

## Court of Errors and Appeals.

MARCO POLO, Administrator of  
Vincenzo Falcone,  
Defendant in Error,

v.

PALISADE CONSTRUCTION COM-  
PANY,  
Plaintiff in Error.

In Tort.  
Points of  
Defendant  
in Error.

The negligence upon which the plaintiff below (defendant in error) justifies the judgment below, is that the negligence of the defendant consisted in doing a dangerous thing, in which the danger was or ought to have been apparent to the defendant, and which danger was not apparent to the plaintiff's intestate; without warning the intestate of the danger, and that thereby the intestate was without his knowledge placed in a position of danger, which danger resulted in an explosion which killed him.

The danger complained of, is not the presence of the unexploded charge of dynamite, which unexploded charge was not in itself dangerous.

The danger was in the operation of extracting the charge, which was beset, by reason of the nature of the operation with great danger.

The liability of an explosion was inherent in the very operation. (P. C., p. 25, l. 9 Etc.)

The intestate did not know the nature of the operation of extracting the dynamite, and did not know there was any extra hazard attached to it

and remained in his position.

He was thus placed in a position of danger arising out of a probable explosion of which danger he was unaware and of which he received no warning and this failure to warn the plaintiff, contends was negligence on the part of the master.

See *Albanese v. C. R. R.*, 70 N. J. Law, 243, *Rogers v. Roe*, 66 Atlantic, 408.

While it is true that there was evidence that the plaintiff knew that there was an unexploded charge of dynamite at the place where the men were working, there is nothing to show that he knew the danger inherent in the operation of extracting the charge.

#### DAMAGES.

The intestate left him surviving his father and mother. He had no brother or sisters. (P. C. 26) He had contributed money to his father (P. C., p. 29.)

It was proved that intestate earned \$1.75 a day.

Thus his earning capacity having been proved and the existence of a person dependent upon him for support a basis was laid warranting damages of substantial sort. 13 Cyc., p. 361; *Hone v. Traction Company*, 30 Vr.

Proof of the existence of the father raised a presumption of his continued existence. 1 Greenleaf Evidence, 41, And it having been shown that deceased did contribute to the pecuniary support of his father, the continuance of this state of affairs was presumed.

1 Greenleaf Evidence, Sec. 41.

Respectfully submitted,

J. PHILIP DIPPEL,

Attorney of Defendant.

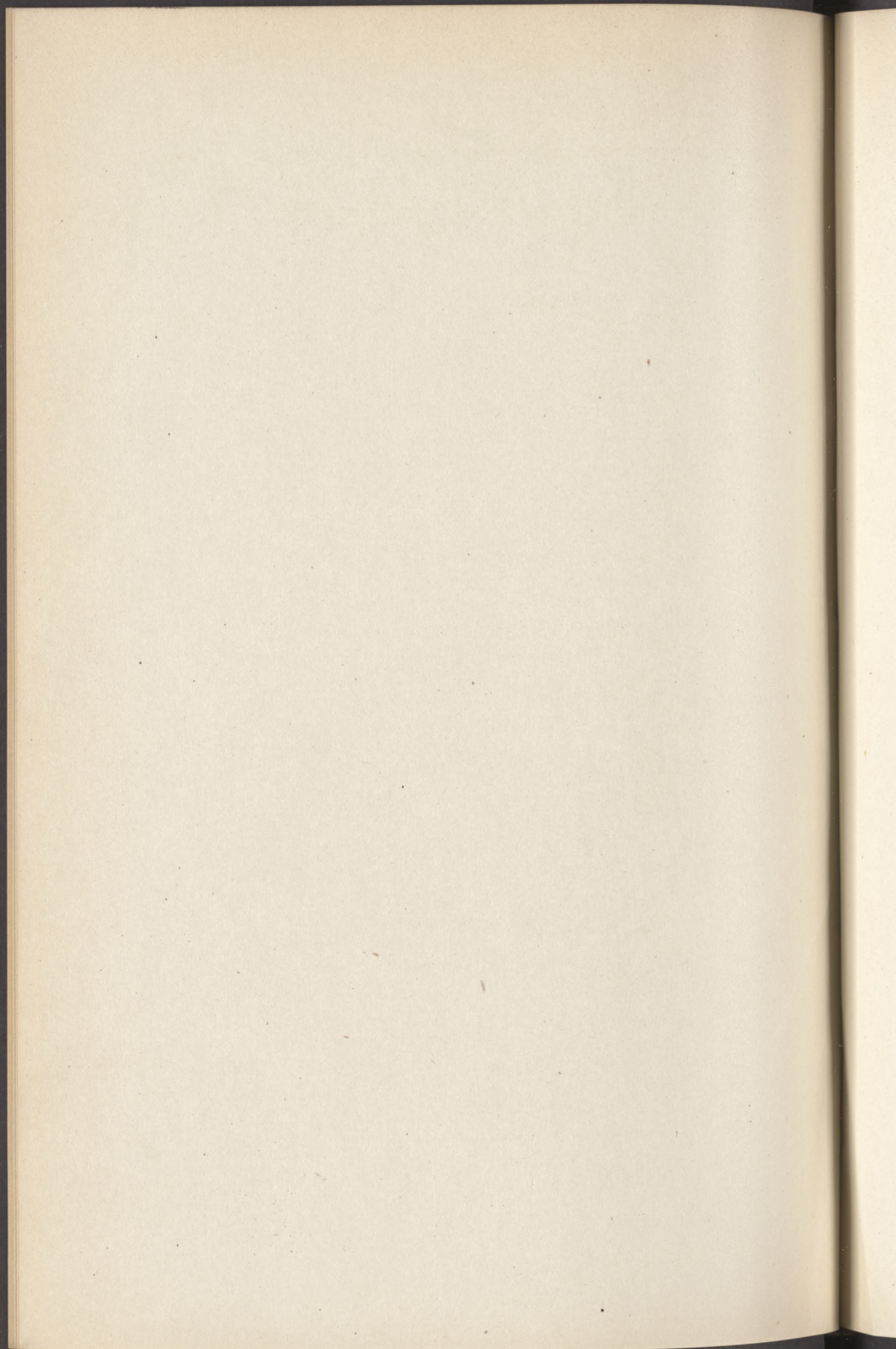
ALEX. SIMPSON,  
of Counsel.

On duty of defendant, see also, *Burns v. Tel. Co.*, 70 N. J. L. 744; *Grimaldi v. Lavel*, 177 Mass. 165; *Hopkins v. O'Leary* 176 Mass. 251

Tel.

177

. 25



NEW JERSEY

Court of Errors and Appeals.

MARCO POLO, ADMR. of VINCENZO  
FALCONE,

*Defendant in Error.*

*vs.*

PALISADE CONSTRUCTION COM-  
PANY.

*Plaintiff in Error.*

*On Writ of Er-  
ror to Hudson  
County Circuit  
Court.*

BRIEF OF COLLINS & CORBIN,

On Behalf of Palisade Construction Company,  
Plaintiff in Error.

The writ of error in this case brings up for review a judgment entered in favor of the defendant in error (plaintiff below) on the verdict of a jury for the sum of \$400. The exceptions and the assignments of error are limited solely to the grounds that the Trial Judge erred in refusing to grant a non-suit and in refusing to direct a verdict in favor of the plaintiff in error (defendant below).

The suit was brought by the plaintiff, as administrator, to recover damages for the pecuniary loss sustained by the next of kin of his intestate.

On January 28th, 1905, plaintiff's intestate was in the employ of the defendant as a laborer. Defendant was engaged in constructing a sewer for the Town of West New York, in Hudson County; and in the course of the work it became necessary to blast with dynamite.

The defendant had employed a man known as "Big Jim" to take full charge of the dynamite. The accident occurred about eight o'clock on a Saturday morning. On the Tuesday preceding, several charges of dynamite had been exploded, but one of the charges failed to go off, and in the morning of Saturday "Big Jim" undertook to withdraw the charge from the hole in the rock where it had been placed. For this purpose he was using certain tools known as a "scraper" and a "swab-stick." While thus engaged, for some unknown reason the dynamite exploded, causing the death of "Big Jim" and the plaintiff's intestate, and injuring another man.

The charges of negligence in the declaration are that the defendant's superintendent negligently permitted Jimmie Decicio (otherwise known as "Big Jim") to attempt to remove the unexploded charge without warning plaintiff's intestate, and failed to make rules prescribing the way in which such work should be done, but permitted Jimmie Decicio to perform the work "in any way he pleased," and that he was permitted to attempt to remove the charge of dynamite in an unskillful and careless manner (p. 5, l. 1-10).

The case was submitted to the jury on the following points: "If the defendant knew, or had reason to know, that these charges of dynamite which had failed to explode were liable to go off when the men were trying to take them out, and so cause injury, it was its duty either to adopt a system of rules which would enable their workmen to get into a safe place before the charge could possibly be exploded; or if it did not adopt rules, it was still its duty to see that a proper warning was given to its servants to enable them to get into a place of safety" (p. 38, ll. 20-30).

## I.

**No negligence on the part of the defendant was proved.**

(a). *The evidence is equally consistent with the existence or non existence of negligence.*

According to the evidence of plaintiff's expert witness, dynamite frequently explodes without any known cause (p. 25, ll. 10 to 20). No witness attempted to explain the cause of this accident. The mouths of "Big Jim" and of the plaintiffs intestate are closed. The latter's companion, in the trench knows nothing about it, except that he and the rest of "the boys," including the intestate, knew that there was an unexploded charge (p. 13, l. 15; p. 14, l. 14; p. 32, ll. 10 to 40). Defendant's foreman, Hangley, says he does not know what caused the explosion (p. 20, l. 28).

"Big Jim" was using tools known as a "swab stick" and a "scraper" in removing the unexploded charge (p. 9, l. 40; p. 10, l. 28; p. 11, l. 25; p. 14, l. 25; p. 16, l. 20 to 30; p. 21, l. 20). It is proved by plaintiff's own witness that these are the proper tools to use for that purpose (p. 25, l. 3). Hence it cannot be claimed that the defendant was negligent in permitting "Big Jim" to use such tools.

*Tompkins vs. Machine Co., 70 N. J. L., 330.*

We submit that the case is barren of any evidence to charge the defendant with negligence. If there was negligence on the part of any one, it is chargeable to "Big Jim." He may have struck the dynamite cartridge too violent a blow with one of the tools. If so, the negligence is that of a fellow servant. (See Point II.) Frequently it is not possible to determine the causes of explosions of dynamite (p. 25, ll. 15 to 20). Whatever may be the true

explanation in the present case, we submit that the evidence is equally consistent with the absence as with the presence of negligence on the part of the defendant. Under such circumstances, the question of liability should not be submitted to the jury.

*Hummer v. L. V. R. R. Co.*, 67 Atl. 1031, 2  
(N. J. Ct. Errors & Appeals, Nov., 1907).

Such a rule may be a hardship on a plaintiff, but it is equally hard on a defendant to require it to respond in damages without adequate proof of liability.

It is elementary that negligence must be proved and not guessed at. "It will not do to submit a "question of negligence to a jury where the facts "are equally consistent with the presence or ab- "sence of negligence, or where the jury could do "no more than surmise as to the negligence of the "defendant."

*Caldwell vs. Arnheim*, 152 N. Y., 182, 190.

In *Dotson vs. Erie R. R. Co.*, 68 N. J. L., 679, this Court said (referring to a claim that a station platform of the defendant railroad company was not properly constructed): "There is another reason why we think the question of negligent construction should not have been left to the jury, and that is the entire absence of proof that the construction was faulty as not being in conformity to the usual mode of construction adopted by well regulated railroads, or otherwise. Negligence must be proved. As was said by Baron Bramwell in *Comin vs. Eastern Counties R. R. Co.*, 4 Hurlst. & N., 781, it is not enough to say there was some evidence; a scintilla of evidence or mere surmise that there may have been negligence on the part of the defendant clearly would not justify the Judge in leaving the case to the jury; there must be evidence on which they

might reasonably and properly conclude there was negligence."

A recent decision on the same point is *Allen vs. Kingston Coal Co.*, 61 Atl., 572 (Pa., 1905). In that case a coal miner was found dead at the mouth of a mine with injuries on his body, which indicated that he had been crushed. The apparent elements of danger were the sides of the gangway, the loaded cars and the mine door, which was kept closed by a strong pressure of air.

Which of these elements, if any, or what combination of them, caused his death, was wholly conjectural. The Court said:

"Appellant's theory, as stated by her counsel, "was that 'the accident that caused her "husband's death, and which was the "only theory advanced at the trial, was "that because of the negligence of the "defendant company he had been caught "between the side of the passageway at "the main door and the side of a mov- "ing car, and squeezed to death.' But "conceding this as the most probable "manner of his death, it does not tend "to show negligence of the defendant. "The deceased may have slipped and "fallen off his car, or jumped off, or "have got off safely, and yet been caught "by the door before he had a secure "hold of it to keep it open. His own "failure in this respect is quite as prob- "able as any other hypothesis. The "doctrine, 'res ipsa loquitur,' dangerous, "and uncertain at best, is never to be "applied, except where it not only sup- "ports the conclusion contended for, "but also reasonably excludes every

“other. *Oil Co. v. Pennsylvania Torpedo Co.*, 190 Pa., 350; 42 Atl., 707; “*Alexander v. Pennsylvania Water Co.*, “201 Pa., 252; 50 Atl., 991.”

“Appellant argues that the plaintiff is entitled to the presumption that deceased “was innocent of negligence. True, “but so is the defendant, and the presumptions are equally balanced. Negligence, contributory or other, is not “to be presumed, but must be shown by “evidence. In the instances where it “is said that this presumption in plaintiff’s favor must take the case to the “jury, there was at least some evidence “of defendant’s negligence, as, e. g., “the excessive speed of the car in “*Haughey v. Pittsburg Railway Co.*, “(No. 1), 210 Pa., 363; 59 Atl., 1110, “cited by appellant. And even in “*Stringert v. Township of Ross*, 179 Pa., “614; 35 Atl., 345, where the minority “of the Judges thought the existence of “a deep rut in the highway was sufficient evidence of defendant’s negligence to take the case to the jury, the “Court held that the cause and manner “of the accident were merely conjectural, and sustained a non-suit.”

In *Chandler v. New York, &c., R. R. Co.*, 159 Mass., 589, plaintiff’s intestate was employed as a brakeman. There was an accident at night whereby the rear part of a train consisting of a box car and a caboose was separated from the rest of the train; the brakeman by direction of the conductor went forward with a lantern from the caboose to investigate the trouble. He was last seen alive go-

ing down a ladder on the front end of the box car; his dead body was afterwards found lying on the railroad track. There was no evidence to indicate how the brakeman came to his death. There was nothing to show that the ladder was defective. Verdict was directed for the defendant by the Trial Judge and this was affirmed, the Court saying:

“Whether he fell from the ladder by reason  
 “of negligence on his part or whether,  
 “without looking to see whether the  
 “coal car was in its place, he attempted  
 “to jump upon it is uncertain. There  
 “is an entire absence of evidence as to  
 “how the intestate happened to fall to  
 “the ground; and there is not enough to  
 “show that one conjecture is more  
 “probable than another.”

In *Patton v. Texas & Pacific R. Co.*, 179 U. S., 558, plaintiff was a fireman on a passenger train. He was injured while attempting to step off the engine on account of step turning. It was claimed that the step turned because the nut which held it was not securely fastened. Verdict was directed for defendant, the Court saying:

“The fact of accident carries with it no  
 “presumption of negligence on the part  
 “of the employer, and it is an affirmative  
 “fact for the injured employee to  
 “establish that the employer has been  
 “guilty of negligence. \* \* \* It is  
 “not sufficient for the employee to show  
 “that the employer may have been guilty  
 “of negligence—the evidence must point  
 “to the fact that he was. And where  
 “the testimony leaves the matter un-

"certain and shows that anyone of half  
 "a dozen things may have brought  
 "about the injuries for some of which  
 "the employer is liable and for some of  
 "which he is not, it is not for the jury  
 "to guess between these half a dozen  
 "causes and find that the negligence of  
 "the employer was the real cause when  
 "there is no satisfactory foundation in  
 "the testimony for that conclusion. If  
 "the employee is unable to adduce  
 "sufficient evidence to show negligence  
 "on the part of the employer, it is only  
 "one of the many cases in which the  
 "plaintiff fails in his testimony, and no  
 "mere sympathy for the uncertain  
 "victim of an accident justifies any de-  
 "parture from settled rules of proof  
 "resting upon all plaintiffs."

In *Price v. L. V. R. R.*, 51 Atl., 756 (Pa.), the  
 engineer and fireman of a train ascending a moun-  
 tain were killed by a descending train colliding  
 with theirs. Plaintiff made several allegations as  
 to defendant's negligence, for example, that a com-  
 petent engineer was not in charge of the descending  
 train. The Trial Court directed non-suit and on ap-  
 peal the Supreme Court affirmed this ruling saying:

"If anything be settled in this State, it is  
 "that the mere fact of an accident as be-  
 "tween employer and employee raises  
 "no presumption that it was due to neg-  
 "ligence of the employer. 'As between  
 "employer and employee, the mere hap-  
 "pening of an accident from which neg-  
 "ligence could have been inferred raises  
 "no presumption of negligence against

"the employer. A specific act of negli-  
 "gence must be shown.' *Higgins v.*  
 "*Fanning, 195 Pa., 559; Dickerson v. R.*  
 "*R. Co., 189 Pa., 567.* \* \* \* Here,  
 "according to the argument, are five  
 "separate causes for the accident from  
 "which negligence may be inferred. The  
 "very statement of them shows the un-  
 "certainty in appellant's own mind as to  
 "the cause of the accident. In fact  
 "there is no evidence that anyone of  
 "them was the specific cause of the ac-  
 "cident. Doubtless if the jury had had  
 "the chance to do so they would have  
 "guessed that some one of them was  
 "the proximate cause of the accident.  
 "and then further guessed that the  
 "cause arose from negligence of the de-  
 "fendant. But the law gives them no  
 "right to guess and the Court below  
 "very properly so decided."

In *Sandt v. North Wales Co., 63 Atl., 596 (Pa., 1906)*, it was held that in an action by a servant to recover for personal injuries where the evidence fails to show any defect in appliances furnished, and any of several theories as to the cause of the accident were equally plausible, and the verdict of the jury as to the real cause would be a matter of guess, a non-suit was properly ordered.

In *Neal v. Chicago, &c., R. R. Co., 105 N. W., 197, (Iowa, 1905); 2 L. R. A. (N. S.) 905*, it was held that no recovery could be had for the death of a brakeman killed at a switch, on the theory that his foot was caught between the rails because of defective blocking, when the circumstances were equally consistent with the theory that his foot

slipped on icy ground and fell in front of the car or that he attempted to board the moving train and fell under it. The Court said:

“The jury are not permitted to find material facts without evidence or on mere conjectures as to the truth of one or two or more equally probable or possible theories having different legal results.”

In *Suburban Electric Co. v. Nugent*, 58 N. J. L., 658, this Court sustained a judgment for plaintiff's intestate when it appeared that the deceased was found dead lying upon the ground about three feet from the base of one of the electric light poles of the defendant. It was claimed that death was caused by an electric shock received from an exposed wire. Under the circumstances the Court concluded that there was sufficient evidence to show that the deceased was killed by touching the exposed wire and also to exclude any other inference, but said:

“It was incumbent upon him (plaintiff) in the absence of direct evidence of that fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant and would exclude the idea that it was due to a cause with which the defendant was unconnected” (p. 660).

In *Paynter v. Bridgeton &c. Traction Co.*, 67 N. J. L., 619, 625, the Court said:

“The mere happening of an accident raised

“no presumption of the negligence of  
 “the defendant. It was necessary to  
 “show by direct evidence that the de-  
 “fendant was responsible for the acci-  
 “dent or to show the existence of such  
 “circumstances as would justify the in-  
 “ference that the injury was caused by  
 “the wrongful act of the defendant and  
 “would exclude the idea that it was due  
 “to a cause with which the defendant  
 “was unconnected.”

This was the case of a passenger who claimed to have fallen off a trolley car. There was no evidence to show what caused her to fall. It was held that the doctrine of *res ipsa loquitur* would not apply. The Court cites with approval the case of *Benedick v. Potts*, 41 L. R. A., p. 478 (Md.), in which it appeared that plaintiff was hurt while riding on a car which passed through a tunnel on a mimic railroad operated for amusement. Plaintiff was not on the car when it came out of the tunnel but was found in an unconscious state in the tunnel and it was held that such facts would not raise a presumption of the proprietor's negligence when there was no defect in or abnormal condition affecting the means of transportation and the other occupants of the car passed through the tunnel in safety.

In the case in hand, no explanation of the accident is offered by the plaintiff. There is no evidence to show that it was caused by negligence on the part of the defendant. The facts are equally consistent with negligence on the part of a fellow servant, for which, of course, defendant is not liable.

(b). *The defendant did not owe to the deceased the duty of adopting rules with reference to unexploded charges of dynamite.*

The Trial Judge's charge on this phase of the case was that *if* the defendant knew, or had reason to know, that the unexploded charges were liable to go off, it was its duty to adopt rules whereby the workmen would be enabled to get into a safe place before the charge could possibly be exploded (p. 38, ll. 20 to 25). We submit that negligence could not be charged against the defendant on any such theory, for the following reasons:

1. The defendant did not know, and had no reason to apprehend, that the unexploded charge would go off when "Big Jim" was in the act of withdrawing it. There is no dispute in the evidence as to the experience and ability of "Big Jim." He had charge of drilling the holes (p. 21, l. 30), and the handling of the dynamite was left to him (p. 24, l. 3). He had worked for the defendant twenty years, and during all that time had had charge of the dynamite; on this particular job he had worked since it started—a year or a year and a half before the accident. He had never before had an accident (p. 24, ll. 15 to 30). Charges were exploded about every other day (p. 22, ll. 1-10). He had had experience in withdrawing unexploded charges (p. 31, ll. 30 to 40). What possible reason was there for the defendant to anticipate that this particular charge, or any other charge, would explode when about to be withdrawn by "Big Jim." If there was no ground to anticipate such explosion, then why was there any legal duty on the part of the defendant to make rules for the purpose of covering a contingency that had never before happened during the twenty years that this man had worked for it?

2. The failure of the charge to explode was unprecedented. The work of constructing the sewer had been going on for a year or a year and a half (p. 24, l. 20). The occasion of this accident

was the only time, so far as the record shows, when it became necessary to withdraw an unexploded charge, although blasts were set off every other day. Why was the defendant bound to make rules to cover a contingency that might never happen, and, in fact, did happen only once during the entire construction of the sewer? Defendant had no reason to suppose from its past experience in doing this work that the contingency of one of the charges failing to explode was likely to happen.

3. The rules, if made, would not have affected the question. What rules could be made to fit a case of this kind? The Trial Judge said:

“Rules which would enable defendant’s workmen to get into a safe place before the charge could possibly be exploded” (p. 38, l. 25, 30.)

We submit that he confused the doctrine relating to blasting operations done in the regular course of the work with the unusual and unprecedented case of a blast failing to explode. The defendant said, in answer to interrogatories, that when a blast was about to be exploded it had a system of warning its servants by calling, “fire,” or some similar expression several minutes before the blast was set off (p. 43, l. 30). But this accident did not happen when defendant was about to set off a blast; on the contrary, the regular blast had been exploded on the preceding Tuesday, four days before the accident.

Hence this accident did not happen because of defendant’s failure to have a system of rules when about to fire a blast. The case is entirely different from *Belleville Stone Co. v. Mooney*, 61 N. J. L., 253, where defendant’s foreman failed to give the workmen the customary warning when a blast was about to be exploded.

We submit that there was no legal duty imposed upon the defendant to make rules requiring the laborers to get away when the unexploded charge was to be withdrawn. It is not an insurer of the safety of its servants. The measure of its duty was to take reasonable care to provide a reasonably safe place for defendant's workmen, and to take reasonable care to furnish reasonably safe tools, etc. Safe tools were admittedly provided in this case; and as shown under Point (b. 1) *supra*, the defendant had no reason to apprehend danger, and therefore it was not bound to make rules to meet a danger which it had no reasonable ground to believe existed.

(c). *Defendant was not bound to warn the deceased of the danger.*

The second ground of liability on which the jury were permitted to find the defendant negligent is found in that part of the charge wherein the Trial Judge said that it was the defendant's duty either to adopt a system of rules, *or*, if it did not adopt rules, it was its duty to see that a proper warning was given to its servants to enable them to get into a place of safety. Here again it seems to us the Trial Judge confused the duty of the defendant to give warning when a blast was about to be exploded in the regular course of work with the duty to give warning when an unexploded charge was about to be withdrawn.

In this case there was no custom proved of giving warning when an unexploded charge was about to be withdrawn, and hence the doctrine of the Mooney case, *supra*, has no application.

Furthermore, the only object of giving warning was to notify the deceased that there was some danger to be apprehended while "Big Jim" was in the act of withdrawing the charge, but the undis-

puted evidence shows that the deceased not only knew that "Big Jim" was engaged in withdrawing the charge, but fully appreciated the danger. The defendant's companion in the trench says that "we knew that one of the charges had failed to explode," and that he knew this because "the boys" said so. Deceased was present when this was said (p. 13, ll. 10 to 20). The fact that the charge had not exploded was also evident because the wires which connected the several cartridges were in plain view (p. 13, ll. 20 to 40). This witness told the deceased that, "we got to look out, there is a loaded blast there" (p. 14, l. 16). He mentions the deceased as one of the men to whom he gave this warning, calling him, "Jimmy." (It is to be noted that the man who this witness describes as "Jimmy" is the plaintiff's intestate. He is to be distinguished from the dynamite man who is known as "Big Jim"—the deceased was known among the men as "Little Jim" [p. 22, l. 20]). The fact that the charge had not exploded, was also evident because the rock had not been broken (p. 18, l. 32). It further appeared that the deceased himself told his co-laborers about the fact that the charge had not exploded, saying: "Frank, here is a loaded blast, we have got to look out" (p. 32, l. 38), and the deceased told the witness that "Big Jim" was engaged in cleaning the hole (p. 33, ll. 5, 20 to 25).

It therefore appears that the deceased not only knew what "Big Jim" was doing, but he, himself, notified his co-employees of the work in which "Big Jim" was engaged, and warned them of the danger. What further warning was the defendant bound to give? The deceased already knew all that the defendant could tell him. He knew that there was an unexploded blast a few feet away from him; he knew that "Big Jim" was engaged in withdrawing

it; he knew that it was dangerous, and he knew that he would have to look out.

It is well settled that there is no duty on the part of a master to warn an adult servant of the danger attending his service. *Murphy v. Rockwell Engineering Co.*, 70 N. J. L., 374; *McDonald v. Standard Oil Co.*, 69 N. J. L., 445; *Sabere v. Benjamin Atha Co.* (N. J. Supreme Court, November Term, 1907, not yet reported).

*A fortiori*, is there no such duty when the servant himself knows and appreciates the danger?

In *Erickson v. Monson Co.*, 60 Atl., 708 (Maine), plaintiff was injured by an explosion of a charge of dynamite which had failed to go off with a previous blast. The failure of the charge to explode with the previous blast was not known to plaintiff. Held, that if plaintiff from his previous experience ought to have known the danger, the master was not bound to give him any special warning thereof. The case in hand is much stronger, because the deceased admittedly knew that a charge had failed to explode.

## II.

### The negligence, if any, was that of a fellow servant.

As we have shown under Point 1, the evidence is undisputed that the defendant had furnished proper tools for the purpose of withdrawing the charge, and that "Big Jim" was using such tools at the time of the accident. The only rational explanation of the accident is that "Big Jim," in a moment of carelessness, must have struck the cartridge too hard while he was digging into the hole for the purpose of removing the packing. "Big Jim" was not in any sense the foreman of the deceased. The mere fact that he may have been of a higher

grade in defendant's service does not avoid the effect of the fellow servant rule.

*O'Brien v. American Dredging Co.*, 53 N. J. L., 291.

*Gilmore v. Oxford Iron Company*, 55 N. J. L., 39.

*Steamship Co. v. Ingebragsten*, 57 N. J. L., 400.

*McLaughlin v. Camden Iron Works*, 60 N. J. L., 557.

*Curley v. Hoff*, 62 N. J. L., 758.

*Knutter v. N. Y. & N. J. Telephone Co.*, 67 N. J. L., 646; 58 L. R. A., 808.

*Rocco v. Gillespie Co.*, 73 N. J. L., 591.

*Cullen v. Norton*, 126 N. Y., 1.

*City of Minneapolis v. Lundin*, 58 Fed., 525, 9.

The evidence being undisputed that "Big Jim" was a skillful and experienced servant, the defendant cannot be held liable for his negligence. See *O'Brien v. Buffalo Furnace Co.*, 73 N. Y. S., 830, 68 App. Div., 451.

### III.

#### The risk of injury was assumed by the deceased.

In the present case there is no doubt about the fact that the deceased knew that there was an unexploded charge of dynamite a few feet away from him. There is also no doubt about the fact that he appreciated the danger, because he himself warned his co-laborers that they would have to look out. The deceased therefore assumed the risk, as he both knew and appreciated the danger, and could have protected himself by ordinary care.

*Hardy v. Sulphur Mining Co., 67 Atl., 177.*

The Trial Judge charged on this point that,

“If the servant knew that the place where  
 “he was working was dangerous, and he  
 “nevertheless saw fit to go to work  
 “there, having notice that this charge  
 “was liable to go off prematurely and  
 “injure him, if nevertheless, he con-  
 “tinued to work in that place \* \* \*  
 “the law says that he assumed the risk,  
 “and if he assumed the risk, he cannot,  
 “nor can his administrator, call upon  
 “the master to respond” (p. 38, ll. 30  
 to 40).

There is no disputed question of fact that the servant did know of the danger. He could not only see the wires and the unbroken rock, but he himself warned his co-laborers of the danger. There was no question of fact to submit to the jury on this point, and therefore the intestate assumed the risk as a matter of law. This is so, even if he did not perhaps fully realize all the possible consequences of the danger.

*Davis v. Somers Cambridge Co., 79 N. E.,  
 233 (Ohio, 1906).*

It would seem that any person of adult age knows enough to know that dynamite is dangerous, even if he be only a common laborer, but it further appears, in the present case, that deceased had worked for the defendant for about a week before the accident happened, and, prior to that time, had worked for a month or so for another contractor. It is not shown whether when working for the other contractor there was any occasion to use

dynamite (p. 12, l. 30 to p. 13, l. 10), but when working for the defendant he did have occasion to observe the effect of dynamite explosions, as the defendant was accustomed to set off blasts every other day (p. 22, ll. 1 to 10).

#### IV.

#### **The evidence shows that there was contributory negligence on the part of the deceased.**

We think the case is one that calls for the application of the doctrine of assumption of risk rather than of contributory negligence, but inasmuch as the Trial Judge dealt with the latter point as well as the former, we call attention to the charge on this phase of the case, as follows:

“If the man who was killed knew, or had  
 “reason to know, that the place where  
 “he was going to work that morning  
 “was a dangerous one to work in under  
 “the circumstances, and if you believe  
 “that he knew at the time he went to  
 “work there that the man who was  
 “known as ‘Big Jim,’ and who himself  
 “was killed, was endeavoring to take  
 “this charge of dynamite out, and that  
 “he had reasonable cause to believe that  
 “might result in an explosion, or might  
 “result in injury or death to him; and  
 “he nevertheless saw fit to go to work  
 “there, he could not come into Court  
 “and ask for damages, and if he could  
 “not neither can his administrator now,  
 “the injury having resulted in his  
 “death, \* \* \* and if you should  
 “further find from the evidence that the  
 “plaintiff’s intestate, that is the man

“who was killed, was not guilty of contributory negligence, then you come to the question of damages” (p. 39, ll. 15 to 40.)

It will be observed that the Trial Judge left it to the jury to consider whether or not the deceased knew, or had reason to know, that the place where he was about to work was dangerous, and said that “if” he knew, or had reason to know that it was dangerous, then he could not ask for damages. The same argument applies to this phase of the case as has already been given in the discussion of the question of the assumption of risk, to wit, there was no disputed question of fact as to the knowledge the deceased had of the danger, and that he of his own volition continued to work in the trench, knowing that an unexploded charge of dynamite was only a few feet away from him, and that another man was engaged in withdrawing it. We submit that, as a matter of law, he was himself negligent in continuing to remain at work in so dangerous a place. The witnesses say that there is always danger when using dynamite (p. 17, ll. 10 to 15; p. 25, ll. 10 to 20). The plaintiff is driven to this dilemma: Either there was no danger to be reasonably apprehended by the defendant from allowing “Big Jim” to withdraw the charge of dynamite—in which case there was no negligence on its part because of its failure to establish rules or give warning to the deceased; or the danger was so great that if the deceased knew of it, then he himself would be chargeable with contributory negligence. Whichever horn of the dilemma the plaintiff chooses to select, the result is that there should have been a non-suit, or a direction of verdict for defendant.

## V.

**There was no evidence of pecuniary loss sustained  
by the next of kin of plaintiff's intestate.**

The deceased was earning one dollar and seventy-five cents a day while he worked for the defendant. His next of kin was his father, who was sixty-eight years old. The deceased was twenty-one or twenty-two years old, (p. 26, lines 10 to 30).

When the plaintiff rested his case the defendant asked for a non-suit on the ground among others that there was no proof of pecuniary loss sustained by the next of kin and the Trial Judge stated that it did not appear that the father was dependent upon the son (p. 27, l. 30.) Thereupon plaintiff's attorney asked leave to open the case "to put in proof that he supported the father and mother" (p. 27, l. 38). The Trial Judge allowed the case to be re-opened and the plaintiff testified that he knew the father and mother of the deceased in Italy, and came to deceased with a message about support, and twenty days before he was killed he sent his father through the plaintiff the sum of twenty dollars. This was the only evidence that was offered to show that the decedent was accustomed to contribute to the support of his father. An attempt was made to put in evidence statements made by the decedent and by his mother, but of course, such evidence was incompetent and the Trial Judge properly struck it out, (p. 29, lines 1 to 30). It will be observed that it was not shown that this money was sent in response to a request for support. Cross-examination showed that it was intended for a Christmas present, (page 29, l. 38). Moreover it was shown that the money was not sent to the father but to the family of the decedent—or at least for both the father and the mother,

(page 30, lines 1 to 15). Further effort to show that the decedent was accustomed to send money to his father failed (p. 30, lines 20 to 30).

In order to maintain the case it was as essential for the plaintiff to prove the fact of pecuniary loss as well as to prove any other fact in the case. We submit that there was no evidence to justify the Trial Judge in submitting to the jury the question as to whether or not any pecuniary loss was sustained by the next of kin, and that non-suit, or direction of verdict in favor of the defendant, should be ordered on this ground. The statute under which the suit was brought limits the recovery in the following language:

“In every such action the jury may give  
 “such damages as they shall deem fair  
 “and just, with reference to the pecuni-  
 “ary injury resulting from such death  
 “to the wife and next kin of such de-  
 “ceased person.”

It is well settled that under this statute the compensation must be limited to the pecuniary loss. *Paulmier vs. Erie R. R.*, 24 N. J. L., 151, 157.

In *Demarest vs. Little*, 47 N. J. L., 28, it is said:  
 “The damages are to be determined exclusively by  
 “reference to the pecuniary injury resulting to the  
 “widow and next of kin of deceased by his death.  
 “The injury to be thus recovered for has been de-  
 “fined by this Court to be ‘the deprivation of a  
 “‘reasonable expectation of a pecuniary advantage  
 “‘which would have resulted by a continuance of  
 “‘the life of the deceased.’ *Paulmier vs. Railway*  
 “*Co.*, 5 Vr., 151. Compensation for such depriva-  
 “tion is, therefore, the sole measure of damage in  
 “such cases” (p. 30).

In *Cooper vs. Shore Electric Co.*, 63 N. J. L., 558, this Court said:

“With respect to the damages recoverable in such a suit, they are not such as arise from injury to the feelings, but are awarded in reference to a pecuniary loss, and in estimating damages, the jury cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary injury only. Such an action cannot under the terms of the statute be maintained for nominal damages.” \* \* \*

“If there be no widow or next of kin at the time of the death of the deceased, the pecuniary injury contemplated by the statute does not exist, and the action cannot be maintained” (p. 565).

In a recent case in this State the point that damages must be limited strictly to the pecuniary loss sustained, is reiterated. *Cook vs. American, &c., vs. Power So.*, 70 N. J. L., 65.

In that case a verdict of \$2,500.00 in favor of the administrator of a boy of thirteen years of age was set aside as excessive, it appearing that the father was the sole beneficiary, and that he, for a period of three years, had abandoned his wife and family, and went off with another woman. The Court said it was doubtful whether in these circumstances a verdict for more than nominal damages could be sustained (p. 69).

The fact of the existence of pecuniary injury is quite as essential to the maintenance of the action, as the fact of the existence of a widow or next of kin. We submit that the evidence in the present case shows clearly that there was no pecuniary injury sustained by the next of kin by reason of the death of the intestate. The motion for non-suit, or for direction of a verdict in favor of the defend-

ant, should, therefore, have been granted on this ground.

There are several cases in other jurisdictions where a similar question has arisen.

*In Von Brunt v. Cincinnati, etc., R. R.*, 78 Mich., 530, 44 N. W., 321, a statute provided that for death caused by negligence of a railroad the jury might give such damages as they deemed "fair and just." Another statute provided that whenever death was caused by negligence the jury might give such damages as they deemed fair and just, "with reference to the pecuniary injury" resulting from such death. Held that the latter statute controlled in a suit against a railroad; and that in a suit by a father for the negligent killing of his son, about twenty-two years of age, who had no one dependent on him for support, it was property for the Trial Court to take the case from the jury on the ground that no damages were shown. Direction of verdict in favor of defendant on the ground was sustained.

*In Hurst v. Detroit City Ry.*, 84 Mich., 539, suit was brought by a father to recover damages for death of a minor child, about two years old. Verdict was directed for defendant on the ground that there was no evidence of pecuniary loss. This ruling was sustained, the Court holding that such loss must be made to appear by proof; and that not even nominal damages could be recovered, unless supported by evidence (p. 548).

*In International etc. R. Co. v. DeBajlegethy*, 9 Tex. Civ. App., 108, 28 S. S. W., 829, held that adult children cannot recover damages for their father's wrongful death, unless actual damages to them are shown to have resulted therefrom.

*In Armour v. Ozischki*, 59 Ill. App., 17, held

that where no legal obligation rested on deceased to contribute to the support of plaintiff, damages must be affirmatively proved, and will not be presumed.

In *St. Louis, etc., R. Co. v. Garner*, 89 S. W., 550, (Ark.) suit was brought by a father to recover for death of his son. There was no evidence that the plaintiff received any pecuniary benefit from his son's earnings, or that he had any reasonable expectation of doing so in the future. Verdict for plaintiff reversed and action dismissed.

In *Fordyce vs. McCants*, 51 Ark., 509, 11 S. W., 694, 4 L. R. A., 296, suit was brought by a father to recover damages for the death of his son. It was held that substantial damages could be recovered only by showing that the deceased gave assistance to his father, contributed money to his support, or that the father had a reasonable expectation of pecuniary benefit from the continued life of his son, and that in the absence of such proof only nominal damages could be recovered.

It was said in a recent case:

"The law, in confining the compensation to the pecuniary loss, does not run along the lines of the imaginery and the possible, but rather along the lines of the actual, and the probable, and, therefore, the reasonable expectation must be made to appear by the evidence. Conjecture, speculation and fancy, cannot supply the absence of evidence, or avoid the effect of the evidence which is presented." *Swift & Co., v. Johnson*, 138 Fed., 867.

The present case is similar in some respects to *Deni vs. Pa. R. R. Co.*, 181 Pa. St., 535, 37 Atl., 558. In that case the right to recover was denied on the ground that it appeared that the decedent was a non-resident alien. That point does not

arise in the present case, as there was no evidence on the subject of the decedent's citizenship. But from the discussion of the facts in the *Deni* case it appears that only one remittance from the decedent to his mother was proved and the Court said: "The claim that he regularly remitted money to "and for the maintenance of his mother in Italy was "not supported by convincing or satisfactory evidence." So in the present case it was not proved that even this single contribution of twenty dollars was intended for the decedent's father, except in so far as the decedent himself told the plaintiff that it was for that purpose. It was said in the *Deni* case that the declarations of the decedent were not competent evidence of contributions by him to his mother's maintenance. If we leave out this evidence there is no proof whatever of any contribution made by the decedent to the support of his father, and therefore no proof of any pecuniary loss.

The judgment should be reversed and a *venire de novo* issued.

COLLINS & CORBIN,  
Attorneys of Plaintiff in Error.

GILBERT COLLINS,  
GEO. S. HOBART,  
Of Counsel.



THE NEW YORK

LIBRARY OF THE

ASTOR LENOX AND TILDEN FOUNDATIONS

1215 Broadway, New York, N. Y.

1900

1901

1902

1903

1904

1905

1906

1907

1908

1909

1910

# INDEX.

## PLEADINGS, ETC.

	PAGE
Writ of Error .....	1
Return .....	2
Declaration .....	2
Plea .....	6
Judgment .....	6
Motion for Non-suit .....	26
Motion for Direction of Verdict .....	35
Request to Charge.....	36
Charge.....	37
Exceptions.....	41
Interrogatories—Set No. 1.....	42
Answer to Interrogatories.....	43
Interrogatories—Set No. 2.....	44
Answer to Interrogatories.....	45
Assignment of Errors.....	47

## PLAINTIFF'S WITNESSES.

### SEVERO PALSTO.

Direct examination.....	9
Cross.....	12
Re-direct .....	15

### GEORGE M. HAYNES.

Direct examination.....	15
Cross.....	18

### JOHN HANGLEY.

Direct examination .....	19
Cross.....	21

### MICHAEL HENRY.

Direct examination. ....	23
Cross.....	24

VINCENZO BITZZUDI.

Direct examination.....	24
Cross.....	25
Re-direct .....	25
Re-cross .....	25

MARCO POLO.

Direct examination.....	26
-------------------------	----

MARCO POLO (recalled)

Direct examination.....	29
Cross.....	29
Re-direct .....	30

DEFENDANT'S WITNESSES.

GILANDO DI CHICHIO.

Direct examination.....	31
-------------------------	----

NICK YELANGO.

Direct examination.....	31
Cross.....	32

FRANK PALOZZO.

Direct examinaaion.....	32
Cross.....	33

## WRIT OF ERROR.

(Returnable April 2, 1907).

STATE OF NEW JERSEY:

The State of New Jersey to the Judge  
of the Circuit Court in and for the  
County of Hudson,

GREETING:

Forasmuch as in the record and proceedings, and also in the giving of a judgment in a certain plaint which was in our said Circuit Court before you, between Marco Polo, administrator of Vincenzo Falcone, plaintiff, and the Palisade Construction Company, defendant, in an action of tort, manifest error hath intervened to the great damage of the said defendant, as it is said; we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed, that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Justices of our Court of Errors and Appeals, in the last resort in all causes, at Trenton, on the second day of April, nineteen hundred and seven, together with this writ, that the record and proceedings aforesaid, being inspected, we may cause to be further done thereupon for correcting that error what of right and according to law ought to be done.

WITNESS, William J. Magie, Esq., our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the fourteenth day of March, nineteen hundred and seven.

COLLINS & CORBIN,  
Attorneys.

S. D. DICKINSON, Clerk.

**RETURN.**

The answer of Benjamin A. Vail, Esquire, the Judge holding the Circuit Court in and for the County of Hudson within named, the record and proceedings of the plaint whereof mention is within made, with all things touching and concerning the same, I send to the Judges of our Court of  
 10 Errors and Appeals in the last resort in all causes, at Trenton, at the day and year within contained in a certain schedule to this writ annexed, as within I am commanded.

B. A. VAIL,  
 Judge.

**DECLARATION.**

Hudson County Circuit Court of the  
 twentieth day of February, A. D.  
 1906.

20 HUDSON COUNTY, SS.

The Palisade Construction Company, a corporation organized under the laws of the State of New Jersey, the defendant in this suit, was summoned to answer unto Marco Polo, administrator of the goods and chattels, rights and credits, which were of Vincenzo Falcone, deceased, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by J. Philip Dippel, his attorney, complains for  
 30 that whereas the said defendant, to wit, on the twenty-eighth day of January, 1905, at the Town of West New York, in said County of Hudson, was, before and at the time of committing the grievances and injuries hereinafter mentioned, contracting excavating and constructing a sewer, and being such contractor in said town and county aforesaid, about five days previous to the injury and grievances hereinafter mentioned, to wit,  
 40 and employed the said Vincenzo Falcone as a ser-

vant and employee to dig and excavate in said sewer for hire, wages and reward, paid by said defendant to said Vincenzo Falcone. That the defendant employed the said Vincenzo Falcone to work under one John——, who was also employed by the said defendant as foreman in said excavation, and who was intrusted with and exercised superintendence over the excavation, and whose 10 sole and principal duty was that of superintendence; and by reason of the negligence of said John——, in superintending the work of blasting rocks with dynamite in said excavation, on or about the twenty-eighth day of January, 1905, while in said defendant's employ the said Vincenzo Falcone, who was at said time also in said defendant's employ in said excavation, was greatly bruised, hurt and wounded and so injured that he died, to wit, on the day and year aforesaid, at West New York 20 aforesaid.

The plaintiff avers that on or about the twenty-third day of January, 1905, Vincenzo Falcone was employed by the defendant to dig and excavate in the sewer for hire, wages and reward, paid by said defendant to said Vincenzo Falcone. That said Vincenzo Falcone was twenty-one years of age, and was not acquainted with and did not know of the dangers of said work, and was not warned by the defendant. That on the twenty-eight day of January, 30 1905, and previous thereto, the defendant had in its employ one Jimmie Deciccio, whose duty it was to blast with dynamite in said excavation.

That said work requires knowledge of explosives, skill and experience; that said Jimmie Deciccio was incompetent, inobedient and careless in the performance of his work; that his incompetence, inobedience and carelessness was known to the defendant and unknown to the said Vincenzo Falcone. 40

That previous to the said twenty-eight day of January, the said Jimmie Deciccio attempted to cause a blast to be made, and that said blast failed to go off. That said Vincenzo Falcone was afterwards, to wit, on the said twenty-eighth day of January, directed to go into the pit about thirty feet below the surface of the street and below the place where said  
10 blast was attempted to be made, and directed to continue his work. Afterwards the said Jimmie Deciccio negligently and carelessly began to remove the charge of dynamite which had failed to explode. That while so carelessly and negligently attempting to remove the dynamite, the foreman, the said John ———, saw the careless manner in which the work was attempted to be done, but did not inform the said Vincenzo Falcone, and that the  
20 said Vincenzo Falcone was so permitted and compelled to work in said pit, while this dangerous work of removing the dynamite was being carelessly done. That the dynamite then exploded, and the said Vincenzo Falcone was greatly bruised, hurt and wounded and so injured that he died, to wit, on the day and year aforesaid, at West New York aforesaid.

That the defendant, on the twenty-eight day of January, 1905, and previously thereto, at West New  
30 York aforesaid, had in its employ one James Filon as superintendent; that he was empowered to discharge and employ men and was superintending the entire work of construction of said sewer in said town of West New York.

That his only duty was that of superintendence; that he, the said James Filon, knew that the charge of dynamite used previous to the said twenty-eighth day of January by said Jimmie Deciccio had failed to go off; that he, the said James Filon, negligently and carelessly permitted the said Jimmie  
40

Deciccio to attempt to remove the same without giving any warning to the said Vincenzo Falcone; that the defendant never had any rules as to the manner in which this dangerous work should be done, but permitted the said Jimmie Deciccio to perform the dangerous work of blasting and removing charges of dynamite, which failed to explode, in any way he pleased. That the said Jimmie Deciccio was permitted to attempt to remove the dynamite in an unskillful, negligent and careless manner, whereby the said Vincenzo Falcone was greatly bruised, hurt and wounded and so injured that he died, to wit, on the day and year aforesaid, at West New York aforesaid. 10

And the plaintiff avers that the said Vincenzo Falcone was unmarried and his next of kin is a father, Carmine Falcone, who is aged and depended upon him, the said Vincenzo Falcone, for support and maintenance, the said Vincenzo Falcone being his only child and support, and that as the next of kin the said father by reason of the premises sustained and suffered great loss, injury and damage, to wit, the sum of twenty thousand dollars. 20

Whereby and by force of the statute in such case made and provided an action hath accrued to the plaintiff, as administrator of the goods, chattels and effects of the said Vincenzo Falcone, for the benefit of the said Carmine Falcone, the father (being the next of kin of said Vincenzo Falcone, deceased), to demand of and from the said defendant the said several sums of money above demanded, in manner and form as is above demanded, and therefore he brings his suit, etc. 30

And the said plaintiff brings into Court here the letters of administration granted to the plaintiff of the goods, chattels and effects of said Vincenzo Fal- 40

cone, deceased, by John E. Moody, Deputy Surrogate of the said County of Hudson, which give sufficient evidence to the said Court here of the grant of administration to the said plaintiff, as aforesaid, the date whereof is a certain day and year therein named, to wit, the twelfth day of January, 1906.

10

### PLEA.

And the said defendant, Palisade Construction Company, by Collins & Corbin, its attorneys, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff has above thereof complained against it, and of this the said defendant puts itself upon the country.

20

### JUDGMENT.

Therefore to try the issue above joined let a jury come before the said Circuit Court, at Jersey City aforesaid, on the twenty-seventh day of February, A. D. 1907, as yet of the term of December, in the year of our Lord one thousand nine hundred and six, who neither, &c., by whom, &c., to recognize, &c., because as well, &c., the same day is given to  
30 the parties aforesaid, at which day before the said Circuit Court come the said parties by their attorneys aforesaid, and the jurors of the jury above mentioned also come, who to speak the truth of the matters aforesaid being chosen, tried and sworn, say upon their oath that the said defendant is guilty as the said plaintiff hath thereof above complained against it, and that they find in favor of the plaintiff and against the defendant, and they  
40 assess the damages of the plaintiff on occasion of the premises, at four hundred dollars and—cents,

over and above his costs and charges by the said plaintiff about his suit in this behalf expended.

Therefore, it is considered that the said plaintiff do recover against the said defendant his damages aforesaid in manner aforesaid found, and also forty-one dollars and eighty-four cents for his costs and charges by the said Court now here adjudged, 10  
and which said damages, costs and charges in the whole amount to four hundred and forty-one dollars and eighty-four cents.

And the said defendant in mercy, &c.

Judgment entered and signed this twenty-seventh day of February, 1907.

BENJAMIN A. VAIL,  
Judge.

20

30

40

# Hudson County Circuit Court

DECEMBER TERM, 1906.

10 MARCO POLO,  
*Admr. et al.,*  
*vs.*  
THE PALISADE CONSTRUCTION  
COMPANY.  
Tort.

MR. SIMPSON, for plaintiff.

MR. HOBART, for defendant.

20 This cause was tried at the Hudson Circuit February 27th, 1907, before Circuit Judge Benjamin A. Vail, with a jury.

30 MR. SIMPSON—I apply to strike out a portion of an answer made to the first interrogatories, second series, proposed by the defendant. The interrogatory is, “What rules did the defendant make or publish to procure the safety of its servants, concerning the treatment of charges of dynamite which failed to explode?” And the answer is, “The defendant made or published no rules, etc.; the matter of the treatment of these charges was left  
in the hands of a man experienced and competent in regard to all the phases of dynamite.” I ask to have that stricken out as it is merely an opinion of theirs as to the ability of the man that they employed.

MR. HOBART—I am willing that all that is not responsive to the question may go out.

40 MR. SIMPSON—Then the answer will be that the defendant had published no rules—

THE COURT—All that is not responsive will be stricken out.

MR. HOBART—We are satisfied with that.

SEVERO PALSTO, a witness on the part of the plaintiff, alleging himself unable to understand the English language, is sworn and testified through an intrepeter as follows:

10

*Direct examination by Mr. Simpson.*

Q. Did you know Vincenzo Falcone in his lifetime? A. Yes.

Q. On the 28th of January, 1906, where were you working? A. In the sewer for James Filon; I was using the shovel; the sewer was at West New York; Vincenzo Falcone was working at the same place; we were together.

Q. What was the company that you were working for? 20

MR. HOBART—We admit it was the defendant company.

Q. Did anything happen while you were working there? A. No.

Q. Was there an explosion there? A. No.

Q. You were sworn at the Coroner's inquest? were you not, into the death of Vincenzo Di Chicia, 30  
A. Yes.

Q. Didn't you say that there was a blast that went off? A. I didn't see anything because I was working.

Q. Did you see Big Jim working on a hole that day? A. Yes.

Q. What did you see Big Jim doing? A. Clean the mine.

Q. What did he use to clean the mine? A. A swab stick and a scrape; we were far away from it. 40

Q. Do you know what a second size drill is? A. Yes.

Q. Did you see Big Jim use a second size drill? A. We didn't see him use it because we were down.

Q. Didn't you say at the Coroner's inquest: "I was working in the sewer back of the bucket, when I saw Big Jim have a second size drill working the drill up and down in the hole?" A. I heard the people say so.

Q. Didn't you say at the Coroner's inquest that you heard it yourself? A. When I came out of the hospital I heard them say so.

Q. Didn't you say that at the Coroner's inquest, taken before George J. Brackner, the Coroner? A. Yes, I said that when I came out of the hospital a man came to my house.

20 Q. Did you say at the inquest, that you saw Big Jim having a drill, working it up and down the hole? A. I saw the scrape, but I don't know whether it was dig or scrape; I was thirteen palme away (the interpreter says a palme is about a foot in Italian measurement).

Q. Did you say at the inquest that you saw Big Jim having a drill and working it up and down the hole? A. I didn't see anything; I thought it was a scrape.

30 Q. Did you say at the Coroner's inquest that you saw Big Jim have a drill, when you were sworn there? A. They told me after; what I know about it.

Q. Did you swear at the Coroner's inquest that you saw it? A. I swear because the people told me so.

Q. Then you swore at the Coroner's inquest to something that was not true, is that right? A. Certainly, they told me so; I was between life and  
40 death myself.

Q. Who do you work for now? A. A nephew of Mike Henry.

Q. After you testified at the Coroner's inquest did any one tell you, for the Palisade Construction Company, that you must not say you saw Big Jim working a drill up and down in the hole? A. There was nobody there.

Q. You know Mr. Dipple? A. Yes. 10

Q. He subpoenaed you to come here, didn't he? A. Yes.

Q. Last Wednesday he served you with a subpoena to come here? A. Yes.

Q. Didn't you tell Mr. Dipple you saw Big Jim on the day of the explosion, use a drill four feet and a half long and an inch and a half thick, in this hole when the blast went off? A. I told him, yes, sir; because knowing that the people told me so. 20

Q. You say you cannot tell what kind of an iron instrument it was; that you were thirteen palmes away, is that right? A. Thirteen palmes deep.

Q. Thirteen palmes away from him, deep, or high, or broad, or thick? A. Yes, sir; deep.

Q. What did this instrument look like to you? A. It looked to me like what we call a scraper, or a swab stick; I was far away.

Q. How long was it, how long was the iron instrument which you saw? A. It could be three or 30 four palmes.

Q. How much is a palme? A. So, (Showing with both hands held apart, which Mr. Hobart on measurement says, indicates about sixteen inches.

Q. How thick was this instrument that you saw? A. Thin iron.

Q. How long after he was using it did you hear the explosion go off? A. Once or twice; we were down in the deep work, and two or three minutes after. 40

Q. What happened when the explosion went off?

A. I was covered with stones; I was under the stones.

Q. Did you see Vincenzo Falcone after that? A. No; they took me as dead upstairs.

Q. Did Mr. Hangley tell you that Big Jim had used the drill?

10           Objected to as immaterial; that there is nothing to show that Hangley had any authority to speak to bind the company.

Q. What was Mr. Hangley there? A. He was the corporal; boss; he was the boss.

Q. You say that you swore at the Coroner's inquest that somebody told you that Big Jim was using the drill; now, who told you that he was using a drill? A. They are in Italy, those people that told  
20 me; they worked with me.

Q. Who else was working in the place where you were working, besides you and Falcone? A. Big Jim, I, the man that is dead, and one is in Italy now.

Q. What is the name of the man that is in Italy? A. I know him by the name of Louie; on the job.

*Cross-examination by Mr. Hobart.*

30           Q. How long had you worked for the company before the accident happened? A. About a year.

Q. How long had you known Vincenzo Falcone? A. It could be a week or three or four days, because he worked with me.

Q. Did you know him before he came to work with you on this special job? A. He worked for Rafael Capono; that is the first time I saw him.

Q. What was his business? A. Contractor for sewers.

40           Q. How long had the dead man worked for

Capono, building sewers? A. It could be a month or so.

Q. How long had you known Big Jim? A. Six or seven years.

Q. What was Big Jim's business? A. To see that the blasting would go off.

Q. What? A. To do blasting.

Q. Do you remember the day of the week on which this accident happened? A. I don't remember; it was about half past eight or nine in the morning.

Q. Did you know before the accident that one of the charges had failed to explode? A. Yes, we know it because the boys say so.

Q. Was the dead man present when the boys said so? A. Yes, he know.

Q. How did you know that Vincenzo, the dead man, knew that the blast had not gone off? A. Because he saw it was a mine there; because he saw the blast did not go off.

Q. Was there anything there to show whether or not there was a blast that had not exploded?

MR. SIMPSON—I object that this is not cross-examination. It is part of the main case of the defendant.

MR. HOBART—It is part of the circumstances, part of the surroundings there.

Q. Was there anything there by which you could tell whether or not the blast had exploded? A. The boss said that the blast was loaded.

Q. Was there anything there by which you could tell, wires, anything of that kind? A. There were wires there.

Q. Could they be seen? A. Yes, so long (indicating about four or five inches).

Q. Do you know whether Vincenzo saw the wires?

Question objected to. Question withdrawn.

Q. Was anything said to you or Vincenzo about the charge not exploding, before the accident? A. No, sir.

Q. Did this man Vincenzo know any English?

A. A little bit, not much.

10 Q. Did your boss tell you about the charge in English or in Italian? A. He talked in American to me.

Q. Did you tell anybody? A. Yes.

Q. Who did you tell? A. Jimmy, the man that is dead, and then the other two persons; the man from Italy named Nick; I told him in Italian that we got to look out, there is a loaded blast there.

Q. What were you and Falcono, the dead man, doing when the explosion came? A. He was thirteen feet down, shovelling dirt.

20 Q. How was the dirt carried up? A. With a box.

Q. You said something about Big Jim using a scraper, is this the thing he was using (showing witness what Mr. Hobart calls a scraper)? A. Sure.

Q. And this other tool which I show you, what do you call that? A. A swab stick.

Q. Did you go to the hospital after the accident?  
30 A. Yes.

Q. Did you give your testimony before the Coroner while you were in the hospital? A. In the hospital nobody came to see me.

Q. Where were you when you made your statement to the Coroner? A. In the house.

Q. Weren't you in the North Hudson Hospital?  
A. North Hoboken, Union Hill.

Q. It was a hospital, wasn't it? A. Yes.

Q. Were you sick at the time? A. Yes.

40 Q. How long after the accident did you make the

statement to the Coroner? A. It seems to me eight days after that I came out of the hospital.

Q. How long after you were hurt did you make a statement to the Coroner? A. I don't remember very well.

*Re-direct examination by Mr. Simpson.*

Q. You told me you were so far away from Big Jim that you could not tell whether it was a scraper or a drill that he was using; you told Mr. Hobart you were sure it was a scraper. How do you explain the contradiction? 10

MR. HOBART—There is no contradiction. He testified that Big Jim was using a scrape; that is not a fair statement of the evidence.

THE COURT—Let him answer.

20

A. Yes, I saw it was a scraper.

Q. Why did you say to me you could not tell what it was? A. I said it was a scraper first, and I didn't say it was a drill.

GEORGE M. HAYNES, called on behalf of the plaintiff and sworn, testified as follows:

*Direct examination by Mr. Simpson.*

Q. Where do you live? A. 315 Sixth street, Hoboken. 30

Q. Were you working for the Palisade Construction Company on the day there was an explosion of an unexploded charge and two men were killed?

A. I was.

Q. Where were you employed? A. I was employed on top of the bank, 16 feet from the bottom.

Q. What was your duty? A. Running a steam drill.

40

Q. Did you see any of this accident? A. I did.

Q. What part did you see? A. I didn't see the explosion, because my back was to it. I turned around, the hose was bursted, and about a couple of minutes after that the smoke cleared away, and I saw Big Jim lying on top of a pile of muck.

Q. How far from the hole he had been working  
10 on? A. Six feet.

Q. Did you see him working at the hole before it went off? A. I did.

Q. After the explosion did you go to him? A. No, I went and got a big drink of whiskey, then I came back again. I didn't go near his body at all.

Q. How near was he to you when you first saw his body? A. Fourteen feet.

Q. Was there a drill shot through his head? A.  
20 I don't know.

Q. Did you see a drill there? A. No, sir; I did not.

Q. Did you see any instruments there? A. Yes, I seen the scraper afterwards, laying back of the hole, about a foot or two feet from the hole.

Q. Did you see the swab stick? A. He had a swab stick there before the explosion; I didn't see it after the explosion.

Q. Did you see whether he had a drill there or  
30 not? A. No, I didn't see any drill; I seen a scraper and a swab stick before the explosion.

Q. Where was the scraper before the explosion?  
A. In Jim's hands.

Q. Where was the swab stick? A. Laying down over the side of the bench; the stick was on the floor.

Q. Did you see the drill? A. No.

Q. Did Jim have anything at the hole besides the scraper and the stick? A. That's all I seen.

Q. Did you watch carefully? A. Yes.

Q. Why? A. Because I didn't care to go up in the air.

Q. Dynamite does not go up? A. Yes, a good deal of it goes up.

Q. Dynamite itself goes down in the ground? A. It goes up.

Q. Were you watching Big Jim pretty close? A. I was. 10

Q. Yet you didn't know anything about the danger of an explosion until it was all over? A. I know there is always danger. I don't care how careful you are, wherever there is dynamite powder there is danger.

Q. Did you see Vincenzo Falcono after the accident; the Italian that was killed? A. Yes, after they dug him out underneath the pile of muck I seen him lie on the top of it.

Q. Did you see him before the explosion? A. I 20 did.

Q. Where? A. He was on my left.

Q. How near was he to this hole that Jim was working on? A. About eighteen feet.

Q. Directly underneath it? A. No, there was a bank sixteen feet below where Jim was, but he was back eighteen feet from it.

Q. Was he working in the same excavation that Jim was? A. Yes.

Q. How much lower than the hole was he? A. 30 Perhaps about fourteen feet.

Q. How long was Big Jim working on the hole before it went off? A. About ten minutes.

Q. Was there any way for him to get out of the hole except coming up past Jim? A. Yes, they could climb up over the stones at the end of the sewer.

Q. How long have you been working for this company? A. I think it was the September before that I went to work for the company. 40

Q. How long had this Italian been working there?  
A. I don't know.

Q. When was the first time you saw him there?  
A. I think the week before.

Q. He had been working there about a week when he was killed? A. That's all I know about it.

10 Q. What was his work? A. Picking and shoveling.

*Cross-examination by Mr. Hobart.*

Q. Are you working for the defendant company now? A. No, I am janitor of the Holy Innocents Church, and was at the time of the accident, but I had a man on my place; I lived at the church then and live there now.

20 Q. Did you continue to work for the company after the accident? A. Yes, we finished the job; I done the drilling and blasting afterwards, and when the job was finished I quit; there was nothing more for me to do.

Q. Is this the sort of scraper and swab stick that Big Jim was using? A. I think it is a little longer than the one Jim had.

Q. A swab stick is only a stick hammered up at one end? A. Yes.

30 Q. Did you know there was an unexploded charge? A. I did.

Q. How did you know? A. Because the rock was not broken.

Q. Was there any sewer there? A. Yes, since the dirt got cleaned away. The sewer was in the hole there.

40 Q. How long a time was it from the time that Big Jim started to work until the time the accident happened? A. From the time he started it was not more than ten or fifteen minutes till the explosion.

Q. Could you see Big Jim from where you were working? A. Yes.

Q. Did you see him? A. Yes.

Q. Was there any talk that you heard with this dead man Vincenzo about the unexploded charge?

A. I think pretty much all the men knew it was there.

Q. Was there any talk that you heard? A. No, 10  
but I know there were talking of it, but what they were saying I could'nt tell you as they were talking Italian; I could not understand Italian; I am sure that is what they were talking about.

Q. Big Jim was killed? A. Yes, and Frank; we heard groans from him, and I got down and helped take him out; that was the man that was just on the witness stand.

JOHN HANGLEY, sworn on behalf of the plaintiff, 20  
testified as follows:

*Direct examination by Mr. Simpson.*

Q. On the twenty-eighth day of January, where were you employed? A. By the Palisade Construction Company, Sixth street, West New York.

Q. What were you doing there? A. Standing round there to see that the work was done right; I was looking after the men.

Q. Were you the man in charge of the work there? A. In part of it, yes; in the construction 30  
of the sewers I was in charge of everything except in using dynamite. Big Jim was in charge of that.

Q. Was Vincenzo, the dead man, working there? A. Yes; he was down in the sewer shoveling and digging the time of the accident.

Q. There was an unexploded charge of dynamite on the work at that time? A. Yes.

Q. How long had that unexploded charge been 40

there? A. Since the Tuesday before; this was Saturday morning; the first attempt to get it out was on Saturday morning.

Q. Who started to get it out? A. Big Jim, the blaster.

Q. You had nothing to do with that? A. Nothing at all, only to let him know in the morning  
10 that the blast had not gone off; I let him know that on Saturday morning, then he went to work to get it out; in order to get it out he went to work first and made a platform on the top of the bench so he could stand on it; after doing that I believe he started to get the tamping and the dirt out of the hole; then after that he was supposed to put another stick of dynamite in it and fire it; while he was to work there it went off; this was about a quarter to eight.

20 Q. What time did Vincenzo, the dead man, go to work in the sewer? A. Seven o'clock.

Q. You put him to work? A. I put them all to work.

Q. What were your instructions? A. I didn't give them any instructions; he was working there in the same place with Frank the day before, and that morning he went ahead to do his work; he knew what he had to do; the two of them together.

30 Q. Do you know what caused the explosion? A. No.

Q. Were you there when the explosion occurred? A. I was standing looking at them loading the bucket, right close to Big Jim, and I seen they had pretty near all the stuff that was in the sewer in the bucket, and I went to the engineer to give him the signal to take the bucket up at the time it occurred.

40 Q. Did you go to see where Big Jim was? A. I seen where he was; he was on top of the stone and dirt.

Q. Any drill with him? A. No, sir.

Q. Had the drill gone through his head? A. Not that I know of.

Q. Did you see his drill round there? A. No.

Q. Did you see him to work on the hole with-drawing the dirt? A. I saw him making a plat-form to stand on, what he used drawing the hole I don't know; I didn't see him drawing the hole; I know he had a scraper, and I know he had a sledge to build a platform for him to stand.

Q. Did he have a drill there? A. I don't know; I don't know sure if he had a scraper; I could not tell if he had a drill there; I don't think he had, because I never saw him using a drill at that work.

*Cross-examination by Mr. Hobart.*

Q. Were there scrapers there? A. Yes. we had four foot scrapers and fourteen foot scrapers; they were right on the bench ready for him to use, and also a swab stick. 20

Q. How long had Big Jim worked there? A. A long time before I was there.

Q. Did he have full charge of the blasting? A. Yes.

Q. Did you direct him where the blasting should be done? A. No, sir; I never gave him any orders.

Q. Who ordered him? A. I don't know.

Q. Did you have anything to do with drilling holes? A. No, sir; Big Jim had charge of that. He had charge of pointing the holes, and set the machine to point the holes that he thought was the best place. 30

Q. A steel drill? A. Yes.

Q. Did you know whether or not the charge was exploded? A. I knew it had not exploded.

Q. How did you know? A. Because we worked there on Friday before with three men, and I found 40

out the wires were there and the rock was not disturbed.

Q. Do you know how long the dead man, Vincenzo, had been working there? A. I think he was there a week, or maybe more.

Q. Had there been any blasting going on while he was there? A. I think so; we generally blast  
10 every other day.

Q. How are these blasts set off? A. Set off with a battery and wires—electricity.

Q. When you went to work there, Saturday morning, did you see the wire then? A. Yes; I saw it the Friday evening before I knocked off.

Q. Did you see it Saturday morning? A. Yes.

Q. Did you see Vincenzo do any work round the wire, or near it, before the accident happened? A. I seen him get hot water; I get mixed up between the men; I used to call him Little Jim, and  
20 the other fellow Big Jim; I mean the man that got killed; no; he didn't do anything around that work.

Q. What did you see Little Jim do? A. I seen him working the same as the other men, picking and shovelling, and loading the bucket.

Q. About how deep was the sewer at that time? A. About thirty feet at that time.

Q. Had you ever seen Big Jim withdraw charges  
30 before? A. Yes.

Q. How did he do it? A. With a scraper and swabstick, and warm water.

Q. Did you notice what he was doing this time? A. I did not take very much notice of him that working, because I was going to log the sewer to get ready for the charge at the time the explosion occurred.

Q. These men that were working down in the sewer, including Little Jim, under whose orders  
40

were they working? A. I told them to go down, Little Jim (I called him Jimmie); he went down in the sewer; I don't think I told him to go down, but it was under my direction anyhow, but I know he was working in the same place the day before.

Q. Had you said anything to him the day before? Did you tell him where to do his work? A. Yes; we were cleaning the sewer all day; I was giving him orders. 10

Q. Had he been under your orders while on the job? A. Yes.

Q. Do you know whether this dead man, Little Jimmie, and Frank happened to be working in the bottom of the sewer while Big Jim was working on the charge? A. Yes; there was some stuff that would stop the force of the blast at the bottom of the sewer, and we had to clear that out before the charge was set off. 20

Q. So that the charge would be more effective? A. Yes; so as to take everything out of the bottom.

MICHAEL HENRY, sworn for the plaintiff, testified as follows:

*Direct examination by Mr. Simpson.*

Q. Are you an officer of the Palisade Construction Company? A. Yes; President. 30

Q. Did you employ Big Jim? A. Yes.

Q. What did you employ him as? A. Blaster.

Q. You left everything in connection with the handling of dynamite to him? A. Yes, sir.

Q. He had full charge of all the work connected with the dynamite? A. Not all of it.

Q. You were sworn at the Coroner's inquest? A. Yes.

Q. Didn't you swear, at the inquest, that he had full charge? A. Yes; where he worked; he worked 40

in three or four places.

Q. At the work that he was engaged in, everything was left to him, so far as dynamite was concerned? A. Yes.

Q. You didn't pretend to know anything about it? A. No, sir.

Q. Made no rules for the handling of it? A.  
10 No, sir.

Q. You made no rules with reference to the men handling the dynamite for the safety of your men? A. No rules.

Q. You left it to Big Jim? A. Yes.

*Cross-examination by Mr. Hobart.*

Q. How long had Big Jim been working on the job when the explosion happened? A. He had been working for us twenty years.

20 Q. On this particular job? A. Since it started; a year or a year and a half.

Q. During all that time that he worked for you, what did he do? A. The same.

Q. Had charge of the dynamite? A. Always.

Q. Did Big Jim ever have an accident before? A. No, sir.

VINCENZO BITZZUDI, called for plaintiff and sworn, testified as follows:

30 *Direct examination by Mr. Simpson.*

Q. Where do you live? A. West New York; Jackson street.

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

Q. What is your business? A. Blasting with dynamite.

Q. How long have you been using dynamite? A. Twelve or thirteen years I have been using dynamite making blasts.

Q. Does it ever happen that the dynamite does not go off? A. Yes.

Q. Then what do you do? A. Get the scraper and scrape it right out, also the swab stick.

Q. Any other way of taking dynamite out of a hole? A. No.

Q. Unless you are careful how you do it it is liable always to go off? A. It is always liable to go 10 off.

*Cross-examination by Mr. Hobart.*

Q. There is no way in which you can prevent it going off? A. It never went off with me, only once. I suppose I was lucky.

Q. You know lots of cases where it did go off? A. Yes.

Q. You don't know any reason for it? A. No, sir.

Q. Can tell what causes it? A. No, sir. 20

*Re-direct examination by Mr. Simpson.*

Q. Do you know the custom with reference to laborers, men who are working around the place where you are trying to get the dynamite out, the custom to protect them? A. If you think it is dangerous tell them to get out of the way.

Q. Do they do that all over in the blasting business? A. I do it myself.

Q. Do other people do it? A. I don't know. 30

*By Defendant.*

Q. You are not a contractor? A. No, I am only a dynamite man.

Plaintiff reads and offers in evidence the first set of interrogatories, and then reads and offers in evidence the second set of interrogatories.

MR. HOBART—We admit that the plaintiff's intestate was killed by that explosion. 40

MARCO POLO, the plaintiff, called and sworn, testified through Italian interpreter, as follows, the witness alleging himself as being unable to understand and speak the English language:

*Direct examination by Mr. Simpson.*

Q. Are you the administrator of the dead man?

10 A. Yes.

Q. How old was he when he died? A. Twenty-one or twenty-two years old.

Q. Was he single or married? A. Single.

Q. Was his father and mother living, or his brothers? A. He still has a father and mother living.

Q. Has he any brothers living? A. No, sir.

Q. No sisters? A. No, sir.

20 Q. How old are his father and mother? A. The father would be about sixty-eight, and the mother sixty-nine.

Q. Did you know the man pretty well when he was alive? A. I know him on the other side, in the country where he came from, and also in Pennsylvania.

Q. Was he a healthy man or a sickly man? A. A healthy man; I also have pictures of him.

Q. Do you know how much he earned a day?

30 Defendant admits that the intestate earned \$1.75 a day, while he worked for this company.

PLAINTIFF RESTS.

Defendant asks for a non-suit on the following grounds: 1. Contributory negligence is shown on the part of the deceased; 2. No negligence is proven against the defendant; 3. Negligence, if any, was that of a fellow-servant; 4.

40 The evidence shows that if there is any

inference that Big Jim might have been using improper tools, it also appears that proper tools were supplied by the defendant, and failure to use proper tools so supplied was not chargeable to the master who had performed his duty in supplying proper tools; 5. The risk was assumed by the plaintiff's intestate, even if he did not know that the charge was unexploded, but he did in fact know that the charge was unexploded; 6. There is no proof that Big Jim was in any way incompetent, the proof being that he had worked for this company twenty years and never had an accident before; 7. There is no proof as to the manner in which the accident happened, therefore no proof of negligence against the defendant, it being shown by the plaintiff that such things happen without any reason; 8. There is no proof of any pecuniary loss sustained by the next of kin. My point being that there is no proof that the next of kin have lost anything.

THE COURT—It does not appear in this case, that the father, who is the next of kin, was dependent on the son.

MR. HOBART—I shall ask the Court to instruct the jury, if the Court does not nonsuit, that the recovery must be limited to six cents.

MR. SIMPSON—I want to open the case to put in proof that he supported the father and mother.

THE COURT—It does not appear whether the

father and mother lived in this country or not.

MR. HOBART—There is no proof of any pecuniary loss as the case now stands.

10 MR. SIMPSON—We seek to recover because they attempted to do a dangerous thing, knowing it was dangerous, without providing means of giving warning to the men of the danger, and because of this failure to do this, and there was an explosion and lack of knowledge of the danger, he was killed.

20 MR. HOBART—If the failure to take proper care was that of a fellow servant there can be no recovery. If there is any negligence it is that of Big Jim, but the defendant employed the best man they could get and supplied him with proper tools; if Big Jim did something which caused the accident, that is the act of a fellow servant. If any custom could be shown to give warning, from which any inference could be drawn that the deceased was relying on such custom, that would be a different case from this.

30 THE COURT—It seems to me there is enough in this case to go to the jury.

Defendant prays exception.

MR. SIMPSON—I want to put in further evidence.

THE COURT—I will allow you to do that.

To which ruling the defendant prays that an exception may be allowed, and it is allowed, and signed and sealed accordingly.

B. A. VAIL, [L. S.]  
Judge.

MARCO POLO, being recalled by the plaintiff, testified as follows:

*Direct examination by Mr. Simpson.*

Q. Did you know the father and mother of this dead man in Italy? A. Yes.

Q. Did you come to this dead man with a message from his father and mother, about sup- 10  
port? A. Yes.

Q. Did you give him that message? A. Yes.

Q. Do you know whether he sent any money to his father and mother? A. Twenty days before he died he sent his father through me, twenty dollars.

Q. Before that time did he send any? A. Yes.

Q. How do you know? A. He told me.

Defendant objects to this.

Q. Besides this twenty dollars, how much did he 20  
send before that time? A. That I could not know.

Q. Did you know of any sum besides the twenty dollars that he sent? A. His mother told me.

Defendant objects to the last answer, and the Court strikes it out.

Q. So that one pay day he sent that money? A. He sent that much in two—fifteen days.

Q. In two fifteen days pay he sent that much? A. In four weeks he sent twenty dollars. 30

*Cross-examination by Mr. Hobart.*

Q. When was it sent? A. Fifteen days before he died.

Q. How do you know it was four weeks' pay? A. As soon as he got his money he would pay his board, and the rest would be in my hand, and he had two bills of ten dollars each; I was going to send it before Christmas, but sent it after.

Q. For whom did he say the money was? A. 40

When you make an address, you always make it to the company.

Q. Did this man tell you who the money was for—the father or the mother? A. He sent the money to his family; that means father and mother.

Q. Did he say whether the money was for his  
10 father alone, or for the whole family? A. The father and the mother.

Q. Was it a Christmas present? A. He did not make it in time to send before Christmas, because he want to make that money.

*Re-direct examination by Mr. Simpson.*

Q. What did he say, if anything, about having  
20 been in the habit of sending money to his father, whether or not he had sent money to his father before that time?

Question objected to.

Q. When this man gave you the twenty dollars to send to his father in Italy, did he tell you anything else besides what you have told us?

Question objected to as immaterial. Question admitted.

To which admission defendant prays that an  
30 exception may be allowed, and it is allowed, and signed and sealed accordingly.

A. No, sir.

PLAINTIFF RESTS.

THE COURT—What verdict do you think you are entitled to now?

MR. SIMPSON—He sent twenty dollars out of one  
40 month's pay, not as a Christmas present, but in response to a request for support; twenty dollars out of sixty dollars, one-third of his month's pay, he sent in response to a request for support.

THE COURT—I will allow the case to go to the jury.

MR. HOBART—I renew my motion for a non-suit, including the ground that there is no pecuniary loss sustained, and if your Honor allows the case to go to the jury, then I pray an exception; which is allowed, and signed and sealed accordingly.

GILANDO DI CHICHIO, sworn on behalf of defendant, testified as follows:

*Direct examination by Mr. Hobart.*

Q. Are you any relation to Big Jim? A. My brother.

Q. Have you ever seen him work with dynamite? A. We worked, my brother and I, thirty-five years in Italy as dynamiters.

Q. Ever see Big Jim withdraw charges that had failed to explode? A. Yes. 20

Q. What kind of tool did he use? A. A stick and a scraper, and lukewarm water.

Q. Ever know him to have an accident while withdrawing an unexploded charge? A. No.

NICK YELANGO, sworn on behalf of the defendant, testified as follows:

*Direct examination by Mr. Hobart.*

Q. Did you know Big Jim? A. Yes; I know him about eighteen or nineteen years. 30

Q. What was his business? A. Blasting.

Q. How long has he been in that business? A. Ever since I know him.

Q. Ever work for him? A. Yes; a couple of years.

Q. Ever see him withdraw unexploded charges? A. Yes.

Q. What kind of tools did he use? A. A wooden stick and a scraper, like these tools in Court. 40

B. A. VAIL, [L. S.]  
Judge.

Q. Did Big Jim ever have an accident withdrawing an unexploded charge? A. I never seen it.

*Cross-examination by Mr. Simpson.*

Q. A man must be very careful to take out the dynamite? A. Yes; he was a very careful man.

Q. Any man has to be careful? A. Yes; take it  
10 out a little by little, water, stick, fraid of iron.

Q. It is very dangerous work. A. Yes.

FRANK PALOZZO, (Vincenzo Bitzzudi) recalled by defendant, testified as follows:

*Direct examination by Mr. Hobart.*

Q. You said that you had some talk with the dead man before the accident—tell us everything that was said about the unexploded charge? A. I told the man that there was danger; I was there  
20 myself, and we were all afraid.

Q. Was there anything said about the charge, whether or not it was exploded? A. The dead man cannot contradict; he has already gone from this.

Q. Did you see Big Jim working? A. Yes, I saw him.

Q. Did you know what he was doing? A. To clean the blast.

Q. Was anything said by you to the dead man as to what Big Jim was doing?

30 Question objected to as leading. Question admitted.

Q. Yes; we both knew it.

Q. Was anything said by you to the dead man? A. He told me about it.

Q. Who did, the dead man? A. Yes.

Q. What did the dead man tell you? A. He told me "Frank, here is a loaded blast, we have got to look out."

40 Q. Did he tell you anything else as to how he

knew it was loaded, or anything of that sort? A. That is all.

Q. Did he say anything about what Big Jim was doing? A. To clean the hole of the mine.

Q. When you went to work that morning of the accident, what did the dead man tell you about the blast?

Question objected to; it assumes that the dead man told him something, and it is ambiguous. 10

Q. Did you and the dead man go to work that morning of the accident together, did you go together? A. Yes.

Q. How long were you working before the accident happened? A. At seven o'clock we went to work and this blast exploded about eight or half-past eight. 20

Q. While you were working did the dead man say anything to you about Big Jim? A. Only told me that he was cleaning this blast.

Q. Told you that who was cleaning it? A. Big Jim.

*Cross-examination by Mr. Simpson.*

Q. After you were on the stand did anybody take you out in the hall and tell you what you should come in and testify to? A. No, sir; nobody. 30

Q. Who did you talk to after you left the stand this morning? A. Nobody.

Q. You didn't talk to anybody since you left the stand, you haven't spoken to a man, is that right? A. I didn't talk to anybody but the master.

Q. Who? A. Jim Filon.

Q. Who is Jim Filon? A. The master; he is the contractor.

Q. He was the boss on the day of the accident? A. He is not a boss; he is a contractor. 40

Q. Did he tell you to come back and say that the dead man had told you that Big Jim was cleaning the hole on the day he was killed? A. The dead man told me.

Q. I am talking about to-day. You talk English, don't you—you talked English to Mr. Dippel, didn't you? A. A little bit.

10 Q. Who were you talking to when you went out of here a little while ago? A. Nobody.

Q. Were you talking to Filon? A. Yes.

Q. Did you talk to Filon about what you have told us just now? A. No, sir; I tell nothing.

Q. Didn't say a word about what you have said just now, did you? A. No, sir.

Q. When you went to work you saw Big Jim cleaning out the hole? A. Yes, cleaning the hole.

Q. What time did you go to work? A. About  
20 seven o'clock.

Q. What time did he tell you? A. Seven o'clock.

Q. Don't you know Big Jim didn't begin cleaning the hole out until eight o'clock? A. No, sir.

Q. Don't you know he didn't begin to clean out the hole until eight o'clock? A. He started eight o'clock to work.

Q. You say the dead man told you at seven o'clock that he was cleaning out the hole? A. No seven at all.

30 Q. Did you ask Mr. Hobart anything about the danger of your being arrested for perjury? A. Who?

Q. For swearing falsely at the Coroner's inquest? A. No, sir.

Q. Did you say that you were not talking to anybody but Filon out in the hallway? A. I talk to nobody only to Mr. Filon.

Q. You did not talk to Mr. Hobart, this gentleman (pointing to Mr. Hobart)? You didn't talk  
40 to him, did you? A. No; I never talked to him.

*By Mr. Hobart.*

Q. How long before the accident did the dead man talk to you about Big Jim?

Question objected to, that this has all been gone over.

A. Seven o'clock in the morning he tell me.

MR. HOBART—I admit that I asked the witness if he had told all that was said. 10

MR. SIMPSON—Will you admit that you were talking to this last witness?

MR. HOBART—Yes.

DEFENDANT RESTS.

Defendant moves for the direction of a verdict on the grounds stated on the motion to non-suit. I want to emphasize the point that it now appears clearly that the deceased knew that Big Jim was in the act of withdrawing the charge, was working on it, and it also appears now, as it did not appear in the plaintiff's case, that Big Jim was a man of many years' experience, had never in twenty years had an accident. There was no reason to suppose when he attempted to withdraw this charge that there was likely to be an explosion; there was nothing to charge the defendant with any notice, or give them any reasonable apprehension that there might be an accident when this same Big Jim was working there. 20 30

THE COURT—I will refuse to direct a verdict for the defendant.

To this refusal the defendant prays that an exception may be allowed, and it is allowed, and signed and sealed accordingly.

B. A. VAIL, [L. s.]  
Judge.

MR. HOBART—I request the Court to charge that if the jury find a verdict at all against the defendant, it can be only for nominal damages, to wit, six cents.

Counsel sum up.

10

20

30

40

**CHARGE.**

GENTLEMEN OF THE JURY:

The plaintiff in this case sues as administrator of a laborer who was killed in the quarry of the defendant company in January, 1905. His death was caused by the unexpected explosion of a charge of dynamite, which it seems was a part of the charge which had not exploded at the time the general charge was set off, and a workman in attempting to take out the unexploded stick of dynamite caused it to explode, resulting in his own death and the death of the plaintiff's intestate. 10

It is the duty of a master to provide a safe place to work and proper instruments for his servants to work with. Of course, that rule is qualified by this, that the workman takes upon himself the risks and dangers which are incident to his employment, which are obvious and which can be perceived by him in the exercise of his senses, in the exercise of ordinary care. 20

You will see that the law lays down the rule in the first place, that it is the duty of a master to provide a safe place for his workmen to work, and if the place in which the work is to be carried on is a dangerous one then the employer is charged with the duty of greater care to see that the servant is amply protected. In a case of this nature, where explosives are used, he must see that his servants have ample opportunity to put themselves in a place of safety before the discharge of the explosive. It is also a rule of law that a servant who is injured by the negligence of a fellow servant cannot recover against the master, but that is qualified by this, that if the master selects an agent to perform this duty for him and the agent fails to exer- 30 40

cise reasonable care and skill in its performance, the master is responsible for the fault of the agent. So, if in the case which you now have under consideration, the defendant company in the exercise of the reasonable care which they are bound to exercise, placed some man in charge of this dangerous work—the exploding of dynamite, or taking  
10 out charges which had failed to explode,—who failed to exercise the care which the law charges upon the master, and this accident followed because of that failure, the master cannot relieve himself of responsibility upon the ground that the accident was caused by the negligence of a fellow-servant.

Now, you must take this case that you have before you, and you are to say in the first place whether you think that the master exercised reasonable care in providing a safe place for this man  
20 to work. If the defendant knew, or had reason to know that these charges of dynamite which had failed to explode were liable to go off when the men were trying to take them out, and so cause injury, it was its duty either to adopt a system of rules which would enable their workmen to get into a safe place before the charge could possibly be exploded, or if it did not adopt rules it was still its duty to see that a proper warning was given to its  
30 servants to enable them to get into a place of safety. Of course, if it failed to perform that duty and the servant himself knew that the place where he was working was dangerous, and he nevertheless saw fit to go and work there, having notice that this charge was liable to go off prematurely and injure him, if nevertheless he continued to work in that place where he was afterwards injured, the law says that he assumed the risk, and if he assumed the risk he cannot, nor can his administrator, call  
40 upon the master to respond.

Now, those, I think, gentlemen, are all the rules of law covering this case. You must find, in the first place, whether or not the defendant company, who is the master in this case, had exercised that reasonable care which the law charges upon it for the safety of the man who was killed. If you find that it did that, that ends the case, and your verdict will necessarily be for the defendant. If you find that it delegated that duty which the law cast upon it, to one of its servants or employees who, as one of the witnesses testifies, had entire charge of that branch of the work, and an accident resulted from his negligence, that negligence does not relieve the master. But if, notwithstanding that, the man who was killed knew, or had reason to know, that the place where he was going to work that morning was a dangerous one to work in under the circumstances, and if you believe that he knew, at the time he went to work there, that the man who was known as Big Jim, and who himself was killed, was endeavoring to take this charge of dynamite out, and that he had reasonable cause to believe that might result in an explosion, or might result in injury or death to him, and he nevertheless saw fit to go to work there, he could not come into Court and ask for damages, and if he could not, neither can his administrator now, the injury having resulted in his death.

Now, if you should find the defendant company in this case was guilty of negligence, either through failing to give proper warnings or failing to adopt proper rules for the safety of its men who were working in this place, and you should find further from the evidence in the cause that the plaintiff's intestate, that is, the man who was killed, was not guilty of contributory negligence, then you come to the question of damages.

Up to the passage of what is known as the Death Act, no action of this nature could be maintained. But the law now provides that where a person is killed through the negligence of some other person, an action may be maintained, and the next of kin, whoever it may be—wife, children, father, or whoever the next of kin may be, may recover such  
10 sum as represents the pecuniary loss suffered by reason of the death of the intestate; that is, a reasonable money expectation such as you think the next of kin would have received from this person had he lived; that sum you would have a right to give by your verdict.

Now, here was a young man, twenty-two or twenty-three years of age, a foreigner; his father is the next of kin, and whatever sum you may  
20 give will necessarily go to the father. The father has never been in this country. He is now sixty-eight years of age. The evidence shows that the intestate sent him twenty dollars; it does not appear that he ever sent him any more. If he and his father were in this country, and the father required his support, and the young man failed to give it to him, his father could go into Court, and by order of the Court compel him to furnish the  
30 proper pecuniary support. If you should find a verdict for the plaintiff in this case, you can only find a verdict for such sum as you would have reason to believe, under the evidence, the father lost by the death of the son. If you can say what that is, from the evidence in the case, and you think the plaintiff is entitled to a verdict at all, let that be your verdict and nothing more.

Defendant prays exception to the following parts of the charge.

*First*—To the effect that the master must see that the servant have ample opportunities to put themselves in a place of safety.

*Second*—To that part which dealt with the question of a fellow servant, beginning with the words 10  
“If the master selected an agent to perform certain duties, and he failed to exercise care, his negligence would be that of the master, and that the master could not escape under such circumstances; that the negligence was that of a fellow servant.”

*Third*—To that part which was to the effect that if the defendant knew that the unexploded charges were liable to go off, it must adopt a system of rules, or if no rules it must see that proper warning is 20  
given. Whatever the Court said on that question.

*Fourth*—To that part which permitted the jury to find, that if the duty was delegated to an employee, and the injury resulted from his negligence, that would not relieve the master.

*Fifth*—To leaving to the jury to pass on the question of whether or not the intestate knew that Big Jim was in the act of withdrawing the charge when the explosion occurred.

Also to where the Court said in effect, that if the 30  
defendant failed to give warning, or failed to adopt proper rules, then they would have a right to take up the question of damages.

And also to that part of the charge to the effect that the law would oblige the intestate to support his father and that the father could compel the son to furnish him support if he was in this country. My point being there is no evidence that the father 40  
ever was in this country, or ever likely to come to

this country, and even if he was there is nothing to show that he was in such a situation as would call upon the son for support, there being no evidence one way or the other, and the burden of proof is on the plaintiff.

10 *Sixth*—To the effect that the father would be entitled to recover such sum as he would have reason to believe the son might contribute to his support.

*Seventh*—To the refusal of the Court to charge the requests submitted verbally. That if the jury find a verdict at all for the plaintiff, it must be limited to nominal damages six cents.

### INTERROGATORIES.

#### SET No. 1.

20 To COLLINS & CORBIN, Esqrs.,  
Attorneys for Defendant.

SIRS:

Take notice that the plaintiff demands that you serve answers to the following interrogatories within ten days from the date of service hereof upon you.

#### FIRST INTERROGATORY:

30 Did the defendant on the twenty-eighth day of January, nineteen hundred and five, use dynamite or any other explosive substance at its work, in the town of West New York, in the county of Hudson, where Vincenzo Falcone was hurt or killed?

#### SECOND INTERROGATORY:

40 If the defendant was in the use of such dynamite or other dangerous substance, by its servants and agents, state what system it had provided in the use thereof to protect its servants, and if such system contained written rules, please give a copy of the rules?

## THIRD INTERROGATORY:

State the name of the person who was charged by the defendant with the duty of seeing that the place where the dynamite was in use was reasonably safe for the servants of the defendant?

## FOURTH INTERROGATORY:

State what tools or instruments the defendant had furnished on July 28th, 1905, at the town of West New York, Hudson County, to its servants, to withdraw or make harmless unexploded charges of dynamite or like explosive substance used by defendant. 10

Yours respectfully

J. PHILIP DIPPEL,  
Attorney for Plaintiff.

## ANSWERS TO INTERROGATORIES.

20

## SET NO. 1.

To J. PHILIP DIPPEL,  
Attorney for Plaintiff.

Take notice, that the following are the answers of the defendant to plaintiff's interrogatories served on October thirteenth, nineteen hundred and six:

*To the First Interrogatory:* Defendant used dynamite at the time and place mentioned.

*To the Second Interrogatory:* When a blast was about to be exploded, the system was to warn the defendant's servants by calling "Fire," or some similar expression, about five minutes before the blast was set off, and continue to call until the moment of the explosion. 30

*To the Third Interrogatory:* Vincenzo Di Ciccio and John Hangley.

*To the Fourth Interrogatory:* The tools or instruments furnished by defendant to its servants 40

to withdraw unexploded charges of dynamite were scrapers and slobsticks. Defendant is unable to answer the question as to what tools were furnished to make such charge harmless, as it is a physical impossibility to make an unexploded charge of dynamite harmless.

10

COLLINS & CORBIN,  
Attorneys of Defendant.

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

MICHAEL HENRY, of full age, being duly sworn according to law, on his oath says: I am President of the defendant company; I have read the plaintiff's Interrogatories in the above case and the foregoing answers thereto; said answers are true to the best of my information, knowledge and belief.

20

MICHAEL HENRY.

Sworn and subscribed at Jersey City, this }  
fifth day of December, A. D. 1906. }

SAMUEL S. MOORE.  
Notary Public of N. J.

### INTERROGATORIES.

Set No. 2.

30 To COLLINS & CORBIN,  
Attorneys for Defendant.

GENTLEMEN:

Take notice that I demand that you serve upon me within the time limited by law, answers under oath to the following interrogatories:

40 *First*—What rules did the defendant make or publish to procure the safety of its servants, concerning the treatment of charges of dynamite which failed to explode when fired at the work in

which the said plaintiff's intestate was engaged when he was killed?

*Second*—If said rules were printed please give copy of same.

*Third*—Please describe the scrapers and slob-sticks mentioned in the answers heretofore made by defendant to the interrogatories submitted to 10 the defendant, which former interrogatories were served on defendant's attorneys October 16th, 1906.

*Fourth*—Were there any slob sticks or scrapers at the place where plaintiff's intestate was killed on January 28th, 1906, and if so, how many, and how many, if any, were used at said time?

*Fifth*—What instrument and other means did Vincenzo Di Ciccio use on the twenty-eighth day of 20 January, 1905, in attempting to withdraw the unexploded charge of dynamite which exploded and killed the plaintiff's intestate.

J. PHILIP DIPPEL,  
Attorney of Plaintiff.

## ANSWERS TO INTERROGATORIES.

SET No. 2.

To J. PHILIP DIPPEL, Esq., 30  
Attorney of Plaintiff.

Take notice, that the following are the answers of the defendant to plaintiff's interrogatories served on February 11th, 1907:

*To the First Interrogatory:* The defendant made, or published, no rules concerning the treatment of charges of dynamite which failed to explode. The matter of the treatment of these charges was left wholly in the hands of Vincenzo Di Ciccio, a man 40

experienced and competent in regard to all of the phases of the use of dynamite.

*To the Second Interrogatory:* See answer to first.

*To the Third Interrogatory:* The scrapers used were iron bars of about one-half inch in thickness, several feet in length, and having a spoon-shaped  
10 form at one end. The swab stick (incorrectly called "slob" sticks) were hickory sticks about twelve feet in length and one and one-half inches in thickness, one end of which was broomed or slivered by means of hammering.

*To the Fourth Interrogatory:* Yes. At least one of each was used.

*To the Fifth Interrogatory:* Vincenzo DiCiccio used a scraper and a swab stick in attempting to with-  
20 draw the charge.

COLLINS & CORBIN,  
Attorneys of Defendant.

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

SAMUEL P. MCGIVNEY, being duly sworn says, I am Treasurer of the defendant company. I have read the plaintiff's interrogatories in the above case and the foregoing answers thereto; said answers  
30 are true to the best of my knowledge, information and belief.

SAMUEL P. MCGIVNEY.

Sworn to and subscribed at Jersey  
City, N. J., this 21st day of Feb- }  
ruary, A. D. 1907, before me, }

SAMUEL S. MOORE,  
Notary Public of N. J.

**ASSIGNMENTS OF ERROR.**

Afterwards, that is to say, on the second day of April, nineteen hundred and seven, in the Court of Errors and Appeals in the last resort of all causes in the State of New Jersey, comes the said Palisade Construction Company, by Collins and Corbin, its attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in the giving of verdict and judgment aforesaid, there is manifest error, to wit: 10

1. Because at the trial of the cause in the Hudson Circuit Court, said Court refused to non-suit the said Marco Polo, administrator as aforesaid, when thereunto moved on behalf of said Palisade Construction Company, whereas by the law of the land the said Court should have ordered a non-suit 20 for one or more of the following reasons alleged in behalf of said motions, to wit:

I. Because the evidence showed contributory negligence on the part of the plaintiff's intestate.

II. Because no negligence was proven against the defendant.

III. Because the negligence, if any, was that of a fellow servant of the plaintiff's intestate. 30

IV. Because the evidence showed that proper tools had been supplied by the defendant, and the failure on the part of the plaintiff's intestate or his fellow servants to use proper tools so supplied was not chargeable to the master, the said Palisade Construction Company.

V. Because the risk of injury from the exploded charge of dynamite was assumed by the plaintiff's intestate as one of the risks of employment. 40

VI. Because there was no proof that the foreman (the person described as "Big Jim") was in any way incompetent as charged in the declaration.

VII. Because there was no proof as to the cause of the accident.

VIII. Because there was no proof of any pecuniary loss sustained by the next of kin of the plaintiff's intestate.

2. Because at the trial of the case at the Hudson Circuit Court, the said Court refused to direct a verdict for the defendant Palisade Construction Company, when thereunto moved on behalf of the said defendant, whereas by the law of the land said Court should have directed a verdict in favor of the defendant for one or more of the following reasons alleged on behalf of said motion, to wit:

20 I. Because the evidence showed contributory negligence on the part of the plaintiff's intestate.

II. Because no negligence was proven against the defendant.

III. Because the negligence, if any, was that of a fellow servant of the plaintiff's intestate.

30 IV. Because the evidence showed that proper tools had been supplied by the defendant, and the failure on the part of the plaintiff's intestate or his fellow servants to use proper tools so supplied was not chargeable to the master, the said Palisade Construction Company.

V. Because the risk of injury from the unexploded charge of dynamite was assumed by the plaintiff's intestate as one of the risks of employment.

40 VI. Because there was no proof that the foreman (the person described as "Big Jim") was in any way incompetent as charged in the declaration.

VII. Because there was no proof as to the cause of the accident.

VIII. Because there was no proof of any pecuniary loss sustained by the next of kin of the plaintiff's intestate.

IX. Because the evidence showed that the plaintiff's intestate knew that the person known as "Big Jim" was in the act of withdrawing the charge of dynamite and the danger of explosion was therefore assumed by the plaintiff's intestate. 10

X. Because the evidence showed that the person known as "Big Jim" had many years of experience in working with dynamite and there was nothing to charge the defendant with notice or give it reason to apprehend an accident when the said "Big Jim" was working with dynamite. 20

3. Because at the trial of the case at the Hudson Circuit Court, the judgment in said cause was given in favor of said Marco Polo, administrator as aforesaid, and against the said Palisade Construction Company, whereas by the law of the land it should have been given against the said Marco Polo, administrator as aforesaid, and in favor of the said Palisade Construction Company.

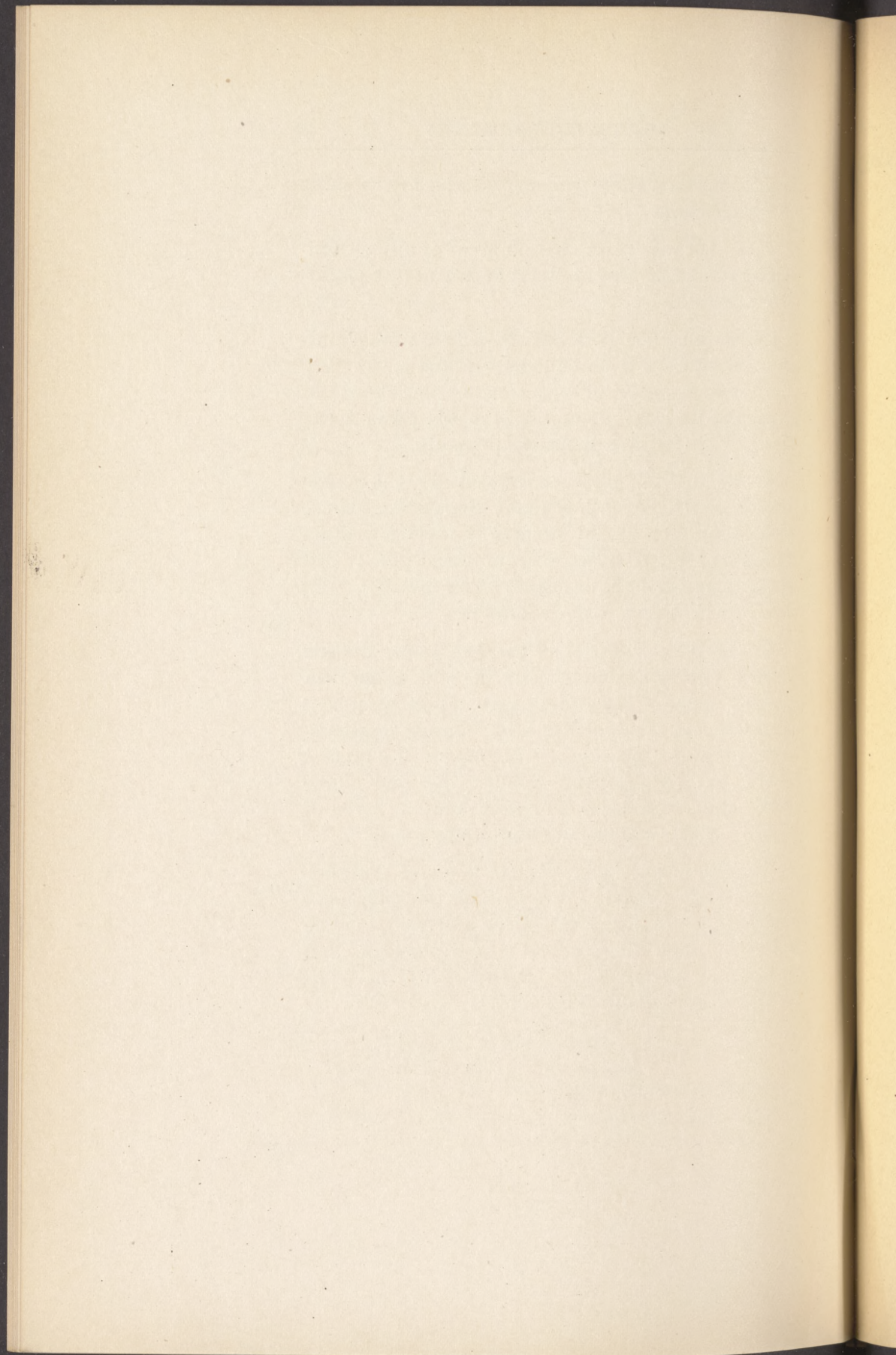
Wherefore, the said plaintiff in error, Palisade Construction Company, prays that the judgment aforesaid, by reason of the error aforesaid, may be reversed, annulled and for nothing holden, and that it may be restored to all things which it has lost by reason of said judgment. 30

COLLINS & CORBIN,

Attorneys for Plaintiff in Error.

Dated April 26th, 1907.

Common Joinder.





use