me.

Q Well, that fear of him always being that way and that fear of there being a soft spot there, as I understand your previous testimony, is an apprehension sometimes that is not entirely waranted? Understand me, doctor. I understood from your last testimony, your deposition, that if the plaintiff would overcome that fear he would make far better progress and

could go to work? A There is no doubt of that.

Q Yes—and then do hard work? A Yes, but in patients whose nervous system—I do not want to mislead you here, because there are some patients who have a cranial defect and it does not bother them. There are other patients, and I would say the majority of patients, who have a cranial defect who are bothered with this dizziness due to a cranial defect, and most of these cases do actually require repairing, as was the experience particularly during the war, when we had great numbers of them; it became necessary.

Q Well, if this man had undergone the pain and discomfort and disagreeableness that would ensue from exerting himself at hard work—if he overcame that—A I think he has.

Q You think he has overcome that? A Yes. His reactions show, in the various tests that we have made, that he is practically normal. I have put him through exercises and have gotten normal reactions.

Q Well, then the way to make him completely normal is to put this celluloid plate in? A It is a comparatively simple thing. Now, that is that side of it. That will correct the symptoms of disability and the only organic thing that he has there. Beyond that—and this applies to many of these cases—if he has a settlement or adjustment of a claim rather than letting it be drawn out and a lot of unpleasantness occurs as a result of it, he will get better much faster. There is always that element in this case which makes it always difficult to know whether it is the irritability of that or the irritability of the actual injury, you see.

Q You feel confident that this man is unduly exercised about the outcome of this case and it has preyed upon his mind entirely too much one way or the other? A Yes, I believe that.

Q The patient, as I understand it—that is, Mr. Freschi—was employed as a gang foreman in and about a factory. There is nothing to prevent Mr. Freschi from pursuing that employment, is there? A I do not know what the duties are.

Q The duties are to direct men to do excavating work, or to direct men to pour cement into molds, to direct men to carry materials from one place to the other—a foreman who directs. A Yes, so long as he does not have to do straining, stooping, lifting or work in an elevated position where there would be danger of falling—so long as he does not have to do those things, he could do anything else that he is mentally qualified to do.

Q I was wondering, from your filing answer —the answer just made—how his condition will improve, as your testimony shows, how your opinion is consistent, I am saying this to get an honest expression on the record, with your testimony in the previous deposition, when you said that if Freschi three months after his injury had undertaken to do this hard work, he would be entirely readjusted to this condition. A He would.

Q And how you say now that he cannot do those things. A That is on account of this cranial defect which the majority—well, I won't say the majority—which we usually never figure on unless we have ruled out everything else. In other words, these symptoms are characteristic, and I have questioned him and gone over

it very carefully, and it is definitely not the result of the brain injury there that he has these symptoms, but it is just simply the instability that comes from stooping. Now, before that, when he came to the office here, if he would be out stooping or exercising he had a complaint which would distract his attention and everything else: he had certain movements of his eyes, which is an exaggerated physiological nystagmus. His reflexes are all exaggerated. They were not the result of stooping or straining, or anything like that. Now, patients with those conditions—if the pressure is not corrected—will go on indefinitely. Sometimes nature clears them up. If the pressure is corrected they still are troubled, more or less, unless you can get them back to hard work to overcome it, and then, by doing that, undergoing a lot of unpleasantness and pain, they will clear up; but that has nothing to do about these symptoms which come in certain conditions.

Q Then, as I understand it, those symptoms that might have been improved by hard work and exertion that you speak of, they have cleared up? A They have cleared up, yes. Now, these things are only symptoms that can be brought out in unnatural conditions.

Q This slight operation that you speak of, of putting the celluloid plate in, would overcome even that? A Yes.

Q That, together with the final disposition of his compensation case, as well as the case that is pending in court—either one or both of them—would also tend to make final his weakness, I mean finally cure it? A If a man is good—I would say this—and it is hard to tell how much more important one is than the other

—he would have this fixed. It can be fixed without risk to speak of; it is a trivial thing.

Q That is, the bulging out, the cranial defect? A Yes. That fixes the brain so that when he makes a move or strain it is not going to shift the brain or unbalance it. That is easily corrected. The next thing for the man's good is, he should have the case settled one way or the other.

(Signature of witness waived by consent.)

Mr. Brown: Counsel hereby agree that the deposition taken this day of Dr. K. Winfield Ney, at his offices in the Wyoming Apartments, at 55th street and Seventh avenue, New York City, were taken in the presence of William Hartshorne, Esq., a member of the firm of Stokes, McDermott & Hartshorne, representing the plaintiff, and Thomas Brown, Esq., representing the defendant. The testimony was taken upon agreement in the presence of George J. Zengerle, stenographer, who is also the commissioner agreed upon to take the deposition in this cause.

It is further agreed that the original may be sent to Stokes, McDermott & Hartshorne, and the requirement of filing the original with the Court is hereby waived.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } *ss.*

I, GEORGE J. ZENGERLE, do hereby certify that I am a shorthand reporter with offices at No. 16 Exchange Place, New York City; that I was agreed upon by counsel for both parties herein to stenographically report the foregoing deposition and to reproduce the same in typewriting, according to the best of my skill and ability; that the within deposition, from pages 29 to 46, inclusive, represents a true transcript of the testimony given before me on the 1st day of July, 1927.

WITNESS my hand and seal of office this 2nd day of July, 1927.

GEORGE J. ZENGERLE.
Notary Public, Kings Co. No. 37.
Register's No. 9006.
(SEAL) Certificate filed N. Y. Co. No. 11.
Register's No. 9011.
Commission expires March 30, 1929.

PLAINTIFF RESTS.

MOTION FOR NON-SUIT

Mr. Brown: I have a motion for non-suit, first, on the ground that the proof in this case does not indicate any negligence on the part of the defendant. There is no one that testifies that a bar fell from above. There is no one who testifies that he saw a bar that was in our possession or our property. The case stands barren of its being our property at all. There is no one who testifies that a bar was picked up. The bar or instrument or material which

is alleged to have caused the injury does not appear in evidence. The nearest that the testimony comes to the identification of the bar is Vecco when he said that the first time he saw this material, whatever it was—he didn't say it in those words, but as I remember the substance of his testimony it amounted to that it struck his foot and he didn't see it after that.

So that your Honor has before you Vecco and Freschi, stooping over with a trowel in his hand, down on one knee, troweling, as he indicated before you; where we have Vecco over him with the shovel; and the final testimony of Vecco is that the first and last time he saw that piece of material, whatever it was, was when it struck his foot. Now that is not sufficient, to my way of thinking, for showing negligence on our part. That is one reason. I have two other reasons.

The Court: I will rule if you want me to. I incline to the view that a prima facie situation has developed here, it is true along circumstantial lines, but sufficient to justify the trial judge in denying the motion for a non-suit for the reasons stated. There is proof in the case which tends to indicate that employees of the defendant were working upon the roof during the morning and afternoon of the day of the accident. There is further proof that the plaintiff, with one Vecco, was working on the ground in the building on the roof of which the employees of the defendant were working. There is likewise proof that the method of the latter with regard to placing the sheets of metal forming the roof involved the use of some instrument or bar held underneath the sheets of metal, and in order to provide a support for the employee above placing rivets and causing them to be

fastened in the circumstances alleged. There is testimony, moreover, that these employees started at the easterly end of the roof and proceeded westwardly; that at or about the time of the accident two or more of these men were working on the roof, perhaps not precisely over the spot where the plaintiff with his co-employee was working on the ground; but that while working as claimed and described, the plaintiff was struck and injured. The proofs further tend to indicate that immediately on the occurrence of the injury a bar fell against the foot of the co-worker of the plaintiff, who has been called and testified and subjected to cross examination. There is no evidence in the case that any other source could have been the occasion for the injury of the plaintiff other than the falling of the bar, which, substantially, at least, would tend to indicate fell from the roof where the employees of the defendant were working. This would seem to present, therefore, a circumstantial case at least, bringing it within the rule of *res ipsa loquitur,* and for that reason I am inclined to the view that a prima facie case has been made out for the plaintiff, subject, of course, to rebuttal testimony by the defendant. The motion, for the reasons stated, will be denied and you may have an exception.

Mr. Brown: I pray an exception.

(Objection noted for defendant as ground of appeal.)

Mr. Brown: I want to say now, as long as your Honor has ruled that the doctrine of *res ipsa loquitur* should be applied or there should be such facts in the petition or complaint that would indicate to the defendant that that was the theory of the case; whereas in this case

there is a variance in the proof, because the plaintiff alleges certain negligent acts on our part, some of which were that we employed unskilled workmen. There is no proof about that. Another was that our workmen let the bar fall from their hands. There is no proof of that. Another was that we permitted the bar to rest in an insecure place and fall. There is no proof about that. And then again the doctrine does not apply because there has got to be some negligence shown before the doctrine can be invoked and every other possible avenue of negligence, of course, is excluded.

The Court: As to the points just made, the Court still thinks that the doctrine does apply, in view of the amendment of the complaint which was permitted at the occasion of the last trial, and under the second count, therefore, of the complaint, the Court is inclined to the opinion that the proofs do tend to support and not vary the allegations in such amendment.

Mr. Brown: That is your Honor's finding, yes.

The Court: You may have an exception.

(Objection noted for defendant as ground of appeal.)

Mr. Brown: Now, if the Court please, there is another reason that I advance for the motion for non-suit in this case. It appears by the testimony that Mr. Freschi was a foreman of considerable experience, evidently, in construction work. He had several men under him and he was directing their employment. The risk, if any, was open and obvious; that is to say, the risk of Mason's men, assuming that they did work over him in the manner that your Honor has indicated, the risk being open and

obvious, it was his duty to take care of himself. That he failed to do. Then again he said that he knew of the danger; and then again he testified or showed in his testimony that he paid no attention to it. Now our claim is, if your Honor please, that he contributed thus by his conduct, without any qualification, to his own injury that he received; whether it was caused by our act or the act of someone else, whether the act of Tuller's men who were on the roof. that that is contribution on his part. He says he knew that the danger was there and that he paid no attention to it; and that being the fact it seems to me, if your Honor please, that it is an open case of contributory negligence.

Mr. Currie: If your Honor please, replying to that—

The Court: I don't care to hear you, Mr. Currie. It would seem that having held that there was a prima facie case here in which the doctrine of *res ipsa loquitur* is regarded as applying, that the present motion with regard to the alleged assumption of risk on the part of the plaintiff would not apply, for the reason that there was no relation between the employees of the defendant and that work in which the plaintiff was engaged under a different employer. Moreover, I am not prepared to say as a matter of law that there was an assumption of risk for the reason that it is not evident that the plaintiff, in assuming to work where he did, was charged with knowledge that any employee of the defendant would carelessly place any bar of iron or instrument where it might fall or negligently allow such bar or instrument to fall at or about the spot where the plaintiff was working at the time. Therefore I hold that the

alleged contributory negligence of the plaintiff is a proper subject for the Court to pass upon as one of law rather than as one of fact. You may have an exception to that.

(Objection noted for defendant as ground of appeal.)

Mr. Brown: The other one was that he had knowledge of it. I suppose that is—

The Court: That is included in that ruling, I suppose.

Mr. Brown: I have still another, if your Honor please. The history of this case is that they started out with one theory, on one count of the complaint, and your Honor permitted an amendment which took place here within the last two weeks, and the amendment was in the form of adding a new count to the already existing complaint. At the opening of this case a motion was made to strike out the first count of the complaint, which your Honor rightfully allowed, in view of your previous rulings, and in fact in view of the law, right on the face of the pleading.

The Court: That there was no legal obligation on the part of the defendant to provide a safe place for the plaintiff to work.

Mr. Brown: And then my adversary added a new count and that your Honor permitted to remain, and that is known as Count 2. In that count there is a different cause of action set up, we claim that is a different theory of action; a cause of action was set up within the last two weeks, which is over a five-year period. This accident happened on July 24, 1924; and Compiled Statutes 1910, Sections 1, 2 and 3, which are pleaded in the answer, plead that it is within the statute, and that therefore this new cause of action having been completed more than

the statutory limitation allows, that the statute is a bar and they are estopped from suing on it, and we make a motion on that ground.

The Court: It would seem to me that the amendment which was permitted by the court is largely based upon the fact that in the complaint as originally filed there was a clear purpose and intent on the part of the pleader to allege negligent conduct on the part of the defendant or his employees; and while that count was defective, and so found by the court, for the reason that it stated a preliminary obligation or duty on the part of the defendant to the plaintiff improperly, nevertheless there was sufficient in the count to indicate the purpose and intent of the pleader to allege and charge negligence against the defendant by reason of the alleged conduct of his employees. The court therefore allowed the motion, striking the first count, as to a legal obligation, and since therein it did appear that there were matters alleged involving negligence which could very well be stated in a simple count charging it, without stating a duty or obligation, the court now inclines to the view that the count did not permit the stating of a new cause of action but merely to alter or change the phraseology of the original count so that it could state what the pleader really intended at the time, namely, to charge generally negligence against the defendant through the medium of his employees. That being so, I hold that the amendment did not allow a statement of a new cause of action, and therefore that the statute of limitations is not a bar.

Mr. Brown: If your Honor please, we want to understand each other now. As I understand it, the amendment that was actually made and the

theory upon which the case is being tried is what is known as the second count in the complaint, and none of the first count was used. Your Honor understands that?

The Court: Yes, I so understand it. You may have an exception.

(Objection noted for defendant as ground of appeal.)

Mr. Brown: May I ask Mr. Freschi a question from where he sits?

The Court: Yes.

SYLVESTER FRESCHI, recalled.

By Mr. Brown.

Q Mr. Freschi, you have journeyed all the way to Florida, have you not, since this injury? A No, sir.

Q You haven't been in Florida? A No, sir.

Mr. Brown: And may we have introduced in the record, if your Honor please, the photograph that was marked for identification, for the purpose of showing, as was testified to by Mr. Vecco and also by Mr. Freschi, that the smokestack that is shown therein is in the position that it was on the day of his injury or about that?

The Court: What does counsel say?

Mr. Currie: If your Honor please, I have no objection to the introduction of this photograph provided it is stipulated that this photograph does not accurately portray the actual existing conditions there at the time of the accident.

The Court: That will be understood, I take it. The only purpose of offering it now is to show the location of the smokestack, as to which Mr. Freschi himself has testified that the foundation of that stack is in the position it was on the day of the accident, but it is not clear as to whether the stack itself had been built at that time. With that qualification the photograph will be received and marked as an exhibit.

Mr. Brown: I will ask my adversary also to admit, for the benefit of the jury, that the general type of building—I don't mean when the corrugated iron is on there, but the general structure of the building as shown in that photograph as to size and height and relative position. I think that will be admitted.

Mr. Currie: Yes, I will admit that. I will ask that this mark on the photograph be indicated on the record that Mr. Freschi has made at the point where he was injured. We will have to have him state how near the stack that was.

The Witness: I don't know the exact number of feet. It was close to the stack.

Mr. Brown: How many feet would you say, Mr. Freschi, as near as you can tell?

The Witness: No, I really can't. Close to the stack.

(Photograph marked Exhibit D. 1.)

Mr. Brown: I would like to have an examination, as soon as Dr. Gesswein comes, of Mr. Freschi for a few minutes.

The Court: I assume there is no objection to that.

Mr. Brown: He will be here in a few minutes. We expect him here at half-past two.

DEFENDANT'S TESTIMONY.

RUSSELL PARKSTROM, sworn for defendant.

Direct examination by Mr. Brown.

Q What is your first name? A Russell.
Q How old are you? A Twenty-four.
Q Are you a married man with children? A Yes.

Mr. Currie: I object to that, your Honor, as immaterial.

The Court: Never mind. It is perfectly harmless. He should be married if he is not. Go ahead.

Mr. Brown: I just want to show what his experience is. It is charged in the complaint.

The Court: Well, I don't see that has anything to do with the interest in this case.

Mr. Brown: Well, sometimes married men get a little more stable in their life than those that are not.

The Court: That may or may not be so.

Mr. Brown: Your Honor recollects it is charged that they hired inexperienced men.

The Court: One of the qualifications of an experienced ironworker would not necessarily be that of marriage, would it?

Mr. Brown: Well, I was wondering, if they were in that dangerous work.

The Court: Well, all right. Oh, you may ask him.

Q How many years were you working at the sheet iron business?

Mr. Currie: Objected to unless some time is set.

Mr. Brown: I will set it.

A Up till now I have been in the trade six years.

Mr. Currie: Objected to.

The Court: Objection overruled.

By the Court.

Q What is your experience as an ironworker and sheet metal worker? How long have you been working at it, Mr. Parkstrom? A About eight years.

Q And where have you been working? A In Perth Amboy, Elizabeth, Roselle, Linden, Newark.

Q And from what age have you been working? A I was about seventeen years old.

Q And what kind of work have you been doing? A Sheet metal work.

Q What does that include? A That includes corrugated iron work and copper work, cornice, metal ceilings.

Q And putting roofs on buildings? A Yes, anything in that line of sheet metal.

Q Of sheet metal? A Yes, sir.

Q You were an apprentice, were you? A I was an apprentice at that time.

Q At which time? A At the time of the job at Matawan.

Q At the time of the accident? A Yes, sir.

Q Involved in this case? A Yes, sir.

The Court: Proceed, Senator.

By Mr. Brown.

Q How long had you been an apprentice at that time? A About three years.

Q You were employed by Mr. Mason? A Yes.

Q Do you remember the day of the alleged accident? A Yes, sir.

Q Mr. Parkstrom, let your voice up so that the last juror can hear you. A Yes, sir.

Q Did you see Mr. McCann that day? A I don't remember seeing Mr. McCann.

Q Who was with you at the time? A I don't remember seeing him.

Q You were working on the roof? A No, under the roof.

Q Under the roof? A Yes, sir.

Q What was the condition of the building on that day, I mean as to the ironwork? A The ironwork was not completed.

Q Why do you say that? A Why, as we went along with the sheeting we had to have an ironworker tighten up and put in more bolts before we could go ahead.

Q How many ironworkers were there working there? A I don't know. I know there was more than two, one or more than that.

Q Did they work there all day? A Yes.

Q What were they doing? A They were tightening up the tie rods, putting in bolts in the purlins and so on.

Q Will you tell why it was necessary and just where that was done? A Well, they wouldn't be able to tighten them up after we got our sheet metal on there, and everything was loose and wabbly.

Q What do you mean everything? A Why, the purlins and the tie rods that held the different pieces together.

Q I show you a photograph and ask you if that shows what you mean by purlins and tie rods? A Yes, sir.

Q Now show the jury what you mean by that.

The Court: Step down and show the jury what you mean by a purlin.

A These are what we call purlins. That is what we fasten our straps around there, the tie rods, for instance, you see here. Before we started that morning—

Q Never mind. Show all the jurors what you mean by purlins and tie rods. Hold it up this way, as if you were a teacher. A That is what we call a purlin.

Q Pointing to the small sized iron? A Yes. And the tie rods are these rods that hold these in station, criss-cross.

Q The large iron ones? A No, the rods.

Q But what are the large irons, the uprights, the cross pieces? A The uprights, they call them U-beams or I-beams. I am not a bona fide ironworker, a sheet metal worker.

Q You are a sheet metal worker? A Yes.

Q How were the I-beams and purlins, as you call them, how were they fastened on that building on this day when you started work? A They were fastened with bolts. They only had one bolt in, just to hold them there.

Q How many places were there for them to be fastened? A There is three holes supposed to be in each one, and there was one bolt in there.

Q And is that the usual way that the iron men do their work, as far as you know? A As far as I know, yes.

Q And then when is the permanent work done, the permanent fastening? A After all the framework is up they usually go over it and they put in new bolts and take out the old ones.

Q What do they do with the old bolts? A I guess they throw them away.

Q Have you seen them throw them away? A Yes, sir; I have seen them throw them away.

Q On this job what were they doing with the old bolts that they took out? A Threw them down, because they were old bolts.

Q Where would they land? A Down below on the ground.

Q Were there many of such bolts below on the ground? A Yes, there was.

Q Were they working on the leanto that day, ahead of you? A Yes, sir.

Q Where did they throw their bolts when they were ahead of you? A I didn't follow where they threw the bolts, but they throw them down and off to one side anywheres.

Q Did they keep them at all? A No.

Q How far ahead of you were they working? A Why, just ahead of us, say about ten feet or so.

Q Did you have to stop your work or not while you were going along, waiting for them? A Why, at one time we did.

Q Yes? A And we couldn't start in the morning before they finished up the end of the building.

Q Now was this plant being operated at that time? I don't mean the new building but the one next to it? A Yes.

Q And what effect, if any, did that have upon your work? A Why, they used caustic in there to purify their lead or something, and when those caustic fumes came out on us it was just like pins sticking all over your face and hands, every exposed part of your body, so we would go down and get vinegar and acetic acid and wash our hands and face with it to take the sting away.

Q And how often would you do that in a day? A I can't say how often. I know several times we went down there.

Q Now you started to work in what bay that day? A In the first bay nearest the railroad.

Q And what hour of the day did you start working there? A Well, it was in the morning, but it wasn't the first thing in the morning because we sorted out sheets and waited for the iron workers to catch up.

Q And how long did it take to sort out the sheets? A I should say about three-quarters of an hour or an hour at least.

Q As they were on the job? A Well, they were scattered all over the buildings, not only there, but they had six feet lengths and seven foot and eight foot, and I believe there were some nine foot siding, and we had to separate those and take those that were to be used on the leanto.

Q Are the sheets of such sharpness that you have got to be careful in the handling? A Yes.

Q Do you have to make holes in them? A What do you mean, Mr. Brown?

Q At any time? A We drew the rivets through them.

Q What do you mean by that? A Why, the rivets were already set in the straps and we held

our bar underneath the strap and the man on top would find the rivet and draw it through. That is the rivet set.

Q What was the first thing you did as you started to work in the way of preparation, on this day, I am speaking about, July 24, 1924? A The first thing we did was to start getting our scaffold ready.

Q Who provided the scaffold? A The scaffold was already there.

Q Well, whose scaffold was it? A It was the Tuller Construction Company's scaffolding.

Q And what did it consist of? A Why, there is two long—what we call needle beams. They are 6 by 6, and there were two planks about 3 by 14 to 15 feet long. The needle beams are 6 x 6; 6 by 6 inches, about six inches square, in other words.

Q Six inches square? A Yes.

Q How long are they? A About twenty-two feet.

Q Are they punctured with holes or not? A No, they are not punctured.

Q Then you had two planks? A Yes, sir.

Q I think you have given the size of the planks as being what? A The planks are 3 by 14, 15 feet long.

Q Fifteen feet long? A Yes.

Q Fourteen inches wide? A Yes.

Q And what else? A Three inches thick.

Q Three inches thick? A Yes, sir.

Q And there were two of them? A Yes, sir.

Q Now how were the needle beams and the planks fastened together? A The needle beams were roped onto the channel iron across under the leanto.

Q What do you mean by channel iron? Are these the straight iron framework? A Yes, framework. The needle beams would be this way, two of them, and the planking would be this way. That would be on a slight slant.

Q Now you say this way and that way. We are not getting that on the record. Did the planking and needle beams form a square? A Yes.

Q And the end would be fastened to the channel iron? A The needle beams are fastened to the framework.

Q To the steel framework of the building? A Yes.

Q Would you lay the needle beam right on the channel iron? A No, not right on it. One end would go on one side and the other end would go on the other side, with the rope fast.

Q The needle beam? A Yes.

Q Would that be on the top of the channel iron or alongside of it or how? A On top of it.

Q On top of it? A Yes.

Q And it would be tied to it? A Yes, sir.

Q Where would the planking be? A The planking would be just on the outside part.

Q Extend out at right angles? A Yes.

Q How are they fastened on the needle beams? A We had bolts up through there just to keep them from sliding out that way, on the slant.

Q How many bolt holes in each plank? A We only had one bolt. That was just to keep it from sliding forward.

Q That had held it on the needle beam? A Yes.

Q How long were the bolts? A How long were the bolts? About six inches long.

Q Now the other needle beam, that was fastened to what? A That was fastened down below the same way.

Q Down at the other end of the twenty feet? A Yes.

Q So that both ends of the platform were stationary, fastened to the channel iron; is that it? A Yes, sir.

Q And the plank would extend from one to the other? A Yes, sir.

Q And they were tied on with bolts? A Yes, sir.

Q Now was that movable at all? A Not movable this way. We could move it one way because we had to move it often.

Q You mean by that you would start at one end of the needle beam and work towards the other? A That is it.

Q Now were there bolts that you could fasten the plank in as you moved it along? A We didn't use them that way.

Q How did you use it? A We used that bolt to keep the plank from sliding down the slant.

Q In other words, when you moved it, if you moved it at all— A Yes, we moved it.

Q You would fasten it after you moved it? A See, this is the plank; here is the needle beam. We had a bolt through here and that would keep the plank from moving that way.

Q Oh, I see. The bolt went through the plank back of the beam, not through the needle? A Back of the needle beam.

Q And that would keept it from going down? A Yes.

Q There was one on the other end? A Yes.

Q Then as you moved along you would move that plank? A Yes.

Q Now you say that they were not on a level? A No, sir.

Q Will you say how much they were off the level? A About eighteen inches.

Q About eighteen inches on one end from the other? A Yes.

By the Court.

Q Which was the higher end? A Why, following the slant of the roof slightly.

Q Oh, I see. So it had to be— A Yes, sir.

By Mr. Brown.

Q What was there extending from the four corners of that square down to the ground, if anything? A Ropes.

Q What were they for? A They were so we could lower the needle beams down. They had to leave ropes so we didn't use all the rope to tie it up. We left the rest of it so we could take it and one man would be on top and tie onto the needle beams and the other man would lower it down.

Q Were those ropes extending down? A Yes, sir.

Q How far down? A Right to the ground.

Q Now who else was working there when you started in in the morning with your framework or scaffolding as I have just mentioned? A There were the iron workers and crane men.

Q What were the iron workers working on in that leanto? A Wait for them to finish up the end there on the building.

By the Court.

Q Which end, east or west? A The end next to the railroad.

Q The end next to the railroad?

By Mr. Brown.

Q That is the end you started on? A Yes, and the crane man, I didn't notice particularly what he was doing, but they were there.

Q Did you notice anything that the crane men had there working with? A They had a large beam there.

Q What were they doing with that beam? A Well, they had that beam over and raising from the ground.

Q Was the crane in place yet? A No.

Q What is the crane? A The crane is a—I don't know how to explain it to the jury. It runs on wheels back and forth through the building and it has a sort of a cogwheel on there for raising heavy instruments from one end of the building and carrying it to the other end; runs on trolley wheels like.

Q Where are those trolley wheels arranged that it runs on? A In the large building up near the top.

Q And is there a rail at one end of the leanto, a slight pitch of the leanto, one of the rails? A Yes.

Q Running all along the leanto? A Yes.

Q And that rail that the crane runs on, was that in place that morning, do you know, or not? A I don't know.

Q Were the men working about that position? A They were working up there; yes, sir.

Q How many crane men were there working there? A I don't know how many more than two there were. I know there were two there.

Q How many of Tuller's men were working? A I don't know any more than two at a time.

Q There were two of each? A Yes.

Q How long did Tuller's men work? A They worked there all day with us.

Q Did it rain that day at all? A No, sir.

Q Are you sure of that? A Positive.

Q Did Tuller's men knock off that day at all? A No.

Q We want to be sure now, Mr. Parkstrom, whether Tuller's men—whether it rained that day at all or not. A It did not.

Q Did the Tuller men keep ahead of you then all the day? A Yes, they did that day.

Q Did you notice Mr. Freschi and Vecco and other men working down below? A Yes, they were working back and forth there with wheelbarrows.

The Court: Counsel for the plaintiff seems to think you are leading, Senator. Don't lead.

Mr. Brown: Have I been leading?

The Court: I think you have.

Mr. Brown: I am sorry about that. I beg the Court's pardon and counsel's because I certainly ought to know enough not to lead.

Q Who was working below, if anyone? A Well, there was Vecco was down below and Freschi.

By the Court.

Q Freschi? A Yes, and there were some other men going gack and forth with wheelbarrows.

Q Do you know that Freschi and Vecco were working below? A Well, I know that Vecco and Freschi were working down below, as we warned them. They would be walking back and forth to meet their—

Q What were they working on? A I couldn't tell you just what they were working on. I know the men that were wheeling the wheelbarrows had concrete in them.

The Court: Proceed, Senator.

By Mr. Brown.

Q Now while they were working there what if anything was said to them, Mr. Freschi and Vecco and the other two men that were working with wheelbarrows? A They were warned to stay away from underneath us.

By the Court.

Q By whom? A We warned them.

Q Who did? A I in particular, and so did the others.

Q You did? A Yes, sir.

By Mr. Brown.

Q When was that? A All during the day.

By the Court.

Q How would you do that?

By Mr. Brown.

Q How would you do that? A We would yell down to them to get away from underneath, out where they were walking back and forth.

The Court: Proceed.

Q Was Freschi working under you or not? A No, not working under us.

Q Passing back and forth under you? A Passing back and forth under us; yes, sir.

Q Did you have any conversation with Mr. Freschi about walking back and forth? A No, only I yelled down to them.

Q What? A Only what I warned them.

Q What did he say, what did he do? A He didn't respond to me at all.

Q Well, did he look at you? A Why, he would just take and glance up, that was all.

Q When you spoke to him? A Yes.

Q Did you hear anybody else warn the men to keep away from there? A Yes, I heard two of the other fellows warning them.

Q Did you hear any reply? A No.

Q How many men were working in the Mason gang that day? A In our gang?

Q Yes. A Why, five.

Q Where were they working? That is, how were they working? A Well, the two mechanics were on top sheeting and there were myself and another helper were down below underneath the sheets.

By the Court.

Q On the scaffold? A On the scaffold; and the foreman was over to one side.

Q How was that work done, Mr. Parkstrom? Describe how it was done, where the men were and what they did and so on. A Well, there would be one sheet would be laid, say for instance here, and there would be one man working on that one, and as we go up we would have to have a start of two sheets and then the other man would take the other one, the other two men. We worked right up in a straight line, the two.

Q What would the men underneath do? A Hold rivets and straps.

Q What tools did you use? A A dollybar.

Q What is a dollybar? A A dollybar is a piece of iron about fourteen inches long, and has one end square, oblong, and the other end is rounded off, and have in the palm of your hand.

Q How is it used? A It is used in this position up against the straps and the rivets (indicating).

Q The square end is— A Against the roof.

Q The round end is in the hands of the worker? A Yes, the round end is in the hands of the worker.

Q The worker is on the scaffold? A Yes, the worker is on the scaffold.

Q What does the man up above do? A The man up above taps on the sheet, and where he sees a dark spot appearing on the sheet, that is where the rivet is. In the sheet after tapping it he finds just where his rivet is and he takes a rivet set, that has a hole in it slightly larger than the size of the rivet, and pulls the rivet through in that manner, and peins it over, flattens it out, to hold the sheet on.

Q That clamps it? A Yes.

Q Is it a cold process or a hot process? A It is a cold process. The rivets are very small.

They are five pounds to the thousand. We call them five-pound rivets.

Q How long is the dollybar? A The dollybar is about fourteen inches long.

Q In circumference how large? A In circumference about an inch and a half to two inches.

Q And the diameter? A That is the diameter.

Q An inch and a half to two inches? A Yes.

Q I see. All right. Proceed.

By Mr. Brown.

Q You say that you laid those sheets from the low part of the leanto up to the high part? A Yes.

Q And you started in by laying them on the end nearest the railroad? A Yes.

Q And there were two helpers underneath? A Yes.

Q And the rest of the men were on top? A Yes.

Q And the men underneath, one would be working on one row of sheets? A Yes, sir.

Q And just beyond him would be someone else working on the next row of sheets? A Yes, sir.

Q And you would move it to the cable end—

Mr. Currie: Now, if your Honor please, again we are falling into that error of leading.

Mr. Brown: I know I am, but I thought it would be saving time and supplement what the Court just wanted to know.

The Court: If you gentlemen would like to lead and do lead I am not objecting to it. You can't do without that. Go ahead. This particular part does not injure the case one bit. It sort of gets it along.

Q What instrument would the men up on the roof use? A On top of the roof?

Q Yes. A They used a hammer and a riveting set.

Q What is a rivet set? A A rivet set is a tool about so large (indicating).

Q Well, how large is that? A That is about five inches. They range in different sizes. One man may have one an inch and a half long, another man may have one six inches long. And there is a small hole in there, slightly larger than the size of the rivet, and there is another sort of a dent in there that helps find the rivet.

Q And then what does he do? I can't lead you. You have got to go on and tell the operation. When he has this thing that you are speaking about what does he do with it? What is it used for? A He sets it on top there.

Q What does he do with it? A He taps on it first, finds the spot and sets the rivet set on top. They are like that (indicating) and there is a slight dent in the rivet set. He hammers that on there, he finds just where his rivet is, then he turns it around and there is a hole where he can pull his rivet through with it. He taps on here and takes that off and then he peins the rivet down, sort of flattens it down to clamp it on there.

Q What is underneath? What tools are used there? A Why, the dollybar.

Q The dollybar? A Yes, sir.

Q How many dollybars were in use that day up on the roof? A Two.

Q Who had them? A I had one and Red MacDonald had the other.

Q You learned of this accident, did you not? A Yes, sir.

Q Did you have any other tools there belonging to Mason that day? A No, I didn't up on top.

Q I mean— A Yes, we had several tools there. We had another dollybar down below.

Q What else did you have down below? A There are several tools. Each mechanic has his own box of tools.

Q Were they down below? A They were down below.

Q Where were they at? A They were over on one side; I think it was the old tool chest.

Q How far away from where Freschi was working? A Oh, I should say 150 feet or more.

Q Was the dollybar that far away, too? A No, the dollybar was down below in a channel iron.

Q What kind of iron do you mean? A There is a channel iron about three or four feet off the ground.

Q It is shown in that picture? A No, sir; I can't place it here, but it is back in there somewheres, in back of the scalehouse on this picture.

Q Was it in the main part of the building? A Yes.

Q Not the leanto? A No.

Q How far back from the railroad? A About 100 feet from the railroad.

Q About 100 feet from the railroad? A Yes.

Q Then was it on the end of the building, that is, the channel iron part of the building, on the

east end of the building? A It was on the far end of the building.

Q From the railroad? A Yes.

Q How high did you say this channel iron was from the ground? A Three or four feet.

Q When was it put there? A It was put there when we first started there. We were supposed to have three helpers on the job and one helper injured his hand and couldn't come on the job, so we had one extra bar.

Q And how long had it been in the channel iron? A Two days or more.

Q Now did you during that day at all drop your dollybar? A No, sir.

Q Did you lay it on the planking or anywhere and let it drop? A No, sir.

Q Did it go from your hand down to the ground or from any position that you put it in here? A No, sir.

Q Did the dollybar that you were using strike Freschi that day? A No, sir.

Q Now in the use of the dollybar, where could you leave it as you moved from place to place? A We very seldom had to leave it out of our hands, but in case we ever did we put it in the channel iron or the purlin behind the strap.

Q Was that the only place to put them? A That was the only logical place, the only safe place to put them. We couldn't put it on the plank because the plank was on a slant.

By the Court.

Q Because it would roll off the plank? A Yes.

Q If it was on a plank? A Yes.

By Mr. Brown.

Q Just the channel iron there or the straps which are around that? A Yes.

Q What were the straps around it for? A To hold the sheets on.

Q What would you do then when you didn't want to use your bar? A Put it behind the strap.

Q You mean the strap that was around what? You mean stuck it in between the strap and channel iron? A Yes.

Q Who was the other helper that was working there that day? A Red MacDonald.

Q Did Red MacDonald drop his channel iron or dolly that day at all—I mean dollybar, do you know?

Mr. Currie: Objected to.

The Court: He will have to speak for himself. He may say whether—

Q Did you see him working there that day? A Yes.

Q How close was he to you? A Right alongside of me.

Q Did he keep working all the time with his dollybar? A Yes.

Q Was it out of his hand and on the ground at any time? A No, sir.

Q What did you see him do with it? A He was using it all the time.

Q The same as you? A Yes.

Q And when not in use what did he do with it? A When not in use he put it in back of the strap on the channel iron.

Q Did you see Mr. Freschi working there about the time you learned of the accident? A

Just before that. I didn't take notice just before.

Q I will withdraw that question and ask you this one: did you see what they were constructing there that day? A No. I knew he was concreting but I didn't know what it was.

Q Where was it? A It was over near the stack.

Q Well, what bay was it in?

The Court: Under.

Q Under, yes. A He was over in the second bay, in the far end from the railroad.

Q The first bay is how wide from the— A It is twenty feet.

Q Twenty feet wide? A Yes.

Q And the next bay is how wide? A Twenty feet.

Q Now where is the stack in relation to that second bay? A The stack is in the far end of the second bay.

Q And near the dividing line or not of the third bay? A Yes, it is near the dividing line.

Q How far from that dividing line?

Mr. Currie: I object, your Honor. It is evident that the witness has no memory of this independent of the photograph and I ask that the photograph be taken away from him and if he can tell then we have no further objection.

The Court: Oh, I should think there would be no difficulty in locating the stack. Proceed.

Q Well, then how near the dividing line between the second and third bay was the stack?

A Right up against it, right up against the dividing line.

Q Now did you see Freschi at all that day after his injury? A Yes, I did.

Q Where did you see him at? A In the laboratory.

Q Did you see where piers were being constructed near the stack? A No, I didn't.

Q Do you know how near the stack they were? A I know they were working near the stack but I couldn't say just how close they were.

Q Where were you when you heard that Freschi was injured?

The Court: When you heard what?

Mr. Brown: That Freschi was injured.

A Well, I didn't learn of it until I went to the laboratory.

Q Well, how did you come to go to the laboratory? Tell the jury. A Well, we was working up above there and I heard someone yelling from down below.

Q Who was yelling? A I couldn't say who it was.

Q Well, where did the yell come from, from your men? A From down below on the ground.

Q Where was this person at or what gang was he with? A He was one of the laborers.

Q That were working with Freschi? A Yes, and he yelled up to me that "Someone has your tool, someone has got your tools." I went down to find out.

Q Where were you at then? A I was on the scaffold up above working.

Q Did you look down? A I looked down, yes.

Q What did you see? A I saw the man down below motioning to me to come down and yelling to me that "Someone has got your tools." I went down and I asked him and he said, "Your tool is in the laboratory." I didn't know what he meant by that so I went over to the laboratory and saw Freschi there in a chair and I was handed the dollybar.

Q Now how far from where the chimney was was it to the laboratory? Oh, you don't have to state exactly. A Oh, about 110 or 120 feet.

Q How did you come down when you heard that somebody was taking your tools? A I come down one of the long upright piers.

By the Court.

Q The iron uprights? A Yes, sir.

By Mr. Brown.

Q Iron upright? A Yes.

The Court: Didn't you ever see an iron worker do that?

Mr. Brown: Yes, I have seen them do that and I have seen them come down ropes, too.

The Court: They can do it as far as I am concerned.

Q Then you went in the laboratory? A Yes; saw Freschi and I should judge about fifteen other men there standing around.

Q And where was the dollybar? A The dollybar was handed to me as I come in.

By the Court.

Q Who handed you that dollybar?

By Mr. Brown.

Q Who handed you that dollybar? A I can't say who it was. There was a large stout man that I never saw after that.

Q You never saw him after that? A No, I know he was connected with the Metallurgical people.

Q What did he say to you? A He handed me the bar and said, "This is what hit him." I says, "I can't understand that."

Mr. Currie: I object to the conversation, your Honor.

The Court: Of course the plaintiff couldn't be bound.

Q Did you recognize the dollybar? A Yes.

Q Where did that dollybar come from? A It come from the channel iron where we had left it.

Q And it had been there how many days? A Two days or more.

Q Are you sure of that, Parkstrom? A I am.

By the Court.

Q And where was that channel iron?

By Mr. Brown.

Q Where was that channel iron? A That channel iron was in the back part of the large building, the new building, over this toward the rear of the building.

By the Court.

Q The leanto? A No, not the leanto, the main building.

Q Can you indicate it on the photograph? A Yes, it was back in here. It would be just back of the scale house, on the far end.

By Mr. Brown.

Q You mean at least the highest section of the new building? A Yes.

Q The far end of that from the railroad? A Yes.

Q Was that the dollybar that you just a while ago testified to as being a dollybar belonging to a helper who was injured? Is that the same dollybar? A That was the same dollybar.

The Court: Just let me interrupt a minute. I see the doctor behind you, and if you want that examination he may go into the rear room.

Mr. Brown: Mr. Freschi, will you come in here with the doctors?

The Court: You may go in with the two doctors and Mr. Currie.

(Intermission for examination of plaintiff.)

DR. CARL GESSWEIN, sworn for defendant.

Direct examination by Mr. Brown.

Q Doctor, you have been practicing as a physician in this section how many years? A Thirteen.

Q And you are a graduate from what institutions or hospitals? A P. & S. University, Illinois, Cook County Hospital, Chicago.

Q Did you treat Mr. Freschi? A Yes, sir.

Q July 24, 1924? A Yes, sir.

Q When he came to you? A I guess that was it.

Q When he came to you—

By the Court.

Q That is the date, doctor, July 24, 1924? A Yes.

By Mr. Brown.

Q When he came to you what was he suffering from? A I was called to the plant to see him—an accident call—and I went down to the plant and I was taken to the laboratory of the plant and there saw Mr. Freschi sitting on a chair, and with a laceration on the left side of his scalp. He seemed to be semi-conscious, did not realize the situation, but in a very little while he was able to get up and take a few steps around; and then in the course of the examination at that time we tried out his reflexes, which we found were normal, and advised him to go home. We dressed the wound at that time and then advised him to go home, and I saw him on the next day and several days following, and at each time when I went through the various tests to determine whether his motility was normal or his reflexes were right, whether he could stand, and he complained of some dizziness and a little tendency to go toward the left side, to walk towards the left side, all of which apparently cleared up within a matter of ten days or thereabouts, and I advised him to go back to work.

Q What about the laceration, was it deep? A Superficial laceration, scalp wound.

Q Scalp wound? How big was it? A Well, I would say about an inch and a half long and more or less irregular; not a sharp cut.

Q And did you suture the wound? A I don't recall. I don't think I did, however.

Q Did it heal? A Yes.

Q And what was his condition when you last saw him? A You mean last saw him from this first treatment, of course?

Q How many times did you see him after that first treatment? A Oh, about eight or ten times.

Q And what was the progress of his recovery? A It seemed to be about the average would be, seemed to clear up within ten days pretty well.

Q Was he well when you saw him last? A He seemed to be; yes, sir.

Q What did you advise him to do? A I advised him to go to work.

Q Was there anything the matter with his head at that time? A He, of course, had the scar remaining, the complaint of being dizzy, but otherwise than that he was all right.

Q What would call for dizziness? A I attributed the dizziness at that time to concussion of the brain.

Q Did that pass away, doctor, in your opinion? A Yes, sir; it would pass away.

Q Was there any need for an operation, in your opinion? A I didn't deem it so, no. I didn't think it was necessary.

Q Now, doctor, supposing—you see where there has been an operation performed, do you? A Yes, sir.

Q What have you to say, in taking a piece out of the skull, administering local anaesthesia,

and that a yellow straw fluid came out for a height of about two inches above the skull; would that indicate anything unnatural to you?

Mr. Currie: I object. The doctor has not qualified as a surgeon, merely as a general practitioner.

By the Court.

Q Are you qualified to answer that question, doctor? Do you feel competent? Don't be at all immodest; if you feel that you will say so. As a matter of fact the general practitioner can give his opinion under the rule, it being for the jury to say what weight or credence they will give it. In other words, he may give an opinion just as an expert would or a specialist, that is the rule; the only difference between them is that one may not be regarded by the jury as expressing an opinion of great weight or entitled to as great weight as one who specializes, that is the only difference. Are you qualified to answer that question, doctor? A I think I am.

Q And what is your answer? What would that indicate to you if a yellow— A Only a straw-colored fluid is quite normal. It was not pussy and does not indicate inflammatory changes.

Q How about the presence of blood? A The presence of blood might cause a trauma, however, not a purulent affair.

By Mr. Brown.

Q Would that presence of blood come from an operation? A Yes.

Q What have you to say about the pressure being two inches high?

By the Court.

Q Not arising after this occurred. Suppose it was said that it didn't come from the operation but did come from the matter that oozed out of the wound, if there were blood in it: what would that indicate to you, if anything? A If he had a concussion at the time of the injury there probably would be some capillary hemorrhage in the meninges.

Q From which blood might do what? A It might be a slightly darker straw color or slightly darker amber than normal meningeal fluid.

By Mr. Brown.

Q What would the pressure indicate of two inches? Did that indicate anything? A I wouldn't say that would indicate anything, because the pressure of the meningeal fluid certainly would rise as high as the highest part of the head. A patient lying down in a ward is how many inches lower than the highest part of the head? While the head was in that position the fluid would rise to that point; so that an incision as low as that certainly would go up two inches.

Q Were there any symptoms ever of a fracture of the skull that you saw? A No, sir.

By the Court.

Q While you were treating him? A I didn't see any symptoms of fracture.

Q Did you see any occasion there for an operation, you yourself? A To my mind there wasn't any indication for an operation, inasmuch as—

Q Did the subjective symptoms indicate that an operation was necessary? A No, sir.

Q By what the patient said? A No, sir.

By Mr. Brown.

Q Inasmuch as what, doctor? What were you going to say? A Inasmuch as his physical findings appeared to be normal, that is, such as the reflexes and his ability to walk. There didn't seem to be any disturbance of equilibrium. He was able to stand; his tactile sensations were all right.

By the Court.

Q What about his walking to the side that you spoke of? A I believe that could be caused by the concussion.

Q A concussion? A Yes.

Q You think this man did have a concussion, did you? A Yes.

By Mr. Brown.

Q Was it serious or not, doctor? A The concussion?

Q Yes. A I don't think so, because after a matter of ten days or so he seemed to be perfectly normal.

Q What about his recovering, as you say, regaining his consciousness when you were there? Would that indicate to you that it was not a severe concussion? A Yes, I would say that would indicate that was not a severe concussion. With a severe concussion a person would be unconscious for a matter of days, two or three or four days, and slowly regain his consciousness, and having a total lapse of memory during that time, not knowing where he was at or what happened or anything at all. It might take even

weeks before he would even realize that something has happened to him.

Q Now what would you say would be the necessary symptoms of a patient before it would be necessary to operate on him as this man was operated on? A Well, I should think he ought to show some cranial pressure, some pressure within the cranium which would be shown by a choked disc, by paralysis. Choked disc would be the thing, or increasing blood pressure, rapidly increasing blood pressure, distinct paralysis of some part.

Q When the brain has a cranial pressure on it what is the undeniable earmark of such a pressure? A The undeniable earmark is paralysis.

Q Was there any paralysis on this man at any time? A No, sir.

Q Is there any today on him? A No, sir.

Q Is it common knowledge in the profession that a paralysis denotes compression and nothing else? A Yes, sir.

Q And if there is no paralysis is there depression?

Mr. Currie: I object to leading the witness again.

Mr. Brown: I am not so sure that is a leading question. That doesn't suggest the answer.

The Court: Of course a leading question suggests the answer.

Mr. Brown: The answer is either yes or no.

The Court: I will allow that.

By the Court.

Q If there is no paralysis, doctor, does that indicate a depression?

By Mr. Brown.

Q Compression or depression? A If there is no paralysis it does not indicate depression.

By the Court.

Q Indicate depression? A No, it does not indicate depression.

By Mr. Brown.

Q What other feature is there present when there is a compression or depression on the brain? A If there is a pressure on the brain we would have the choked disc.

By the Court.

Q What do you mean by that? A A choked disc is in the fundus of the eye, the place where the optic nerve comes into the fundus of the eye. The place where the optic nerve comes into the fundus of the eye is pressed forward and gives an appearance of pallor in the eyeball, which is known as choked disc.

Q In other words, it is indicated in the eye? A Yes.

Q And where else if any? A Well, in the paralysis and in the increased blood pressure.

By Mr. Brown.

Q Did he have any of those symptoms at all? A He did not.

Q At any time? A No. He would have an unequality of pupil also.

Mr. Brown: That is all. Take the witness.

The Court: Cross examine.

Cross examination by Mr. McDermott.

Q Doctor, how long have you been practicing your profession? A Twenty-five years.

Q And do you specialize in any branch of your profession? A I do general practice and I have not specialized in anything.

Q Have you had within your direct charge or control any case where an operation was necessary, where a person had brain injury?

By the Court.

Q For head injuries? A Yes.

By Mr. McDermott.

Q How long ago? A Well, I think the most recent case I had was about six months ago.

Q And before that how long ago? A About a year before that.

Q And before that how long? A I can't recall. I would say about one or two cases per year.

Q And in those cases an operation was deemed necessary by you? A Yes.

Q Did you perform the operation? A I did not.

Q You do not perform such operations, do you? A I do not operate on the brain, no.

Q What? A I do not operate on the brain.

Q Doctor, any brain injury is a serious injury, isn't it? A Yes, any brain injury.

Q However slight it might be? A Yes.

Q Doctor, in the cases which passed under your own care and which you say resulted in an operation being performed, did you determine yourself that an operation was necessary in those cases or did you abide by the decision of a brain surgeon? A Well, I would say that I think an operation is necessary—

Q No, just answer the question. Did you in those cases advise an operation on your own diagnosis? A Yes.

Q Or did you confirm it by the diagnosis of a brain surgeon? A I advised the operation.

Q You did? A Yes.

Q Now you found Mr. Freschi in such condition that you deemed it necessary to go see him on three or four occasions; is that right? A Yes.

Q And you deemed it necessary on those three or four occasions to put him through certain tests which you have related? A Yes.

Q And those tests you deemed necessary in order to determine what? A To determine whether there was any hemorrhage or any pressure following an accident.

Q In other words, doctor, you tried to find if there was any brain injury; is that it? A I did, yes.

Q Because you were suspicious that there might be a brain injury? A Yes.

Q Even though there was just a superficial scalp wound, as you call it? A Yes.

Q In other words, anybody or any thing striking one on the head, although no external injury of any size be denoted, still underneath

might cause a serious injury to the brain? A Yes.

Q And a concussion, even though slight, might in itself cause a serious injury, might it not? A I would say not.

Q All right. You know, do you not, doctor, that from a concussion, for instance, of a football player— A Yes.

Q You know that in your profession there are even recorded cases of a man playing football, rendered unconscious for a moment or two, finish the game and come in and die? A Yes.

Q So that a concussion—and that would be a slight concussion, wouldn't it? A I wouldn't think his death was due to concussion, however.

Q You wouldn't think that concussion could cause death? A That death would be caused by concussion?

Q Yes. A Oh, I should say that if the concussion was bad enough a man might die from it.

Q Well, doctor, a concussion is a brain condition, isn't it? A Yes.

Q And that effects the nervous system, doesn't it? A Yes, sir.

By the Court.

Q Does it actually move the brain, a contrecoup? A Yes.

Q What is it that moves? A The brain tissue. The brain itself is within a meningeal fluid, and swings freely, not touching any part of the skull; but one might receive a blow on the skull sufficient to drive the skull against the brain tissue, bruising some of the brain cells, and

that causes a concussion or that is a concussion of the brain.

By Mr. McDermott.

Q And Mr. Freschi did have a concussion? A I would say he had symptoms of concussion.

Q Well, he did have a concussion, not symptoms? A Yes, all right.

Q He had a concussion, didn't he? A Yes.

Q Now, doctor, do you know Dr. Winfield Ney? A No.

Q Never heard of him? A Oh, yes, I have heard of him.

Q Is he recognized as a brain surgeon? A Yes.

Q A specialist in brain surgery? A Yes.

Q Recognized in the profession as an eminent man? A Yes.

Q Doctor, if Mr. Freschi was dazed on examination and the eyeground showed increased intra-cranial pressure but with markedly exaggerated physiological mystagmus, with past pointing to the left and vertigo to the right, and had a fine intention tremor of both hands, all reflexes markedly exaggerated, with an abortive ankle clonus and in view of that a spinal puncture was recommended, and the spinal puncture revealed old bloody spinal fluid, and then a diagnosis was made of a post-traumatic increase of intra-cranial pressure, due to edema of the brain: would you say that operation was necessary? A I would say if all those symptoms were present that an operation would be indicated.

Q You think that under those circumstances that you would advise such a patient of your-

self to have an operation, wouldn't you? A If those symptoms were present I surely would.

Q Regardless of whether any paralysis was present or not? A Yes, sir. I don't see how you could have all those symptoms without paralysis.

Q That is all, doctor.

Mr. Brown: I should think we are entitled to that answer.

The Court: Yes, you are entitled to it. He says yes but he doesn't say how all these symptoms could be present.

Q Doctor, what is the dura? A The dura?

Q Yes. A It is the covering of the brain.

Q What covering?

By the Court.

Q Inside? Outside? A The outside covering.

By Mr. McDermott.

Q Assuming that the dura was punctured and following that there was a spurt of fluid two inches high: would that indicate any pressure on the brain? A I would say not.

Q Doctor, you mentioned about the fluid. I think his Honor questioned you something about the yellow fluid. Didn't I understand you to say that that would rise as high as a man's head? A Yes.

Q What is it, standing or lying down? A If a man is lying down it would rise to the highest point of his head.

Q What is that fluid? A That fluid is the meningeal fluid.

Q The fluid is the result of blood, isn't it, the yellow fluid? A Oh, no, there is always fluid. There always is a fluid in the cord and around the brain.

By the Court.

Q Has no relation? A That is normal.

Q Has no relation to the material of the brain at all? A No.

Q It is in normal condition? A It is in normal condition, the gravity of which is just so that the brain will float in the center of it.

By Mr. McDermott.

Q Now, doctor, you have said that in case the dura was punctured and that the fluid, which would rise as high as a man's head, would come out, is that what I understand you to say, that it would spurt out?

Mr. Brown: No, he didn't say that.

Q I am asking that, did you say it would spurt out two inches?

Mr. Brown: Objected to.

Q I will reframe the question. Assuming that the dura is punctured will this fluid—we will call it a yellow fluid—in a case where we will say there has been no brain injury, will that fluid spurt out?

By the Court.

Q As a result of the puncture?

By Mr. McDermott.

Q As a result of puncture? A Yes, it will spurt out, it will rise to the height of the highest

point of the head if the patient is in a recumbent position.

Q Well, that is due to the fact then because he is in that position and you say that would be a natural condition, would it? A That would be in accordance with a law of physics.

Q So that, doctor, if I understand you correctly—and I don't want to repeat unnecessarily—but the fact that the dura is punctured, there is a spurt of fluid two inches high, does not indicate any degree of pressure in the brain? A I would say not.

Q How many of such cases have you had pass within your experience where such a condition as you have related existed, where you saw a dura punctured, there has been a spurt of fluid two inches and a half high and there has been no brain injury?

Mr. Brown: He has not said, I submit, and I except to the question, that the dura was punctured. Counsel says he did say so.

The Court: No, he is talking hypothetically. He is asking him whether he has had any case where the dura was punctured.

By the Court.

Q Have you had any such case, doctor? A I myself haven't. I have seen brain specialists operate on many cases.

By Mr. McDermott.

Q Now, doctor, assuming that there is a brain injury and an operation, we will assume, is necessary, isn't it a fact that minutes count between the time of the injury and the opera-

tion, as relieving the extent of that injury to the brain? A I would say so.

Q In other words, if a man is injured today, if he can be operated on within an hour he will improve much more rapidly and the injury to his brain will not be as great as though he were allowed to continue five or six days without an operation: that is so, isn't it? A I would say so.

Q And in these brain injury cases it is a fact that a large percentage of them never do recover, isn't it?

Mr. Brown: I object to that. What injury cases are you speaking about?

Mr. McDermott: What we have been questioning him about.

Mr. Brown: I know, but we haven't such a case here.

Mr. McDermott: All right; in an injury to the brain where an operation is necessary.

Mr. Brown: I object to that. It depends upon the extent of the injury.

The Witness: Yes.

The Court: That is the doctor's answer.

A It depends on the extent of the injury.

Mr. McDermott: That is Mr. Brown's answer.

The Court: Well, I thought I heard him say yes.

By the Court.

Q Is that your answer, doctor? A Yes, that is my answer. It depends on how much damage has been done, of course.

By Mr. McDermott.

Q Assuming that there has been any injury to the brain, however slight, and there is an operation, within what period of time will a patient recover?

Mr. Brown: Well, now if your Honor please—

The Court: No, let the doctor take care of himself. He doesn't need any help.

A No matter how slight? Well, I think that of course is also—

By the Court.

Q Well, if you are not able to answer it in that form you may say so. A I am not able to answer it in that form.

By Mr. McDermott.

Q Doctor, you just examined Mr. Freschi in the room, didn't you? A Yes.

Q And you found his condition to be what? A We found at this time that his reflexes were normal in every respect. He was able to walk in a straight line and he was able to stand and he was able to have normal tactile sensations, his pupillary reflexes were normal, his pupils are normal, his facial reflexes are normal. The last thing we tried on him was a very difficult thing and I am not so sure but what even many of us who are in perfect health—that is, to walk down a hall in a straight line. He was unable to do that perfectly, but other tests he did just as good as any normal individual would do.

By the Court.

Q You found him to be the condition as when you stopped treating him, doctor? A Yes, I did.

Q No real change? A No real change at this time.

By Mr. McDermott.

Q In other words, doctor, you don't find anything the matter with this man? A I do not.

Q A perfectly normal individual; is that so? A Yes.

Q Well, doctor, can't you tell by looking at him that the man is not normal? A I am thinking of the physical normal. Now you understand what I mean. His physical findings I would say are normal. Everything that we could find physically is normal. Mentally is another story.

Q Is it normal for this man to have that hole in his head that he has got today? A Well, that is an operative hole.

Q Is he normal as a result of that? A Perfectly. I know many men with a hole in their heads going about their business in a normal way.

Q And you from your observation and your examination as we found it in that room, you as a medical man of years of experience, will say that that man is in a normal state? A From a physical point of view, yes.

Q Well, that is what I am asking about. A Yes.

Q Not a thing the matter with him? A Yes, that is just exactly what I say.

The Court: Anything more?

Mr. McDermott: I guess that is all.

Q Doctor, when did you discharge this man from your treatment? A I don't recall but I think it was about a month after the injury.

Q And when you discharged him you discharged him as completely cured? A Yes.

Mr. McDermott: That is all.

Re-direct examination by Mr. Brown.

Q Doctor, Dr. Ney has testified, and I want to know whether you agree with him or not, that the yellow fluid is the result of blood. Is that so or not? A Well, the meningeal fluid is a straw color anyway, a yellowish straw color. I don't know how deep a yellow. Of course, if there had been blood in it the serum of the blood might darken the fluid some.

Q No, not that; is the yellow fluid the result of blood or not? A No, not necessarily.

Q Now, is this hole in his head that has been spoken of—there is no hole there now that you can see, is there? A Well, the bony tissue has been removed from that area, of course, and so was covered with soft tissue, and it can be felt and no doubt pulsates from the pulsation of the dura.

Q And is that hole in the place where the injury occurred? A No, it is below the injury.

Q How many inches away from the place where he was injured? A The upper edge of the hole is about a half inch from the point of injury. The lower edge is—oh, two inches away from it. The operation has been made over the Rolandic area of the brain.

Re-cross examination by Mr. McDermott.

Q Doctor, just in answer, following Mr. Brown's question, did I understand you to say the yellow fluid is not the result of blood? A Not necessarily.

Q What would it result from? A I say the normal meningeal fluid has a yellowish tinge or straw color.

By Mr. Brown.

Q Has this man changed in weight that you can see from the first time you saw him up to today? A He doesn't appear to me to have changed in weight.

Mr. Brown: That is all.

DR. WILLIAM E. RAMSAY, sworn for defendant.

Direct examination by Mr. Brown.

Q Dr. Ramsay, how long have you been practicing medicine? A Forty-two years.

Q And what institutions are you a graduate of? A I graduated from Columbia University Medical Department and later post graduate of John Hopkins, Baltimore.

Q And since that time what has been your experience in your profession? A After a trial at Columbia University I was assistant to Edward Seguin and later Birdsall, at the Nervous Disease Department of the Manhattan Eye and Ear Hospital, and from there went back to the Baltimore Eye, and I was also assistant to M.

Allen Starr, who sent me to Baltimore to take charge of the Baltimore State Insane Asylum in the John Hopkins University, in which institution I remained three years, then returned to Jersey and I am now on the medical staff of the Perth Amboy City Hospital. I am surgeon in charge of the American Smelting & Refining Company Hospital, the Standard Underground Cable Company's Hospital, and the Anaconda Copper Company. I am physician for the National Lead Company, to the Ressler & Hasslacher Chemical Company and surgeon for the Pennsylvania & Lehigh Valley Railroad Companies.

Q How many men do those companies employ in your district, doctor?

Mr. Currie: I object to that as immaterial.

The Court: It may or may not be. Of course it does not appear material at the present moment. Proceed.

A Depending upon the services at the industrial works, it varies from five to nine thousand.

By the Court.

Q A year? A Yes, a year.

By Mr. Brown.

Q Do you have that many cases under your charge in a year? A Yes; not that many cases, I have that number of men in the employ of the plants that I am physician to. That is exclusive of the railroad, because there is no way of estimating them.

Q Now, doctor, you have examined Mr. Freschi, have you not? A I examined him here today.

Q And you have read the testimony of Dr. Ney, depositions? A I have.

Q And you have heard the testimony of Dr. Gesswein? A I have.

Q Have you specialized in neurological cases? A I have, and particularly in industrial nervous work.

By the Court.

Q By neurological cases you mean nervous— A Nervous work connected with the industry, due to accident.

By Mr. Brown.

Q How many cases during your practice have come before you of brain injuries for operation or otherwise? A That would be impossible. I have been doing industrial work for these large plants for thirty-six years, and probably one of the most common head injuries we would get is that of concussion of all degrees, from the most trifling to absolutely fatal cases.

Q To the brain? A Yes.

Q If you shake a person does that cause a concussion of a degree? A Concussion of the brain?

Q Yes. A Well, it would have to be a pretty severe shaking.

By the Court.

Q Ordinarily not, doctor? A Ordinarily not.

Q He is comparing now to a prize fighter? A In prize fighting, which is not a shaking, you can get concussions of the brain from the boxing gloves.

Dr. William E. Ramsay, for Defendant, direct.

By Mr. Brown.

Q What are the symptoms of a concussion of the brain that requires operation, doctor? A A concussion requiring an operation would be one in which there were some external manifestations of an internal injury.

By the Court.

Q Such as— A Paralysis or some pressure symptom.

By Mr. Brown.

Q What would they be besides paralysis? A What?

Q Besides paralysis? A That would require an operation, I would look for pupillary changes, changes in the eyes, and interference with breathing, and particularly the symptoms of a paralysis, either where the patient showed loss of reflexes or loss of sensation in the hands or in the legs or some motor disturbance.

Q Does that continue as long as the pressure is there? A It will.

Q It will? A Yes.

Q And if those symptoms are not shown, that is, subjective—or objective, rather—has there been cranial pressure? A Cranial pressure may occur in severe concussion, but as a rule it is only transitory. It does not last any great time, as the fluid is very quickly absorbed. The pressure symptoms very quickly disappear.

Q Now supposing that, as it appears in this case, this man had a scalp wound an inch and a half long and that shortly after his injury he was semiconscious and a little while thereafter was fully conscious, and that the scar healed

within ten days, that he didn't have any paralysis nor those symptoms that you have mentioned: would you say there was or was not a cranial pressure on the brain? A From the symptoms stated there was no evidence of any cranial pressure.

Q Now, doctor, what would be the first thing that you would do in order to ascertain whether or not there was a cranial compression or depression on the brain? A The cranial pressure in those cases would be due to one of two causes: either that of fracture of the skull with pressure or a depression, or an internal hemorrhage. If he had an internal hemorrhage he would have symptoms of paralysis. You could have a fracture of the skull without, which could be determined at least within a very short time by an X-ray. An X-ray of that skull would show whether or not there was a fracture of the skull.

Q Do you know of any responsible surgeon in that line of work that would undertake an operation on the skull without an X-ray? A I can only answer that in this way: it is usually done where they have an X-ray. It might be done by a physician where he had no such facilities, but if he had the facilities I think the brain surgeon would have made an X-ray first.

Q Now, doctor, is this man suffering from any physical condition that you see now? A None visible, except the removal of the bone from the head.

Q Well, is that serious or not? A No, it is not.

Q Why do you say it is not serious? A Well, I have seen so many of them that entirely healed up. I had one case that I took several square inches of bone out of his head that cleared

up, and it is rather amusing; his wife says he has been a better husband since than he was before.

Q Well, has this operation been over the region of his injury or not? A If the scar as indicated there is the point of injury this was an exploratory operation.

By the Court.

Q In other words, you think the doctor really wanted to find out what the difficulty was? A Yes.

Q So he explored? A I think it was an exploratory operation. That operation was done, about the size of a silver dollar, below the point of injury. It apparently was opened and closed up. I think it was an operation that was done—it may have been perfectly justifiable; I wouldn't say that it was not; but at the same time there is no indication there that it was done with the idea of removing a depression at the point of accident.

By Mr. Brown.

Q Now what is this man's mental condition that you can find now? A This man's mental condition is that that is very common in cases of depression. It is very frequent, so that I mean—I was going to say almost daily, but frequently—what we call a traumatic neurosis, or since the days of the compensation court they are called compensation neurosis.

Q Why do the doctors term them compensation neurosis? A Because the remedy is a settlement.

Q Because the remedy is a settlement? A Yes.

Q And as long as they get compensation are they suffering that way? A As a rule they recover very rapidly, as soon as their mind is relieved with what they feel is an obligation of somebody else to them.

Q Is there any doubt in your mind about that, doctor? A None whatever.

Q From your observation is the man physically fit? A Well, that would be very hard for me to say, for the reason that I did not have an opportunity to go over everything. I didn't have a chance to examine his lungs or his kidneys. I listened to his heart, and I see nothing wrong with that. But he has no evidence of any paralysis. He has what we call a neurotic tremor but that has no real significance.

Q What does that come from, neurotic tremor? A Disuse, as a rule.

Q What do you mean by disuse? A If he had been working all the muscles would have regained their normal function before this.

By the Court.

Q How does a neurotic tremor manifest itself? A A little twitching. He has got it in his hands and he has got it a little in his legs, and he has not taken normal exercise for a long time; and in addition to that he is suffering, from his own history—

Q I imagine most of the judges would have neurotic tremor, wouldn't they? A In addition to that he is suffering from a gastric disturbance, which also can come from the same disuse. Here is a man who has led an active life, and by not taking any occupation, eating right along, he begins to become costive, and he begins to get intestinal disturbances, and as a result he

has flatulency, which he complains of, and is compelled to resort to the use of laxatives right along, and gets intestinal indigestion. Those are the symptoms that go with traumatic neurosis.

Mr. Brown: That is all.

The Court: Cross examine.

Cross examination by Mr. McDermott.

Q Doctor, assume you were called on to examine a patient whom you learned had been injured, and you found him dazed at the time of the examination, and the eye-ground showed increased intra-cranial pressure, he had markedly exaggerated physiological mystagmus, with past pointing to the left and vertigo to the right, he had fine intention tremor in both hands and reflexes markedly exaggerated and an abortive ankle clonus. What would you advise? A I would advise a further examination.

Q What? A In the first place I would try to determine in the course of time whether it was due entirely to concussion or whether he had cranial injury, either do it by X-ray—

Q Is that all you would do? A I would do that the first thing, yes.

Q That is all you would do? A I didn't say all.

Q What would be the thing that you would do first? A I would put the man under observation.

Q You mean put him through certain tests? A I would put him under observation.

Q Well, you mean by observation through certain tests? A In the first place I would get him where I could put him to bed.

Q Well, put him to bed; what else would you do? A And then watch him, and as these symptoms abated, naturally I would think it was a case of concussion, then I would treat him as a case of concussion. If he began to show symptoms of paralysis I would try to determine the center at which the paralysis occurred and have him X-rayed.

Q Now, assuming that you had him under observation and all those conditions appeared, what would you do? A It would depend on what symptoms the man manifested.

Q Those symptoms I have given you. A That would be what I would determine.

Q I know, but you had him under observation now.

By the Court.

Q He is asking whether, if you found all those symptoms, whether you would advise an operation? A I would not advise an operation until I had determined the seat of injury.

By Mr. McDermott.

Q All right; what would you do next to determine? A An X-ray.

Q All right; what next? A X-ray, and then if I found there were evidences of paralysis that was located in certain groups of muscles, then it would be the proper thing to trephine him.

Q Wouldn't you take a test of the spinal fluid? A A test of the spinal fluid would not be indicated immediately.

Q Well, would you, doctor, take a test of the spinal fluid? A If his symptoms did not begin to abate.

Q All right. Now I am assuming that the symptoms I have given you did not abate, what I have already outlined to you did not abate: would you then take a test of the spinal fluid? A If they did not abate I would.

Q And then if that spinal puncture revealed a lot of bloody spinal fluid, and then as a result of the evidence, or the evidence so found, you found traumatic increase of intra-cranial pressure, due to edema of the brain, what would you advise? A I would relieve my pressure by taking the spinal fluid.

Q Doctor, do you know Dr. Ney? A I know the man, yes.

Q Is he a man recognized in your profession? A I really couldn't say. He is connected with the Polyclinic Hospital in New York, which has been recently reopened—I say recently—within the last couple years, and during my nervous disease work in New York I didn't know, although I am a member of the American Psychiatric Association, I didn't know Dr. Ney. He may be one of the best known men in New York City as far as I know.

Q You don't know whether he is recognized as a brain surgeon, to some extent? A I don't know anything other than if he is connected with the Polyclinic he must have some standing.

Q If he is the dean of the Polyclinic Hospital he is a good man? A He may be a very good man.

Q He must be, mustn't he? A Yes, he is a good man.

Q What is a dean's job?

Mr. Brown: Objected to as not material.

The Court: Let him tell.

A A dean is practically the presiding officer of the faculty of a college.

By the Court.

Q I was wondering whether it necessarily followed that a dean was a specialist in the particular thing that the Polyclinic was doing. Is he a specialist, supposed to be?

Mr. McDermott: Do you ask the doctor?

The Court: I am asking the doctor.

A I beg your Honor's pardon.

Q Is the dean necessarily a specialist? A Oh, no; he may come from any branch in medicine, either in general practice or general surgery or even a skin disease specialist.

Q For example, Owen D. Young is chairman of the board of the General Electric; that doesn't necessarily mean he is an electrician? A No.

By Mr. McDermott.

Q Doctor, any injury to the brain, of course, is serious, isn't it? A Yes.

Q However slight? A Yes. I would hardly say that. Slight concussions are not serious.

Q There are other injuries to the brain beside slight concussions, aren't there? A Oh, my; yes.

Q And however slight they may be they are serious?

Mr. Brown: Now he has just answered that.

Q All right. Any hemorrhage of the brain is serious, isn't it, doctor? A Hemorrhages of the brain may be so slight that they are never recognized and never leave any ill effect. Here is a condition, patients sometimes have hemorrhage in which the man never knew he had any of his brain.

By the Court.

Q I suppose a prize fighter that has had four knockouts has an injury each time? A A great many.

Q He has concussion? A Gets well the next night.

By Mr. McDermott.

Q You read Dr. Ney's testimony? A I did, yes.

Q Reading from page 23, "Hemorrhage is a serious thing, very serious, and if it is not corrected, they do not get over it. They will go on, they are invalids for the rest of their lives." A That depends on the size of the hemorrhage. Many a child with whooping-cough has a little hemorrhage there and no one ever knows it, not even the child.

Q I am talking now of a hemorrhage as a result. A Yes, I am speaking of hemorrhage, of one of the results. Whooping-cough will give you that one. Hemorrhage that is the result of injury is a trauma just as much as a blow.

Q Hemorrhage will produce pressure? A That is a different thing.

Q If you get a hemorrhage that will produce a pressure? A That is a different thing entirely.

Q It is a serious thing? A If it produces a pressure it will produce a paralysis.

Q Doctor, when was your last operation for brain injury? A About six to eight weeks ago.

Q And before that? A Let me see; about six months ago.

Q And before that? A Oh, I can't go on. I have done possibly six or eight a year for the last thirty years.

Q And in those cases that you have just related were you obliged to remove a part of the skull? A No, sir.

Q How did you perform them if you did not remove the skull or part of the skull? A It was not necessary.

Q It was not necessary? A It was not necessary, no.

Q But in those cases where a portion of the skull is removed, such as in this case—and you don't find that to be a fact? A No.

Q Strike it out. In those cases, such as Mr. Freschi's case, where a portion of the skull is removed—and you do find that to be present in this case, don't you? A A piece removed, yes.

Q That the progress or improvement of those patients is very, very slow? A No, I haven't found it so. That is, in the case I spoke of a little while ago, where seven inches of the skull was taken out—

Mr. Brown: Just a minute.

Mr. McDermott: We have got that part of the answer, where he spoke of that a minute ago.

Mr. Brown: The doctor hadn't finished his answer. Finish it.

A I was going to say in that case, where seven square inches were removed, that man made a good record and was out of the hospital inside of a month.

Q The individual, of course, enters into that to some degree, doesn't it? A Every operation, there must be an individual and an operator.

Q Establishing the brain injury there?

The Court: He means physical background, a constitutional inheritance.

A That is so in all operations, yes.

Q In how many cases, doctor, that you have operated on and removed a portion of the skull have they recovered? A Oh, I couldn't tell you that. With thirty years of active practice it is very hard. I didn't bring records with me of that kind.

Q What proportion, can you say? Twenty per cent.? Fifty per cent? A A great many of them die as a result of accident, not the result of operation.

Q And a great many of them upon whom you operate never do recover? A A great many of them, when you are operating you are just giving the man a chance.

Q In other words, if the brain has been injured, even slightly, and an operation has been performed, the will-power and courage of that patient might never come back; isn't that so? A Well, it depends on what you mean by an injury.

Q An injury sufficient to cause an operation and cause pressure on the brain. A Oh, no.

You have got to take all degrees of injury. Here is a man that comes in with a skull that is fractured and he is alive, and you simply think you are going to lose all hope; and another man comes in with a very trifling accident and there you find a small splinter of bone on the inside of the skull, which you think should be removed simply to prevent further injury.

Q Doctor, the first time you saw this man was today, wasn't it? A It was.

Q And you saw him about three or four minutes in that room, didn't you? A I saw him fully that time, yes.

Q And you looked at his eye? A Yes.

Q You felt of his hand? A I did.

Q And you had him draw his teeth back? A Yes.

Q And you hit his knee? A Yes.

Q And as a result of that you can say now to this court there is nothing the matter with him? A I had heard the testimony, I had read your expert's opinion and I have heard the history of the case and I naturally drew the conclusion that is based upon thirty years' experience.

Q And there is nothing the matter with that man? A I say that man has got a traumatic neurosis.

Q What is that? A What is that?

Q Yes. A It is a nervous condition that is aggravated by the mental anxiety of what he is going to get out of it.

Q That you think is the trouble? A That is my diagnosis, yes.

Q And you think that when he recovers in this case that he will be all right; is that it? A I think he will be much improved, yes.

Q He will recover his normal state? A I think he will go back to work and he will be a better man.

Q You do? A Yes.

Mr. McDermott: That is all, doctor.

Re-direct examination by Mr. Brown.

Q Doctor, just one question. If this man was suffering from an injury such as has been indicated here by Dr. Gesswein and it had healed up and you were going to perform an operation, where would you perform the operation? How big would the hole be? A In the first place I would determine if there was any brain injury from the X-ray, and I would make an operation in keeping with the findings of the X-ray.

Q Is it necessary to make a great big hole to relieve pressure? A If you want to explore the brain then it is.

By the Court.

Q But if it was done to relieve pressure? A I don't think it was done to relieve pressure.

Q But your answer is it depends on what the X-ray showed? A Yes.

By Mr. Brown.

Q If you were exploring the wound right under where the point of injury was, to relieve the pressure, would you need to make a hole as big as a dollar?

The Court: That is hardly fair, to ask Dr. Ramsay that, because he has already

said it depends entirely upon the X-ray and what that showed, and he might be inclined to explore himself.

Adjourned till November 27, 1929, at 10 A. M.

Freehold, N. J., November 27, 1929.

Trial of the cause resumed at 10:00 A. M.

RUSSELL PARKSTROM, resumed.

Direct examination by Mr. Brown.

Q Mr. Parkstrom, at the close of yesterday's session when you were on the stand the testimony was directed to the dollybar that was in the channel iron on the very far east end of the building, about four or five feet from the ground, as being the dollybar that you got in the laboratory? A Yes, sir.

Q Do you know how that dollybar got from the channel iron into the laboratory? A I don't know.

Q And you described the man as an employee, as you thought, of the Metallurgical Company that gave it to you?

Mr. Currie: I object to what he thought and object to the question as leading.

The Court: Yes.

Mr. Brown: I am just getting the testimony of this witness the other day so as to get a proper start.

Q Who was the man that gave you the dollybar, may I ask you again?

The Court: If you know.

A I don't know his name, no.

Q Do you see him today or what was he like? A He was quite a tall man and stout; I know that he was around the place there quite a lot.

Q Who was he working for, do you know? A Well, I don't really know. I surmise that he worked for the—

Mr. Currie: Objected to.

The Court: No, don't guess.

Q What did you see him do around there? A Working around the plant as though he was superintendent.

Mr. Currie: I object to that, your Honor.

By the Court.

Q What was he doing?

By Mr. Brown.

Q Please tell what you saw him doing. A I saw him working around the plant.

Q How many days before that had you seen him there? A A day or two.

Q I show you two pieces of metal and ask you what they are? A They are rivets, tinned rivets.

Q Are those the size and kind of rivets that you referred to yesterday as being a thousand to a pound? A Yes, sir; five pounds.

Q Are those the kind of rivets that were used in the work that day? A Yes, sir.

Mr. Brown: We offer one of these.

The Court: It may be marked.

(Rivet marked Exhibit D. 2.)

Q I show you here a piece of metal about fourteen or fifteen or sixteen inches long and ask you what that is? A A dollybar.

Q Is that the same size bar that was used that was down on the channel iron the day in question? A Yes, sir.

Q And that you got from the place? A Yes, sir.

Mr. Brown: Can we agree upon the length of that iron?

The Court: Put it in and let the jury see it. Just mark that as an exhibit.

Mr. Brown: For the record.

The Court: Well, for the record it is about how long, sixteen inches?

Mr. Currie: No, it is not sixteen inches.

The Witness: Fourteen inches.

Mr. Brown: And weighs about ten pounds or more?

By the Court.

Q How much does it weigh, Mr. Parkstrom? A About eight pounds, I should judge.

Q Is that the size dollybar you used for your work up there? A Yes, sir.

Mr. Brown: Now I would like to demonstrate to the jury just what this thing would do if it falls.

The Court: No, it is not necessary. Assume that the jury has some intelligence.

Mr. Brown: I want this in evidence.

(Dollybar marked Exhibit D. 3.)

By Mr. Brown.

Q Mr. Parkstrom, how far had you worked from the railroad side of the building toward the second bay at the time that you were notified that somebody was taking your tools? A About fifteen feet.

Q In the first bay? A Yes, sir.

Q Did you see Mr. Freschi that day? A That day; yes, sir.

Q In the laboratory you saw him? A Yes, sir.

Q After you came out of the laboratory did you go look around the ground? A Yes, sir.

Q Did you see any marks anywhere? A Yes, sir; in the main building we saw blood-stains.

Mr. Currie: Just a minute, your Honor. This is testimony here which I think is incompetent because it is after the happening of the accident, and unless this witness can tell what those blood-stains were, who they came from, how long they had been there—

The Court: Well, let's see whether he can qualify.

By the Court.

Q When did you see them, Mr. Parkstrom? A Right after we came back from the laboratory.

Q And where were they? A In the large building, the main building.

Q How far from the place where the concrete work was being done in the leanto? A Thirty feet.

Q But in the main building? A In the main building.

By Mr. Brown.

Q Was it fresh blood or not? A Yes, it looked like fresh blood.

Q Was there any there before that time? A I didn't see any.

By the Court.

Q Had you looked before? A No.

Mr. Brown: I think that is all.

The Court: Cross examine.

Cross examination by Mr. Currie.

Q Now, Mr. Parkstrom, in your testimony yesterday you told us that you were standing on two planks. Are you quite sure of that? A Two planks; yes, sir.

Q Do you remember being asked this question on July 13, 1926: "And that plank was how wide that you were on? A About a foot wide, twelve inches. Q And how long? A About ten or twelve feet, I guess." Now were you on one plank or two planks? A Well, the planks were close together, about eighteen inches apart. One man usually worked on a plank, and at times we would stretch our feet apart about eighteen inches and step on the other and work on both planks.

Q How long was this plank, Mr. Parkstrom? A Well, anywheres from ten to fifteen feet.

Q Do you remember being asked this question on the trial of July 13, 1926: "And the end of

that plank you had tied to a rod and the planks down at your end you had tied to a rod and between them you had this long twenty foot plank; that would make it a swing, in other words? A Yes."

By the Court.

Q Did you so testify? A I don't remember.

By Mr. Currie.

Q Now was the plank ten or fifteen feet long or twenty feet long as I read to you? A Which plank are you referring to?

Q The plank on which you were.

Mr. Brown: If your Honor please, he is on cross examination and the attorney puts the question that it is twenty feet long and the witness testifies—

The Court: No, he says he finds in the previous record a question propounded containing that matter and then the witness immediately answered it adopting the content of the question.

Mr. Brown: I didn't get what you say on page 115, Mr. Currie.

Mr. Currie: The bottom of the page, the last question.

By the Court.

Q Was the plank twenty feet long? A The plank on which I was standing wasn't twenty feet long, no.

By Mr. Currie.

Q When was your recollection better, on the previous trial or on this trial? A I may not have understood the question at this time.

Q Since then you have had this explained to you, haven't you? A No, sir.

Q You haven't? Now you have read the testimony since then? A I may have; I read it, yes.

Q How many times did you read it? A Only once.

Q And when was that? A I can't remember just when it was.

Q Now as you worked over the top you were quite close to Freschi, weren't you? A No.

Q How far was he from you? A At what time?

Q The time of the happening of the accident? A He was about twenty-five feet away.

Q Now you were asked this question on July 13, 1926: "How far was he away from you? A He must have been fifteen or twenty feet. I couldn't say."

Mr. Brown: What page is that?

Mr. Currie: Page 111.

Q Did you not so testify at that trial? A Yes.

Q And now you have him twenty-five feet away? A I said about twenty-five.

Q About twenty-five? Is your recollection now better than then as to that fact? A No, it is not.

Q Is it poorer now? A Yes, it is five years since it happened.

Q But your recollection as to the question of planks is better? A Well, the planks, I understand, couldn't be twenty feet long.

Q They couldn't be? A No.

Q This was a twenty foot bay, wasn't it? A Yes.

Q And a twenty foot plank would fit in there easy enough, wouldn't it? A This crosswise—the needle beam was twenty-two feet long, the plank on which we were standing was between ten and fifteen feet long.

Q What kind of a channel was this bar in down below near the ground? A It was U-shape.

Q How deep was the channel? A I can't recollect how deep it was.

Q Well, was it three inches deep? A No.

Q Wasn't three inches deep? Was it two inches deep? A It may have been; it may have been more or less.

Q As a matter of fact that bar could be in the channel and no one see it, couldn't it? A I don't know.

Q You don't know? A Three feet off the ground, if a person—

Mr. Brown: Objected to, if your Honor please.

The Court: Ask the simple question: could it be seen if it was in the channel iron.

Mr. Brown: Objected to for the reason that this man can't tell what somebody else could do.

The Court: If he can't say so—

Mr. Brown: I think it is calling for a conclusion.

The Court: Not necessarily, if he made the test.

By the Court.

Q Could the dollybar be seen when resting in a channel iron such as you say? A It could be seen.

Q You have seen it yourself? A Yes, I saw it there.

By Mr. Currie.

Q You saw it there for two days? A It was there the day before.

Q You saw it there? A Yes.

Q And it was not disturbed from that position? Now when as a matter of fact—

Mr. Brown: Are we going to have an answer for that?

By the Court.

Q Had it been disturbed at all as far as you know? A As far as I know, no.

By Mr. Currie.

Q Now when you came down the rope did you see that dollybar there in the channel?

Mr. Brown: I object. He hadn't said he came down the rope.

By the Court.

Q How did you come down? A I slid down one of the long piers.

Q I thought you described it yesterday, and I envied your ability; in other words I said I would let you do it rather than me. A Yes, sir.

Q Wasn't that right? A Yes, sir.

By Mr. Currie.

Q When you came down on the ground was that bar in the channel? A I couldn't see it in the channel because the channel was in the back.

Q You couldn't see it from where you were? A No, sir.

Q And were you near where these concrete foundations were being put in when you came down? A No.

Q How far from them were you? A I can't remember.

Q You can't remember how far you were from these concrete foundations when you came down? A No, sir.

Q You are sure? A Yes, sir.

Q And you can remember all these other matters in such details but you can't remember that? A I can't remember that.

Q You are sure of that? A Yes.

Q Did you walk toward the place where these concrete foundations were? A No, sir.

Q What did you do? A I spoke to the man as I got down below and he told me the tool was in the laboratory.

Q As a matter of fact you were looking for the tool, weren't you? A No, sir.

Q You were not? A No, sir.

Q Well, he told you that without your saying anything to him? A Well, he called me down.

Q He called you down? A Yes.

Q Who was he? A I don't know who he was but he was a laborer.

Q He was a laborer? A Yes.

Q Did he call you by name? A No.

Q How is it the other man didn't go down?

Mr. Brown: I object to that if your Honor please.

Mr. Currie: I withdraw that question.

Q Why did you go down instead of the other man?

Mr. Brown: I object to that. How can he tell why he went down instead of the other man?

The Court: I don't know. I am going to let him tell. I don't know, either.

Mr. Brown: It is calling for the memory of somebody else.

The Court: Strike it out. Now start over again.

By the Court.

Q Do you know why the other man called you, the man on the ground? A I don't know why he called me, no.

Q Well, where was he? A Down on the ground.

Q Where? A Off to one side from where we were down to the ground.

Q And was he anywhere near the concrete foundation that Freschi was working on? A He was off to one side away from there.

Q And what did the man say to you? A When he yelled to me while I was up above he says, "Someone has your tools."

Q Tools? A Yes.

Q Plural? A Plural.

The Court: All right. Proceed, Mr. Currie.

Q Why did you go down if that is all he said to you? A Why, it was to my interest to look after the tools.

By Mr. Currie.

Q Now, Mr. Parkstrom, was the bar that you received from the laboratory any different from the bar you had been using? A No, sir; they are all alike.

Q Was it any different from the bar that McDowell was using? A I don't think so.

Q As a matter of fact if I had those three bars here and put them together you wouldn't be able to tell one from another, would you? A No, they all look alike.

Q When you were up there on the scaffold it was swinging, wasn't it? A No.

Q Never swung? A No.

Q You never had to hold on anything? A No.

Q You never did hold onto anything? A At times we did.

Q What did you hold on? A Tie rods and so on.

Q Why did you hold on? A Why, at times to steady ourselves.

Q Because you were swinging with the scaffold, wasn't it? A No, you couldn't steady yourself against a stable body and swing on the scaffold.

Q Why did you hold on? A Why, as you are bracing up against anything it is natural for you to grab something; you can push better by holding onto something.

By the Court.

Q Get a purchase? A Certainly.

By Mr. Currie.

Q When you held on something you could only keep one hand on the bar, couldn't you? A No, sir.

Q How did you hold on then? A At times I would run my arm around a tie rod and I could just hold my bar up in that manner.

Q Now at other times when you were a greater distance from the rod what would you do? A Well, I wouldn't have to hold onto anything. It wasn't absolutely necessary to hold on anything.

Q But it was convenient, wasn't it? A It was convenient, yes.

Q As a matter of fact you held on the channel bars, didn't you? A What?

Q You held on the channel bars, didn't you? A Channel bars?

The Court: Channel irons.

Q Channel irons. A We may have, I don't know.

Q Now do you remember at the first trial you were asked where Mr. Freschi was working? As a matter of fact, Mr. Parkstrom, you didn't know anything about Mr. Freschi's injuries till quite a while after it happened; and Mr. Freschi was working down below you and you knew he was working there, didn't you? A Not below us, no.

Q He wasn't working below you? Where was he working? A Off to the front of us.

Q To the front of you? A Yes, sir.

Q And you had warned him? A Yes, sir.

Q Several times? A Yes, sir.

Q Now if he wasn't under you why did you warn him? A Because he was walking back and forth.

Q What was the danger? A The danger a sheet might have fell, anything might have fell on him.

Q As a matter of fact something did fall, didn't it? A No, sir.

Q Oh, it didn't? A No, sir.

Q There was danger of things falling but nothing fell? A Yes.

Q You are quite sure of that? A Yes.

Q Now you said you saw some men there rigging a crane? A Yes.

Q The crane as a matter of fact was not in this building at all, was it? A Not in the leanto, no.

Q Wasn't in the leanto at all.

By the Court.

Q On that day? A Sir?

Q His question is, as a matter of fact the crane was not in the building, the leanto, at all on that day, was it? A Not in the leanto; no, sir.

By Mr. Currie.

Q As a matter of fact that never was in the leanto? A Not in the leanto.

Q It was in the Recoveries Craft Building? A I don't know what building. It was in the large building.

Q It was in the large building? A Yes.

Q You think you saw some men working there that day on the crane? A Yes.

Q Sure of that? A Yes.

Q Where were they working? A Off to the side there.

Q Which side? A Well, on the side where the leanto comes up against the larger building.

Q What part of the side? A I don't just recall what part of the side.

Q Was it on the end? A I don't remember.

Q You don't remember? They were on the side? As a matter of fact you don't know of any cranemen being anywhere near Mr. Freschi? A I don't know whether they were near Mr. Freschi or not, no.

Q Now you said you saw Tuller's men there? A Yes.

Q Where did you see them? A They were working before us.

Q Before you? A Yes.

Q As a matter of fact you didn't start to work till they finished, did you? A They were working as we were working.

Q They were working? A Yes.

Q Were they using any scaffolds? A No, they didn't use scaffolds.

Mr. Brown: Now if your Honor please, I don't know whether the stenographer is taking the testimony as it is given and counsel's comment on it, but every time the witness answers a question counsel answers it too and repeats the answer, and I submit that we won't have a very nice record and I would like not to have the answer repeated.

The Court: Don't repeat the answer.

Q You saw Tuller's men there? A Yes.

Q Where did you see them? A Working before us.

Q What kind of tools were they using? A They were using wrenches.

Q What were they doing with the wrenches? A Putting in bolts.

Q What kind of bolts? A I can't just remember how big they were.

Q Where did they put those bolts? A In the purlins and in the irons on the end of the tie rod.

Q And where were the ends of those tie rods? A In the bays.

Q Where were the ends of the tie rods? What were they fastened to? A I just can't remember what they were fastened to.

Q As a matter of fact the tie rods in the ends were fastened to these uprights on the new building and a part of the Harris Building, weren't they? A I don't remember.

Q They were not in the bays at all, were they? A Oh, yes.

Q Sure of that? A They were in the bays, yes.

Q The bolts were in the center of the bays? A I couldn't say in the center, no.

Q Where were they then? A The tie rods criss-cross at the different points.

Q Where did the points go?

The Court: Showing you Exhibit—— now show him the photograph and ask him to indicate. Stenographer, what is it?

Mr. Brown: D. 1.

By the Court.

Q Indicate the tie rods which you are speaking of. Take them down and show them to the jury. Take the photograph down and show it to the jury. A It is not shown in this picture. There is trestle work in here that was put on later on.

Q But the tie rods are not shown in the photograph? A No.

The Court: That is his answer, it is not shown.

By Mr. Currie.

Q Where would they fasten if they had been in there? A They would have criss-crossed this way.

Q Just come down to the jury and indicate that. A Below the leanto there is trestle work on a level and the tie rods were across as you see them there.

Q Show me where one end of one tie rod was fastened. A They would be fastened here.

Q Indicating the corner of the leanto and the Harris Building? A Yes.

Q Now that tie rod, where would the other end of it be fastened? A Over here (indicating).

Q Over here? Where? A Off here. You see this section and these two make up a square.

Q Do you mean to indicate this upright beam? A No, not that upright, because there is trestle work, as I said before, in here and they fastened in here.

Q Well, you always indicate that upright. A Near the upright.

Q How far from the upright? A I don't know.

Q Did you know this fellow McDowell that was working with you? A Yes.

Q How long had he been working there? A He started the day before.

Q Did he ever work with you on the job before that? A No.

Q And he worked there one day before this accident? A I think he did.

Q And what was he doing there? A He was bucking rivets the same manner as I was.

Q How long had you been working for Mason? A For Mason I worked two years before that.

Q On this type of work? A Yes, on this type of work, too.

Q Where was the last job that you worked on this type of work? A Perth Amboy Tile Works.

Q And how long before this was it? A I can't remember just how long.

Q Was that the first job on which you had ever done this work? A No, sir.

Q You had done it before that? A Yes, sir.

Mr. Currie: That is all.

Re-direct examination by Mr. Brown.

Q Just one question. You have been asked about the width that you spoke of in your examination on July 13, 1926, that you assigned to the plank—or length rather. Did you not at that time answer as follows: "And that plank was how wide that you were on? A About a foot wide, twelve inches. Q And how long? A About ten or twelve feet, I guess." A Yes.

Re-cross examination by Mr. Currie.

Q You were also asked: "And how far from each end were these guide ropes that held it, this swing like? A Well, the way we had the scaffold rigged it was about a twenty-foot plank."

Was that your answer at that time? A That was in reference to the needle beam.

Q "Well, now, if I gather what you had, you had a plank on each end, didn't you, and across that plank you had another plank laid; isn't that so? A We had one plank and we run this plank from here over onto a tie rod of the building we used there." Was that your answer? A I just don't understand that.

JOHN TIEDGE, sworn for defendant.

Direct examination by Mr. Brown.

Q John, how old are you? A Thirty-five.

Q And what is your trade? A Sheet metal worker.

Q And how long have you been working at your trade? A Nineteen years, going on twenty.

Q You were working for Mr. Mason on the day in question? A Yes, sir.

Q And you were at that plant that day? A Yes, sir.

Q And how many men had you working for you at that time? A Five including myself.

Q Mr. Tiedge, who supplied the apparatus for the scaffold and the material for the job? A Tuller Construction. They was on the job when I got there.

Q Mr. Mason was not there at the time, was he? A The day I started?

Q Yes. A Yes, the first day he was there with me.

Q Now what was the scaffolding that was provided? A Why, ropes and needle beams and planks.

Q What was the size of the needle beams? A Why, the needle beams were about 6 by 6, 22 feet long. The planks were 3 by 12, 3 by 14, about 15 or 16 feet long, tacked up half to a bay.

Q How did you construct your platform upon which to work out of the needle beams and planks and ropes? Explain it to the Court and jury. A Well, we set one against the old building, a 22-foot run.

Q What did you set against that, the needle beam or the plank? A The needle beam.

By the Court.

Q I wish you would take the photograph D. 1 and step down and show the jury just what Senator Brown is now asking, and also indicate the bays. Now I understand what the bays are, and you show the jury. I don't know whether they understand it or not, but these bays we have been talking about; and answer the Senator's question. Repeat that question, and then use the photograph. A Your bays are these sections in here that you see here going up between this and that. That is one bay, this is the second bay in here, and that is the third bay (indicating on photograph).

Mr. Brown: Just one minute. I want to get that on the record.

The Court: Well, it is on the record. What do you mean?

Mr. Brown: Well, "this" and "that" is no record, if your Honor please.

The Court: Oh, yes, the photograph explains it. I will allow him to make a cross on that to show what the bays are.

Mr. Brown: I was going to suggest that the first thing he pointed to was the—

The Court: Well, they may be sections, sections of roof construction, 1, 2, 3. That is on there. Go ahead. They call them bays instead of sections. It is a technical term.

A Now you want to know the construction of the scaffold?

By Mr. Brown.

Q Yes. A Well, it doesn't show a view of it here, the completion of that.

Q When you say in that you mean— A That girder going down.

Q Well, there are five hundred girders there. You mean the girder— A Connecting the leanto to the old building.

Q The nearest to the railroad? A Right. That is the starting point where we started. Set a needle beam running from here towards this other one and half-way up another one here was a plank that way, two planks, one for each man, which we slide back and forth as we work.

Mr. Brown: The witness has just pointed now from the top to the bottom.

The Court: I think the jury will understand it now, Senator. Proceed.

Q Were the planks on a level or not? What were they as to grade? A Why, they had a slant of about eighteen inches, somewheres in that neighborhood.

By the Court.

Q Why was that slant necessary? A Why, the slant of the roof was so great.

Q Because of the slant of the roof? A So great that when we got down to the low—we couldn't have a level from the low point halfway up. The men wouldn't be able to reach it; give it a slight slant.

Q And, of course, it would be higher at one end than the other and you couldn't reach it? A Right.

By Mr. Brown.

Q How did your work progress? A Very slow.

Q I mean in what direction? A From the railroad side towards the rear of the building.

Q I want to know in laying the sheets what way did you lay them? A You would start with one sheet at the end towards the railroad side and keep going up towards the top as far as we could go, say halfway.

Q Well, would you start at the bottom of the leanto and work towards the top? A From the gutter, from the bottom, to the top.

Q Now this planking and the needle beams that you have mentioned, how were they fastened? A Ropes.

Q Well, how ropes? A Had a rope right to these here risers here. These sheets were all taken off. I have taken off all these sheets here and set a needle beam in there and roped it fast.

Q When you say sheets here and needle beams there, when you read that record, all you see is "here" and "there." What are you pointing to now? A I am pointing to the old building where the leanto starts.

Q And you fastened one needle beam there? A Right.

Q In the first bay? A In the first bay.

Q And fasten that with ropes? A With ropes.

Q And then the other needle beam is fastened where? A Halfway up.

Q Up the bay? A Yes.

Q And how was that fastened? A Hung down with ropes here with a guide set from one end to the other to make it stay.

Q Now when you had the planks and needle beams in place did they make a sort of square? A Well, we had to have the ropes hanging down to the ground.

Q Why did you have to have the ropes hanging down to the ground? A There is no way of lowering that down after the sheeting is put on our scaffolding.

Q What? A There was no way to lower our scaffold down after the sheeting was put on, so we have to have a man down there to hold the ropes while the man was in there untying the rope and lowering it down.

Q And what other purpose did those ropes that were extending down—

The Court: Serve.

Q Used for? A I would say as danger signals; there were men working up above.

Q Were they ever used for going up and going down by your men? A No, sir.

Q What was the first you learned of the accident that day? A I was told that someone was stealing tools.

Q Who told you that? A I don't know, someone hollered to me and I come down.

Q Do you know whether you got down ahead of Parkstrom or not? A No, I think Parkstrom was down before me.

Q And when you got down what did you see or what was going on? A Why, they told us the tools was taken over to the laboratory.

Q Who told you that? A I don't know who it was. It was some one there; not acquainted with him at the time.

Q Was Parkstrom there at the time? A Yes, I think he was in the building at the time.

Q In what building? A In the main building.

Q Now did you go to the laboratory at all? A Yes.

Q Did Parkstrom go to the laboratory? A Yes.

Q Did he go with you or ahead of you? A I think he was a little distance ahead of me.

Q Did you get in the laboratory? A No, they slammed the door in my face. I didn't get in. Parkstrom got in. So I come back to the building again.

Q How long had you worked up to that hour? About what hour of the day was that? A That was near four o'clock, ten minutes of four.

Q Were there any men working on that building that day other than you? A Yes.

Q That is, Mason's men? What men? A Ironworkers, cranemen.

Q What ironworkers? A Tuller's men.

Q How many of them? A There were two.

Q Any others besides two? A Well, they was just the two on this leanto. There was other men in the other building.

Q What were they doing? A Well, replacing purlins, putting in bolts or replacing bolts

and putting in purlins, setting in tie rods and putting bolts in them.

Q Why were they doing that? A I told them to do that, otherwise I could'nt go ahead.

Q Did you wait for Tuller's men that day? A Yes.

Q How many times had you to wait? A Oh, numerous times, three or four. I couldn't start in the morning on account of that.

Q Why not? A Things wasn't right. An angle iron was missing here, a purlin missing here. I drawed their attention to it, the foreman, to have those things put in.

Q Was it necessary to have those tie rods and purlins fastened before you could put your sheeting on? A Yes.

Mr. Currie: I must for the eighth or tenth time object to leading questions.

The Court: Yes; don't lead, Senator.

By the Court.

Q Was it necessary to do this? Was it necessary to do that? A Yes, sir.

Mr. Brown: It does not suggest the answer. He can say yes or no.

The Court: It has a tendency if it incorporates in the question something that was not set up in testimony. Let him tell just how.

Mr. Brown: But I don't understand how—

The Court: Don't argue it. It is a waste of time.

John Tiedge, for Defendant, direct.

By Mr. Brown.

Q Did you notice what Freschi's men were doing that day? A I know they were pouring concrete down there, setting footings.

Q How many men were working with him? A Well, I couldn't say how many. I seen four or five walking in and out.

Q What were they doing walking in and out? A Wheeling in concrete.

Q When did they go to work there, did you notice? A Early in the morning.

Q Had they worked there all day? A Yes.

Q What were they working at? A Concrete forms.

By the Court.

Q What for? A For the machines they were going to set on the base.

Q Where was it? A Around the stack.

Q Forms for what? A From what I understand, the factory.

By Mr. Brown.

Q Was it the forms for the factory or the foundation? A Foundation for the factory.

Q Well, then, why don't you say that? Forms for a foundation? A Yes.

Q What sort of a foundation? A Concrete foundation.

Q What was the size of the concrete foundation? A Oh, about eighteen inches square.

Q And how many of them were there? A Four.

Q And where were they being constructed? A Near the stack.

Q How far from the stack? A About three or four feet each side of the stack.

Q What way were they situated as to the bays? What bay were they under or in? A They were in the second bay and I think two in the second and two in the third.

Q The foundations? A Right.

By the Court.

Q That is, they were under? You keep saying they were in. You mean they were under the second and third bay? A Yes.

By Mr. Brown.

Q Were these piers in squares or how were they? A Squares.

Q That is, an equal distance apart? A Yes, sir.

Q Now how near were the two nearest the old building, about how far from them? A Oh, about six or seven feet; the length of my body, I should judge.

Q That is, from the leanto out? A From the old building out.

Q And the piers were how far from each other? A About eight or ten feet.

Q About eight or ten feet? A Yes; say one was here and eight feet over was another, and so on; formed a square.

Q How near were the two nearest piers toward the first bay? A Toward the first bay?

Q Yes, how many feet would you say? A About twenty or twenty-five.

Q Twenty or twenty-five feet? How many feet away were the two second piers? A Well, eight feet more.

Q That would be about thirty-eight feet? A Thirty-eight feet.

Q Well, the bays are forty feet, aren't they, two bays?

Mr. Currie: I object to constantly leading the witness into every answer. I don't like to object all the time, but he is repeatedly coming here and saying to the witness, "The bays are forty feet?"

Mr. Brown: That has been testified to five hundred times.

Mr. Currie: I don't care how many times it has been testified to. This witness hasn't.

(After argument.)

Mr. Brown: Do I have to ask the witness every time how much two times twelve is and how much twenty and twenty is?

The Court: Don't argue it with me. I am not a mathematician.

Q Then how far would the farthest piers be from the end of the bay nearest the railroad? A About forty-five feet, forty-six.

Q You understand my question? A From the end of the building at the railroad?

Q No. How big are the bays? A Twenty feet.

Q Square? A About twenty-five, twenty by twenty-five, are the bays.

Q I am asking you what the size of the bays were. A Twenty by twenty-five.

Q Now how wide were they? A Twenty.

Q And toward the twenty-five direction what were they? A It was on a slant.

Q Were all the bays the same size? A Yes; that is, on the leanto.

Q You have said that the first piers were how far from the end of the bay nearest the railroad? A From the oustide end or the inside end?

Q Outside end. A About forty some feet.

Q Do you understand my question? A I understand it from the edge of the bay where we started—

The Court: Repeat the question.

(Question repeated.)

A You have reference to the piers of concrete—

Q You had four piers there, did you?

The Court: On the ground.

Q On the ground; is that right? A Yes.

Q And they were eight feet apart? A Yes.

Q Is that right? A Yes.

Q Now there were two of the piers that were nearest the railroad, were there not, and two of them farther away? A Yes.

Q I am asking you how near the edge of the building nearest the railroad were those two, that is, the leanto, the edge of the leanto nearest the railroad from that point of the first piers, how far was it? A It is not clear to me yet. I would still say the same thing, it was that distance from the start of the building.

By the Court.

Q Wait a moment. On the east end of the leanto, where you were working, it was nearest the railroad? A Is the railroad end the east end?

Q The east end.

Mr. Brown: No, if I understand, the railroad is the other end.

The Court: All through this trial these men have been saying they worked from

east to west, haven't they? Did they work from west to east or east to west? How did you work?

A Worked from the railroad end; I don't know which is east or west.

Q He is asking the distance. Now he is asking from toward the railroad end; you were up there on the leanto nearest the railroad? A Yes.

Q These piers, concrete foundations, were near the stack? A Yes.

Q Now he is asking you on the ground, if you dropped a rope right down toward the railroad side nearest the railroad, what would the distance be from there where that rope would fall on the ground, to the foundation where this man Freschi and others were working; twenty feet? A No, it is forty feet.

The Court: All right. He says forty feet. That is his answer.

A I would say thirty-eight to forty feet, somewheres in that.

By Mr. Brown.

Q The Court has asked you the foundation. I am asking you the first piers of the foundation nearest the edge of the building. A The leanto building or the old building?

The Court: Yes, the leanto building, he means, nearest the railroad.

Q We will say this cable now, the outer edge nearest me, is the railroad end of the leanto. Do you understand? A Yes.

Q And there are three bays, as I understand it, twenty by twenty-five? A Yes.

Q You say that the piers are eight feet apart? A Yes.

Q Square? A Yes.

Q I am asking you now what the distance was from the edge of the leanto, that is, that bay that is nearest the railroad, to the first two piers, the nearest two piers? A I still say it is thirty-eight feet.

Q Thirty-eight feet? A Thirty-eight to forty feet.

Q Thirty-eight to forty feet? A Yes.

Q Did you have any conversation with Mr. Freschi that day? A Yes.

Q Talked to him? A Yes.

Q When was it? A In the afternoon.

Q About what time? A I couldn't state the exact time.

Q Well, was it before this alleged accident or after? A Before.

Q What was the occasion of the conversation? A I told him that it was about time to get wise to himself and keep himself and his men out from underneath our men that is working there. He said, "Gee, I hate to work under you fellows." That was the conversation I had with him. At that time I didn't know who he was but I understood he was in charge of the men that was working there.

Q Do you know whether any other warnings were given that day to Freschi or not? A Yes, sir.

Q How do you know? A Why, the men warning him that they were coming there.

Q How do you know that? A I heard them. I heard them holler practically all over the building, "Get out from under there," when they were

working there. They had no other means of getting through there. They had to go underneath there. That was the only clear passage they had.

Q Now, Mr. Tiedge, how far had you progressed with you work up to the time you learned of the tools being stolen? A Why, then about fifteen feet—no, about eight or ten feet from the top, two rows to run.

Q What bay were they in? A First bay.

Q Had you gotten in the second bay at all? A No, sir; not till the next morning.

Q When you say eight or ten feet, from where, from the top? A From the top of the leanto.

Q I know, but how far from the railroad in? The railroad is on the west of the building, isn't it? A Well, that is two rows of sheets. On top was a row and a half right towards the railroad end, and down lower it was two rows in the first bay.

Q How much was still to be laid on the—I will say the end away from the railroad on the first bay? A About two hour's work.

Q Well, how many feet in width? Do you remember that question? A bay is how wide? A Twenty feet.

Q How much of that twenty feet had you laid up to the time of the— A How many feet we had laid up till that time?

Q Yes. A About three-quarters of the first bay.

Q I am not asking you about, I am asking you of the twenty feet how much of that twenty feet had you laid? A In width?

By the Court.

Q In width, up to the time you learned of your tools being taken? A In the morning—

By Mr. Brown.

Q I don't want to know about the morning or night.

The Court: If you don't know you had better say so.

Q The bay is twenty feet wide, isn't it? A Yes.

Q How much of that twenty feet had you laid? A We laid twenty feet across.

Q No, the twenty-five foot way. A All the way across, on the first scaffolding, and then we shift the scaffolding to get the second part of the bay, the same bay.

Q The same bay you go up towards the top? A Towards the top.

Q And you had how much left undone? A Oh, about ten or fifteen feet to go on, somewheres in that neighborhood.

Q From the top? A From the top.

Q What part of the top were you working, what part of the first bay? A Oh, about ten or twelve feet from the end where we started from.

Q Where was Freschi working at that time or about that time, do you know? A Around about the stack.

Q Had the two first piers nearest the railroad been finished or not? A No, they were not.

Q What piers was he working on? A The first two. He was building them.

Q Well, the first two piers; there are four piers, aren't there? A Yes.

Q How many were completed at that time? A There were two completed and he was completing the other two.

Q How near to the stack were the last two? A Well, they were pretty near about equal.

Q What do you mean about equal? A Well, two was on one side of the stack, that is, the furthest distance away from the railroad, and the other two was on the other side of the stack.

Q How near to the stack was he when he was working when you saw him last? A Well, about ten feet, eight feet.

Q How near are the nearest piers to the stack? A About six or eight feet.

Q Then how far was Freschi from you when you were working? A About twenty-five feet—fifteen, twenty-five or thirty, somewheres in that neighborhood.

Q Was he in the first or second bay? A He was in the second bay.

Q Where was the smokestack in relation to the second bay? A Pretty close to the starting of the third bay.

Q You mean the dividing line? A The dividing line, yes.

Q How close is the stack to that? A Oh, about five feet.

Q Did you see any other men besides the Tuller men working there that day? A Cranemen.

Q What were they doing? A Raising the crane.

Q What side of the building were they working on? A They started in the front, on the railroad side, they tried to raise it from that bent up in the channel, so they couldn't raise it and so they taken the beam that was on the outside and brought it up towards the center, back toward the leanto in the same building, and set the beam up and raised the crane up in the center of the building.

Q Where were the tracks that this crane was to go on? Where were they constructed? A They made the leanto high point in and the other part of the crane was running in this direction here. The track was set right here (indicating).

Q At the upper end of the leanto? A Yes, at the upper end of the leanto.

Q The highest end of the leanto? A Yes.

Q Right along that edge? A Yes.

Q Was it running that day? A No, sir.

Q Were Tuller's men working all day or not? A Yes, sir.

Q Did you see Mr. McCann that day? A I didn't know McCann that day.

Q Well, do you know him now? A Yes.

Q Did you meet that man that day? A No, sir.

Q This dollybar—how many dollybars had you working there? A Three.

Q How many men had you working there? A Five men.

Q How many men were working with dollybars? A Two.

Q Where were they working at? A Underneath the sheeters on the scaffold.

Q Where was the other dollybar? A Down below on the channel.

Q How long had it been there? A Been there from the first day we came there.

Q Why? A Didn't have an extra man for it.

Q When you came down from above or at any time were there any of your dollybars that had fallen or had been dropped from where you were working? A No, sir.

Q How do you know that? A I asked the man about that.

Mr. Currie: I object to that, your Honor, and move that it be stricken out.

The Court: Strike it out.

Q Were you right there? A I was on the roof.

Q Working? A Yes.

Q Could you tell if a man was using a bar or not under the roof? A Yes, sir.

Mr. Currie: Objected to as leading.

The Court: Yes; don't lead.

Mr. Brown: I would like to know what is leading about that question.

The Court: Well, was there a man on the roof? Was he working there?

Mr. Brown: No, I want to know where that question is leading.

Mr. Currie: Now there are three or four types of questions which have been repeatedly decided as leading, and the first type is the question which calls for an answer yes or no.

The Court: Now listen. Concede that the Court knows something about a leading question. There is a form of question that is objectionable that assumes certain facts to have been proven which have not been proven. That is an objectionable question. Repeat this question again. Of course the ordinary leading question suggests the answer and is intended to suggest the answer. It is highly improper, of course. And then there is another question that incorporates in it an assumption that facts have been proven by evidence when they have not.

(Question repeated.)

The Court: I will allow him to answer it. Don't let's waste time on trifles.

Q How many dollybars were in operation at the time that you learned somebody was taking tools? A Two.

Q Did you have a dollybar in your hand that day, I mean when you were on the ground and went towards the laboratory or coming from it? A No, sir.

Q Did you get a dollybar in the laboratory? A No, sir.

Q Did you have a dollybar when you went there? A No, sir.

The Court: Now you see your difficulty is he said the door was slammed in his face and he didn't get in.

By the Court.

Q Were you in the laboratory at all? A No, sir.

Q By the way, who slammed that door in your face, do you know? A I don't know.

By Mr. Brown.

Q Was there any object of any kind dropped that day? A No.

Q Just one minute. Or did any object roll from the plank?

The Court: Where you were working?

Q From where you were working? A No.

Mr. Brown: Take the witness.

John Tiedge, for Defendant, cross.

Cross examination by Mr. Currie.

Q Mr. Tiedge, did each man have a plank to himself? A Yes, sir.

Q What size plank was it? A About three by fourteen or twelve.

Q How wide was the plank? A About twelve or fourteen inches wide.

Q And when he held the bar did he stand or sit on that plank? A According to what point of the plank he was at.

Q Did he hold on, do you know? A Occasionally.

Q And why did he hold on? A Just to steady himself.

Q As a matter of fact the plank swung, didn't it, on these ropes? A No, sir.

Q Couldn't swing? A No, sir.

Q Didn't swing? A No, sir.

Q Quite sure of that? A Absolutely.

Q Now when you were apprised that some one had stolen your tools were you hammering rivets? A I was on top working. I couldn't just exactly say whether I was hammering rivets.

Q When you are hammering rivets it makes quite a noise, doesn't it? A No, not much noise.

Q Makes no noise? A No, not much noise.

Q Not so you couldn't hear a man call? A Absolutely.

Q From below? A Yes, sir.

Q But you did hear him that day? A Yes.

Q Do you remember what you were actually doing when you heard that man? A I was working down in the gutter.

Q What were you doing there? A Putting in bolts.

Q Putting in bolts? A Yes.

Q On the gutter? A Yes.

Q Why were you putting in bolts? A Why, to fasten.

Q To fasten what? A The sheeting to the gutter.

Q As a matter of fact your crew used bolts as well as Tuller's men, didn't they? A Yes, 3-16ths bolts an inch long.

Q And you were in the gutter? A Yes.

Q Where was that gutter? A The start of the old building and the new building.

Q What did you use for tightening the bolts up? A Screwdriver.

Q Did you have any wrench? A I did not.

Q Or use any wrench? A No, sir; just punched them out, and the bar holds it down inside as a wrench.

Q That is where you were? A Yes.

Q And at the time you heard a man underneath you were holding a rivet? A There was no man there.

Q Where was the man that was holding the bar at the time the accident happened? A We didn't work with the man that was holding the bar.

Q You didn't? A No, sir.

Q Then you don't know whether at the time the accident happened they were actually engaged in riveting or not? A Yes, they were.

Q How do you know? A The two men were right up above me. I was below them.

Q How far were you from them? A About ten feet.

Q About ten feet? A Yes.

Q You know that there was riveting being done? A Yes, sir.

Q And that the man underneath surely had his bar? A Yes.

Q Now Parkstrom was higher than you were on this building, wasn't he? A No, he wasn't.

Q Oh, he wasn't? A No, he was on the scaffold below me.

Q Oh, he was on the scaffold below you? A Yes, just below the two men that he was working with or one man he was working with.

Q As a matter of fact this roof had a pitch to it, didn't it? A Yes.

Q And you were at the lower part of the pitch of the roof? A Yes.

Q And he was on a scaffold ten feet away from you towards the incline, wasn't he? A Yes.

Q He was on a slanting plank, wasn't he? A Yes.

Q And didn't that plank slant up to a position higher than where you were? A Yes, sure.

Q And as a matter of fact he was higher than you, wasn't he? A Yes, he was.

Q And he came down what, if you know? A He went down after—

Q How did he go down? A I don't know how he got down.

Q But he did get down ahead of you, didn't he? A Yes. I taken the ladder down.

Q And he was there on the ground when you arrived there? A Yes.

Q When did you first learn the man had been injured? A The words were repeated to me that tools were stolen.

Q As a matter of fact you didn't know a man had been injured? A No, sir.

Q You didn't see any blood on the ground? A I did.

Q Oh, you did? A Yes.

Q You didn't think anything of it, did you?

Mr. Brown: Objected to.

A No, I didn't.

Mr. Brown: What difference does it make what he thinks?

The Court: You don't have to argue it. Strike it out.

Q As a matter of fact you didn't pay any particular attention to this blood that you saw there? A No, I didn't know anyone was injured.

Q Why did you go to the laboratory? A I was told the tools were taken over there.

Q Oh, that they had taken your tools to the laboratory? A That is the way I understood it. Or no, now when I got down I was told that there was someone injured after that and then from there I went to the laboratory.

Q Where did you go first? A Down on the ground.

Q And whereabouts on the ground? A About the center of the main building.

Q You didn't go near the point where these foundations were? A Not right away, no.

Q When did you go there? A Later on, after I came back from the laboratory.

Q What did you find when you got there? A Found blood in the center of the building.

Q Didn't find any blood near the foundations? A No, sir.

Q Did you find the foundations completed? A No, sir.

Q Which ones were completed? A The two far end ones.

Q The other two, what was being done to them? A They were working on them.

Q They were working, not completed? A Not completed.

Q Did your men return to work that day? A Well, the men up above kept right on working.

Q They didn't come down? A No, sir.

Q Didn't stop? A No, sir.

Q Did you change that scaffold that day? A No, sir.

Q You are sure of that? A The scaffold when the accident happened?

Q Yes. A Right after the accident?

Q Any time that day did you change that scaffold? A We changed twice.

Q After the accident? A No.

Q Not any at that time? A During that day.

Q After the accident the scaffold hadn't been changed, had it? A No, sir.

Q And you worked right on? A Well, it was quitting time for us then.

Q Oh, it was quitting time? A Yes.

Q Did you quit ten minutes of four? A Around four o'clock.

Q Around four o'clock? A Yes.

Q As a matter of fact there wasn't any more work done after you heard about this thief of the tools and you went down to investigate, was there? A No, the two men, that is, the two mechanics and the one bucker was working there till I told them to come down, it was time to quit working.

Q How many days had you been there? A Three.

Q How many days did it take you to do that? A Oh, I guess they was on it a week.

Q They were on it a week? You are quite sure of that? A About that.

Q On three bays? A On three bays.

Q But as a matter of fact you only commenced at eleven o'clock that morning, didn't you? A About that time.

Q And from eleven o'clock till four you had been able to do how much of the first bay? A From eleven o'clock, you say, till the accident or quitting time?

The Court: Till four in the afternoon.

A Till four in the afternoon, within about three-quarters of the top.

Q What does that mean? A That is about two rows more work for the following day.

Q To finish the first bay? A To finish the first bay.

Q In other words, the first bay was done in less than a day? A Yes.

Q And still had—

Mr. Brown: Objected to.

The Court: Had about two days' work.

Q But as a matter of fact if a full day had been put on the first bay instead of starting late you could have done it in one day? A No.

Q Oh, you couldn't? A No, sir.

Q How many hours did you put in on this first bay? A Real actual work, that is?

Q Yes. A About five.

Q Five hours? A Yes.

Q And you put two hours on it the next day? A Yes.

Q And you completed it? A Yes.

Q In seven hours? A Yes.

Q How many hours do you work a day? A On this particular job.

Q Yes, on this job. A About six hours.

Q Is that the union time? A That is the rules.

Q You are only allowed to work six hours? A No, it isn't that; no, it is the traveling time. We are allowed to get from job to job, from shop to shop.

By the Court.

Q It is really eight hours, I suppose? A Yes.

Q Allow an hour for lunch? A Half an hour.

Q And then the time consumed in traveling? A Traveling back and forth.

By Mr. Currie.

Q Now you know Mr. McCann now, don't you? A Yes.

Q And you were on your way to the laboratory, can you now say whether or not you met him coming from there? A No, sir.

Q You didn't meet him? A No, sir.

Q You didn't see McCann on the way from the laboratory and say to him then, "How bad is the man injured?" and didn't McCann say to you, "To the best of my knowledge quite serious"? A No, sir.

Q Did you not reply, "This is what fell from the roof. We have traced it on the steel beam and from that point it fell off"? A No, sir.

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

Q Quite sure of that? A Positive.

Mr. Currie: That is all.

Mr. Brown: That is all.

JAMES McDOWELL, sworn for defendant.

Direct examination by Mr. Brown.

Q Mr. McDowell, you were working with the Mason men on the day in question? A Yes, sir.

Q How long had you been working in the iron business? A Oh, about eighteen years altogether, eighteen years.

Q Had you worked for Tuller? A Yes, I worked for Tuller.

Q Did you work for Tuller on this job? A Yes, sir.

Q At the Metallurgical? A Yes, sir.

Q On the day that Freschi was injured who were you working for? A Mason.

Q How many days had you worked on that job for Tuller? A Well, I worked for Tuller before he started that job, over in Cliffwood yard. Titus sent us over there to unload cars.

Q Who was Titus? A Foreman of the Tuller Construction Company.

Q Do you remember what the condition of the iron work was on the day that Mason went to work on this plant where Freschi was working? A Well, the steel was all up but not bolted up.

Q What is that? A The steel was all up in place where it was supposed to go. When you raise steel you put one bolt in.

Q Not bolted up, did you say? A Yes.

Q What do you mean by that? A Well, some of the bolts wasn't in and some of them not tightened up, I guess.

Mr. Currie: I object to what he guesses.

A Well, half of the bolts was in the building.

How is that?

Q How did they do that construction work, the Tuller men there? Just state the operation, how it was done. How was it done? A Well, when you raise steel, as they send the steel up you stick one bolt in, just half tight.

By the Court.

Q That is to hold it together? A That is to hold it together.

Q It is not a complete job? A No.

Q And that was the condition on the day that he is asking you now; the steel work was up and a few bolts were in but you had some to put in? A Yes.

Q You had to go back and do some work there, didn't you? A Yes, we had to go back after the sheeting was up.

By Mr. Brown.

Q Were Tuller's men working there that day? A Yes, they were.

Q How many of them? A Well, I guess—

Mr. Currie: I object to him guessing.

A I use that in my own building line and that is why it comes out so often.

The Court: What came out? I didn't hear it.

Mr. Currie: "I guess so."

Mr. Brown: You can't use "guess" any more.

The Court: You can't guess because it passes time.

Q What is it? A What was the question?

Q How many of Tuller's men were working there? A Four.

Q Where were they working about the time—did you hear that Freschi was injured that day? A Not until the foreman told us to come down, it was quitting time.

Q Did you hear about it before that? A No.

Q Well, between three and four o'clock that day, during that hour, where were Tuller's men working? A They were working right around the chimney there putting in bolts and trying to fix up a piece of purlin in there to carry the sheets around the chimney.

Q Now will you explain how? Did they have tie rods there? A Yes, they have tie rods.

Q And purlins? A And purlins.

Q Just explain how they were fastened and put in, will you? A Well, the tie rods run down and hold the purlins and they stagger the tie rods.

Q Well, they extend from where to where? A From the top to the bottom of the leanto.

Q Well, the leanto has got a high side, hasn't it? A Yes.

Q With a large column, steel column or iron column? A Yes.

Q Then the building is on the other side? A Yes.

Q Then the bays are on the top? A Yes.

Q How are the purlins? What are they? Where do they extend from? A Well, the purlins extend from header beam to header beam.

Q From header beam to header beam? What do you mean? A Well, that is the words we use for the beams. We have got them different numbers on the building.

Q For instance, on the top of the first bay are there any purlins or tie rods there on the

roof? A Well, on the first bay there is—we call them sections.

Q Well, the first section. A There is five purlins.

Q Where do those extend from? A They extend from one beam to the other.

Q What are they, crosswise or straight across or what? A One runs from west to east and the purlins run that direction.

Q How far are they apart? A They were about five feet, for a five-foot sheet, I guess.

Q And they extend all the way up the roof? A Yes.

Q Where did tie rods come in? A They come in between, start with—that is, say the whole steel in the—

Q Are they crosswise or straight or what? A The cross rods are sway rods.

Q Sway rods? A Yes.

Q Are there other rods besides that? A There is sway rods and tie rods.

Q What are the tie rods? A The tie rods go in between the purlins.

Q From one purlin to the other? A Yes.

Q All the way? A All the way through, on the run of the building.

Q What were you doing the day in question? A I was working for the foreman that Mason had there, bucking up underneath.

Q Bucking up underneath? A Mason.

Q Who else was bucking with you? A Another young fellow by the name of Tiedge, I think that is his name; he was underneath with me; that dark young fellow that was on the stand first.

Q This young man here (indicating)? A Yes, sir.

Q Parkstrom? A Parkstrom.

Q Did you drop anything that day? A No, I didn't drop nothing.

Q What did you have? A Well, I had some rivets and straps and a dollybar.

Q Did you drop your dollybar that day? A No, sir.

Q How far ahead of you were Tuller's men working?

The Court: He was Tuller's man.

The Witness: Not that day.

The Court: Oh, weren't you?

Mr. Brown: No.

By the Court.

Q All right. How far ahead of you were Tuller's men working? A They were working in that next section, about thirty some odd feet, I should say.

By Mr. Brown.

Q You were working in what section? A I was working in the first section.

Q They were working in the second? A The second.

Q Do you know where that chimney is? A Yes, sir.

Q Where is it at? A Well, the chimney is in the second section, next to the third header beam.

Q Is that the beam that separates the second from the third section? A No, that is the beam that runs from the old building to the column.

Q I know that, but does it divide the second and third sections from each other? A Yes.

Q How near that beam was the stack? A About three feet.

Q Could you see what construction work was being carried on there that day? A Tuller had some men there putting in bolts on that same section where we were working.

Q Did you see what construction work was being done by Freschi and his men down below? A Well, the day before the carpenters put a footing in there.

Q Put a what in? A Footing; the next day they were pouring concrete.

Q What were they pouring concrete in? A In these four footings.

Q Well, what was the size of the footings? A About eighteen inches.

Q Eighteen inches square? A They looked square.

Q And how far apart were they? A Eight feet.

Q What was the situation of those four piers in? In what bay were they or under what bay? A They were in the second bay, second section.

Q What part of it? A Well, they were nearest to the third beam, the nearest to the chimney.

Q What piers were nearest to the chimney? What footings were nearest the chimney? A Well, the two nearest piers was nearest the chimney and then there was two near to us again; see?

Q How near were the nearest piers to the chimney, in line with the chimney? A About two feet away from the chimney.

Q Two feet out from it? A Away from the chimney.

Q That is towards the railroad? A Yes; that is the two nearest piers to the chimney.

Q And then where were the other two piers? A Well, the other two was about eight feet up from them.

Q That is nearer to the railroad? A Nearer to the railroad.

Q Now, Mac, how far were the piers from the leanto? A The leanto? About three feet.

Q Do you know what piers were finished first? A Well, they finished the two nearest to us in the morning.

Q In the morning? A Yes.

Q What piers were they working on in the afternoon? A They were working on when I seen them start at twelve o'clock or half-past twelve, they started on the one nearest to the chimney. There is two there by the chimney but there is one nearest to the chimney, sets in that corner, and the other sets on the outside to the big building.

Q How many men were working down there that you saw, that you can remember? A How many men was on the ground?

Q That is, working around the concrete? A Oh, there was quite a few.

Q Well, how many? A Well, I seen quite a few. I couldn't tell you exactly how many.

Q Well, was there more than two? A Oh, yes.

Q What were they doing? A There was men running in there and out from that concrete, and sometimes there would be two standing around and talking and sometimes there would be four standing around.

Q Did you see Mr. Freschi there? A Oh, I am acquainted with him. Up to that time I was acquainted. I ain't seen the fellow since but I knew him before the accident.

Q Did you see where he was working? A Well, in the morning he was working down on these concrete piers.

Q With the men down below? A Yes.

Q How far was Freschi and his men working from you between three and four o'clock that afternoon or from three to four? A I don't know. I never measured it. I tell you the truth.

The Court: If you don't know say so.

Q As near as you can tell. What bay were you working in, or section? A I was working in the first bay.

Q And where was he working and his men? A He was working in the second bay over by the chimney.

Q How many feet was that, in your estimation? A Well, a footing was about thirty or thirty-eight feet away from me; see? It must have been the same distance, I guess.

Q Did it rain that day? A Not any.

Q Sure of that? A Yes, positive. Couldn't work in the rain.

Q Did you see what way Tuller's men put on those purlins and tie rods, what they would do while they were doing that? A Well, they would put them in the hole and tighten them up, pull them up. The foreman of maintenance was complaining that they had a sag in them and he couldn't carry his roof straight, or something like that. He was arguing with this Titus, and he told him if he didn't pull up the work he would have to knock the gang off. So Titus told him he was willing to go ahead and do anything, and he and the foreman had a little argument, and Titus was up there putting bolts in and knocking them out with their hammer. He was mad.

Q What would they do with the bolts as they were putting them in permanently, the old bolts?

What would they do with them? A You mean the ones they would put in the hole?

Q Yes. A They would tighten them up with a wrench.

Q Did they change the bolts at all? A Well, the ones that was no good, that they couldn't tighten with a wrench, they would take them out and throw them down.

Q Did you notice whether there were any bolts around where Freschi and his men were working? A Well, there was bolts all around. Before they come on the job there was bolts all around.

Q Did you see Parkstrom working with you that afternoon or near you? A Yes.

Q At any time that you and Parkstrom were working there was there any dollybar dropped by you or him? A No, sir.

Q Any dollybar or any hammer or piece of material of any kind dropped by anybody on that roof down in the section where Freschi was working? A I didn't see none.

Q If a dollybar had dropped would you have known it?

Mr. Currie: Objected to.

The Court: Oh, yes; that is too broad. It depends on where he was and what he was able to see.

Mr. Brown: Your Honor won't permit that question?

The Court: Objection sustained.

Mr. Brown: I pray an exception.

The Court: You may have an exception.

(Objection noted for defendant as ground of appeal.)

The Court: It depends on whether he is qualified to answer a question of that kind.

Q Were all these men on the roof working in the range of your vision? A Yes, sir.

Q Those men who had dollybars? A Well, me and the other fellow had a dollybar underneath.

Q Well, now, if he dropped a dollybar could you see it? A Well, he would let me know if he dropped it.

Mr. Currie: I object to that, your Honor.

The Court: It is not responsive.

Q Was there any other way that you would know that he had dropped his dollybar? A Well, if I was looking his way I would see it; but we generally tell one another when we drop anything.

By the Court.

Q So far as you know and saw there was no dollybar dropped that afternoon? A No, sir.

Q That is all you are able to say? A Yes, sir.

By Mr. Brown.

Q How many men did you keep going on the roof with your dollybar? A Well, I keep the sheeter going and he keeps his sheeter, and sometimes he wants to get down and get a drink or something and I keep the two sheeters going, and if I want to go down he keeps the two sheeters going.

Q If a dollybar was dropped, would that make any difference in the work between you two? A Why, certainly.

Q Would you know it then by that difference? A Yes, sure.

Q Why would you know it? A Because if he dropped his or I dropped mine and the sheeter was up there on top or waiting for somebody to buck up there would have to be a dollybar there to buck up with the sheeter with a rivet on it.

Q From that experience and what you say was there any dollybar missing that afternoon? A We brought two dollybars down quitting time.

Q Yours and Parkstrom's? A Mine and Parkstrom's.

Q Were there any other dollybars up there that day? A There was one on the ground.

Q How do you know that? A Well, I seen it in the morning. I was looking at it to change dollybars, looked to get the best one.

By the Court.

Q Do I understand you were working with Parkstrom? A Yes, on the same scaffold.

Mr. Brown: He was a Tuller man before that but this was the day he worked there.

The Court: All right. Go on.

Mr. Brown: That is all.

The Court: Cross examine.

Cross examination by Mr. McDermott.

Q James, you testified in this court on July 13, 1926, didn't you? A Yes.

Q Do you remember that? A On the witness stand.

Q How many dollybars were on this job? A There was one down—there was three.

Q You mean one down in the channel iron? A Yes.

Q Two being used, one by you and one by Parkstrom? A Yes.

Q How far were you and Parkstrom apart on that platform? A Well, the sheets is 28 inches wide and he is on one sheet 28 inches and I am on the next one.

Q Well, you are practically close together, aren't you? A And if the sheets are five feet long he is down on a five-foot sheet and I am on the other sheet.

Q But you are practically close together, four or five feet apart? A Yes.

Q And one can do the other's work if he has to? A Yes.

Q And Parkstrom did go down, didn't he? He went down? A He went down a couple times during the day.

Q Well, he went down around four o'clock, I mean, before quitting time? A Well, I couldn't tell you how he come to go down.

Q Now just answer my question. He went down, didn't he? A Yes, he went down.

The Court: He went down.

Q Did you do both men's work at that time? A Yes.

Q And what is the width of the bay? A The section is 20 by 25.

Q And you would do both men's work? A Well, if he puts his sheet on, one of the sheeters puts his sheet on, see—and we work the sheet up, follow one another. You don't go out but you follow to the leanto.

Q Now then Parkstrom went down and then he didn't come back to work, did he? A No.

Q And when he went down on the bottom and didn't come back to work, did you know what took him down? A Yes.

Q What? A Well, if you want to know I heard a couple holler up, or somebody holler up, "Hey! come on down. Somebody took one of your tools away."

Q Now referring to page 140 of your testimony of July 13, 1926—what did Parkstrom say? A I said, "Go ahead down and see who is taking your tools." He says, "I am going down."

Q On July 13, 1926, were you asked this question and did you give the following answer, referring to Parkstrom: "And you saw him leave and go down? A Yes, sir. He said, 'I am going downstairs.' Q That is all he said to you? A And he put his bar up in the channel and he went downstairs. Q That is all he said to you? A That is all. Q Simply said, 'I am going downstairs?' A Yes, sir." Did you so testify? A I guess I did.

Q Well, now, is your recollection now better as to what that conversation was with Parkstrom than it was on July 13, 1926? A I guess so.

Q What? A Yes, just the same.

Q How long was Parkstrom gone after he said, "I am going downstairs?" A All I know when you are working you don't have no watch out to keep time on it.

Q Did you testify as follows on July 13, 1926: "How long was he gone? A Well, he was gone until the foreman told us to knock off?" A Yes.

Q Then he did come back to work, did he?

The Court: That day.

A Not up on the scaffold.

The Court: Not up on the roof.

Q Were you asked this quesiton and did you make this reply: "But immediately before Parkstrom went down you didn't hear anybody make any remark of any kind? A In what way? Q Any way; say anything. A Well, they said it during the day. Q Oh, no; immediately before Parkstrom went down did you hear anybody say anything? A No, sir; I was busy working." Did you so testify? A Well, I must have if it is there, but I didn't mean it that way.

Q I see. And did you further testify in answer to Senator Brown's question on page 141, "Do you know why Parkstrom went down? A No, sir." Did you so testify July 13, 1926? A Well, I might not have got the question right.

Q Was there anything about that question, sir, that you don't understand? A I think I understand it.

Q Well, what would there be, Mr. McDowell, about that that you would not understand. Do you know why Parkstrom went down? A Well, I am telling the truth—

Q Were you telling the truth on July 13, 1926? A Yes, I was telling the truth but might not have remembered it at that time.

Q Oh, you might not have remembered it at that time and five years afterwards you recall it, a year afterwards you couldn't recall it? Did you read this testimony over? A No, sir.

Q Freschi got you a job? A Yes, sir.

Q You were working for Tuller? A Yes.

Q Tuller laid you off? A Tuller didn't lay me off, I quit.

Q Hadn't been laid off? A I quit.

Q Oh, you quit? A Yes.

Q Freschi got you a job with Mason? A Yes, I asked him to get me a job.

Q Yes, you say you asked Freschi to get you a job; and he did get you a job? A Yes.

Q Did you move the scaffold that day in the second bay? A Not after—I will tell you when we moved the scaffold.

By the Court.

Q Did you move the scaffold in the second bay that day? A Yes, sir.

Q When did you do it? A In the morning.

By Mr. McDermott.

Q In the morning? How much of the second bay was completed when you moved the scaffold? A Well, that wasn't none of my business, how much was done, because the longer it took me to do the job the better off I was.

Q In other words, if you loafed on the job so much the better? A Yes.

Q Did you put on sheets in the second bay?

By the Court.

Q That is not the union rule though, is it? A Yes, to divide the job.

Q Do they allow you to do that? A Yes.

By Mr. McDermott.

Q Did you put on any sheets in the second bay? A The second bay?

Q I don't mean actually put the sheets on but helped. Were any sheets laid in the second bay? A Not that day.

Q Then why did you move the scaffold? A Well, they put a few sheets on down in the leanto

and then they moved the scaffold up to go up that way.

Q That is in the second bay then? A No, in the first bay.

Q Did you get in the second bay at all? A No.

Q So you had work to do in the first bay and yet moved your scaffold over in the second bay; is that right? A No.

Q Did you move your scaffold in the second bay? A Not that day.

Q I thought you said you moved it in the morning? A Not that day.

Q The morning of the next day; is that right? A The following day.

Q The following day, the next day? That is all.

Re-direct examination by Mr. Brown.

Q I have just one question I would like to ask.

The Court: All right, go ahead.

Q Would the fact that Mr. Freschi got the job for you change your testimony in this case?

Mr. McDermott: Objected to.

The Court: Let him answer in view of the question. He may answer.

A I didn't get the question.

By the Court.

Q Does the fact that Freschi got you the job that day induce you to change your testimony? A No. I am telling the truth.

James McDowell, for Defendant, re-cross.

Q Well, so you said. I assume you are. You are under oath.

By Mr. Brown.

Q Was there any warning of any kind given that day to the men down below? A Yes, sure.

Q When was it given? A Well, on and off they hollered, "Don't get under there. Something it liable to drop down," and then I had mine before with Mr. Freschi and I advised him to stay out from underneath the building.

Q What did you say to him? A I says, "You fellows is foolish where men are working over your head. Suppose something would drop down and it would hit you on the head." He says, "What am I to do? I have got to make a living."

Re-cross examination by Mr. McDermott.

Q Things did drop? A Not as I seen.

Q And that is the reason you warned Mr. Freschi? A Well, you always want to warn somebody there working under you.

Q There wasn't any danger if you were not working over this man? A I wasn't working over him. The other men would walk underneath us once in a while.

Q And you immediately warned Freschi to get away? A I warned everybody that I seen in the room.

Recess till 1:15 P. M.

Trial of the cause resumed at 1:15 P. M.

ALBERT F. MITCHELL, sworn for defendant.

Direct examination by Mr. Brown.

Q Mr. Mitchell, what is your profession? A Civil engineer.

Q Graduated from what college? A Rutgers University.

Q What official positions do you hold? A I am borough engineer of Carteret, one of the engineers of Larson & Fox, civil engineers, Perth Amboy.

Q County engineer, are you? A Connected with the office.

Q I show you here a dollybar. At my request did you conduct some experiments with that bar? A I did.

Q What were they? A I dropped the bar from the height of thirty-five feet at different times.

Mr. Currie: Just a minute. This is objected to.

The Court: How is this competent?

Mr. Currie: It is not competent.

Mr. Brown: The reason of that, your Honor, dropping that bar from a certain height, under certain conditions, from an engineering and mathematical standpoint, estimating the speed of the bar and the weight of it at the end of its flight, that it is material in this case for the reason that it is our contention that this bar, being of such a weight and falling so far as is claimed in this case, that if it struck Mr. Freschi it would have had a different effect from what it did.

The Court: I know, but that depends entirely upon how it struck him. Of course you may say if it struck him square on the top of the head it would have killed him. But his testimony in this case and other testimony already in the case would tend to show that he was not struck square on top of the head, but struck a slanting blow, apparently, as far as he knows.

Mr. Brown: Then that doesn't detract from the testimony—

The Court: Now what you are going to show would have no application at all unless it appeared in the case that he was struck squarely on top of the head.

Mr. Brown: Because no matter how it strikes a person, if it is five ounces or five pounds it would have a different effect, whether it was a direct or slanting blow.

The Court: I am not so sure of that. There is nothing so erratic as the creation of an injury such as here alleged. An accident, such as the falling of a body upon another, depends altogether upon how it was done. A stick might drop on a man and of course you would say he would be instantly killed. On the other hand, he might not be in the immediate range and might get a slanting contact or impact with it.

Mr. Brown: But even that, I cannot conceive of a case that is not material to show the speed of the body to a certain point.

The Court: I will allow you to go that far, but I am not going to allow you to argue to the jury that the speed would be at all relevant unless it appeared how the man was struck.

Mr. Currie: Now if your Honor please, I want a further objection for the reason that this is a problem of physics.

The Court: Moreover the conditions would have to be exactly the same.

Mr. Currie: This is a problem of physics and not an engineering, and I would like to cross examine this man as to just the amount of physics he has studied, when and where, before he be allowed to testify to any physical formulas that he might have on hand. I object to that question, that the witness is incompetent and not qualified, has not been properly qualified to testify.

The Court: Well, that may be.

Q What other heights did you drop the bar from?

Mr. Currie: I object to that, that he has not been qualified to testify to the formulas which he wants to use here.

The Court: I will allow you to cross examine him on his qualifications.

Mr. Brown: If your Honor please, we haven't got to that stage yet. I submit I am not going into any physics or engineering. All I am asking is the physical fact.

The Court: I will allow his question.

Q What other heights did you drop it from? A Sixty-five feet.

Q In what manner did you drop it? A I rolled it off the railing of a bridge.

Q How many times did you do that? A Three times from each elevation.

Q Now did you ascertain the speed of that object?

Mr. Currie: Just a minute.

The Court: I am going to allow you to answer that. I am going to allow you to answer the speed, that is all.

Mr. Currie: I submit that he is not qualified.

The Court: I don't know yet. I am going to allow him to answer.

Mr. Currie: But he is not qualified.

The Court: Wait a minute. You see you can't get anywhere, Mr. Currie, working that way.

By Mr. Brown.

Q Did you? A Yes.

Q At what point did you ascertain the speed? A From the height of thirty-five feet.

Q Did you ascertain anything else beside the speed? A The manner in which it fell.

Q Can you tell what the speed was? A At the time it hit the ground it was traveling at the rate of 38 feet per second.

By the Court.

Q How do you know that? A From the law of gravitation.

Q How did you demonstrate that to your satisfaction? What method did you use, stating the law of gravitation, which we all recognize? How do you know how fast it was going? A It fell thirty-five feet.

Q But you are giving a conclusion, not your method of arriving at that. How did you figure it out? A By Newton's formula, s ½ gt.

Q What does that mean? A S is the space the bar falls, g the force of gravity and t the time it takes to fall.

Q How do you apply that? A The figure S equals 35 feet, g 32, and the time it takes to fall, and then there is the formula: v equals the square root of 2gs, and substituting the quantities you get the velocity at the time, computed as follows:

By Mr. Brown.

Q Now when you made that computation, what was the speed at the time it reached the ground? A Thirty-eight feet per second.

Q What is that in miles per hour? A About 38 miles per hour.

Q Did you figure out anything else? You say the way it fell; what do you mean by that? A Well, I observed the manner in which it fell.

Q How did it fall? A After the body had fallen about ten feet it started to turn, so that it fell vertically.

Q What do you mean by that? Will you show the jury and Court? A When the bar rolled off the railing of the bridge it started in a horizontal position and it immediately started to turn in a direction so that at the time it hit the ground it was falling vertically down.

Q Which end up? A The flat end up.

Q Was that all the computation you made? A Yes, sir.

Q You didn't compute the weight of the object according to the speed at the end of its— A Well, yes. A body falling at a height of 35 feet, and weighing 5¼ pounds which the bar here weighed, would be the equivalent of a body of 184 pounds falling one foot.

Mr. Brown: That is all. Take the witness.

Cross examination by Mr. Currie.

Q Now, Mr. Mitchell, you have told us about Newton's law of gravitation. Where did you learn about that? A Rutgers University

Q And in what course did you learn it? A Civil engineering.

Q What particular course of civil engineering? A That is part of the course in Rutgers University.

Q Isn't there any other name for this course in which you learned this Newton's law of gravitation besides the civil engineering course? A It came in my course.

Q Didn't they teach it in the regular academic course? Do you know whether they teach it in the academic course or not? A In college?

Q Yes. A I don't know.

Q And you don't know that they call this subject physics? A I said they called it physics.

Q Did you say that? Pardon me, if you said it. They call it physics? A In my course, yes.

Q And they teach it how long? A In my course there was a one-year course.

Q And in this subject of physics there is the law of falling bodies as a separate subdivision, isn't there, and that is put in with composition and resolution of forces, isn't it, as another subdivision? A Yes.

Q And with heat as another subdivision? A Yes.

Q And light as another subdivision? A Yes.

Q And magnetism and electricity as still another subdivision? A Yes.

Q And this course is taught how many hours per week?

Mr. Brown: Objected to as immaterial.

The Court: Well, it is as to the credibility as an expert, that is all.

Q How many hours per week during the first year did you have this course in physics? A Approximately three or four hours.

Q Don't you know how many hours you had? Three or four hours? A Sixteen years ago, nineteen years ago.

Q And of that three or four hours a certain percentage of time was devoted to laboratory work, wasn't it? A Yes.

Q And how much of your time was devoted to laboratory work?

The Court: I ought to say to counsel that I have allowed this testimony to come in only this way. I shall tell the jury that it is wholly immaterial unless they find in the case that this bar, in accordance with the theory of the defendant, struck the plaintiff as he thinks it may have, but that the jury must confine their attention entirely to the testimony that that did strike this man in the middle of the head, not that it struck him somewhere else. So that this is mere theory, after all, without any real evidential value, and I am going to tell the jury so.

Mr. Currie: I am going to go to the composition and resolution of forces, which is a scientific expression of that very thing.

The Court: I hope you won't, unless you want to question his conclusion as to the rate

of speed from the height indicated. I really think it is entirely immaterial, as a matter of fact.

Mr. Currie: That is all.

CECIL STAUB, sworn for defendant.

Direct examination by Mr. Brown.

Q Mr. Staub, were you working on the day in question? A Yes, sir.

Q For Mr. Mason? A Yes, sir.

Q And how long had you been working or have you been working at that trade? A Twelve years.

Q Did you see the scaffolding that was built that day? A Yes, sir.

Mr. Brown: Now if my adversaries will agree, I will ask him if it was similar in description to what the other witnesses have testified. There has been no difference, only we can save time on it.

Mr. McDermott: Yes.

Q Was the scaffolding built as described by Parkstrom and Tiedge? A Yes, sir.

Q What part of the buildings were you on, on the roof, when this thing happened? A On the top.

Q Did you know that anybody was injured? A No, sir.

Q Was it raining that day? A No, sir.

Q Did you work there all day? A Yes, sir.

Q Quit at what hour? A Four o'clock.

Q Were there any other men working on the roof besides Mason's men? A Well, I saw a few iron workers around there.

Q How long were they working? A They were probably working all day.

Q How much ahead of you or near were they? A They were just ahead of us, carrying up some bolts.

Q Had they done that way all day? A They had been doing that work all day, yes, finishing up.

Q What have you to say as to whether or not they kept ahead of you or stopped your work or not? A They stopped us occasionally. In the morning at one time they stopped us.

Q Why? A That was because the tie rod laying on the roof rafters or big girders, they were not straight and we couldn't lay our sheets straight.

Q Did you have any dollybar that day? A Not me; no, sir.

Q Do you know how many dollybars were up on the roof? A There was none on the roof that I could see.

Q Well, did you know what was being used under? A Well, my helper, he had a dollybar, I guess, to hold onto the rivets.

Q Did you drop anything that day? A Not me, no.

Q Did you see anybody else drop anything that day? A No, sir.

Q Did you see where Mr. Freschi was working that day? A Never took notice.

Mr. Brown: That is all. Take the witness.

Cecil Staub, for Defendant, cross.

Cross examination by Mr. McDermott.

Q You were in the same position, a worker, as Mr. Tiedge, that is, working on top of the roof? A Mr. who?

Q Tiedge? A Well, I was on top of the roof, yes.

Q Well, Mr. Tiedge was on top of the roof? A I believe he was.

Q Well, don't you know whether he was or not? A I don't know. I never paid any attention to Mr. Tiedge.

By the Court.

Q Do you know Tiedge? A Yes.

By Mr. McDermott.

Q When you didn't see him you didn't know where he was? A I probably saw him, sure.

Q Now those sheets of iron or roofing that you mentioned, that is put in place by you men like Mr. Tiedge and yourself and then put a rivet in, don't you? A Yes, sir.

Q And the man underneath holds the dolly-bar against the rivet? A Right.

Q So your view is obscured and obstructed by that sheet? A Yes.

Q In other words, your attention is centered solely on that piece of sheet roofing? A Yes, sir.

Q And you paid no attention to the man underneath? A Well, I have to pay attention to a certain extent. When he is ready to hold onto the rivet I smash it.

Q To smash it? A With a hammer.

Q Did any of those men underneath before you quit work that day, leave his place of employment? A No, not that I could notice.

Q So that so far as you recall both men, Parkstrom and McDowell, were working until you quit? A I believe so; I don't know.

Q Well, those iron workers that you mentioned were where? Showing you Exhibit D. 1, can you indicate on there where these iron workers were? A Yes.

Q Where? A We were working around here, right here. Here is the iron; one of these across here is missing and they were putting them in so we could lay our sheets on top of them.

Q How big is that piece that they were laying? A What piece?

Q This piece—I will show it to the jury as you have indicated. Just come down here a minute.

Mr. Brown: Just let him indicate it.

Mr. McDermott: I will do that gladly.

A This here bar is twenty feet long from here to here is twenty feet.

Mr. Brown: The witness is referring—

Mr. McDermott: Let him finish his answer. Don't try to interpret.

A This bar reaches from here to here, to the sheet. From this girder to this girder is twenty feet.

Mr. Brown: I wanted to get the record so it would be intelligent, if your Honor please. That doesn't mean a thing on the record.

Mr. McDermott: Well, I think any court would understand that it was used to expedite and indicate.

Mr. Brown: Except there is nothing to indicate.

The Court: What do you want to put on the record?

Mr. Brown: That the witness referred to the first bay that we have been talking about, nearest the railroad, and to the first iron that runs parallel with the old building that appears in the photograph.

By Mr. McDermott.

Q Those men were working there when you first came on the job in the morning, do I understand you to say? A Well, they were working right ahead of us all day long.

Q You were working in the first bay, weren't you? A Well, before we went to work they had to tie something up there.

Q But I mean was that before you went to work they completed that thing across there so you could put your piece on? A Yes.

Q You couldn't work until that bar was in place; you couldn't have anything to fasten your sheet to; isn't that so? A That is right.

Q So when they finished you went to work? A Yes.

Mr. McDermott: That is all.

Mr. Brown: That is all.

VALENTINE ZIEGLER, sworn for defendant.

Direct examination by Mr. Brown.

Q You were working with Mason's men on the day in question? A Yes, sir.

Q You were working on the roof? A Yes, sir.

Q Did you notice who else was working on that roof that day? A There were iron workers on the roof and the crane men were working there.

Q The iron men did you say? A Iron men.

Q How close were they working to you? A The next bay.

Q What bay were you working in? A The first.

Q The first bay? A The first bay.

Q Did you work in that bay all day? A Yes, sir.

Q Did you see Mr. Freschi and his men working that day? A No, sir.

Q Did anything drop out of your hands that day? A No, sir.

Q Did you place anybody or any tool or anything at any place where it fell from where you were working? A No, sir.

Q Was it raining that day? A No.

Mr. Brown: Nothing else.

The Court: Cross examine.

No cross examination.

ABRAHAM B. MASON, sworn for defendant.

Direct examination by Mr. Brown.

Q Mr. Mason, your men were working on this leanto or on that building on the day in question? A Yes, sir.

Q What job did you have there? A I had a contract to put on the sheeting, in other words, the corrugated iron, if they understand it better that way.

Q What did that include?

Mr. Currie: Objected to as not the best evidence.

The Court: He knows what they are. I will allow it.

A That included roofing, siding on this building. Of course with that covered work leaders and valleys, things like that, that went with it.

Q Did you have a contract with someone? A Yes.

Q With whom? A Tuller Construction Company of Red Bank.

Q And how was the contract made out? A The contract was made up that I was to furnish labor only.

Q Who furnished the material? A Tuller Construction Company.

Q And who furnished the operators to do the work? A Tuller Construction Company.

Q Who furnished the scaffolding? A Tuller Construction Company.

Q Were you down there on the day in question? A I was not, sir.

Q What was the amount of the contract? A As I recall, between $900 and $980. I couldn't

right now be positive of that. It is a good while since I looked at the price.

Q I show you here a notice from the Employers' Liability Insurance Company of London, England, addressed to you about this case, whereby you are to pay them the compensation paid Mr. Freschi, and ask you when you got that.

Mr. Currie: Objected to as immaterial.

The Court: Objection overruled. The ruling will be as heretofore; the jury will be told that this is wholly immaterial excepting as it may have some bearing upon the suggested defense that this suit would not have been brought by the plaintiff as a bona fide effort to recover compensation but is really brought for the purpose of reimbursing the employer of the plaintiff for the moneys that have paid to him under the Employers' Liability Act. Now so far as it has any evidential value in that respect it will be received, otherwise not, and the jury will be so told.

(Objection noted for plaintiff as ground of appeal.)

A August 20, 1924.

Mr. Brown: We offer it in evidence.

Mr. Currie: The same objection.

The Court: The same ruling.

(Objection noted for plaintiff as ground of appeal.)

(Paper marked Exhibit D. 4.)

Q Do you know how many dollybars were on that job?

Mr. Currie: Objected to. He has already said he was not on the job.

A I don't know.

Mr. Brown: That is all right. He said he wasn't there.

The Court: That doesn't follow.

(Objection noted for plaintiff as ground of appeal.)

A I sent three down with them.

Q Do you work, too, in your business? A I certainly do, sir.

Q And have for how many years?

Mr. Currie: That is objected to as immaterial.

By the Court.

Q Did you work on this job at all? A No, sir; I didn't on this job.

Mr. Brown: That is all. Take the witness.

No cross examination.

Mr. Brown: We have two witnesses as to the manner in which this work was done.

The Court: Is it necessary to put that on? Isn't it cumulative?

Mr. Brown: That is all it is, and there is nothing in this case against it, as I see, unless my adversaries are going to rebut it by putting on some testimony of that character. I do not understand they dispute the manner in which it was done. That is my understanding.

The Court: Is that right?

Mr. Currie: Your Honor, the only way we can dispute it is the inexperience of one of these men.

The Court: Put that on. Save time. I am willing to sit here.

JENS ANDERSON, sworn for defendant.

Direct examination by Mr. Brown.

Q Mr. Anderson, what is your business? A Roofing and sheet metal.

Q How many years have you been in that business? A Well, father has been in the business twenty-four years; I have been in it with him sixteen.

Q And you have been employed, have you? A Yes, sir.

Q Do you know anything about the job that was done at the Metallurgical Company's plant? A No, sir; I don't.

Q Do you know what corrugated sheet iron is that is used in the roofing business? A Yes, sir.

Q Will you please explain in what manner your trade would arrange the scaffolding and put on the sheeting and fastening on the leanto that is shown in that picture? (Photograph D. 1 shown witness.) Do you know what a leanto is? A Yes.

Q It is about twenty feet wide and runs up twenty-five feet, and it is about thirty-five feet, the high point, from the ground, and twenty or thirty on this end from the ground, the low end. Now how in the trade would you first put

your scaffolding on? A I would put the scaffolding inside for the men to work underneath. We would have to use four slings, two slings to each string, and then lay the planks onto these strings, and to safeguard the plank from slipping off the strings I would put a 2 by 4, nail a 2 by 4 on, is what we use for scaffolding.

Q You mean to it? A No, I mean back of the string.

Q Back of it? A Yes.

Q Now in this case there were what are known as I-beams, 6 by 6, twenty-two feet long, two of them used, and there were two planks 3 inches thick and about 12 or 14 inches wide and from 10 up to 15 or 16 feet long. There was a bolt put through the plank over the I-beams and the planks were fastened in the channel iron and ropes down, the same way with the other I-beams. Would you say that was the regular way to build a scaffold or not? A You can use a bolt. As I say, we use a 2 by 4 as a safeguard in the plank, which I think the bolt is more safer, when it comes to that, than the 2 by 4 is.

Q Now will you say whether the dollybar that is shown here, whether that is used in the business in doing the sheeting? A Yes.

Q Explain to the Court and jury how they put a sheet on in your business in a case of that kind? A Well, to fasten the sheets around the purlins, if it is riveted then we would use a strap and use a dollybar for bucking underneath, the mechanic driving the rivet to a head on top, bringing the rivet out in the sheet, holding the sheet in place.

Q How many dollybars would you use? A Well, one for each man who would be underneath the roof.

Q And how does he work that dollybar? A Well, to hold the dollybar he holds it in his hands, if he has got strength enough he will hold it with one, but most of the time he will stand there and hold it with two, and make it come solid for the man on the top.

Q As to a slant roof of this kind, what do you do as to the level of the scaffold, whether that would be with the roof or not? A You mean how far it would be down from the roof?

Q Yes, whether it would be on a slant or how it would be? A Sometimes they may have it on a slant, if it has too much pitch to it, otherwise you have to carry it on the plank itself; so that we use 4 by 4's to keep it from sliding off the string.

Q In a case of that kind, what will your work necessitate in the ordinary performance of putting the sheets on; a dollybar on the plank, and it would stay there? A Well, yes; you can lay it on the plank and you can also reach over and lay it up on the string where the man is working.

Q If the plank was on an incline, would you put it there? A No, sir.

Mr. Currie: Objected to as not within the purview of an expert opinion, whether he would do it or not. It is immaterial.

The Court: It doesn't follow. It depends on what was actually done.

Cross examination by Mr. Currie.

Q How many planks would you have there, Mr. Anderson? A Two or three.

Mr. Currie: That is all.

SAMUEL DIAMOND, sworn for defendant.

Direct examination by Mr. Brown.

Q Mr. Diamond, how long have you been in the roofing business? A You mean for myself.

Q Yes. A Twenty-two years.

Q And before that how long had you worked in the business? A About forty-three altogether.

Q I show you here the skeleton ironwork and indicate to you that the slanting part is what is known as a leanto, and the bays are twenty-five feet in length, running from the old building up to the main building, twenty feet in width; the height of the bay at this point is about thirty-five feet from the ground and the other end about twenty-five feet from the ground. Now in laying corrugated iron or sheeting on the top of that bay what way would you construct the scaffold? A Well, we have two stringers running across, and put a few planks on top of it, too, and from there in there is a man inside and one outside, places the sheets and in that manner it is done.

Q And the operation of the dollybar in putting the sheets on the same as explained by the other witness? A Yes.

Mr. Brown: That is all. Take the witness.

Cross examination by Mr. Currie.

Q How many planks would you use? A About two.

Q Wouldn't you use more than that? A Two or three; two at least.

Q At least two? A Yes.

Q For each man? A Yes.

Mr. Brown: I want to read into the record the testimony of Mr. Freschi for which the foundation was laid yesterday as follows. This is in the examination before trial:

"Q You knew that it was possible that tools or pieces of iron that they were working with and bolts, might be dropped, didn't you? A I presume so. Q You knew that? A I presume so."

And again in his testimony—I pointed it out yesterday—in the transcript of the testimony of July 13, 1926, at page 72:

"Q You knew that going in and about this building that men working on the roof and elsewhere with tools and objects were likely to drop pieces of metal or whatever was being used about that plant? A I know tools was dropped but not on a human skull like mine."

And on page 74 of the same testimony:

"Q And you knew that and went in there in the afternoon, didn't you? A I paid no attention."

Also the testimony of Mr. Vecco of the same date, page 17:

"Q How many men were up there, do you know? A I don't know; I can't tell."

And then at the bottom of page 21:

"Q Now this is the iron that you have referred to; did you see the men on the roof working with that iron? Did you see the

piece of iron that fell, you say, near your foot, did you see the men that were laying the roof working with that iron? A I no see him. Somebody says it belonged to him."

Mr. Currie: I object to that, your Honor. That was stricken out.

The Court: Was it?

Mr. Currie: Yes, sir.

The Court: At the time apparently it was stricken out—"somebody told me"—and then I struck it out.

Mr. Brown: Even though it was stricken out it happened before it was struck out. If he did say that that wouldn't make any difference.

The Court: Well, you offer that for the purpose of contradicting it, because in the present trial you called his attention to the fact that he swore positively to the fact that that was in his previous testimony and on his previous trial he said it; that it was stricken as incompetent testimony as proving any affirmative fact; but it is now used for the purpose of contradiction. I will allow that to stand. It is not stricken.

Mr. Brown: Then page 25:

"Q Did you watch them do any of the working, Frank? A I ain't watch what they doing; I watch my work; that is all I know. You no ask me any more."

Then on page 27, referring to the iron:

"Q You never saw it after that any more? A You mean I see him? Q No, the iron. A No, I never see the iron. Q You never saw it after that? A No."

Page 29:

"Q Any men working on the roof? You know what iron is, don't you? A I don't know."

That is all. I think that is all I have got.

DEFENDANT RESTS.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

SYLVESTER FRESCHI, re-called for plaintiff.

Direct examination by Mr. Currie.

Q Mr. Freschi, on July 24th did you receive any warning from anyone? A I did not.

Mr. Currie: That is all.

Cross examination by Mr. Brown.

Q Mr. Freschi, how many years had you been working around construction work?

Mr. Currie: That is objected to, your Honor, as improper cross examination.

The Court: I think that is already brought out.

Mr. Brown: I don't think it is on the record.

The Court: Well, if it is not I will allow it.

Q How many years have you been working on construction work? A A few years, more or less.

Q How many is that? A More or less, a few years.

Q What does that mean?

By the Court.

Q Four years, five years, six years? A Three or four.

By Mr. Brown.

Q You knew the danger, did you not?

Mr. Currie: Objected to.

The Court: Objection sustained as improper cross examination.

Mr. Brown: All right. That is all.

CLARENCE McCANN, re-called for plaintiff.

Direct examination by Mr. Currie.

Q Mr. McCann, on this day of the accident did you see John Tiedge? A I did.

Mr. Brown: Objected to. This has all been gone into.

The Court: Objection sustained.

Q When you saw him where was he?

Mr. Brown: Objected to. It was gone into. He testified that he saw Tiedge when he was coming from the laboratory. I am perfectly willing to have that part of the record, what he saw.

Mr. Currie: I just want to fix where this conversation took place.

The Court: Didn't he testify to that?

Mr. Currie: No.

The Court: I will allow that.

By the Court.

Q Where did the conversation take place? A Between the scalehouse and the lab.

By Mr. Currie.

Q What was the conversation?

Mr. Brown: I object to that.

Q Mr. McCann, did Mr. Tiedge say to you, "How bad is the man injured?"

Mr. Brown: I object to that.

The Court: I will allow that. That is competent.

A I stated, "Very seriously."

Q Just a minute. Answer the question.

(Question repeated.)

A Yes.

Q Did you say to him, "To the best of my knowledge quite seriously"?

Mr. Brown: Objected to as being leading.

The Court: No, it is laying a foundation.

Mr. Brown: No, he has already laid a foundation. Now he wants the witness to apply it, not the counsel.

The Court: No, the way to provide a contradiction is to put the exact words to the witness, lay a foundation by "Did you not say so and so?" in the exact language; then call so and so who is alleged to have had the conversation, and repeat it, that is all.

Mr. Currie: That is what we have done, your Honor.

The Court: Yes.

Q Did he say, "This is what fell from the roof. We had placed it on the trestle-board but from that point it fell off"? A Yes, sir.

Cross examination by Mr. Brown.

Q You know you have testified in four trials to that before, have you? A I have.

Q Will you point out in your testimony anywhere where you have said that he has done that? A I testified to that on the first and second trials.

Mr. Brown: I want counsel to point it out.

Mr. Currie: We are not required to point it out. He says he has.

The Court: The first and second trial he said he testified to it.

Q Well, any trial?

The Court: Well, counsel has an opportunity to offer it? You go there and say he has not said it at all, and that would be a matter for the jury then.

Q Why didn't you testify on direct examination that there was such a conversation?

Mr. Currie: I object to that. It would have been immaterial. He couldn't have testified to it. We had to lay a foundation when we got the other witness on the stand.

Mr. Brown: I challenge counsel now to show me anywhere in the testimony where he has ever testified to that line of testimony.

Mr. Currie: If your Honor please, I don't know as I am engaged in any personal fight or challenge, or duel with my adversary. I am merely going by the testimony of the witness.

The Court: Anything more?

Mr. Brown: Yes, I want to examine him on this.

The Court: He says he testified on the first and second trials.

Mr. Brown: I have got the testimony here. Is this not what you said on the first trial, July 13, 1926:

"Q Did you see Mr. Tiedge there, the gentleman who was just on the witness stand? A Yes, sir.

Q Did he have anything in his hand? A He did.

Q What did he have? A A dollybar.

Q What is a dollybar? A A bucking up iron that they hold under rivets to set the rivets.

Q Just describe that bar. A It is a bar about fifteen inches long with a hole turned on one end and round on the other.

Q What was he doing with the bar? A He had it in his hand.

Q How long was this after the accident? A Probably about twenty minutes.

Q Did you observe anything on the bar? A No.

Q No marks on it or anything? A No marks.

Q You stood and talked with him? A Yes, sir.

Q Who was with you at the time? A No one right at present.

Q Who was with Tiedge? A There was another man with him.

Q Was the other man one of the men that you saw—was the other one of the two men that you saw working on the roof? A He was one of the men that was working with the Mason men.

Q On the roof? A On the roof.

Q Laying roof that morning and afternoon? A Yes.

Q Did he have any bar in his hand? A No, sir.

Q After their talk with you where did they go? A I couldn't say. I think they went towards the laboratory.

Q And that was where? A That was northward from where I was."

Now did you say anywhere in your testimony anything about a conversation?

Mr. Currie: I object, your Honor. That is not his entire testimony. Have you got his testimony there for that trial? Now I will just call you on this.

(After argument.)

The Court: This is all very interesting to me and I suppose to the jury, to see these two lawyers scrapping here in this peaceful and model way they are going about it. Don't let's get the discipline of the Court.

Now if you will turn, Senator, to the testimony of Tiedge and then to the cross examination and then discover whether counsel for the plaintiff asked Tiedge if he had any conversation with this witness and whether or not he did not say to this witness at that time and whatever the answer may have been, of course, as a matter of record, then whether this man was re-called and he was not asked: that is the way to find out. You won't find out on the record of direct examination at all. In other words, see whether the same thing occurred then as occurred now.

Q Who was with Tiedge at the time you had this conversation with him? A Some other man.

Q Who was the other man? A I didn't just recognize him.

Q Why can't you recognize him when you can recognize Tiedge? A I didn't pay much attention to him.

Q Why can't you tell who it was? You knew every man that was there, didn't you? A No.

Q You say that you didn't know every man that was there? A Not every man on the job.

Q Wasn't it Parkstrom that was with him? A Probably it was.

Mr. Brown: All right. That is all.

Mr. Currie: That is all.

VINCENT BINGHAM, re-called for plaintiff.

Direct examination by Mr. Currie.

Q Mr. Bingham, after the accident on the afternoon of July 24th did you go to the scene of the accident? A I did.

Q And did you observe the conditions there? A In what way?

Q Did you observe this particular work that was done on the foundations? A I did.

Q And what work had been done—

Mr. Brown: Objected to. Your Honor sustained this objection before.

The Court: This is not rebuttal. How is it rebuttal?

Mr. Currie: They said the foundations, two of them, were finished, and the two where these men were working were unfinished.

The Court: Does it make any difference? Weren't your men working there? I don't understand that is disputed at all.

Mr. Currie: No, it is not disputed. I will withdraw the question.

Mr. Brown: Mr. Freschi stated that he was working with a trowel on those piers, and this other man over him with a shovel, and that he was near the chimney.

Mr. Currie: Now I want to show in rebuttal—they say that he was working near the chimney—that he was working away from the chimney.

The Court: All right. I will allow it.

Q Which piers had been finished, Mr. Bingham? A The two nearest the railroad.

Q Now, Mr. Bingham, did you observe the scaffold there? A I did.

Mr. Brown: Objected to as not being proper rebuttal.

The Court: I can't tell yet whether it is or not.

Q Where did you observe the scaffold? A Directly overhead.

Mr. Brown: Objected to. It is a leading question. Your Honor ruled against that the other day, that after this accident, after he came out there—he only saw it in the morning and then after that it is not material.

Mr. Currie: If your Honor please, I distinctly and directly asked every witness called by defendant if that scaffold was ever placed on that day in the second bay and they all said it was in the first bay that day.

The Court: The testimony is that the man came down after the accident and never went back, as I understand it.

Mr. Currie: They said the scaffold was never moved into the second bay. I am rebutting that by testimony that it was.

The Court: He may answer.

Q Where did you see the scaffold? A In the second bay.

Q And where was it with relation to the concrete foundations? A Overhead.

Q What do you mean by overhead? A Well, the foundations, eight foot centers, it might be two feet or three feet one way or the other.

Mr. Brown: Your Honor allows me an exception on this line of examination? We have been over this time and time again.

The Court: I think it is as a matter of fact. I am going to strike it as not being rebuttal at all, because there is affirmative testimony to the effect that it was overhead on the plaintiff's case.

Mr. Currie: No, but your Honor has refused to allow me to permit this witness to testify to that fact.

The Court: Whether it was?

Mr. Currie: Yes, because he was not there at the time of the accident or immediately preceding.

The Court: Well, if that is so, then I will allow that to stand.

Mr. Brown: And if your Honor please, the reason of that was that his observation came long after the accident.

By the Court.

Q How soon after the accident? A Directly after it, sir.

Mr. Brown: I object to that.

A Within twenty minutes.

Q How do you know it was within twenty minutes? A Immediately the man was sent home I walked outside to look the situation over.

Q How long was he in the laboratory? A I should judge half an hour to three-quarters.

Q And then you went back to where this scaffold was? A Certainly, sir.

Mr. Brown: Now I say it is too remote.

The Court: No, I think not. There is no evidence that anybody was up there moving it.

Mr. Brown: Fifty minutes.

Mr. Currie: He has already testified to it.

By Mr. Currie.

Q Did you see how much roofing had been put on then, Mr. Bingham? A I did.

Q How much had been put on? A I should say half-way in that second bay.

Cross examination by Mr. Brown.

Q Just one minute, sir. You testified in this case on November 14, 1927? A I believe so, sir.

Q What? A Yes, I did.

Q Well, did you or not? A I did.

Q Do you remember being asked the question of how far the work was or the scaffolding from the place that Mr. Freschi was working? A Yes, sir.

Q How many feet did you say it was? A I said within three or four feet away from where he was working.

Q You didn't know where he was working at that time, did you?

The Court: Actually, he means.

Q Actually. A Yes.

Q How did you know it? A By seeing the site after the accident.

Q Then you judged it by after the accident; is that right? A Right, sir.

Q Didn't you swear that it was from five to ten feet in the previous trial?

Mr. Currie: I object to that unless he reads the question and the answer.

Mr. Brown: I will read the answer to him; you don't have to worry about that.

A Yes, if it is there I said that.

Q And if it is not there you didn't say it; is that it? A If it is there I said so.

Q Well, were you correct then or now?

Mr. Currie: I object unless he reads this question and this answer to this man. If he wants to impeach his testimony—

The Court: Objection overruled. He may answer.

A I did answer.

The Court: I am going to have this case closed if possible, gentlemen.

Mr. Brown: If your Honor please, we are not causing this delay. We put our case in in three hours today.

By the Court.

Q What is your answer? A If it is there I must have said so.

The Court: "If it is there I must have said so," is the answer.

Vincent Bingham, in Rebuttal, cross.

By Mr. Brown.

Q Well, did you say it or not? A If it is there, yes.

Q Well, I am asking you if you said it or not.

Mr. Currie: I think the witness has answered the question.

The Court: Don't interrupt.

A Yes.

Q Now this estimation that you made was how long after Freschi was in the laboratory? A I should judge three-quarters of an hour.

Q Three-quarters of an hour? A It might have been an hour.

Q You don't know how long Freschi was in the laboratory before you got there, do you? A No.

Q So that the time that you estimate was from the time you saw him in the laboratory until he was taken away was three-quarters of an hour or an hour? A Right.

Q And how long he was there before that you don't know? A Well, it couldn't have been very long.

Q I am not asking you that. You of your own knowledge don't know? A No, I don't know.

Q You don't know how long he was lying outside before he was taken inside? A No.

By Mr. Currie.

Q One additional question. Was Dr. Gesswein, who was sworn, the company's physician? A Yes, he was the company's physician.

Q And was he the company's physician when you left there? A He was.

Both Sides Rest.

MOTION FOR DIRECTION.

Mr. Brown: If your Honor please, I want to move for a direction of the verdict in favor of the defendant on the following grounds:

1. That there has been no negligence shown on the part of the defendant that was the proximate cause of the injury received by the plaintiff.

The Court: I incline to the view that the situation which prevailed at the end of the plaintiff's case has not been changed or altered by subsequent testimony and that the question at issue with regard to negligence is one of fact for the jury rather than for the Court to decide, and therefore that the motion should be overruled and an exception allowed.

(Objection noted for defendant as ground of appeal.)

Mr. Brown: I move for a direction also on the ground that it now appears that Mr. Freschi contributed by his own negligence or want of care to the injuries for which he is bringing suit, or, in other words, on the ground of contributory negligence.

The Court: I also think that that question is one for the jury, for the reason that there is a sharp contradiction of the testimony with reference to the place on the roof where the employees of the defendant were working; they insisting that they were twenty-five or thirty feet away from the spot on the ground where the plaintiff was working at the time of the injury alleged by him to have been received, and witnesses on

behalf of the plaintiff testifying that the employees of the defendant were working on the roof directly overhead; it being a question, therefore, in dispute as to where the employees were at the time, it becomes a question for the jury to determine not only as to the fact of negligence but of contributory negligence; because the Court will not assume that the plaintiff was charged with knowledge that any tools would fall, or if they did fall that it would not be due to the negligence of persons responsible or in whose custody they were. Therefore the issue as to how the accident happened is one for the jury, as I see it.

Mr. Brown: Your Honor says that the testimony of the plaintiff's witnesses is that it was directly overhead. Mr. Freschi says that he was ten feet away; he used the term ten feet more or less. Bingham didn't testify to it until when recalled to the stand, and now he admits that he testified before five or eight feet away, but today, as I say, but three or four. The only other testimony had on it, McCann, did not testify on this trial, although he did on the others. The only other testimony is that of Vecco, and is that the position he is in, he says "over"; he did not use the word "directly." So that the testimony, as I remember it, of the plaintiff's witnesses is not that they were directly overhead.

The Court: Counsel's statement of his recollection of the testimony would tend to indicate that there is a disputed question of fact as to where the scaffolding actually was at the time. In the circumstances I think I

have to allow the jury to ascertain that as a fact.

(Objection noted for defendant as ground of appeal.)

Mr. Brown: Then on the other ground, that the statute of limitations has interposed since the last cause of action, and upon which the case is being tried, was brought.

The Court: The same ruling will apply as heretofore on that subject. You may have an exception.

(Objection noted for defendant as ground of appeal.)

CHARGE OF THE COURT.

Ladies and Gentlemen of the Jury: This case has been so thoroughly and exhaustively argued to you by the respective counsel for the parties that I shall content myself with limiting the charge comparatively to a mere statement of the law as it appears to me to be applicable. You will understand that counsel are here representing their respective clients; that the nature of their employment obviously means that they must present all of the facts and the testimony and their interpretation of those facts and testimony in accordance with the desires, naturally, of their clients, and just as though their clients themselves were speaking to you instead of these professional and trained and experienced attorneys representing them.

Now a perfect example of what may happen in a summation made by counsel has just been indicated to you by counsel for the defendant

taking exception to the remarks of counsel for the plaintiff. You also have heard counsel for the plaintiff take, during his summation, the same exceptions to the remarks of counsel for the defendant. The rule applicable in such a situation is that you are judges of the facts. It is your recollection that must prevail as to what the several witnesses testified to. It is you who must determine and assess the weight and credibility that shall be given to the several witnesses, having seen them on the stand, observed their demeanor, and then you determine whether that which they testify to was within their knowledge, whether they were speaking truthfully that which would come under oath and then whether your recollection of the testimony that is under criticism by the respective counsel is supported by such testimony or whether or not there is no such testimony at all. You do not have to agree with these lawyers; you listen to them; you are expected, of course, to assess the arguments that they make pro and con, whether it be for the plaintiff or for the defendant, naturally. That is involved in the very nature of their employment. But bear in mind that they are speaking for their respective clients. Now obivously where there is a contradiction in the testimony, where there is a debatable question, as there are many in this particular case, after all your function is a very simple one. Who is right and who is wrong in this matter? And you will determine the fact in accordance with the rules of law the court will give you.

Now of course that means that you have got to consider the real issue, and moreover, you will have to winnow the wheat from the chaff, and that which is mere chaff and not wheat,

involving the merit of the question to be solved, of course you will disregard. And so in the arguments of counsel. They have the license permitted by our practice to put any interpretation they may see fit in accordance with the idea as it may benefit or harm the particular client that is being spoken of. And always remember that whatever they may say and whatever reference they may make to the testimony, if it is not in accordance with your recollection, it is your recollection that prevails rather than theirs.

So with this controversy just now as to whether there was any testimony on this subject or that subject, as you have heard counsel indicate, it is for you to say whether, in accordance with your recollection, there was or was not such testimony, and judge whether the criticism is justified or whether the statement that counsel has made is correct. In other words, never forget that you are judges of the facts; you determine the issue always under the rules of law that the court lays down for your guidance.

Now I may say that this is a case in which the plaintiff is seeking to recover compensation for an injury, and he alleges that that injury was due to the negligence of the defendant, through his employees, in so carelessly handling some instrument while working upon the roof of the building referred to as a leanto at the time of the accident, while he, the plaintiff, was working on the ground for the owner of the building; namely, the defendant was an employer of those who are claimed to have been negligent. The plaintiff was employed by another employer, namely, the owner of the property on which the building was being constructed.

Now there has been brought out in this case—and I am very anxious, I mean now in a sense of your understanding the relation of the law to the matter, that is to say, that it appears that this plaintiff has been receiving compensation under what we know as the Workmen's Compensation Act of the state. Every employer in the state, in the event of an employee being injured while in the course of his employment, is required to pay the employee so injured a stipulated sum per week for a certain period of weeks on the basis of the wage that is being paid at the time that the injury is received. And in such case the question of negligence is not involved at all. The employer is obligated by the very nature of the employment, under the law, to compensate his employee if injured while in his employ and in the line of his work or in the course of the work. But because that is so that does not prevent the employee, if he is injured through the negligence of a third person, from bringing suit in his own right to recover compensation, and the measure of compensation in such a case is wholly different from that laid down in the schedule under the employers' liability act. In other words, under the latter act there is compensation awarded on the basis of a percentage of wage being paid to the employee at the time of the accident or injury. And so where it appears that the injury was due to the negligence of the defendant and a third person, it is provided in the law, assuming that an employer gives a proper notice to the third person who may be held responsible for the injury, to recover or be reimbursed by such third person for the amount that he, the employer, has been obliged to pay under the

Workmen's Compensation Act. In other words, the idea of the law is that a third person shall not go free of his legal obligation to respond in damages if it is shown that he in a negligent sense was responsible for the employee's injury. He is not permitted to go free from any such responsibility at all. If he be the proximate cause of the injury in a negligent sense, why, then the employee may recover, and he can recover as much as he proves his injury is entitled to under the rule regarding compensation for injury directly resulting from a negligent act.

Now the law on the subject is this; and I am giving you this specifically because you are not to misuse this law, upon the theory that because the plaintiff has been paid here so much a week for some period of time, dating from the accident, by his employer, the Metallurgical Chemical Company, which apparently was insured in some insurance company, but nevertheless it is because the plaintiff was the employee of the Metallurgical Chemical Company that the insurance company became liable to pay in behalf of the Metallurgical Chemical Company. But the law is this: "That where a third person or corporation is liable to an employee or his dependents for an injury or death, the existence of a right of compensation from the employer under this statute shall not operate as a bar to an action of the employee or his dependents, nor be regarded as establishing a measure of damage therein." The measure of compensation under the employers' liability act and the measure of compensation for a negligent act under the common law are wholly different, as I shall presently indicate to you. "—Nor be regarded as establishing a measure of damage

therein. However, in the event that the employee or his dependents shall recover from said third person or corporation a sum equivalent to or greater than the total compensation payments for which the employer is liable under this statute, the employer shall be released thereby from the obligation of compensation. If, however, the sum is less than the total of compensation payments, the employer shall be liable only for the difference. The obligation of the employer under this statute to make compensation shall continue until the payment, if any, by such third person or corporation is made."

Now it does appear in this case that the Metallurgical Chemical Company or this insurance company has from time to time been paying this plaintiff some sort of compensation based upon what the wage was at the time of the injury. But the law is that that does not release this defendant, if it be shown under a fair preponderance of the proof it was his negligence or that of his employees that was the proximate cause of the injury alleged in the complaint.

So that you are not to misconstrue this law, therefore, in its application. You will not be permitted to say, "Why, this man has already been paid some sum and we will let it go at that." That is not the law. As a matter of fact the general rule is this: that what the plaintiff may have recovered under the compensation act from his employer is wholly immaterial to you in a case of this kind. You would have no right to consider that phase of it at all, because of the very nature of the section of the statute I have just read to you; the language being: "Wherever a third person or

corporation is liable to an employee or his dependents for an injury or death, the existence of a right of compensation from the employer (in this case the Metallurgical Chemical Company, as applying it to this plaintiff) under this statute shall not operate as a bar to an action of the employee or his dependents nor be regarded as establishing a measure of damage therein."

Now I have only allowed that phase of the case to come to you because it was suggested by counsel for the defendant that there is no real merit to this suit at all; that as a matter of fact the plaintiff was not injured through the negligence of the employees of the defendant; he was not hurt because such employees carelessly allowed the bar, to which reference has been made, to be dropped over the spot or at or about the spot where plaintiff was working on the ground. The suggestion was that as a matter of fact the plaintiff never would have brought this suit but for the fact that his employer, the Metallurgical Chemical Company, had been paying out moneys under the compensation act, and therefore the real purpose of the suit was to enable that company to recover from the defendant what it had paid through its insurance company to the plaintiff.

Now therefore only as that had a bearing upon the credibility that you will accord to a man like Bingham, for example, who appears to have been an employee of the Metallurgical Chemical Company, or any other employee of that company that has been produced here to testify as a witness, I have allowed that phase of the case to come in. Bear in mind that you cannot use that fact in favor of the defendant to release him

from his obligation to respond if it be proven under a fair preponderance of this case that he or his employees were negligent as charged.

The case is one in which the plaintiff charges the defendant, through his employees, was negligent; and in that aspect I may say it is rather a simple one. The rules at law applicable are not difficult to understand. The charge is that the employees of the defendant working upon the roof at the time that the plaintiff was working upon the ground, one or more of them—which one, of course, is a matter for you to determine under the evidence, if either one is indicated—carelessly and negligently allowed an iron bar which such employee of the defendant was using at the time to drop to the ground the distance indicated in the testimony, with the direct result that the plaintiff was hit and injured as claimed.

Now I may say that ordinarily where an occurrence of that sort occurs there is a rule of law which I regard as applicable, and it is this: "The principle is that when through any instrumentality or agency under the management or control of a defendant or his servants, there is an occurrence injurious to the plaintiff which in the ordinary course of things would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords prima facie evidence that there was want of due care." Now you are walking along a street or highway and some mason or carpenter or other artisan is working upon the roof of a building and he carelessly throws over something and it comes down upon the sidewalk and hits you and you are injured: the rule of law is that therefore the proof that such a thing happened and hurt you

is enough, is prima facie proof of negligence, providing you show the person who was responsible for it and that such person was in the possession or control of the instrumentality which caused the injury when it fell.

Now here there are a number of elements that must be proven by this plaintiff before you can award him any verdict at all. The fundamental rule, of course, on the main case is that since he charges the defendant or his employees with a negligent act, that is to say, the failure to exercise the care of ordinarily and reasonably prudent persons or an ordinarily and reasonably prudent person, in the immediate circumstance of the case under inquiry, therefore the plaintiff must satisfy you under a fair preponderance of the proof, by which is meant the greater weight of credible legal testimony, taking it as a whole, no matter from which side it comes, that some employee or the employees of the defendant negligently allowed an instrument of the nature charged in the case by the plaintiff to fall, causing injury to him.

Now that is the first thing that the plaintiff must do; and it is needless for me to say to you that if he has failed to prove either that the instrument in question was in the custody of the defendant or one of his employees, that you could not hold the defendant. In other words, if some employee of the Tuller Construction Company was responsible for the falling of a bar or whatever it may have been, you could not hold this defendant, necessarily. The fair preponderance of the proof must show to your satisfaction, by credible legal evidence, first, that the bar fell; second, that it was in the custody of the defendant or one or more of his employees at the time;

third, that its falling was due to the carelessness, the negligence, of such employee or employees; and fourthly, that it was the bar that struck the plaintiff and that it was the proximate cause, together with the items I have just indicated, of the plaintiff's injury. In other words, if he left out any one of those features the plaintiff then would have failed to satisfy you by a fair preponderance of the proof of the negligence. Because you have heard me say during the term that the mere happening of an accident is not enough; the mere fact that the plaintiff was hit in the circumstances alleged by him, if they be proven, is not enough. You could not award damages to the plaintiff and against the defendant on mere proof of the accident. That is not enough. There must be some proof of negligence on the part of the defendant or his employee or employees in the respect I have indicated: namely, that the bar was in the control of such employee or employees; that it dropped; that the drop was due to the negligence of such employee or employees; and that it did strike the plaintiff; and finally, having under the fair preponderance of the proof established all those features, then that it was the proximate cause, they were all the proximate cause, they combined and united in the proximate cause of the plaintiff's injury. For "The damages chargeable to a wrongdoer must be shown to be the natural and proximate effect (and as in this case) of his negligence. And the term 'natural' imports such as might reasonably have been foreseen, such as occur in the ordinary state of things; and the term 'proximate' indicates that there must be no culpable and efficient agency intervening between the defendant's negligence and the loss.

The proximate cause is that which naturally and probably led and which might have been expected to produce the result. It is the efficient cause, the one that necessarily set the other causes in operation."

Now here there is a sharp contradiction of testimony, and it is for you to say who is telling the truth. You will apply your usual experience in ascertaining where the truth lies, in order that you may determine whether the plaintiff has by a fair preponderance of the evidence satisfied you of the negligence of the defendant as charged. The contradictory testimony is quite apparent. The plaintiff testifies where he was at the time of the accident, the receipt of the injury. He produces his co-worker, Vecco, who states under oath that as they were working on the cement foundation the plaintiff was injured at the very moment that a bar or piece of iron fell against his foot. Now, of course, that brings it within the circumstantial confines of testimony and evidence. And, of course, to some extent the case is based upon circumstantial evidence. In other words, it has been suggested here that no eye-witness to the dropping of the bar from the scaffolding, where the employees of the defendant were working, to its downward course in striking the plaintiff has been produced. But you have a right to consider the circumstances: men working upon a scaffold, according to the plaintiff, at or above his head; that he was suddenly struck; an injury occurred. A witness present at the moment feels an iron bar falling against his foot, looks down and sees it. Was there any causal relation between the injury of the plaintiff and the presence of the bar against the foot of the witness Vecco? If under your examination of all the testimony in the case you

arrive at the conclusion that there was no causal relation between the plaintiff's injury, that every other thing or cause had been eliminated except the dropping of the bar, then I charge you you would have a right to consider whether or not the plaintiff had not proven under a fair preponderance of the proof that the proximate cause of his injury was the falling of the bar under the rule that I have given you, through the negligence or carelessness of the defendant by an employee or employees at the time in the circumstances which we are here considering, involving the defendant's work through his employee upon the roof of the building in question.

Now it is unnecessary for me to go further into any suggestion with reference to the testimony. Counsel for both sides have told you that a witness on one side or another is not to be believed. That is for you to say, peculiarly your function; you are judges of the fact. You pass upon the weight and credibility of the testimony, and then say who is telling the truth as the truth lies, if you are able to ascertain it, and find that the plaintiff has satisfied you under a fair preponderance of the proof or the credible, believable, truthful testimony of a legal nature, then will you decide in what direction a verdict should go in this case. I say if the plaintiff has so satisfied you under that rule of the preponderance of proof or the greater weight of credible legal testimony, that is to say, that it was the defendant or his employee or employees who are responsible in a negligent sense, as I have heretofore indicated in this charge as required under the rule; if he has so established to your satisfaction under those rules that I have given you, then you have a second question, and that is this: whether the plaintiff was injured through

his own negligence, even though that of the defendant or his employee or employees has been shown. Contributory negligence is present in a given case when the injured person by his own negligence has contributed to the injury in such a way that but for his own negligence he would have received no injury from the negligence of the other party. Now that is a defense and it must be proven under a fair preponderance of the proof; that is to say, it must appear under all of the evidence in the case, no matter from which side it comes, that the plaintiff was guilty of contributory negligence within the definition I have given you before he can be held responsible therefor. In other words, the plaintiff does not have to prove that he was free from contributory negligence; that is not the law. His duty is to prove the negligence of the defendant under the rules of law I have given you before he can recover. The burden is on the defendant to show the contributory negligence of the plaintiff, even though his, the defendant's, negligence appears, before the defendant can take advantage of that rule regarding contributory negligence.

Now, of course, that does not take the duty from the plaintiff of proving the negligence of the defendant. That always remains. The burden never shifts there. It is always on the plaintiff. And this question of contributory negligence, while a defense, is only to be considered by you where you find the plaintiff has proven the negligence of the defendant as charged under a fair preponderance of the proof. I am quite aware that those two phases of negligence might lead to a confusion in the minds of the jury, and when I say that the burden is on the defendant to prove the contributory negligence of the plaintiff I do not mean by that that the plaintiff is

relieved from the responsibility of proving the negligence of the defendant; because the burden there never shifts; it always remains with the plaintiff; and, of course, if he fails to prove negligence to your satisfaction as charged against the defendant, under a fair preponderance of the proof, or the greater weight of credible legal evidence, the plaintiff fails; he cannot recover. But if he does prove the negligence of the defendant but at the same time it appears under all of the testimony in the case, by a fair preponderance of the proof, that the plaintiff himself was guilty of contributory negligence, then again he cannot recover. He can only recover where it appears in the case that he has proven the negligence of the defendant and on the whole case it appears that he was free from contributory negligence.

Now that question of contributory negligence centers around the claim of the defendant that the plaintiff had been warned on the day in question on one or more occasions—how many you will recall—that he was working in a dangerous place, to get out from under that operation of the roof where the defendant and his employees were working. And while I am not prepared to say to you as a matter of law that the mere warning would amount, if the plaintiff failed to observe that warning, to evidence of contributory negligence, I am not so sure that even in this situation with which we are dealing, men on a roof, other men on the ground, working for different employers, presents a case where the men on the ground were bound to assume that the men on the roof were going to do some negligent act, such as allowing carelessly something to drop which might fall upon and injure the men on the ground; bearing in

mind that they were working for different employers.

Now it has been suggested in this case, for example, that since the plaintiff was employed by the Metallurgical Chemical Company, that that company was bound to provide him with a safe place to work, and since it did not so provide him with a safe place to work the proximate cause of his injury was not the negligence of the defendant, his employee or employees, but the Metallurgical Chemical Company. I am going to leave that question to you to determine as a fact. I shall not give a binding instruction upon it; because it is my conception that it is for you to say what was the proximate cause of the injury of the plaintiff, and whether it was due to the negligence of the defendant, his employee or employees.

So that therefore this question is left with you to determine: did the plaintiff have a right to assume, was he charged with knowledge that even if the warnings were given as alleged that something would drop from the roof to his injury, and therefore having that knowledge was he bound to stop work entirely on the ground for his employer because of the warnings that are alleged to have been given by the defendant's employees in this case? It is a question of fact, in my mind, not one of law, and I am leaving it to you to determine. And therefore if you found that the plaintiff, by working where he did without exercising the care of an ordinarily and reasonably prudent person, placed himself in a position of danger which he should have known by reason of the warnings given, and whether thereby, by continuing to work, he contributed to his own injury in such a way that but for it he would have suffered no injury from

the negligence of the defendant or his employees, if it be proven. So that you will bear in mind the law of the case as I lay it down for you in considering the question of contributory negligence to which the court has heretofore referred.

In the event that you find in favor of the plaintiff under a fair preponderance of the proof, which means the greater weight of credible legal testimony, and you further find there was no contributory negligence on the part of the plaintiff, he would be entitled to recover. I ought to say to you that negligence is never presumed; it is never guessed at; it is never taken as a matter of course. As heretofore stated, the mere happening of this accident is no proof of negligence; you cannot presume it. The law is that it must be proven and the burden is on the plaintiff to prove it by the greater weight of credible legal testimony or, as I say, a fair preponderance of the proof. Therefore, as I say, if it has been proven in this case and you find that there was no contributory negligence on the part of the plaintiff, then he would be entitled to be awarded a sum which, in your judgment, would properly and adequately compensate him for his injury. But you would have to ascertain what that injury was; whether or not there was any pain and suffering that accompanied it; and having so ascertained, bearing in mind that the injury and the pain and suffering are considered together—if there was no pain and suffering with the injury of course you would simply consider the injury—but in all reasonable probability there was pain and suffering with the injury—then you take that feature in consideration. Having ascertained, therefore, the injury, the nature of it, the extent, whether or not in all reasonable prob-

ability there was any pain and suffering accompanying it, you would award him a sum which in your judgment would compensate him for that injury. That means that you have to ascertain, under a fair preponderance of the proof in a proximate sense what the injury was.

Now it is suggested here that as a matter of fact the plaintiff in his present condition does not show the injury that he received as a result of the fall of the bar as charged by him. In other words, the defendant urges upon you here, through counsel, that the fact that he went through an operation at the hands of Dr. Ney was not one of the necessary results of the injury; that as a matter of fact Dr. Ney did not know what was the matter with the plaintiff but he knew that there was something, and therefore he began to explore, and that his present condition is due to the exploratory operation of Dr. Ney rather than the injury. Well, of course, you will examine that phase of the case and it is for you to say whether the argument now made to you is based upon evidence in the case, or whether after all the injury was as is claimed by the plaintiff and that an operation became necessary in attempts to cure the plaintiff of that injury. Of course if that be so then you would not arbitrarily hold that the operation in question was unnecessary; you would not have any right to do that. But your business is to ascertain what the injury was proximately resulting from the negligence of the defendant, his employee or employees, if it be proven under a fair preponderance of the proof; because you will observe the rule of law is that the injury must be the proximate cause, within the definition I have given you of it.

Now the plaintiff claims as a matter of fact his injury created a depression on the brain and the only way he could be relieved was by having an operation performed such as that which is said to have been done by Dr. Ney. Whether you agree with the plaintiff and his counsel or with the defendant and his counsel on that subject becomes a question of fact entirely. I have nothing to say about whether it would indicate it to you. It is for you to determine and ascertain and infer the fact upon adequate testimony found in the case. If you so find it, what that injury was and whether the operation was reasonably necessary in the circumstances in attempts to cure the plaintiff of his injury proximately resulting from the alleged negligence of the defendant or his employee or employees.

Now the case is left with you for your consideration. I have been asked to charge a number of requests here, but I think that I have substantially done so, and those which I have not charged I have surmised there was no necessity for in the circumstances. Suffice it to say that I will say this to you: that if you find the plaintiff was warned by the defendant or his servants to keep away from the place where the defendant's servants were working, and that the plaintiff disregarded those warnings, that the plaintiff was guilty of contributory negligence and cannot now recover against the defendant. I charge you this always provided you find that such warnings indicated a conveyance of knowledge to the plaintiff that if he ignored such warnings he would be hurt; in other words, what I have heretofore said on the question of whether or not he was bound to assume that the employees of the defendant would negligently drop some material,

such as the bar here in question, or not is for you to say. I am leaving that question to you, and therefore I charge this request with the qualification heretofore indicated in my charge and just referred to.

If the danger existing at the time and place of the accident was a perfectly obvious one and one of which the plaintiff ought reasonably to have been fully aware, and if the plaintiff continued to work where he did with full knowledge of the danger, he assumed the risk of such an injury as he received and cannot now recover from the defendant.

I charge you with that with the qualifications heretofore indicated to you in the charge which has been delivered to you.

If the plaintiff continued to work with full knowledge of the obvious and apparent danger which existed at the time and place of the accident, he was guilty of contributory negligence which bars a recovery from the defendant.

I so charge, with the qualification heretofore stated to you under the Court's definition of contributory negligence, whatever the Court had to say upon that subject, and whether or not the plaintiff was bound to assume that such warnings created a condition which would convict him of contributory negligence if he ignored them.

The plaintiff was bound to do everything reasonably possible to minimize the effect of the injury and even though your verdict should be for the plaintiff, if you find that the plaintiff at any time omitted to take any measures which would have mitigated the injurious effect of the injury, this must be taken into account by you in estimating the damages to the plaintiff.

I so charge you, also with the qualification heretofore indicated in the remarks of the Court on that subject, which need not be here repeated, although I ask you to consider that I have reiterated them, without going over them in detail, directing your attention to the previous remarks, and that you must also consider that as well as this request.

The case is left with you for your consideration. I may say that the defendant here denied all causal relation to this injury. As a matter of fact the defendant and his employees testified that they were not over the plaintiff at the time the accident happened and they were not responsible for it. That becomes, of course, an issue of fact, bearing in mind that the fundamental rule is that the plaintiff carries the burden of satisfying you under a fair preponderance of the proof or greater weight of credible legal evidence that the negligence of the defendant; likewise it must appear on the whole case, under all the evidence, that the plaintiff himself was not guilty of contributory negligence.

If you find against the plaintiff, and that there should be no recovery, there can only be a recovery if you find in his favor on this subject, in accordance with the rules of law I have given you.

DEFENDANT'S EXCEPTIONS.

Mr. Brown: Defendant excepts to that part of your Honor's charge wherein you say it is the right of counsel to interpret the testimony as they may see fit. My understanding is that it is not the right of counsel to do that; that all they can do is to argue from the fair inferences that might be drawn from the testimony.

2. The defendant also excepts to that part of your Honor's charge wherein you say the jury is not to consider the question of compensation except in so far as it was advanced to show the motive of the Metallurgical Chemical Company—you did not use those words but substantially—that they were behind this suit and not the plaintiff. My reason for taking this exception is that it is not only by reason of motive but also it appears in the plaintiff's own testimony, in the depositions of Dr. Ney, that the compensation had some relation to this man's present condition, that is to say, he is suffering from compensatory or compensation neurosis, and that compensation did have something to do with his present alleged inability to work.

3. The defendant also excepts to that part of your Honor's charge in which you say that the principal or the agent—it is the doctrine of *res ipsa loquitur*.

The Court: Do you object to my charging the doctrine of *res ipsa loquitur* on the ground that it does not apply to this case?

Mr. Brown: Exactly, and the language you use, that where this occurrence happens and everything—I think your Honor knows what I am directing your attention to.

Defendant's Exceptions to Charge.

4. The defendant also excepts to the illustration that your Honor gave of a person walking along a street and carpenters or masons working up in a building and something falls down and it strikes the person; if it was proven that it was in their possession or custody, and then they are presumptively negligent under the doctrine of *res ipsa loquitur*. I take exception to that for the reason that a person walking along a street is not in the same position and the example is not the same, or the illustration is not the same as Freschi was working at this particular place.

5. The defendant also excepts to that part of your Honor's charge wherein you say that the defendant, according to the plaintiff and his witnesses, were at or above his head or the place where he was working, and that the bar fell and struck his foot while they were so working above. The reason I am making that exception is that there is no testimony, as I remember it, that they were at or above his head; that the testimony is to his knowledge they were to one side.

6. The defendant also excepts to that part of your Honor's charge wherein, on another occasion, you charged the doctrine of *res ipsa loquitur* by saying that where it appeared, excluding all causes of how this man was injured except the dropping of the bar, "then I charge you that you have the right to consider that the falling of the bar was the proximate cause of the injury." Your Honor has left out in that part of the charge that they have got not only to exclude all other evidence or causes for it, but also that the bar was caused to drop because of the negligence of the defendant.

7. The defendant also excepts to that part of your Honor's charge wherein you say that "con-

tributory negligence is only to be considered by you where the plaintiff has proven to you the negligence of the defendant." Our understanding of the law is that contributory negligence has got to be considered by the jury whether or not the negligence of the defendant has been proven.

8. The defendant also excepts to that part of your Honor's charge wherein you have referred to the burden of proof on the part of the defendant to prove contributory negligence. You used the word on two or three occasions, "under all the evidence," and on each of those occasions I object to that because I think the law is that not by the evidence but by a fair preponderance of the evidence, the same as the plaintiff, and that the word "all" in each case is prejudicial to the defendant and was an erroneous charge to the jury.

9. The defendant also excepts to that part of your Honor's charge wherein you say that contributory negligence centers around the fact that the plaintiff had been warned to get out from where he was working. We except to that because the contributory negligence not only depends upon that but also on the fact that this man testified that he knew there was danger there and notwithstanding he paid no attention; or, in other words, that he went along heedless of the danger that he knew existed, which is a different element of contributory negligence and the failure to obey a warning.

10. The defendant also excepts to that part of your Honor's charge wherein you say that you are not so sure you are not right to charge as the law that the mere disregarding of a

warning to keep away from the place where these men were working, or words to that effect, is the law; that you left that question to the jury as a question of fact; that is, the disobedience to the warning if such was given.

11. The defendant also excepts to that part of your Honor's charge wherein you left the question of whether or not it was the duty of the employer, the Metallurgical Chemical Company, to supply a safe place to work. We contend that that is also a question of law which your Honor should instruct the jury upon and not leave it as a jury question.

12. The defendant also excepts to that part of your Honor's charge wherein you say that it was for the jury to say, after concluding the matter about warning, you again added in the second place: "Was the plaintiff bound to stop work entirely? It is a question of fact for you to determine. Even though he knew about warnings or had knowledge of warnings, was it then his duty to stop work entirely?" You left that to the jury.

13. The defendant also excepts to that part of your Honor's charge, at the conclusion thereof, where you repeated again that the burden of contributory negligence being upon the defendant by all of the evidence in the case.

14. The defendant also excepts to your Honor's failure to charge the second request as requested by the defendant in his requests to charge.

15. The defendant also excepts to your Honor's failure to charge the fourth request as requested by the defendant in his requests to

charge. We think that that is a very material thing in this case, that they ought to prove some negligence, even under the doctrine of *res ipsa loquitur,* or as the case was presented to the jury; that it was necessary for the plaintiff to give proof as to the cause of thing which was alleged to have been a negligent act.

16. The defendant also excepts to your Honor's failure to charge the fifth request as requested by the defendant in his requests to charge.

17. The defendant also excepts to your Honor's failure to charge the sixth request as requested by the defendant in his requests to charge.

18. And then again your Honor charged the fourteenth, fifteenth, sixteenth and seventeenth requests and you attach thereto a qualification. We object to your Honor's failure to charge the requests as made, and also to the manner in which they were charged.

And your Honor allows me an exception to each one?

The Court: Yes.

PLAINTIFF'S EXCEPTIONS.

Mr. Currie: The plaintiff prays an exception to the refusal of the Court to permit the depositions offered and accepted in evidence to be taken into the jury room.

2. Plaintiff takes an exception to that part of the Court's charge to the effect that it is incumbent upon the plaintiff to prove the negli-

gence of the defendant; the reason being that in such a case as this it is only incumbent upon the plaintiff to prove the occurrence of the event by a tool or piece of apparatus under the control and management of the defendant; that upon proof of this negligence will not be presumed but inferred; thereupon it is the duty of the defendant to explain the happening of the accident.

DEFENDANT'S REQUESTS TO CHARGE.

1. The burden of proof is on the plaintiff to establish negligence on the part of the defendant by a fair preponderance of the evidence.

2. Negligence on the part of the defendant must be proved by the evidence. It will not be presumed. There is also a presumption against negligence.

3. Mere proof of the fact that the plaintiff received an injury is not sufficient to establish negligence on the part of the defendant.

4. It is necessary for the plaintiff to give proof as to the cause or thing which was alleged to have been the negligent act which produced the injury or proof of such facts from which the existence of such cause or thing constituted the alleged negligent act, was the only reasonable inference that could properly be drawn.

5. The plaintiff must also prove that the negligent cause or thing which produced the injury was in the possession of and under the control or management of the person charged with the negligence or of his servants.

6. If you find there is no proof in this case as to what caused the injury to plaintiff then your verdict should be in favor of the defendant.

7. To warrant a verdict in favor of the plaintiff, it is not sufficient that the plaintiff prove a mere possibility that the injury was caused by the negligent conduct of the defendant or his servants.

8. The plaintiff is not entitled to a verdict unless negligence on the part of the defendant or his servants is the only inference that can reasonably be drawn from the facts proved by the plaintiff.

9. In the absence of direct evidence as to the cause of the injury, the plaintiff must show not merely the existence of possible responsibility by the defendant, but must show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant and would exclude all possibility that the cause of the injury was one with which the defendant was unconnected.

10. Where the plaintiff's evidence is equally consistent with the absence of negligence as with the existence of neglignce, on the part of the defendant, the plaintiff must fail.

11. In this case there has been no proof of any fact from which the conduct of the defendant can be ascertained and therefore a verdict must be for the defendant.

12. If the plaintiff has failed to offer any proof as to the cause of the injury and there is therefore no evidence from which any negli-

gent conduct on the part of the defendant can be found then your verdict must be for the defendant.

13. The doctrine of *res ipsa loquitur* is not applicable to the present case.

14. If you find that the plaintiff was warned by the defendants or his servants to keep away from the place where the defendant's servants were working, and that the plaintiff disregarded these warnings, the plaintiff was guilty of contributory negligence and cannot now recover against the defendant.

15. If the danger existing at the time and place of the accident was a perfectly obvious one and one of which the plaintiff ought reasonably to have been fully aware and if the plaintiff continued to work where he did with full knowledge of the danger, he assumed the risk of such an injury as he received and cannot now recover from the defendant.

16. If the plaintiff continued to work with full knowledge of the obvious and apparent danger which existed at the time and place of the accident, he was guilty of contributory negligence which bars a recovery from the defendant.

17. The plaintiff was bound to do everything reasonably possible to minimize the effect of the injury and even though your verdict should be for the plaintiff, if you find that the plaintiff at any time omitted to take any measures which would have mitigated the injurious effect of the injury, this must be taken into account by you in estimating the damages to the plaintiff.

Exhibit D. 4.

EXHIBIT D. 4.

CLAIM DEPARTMENT.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED,
of London, England.

CHARLES D. HILLES,
Resident Manager for State of New York,
79 John Street,
Telephone—2160 Bowling Green.

Samuel Appleton,
United States Manager,
Boston.

New York, August 20, 1924.

A. B. Mason,
90 Jefferson Street,
Perth Amboy, N. J.

Dear Sir:

RE: WEC-U-13349—Accident—7/24/24
S. Freschi vs. Metallurgical & Chemical Company, Inc.
*____*____*____*____*____*____*

Please take notice that on or about July 24th 1924, Sylvester Freschi, while putting in some concrete base for an iron pillar in building being constructed at Lloyd Road, Matawan, N. J., in the course of his employment by the Metallurgical & Chemical Company, Inc., was injured through the negligence of yourself, your agents, servants, or employees, in carelessly and negligently dropping a chisel.

No negligence on the part of the Metallurgical & Chemical Company, Inc., its agents, servants, or employees, in any way contributed to the said accident. The injuries sustained by the said Sylvester Freschi, at the time and place afore-

Exhibit D. 4.

said, having been caused by an accident arising out of and in the course of his employment by the Metallurgical & Chemical Company, Inc., that Company has entered into an agreement with the said Sylvester Freschi to pay him compensation at the rate of $17.00 per week in accordance with the provisions of the Workmen's Compensation Law of the State of New Jersey.

Take notice, therefore, of this statement of the compensation agreement between the said Metallurgical & Chemical Company, Inc. and its said employee, Sylvester Freschi, for the said Metallurgical & Chemical Company, Inc. is entitled under the provisions of the Workmen's Compensation Law of the State of New Jersey to receive from you, or such other person or corporation as may have been responsible for the dropping of the chisel at the time and place aforesaid, upon the payment of any amount in release or in judgment by you, or other person or corporation, on account of its liability to the said Sylvester Freschi, a sum equivalent to the amount of compensation payments which the said Metallurgical & Chemical Company, Inc., employer of the said Sylvester Freschi, has theretofore paid to the said Sylvester Freschi, its employee, and the said Metallurgical & Chemical Company, Inc. will hold you liable to it for such sum, which shall be deducted by you, or other person or corporation, as aforesaid, from any sum paid in release or judgment to the said Sylvester Freschi.

Very truly yours,

METALLURGICAL & CHEMICAL COMPANY, INC.

Walter L. Glenney

By Attorney.

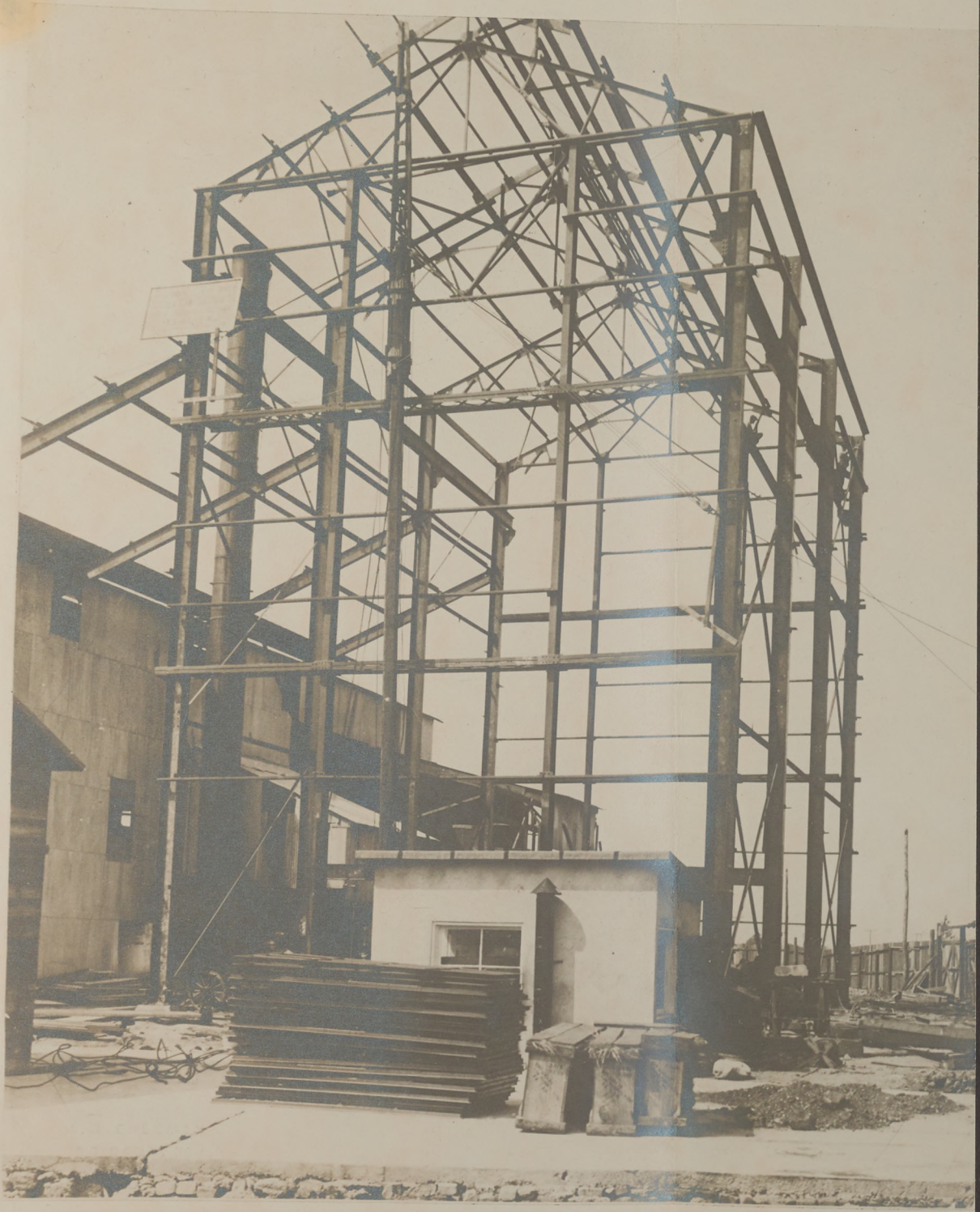

EXHIBIT D. 1.

New Jersey Court of Errors and Appeals

SYLVESTER FRESCHI, *Plaintiff-Respondent,* *vs.* ABRAHAM B. MASON, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF.

This case was tried at the New Jersey Supreme Court, Monmouth County, before the Honorable Rulif V. Lawrence, Circuit Court Judge, with a jury, and resulted in a verdict in favor of the plaintiff Sylvester Freschi and against the defendant Abraham B. Mason, in the sum of $20,000.00. Following the verdict judgment thereon was entered December 6, 1929, and from the whole of said judgment so entered the defendant Abraham B. Mason appeals to this court on the following grounds:

1. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously refused to grant a motion of the defendant to non-suit the plaintiff and allowed the defendant an exception to such ruling.

2. Because the learned Judge of the Circuit Court, who tried the case for the Supreme Court, erroneously refused to grant defendant's motion to direct a verdict in favor of the defendant and against the plaintiff and allowed defendant an exception to such ruling.

3. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously permitted the reading of depositions

of one K. Winfield Ney over the objection of the defendant and allowed the defendant an exception to the ruling permitting the reading of the depositions.

4. Because the learned Judge of the Circuit Court, before whom the said cause was tried, erroneously charged the jury and refused to charge as requested (pp. 355-6-7).

5. Because the court below erroneously entered a judgment in favor of the plaintiff and against the defendant, whereas the judgment should have been in favor of the defendant and against the plaintiff.

Statement of Facts.

The case arose out of a head injury alleged to have been sustained by the plaintiff while working for his employer The Metallurgical and Chemical Company, Inc., at Matawan, N. J., on the 24th day of July, 1924. The Metallurgical and Chemical Company, Inc., had contracted with the Tuller Construction Company, as a general contractor, to erect and construct a "recoveries building" C. p. 2). The defendant was an independent contractor working for the Tuller Construction Company, which company furnished the scaffolding and materials to the defendant. The defendant was employed to do the laboring work only (p. 306). On the day in question the steel or frame work of the building was almost completed by the Tuller Construction Company (Exhibit D. 1) and the defendant's employees were in the act of placing a corrugated sheet roofing on the part of the new building known as a "lean to"; the "lean to" being the slanting part of the roof that connects the new with the old building.

The "lean to" consists of three squares or bays which were about 20 feet square (p. 46). The defendant claims his men were working in the most westerly half of the first bay (pp. 193, 235, 261, 262, 281 to 283) at the time of the alleged injury to the plaintiff. While the defendant's employees were thus working in the construction of the roof the plaintiff was working on the ground under the second bay near a chimney that is shown in Exhibit D. 1. Plaintiff claims to have been about 10 feet from a position directly under where the defendant's men were working (p. 122). The defendant claims the distance was at least 25 feet. While thus working, the plaintiff says he was struck on the head with some object that gave him a scalp wound with no fracture of the skull and several months after he claims it was necessary to have an operation upon his skull to relieve a pressure that caused him pain (p. 116).

The defendant claims that Tuller's men who were known as the "iron men" were working over and closer to the plaintiff than the defendant's men and that the defendant's men were not the cause of the injury to the plaintiff. He also claims that in any event his servants and employees were not negligent in such a way as to cause injury to the plaintiff.

LAW.

POINT I.

The Trial Court erroneously refused to grant the motion for a non-suit made by counsel for the defendant-appellant. (Pp. 36-7.)

The substance of the testimony is that the defendant's men were from 10 to 25 feet from the

plaintiff when he was alleged to have been injured. This being so, it was physically impossible for the plaintiff to be struck by any tool or any object falling from the place where the defendant's men were working. The court then has the established fact that the plaintiff or his witnesses did not see the accident happen. The plaintiff's witness McCann testified when he was asked if other men were on there:

> "A Why some of Tuller's men were there" (p. 74).

The court further has the established fact that the plaintiff was at such a distance from the place in which the defendant's men were working that it was physically impossible for anything to be dropped by the defendant's men upon the plaintiff. It also appears by the plaintiff's witnesses and defendant's witnesses that other men were working on the roof on the day in question besides the defendant's employees. Parkstrom, a witness for the defendant-appellant, testified that the crane men were also working on the job on top of the roof putting in the train on which the crane was to be operated. The crane was to be operated on trolley rails fastened near the top of the roof (p. 183).

This witness further testified that he worked on the roof and said that the "iron men" who were Tuller's men were there putting in permanent fastenings to the iron and removing temporary ones thereby throwing the unused bolts to the ground (pp. 175 to 177). This procedure was necessary in order for the roofer to work. The "iron men" were to make the fastenings of the iron before the sheet metal was put on the roof. Parkstrom further testified that after they took

the bolts out of the temporary fastenings *they threw them away* because they were old bolts.

> "Q Were they working on the 'lean-to' that day ahead of you? A Yes, sir" (p. 177).

The court can see on Exhibit D. 1 that the crane boom is erected for the purpose of hoisting the crane. *It was necessary to have the crane in before the roofing was on and the work was taking its natural sequence.* The crane men were putting in the crane before the roof was put on and the "iron men" were putting on the fasteners before the roof was put on.

The witness John Tiedge said that Tuller's men were working there at the time on the "lean to" (p. 255). McDonald, who formerly worked with the Tuller men and who knew them, also said that the Tuller men were working there at the time of the accident (pp. 275 to 278). This testimony of other men working on the roof is not disputed except by the testimony of one witness and that is of Harry Jervis.

Jervis was at the job about noontime (p. 84). *Jervis was not there at the time of the accident.* He could not tell whether the foreman worked there that afternoon or not. When asked,

> "Q And did he remain there working? A That I don't know.
>
> Q You don't know how many remained there working after you left, do you? A No, sir" (p. 84).

This witness testified that the time sheets that he made out didn't show them working on that job but showed that some of the men were working on another job in the afternoon. This testimony was admitted over an objection which the defendant contends was an improper ruling ac-

cording to the case of *Wise* v. *City of Clifton,* 1 Misc. Rep. p. 535.

Jervis stated that he did not know how many men were working on the job in the afternoon and the only reason he knew they quit was because Mr. Titus, the foreman, told him so. This is out and outright hearsay testimony. The testimony on this point is as follows:

"Q How do you know they had quit? A Because Titus told me so" (p. 84).

It may be noted that in the case of *Cetola* v. *L. V. R. R.,* 89 N. J. L. p. 691, the Court of Errors and Appeals sustained a motion for a non-suit at the close of the plaintiff's case. Such a motion was made in the case at bar but was overruled (pp. 165 to 170).

The doctrine was laid down in the case of *Brown* v. *R. R. Co.,* 68 N. J. L. p. 618, that if upon the plaintiff's case it appears that his negligence contributed to his injury then it is not an error to submit the case to the jury. It appeared in the Brown case that there was a trolley car collision in that the plaintiff did not exercise his powers of observation as keenly as he should and it is further submitted in the same case that the contributory negligence was not manifested as clearly as in the plaintiff's case. In the Brown case, *supra,* the motion for a non-suit was sustained at the close of the plaintiff's case.

It is a well known rule that one who receives injuries from the disregard of obvious dangers or a danger which could be discovered by the reasonable exercise of his faculties is regarded as being injured through his own negligence.

The law contemplates that every person having the capacity to exercise ordinary care and such failing concurring and co-operating with

the actionable negligence of defendant contributed to the injury complained of as the proximate cause. He is guilty of contributory negligence. This is true even though he was doing what he had a right to do. 46 *C. J.* p. 944, sec. 504.

It is true that by the doctrine of assumption of risk even though the risk was obvious, it may be free from any suggestion or fault of negligence on part of the employee. In the case at bar the condition of an employee being free from fault and negligence, if Freschi did not contribute in this manner to his own injury the accident would never have happened *regardless of whether the defendant was guilty of negligence.*

The fact is that he persisted and insisted upon working in a place that he knew was dangerous; therefore, he contributed by his own act to his injury. It appears that the plaintiff's conduct contributed to his injury. The fact that the defendant was guilty, if so proven, of negligence, does not entitle the plaintiff to recover.

Pa. R. R. Co. v. *Righter,* 42 N. J. L. p. 180.

The decision in the Righter case, *supra,* given by the Court of Errors and Appeals, held:

> "That the plaintiff, therefore, should have been non-suited."

In the case of *Dwyer* v. *N. Y. Lake Erie R. R. Co.,* 47 N. J. L. p. 7 it was held:

> "A person who in passing from a ferry boat to the dock puts himself in so dense a crowd that he cannot see his footing and in that situation gets his foot crushed between the boat and the dock has no cause of action against the ferry company and his own negligence has been contributed to his injury."

Chief Justice Beasley in writing the opinion in the Dwyer case said:

> "That the plaintiff's own negligence was plainly contributory to the injury of which he complains, and *therefore the plaintiff should have been non-suited* accepting as the truth his own statement when on the witness stand of the affair in question, he has no standing as I think, to call on the defendant to compensate him for the consequence of the accident that befell him. When he says that he placed himself in the midst of a jostling crowd of persons and he voluntarily attempted to pass off the boat in that situation and on account of the press of such passengers was unable to see his footing as he approached the separation between the boat and the dock he manifested most conclusively his contributory negligence of carelessness as partial cause of the disaster that occurred."

The same rule applies in the case under discussion for it appears that the danger was obvious, that it could have and had been discovered by the reasonable exercise of care on the part of the plaintiff and in fact he admitted full knowledge of the danger and the consequence thereof. The rule therefore, is singularly applicable in the case at bar. One who knows and appreciates or in the exercise of ordinary care should have known, and appreciated the existance of the danger from which injury would reasonably be anticipated must exercise ordinary care to avoid such injuries *and by his own voluntary acts and omissions exposes himself to such danger is guilty of contributory negligence* and in an action for damages cannot recover.

Under the doctrine of assumption of risk the plaintiff cannot recover where he brought him-

self within the operation of the maxim "*volenti non fit injuria.*" 45 *C. J.* p. 1043.

In the case of *Runyon* v. *C. R. R.,* 25 N. J. L., p. 556,

at the close of the plaintiff's case a motion for a non-suit was granted and the Court said:

> "If by exercise of ordinary skill and care the plaintiff could have avoided the injury or if his conduct contributed to produce it he cannot recover."

In the case of *Gillespie* v. *J. W. Ferguson Co.,* 78 N. J. L. p. 470

at the close of the plaintiff's case a motion for non-suit was granted. This ruling was sustained by the Court of Errors and Appeals for it appeared that the plaintiff went through a strange and totally dark place where to his knowledge building operations were being carried on in the day time for his employer and in doing so was injured. Under those circumstances it appeared that the plaintiff knew of the danger and nevertheless persisted in his course he could not recover.

Chief Justice Gummere held in the case of *Saunders* v. *Smith Realty Co.,* 84 N. J. L. p. 276 (Ct. of Errors and Appeals)

> "Accepting as a proved fact that a passageway from the front to the rear cellar was dangerous to one passing through it in the dark the danger was obvious to the plaintiff as to the defendant. He was *sui juris* and when he undertook to use the passageway with full knowledge of the danger he ran in doing so, *he assumed the risk of such injury as might result to him from such use and cannot now charge it upon the defendant.*"

All the testimony indicated that the plaintiff knew of the danger and assumed the risk and danger of his employment. This testimony was

neither contradicted nor neutralized by the plaintiff. So it remained undisputed that the plaintiff was injured due to his own negligence and there does not appear anywhere in the case any evidence of any negligence on the part of the defendant or any of his servants and the trial court should have granted the motion of defendant-appellant to non-suit the plaintiff as to him.

POINT II.

The Trial Court erroneously refused to grant the defendant's motion to direct a verdict in favor of the defendant and against the plaintiff. (Pp. 328-9-30.)

At the close of the plaintiff's case (p. 328) the attorney for the defendant-appellant moved that a verdict be directed in favor of the defendant Abraham B. Mason on the ground that it appeared without contradiction that the defendant was entirely unconnected with the present accident. This motion was denied and the defendant-appellant contends that the trial court committed legal error in doing so. The plaintiff himself said when asked what he was doing at the time of the accident,

> "A I was on my hands and knees floating concrete. I remember getting struck a terrible blow on the head, I had one knee down this way and the other knee this way and I was bent in this position. My head in this position, with my right, here floating this concrete. Mr. Vecca stood two feet away with a left-hand shovel and as the men dumped it into the hole he would push it towards me with the shovel and I would float it with a float" (p. 106).

In the case of *Bearley* v. *Eastern Coal Dock Co.*, 95 N. J. L. p. 517 the plaintiff was injured while attempting to go through an opening be-

tween two drafts of cars on the defendant's dock. The plaintiff in that case testified:

"We took a chance in going through."

This court said in regard to this question on page 519:

> "The trial court also based a direction of a verdict upon further ground that the plaintiff was guilty of contributory negligence. This position we deem sound. The danger to which the plaintiff was exposed in attempting to pass between the cars was obvious. The passageway was narrow, in fact so narrow that he had to enter sideways, he was unfamiliar with the premises. He made no inquiry as to why the cars were there or whether a warning signal would be given to their movement. He just took, as he said, the chance of going through. It is difficult to conceive a stronger case of contributory negligence."

If Freschi did not contribute in this manner to his own injury the accident would not have happened, but it is a proved fact that he persisted and insisted upon working in a place that he knew was dangerous and therefore he contributed by his own act, to his own injury.

The case of *Furey* v. *N. Y. C. &c. Co.*, 67 N. J. L., p. 270 fully sustains the contention of the defendant that the plaintiff under the circumstances was guilty of contributory negligence. It also appeared at the conclusion of the case that the plaintiff by his own admission as well as other evidence referred to under Point I of this brief assumed the risk or danger and there was no negligence proven against the defendant that was the proximate cause of the injuries. The trial judge should have directed a verdict in the defendant's favor.

POINT III.

The Trial Court committed error in permitting the reading of depositions of one K. Winfield Ney over the objection of the defendant. (Pp. 124-5-6.)

The defendant contends that it was prejudicial error for the trial judge to permit two sets of depositions to be introduced into evidence. Depositions may be admitted in evidence in two ways—one under a commission duly appointed by the court and the other under an order of the court. The statute also provides the method of admitting depositions by consent (C. S. 1910, p. 2231 to p. 2237).

A close study of the statute seems to regulate the method by which depositions may be admitted in evidence. Depositions in the instant case if admissible at all, must be under the statutory provision regarding consents.

In the instant case there were no stipulations in writing signed by the parties. The defendant contends that the statute was not complied with and consequently the depositions should not be admitted in evidence. The statute requires that the stipulation should state the name of the person or witness, his address, place where his testimony is to be taken and the officer before whom the same should be taken. There is no written stipulation in the case at bar containing this information. It will no doubt be conceded that there was no commission issued whereby the depositions could be admitted and there remains therefore to be considered the correct method required by the statute.

There is no stipulation that such testimony should be taken stenographically. The statute provides:

> "Such stipulation shall be filed with the clerk of the court in which such action is pending before such testimony is taken."

It will be noticed that in order for depositions by consent to be admitted in evidence the statute provides among other things, that the stipuation shall be signed and *must be filed* with the clerk of the Court as above stated. The stipulation in the present case was not filed with the clerk before the testimony was taken; consequently, the statute was not complied with. The statute further provides that each of the parties

> "shall be furnished with a transcript of testimony subscribed and sworn to and either party may file a transcript of such testimony with the clerk of the court in which such action is pending and thereupon either party may use that testimony in trial of the action in the same manner and with the same force and effect as if said testimony had been taken under a commission duly issued."

It may be noted that the transcript of the testimony as provided by the statute may be filed by either party with the clerk of the court and *only thereupon the testimony may be used at the trial.* None of these conditions precedent required by the statute were fulfilled.

The contention might be made that in the year 1925 (p. 126) there appears an insertion by the stenographer that counsel agreed that the depositions of Dr. Ney should be taken. The most that can be said of the said stipulation is that the stenographer made an entry that the parties had agreed that the depositions of Dr. Ney should be taken but giving the alleged stipula-

tion all of the force and fair construction of the language it will be seen that there is no provision in the alleged stipulation agreeing that the testimony should be filed in the court or that the same should be used at the trial of the cause as provided by the statute quoted above. *The stipulation is entirely barren of all of the statutory requirements and particulars and therefore should not have been admitted in evidence.*

In the case of *Case* v. *Garretson,* 54 N. J. L. p. 44 it was said:

> "As the power to take testimony of absent witnesses is only a new power created by statute the rule is that it must be pursued strictly."

The statute of our State does not make admissible depositions taken upon notice and while the defendant was present and examined the witnesses. The statute not only required notice of examination but also that a stipulation shall be entered in writing and such stipulation shall name the person to be examined, his name and the place where testimony is to be taken and the person before whom it is to be taken and *that such stipulation shall be filed with the clerk of the court before testimony shall be taken.* See statute entitled "Depositions by consent, subject, and evidence." C. S. 1910, p. 2237, sec. 57.

The objection to the admission of the depositions was timely. Notice was given to the plaintiff that objection would be made if an attempt was made to introduce the depositions (p. 124) and notwithstanding this warning and the timely objection the plaintiff made no attempt to have the depositions properly taken or conform to the statute but read the depositions into the evidence.

The general rule of law is that every witness must give his evidence in person in order that credibility and weight of his testimony may be determined from his appearance and mode of testifying.

18 *C. J.* p. 733.

In the case of *Sayre* v. *Sayre,* 14 N. J. L. p. 487 the question involved the improper admission of depositions, the defendant claiming a new trial because the statute was not complied with. The court upheld the contention by stating,

> "That the statute is an innovation on a great and valuable principle of common law, that the witnesses shall be produced before the jury who are to judge as well from his manner as otherwise of the credit to which he is entitled. This statute said Chancellor Zabriske, speaking of the same act, created a new power contrary to the settled practice and should therefore be strictly construed and complied with (Parker *v.* Hayes, 8 C. E. Gr. 186-187). It is true that this, like every other general rule worked evil in special cases against which the Legislature have undertaken to provide by the statute, they have prescribed the course when and the terms upon which the party may have the aid of the statute and we are not at liberty to extend its benefits either to the cause or upon other terms although in our opinion they should be equally entitled to aid or calculated to prevent abuses. I do not think this a case where the Legislature have engrafted a new principle in the common law which the court are to regard as a principle and give efficiency to it in practice. They have only made an exception and the party has not brought himself within it. But to prevent my meaning from being misunderstood, I would remark by a strict, I do not mean literal compliance, the guards which

the statute has provided against fraud, must in substance be preserved."

In *Jackson* v. *Geiger,* 4. Mis. Rep. p. 726, we think the statute contemplates,

"That objection made to the competency of witnesses and relevancy of testimony, if made to trial court when the depositions are offered in the trial of the case, are timely such objections need not have been made at the time of the depositions."

No matter how the depositions were taken or used before the trial in the instant case there was no justification to admit them in evidence. *Housteca Petroleum* v. *U. S.* 14 Fed. (2 ed.) p. 495.

POINT IV.

The Trial Court erroneously charged the jury:

(a.)

"Now I have only allowed that phase of the case to come to you because it was suggested by counsel for the defendant that there is no real merit to this suit at all. The suggestion was that as a matter of fact the plaintiff never would have brought this suit but for the fact that his employer the Metallurgical Chemical Company had been paying out moneys under the compensation act. Now, therefore, only as that had a bearing upon the credibility that you will accord to a man like Bingham, for example, who appears to have been an employee of the Metallurgical Chemical Company or any other employee of that company that has been produced here to testify as a witness, I have allowed that phase of the case to come in" (p. 336).

The defendant excepted to that part of the trial judge's charge wherein the court says that

the jury is not to consider the question of compensation except in so far as it was advanced to show the motive of the Metallurgical Chemical Company. The reason for taking this exception was because it appears in the plaintiff's own testimony, in the depositions of Dr. Ney that *compensation had some relation to the plaintiff's present condition, that is to say, he is suffering from compensatory or compensation neurosis, and that compensation did have something to do with his present alleged inability to work.* This appears conclusively by the following testimony of the plaintiff's doctor:

> "Q Now, doctor, you testified at the last hearing to that much of his nervous condition and lack of readjustment and complaint, especially that the irritability and nervousness were due to the fact that those who were responsible for his compensation under the compensation law were not treating him as he thought he should be treated? A Yes.
>
> "Q Has that condition all passed? A No, he still harbors that (p. 157).
>
> "Q He still harbors that sort of a hallucination we might call it? A Yes.
>
> "Q That is a neurological symptom, is it? A Well, it is what is commonly called a "compensation neurosis."
>
> "Q That means he is imagining that something is happening to him that is not happening at all, that is it may be so? A Well, that is pretty hard thing to say.
>
> "Q All right? May we get it this way, as I understand it your idea about Mr. Freschi's case and the condition that causes his fretfulness or irritability and nervousness is that if the persons who were responsible for paying the compensation would not encourage the dependency of the injured person, Freschi, in this case, that he would be likely to recover more quickly? A No, I couldn't think that but I do think this. Judging from what he says that if he did

not have this cranial defect which reminds him of his disability every time he stoops over and if he had a settlement of the case so that there is nothing uncertain about it so that it is finished one way or the other he might be better off.

"Q All right, doctor. The last time you testified that his irritableness and nervousness and unsettled condition particularly was not due to the case then pending in the court but due to the compensation feature of his employment at the place where he was injured; that is to say, that the compensation law permitting this "compensation" to be paid created a dependency in the mind of the patient and having that dependency, if the case and the compensation did not go just the way he wanted it it would create this lack of readjustment? A It does create that. I did not think there is any question about it. There is an element of uncertainty which exists in any one in a case of that kind (pp. 158-159).

"Q As distinguished from the law case I am referring to the compensation relationship between him and his master? A *I think if that were adjusted one way or another* favorably or unfavorably that he would be in a better condition because he is worrying over that a great deal, I know (p. 159).

"Q Now, what is this man's mental condition that you can find now? A *This man's mental condition is that that is very common in cases of depression. It is very frequent so that I mean, I was going to say, almost daily but frequently, what we call a traumatic neurosis or since the days of compensation court they are called compensation neurosis.*

"Q Why had the doctors termed them compensation neurosis? A *Because the remedy is a settlement* (p. 221). As a rule they recover very rapidly as soon as their mind is relieved with what they feel is an obligation of somebody else to them.

"Q Is there any doubt in your mind about that, doctor? A None whatever" (p. 222).

From Dr. Ney's testimony it appears that the operation was a successful one; that the plaintiff should have returned to light work within a period of three months and to his regular work within a period of six months; that the place where the operation occurred is healed up so that it is protected as good as when the bone was there and that *from what the plaintiff is suffering is his own indolence and unwillingness to work and that was brought about because he was receiving compensation from his employer during all the time he was unemployed.*

The trial judge was in error when he charged the jury as he did about the question of compensation for the question of compensation relates directly to the plaintiff's physical condition. The trial judge therefore committed a prejudicial error in charging as he did.

(b.)

The Trial Court erroneously charged the jury as follows:

"Now I say that ordinarily where an occurrence of that sort occurs there is a rule of law which I regard as applicable and it is this: 'The principle is that when through any instrumentality or agency under the management or control of a defendant or his servants there is an occurrence injurious to the plaintiff which in the ordinary course of things would not take place if the person in control were exercising due care the occurrence itself in the absence of explanation by the defendant affords a *prima facie* evidence that there was want of due care.' Now you are walking this A street or highway and

> some mason or carpenter or other artisan is working upon the roof of a building and he carelessly throws over something and it comes down upon the sidewalk and hits you, and you are injured. The rule of law is that therefore the proof that such a thing happened and hurt you is enough, is *prima facie* proof of negligence" (p. 337).

The defendant excepted to the illustration that the trial court gave of a person walking along the street and carpenters or masons working up in a building and something falls down and strikes the person. If it was proven that it was in their possession or in the custody of the defendant and then they are presumatively negligent under the doctrine of *res ipsa loquitur.* Further exception to the above illustration is that a person walking along the street *is not in the same position and the example is not the same or the illustration is not the same as Freschi working at this particular place.*

(c.)

The Trial Court erroneously charged the jury:

> "But you have a right to consider the circumstances; men working upon a scaffold according to the plaintiff, at or above his head; that he was suddenly struck; an injury occurred" (p. 340).

The defendant excepted to that part of the trial court's charge wherein the court says that the defendant, according to the plaintiff and his witnesses were at or above his head or the place where he was working and that the bar fell and struck his foot while they were so working. There is no testimony that they were at or above his head. The testimony is that they were to one side. None of the witnesses produced on behalf of the plaintiff saw the accident. Bing-

ham says that he did not know of the accident until half an hour to three-quarters of an hour after the accident (p. 324). Acker who was working with the plaintiff testified that he could not tell how the plaintiff was injured (p. 72). Clarence McCann said that he was in the scale house at the time the accident happened (p. 70). The scale house is about 100 feet away from the place of the scene of the accident (p. 72).
He was asked:

> "Q Did anything obstruct your view? A Yes.
> Q So that you could not see Freschi? A No, sir" (p. 73).

The plaintiff himself said when asked what he was doing at the time of the accident:

> "A I was on my hands and knees floating concrete. I remember getting struck a terrific blow on the head. I had one knee down this way and the other knee this way and I was bent in this position. My head in this position and my right here floating this concrete. Mr. Vecco stood two feet away with a left-handed shovel and as the men dumped it into the hole he would push it towards me with the shovel and I would float it with a float" (p. 106).

This witness said he did not know what struck him (pp. 106-107). He said that he paid no attention to the men working above him (p. 121).

From the testimony of the plaintiff's witnesses it is fair to conclude that no one saw the accident. The defendant's witnesses all testified that they were working in the first bay, a distance of 28 to 30 feet from the plaintiff. Bingham said when the men were working in the morning they were about 25 feet away (p. 53) and that he instructed the plaintiff and his men under him to build the four 18-inch concrete squares or piers (p. 53).

He said that the piers were being built near the stack (p. 54).

> "Q They were extended so that the building would be near the smoke stack? A Yes" (meaning the piers) (p. 54).

This corroborates the testimony of the plaintiff when he testified:

> "Q I show you here a photograph and ask if this is the chimney near which you were working? A Yes" (p. 123).

It will be noted that the chimney referred to is the one shown on Exhibit D. 2. A careful examination of the exhibit will show that the stack on the base of the "lean to" is near the girder or channel iron that divided the second and third bays at a distance of almost fifty feet from the front of the first bay.

Bingham was recalled as a witness and testified that he saw the "lean to" about three-quarters of an hour after the accident, "I should judge half hour to three-quarters of an hour" (p. 324). By the witnesses' testimony it was three-quarters of an hour after the accident (p. 324). Three-quarters of an hour after the accident he saw the second bay half finished. Such a position would still leave the defendant's men from 12½ to 15 feet from where the plaintiff was working. This witness places the distance of 5 to 10 feet from the plaintiff so that the testimony is irrelevant. The plaintiff was from 10 to 15 feet from the place where the defendant's men were working. The plaintiff himself said it was 10 feet (p. 119). The plaintiff testified in this regard as follows:

> "Q Well, didn't you see them there in the afternoon? A Yes.
>
> Q Well, then, why do you say the morning? A Because they wasn't over my head in the morning.

Q They were not over your head in the afternoon, were they? A They must have been when they hit me with that bar.

By the Court.

Q Do you remember where they were when you last saw them? A A few feet past my head, your Honor, ten, ten or five feet. I don't just remember. They were close to me, I know that" (pp. 119 and 120).

The substance of the whole testimony is that the defendant's men were from ten to twenty-five feet from the plaintiff when he was injured. This being so, it was physically impossible for the plaintiff to be struck by any tool or any object falling from the place where the defendant's men were working.

It is an established fact that the plaintiff or his witnesses did not see the accident and that the plaintiff was at such a distance from the place in which the defendant's men were working that it was physically impossible for anything to be dropped by the defendant's men upon the plaintiff and it appears by the plaintiff's witnesses and the defendant's witnesses that other men were working on the roof on the day in question besides the defendant's employees.

The plaintiff's witness McCann testified when he was asked if other men were there: "Why, some of Tuller's men were there" (p. 74). Parkstrom, who worked on the roof, said that the iron workers who were Tuller's men were there putting in permanent fastenings to the iron and removing the temporary ones, thereby throwing the unused bolts to the ground (pp. 175-177).

From the testimony that was given it is a known factor that the work of the Tuller men was to precede that of the defendant's men. This procedure was wholly necessary in order for the

roofer to begin his work. The iron men were to make the fastenings of the iron before the sheet metal was to be put on the roof. The witness further testified that after they took the bolts out of the temporary fastenings they threw them away because they were old bolts.

> "Q Were they working on the lean to that day ahead of you? A Yes, sir" (p. 177).

From Parkstrom's testimony we are enlightened that other men were working on the roof on the day in question besides the defendant's employees. He testified that the crane men were also working on the job on top of the roof putting in the train on which the crane was to be operated. The crane was to be operated on trolley rails fastened near the top of the roof (p. 183). The court can see in Exhibit D. 1 the crane boom that is erected for the purpose of hoisting the crane. It was necessary to have the crane in before the roofing was on and the work was taking its natural sequence. The crane men were putting in the crane before the roof was on and the iron men were putting on the fastenings before the roof was put on.

It is very important to note from the testimony given by John Tiedge, who said that Tuller's men were working there at the time on the lean to (p. 255). McDowell, who formerly worked with the Tuller men and who knew them, also said that the Tuller men were working there at the time of the accident (pp. 275-278). Parkstrom, Tiedge and McDowell testified that the plaintiff was warned time and again to keep his men from passing under where the defendant's men were working. It is true that the plaintiff

denies receiving such a warning. The plaintiff testified on page 117:

> "Q Do you remember being asked on July 13, 1926, at the trial of this cause about the men being up above and were you asked this question: 'And you knew that you went in there in the afternoon, didn't you?' A I paid no attention.
>
> Q Did you answer that way? A If it is there I did" (p. 121).

So that the fact is well established and evident from the testimony that whether he was warned or not by the men, he knew that men were working on the roof above him. The knowledge of the plaintiff that others were working above him included the defendant's men.

The further facts are established in the case that the scaffolding was not the scaffolding of the defendant. All that the defendant did on the job was to supply the labor. The defendant testified to the following:

> "Q Did you have a contract with someone? A Yes.
>
> Q With whom? A Tuller Construction Co. of Red Bank.
>
> Q And how was the contract made out? A The contract was made up that I shall furnish labor only" (p. 306).

It will be noted that this testimony is not contradicted. Not only did the plaintiff have knowledge that men were working above him, but he knew that pieces of iron and bolts and other material was likely to be dropped down and injure him. He had knowledge of the danger and he appreciated that knowledge. He testified in this regard as follows:

> "Q In the examination before trial in this case on May 25, 1925, that is, over four years ago, you were asked this question and did you make this answer:

Q You knew that it was possible that tools or pieces of iron that they were working with and bolts might be dropped, didn't you? A I presume so.

Q You knew that? A I presume so.

Q You made that answer, didn't you? A I don't remember that. If it is there, but I don't remember it so many years ago" (p. 120).

(d.)

The Trial Court erroneously charged the jury:

"If under your examination of all the testimony in the case you arrive at the conclusion that there was no causal relation between the plaintiff's injury, that every other thing or cause had been eliminated except the dropping of the bar, then I charge you you would have a right to consider whether or not the plaintiff had not proven under a fair preponderance of proof that the proximate cause of his injury was the falling of the bar under the roof that I have given you" (p. 341).

The defendant excepted to that part of the trial court's charge wherein the trial court charged by saying:

"where it appeared excluding all causes of how this man was injured except the dropping of the bar then I charge you that you have a right to consider that falling of the bar was the proximate cause of the injury" (p. 341).

From the charge it appears that the trial judge omitted from his charge that the plaintiff has not only to exclude by his proof all other evidence or causes resulting in his injuries but also *that the bar was caused to drop because of the negligence of the defendant.* Even if the case was to be proven not by direct testimony but by circumstantial evidence, the plaintiff wholly

failed to produce the men or person who picked up the bar that struck the plaintiff. The plaintiff further wholly fails to account for that omission in the case. Therefore, the burden is not on the defendant to prove that fact but upon the plaintiff.

Further, the plaintiff did prove that the dolley bar that was taken to the laboratory after the plaintiff was injured was taken through by some of the metallurgical men who got the dolley bar from the channel iron which is about four feet from the ground and about 100 feet from where the plaintiff was working. Absolutely no witnesses were produced to contradict this testimony. The defendant further traced the dolley bar to the laboratory and out again and none of that testimony is denied.

So the court has before it a case that is not within the doctrine of *res ipsa loquitur.*

Considering the case of *Bahr* v. *Lombard,* 53 N. J. Law, p. 239, the court said that in order that the doctrine of *res ipsa loquitur* could apply

> "there must in each case be something in the facts that speaks of the negligence of the defendant. Inasmuch as the plaintiff's proofs are silent as to the conduct of the defendant, personally or through their agent, the rule does not apply."

In the case of *Levendosky* v. *The Empire Rubber Mfg. Co.,* 84 N. J. Law, p. 698, the court said in discussing the doctrine of *res ipsa loquitur* that

> "the plaintiff who made no pretense of having submitted all the evidence that he had been able to obtain on this point or that he had been unable to obtain any but rested on the proposition that no matter what he knew or could show the defendant on proof of the occurrence of the accident was bound to explain it away."

See also

Price v. *Central R. R. Co.,* 92 N. J. Law, p. 429.

In the present case the plaintiff did not exclude every probable source of danger; he did not exclude the probability of being injured by other men than the defendant's; he did not prove that it was physically impossible for him to be injured in the manner he said he was injured, for it appears that other men were working at or near the "lean to" from the following testimony (p. 47):

From the testimony of Mitchell, a civil engineer, we have seen that it would have been impossible for this weight to have struck the plaintiff as alleged, particularly in view of the fact that the plaintiff by his own statement was at least ten feet away at the time he was struck from a point where the defendant's men were working and by other witnesses at least 25 feet away (p. 122). There does not appear anywhere in the case any evidence of any negligence on the part of the defendant or any of his servants. All of the witnesses for the defendant deny that they were negligent and the plaintiff wholly failed to prove that they were negligent. The plaintiff proved that he was hit on the head with an object while ten feet away from where the defendant's men were working. That is all that he does prove. He does not prove what the object was; he does not prove where the object came from; he does not prove whether the object was one that was being used or handled by the defendant's men who were working on the roof. Under those circumstances the case does not come within the doctrine of *res ipsa loquitur.*

(e.)

The Trial Court erroneously charged the jury:

> "And this question of contributory negligence while a defense is only to be considered by you where you find the plaintiff has proven the negligence of the defendant as charged under a fair preponderance of the proof" (p. 342).

The defendant excepted to the foregoing of the trial judge's charge for it is a matter of law that contributory negligence has got to be considered by the jury whether or not the negligence of the defendant has been proven.

Gillespie v. *Ferguson,* 78 N. J. Law, p. 470;
Cetola v. *L. V. R. R. Co.*, 89 N. J. Law, p. 691;
Dwyer v. *Erie,* 47 N. J. Law, p. 9.

(f.)

The Trial Court erroneously charged the jury:

> "Contributory negligence is present in a given case when the injured person by his own negligence has contributed to the injury in such a way that but for his own negligence he would have received no injury from the negligence of the other party. Now that is a defense and it must be proven under fair preponderance of the proof, that is to say, that it must appear under all of the evidence in the case, no matter from which side it comes, that the plaintiff was guilty of contributory negligence within the definition I have given you before, he can be held responsible therefor. But if he does prove the negligence of the defendant but at the same time it appears under all of the testimony in the case by a fair preponderance of the proof that the plaintiff himself was guilty of contributory negligence then again he cannot recover" (pp. 342-3).

The defendant further excepted to the trial judge's charge wherein the trial court referred to the burden of proof on the part of the defendant to prove contributory negligence. The trial court had used the phrase "under all the evidence" on two or three different occasions in his charge (p. 342). The law is not by the evidence but by the "fair preponderance of the evidence," the same as the plaintiff, and that the word "all" in this case is prejudicial to the defendant and was an erroneous charge to the jury.

McCombe v. *P. S. Ry. Co.* 95 N. J. Law, 187-189;

Niebel v. *Winslow,* 88 N. J. Law, 191-193;

Bien v. *Unger,* 64 N. J. Law, 596-597.

(g.)

The Trial Court erroneously charged the jury:

> "Now that the question of contributory negligence centers around the claim of the defendant that the plaintiff has been warned on the day in question on one or more occasions, how many you will recall, that he was working in a dangerous place, to get out from under that operation of the roof where the defendant and his employees were working" (p. 343).

The defendant excepted to that part of the trial judge's charge (p. 352) wherein the trial court says that the contributory negligence centers around the fact that the plaintiff had been warned to get out from where he was working. *Contributory negligence not only depends upon that but also on the fact that the plaintiff testified that he knew that there was danger and notwithstanding he paid no attention* (p. 119) *or in other words, that he went along heedless of the danger which he knew existed,* which is

an entirely different element of contributory negligence than a failure to obey a warning.

The defendant contends that the testimony shows beyond peradventure that the plaintiff herein assumed the risk of danger that resulted in his injury and also beyond a doubt and *by his own statement he contributed to the injury that befell him.* He knew that an object was likely to fall and notwithstanding this knowledge and appreciation of the danger he continued to work in the place where he was injured (pp. 120-122).

Cetola v. *L. V. R. R. Co.,* 89 N. J. Law, p. 691;

Brown v. *Railroad Co.,* 68 N. J. Law, p. 618;

Pa. R. R. v. *Righter,* 42 N. J. Law, p. 180;

Dwyer v. *N. Y. Lake Erie & Ry. Co.,* 47 N. J. Law, p. 9;

Runyon v. *C. R. R. Co.,* 25 N. J. Law, p. 556;

Gillespie v. *J. W. Ferguson Co.,* 78 N. J. Law, p. 470;

Saunders v. *Smith Realty Co.,* 84 N. J. Law, p. 276;

Vorrath v. *Burke,* 63 N. J. Law, p. 68;

Berley v. *Eastern Coal Dock Co.,* 95 N. J. Law, p. 517.

(h.)

The Trial Court erroneously charged the jury:

"So that therefore this question is left with you to determine, did the plaintiff have a right to assume, was he charged with knowledge that even if the warnings were given as alleged that something would drop from the roof to his injury, and therefore having that knowledge was he bound to stop work entirely on the ground for his employer

> because of the warnings that are alleged to have been given by the defendant's employees in this case." "It is a question of fact, in my mind, not one of law, and I am leaving it to you to determine" (p. 344).

The defendant excepted to that part of the trial judge's charge (p. 352) wherein the trial court said that the mere disregarding of a warning to keep away from the place where these men were working or words to that effect is the law. The trial court left the question to the jury as a question of fact; that is, the disobedience of the warning if such was given.

It will be recalled that Parkstrom, Tiedge and McDowell testified that the plaintiff was warned time and again to keep his men from passing where the defendant's men were working.

The plaintiff further testified that he saw the men working on the roof (p. 104) and that he was the foreman of several men working under him (p. 117). Also the plaintiff said he knew of the danger (p. 119). The court then should not have left the question of the danger to the jury. This part of the charge was also prejudicial, as it tended to confuse the question of negligence to that one question when in fact there were several questions of negligence.

(i.)

The Trial Court erroneously charged the jury:

> "Now it has been suggested in this case, for example, that since the plaintiff was employed by the Metallurgical Chemical Co. that that company was bound to provide him with a safe place to work and since it did not so provide him with a safe place to work the proximate cause of his injury was not the negligence of the defendant, his employee

or employees but the Metallurgical Chemical Co. I am going to leave that question to you to determine as a fact'' (p. 344).

The defendant excepted to that part of the trial judge's charge (p. 353) wherein the trial court left the question of whether or not it was the duty of the employer, the Metallurgical Chemical Co. to supply a safe place to work. We contend that that is also a question of law which the trial court should have instructed the jury upon and not leave it as a jury question.

Pa. R. R. v. *Righter,* 42 N. J. Law, 180;
Cetola v. *L. V. R. R. Co.,* 89 N. J. Law, 691.

POINT V.

The Trial Court should have granted the defendant's request to charge:

1.

''Negligence on the part of the defendant must be proved by the evidence. It will not be presumed. There is also a presumption against negligence'' (p. 355).

The trial judge's charge nowhere contains the subject matter of the above request, that is to say, the trial judge did not charge the jury that negligence will not be presumed. The trial judge failed to charge the jury that there is a presumption against negligence.

The case of *McCombe* v. *Public Service Rwy. Co.,* 95 N. J. Law, p. 188, held that negligence is a fact which must be proved. It will not be presumed. It is very material and most necessary for the jury to be instructed that there is also a presumption against negligence. The only presumption of fact which the law recognizes is an immediate inference from facts proved and mere theories and inferences do not authorize a

verdict unless they are the only conclusions which can reasonably be drawn from the facts proven and if the plaintiff is to succeed here it is incumbent on the plaintiff in absence of direct evidence to show not only existence of such possible responsibility but the existence of such circumstances as would justify the inference that the plaintiff's injury was caused by the negligent act of the defendant and which would exclude the idea that it was a cause with which the defendant was not connected.

Ryan v. *Public Service Rwy. Co.*, 101 N. J. Law, p. 361 (C. E. & A.);

Boyer v. *Atlantic & Pacific Co.*, 99 N. J. Law, p. 451 (E. & A.);

Mapheth v. *Hudson & Manhattan R. R. Co.*, 98 N. J. Law, p. 369;

Alvino v. *Public Service Rwy. Co.*, 97 N. J. Law, p. 526 (E. & A.).

It is very evident that the court committed prejudicial error in utterly failing to charge the request that there is always a presumption against negligence. Nowhere in the court's charge does the judge deal with the subject of presumptions as covered by the request (p. 355).

2.

The Trial Court should have granted the defendant's requests to charge: (Pp. 355-6-7.)

"1. The burden of proof is on the plaintiff to establish negligence on the part of the defendant by a fair preponderance of the evidence.

2. Negligence on the part of the defendant must be proved by the evidence. It will not be presumed. There is also a presumption against negligence.

3. Mere proof of the fact that the plaintiff received an injury is not sufficient to establish negligence on the part of the defendant.

4. It is necessary for the plaintiff to give proof as to the cause or thing which was alleged to have been the negligent act which produced the injury or proof of such facts from which the existence of such cause or thing constituted the alleged negligent act, was the only reasonable inference that could properly be drawn.

5. The plaintiff must also prove that the negligent cause or thing which produced the injury was in the possession of and under the control or management of the person charged with the negligence or of his servants.

6. If you find there is no proof in this case as to what caused the injury to plaintiff then your verdict should be in favor of the defendant.

7. To warrant a verdict in favor of the plaintiff, it is not sufficient that the plaintiff prove a mere possibility that the injury was caused by the negligent conduct of the defendant or his servants.

8. The plaintiff is not entitled to a verdict unless negligence on the part of the defendant or his servants is the only inference that can reasonably be drawn from the facts proved by the plaintiff.

9. In the absence of direct evidence as to the cause of the injury, the plaintiff must show not merely the existence of possible responsibility by the defendant, but must show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant and would exclude all possibility that the cause of the injury was one with which the defendant was unconnected.

10. Where the plaintiff's evidence is equally consistent with the absence of negli-

gence as with the existence of negligence, on the part of the defendant, the plaintiff must fail.

11. In this case there has been no proof of any fact from which the conduct of the defendant can be ascertained and therefore a verdict must be for the defendant.

12. If the plaintiff has failed to offer any proof as to the cause of the injury and there is therefore no evidence from which any negligent conduct on the part of the defendant can be found then your verdict must be for the defendant.

13. The doctrine of *res ipsa loquitur* is not applicable to the present case.

14. If you find that the plaintiff was warned by the defendants or his servants to keep away from the place where the defendant's servants were working, and that the plaintiff disregarded these warnings, the plaintiff was guilty of contributory negligence and cannot now recover against the defendant.

15. If the danger existing at the time and place of the accident was a perfectly obvious one and one of which the plaintiff ought reasonably to have been fully aware and if the plaintiff continued to work where he did with full knowledge of the danger, he assumed the risk of such an injury as he received and cannot now recover from the defendant.

16. If the plaintiff continued to work with full knowledge of the obvious and apparent danger which existed at the time and place of the accident, he was guilty of contributory negligence which bars a recovery from the defendant.

17. The plaintiff was bound to do everything reasonably possible to minimize the effect of the injury and even though your verdict should be for the plaintiff, if you find that the plaintiff at any time omitted to take any measures which would have miti-

gated the injurious effect of the injury, this must be taken into account by you in estimating the damages to the plaintiff."

It is necessary for the plaintiff to give proof to the cause or thing which was alleged to have been the negligent act which produced the injury or proof of such facts from which the existence of such cause or thing constituted the alleged act, was the only reasonable inference that could properly be drawn (p. 355). The court committed prejudicial error in refusing to charge the request made by the defendant which can be found on page 355.

A timely exception was made to the trial judge's failure to charge the request (p. 354). The trial judge evidently made an effort to charge the contents of the request when he said (pp. 338 and 339) that the things the plaintiff must prove must be that the thing that fell was in the custody of the defendant or his men; that it was due to the carelessness and negligence of his servants and that it was the bar that struck the plaintiff. It will be seen at a glance that the court had the jury limit the investigation of the bar striking the plaintiff and the error in failing to charge the request was that the plaintiff evidently assumed that the bar was the thing that caused the injury and therefore excluded from the case entirely the facts as testified to by Russell Parkstrom (pp. 177, 183 and 184); John Tiedge (pp. 255 and 256) and James McDowell (pp. 276 to 284) that Tuller's men were throwing bolts from the "lean to" down to the ground. There was taken from the jury entirely the fact that a bolt from Tuller's men might have struck the plaintiff. Indeed, from the physical result it must have been a bolt and not a dolley bar for a dolley bar would have crushed the skull

of the plaintiff and not give the slight scalp wound that he received. The court then eliminated and excluded entirely from the consideration of the jury the testimony to the effect that a bolt from Tuller's construction iron workers might have been the cause of the injury.

Hughes v. *Atlantic City,* 85 N. J. Law, p. 212;

Hoff v. *Public Service Rwy. Co.,* 91 N. J. Law, p. 641;

Alvino v. *Public Service Rwy. Co., supra.*

To establish a case of negligence and fix the liability of the defendant it is incumbent upon the plaintiff as a matter of law to prove some fact which is more consistent with the negligence of the defendant than with the absence of it and for these reasons the trial judge should have granted the request of the defendant and it is most evidential from the facts recited that the court committed prejudicial error in refusing to charge the request.

3.

The Trial Court should have granted the defendant's request to charge:

> "The plaintiff must also prove that the negligent cause or thing which produced the injury was in the possession of and under the control or management of the person charged with the negligence of his servant" (p. 355).

The trial court committed prejudicial error in refusing to charge the request of the defendant which can be found on page 355; that a timely exception was made to the trial judge's failure to charge the request (p. 354). Where the plaintiff's evidence is equally consistent with the ab-

sence as with the existence of negligence on the part of the defendant the plaintiff must fail because there is always a presumption against negligence and in favor of innocence.

The responsibility of the defendant depends upon the question whether the injury to the plaintiff or to a class of which the plaintiff was one ought reasonably to have been anticipated.

Myers v. *Benton,* 74 N. J. Law, p. 535 (E. & A.);

Hughes v. *Atlantic City, supra;*

Hoff v. *Public Service, supra.*

4.

The Trial Court should have granted the defendant's request to charge:

> "If you find there is no proof in this case as to what caused the injury to the plaintiff then your verdict should be in favor of the defendant" (p. 356).

The trial judge committed prejudicial error in refusing to charge the request of the defendant which can be found on page 356; that a timely exception was taken to the trial judge's failure to charge the request (p. 354).

The defendant realizes that this request amounted to a direction but nevertheless contends that there was no proof in the case connecting the defendant with the object that struck the plaintiff. The doctrine of *res ipsa loquitur* did not apply. The overwhelming testimony was that all the defendant was hired to do was to perform the labor work in putting on the sheeting. The scaffold was supplied by the Tuller Construction Co. according to their contract. Neither by circumstances nor by direct proof does it appear that any of the defendant's men

were negligent. The proof is positively to the contrary. The injury to the plaintiff, according to the proof, might well have happened to him from the negligence of the Tuller men or the crane men. Insofar as the defendant's men were concerned the proof is positive that they were not negligent. There is no proof that they were negligent. There was not a witness who pointed to the negligence of any of them. To say that the dolley bar struck the plaintiff is outside of the proof because no one testified that such was the case. Mr. Vecco attempted, but said *that someone else told him it was the bar* (p. 93). The bar was not picked up near the scene of the accident and if it was there was no witness produced to testify to the fact. The defendant shows where the bar was taken from. Under all of these circumstances the court should have charged the contents of the defendant's request to charge and for these reasons the court had committed a prejudicial error in refusing to charge the defendant's request.

5.

The Trial Court should have granted the defendant's request to charge:

> "If you find that the plaintiff was warned by the defendant or his servants to keep away from the place where the defendant's servants were working and that the plaintiff disregarded these warnings, the plaintiff was guilty of contributory negligence and cannot now recover against the defendant" (p. 357).

The court committed prejudicial error to the defendant in not charging the defendant's request which is fully set forth on page 357 of the case. A prompt exception was made to the trial judge's refusal to charge as requested (p. 354).

The request deals with the warnings given by the employees of the defendant (pp. 104, 120, 121, 185, 186, 262 and 292). There was not only the warning by word of mouth but also the four ropes that extended from the scaffold to the ground which acted as a warning (pp. 182 and 254). *There was no testimony denying the fact that the ropes extended from the four corners of the scaffold to the ground.* It therefore became a very material part of the charge for the jury to understand that *if the plaintiff disregarded the warnings and the jury so found the plaintiff would be guilty of contributory negligence.*

Gillespie v. *Ferguson, supra.*

Instead of charging as requested the trial judge left the question to the jury to determine even though the plaintiff disregarded the warnings, saying "was he bound to stop work entirely on the ground for his employer because of the warnings" (p. 344).

The trial judge not only failed to charge this proposition of contributory negligence to which the defendant was entitled but left it to the jury to say whether he should not keep on working even though he knew of the danger. This was not only a failure to charge as directed but a charge that erroneously stated the law.

Cetola v. *L. V. R. R., supra;*

Brown v. *Railroad Co.,* 68 N. J. Law, p. 618;

Penn. R. R. v. *Righter,* 42 N. J. Law, p. 180;

Dwyer v. *Erie, supra.*

6.

The Trial Court should have granted the defendant's request to charge:

> "If the plaintiff continued to work with full knowledge of the obvious and apparent danger which existed at the time and place of the accident he was guilty of contributory negligence which bars a recovery from the defendant" (p. 357).

The court committed prejudicial error in refusing to charge the request made by the defendant (p. 357); that a timely exception was made to the court's refusal to charge as requested (p. 354).

The request herein is directed to the proposition that if the plaintiff continued to work with full knowledge of the danger he thereby contributed to his own injury and cannot recover. *The trial judge left both of these questions for the jury to determine and under the testimony he should not have done so for the reason that there was no doubt that the plaintiff had knowledge of the danger and the likelihood of something falling upon him. He so admitted in his testimony* (p. 120). He not only said he knew but he had experience of working about construction work (p. 102); he saw the men working on the roof (pp. 105 and 119); he did not deny that he saw the ropes extending to the ground from the scaffold indicating that men were working over him. Under these circumstances it was improper for the court to leave those questions to the jury. It was clearly prejudicial error for the trial court not to at least charge as requested.

Brown v. *R. R. Co., supra;*
Dwyer v. *Erie, supra.*

7.

The Trial Court should have granted the defendant's request to charge:

> "The plaintiff was bound to do everything reasonably possible to minimize the effect of the injury and even though your verdict should be for the plaintiff, if you find that the plaintiff at any time omitted to take any measures which would have mitigated the injurious effect of the injury this must be taken into account by you in estimating the damages to the plaintiff" (p. 357).

The court committed prejudicial error in refusing to charge the request of the defendant which is found on page 357 and a timely exception taken to this refusal (p. 354). The contents of this request the court wholly failed to charge. It was a question in this case whether the operation was at all necessary that was performed by Dr. Ney. It was a serious question whether the plaintiff did not rush into the operation without sufficient time having elapsed to determine whether or not it was necessary. The accident here happened on the 24th day of July and on the 5th day of August he was operated on against the direction of his own Dr. Gesswein; he was operated on without having an X-ray taken, as Dr. Ramsay said the operation was an exploratory one and should not have been undertaken without an X-ray first being had of the injury.

Those facts appearing in the case it was clearly the trial judge's duty to charge the jury that the plaintiff was *bound to do everything reasonable to minimize the effect of the injury and as he failed to do so such failure should be taken into account in estimating the damages.* In other words, the defendant should not have been

held chargeable for the fault or recklessness of the plaintiff for his failure to do that which he should have done.

Another very serious proposition that presents itself under this request is the failure of the plaintiff to go to work. The doctors unanimously testified that if the plaintiff had gone to work he would have been entirely cured of his injuries; that he should have done so promptly. As we have seen the doctor termed his reluctance "compensation neurosis." Dr. Ney said that if he returned to his work he would have been cured within six months (pp. 134 and 138); that it was his duty to try and work; that an effort to attempt to work was much more beneficial to him than the operation or attention of the doctors; in fact, they said it was the only cure. Surely the jury should have been impressed by the judge's charge with the duty of the plaintiff. The trial judge wholly failed to charge the contents of this all important request in this case and this failure is evidently reflected in the verdict.

Conclusion.

In view of this convincing and undisputed testimony on the part of the defendant, it is respectfully submitted that the judgment entered in this case be reversed for the reasons enumerated above. The case is barren of even the slightest symptoms of negligence on the part of the defendant as seen from the testimony read in by the plaintiff. The verdict is legally unjustifiable and without any evidential foundation and that the verdict of the jury was against the clear weight of evidence adduced at the trial and was legally unwarranted for reasons hereinabove stated and

we therefore pray the court to set aside the said verdict rendered.

JOHN C. STOCKEL,
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RUSSELL E. WATSON,
Of Counsel.

NEW JERSEY COURT OF ERRORS
AND APPEALS

SYLVESTER FRESCHI, Plaintiff-Respondent, vs. ABRAHAM B. MASON, Defendant-Appellant.	Action at Law On Appeal from Supreme Court.

FACTS.

On July 24, 1924 the plaintiff Sylvester Freschi was employed by the Metallurgical and Chemical Co., Inc., at Matawan, N. J. (p. 46, 1. 30) as a labor foreman (p. 48, 1. 19). He was engaged that day (p. 47, 1. 10) in supervising and constructing concrete piers in a leanto which was in the process of construction as was the recoveries craft building which said leanto joined to an already erected and fully completed building known as the Harris building (p. 44, 45 & 46). These piers were being constructed for the purpose of placing a piece of machinery (p. 257, 1. 16) known as an evaporator in said leanto. They were located in what was known as the second bay (p. 46, 1. 15) in said leanto and extended from the stack located in the second bay towards the railroad side of the leanto (p. 46, 1. 20). The piers were set on centers of 4'x8' with the eight feet centers being parallel with the side of the recoveries craft building (p. 54, 1. 1). The nearest pier was four feet from the side of the second bay nearest to the railroad (p. 54, 1. 23). In other words the nearest piers to the railroad were four feet from the end of the first bay or the begin-

ning of the second bay (p. 54, 1. 20). These bays were three in number (p. 46, 1. 15) and each consisted of the same area and were each twenty feet in length. On the morning of the day of the accident the defendant's men started to lay a roof over this leanto, and, beginning at the side or end toward the railroad worked toward the place where the plaintiff was working. The roof was fastened on by means of very small rivets (p. 233, 1. 36) which weighted but five lbs. (p. 233, 1. 36) to the thousand. These were fixed into straps which were wrapped around the steel structure and then the rivets hammered over in their positions while cold (p. 69). This riveting was done by the defendant's men working on a scaffold slung into position by ropes and consisting of a plank or two upon which they worked (p. 88, 1. 30; p. 89). At times they would hold on to the iron beams to steady themselves (p. 243, 1. 28) when on the scaffold. The only tools used by the men on the scaffold or those under the roof were dolly bars (p. 92, 93; p. 234, 1. 8). These were iron instruments about twelve or fourteen inches long, about two inches thick for half their length, and one inch for the other half which constituted the handle (p. 234). The large end was cupped to fit the head of the rivet. The defendant's men would hold these bars against a rivet or buck it up while the men on the roof would batter over the head (p. 69, 1. 9). When the defendant's men had started to roof in the second bay and approximately directly over the plaintiff on the afternoon of that day, the plaintiff was injured by being struck on the head a glancing blow by one of these bars (p. 90, 1. 36; p. 91). The only men working on the roof **that afternoon** (others had been there in the morning and quit at noon) were the employers of the defendant (p. 73, 1. 36) who was a subcon-

tractor of the Tuller Construction Company who were the erectors of this leanto, and this recoveries craft building. The defendant's men were the only men near and the only ones who used this type of a tool (p. 71, l. 8). After the plaintiff was injured one of the defendant's men quickly descended to the ground, because, as he says, someone was stealing tools, although he admitted one of these bars remained in open sight in a channel iron for a couple of days without being taken, (p. 240, l. 8) but evidently to retrieve the bar which he had dropped. Later he went to the laboratory where the injured plaintiff was taken and where a bar similar to the one he had been using and admittedly owned by the defendant (p. 243, top of page; p. 279, l. 30; p. 285, l. 6) was. This was afterwards given back to defendant's men.

The plaintiff suffered a severe head injury (p. 47, l. 20; p. 48, l. 26; p. 199 top) rendering him unconscious which was immediately sutured (p. 128, l. 11) by Doctor Gesswein who was plant physician for his employer, the Metallurgical and Chemical Co., Inc. (p. 198, l. 15) and returned to work in ten days. It was evident to his employers that a cure had not been effected and they sent him home from work (p. 51, l. 20; p. 107, l. 16). Thereafter he was taken to Dr. Ney, a brain specialist, (p. 127, l. 19-24) in New York City who operated upon him for his injuries. As a result of this operation he has an opening in his skull about the size of a silver dollar (p. 128, l. 35). Up to the time of the trial which was over five years after his injury he had been unable to earn more than seven or eight dollars a week whereas before his injury he had earned over thirty dollars per week (p. 102, l. 34).

The jury returned a verdict in favor of the plaintiff for $20,000.00 against the defendant at

a trial in the Monmouth Circuit Court on November 25, 26 and 27, 1929 before the Honorable Rulif V. Lawrence, judge of said court.

A rule to show cause was allowed and argued before the Supreme Court with the result that the Supreme Court ordered that said rule be discharged. At the time of the argument of the aforesaid rule, defendant-appellent argued practically all the points which are set forth in this appeal.

LAW.

POINT I.

THE TRIAL COURT WAS NOT IN ERROR IN REFUSING TO GRANT THE DEFENDANT'S MOTION FOR NON-SUIT.

A.

Among the reasons filed by the defendant-appellant in the present case for argument under the rule to show cause was the following:

> 2. Because the verdict in favor of the plaintiff and against the defendant is contrary to the law of the State of New Jersey.

It is apparent at the outset that while this reason did not meet the degree of particularity required by Supreme Court Rule No. 125, nevertheless, it is a fact that no objection was made to the reason on this ground at the argument under the rule, and the defendant-appellant did at said argument argue at great length to the effect that the trial court erred in not granting defendant's motion for a non-suit at the close of the plaintiff's case. He devoted a great number of pages in the brief which he filed in the cause

to this point and to this reason and argued in support of same practically the same factual situation which he now argues upon this appeal. The Supreme Court in considering the rule to show cause passed upon this very point and we therefore submit that it is Res Adjudicata. The defendant-appellant having had this day in court upon this very point and having had the court pass upon the same, he is not here entitled to be heard again arguing the same proposition which has heretofore been disposed of. We therefore submit that for this reason the point which the defendant-appellant attempts to make as Point I in his brief is not well taken and should not be considered again by this court. (Goekel vs. Erie R. Co. 126 Atl. 446, 100 N. J. L. 279; Margolies vs. Goldberg 127 Atl. 271, 101 N. J. L. 75.)

B.

The defendant-appellant has urged in his brief that the facts surrounding the plaintiff's injuries were such that as a matter of law the court should have non-suited the plaintiff at the close of his case when a motion for same was made by the defendant-appellant's counsel. It was to be expected that the quotations from the testimony which he makes in support of this proposition would be those most favorable to the point which he is attempting to make, but it was not to be expected that he would confine his quotations practically exclusively to the testimony of his own witnesses, which it is apparent that he has done. The defendant-appellant contends that the uncontradicted testimony shows that the defendant's men were working at such a distance from the plaintiff that it was a physical impossibility for the plaintiff to have sustained his injury in the manner claimed. This is

clearly not so, as the evidence produced on the part of the plaintiff showed that defendant's men at or before the time of the happening of the accident were working practically directly over the place where the plaintiff was laboring (p. 91, 1. 34). The defendant's witness admitted that after the happening of the accident the scaffold on which they were working was not moved again that day (p. 273, 1. 10) and Mr. Bingham, who was called on behalf of the plaintiff, testified that after he came onto the scene of the accident within twenty minutes thereafter (p. 324, 1. 31) he examined the situation as it then existed and found that the scaffold of the defendant's men was directly over the point where the plaintiff had been injured (p. 323, 1. 36). Mr. Vecco, also a witness for the plaintiff, testified that the men were working directly overhead (p. 91, 1. 34) and that the dolly bar which injured the plaintiff came from that direction (p. 92, 1. 10-15). Defendant-appellant further argues that there were many other men of varying trades and performing different operations engaged upon the building at that time. The testimony produced on both sides clearly shows that there is very little support to be given to this argument for as a matter of fact there was no one else working there that afternoon except the men who were working for the defendant-appellant (p. 82, 1. 9). In fact it was distinctly shown that the men who the defendant blamed for the happening of the accident were not working on this job at all, but were working on another job some distance from this place and had received their pay for working on this other operation (p. 86, 1. 30). Defendant-appellant calls the court's attention to Exhibit D I and points out that there was a crane boom which indicates distinctly that these men were on the job work-

ing at the time of the accident. We wish to direct the court's attention to the objection made by counsel for the plaintiff at the time this exhibit was offered which was to the effect that it did not clearly represent the situation existing at the time the accident occurred (p. 56, l. 3). The trial court conceded this and only admitted the exhibit upon stipulation of counsel that the crane boom to which reference is now made was not in the position indicated nor was it in any position on the building at the time of the happening of the accident (p. 171-2). Besides the crane was not in the leanto where the accident occurred (p. 66, l. 12) but in the main building. The plaintiff's picture of the scene of the accident as painted by the testimony of his witness clearly showed that at the time of the happening of the accident there was no crane boom in position, that there were no other men working overhead (p. 82, l. 4) except the defendant'appellant's men (p. 105, l. 35), that they had reached a point in the roofing operation which was directly over the plaintiff-respondent's head at the time of the happening of the accident (p. 91, l. 34), that an instrument known as a dolly bar and used only by the men of the defendant-appellant (p. 71, l. 8) fell from above and in so doing struck the plaintiff-respondent a glancing blow with the resulting injury (p. 90, l. 36; p. 91). This bar was plainly seen by Mr. Vecco who was working with the plaintiff and he testified directly regarding it (p. 91, l. 34; p. 92, l. 10-15). We therefore submit that the motion made by the plaintiff admitted as true the facts produced by the plaintiff and under these facts there was a prima facie case of negligence made out against the defendant.

There was no relationship of master and servant existing between the plaintiff and the

defendant and therefore the plaintiff did not assume any risk of injury at the hands of the defendant or his servants or agents.

5 C J 1412

Assumption of risk—a term in a contract of employment either express or implied from the circumstances of the employment by which employee agrees that the dangers ordinarily or obviously incident to discharge of his duty in the particular employment shall be at his own risk.

WALZ vs. PUBLIC SERVICE ELECTRIC & GAS CO. Vol VII N. J. Adv. Rep. No. 48 p. 993 at page 995

While it is true, that a servant assumes the risks or hazards of his employment, he only assumes such as are obvious to him, existing and arising in his masters' service, but cannot be held to assume risks and dangers which are created by third persons, and the presence or existence of which he is ignorant, and has had no warning.

The plaintiff did not wilfully expose himself to such danger as to bring him within the operation of the maxim **volenti nonfit injuria.** Construction operations such as the one which was being carried on in the case at bar when the accident happened are in progress every day in which different groups or gangs of men are working side by side or over and above the other. There was nothing particularly different on this job from any other job. In fact it would seem that

the plaintiff was exposed to less danger here than in the case of

SHERIDAN vs. FOLEY, 58 NJL 230, 33 A. 484

In the Sheridan case the plaintiff was working under bricklayers handling loose bricks. The defendant's men testified that they were not above the plaintiff although admitted they were near. Even if they were above they were using but one tool per man and very light rivets (1000 weighing 5 lbs.) The fact that some of the defendant's witnesses called it dangerous does not make it so. This is a factual question to be decided by the jury. The court speaking in Walz vs. Public Service Electric & Gas Co., supra, said these (assumption of risk and contributory negligence) present purely factual questions which were for the determination of a jury, and are not reviewable here. It would have been the same if plaintiff's witnesses had said it was not dangerous. (A jury question.)

The plaintiff was not guilty of contributory negligence. As stated above it is common practice for several gangs to work at the same time around the same building. May we state again that the fact some of plaintiff's witnesses may have said it was dangerous did not make it so or remove it from the province of the jury to pass upon it. We repeat here the argument stated above relative to the case of Sheridan vs. Foley and Walz vs. Public Service Electric & Gas Co. and the opinion of the court in said cases.

We therefore further submit in view of the foregoing that the trial court did not err in refusing to grant defendant's motion to non-suit and that the complaint which he makes regarding same is without foundation and groundless.

POINT II.

THE TRIAL COURT WAS NOT IN ERROR IN REFUSING TO GRANT THE DEFENDANT'S MOTION TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF.

The defendant-appellant in his brief seems to rely principally on BERLEY vs. EASTERN COAL DOCK CO. 95 NJL p. 17 and FUREY vs. NEW YORK CENTRAL & HARTFORD RAILROAD COMPANY 67 NJL p. 270 to make this point. It is difficult to see how these cases support the contention which he makes in this regard. In the case of Berley vs. Eastern Coal Dock Co. the plaintiff was a stranger to the premises and consequently the defendant did not owe the duty to him as existed in the present case. The same situation existed in Furey vs. New York Central & Hartford Railroad Co., where the court held that the plaintiff was not an invitee of the defendant and therefore it is apparent that the same duty did not exist as existed in the present case. The case of SHERIDAN vs. FOLEY, 58 NJL 230, 33 A. 484 bears directly on the precise point involved in this case and the defendant-appellant makes no effort or attempt to show that the proposition set forth in that case is inapplicable here and not controlling. The situation at the close of the entire case when this motion was made did not differ materially from that existing at the end of the plaintiff's affirmative case when defendant's motion for non-suit was made and very properly over-ruled as herefore discussed. While it is true the defendant's witnesses had to some extent contradicted those of the plaintiff, yet it remained for the jury, and the jury only, to say as to which group they

would believe. Surely there was not a situation in which twelve reasonable men would not be likely to differ with defendant's contention and in fact all twelve were against him as it turned out. The question of the defendant's negligence, contributory negligence of the plaintiff, and assumption of risk were questions for the jury. The court very properly left them to it for determination. WALZ vs. PUBLIC SERVICE ELECTRIC & GAS CO., Vol. VII N. J. Adv. Rep. No. 48 p. 993; GERMAN vs. HARRIS 8 A R 36.

POINT III.

THE TRIAL COURT DID NOT COMMIT ERROR IN PERMITTING THE READING OF DEPOSITIONS OF K. WINFIELD NEY OVER THE OBJECTION OF THE DEFENDANT.

A.

Among the reasons assigned by the defendant for setting aside the verdict under the rule to show cause was the following:

> 8. Because the trial judge over the defendant's objection permitted the reading of the depositions of Dr. K. Winfield Ney.

This point was argued by the defendant-appellant in his brief upon the hearing of the aforesaid rule and passed upon by the Supreme Court in its opinion filed regarding same. See opinion of Supreme Court page xii, line 39, State of Case. It thereby became res adjudicata, (Goekel vs. Erie R. Co. 126 Atl. 446, 100 N.J.L. 279; Margolies vs. Goldberg, 127 Atl. 271, 101 N.J.L. 75) and has been disposed of in so far as this appeal is concerned.

B.

If the court is of the opinion that the admission of said depositions should be considered even in view of the foregoing, we submit that they were evidential in the cause and legally admissible.

These depositions of Dr. Ney who resides in the City of New York were taken on December 18, 1925, and on July 1, 1927, in the presence of an associate of the attorney for the defendant and of the attorney of the defendant **without any objection being made by the defendant and apparently under an agreement between the attorneys of the parties that they should be admitted in evidence with further formality waived.** They are extremely detailed and throughout the defendant by his attorneys availed himself of his right of cross-examination.

18 CORPUS JURIS p. 754, Sec. 381

> Where a party participates in the taking of depositions without objection he cannot thereafter object on account of formal irregularities.

CAROLINE HOLCOMBE vs. HOLCOMBE EXECUTOR 10 N.J.E. 284.

> The defendants were present by their counsel and had the benefit of cross-examining the witness. It is not shown how the defendants can be prejudiced by permitting the evidence to be read on the hearing.

The first depositions (the second not being in existence at the time) were used at the first trial of the cause on July 13, 1926, without objection. The first and second depositions were used

at the second trial of the cause on November 14, 1927, also without objection. This tends to confirm the fact that it was agreed that they could be used and does in any event preclude the defendant from raising objection when he **did for his objection was not timely and came after a waiver of same.**

NOTE: (Counsel for plaintiff was changed between the second and third trials.)

18 CORPUS JURIS p. 750 SEC. 376.

> As a general rule a deposition which has been read on a former trial is admissable in evidence at every subsequent trial of the case.

18 CORPUS JURIS p. 753 SEC. 380.

> In the absence of proper and timely objections all defects, irregularities, and illegal evidence in depositions are waived. By allowing a deposition to be read once without objection, a party waives all objections all defects, irregularities (and il- in the taking of which he has knowledge, **as where there has been a former trial of the cause,** and no such objection was therein noted.

JACKSON vs. GEIGER, et al, 4 Misc. 726, 134 At. 288.

Cites with approval the following from 1 Wigmore p. 55, Sec. 18.

> Objections to the procedure of taking and the form of the document must be made before trial; also objections to the manner of the interrogatives, for example as improperly leading the deponent, or to the manner of the answer as being insufficient or irresponsive.

These depositions, having been admitted in the former trials, became and were admissable in this trial.

CAROLINE HOLCOMBE vs. HOLCOMBE EXECUTOR 10 N.J.E. 284.

Depositions taken on a preliminary matter after bill filed, and before the time had expired for any further pleading were permitted to be read on the final hearing, so far as they were relevant to the matters in issue, and which were involved in the preliminary matter.

McGRATH vs. HERVEY, 44 Atl. 962

The fact that a deposition has been used before a referee is no ground for its exclusion on a trial before the court, where the issues were not finally determined by the referee.

WANNER vs. SISSON, 29 N. J. E. 141.

1. In a suit in this court to quiet title and restrain an action of ejectment, a deposition of a witness in that action who has since died is competent, the action at law, having been between the same parties, for the same land.

SEE ALSO 18 CORPUS JURIS p. 753, SEC. 380 CITED ABOVE

The point made by the defendant that the depositions were taken without a strict compliance with sections 45 and 57 of the Evidence Act (C. S. 1910 p. 2234, 2237) does not render them inadmissable as Section 52 of the same act provides that same may be admitted and

validates such irregularities. Besides the case of FLANNERY vs. CENTRAL BREWING CO., ET AL (Court of Errors & Appeals) 70 N. J. L. 715, 59 A 157, expressly and directly overules anything to the contrary contained in CHASE vs. GARRETSON, 54 N. J. L. p. 42—23 Atl. 353 (SUPREME COURT) and the cases on which it is based.

C. S. 1910, p. 2236.

Sec. 52—Any deposition or examination taken under this act shall be subject to be excluded or overruled, wholly or in part, according to the opinion of the court, upon any objection taken to the competency of the witness, the materiality or competency of the evidence given, or the regularity of the questions put; but shall not be excluded for any irregularity or informality in taking or returning the same, if the court in which the same is offered shall be satisfied that the testimony of the witness has been fairly and truly taken and returned; and if such deposition or examination shall be admitted in evidence by the court, no exception shall be taken to the admission thereof, on the ground of any irregularity or informality in taking or returning the same. (P. L. 1900, p. 377).

FLANNERY vs. CENTRAL BREWING CO., ET. AL 70 N. J. L. 715, 59 Atl. 157.

p. 158—it is quite apparent from the record that the testimony of the plaintiff was irregularly taken, even under Sec. 57. But irregularity in the taking will not defeat the introduction of the testimony in evidence.

(Note: Court then recites Sec. 52 of Act to substantiate aforesaid).

Disregarding the fact that the depositions

were admissable because the defendant had agreed to the taking of them and waived the formalities of the statute, because the defendant's attorneys were present and cross-examined the witness at great length, because they had been admitted at two previous trials without objection and because the defendant had not made timely objection to their admission, the Court had a right to exercise its discretion under Sec. 52 of the Evidence ACT (S. C. 1910, p. 2236) and allow them which discretion it exercised wisely as the witness was out of the State and not subject to subpoena (P. 124 line 30).

THE COURT:

And it appears at this time that the defendant was represented and cross-examined, Dr. Ney, being a non-resident of the State, was not subject to compulsory process requiring his attendance at the trial and therefore, as provided by our practice act, his examination has been taken in another State under deposition on notice. The practice makes such deposition eligible to be used and read at a subsequent trial of the case.

POINT IV.

THE PORTIONS OF THE COURT'S CHARGE TO WHICH THE DEFENDANT EXCEPTED WERE NOT ERRONEOUS AND THE DEFENDANT-APPELLANT WAS NOT HARMED THEREBY.

A.

A careful reading of the testimony will show that the defendant-appellant was permitted by the trial judge to drag the question of the

amount which the plaintiff had been paid as workmen's compensation through the entire cause. At every turn he was permitted to bring out the number of years for which compensation had been paid and through it permitted to attempt to enlist the sympathy of the jury in favor of the defendant-appellant. The trial judge allowed defendant to do this over the objection of plaintiff's counsel and the case of GILBERT vs. JUNIOR TRUCKING CORP. 104 NJL 608, 141 A 776 which plaintiff cited in support of his contention. We therefore submit that the defendant-appellant was permitted, allowed, and did have every advantage which any testimony pertaining to workmen's compensation could avail him. Even if this were not so, the error complained of was not harmful to him in view of the fact that it did not pertain to the liability of the defendant-appellant but only to the question of the amount of damages. In this respect the defendant has had a rule to show cause in which the question of damages has been very carefully considered by the Supreme Court with the result that the award heretofore made to the plaintiff was considered not excessive under the circumstances. We further submit that if there was error committed it was not harmful to the defendant-appellant and therefore he has no cause to complain here.

B.

The exception which the defendant-appellant took to the charge of the court which is set out under subdivision B of Point IV of his brief is also without merit. There can be no doubt but that the doctrine of res ipsa loquitur was applicable to the present case, supported as it is by SHERIDAN vs. FOLEY 58 NJL 230, 33 A

484. Regarding the illustration put by the court it is difficult to see how the defendant-appellant was harmed thereby and that harmful error was committed by the court in charging as it did.

C.

The exception taken to that portion of the court's charge set forth in part C of Point IV in defendant-appellant's brief is also without merit. As heretofore set forth and pointed out, the circumstances surrounding the accident were such as supported entirely the assumption indulged in by the court. It is not true as defendant-appellant argues that no one saw the accident for Frank Vecco, a witness called on behalf of the plaintiff and who was working with the plaintiff, actually saw it and so testified. He and other witnesses substantiated the story that the defendant's men were working directly over the plaintiff at the time of the happening of the accident and in fact they were the only men working on the building at this time excepting, of course, the plaintiff and his men.

D.

Contention made by the defendant-appellant regarding the exceptions which he took to that portion of the court's charge which is set forth in part D, Point IV, of his brief is also without merit. This same point was made under the rule to show cause heretofore argued before the Supreme Court and passed upon in the opinion filed. In fact that same argument and the same authorities are cited in support of the contention made here as were given in defendant-appellant's brief under the rule to show cause. Defendant-appellant says that the doctrine of res ipsa lo-

quitur was inapplicable to the situation at hand. We submit to the court that it was (SHERIDAN vs. FOLEY, 58 NJL 230, 33 A. 484) and therefore say that the court did not err in this portion of the charge.

E.

It is very difficult to find how the defendant-appellant can seriously contend that if error was committed by the court in charging as it did to which exception was taken and allowed in part E, Point IV, of his brief that it could be harmful to him. We submit that the court did not err in charging as it did and that, even if it were so that error was committed, it surely was not harmful error of which the defendant-appellant could here complain.

F.

The contention made by the defendant-appellant to that portion of the court's charge contained in said part F, Point IV, of his brief is not important and no harmful error resulted in the language used by the court under the circumstances.

G.

As to defendant-appellant's contention to the argument made in part G, Point IV, of his brief regarding that portion of the court's charge set forth, we say that the court charged clearly and fully on the question of contributory negligence in such a manner to favor and protect the defendant-appellant fully in his rights. Defendant-appellant here attempts to argue over the questions of negligence and contributory negli-

gence which have heretofore been fully argued and set forth in other points of this brief. We repeat the arguments heretofore made and say that no harmful error was committed against the defendant-appellant in this respect.

H.

The trial court did not commit harmful error in that portion of its charge which was excepted to and set forth in part H, Point IV, of defendant-appellant's brief. Defendant-appellant here argues again questions of facts which were in dispute and primarily for the jury. The court very properly left it to them for determination.

I.

The question as to whether or not the Metallurgical Co. had supplied the plaintiff with a safe place to work was not an issue in the suit brought by the plaintiff against it which, of course, could not be done since the passage of the workmen's compensation laws. The question of the proximate cause of the accident was fully developed by the court and the court very properly left to the jury to determine whether or not the proximate cause of plaintiff's injuries was the defendant or his employees, or the Metallurgical Co. We therefore submit that no harmful error was committed by the trial court in so doing.

POINT V.

THE TRIAL COURT CHARGED DEFENDANT'S REQUESTS SO FAR AS THEY WERE APPLICABLE TO THE CASE.

It is to be observed that the defendant-appellant set out in his reasons for new trial under

the rule to show cause the exceptions which he took to the court's refusal to charge his requests as set forth in parts 1, 2, 3, 4 and 5 of Point V of his brief. These were all fully argued on the rule to show cause and passed upon by the court in its opinion. They have therefore been disposed of and are res adjudicata in so far as this cause is concerned. (Goekel vs. Erie R. Co. 126 A. 446, 100 NJL 279; Margolies vs. Goldberg 127 A. 271, 101 NJL 75.) An inspection of the record will further show that in so far as these requests to charge were pertinent to the issue involved the court charged same fully and that no harmful error resulted to prejudice the right of defendant-appellant in this regard.

CONCLUSION.

We respectfully submit to the court that the case involved the doctrine of res ipsa loquitur and the factual situations found by the jury regarding the negilgence of the defendant-appellant, contributory negligence of the plaintiff, and like issues were well supported by the evidence given in the cause by the witness called. Defendant-appellant's interests were fully protected at all times by the concessions made to him by the trial court in conducting his cause, charging the jury, and generally protecting his interests. No error was committed in the trial of the cause harmful to the defendant-appellant. The case has been tried four times and we submit that the verdict rendered by the jury which has been upheld by the Supreme Court, when it was assailed on practically the same grounds under rule to show cause, should not be disturbed but affirmed.

BURLEY & CURRIE,
Attorneys for Plaintiffs.

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