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NEW JERSEY SUPREME COURT,
PASSAIC COUNTY.

Amended Complaint.

Plaintiffs, residing in the City of Passaic, County of Passaic and State of New Jersey, say that:

FIRST COUNT.

1. On or about August 14th, 1924, and for a long time prior thereto, the defendant, Great Atlantic & Pacific Tea Company, a corporation, maintained, controlled and conducted a certain store at corner Harrison Street and Central Avenue, Passaic, New Jersey, where it possessed, purchased, stored, dealt in, and vended in groceries, canned goods and bottled beverages.

2. On the aforesaid date, the plaintiff, Christina Noonan was lawfully in the said store, as an invitee of the said Great Atlantic & Pacific Tea Company, a corporation, its agent and servant, expressly, and also by implication, as a customer of the said defendant for the purpose of purchasing some commodities or articles kept, stored and maintained by said corporation at its said store for the purpose of sale.

3. On the aforesaid date and for a long time prior thereto, the defendant, Fairmount Bottling Co., a corporation, was engaged in the business of manufacturing and selling bottles and in the business of manufacturing beverages and bottling said beverages in its said bottles, such beverages being bottled with carbonic gas and pressure.

4. On and for a long time prior to the aforesaid date, the defendant, Great Atlantic & Pacific Tea Company, a corporation, was a customer of the defendant, Fairmount Bottling Co., a corporation, and said Fairmount Bottling Co., a corporation, sold and delivered to the defendant, Great Atlantic & Pacific Tea Company, a corporation, at its said store such bottled beverages.

5. On the aforesaid date, said bottles and the beverages so bottled and manufactured by the defendant Fairmount Bottling Co., a corporation, and sold to the defendant, Great Atlantic & Pacific Tea Company, a corporation, and delivered to its said store, was then stored, maintained and kept by the said Great Atlantic & Pacific Tea Company, at its said store.

6. The defendant, Fairmount Bottling Co., a corporation, carelessly and negligently failed to make reasonable or sufficient inspection or examination to ascertain the condition of its said bottles and carelessly, and negligently manufactured and used dangerous, unsafe and insecure bottles of an inferior grade and quality of glass, too brittle and not of sufficient strength to use for bottling of said beverages, and carelessly and negligently used a greater quantity of carbonic gas or more pounds of carbonic pressure than such bottles can safely hold, and more than reasonably safe to be used for bottling such beverages, and carelessly and negligently did not safely, sufficiently or properly cap, cork or secure said bottled beverages and carelessly and negligently placed said bottled beverages upon the market for sale, and sold to the defendant, Great Atlantic & Pacific Tea Company, a corporation, and delivered to its said store a number of such bottles.

7. Said defendants were representing to the public and to the plaintiffs that said bottles were safe, secure and harmless and that the said bottles were of sufficient strength and so manufactured as to be not dangerous and the said beverages were so properly bottled, and that the said bottles and bottled beverages were harmless and could not cause any injury, could not break, burst or explode. Said defendants failed to exercise reasonable care to ascertain or determine whether or not the said bottles and the said bottled beverages were safe and whether or not they were likely to break, burst or explode.

8. Said defendants, their agents and servants, knew, or by the exercise of reasonable care or by inspection, should have known, that said bottles were dangerously bottled, and that the said bottled beverages could and would by reason of their defective state and condition, and excessive quantity of gas and pressure and by reason of the foregoing premises, burst, break or explode. Said defendants, carelessly and negligently failed to warn or apprise the plaintiff, Christina Noonan, of the foregoing danger and of the fact that the said bottles or any of them could and would, break, burst or explode.

9. Said bottles, to the knowledge of said defendants, had such inherent defects, and the said beverages were so defectively and negligently bottled, that the same could, and did easily break, burst and explode.

10. On the aforesaid date, while the plaintiff, Christina Noonan, was in the store of the defendant, Great Atlantic & Pacific Tea Company, a corporation for the purposes aforesaid, and while said plaintiff stood at the said defendant's counter

in said store, making purchases from the said defendant, one of the bottles, broke, burst or exploded. Because of the foregoing premises, and the defective condition of said bottles, and also because of the inherent defective manner in which the said beverages was bottled, and also by reason of the carelessness and negligence of said defendant, and its agents and servants, and as a direct and proximate result thereof, all or some parts thereof was caused to fly about in said store and struck and injured the plaintiff, Christina Noonan.

11. By reason of the foregoing premises and the careless and negligence of the defendants, said Christina Noonan suffered deep cuts and lacerations on the nose which are permanent in their character; as a result of which, the plaintiff sustained other injuries, as a result of which, the plaintiff suffered severe nervous shock, strain and fright.

12. By reason of the injuries which the said plaintiff Christina Noonan sustained, she was for a long time obliged to receive medical aid, treatment and attention, in an effort to cure and heal said injuries.

13. By reason of the injuries which the said Christina Noonan sustained, she did and will for a long time in the future suffer great pain, torment and anguish of mind and body, and said plaintiff was and will for a long time in the future be prevented from attending to her business and walking and moving about.

Plaintiff, Christina Noonan, demands damages in the sum of Ten Thousand ($10,000) Dollars, together with costs of suit, on the First Count.

SECOND COUNT.

Plaintiff, Michael Noonan, who is the husband of and resides with the plaintiff, Christina Noonan, says that:

1. Each and every allegation of the First Count is hereby repeated and made a part of this count.

2. By reason of the injuries which the said Christina Noonan sustained, the plaintiff Michael Noonan was and will be obliged to expend divers sums and incur various debts for medical aid, treatment and attention in an effort to cure and heal the injuries which his wife, the plaintiff Christina Noonan, sustained.

3. By reason of the injuries which his wife sustained, the plaintiff Michael Noonan did and will for a long time in the future be deprived of the services and consortium of his wife, Christina Noonan, to his great damage.

4. Plaintiff, Michael Noonan, demands damages in the sum of Five Thousand ($5,000.00) Dollars, together with costs of suit, on the Second Count.

Plaintiffs demand damages in the sum of Fifteen Thousand ($15,000.00) Dollars, together with costs of suits, on both counts.

FEDER & RINZLER,
Attorneys of Plaintiffs.

Answer of Fairmount Bottling Company, to Amended Complaint.

The answer of the Fairmount Bottling Company, a corporation of the State of New Jersey, having its principal office of business at No. 820 Main Street, Hackensack, Bergen County, New Jersey, to the amended complaint herein say;

ANSWER TO FIRST COUNT.

1. On information and belief it admits the allegations of the first paragraph.
2. It has no knowledge of the facts alleged in the second paragraph and therefore denies the same.
3. It admits the third paragraph.
4. It admits the fourth paragraph.
5. It has no knowledge of the facts alleged in the fifth paragraph and therefore denies the same.
6. It denies the sixth paragraph.
7. It denies the seventh paragraph.
8. It denies the eighth paragraph.
9. It denies the ninth paragraph.
10. It denies the tenth paragraph.
11. It denies the eleventh paragraph.
12. It denies the twelfth paragraph.
13. It denies the thirteenth paragraph.

ANSWER TO SECOND COUNT.

1. It repeats its answers to the first count.
2. It denies the second paragraph.
3. It denies the third paragraph.

WRIGHT, VANDER BURGH & McCARTHY,
Attorneys for Fairmount Bottling
Company, a corporation.

Answer to Amended Complaint.

The defendant, the Great Atlantic & Pacific Tea Company, a corporation of the State of New Jersey, with its principal office in Jersey City, says that:

1. It admits paragraph one of the First Count.

2. It admits that it purchased bottled beverages from the Fairmount Bottling Company and sold them in said store.

3. It has not sufficient knowledge nor information on which to form a belief as to the allegations of paragraph 6.

4. Except as hereinabove admitted all the allegations of the complaint are denied.

REED & REYNOLDS,
Attorneys of defendant,
Great Atlantic & Pacific Tea Co.

Plaintiffs' Interrogatories.

TO FAIRMOUNT BOTTLING COMPANY,
Defendant.

Sirs:

The plaintiffs hereby demand and you are required to make written answers under oath to the following interrogatories, and file the same with the Clerk of this Court and also serve the same upon the plaintiffs' attorneys within the time required by law.

1. On and prior to August 14th, 1924, was the defendant, Atlantic & Pacific Tea Company, here-

inafter referred to Great Atlantic & Pacific Tea Company, a customer of bottled beverages?

2. On and prior to August 14th, 1924, did you manufacture beverages and bottle the same in glass bottles or containers?

3. Did you sell, furnish or deliver to the defendant, Great Atlantic & Pacific Tea Company, such bottled beverages or liquid content?

4. Did you manufacture the bottles in which such beverages or liquid was contained?

5. Describe the size, kind and type of said bottle and the kind and quality of the glass?

6. How were such bottles capped, corked or sealed?

7. How many pounds or what quantity of carbonic gas, if any, did such bottled beverage contain?

8. How many pounds of carbonic gas or what quantity of carbonic pressure did you use previous to August 14th, 1924, in bottling similar beverages or liquid in like bottles.

9. Did you make any inspection or examination of such bottles to determine quality and condition thereof, and to determine whether they were safe for the purposes contended; and if so, what did you do and when?

10. Did similar bottles or bottles of like kind or type ever burst, break or explode prior to August 14th, 1924, after they were bottled, capped or sealed?

11. Has freezing of the beverage any effect upon the bottle in which it is contained; if so, why?

12. On August 14th, 1924, were there in the possession of the defendant, the Great Atlantic & Pacific Tea Company in its store on Harrison Street, corner Central Avenue, Passaic, New Jersey any of such bottles containing beverage sold to the defendant, the Great Atlantic & Pacific Tea Company and manufactured by you?

Dated: February 19, 1926.

FEDER & RINZLER,
Attorneys of Plaintiffs.

Answers As To Interrogatories of Plaintiff by Fairmount Bottling Co.

Sirs:

The defendant, Fairmount Bottling Company, a corporation, answers the written interrogatories dated February 19th, 1926 served by the plaintiffs herein under oath.

Answer to the first Interrogatory. Yes.
Answer to the second Interrogatory. Yes.
Answer to the third Interrogatory. Yes.
Answer to the fourth Interrogatory. No.
Answer to the fifth Interrogatory. The bottles were 12 oz. bottles of emerald green glass similar to those used by other manufacturers and distributors of bottled beverages.
Answer to the sixth Interrogatory. The bottles were capped or sealed with a metal and cork cap which was placed on by machinery at the time the bottles were filled.

Answer to the seventh Interrogatory. The beverages contained in the bottles were bottled under a pressure of fifty pounds. There is a slight loss in bottling due to leakage of gas between the time the bottle is filled and the cap applied.

Answer to the eighth Interrogatory. The beverages contained in the bottles were bottled under a pressure of fifty pounds. There is a slight loss in bottling due to leakage of gas between the time the bottle is filled and the cap applied.

Answer to the ninth Interrogatory. Yes. The bottles were inspected after being washed and before being filled.

Answer to the tenth Interrogatory. No.

Answer to the eleventh Interrogatory. Yes. All liquids expand when frozen.

Answer to the twelfth Interrogatory. Do not know.

Dated, March 2nd, 1926.

WRIGHT, VANDER BURGH & McCARTHY,
Attorneys for Defendant,
Fairmount Bottling Company.

STATE OF NEW JERSEY,
COUNTY OF BERGEN, } ss.:

MATTHEW ANDRONICO, of full age, being duly sworn according to law upon his oath, deposes and says; that he is the President of the Fairmount Bottling Company, a corporation, one of the defendants herein and is the active Manager of the

business of said corporation and is familiar with the facts stated in the answers to Interrogatories attached hereto, and that the same are true to the best of his knowledge and belief.

MATTHEW ANDRONICO.

Subscribed and sworn to before me
this 5th day of March, 1926.

JOSEPHINE S. BARNEY,
Notary Public of New Jersey.

Interrogatories by Great Atlantic and Pacific Tea Company.

To: Feder & Rinzler,
Attorneys of Plaintiffs,
Liggett Building,
Passaic, N. J.

Sirs:

PLEASE TAKE NOTICE that the defendant herewith answers, under oath, the interrogatories propounded in this cause:

1. On or about August 14th, 1924, was therein your possession the bottle containing beverage purchased from and manufactured by the defendant, Fairmount Bottling Company?

On said date there were bottles in our possession said to contain beverage purchased from and manufactured by the defendant, Fairmount Bottling Company.

2. If so, how long was it in your possession in your store prior to August 14th, 1924?

About two weeks.

3. Describe the kind, size and type of said bottle?

About ten inches high; glass tinted a greenish color.

4. Did the bottle contain carbonic gas?

Do not know.

5. How many pounds or how much pressure of carbonic gas did the bottle contain?

Do not know.

6. Prior to the happening of the grievances mentioned in the complaint, did you know, or make any effort to ascertain how many pounds or how much pressure of carbonic gas was contained in that bottle or in similar bottles of like content, purchased by you from and manufactured by the Fairmount Bottling Company, and if you made any attempts to ascertain such fact, explain what the attempt so to do consisted of, and when and from whom you attempted to acquire such information?

No.

7. Prior to the happening of the grievances mentioned in the complaint, has a similar bottle or a bottle of like content ever broken, burst or explode in your store, said bottle being purchased from and manufactured by defendant, Fairmount Bottling Company?

No.

8. Prior to the happening of the grievances mentioned in the complaint did you make or cause to be made any inspection or examination of this bottle to determine its contents and to determine if it was likely to break, burst or explode; if so, what was done?

No.

9. On or about August 4th, 1924, was the plaintiff in your store?

No, so far as we know.

10. If so, did such a bottle explode while she was there; if so, was said bottle purchased from and manufactured by the defendant, Fairmount Bottling Company?

No.

11. Was the plaintiff, Christina Noonan, struck or injured by such bottle or any part thereof?

No.

12. While Christina Noonan was in your store, what, if anything, happened to such bottle?

Nothing.

Dated: February 27, 1926.

REED & REYNOLDS,
Attorneys of Defendant,
Great A & P Tea Co.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } ss.:

WILLIAM G. WRIGHTSON, being duly sworn according to law, on his oath deposes and says:

That he is a Vice-President of the Great Atlantic & Pacific Tea Company, a corporation, one of the defendants in this action, in which the foregoing interrogatories and answers thereto are made; that he is upon information and belief familiar with the facts in this case, and the facts set out in the

said answers, and the statements made therein, are true to the best of his knowledge, as he verily believes.

W. G. WRIGHTMAN.

Subscribed and sworn to before me
this 3rd day of March, 1926.

WILLIAM CORKILL,
Notary Public,
New Jersey.
(SEAL)

Defendant's Interrogatories by Fairmount Bottling Co.

To—Christina Noonan and Michael Noonan, plaintiffs:

The defendant, Fairmount Bottling Company, a corporation, hereby demands, and you are required to make written answers under oath to the following interrogatories and file the same with the Clerk of this Court, and also serve the same upon said defendants attorneys within the time required by law.

1. State in detail the alleged injuries suffered by the plaintiff, Christina Noonan.

2. Where and by whom did the plaintiff, Christina Noonan, first receive medical aid?

3. Give the names and addresses of the Doctor or Doctors who attended the plaintiff, Christina Noonan; the number of times and approximate dates she was attended by each such person.

4. What was the nature of the medical aid or treatment given or supplied to the plaintiff, Christina Noonan?

5. How long was the plaintiff, Christina Noonan, confined to her home?

6. Was the plaintiff, Christina Noonan confined to her bed; if so, between what dates?

7. What is the age of the plaintiff, Christina Noonan?

8. Give names and addresses of physicians who treated plaintiff, Christina Noonan prior to August 14th, 1924; the approximate dates of each such treatment and the nature of the injuries or illness in each case.

9. Is the plaintiff, Christina Noonan engaged in any business or other occupation other than as housewife? If so, state the nature of such business or occupation.

10. State in detail the items of expenditures and the amounts in each case made or incurred by the plaintiff, Michael Noonan for medical aid, treatment and attention in an effort to cure and heal the injuries which his wife, the plaintiff, Christina Noonan is alleged to have sustained.

Dated, March 8th, 1926.

WRIGHT, VANDER BURGH & McCARTHY,
Attorneys for Defendant,
Fairmount Bottling Company.

Answers to Defendants' Interrogatories.

The plaintiffs, Christina Noonan and Michael Noonan, answer the written interrogatories dated March 8th, 1926, served by the defendant, Fairmount Bottling Company herein under oath.

Answer to the first Interrogatory. Injuries consisted of as follows: contusion and bruises to the nose, swollen from the date of the contact to the date hereof. Will necessitate operation. Right side of nose clogged by break so that plaintiff cannot breath freely. Cuts on nose.

Answer to the second Interrogatory. Dr. Henry Dwyer.

Answer to the third Interrogatory. Dr. Matthews, No. 269 Bloomfield Avenue, Passaic, New Jersey, and Dr. Henry Dwyer, No. 261 Madison Street, Passaic, New Jersey. Made so many visits that I cannot give the right number. Last time two weeks ago.

Answer to the fourth Interrogatory. Cannot explain very well. Doctors are in better condition. However, Doctors treat me for my nerves and I also receive medical treatment to my nose. Medicines used, examinations made from time to time, salves used on nose, etc.

Answer to the fifth Interrogatory. Confined off and on. For the first six weeks I could not work. I couldn't even take care of my own home or could not sleep.

Answer to the sixth Interrogatory. Was not confined actually to bed, excepting was forced to rest during the day for several hours at a time.

Answer to the seventh Interrogatory. I am fifty-five years of age.

Answer to the eighth Interrogatory. Dr. Henry Dwyer, No. 261 Madison Street, Passaic, New Jersey.

Answers to Defendant's Interrogatories.

Answer to the ninth Interrogatory. No other work but house-work.

Answer to the tenth Interrogatory. Dr. Henry Dwyer's bill not submitted. Dr. Matthews' bill not submitted until operation complete.

Dated: April 16, 1926.

FEDER & RINZLER,
Plaintiffs.

STATE OF NEW JERSEY,
COUNTY OF PASSAIC, } ss.:

CHRISTINA NOONAN and MICHAEL NOONAN, of full age, being duly sworn, according to law, upon their oath say that they are the Plaintiffs in the suit in which the foregoing Interrogatories and the answers thereto are made, and that they are familiar with the case, and that the facts set out in the said answers and the statements made therein are true to best of their knowledge as they each verily believe.

MRS. CHRISTINA NOONAN,
MICHAEL NOONAN.

Sworn to and subscribed before me,
this 16th day of April, 1926.

MORRIS M. SPINDLE,
Attorney at Law of N. J.

NEW JERSEY SUPREME COURT,
PASSAIC CIRCUIT.

CHRISTINA NOONAN and MICHAEL NOONAN, her husband,
Plaintiffs,

vs.

GREAT ATLANTIC & PACIFIC TEA COMPANY, a Corporation, and FAIRMOUNT BOTTLING COMPANY, a Corporation,
Defendants.

Action at Law.

Paterson, N. J., June 8, 1926.

Tried Before: Hon. CLIFFORD L. NEWMAN, Judge and a Jury.

Testimony.

APPEARANCES:

Messrs. FEDER & RINZLER (by Mr. Rinzler), for Plaintiffs;
Messrs. REED & REYNOLDS (by Mr. Brown and Mr. Reed), for Defendant Great Atlantic & Pacific Tea Company;
Messrs. WRIGHT, VANDER BURGH & MCCARTHY (by Mr. Wright), for Defendant Fairmount Bottling Company.
A Jury was duly empanelled and sworn.

(Noon Recess)

Henry Dwyer, M.D., direct.

HENRY DWYER, M.D., sworn for Plaintiffs.

Direct Examination by Mr. Rinzler:

Q. You, sir, are a duly licensed medical practitioner of this state? A. Yes, sir.

Q. And have been for how many years? A. Since 1916.

Q. Where do you engage in your practice of medicine? A. Passaic.

Q. Have been since 1916? A. Yes, sir.

Q. Did you, on the 15th of August, 1924, in the morning, examine Mrs. Christina Noonan, one of the plaintiffs? A. Yes, sir.

Q. Where did you make that examination? A. At her home.

Q. Did you find her to be injured? A. Yes, sir.

Q. What injuries did your medical examination disclose? A. A lacerated wound of the nose.

Q. That was a recent injury? A. Yes, sir.

Q. You had been the Noonan family physician, had you not been, for sometime? A. Yes, sir.

Q. Had you known Mrs. Noonan, as the family physician? A. Yes, sir.

Q. Prior to that date, of August 15, 1924, had Mrs. Noonan been suffering with any nose trouble? A. Not that I know of.

Q. Had you ever treated her prior to that time? A. I don't remember, not for the nose.

Q. To your knowledge, had Mrs. Noonan ever had any impairment in her breathing, or any difficulty in her breathing? A. Not to my knowledge.

Q. Had she, to your knowledge, ever had any throat trouble of any kind? A. I don't remember treating her.

Q. Where did the cut or laceration on the nose commence? A. Well, I don't remember it clearly; it was just a little cut over the nasal bone, I think.

Q. How long did you continue to treat Mrs. Noonan? A. Well, I have been treating her off and on ever since.

Q. To this date? A. Yes, sir.

Q. You have continued treating her continuously for approximately two weeks after the injury, have you not? A. About that.

Mr. Brown: The question is rather leading.

Q. After that, you kept treating her off and on? A. Yes, sir.

Q. As a result of the injury to Mrs. Noonan what effect, if any, has it had upon her breathing? A. Well, I only know what she complains of.

Q. What does she complain of to you? A. She complains of difficult breathing.

Q. Any throat condition? A. She says she has some catarrh now.

Q. What, if anything, have you found in the nose? Is there a foreign substance or growth there? A. I didn't look in her nose.

Q. You did not? A. No, sir.

Q. What, in your opinion, doctor, is a fair and reasonable sum for your services in treating Mrs. Noonan? A. Oh, about fifty dollars.

Mr. Rinzler: That is all.

Cross-Examination by Mr. Brown:

Q. Doctor, just what did you treat Mrs. Noonan for from the time of the injury down to the present time? A. Why, for the lacerated wound on the nose and for her nervous condition.

Q. The first injury mentioned, how long did that take to heal up? A. Why, it healed up in a week or two.

Q. In a week or two? A. Yes, sir.

Q. So that your subsequent treatment for her, was for her nervous condition? A. Yes, sir.

Mr. Brown: All right.

Redirect Examination by Mr. Rinzler:

Q. Doctor, assuming that the cut to Mrs. Noonan's nose was the result of a blow received by flying glass that struck her nose, in your opinion, that as a direct result, Mrs. Noonan would suffer from nervousness, shock and headache?

Mr. Brown: I object to that.

The Court: Of course, this man is called out of turn; he can only speculate on that, I suppose.

Mr. Rinzler: It was only at the suggestion of Mr. Brown that I called the doctor out of turn, made a special effort to get him here at this time, because he wanted to have his own doctor here. I will connect it up.

The Court: They object to it.

Mr. Wright: It is not cross-examination, of course.

The Court: He is not cross-examining him; this is his witness.

Mr. Brown: Not on that ground, Your Honor, do we object; but we object on the ground that it is not only leading, but if he is going to put a hypothetical question, it will have to be more specific.

The Court: Let me hear the question.

(Question repeated.)

The Court: That is leading, Mr. Rinzler.

Mr. Rinzler: I pray an exception.

Henry Dwyer, M.D., re-cross.

Q. Assume, doctor, that on the 14th of August, 1924, Mrs. Noonan was struck by flying glass, the flying glass emanating from a bottle containing a beverage, the bottle having exploded and the flying glass having struck Mrs. Noonan and cut her across the nose, as you have indicated, what, in your opinion—what would you say was the cause of her nervousness, shock and headaches, assuming that she has suffered with nervousness, shock and headache? A. Well, I should say that was the cause.

Mr. Rinzler: That is all.

Recross-Examination by Mr. Brown:

Q. Doctor, you would not say that her nervousness, headache and shock could not be brought about by other causes, would you? A. I couldn't say that.

Q. You were called on August 15th, were you not? A. I think that was the date; yes, sir.

Q. About how soon after the call did you answer the call—did you respond? A. I don't know the exact time; I think I answered pretty promptly, though.

Q. Do you remember the time of day that you arrived there? A. I think it was in the morning; I am not sure.

Q. In the morning? A. I am not sure.

Q. You went to call just as promptly as you could? A. Yes, sir.

Q. You stated, I believe, that you did not make any examination of the nose? A. Not of the interior of the nose.

Q. Not of the interior of the nose? A. No, sir.

Joseph F. Rubacky, direct.

Q. Did you have X-rays taken? A. No, sir.

Mr. Brown: That is all.

(Witness excused.)

Mr. Rinzler: Do you wish to call your doctor at this time?

Mr. Brown: Yes.

Mr. Rinzler: I have no objection. Dr. Rubacky is offered by the defendant,——?

Mr. Brown: By the Great Atlantic & Pacific Tea Company.

JOSEPH F. RUBACKY, sworn for defendants.

Direct examination by Mr. Brown:

Q. Dr. Rubacky——

Mr. Brown: Do you admit the qualifications?

Mr. Rinzler: Yes, I will waive proof of qualifications.

Q. —did you examine Mrs. Noonan? A. I did.

Q. On what date? A. Last Thursday.

Q. Last Thursday? A. Yes, sir.

Q. Did you examine her nose? A. Yes, sir.

Q. Will you tell us what the result of your examination was? A. Due to an accident which she sustained sometime in 1924, I believe on August 16th, if I recall the date correctly, she, in her history, stated that she was struck by the cap that had been—that had exploded off the top of a bottle. I examined her nose and found a very minute scar, probably a quarter of an inch or three-eighths of an inch in length, running from the midline of the nose, about the center of the bridge, downwards and backwards, the distance mentioned.

Q. That was on the exterior of the nose? A. Yes, sir.

Q. Did you examine the interior? A. The interior of the nose presented what we could term a polyp or a growth off one of the turbinate bones of the nose.

Q. From your experience, doctor, could you determine as to what was the cause of that growth? A. Why, that is a natural growth that occurs quite frequently in, I would say, a good majority of the people.

Q. Would you, as a result of your experience, say that such a growth, assuming that this patient had been struck on the exterior of the nose, on the nasal bone, by a flying piece of glass or a cap of a bottle, would you say that the growth which you discovered was the direct result of such an injury? A. I would certainly decidedly say no, that it would not be because of that.

Mr. Rinzler: Wait a minute.

A. (Continuing) A blow of such a minor force as to inflict such a small scar——

Mr. Rinzler: I object, if your Honor please, and ask that the answer be stricken out, because the witness assumes that there was such a minor force inflicted; there is no such evidence in the case.

The Court: Motion denied.

Mr. Rinzler: Exception.

Q. When you used the word "minor," were you judging from the size of the scar which you were able to discern? A. I was, and from the nature of the scar.

Q. And from the nature of the scar, basing your conclusions on your experience, would you say that —would it be your opinion that the injury had been a very serious one to the exterior of the nose? A. I would say no, not in my opinion.

Q. Doctor, in your opinion, would such a growth as this showed come from a nasal disease by—or rather result in defective breathing, difficulty in breathing? A. It would impair the breathing to a certain extent.

Mr. Brown: That is all.

Q. Oh, doctor, how large was this growth or polyp in the nose which you found? A. It was only a minor polyp; I don't believe it was about half the size of a pea, something like that.

Q. About half the size of a pea? A. Yes.

Q. With respect to the passage, how large would that be with the passage? A. That all depends on climatic conditions; sometimes these polyps are increased due to climatic conditions; sometimes they shrink, especially when the air is less humid, they have a tendency to shrink; when it is more humid they have a tendency to become more inflammed and enlarged.

Q. So that in certain conditions of the atmosphere, this polyp might practically, for the time being, fill up the passage? A. Oh, yes.

Q. And when it got dry and the conditions changed it would reduce itself in size? A. No question about that.

Q. Would you say that in your opinion that would not be the result of a blow? A. I would say no.

Q. To what was the polyp attached, to what part of the nose? A. Why, to be precise about it, I would say that it probably came from the——

The Court: What part of the nose is it attached?

A. (Continuing)—midde turbinate, for that section of the nostril corresponds with the midline of the nostril.

Q. You don't mean the bridge of the nose? A. No.

Q. You mean the bone running laterally, somewhat diagonally to the eye? A. Yes, but in the nose it is.

Q. But in the nose it is? A. Yes.

Q. That would be this lower part of the nose, down near the cheek? A. More toward the cheek than toward the point of the nose.

Q. Where was this scar with respect to the polyp? A. The scar was probably a half an inch or more,—about half an inch or more approximately above that.

Q. That is, up toward the bridge of the nose? A. Yes.

Q. So if there is a horizontal line drawn through it, would it be above the horizontal line? A. Yes, I would say that.

Q. So that it was higher up on the nose than the scar, or the scar was higher up than the polyp; is that right? A. No, I would say that the scar is lower than the polyp.

Q. That the scar was lower than the polyp; I think that is all.

Cross-Examination by Mr. Rinzler:

Q. Doctor, you are being paid for giving your testimony here, both for making your examination and testifying, on behalf of the Great Atlantic & Pacific Tea Company? A. Yes, sir; I have been paid.

Q. You are being paid for your testimony here today? A. I don't know; I assume I shall be.

Q. You expect to charge for it, don't you? A. Yes, sir.

Q. You have been paid for your examination last Thursday? A. Yes, sir.

Q. Doctor, the growth in this woman's nose impairs her breathing to some extent, doesn't it? A. Undoubtedly.

Q. And when a person's breathing is impaired, that affects the throat, doesn't it? A. Not necessarily.

Q. It can very naturally and approximately affect the throat, can it not? A. I would say no.

Mr. Brown: It would not?
The Witness: No.

Q. If a person's breath was cut off, it would have no effect whatsoever upon the throat, would it? A. No, not necessarily.

Q. Could it? A. It might, if you didn't have compensatory breathing on the other side.

Q. But it would naturally affect the throat, would it not? A. No, that all depends on what is the condition. You are trying to classify this polyp——

Q. (Interrupting) Then why on direct examination did you say that to some extent the breathing is impaired by the growth? A. If you are referring to this particular case, counsellor, I would say that the polyp would have a tendency to impair the breathing.

Q. That is what I want to know. And the impairment of the breathing in this particular case could naturally affect the throat, could it? A. What part of the throat, counsellor?

Q. The throat? Would it not cause sore throat —or could it not cause sore throat? A. Sore throat due to a specific infection or sore throat due to some irritation?

Q. Sore throat due to impairment in breathing? A. No.

Q. Well, doesn't catarrh often follow impairment of breathing? A. It very often does.

Q. Yes. Now, you have never seen Mrs. Noonan prior to last Thursday, have you? A. No, sir.

Q. Never examined her before that time? A. No, sir.

Q. You are assuming, doctor, that the blow that she received to the nose was a minor one? A. I am; I have.

Q. You haven't taken into consideration that the blow was from a chunk of glass that came from a faulty bottle, this piece of glass that struck her having traveled in the air about eight or nine or ten feet; have you? A. I know nothing about it, except that her history said she was hit by a bottle cap.

Q. You did not take into consideration the fact that this glass that struck her came from a bottle that had exploded, and that the piece of glass had traveled a distance of eight or ten feet before it struck her; you haven't considered that at all, doctor, have you? A. Repeat that again.

Q. In giving your testimony and stating your opinion, you have not taken into consideration the fact that a bottle exploded, and that a piece from that exploded bottle had traveled a distance of eight or nine feet in the air, and then struck her in the nose; have you? A. I am.

Q. You are? A. Yes, sir.

Q. Did she tell you it was a piece of glass that struck her? A. She told me it was a bottle cap.

Q. Well, assuming that it was a piece of glass that exploded from a bottle, and that that piece of glass had traveled a distance of eight or ten feet before it struck her, would that have a tendency to change your opinion and your testimony? A. No, sir.

Q. It would not? A. (Indicating negatively.)

Q. Would the fact that it had exploded, the bottle containing carbonic gas, under a pressure of fifty pounds, change your opinion whatsoever? A. Considering the distance, counsellor, you must remember——

The Court: Would it change your opinion?

A. No, sir.

Q. It would not? A. No, sir.

Q. You are assuming that it was a minor blow? A. Absolutely.

Q. Assuming, doctor, that it was a violent blow; that would change your opinion, would it not? A. With conditions as they exist——

Q. Assuming that this woman was struck in the nose a violent blow with that glass, wouldn't that change your opinion? A. In reference to what?

Q. To this woman's condition of the nose? A. No.

Q. It would not? A. No.

Q. And the fact that she may have been struck a violent blow with that glass would not change your opinion about the growth, doctor? A. I am not assuming that.

Q. Suppose you should assume that she was struck a violent blow, couldn't a growth inside result from it? A. A growth such as she had?

Q. A growth in the nose such as she has? A. No.

Q. Could any growth ensue as a result of a violent blow in the nose? A. It might arise from right underneath the point of traumatic pressure, you mean to say?

Q. From a violent blow, doctor; is that right? A. Yes.

Q. Yes. Now, doctor, do you know that this woman is fifty-five years old? A. According to the history, I do.

Q. A blow taking a person unawares very often causes shock and nervousness, does it not? A. Depends on what force there is to the blow.

Q. Well, is force to be considered in the blow? A. Absolutely.

Q. Well, suppose it was a violent blow, wouldn't shock and nervousness ensue as a result? A. Assuming so, I would say yes.

Q. And your assumption is on the theory that it was a minor blow; is that right? A. From the nature of the scar, absolutely.

Q. Yes, and the scar in the course of a year and a half should heal, diminish in size, shouldn't it? A. Not very much at that particular point.

Q. Doesn't a scar, doctor, heal and diminish in size with time? A. It all depends on where your scar is. If you have got a scar over bony tissue, you certainly would not have a radical change in that scar ten years later.

Q. About the nose, now, doctor? A. I would say no.

Q. Would you say now that the scar is of the same size that it was in August 1924, immediately after she had the scar? A. I would say the width of the scar would diminish.

Q. Width of the scar would diminish? A. Yes.

Q. How about the length? A. I would say no.

Q. Only in width? A. Yes.

Q. What are the various causes of a polyp or a growth in the nose, doctor? A. Various causes; in the first place, the most frequent cause is an abnormal formation in the nose.

Q. Caused by what? A. Caused by birth.

Q. By birth? Now, that is a troublesome condition, isn't it? A. I don't know what you are referring to, counsellor.

Q. A polyp in the nose which a person would have at birth would be a troublesome condition in the person's lifetime, wouldnt it? A. Ordinarily, you don't very often get polyps at birth.

Q. But if there was a polyp at birth, it would be a troublesome condition, wouldn't it? A. It might be.

Q. It might be? A. Certainly.

Q. Cannot you say that it would be? A. No.

Q. Could it be, in your opinion, a troublesome condition? A. It might be.

Q. Is it ever, in your opinion, a troublesome condition? A. Absolutely, many, many times.

Q. If it was a troublesome condition—— A. (Interrupting) When you get a polyp in the fossae of the nose, that causes a lot of disturbance by the fact that the polyp is so in its arterial construction, is so filled with the flow of blood, that it occupies or blocks up the entire passage of the nose.

Q. And that impairs the breathing? A. Naturally clogs the breathing if you did not have compensatory breathing on the opposite side of the nose, you would certainly get impaired breathing without any doubt.

Q. You would not say that a person that breathes through one nostril is a normal healthy human being? A. I would not.

Q. In fact, you would say such a person has abnormal breathing? A. No, I wouldn't say that either.

Q. Is it normal or abnormal? A. It all depends; you could have abnormal compensatory breathing, or you can have normal compensatory breathing.

Q. Is a person who has a growth in one nostril and whose breathing in that one nostril is impaired—has such person a normal breathing nose? A. If you consider the nose——

Q. Yes or no; doctor. A. You must define yourself; you must be more explicit in your questions. I cannot answer an indefinite question.

Q. Doctor, take a natural, healthy person, who has two nostrils, does he breathe normally? A. Absolutely.

Q. And when one nostril is clogged, that person has an abnormal breathing, doesn't he? A. Not when you consider the passages.

Q. That is what you were considering, weren't you, doctor? A. Necessarily.

Q. Didn't you take that into consideration? A. Absolutely.

Q. Now, aside from a polyp or growth coming at birth, they might also come as a result of a violent blow, would you say some of the other causes of a polyp or a condition such as this?

The Court: He said it might come from a traumatic pressure. Didn't you?

The Witness: I said, Your Honor, that the polyp, if it would arise, would arise on the under point of contact.

The Court: Could it arise from a violent blow?

The Witness: It could, providing you have the polyp arising on the under point of the traumatic contact.

The Court: Read the question. (Repeated by stenographer) Could it arise from a violent blow?

The Witness: You can have from a traumatic contact any pathological growth of the tissues surrounding the inferior medullary or superior turbinate.

Q. Doctor, did you examine any authorities on polyps before you came here to testify today? A. No, sir.

Q. Do you know of any authority, doctor, on that subject? A. Absolutely.

Q. What is the authority? A.

Q. How long is it now that you have read it? A. I read on and off during my practice.

Q. When is the last you have read it, doctor? A. I have read probably a week or .en days ago.

Q. Not since you made this examination? A. No, sir.

Q. Did you ever treat a case of polyp such as this? A. I never treat polyp.

Q. No such condition? A. No, sir.

Q. No condition of a polyp? A. No, sir.

Mr. Rinzler: That is all.

Cross-Examination by Mr. Wright:

Q. This polyp, was it under the point of the scar any place? A. No, I told you, counsellor, that the polyp was a little above a horizontal line drawn through the scar.

Q. So then this particular polyp could not have been caused by any kind of a blow——

Mr. Rinzler: I object; counsel has already gone into that.

Mr. Wright: I have not.

The Court: I will permit it.

Mr. Rinzler: Exception.

Mr. Wright: Read the question.

Q. (Repeated by stenographer). So then this particular polyp could not have been caused by any kind of a blow? A. I would say decidedly not.

Q. What is the treatment for polyp? A. I refer them generally to a nose and throat specialist for removal.

Q. Do you know what his treatment is? A. Ordinarily, they shear them out.

Q. Serious operation? A. No, not very serious.

Q. How long does it lay a person up? A. Very seldom, if ever, lays them up for any length of time, not over probably a couple of days or so in the hospital to "scale" it off right.

Q. Operation is usually performed in the specialist's office? A. Yes.

Mr. Wright: That is all.

Recross-Examination by Mr. Rinzler:

Q. You have never seen one treated? A. Oh, I have seen them treated.

Q. But you have never treated one? A. I don't treat them.

Q. How long, in your opinion, doctor, has this woman had this polyp? A. That, I couldn't tell.

Q. Haven't got any idea, have you? A. No.

Mr. Rinzler: That is all.

Redirect Examination by Mr. Brown:

Q. When a case of polyp comes to you, doctor, what do you do? Turn it over to a specialist? A. I refer them to a nose and throat specialist.

Q. One more question, doctor. Would the fact that you are being paid this afternoon for taking a day away from your practice and coming up here to testify cause you to favor us at all in your testimony? A. Absolutely not.

Mr. Brown: That is all.

(Witness excused.)

ISADORE LEICHTER, sworn for Plaintiffs.

Direct Examination by Mr. Rinzler:

Q. Where do you live? A. In Passaic.

Q. Have you ever been a soda bottler? A. Yes, sir.

Q. Or bottler of carbonic gas beverages? A. Yes, sir.

Q. For how many years did you work at the business of bottling carbonic gas beverages? A. Ten years.

Q. And after that did you engage in business for yourself? A. Yes, sir.

Q. In the same type business? A. Yes, sir.

Q. For how many years? A. Three years.

Q. So that for thirteen years you have been bottling soda water beverages? A. Yes, sir.

Q. And bottling soda water beverages, I mean, using carbonic gas pressure? A. Yes, sir.

Q. Have you ever bottled soda—particularly, have you ever bottled ginger ale? A. Yes, sir.

Q. With carbonic gas pressure in emerald green glass twelve ounce bottles? A. Yes, sir.

Q. Is this bottle that I now show you such a bottle? A. Yes.

Mr. Rinzler: Any objections to this going into evidence? Fairmount Bottling Company, it comes from.

Mr. Brown: I don't know whether it does or not; it hasn't any label on.

Mr. Rinzler: Do you wish it marked for identification?

Mr. Wright: From its appearance, it looks like ours.

(Marked P-1, Identification.)

Q. Referring to this bottle, P-1 for identification, you say it is a twelve ounce emerald green glass bottle? A. Yes, sir.

Mr. Rinzler: I offer it in evidence. The interrogatory served upon the defendant Bottling Company, asked what kind of a bottle was used, and that company in response to this interrogatory uses a bottle—answers that it was a twelve ounce green glass bottle.

Mr. Wright: I object to your using the contents of the interrogatories, unless you offer them in evidence.

Mr. Rinzler: I offer them in evidence. I offer the interrogatories served upon each defendant with the answers thereto.

Mr. Brown: I wish it understood the purpose of offering this in evidence is merely for the purpose of showing that it is a

twelve ounce green glass bottle, and that a bottle without the label on, such as theirs, is not to be considered at all in the evidence.

The Court: There has been no testimony in the interrogatories, which I have heard, as to what kind of a bottle it was that was exploded.

Mr. Rinzler: Is there any dispute about that, that this is the kind of a bottle that exploded?

Mr. Wright: I do not know. I cannot say this is or is not; if you want us to produce one of our bottles, I shall be very glad to do it.

Mr. Rinzler: I wish you would.

Mr. Wright: I have some here now that have had something in them; they have had ginger ale in them.

Mr. Rinzler: I wish you would.

Mr. Wright: This bottle, just as it is, I do not know anything about it.

Mr. Rinzler: And I do not know anything about yours. I offer this in evidence.

The Court: I admit it.

(Bottle offered and received in evidence and marked Plaintiffs' Exhibit P-1.)

The Court: It is a twelve ounce bottle?

Mr. Rinzler: Twelve ounce emerald green glass bottle.

Q. Now, I show you a bottle handed to me by counsel; is this also a twelve ounce emerald green glass bottle? A. Yes, sir.

Mr. Rinzler: I offer it in evidence.

(Bottle offered and received in evidence and marked Plaintiffs' Exhibit P-2.)

Q. You say these two bottles, P-1 and P-2, are the same? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Mr. Rinzler: Do you say, gentlemen, that P-2 is the type bottle that exploded?

Mr. Wright: I do not say anything about it.

Mr. Rinzler: Is this the type bottle that was sold by the Fairmount Bottling Company to the Great Atlantic & Pacific Tea Company?

Mr. Wright: You are proving your own case; I do not want to prove it for you.

Mr. Rinzler: I just wanted to know how far you would admit, to save time for the court and jury.

Q. In your experience as a soda water bottler, have you bottled such beverages, particularly ginger ale, in this type, kind and quality of bottle? A. Yes, sir.

Q. And the size of this bottle? A. Yes, sir.

Q. You have bottled ginger ale in a twelve ounce bottle such as—— A. Yes, sir.

Q. Is this green glass emerald bottle a good or a poor quality of glass? A. Very poor.

Q. In your experience as a bottler of carbonic gas beverages, particularly ginger ale——

Mr. Rinzler: (Interrupting question) Because this, gentlemen, I will say, is ginger ale——

Q. (Continuing)—in bottling that beverage and beverages with carbonic gas pressure in twelve ounce emerald green glass bottles, such as these, Exhibits P-1 and P-2, what is the maximum, the

greatest number of pounds carbonic gas pressure that it is safe to use?

Mr. Wright: I object; this gentleman has not qualified as an expert.

The Court: You haven't shown qualifications yet in that respect.

Mr. Rinzler: I have shown he has been in that business thirteen years——

Q. (Interrupting comment) Have you not? A. Yes.

The Court: I know you have, but that is not sufficient for this question.

Q. Have you bottled in this sort of bottles ginger ale at various carbonic gas pressures? A. Yes, sir.

Q. How many pounds do these bottles—how many pounds of carbonic pressure do these bottles hold?

Mr. Wright: I object to that.

The Court: If he knows, he may tell. He cannot tell what he puts in them, but he can tell what he knows that they will hold, if he knows.

Q. If you know, tell us how many pounds of carbonic gas pressure——

Mr. Wright: Exception.

A. From thirty pounds to thirty-five.

The Court: Do you mean that they can hold that much without exploding?

The Witness: They could, yes, hold about thirty to thirty-five pounds without exploding.

Q. Now, what, in your experience, have you found to be the result in case you used more than thirty or thirty-five pounds of carbonic gas pressure in the type bottle such as these, Exhibits P-1 and P-2, in bottling ginger ale and other beverages? A. Very dangerous; it explodes.

Mr. Wright: What was that answer?

Mr. Rinzler: "Very dangerous; it explodes."

Q. Have you seen such bottles as Exhibit P-1 explode when more than thirty to thirty-five pounds of carbonic gas pressure is used in bottling these beverages in such bottles as Exhibit P-1?

Mr. Wright: I object to that as very leading.

The Court: I sustain the objection.

Q. Have you seen such bottles explode? A. Yes, sir.

Q. Did you make tests to see how many pounds gas pressure they held? A. Yes, sir.

Q. Did you see—Did you find out how many pounds of gas pressure they held? A. Thirty-five to thirty pounds.

Q. And in your experience, when you used more than thirty to thirty-five pounds carbonic gas pressure, what happened to the bottles? A. They exploded.

Q. Have you seen them explode? A. Yes, sir.

Q. When you have seen them explode, did the bottle contain more than thirty to thirty-five pounds of carbonic gas pressure? A. Yes, more than thirty-five.

Q. Is it safe in bottling such beverages in such bottles as Exhibit P-1 and P-2 to use fifty pounds of carbonic gas pressure?

Mr. Brown: Objected to.

The Court: I sustain the objection.

Q. Have you ever, in your experience, seen what happens to a bottle when it contains more than thirty-five pounds of carbonic gas pressure? A. It explodes.

Q. Have you seen such bottles containing such beverage with carbonic gas pressure as much as fifty pounds? A. I have not.

Q. Have you ever seen bottles with fifty pounds pressure in testing the bottles? A. They explode.

Q. Can they hold fifty pounds of carbonic gas without exploding? A. No, sir.

Mr. Brown: What was the answer?

Mr. Rinzler: He said, "No, sir," I don't know whether that is evidence, if Your Honor please, the laughter.

The Court: Proceed.

Q. Assuming that in bottling beverages, there is a crack or other defect in the bottle, what happens when carbonic gas pressure is in the bottle?

Mr. Brown: I object to that; there is nothing to show that in the bottle in question there was a crack.

The Court: No, I do not think there is any evidence to support that.

Mr. Rinzler: Suppose I connect it up later, Your Honor?

The Court: No, connect it up now.

Q. Now, in bottling such beverages with the machine, the machine comes down on the bottle; is there any protection in the machine to protect the glass of the bottle from breaking, such as a rubber or other protection?

Mr. Wright: I object to that. It does not appear that the machine used in bottling these bottles are the same kind of machine he uses.

The Court: I sustain the objection.

Q. In bottling these beverages, such as contained in P-1 and P-2, on the machine that you use, is there or not anything to protect the bottle from breaking when the caps are put on the machine?

Mr. Wright: I object to that.

Mr. Brown: I object to that.

A. We have——

The Court: I sustain the objection.

Q. In your opinion, from your experience, in using such bottles as Exhibit P-1, and in making the necessary tests, is it or not safe to bottle beverages in such bottles with fifty pounds carbonic gas pressure?

Mr. Wright: I object to that.

The Court: I sustain the objection.

Mr. Rinzler: I urge the question, if Your Honor please, on the ground that this man is an expert, having been in this business for thirteen years, that in using in excess of thirty to thirty-five pounds of such pressure, it is dangerous and may explode the bottle.

The Court: He may tell what happens. Whether it is safe or not, that is a jury question. He has already told us in great detail, I think.

Q. Now, when you use more than thirty to thirty-five pounds carbonic gas pressure, in bottling beverages in such bottles, what happens? A. It is very dangerous; it explodes.

Mr. Rinzler: That is all.

Cross-Examination by Mr. Wright:

Q. Where were you employed for ten years in the bottling business? A. In Passaic.

Q. In Passaic; for whom? A. For Rinzler—M. Rinzler.

Q. Who? A. M. Rinzler, Maurice Rinzler.

Q. M. Rinzler? A. Yes, sir.

Q. You say you have been in business for yourself for three years? A. Yes, sir.

Q. Where? A. In Passaic.

Q. Under what name? A. Passaic Seltzer Bottling Company.

Q. What? A. Passaic Seltzer Bottling Company.

Q. You bottle seltzer, do you? A. Yes, sir.

Q. Bottle ginger ale? A. Yes, sir.

Q. Are you still engaged in that business? A. No, sir.

Q. When did you quite that business? A. Two years ago.

Q. What business are you in now? A. Bakery business.

Q. In the bakery business? A. In the bakery business.

Q. What kind of bottles did you use? A. White bottles.

Q. You used white bottles; where did you buy your bottles? A. Newark.

Q. New bottles or second-hand bottles? A. New ones.

Q. You are familiar with pressures which other ginger ale bottlers and manufacturers use? A. No, sir.

Q. You are not? A. (Indicating negatively.)

Q. You have heard of Canada Dry Ginger Ale, have you not? A. I have heard about it.

Q. Never saw it, I suppose? A. I have seen it.

Q. Never made any tests of those bottles to see how much pressure in them, have you? A. Never tested, you cannot test them.

Q. In what kind of bottles is that bottled in? A. White bottles.

Q. What did you use to test the pressure in the bottling of ginger ale? A. We have got a regulator.

Q. What? A. Regulator.

Q. Regulator? A. Yes, sir.

Q. You mean pressure gauge? A. Yes, sir.

Q. What did you do? How did you test it? A. Well, we would put in a certain amount into the carborator.

Q. You do what? A. To the carborator goes in a certain amount of gas.

Q. Oh, you have got a gauge on your machine, what you are talking about; is that right? A. That is what we call it; it is a carborator.

Q. But that is in the bottling machine? A. Not in the bottling machine, in the carborator, which mixes the water up with the gas.

Q. Did you ever test the bottle after it had been bottled? A. You cannot test it.

Q. Sure of that? A. Positive.

Q. You cannot? A. No.

Q. Did you ever see one of these gauges? A. No. sir.

Q. Never did, eh? A. No, sir.

Mr. Wright: I would like to have that marked for identification, gauge which bears on the outside, "Liquid Carbonic Company," only identifying mark on it, I think.

Mr. Rinzler: All right.

(Known as D-1 for Identification, not marked.)

Q. So you say a bottle that has had fifty pounds carbonic gas pressure will explode? A. Yes, sir.

Q. And particularly one of these emerald green twelve ounce bottles? A. Yes, sir.

Mr. Rinzler: That is what he is talking about.

Q. I suppose there are different grades of emerald green bottles, aren't there? A. I don't know if there is only one kind—

The Court: Speak up.

Q. So that if it has a large amount in, it will explode? A. Yes, sir.

Q. No doubt about that? A. Yes, sir.

Q. You mean there is no doubt about it? A. If it holds more than thirty-five pounds, it will explode.

Q. If it has got fifty pounds in, it will explode? A. Yes, sir.

Q. If you have forty-five pounds in, it will explode? A. Any more than thirty-five it will explode.

Q. That bottle has not exploded yet, has it, since it has been on the table (indicating)? A. You cannot prove it to me there has been more than thirty-five pounds in there.

Mr. Wright: That is all.

Redirect Examination by Mr. Rinzler:

Q. Does heat affect the explosion also?

Mr. Wright: I object to that; this witness has not qualified——

The Court: If he knows, he may answer.

Q. In other words, when the weather is too warm, if the bottle is kept in a warm place, what effect has that on the bottle? A. It will explode too.

Q. What effect has movement of the beverage upon the bottle? A. That makes it explode.

Mr. Wright: I object to that; no evidence of movement.

The Court: I will permit the question.

Mr. Rinzler: That is all.

Cross-Examination by Mr. Brown:

Q. Just one minute. How often have you attempted to fill a green bottle? You say you used white bottles? A. I used to have them before, but I gave them up.

Q. How long ago? A. Three years ago.

Q. Three—— A. —years.

Q. That was as late as you have attempted to fill any bottles? A. No, that was when I am still in business, then.

Q. What were you filling them with? A. I was filling them with that pressure.

Q. What were you filling in green bottles? A. With the same machine, with thirty-five pounds pressure.

Q. I mean, putting in them? A. Ginger ale.

Q. Were you dealing in ginger ale three years ago? A. All kinds of soda.

Q. Eh? A. All kinds.

Q. From whom did you purchase the bottles that you used, green bottles? A. From Newark.

Q. Where? A. From a dealer.

Q. Eh? A. From a dealer.

Q. From what dealer? A. From a bottle dealer.

Q. What was his name? A. DeLuccia.

Q. Where? A. In Newark.

Q. Where in Newark? A. I don't know where, I know he lived in Newark.

Q. What street? A. I couldn't tell you.

Q. How many bottles did you buy of him? A. I bought a truck load.

Q. Who delivered them? A. The same man, Mr. DeLuccia.

Q. He brought them to you? A. Yes, sir.

Q. Truck load of green bottles? A. Yes, sir.

Q. How did you get them from him? How did you communicate with him that you wanted them? A. Called him up.

Q. Where did you call him? A. Newark.

Q. What part of Newark? A. I couldn't tell; I looked up the telephone book and I called him up.

Q. You don't know where, what part of Newark he was in? A. No, sir; I don't know what part.

Q. Where did you first hear of him? A. I found out in the telephone book.

Q. When you wanted bottles, you went to the telephone book, looked there, and you found the man's name in Newark? A. Yes.

Q. That is all you knew about it? A. That is all.

Q. Now, was that the only green bottle you purchased, that truck load? A. No, I bought some more.

Q. Eh? A. No, I bought some more.

Q. Where did you buy those? Where? A. In Newark.

Q. Same man? A. Yes, sir.

Q. Eh? A. Yes, sir.

Q. Did he bring them to you? A. Yes, sir.

Q. When was that? A. Well, it is a couple of months later.

Q. Well, how long ago now? A. Well, that is about three years ago.

Q. Still three years ago? A. Yes, sir.

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

Q. How many did you get that second time? A. A truck load.

Q. Got a truck load the second time? A. Yes, sir.

Q. Were those two truck loads all you bought? A. Yes, sir.

Q. That is all you got? A. I haven't got any more.

Q. You hadn't gotten any before that? A. I had the first load, and then I bought the second one.

Q. You bought the first and then you bought a second? A. Yes, sir.

Q. Those are the only two loads of green bottles you bought? A. Green glass, yes.

Q. Do you know where they were made? A. No, sir.

Q. You think they looked like this, did they? A. Yes, sir.

Q. They did not have any labels on them, I suppose? A. No labels, no names.

Mr. Brown: That is all.

Recross-Examination by Mr. Wright:

Q. You said that you had seen Canada Dry bottles. I show you a bottle and ask you if that is a bottle of Canada Dry Ginger Ale? A. Well, they make different bottles.

Q. They do? A. Yes, sir.

Q. This is a bottle of Canada Dry Ginger Ale, isn't it? A. Yes, sir; that is their bottle.

Q. What kind of a bottle is that? Emerald Green? A. Yes, sir.

Q. The same as this? A. Yes, sir.

Q. Same as the other two that have been offered and marked? A. (No audible response.)

Mr. Wright: I ask that this be marked for identification.

(Marked D-2, for Identification.)

(Witness excused.)

Mr. Rinzler: I offer in evidence, Your Honor please, interrogatories served upon each defendant respectively and their respective answers thereto.

(Interrogatories to Great Atlantic & Pacific Tea Company offered and received in evidence and marked Plaintiffs' Exhibit P-4; answers thereto marked P-4-A.)

(Interrogatories to Fairmount Bottling Company offered and received in evidence and marked Plaintiffs' Exhibit P-5; answers thereto marked P-5-A.)

Mr. Rinzler: What is your answer as to the date of the occurrence, as August 14th? Do you care to answer that?

Mr. Wright: She was there on the 14th; we do not deny that.

Mr. Rinzler: You say she was there on August 14th?

Mr. Wright: We will admit she was there.

Mr. Rinzler: Do you admit that on August 14, 1924, when she was there the bottle exploded?

Mr. Wright: We do not want to go that far, no. The testimony will bring that out.

Mr. Rinzler: Who is the manager of the Great Atlantic & Pacific?

A Voice: I am.

Mr. Rinzler: Come forward and be sworn.

MAX A. KRETSCHMAR, sworn for Plaintiffs.

Direct examination by Mr. Rinzler:

Q. Mr. Kretschmar, on August 14, 1924, were you the manager in charge of the Great Atlantic & Pacific Tea Company's store conducted by that corporation at the corner of Harrison avenue and Central avenue, in the City of Passaic, New Jersey? A. Harrison street.

Q. Harrison street and Central avenue, Passaic? A. I was.

Q. For how long prior to that time had you been the manager in charge of that store? A. Three years.

Q. And are you still and have since been manager of that store? A. No, not that store no more.

Q. Oh, until what time did you remain in charge of that particular store, as the manager, on behalf of the Great Atlantic & Pacific Tea Company? A. About April 10, 1925.

Q. On August 14, 1924, while you were in charge of, as the manager in charge of that store on behalf of the Great Atlantic & Pacific Tea Company, a corporation, did you see Mrs. Noonan in the store? A. Yes, sir; quite frequently.

Q. Pardon me? A. Quite frequently.

Q. On that day, was she in the store? A. Yes.

Q. On that day, while you were in charge of that particular store for that corporation as manager, did a bottle of ginger ale, similar to Exhibits P-1 and P-2 explode? A. Yes, sir; it did.

Q. Where did that bottle that exploded on that day while Mrs. Noonan was in that store of which you were the manager—did the ginger ale that the bottle contained—was that ginger ale the same as the ginger ale in this bottle of ginger ale that has been identified? A. As far as I know.

Q. It was the same type bottle, you do know that? A. Same type bottle.

Q. When did you receive—withdraw that. From whom did your company purchase that ginger ale so bottled, from what company? A. Why, it was delivered by the Fairmount Bottling Company wagon, or truck.

Q. When delivered, did the bottles contain such labels as are now contained on Exhibits D-1 and D-2? Just look at them? A. They did.

Mr. Rinzler: I offer the labels in evidence, Your Honor please, on each of these bottles.

Q. Where was the bottle which was similar to exhibits P-1 and P-2 at the time when it exploded, in what part of the store of the Great Atlantic & Pacific Tea Company? A. I had them in a paper box on the counter.

Q. Were you laying them down in a paper box? A. I was standing them in.

Q. Standing them in. When the Fairmount Bottling Company delivered that bottle and the other bottles they were contained in boxes, weren't they? A. In boxes.

Q. They were wooden boxes? A. Wooden boxes.

Q. With twenty-four compartments, weren't they? A. No, they were covered with a piece of paper on top, like Canada Dry comes that way now, piece of paper comes around them; they have them now on each bottle.

Q. They were covered (illustrating)? A. That is the idea.

Q. Piece of paper such as this? A. Each bottle was covered with it.

Q. Wasn't the bottles in boxes? A. When delivered, they were.

Q. I mean—wait a moment—when the bottles were delivered at the Great Atlantic & Pacific Tea Company by the Fairmount Bottling Works, were the bottles in boxes? A. They were delivered in boxes.

Q. Yes, they were delivered in boxes; how many bottles to the box? A. Twenty-four.

Q. There were twenty-four compartments made inside of it? A. No, those bottles lay in, one across the other.

Q. Twenty-four in a box? A. Twenty-four in a box.

Q. Were each of the bottles contained in such a paper as this? A. Every one.

Q. Placed over the bottle from the top (illustrating)? A. Yes.

Mr. Rinzler: Mark this in evidence.

(Offered and received in evidence and marked Plaintiffs' Exhibit P-6.)

Q. Was this paper such as Exhibit P-6 the only cover or carton that was contained on these bottles when they were delivered to your store? A. That was the only thing, yes.

Q. In other words, when the Fairmount Bottling Company delivered these bottles, and the one that was exploded, the only covering that was on the bottle and the only carton that it had was such a paper as Exhibit P-6? A. No, sir.

Q. No wire mesh over it? A. No.

Q. No outside packing, was there? A. No.

Q. Now, when you unpacked those bottles in the store, did you leave those paper covers on them or were they removed? A. Those that were displayed didn't have the cover on.

Q. This bottle that exploded, was that one of the bottles on display in that store? A. It was one that had been on the shelf.

Q. That bottle then did not have such a paper covering on? A. It did not.

Q. Mrs. Noonan was not buying some beverages at the time, was she? A. She was not.

Q. She was not, buying that bottle of beverage? A. No, sir.

Q. You were serving some other lady with the bottle of beverage that exploded? A. That is right.

Q. How many were you serving her with—two? A. It was more than two; I figure about six or eight.

Q. It was more than two? A. Yes, it was more than two.

Q. About six or eight? A. About six or eight.

Q. You took all of those six or eight bottles from the shelf where they were on display, uncovered on display, and placed them on the counter? A. On the counter.

Q. Were they on the counter when this one bottle exploded? A. The balance was; yes.

Q. Now, the bottle that actually exploded, where was that bottle? A. I was putting it in that box.

Q. Did you hit that bottle with another bottle or not? A. No, sir.

Q. Just had put it in the box? A. Yes.

Q. The bottle that exploded, immediately before it exploded, was in the same form and condition as it was when the Fairmount Bottling Company delivered it to the Great Atlantic & Pacific Tea Company store, with the exception of this covering such as P-6? A. That is right.

Q. From the moment it was delivered to your company, to the store of which you were the manager, it was in the control and custody of the Great Atlantic & Pacific Tea Company; is that right? A. Yes.

Q. In that store of which you were manager? A. Yes, sir; right.

Q. Mrs. Noonan was there to make some purchases? A. That is right.

Q. She was buying some commodities that were on sale by the Great Atlantic & Pacific Tea Company, is that right? A. That is right.

Q. She was being waited on by a clerk? A. Yes.

Q. (Continuing) Who was under your supervision in that store, working for the same corporation; is that correct? A. That is right.

Q. And that clerk was waiting on her while you were waiting upon this other lady? A. That is right.

Q. (Continuing) Selling her these bottles of soda? A. That is right.

Q. The lady that you were waiting upon was at one end of the counter; is that right? A. That is right.

Q. Mrs. Noonan was at the other end of the counter; is that right? A. That is right.

Q. They were about ten feet apart? A. Well, I would say six to eight.

Q. Six to eight feet apart, very well. A. Yes.

Q. As this one bottle was in the box, what were you doing—putting other bottles on top of it? A. Now, I was going to deliver the order and I started to put the first bottle in when it exploded.

Q. So that was the first bottle that was in the box? A. Yes.

Q. Was there anything else in that box? A. I cannot recollect.

Q. Did you still have the bottle in your hand or had you deposited it in the box? A. No, it was in the box.

Q. Was it standing up? A. It was standing up.

Q. You say the bottle was standing up in the box? A. That is right.

Q. In a wooden box? A. No, it was a paper carton.

Q. There was no covering such as P-6 on the bottle, was there? A. No.

Q. At the time this bottle exploded, did you have a covering on it such as P-6 or any other covering on it? A. Such as you have there, no.

Q. There was nothing on the top of the bottle or over it by way of guard or other protection, was there? A. No.

Q. Now, that was such a bottle as this, Exhibit P-1 and P-2 that exploded? A. Yes, sir.

Q. You didn't have your hands on it? A. Not when it exploded.

Q. When it exploded one half of the glass flew in the air, didn't it? A. No, sir.

Q. What did it do? A. One part of the glass.

Q. One part of the glass flew in the air? A. Yes.

Q. It traveled to where Mrs. Noonan was standing and it struck her on the nose, didn't it? A. Yes.

Q. Then she was bleeding? A. She was.

Q. Was it warm or cold in the store at the time? A. Well, at the time in August, it was not so very warm; it was a cool store; we have always had the open, and it was fairly cool for the time of the year.

Q. You had this bottle up on display, up on the top shelf, didn't you? A. No, sir.

Q. Where? A. Right underneath the cash register.

Q. What time of the day was it that it exploded? A. Between four and five, in the afternoon.

Q. You never have looked over those bottles and examined them after they were delivered excepting to take the covers off of those you had on display? A. No, that is all.

Q. That is all you or anybody else did in that store? A. That is all.

Q. Those that were not on display, you would put away? A. They were kept in the back room.

Q. And the only thing you did to those that you wanted to put on display was to take the paper cover off and put it on the shelf; is that correct? A. That is right.

Q. Now, Mrs. Noonan was from six to eight feet away from the bottle at the time it exploded? A. That is right.

Q. This piece from the bottle flew in the air and hit her in the nose? A. Right.

Q. When she commenced to bleed from the nose, she sat down, didn't she? A. No, sir.

Q. What did she do then? A. She stood there.

Q. How long did she stay in the store? A. Oh, I would say she was there ten minutes.

Q. Then, didn't she sit down on the window platform or floor there? A. No.

Q. Then she went home? A. She went home after a while, yes.

Q. This bottle that exploded, once it was delivered by the Fairmount Bottling Company to the Great Atlantic & Pacific Tea Company had never left the control or custody of the store of which you were the manager, had it? A. No, sir.

Q. And the only change was that you had taken this paper covering off? A. That was the only change.

Q. Did any bottle similar to this ever explode in the store prior to this date? A. Not that I know of.

Q. Not that you know of? A. Not explode, no.

Q. Break? A. Break? Yes, we have found broken ones in handling.

Q. In handling? A. In the handling.

Q. In other words, you mean after it was delivered or while it was delivered? A. No, when we unpacked our boxes, sometimes there is one broken evidently before that.

Q. You mean when you took them out from the package in which the Fairmount Bottling Company delivers you the bottles? A. That is the idea.

Q. When you took them out of the package, you, on previous occasions, found that some of those bottles were broken? A. Not necessarily Fairmount.

Q. I am talking about Fairmount now. A. Yes.

Q. You found such bottles on previous occasions broken as you took them out of the package in which the Fairmount Bottling Company delivered it? A. I have found a number of them, not many, but I have found broken bottles——

Q. (Interrupting) Several of them? A. (Continuing) Not particularly Fairmount soda, but I believe there were several.

Q. Several? A. Several, yes.

Q. How many did you find broken of the Fairmount Bottling Company? A. I only recall that one instance.

Q. You only recall that one instance of it? A. I only recall that one instance of it.

Q. Now, how long before the date of this accident was that? A. I couldn't tell you that.

Q. Don't some of the bottles explode right in the store? A. Not of Fairmount.

Q. Similar bottles to this? A. Not explode; the caps come off.

Q. Flying off in the store? A. When you come in in the morning, you find the caps off.

Q. Blown off? A. Yes.

Q. Sometimes you find the neck blown off with the cap? A. I have never seen that.

Q. At any time? A. I have never seen this part, no, blow off.

Q. It was a piece of glass that struck Mrs. Noonan in the nose— A. Yes.

Q. —not the cap? A. No, that was glass.

Q. You did nothing in the store to protect those bottles or guard them any way, did you? A. No.

Q. To protect glass from flying off the bottle exploded did you? A. No.

Q. You know that these bottles were made with gas, under carbonic gas pressure? A. Oh, yes.

Mr. Rinzler: That is all.

Cross-Examination by Mr. Brown:

Q. How many kinds of ginger ale did you carry in the store at that time? A. We had Cliquot Club, and I think we did have Hoffman's; I am not positive about Hoffman's at the time; but we had another big bottle similar to Hoffman's, Rambler's, something like that; it was another one I know I had.

Q. What color bottles were they? A. Those were big white bottles.

Q. Any other green bottles beside the Fairmount? A. That is the only one I think of at that time; we have had some since. There was no Canada Dry at that time.

Q. You did not carry Canada Dry at that time? A. Not at that time, no.

Q. You do now? A. We do now.

Q. What kind of bottles are the Canada Dry put in? A. Green.

Mr. Rinzler: I object; there is no proof that they are all put up in the green emerald glass bottles.

The Court: Permit the question.

Mr. Rinzler: Exception.

Q. Do you know what kind of bottles Canada Dry Ginger ale is put up in? A. All I know is green the same as ours.

Q. You handle that in the store? A. We do now, yes.

Mr. Brown: That is all.

Cross-Examination by Mr. Wright:

Q. Just one moment. Where did you have this ginger ale that you took out and put on display? You started to say you had it back under the cash register. Will you just a little more clearly tell us where you kept it? A. Previously to that, it was under the cash register, where there had been our bread and cakes; we took the glass out, put a shelf in there, and put our bottle goods on a shelf.

Q. You mean, under the counter? A. No, behind the counter, underneath the cash register, right against the wall.

Q. Those bottles— A. (Interrupting) Were directly under the cash register, on the shelf.

Q. They were behind the counter but lower than the top of the counter? A. Lower than the top of the counter.

Mr. Wright: That is all.

Cross-Examination by Mr. Brown, resumed:

Q. Were those ginger ale bottles placed in such a position that the sun would strike them as it shone through your windows? A. No, sir; it could not strike them there.

Q. You have told us, I believe, that you took these bottles off the shelf and placed them on the counter? A. That is right.

Q. Then lifted one and placed it in this paper box? A. That is right.

Q. After taking your hand away this explosion occurred? A. That is right.

Q. Just what was the result of the explosion— that is, as to the bottle? Describe the bottle and the piece of glass which came out of the bottle. A. Why, when I put the bottle in the box, it exploded,

and the ginger ale came out like you would ordinarily open a seltzer bottle; it shot out, and the piece of glass, I would judge, about an inch round, flew on the other side of the counter, and a small piece, about half an inch, struck Mrs. Noonan at the nose. That was the small piece that flew to the further part of the counter. The bigger part fell directly on the counter where I was serving the customer.

The Court: Where did the cap go?

The Witness: The cap stayed right on the bottle. The bottle broke on the side, just below the neck.

Q. Did you examine the bottle at that time? A. I did.

Q. Did you notice any crack or any defect in that bottle? A. There was no crack only I did notice that the glass that was at the side of the bottle was not the same thickness all of the way around it; it didn't come out in a—it wasn't exactly the same thickness of glass; I know it was thinner at one end than it was on the other.

Q. Which piece of glass was that, the piece that fell to the floor or the piece that struck Mrs. Noonan? A. Both pieces were broke practically alike.

Q. As they separated from each other, there was nothing

Q. Did you see any cracks in this bottle then? A. I did not; no, sir.

Q. How long after the explosion occurred, did you know that Mrs. Noonan had been struck? A. Not until we seen the blood. I turned around to the front, to the counter, and seen Mrs. Noonan, and seen blood on the nose.

Q. That was the first intimation you had that she had been struck? A. That was the first, that I knew of it.

Q. Had there been any outcry before that? A. No.

Q. Did you say anything at the time? A. Not until she seen the blood running down the nose; she said, "Oh," she said, "I am !"

Q. Who saw that first? Did you see it before she spoke of it? A. I don't quite remember that quite well; I don't remember where she said that first or whether I saw it first.

Q. What did you do then? A. Why, I went over and assisted Mrs. Noonan, wiped her nose with my handkerchief.

Q. You saw the cut, did you? A. I did.

Q. Describe the cut as you saw it at that time. A. Well, it, I should judge, was about half an inch long on this side of the nose, about here, I should judge.

Q. On the right side of the nose? A. Right side of the nose, about half an inch long. It would be ordinarily like a man takes and cuts himself with a razor, looks like a man cuts himself with a razor blade.

Q. Very sharp? A. Very sharp, fine cut.

Q. Was it a deep cut? A. It didn't appear very deep to me.

Q. Did it bleed very freely or did it bleed quite some? How many handkerchiefs did you use? A. I only had the one there; that one did it.

Q. That one sufficed? A. I think so.

Q. That was your handkerchief? A. That was my handkerchief.

Q. Did Mrs. Noonan appear to be very seriously affected by the cut? A. Not at that time.

Q. She stayed in the store about ten minutes, you said. A. About ten minutes.

Q. She didn't faint or collapse, did she? A. No, sir.

Q. She was able to walk home? A. Yes, sir.

Q. You also said, I believe, that you would, at times, find some of the tops or caps blown off? A. I have seen that come sometimes, yes, not on that bottle, though, not on that particular bottle, not on Fairmount bottles. I have never noticed that on the Fairmount Bottling Company bottles. I have noticed it on the big bottles, Rambler, I think it was, manufactured at the time by the Rambler sodawater people.

Q. That was a larger bottle? A. That was a large quart bottle.

Q. And prior to that time then, did you ever see anything the matter with the Fairmount bottle? A. Never, excepting that on upon delivery I have found broken bottles in the case.

Mr. Brown: That is all.

Redirect Examination by Mr. Rinzler:

Q. You did not see this defect in the bottle until after it exploded, did you? A. I couldn't see anything; it was a normal bottle.

Q. You say parts of it were thicker than other parts? Didn't you say when you examined it various parts of the bottle were thicker than other parts? A. It broke, I should say, on a slant.

Q. Now, you never examined this bottle before the explosion? A. Never.

Q. You never examined any of the bottles before the explosion? A. Never.

Q. This explosion was a loud report? A. (Illustrating.)

Q. You say the report was like when the cork shoots out of a bottle? A. That is right.

Max A. Kretschmar, re-cross.

Q. You say when you put the bottle in the paper box on the counter it exploded? A. Yes, sir.

Q. What kind of a counter was it, marble? A. Wooden counter.

Mr. Rinzler: That is all.

Recross-Examination by Mr. Wright:

Q. Just one question. These packages that were delivered by the Fairmount Bottling Company, the bottles were wrapped or covered with this paper covering? A. That is right.

Q. Laid in the box— A. Laid in the box.

Q. That is, laid down on the side? A. That is it, cross-ways.

Q. That is the way they were delivered in your store? A. That is the way they were delivered in our store.

Q. You took them out, put some on display and left the balance in your back room you had in the back? A. That is right.

Q. The ones that you say you found broken were the ones you found in the box laying down when you came to take them out? A. Yes, like that, with the covers on.

Q. The ones that had not been taken out of the box? A. Yes, sir.

Recross-Examination by Mr. Brown:

Q. When you were asked the question by Mr. Rinzler, whether you had examined these, just what did you mean when you said "No". A. I never examined the bottle, that was what I meant.

Q. What is that? A. I never examined the bottle; that was what I meant.

Mrs. H. Fesold, direct.

Q. You mean the interior or exterior? A. I mean when they are in the case; because whenever I took the cover off to put it out on display, you have to examine the bottle then.

Q. If the bottle would have been cracked, would you have exhibited it?

Mr. Rinzler: I object to that; that is speculative.

The Court: I sustain the objection.

Mr. Brown: That is all.

(Witness excused.)

MRS. H. FESOLD, sworn for Plaintiffs.

Direct Examination by Mr. Rinzler:

Q. You were not subpoenaed by me, were you? A. Beg pardon?

Q. You do not know me, do you? A. No.

Q. Never talked to me before? A. No.

Q. Didn't get a subpoena to testify for the Noonans, did you? A. No.

Q. Were you the other customer in this store? A. Yes.

Q. At the time of the explosion of this bottle? A. Yes.

Q. Did you see the explosion? A. I heard it.

Q. Did you hear it? A. Yes.

Q. Was it a bottle like these, P-1 and P-2? A. I didn't see——

Q. Were you buying bottles like these? A. Yes.

Q. Like—ginger ale in bottles like these two bottles, P-1 and P-2? A. I think so, I don't remember.

Q. Are they like one of the bottles that exploded? A. Yes, sir.

Q. Where was the bottle that exploded? A. Mr. Kretschmar put them in the box on the table; then it exploded.

Q. Did he put it in the box on the table? A. Yes.

Q. Just how did he put it down? A. I don't know—slow.

Q. Did he have his hand off when it exploded? A. Yes.

Q. Then the glass flew in the air? A. Yes, on the sides.

Q. Did one piece of glass strike Mrs. Noonan in the nose? A. I think so.

Q. How far away from that bottle was Mrs. Noonan when the explosion happened? A. From me here to here (indicating).

Q. You were at one end of the counter, weren't you? A. Yes, sir.

Q. Mrs. Noonan at the other end? A. Yes.

Q. And the bottle when it exploded stood at the counter where you was? A. Yes.

Q. How many bottles of that soda were you buying? A. I don't remember; maybe a whole box.

Q. How many bottles were in the box when the explosion happened? A. I don't know.

Q. Don't know? A. No.

Q. Was it a loud noise? A. Yes.

Q. Did you see Mrs. Noonan bleeding? A. Yes, after Mr. Kretschmar said, "You are bleeding."

Mr. Rinzler: That is all.

Cross-Examination by Mr. Brown:

Q. I don't think you quite understood Mr. Rinzler when he asked you with reference to how many bottles were in the box.

Mr. Brown: I think you mean the box in which her groceries were placed which was on the counter; is that correct?

Mr. Rinzler: The box in which this bottle was put.

Q. Now, I am going to ask you this question, meaning this box in which the bottle was which exploded: How many bottles were in that box? A. I don't know; I don't remember.

Mr. Brown: I see; all right.

(Witness excused.)

JOSEPH MUMLER, sworn for Plaintiffs.

Direct Examination by Mr. Rinzler:

Q. Were you working under the management of Mr. Kretschmar— A. Yes.

Q. —at the store of the Great Atlantic & Pacific Tea Company? A. Yes.

Q. You were there when this explosion happened? A. Yes, sir.

Q. Bottle, referring to Exhibit P-1 and P-2, such as one of these exploded? A. Yes, right.

Q. I see; did you see the glass strike Mrs. Noonan on the nose? A. Well, I didn't see the glass strike her.

Q. Where was the bottle when it exploded? A. I wasn't behind the counter when the bottle exploded; I was on the other end of the store.

Q. On the other end? A. Yes.

Q. How many bottles were in the box, do you know? A. In the boxes when they come in, you mean?

Q. Yes. A. Twenty-four, I think.

Q. Speaking from memory? A. Memory.

Q. How many bottles were in this particular box that was on the counter at the time this one bottle exploded? A. I don't know.

Q. Don't know; was that a loud noise when it exploded? A. Yes, I heard it from the other end of the store.

Q. You heard it from the far end of the store? A. Yes.

Q. How far away were you from the explosion when it happened? A. It must have been about fifteen feet.

Q. Did you ever see them explode before this? A. No, not when I was around; I have found them broken in the morning when I would come in to go to work.

Q. When you came in to go to work in the morning, you mean? A. Exploded over night.

Q. Were they Fairmount Bottling Company bottles? A. No, bigger bottles.

Q. In bottles like these? A. No.

Q. I called you up on the telephone yesterday, didn't I? A. Yes.

Q. I asked Mr. Levey for whom you work to let me talk to you, didn't I? A. Yes.

Q. And I asked you whether ever before similar bottles, such as this one, exploded during the day, ever exploded before, didn't I?

Mr. Wright: If Your Honor please, I think this is highly improper, cross-examining his own witness.

The Court: He may ask him about that, if the witness has made statements contrary to the testimony that he is giving today.

Q. I did ask you that yesterday, over the telephone, didn't I? A. That is what I was trying to tell you, that I found bottles broken over night.

Q. Didn't you tell me that on two occasions, you found bottles the same as this one in this suit broken of the same kind? A. I didn't mention——

Q. Didn't you tell me that? Didn't you say to me yesterday on the telephone, yesterday afternoon, that you saw the same type bottles broken when you came into the store in the morning, the same kind of bottles? A. Well, if I did——

Q. Not if you did; didn't you say that? A. Well, I don't remember what I said last night——

Q. You don't remember? A. (Continuing) I know that I said that I found broken bottles in the morning when I came in to work.

Q. Bottles like the Fairmount Bottling Company had? A. I don't remember if I told you the same bottles.

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

Q. Did you ever see such bottles break or explode—did you ever—when you came in in the morning in that store? A. I never saw them break or explode.

Q. Did you ever see them come in broken and exploded in the box when they came in delivered by the Fairmount Bottling Company? A. Off the truck?

Q. Yes. A. Oh, yes, sure.

Q. How many times before the date of this accident? A. Once before.

Q. How long before the accident? A. I don't know how long.

Q. That wasn't the time that Mr. Kretschmar saw it, was it? A. I don't remember.

Q. You remember one such occasion, don't you? A. Yes, but when it came off the truck.

Q. Once when it came off the truck you found a bottle exploded, one of these bottles? A. Yes, right in the carton when we unpacked it.

Mr. Rinzler: That is all.

Cross-Examination by Mr. Brown:

Q. When you say "exploded," you don't mean to tell us you saw the explosion, do you, that you know it exploded? A. No, I do not mean to say that I saw the explosion.

Q. You mean to say is you saw it was broken; is that what you mean? A. When the case came off the truck, we went to unpack it and I found one broken bottle in the case.

Q. You saw the broken bottle, but you do not know how it broke? A. No.

Q. The bottles you found in the morning, in the store, you don't know how they were exploded or broken, do you? A. No.

Mr. Brown: That is all.

By Mr. Rinzler:

Q. You have seen these caps fly off such bottles, haven't you? A. No.

Q. You haven't? A. No.

Q. You haven't seen the gas shoot the cap off the neck of the bottle? A. No.

Mr. Rinzler: That is all.

(Witness excused.)

(Evening Recess.)

MRS. CHRISTINA NOONAN, sworn for Plaintiffs.

Direct Examination by Mr. Rinzler:

Q. Mrs. Noonan, where do you live? A. 172 Sherman street, Passaic.

Q. How long have you been living in Passaic? A. How long have I lived in Passaic?

Q. Yes, please? A. About thirty-nine years.

Q. You are living with your husband at that address? A. Yes, sir.

Q. Do you remember August 14, 1924, when you were in the store of the Great Atlantic & Pacific Tea Company, a corporation, located at the corner of Harrison street and Central avenue, Passaic? Do you remember being in that store on that day? A. Yes, sir.

Q. What purpose did you go there for, Mrs. Noonan? A. Groceries.

Q. To buy some groceries? A. To buy some groceries.

Q. You had bought groceries there before, had you? A. Yes, sir.

Q. You lived right near that store? A. Yes, right near there.

Q. How far from that store were you living then? A. One block.

Q. One block? A. Yes.

Q. While you were in that store, were you being waited upon by a clerk? A. Yes, sir.

Q. In that store? A. Yes, sir.

Q. While you were being waited upon, Mrs. Noonan, was there any other lady customer in the store? A. Yes, sir.

Q. So that besides you and the other customer, this lady, were there any other customers or persons in the store? A. Nothing——

Q. (Continuing) Excepting you and the other lady customer and the clerk that waited upon you and the manager that waited upon the other customer? A. I didn't see nobody else.

Q. Nobody else that you saw? A. No.

Q. Did you buy any soda or ginger ale or other beverages while you were there? A. No.

Q. Did you order any? A. No.

Q. You were buying groceries? A. Groceries.

Q. While you were there, Mrs. Noonan, what happened? A. I heard an explosion like a shot.

The Court: Speak up so the jury can hear you, Mrs. Noonan.

A. (Continuing) It was like a shot from a gun.

Q. You heard an explosion like a shot from a gun. And immediately after the explosion, what, if anything, happened to you, Mrs. Noonan? A. I felt a striking blow on the side of the nose.

Q. What kind of a blow was that? A. It just seemed to strike the nose and affect my head and eyes for the time being.

Q. In what way did it affect your eyes and head for the time being? A. Why, my head seemed light at the time and my eye sight left for half a second or two; it was like a light passing through it.

Q. Like what? A. Like pins and needles, something like that in them.

Q. Was that right when the blow struck you? A. That was right when the blow struck me.

Q. What kind of a blow was that, Mrs. Noonan? A. I would call it a sharp penetrating blow.

Q. Was it a slight or a hard blow? A. It seemed to be a hard blow to me.

Q. What was it, Mrs. Noonan, that struck your nose? A. The manager come up and told me.

Q. What did he tell you? A. He said, "The ginger ale bottle broke and I caught it," that was the words he used.

Q. Did you see any part of the bottle there after the explosion? A. The manager brought the two quite large pieces back and showed them to me; either one hit me.

Q. Did you tell Dr. Rubacky that it was a cap that struck your nose? A. No, sir.

Q. Before the explosion, did you know that there was any soda or ginger ale or other bottle beverage in the store? A. I knew they sold it, but I didn't pay any attention then.

Q. Did you know where it was kept? A. Yes, I could often see it as I went there.

Q. You could. This explosion was—did it make a slight or a loud report? A. To me, it was very loud.

Q. Now, after the explosion, Mrs. Noonan, did you stay there or did you leave immediately? A. I stood for a short time and then I sat in the window.

Q. You stood? You mean you were standing up? A. For a half second.

Q. For a half second? A. And then I went over to the window.

Q. What did you do at the window? A. I sat there.

Q. About how long did you remain sitting there? A. Well, it seemed to me about half an hour.

Q. As a result of the blow to the nose, and aside from your pins and needles, I think you said that was, was there a flow of blood that came from the nose? A. Yes, sir.

Q. And how freely did you bleed? A. Very freely.

Q. While you remained seated at the window in the store for half an hour, did you suffer any pain? A. I suffered terrible headache.

Q. Had you ever before suffered such headache? A. Not such a headache.

Q. What kind of a headache was it, Mrs. Noonan? A. It was a kind of a nervous headache.

Q. Prior to that, had you ever had any sort of a headache other than an ordinary headache? A. Never a nervous headache, just headache.

Q. Never a nervous headache, just headache. Then you went home, did you? A. Yes, sir.

Q. You say you lived a block away from the store? A. Yes, sir.

Q. Did you call for a doctor? A. Yes, sir.

Q. When? A. Right away I telephoned for a doctor.

Q. And did the doctor come right away? A. No, sir.

Q. When did he come? A. He sent word he would come just as quickly as he could.

Q. Did he come that night? A. No, sir.

Q. When did he first come? A. He couldn't come that night, he was on a very important case, and he came at nine in the morning.

Q. Following morning at nine? That was Dr. Dwyer that you called? A. Dr. Dwyer.

Q. It was he that called the following morning? A. Yes, sir.

Q. When he came the following morning, did he treat your nose? A. Yes, sir.

Q. Did the doctor continue to treat your nose after that day? A. Yes, sir.

Q. For how long did you continue under Dr. Dwyer's care and treatment? A. I can say, from that day to this.

Q. From that day to this. For how many weeks steadily did he come steadily and treat you? A. He only came for two weeks steadily; then he told me for mornings I should go to him.

Q. That was after the two weeks? A. That was after the two weeks.

Q. Did you go to his office? A. Yes, sir.

Q. After the two weeks, you say you continued going to the doctor's office? A. Yes, sir.

Q. You are still under the doctor's care now? A. Yes, sir.

Q. Were you able to sleep that night? A. Oh—

Q. (Continuing) After you had been injured? A. No.

Q. What kept you from sleeping, Mrs. Noonan? A. Nervousness.

Q. Had you ever before this accident suffered any form or kind or shape of nervousness? A. I was never nervous.

Q. Never had. Pardon this question, Mrs. Noonan, but how old are you? A. I am fifty-five.

Q. Fifty-five. Now, prior to this accident, Mrs. Noonan, had you had a growth or other clogging in your nose or nostril? A. No, sir.

Q. Never before? A. Never before.

Q. Prior to this accident, was your breathing ever impaired or affected or clogged in any way? A. No, sir.

Q. Now, since the accident, have you had a growth? A. Yes, sir.

Q. How soon after your nose was struck, did you get that growth? A. For a while it used to bleed inwardly a little——

Q. Huh? A. Inward a little.

Q. For how long? A. Well, it bled for just several weeks, would come once in a while for about three months,——

Q. Yes. A. (Continuing)—and then stopped, I noticed. I treated it myself with ointments, kind of keeping it moist. Then, after that I could feel it was worse, the nostrils was getting tight and the cold weather affected it.

Q. Was it particularly more affected in the cold weather, you say? A. In the cold weather it was very bad.

Q. You still have that growth in your nose? A. Yes, sir.

Q. And it has remained the same ever since? A. Yes, sir.

Q. What effect, if any, has that growth in your nose upon your breathing? A. I have a dry feeling in my throat, no moisture, in the night time especially, because I only breathe through one side of my nose.

Q. Do you breathe now as well as you were able to prior to this accident? A. No, sir.

Q. Had you ever had any trouble with your breathing of any kind? A. No, sir.

Q. Since the accident, what has been your condition of health, Mrs. Noonan, as result of the accident? A. Very nervous.

Q. What is the nature of that, your nervousness, Mrs. Noonan? A. Least little excitement of any kind upsets my whole system.

Q. Have you ever had that trouble before the accident? A. No, sir.

Q. What about your headaches since the accident; have they stopped? A. They are very bad.

Q. Just what kind of headaches are they? A. They start at the back of my neck, seeming to penetrate all up through into my head, and my eyes run frightful from them, and I had to go to the doctor.

Q. Had you ever had that trouble before this accident? A. No, sir.

Mr. Rinzler: That is all.

Cross-Examination by Mr. Brown:

Q. Mrs. Noonan, you saw Dr. Dwyer the day following your accident, didn't you? A. Yes, sir.

Q. You are treating with him off and on, treating with him off and on ever since? A. Yes, sir.

Q. Were you here in the court room yesterday afternoon when Dr. Dwyer testified? A. Yes, sir.

Q. Do you recall hearing him say that he did not examine your nose?

Mr. Rinzler: I object, if Your Honor please; that is not proper cross-examination, and is not relevant.

A. (Interrupting) No, I didn't hear him say that.

The Court: I don't think that makes any difference what the doctor said. I sustain the objection; strike out the answer.

Q. How soon after that accident did you discover this bleeding of the nose from the inside? A. It was only a speck about, it seemed to me, about two or three months, that I noticed it.

Q. Didn't you call that to the attention of Dr. Dwyer? A. Yes; he said that wasn't anything, it would come around all right.

Q. He said it was nothing, it would come around all right? A. He said that wasn't anything, it would come around all right in time.

Q. But he made no examination of the inside of your nose? A. He always used to laugh at it and say I was so nervous, all of that; he tried to talk me out of it, that it was just my nerves that was working on me.

Q. Are you sure, Mrs. Noonan, that your nerves were not in an upset condition before this accident? A. Yes, sir.

Q. Were you perfectly calm and had your nerves in perfect control? A. I was.

Q. Do you recall the examination by the doctor which we had in Mr. Gaston's office— A. Yes, sir.

Q. —a few days ago? A. Yes, sir.

Q. Do you recall telling us at that time that within two weeks prior to this accident to your nose your husband had been in an accident in which he had broken both arms? A. Yes, sir.

Mr. Rinzler: If Your Honor please—one moment. —I object to that. I have no objection, however, to the testimony given at the examination before trial going into evidence.

The Court: I will permit the question, if you will amend your statement, "do you recall"; the question should be, "Did you say so?"

Mr. Rinzler: I have no objection to the examination before trial going into evidence.

Q. Did you say at that time that your husband had both arms broken in an accident two weeks prior to this accident to you? A. Yes, sir.

Q. When you learned of this accident to your husband and he was brought home and during that two weeks following, were your nerves under perfect control? A. Perfect control.

Q. It did not upset you in the least? A. I went to the hospital every day in the morning and stayed until in the evening to learn how to take care of him when he came home.

Q. And that did not make you the least bit nervous? A. Not a bit nervous; I never was nervous.

Q. Mrs. Noonan, can you tell us how much you have expended for doctors' bills, that is, what you have paid to any doctor for his treatment? A. To a doctor?

Q. Just a minute, please. (Continuing) For his treatment for this injury? And then will you tell us what moneys you have expended for medicines or any other medical appliances (applications) which you may have purchased as a result of the doctor's advice to be applied on account of this injury?

Mr. Rinzler: There is duplicity in that question.

A. I cannot answer the doctor I paid nothing to the doctor so far, and it would be impossible for me to count two years' medicines that I bought in drugstores; I didn't put it down.

Q. That is, up to the present time, you have paid no doctor's bill? A. Up to the present time, I have paid no doctor's bill.

Q. Now, can you give us an approximate idea? A. I could not say no how.

Q. You would not be able to say whether it was five dollars or ten dollars for medicines? A. I would not say for I couldn't tell the truth; I don't know how much I have spent.

Q. You would not know whether it was under five dollars or over five dollars? A. Oh, I am sure, I know it was over five.

Q. Well, would you say it was under ten or over ten? A. Oh, I would say it was over ten.

Q. Would you say it was under fifteen or over fifteen? A. I won't go no further. I told you in the beginning I couldn't tell one thing about that every week—I don't know how many times I go to the doctor.

Q. I see; you do not remember whether you paid more than fifteen dollars? A. I wouldn't say. Oh, I paid more than fifteen dollars, that I am sure, but the amount I cannot say.

Q. Now, Mrs. Noonan, how many members are there in your household? A. There is four.

Q. Who are they? A. My husband and son and sister and myself.

Q. How many members of the household are employed outside of the household? A. All but myself.

Q. You then are keeping the home, are you? A. Yes, sir.

Q. And at the time of this accident, did you find it necessary to bring in any other help to maintain the home? A. I had my sister.

Q. That is the sister who is living with you? A. Living with me.

Q. Did she go to business at all during the time that you were sick two weeks? A. Occasionally she did to keep her position one day each week, two days, then she would stay home; she just held her position, she did go once in a while.

Q. Over what period of time did that situation exist where she would stay home and then go to business? A. I should think about six weeks.

Mr. Brown: I think that is all.

Redirect Examination by Mr. Rinzler:

Q. How long were you incapacitated, Mrs. Noonan, on account of these injuries from taking care of your household work? A. How long?

Q. Yes. A. Oh, for six weeks I didn't work, do anything hard, only light work, but I walked around a little.

Mr. Rinzler: At this time, if Your Honor please, I offer in evidence testimony given when the plaintiff, Christina Noonan, was examined before trial, before the Master, pursuant to an order made by your Honor. Any objection? I do not suppose there can be, if Your Honor please, under the statute.

Mr. Brown: No.

Mr. Rinzler: I offer it in evidence.

(Examination Before Trial offered and received in evidence and marked Plaintiffs' Exhibit P-7.)

Mr. Rinzler Before I excuse this witness, Mr. Brown, will you point out to me, if you can, in the examination before trial where this witness testified that she was nervous because her husband was involved in that accident because he broke his two arms?

Mr. Brown: No,——

Mr. Rinzler: You said so.

The Court: Proceed.

Mr. Rinzler: May I read from the Examination, Your Honor please, at Page 11 —at Page 5 first?

Mr. Brown: Read it all.

Mr. Rinzler: You can read the rest later, if you want to, and the jury will read it when they retire. (Reading extracts from Pages 5 and 11 of the Examination Before Trial, P-7.) That is all, Mrs. Noonan.

(Witness excused.)

MICHAEL NOONAN, sworn for Plaintiffs.

Direct Examination by Mr. Rinzler:

Q. Mr. Noonan, you are residing with your wife in Passaic? A. Yes, sir.

Q. At what address? A. 172 Sherman street, Passaic.

Q. You did not see the explosion of this bottle on the 14th of August, 1924? A. No, sir; I did not.

Q. Prior to that day, Mr. Noonan, what was the state of health of your wife, prior to that injury? A. What is that?

Q. Prior to the time that your wife was hurt by that explosion of this bottle, what was your wife's state of health? A. Why, good, the best.

Q. Had she ever been troubled with wracking headaches, bad headaches? A. No, not at all.

Q. Had she ever had any nervous trouble? A. Not at all.

Q. Had she ever had, to your knowledge, a growth in the nose? A. Not at all.

Q. Had she ever complained of such a condition? A. No, sir.

Q. Prior to this injury, had your wife had any trouble or impairment in her breathing? A. No, sir.

Q. Did she ever complain of any such condition? A. No, sir.

Q. Did she ever have a dryness in her nose or throat? A. No, sir.

Q. On the day of the accident, after you learned that your wife was hurt by this exploded bottle, did you go to the store where the explosion happened? A. Yes, sir.

Q. At the corner of Harrison street and Central avenue, Passaic? A. Yes, sir.

Q. That was the Great Atlantic & Pacific Tea Company store? A. Yes, sir.

Q. Did you there see the manager? A. Yes, sir.

Q. What did you say to him and he to you? A. I asked him to show me the bottle that hit my wife——

Q. (Interrupting.) Yes. A. He showed it to me, a piece right out of the side of the bottle; it was about that long (indicating).

Q. Was it a large piece? A. Out of the bottle, just the same as that (indicating).

Q. As stands on the table? A. Yes, sir.

Mr. Rinzler: P-1 and P-2.

Q. Did you talk to him about anything that happened prior to this accident? A. I asked him, was he going to make a report of it? He said he would report.

Q. Did he say anything about this explosion, how it happened? A. No, sir; he did not.

Q. Did he say how it happened? A. No, sir; he did not.

Q. Was he able to explain how it happened? A. No, sir.

Q. Did he do any explaining? A. No, sir; he did not.

Q. Did you talk about any other explosion of such bottles? A. Well, he did say it happened before.

Q. Did he say how many times it happened before? A. No, he did not.

Q. Well, he did say that it happened before? A. Yes, sir.

Mr. Rinzler: That is all.

Cross-examination by Mr. Brown:

Q. What do you mean by the statement that he said it happened before? A. Well, as much as

I took out of that, he mean by bottle busted before; that is what I took out of it.

Q. That is, they might have been broken in bringing them into the store? A. No, he didn't say that way at all. He said they had busted before. "It had happened before," that is the way he said it.

Q. What had happened? A. Bottle busted.

Q. Nothing else? A. No, he didn't say.

Mr. Brown: That is all.

(Witness excused.)

Mr. Rinzler: We rest.

(Plaintiffs rest.)

Mr. Reed: If your Honor please, I want to ask for a non-suit in this case on behalf of the Great Atlantic & Pacific Tea Company, on the ground that there is nothing in the evidence which shows any negligence on its part. (Citing Chatterer vs. Bamberger.) Under the facts as they thus far appear in the testimony, they are that the ginger ale was purchased by the defendant, Great Atlantic & Pacific Tea Company, from the Fairmount Bottling Company, in ordinary bottles, such as are shown here in court, with nothing about them to show that they would explode or any reason to believe that they would; and, therefore, unless there was some defect in the bottle which was brought to its attention, it is not responsible, for the

description of the accident is such that it shows, I think, that there is nothing even on an inspection of the bottle which would disclose it would be apt to cause such an accident as this, and the accident is unforeseeable. These goods are purchased in the ordinary course of business, and a great many of them, and are sold in the ordinary course of business; they are sold in stores and I think there is absolutely nothing in the testimony which shows anything which would attract the attention of the storekeeper to the fact that this bottle might explode. I think, therefore, that there should be a non-suit granted in favor of the Great Atlantic & Pacific Tea Company.

The Court: While, of course, the explosion of a bottle in the store of the Great Atlantic & Pacific Tea Company may be considered as an unusual occurrence, still it would seem as though the doctrine of *res ipse loquitur* applied, and, of course, if the doctrine of *res ipse loquitur* applies, then, of course, the burden of showing that it was not through the act of the Great Atlantic & Pacific Tea Company rests upon the defendant. . . . It seems to me that the happening of it is sufficient to call upon the defendant in whose control the bottle was and in whose possession it was to show that in the exercise of reasonable care they could not have prevented it.

Mr. Reed: (Interrupting) The mere happening, you think, of the accident, is such that would make them liable?

The Court: (Continuing) While it is an unusual happening, but the bottle was in

the control of the defendant, and it seems to me the doctrine of *res ipse loquitur* applies. It may be their explanation will entirely exculpate them from any liability. I will deny the motion.

Mr. Reed: Your Honor will allow me an exception.

Mr. Wright: I move for a non-suit on the ground that the evidence holds nothing which the Fairmount Bottling Company could be called upon to explain, no negligence nor any inference of negligence. The evidence clearly and affirmatively shows that the Fairmount Bottling Company purchased the bottles from manufacturers or dealers, that the bottles used are of the standard quality used by other manufacturers, and that they are properly inspected, reasonably inspected, and I submit that that brings us within the doctrine of the Studebaker case.

The Court: There is no testimony about the reasonable inspection.

Mr. Wright: Yes, in their case they have put in evidence the interrogatories, which show that the bottles are inspected as they are bottled, as they are filled with the contents.

The Court: Of course, while the interrogatories show that they put in fifty pounds of gas in the bottles, their witnesses says if there is more than thirty-five pounds put in it will explode. I suppose, if that were true, the jury might find negligence. It seems to me to be a jury question.

Mr. Wright: (After discussion) I wish to make my motion for the sake of the record, and ask Your Honor for a non-suit on the grounds stated.

The Court: I will deny the motion.

Mr. Wright: Exception.

HERBERT BRAUER, sworn for Defendants.

Direct examination by Mr. Wright:

Q. Mr. Brauer, where do you live? A. I live in Lodi.

Q. Where are you employed? A. Fairmount Bottling Company, Hackensack.

Q. In August, 1924, where were you employed? A. Fairmount Bottling Company.

Q. In what capacity? A. Driver and salesman.

Q. And as such did you have anything to do with supplying bottled ginger ale to the store of the Great Atlantic & Pacific Tea Company at Harrison street and Central avenue, in Passaic? A. Yes, sir.

Q. Do you recall having heard sometime in August about an accident having happened to Mrs. Noonan? Do you yourself recall that fact of such a thing happening? A. I do.

Q. Can you say how long prior to that time you had made your last delivery of ginger ale to that store?

Mr. Rinzler: You mean prior to the accident?

Q. (Continuing) Prior to the accident? A. I should judge about two weeks before that.

Q. Now, in what way was the ginger ale delivered to the store? A. It was packed in cartons, twenty-four bottles in a box.

Q. You say "cartons"; what kind of a box, paper or wood? A. Wooden box with cardboard cartons.

Q. What do you mean by "cardboard"? A. Well, heavy corrugated paper.

Q. I show you P-2 in evidence,—I don't know whether this is P-4 or P-6,—and ask you if you will put these together in the way they were when the ginger ale was delivered? A. (Illustrating) Placed on the bottle like that, laid in the box this way.

Q. The paper covers are placed over the bottles; then they were laid in the box on their sides? A. On their sides.

Q. One row or double rows? A. Double rows; one bottle laid this way and the other one just the opposite (illustrating).

Q. How long have you been employed by the Fairmount Bottling Company? A. Three years.

Q. All of the time as a driver and salesman? A. Yes, sir.

Q. During that time did you ever see a bottle explode? A. No, sir.

Q. How do you transport those bottles to the various stores, particularly to the store in Passaic? A. What do you mean, on a large truck?

Q. Yes; how did you carry them, in what? A. In boxes.

Q. The boxes are on what? A. Trucks.

Q. Automobile truck? A. Yes, sir.

Q. How many do you carry at a time? A. Fifty or sixty cases.

Mr. Wright: I think that is all; cross-examine.

Cross-examination by Mr. Rinzler:

Q. Mr. Brauer, you have also seen these beverages bottled in these bottles, haven't you? A. I have.

Q. A lot of them even explode in the bottling, don't they? A. Well, not a lot——

Q. Pardon. They explode in the bottling too, dont they? A. Why, yes, if you have a defective bottle, it will.

Mr. Rinzler: I ask that the answer be stricken, the latter part.

The Court: Motion denied.

Q. You have seen them explode, thousands, haven't you? A. Well, bottles, yes; not thousands.

Q. Yes; then you have seen bottles explode, havent you? A. I have.

Q. When delivered, the only wrapper or guard about the bottles—on it—is such a paper as Exhibit P-6? A. Yes.

Q. And as a rule, when a bottle such as this explodes, containing beverage with carbonic gas, the glasses fly about, don't they,——particles? A. No.

Q. Pardon? A. No, they do not fly about, no.

Q. They do not fly about? A. No.

Q. You mean to say to this court and jury that when a bottle such as this explodes, having carbonic gas in them, that the bottle whenever it explodes, the glass in them remains intact in explosions, without moving about or flying about? Do you mean that? A. It does not fly about; it just falls over; that is all.

Q. Why, doesn't it go through the air and strike other parts of the room where it explodes? A. No.

Q. Do you mean then, Mr. Brauer, that if this bottle, P-2, were to explode now, as I have it in my hand, that the pieces of glass would just drop? A. Yes, sir.

Q. That is what you mean? A. Yes, sir; I do.

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

Q. Mr. Brauer, besides the explosion that you have seen of bottles that were being in the process of bottling in the machine, have you ever seen any other bottle explode? A. No, sir.

Q. In other words, the only explosion of such bottles that you have seen is while the bottle is in the machine? A. That is all.

Q. Then if a bottle were to explode, when it is not being bottled, such bottle containing carbonic gas pressure, you do not know then whether or not the glass would fly about, do you? A. If it is kept in the carton, no.

Q. If it is not kept in such a paper carton, you do not know, do you? A. (No audible response).

Q. Now, if the explosion is loud enough, if there is sufficient quantity of carbonic gas pressure, do you mean to say that to this court and jury, that the broken pieces of glass from the explosion will not pierce this piece of paper, P-6? A. Sure, it will pierce the paper.

Q. Sure it will, won't it? That is the only cover they ever put on these bottles? A. That is all.

Q. Now, let's see; you have delivered in the summer and you have delivered in the winter, haven't you? A. Yes.

Q. Do you protect the bottles any other way throughout the year—have any other method, other than the one you have described? A. No; in the winter time, we have closed cars, that is all.

Q. Closed cars, why? because the freezing causes explosions? A. No, sir.

Q. Why do you have closed cars in the winter time? A. Not for the purpose of these bottles exploding; no, sir.

Q. Well, do you mean to say to the court and jury that bottled beverages, bottled under pressure of carbonic gas, freezes, that it will not explode? A. No, sir; the cap will come off first.

Q. It will not explode? A. No, sir.

Q. But the cap does come off? A. The cap comes off.

Q. Now, aside from the explosions you have mentioned after the bottle left the machine, have you ever seen the cap blow off? A. No, sir; I never have.

Q. Never have? A. No, sir.

Q. Haven't they—you have been making deliveries for three years, and you have never seen an explosion, have you? A. I have not.

Q. Do you throw the boxes about? A. I do.

Q. When a beverage containing carbonic gas pressure in the bottle is shaken up considerably, that causes explosions, doesn't it? A. Not to my knowledge.

Q. Is it likely to cause an explosion? A. No, sir.

Q. Can that cause an explosion? A. No, sir.

Q. If the bottle is filled or not, this pounding on the road in making the delivery, is that likely to cause an explosion? A. No, sir.

Mr. Rinzler: That is all, Mr. Brauer.

(Witness excused.)

MATTHEW ANDRONICO, sworn for Defendants.

Direct examination by Mr. Wright:

Q. Mr. Andronico, where do you live? A. 818 Main street, Hackensack.

Q. What is your business? A. Bottler of carbonated beverages.

Q. You are the chief proprietor of the Fairmount Bottling Company? A. President.

Q. How long have you been engaged in that business? A. About five years.

Q. Does the Fairmount Bottling Company bottle the beverages contained in the bottle, Exhibit P-2? A. Yes, sir.

Q. Do you have anything to do with the actual bottling of the beverages? A. Once in a while, yes.

Q. I mean, are you in the place? A. I supervise it, yes, right in the place.

Q. Now, in the first place, what do you call these bottles, such as Exhibits P-2— A. Why, just green emerald bottle, emerald green bottle.

Q. And as to size, what? A. Twelve ounce.

Q. Twelve ounce; do you know who manufactures those bottles? A. Why, they are manufactured by several concerns; there are large concerns in the United States.

Q. Who? A. Well, one of them is the Graham Glass Company of Evansville, Indiana; one is the American Glass Company, and, I think, the Illinois Glass, I think; there are three or four concerns manufacturing them.

Q. Is there any distinguishing mark at all upon them to indicate who makes the bottles? A. I do not think so; it is a plain bottle.

The Court: Can you tell us from whom you purchased the bottle involved in this case?

The Witness: Oh, yes.

Q. Where did you buy the bottles which you used and have used since you have been in business? A. All of the bottles that I have used for that special ginger ale have been purchased from second-hand dealers; they were all Canada Dry's, they had the Canada Dry label just the same as the one on the bottle.

Q. That is, when you buy them, they have the labels on, the same as on Exhibit— A. That is the idea.

Q. (Continuing) —D-2 for Identification? A. That is the idea.

Q. You wash the labels off? A. They go through the washing process.

Q. Why do you use those bottles of the Canada Dry?

(Objected to, overruled; exception.)

A. I have only one purpose in using that bottle, that is, after Canada Dry uses it, and the only purpose is this, that bottle, that has already been used, has already been tested, and I know that a bottle that is already tested——

Mr. Rinzler: If your Honor please, I object to that and ask the answer be stricken out; that is evidently hearsay.

The Court: Motion denied.

Mr. Rinzler: May I have an exception?

The Witness: All right.

A. (Continuing) —is all right.

Matthew Andronico, direct.

Q. Now, will you please decribe what you do with the bottles after you receive them and before you fill them? A. Well, after we receive the bottles, they run through a washing process. In other words, they are run through soaking tanks and they go on from soaking tanks to rinsing inside and outside with brushes, and from there they go up to the conveyor, and just before they come out there is an electric light just under the bottles, so that the man that watches them come out of the machine can inspect them, look through them, to see whether there is any cracked bottles.

Q. Do you have a man there watching all of the bottles? A. Yes.

The Court: What was that?

Q. Speak up, Mr. Andronico; dont shake your head. A. "Yes."

Q. Now, will you just describe how the bottles are filled? A. The bottles are taken from a moving conveyor and they are placed in filling machines. The machine has a rotating table, which carries eight bottles at one time. The table rotates. At the first filling it takes up the syrup. At the next move it takes up the carbonated water and the carbonation and capping at the same time; then she moves on and she is sealed.

Q. I understand, the first operation is to put in the syrup? A. Syrup.

Q. The flavoring extract? A. Yes.

Q. And the next is to put in the carbonated water? A. Yes.

Q. Where does the carbonated water come from in the machine? A. It comes from a carbonator; it flows in through pipes.

Q. That is all done by machinery? A. That is all done by machinery.

Matthew Andronico, direct.

Q. After the water is put in, then just what is the operation with respect to capping it? A. Why, the head raises from the bottle just sufficient so that the cap door slides open and the cap put on; then she comes down on the bottle, driving the cap down (illustrating).

Q. That is after it is filled with the carbonated water? A. Huh-huh.

Q. There is— A. (Interrupting) There is a slight lifting of the filling head, and the cap slides on.

Q. In other words, the filling head is made of what? A. It is made of iron and it has a leather washer which sits tight on the edge of the bottle.

Q. And through that—? A. And the carbonated water runs through that.

Q. Then that lifts, you say? A. Then there is a lifting arm that just raises that off a slight bit so that the cap can slide through there; there is a cap door that slides the cap into position; then she comes down.

Q. In what form are the caps just as they are put on the bottle? A. In what form?

Q. Yes. A. They are a little more open.

Q. Are they in this particular shape as shown on the bottle, P-2? A. Of course, excepting that the sides are a little wider open; that is all.

Q. These caps consist of what? A. Well, tin and cork on the inside.

Q. On the inside is cork? A. Is cork, yes.

Q. What puts them on to hold them in this tight form? A. A slit comes down, just squeezes the bottle or squeezes the cap.

Q. Any pressure required to put the cap on? A. Yes, considerable pressure; you have got to force it down.

Q. Now, in that process, do you ever have any broken bottles? A. If there is any defective ones, they will go; yes.

Q. It does happen occasionally? A. Occasionally, yes.

Q. How frequently? A. Very seldom.

Q. Now, in your machine where the gas is put into the water, how do you regulate the pressure of the gas? A. Why, the pressure of the gas is regulated by a gauge on the carbonator just at the outlet of the tube.

Q. Gauge; what does that gauge show? A. You mean, what pressure does that show?

Q. Yes. A. That depends on the beverage.

Q. Yes; well, ginger ale? A. Our ginger ale is fifty pounds.

Q. Does the pressure show on the gauge? A. On the gauge, yes.

Q. That gauge is how far from the place where the bottle is? A. Well, it depends; in our shop it is probably six or eight feet.

Q. That is, there is six or eight feet of pipe between that gauge and the outlet where it goes in the bottle? A. Yes.

Q. Why do you put in the beverage, bottle it under this pressure of fifty pounds?

Mr. Rinzler: I object on the ground it is a self-serving declaration.

The Court: I will permit it.

A. Well, the reason for the fifty pounds is this, that ginger ale cannot be sold under fifty pounds without going flat; where it has got fifty pounds, that will bring out the real snap, so that it won't be flat. With ginger ale, people will not buy ginger that is flat.

Mr. Rinzler: I object to that, if Your Honor please, what people won't do, and ask that it be stricken out.

The Court: I will permit it.

Q. Have you ever made tests of other ginger ales, testing especially for pressure? A. I have made tests from time to time; yes.

Q. Can you tell us what ginger ales you have made tests of? A. Why, several ginger ales. I have more or less compared it with Canada Dry, that being one of the standards, and that gives me a fair idea of how snappy these ginger ales are.

Q. Do you know what the pressure on Canada Dry is?

Mr. Rinzler: I object upon the ground that the pressure they use is not the real standard, the standard used by some other firm cannot be the measure to show the standard that was used by the defendant. The question is what the defendant bottling company does.

The Court: I will permit it.

Mr. Rinzler: Exception.

A. Well, that all depends on when the test is taken. I don't know just what you mean by the question.

Q. I mean, the pressure in the bottles. You say you have tested it. Now, do you know what the pressure is? A. Well, I can give you the test of the other day.

Q. Never mind that. Give me at the present moment, just Canada Dry; do you know what the pressure is on Canada Dry? A. Well, it is around fifty pounds.

Q. That is in the bottle? That is tested in the bottle? A. Well it is, as I answered before; that depends on your temperature.

Q. I am asking you now, if your figures will be a good idea of—to me—of the pressure in the bottles? A. Yes.

The Court: Have you ever tested Canada Dry or just estimated it?

The Witness: Tested it; tested it by gauge.

Q. Do you know whether there are other ginger ales which are put up in emerald green, twelve ounce bottles, similar to the ones used by you?

Mr. Rinzler: I object, immaterial, irrelevant.

The Court: I will permit the question.

Mr. Rinzler: Exception.

A. There are several. There is Silver King, for instance; that is one. There is Imperial Dry; that is another one; then you have the Cliquot Club; there is one made by the name of O'Keefe's Ginger Ale, a dry ginger ale. There are several other makes that I just cannot think of just now.

Q. I show you a bottle bearing the label "Imperial Dry, C. & C."; is that a standard brand of ginger ale to your knowledge? A. Yes, sir.

Mr. Rinzler: I object to this, Your Honor please, on the same grounds as before.

The Court: I will permit it.

Mr. Rinzler: Exception.

A. That is a standard brand.

Q. What kind of a bottle is that? A. Emerald green, same as I used.

Mr. Wright: I ask that it be marked for identification, please.

(Marked D-5, for Identification.)

Q. I show you a bottle marked "O'Keefe's Ginger Ale"; do you recognize that as a standard brand of ginger ale?

Mr. Rinzler: I object to that because by any other standard cannot be measured the duty which this defendant owed to the plaintiff.

The Court: Permit the question.

Mr. Rinzler: Exception.

A. It is.

Q. What kind of a bottle is that? A. Emerald green, same as our bottle, twelve ounce.

Mr. Wright: I ask that it be marked for identification.

(Marked D-6, for Identification.)

Q. I show you a bottle marked "Silver King, Extra Dry Ginger Ale"; is that a well known brand of ginger ale? A. Yes, sir.

Mr. Rinzler: Same objection, same grounds.

The Court: I will permit it.

Mr. Rinzler: Exception.

Q. What kind of a bottle is that? A. Emerald green, twelve ounce bottles.

Q. Same as that you used? A. Same as I have always used.

Mr. Wright: I ask that it be marked for identification.

(Marked D-7, for Identification.)

Q. I show you the gauge which I produced yesterday and which was marked as D-1 for Identification; what is that? A. That is a pressure gauge, to test pressure in bottles.

Q. Made by what company? A. This particular one is made by Liquid.

Q. Liquid Carbonic Company? A. Yes.

Mr. Wright: I offer this gauge in evidence.

Mr. Rinzler: I object, if Your Honor please, not relevant.

The Court: I will admit it.

Mr. Rinzler: Exception.

(Gauge offered and received in evidence, and known as Defendants' Exhibit D-1, not marked.)

Q. Now, have you made tests of the various types of ginger ale in bottles? A. I have.

Q. Can you give us a date when you made a test? A. I have a date here of a test, comparative test, made on April 21, 1926.

Q. Wait a minute; April 21, 1926? A. Yes.

Q. Now, what brands of ginger ale did you test at that time? A. I tested Canada Dry and our own.

Q. What were the results of the tests? A. I made a test of six bottles of each kind.

Q. Give us, now, your own; what did yours test, —what was the high and the low? A. Our high was forty-eight, and our low was forty-five.

Q. What was the high and the low of the Canada Dry? A. Low was forty-six, and the high was forty-eight; that is, on that date.

Q. Yes. Now, have you since conducted or made tests of those or other brands? A. We made tests, yesterday.

Q. Yesterday afternoon? A. Yesterday afternoon.

Q. What brands did you test then? A. You have the list; I don't remember them,—Cliquot Club——

Mr. Rinzler: Now, I object, Your Honor please, on the ground that the amount of pressure used by other dealers is not relevant here.

The Court: I suppose this will tend to contradict the testimony of your witness, who said that anything above thirty-five pounds would burst the bottle.

Mr. Rinzler: I know, but that does not tend to contradict that, if Your Honor please.

The Court: I think it does.

Mr. Rinzler: He is giving what he claims to be the amount of carbonic gas pressure as the standard of other people's manufacture.

The Court: No, he is telling what he found in certain other bottles; proceed.

Mr. Rinzler: May I have an exception.

A. Cliquot Club, Silver King, our Fairmount, O'Keefe's, and one bottle of White Rock Mineral Water.

Q. Will you give us the result of the tests, naming the particular ginger ale in each case, as to what it tested? A. Cliquot Club tested exactly fifty pounds; Silver King, fifty-six; Fairmount, fifty-five; Canada Dry, fifty-five; O'Keefe's, fifty-eight; White Rock Mineral——

The Court: We are only talking about ginger ale, not White Rock.

A. (Continuing) —fifty-two.

Mr. Wright: Yes, strike out the White Rock.

The Witness: All right.

Q. Were the tests which were made by you in April and yesterday made with this gauge that is now in evidence, D-1? A. Yes, sir.

Q. Will you take a bottle of Canada Dry and make a test to show the jury how the test is made? A. That is not Canada, Mr. Wright.

Q. No, that is Imperial; show them the result.

Mr. Rinzler: I object upon the same grounds, if Your Honor please.

The Court: I will permit it.

A. (Demonstrating on bottle).

Q. Show the jury the operation so that they will see how you do it. You insert the gauge over the cap first. A. I will, Mr. Wright, as soon as I get the gauge over the cap. First, the gauge is put over the cap, and then it is tightened, so that there is a washer on there, so that the pressure cannot get away, so that there is no air between the bottle and the gauge. Then we operate it and turn it, driving a hole through the cap, and it shows—it allows the pressure to go through into the gauge. (Demonstrating) There is the operation.

Q. What does that show? A. It shows about fifty-two pounds, as high as—well as I can read it; I don't know.

Q. About fifty pounds? A. About fifty, yes.

Q. Each notch above the forty is five pounds? A. Five pounds, yes.

Q. So that if it is up to the second notch, it would be fifty pounds? A. Fifty pounds.

The Court: What does it show, the gauge?

The Witness: Fifty pounds.

Mr. Wright: (Exhibiting) It shows fifty pounds exactly, look at it. Each notch represents five pounds. All right, I offer that bottle in evidence.

Mr. Rinzler: I make the same objection.

The Witness: Open it?

Mr. Wright: Take it off, yes.

The Court: I will admit it.

Mr. Rinzler: Exception.

(Bottle of ginger ale offered and received in evidence and marked Defendant's Exhibit D-8.)

Mr. Wright: I don't know what we will do with the contents because it will leak out.

Mr. Rinzler: Leave that on, if you wish.

Mr. Wright: No, I am going to make some more tests to compare with it.

Mr. Rinzler: All right.

Q. I show you another bottle of Imperial Dry and ask you, if you will, to make the same test with that bottle. A. (Testing pressure) Slightly under fifty-five pounds.

Q. No, you read it wrong; fifty pounds, second notch. A. Yes, fifty pounds, yes; it is hard to see it.

Q. Each notch on the gauge is five pounds, two notches ten? A. Yes.

Mr. Wright: (Exhibiting to jury) I offer that bottle which has just been tested in evidence.

(Bottle of ginger ale offered and received in evidence and marked Defendants' Exhibit D-9.)

Q. Cliquot Club is a slightly different shaped bottle, is it not, different type bottle? A. Yes.

Q. Will you now make the test with this bottle of that ginger ale in the same way? A. (Testing pressure).

Q. What does it show? A. About fifty-eight, is it not?

Q. It shows sixty. A. Yes, about sixty.

Mr. Wright: I ask to have that marked.

(Bottle of ginger ale offered and received in evidence and marked Defendants' Exhibit D-10.)

Q. The bottle which you have tested—that is, the bottle of Canada Dry, which you tested, D-8, is that emerald green? A. It is.

Q. Twelve ounce bottle similar to that used by you? A. Yes.

Q. And the bottle of Imperial Dry, D-9, is that green emerald? A. Same.

Q. Glass bottle, similar to those used by you? A. Yes, sir.

Q. I now show you D-7 for identification, bottle marked "Silver King"; will you make a test of that bottle? A. (Testing pressure) I would say, sixty; slightly under, isn't it?

Q. No, that is fifty-five; one notch short. A. Fifty-five.

Q. (After exhibition to jury) What does it show now after it has been handled around? A. Well, it is over fifty-five now.

Q. Yes. Take it off (referring to gauge). A. (Removing gauge) That is a good charge.

Mr. Wright: I offer this in evidence.

(Bottle of ginger ale offered and received in evidence and marked Defendants' Exhibit D-7, previously marked "D-7, Id.")

Q. We will now take bottle D-6 for identification, known as O'Keefe's; make the same test with that. A. (Testing pressure).

Q. What does it show? A. It shows about fifty-seven pounds, about fifty-seven; is that right?

Q. I read it just short of sixty, just a hair line off sixty. A. All right.

Q. (After exhibition to jury) What does it show now? A. Oh, about sixty-two.

Q. Just take the gauge off. A. (Removing gauge).

Mr. Wright: I offer this bottle, D-6 for Identification, in evidence.

(Bottle of ginger ale offered and received in evidence and marked Defendants' Exhibit D-6, previously marked "D-6, Id.")

Q. Does handling of the bottle of ginger ale increase the pressure? A. It may increase it slightly.

Q. Does the difference of temperature have any effect upon the pressure? A. It has.

Q. What effect does that have? A. Why, that increase the pressure in the bottle slightly.

Q. That is what difference of temperature? A. The higher temperature.

Q. That is the higher the temperature the more the tendency is to increase the pressure? A. Yes.

Q. Now, those tests that you made on April 21st, where did you make those tests of the two, of the Canada Dry and yours? A. Those tests were

made in the bottling plant, in the brick building, and those bottles I tested six of each, as I said before, and those bottles stood side by side for a period of probably three or four days so as to get an even temperature on them.

Q. That was on April—? A. April 21st.

Q. The weather at that time, got any idea about how warm or cold it was? A. Well, it was much cooler than it is now.

Q. Now, in your experience have you ever known of a bottle after it had left the filling machine to explode? A. I do not.

Q. Did you ever hear of a bottle of your ginger ale, or any of the brands which I have offered in evidence, exploding after they left the filling machine? A. That is taken standing by the—standing alone, or how do you mean?

Q. Did you ever hear of any exploding? A. In handling or how do you mean?

Q. Well, did you ever hear of any exploding while standing in an upright position? A. I didn't, no, I didn't.

Q. Have you ever heard of any exploding by any cause? A. Why, I don't know off-hand; I couldn't say; yes, I have.

Q. I mean, did you ever hear of it? A. Yes, I have heard of bottles exploding being dropped. I have seen bottles dropped from the handlers' racks, drop on a cement floor, and explode. That is possible, you know, careless handling will do it.

Q. How long do you keep a bottle of ginger ale in your place after it is bottled in this form? A. Oh, sometimes it is probably there sixty days; sometimes, thirty days, you cannot tell; it is all according to the demand.

Q. Did the bottles ever explode there? A. I haven't seen any explode.

Q. In your experiments, have you ever put more than fifty pounds pressure in these bottles? A. I have put as high as seventy-five pounds pressure in these bottles, but not in ginger ale.

Q. What was the result of that seventy-five pounds pressure?

Mr. Rinzler: I object; if it was not ginger ale, I object.

The Court: Ginger ale is the test, unless he can show there is no difference.

Q. In what kind of a beverage did you put the seventy-five pounds pressure? A. Just in the plain carbonated water.

Q. But in the same bottles, you say? A. In the same bottles.

Q. And would there be any difference in the explosive effect between the plain carbonated water and the ginger ale? A. Not that I know of.

Q. What is pressure in the bottle? Of what does it consist? A. Why, it is simply gas pressure, because it is filled under a certain pressure.

The Court: Does the poundage pressure indicate per square inch?

The Witness: Does it indicate what?

The Court: Does it indicate so many pounds per square inch?

The Witness: It indicates the pounds of pressure in the bottle, as it is.

Q. You mean that your gauge indicates the amount of pressure for a certain size bottle? A. For a certain size bottle.

Q. Now, what was the result of putting in seventy-five pounds pressure in the green bottle in carbonated water? A. The result?

Q. Yes. A. Why the same result as fifty pounds with ginger ale.

Q. Did you ever see a bottle explode? A. I have not.

Q. After the bottles are filled, these bottles, then what is done with them? A. They are put in cases, standing up in them, and go to the labeling machines.

Q. Yes, and then what happens there? A. They are labeled.

Q. Then what is done with them? A. And from there they are packed.

Q. And how are they packed? What is the procedure of packing? A. They are packed, what we call these paper slips are put on, and they are laid down in the boxes.

Q. These paper slips, you mean paper similar to P-6? A. Yes.

Q. That is done by hand? A. Done by hand.

Mr. Wright: That is all.

Cross-Examination by Mr. Reed:

Q. How long have you been in this business, Mr. Andronico? A. Five years.

Q. How long has the Fairmount Bottling Company been bottling? A. Oh, perhaps twenty years.

Q. How long? A. Twenty years.

Q. Been using this same product?

Mr. Rinzler: How does he know, only been there five years; I object to it.

The Court: Unless he knows.

A. I do not understand your question.

Q. Did you have any acquaintance with the Fairmount Bottling Company before you came in its employment? A. Yes, to some extent.

Q. Do you know what they were selling before then? A. I do.

Q. Were they selling ginger ale? A. They were selling several brands, yes.

Q. Similar to this? A. No, sir.

Q. So they began to make this when you first came there? A. I wouldn't even say that; I will say probably a year or two after going there.

Q. A year or two after you got there? A. Yes, that was pretty flat ginger ale in those days; there was no demand for that kind of a ginger ale in those days.

Q. How does that differ from the other? A. Well, it differs in the color and in the taste.

Q. I see; how? A. That is a dry ginger ale.

Q. This is dry? A. Yes.

Q. Do you know whether or not the Fairmount Bottling Company is licensed?

Mr. Rinzler: I object, if Your Honor please—no relevancy to this issue.

The Court: What difference does that make?

Mr. Reed: I understand that all of these bottling concerns have licenses from the Boards of Health.

Mr. Rinzler: That is for sanitation.

The Court: I do not suppose whether they are licensed or not would affect this case.

Mr. Reed: I think it affects our position in this case, if they are a duly licensed concern, dealing in ginger ale, that we have a right to accept it as such.

The Court: What is the criterion as to license, only as a sanitary measure, isn't it?

Mr. Reed: Well, I was going to ask him what that covered.

The Court: Suppose you ask him first.

Mr. Reed: I think it covers all of the process.

The Court: Ask him first.

Q. Do you get licensed from the local Board of Health or the State Board of Health? A. You mean, do we have a license?

Q. Yes. A. Yes, sir.

Q. What does that cover? A. Why, mostly sanitation.

Q. Sanitation? A. Sanitary license; you have got to have your plant sanitary before they pass it, and then they will issue a license; that is only issued for a period of six months and renewed.

Q. What happens then? A. You get it renewed.

Q. In order to get a renewal, is there an inspection made? A. Yes, sir.

Q. By whom? A. Yes, sir; by the State Board.

Mr. Rinzler: I object, if Your Honor please; it applies to sanitation only.

The Court: I suppose, if it applies to sanitation only, we are not particularly interested in it.

Mr. Reed: Let me ask one more question.

Q. What does that particular inspection include? A. The inspection is of the cleanliness of the plant, cleanliness of the syrup, everything that goes into the bottle, and the washing of the bottle, the plant; it is just a question of sanitation, that is all.

Q. It has nothing to do with the process of filling, capping and labeling the bottles then? A. I do not think so.

Q. Just one more question. After you have filled these bottles that are upon the table, do you make any inspection to determine whether any of them are broken? A. No, sir.

Q. What is done with them? A. What do you mean, the bottle?

Q. Yes. A. Whether we inspect the bottles?

Q. Yes. A. No.

Q. You do not inspect the bottles? A. We can see that when we label them, if they are broke.

Q. Then the label is put on after they are— A. (Interrupting) After they are filled.

Q. After they are filled, at that time, you say you could see whether or not there is any break in the bottle? A. Yes.

Q. Then, there are covers put on and they are put in boxes? A. Yes, sir.

Q. Well, is there any possibility in these machines that fill them of giving a different pressure to different bottles? A. No.

Q. So that the bottles that come off at a certain temperature have all the same pressure in them? A. Approximately the same pressure.

Q. Approximately, that means within what variation? A. Well, the only variation that you possibly could get would be if there is a part of the rubber that fits over the top of the bottle, if that should be, for instance, out, a little air could get into it or something, why your pressure would be lower.

Q. Yes. A. You are bound to lose a certain amount of pressure.

Q. I think your pressure of your bottle was sixty pounds? A. I think it was, yes.

Q. How much does that vary in hot and cold weather? A. Well, of course, I cannot just tell you that unless I make tests.

Q. Ordinary summer and winter weather. A. There may be a few pounds difference, yes.

Q. Two or three or more? A. Oh, sure, possibly maybe more.

Q. Well, what would be the extent? A. Well, I couldn't tell unless I had the temperature of the bottle and had a test on it.

Q. Well, take a bottle that was stored in an ordinary grocery store, office or home, weather that usually comes at that time of the year that this accident occurred? A. What do you mean, whether the pressure would be higher?

Q. Yes.

Mr. Rinzler: I object, if Your Honor please; there is no question founded— hypothetical question—upon the evidence in the case.

The Court: I will permit it.

Mr. Rinzler: Exception.

A. Well, it may be slightly higher, but I couldn't tell you exactly how many pounds there would be in a bottle.

Q. Well, would it be ten pounds higher then? A. I couldn't say, because I don't know what the conditions are; I don't know what the temperature in the store is.

Mr. Reed: All right; that is all.

Cross-Examination by Mr. Rinzler:

Q. There isn't any doubt about the fact, sir, that the warmer the temperature the greater the gas pressure? A. Yes, sir.

Q. The greater the gas pressure, the more liability of the bottle to explode; isn't that so? A. Why, that depends on the bottle.

Q. There is no question, however, about the fact that the greater the carbonic gas pressure the greater the liability of exploding? A. That is the idea.

Q. And in all events also, it depends upon the condition of the bottle; it depends upon whether the bottle has a bubble or break, whether it is perfect, or imperfect, doesn't it? A. Yes, sir.

Q. Now, the labeling process is a very speedy, swift process? A. It is.

Q. The labeling process is a process done by machinery, isn't it? That is so, isn't it? A. Yes, sir.

Q. And they are labeling how many bottles to the minute? A. Well, do you mean mine?

Q. Yes? A. I will say thirty-five.

Q. All right. So that it takes how long to label each bottle? A. Why, two seconds.

Q. Two seconds? A. Less than two seconds.

Q. As a matter of fact, the bottle is picked up, isn't it, and a number of them are put on the labeling machine at one time? A. No, sir.

Q. What then? A. A number of them at the time are inserted— A. No, sir.

Q. What then? A. Give me the bottle. There are two empty cases, one is a filling box, take the bottle out, lay it down, the machine comes down and labels it; take it off with this hand, take it off, put the other one on (illustrating).

Q. It is a very swift process? A. It is.

Q. A labeler doesn't look at the bottle and examine its condition, does he? A. That is right.

Q. He has got all he can do to put the bottle in the labeling machine, then to see that it has got something in it; is not that so? A. Yes, sir.

Q. So that the bottle inspection is done before the bottle gets filled, while it is being washed? A. Oh, no; the inspection is before the bottle is filled, yes.

Q. Now, the only inspection that you make is while the bottles are being washed? A. While the bottles are coming out of the wash room.

Q. You do not have an inspection man, do you, whose duties are solely to inspect the condition of the bottle as to flaws? A. Yes.

Q. Why, the man that inspects your bottles is the man that washes them? A. Oh, absolutely not; he has got no other duty but to stand there and watch them coming through.

Q. How many men do you keep to do that? A. What do you mean?

Q. To do that sort of business, of watching the bottles? A. One man.

Q. One man; you have one man all of the year round? A. We have one man all of the year round.

Q. How many thousands of bottles do you wash at your plant in the very hot summer time when business is very, very heavy? A. Well, I couldn't tell you off-hand.

Q. Well, you bottle hundreds of boxes per day, don't you? A. Yes, sir.

Q. Twenty-four bottles per case; how many hundreds of boxes do you bottle per day in the good hot summer weather? A. Why——

Q. (Continuing) In the good old summer time? A. (Continuing)—I should say six or eight hundred boxes.

Q. And the whole process is a very speedy one in a plant like yours, isn't it? A. It is.

Q. Everything is operated by the process of machinery, isn't it? A. Everything is by machinery.

Q. Eight hundred boxes at twenty-four to the box would be something like 19,000 or more bottles, wouldn't it? A. Yes.

Q. Your man that inspects these bottles goes to work at what hour of the day? A. Eight o'clock.

Q. Eight o'clock; his lunch hour is at twelve? A. Yes, sir.

Q. When does he come back after lunch? A. One o'clock.

Q. And he works until five? A. Some times six.

Q. So he works eight to nine hours a day? A. That is right.

Q. You mean to say that one man during that process can examine nineteen thousand bottles in an eight hour working day? A. I will say that he can, with the facilities that he has with that machine, he can.

Q. How do you reconcile that statement, Mr. Andronico? A. (Continuing) He has a batch of eight bottles at one time, and he can look right through the whole bunch.

Q. He looks right through; he doesn't pick it up to look into it, does he? A. He does not have to.

Q. As the bottles are slipping through, he just looks at it, and they slide through a number per second, don't they? A. Oh, no; they slide through at the rate of about sixty a minute.

Q. Sixty a minute? A. That is one a second.

Q. That is one a second? A. That is one a second.

Q. They slide through rather rapidly? A. They do not slide through; they are resting there.

Q. How long has he each bottle before his eyes during that process? A. One second.

Q. And he just looks at the whole bottle? A. He looks at the whole bottle; that is why he can tell if there is a crack in it; that is the idea.

Q. That depends upon whether he sees it? A. Yes.

Q. If the crack is beneath the bottle, he cannot see it? A. Yes, he can; your bottle don't say in that position.

Q. Well, in that position?

Mr. Rinzler: Does the jury see?

A. In that position (illustrating).

Q. And by holding the bottle in that diagonal position, you say to this court and jury that the man, doing that process, he can determine whether the condition of the bottle is good or safe? A. Not under that condition, the way you have your bottle, but with a strong light underneath he can see it.

Q. What kind of light? A. Electric light.

Q. Holding it that way with an electric light he can see? A. Yes, sir.

Q. In that second's process? A. Yes, sir.

Q. See a bottle per second; is that right? A. Yes, sir; that is right.

Q. And a man working steadily for eight hours that way, with the exception of one hour for lunch, washing nineteen thousand bottles per day, when business is good—? A. Yes.

Q. In August it is good, isn't it? A. Sometimes.

Q. Well, as a rule it is the best in July, August and September? A. Sometimes.

Q. As a rule, sir? A. As a rule, it is best in June.

Q. Well, June, July and August? A. I will say, as a rule, it is best in June.

Q. Are June, July and August your best months in the bottling season? A. Sometimes.

Q. As a rule? A. As a rule, yes.

Q. Isn't it better than October, November and December? A. It is.

Q. Isn't August better than October, November and December? A. It is.

Q. And isn't it better than January or February? A. It is.

Q. You have one man doing that particular inspection work, have you not? A. Yes, sir.

Q. No relief man, is there? A. Oh, yes.

Q. When? A. Well, if he happens to be sick, there is always somebody to take his place.

Q. Sometimes you have a substitute relief man to take his place when he is off duty on account of illness or other reason? A. That is right; I have done it myself.

Q. This bottling process on your bottling machine is also a speedy process, isn't it? A. It is.

Q. First the syrup enters into the bottle? A. That is right.

Q. The quantity and the quality of the syrup has some effect upon the pressure of the beverage itself, hasn't it? A. It has not.

Q. None at all? A. What do you mean? Other than to flavor it.

Q. You say that neither the quantity of the syrup nor the quality of it have any effect upon the pressure of the gas in it? A. No, sir.

Q. Does the quantity of beverage or the syrup or the water in the bottle have any effect upon the beverage? A. It has not.

Q. Is it not a fact, sir, that if this bottle, D-10, were bottled higher up, to the top of the neck, would there not be a greater liklihood or danger of explosion? A. Absolutely not at all.

Q. None at all? A. Absolutely not.

Q. Suppose this bottle was filled right to where the cap is, wouldn't there be a greater danger of explosion? A. No, it would not.

Q. Why do you bottle it up to this point? A. Because it looks better.

Q. Because it looks better? A. Yes.

Q. You are in business for looks? A. That is half of the business.

Q. Do you sell the public looks or quality? A. They are all selling the label.

Q. In the dry ginger ale? A. That is the idea; they are all selling the label.

Q. You are selling the label? A. That is part of the game.

Q. In the head of the bottling machine which comes down over the top of the neck or mouth of the bottle, it has included within it a rubber throat, hasn't it? A. Yes, sir.

Q. And that rubber throat is a guard or protection against explosion while bottling, isn't it? A. No, sir.

Q. What is that for? A. That rubber throat is simply to hold that bottle in position so that there is no leakage while filling.

Q. The rubber throat comes around like that, as I am indicating? A. Comes down a little bit further.

Q. But around it as I have indicated? A. Something about that.

Q. That is half an inch thick? A. It is an inch thick in my machine.

Q. That does protect the bottle from the pressure of the head of the machine coming down upon it? A. It does not.

Q. It does not? A. Not at all.

Q. Not one bit? A. Not one bit.

Q. That rubber does not protect the top, does not protect the bottle from exploding? A. That is not the purpose of the rubber.

Q. I didn't ask you about the purpose. Do you mean to say to this court and jury that that inch rubber throat which is in the head of the machine, about an inch thick, does not protect or guard the bottle from exploding in the filling process? A.

What do you mean; it is no protection, that is not the purpose.

Q. Now, we will see about that? A. That is not the purpose of the rubber, as I said.

Q. So that that is not the purpose of it, that is to protect or guard the bottle in any degree? A. It does not.

Q. Had it not been for the fact that the rubber comes around the bottle in this way, then metal would touch the bottle, wouldn't it? A. There would be nothing touching the bottle.

Q. Nothing at all? A. No, sir.

Q. Isn't there a metal presser that comes down on the bottle? A. No, sir; it is what we call a leather washer.

Q. I mean, there is some metal that comes down on the bottle? A. It is a sealing throat that comes down.

Q. Is the sealing throat made of metal? A. It is.

Q. And the rubber closes in tight? A. No, no.

Q. No? A. The rubber goes below the sealing throat.

Q. Doesn't it close in tight around the bottle? A. That goes down further.

Q. Tight, though, doesn't it? A. Yes.

Q. And that does not protect, or guard the bottle from exploding? A. It does not.

Q. And that is an inch thick? A. That is an inch thick.

Q. Now, Mr. Andronico, rough handling affects the bottle, doesn't it? A. Well, I don't know what you mean by rough handling.

Q. Well, shaking up? A. Well, no.

Q. Not a bit? A. Not unless they come against or in contact with heavy metal that will bump it.

Q. They will explode won't they then? A. Yes, it will break the glass sometimes.

Q. Suppose you agitated it or shook it up roughly with the hand, that has no effect on it, you say? A. It has not.

Q. Have you ever seen bottles explode? A. Have I ever seen bottles explode?

Q. Yes. A. Yes.

Q. Have you ever seen bottles fly up, fly about? A. No, sir; not fly about, just break off.

Q. Doesn't it happen that people working in the bottling plant are injured from bottles exploding? A. From seltzer bottles.

Q. From all bottles? A. No.

Q. As a matter of fact to protect you from injuries against flying glass, you carry workmen's compensation— A. We do not carry——

Mr. Wright: I object to that.

The Court: I sustain the objection.

A. (Continuing) That is a legal requirement.

Q. But you do know that people working in the plant, working in the plant when bottling is going on, are at times injured by flying glass, don't you? A. I do; yes, sir.

Q. And the bottlers at times are cut by the pieces, aren't they? A. They have been.

Q. Yes, and they have been cut severely, suffered permanent scars, gashes in the face, haven't they? A. By seltzer bottles.

Q. By soda bottles as well? A. I do not know of any.

Q. You do not know of any? A. Not in my plant.

Q. Haven't they been cut in the palm of the hand from the glass of a soda water bottle? A. I have seen them cut—

Q. (Interrupting) Such as I am now showing you? A. (Continuing)—but not from explosions, but from breaking a bottle.

Q. Mr. Andronico, you have been asked if you had not seen them cut in the palm of the hand, such as this scar, as a result of a cut coming from an exploded bottle, the pieces of glass flying and injuring one's hands, such as I have? A. I have not.

Q. You have not? A. Not in my plant.

Q. Have you seen it in anybody's plant? A. I have not.

Q. You have seen seltzer bottles explode? A. I have seen seltzer bottles explode.

Q. If there is enough pressure in the ginger ale bottle, the pieces of glass from that bottle, when it explodes, can also fly about, can't they? A. Well, but there is this difference—

Q. I say, if there is enough pressure? A. Yes, sir.

Q. If the bottle explodes, if there is nothing about the bottle to protect it or to guard it, the pieces will fly about— A. Yes, sir.

Q. —is that so? A. Yes, sir.

Q. You have had your knowledge about the bottling business for a number of years—you say five years steadily? A. Five years.

Q. You say that you never heard of a bottle bursting or exploding once it left your plant? A. I have not.

Q. Why, don't the drivers ever bring back bottles that have exploded, sir? A. Why, I have, yes, from moving around, striking the packing cases against each other.

Q. From explosions? A. I haven't seen any from explosion.

Q. You haven't seen any from explosion? A. From explosion, no.

Q. Don't the caps at times blow off? A. I didn't see the caps fly off.

Q. Have you heard of it? A. I have heard of it, yes.

Q. And the higher the temperature by weather or warmth, the higher the pressure? A. Yes, sir.

Q. The higher the pressure the greater the danger of explosion; is that right? A. Yes, sir.

Q. You, of your own personal knowledge, do not know how many pounds of pressure that bottle that exploded and injured Mrs. Noonan contained, do you? A. Why, excepting that it was bottled under a certain pressure.

Q. Well, that is from hearsay, what you have been told by one of your workman? A. What do you mean?

Q. Well, do you supervise every bottle that goes through the machines? A. I supervise the plant.

Q. Are you there every minute of the day? A. I am there every day; sometimes I am out.

Q. Who is there is your place today? A. Why, one of the members of the firm.

Q. Well, that happens now and then that you have got to be away from the plant, doesn't it? A. Yes, sir.

Q. So that you may now know whether you were present when this particular bottle was filled or not, do you? A. Oh, I cannot tell, no.

Q. You have no personal knowledge of how many pounds of carbonic gas pressure it contained, have you? A. I could not unless I tested the bottle.

Q. Very well; freezing of the beverage likewise has a tendency to cause the bottle to burst or explode?

Mr. Wright: I object to that.

The Court: No evidence about freezing in August.

Q. The sun shining through the door and that coming upon the bottle, warming the beverage, would have a likelihood or tendency to cause the bursting or explosion of the bottle, wouldn't it? A. It would increase the pressure; I do not think it would burst.

Q. Increasing the pressure would have a tendency to cause bursting or explosion of the bottle? A. I do not know.

Q. It could, though, couldn't it? A. I do not know.

Q. If the pressure were increased high enough by that sun or warmth, that could have a tendency to cause an explosion of the bottle, couldn't it? A. That depends on how high.

Q. If it was high enough, it could have that tendency? A. I don't understand what high enough means.

Q. You did say the higher the temperature the greater the danger of explosion? A. Yes, sir.

Q. So that if this bottle of beverage was warmed sufficiently by the temperature of the heat of the sun, the greater the danger of the bottle exploding, is that right? A. Right.

Q. You do not say, sir, that you can guarantee that once the bottle leaves your plant, that it cannot explode, can you? A. Well, of course, you have got to realize that there is different conditions under which an explosion might be possible. I cannot guarantee anything, I cannot guarantee——

Q. All right. A. (Continuing) —anything about breakage, as far as the bottle is liable to breakage, after it is delivered off the wagon or truck.

Q. No, aside from breakage against or striking the bottle against a hard substance, you would not undertake to make any such guarantee, that there are conditions under which it might not explode?

Mr. Wright: I object to that.

The Court: I sustain the objection.

Q. You do not indicate on the label the number of pounds of carbonic gas pressure? A. We do not.

Q. You do not indicate that to the public? A. We do not.

Q. Or indicate it to the company? A. Not that I know of.

Q. Even if a paper like P-6 is over such bottle, and it explodes, the glass will pierce through the paper, won't it? A. The explosion is not strong enough to drive the glass through the paper.

Q. Will it pierce the paper? A. It will not pierce the paper.

Q. It will not pierce the paper? A. It will not.

Q. Now, there are different kinds of carbonic gas pressure, aren't there? A. I do not understand your question.

Q. Well, there is the liquid carbonic gas pressure, isn't there? A. Well, that is——

Q. Isn't there? Isn't there liquid carbonic pressure? A. There is the liquid carbonic gas under intense pressure.

Q. Used for gas in bottling beverages? A. Yes, sir.

Q. And there is the Natural Carbonic located in Newark? A. Yes, sir.

Q. There is the General Carbonic Gas? A. Located in New York.

Q. Probably a dozen or more in the eastern part of this country, aren't there? A. Yes, sir.

Q. Are they all alike as far as pressure is concerned? A. Why, yes.

Q. Don't they vary, Mr. Andronico? A. They will vary in the different temperature, yes.

Q. Yes? A. They do.

Q. What causes caps to fly off, Mr. Andronico? A. I cannot tell you; I never seen any fly off.

Q. You have heard about it? A. Well, yes, I have.

Q. You do not know what causes that? A. Well, it is probable that may be due to improper capping. For instance, in the old days there used to be more of that used to happen because they had bad machines and the proper power was not applied in putting the caps on.

Q. Sometimes it comes from improper capping, you say? A. Yes.

Q. Sometimes from too high temperature? A No, sir.

Q. Sometimes from too much gas pressure? A. No, sir.

Q. If it charge, I mean,— A. No, sir.

Q. So that in your opinion a bottle containing as much as fifty pounds of gas pressure can never burst or explode unless the temperature becomes too high? A. If it becomes too hot.

Q. Well, unless it becomes hot enough? A. Well, it may, if it is too high, yes.

Q. All right, assume, sir, that the bottle that exploded and injured Mrs. Noonan, did not explode as a result of a contact of that bottle or its striking another hard substance, can you give what in your opinion is the probable cause of that explosion? A. I cannot.

Q. Can you assign to this court and jury any cause, if that bottle did not strike some hard substance? A. I cannot.

Q. You qualified yourself as a expert, have you not? A. I have not.

Q. Do you say, sir, that you are an expert insofar as the testimony that you have given in this court, in this case?

The Court: Expert on what?

Mr. Rinzler: Expert on these various tests.

Mr. Wright: He has not qualified as an expert, if Your Honor please, and he has not testified as an expert; he has testified to what he personally knows about it.

Mr. Rinzler: If you say he is not testified as an expert——

Q. Well, sir, then you cannot give us an opinion, can you? A. No, sir.

Q. Providing that you should assume that this bottle did not strike against some hard substance, and that that was not the cause, you could not give any possible cause of that explosion, could you? A. I cannot give any possible cause at all, because I do not know anything about what happened.

Q. You could not give any possible cause, could you? A. No, sir.

Q. If you should eliminate the striking the bottle against some hard substance? A. No, sir.

Q. You have heard from customers that bottles explode, haven't you? A. I have not.

Q. Haven't heard that report at all? A. I have not.

Q. Did not the manager of the Great Atlantic & Pacific Tea Company report that to you? A. This very bottle?

Q. Yes. A. Yes.

Q. Did he report other bottles that were found in the boxes broken? A. I do not know.

Q. Don't know. When did you get this tester that you have used here? A. This particular tester?

Q. Yes. A. Oh, I think, a couple of months ago, but I have owned other testers.

Q. Well, when did you get this one? A. Oh, a couple of months ago.

Q. Did you get this one to be used in this case? A. I got that to test bottles for myself.

Q. For this case? A. For this case and myself.

Q. Well, where are some of the other testers that you own? A. Why, home.

Q. Home. If the bottle is too brittle and the quality of the glass not quite strong enough, the carbonic gas pressure has a tendency of causing the bottle to burst or explode, hasn't it? A. I don't know what you mean by "brittle."

Q. If it is not strong enough to hold carbonic gas, it will explode, won't it? A. She will explode while filling, yes.

Q. And after it is too? A. No, sir.

Q. I just want to ask this one. You have never seen or heard of a bottle bursting or exploding containing carbonic gas pressure after it was filled, have you? A. No, sir.

Q. Is your plant a heated one? A. No, sir.

Q. You have never came in in the morning and seen exploded bottles in your factory? A. No, sir.

Q. And you have never heard of that? A. No, sir.

Mr. Rinzler: That is all.

Redirect examination by Mr. Wright:

Q. With reference to this gauge, D-1, a part of that gauge is composed of rubber which goes over the cap at the point where the drill goes through, is there not? A. Yes, sir.

Matthew Andronico, re-cross.

Q. Is this the rubber, this central piece here? A. Yes, sir.

Q. If that rubber gets hard or worn, of course, it does not operate as thoroughly as when it is soft and pliable, does it? A. It is liable not to be accurate.

Q. That is the standard gauge made and used for the purpose of testing bottles, is it not? A. Yes, sir.

Q. Made by what company? A. Liquid Carbonic Co.

Q. They are manufacturers of what? A. They are manufacturers of bottlers' accessories, anything you want in the bottling line.

Q. They manufacture carbonic gas? A. They manufacture gas too.

Q. Now, in the labeling of these bottles, you say that is done by machine? A. Yes, sir.

Q. In the handling of the bottles, to put the caps on, that is done by individuals; isn't that by hand? A. You mean the caps around, the paper covers?

Q. The paper caps, or wrapper? A. Yes, sir.

Q. Does he have an opportunity to observe the bottles, the man that puts these wrappers on? A. Why, if the bottle is broken, there would not be any liquid in it; that he would know before he gets the bottle in his hand.

Q. If you took up a bottle like that? A. If it is broken there would not be any pressure in it.

Q. Did you ever notice, or ever find, a bottle which was broken after it had gone through the labeling machine? A. No, sir.

Recross-examination by Mr. Rinzler:

Q. These covers, P-6, are just put on in this manner, the man in charge of that particular duty picks up the bottle with one hand, slips the cover right over it, dosen't he? A. Yes.

Max A. Kretschmar, recalled, direct.

Q. So that his duty is in no sense those of a man who is inspecting the bottles? A. I don't know.

Q. What do you mean? A. I do not know.

Q. His duty is not to pick up the bottle to inspect it? A. No, sir.

Q. But his duty is solely to slip these covers on? A. Yes, sir.

Mr. Rinzler: That is all.

(Witness excused.)

MAX A. KRETSCHMAR, previously sworn, called.

Direct examination by Mr. Brown:

Q. You remember Mr. Noonan on the stand this morning saying that he called upon you the day after this happened and had a conversation with you; will you just tell us what that conversation was? A. It was the same day; it was right after the accident, he came in and asked me to show the bottle to him, how it had occurred, and I showed him the bottle and I told him how it occurred and where it occurred, and I do think he asked me if we had ever had any bottles break before, but I told him, "No, that there was never a bottle broke in that manner, in that way." We have found bottles broken in the cases upon delivery but there were never any bottles break in the store, and I have come in the store to find the tops off the big soda water bottles but I did not know how they got off; I know I seen them off in the morning, but I have not told him that I had seen them come off.

Q. Did you ever tell him you had seen explosions like that happen before? A. I did not.

Max A. Kretschmar, recalled, cross.

Q. Didn't you testify yesterday that you had not ever——

Mr. Rinzler: I object to that.

Q. Have you ever seen explosions like that occur before? A. Never.

Mr. Brown: That is all.

Cross-examination by Mr. Rinzler:

Q. Tell the court and jury, Mr. Kretschmar, as best as you can, what caused the explosion, if you can tell us.

Mr. Brown: I object, calling for a conclusion.

The Court: Yes, I think so; I sustain the objection.

Q. Can you tell what caused the explosion? A. I do not know; I just put it in the box and it burst.

Q. You do not know what caused the explosion nor how it came about? A. No, I couldn't tell.

Q. You say you came in mornings and found the caps blown off the top of the bottle; is that right? A. Off the soda water bottles.

Q. Soda water? A. Soda water, no ginger ale.

Q. They are made the same way as this? A. They are bigger bottles.

Q. You mean higher bottles? A. Quart bottles, I think they are.

Q. Yes, but the same kind of glass. A. White bottles.

Q. White bottles? A. White bottles.

Q. And the caps you saw blown off? A. I have seen caps off.

Q. But they were not off the night before when you left the place? A. Positively not.

Michael Noonan, recalled, direct.

Mr. Rinzler: That is all.

(Witness excused.)

Mr. Brown: That is our case.

Mr. Wright: We rest.

(Defendants rest.)

The Court: Any rebuttal?

Mr. Rinzler: Yes, Mr. Noonan take the stand.

(Plaintiffs' rebuttal.)

MICHAEL NOONAN, recalled in rebuttal.

Direct examination by Mr. Rinzler:

Q. When you spoke to Mr. Kretschmar about whether or not he had ever before seen bottles explode, did he say "No"? A. He told me, "Yes," he said.

Mr. Rinzler: That is all.

(No cross-examination.)

Mr. Rinzler: We rest, sir.

(Plaintiffs rest.)

Mr. Reed: If Your Honor please, may I just make a motion? I would like to call your attention to one or two cases.

The Court: Suppose you first state your motion.

Mr. Reed: The motion is that you direct a verdict for the defendant Great Atlantic & Pacific Tea Company, on the grounds that I asked for a non-suit.

The Court: (After discussion) The mere explosion, in my judgment, raises the question of *res ipse loquitur*. The plaintiff yesterday undertook to introduce some reasons yesterday which he was not obliged to do, and if the reason which he advanced, viz., as to pressure was the only reason, why the jury would doubtless find that you had nothing to do with the pressure. If the doctrine of *res ipse loquitur* applies, I could not direct a verdict, for that is a jury question. * * * If the doctrine does not apply, then I am wrong, but if it does I think it is a jury question. For that reason, I will deny the motion.

Mr. Reed: I ask an exception.

Mr. Wright: Now, if Your Honor please, in behalf of the Fairmount Bottling Company, I desire to ask your Honor to direct a verdict upon the ground that there is no negligence shown against them, and that, on the contrary, they have shown by the undisputed evidence that they have produced, these bottles from reputable concerns, that they have used due care in applying the gas pressure to the products of their manufacture, and that they have used no higher gas pressure in the filling of the bottle than is generally used and which is shown to be safe by the tests.

The Court: Well, the same situation seems to be present now as was present on your motion for a non-suit. The witness presented by the plaintiff says that thirty-five pounds was the limit and that if it were more than thirty-five pounds the bottle would explode. Whether that is true, or

not, I suppose is a jury question rather than for me.

Mr. Wright: Perhaps it is, if it is limited to that, coming down to that.

The Court: I cannot deal with it if it is a jury question, I suppose. When one man comes up and says that a certain thing is a fact, and another witness comes up and says that that is not true, that creates a question for the jury to decide. I will deny the motion, and you may have an exception.

Mr. Wright: I ask Your Honor for an exception.

The Court: Yes.

Mr. Reed thereupon summed the case to the jury on behalf of the Defendant Great Atlantic & Pacific Tea Company.

Mr. Wright thereupon summed the case to the jury on behalf of the Defendant Fairmount Bottling Company.

Mr. Rinzler thereupon summed the case to the jury on behalf of the Plaintiffs.

Thereupon the Court charged the Jury as follows:

MEMBERS OF THE JURY:

This is an action brought by Christina Noonan and Michael Noonan, her husband, against the Great Atlantic & Pacific Tea Company and the Fairmount Bottling Company, defendants, to recover damages which these plaintiffs allege they suffered through the negligence of both defendants. Now, there are two plaintiffs, Mrs. Noonan and Mr. Noonan; therefore it will be necessary for you to render two separate and distinct verdicts, either for damages or for no cause of action, be-

cause there are two separate and distinct causes of action set up in the complaint.

The plaintiffs allege that on August 14, 1925, the A. & P. Company conducted a grocery store in Passaic; that it had purchased soda water from the defendant, the Bottling Company, and had such ginger ale for sale; that Mrs. Noonan was a customer of the grocery store and was in the storeroom for the purpose of making purchases, not of ginger ale but of other groceries; that another customer of the store was purchasing some ginger ale, and that when the clerk who was waiting upon her put one of the bottles of ginger ale in a container for the purpose of being carried home by this customer; that suddenly and without any warning the bottle exploded with a loud report and that a portion of the neck of the bottle under the cap flew and struck Mrs. Noonan upon the nose; that the cap remained upon the bottle, inflicting upon Mrs. Noonan certain injuries of which she now complains and for which she seeks compensation at your hands. Her husband seeks damages for the inconvenience and the expense which he suffered, because of such injuries to Mrs. Noonan.

Now, where there are any disputed questions of fact, it becomes your function first to settle and determine what the facts are, and then when you have settled the facts to apply to those facts as you find them the rules of law which the court gives you for your guidance. These rules of law which the court gives you, you must accept as to the law, and not undertake to determine the case upon any ideas of your own as to what the law is or as to what the law ought to be. You are the sole judges of the facts, but the court is the judge of the law.

This plaintiff claims that this bottle, in common with others, was charged too high with carbonic gas, and says that it was charged to fifty pounds and that thirty-five pounds is the maximum number of pounds which a bottle of that character will stand without exploding, and alleges that as one of the grounds of negligence in this case.

Now, there are two defendants in this case, the A. & P. Tea Company and the Bottling Company, and their duties or obligations to this plaintiff, Mrs. Noonan, are somewhat different, and so the court will attempt to outline to you the obligations which rested upon each defendant.

Taking up first the question of the A. & P. Tea Company, in that case, the fact of the occurrence, that is, the explosion of the bottle, bespeaks negligence which calls upon the defendant to exculpate itself from the legal inferences or presumption of negligence arising therefrom; but it does not necessarily follow that because that doctrine is pleaded that there must be a verdict against the A. & P. Tea Company. You will note that I said while there was a presumption of negligence that arose from the circumstances of the explosion which called upon the defendant, the A. & P. Tea Company, to exculpate itself from any presumption of negligence, the question thus presented for your consideration is as to whether or not the defendant has exculpated itself, and if you find that there was no negligence on the part of the employees of the A. & P. Tea Company, then, of course, there could be no verdict against the defendant, because the basis of a right of recovery against either or both defendants is negligence, a failure to exercise reasonable care.

Now, the defendant A. & P. Tea Company says that it has thus exculpated itself from such pre-

sumption of negligence, that it has shown that it has performed its full duty of exercising reasonable care upon the part of its agents or servants as to the safety of this customer, that there was nothing else which it could have done.

If this explosion arose because the bottle was too highly charged, then, of course,—while it is for you to say,—you could hardly expect that the A. & P. Tea Company would be called upon to open and inspect each bottle or to test each bottle as to whether it was too highly charged or not, nevertheless its obligation was to exercise reasonable care for the safety of its customer, Mrs. Noonan; and if you find that it has not exculpated itself from the presumption of negligence, then, of course, there would be a verdict against the A. & P. Tea Company. On the other hand, if it has exculpated itself, that is, shown that there was nothing more it could or should have done in the exercise of reasonable care for her safety, then, of course, your verdict as to the A. & P. Tea Company would be no cause of action.

Taking up now the question of the liability of the Bottling Company, as to that company the doctrine of the presumption of negligence by the happening of the accident does not apply. As to that company, the burden of proving the negligence by a fair preponderance of the evidence rests upon the plaintiffs; and if they do not prove that the Bottling Company, or its agents and servants were negligent, that is, failed to exercise reasonable care, and that such failure to do so was the proximate cause of the injuries to Mrs. Noonan, then they cannot recover against that defendant.

The obligation or the rule of law applicable to that defendant is that it is not an insurer that the bottles are free of defects, but it is only under a

duty of exercising reasonable care to ascertain by proper and reasonable tests and inspections whether the bottles are reasonably adequate for the purposes for which they are made.

The plaintiffs, so far as I can recall it—you must be the judges—introduced no evidence in their behalf as to what inspection or test the defendant made. The defendant through its president, Mr. Andronico, has outlined to you the tests or inspections, which it is alleged by the defendant Bottling Company were made to ascertain the condition of the bottles. The defendant Bottling Company says that it purchased second-hand bottles, that is, bottles which had previously been used by the Canada Dry Company, as I recall it, and that it purchased those upon the theory that having once been used, they have been tested and that it had a right to assume that having withstood the first test it would withstand the second test.

Now, of course, before you can award a verdict against the Bottling Company for failure to make reasonable inspection or tests, you must find by a fair preponderance of the evidence that it did not make such tests or inspection, and that its failure to do so was the proximate cause of the plaintiff's injuries.

But there is another charge of negligence which the plaintiff urges against this defendant. The plaintiff says it was negligent in that it charged the bottles at too high a pressure with carbonic gas. The plaintiff says that the maximum which a bottle of the character which you have before you and which exploded in this case—the maximum which it will stand without explosion is thirty-five pounds, and that the defendant concededly in this case charged its bottles to approximately fifty pounds, thus presenting a sharp conflict of fact for your solution, the burden of proving the negli-

gence by a fair preponderance of the evidence resting upon the plaintiff.

The defendant says that this allegation is untrue. The defendant says that it is not negligence so to charge the bottles to fifty pounds pressure, and says that a bottle will not explode if it is charged in excess of thirty-five pounds, and says that it has amply demonstrated the falsity of that charge by the presentation of numerous samples of bottles which are charged in excess of that amount. The defendant says that it has made three separate tests of other ginger ale bottles of a similar or a like character in shape and quality of glass, first, I think, in April, when it tested Canada Dry, in which the highest pressure was forty-eight pounds, the lowest, forty-five; and another test of another brand, the result of which was forty-eight pounds high and forty-six pounds low; that yesterday it made other tests of similar bottles of ginger ale, that the Cliquot Club contained fifty pounds, Silver King, fifty-six pounds, Canada Dry fifty-five pounds, O'Keefe's fifty-eight pounds; and the defendant says that it has further demonstrated the fallacy of the arguments of the plaintiff by Mr. Andronico this morning upon the stand testing Canada Dry showing fifty pounds, Imperial Dry fifty pounds minus, Silver King fifty-five pounds, O'Keefe's fifty-seven pounds, and a bottle of its own ginger ale showing sixty pounds.

So that what the facts are is for you to say. Unless the plaintiffs have shown negligence on the part of the Fairmount Bottling Company in one or the other of these respects and that such negligence was the proximate cause of their injuries, they cannot recover against the Bottling Company. If they have shown that this defendant was negligent and that such negligence was the proximate

cause of the injuries, then they would be entitled to recover against the Bottling Company.

Now, then, in your verdict, if you find in favor of the plaintiffs, you must specify against which defendant, that is, whether against one or both. If your verdict is for the defendants, then your verdict is no cause of action. If your verdict is in favor of the plaintiffs and against one defendant, then your verdict is no cause of action as to the other defendant; but you must specify in your verdict whether it is against one or both or against neither. If your verdict as to both defendants is in favor of both defendants, then your verdict is no cause of action. If your verdict is in favor of the plaintiffs and against one or both of the defendants, then you would take up for consideration the question of the damages to which the plaintiffs would be entitled.

Taking up first the case of Mrs. Noonan, she alleges that she suffered a cut over the nasal bone from which she suffered nervousness, headaches and other injuries. Now, as to the cut over the nose, the doctor says that this was healed in approximately one week, but the plaintiff alleges that she has suffered further consequential injuries, that this cut or bruise from the contact with this glass has brought about the growth of a polyp in one of her nostrils which has interfered with her breathing and the condition of her throat. The doctor who attended her says that he did not examine her nose or throat, and, as I recall it, no doctor who has testified has supported the contention or made the statement that the polyp is the result of the injury which she received on that occasion. The only doctor who expressed an opinion upon it, as I recall it, says that it has no connection with the injury which she thus received.

Of course, you are the judges of the facts, and she can recover only for such injuries as are the result of this accident. If the accident, the contact with this piece of glass, brought about the growth of the polyp, then, of course, she would be entitled to recover for pain and suffering brought about by the polyp; but if it is not shown by the evidence (and the burden of proof rests upon the plaintiff) that the polyp is the result of the injuries she received upon that occasion, then she could not recover any compensation for the polyp.

Having determined from the evidence what injuries she received in the accident and what injuries are the result of the accident, then she would be entitled to reasonable compensation for any pain and suffering brought about by such injuries as she thus received or were the result of the injuries she received on that occasion, and those only.

Turning now to the case of the husband, the law casts upon the husband the obligation of providing medical attention for his wife, and he says that in the discharge of that obligation he was called upon to incur an indebtedness of $50.00. Whatever reasonable sum, either expended or indebtedness he incurred in that behalf, he would be entitled to recover. Of course, if his wife does not recover, then he cannot recover, because his right of action is contingent upon and dependent upon his wife's right of recovery.

Then the husband alleges that he was deprived of the society of his wife by the injuries which she received. The husband is entitled to the society of his wife, and if, as the result of any injuries which she thus received on that occasion or the result of the injuries she received, he has been deprived to any extent of her society, to the extent to which he has been thus deprived, he would be

entitled to reasonable compensation.

Those are the elements of damages which the husband would be entitled to recover, if he recovers. Whether they shall recover or not is for you to say after you have settled the facts and applied to those facts as you find them the rules of law which the court has given you for your guidance. The husband, as I say, cannot recover unless the wife recovers. If she does not recover, then he cannot recover. You must render two separate and distinct verdicts, either in favor of the husband and wife for damages or else no cause of action, and if you render a verdict in favor of the plaintiffs, then you must specify against which defendant or both defendants. If your verdict is in favor of both defendants, then, of course, your verdict is no cause of action as to both defendants.

I have certain requests to charge on the part of the defendant Great Atlantic & Pacific Tea Company.

No. 1, I decline to charge.

No. 2: The Great Atlantic & Pacific Tea Company is not an insurer of the safety of its customers but is required to use ordinary care to protect them from injury while in its store. I so charge you.

No. 3, I decline to charge.

No. 4: The Great Atlantic & Pacific Tea Company cannot be held responsible for negligence, if any, of the defendant Fairmount Bottling Company. I so charge you. Neither defendant is responsible for negligence of the other. It is only re-

sponsible for the negligence of its agents or servants.

You may retire and when you have rendered your verdict, you will be excused until to-morrow morning.

(The Jury Retires.)

Mr. Reed: Your Honor will allow me an exception for your refusal to charge the first and third requests to charge.

The Court: Yes, sir.

Mr. Reed: And with your consent, I would like to take exception to that part of the charge in which you said that the fact of the explosion made it necessary for the Great Atlantic & Pacific Tea Company to exculpate itself from the charge of negligence.

The Court: All right.

Mr. Reed: (Continuing) And that that rule did not apply to the defendant Fairmount Bottling Company.

The Court: I don't know whether you can except to that or not, but you can take your exception.

Mr. Reed: Your Honor is permitting me to take an exception?

The Court: Yes.

(No exceptions were taken by the defendant Fairmount Bottling Co.)

Verdict.

The jury returned into Court and rendered a verdict in favor of the plaintiff Christina Noonan and against both defendants in the sum of five thousand dollars; and a verdict in favor of the plaintiff Michael Noonan and against both defendants in the sum of one thousand dollars.

Examination Before Trial.

Before: Louis A. Cowley, May 27th, 1926.

Appearances:

John B. Brown, of the firm of Reed & Reynolds, for Great Atlantic & Pacific Tea Company, a corporation, defendant.

Feder & Rinzler, for plaintiffs.

Anne J. Eis, stenographer, sworn.

CHRISTINA NOONAN, sworn, testified as follows:

By John B. Brown:

Q. Mrs. Noonan, you are the plaintiff in this action?

A. Yes.

Q. And were you in the Atlantic & Pacific Tea Store on the corner of Harrison Street and Central Avenue, Passaic, N. J., on or about August 14th, 1924?

A. Yes.

Q. About what time of day did you visit the store?

A. About four in the afternoon.

Q. And will you just describe the layout of the store as you enter the store. Is the counter on the right or left hand side?

A. On the right. No, I am wrong, it is on the left.

Q. When you entered the store, where did you go?

A. I stood right near the door.

Q. In front of the counter?

A. Yes, near the door.

Q. That is, you turned to the left as you went into the store?

A. Yes.

Q. Did somebody come to wait on you?

A. Yes, not the manager but the clerk that works there.

Q. And at the time that this accident happened, was the clerk attending to your order? Had your order been completed?

A. No. I was just finishing the last article and he was figuring out what I had ordered.

Q. Were you watching his figures?

A. Maybe I was. I was kind of nervous.

Q. I mean before you were struck?

A. I got four articles and I was standing waiting for them, and he was figuring on a piece of paper and I was looking at him.

Q. Do you recall what the articles were?

A. No, there were four.

Q. Did you know what happened?

A. I thought somebody shot a revolver off. I was looking at the clerk. It got my nose and touched my head. I couldn't see and was blinded for the time being.

Q. But you didn't see anything coming?

A. No. I thought I was shot. I just imagined a bullet got me right straight that way.

Q. What did you do for it?

A. I stood there. The manager came and the blood began to come. He got a large handkerchief to catch the blood.

Q. Did you go to a doctor from there?

A. No. I went home and sent for my doctor. I stayed in the store for quite a time.

Q. How did you know just what it was that struck you?

A. The manager said a bottle of ginger ale had exploded and I got it.

Q. You sat down and he applied a handkerchief?

A. Yes. It was full of blood, and he picked up two large pieces of glass.

Q. Did you go directly home?

A. I went home to get my own doctor. Dr. Dwyer.

Q. What time did you get in touch with your doctor.

A. I didn't see him until the next morning. He was on a severe case but he sent me word he was coming, and we waited all night for him.

Q. What did he do for you?

A. He cleaned the cut. We had wet cloths on it all night. The next morning he cleaned it and fixed it. I was nervous.

Q. He was your family physician?

A. Yes.

Q. You knew him, and had him before?

A. Yes.

Q. He had treated you previously for your nervousness?

A. I was never nervous before. I am nervous ever since the shock.

Q. Did he have an X-ray taken.

A. No. He is sorry he didn't.

Q. Aside from dressing the wound, did he do anything else?

A. He prescribed for my fever and he said my nerves were shot to pieces.

Q. He saw you on August 15th for the first time?

A. Yes, at nine A. M.

Q. At your home?

A. Yes.

Q. Did you make any visits to his office?

A. Not for a long time. I started to go afterwards for my nervousness.

Q. He visited you at your home how many times?

A. I should think he came every other day for about a week or two. He was working on my nerves and the nose at the same time.

Q. After the week or two he stopped coming?

A. Yes, and I took a walk to the office.

Q. How many times did you go to his office?

A. I can't tell you. I had a nervous stomach and he helped me a good deal.

Q. That was August 15th that he first saw you, and then two weeks after he stopped?

A. I can't be positive. He stopped coming and he told me the air was good for me and to come to his office.

Q. How far did he live from your house?

A. From Sherman to Madison Street, about four or five blocks.

Q. Your husband is living?

A. Yes.

Q. Have you any other members of the household?

A. Yes, I have a son and my sister lives with me.

Q. Then there are four of you?

A. Yes.

Q. How old is your sister?

A. She is over sixty.

Q. What does she do?

A. She still goes to business.

Q. How old is your son?

A. Twenty-four.

Q. Does he go to business?

A. Yes.

Q. During these two weeks that the doctor came to see you, did you get outdoors at all?

A. I got out in the night to sit on the porch for my nerves and sat there most of the night. Often I sat hours alone.

Q. And during this time your husband and your sister and your son all remained inmates of the household, and there were no others?

A. Yes.

Q. Did you take care of the household?

A. No.

Q. Who did that?

A. My sister.

Q. What is her name?

A. Catherine Cornsgrove.

Q. Did she take any time away from her business?

A. She took six weeks.

Q. She did this because you were her sister?

A. She had to do it. She got to work one day and stayed out the other.

Q. During that six weeks she stayed home about one-half of the time?

A. Yes, she did that for six weeks.

Q. And between you and your sister you managed to take care of the household duties?

A. Yes.

Q. Did your husband help?

A. No, he had two broken arms and I was his nurse. He had come from the hospital.

Q. Did your son help?

A. Yes, my both boys did that. I have one married son.

Q. Outside of your sister and your two sons you had nobody else?

A. No, except a neighbor who came in occasionally.

Q. You didn't pay your son anything?

A. No.

Q. Did you pay your sister?

A. Yes. Why shouldn't I pay her?

Q. What is the nature of her work?

A. She works in a handkerchief factory, an examiner.

Q. Well, she was there about one-half of the six weeks, that is about three weeks altogether?

A. Yes, she kept on working day and night for me.

Q. What did you pay her?

A. I paid her according to what she got in the shop.

Q. How much did she get?

A. About fifteen dollars a week.

Q. Does she work six days a week?

A. She works five and one-half days.

Q. Did you pay her at the same rate?

A. Yes.

Q. You say the doctor prescribed some medicine for your nerves to quiet you down?

A. Yes.

Q. Did he prescribe anything else?

A. He prescribed for my nerves and left me some medicine that he had with him, and he always left me enough till he came the next time.

Q. Afterwards I suppose he gave prescriptions?

A. He would bring most of the medicines with him.

Q. Did you get his prescriptions and pay for them?

A. Yes.

Q. What would you say you paid for the medicines?

A. It would be impossible for me to answer. I haven't the least idea. My friends recommended several medicines and I tried a number, but can't figure out the money. It would make me nervous and crazy.

Q. That is, you mean to figure out all that you paid for medicines which your friends recommended?

A. Yes.

Q. Were there any other expenses which you paid for, besides medical expenses?

A. No.

Q. You didn't have X-rays, you didn't go to the hospital, you merely paid for the doctor's prescriptions?

A. Yes.

Q. When did you stop going to the doctor on account of this accident?

A. I stopped going when I got discouraged, but I was very bad in the winter when this growth started in my nose, and went several times in the cold weather. I only breathe through one side of my nose.

Q. The cut is on the right side and is the growth also?

A. Yes. I didn't know that until I went to a specialist.

Q. How many doctors did you employ for the injuries received from this accident?

A. I employed Dr. Dwyer until he asked me to go to the specialist.

Q. Who was the specialist?

A. Dr. Matthews.

Q. Where is he?

A. Right here in this building, the Passaic National Bank Building.

Q. How many trips did you make to Dr. Matthew's office.

A. One.

Q. What did he charge you?

A. I didn't pay him because I didn't have the growth removed.

Q. When did you visit him?
A. About two months ago.
Q. About March?
A. Yes. It was cold weather then and my nose was very bad and swollen.
Q. There has been no bill rendered by Dr. Matthews?
A. No. He told me to come back when I felt that I could.
Q. How much was Dr. Dwyer's bill?
A. I never asked him.
Q. Does he do that with everybody?

Objection by Feder & Rinzler for the reason that this question is not material to the issue.

A. He was my doctor for ten years, and doesn't have to worry.
Q. You usually pay your bills to Dr. Dwyer after his services are completed?

Objection by Feder & Rinzler for the reason that this question is not material to the issue.

A. Yes.
Q. If I recall, you said that Dr. Dwyer came to your house for two weeks, and how long did you visit his office?
A. I went to his office not very often. I couldn't tell you. I should say he came for about two weeks every other day. Then he told me to get air, and I went to him for my nerves, not my nose.
Q. After the two weeks were up, how many visits did you pay?
A. I don't know.

Q. Over what period did it extend?
A. I don't know. I was there two months ago.
Q. How frequently did you go?
A. Maybe once a month to get medicine.
Q. Did you keep it up steadily?
A. No. I just went when I got very sick to ask him if he could open my nose.
Q. About how many visits did you pay to him?
A. I don't know exactly. When he could do nothing, he suggested this other doctor and he did help a little.
Q. Prior to that last visit to Dr. Dwyer about two months ago when was the last visit you made to Dr. Dwyer?
A. Maybe about a month before that.

By Feder & Rinzler:

Q. Mrs. Noonan, the store you were in was the Atlantic & Pacific Tea Company Store?
A. Yes.
Q. You were at the counter in the act of purchasing certain goods?
A. Yes.
Q. How far were you away from the next man that was waiting on the next customer?
A. I don't know.
Q. Just you and another customer?

Objection by John B. Brown to above and all following questions.

Q. How far away were you from where the bottle was on the counter?
A. I should say about eight or nine feet. I was at one end and the bottle at the other.
Q. Was there anything said after you were struck?

A. Yes. He told me I was struck by the bottle.

Objection by John B. Brown for the reason that manager was not present at hearing.

Q. You were badly upset about it?
A. Yes. I was nervous at the time.
Q. How long did you remain in the store after you were struck by the bottle.
A. I remember there was no chair, so I sat on the window and stayed about a half hour. I was too nervous to guess the time. I thought that one of the ladies went out and did some shopping and finally I decided to go home.

Objection by John B. Brown.

Q. Why didn't you go home immediately?
A. I couldn't walk.
Q. When you arrived home what did you do?
A. I called the doctor right away. He left word that he would come.
Q. You called the doctor immediately?
A. Yes, but he was on another case.

Objection by John B. Brown.

Q. You were treated by your family doctor?
A. Yes.
Q. And you haven't paid your family doctor?
A. No, because I am not through with him.
Q. Has he rendered you a bill?
A. Not yet.
Q. You were treated by the family doctor, and as a result what did he advise you when he found that he couldn't do anything for you?

Objection by John B. Brown.

A. He advised me that he did as much as he could and that I had to see a specialist.
Q. What specialist did he advise you to see?
A. Anybody whom I wanted to, so I went to Dr. Matthews.
Q. Did you see Dr. Matthews?
A. I went that night.
Q. What did he tell you as to your trouble?
A. He told me I had a growth in my nose which had to be removed.
Q. By what process?
A. He would have to cut it out.
Q. Is your breathing well now, or as good as it was before?
A. I could only breathe through one side of my nose.
Q. What other trouble have you since you were struck by this broken bottle?
A. I am very nervous.
Q. And you had that trouble before the accident?
A. No. I was perfectly well before that. Couldn't feel any better than I felt that day.
Q. You say in order to remedy your breathing, the doctor advises an operation on your nose?
A. Yes.
Q. Did Dr. Matthews advise you to see any other doctor?
A. No.
Q. You paid your sister for six weeks of work?
A. Yes.
Q. How much?
A. I just allowed her what I thought was right. She took care of me day and night and didn't go to business. I don't see the necessity of all this. It makes me nervous.

Examination Before Trial.

By John B. Brown:

Q. You don't relish the idea of going through this trial?

Objection by Feder & Rinzler.

Q. You stated that you didn't like the necessity of this and that it all made you nervous, and the trial which is coming on?

A. Yes.

Q. Is that which makes you nervous?

A. Yes.

Objection by Feder & Rinzler.

The within is a correct transcription of the testimony taken by me stenographically before Louis A. Cowley, Master in Chancery of New Jersey.

ANNE J. EIS.

The within is a correct transcription of the testimony taken by Anne J. Eis before me, a Master In Chancery of New Jersey.

LOUIS A. COWLEY.

Defendant's Rule to Show Cause.

NEW JERSEY SUPREME COURT.
PASSAIC COUNTY.

CHRISTINA NOONAN and MICHAEL NOONAN,
Plaintiffs,

vs.

GREAT ATLANTIC & PACIFIC TEA COMPANY, a corporation, and FAIRMOUNT BOTTLING COMPANY,
Defendants.

Action at Law.

A verdict having been entered in favor of the plaintiffs in the above entitled matter and against the defendants, the Great Atlantic & Pacific Tea Company, and Fairmount Bottling Company, in the above entitled matter, and application having been made within four days by the defendant, Fairmount Bottling Company for a rule to show cause why the verdict should not be set aside and a new trial granted;

It is thereupon on this 10th day of June, A. D. nineteen hundred and twenty six, on motion of Wright, Vander Burgh & McCarthy, Attorneys of the defendant, Fairmount Bottling Company, ORDERED that the plaintiffs, Christina Noonan and Michael Noonan show cause before the Supreme Court at the State House in the City of Trenton, on the first tuesday in October next, why the verdict should not be set aside and a new trial granted.

CLIFFORD L. NEWMAN,
Circuit Judge.

Let this Rule be entered on the Minutes.

Reasons of Defendant, Fairmount Bottling Company.

The defendant, Fairmount Bottling Company, in the above entitled cause, by Wright, Vander Burgh & McCarthy its Attorneys comes and assigns the following reasons why the verdict entered in the above entitled cause against said Fairmount Bottling Company should not be set aside and a new trial granted, viz;

1: Because the verdict is against the weight of evidence.

2: Because the verdict is contrary to the evidence.

3: Because the verdict is contrary to law.

4: Because the plaintiffs at the close of their case should have been non-suited.

5: Because the trial Judge at the end of the case should have directed a verdict for this defendant.

6: Because the verdict is excessive.

WRIGHT, VANDER BURGH & McCARTHY,
Attorneys of Defendant,
Fairmount Bottling Company.

Rule to Show Cause.

It appearing that a verdict in favor of the plaintiffs, Christina Noonan and Michael Noonan, and against the defendant, the Great Atlantic & Pacific Tea Company and Fairmount Bottling Company, was rendered in the above entitled cause on June 9th, 1926;

And it further appearing that application was made for a rule to show cause within six days after rendering said verdict, why the aforesaid

verdict should not be set aside and a new trial granted on the following grounds:

1. That the verdict was contrary to the evidence.

2. That the verdict was contrary to the weight of the evidence.

3. That the damages were excessive.

NOW, on motion of Reed & Reynolds, attorneys for the said defendant, Great Atlantic & Pacific Tea Company,

It is on this 10th day of June, 1926, ORDERED, that the plaintiffs Christina Noonan and Michael Noonan show cause before the Supreme Court at the State House, in the City of Trenton, on the first Tuesday of October, 1926, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, why the verdict in this cause should not be set aside and a new trial granted;

And it is further ORDERED that all exceptions made on behalf of the defendant, Great Atlantic & Pacific Tea Company be reserved as grounds of appeal;

And it is further ORDERED that a copy of this rule be served upon the attorneys for the plaintiffs four days from the making of this Order.

CLIFFORD L. NEWMAN,
Circuit Court Judge.

REED & REYNOLDS,
Attorneys of defendant,
Great Atlantic & Pacific Tea Co.

NEW JERSEY SUPREME COURT,

No. 49, October Term, 1926.

CHRISTINA NOONAN and MICHAEL NOONAN,
Plaintiffs,

vs.

GREAT ATLANTIC & PACIFIC TEA COMPANY, and FAIRMOUNT BOTTLING CO.,
Defendants.

Argued October 7, 1926; Decided January 28, 1927.

On defendants' rules to show cause why plaintiffs' verdicts should not be set aside.

Before GUMMERE, Chief Justice, and Justices TRENCHARD and MINTURN.

For the plaintiffs, FEDER & RINZLER.

For the defendant Great Atlantic & Pacific Tea Company, REED & REYNOLDS.

For the defendant Fairmount Bottling Company, WRIGHT, VANDER BURGH & MCCARTHY.

PER CURIAM:

The plaintiff, Christina Noonan, went to the store of the defendant Great Atlantic & Pacific Tea Company, to purchase groceries. While she was there a ginger ale bottle, which one of the clerks was selling to a customer, exploded, and she was struck on the nose by a piece of flying glass. Her

claim was not only that the cut was the result of the accident, but that a polyp developed in the inside of her nose as a further result. The jury awarded her $5000 damages and her husband $1000 against both defendants.

This ginger ale was bottled by the defendant the Fairmount Bottling Company and sold at wholesale to the Great Atlantic & Pacific Tea Company. There was evidence to the effect that this ginger ale was bottled under a pressure of 50 pounds, and that 35 pounds was the maximum number of pounds which a bottle of the character used would stand without exploding. There was evidence on the part of an employee of the A. & P. Co., from which the jury might have properly concluded that when he came to the store in the morning he would sometimes find that *bottles of this ginger ale* had exploded over night. In view of this evidence we think it was for the jury to say whether the A. & P. Co., was not negligent in failing to take some means for the protection of customers from injury which might result from flying glass, in case bottles should explode during business hours.

As to the Fairmount Bottling Company: It seems to us in view of the evidence to which we first referred, and other evidence, that it was a question for the jury to say whether that defendant had not failed in the exercise of reasonable care in the selecting of these bottles, and in inspecting and testing the bottles in which this ginger ale was put under a pressure of 50 pounds.

We think that the motions to nonsuit and to direct a verdict for the defendants were properly denied, and we think that the verdict of the jury finding negligence on the part of these two defendants cannot be said to be contrary to the weight of the evidence. We think, however, that both verdicts are plainly excessive under the evidence.

Under these circumstances if plaintiff Christina Noonan will consent to a reduction of her verdict to $3500, and her husband will consent to a reduction of his verdict to $750, such verdicts may stand for such amounts, and the rules will be discharged; otherwise the rules will be made absolute.

NEW JERSEY SUPREME COURT,

No. 49, October Term, 1926.

CHRISTINA NOONAN and MICHAEL NOONAN, *Plaintiffs,* vs. GREAT ATLANTIC & PACIFIC TEA COMPANY, a corporation and FAIRMOUNT BOTTLING COMPANY, a corporation, *Defendants.*	On Rule to Show Cause. Order Discharging Rule.

At the trial of the above cause in the New Jersey Supreme Court, Passaic County, the jury having returned a verdict in favor of the plaintiff, Christina Noonan, for Five Thousand ($5,000.00) Dollars, and a verdict in favor of the plaintiff, Michael Noonan, for One Thousand ($1,000.00) Dollars, against both defendants, and judgments having been accordingly entered on said verdicts in this Court, and rules to show cause having been issued requiring plaintiffs to show cause, if any, why the said verdicts should not be set

Order Discharging Rule

aside and a new trial granted and the arguments of the attorneys for the plaintiff and for the defendants on said rule, having been duly heard and considered by this Court at the October Term, 1926; and the Court having determined to discharge the rules if plaintiff, Christina Noonan would consent to a reduction of her verdict to Thirty-Five Hundred ($3500.00) Dollars, and if plaintiff, Michael Noonan would consent to a reduction of his verdict to Seven Hundred and Fifty ($750.00) Dollars, and it appearing that the plaintiffs consent to the reduction of the said verdicts accordingly;

It is, on this fifth day of February, 1927, ORDERED, that the aforesaid rules to show cause be, and the same are hereby discharged, and the said verdict in favor of the plaintiff, Christina Noonan, is reduced to Thirty-Five Hundred ($3500.00) Dollars, and the verdict in favor of the plaintiff, Michael Noonan, is reduced to Seven Hundred and Fifty ($750.00) Dollars;

And it is further ORDERED, that the judgments entered on said verdicts be accordingly reduced as aforesaid, and the said judgments be affirmed in the amounts so reduced;

And it is further ORDERED, that defandants pay plaintiffs their costs to be taxed on the said rules to show cause.

Entered Feb. 5, 1927.

On motion of

FEDER & RINZLER, ESQS.,
Attorneys for Plaintiffs.

True Copy.

EDWARD J. KELLEHER,
Clerk.

(Filed Feb. 19, 1927.)

NEW JERSEY SUPREME COURT,
PASSAIC COUNTY.

CHRISTINA NOONAN and MICHAEL NOONAN, *Plaintiffs-Appellees,* vs. GREAT ATLANTIC & PACIFIC TEA COMPANY, and FAIRMOUNT BOTTLING COMPANY, *Defendants,* GREAT ATLANTIC & PACIFIC TEA COMPANY, *Appellant.*	Action at Law. Amended Notice of Appeal.

TO: Messrs. Feder & Rinzler,
Attorneys for Plaintiffs-Appellees,
694 Main Avenue,
Passaic, N. J.

TAKE NOTICE that the defendant-appellant, Great Atlantic & Pacific Tea Company, a corporation, appeals to the Court of Errors & Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

REED & REYNOLDS,
Attorneys for the defendant-appellant,
Great A. & P. Tea Company.

Dated: Feb. 15th, 1927.

True Copy.

EDWARD J. KELLEHER,
Clerk.

(Filed March 14, 1927.)

NEW JERSEY SUPREME COURT,
PASSAIC COUNTY.

CHRISTINA NOONAN, *et al.*,
Plaintiffs-Appellees,

vs.

GREAT ATLANTIC & PACIFIC TEA COMPANY a corporation, and FAIRMOUNT BOTTLING COMPANY, a corporation,
Defendants,

GREAT ATLANTIC & PACIFIC TEA COMPANY, a corporation,
Defendant-Appellant.

Action at Law.
Notice.

To Messrs. Feder & Rinzler,
Attorneys for Plaintiffs-Appellees.

TAKE NOTICE that the following are the grounds of the appeal taken by the Great Atlantic & Pacific Tea Company from the whole of the judgment entered in this cause:

(1) The Court refused to grant the motion made on behalf of Defendant-appellant that the Plaintiffs-appellees be non-suited as to appellant.

(2) The trial court refused to direct a verdict in favor of the appellant.

(3) The Court charged the jury as follows:

"Taking up first the question of the Atlantic & Pacific Tea Company, in that case,

the fact of the occurrence, that is the explosion of the bottle, bespeaks negligence which calls upon the defendant to exculpate itself from the legal inferences or presumption of negligence arising therefrom."

(4) The Court charged the jury as follows:

"You will note that I said while there was a presumption of negligence that arose from the circumstances of the explosion, which called upon the defendant the Atlantic & Pacific Tea Company to exculpate itself from any presumption of negligence, the question thus presented for your consideration is as to whether or not the defendant has exculpated itself."

(5) The Court charged the jury as follows:

"And if you find that it has not exculpated itself from the presumption of negligence then, of course, there would be a verdict against the Atlantic & Pacific Tea Company."

(6) Because the Court charged the jury as follows:

"Taking up now the question of the liability of the Bottling Company, as to that company the doctrine of the presumption of negligence by the happening of the accident does not apply: as to that company the burden of proving the negligence by a fair preponderance of the evidence rests upon the plaintiffs."

Respectfully,

REED & REYNOLDS,
Attorneys for Appellant,
Great Atlantic & Pacific Tea Company.

81 MAY.1.1927

New Jersey Court of Errors and Appeals

CHRISTINA NOONAN and MICHAEL NOONAN, her husband, Plantiffs-Appellees, *vs.* GREAT ATLANTIC & PACIFIC TEA COMPANY, *et als.*, Defendants. GREAT ATLANTIC & PACIFIC TEA COMPANY, Defendant-Appellant.	Action at Law. On Appeal from Supreme Court.

BRIEF FOR APPELLANT.

Facts.

This is an appeal from a judgment entered in the New Jersey Supreme Court in favor of the appellees and against the appellant. The case was tried in the Passaic Circuit, Hon. Clifford L. Newman presiding, and a jury. The jury rendered a verdict in favor of the female plaintiff in the sum of $5000.00 and in favor of her husband in the sum of $1000.00, against both defendants. Each defendant took a rule to show cause why a new trial should not be granted. The appellant reserved all exceptions taken at the trial. The defendant Fairmount Bottling Company did not. The Supreme Court decided that unless the female plaintiff would accept a reduction to $3500.00 and her husband to $750.00, a new trial would be granted. The

reduction was accepted by the plaintiffs. The Great Atlantic & Pacific Tea Company now appeals to this Court for error alleged to have occurred at the trial of the cause and specifically reserved in its rule to show cause.

The circumstances upon which the suit was based are briefly these:

On August 14th, 1924, Christina Noonan, plaintiff was in a store maintained by the appellant at the corner of Harrison Street and Central Avenue, Passaic, N. J., where she was purchasing groceries. An employee of the appellant was serving another customer at the same counter about eight feet distant. He was about to place or had placed in the carton containing or intended to contain the groceries purchased by the customer he was serving a bottle of ginger-ale which had been purchased by appellant from the defendant, Fairmount Bottling Company. The bottle exploded and a piece of flying glass struck the plaintiff Christina Noonan upon the nose, injuring her. The grounds of appeal are stated on pages 164 and 165 of the State of the Case and cover refusal to grant a non-suit; to direct a verdict, and a charge to the jury by the trial Judge that so far as the appellant is concerned the mere fact of the explosion bespoke a negligence which called upon appellant to exculpate itself from the presumption of negligence arising therefrom, and that if it had not exculpated itself from that presumption there must be a verdict against appellant but that so far as the Fairmount Bottling Company was concerned the burden of proving negligence was upon the plaintiff.

These grounds may be conveniently considered together as practically the same question is involved in all.

I.

We contend that the Court erred in applying the doctrine of res ipsa loquitur to the situation revealed by the proofs in this case so far as the appellant is concerned.

The application of that doctrine is discussed in *Sheridan* vs. *Foley,* 58 N. J. L., page 230, where the general principal that mere prooof of the occurrance of an accident raises no presumption of negligence is recognized, but it is there stated that the maxim above referred applies only to those cases where the accident is such that in the ordinary course of things it would not have happened if proper care had been used.

The only presumptions of fact which the law recognizes are immediate inferences from the facts proved.

> *Adriance* vs. *Schenck Bros., et als.,* 95 N. J. L. 185:

In that case the plaintiff went to an amusement park owned by one of the defendants and took a ride on a "racer" and was injured, but there was no testimony as to how the injury occurred and the court, quoting from *Bahr* vs. *Lombard, et als.,* 53 N. J. L. 233-239, said: "It is evident that this phrase (*res ipsa loquitur*) clearly imports that there must, in each case, be something in the facts that speaks of the negligence of the defandant."

In *Bahr* vs. *Lombard, supra,* a pipe used for conducting oil in the process of refinement exploded and injured the plaintiff and the Court said on page 236:

> "In the present case giving to the plaintiff's testimony its fullest significance, the only in-

culpatory circumstance is that an explosion occurred which injured the plaintiff while he was at work on the defendant's premises."

The Court then discussed cases coming within the maxim above referred to and confined it to those where the accident is of such character that from its very nature almost all of the evidence which could be produced must lie in possession of one of the defendants.

In the present case it will be noted that all of the employees of the appellant who could have had any knowledge of the occurrence were called and examined by the plaintiff and that none of the witnesses called showed any act of negligence on the part of any of them or any circumstance from which negligence could be inferred. All the facts within the knowledge of appellant were those laid before the jury. All other facts in connection with the matter were in possession of the Fairmount Bottling Company, if any one.

In the dissenting opinion in *Bahr* vs. *Lombard, supra,* it will be noted that the reason given by Chief Justice Beasley for his dissent from the opinion of the majority of the court was that in that case defendant's business was a very dangerous one unless carefully conducted, so that it was incumbent upon the defendant to use the highest degree of care and attention.

The business conducted by appellant is not a dangerous one and the care required of it is only reasonable care.

The doctrine of *res ipsa loquitur* has been applied to cases where a barrel has rolled from a warehouse; a brick has fallen from a scaffold or some object in the possession or under the control of the defendant which if carefully used or handled would not have caused the damage nor injured the plaintiff, so that the fact of the accident infers that there must have been negligence.

There can be no such inference here. Millions of bottles of ginger ale are bought and sold every day, and the way in the which the bottle in question was handled was no different from the usual method of handling such objects. The instances where a bottle such as this has exploded are very rare. The trial Judge evidently recognized this fact because in his charge (page 136, line 11) he said: "You could hardly expect that the Great Atlantic & Pacific Tea Company would be called upon to open and inspect each bottle or to test each bottle as to whether it was too highly charged or not." It is difficult to see what different conduct could have been required of the appellant with respect to the bottle which exploded. It purchased it of a reputable bottling company; it was not considered a dangerous instrumentality, it was a common commodity.

It is true that the Supreme Court in its discussion of the rule to show cause for a new trial said that there was evidence on the part of an employee of appellant from which the jury might conclude that bottles of this ginger ale had exploded over night. We think a careful reading of the testimony on this point must result in a reconsideration of the effect of the evidence.

Page 57 beginning at line 24, the employee in question said that he had never known a bottle of this ginger ale to explode; that some or one of them had been broken when taken out of the packages, and that caps of bottles purchased from other companies had been found to have come off during the night, but he knew of no case in which one exploded except the one which caused the injury complained of. The witness Joseph Mumler, at page 68, line 18, said that he had never known any bottles to explode but had found them broken in the morning when he came to work. Those were not bottles purchased from the Fair-

mount Bottling Company.

At page 83 line 30, plaintiff, Michael Noonan, testified that the store manager said "it happened before", which he, the witness, took to mean that bottles had burst before. The store manager denies this. Page 129 line 20, he said he had never seen an explosion before. Page 130 line 8. On page 131 line 23, Michael Noonan insisted that the manager had said he had seen bottles explode.

Whether he had or had not seen them explode there is no evidence that he communicated any knowledge he had on the subject to the appellant and anything he had to say about the subject of explosions on previous occasions does not bind this appellant for they were not words spoken or actions done by the witness in the execution of his duty.

Blackman vs. *West Jersey and Seashore R. R.*, 68 N. J. L., p. 1;
Huebner vs. *Erie R. R.*, 69 N. J. L., 327-330;
Hayes vs. *Railway Co.*, 73 N. J. L., p. 639;
King vs. *Atlantic City Gas Co.*, N. J. L. 70, pp. 679-681.

Since the doctrine *res ipsa loquitur* does not apply the trial Judge should have granted a nonsuit. He should have directed a verdict in favor of appellant. It is evident from his remarks that he would have done so had he not been convinced that the maxim did apply since he recognized that there was no evidence of negligence on the part of appellant.

Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence. *McCombe* vs. *Public Service Railway Co.*, 95 N. J. L., 188-189.

The plaintiff must show such circumstances as

would exclude the idea that there was a cause with which defendant was not connected. *McCombe* vs. *Public Service Railway, supra.*

In well considered cases resting upon the application of the doctrine of *res ipsa loquitur* as tending to establish *prima facie* negligence and where liability was upheld, it will be invariably found that in every instance there was an essential element present, that is, proof of the existence of 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 constituting the alleged negligent act was the only reasonable inference that could be properly drawn, and that such negligent cause or thing producing the injury was in the possession of and under the control or management of the person charged with negligence or his servant.

Conover vs. *Del., Lack. & W. R. R.*, 92 N. J. L., 602-604.

II.

If the doctrine of res ipsa loquitur can be held to apply in this case, still there is error in the charge of the trial Judge which must result in a reversal.

The trial judge charged (page 135, line 18):

> "Taking up first the question of the question of the A. & P. Tea Commpany in that case the fact of the occurrence that is the explosion of the bottle, bespeaks negligence which calls upon the defendant to exculpate itself from the legal inferences or presumption of negligence arising therefrom."

And again on page 135, line 26:

"You will note that I said while there was a presumption of negligence that arose from the circumstances of the explosion which called upon the defendant, A & P Tea Company to exculpate itself from any presumption of legligence, the question thus presented for your consideration is to whether or not the defendant has exculpated itself."

And on page 136, line 12:

"And if you find that it has not exculpated itself from the presumption of negligence then, of course, there would be a verdict against the A & P Tea Company."

And on page 136, line 28:

"Taking up now the question of the liability of the Bottling Company, as to that company the doctrine of presumption of negligence by the happening of the accident does not apply. As to that company the burden of proving the negligence by a fair preponderance of the evidence rests upon the plaintiffs."

It will thus be seen that the jury was told and retold that unless the appellant had exculpated itself from the inference of negligence which the trial judge insisted arose from the mere fact of the happening of the explosion there must be a verdict against it. While on the other hand in order to hold the Bottling Company which filled this bottle and sold it to the appellant actual negligence must be shown in order that it be held liable. A distinction was thus emphasized which must have had its effect upon the jury.

It is evident that the jury concluded to accept the evidence of plaintiff's witness to the effect that a bottle filled to over 35 pounds pressure would explode in the face of a series of tests made before them at the trial with similar bottles showing in

each case a pressure of over 50 pounds, and having heard nothing which in their opinion came within their idea of exculpation on the part of the appallent rendered a verdict against both. We contend that the judge's charge in this respect was prejudicial.

In *Hughes* vs. *Atlantic City, et als.*, 85 N. J. L., page 212, the plaintiff was injured by fragments of glass from the explosion of an electric light bulb in the ceiling of the car. There was no proof of the cause of the explosion except that the plaintiff testified that it was "probably a weak bulb and the voltage might have run up on it and of course, it had a tendency to burst the globe."

Justice Swayze, who wrote the opinion, makes this comment:

"The learned trial judge distinctly said that this burden shifted to the defendant and he did not even submit to the jury the question whether the plaintiff had established negligence; he treated that as a matter of legal inference and only left to the jury to say whether the defendant had exculpated itself. He thus put upon the defendant in a case where there was no direct evidence of negligence a burden from which it would have been free in a case where there was direct evidence. Instead of the question that has been so much discussed in the cases whether negligence may be inferred from the mere fact of injury, we now have the proposition that the inference of negligence is so strong that the jury need not consider it at all, but need only consider whether the defendant has exculpated himself. This is an unwarranted extension of the application of the maxim *res ipso loquitur*."

He then discussed the application of the rule and the provinces of the Court and jury and proceeds:

"The most that is required of the defendant is explanation not exculpation."

This case seems to be directly in point and we think must govern the situation in the case before us.

In *Neibel* vs. *Winslow,* 88 N. J. L., 191-193: The Court had charged that if the plaintiff had established a certain step in its proof the burden of exculpating himself from complete charge of negligence was shifted to the defendant. This was held to be error requiring a reversal.

The plaintiff cannot be relieved of the duty of satisfying the jury by preponderance of evidence that the defendant has been negligent, and to deprive the defendant of his right, which is a substantial one, to have the plaintiff bear the burden of the affirmative.

In *Collins* vs. *Central R. R. of New Jersey,* 91 N. J. L., 615, the action was brought to recover for injuries caused by the falling of a radiator stored in the defendant's warehouse. The Court charged the jury that if it found that the radiator fell from what seemed to be a secure position without any action on the part of the plaintiff then the defendant was called upon to make an explanation and the question for the jury was whether the evidence afforded a satisfactory explanation and that if no satisfactory explanation was afforded a verdict should be rendered against defendant. Justice Bergen said that the charge amounted to an instruction that the burden was on the defendant to make satisfactory explanation and that the failure to do so would justify a verdict against it. "That is, a defendant is to be charged with negligence if the plaintiff shows the happening of an unexplainable accident, unless he bears the burden of a satisfactory explanation by proof of facts, knowledge of which by him cannot be inferred from any proof offered in the cause."

III.

We think it is, therefore, clear under the laws of this State that under the circumstances set forth in the evidence submitted in this case, the maxim of res ipsa loquitur did not apply and that if it had applied the charge of the Judge to the jury was improper and prejudicial to the appellant and, therefore, the judgment in this cause should be reversed.

REED & REYNOLDS,
Solicitors for and of Counsel
with Appellant.

81 MAY.T.1927

New Jersey Court of Errors and Appeals

CHRISTINA NOONAN *and* MICHAEL NOONAN, Plaintiffs-Appellees, *vs.* GREAT ATLANTIC & PACIFIC TEA COMPANY, Defendant-Appellant.	Action at Law. On Appeal of Great Atlantic & Pacific Tea Company from Judgment of the Passaic Circuit.

BRIEF FOR PLAINTIFFS-APPELLEES.

Statement of Facts.

This action was brought against the appellant (which we shall call the A. & P.) and Fairmount Bottling Co. The trial occurred at the Passaic Circuit of the New Jersey Supreme Court on June 8th, 1926. The jury rendered a verdict in favor of the plaintiffs and against both defendants. Each defendant obtained a rule to show cause why the verdicts should not be set aside. The bottling company's rule contained no reservation of exceptions taken at the trial, although the A. & P.'s rule did.

Plaintiffs' verdicts, aggregating Six Thousand Dollars, were reduced to Four Thousand Seven Hundred and Fifty Dollars, and plaintiffs having consented to the reduction, both rules were discharged; with the result that the A. & P. now seeks a reversal on the exceptions reserved.

The evidence established the following facts:

On August 14th, 1925, Mrs. Christina Noonan went to a chain store of the defendant, A. & P., located at Passaic, to purchase some groceries. While the defendant's clerk, who was waiting upon her, was furnishing her with groceries which she was selecting, the manager in charge of the store was waiting upon another customer, a lady, who was also making some purchases.

These were the only persons in the store. Mrs. Noonan stood at one end of the trading counter and the other customer at the other end, about eight feet distant.

Suddenly and without any warning, Mrs. Noonan "heard an explosion like a shot"; "it was like a shot from a gun", and she "felt a striking blow on the side of the nose; it just seemed to strike her nose and affect her head"; her head seemed light and her eyesight left her for a second or two; she felt "like pins and needles in them". She said it was a sharp, penetrating blow, and the explosion made a loud report.

Mrs. Noonan did not know what struck her or how, or what had occurred. All she could explain from her own knowledge was the fact of the explosion, its loud report and gunlike shot, and that she had suffered physically and mentally in the moments that followed. She received some enlightenment regarding the occurrence, however, from the manager of the A. & P. Store, who told her that a ginger ale bottle exploded and struck her nose. The manager also gathered two quite large pieces of the exploded bottle and showed them to her. It developed that it was one of those pieces of flying glass that caught Mrs. Noonan in the nose.

She was considerably overtaken by the explosion and was obliged to seat herself in the window of the store awhile, her nose bleeding freely, before she was able to return home.

Plaintiffs had no personal knowledge of the cause of the explosion or the circumstances surrounding it other than above mentioned, but exerted every possible effort to unravel and present all the facts that they could possibly discover in the exercise of due diligence.

In furtherance of that purpose, Michael Noonan, husband of the injured plaintiff, went to the A. & P. store, and inquired of the manager about the explosion. The manager showed him the bottle that exploded and struck Mrs. Noonan, but said nothing about the *cause* of the explosion. On the contrary, the manager told Mr. Noonan that *he was unable to explain* how it happened, although *he admitted that similar bottles had exploded in the store on previous occasions.*

Plaintiffs testified to all the facts that they knew and learned about the explosion, and also produced as witnesses the manager and clerks in charge of the A. & P. store, and a Mrs. Fesold, the other customer who was in the store at the time. These were the only persons present when the explosion happened.

In addition, plaintiffs submitted to both defendants interrogatories relating to the explosion, its causes, etc., and received sworn answers thereto, which were received in evidence on plaintiff's case.

The answers to these interrogatories and the testimony established the following facts: That the bottle which exploded was a twelve ounce emerald green glass bottle; it was bottled at a pressure of 50 lbs. carbonic gas; the bottle was filled or bottled by Fairmount Bottling Company; that about two weeks before the explosion, the Bottling Company made its last delivery of carbonated ginger ale to the A. & P. at its said store; *that similar bottles had exploded on previous occasions; that the A. & P. Company's agents and servants, in charge of its said store, knew of such previous ex-*

plosions, some of which occurred in said store; that the *only* guard or means of protection which the Bottling Company employed or used on the bottle was a paper carton which was slipped over the bottle; *that the A. & P. Company's employees removed that paper carton from the bottle which exploded;* that the A. & P. failed to exercise reasonable care to prevent such explosions and to prevent the fragments of glass from flying about in the event of such explosions; that defendant's agents and employees in charge of said store, knew that the bottles were charged with carbonic gas pressure, but made no effort to ascertain how many pounds or how much carbonic pressure was contained in said bottle, or similar bottles of like content purchased by the A. & P. from the same bottling company.

The evidence likewise showed that warm temperature or handling of the bottled beverage increases the carbonic gas pressure of its content, and renders the bottle more liable to explode; that the A. & P. Company's servants had placed the bottle in question on display in the store which was exposed to the sun; that it was not stored in a store room under proper temperature.

In addition, plaintiffs produced an expert bottler of thirteen years' experience who testified that from his experience and the tests which he made with similar bottles he found that they could not safely hold more than from thirty to thirty-five pounds of carbonic gas pressure, and that if more than thirty-five pounds of such pressure was used in such bottles that it was very dangerous, and that they would explode either in the bottling process or sometime after. In short, it was certain that the bottle would at some time burst or explode if more than thirty-five pounds of carbonic gas pressure was used because the glass

was too brittle, and the bottle not strong enough, to hold a greater amount of carbonic gas pressure.

From all of the evidence, including that offered by the A. & P. and the co-defendant, who is not involved in this appeal, it is clear that the A. & P. did not cause proper tests or inspections to be made and did not exercise reasonable care; that the A. & P. was negligent; and that such negligence was the proximate cause of the injuries which Mrs. Noonan sustained.

The *per curiam* opinion of the Supreme Court, dealing with the rules to show cause which were issued, in part reads:

> "There was evidence on the part of an employee of the A. & P. Co., from which the jury might have properly concluded that when he came to the store in the morning he would sometimes find that *bottles of this ginger ale* had exploded over night. In view of this evidence we think it was for the jury to say whether the A. & P. Co., was not negligent in failing to take some means for the protection of customers from injury which might result from flying glass, in case bottles should explode during business hours."

(Case, p. 160, ls. 16-30.)

Appellant assigns six reasons upon which it rests its claim for reversal. The first and second relate to the trial Court's charge to the jury.

In our brief, we shall deal with the reasons in the order above mentioned.

POINT I.

The trial Judge rightfully denied the motion for a non-suit.

The motion for a non-suit was rested "on the ground that there is nothing in the evidence which

shows any negligence on its (appellant's) part" (Case, p. 84, ls. 25-30). In the course of counsel's argument on the motion, he said:

> "These goods are purchased in the ordinary course of business, and a great many of them, and are sold in the ordinary course of business; they are sold in stores and I think there is absolutely nothing in the testimony which shows anything which would attract the attention of the storekeeper to the fact that this bottle might explode" (Case, p. 85, ls. 10-18.)

In response to that motion, the trial Court said:

> "The Court: While, of course, the explosion of a bottle in the store of the Great Atlantic & Pacific Tea Company may be considered as an *unusual occurrence,* still it would seem as though the doctrine of *res ipse loquitur* applied, . . . *It seems to me that the happening of it is sufficient to call upon the defendant in whose control the bottle was and in whose possession it was to show that in the exercise of reasonable care they could not have prevented it.*
>
> Mr. Reed: (Interrupting) The mere happening, you think, of the accident, is such that would make them liable?
>
> The Court: (Continuing) While it is an *unusual happening, but the bottle was in the control of the defendant,* and it seems to me the doctrine of *res ipse loquitur* applies. It may be their explanation will entirely exculpate them from any liability. I will deny the motion" (Case, p. 85, ls. 20 to bottom, and Case, p. 86, ls. 1-10.)

We say the trial Judge was right in denying the motion for a non-suit for the reasons which he gave, as well as upon other evidence in the case, which justified his refusal to non-suit, as we shall presently point out.

We start out with the fact that, as the trial Judge

said, the explosion of a bottle of carbonated beverages in a store of the A. & P. is an *unusual occurrence.* The bottle, as the appellant's answers to interrogatories show, was purchased from the Fairmount Bottling Company about two weeks previous to the explosion, and from the time that the Bottling Company delivered this and the other bottles to the A. & P. it was *exclusively under the control and in possession of the A. & P. in its said store.*

No one, other than the agents and servants of the A. P., handled the bottle or had any control over it, or the manner in which or the place where it was kept, for two whole weeks previous to and including the moment of the explosion. No one, but the A. & P.'s agents and servants, was in a position or able to explain the cause of the explosion, or how, where, or under what temperature the bottle which exploded was kept for a period of two weeks, or how the bottle was handled during that period.

All that the plaintiffs were able to do was to give evidence of the fact of the explosion and the circumstances that immediately preceded and followed it. More than this, it was physically impossible for plaintiffs to establish. They furnished the trial Judge and jury with all of the facts they knew from personal knowledge or were able to produce by subpoenaing all of the witnesses who were present when the explosion occurred, including the other customer in the A. & P. store, and the manager and clerk, who were in charge of its said store; and in addition served interrogatories upon the A. & P. (Case, pp. 11 and 12), with a view of obtaining all possible evidence that was available to them, and present such evidence of the cause of the explosion, the nature of the bottle that exploded, its content, the carbonic pressure under which

it was bottled, as well as the quality, size, and kind of bottle.

These interrogatories and their answers were submitted in evidence as plaintiff's exhibits in order to give the trial Judge and the jury the benefit of all of the evidence that plaintiffs knew, and were able to produce that dealt with the case. More than that, no Court can expect of the plaintiffs.

In that situation, and in view of the fact that A. & P. Company's agents and servants removed the paper slip or cover from the bottle, which was the only guard or cover over the bottle to prevent its fragments of glass from flying about in the event that the bottle exploded; and in view of the further fact that the defendant's agents and servants knew that similar bottles had burst and exploded on previous occasions on the truck, during delivery, and in its said store; and in view of the fact that the company made no effort to ascertain the amount of carbonic gas pressure under which the beverage was bottled, or the quality of the bottle, or whether there were any defects in the bottle; and in view of the fact that they kept the bottle exposed to the sun, there was a *prima facie* case of negligence established, which no one but the A. & P. could explain, and whose duty it was to explain in order to exculpate itself from the presumption of negligence that arose.

Mrs. Noonan testified that she was in the chain store of the A. & P. Company, where she went to purchase some groceries. She was being waited upon by a clerk of the store at one end of the trading counter, and another customer, also a woman, was buying something, and was being waited upon at the other end of the counter about eight feet away by the manager in charge of the store. There were no other persons present (Case, p. 71, ls. 15 to 42; Case, p. 72, ls. 1-12).

Suddenly and without any warning, Mrs. Noonan heard an explosion. She testified: "I heard an explosion like a shot, it was like a shot from a gun" (Case, p. 72, ls. 13-25). Immediately after the explosion she "felt a striking blow on the side of the nose". She said, "It just seemed to strike the nose and affect my head and eyes for the time being"; and "Why, my head seemed light at the time and my eye sight left for half a second or two; it was like a light passing through it; like pins and needles, something like that in them" (Case, p. 72, ls. 25-38). Her description of the blow to her nose was: "I would call it a sharp penetrating blow; it seemed to be a hard blow to me" (Case, p. 72, ls. 39-42). As a result of the stunning blow she received, Mrs. Noonan was obliged to remain seated in the window of the store for about a half hour, before she was able to go home; and aside from the "pins and needles" sensation, she bled from the nose very freely and suffered a terrible headache; a nervouse headache (Case, p. 73, ls. 25-43, and p. 74, ls. 1-15). She then went to her home, distant about a block away and telephoned for a doctor (Case, p. 74, ls. 17-23).

Mrs. Noonan did not know what occurred, excepting that after the explosion the manager in charge of the A. & P. store said: "The ginger ale bottle broke and I (plaintiff) caught it;" he also showed her two quite large pieces of glass; one of them hit her (Case, p. 73, ls. 1-15).

The explosion made a very loud report (Case, p. 73, ls. 22-24); she knew the A. & P. sold ginger ale in the store "but didn't pay any attention there", and she didn't know where it was kept (Case, p. 73, ls. 15-20).

On cross-examination, Mrs. Noonan was not asked any questions about the explosion; cross-examination was confined solely to her injuries and the resultant disability.

Mrs. Noonan was examined before trial by defendant. Her deposition taken on this examination was offered and received in evidence on the plaintiffs' case (Case, p. 143, etc.). In her deposition, she said, she was just finishing her purchase, buying the last article and the clerk was figuring up the amount of the order, when the explosion happened (Case, p. 144, ls. 10-25). Respecting the explosion, her examination showed: "I thought somebody shot a revolver off. I was looking at the clerk. It got my nose and touched my head. I couldn't see and was blinded for a time". "Q. But you didn't see anything coming? A. No, I thought I was shot. I just imagined a bullet got me right straight that way" (Case, p. 144, ls. 25-30).

"Q. How did you know just what it was that struck you? A. The manager said a bottle of ginger ale had exploded and I got it" (Case, p. 144, bottom, and top p. 145). The manager told her she "was struck by the bottle" (Case, p. 152, top).

Plaintiffs produced as a witness, Isadore Leichter, an expert bottler of carbonic gas pressure, similar to the bottle which exploded, who testified: that heat or warm temperature increases the amount of carbonic gas pressure thereby increasing the danger of explosion (Case, p. 46, ls. 11-21), and that the hazard of explosion is increased by handling of the bottle, because it, too, increases the amount of carbonic gas pressure (Case, p. 46, ls. 22-30).

Max A. Kretschmar, *a witness for the plaintiffs,* testified that at the time of the explosion and for three years previous *he was manager in charge of the A. & P. Tea Store* (Case, p. 50, ls. 1-42, and Case, p. 51, ls. 5-20); *that on August 14th, 1924, while he was in charge of the store, as manager, a bottle of ginger ale, similar to Exhibits P-1 and*

P-2 exploded; that it was exactly the same type bottle; the ginger ale bottle that exploded, amongst others, was purchased by the A. & P. from the Bottling Company and delivered by the latter's truck (Case, p. 51, ls. 15-32) the labels on the bottles which were delivered were similar to those that were received in evidence (Case, p. 51, ls. 32-40); these labels bore the statement: "Manufactured and bottled by Fairmount Bottling Co., Hackensack, N. J."; when the bottles were delivered by the Bottling Company, they were contained in wooden boxes, twenty-four to a box (Case, p. 52, ls. 28-42); that on each of the bottles was contained a paper cover which was placed over the bottle from the top; that this paper cover, Exhibit P.6, was the only guard or carton that was contained on these bottles; that there was no wire mesh over them or outside packing; and that the bottles that were kept on display in the store (the one that exploded was on display) did not have the cover on; that he removed the cover or carton from the bottles that he kept on display (Case, p. 52, ls. 38 to bottom, and Case, p. 53, ls. 1-31).

He deposited the first bottle of ginger ale in the paper carton on the counter, and it immediately exploded after removing his hand from it; nothing else was in the box; one part of the broken glass "flew in the air", and "traveled to where Mrs. Noonan was standing and struck her on the nose" (Case, p. 55, ls. 18-30; p. 56, ls. 1-18, and p. 57, top).

On previous occasions in handling similar bottles he found, on unpacking them from the box, that sometimes they were broken (Case, p. 57, ls. 30-32, and Case, p. 58, ls. 1-20); that on previous occasions the caps of similar bottles had blown off in the store (Case, p. 58, ls. 25-30).

On cross-examination by counsel for the A. & P. this witness said that when he put the bottle in the

box it exploded, and the "ginger ale came out like you would ordinarily open a seltzer bottle; it shot out, and a piece of glass flew on the other end of the counter and struck Mrs. Noonan; the bigger part of the bottle fell directly on the counter where he was serving; the bottle broke just below the neck; the cap remained on the bottle." He examined the bottle and noticed "that the glass on the side of the bottle was not the same thickness all of the way around; it was thinner at one end than it was on the other" (Case, p. 60, ls. 30-42, and p. 61, ls. 1-30).

When the explosion occurred the report "was like when the cork shoots out of a bottle". "Q. You say when you put the bottle in the paper box on the counter it exploded? A. Yes, sir. Q. What kind of a counter was it, marble? A. Wooden counter" (Case, p. 64, ls. 1-5).

Joseph Mumler, *a witness for the plaintiffs,* testified that he was the clerk in the A. & P. Tea store; he was by the trade counter at the time of the explosion (Case, p. 67, ls. 20-40); the explosion made a loud report; he heard it from the other end of the store about fifteen feet away; on previous occasions he found bottles exploded and broken (Case, p. 68, ls. 1-25; p. 69, ls. 30-35; p. 70, ls. 1-4).

Mrs. H. Fesold, a witness for plaintiffs, said she was the other customer in the store when the bottle exploded; the manager put "them" (bottles) in the box on the table, "slow"; his hands were off the bottle; the glass flew in the air and struck Mrs. Noonan; she was buying the ginger ale, and stood at one end of the counter and Mrs. Noonan was at the other end; the explosion made a loud report. (Case, p. 66, ls. 1-35).

Michael Noonan, husband of Christina Noonan, said that on the day of the accident after he learned of the explosion he went to the A. & P. to

speak to the manager (Case, p. 82, ls. 35-45).

In response to his inquiry, the manager showed him "a piece out of the side of the bottle that struck Mrs. Noonan; the manager said nothing about the explosion or how it happened; he was unable to explain it; he admitted to Mr. Noonan that other explosions happened before in the store" (Case, p. 83, ls. 1-32).

There was evidence that the Bottling Company took no care or precaution to guard against the glass flying about in the event of an explosion. For example, if a bottle is packed in sawdust as is very often the case, or is protected by wire or mesh, even though the bottle should burst, the protector would at least guard or prevent the glass from flying about.

By the answers which the A. & P. furnished, under oath, to plaintiffs' six interrogatories (Case, pp. 11 and 12), the company admitted that it made no effort to ascertain how many pounds or how much pressure of carbonic gas was contained in the bottle that exploded, or in similar bottles of like content which it purchased from the same bottling company.

And in answer to the eighth interrogatory (Case, p. 12), the company admitted that it did not make or cause any inspection or examination of the bottle to be made to determine its contents or determine if the bottle was likely to break, burst or explode.

By the answers to interrogatories 9 to 12 (Case, p. 13), the A. & P. Company denied that Mrs. Noonan was in its store on the date of the accident; denied that a bottle exploded while she was in the store, or that she was struck or injured by such a bottle or any part of it.

Now, in the first place, the plaintiff was not an agent or servant of the A. & P., but was its cus-

tomer, an invitee in its store, and as an invitee this storekeeper owed the plaintiff the *absolute* duty of exercising reasonable care to protect the plaintiff from injury, and to maintain its store reasonably safe for the use of its customers.

In that connection, the rule of this state is:

> "But the case at bar is distinctly accentuated by the fact that the plaintiff occupies the status of an invitee to the premises of another, whereby the duty is cast upon the inviter to use reasonable care and foresight to protect one who occupies the status of a guest from harm, or at least to refrain from careless or indifferent conduct in the management and control of its property upon exhibition, which may prove injurious to one casually examining it, whether the property be a work of art or a domestic utensil, and which examination presents the conspicuous reason for the presence of the guest upon the premises".
>
> *Higgins* vs. *Goerke-Krich Co.*, 91 N. J. 1. 464, 103 Atl. 37, and affirmed by our Court of Errors and Appeals, in 106 Atl. 394.

In the case just cited the court held that where an ice box lid fell on plaintiff's hand in defendant's store, there was a presumption of negligence; that upon proof of the occurrence itself the storekeeper was required to explain it; and since the case was barren of explanatory testimony, or of any semblance of it, the liability of the defendant upon the uncontroverted testimony, bespeaking negligence, as well as upon the legal presumption arising from the unexplained occurrence becomes manifest.

In *Law* vs. *Morris,* 4 N. J. Adv. Rep. (22) 952, a customer in defendant's store was injured by part of a ceiling which broke and struck her.

Proof of the mere occurrence made out a *prima facie* case of negligence, whereupon the defendant was called upon to explain it.

In *Stark* vs. *Great Atlantic & Pacific Tea Co.,* 133 Atl. 172, this court held:

> "A storekeeper owes to one entering his place of business for the purpose of making purchases the duty of exercising reasonable care to keep the floors of the store in such condition that with the exercise of reasonable care on the part of the customer they will be reasonably safe.
>
> "Where a customer is injured through a fall caused by a deterioration in or disrepair of the floor, the nature and character of the disrepair or deterioration may be such as to present a jury question as to whether the condition had existed for such period of time as to give the party chargeable with the care and maintenance of the premises reasonable time and opportunity to inspect and repair, if necesary."

We say, as the trial judge said, that the explosion of a bottle of carbonated beverage is an *unusual occurrence,* and that since it was in the exclusive control and possession of the A. & P. for two whole weeks, there was *prima facie* evidence of want of due care which calls upon the A. & P. to exculpate itself.

In that situation, the rule is:

> "When, through any instrumentality under the management of a defendant or his servants, plaintiff is injured, and the injury would not result if defendant were exercising due care, the occurrence, itself, in the absence of explanation, affords *prima facie* evidence of want of due care." *Mannon* v. *Vesper Lodge,* (Err. & App.) 116 Atl. 784.

And in *Veesy* vs. *Central* R. Co. of N. J., 95 Atl. 977, this court held:

> "The maxim of '*res ipsa loquitur*' 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."

So in the case at bar, the bottle that exploded was under the management and control of the defendant, A. & P., its agents and servants. It is an occurrence which in the ordinary course of things would not take place if the defendant, its agents and servants, who were in control thereof, were exercising due care; and the occurrence itself, therefore, in the absence of explanation by the defendant (there was no explanation in this case) affords *prima facie* evidence that there was want of due care on the part of the A. & P.

A reading of the case of *Mannon* vs. *Vesper Lodge,* supra, signifies the importance of the fact that in the case at bar *similar bottles* had previously exploded, and that the A. & P.'s agents and servants had knowledge of the fact.

The syllabus by the court in the Mannon case reads:

> "Plaintiff, while rightfully in a building controlled by defendant, was injured by the *explosion* of a gas machine in the cellar of the building, which machine was operated and managed by a servant of the defendant so as to furnish light to the building. *There was evidence that for some months gas had been escaping, that the gas jets frequently flared a foot or more, that the machine had emitted noises, that there had been no inspections of it for about a year, and that about a month before the accident the servant in question had been warned that it might explode if its use was continued.* Held, that on the whole case the question of defendant's negligence was for the jury, and that a direction for defendant was erroneous." (Italics ours.)

The Mannon case is likewise significant in another respect. Plaintiffs testified to all the facts that they knew concerning the explosion, and likewise produced all the evidence that they could furnish, and all the witnesses that were present when the explosion occurred, and that were obtainable who might give evidence of the explosion, and the circumstances surrounding it, and the cause of the explosion; and it is significant that the *plaintiffs held back nothing that might be helpful to the court or jury in disposing of the case; they held back nothing material to the case.*

In that connection, this court in the Mannon case said at page 785, of the opinion:

> "There is no question in the case of plaintiff having held back any material evidence at his command, as in *Bahr* v. *Lombard Ayres & Co.,* 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167, or *Levendusky* v. *Empire Rubber* Co., 84 N. J. Law, 698, 87 Atl. 338, Ann. Cas. 1914 D, 969; nor was there, as a court question, adequate counter proof, as in *McCormack* v. *Standard Oil Co.,* 60 N. J. Law, 243, 37 Atl. 617."

And the *latter* portion in the court's opinion is important to the case at bar because defendant offered no adequate counter proof to constitute the issue a court question.

A case that denotes the importance of the fact that plaintiffs exhausted every effort to unfold all obtainable evidence relating to the explosion is *Halmes* vs. *Pelligrino,* 133 Atl. 194, decided by this court. There, plaintiff was working on a

scaffold, one of the planks of which broke causing him to fall to the floor, resulting in his injuries. He merely proved the fact that the plank broke and rested his case.

In dealing with that situation, the court, at page 195, of the opinion said:

> "The plaintiff admitted that he had made no inspection of the planks, and that no one else, as far as he knew, had inspected them. . . . *There is no evidence that the plaintiff attempted to examine the defendant before trial, or that he called for the production of the plank on a bill of particulars, or submitted interrogatories.*" (Italics our own.)

It is apparent, therefore, that in the Holmes case, if the plaintiff had in the manner indicated by the court shown that he had exhausted all effort to present all evidence that was possible for him to obtain, that that would have been sufficient to warrant the case being submitted to the jury. There is no such shortcoming in the case at bar.

Furthermore, we find:

> "The reasonable rule has been said to be that from the mere fact of an explosion it is competent for the jury to infer as a propoistion of fact that there was some negligence."
>
> 29 *Cyc.* 594 (Footnotes);
> *Young* vs. *Bransford,* 12 Lea. (Tenn.) 232.

An analagous case to ours is:

Stolle vs. *Annheuser Busch,* 39 A. L. R. 1001, 271 S. W. 497, it was held:

> "The rule '*res ipsa loquitur*' applies in case of the explosion of a bottle of highly charged beverage, to the injury of a bystander, where the bottle is shown to have been transported

> and handled in the usual course of business, with reasonable and ordinary care.
>
> "It is not incumbent upon the plaintiff to show what precautions the defendant should take; that duty devolved upon the defendant, who was liable for negligence in putting such dangerous goods upon the market without sufficient precaution to make them safe."

As a rule, in the ordinary and usual handling of a bottle of carbonated beverage, there is no danger; it is unusual for such a bottle to explode. Since the defendant, A. & P., had the exclusive management and control of the bottle, and is the only one who is in a position to explain the explosion, the only fair and reasonable inference that can be drawn from the explosion, in the absence of an explanation, is that the occurrence itself bespeaks negligence.

In *La Rue* vs. *Potts,* 91 N. J. L. 606, 103 Atl. 197, decided by our court of last resort, the plaintiff showed evidence of the explosion of a "septic tank" and rested. It was held that a non-suit was properly *denied.*

Likewise:

> "One negligently putting up highly charged beverages for the trade is liable for injury to the consumer by the bursting of a bottle, although there are no contractual dealings between them.
>
> "One injured by the explosion of a highly charged drink bottled for the trade is not bound to prove what precautions the bottlers should have taken to prevent injury by the explosion.
>
> "It is not incumbent upon the plaintiff to show what precautions the defendant should take; that duty devolved upon the defendant, who was liable for negligence in putting such dangerous goods upon the market without sufficient precaution to make them safe. It *may*

be that the defendant could have used wicker covering for the bottles, such as is used for champagne bottles, or wire mesh cases, as is used for certain goods of explosive nature. These would not prevent explosions, but would prevent the fragments of the glass doing much damage. Or the goods might be packed in sawdust, as is done with some goods such as aerated water, liable to explosion. Or there might be some harmless ingredient put in the decoction to prevent sudden expansion causing explosions,—a device that is not unusual. Or thicker bottles might be used, or there may be still other devices in this age in which 'men have sought out many inventions.' Ecclesiastes, chap. VII v. 28. But what is the best protection is one which the defendant must ascertain and use. It is certainly no defense for the defendant, who has placed dangerous and highly explosive merchandise upon the market which it knows has often exploded, to the injury of its customers and others, to claim that other vendors and manufacturers, in their pursuit of gain, have been as indifferent to the safety of their customers and the public as the defendant itself." (Italics our own.)

Grant vs. *Graham Chero-Cola Bottling Co.,* 176 N. C. 256, 97 S. E. 27.

In *Colyar* vs. *Little Rock Bottling Works,* 114 Ark. 140, 169 S. W. 810, where a person was injured by the explosion of a bottle containing a charged soft drink, which was being handled in the usual and customary way, and the proof tended to show that the bottle was improperly charged, and that the bottler, or at least his agents, possessed either actual or imputed knowledge of such overcharging, it was held that the case was one for the jury on the issue of such negligent charging and whether that negligence was the proximate cause of the injury.

In the Calyar case the court also said that a manufacturer and bottler of charged soft drinks cannot be relieved of any negligence in so overcharging a bottle that it burst, to the injury of an employee of the purchaser, on the ground of a lack of privity of contract, where the injury occurred while such employee was handling the bottle in the usual and necessary course of the purchaser's business, which handling was necessarily within the contemplation of the parties when the sale was made; *and the defendant was charged with notice that the bottle was overcharged, and that such condition would probably cause it to explode.*

To the same effect:

> "Evidence of the explosion to the injury of the purchaser of a bottle of carbonated beverage, accompanied by evidence that other bottles put up by the same bottler had exploded during the several preceding months, is sufficient to carry to the jury the question of the latter's negligence, in an action to hold him liable for the injuries."

Dail vs. *Taylor,* 151 N. C. 284, 66 S. E. 135.

In *Cashwell* vs. *Fayetteville Pepsi-Cola Bottling Works,* 74 N. C. 234, 93 S. E. 901, where bottle exploded and injured plaintiff, who showed similar bottles of beverage bottled by defendant had exploded, the judgment for the plaintiff was affirmed.

And in 29 Cyc. p. 591, we find:

> "Perhaps a more accurate statement is that where defendant owes to plaintiff a duty to use care, and the thing causing the accident is known to be under the management of defendant, or his servants, and the accident is such

that in the ordinary course of things does not occur if those who have the management or control use proper care, the happening of the accident in the absence of evidence to the contrary is evidence that it arose from the lack of requisite care". Citing *Sheridan* vs. *Foley,* 58 N. J. Law 230, 33 Atl. 484; *Bahr* vs. *Lombard,* 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; and also citing cases from California, Illinois, Minnesota, Missouri, New York, Ohio, Pennsylvania, Vermont, West Virginia, Wisconsin, U. S. Courts and England.

The footnotes read:

"Basis of Doctrine: 'The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively rested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident which plaintiff is unable to present." (Citing several cases.)

And in 29 Cyc. 594, the footnotes read:

"The reasonable rule has been said to be that from the mere fact of an explosion it is competent for the jury to infer as a proposition of fact that there was some negligence." (Citing *Young* vs. *Bransford,* 12 Lea. (Tenn.) 232.

In *Sheridan* vs. *Foley, supra,* it was held:

"Where one engaged in laying a sewer in a building is injured by a falling brick, in the absence of explanation by the contractor doing the brick work, it will be presumed that it occurred from want of reasonable care on his part, and he is liable for the injuries received."

Chief Justice Gummere, writing the opinion for the Supreme Court, in that case, said:

"While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern,—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases the maxim, *'Res ipsa loquitur,'* is held to apply, and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care."

The Chief Justice, in that case, illustrated various cases where the maxim was applied. One of the illustrated cases dealt with a situation in the English courts where the plaintiff, passing along a highway under a bridge, was injured, when a brick fell from one of the piers on which the girders of the bridge rested, and injured him.

Another of the cases there illustrated is one where the plaintiff was injured by the falling of a barrel from the window of defendant's shop. There was no evidence to show what caused the barrel to fall, nor was there any direct evidence to connect the defendant or his servants with the occurrence. The Chief Justice then deciding that case held:

" 'A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff, who is injured by it, must call witnesses from the warehouse to prove negligence, seems to me preposterous. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence.' "

Applying that principle here to the case at bar, it is the duty of a storekeeper to exercise reasonable care to protect his customers from injury from an explosion of a bottle of carbonated beverage, which he keeps on display, or, at least, to protect him from injury from fragments of glass flying about in case of the explosion of such a bottle.

Although the Court in the illustrated case, *supra,* said, that the injured person need not call witnesses from the defendant's premises to prove the negligence, that seeming to the Court to be preposterous, yet in the case at bar, the plaintiffs went to that extreme degree to obtain all material evidence relating to the cause of the injuries.

The Chief Justice, in the opinion, continues:

> "In our own state, in the case of *Bahr* v. *Lombard,* 53 N. J. Law 233, 21 Atl. 190, and 23 Atl. 167, this maxim was fullly commented upon and applied. The facts in the present case bring it within the application of this principle. The bricks were in the custody of the defendant's servants at the time when this one fell, and it was their duty to so handle them as not to endanger others, who were engaged in other work upon the same premises. This brick could not have fallen of itself, and the fact that it fell, in the absence of explanation by the defendant, raises a presumption of negligence. If there are any facts inconsistent with negligence, it is for the defendant to prove them."

In the instant case, it was the duty of the A. & P. to so handle and keep its bottles as not to endanger customers invited into its store; this bottle could not have exploded of itself; a piece of glass of such a bottle could not fly about in the store of itself; if the bottle was covered by a wire mesh or paper carton the fragments of it could not fly about; such a situation raises a presumption of

negligence; and if there were any facts inconsistent with negligence, it was for the defendant, A. & P., to prove them.

The rule laid down by this court in *Bahr* vs. *Lombard,* in 21 Atl. 190, is:

> "1. As a general rule, the proof of the occurrence of an accident does not raise a presumption of negligence.
>
> "2. Where the testimony which proves the occurrence by which the plaintiff was injured discloses circumstances from which the negligent conduct of the defendant is a reasonable inference, a case is presented which calls for a defense.
>
> "3. If, however, the plaintiff's case shows him to be possessed of material but undisclosed evidence, the mere proof of the occurrence of an accident raises no presumption of negligence to rebut which the defendant can be called upon to offer testimony.
>
> "4. *Res ipsa loquitur* commented upon and applied.
>
> (Syllabus by the Court.)"

The testimony offered by Mrs. Noonan and her witnesses, proving the occurrence by which she was injured, disclosed circumstances from which the negligent conduct of the A. & P. is a reasonable inference, presenting a case which calls for a defense.

The plaintiff's case did not show them to be possessed of material but undisclosed evidence, but, on the contrary, showed that they went beyond the realm of their duty and produced witnesses from *defendant's* premises in *defendant's* employ to prove their case, and exhausted all effort to produce all material evidence that was possibly available.

The Missouri Supreme Court in *Stolle* vs. *Anheuser-Busch,* 271 S. W. 497, held:

> "The rule '*res ipsa loquitur*' applies in case of the explosion of a bottle of highly charged beverage, to the injury of a bystander, where the bottle is shown to have been transported and handled in the usual course of business, with reasonable and ordinary care."

In *Stolle* vs. *Anheuser-Busch, supra,* the person injured was a bystander in a store, who happened to be hit by part of a bottle which another customer had just purchased.

The evidence adduced in the case at bar established that the bottle was a highly charged beverage, being bottled under a pressure of fifty pounds of carbonic gas (Case, p. 10, ls. 1-10, Answers to Interrogatories). The bottle was apparently delivered by the bottling company to the A. & P. in good condition, for it remained in the exclusive custody, control and possession of the A. & P. for two whole weeks before it exploded.

Moreover, even though we should assume, but not concede, that the A. & P. was not responsible for the explosion itself, we cannot, nevertheless, escape the fact that the A. & P. was directly and solely responsible for the fragments of glass from the exploded bottle flying about in its store, resulting in plaintiff's injuries, for if the A. & P. had not removed the paper carton or cover from the bottle, there would be no flying fragments, the glass would merely pierce the paper carton, but remain within it (Case, p. 90, ls. 19-32).

The evidence also showed that handling a bottle of carbonated beverage, or keeping it under a warm temperature, has a tendency to increase the carbonic gas pressure. No one, but the A. & P.'s agents and servants, handled the bottle for two

whole weeks (Case, p. 105, ls. 29-45). At the close of plaintiffs' case, it was, therefore, the duty of the defendant to explain the temperature under which it kept this bottle on display in its store, and the manner in which it handled it.

At the close of the plaintiff's case, it was also open for the jury to say whether the manager was negligent in placing this bottle on the counter. It should be recalled that the undisputed evidence is that the manager took several bottles from the shelf and was placing them in a paper carton on the counter to wrap them for the customer who was buying them, and that as he did so, one of the bottles exploded; it was open for the jury to say whether the manager was careless either in banging one of the bottles against the others or against the counter.

In *Riecke* vs. *Anheuser-Busch Brewing Asso.* (1921) 206 Mo. App. 246, 227 S. W. 631, where a bottle of Bevo exploded, resulting in the disfigurement of one's nose, who was inspecting the premises upon defendant's invitation, the court held that there was a presumption that the explosion was caused by defendant's negligence, upon which presumption alone plaintiff relied.

In *Payne* vs. *Rome Coca-Cola Bottling Co.,* (1912) 10 Ga. App. 762, 73 S. E. 1087, it was squarely held that the explosion of a bottle, the contents of which were advertised and sold as Coca-Cola, a harmless and refreshing beverage, raised an inference of negligence against someone, and that upon its being affirmatively shown that all the persons through whose hands the bottle had passed after leaving the manufacturer were free from fault, and that the condition of the bottle and its contents had not been changed, the inference of negligence, by process of elimination, must be placed against the manufacturer. This

conclusion was reached in the face of the contention that the principle at the foundation of the rule *res ipsa Loquitur* could not be applied because the bottle was not in the possession or control of the defendant when it exploded. However, the Court said that the plaintiff, to recover, must do so upon the theory *res ipsa loquitur.*

Plaintiffs' witness, Kretschmar (*defendant's* employee) testified that immediately before the bottle exploded, it was in the same form and condition as it was when it was delivered to the A. & P. store by the bottling company, with the single exception that the paper cover (Exhibit P-6) was removed therefrom when he put it on display in the A. & P. store (Case, p. 54, ls. 20-25).

The case of *Dail* vs. *Taylor,* (1909) 151 N. C. 284 28 L. R. A. (N. S.) 949, 66 S. E. 135, was followed and approved in *Cashwell* vs. *Fayetteville Pepsi-Cola Bottling Works,* (1917, 174 N. C. 324, 93 S. E. 910, which involved injuries to a purchaser for resale, caused by the explosion of a bottle of Pepsi-Cola while being handled by him. This conclusion was again approved and adhered to in *Grant* vs. *Graham Chero-Cola Bottling Co.*

In *Mackenzie* vs. *Oakly,* 108 Atl. 775, where an automobile in which the plaintiff was a guest skidded on a highway, our Supreme Court said:

> "In this respect the case was properly submitted to the jury. The situation thus presented is within the rule applicable to an accident, which suddenly and for no apparent cause happens, and yet from the very fact of its occurrence an abnormal situation is presented which bespeaks negligence in operation, which calls upon the defendant for an explanation to exculpate herself from the legal inference or presumption of negligence arising therefrom."

In *Higgins* vs. *Goerke-Krich Co.,* 91 N. J. Law 464, 103 Atl. 38, where plaintiff, a customer in defendant's store, was injured, the Supreme Court said, at page 39:

> "If it be asked what the defendant did that bespeaks negligence, it may be confidently answered that his tort-feasance consisted in doing nothing to render reasonably safe for the inspection of its guests an article which confessedly in its situation was dangerous, and which by the exercise of ordinary business foresight it would have known to be dangerous to those invited to inspect it, and who were unconscious of the danger."

A feature of negligence on the part of the A. & P. in the case at bar is its tort-feasance which consisted in doing nothing to render its store reasonably safe for its guests, whereas by the exercise of ordinary business foresight, it would have known that a bottle unprotected by a paper carton which it had removed, or unguarded by a wire mesh or other means, would, if it exploded, cause the fragments of glass to fly about to the injury of its customers.

In *Philip's Library,* this court held that an owner or occupier of premises, who, by invitation, express or implied, induced a person to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purposes embraced in the invitation. (Citing several cases).

In the first place, if the A. & P. had exercised ordinary care the bottle would not have exploded; to say the least, if the A. & P. had exercised ordinary care there would be no fragments of glass from the exploded bottle flying about in the store.

The general rule of negligence resulting from explosions is stated in 20 Ruling Case Law 192,

"Cases of injuries from explosions is another class in which the doctrine *res ipsa loquitur* frequently has been invoked."

In *Kloran* vs. *Drogin*, 123 Atl. 760, the Court held that the explosion of a pneumatic tire on a bus at least calls upon the defendant for an explanation with a view of eliminating him from the category of an active or passive tort-feasor.

Appellant in its brief under Point I referring to the testimony of Michael Noonan as to what was said by the Manager of the Atlantic & Pacific Tea Co. Store to him in connection with the explosion of other bottles, says that it is not bound by this testimony. The testimony in question was admitted without objection on the part of the Counsel for the Appellant or for the co-defendant and no motion was made to strike out the answer and no objection was taken to the Court's charge in this respect, and therefore, under the many decisions of this Court even assuming that appellant is right in its theory it is not entitled to have the matter considered on appeal where it now urges the matter for the first time.

We submit that at the close of plaintiff's case a *prima facie* case of negligence was established which compelled the trial judge to deny the motion for a nonsuit.

POINT II.

The trial Court properly refused to direct a verdict in favor of the defendant-appellant.

In view of the *prima facie* case made out by the plaintiffs which required a refusal to non-suit, it of course follows that at the close of the case there was a question of fact to be submitted to the jury for determination.

In *Mannon* vs. *Vesper Lodge, supra.*, this court said, "The testimony for plaintiff made a *prima facie* case for the jury, and on the whole case it remained for the jury to say whether such *prima facie* case was met by the evidence for defendant; . . . ." That rule was controlling on the trial Judge on the motion for a direction of the verdict. The court in the Mannon case also said, "The testimony for defendant tended to negative the escape of gas, but this merely raised a dispute of fact, and it appeared on defendant's case that the machine had not been inspected for about a year prior to the accident. This evidence, with the conceded facts already stated, plainly made it a jury question whether due care had been exercised in the management of the machine, and, if not exercised, whether the accident resulted from that lack of care. There is no question in the case of plaintiff having held back any material evidence at his command, ... ; *nor was there, as a court question, adequate counter proof.*" (Italics ours).

The A. & P. Company's defense consisted of a single witness, Kretschmar. He did not testify to a single fact about the explosion or its cause, or the manner in which the bottle which exploded was handled by the A. & P. Company during the two weeks in which it was exclusively under its control and management and in its custody and possession. He did not testify to the manner in which it was kept or the temperature under which it was kept. He offered no explanatory testimony to exculpate the A. & P. His testimony was directed *solely* to the conversation which plaintiff Michael Noonan testified he had with him some time after the explosion. His testimony on direct consisted of only a denial that "he had never seen explosions like that happen before." (Case, p. 129, ls. 20-41). On cross-examination, appellant's said witness, Kretschmar was asked:

"Q. Tell the court and jury, Mr. Kretschmar, as best as you can, what caused the explosion, if you can tell us.

"Mr. Brown: (Appellant's counsel) I object, calling for a conclusion.
"The Court: Yes, I think so; I sustain the objection.

"Q. Can you tell what caused the explosion?
"A. I do not know; I just put it in the box and it burst.
"Q. You do not know what caused the explosion nor how it came about?
"A. No, I couldn't tell." (Case, p. 130, ls. 11-28.)

We cannot conceive how appellant can argue that there was no question of fact to be submitted to the jury at the close of the case (in view of the *prima facie* case which the plaintiffs established) when appellant's only witness testified that *he did not know the cause of the explosion and was unable to explain it.* This witness on cross-examination also admitted that when he reported in the A. & P. store on certain mornings he found the caps blown off the tops of soda water bottles made of the same kind of glass as the bottle which exploded. (Case, p. 130, ls. 28-38). Appellant's counsel was apparently afraid to have the witness tell the court and jury what caused the explosion for when the witness was asked the question on cross-examination, counsel objected and the question was overruled.

On direct examination plaintiffs' witness, Kretschmar, admitted that after the explosion occurred, plaintiff Michael Noonan came to him and asked that he be shown the bottle that had exploded and also requested an explanation as to how it occurred; the witness Kretschmar testified, "I showed him the bottle and told him how it occurred and where it occurred", ... Michael Noonan having testified on that subject said that after the explosion, on the same day that it occurred, he went to the A. & P. store and asked the manager, Kretschmar to show him the bottle that had exploded; that Kretschmar then showed him a piece of the bottle; he further said that Kretschmar said nothing about the explosion or how it occurred; he was unable to explain how it happened; that Kretschmar admitted that similar bottles exploded on previous occasions. (Case, p. 83, ls. 1-35). In rebuttal, Michael Noonan repeated that in that conversation, Kretschmar told him that he had seen similar bottles explode before this accident. (Case, p. 131, ls. 20-25).

In *Hughes* vs. *Atlantic City & S. R. Co., supra.,* the Court of Errors and Appeals, said:

"The *res ipsa loquitur* doctrine affects the province of the trial judge, rather than the functions of the jury, and requires the judge, in the first instance, to determine whether there is any evidence of negligence for the jury; and while he may hold that the circumstances, unexplained, permit the jury to draw the inference of negligence, such inference is still for the jury, notwithstanding the application of the doctrine."

We repeat what Justice Minturn in speaking for the Supreme Court in *Higgins* vs. *Goerke Kirch Co., supra,* said:

"We have intimated that the case at bar is barren of explanatory testimony, or of any semblance of it, and in that situation the liability of the defendant upon the uncontroverted testimony, bespeaking negligence, as well as upon the legal presumption arising from the unexplained occurrence becomes manifest."

The motion for a direction of a verdict was rested "on the grounds that I asked for a non-suit." (Case, p. 138, bottom.) The reasons urged for a non-suit being insufficient to warrant the granting of a non-suit it follows that they will not sustain a motion for the direction of a verdict. The motion was properly denied.

POINT III.

There was no error in the trial Court's Charge to the jury . (Reasons 3 to 6.)

Appellant's reason number 3 deals with the following excerpt of the trial Court's charge to the jury. "Taking up first the question of the A. & P. Tea Company, in that case, the fact of the occurrence, that is, the explosion of the bottle, bespeaks negligence which calls upon the defendant to exculpate itself from the *legal inferences or presumption of negligence* arising therefrom." (Case, p. 135, ls. 18-23.)

APPELLANT DID NOT TAKE AN EXCEPTION TO THAT PORTION OF THE CHARGE. NO EXCEPTION WAS TAKEN TO THAT PART OF THE CHARGE WHERE THE COURT SAID, "THE FACT OF THE OCCURRENCE, BESPEAKS NEGLIGENCE."

The rule is, "Any error in charge of trial Court *held* not reviewable, where no exception was taken to any part thereof." *Palocz* vs. *E. & S. Transp. Co.,* 133 Atl., p. 80.

We shall now deal with appellant's reason No. 3 as though appellant had laid its ground for review in the trial Court. It would serve no useful purpose to repeat the evidence of the case or the citation of authorities already referred to in this brief;

we shall merely add what we have already said by quoting from leading decisions of this State controlling the question.

In *Bergen County Traction Co.* vs. *Demarest,* 62 N. J. L., p. 755; 42 Atl., p. 729, at p. 730, Chief Justice Gummere, in the opinion of this Court, said:

> "In the *Seybolt Case,* RUGER, C. J., delivering the opinion of the court, quoted the above extract from the *Edgerton Case,* and adds: 'While it is true, as a general proposition, that the burden of showing negligence on the part of the defendant occasioning an injury rests, in the first instance, upon the plaintiff, yet in an action of this character, when he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus then rests upon the defendant to prove that the injury was caused without his fault."

When the Court said that the occurrence bespeaks negligence which calls upon the defendant to exculpate itself from the legal inferences or presumption of negligence arising therefrom, it was equivalent to what our Court of Errors and Appeals said in the case of *Mannon* vs. *Vesper Lodge, supra,* at page 785, viz: . . . and on the whole case it remained for the jury to say whether such *prima facie* case was met by the evidence for defendant; . . . (Citing Cases.)

In *Hughes* vs. *Atlantic City & S. R. Co., supra.,* "The rule supported by authority is that when a passenger shows that he was injured through some defect in the appliance of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by due care, *then the jury have the right to infer negligence,* unless the carrier proves that due care was exercised." (Citing cases.) Applying that rule to the case at bar, the result is that under the evidence,

the jury had the right to infer negligence on the part of the appellant's agents and servants, unless appellant proved that due care was exercised.

In *Mumma* vs. *Easton & Amboy R. R. Co., supra.,* our court of last resort said that "the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care." Cited and followed with approval in *Hughes* vs. *Atlantic City & S. R. Co., supra.*

In *Tompkins, et al., vs. Burlington Island Amusement Co.,* 132 Atl., p. 670, the Court said, "The slip which collapsed was constructed by the company and was under its control. Its collapse when being used for the purpose for which it was constructed and designed, at least, raised a presumption of negligence calling for an explanation from the company." Citing *Bahr* vs. *Lombard Ayres & Co., supra; Smith* vs. *Jackson,* 56 Atl., p. 118, 70 N. J. L., p. 183; *Mumma* vs. *Easton & Amboy R. Co., supra;* and *Vecsy* vs. *Central R. Co.,* 95 Atl., p. 977, 88 N. J. L., p. 177.

The language of the trial Judge in the case at bar, of which appellant complains is identical with the trial Court's charge to the jury in the case of *Mackenzie vs. Oakley, supra,* where the Supreme Court said:

> "In this respect the case was properly submitted to the jury. The situation thus presented is within the rule applicable to the accident; which suddenly and for no apparent cause happens, and yet from the very fact of its occurrence an abnormal situation is presented *which bespeaks negligence* in operation, *which calls upon the defendant for an explanation to exculpate herself from the legal inferences or presumption of negligence arising therefrom.* It would seem as though the trial judge in the case at bar had before him the trial court's charge in the Mackenzie case."

Appellant's reason No. 4, deals with the following portion of the court's charge to the jury:

> "You will note that I said while there was a presumption of negligence that arose from the circumstances of the explosion which called upon the defendant, the A. & P. Tea Company, to exculpate itself from any presumption of negligence, the question thus presented for your consideration is as to whether or not the defendant has exculpated itself."

(Case, p. 135, ls. 18-33.)

NO EXCEPTION WAS TAKEN TO THAT PORTION OF THE CHARGE. (See Case, p. 142, ls. 13-21.) The *alleged* error in this portion of the charge, if any, cannot be made the basis of reversal. *Palocz* vs. *E. & S. Transp. Co., supra.*

And *Stickle* vs. *Vreeland,* 123 Atl., p. 753, where this Court held:

> "The settled practice of this court is to leave unconsidered alleged errors to which no exceptions have been taken at the trial."

Aside from the failure to take an exception, however, the portion of the charge now for the first time complained of contains a sound prinicple of law. It is substantially the same as that part of the Court's charge embodied in appellant's reason No. 3. As was already pointed out by the foregoing decisions, particularly *Mumma* vs. *Easton & Amboy R. R. Co., supra,* "the occurrence, that is, the explosion of the bottle, bespeaks negligence which calls upon the defendant to exculpate itself from the legal inferences or presumption of negligence arising therefrom." The trial Judge merely added to what he already said, "the question thus presented for your consideration is as to whether or not the defendant has exculpated itself."

That statement of the law is too elementary to require elaborate discussion. It surely was the jury's function to say whether the defendant has exculpated itself or not. That was a question of fact for the jury; not a question of law for the Court.

Appellant's reason No. 5 deals with a part of the Court's charge to the jury, which is practically similar to the other portions of the charge embraced in appellant's reasons Nos. 3 and 4, and what we said with respect to those reasons applies here. *Moreover, appellant did not except to that portion of the charge* (see Case, p. 142, ls. 10-22), and is not entitled to have that question considered by this Court. *Stickle* vs. *Vreeland,* 123 Atl., p. 753.

By the sixth reason for reversal, appellant complains of that portion of the Court's charge to the jury which relates to the question of liability of the co-defendant, the Fairmount Bottling Co., who is not involved on this appeal. The trial Judge charged: "Taking up now the question of the liability of the Bottling Company, as to that company the doctrine of the presumption of negligence by the happening of the accident does not apply. As to that company, the burden of proving the negligence by a fair preponderance of the evidence rests upon the plaintiffs." *No exception was taken to that part of the Court's charge.* The question, therefore, should not be considered. Counsel merely said:

> "Mr. Reed: (Continuing) And that that rule did not apply to the defendant Fairmount Bottling Company.
>
> "The Court: I don't know whether you can except to that or not, but you can take your exception." (Case, p. 142, ls. 23-30.)

The rule is clear in this State that defendant cannot complain of alleged error in the court's charge to the jury which concerns a co-defendant but has no relation to the case of the party asserting the error. If there was an error in that charge, since it dealt with the liability of the bottling company, that party is the only one who can complain of the error. That defendant did not complain and is apparently satisfied with the correctness of the charge and took no exception. (Case, p. 142, ls. 35-36) where we find, "No exception was taken by the defendant Fairmount Bottling Co.

In *Rose* vs. *Squires, 128 Atl. p. 880, affirmed by this court in 133 Atl. p. 488* it was held, "Where two or more defendants are sued as joint tortfeasors, and a non-suit is directed as to one of them, such non-suit, even if erroneous as to the plaintiff, is not such error as may be invoked by the other defendants for a reversal. (Syllabus by the court).

What the trial Judge said to the jury is substantially the rule laid by this Court in Hughes v. Atlantic City S. & R. Co., 85 N. J. L. 212, 89 Atl. 769:

> "In one sense the phrase 'burden of proof' refers to the duty of the party having the affirmative to establish the issue at the end of the whole case, in which sense the burden of proof never shifts, but in another sense the phrase means the duty of going forward in producing evidence, and in this sense the burden of proof may shift according as one side or the other has satisfied the judge that his evidence makes a *prima facie* case in his favor."

The trial Judge merely pointed out to the jury that as to the Bottling Company, there was no presumption of negligence, whereas there was such a presumption against the A. & P.

Conclusion.

For the foregoing reasons, we respectfully submit that the trial court committed no reversible error and that no ruling of the court resulted in substantial harm or injury to the appellant.

We respectfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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