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Notice of Appeal.

New Jersey Supreme Court.

ANTHONY HERRERA,	}	Action at Law.
<i>Plaintiff,</i>		
<i>vs.</i>		
MANHATTAN ELECTRIC SUPPLY COMPANY,		
<i>Defendant.</i>		

1st. The plaintiff Anthony Herrera, appeals
from the judgment of non-suit entered herein 20
upon the 21st day of February, 1913, to the New
Jersey Court of Errors and Appeals, In The
Last Resort In All Causes and assigns for causes
of reversal the following reasons, the Court
directed a non-suit upon the ground that the evi-
dence failed to disclose any neglect on the part of
the defendant Company and upon the ground that
the evidence does show that the press was in-
spected and was in proper order at the time the 30
plaintiff was set to work on it, and that the evi-
dence showing on the plaintiff's case that the
press was in good condition, was in proper order,
was fit to be worked on, leaves no question to
be submitted to the jury, whereas in fact there
was evidence from which the jury might find
that the press was not in proper working order
at the time of the happening of the accident to
the knowledge of the defendant; that the de-
fendant did not cause the press to be proper- 40

Notice of Appeal.

ly inspected; that it was the defendants duty in view of the condition of the press to instruct the plaintiff with respect to its condition which the defendant failed to do; that the accident happened because of the negligence of the defendant.

2nd. Because the Court overruled in the testimony of Joseph Fina, a witness,

“Q. During the time that you worked on this press did it repeat?”

“MR. SMITH: I object because it is absolutely leading, and it is too remote.

“THE COURT: It is objectionable on both grounds, Mr. Ziegner.”

3rd. Because the Court in the testimony of Nicholas Sarre refused to permit an answer to the following question propounded by counsel for plaintiff, “Q. As the result of the actions of that press during the time you worked on it on and off, did you have occasion to report anything to Mr. Cook?” upon the ground that the time was too remote being two months before the accident, because the question was coupled with an offer of counsel to show that nothing had been done to the press between the time to which the witness referred and the time of the happening of the accident.

4th. Because the Court refused to permit an answer to the question, “Q. Do you remember the time, Mr. Sarre, that Mr. Arthur Lazze met with an accident on this particular press?” upon the ground as expressed by the Court, “No, I do not think that would be competent. If he met with an accident, he is the one that can best testify to it, not somebody else,” which would have the effect of excluding the testimony of a witness to an accident.

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5th. Because the Court struck out the answer of the witness Martin, "Q. Before you never saw it repeat? A. I never saw it but people told me to come up and repair it, and I fixed it for them, but after the accident it repeated forty or fifty times," because it was competent for the purpose of showing the knowledge of the witness who was the person charged with the duty of inspection. 10

6th. Because the Court struck out the testimony of the witness Martin as to anything prior to the time of the accident because the testimony was competent, relevant and material, the witness Martin being one of the persons charged with the inspection and repair of this machine and his testimony of repairing the press and having his attention called to its defects was relevant, competent and material. 20

7th. Because the Court refused to permit an answer to the question, "Q. How came it, Mr. Martin that you referred the defective condition of this press to Mr. Cook?"

To:

Edwards & Smith,
Attorneys for Defendant.

ZIEGENER & LANE,
Attorneys for Plaintiff. 30

MERRITT LANE,
Of Counsel.

Service duly acknowledged by Attorneys for Defendant.

Transcript of Record.
New Jersey Supreme Court.

ANTHONY HERRERA, <i>vs.</i> MANHATTAN ELECTRICAL SUPPLY COMPANY.	}	In Tort. Judgment of on Postea. non-suit.
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EDWARDS & SMITH, Attorneys.

As yet of the twenty sixth day of December,
A. D., nineteen hundred and eleven.

WITNESS,

WILLIAM S. GUMMERE, Esquire,
Chief Justice.

WILLIAM RIKER, JR.,
Clerk.

20

Hudson County, ss:

The Manhattan Electrical Supply Company, a corporation of this State, was duly summoned to answer unto Anthony Herrera, the plaintiff herein, in an action in tort and thereupon the said plaintiff, by Ziegner & Lane, his attorneys, complains:

For that the said defendant upon or about the 3rd day of May, A. D., nineteen hundred and eleven, and before and at the time of the committing of the grievances and injuries hereinafter mentioned was a corporation of the State of New Jersey, and was operating, managing and controlling a certain factory, shop or electrical concern or plant, and the machinery engines, boilers and electrical appliances therein contained and its servants and employees therein employed, at the City of Jersey City, in the County of Hudson

40

and State of New Jersey, for that the said plain-

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tiff was then and there in the employ of the said defendant as its servant in and about the operation of a certain power press then and there in said factory or plant, and it then and there became and was the duty of the said defendant to supply the plaintiff a reasonably safe place wherein to work and to supply the said plaintiff with reasonably safe and good appliances to work with, and to use reasonable care in inspecting, maintaining and operating said plant, shop or factory, and to use reasonable care that the defendant's servants employed with the said plaintiff should be competent and that the superintendent of the said factory or works should be competent. 10

Yet the said defendant not regarding its duty in the premises did not use reasonable care to provide the plaintiff with a safe place within which to work, and did not use reasonable care to provide the plaintiff with proper tools and appliances with which to work, and did not use reasonable care in inspecting, operating and maintaining its plant and the appliances and machinery therein contained, and did not use reasonable care to select competent fellow servants and a competent superintendent, but did maintain and operate said power press, electrical apparatus, machine and appliances in connection therewith in such a dangerous and improper manner and condition and did place the same in charge of a superintendent who was incompetent in the performance of the work assigned, and did employ negligent and incompetent fellow servants so that at the time and place aforesaid while the plaintiff was engaged in and about his work aforesaid, and without negligence on his part, the said power press upon which the said plaintiff was then and there working came down and 20 30 40

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crushed the fingers of the left hand of the said plaintiff, so that part of one of said fingers on said left hand had to be amputated and that the other fingers on said hand have been crippled.

And for that the said plaintiff by reason of the premises suffered and underwent great pain and suffering and will in the future undergo great
10 pain and suffering and has been and will continue to be permanently lamed and disabled throughout his life and has by reason of said injuries been deprived of great gains and profits in his business and occupation, to wit, the sum of one thousand dollars (\$1,000.); and that his earning capacity by reason of said injuries has been permanently diminished; that the plaintiff
20 has suffered great nervous shock and impairment to his general health and will so continue during his life, and has incurred an expenditure of a large sum of money in and about, medical and surgical treatment of his injuries, to the amount of Ten Thousand Dollars (\$10,000), to the damage of the plaintiff, and therefore he brings his suit.

And that also heretofore, to wit, the said defendant on or about the third day of May, A. D., nineteen hundred and eleven, and before and at
30 the time of the committing of the grievances and injuries hereinafter mentioned, was a corporation of the State of New Jersey and was operating, maintaining and controlling a certain factory, shop or electrical plant, and the machinery, engines, boilers and electrical appliances therein contained, and its servants and employees therein employed, at the City of Jersey City, in the County of Hudson and State of New Jersey, and
40 for that the said plaintiff was then and there in the employ of the said defendant as its servant

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and was then and there set at work by the said defendant in the business of bending metal in such a manner by said power press as to cause such metal to be looped and to remove such metal from the said press after the end had been looped as aforesaid, the business for which the said plaintiff was hired and employed being to place such metal in said press and cause the same to be looped at one end thereof, and the said plaintiff avers that without any fault or negligence on his part, and while he was engaged in the operating and employment as aforesaid, and while placing or removing such metal in and out of said power press before and after the same has been looped, the said power press or machine and appliances upon which the said plaintiff was then and there employed, and by reason of the defective condition of the said power press and appliances, all of which was unknown to the plaintiff and without any fault or negligence on his part, came down and crushed the fingers on the left hand of the plaintiff so that since part of one of said fingers on said left hand has been amputated and the other of said fingers crushed and crippled, and that the said plaintiff suffered damage as set forth in the first count of this declaration, to the amount of Ten Thousand Dollars (\$10,000), and therefore he brings his suit.

And for that also, heretofore, to wit, on or about the third day of May, A. D., nineteen hundred and eleven, before and at the time of the committing of the grievances hereinafter mentioned, the said defendant was a corporation of the State of New Jersey and was operating, maintaining and controlling a certain factory, shop or electrical plant and the machinery, engines, boilers and electrical appliances therein contained,

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and its servants and employees therein employed, to wit, at Jersey City, in the County of Hudson and State of New Jersey, and for that the said plaintiff then and there was in the employ of the said defendant as its servant in said factory or shop, and it then and there became and was the duty of the said defendant to use reasonable care in the employment of fellow servants of the said plaintiff so that the fellow servants of the said plaintiff should be competent and also in the employment of a superintendent of said factory so that the superintendent of said factory should be competent, yet the said defendant not regarding its duty in the premises did not use reasonable care to select competent fellow servants and a competent superintendent, but on the other hand employed incompetent fellow servants and placed the said factory or plant in charge of a superintendent who was incompetent for the performance of the work assigned so that at the time and place aforesaid while the plaintiff was engaged in and about his employment, and without negligence on his part, the said power press, at which the said plaintiff was working, came down and crushed the fingers of the left hand so that since said time one of said fingers has been necessarily amputated and the other fingers on said hand being crushed and crippled, and the said plaintiff has suffered injury as set forth in the first count of this Declaration to the plaintiff's damage Ten Thousand Dollars (\$10,000.) and therefore he brings his suit.

And for that the said defendant on or about the third day of May, A. D., nineteen hundred and eleven, and before and at the time of the committing of the grievances and injuries hereinafter mentioned was a corporation of the

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State of New Jersey, and was operating, managing and controlling a certain factory, shop or electrical plant, and the machinery, engines, boilers and electrical appliances therein contained, and its servants and employees therein employed, to wit, at Jersey City, in the County of Hudson and State of New Jersey, and the said plaintiff was then and there in the employ of the said defendant as its servant in said factory or shop and it then and there became and was the duty of the said defendant to provide safe machinery or presses whereon the said plaintiff was to work and was to provide reasonable care and good appliances to work with, yet the said defendant not regarding its duty in the premises did not use reasonable care to provide the plaintiff with reasonably safe and good appliances with which to work and did not use reasonable care to provide the plaintiff with proper tools and appliances or press, but did maintain the said power press, upon which the said plaintiff was then and there working, unknown to said plaintiff, in a defective, dangerous and improper condition and as the result of the maintenance of said defective, improper and dangerous condition of said power press and without any fault or negligence on the part of the said plaintiff the said press came down upon his fingers, crushing the fingers of the left hand of said plaintiff so that since said time part of one of the said fingers of the left hand of said plaintiff has been amputated and the other fingers on said hand crushed and crippled and that the said plaintiff has suffered injuries as set forth in the first count of this Declaration, to the amount of Ten Thousand Dollars, and therefore he brings his suit.

And the plaintiff avers that he has been in-

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jured as set forth in the first count of this Declaration to the amuont of ten thousand dollars and therefore he brings his suit.

10 And the said defendant, by Edwards & Smith, its attorney, 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, in manner and form as the said plaintiff hath above thereof complained against it and of this it, the said defendant, puts itself upon the country, &c.

20 Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Jersey City, in and for the County of Hudson, on the third Tuesday of September, in the year of our Lord, one thousand nine hundred and twelve, by whom, etc., and the same day is given to the parties aforesaid there, etc.

30 And now at this day, to wit; the twenty-first day of February, A. D., nineteen hundred and thirteen, before our said Supreme Court at Trenton come the said parties by their attorneys aforesaid, and the Justice before whom etc., having first sent hither his record had before him in these words, to wit:

40 Afterwards, that is to say, on the twenty-fifth day of November, in the year of Nineteen hundred and twelve, at a Circuit Court held at Jersey City, in and for the County of Hudson, by his Honor, Benjamin A. Vail, Judge of the Circuit Court, to whom this issue was referred for trial, according to the form of the statute in such case made and provided, comes as well the within named plaintiff as the within named defendant, by their respective attorneys within

Transcript of Record.

mentioned, and the jurors of the jury, whereof mention is within made, being summoned also, come, who to speak the truth of the matters within contained, were chosen, tried and sworn, and evidence was given to them thereupon by the above named plaintiff, which was deemed by said Judge insufficient to maintain the said issue on his part, and the said plaintiff being thereupon solemnly called to produce further evidence to support and maintain the said action, comes not, but makes default, nor doth he further prosecute his suit against the said defendant. 10

Therefore it is considered that the said plaintiff, Anthony Herrera, take nothing by his said writ, and that the said defendant, Manhattan Electrical Supply Company, do go thereof without day, &c.

And it is further considered that the said defendant, Manhattan Electrical Supply Company, do recover against the said plaintiff, Anthony Herrera, the sum of forty three dollars and ten cents, for its costs and charges by it about its defence in this behalf laid out and expended by the Court now here adjudged to the said defendant and with its assent according to the form of the statute in such cases made and provided, and that the said defendant, Manhattan Electrical Supply Company, have execution thereof, etc. 20 30

Judgment signed this twenty-first day of February, A. D., nineteen hundred and thirteen.

WILLIAM S. GUMMERE, C. J.

Anthony Herrera—Direct.

Testimony.

New Jersey Supreme Court.

HUDSON CIRCUIT.

10

ANTHONY HERRERA,

vs.

MANHATTAN ELECTRIC SUPPLY
COMPANY.

Transcript of shorthand notes of testimony taken on the 21st day of November, 1912 before Hon. Benjamin A. Vail, Circuit Judge, and a jury.

20

APPEARANCES :

ZIEGENER & LANE, ESQS.,
For Plaintiff.

EDWARDS & SMITH, ESQS., (Mr. Smith),
For Defendant.

ANTHONY HERRERA, called and sworn on his own behalf, testified as follows:—

30

DIRECT EXAMINATION BY MR. ZIEGENER:

Q. Mr. Herrera, you are the plaintiff in this case, are you not? A. Yes, sir.

Q. How old are you? A. I am thirty years old—thirty the 30th of last October.

Q. You live where? A. At the present at St. Felix Street, Brooklyn.

Q. Now on May 4, 1911— A. 1910.

40

Q. —1910, and previous thereto, what was your business? A. I was previous to 1910 in the

Anthony Herrera—Direct.

Manhattan Electric Supply Company, first on the assembling floor, and then down in the power press department.

THE COURT: When did you say this accident occurred?

Q. You say 1910; you mean 1911, don't you?

A. I think it was 1910.

10

THE COURT: I was going to call your attention to your declaration which says 1911, and he says it is 1910.

Q. It was not two years ago last May? A. Two years this May coming.

Q. That is 1911? A. Yes, sir.

Q. Two years this May coming? A. Yes.

THE COURT: You mean two years next May? 20

A. Yes, it will be two years this May coming.

Q. Now, on May 4, 1911, at about 11:55 A. M. were you in the employ of the Manhattan Electrical Supply Company? A. Yes sir.

Q. And you say you had been in their employ how long? A. Off and on for about two years. I went away one summer and came back again.

Q. During those two years what were your duties? A. Well, everything in general in regards to the power press department, working on the presses. 30

Q. On this day, previous to 11:55 A. M., had you been engaged in the bending or pressing of certain brass articles? A. Yes.

Q. What were those articles called? A. Called 1181, the job number was 1181. They were for electrical work; I don't know what they were for. 40

Anthony Herrera—Direct.

Q. I show you a piece of brass upon one end of which there is a loop, and the other of which is bent with two holes, and ask you whether that was known as job. No. 1181? A. Yes, sir.

Q. Was that the work that you were engaged upon at this time, on that day? A. Yes.

10 Q. Now at 11:55 or thereabouts did you meet with an accident? A. I did sir, yes, sir.

20 Q. Just tell the court and jury in your own way just what you were doing and just how you sustained any damage? A. Well, I was working on these 1181's as you see here, which is not this way at present, it is down flat, with the loop on it at this end. You have got to place a piece of one-eighth drill rod or wire with this hand in the press to form that loop, and with the other hand here you have to put the piece of work in the press; as you put one piece in with this hand you take this hand out and pull it off and through the back, where it forms the loop on it. I was in the act of taking out the first one and putting in the second when the press went up and instead of staying up there and sticking on the clutch, it came right down again and caught my hand, this hand, in the act of putting in another one.

30 Q. Just a moment. Now in the operation of this press, in order to raise the press or to lower it, what were you to do? A. You have got to put your foot on the throttle to bring it down and just take your foot off—there is a piece of wood down at the foot there where you rest your foot on, a piece of block which is just even with the bent part of the throttle, and as you place the pressure of the toe on this throttle it throws the clutch off and brings the press down.

40 Q. Now just previous to the time the press came down on your hand had you touched the

Anthony Herrera—Direct.

footboard or whatever you call it, in order to drop it? A. No, sir—only once in the first operation there I pressed it and just let up on it, and I had no more than done that and had in this other one, because it is not necessary to put your foot on it until you have this one in with this hand—I had no more than got that finger in with the piece of work when she came right down. 10

Q. Had you by your foot operated that press in such a way that she came down on your fingers? A. No, sir.

Q. Now you say it came down on that hand; what was the condition of your hand immediately afterwards? A. Well, this finger here was crushed and this finger was off to here, and I don't remember much more. I run— 20

MR. SMITH: Which finger?

A. The middle left hand finger.

Q. And in so far as the index finger was concerned, what was that condition? A. It was crushed and bruised.

Q. Were any other fingers crushed and bruised? A. They were a little bit bruised, but not crushed or hurt in any form.

Q. How was it those other fingers escaped? In what position did you hold your hand just previous or while in the act of putting that brass in to the machine? A. You hold the—I cannot do it now, because I do it with this finger (illustrating), you hold it— 30

Q. Do it with your right hand. Take off your glove. A. You have got to put that in—(takes off glove.) You have got to place this in in such a way that when you put it in you have to place it with the middle finger. As you see, you have 40

Anthony Herrera—Direct.

to place it in a form which just exactly fits the thing, and as you put it into that form, why, it rests there easily, and then you can take your hand out.

Q. But what was the position of your two other fingers at the time you were making this operation? What position did you hold your finger in?

10 A. It is under the press, under the punch and die.

Q. So that the three fingers were exposed? A. Yes, the middle finger being the longest was the one that got it.

Q. The other two fingers being held beneath the palm; is that so? A. Yes.

Q. Now, what happened after that, Mr. Herrera? A. Well, I don't remember much more, 20 only I know I had to wait a long while for them to get me assistance of the doctor. I was up there, I don't know how long, but I became unconscious, and they came and put some cotton or something on it, and then they sent for a doctor, and the doctor came and he was a little bit unruly and did not care how he handled me either.

Q. Do not characterize his actions; just tell 30 what happened, as far as you know? A. Well then, they brought me upstairs on a cot and I was froze up there—I was freezing there, and I made one of the men know it, so they went and they brought me upstairs to the carpenter's room and put me by the heater, and the superintendent came upstairs then and he asked me a few questions and I told him, I says, "Mr. Ditmar—"

MR. SMITH: I object.

40

Q. Never mind what you told the superintendent.

Anthony Herrera—Direct.

What happened then? A. Well, I went home then, went downstairs after a while, and walked around, and I was in a great pain, and I says, "I guess I will go home," so I went across to the house—I had a room, a furnished room across the street.

Q. At that time you lived in Jersey City? A. 50 Morris Street, Jersey City.

10

Q. After you returned home did you secure medical attention? A. Well, I called at St. Francis' Hospital occasionally and they treated it for me.

Q. When was the first time you went to the hospital? A. About the second day after the accident.

Q. And on the day of the accident did this doctor that was called by the company treat you? A. On the day of the accident, yes, sir.

20

Q. How long did you continue to attend at St. Francis Hospital for treatment after that time? A. I went there sometimes two or three times a week, for a while.

Q. Did you secure other medical attention? A. I secured some medical attention after I got a position up in the park—I could not come down there and I went over to Dr. Thomas, my own doctor, in Brooklyn.

30

Q. Your family physician? A. My mother's doctor.

Q. How long did he treat you? A. It was pretty near—I only went there, I guess, a few times, but I went there for medical attention more than I did my finger.

Q. When you say medical attention what do you mean? A. I mean for my own self; I was run down and sickly after the accident.

40

Anthony Herrera—Direct.

Q. Were you so before the accident? A. I was not, to speak of. I was never sick hardly.

Q. What effect has the accident had upon you since May 4, 1911, as to your general health? A. My general health is very poor. I am a general wreck. I am a nervous wreck. My stomach is bad.

10 Q. Are you able to operate any presses? A. I don't hardly think so. It would be hard work.

Q. Your business now it what? A. I have been working for a club in Brooklyn, for a dollar a day.

Q. As what? A. As a hall boy.

Q. Are you able to perform the duties of a pressman to the extent that you had performed them previous to May 4, 1911? A. No, sir.

20 Q. How many years have you worked on presses? A. Oh about, off and on for five years.

Q. From the time of the accident, and during the treatment which was given you by St. Francis Hospital and your Dr. Thomas, did you undergo any pain? A. I certainly did, sir; yes, sir.

30 Q. How long did that continue to the best of your knowledge? A. Well, the pain in my hand continued for six months. This finger here is in pain now all the time; it is always ice cold and painful.

Q. When you say this finger here which one do you mean? A. The injured finger.

Q. What is the condition of the other fingers? A. The other fingers I cannot very well open it up; I cannot close my hand. The curve in that hand is all tightened up; I cannot open my hand or I cannot close it.

40 Q. Did you have any difficulty with that hand

Anthony Herrera—Direct.

whatever previous to the date of this accident?

A. No, sir.

Q. Now during the time that you went to St. Francis Hospital did you incur any expense? A. No.

Q. It was free treatment? A. Free treatment.

Q. Did you incur any expense as the result of medicines? A. No, sir, only for myself, that I bought. 10

Q. Eh? A. Only medicines that I bought for myself.

Q. As far as Dr. Thomas' treatment was concerned, do you know about what it cost you? A. In the neighborhood of maybe thirty-five or forty dollars altogether for the whole time, medicine and everything.

Q. That included medicines, his treatments? 20
A. Yes, the calls.

Q. Previous to the accident had you had any knowledge whatsoever of any defective condition of the machine? A. Not that I know of, sir, no sir.

Q. At the time you were actually operating this machine, did you have the knowledge brought to you by any person— A. No, sir.

Q. —or did you know that it was in any manner in a defective condition? A. No, sir. 30

Q. Did you have any knowledge previous or at the time of the operating that it would repeat on you without the operation of your foot? A. No, sir.

Q. After the accident did you go back to the place of business? A. I went back for a little while, yes sir.

Q. How long after the accident? A. Oh, a couple of days after. 40

Anthony Herrera—Direct.

Q. How long did you remain there then? A. A little over a week, I guess, about—I remember about—a little over a week.

Q. During the time you were operating this press as an employe of this defendant company, was it your duty to inspect or repair or take care of that press or any press? A. No, sir.

10 Q. Now after you went back to the place of business did you have occasion to notice the condition or the construction of the clutch in question? A. Yes, sir.

MR. SMITH: I object.

THE COURT: Well, I will allow that question so far.

MR. SMITH: As to the yes or no, I do not object. I did that to shut off his answer.

20

Q. Was that the first time that you examined the clutch, after the accident? A. The first time after the accident, yes, sir.

Q. Are you familiar with a clutch of a press? A. I am not familiar as a mechanic, but I am familiar with the way that press was, yes, sir.

Q. Now the clutch on this press was made of what? A. Made of steel.

30

Q. Just explain to the jury the operation of it? A. Well, the clutch is a thing that guides the pressure of the press coming down; it loosens up, and when that clutch loosens up by the pressure of your foot it lets this eccentric you might say, come right down and do the punching and dieing of the work. On the upper end of the shaft there is a wooden clamp on this press, holding that clutch or holding that pressure, where
40 on all the other presses there is steel bands holding it.

Anthony Herrera—Direct.

Q. But this was a wooden band. A. A wooden clamp.

Q. Wooden clamp? A. Yes; two small pieces of wood.

Q. Had you known that before the accident? A. I never took notice of it.

Q. Who was the person, who, if you know, had the charge or inspection of the presses used in this business? A. Well, there is nobody that I know of, only the die setter, Eddie Martin. 10

Q. Who was the doctor, Mr. Herrera, who treated you immediately after the accident? A. I think Dr. Nelson.

Q. Of Jersey City? A. Of Jersey City.

Q. Now, after the accident did you follow the trade of pressman? A. No, sir.

Q. When did you next secure any employment after you had left the Manhattan Electrical Supply Company? A. Oh, I guess about a month after. I got an outside job in the air in Palisade Park. 20

Q. What was that job? A. A sort of a clerk behind the game.

Q. Behind a game? A. Yes, an amusement game.

Q. Your salary? A. Ten dollars a week, seven days a week. 30

Q. What hours? A. From twelve at noon until twelve at night.

Q. And your salary as a pressman was what, on an average? A. I usually made on an average of thirteen dollars and a half a week.

Q. Thirteen and a half? A. Yes, twelve to thirteen and a half.

Q. You are now employed as a hallboy? A. I was, at a dollar a day—I was. 40

Anthony Herrera—Cross.

Q. How many days a week? A. Seven days a week, every other Sunday off.

Q. Your hours? A. They are split hours; one day you work from seven in the morning until half past twelve, and then you are off until half past five, and you will come back and work until maybe one or two or three o'clock in the morning, and the next day you come in at twelve o'clock.

10

Q. And you are employed by whom? A. By the University Club of Brooklyn, I have been employed.

CROSS EXAMINATION BY MR. SMITH:

Q. How long had you been a pressman before you went to the works of the Manhattan Electrical Supply Company? A. How long had I been a pressman? Well, I had worked—I don't know what you call a pressman, but I had worked at presses in Brooklyn for Brill.

20

Q. Where? A. For a man by the name of Brill over in Brooklyn, I had charge of his place there.

Q. What doing? A. On the presses, setting the punches and dies on the few that were there, and working on the presses.

Q. So that you knew about a press and die and so forth? A. I knew how to run a press, but I didn't know nothing about presses.

30

Q. You said you had charge of the shop? A. I had charge of the business then, but that was not the presses.

Q. You said the presses, didn't you? A. Well, that is including everything, but I worked on the presses and attended to the telephone and customers, and came in and did something on them.

40

Q. When you worked on the presses did you

Anthony Herrera—Cross.

know what kind of presses they were? A. Not by their names. I knew they were an upright press, and so forth.

Q. Were there any of them of the same style as this one you were working on for the Manhattan Electrical Supply Company? A. There were not, they were a little lighter, they wasn't as heavy.

Q. But they practically worked the same? A. Yes, sir; up and down. 10

Q. Practically all presses worked that way, don't they, all this kind of presses? A. Well, some presses do not work up and down; some presses work this way (indicating).

Q. What kind of presses are they that work that way? A. I don't know the names of them, but I have seen them.

Q. How many have you seen? A. Oh, I have seen a number of them, sir. 20

Q. Worked on them? A. No, sir.

MR. ZIEGENER: I object to that as immaterial. It is not this kind of press; it is a press that works in and out and not up and down.

MR. SMITH: It shows his familiarity with presses.

THE COURT: I will allow the testimony. It is intended to show his familiarity with presses, upon which he was injured. 30

Q. How long and how often had you worked on these presses that go up and down? A. Well, I worked for Brill every day in the week.

Q. On these presses? A. Operating presses, yes, sir.

Q. Those presses have clutches, haven't they? A. Yes. 40

Q. Foot treadles? A. Yes.

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Q. Operate substantially the same as this press you were working on for the Manhattan Electrical Supply Company? A. Yes, sir.

Q. And then what did you do after you left Brill? A. After I left Brill, why—Oh, I think I came over to Jersey City.

Q. Worked for the Manhattan Electrical Supply Company? A. Manhattan people.

Q. Worked on the presses there? A. Yes.

Q. How long had you worked on these presses for the Manhattan? A. Well, I was upstairs in the assembling department first when I first went with the Manhattan Electrical Supply Company people.

Q. What did you do up there? A. Worked on the phone boxes and extension bell boxes and testing bell boxes.

20 Q. Use presses up there? A. No, sir.

Q. How long did you work up there? A. I was up there, oh, pretty near a year, I suppose, and I was put down stairs.

Q. Then you went on presses? A. Yes.

Q. You were on the presses for about two years, weren't you? A. Pretty near, yes, off and on.

30 Q. What do you mean by off and on? A. I used to go away in the summertime—I went away a couple of summers and came back again.

Q. What were you doing in the summer? A. Up working in the Palisade Park, out in the air.

Q. The same as you did after the accident, you mean? A. Yes.

40 Q. Then you had worked on the presses altogether a year, steadily? A. No; I worked a year for Brill and I worked a couple of years in the Manhattan.

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Q. I see. And this press that you were working on in the Manhattan, how long had you worked on this press? A. In the Manhattan you go around to different other presses, you do not put on the same press all the time.

Q. How often did you work on this press? A. I hardly ever worked on this press at all, this special one, because I usually had steady work on the one next to it in the back. That used to be the press I used to usually always work on. 10

Q. How long did you work on this press? A. Which one do you mean, the one that injured me?

Q. The one you were injured on? A. I was only on that a couple of days. I was on that job only a day and a half.

Q. Only a day and a half? A. About a day and a half. I was working on that job. 20

Q. As a matter of fact you had been working on this press, doing this kind of work, for about two years? A. Not on that press, no, sir.

Q. Did you do that same kind of work on any other press? A. Why, I hardly ever had that job.

Q. Did you do that same kind of work on any other press? A. Not that kind; I have done different kinds.

Q. Did you do that same kind of work on any other press? A. No, sir. 30

Q. You remember answering an interrogatory: "For how long a time, giving months, days and years, had plaintiff been engaged in the particular work he was doing at the time of said alleged accident," and your saying, "About five years on and off, and with defendant about two years on and off." A. Well, I think——

Q. You said that, didn't you? A. I think——

Q. That is your signature? A. I thought that 40

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was different kind of work, I thought that was power press work.

Q. That is your signature, isn't it? A. Yes.

Q. You thought it was power press work? A. Yes.

10 Q. I see. You did not know when you were swearing to it, that you were working doing this particular kind of work? You did not know if that is really what you were swearing to, did you?

MR. ZIEGENER: I object to it, as the particular kind of work has been characterized both as pressman's work, or this particular operation on this little piece of brass.

A. That is what I thought it was.

20

MR. ZIEGENER: His answer may be very well construed to be——

MR. SMITH: I am asking the question.

MR. ZIEGENER: I object. The answer speaks for itself.

30

MR. SMITH: The question, sir, is this: "For how long a time, giving months, days and years, has the plaintiff been engaged in the particular work he was doing at the time of said alleged accident."

THE COURT: That is your interrogatory.

MR. SMITH: That is the interrogatory and the answer was, "About five years on and off, and with the defendant about two years on and off."

Q. That is your signature, isn't it, sworn to? A. Yes.

40 Q. Now, Mr. Herrera, this press that you were working on, was a Hibbard press, wasn't it? A. I don't know the name of that, sir.

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Q. Don't even know the name? A. No, sir.

Q. And it went up and down with the plunger, that worked up and down? A. Yes, sir.

Q. And that plunger fitted into a die; is that right? A. No, sir; the die fitted into—the punch fitted into the die.

Q. The plunger is the punch, isn't it, that comes down? A. The punch has got to be put into that part to come down into the die. **10**

Q. The punch is put into the plunger and the plunger comes down and the punch fits into the die? A. Yes, sir.

Q. That is, you had been operating that all that day, hadn't you? A. No, only up until 11.55, I think it was, a few minutes before twelve.

Q. Until the time you were hurt? A. Yes.

Q. You had operated it the day before? A. **20**
Yes.

Q. And the day before that? A. I don't remember the day before, because I only got the job—Eddie Martin set the die—I was only on that job about a day and a half when I was injured.

Q. A day and a half? A. A day and a half, I remember.

Q. And you were sitting in front of the press all the time? A. Yes. **30**

Q. Operating it, weren't you? A. I was operating the press, yes, sir.

Q. And it operated by use of a treadle with your foot, didn't it? A. Yes.

Q. So that the plunger would not come down unless you pressed your foot on the treadle? A. Put the pressure of your toe on the treadle.

Q. And that released the clutch and the wheel kept turning around and sending the plunger up and down? A. Yes. **40**

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Q. And your operation was to take something in one hand and put it in the die? A. Yes, sir.

Q. Then you had a piece of wire like that (indicating)? A. Yes, sir.

Q. What you did was to put this right over this piece of brass that you had, so that it would be looped around it? A. Yes.

10 Q. As that went through that piece of brass that was in the die the plunger came down—the punch? A. I know, but you had to hold it with that hand and put it in with this hand. You did not use one hand to the operation.

Q. If you will listen to my questions you won't be talking all the time. You put this in, isn't that so? A. Yes.

Q. So that the piece of brass was to fit around this? A. Yes.

20 Q. To make the loop? A. Yes.

Q. Now, it wasn't necessary for you to keep your fingers under there, was it? A. Well, my fingers was never under there.

Q. I didn't ask you that. I say it was not necessary for you to keep your fingers under there as that loop was made? A. No, sir.

Q. So after you placed the piece of metal in the die you put that there so the loop could be
30 formed around it? A. Yes.

Q. That is all you had to do after you put this wire in there, you tripped it with your foot and the punch came down, isn't it? A. That is not the first operation, sir, that is the second. The first you put the piece in and then you put that piece in.

Q. Isn't that just exactly what I have been telling you? A. The way you asked me that question
40 is the same as if I had the whole pieces with one hand. You hold the wire with this hand

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and I put the piece in with this hand and you take this hand out and hold that hand there with the wire.

Q. Isn't that what I have been telling you. You used one hand for the piece of brass, and the right hand for this piece of wire, and after you get the piece of brass on the die you take your left hand away? A. Yes.

10

Q. You hold that there so that the loop is formed around the wire? A. Yes.

Q. You hold your right hand there when you trip the treadle, don't you? A. Yes.

Q. And that makes the plunger come down? A. Yes, sir.

Q. You had worked on that plunger all day; is that right? On that press—all day long? A. Yes, sir; up until the accident.

20

Q. The day before. Now so far as you knew you were working on the press—the press was in first class order, wasn't it? A. No, sir.

Q. What was the matter with it? A. Why, it couldn't be in first class order or it wouldn't have injured me.

Q. I say, as far as you know? A. As far as I knew, yes.

Q. So far as you knew? A. Yes, sir.

30

Q. And working on that press all day the day before and on the day of your injury all the way up to the minute you were injured, in your opinion that press was in first class order?

MR. ZIEGENER: I object.

THE COURT: What is the objection?

MR. ZIEGENER: The objection is, in his opinion in first class order. He says it was not, in so far as it injured him.

40

THE COURT: That was not the question.

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The question was as far as he knew and as far as he believed the machine was in first class order.

MR. ZIEGENER: In his opinion.

THE COURT: Exactly.

MR. ZIEGENER: I will withdraw the objection.

10 Q. That is true, isn't it? A. Ask me that question again.

(Question repeated.) A. Yes, sir.

Q. Nothing wrong about it that you could see?

A. I couldn't see anything, no, sir.

Q. You were sitting right in front of it? A. Yes, sir.

Q. How far away from you, as you sat there, was the press? A. Oh, within arm's reach.

20 Q. Within arm's reach? A. Yes.

Q. How far away from you was the punch as it came down? A. Just about four inches further.

Q. Four inches further, so you could put your hand right under it? A. Put my hand right under it and be close up to it and still have my hand—

Q. You say that all day the day before and the time right up to the time of the injury—

30 A. Yes.

Q. —in your opinion the press was in first class order? A. Yes, sir.

Q. Now, who worked near you? What was the nearest man? A. The nearest man was a young fellow by the name of Lizzee, and the next man was another man by the name of Lizzee, two brothers.

40 Q. Both by the name of Lizzee? A. Arthur Lizzee, that is the names.

Q. Anybody else? A. I don't remember seeing anybody else being around there.

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Q. This piece of brass that you had, you performed one operation on it, didn't you—one operation? A. I performed the operation I was working on, yes, sir.

Q. Did anybody else work on it afterward? A. I don't know.

Q. Well, just the same work there? A. I don't know. I was not there. I didn't see anybody the time I was there, or take notice, because after—I was only there for a short time after the accident. 10

Q. Before the accident? A. I didn't see anybody. I was put on the job new. It was a new blank, and I was put right on the job.

Q. Who followed you? A. Well, that was the last operation I was on.

Q. You were on the last operation? A. Yes. 20

Q. Sure of that? A. Yes.

Q. As you worked there you tripped this treadle up and down all the way up to the time of the accident—the whole machine, including the treadle, worked properly, didn't it? A. Yes.

Q. So you had no knowledge or information at all as to there being anything the matter with that machine right up to the time it came down on your finger? A. Not a thing.

Q. Just prior to the time it came down had you been away from your machine? A. Yes, sir. 30

Q. Where had you been? A. Down the other part of the room.

Q. What had you gotten? A. What do you mean?

Q. Did you get anything? A. It was just about a few minutes before twelve when I went down to my clock and I brought up my hat and coat and laid it by my press. 40

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Q. How many minutes before twelve was it?

A. About four minutes.

Q. You had been away from the press, had you, how long? A. One minute.

Q. One minute? A. That is all; just a minute to go down there and bring it up again.

Q. How far away was it? A. It is only about
10 twenty feet.

Q. I see. Had you left the press there when you went away? A. Yes.

Q. Where was the plunger, up or down? A. Why, the plunger was up.

Q. When you got back to your work you put your hat and coat down, didn't you? A. Lying on the side.

Q. Did you see Mr. Cook there? A. Up at the
20 desk.

Q. You saw him at the desk, didn't you? A. Yes.

Q. And you sat down rather hurriedly? A. No, sir; took my time. I was piece work.

Q. You picked up one of these pieces and put it in the press? A. Yes.

Q. It that when the press came down? A. No, sir.

30 Q. What did you then do? A. It was as I was taking that one out, the first one, and putting in the next one that the press came down on my finger.

Q. How did you pick it up, which hand? A. I put it in with this and took it out with this (illustrating).

Q. With the right? A. Yes.

Q. As you were taking it out the press came
40 down? A. As I was putting it in.

Q. Oh, putting a new one in? A. Putting a

Anthony Herrera—Cross.

new one in and the second one it was the press came up and came down on it.

Q. Had you been operating the press at all from the time you had gone back to get your hat and coat? A. I just had previously oiled up the press.

Q. Had you operated it at all. When you came back with your hat and coat you put it down on the box? A. Yes. 10

Q. Had you operated that at all after that before you were hurt? A. Just as I say, on this first operation, as I sat down to put in the second one she came down on it.

Q. The second one? A. Yes, sir.

Q. Not the first? A. No; not the first; the second one.

Q. When you were hurt you say you were taken upstairs somewhere? A. No, I was—I ran up—I didn't know much what I was doing. I was in great pain and I ran out to the front and I laid around there for a while, and I know I fainted or went unconscious for a while, and then a doctor came. 20

Q. That was Dr. Nelson? A. That was Dr. Nelson.

Q. Did he do anything with your hand? A. I don't remember anything at all about it. 30

Q. You said a little while ago you were frozen, cold? A. That was after. I went upstairs after the accident happened.

Q. It was upstairs when you began to freeze, was it? A. Yes.

Q. This accident happened May 4th? A. May 4th.

Q. You say after that you went to St. Francis Hospital? A. Yes. 40

Anthony Herrera—Cross.

Q. Alone? A. Right after the accident you mean? No, I did not go to any hospital until after the accident. I went over to my room about four o'clock, and then a couple of days after I went up to St. Francis Hospital.

Q. They treated you over there? A. Yes.

10 Q. How many times did you go there? A. I went there, I guess, about six or seven times.

Q. Who did you see? A. Well, I seen a doctor there.

Q. What doctor? A. Tall doctor, I don't know what his name is. Dr. Long, I think his name was.

Q. Long, and he was tall? A. No, I think that was his name, Dr. Long.

20 Q. When did you return to work after the accident? A. I think, if I remember right, I think I stayed home next day after the accident, and came in the following day.

Q. What did you do? A. I did not do much but stand around and run upstairs with something.

Q. You worked after the accident on piece work on the machines, didn't you? A. Piece work, no sir; I didn't do no piece work.

30 Q. You worked in that shop all the way from the fourth of May, except for two days, all the way up to the 31st? A. I was not there the 31st. A little after the 15th of May I was up in the Palisade Park.

Q. I suppose that you got paid down there? A. Well, I got paid for a couple of days, a few days.

Q. Who was Dr. Thomas? A. Who was he?

Q. Yes. A. My mother's doctor, family doctor.

40 Q. In New York? A. In Brooklyn.

Q. You say you went to see him? A. I went to see him a number of times.

Anthony Herrera—Cross.

Q. For your hand? A. For my hand,—both my hand and my physical condition.

Q. What was the matter with your physical condition? A. Well, I was run down, I was,—the shock of this here had kind of made me feel bad, and I was nervous and could not sleep nights with that pain—it was a shooting pain.

Q. So you went over to see Dr. Thomas? A. 10
Yes.

Q. Is Dr. Thomas here? A. I don't think so; I don't see him here.

Q. Did you ask him to come here? A. I did, sir.

Q. Did he say he would come? A. He said he would willingly come.

Q. Do you expect to have him here? A. I hope so. 20

Q. You have been familiar, you say, with clutches on presses; is that right? A. Oh, well, I have not been familiar, only with the—probably the presses I worked on in the shop, that one press. I got familiar with it after I came back. I came back to get familiar with it for a reason.

Q. You had been familiar with it before, had you, with clutches on presses? A. No, sir.

Q. You had not? A. Not that I—

Q. Did not know what a clutch was for? A. I 30
knew what a clutch was for, but I didn't know what the mechanical part of the whole thing was.

Q. You knew what a clutch was? A. I knew it regulated the coming up and down of the punch press.

Q. That is all you knew about it? A. That is all I knew about it, it controlled the power of the press.

Q. Who was this die setter you spoke of? A. 40
Eddie Martin.

Anthony Herrera—Re-Direct.

Q. Martin? A. Yes.

Q. Did he set the die for you? A. He set that die in that press, yes, sir.

Q. How long before this day of the accident?
A. Just about in the morning of the day before the accident.

Q. The morning of the day before? A. Yes.

10 Q. He set the die? A. Yes.

Q. See him? A. I seen him, yes, sir.

RE-DIRECT EXAMINATION BY MR. ZIEGENER:

Q. In answer to the fourth interrogatory, "For how long a time, giving months, days and years, had the plaintiff been engaged in the particular work he was doing at the time of said alleged accident?" And to which you replied, "About five
20 years on and off, and with the defendant about two years on and off."

THE COURT: Did you offer these interrogatories?

MR. SMITH: I had not offered it yet.

Q. What work did you refer to?

MR. SMITH: I object.

THE COURT: You cannot cross examine
30 on that, because it has not been offered.

Q. Well, had you operated this perss in this particular work of bending this brass article here any time previous to the day and a half that you referred to? A. Not on that press, no sir.

Q. Job 1181, I am referring to? A. Not on this press, no sir.

BY MR. SMITH:

40 Q. What press had you? A. I might have done it on another press down there.

Joseph Fina—Direct.

JOSEPH FINA, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. ZIEGENER:

Q. Mr. Fina, where do you reside? A. 172 Morgan Street, Jersey City.

Q. How long have you resided in Jersey City?
A. About twenty years. 10

Q. On or before May 4, 1911, what was your business? A. I was press hand down in the Manhattan Electrical Supply Company.

Q. How long had you been a pressman? A. Previous to that?

Q. Yes. A. Altogether about seven years.

Q. How long have you been employed by the Manhattan Electrical Supply Company? A. About three years. 20

Q. Do you know Mr. Herrera? A. Yes, sir.

Q. Had you known him during the time that he worked at the Electrical Supply Company's plant?
A. Yes.

Q. How long did you work there when he worked there? How long did you know him? A. Why, I knew him during the entire time that he worked there. I guess I was working there previous to him. 30

Q. On May 4th, at about 11.55 did you notice that an accident occurred? A. Yes, sir.

Q. Now, did you see the accident itself? A. No, sir.

Q. How long after the accident did you see Mr. Herrera? A. Why, a couple of minutes, I guess, I saw the commotion.

Q. Where did you see him? A. Standing up at the front of the shop near the bench. 40

Joseph Fina—Direct.

Q. Near a bench? A. Near a bench where they put dies on.

Q. Did you notice the condition of any of his hands? A. No, sir; I did not care to look at it, in fact I did not have the heart to look at the sight.

10 Q. But did you see whether he was attended afterwards by any physician? A. A physician came, but I did not see what happened.

Q. You did not go near him, did you? A. No, sir.

Q. Were you familiar or do you know of the job which was referred to as job 1181? A. Yes, sir.

Q. I show you a brass piece and ask you whether that is the job referred to? A. Yes, sir.

20 MR. ZIEGENER: I will offer this piece in evidence. I meant to at the close of Mr. Herrera's statement.

THE COURT: How are you going to offer it? You cannot offer it very well.

MR. ZIEGENER: Just refer to it then.

Q. Did you see Mr. Herrera working on a press on the 4th day of May? Do you know which press he was working on? A. Yes.

30 Q. You know the job on which he was working? A. Yes.

Q. And that was what job? A. Job known as 1181.

Q. Now, had you worked on this press previous to the day of this accident? A. Any time previous?

Q. Yes. A. Yes, sir.

40 Q. How long previous, Mr. Fina? A. Well, as far as I can recollect it might have been a month or might have been two months.

Joseph Fina—Direct.

Q. You continued to work on that floor since the time that you worked on this press, did you?

A. Yes, sir.

Q. During the time that you worked on this press did it repeat?

MR. SMITH: I object because it is absolutely leading, and it is too remote.

THE COURT: It is objectionable on both grounds, Mr. Ziegner. 10

Q. Do you know what repeating means from a pressman's standpoint? A. Yes.

Q. What does it mean? A. It means that the press come down one time more than it should.

Q. What would be the cause of repeating, if you know? A. What would be the cause?

Q. Yes. A. Well, either a defective clutch or something defective about the machinery itself. 20

Q. Now, you were familiar with this particular press, were you? A. Yes.

Q. If the person who was operating that press did not come in contact with that foot treadle—if he did not come in contact with the treadle with his foot, would that press, if working properly, repeat?

MR. SMITH: I object. The man is not qualified as an expert. 30

THE COURT: If you want to qualify him as an expert, the other side have a right to cross examine.

MR. ZIEGENER: I will withdraw the question.

Q. Now, Mr. Fina, during the time that you worked on it, and during such time as your foot did not come in contact with the treadle, did this press repeat? 40

Joseph Fina—Direct.

MR. SMITH: I object.

Q. And if so, at what time or how long before this accident?

MR. SMITH: I object on the ground that it is too remote. The man said that he did not work on it for a month or two months before the accident.

10

MR. ZIEGENER: I am merely leading up to another proposition, proving the condition existed up until the present time.

THE COURT: I will allow the question.

A. Yes. The press has repeated on me.

Q. On you? A. Yes.

Q. After the time that you worked on it and during the time that you worked on that floor on
20 other presses, as you say, and up until the time of the Herrera accident, did you see it repeat on other people working on it? A. Yes, sir.

Q. And did you during that time, see any person's hand caught in it, or fingers? A. Did I see? I know that other people's hands has been caught.

THE COURT: Oh, no, no.

Q. How do you know it? Did you see it afterwards? A. I saw the hand. You mean did I see
30 anybody else get hurt, that is, see the accident, in other words?

Q. You did not see the accident then? A. No.

Q. Never mind what you heard. How many times did you see it repeat from the time you have been working on it up until the time of the Herrera accident, about? A. Well, when you say
40 see, do you mean that if I knew of the press repeating on some one else?

Joseph Fina—Direct.

THE COURT: No; the question is how many times did you see it?

A. Oh, once.

Q. How many times did it repeat on you? A. Just that once.

Q. Who was the person in charge of these presses, the inspection or repairs, if any, were to be made, if you know? A. Well, the person in charge was Mr. Cook. 10

Q. Mr. Cook. Now, did you before or after this accident, Mr. Fina, have occasion to examine the clutch of this particular press? Have you seen the clutch? A. Yes.

Q. Did you notice the clamp attached to that clutch? A. Yes.

Q. With what was it constructed? 20

MR. SMITH: I object, unless he can specify as to the date.

Q. When did you last see it, or when did you see it just prior to the accident? A. Day before, the same morning.

Q. Did you see it the day of the accident or after the accident? A. Yes.

Q. Did you see it after that? A. Yes.

Q. What was it constructed of? A. Piece of wood. 30

Q. Wood? A. With a hole in the center with the shaft going through.

Q. Are you familiar with this particular press—presses of that kind? A. Yes.

Q. What are those clamps generally constructed of? A. Cast iron, I think it is—cast iron rim.

Q. Now, a proper clamp attached to that clutch, would that overcome the question of the machine repeating? 40

Joseph Fina—Direct.

MR. SMITH: I object unless he qualifies this man as an expert.

THE COURT: Yes; he is not qualified as an expert. Whatever he saw he can testify to. If you are going to qualify him as an expert they have a right to cross examine.

10 Q. Are you familiar with the presses to such an extent that you can tell of its construction and the better use of it? A. No, sir.

Q. Now, from the time that you worked on it and the time you say it repeated on you up until the date of this Herrera accident, had you seen any repairs made to this machine—from the time that you worked on it until the time of the Herrera accident? A. No, sir.

20 Q. And how often were you there? A. Every day.

Q. And did you see them repairing the machine after the accident, and if so, about how long?

MR. SMITH: I object to it as absolutely incompetent.

THE COURT: He may answer yes or no to that.

30 Q. Did you see them make any repairs after the accident? A. I do not recollect.

Q. Now, at the time you worked on it, and at the time it repeated did you advise the party in charge of its condition?

MR. SMITH: I object.

(Question repeated.)

A. May I answer?

Q. Yes. A. Yes.

40 Q. What did you say? A. I told the die setter,

Joseph Fina—Cross.

Mr. Martin, that the machine had repeated on me.

MR. SMITH: What is that?

A. I told the die setter, Mr. Martin, that the machine had repeated on me, and showed him the work I spoiled thereby, and I believe he informed the foreman.

10

MR. SMITH: I object, and ask to strike it out.

Q. Never mind what you believe. You did tell Mr. Martin? A. Yes, sir.

Q. What was the position of Mr. Martin with the company, if you know? A. Die setter.

Q. I said, do you know whether he had charge or control in any particular of these presses?

MR. SMITH: I object. He has already said a minute ago, that Mr. Cook was the man.

20

Q. Now, do you know whether any other person other than Mr. Cook, was in charge of the presses?

A. Mr. Martin, of course.

Q. What was he designated as? A. Die setter.

Q. And Mr. Cook was what? A. He was the foreman.

30

CROSS EXAMINATION BY MR. SMITH:

Q. You said a little while ago that Mr. Cook was the man in charge? A. So he is.

Q. Now, you say Mr. Martin is the man in charge? A. In charge of the presses.

Q. What do you mean, Mr. Cook is in charge of Mr. Martin, and Mr. Martin is in charge of the presses? Is that what you mean? A. Certainly, yes.

40

Joseph Fina—Cross.

Q. You couldn't say that before, could you?

A. What did I say? Words to that effect.

THE COURT: Just answer the questions.
Do not argue.

Q. You worked on this press how long? A.
On this press?

10 Q. Yes. A. Well, I worked on it for weeks at
a time. I couldn't tell you just how long.

Q. Well, how long prior to the accident had you
worked on it? What was the last particular oc-
casion that you worked on that press? A. About
a month before.

Q. How long had you worked on it at that
time? A. About a week, I think.

Q. It was a simple up and down press, wasn't
it? A. Yes, sir.

20 Q. Worked a foot treadle? A. Yes, sir.

Q. You could see the whole thing right in front
of you? A. Yes.

Q. When you sat down the press was not any
more than a foot from you? A. That is true.

Q. Isn't that true? A. Yes.

Q. So that the whole working of the press is
right there in front of your eyes? A. Yes, sir.

30 Q. The clutch is right in front of your eyes? A.
No.

Q. Where is the clutch? A. Have to look up
at that.

Q. How far? A. Possibly a foot above your
head.

Q. As you sit down? A. When you sit down,
yes.

Q. So it is right in front of your eyes if you
happen to glance up a little bit? A. Yes.

40 Q. Easily seen? A. The clutch?

Joseph Fina—Cross.

Q. Yes. A. Yes; you can see it.

Q. You say as you worked on this machine for that week steadily during this month, one of the times it repeated on you, did it, came down? I suppose you immediately told everybody in the shop, didn't you? A. Everybody in the shop no, sir.

Q. Who did you tell? A. Mr. Martin, and sent him over. 10

Q. Mr. Martin was a die setter there? A. Yes, sir.

Q. He was the man that put in the dies? A. Yes.

Q. Working around and putting in the dies the same as you worked on a press? A. Yes, that was his duties.

Q. What did you do to the machine, anything? 20
A. I?

Q. Yes. A. No, sir.

Q. Went right on working with it? A. After I told him?

Q. Yes. A. Yes.

Q. And the press kept right on working, didn't it? A. Yes.

Q. In other words, this thing repeated once and you kept right on working with it? A. Yes. 30

Q. Went on working that whole week with it? A. Yes.

Q. That is the only time you ever knew of it repeating, wasn't it? A. Yes, that is the only time it repeated on me.

Q. That is the only time you ever saw it? A. Yes.

Henry Weil—Direct.

HENRY WEIL, called and sworn on behalf of the plaintiff testified as follows:

DIRECT EXAMINATION BY MR. ZIEGENER:

Q. Mr. Weil, where do you live? A. 241 Livingston Street, New York.

10 Q. On or about May 4, 1911, what was your business or trade? A. Press hand.

Q. How long had you been engaged in that? A. In that business I have been engaged five years.

Q. Do you know Mr. Anthony Herrera? A. Yes.

Q. Do you recollect the 4th day of May at the time of an accident? A. Yes.

Q. Did you see the accident? A. Yes, sir.

20 Q. Just tell the court and jury in your own way, if you will, just what happened? A. Well, I was walking down the aisle when I got through with my press there, to see the time—walking along there—happened to step off in front of him and caught my eye, noticing that double bound of that press.

30 Q. When you noticed that double bound how far from Herrera were you? A. I was right in front of him, from a distance of six or seven feet—right in back of him.

Q. When you say there was a double bound, just describe what you mean, and just what Herrera was doing at the time he—A. Well, Herrera was facing me with his back and you couldn't see what he was doing.

Q. You mean Herrera's back was toward you? A. Yes.

40 Q. When you say a double bound what did these machines do? A. Every time you step on that

Henry Weil—Direct.

clutch it makes that noise when it pulls away from the brake.

Q. That is, the one drop? A. That one drop, and when it comes down again you hear that second distinct noise—you always hear a noise every time the press is in operation.

Q. What would be the cause, if you know of a rebound? A. The clutch going—

10

THE COURT: Ask him first if he knows.

Q. Do you know? A. Yes.

Q. What was the cause of it?

MR. SMITH: I object unless you qualify him as an expert.

Q. How long have you been working on presses?

A. I have been working there about five years, on press work.

20

Q. Are you familiar with the conditions of a clutch and its use? A. Well, I know its use, but I am not very familiar with it.

Q. Do you know what this particular clutch was made of? A. Well, it is a piece of steel coming to a point, and always springs back in place as soon as you take your foot off the treadle.

Q. Is there a clamp attached to it? A. Well, not all presses have that.

30

Q. Does this particular one have a clamp? A. Well, I have never noticed that press.

Q. Never noticed it? A. Never noticed that press.

Q. Did you work on this press yourself? A. No, sir.

Q. Did you ever see it repeat on any press previous to the Herrera accident? A. No, sir.

Q. After the accident did you see the condition of Mr. Herrera's hand? A. Yes.

40

Henry Weil—Cross.

Q. What was the condition?

THE COURT: Is it worth while to go into that?

A. Right after the accident—

MR. ZIEGENER: I will withdraw the question.

10

CROSS EXAMINATION BY MR. SMITH:

Q. As I understand, you say you were walking down the aisle? A. Yes.

Q. Which way were you going? A. Walking down toward the exit—or the entrance, in fact.

Q. You were then about six or seven feet from Herrera? A. Six or seven feet from Herrera.

Q. Then you say you heard two noises? A. 20 Yes.

Q. You did not see anything? A. Certainly. I was facing right that way.

Q. What did you see? A. I seen the press come down twice in succession without the clutch bringing it back into place.

Q. How could you see whether the clutch sprung back into place or not? A. The only way you could look down the aisle, and that was to your 30 right.

Q. How could you see whether—A. The whole press is open work and you can see the press come up and down.

Q. You can see the plunger come up and down? A. Yes.

Q. But you could not see whether the clutch sprung back into place? A. You cannot see that. It does go that way.

40

MR. SMITH: I submit his testimony should be stricken out.

Henry Weil—Re-Direct, Re-Cross.

THE COURT: Yes; only testify what you saw.

Q. All you heard was two noises? A. Two noises, and I happened to be looking in that direction.

Q. From the fact you heard the two noises you thought the press went up and down twice?

A. Yes, sir.

10

RE-DIRECT EXAMINATION BY MR. ZIEGENER:

Q. Now, other than your thinking that the press went up and down twice, did you see the press go up and down at all? A. Certainly; I was looking in his direction.

Q. How many times did it go up and down? A. Twice.

Q. So it was not merely thinking at all? A. No, sir.

20

RE-CROSS EXAMINATION BY MR. SMITH:

Q. Then why did you say you just thought so because you heard the noise? A. I said I seen and heard it.

Q. That is why you said you just thought so, because you heard the noise? A. I didn't say—I don't recollect saying that.

30

MR. SMITH: Just repeat his testimony.

(Stenographer repeats testimony on cross examination.)

THE COURT: That is what you said.

Q. That is what you said, didn't you?

MR. ZIEGENER: I object. Mr. Smith said it. He said he saw it first.

THE COURT: No, but he did make that answer, Mr. Ziegenger, as the stenographer's notes show.

40

Nicholas Sarre—Direct.

NICHOLAS SARRE, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. ZIEGENER:

Q. Mr. Sarre, where do you live? A. 295 Railroad Avenue.

Q. How long have you lived in Jersey City?
110 A. Last twenty-two or twenty-three years.

Q. Previous to May 4, 1911, what was your business? A. Why, I have been working at the Manhattan Electrical Supply Company.

Q. As what? A. Press hand.

Q. Pressman? A. Pressman.

Q. Do you remember the 4th day of May at the time Mr. Herrera met with an accident? A. Why, I remember it, but I never see it.

20 Q. You remember the day of the accident, do you? A. Yes, I remember the day of the accident.

Q. Now, previous to that time had you worked on the—I will withdraw that—do you know the press he was working on on the day of the accident, and before the time of the accident?

Q. Previous to that time had you worked on that press? A. I did.

30 Q. Now, do you know what repeating of a press means? A. Why, yes.

Q. Now, how long did you work on the press?
A. How long did I work on it?

Q. Yes. A. Why, I couldn't exactly say how long I did work on it.

Q. About how long? A. Well, might work on it for a day, and might work on it for a week or so.

Q. But you were on it on and off then? A.
40 On and off.

Nicholas Sarre—Direct.

Q. How long before Herrera accident had you worked on it? A. About two months.

Q. During the time that you worked on it and up to the time of the Herrera accident, had you continued to work on that floor where that press was? A. Yes.

Q. Now, during that time that you worked on it did it repeat?

10

MR. SMITH: I object to it as too remote.

THE COURT: I think it is too remote, two months before.

MR. ZIEGENER: I will withdraw the question.

Q. During the time, Mr. Sarre, who was your foreman? A. Why, Mr. Cook.

Q. As the result of the actions of that press during the time when you worked on it on and off, did you have occasion to report anything to Mr. Cook?

20

MR. SMITH: I object.

THE COURT: I understand him to say he was not working on it within two months of the date of the accident. If so, I think it is too remote.

MR. ZIEGENER: Will your Honor permit me to show that there was nothing done with it during the time?

30

THE COURT: I have let in evidence to show that it repeated a month before, but I think going back two months is too remote.

Q. Had you seen the press in operation less than two months before the Herrera accident? A. Yes, I did.

40

Q. Who was operating it? A. Before the accident?

Nicholas Sarre—Direct.

Q. Yes. A. Why, Herrera.

Q. No; I mean before Herrera was on the machine. A. Before that?

Q. Who worked on it before Herrera? A. Why, I don't know who did work on it before Herrera.

Q. Do you know Mr. Lazzee, Arthur Lazzee?

10 A. Do I know Arthur Lazzee?

Q. Yes. A. Yes.

Q. Did you see him working on that press? A. Yes.

Q. How long before Herrera, about? A. Why, I couldn't exactly tell how long.

Q. About how long, do you know? A. Might have been a month or so, maybe more, or two or three months.

20 Q. Now do you recall Arthur Lazzee meeting with an accident?

MR. SMITH: I object to it as not competent.

MR. ZIEGENER: I am trying to place the time. I am not going into the accident; I am trying to place the time.

30 THE COURT: Well, he might have met with an accident by stubbing his toe, or something or other; that does not throw any light on the accident.

Q. Do you remember the time, Mr. Sarre, that Mr. Arthur Lazzee met with an accident on this particular press?

MR. SMITH: I object.

40 THE COURT: No; I do not think that would be competent. If he met with an accident, he is the one that can best testify to it, not somebody else.

Edward Martin—Direct.

EDWARD MARTIN, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. ZIEGENER:

Q. Mr. Martin, where do you reside? A. 227 Clinton Avenue, West Hoboken.

Q. On or before May 4th, what was your business? A. Well, I was a die setter down at the Manhattan Electrical Supply Company. 10

Q. How long had you been working there? A. Well, I have worked two years and one month.

Q. In what capacity? A. What's that?

Q. In what capacity? A. What do you mean?

Q. In what position? A. Well, I was die setter, and assistant foreman, and timekeeper.

Q. As such did you have control of the machines and presses? A. I used to set dies. 20

Q. Setting the dies? A. Yes.

Q. Now do you recall the date that Herrera had the accident? A. Well, I can remember the day.

Q. Do you recall the machine he was working on at the time? A. Yes.

Q. Do you know Mr. Cook? A. Yes.

Q. What position does he hold with the company? A. Well, he was foreman. 30

Q. Did you know previous to the accident that there was anything wrong with this machine or that it was liable to repeat?

MR. SMITH: I object, unless he states the time.

Q. And if so, how long before? A. That was before the accident, you mean?

Q. Before Herrera was hurt? A. Well, they repeated often. 40

Edward Martin—Direct.

Q. As the result of that repeating did you have any conversation with Mr. Cook? A. I always told Mr. Cook, told him three or four times.

Q. What did he say? A. Well, Joe Fina got hurt—Joe Fina told me about it and I told Mr. Cook.

(Answer repeated by stenographer).

10

A. Well, I mean the time the press repeated.

Q. What did you tell Mr. Cook and what did Mr. Cook say? A. I told Mr. Cook, I said—Joe Fina has bell frame work, making bell frames, so I told Mr. Cook, I says, "Joe Fina down there, he has got a bell frame and the press repeated on him," and he says, "I will throw the son of a B out." Well, it repeated often. Every time it repeated all you had to do there was a clutch—if

20

you want me to explain how this—

Q. Do you know the cause of the repeating of this machine? Yes.

Q. Well, what is it? A. Well, the machine is an old machine, and there is a clutch and there is a shaft—when you say a shaft, there is another iron bar comes out on the shaft and there is a clutch goes up there and catches it here and there is a spring on the botton, and the bottom of the

30 spring is another bar screwed into that bottom, and on that screw is a nut—by rights there ought to be two nuts in there instead of one, and that continuously pounds it on the press, that makes the spring loose, and when that gets loose that won't clutch to this shafting, tight, and when it comes around it hits this spring and forces this spring down and that will repeat on you—on the other side of the machine the friction is lost—

40 there is a friction like resistance holds this shafting so the press cannot repeat. Of course this

Edward Martin—Direct.

wheel going down and the weight of this punch—if this friction was not there the punch would come down with the weight, but this friction holds this shafting tight so it has to go around with a wheel, and of course that there is wood—that ought to be iron with leather lining.

Q. What do you refer to? A. This shafting on the other side—or friction at least.

10

Q. It was wood? A. That is wood now since I was there.

Q. After the accident—— A. Then that there wood, that is worn out, and, of course, you can't clamp them in tight.

I don't know if they changed it lately. Now, the only thing you could apply was a spring, and the only way was to tighten this nut so as to force this clutch out of the shafting so it will hold it. If that was loose it would hold for a fraction of a minute or second and it will come right down again.

20

Q. Now, after the accident did you have occasion to try this machine? A. Well, after the accident—why, I didn't see the accident; I was setting up another machine, but when I could get time I went right down there, and it repeated on me, so all I had to do was tighten up this spring.

Q. Repeated on you? A. Yes.

30

Q. Did you see the superintendent on that day? A. Well, I was the superintendent with Mr. Cook. We went down to look at the machine.

Q. What did Mr. Cook say to him, if anything?

MR. SMITH: I object.

Q. In relation to the machine?

MR. SMITH: I object to it as not evidence——

40

Edward Martin—Direct.

MR. ZIEGENER: Immediately following the accident.

10 THE COURT: If you propose to show by this conversation that they knew beforehand it was out of order it would be competent; otherwise it would not, but I cannot tell. If you say that you propose to prove that by this question I will allow it.

MR. ZIEGENER: I perhaps better not ask it, because I am not sure I can prove it, except if a remark was made it would be evidence to the jury as to whether they did know; but I will withdraw the question.

20 Q. Mr. Martin, do you recollect a conversation taking place between Mr. Cook and a Mr. Dittmar, and if so, was that conversation before or after this accident? A. Well, it was after the accident. The three of them went up—the two of them at least, I know.

Q. Immediately after the accident? A. It was not immediately, but I think it was about one o'clock. It was around one o'clock.

Q. Was there an inspection made at that time? A. What do you mean?

30 Q. Of this press? A. Anybody inspecting it? Well, after I fixed it Mr. Cook came up, but he didn't do—he just put his foot on the treadle and it worked all right.

Q. Was there anything said, to have you fix it? A. Before I fixed it I told Mr. Cook about it, that the press was no good.

40 Q. I mean other than that. Was there any investigation made by Mr. Cook? A. After he got hurt. After I got fixed the press, this Arthur Lizzee, he saw me fix it—he saw it repeat on me.

Edward Martin—Direct.

Q. Who was your foreman, Mr. Cook? A. Cook.

Q. Did you have a conversation with Mr. Cook as to whose fault the accident was?

MR. SMITH: I object.

A. Yes.

Q. When?

10

MR. SMITH: I object.

THE COURT: I will allow it—when.

A. Well, I told him after the accident before the suing was going on.

Q. About when was that after the accident?

A. Oh, I told him two days after the accident that it was the machine's fault, but he told me not to say nothing, because there would be trouble if I did say anything.

20

MR. SMITH: I object to it as immaterial and incompetent.

THE COURT: I don't catch what he says. (Testimony repeated by stenographer).

THE COURT: That ought to go out, as to what he told Mr. Cook. Such an admission as that—such a statement as that, even by the superintendent, would not bind the corporation, would it?

30

MR. ZIEGENER: No; except for the purpose of showing that the man in actual charge, management and control of this machine was the man that made this remark, showing knowledge, that is all.

THE COURT: No; it does not show a knowledge; it shows the knowledge of this witness—this witness says he told him and this superintendent said, "Don't say any-

40

Edward Martin—Cross.

thing about it; we will get in trouble." There is nothing from that from which you could infer the superintendent knew.

Q. Did you have any conversation with Mr. Cook—

THE COURT: His answer will be stricken out.

10

Q. Did you have any conversation with Mr. Cook, who I understand is your foreman, as to whether or not he had knowledge or knew of the defective condition of this machine before it hurt Herrera? A. Yes.

Q. Did he or did he not know it? A. He did know it.

MR. SMITH: I object.

20

THE COURT: No; that is the witness's inference, what he said.

Q. How do you know he knew it? Why did you say he knew it. A. Because I told him and he fixed it himself many a time, went up and just tightened the screw up, that is all.

Q. After the tightening of the screw did you see it repeat? A. Yes; only it might last a week; it might not last a day.

30

Q. He was the man who along with yourself was tightening those screws? A. Yes; both of us had charge of it.

CROSS EXAMINATION BY MR. SMITH:

Q. Then it was your duty to look after the screws? A. My duty is just to look after the machine.

40 Q. Didn't you just say here a moment ago that you were in charge of looking after the screws? A. On that press, yes.

Edward Martin—Cross.

Q. When did you tighten up the screw before this man was hurt? A. I tightened it up often.

Q. When? A. Well about a week.

Q. A week? A. Or a month.

Q. Did you know that it was liable to be loose?
A. Certainly.

Q. Did you tell him? A. Well, I told the foreman, and he told him to go ahead. 10

Q. Did you tell him? A. No, I didn't tell him.

Q. Mr. what's-his-name here? A. No, I didn't tell him.

Q. Why didn't you? A. He was supposed to let him go on the job.

Q. Why didn't you tell him if you knew it was likely to repeat when he was going to work on it? A. I just told him to go on ahead on the job.

Q. Did you know it was liable to repeat then?
A. Yes, everybody knew. 20

Q. Who is everybody? A. Everybody in the shop.

Q. Did he know it? A. I don't know if he knew it.

Q. Is he one of the persons in the shop? A. Well, yes.

Q. What do you mean by everybody in the shop knew it? Did he know it? A. He was only there a year. He went and came back. 30

MR. ZIEGENER: I object on the ground that it calls for a conclusion.

MR. SMITH: He has already said it.

Q. Did Mr. Herrera know at that time? A. I don't know if he knew. He knew it after.

Q. Did you tell him before? A. I didn't say nothing to him. 40

Edward Martin—Cross.

Q. Why didn't you? A. The foreman told me to set him to work on it.

Q. Why didn't you tell him? Why didn't you tell the man who was going to work? A. He might stick out the job and the machine would not repeat.

10 Q. I asked you why you did not tell him? A. I couldn't say why I didn't tell him.

Q. With your knowledge that the press would repeat you allowed him to go and work on the press, knowing it might repeat on him any minute and catch his fingers, and you never said a word to him. Do you mean that? A. I couldn't say nothing to him. It was the foreman told him.

Q. Why didn't you tell him?

20 THE COURT: Just answer the question.

A. I didn't tell him. I didn't know anything about it.

MR. SMITH: Repeat the question.

(Stenographer repeats the question as follows: With your knowledge that the press would repeat you allowed him to go and work on the press, knowing it might repeat on him any minute and catch his fingers, and you never said a word to him. Do you mean that?)

30

A. Yes sir.

Q. So then, Mr. Witness, knowing that the press was liable to come down and catch the fingers of a workman, you deliberately set a man to work on the press and never told him a word about it? A. Well, the foreman set him on the job.

40

THE COURT: Answer the question.

Edward Martin—Cross.

(Question repeated).

A. Yes sir; that is right.

Q. That is right, is it? A. Yes sir.

Q. You want the Court and jury to believe that you, knowing such a thing was there, knowing it was dangerous, deliberately set a man down to work on it and you never informed him about it?

A. Well, no one informed anybody. I just got word from the foreman to put him on the job, that is all I told him, "There is that job." 10

Q. Why didn't you tell him it would repeat?

A. I didn't tell none of them.

Q. Didn't you say everybody knew it? A. Everybody knew it.

Q. Why didn't you tell this man that was going to work on that job, if you knew it? A. Well, that job was always done on that press. 20

Q. Why didn't you tell the man? A. I didn't think of it at the time and I only told him to go ahead on the job.

Q. Don't you know that the truth of the matter is that you did not tell him because it did not repeat? A. Well, it repeated on me. I didn't say it repeated, but it repeated on me after the accident, because I repaired it.

Q. Before you never saw it repeat? A. I never saw it, but people told me to come up and repair it, and I fixed it for them, but after the accident it repeated forty or fifty times. 30

MR SMITH: I object and move to strike out all the evidence as to a repetition of this. He said he never saw it prior to the accident.

THE COURT: Yes.

A. I didn't see the accident, but I just re- 40

Edward Martin—Cross.

paired the machine and it repeated on me after the accident. I was the person to go over it and look at it.

Q. Who requested you to go over and look at it? A. Nobody.

Q. You said you were requested to go over and look at it? A. Nobody. I didn't say I was
10 requested.

MR. SMITH: Just repeat his testimony.
(Testimony repeated).

Q. Why did you go right over and look at it?
A. I went to see what was the matter. It was my duty.

Q. What was your duty? A. To go over and look at it.

Q. It was your duty to look at it before? A.
20 Yes.

Q. You did not do it? A. I always looked at it before I set somebody on the job. I always tried it myself.

Q. Did you look at it before you set him on the job? A. Yes.

Q. How did it work? A. Worked all right.

Q. That press all right? A. The press was all
30 right.

Q. Was it working all right? A. Yes.

Q. Nothing the matter with the clutch? A. Nothing the matter with the clutch.

Q. Nothing the matter with the friction? A. Only the friction was wooden friction; ought to be a steel friction.

Q. I didn't ask you that.

MR. ZIEGENER: I object; he did ask
40 him that.

THE COURT: Yes he did.

Edward Martin—Cross.

Q. There was nothing the matter with the friction at that time? A. At that time he went to work on it?

Q. Was there? A. No sir.

Q. And at the time he set him on it there was nothing the matter with it? A. I just told him to go over—

THE COURT: Just answer the question. 10

A. No; it was all right.

Q. You mean the press was all right at the time you set him to work on it? A. Yes.

Q. In good order? A. Yes.

Q. And fit to work on? A. Yes.

MR. SMITH: I understood your Honor to strike out the testimony as to anything prior to the time of this accident. 20

THE COURT: Yes, because I understood you to say that he did not know it at least prior to the accident.

MR. SMITH: Yes, he says that.

THE COURT: So it goes on.

Q. You understand what I have been asking you, do you sir? A. What you just asked me?

Q. Yes; and you answered truthfully, did you? A. Certainly, yes. 30

Q. You are not working for this company now? A. No; I didn't get enough money, so I quit. I worked two years on one as foreman and die setter and timekeeper for thirteen dollars.

THE COURT: Just answer the question and stop.

Q. If you will stop talking until somebody speaks to you, we will get along. 40

Edward Martin—Re-Direct.

RE-DIRECT EXAMINATION BY MR. ZIEGENER:

Q. Now Mr. Martin, were you present at any time previous to the Herrera accident? A. Before?

Q. When any press hand was caught in this particular machine and if so which press and how long before the accident to Herrera?

10

MR. SMITH: I object. Of course he has already been over that.

THE COURT: You went over it on direct examination and he brought it out on cross examination that he did not know. You cannot repeat. You went all over that ground.

20

Q. How came it, Mr. Martin, that you referred the defective condition of this press to Mr. Cook?

MR. SMITH: I object.

THE COURT: I do not see, in the light of his last testimony—he said that the machine had repeated and he referred it to Mr. Cook, but he said it was his business to put it in order and he did put it in order the day this man went to work on it, and then it was in good order.

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MR. ZIEGENER: He also said it that a slight operation of it, or a short operation of it, causing that bolt to loosen in such a way that it would repeat.

THE COURT: And he said he put it in order, so it was in order at the time he put this man on it.

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MR. ZIEGENER: He tightened the bolt at that time, yes.

Q. Mr. Martin—I will ask the Court's permis-

Edward Martin—Re-Direct.

sion to examine him on that—you said a moment ago on direct examination that you had referred the fact that this machine had repeated and was in a defective condition, did you—

MR. SMITH: I object to the question as entirely leading and not proper. The man himself can state that. He ought not to call his attention to it. 10

MR. ZIEGENER: I am asking him if he did say it.

THE COURT: If you want to get at that you may refer to the stenographer's notes, and not ask him what he said. If you want to get at it you may refer to the stenographer's notes.

MR. ZIEGENER: That is all. 20

MR. ZIEGENER: Now if your Honor please, I do not think that Dr. Thomas has arrived, and that is the only witness except the Doctor. It may be that I even may not want to call him. I think we will rest on the injuries shown and as testified to by the plaintiff. 30

PLAINTIFF RESTS.

(RECESS.)

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Motion to Non-Suit.

MOTION TO NONSUIT.

10 MR. SMITH: If the Court please I move for a nonsuit on the grounds the evidence fails to show any negligence on the part of the defendant company, and upon the ground that the evidence does show that this press was inspected and was in proper order at the time this man was set to work on it; and that the evidence, showing on the plaintiff's case that the press was in good condition, was in proper order, was fit to be worked on, leaves no question to be submitted to the jury. I respectfully submit under the cases and under the circumstances your Honor should direct a nonsuit.

20 (Argued.)

THE COURT: I will grant a nonsuit and I will allow the plaintiff an objection.

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New Jersey Court of Errors and Appeals.

ANTHONY HERRERA, <i>Appellant-Plaintiff,</i> <i>vs.</i> MANHATTAN ELECTRICAL SUPPLY COMPANY, <i>Respondent-Defendant.</i>	}	On Appeal from Supreme Court. 10
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BRIEF FOR RESPONDENT.

This was an action for personal injuries and was tried before Hon. Benjamin A. Vail and a jury at the Hudson County Circuit of the Supreme Court. At the close of plaintiff's case, a non-suit was granted. From this judgment of non-suit plaintiff appeals. 20

Facts.

Appellant was employed by appellee as an operator of a die plunging machine and while operating the machine the plunger fell and crushed his finger. The alleged vice in the operation of the machine was that a plunger that should have remained suspended upon a die until released by pressure upon a treadle descended without pressure having been applied and crushed the hand of the plaintiff while he was in the act of feeding metal to the die. 30

Evidence.

Plaintiff, thirty years of age, had been in defendant's employ two years and working on power 40

presses (pp. 14-15). To lower the press the operator pressed with his foot upon a throttle, which throws off the clutch and the plunger drops. At 11:55 A. M., after working on the machine all morning, it dropped and crushed the middle finger of his left hand. Just previous to the accident plaintiff had not worked the throttle with his foot (p. 15). Previous to the accident plaintiff had no knowledge that the machine was defective or that it would repeat without operation of the foot (p. 19). That Eddie Martin, a die setter, had charge of inspection of the presses.

CROSS EXAMINATION:

(p. 24, l. 37). He had worked on presses for three years, substantially the same as the press in question (p. 25, l. 13). He had work on this press about 11½ days before the accident occurred (p. 28, l. 22). That it was not necessary for him to keep his fingers under the plunger, while the loop was being made (p. 29, l. 29, p. 29, l. 30). Plaintiff had worked on the press all of the preceding day and on the day of the injury, and in his opinion the machine was in first class order (p. 31, l. 20); that up to the time of the accident the whole machine had worked properly (p. 36); that Martin, the die setter, had set the die in the press the day before the accident.

JOSEPH FINA testified (p. 37) that he was a pressman employed by defendant and (p. 44, l. 11) had worked on this particular machine for about a week, one or two months before the accident (p. 39, l. 40). That during that time the press had repeated on him *once* (p. 45, l. 20); that thereafter he continued to work on it and it worked properly.

HENRY WEIS, another pressman, testified (p. 46) that he saw the machine repeat on plaintiff at the time of the accident (p. 42, l. 39); that he had never seen it repeat before the accident.

NICOLAS SARRE, a witness called by plaintiff (p. 51) knew nothing except the occurring of the accident.

EDWARD MARTIN, called by plaintiff, testified (p. 53) that he was the die setter and assistant foreman, and as such set the dies on the machine (l. 25); that Mr. Cook was the foreman (p. 53, l. 40). He testified *that the machine had repeated often before the accident, but it later developed on cross examination (p. 61, l. 30) that he had not seen it but his information was founded upon hearsay evidence and all of his testimony concerning the repeating of the machine was accordingly stricken out (p. 61, l. 34 and p. 63, l. 8) to which plaintiff's counsel made no objection (p. 54).* That the machine was an old machine and there is a shaft to which a clutch is attached, on the bottom of which is a spring; a bar is screwed on the bottom and a nut fits on the screw. The continuous pounding of the press loosens the spring and the clutch will not operate tightly on the shaft, and when it revolves it hits the spring and allows the plunger to fall or repeat through the loss of friction. 10 20

(P. 55, l. 22) :

"Q. Now, after the accident, did you have occasion to try this machine? A. Well; after the accident—why, I didn't see the accident; I was setting up another machine, but when I could get time I went right down there, and it repeated on me, *so all I had to do was to tighten up this spring.*" 30

* * * * *

(P. 56, l. 27). "was there an inspection made at that time? A. What do you mean? Q. Of this press? A. Anybody inspecting it? Well, after I fixed it, *Mr. Cook came up, but he didn't do—he just put his foot on the treadle and it worked all right.*"

(Page 62, l. 18).

"Q. What was your duty? A. To go over and look at it. 40

"Q. It was your duty to look at it before?
A. Yes.

"Q. You did not do it? A. I always looked at it before I set somebody on the job. I always tried it myself.

"Q. Did you look at it before you set him on the job? A. Yes.

"Q. How did it work? A. Worked all right.

10

"Q. That press all right? A. The press was all right.

"Q. Was it working all right? A. Yes.

"Q. Nothing the matter with the clutch?
A. Nothing the matter with the clutch.

"Q. Nothing the matter with the friction?
A. Only the friction was wooden friction; ought to be a steel friction.

"Q. There was nothing the matter with the friction at that time? A. At that time he went to work on it.

20

"Q. Was there? A. No, sir.

"Q. And at that time he set him on it there was nothing the matter with it? A. I just told him to go over—"

THE COURT: Just answer the question.

"A. No; it was all right.

"Q. You mean the press was all right at the time you set him to work on it? A. Yes.

"Q. In good order? A. Yes.

"Q. And fit to work on? A. Yes."

30

I.

The Court properly granted a non-suit.

The plaintiff had worked on similar presses for years, and the one in question, one and one-half days. Giving to the plaintiff the most favorable aspect of the testimony, the plunger on this machine descended and caught his hand without force having been applied to the throttle. The sole cause of this plunger so descending, according to the testimony of Martin, was that the spring attached to the bottom of the plunger became loose by reason of the constant pounding of the machinery in the operation of this machine. There was no proof that this particular machine was not in general use in this particular line of work throughout the country and the fact that clutch was constructed of wood instead of steel in no way contributed to the occurrence of this accident because under the plaintiff's own testimony, it was due to the loosening of the spring. 10 20

The only evidence before the Court at the time of granting a non-suit concerning the repeating of the machine before the accident was that the machine had repeated on Joseph Fina two months previous to the accident to the plaintiff. There was no evidence that it was caused by the same conditions that caused plaintiff's accident. 30

Bearing in mind that the testimony of Martin as to the repeating of the machine had been stricken out, there was no evidence that this machine was a dangerous one, and in the habit of repeating without pressure upon the throttle except once two months before the accident. Even assuming that the defendant had knowledge of the machine repeating on Fina, this we sub- 40

mit did not establish a history that this machine was dangerous and that scienter should be imputed to defendant. In addition thereto, plaintiff's own evidence showed that this machine was thoroughly inspected, the day preceding the accident, and that it was in first class condition.

10 Plaintiff himself testified that up to the time of the accident the machine had worked properly and was in first class condition: that immediately after the accident, Martin tightened up the spring and the machine worked properly. This case was not in line with that of *Borton v. Excel-*
sior Drum Masks, 52 v. p. 658. There that machine had tripped twice before on the plaintiff within a week of the accident complained of. This was caused by the shaft being too large, which would catch on the fly wheel and cause the machine to trip. That an attempt had been made to repair it two or three days before the accident
 20 but that no inspection had been made thereof before plaintiff was injured. That he had been working on it about twenty minutes when the accident occurred.

The case at bar is identical with that of *Bien v. Unger (infra)* with the additional fact that a thorough inspection had been made by defendant before setting plaintiff to work thereon, and that the machine was in first class condition. The
 30 alleged vice in the machine was an obvious mechanical disorder, viz: a spring had worked loose, and so remained until readjustment thereof.

The machine together with the spring was open and in plain view of plaintiff. He worked upon similiar machines for three years. The machine having worked properly up to the instant of the accident, the loosening of the spring must have been practically instantaneous so that no inspection prior thereto would have disclosed that the
 40 spring was loose. Such a loosening of the spring, we submit was an unavoidable accident, the risk of which plaintiff assumed.

Coyle v. Griffing Iron Co., 62 N. J. L.
540;

Coyle v. Griffing Iron Co., 63 N. J. L.
609 where Chief Justice Gummere,
speaking for the court said:

"Although the master is charged with the duty to his servant of providing reasonably safe and proper machinery and appliances for the latter to work upon, and of using due care in keeping such machinery and appliances in repair, and of making inspection thereof at proper intervals, the servant, who operates a machine or mechanical appliance, is on his part also chargeable with certain duties with relation to such machinery and appliances. He must exercise a proper watchfulness in order to see that, in the course of its use, it does not become defective for want of repair and so more dangerous in its operation than it would otherwise be. And if the repairs needed are not such as should be made by him, his duty requires him to report the condition of the machine to his employer. And this duty becomes more imperative when personal danger to himself and others may follow from the continued use of the machine while out of repair."

Weatherby v. Newfield Syrnia Rug Co.,
51 Vr. 364.

We therefore submit that the defendant had performed its full duty in the premises and that the accident was one which plaintiff assumed and that the judgment of non-suit was properly granted.

II.

The Court properly overruled the question (p. 51).

"Q. As the result of the actions of that press during the time which you worked on it on and off, did you have occasion to report anything to Mr. Cook."

10 The question simply required either an affirmative or negative answer, and without more would be immaterial. No question was asked as to what this report was or any offer to show that it concerned the same condition of the press as caused the plaintiff's injury. Likewise it was too remote. The offer of counsel for the plaintiff to show nothing had been done with the press between the time that Sarre worked on it and the date of plaintiff's injury was apparently set as a trap for the court, as the plaintiff had shown
20 that the machine had been repaired since it repeated on Joseph Fina, which the court apparently understood as occurring after Sarre had worked thereon, and that the machine was in first class condition at the time plaintiff began working thereon.

Therefore we submit that the Court's ruling was proper, and that plaintiff was not prejudiced thereby. *Brown v. Newcomb* Ref 939
30 Counsel for plaintiff failed to make any objection to the ruling of the court or to indicate the bases of its admissibility. It is a fundamental rule that a party will not be permitted to reverse a judgment upon a ground not called to the attention of the trial court.

Garretson v. Appleton, 29 Vr. 386;
O'Donnel v. Miller, 43 Vr. 145.

III.

The court did not err in overruling the question.

(P. 52). "Q. Do you remember the time, Mr. Sarre, that Mr. Arthur Lazzee met with an accident on this particular machine?"

Assuming that the question was a preliminary one, it was founded upon an unwarranted assumption of fact, ^{and} without additional proof that such an accident had occurred and that the cause thereof was similar to the one in issue, in addition to being called to the attention of the defendant, it, we submit, was immaterial and irrelevant. Counsel for the plaintiff did not attempt to prove such matter nor offer to do so, nor explain to the court the purpose thereof. Apparently the trial court understood that the witnesses' knowledge was based upon hearsay testimony, as other testimony of this character had been, and thus made his ruling upon the ground stated. Yet, as the court stated in sustaining an objection to a similar question immediately proceeding the one under discussion (p. 52, l. 28), "Well, he might have met with an accident by stubbing his toe, or something or other; that does not throw any light on the accident." Therefore, we submit, that although the grounds upon which the trial court based its ruling may have been erroneous, yet the question was objectionable for the reasons *supra* and the ruling itself was correct. 10 20 30

Plaintiff again failed to make any objection to the ruling of the trial court.

IV.

The court properly struck out the answer of the witness Martin to the following question.

“Q. Before you never saw it repeat? A. I never saw it, but people told me to come up and repair it, and I fixed it for them, but after the accident it repeated forty or fifty times.”

10

It was disclosed for the first time in this answer that the witness' knowledge as to the repeating of the machine prior to the accident, was founded upon hearsay evidence and unless he was a “vice-principal” or “alter ego” his knowledge would not be imputable to defendant and would be incompetent evidence and inadmissible. For the reasons set forth in paragraph 5 (*infra*) we submit he was not a “vice-principal” or “alter ego” and, therefore, his evidence in this respect was inadmissible.

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So much of the answer which says “but after the accident it repeated forty or fifty times” was not responsive to the question and was properly stricken out.

No objection was made to the ruling of the trial court by plaintiff's counsel.

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V.

No error was committed by the trial court in striking out the testimony of Martin as to the alleged ~~grievous~~ *previous* history of the machine.

Martin had testified that he was a die-setter, assistant foreman and time-keeper (p. 54, l. 10), allegations in the appellant's brief, to contrary notwithstanding; that the *machines* had repeated often before the accident and that he had reported the same to Cook, the Superintendent, he then proceeded to testify as follows (p. 61):

"Q. Don't you know that the truth is that you did not tell him because it did not repeat? A. Well, it repeated on me. I *didn't say it repeated*, but it repeated on me after the accident, because I repaired it.

"Q. But before you never saw it repeat? A. I never saw it, but people told me to come up and repair it, and I fixed it for them, but after the accident it repeated forty or fifty times.

"MR. SMITH: I object and move to strike out all the evidence as to a repetition of this. He said he never saw it prior to the accident.

"THE COURT: Yes.

* * * * *

"MR. SMITH: I understood your Honor to strike out the testimony as to anything prior to the time of this accident.

"THE COURT: Yes, because I understood you to say that he did not know it at least prior to the accident.

"MR. SMITH: He says that.

"THE COURT: So it goes out."

His previous testimony as to the history of this or other machines was under either of the two hypotheses, viz: that he had no such knowledge and his previous testimony was false or that his knowledge was based upon hearsay evidence, was properly stricken out.

To charge the defendant with the knowledge of Martin of the alleged repeating of the machine,

it was necessary that Martin be within the category of "vice principal" or "alter ego." The determination of the question rests upon the fact whether the defendant would be legally chargeable for an injury to the plaintiff caused by the negligence of Martin.

LA BATT, §148.

Martin was a fellow-servant of the plaintiff.

10 He was merely an assistant foreman, whose superior was another foreman, who in turn was superceded by the superintendent. He had no authority to hire or discharge employees or even designate the work which should be performed by them. In addition to being an assistant foreman, he was working as a die-setter. He was engaged in the same common employment with the plaintiff.

20 To manufacture the brass articles known as job 1811, upon which the plaintiff was engaged at the time of the accident required first that the die be set and that the materials be placed under the die and the machine operated. Martin, in placing the die, was working with the plaintiff towards the same end, i. e., the manufacture of these brass articles. Therefore, he was engaged in the same common employment with the plaintiff.

30 We submit, therefore, that Martin was a fellow-servant of plaintiff, engaged in the same common employment, and that his alleged knowledge of the repeating of the machine was not imputable to the defendant.

O'Brien v. Am. Dredging Company, 24 Vr.;

Rogers Loc. Mach. Work v. Hand, 21 Vr., 464;

40 *Kinney v. Corbin*, 19 Atl. Rep. (Pa.), 141;

Barringer v. D. & H. Canal Company, 19 Hun, 216;

North German Lloyd Steamship Company v. Ingebregsten, 28 Vr., 400;
Knutter v. Tel. Co., 38 Vr., 646.

On the other hand if we assume for the purpose of argument that the trial court did error in striking out this testimony, counsel for the plaintiff made no objection thereto nor did he indicate to the court the basis of its admissibility as evidence.

10

VI.

The court did not err in refusing to permit the witness to answer the following question:

"Q. How came it, Mr. Martin, that you referred the defective condition of this press to Mr. Good?"

The materiality or the relevancy of this question does not appear. His reason for so doing was a conclusion on his part, and therefore properly overruled. Again it was not redirect examination as the court had ruled on the previous question. 20

We desire to call the attention of the court to the incorrect statement of the testimony in this paragraph. Martin was *not* in direct control not the assistant superintendent to Cook. His position was die-setter and *assistant foreman*.

The plaintiff was not prejudiced by the overruling of this question. He again made no objection to the court's ruling. 30

It is respectfully submitted that the judgment should be affirmed.

EDWARDS & SMITH,
 Attorneys for Appellee.

MARK TOWNSEND, JR.,
 WILLIAM D. EDWARDS,
 EDWIN F. SMITH,

Of Counsel.

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New Jersey Court of Errors and Appeals.

ANTHONY HERRERA,	}	
<i>Plaintiff below—Appellant,</i>		Tried below in the
<i>and</i>		Supreme Court.
MANHATTAN ELECTRICAL SUPPLY		Hudson Circuit. 10
COMPANY,		before Hon. B. A.
<i>Defendant below—Appellee.</i>		Vall and a jury.
		Judg't of non-suit.

BRIEF OF APPELLANT.

Statement of the Case.

This writ brings up a judgment of non-suit directed by the Court after the plaintiff's proofs were in at a trial held at the Hudson Circuit of the Supreme Court (p. 11). 20

Suit was brought by an employee of the Manhattan Electric Supply Company to recover damages for an injury suffered by him as the result of an accident on the 4th day of May, 1911.

The plaintiff testified (p. 12) that on that day, while working on a press as he was in the act of putting in to the press the material upon which he was working, it repeated and the punch or plunger came down on his hand and he was injured (p. 14). That he was operating the press as he had been told. That he did not set in operation the moving power. That he did not know the defective condition of the press and no knowledge had been brought home to him by any person (p. 19). That he did not know that it would repeat. That it was not his duty to in- 30 40

spect or repair or take care of the press (p. 20). That after he went back to the press he examined the press and found that the clutch, which is the part of the press which was out of order, was made of two small pieces of wood instead of steel as in other presses (p. 20). That he did not know this fact until after the accident (p. 21). That the person in charge for the company of the inspection of the presses was Edward Martin (p. 21). On cross examination he said he knew how to run the press, but did not know anything about this construction (p. 22). That he had not been working on the press at which he was hurt more than a day and a half and that he had not before performed the same kind of work (p. 25). He says that so far as he could tell, the press up to the time he was hurt was in first class condition (p. 29). He did not know there was anything the matter with it. That all he knew about what a clutch was that it regulated the coming up and going down of the punch (p. 35).

Joseph Fina, a witness (p. 37), testified that he had been employed by the company about three years; that he knew the press at which the plaintiff was working when hurt; that he himself worked on the press a month or two before (p. 38); the press repeated on him and that after it repeated on him and during the two months before the accident and up until the time of the accident he had seen it repeat on others persons working on it (pp. 39, 40, 41); that the person in charge was a Mr. Cook; that he is familiar with this style of press and the clamp or clutch usually is made of steel but in this press was made of wood and that the accident could not have happened except from the defective clutch or something defective about the machinery itself (pp. 41, 42, 43); that he told Mr. Martin who he says was in charge of the press for the company as well as Mr. Cook of the fact that the

press had repeated on him; showed him how his work had been spoiled and that from the time it repeated on him up until the time of the accident to the plaintiff no repairs had been made to the press (p. 42).

Henry Weil (p. 46), another employee, testified that he saw the press repeat at the time the plaintiff was injured and that it was because of the repetition of the press that he was injured.

The plaintiff offered as a witness Nicholas Sarre (p. 50), another employee, who testified that he had worked on the press about two months before and it was attempted to show by him that the press repeated on him and that as a result of such repetition he reported it to Mr. Cook, but the Court excluded the testimony (p. 51). He testified that he had seen the press in operation less than two months before the Herrera accident and that at the time one Arthur Laszee was hurt, and it was sought to show by him that Laszee met with an accident of the same kind, and the court overruled the testimony (p. 52), as the Court states:

"THE COURT: No; I do not think that would be competent. If he met with an accident, he is the one that can best testify to it, not somebody else."

Edward Martin (p. 53) says that he is a die setter, assistant foreman and time keeper and that it is his duty to inspect and take care of the presses (pp. 53, 62). That Mr. Cook was the foreman and that he, under Mr. Cook, was in charge of the presses.

He testified that he knew before the accident that the machine repeated often and that he always told Mr. Cook,—told him three or four times (54) that the machine was an old machine and that if you tightened up the clutch it was liable to get loose again (54). That Cook, the superintendent, had himself fixed it. And that he

knew and the superintendent knew that it might last a week if it was fixed and it might not last a day (p. 58). It would appear that because the witness testified as follows (p. 62):

"Q. What was your duty? A. To go over and look at it.

"Q. It was your duty to look at it before? A. Yes.

10 "Q. You did not do it? A. I always looked at it before I set somebody on the job. I always tried it myself.

"Q. Did you look at it before you set him on the job? A. Yes.

"Q. How did it work? A. Worked all right.

"Q. That press all right? A. The press was all right.

"Q. Was it working all right? A. Yes.

"Q. Nothing the matter with the clutch? A. Nothing the matter with the clutch.

20 "Q. Nothing the matter with the friction? A. *Only the friction was wooden friction; ought to be a steel friction.*

"Q. There was nothing the matter with the friction at that time? A. At that time he went to work on it?

"Q. Was there? A. No, sir.

"Q. And at the time he set him on it there was nothing the matter with it? A. I just told him to go over— No, it was all right.

30 "Q. You mean the press was all right at the time you set him to work on it? A. Yes.

"Q. In good order? A. Yes."

The Court directed a non-suit disregarding entirely his testimony that he and the superintendent both of whom were charged with the duty of inspection and with the duty of repairing and keeping the machines in order knew that whenever this press was put in order it might last a week or it might last a day. That it was 40 an old press and that because of the wooden clamp of clutch was liable to get out of order at any moment.

The Errors Complained Of.

1st: The Court directed a non suit.

2nd: Because the Court in the testimony of Nicholas Sarre refused to permit an answer to the following question propounded by counsel for plaintiff (p. 51):

"Q. As the result of the actions of that press during the time you worked on it on and off, did you have occasion to report anything to Mr. Cook?" 10

upon the ground that the time was too remote being two months before the accident, because the question was coupled with an offer of counsel to show that nothing had been done to the press between the time to which the witness referred and the time of the happening of the accident.

3rd: Because the Court refused to permit an answer to the question (p. 52): 20

"Q. Do you remember the time, Mr. Sarre, that Mr. Arthur Laszee met with an accident on this particular press?"

upon the ground as expressed by the Court,

"THE COURT: No, I do not think that would be competent. If he met with an accident, he is the one that can best testify to it, not somebody else,"

which would have the effect of excluding the testimony of a witness to an accident. 30

4th: Because the Court struck out the answer of the witness Martin (p. 61):

"Q. Before you never saw it repeat? A. I never saw it but people told me to come up and repair it, and I fixed it for them, but after the accident it repeated forty or fifty times,"

because it was competent for the purpose of showing the knowledge of the witness who was the person charged with the duty of inspection. 40

5th: Because the Court struck out the testimony of the witness Martin as to anything prior to

the time of the accident because the testimony was competent, relevant and material, the witness Martin being one of the persons charged with the inspection and repair of this machine and his testimony of repairing the press and having his attention called to its defects was relevant, competent and material.

6th: Because the Court refused to permit an answer to the question:

- 10 "Q. How came it, Mr. Martin that you referred the defective condition of this press to Mr. Cook?" (P. 64).

Argument.

I.

The Court improperly granted a motion to non suit.

- 20 It had been shown at the close of plaintiff's case that the plaintiff had no knowledge of the condition of this press; that he had only been working on it for a day and a half; that the press had repeated before and notice of this repetition brought home to the Superintendent, Mr. Cook and the Assistant Superintendent, Mr. Martin; that the accident happened because of the loosening of the clutch, which in the press in question was constructed of wood whereas
30 in all other presses of similar kind they are constructed of steel or iron.

Edward Martin had testified that he and Mr. Cook were in direct control of the work and charged with the duty of inspection (pages 53, 62, 55). He had testified (p. 54), that the machine was an old one and as follows:

- 40 "Q. What did you tell Mr. Cook and what did Mr. Cook say? A. I told Mr. Cook, I said—Joe Fina has bell frame work, making bell frames, so I told Mr. Cook, I says: 'Joe Fina down there, he has got a bell frame and the press repeated on him' and he says

'I will throw the son of a B— out.' Well it repeated often. Everytime it repeated all you had to do there was a clutch—if you want me to explain how this—

"Q. Do you know the cause of the repeating on this machine? A. Yes.

"Q. Well, what is it? A. Well, the machine is an old machine, and there is a clutch and there is a shaft—when you say a shaft there is another iron bar comes out on the shaft and there is a clutch goes up there and catches it here and there is a spring on the bottom, and the bottom of the spring is another bar screwed into that bottom, and that screw is a nut—by rights there ought to be two nuts in there instead of one, and that continuously pounds it on the press, that makes the spring loose, and when that gets loose that won't clutch to this shafting, tight, and when it comes around it hits this spring and forces this spring down and that will repeat on you—on the other side of the machine the friction is lost—there is a friction-like resistance holds this shafting so the press cannot repeat. Of course this wheel going down and the weight of this punch—if this friction was not there the punch would come down with the weight, but this friction holds this shafting tight so that it has to go around the wheel, and of course that there is void—that ought to be iron with leather lining." 10 20

And he had testified (p. 58):

"Q. Did you have any conversation with Mr. Cook, who I understand is your foreman, as to whether or not he had knowledge or knew of the defective condition of this machine before it hurt Herrera? A. Yes. 30

"Q. Did he or did he not know it? A. He did know it.

"Q. How do you know he knew it? Why did you say he knew it? A. Because I told him and he fixed it himself many a time, went up and just tightened the screw up, that is all. 40

"Q. After the tightening of the screw did

you see it repeat? A. Yes, only it might last a week; *it might not last a day.*

"Q. He was the man who along with yourself was tightening those screws? A. Yes; both of us had charge if it."

He had testified (p. 59):

"Q. Did you know it was liable to be loose? A. Certainly.

"Q. Did you tell him? A. Well, I told the foreman and he told him to go ahead.

10 "Q. Did you tell him? A. No, I didn't tell him.

"Q. Mr., what's his name here? A. No, I didn't tell him.

"Q. Why didn't you? A. He was supposed to let him go on the job.

"Q. Why didn't you tell him if you knew it was likely to repeat when he was going to work on it? A. I just told him to go on ahead on the job.

20 "Q. Did you know it was liable to repeat then? A. Yes, everybody knew.

"Q. Who is everybody? A. Everybody in the shop.

"Q. Did he know it? A. I don't know if he knew it.

"Q. Is he one of the persons in the shop? A. Well, yes.

"Q. What do you mean by everybody in the shop knew it? A. He was only there a year. He went and came back.

30 "Q. Did Mr. Herrera know at that time? A. I don't know if he knew. He knew it after.

"Q. Did you tell him before? A. I didn't say nothing to him.

"Q. Why didn't you? A. The foreman told me to set him to work on it.

"Q. Why didn't you tell him? Why didn't you tell the man who was going to work? A. He might stick out the job and the machine would not repeat."

40 In view of this testimony that this machine was

of such a character as that no matter how it was fixed it might get out of order at any time; that the plaintiff was not informed of this fact; that the plaintiff had testified that he did not know of the fact nor did he know that this machine had ever repeated; that he did not understand the mechanism of the machine except very generally; that he was not told because he might stick out the job and the machine not repeat; the testimony of Martin that he had before putting the man at work tightened up the clutch which according to his own testimony might immediately become unloosened, cannot save the defendant. The witnesses all agreed that similar machines have iron clutches instead of wooden and Martin says there was one nut where there should have been two. The question was one for the jury. 10

Bellville Stone Co. v. Mooney, 60 N. J.

L., 323, 61 N. J. L., 253;

Maher v. Thropp, 59 N. J. L., 186; 20

Smith v. Erie R. Co., 67 N. J. L., 636;

Cole v. Warren Mfg. Co., 63 N. J. L., 626.

This case is not at all within *Bien v. Unger*, 35 V. 596, but is clearly within *Borton v. Excelsior Drum Works*, 52 Vr., 659.

II.

Because the Court in the testimony of Nichols 30
Sarre refused to permit an answer to the following question propounded by counsel for plaintiff (p. 51):

"Q. As the result of the action of that press during the time you worked on it on and off, did you have occasion to report anything to Mr. Cook."

Sarre had testified that he had worked for the Manhattan Electrical Supply Company as pressman; that he worked on this particular press 40

on and off, the last time he worked on it was about two months before the accident. It had been testified that Mr. Cook was the superintendant in charge of the plant. The report that this man made with respect to the press to Mr. Cook even if it was made two months before was material, competent and relevant. It was further coupled with an offer by counsel to show that there had been nothing done with the press after this report was made.

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III.

Because the Court refused to permit an answer to the question (p. 52) :

“Q. Do you remember the time, Mr. Sarre, that Mr. Arthur Laszee met with an accident on this particular press?”

Counsel was endeavoring to show the time that Mr. Laszee met with an accident on this machine and was endeavoring to show this by Mr. Sarre as a witness. The question was preliminary and designed to ascertain what the knowledge of the witness was. The court excluded the testimony apparently upon the ground that no one can testify to the happening of an accident except the person injured.

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IV.

The Court erred in striking out the answer of the witness Martin as follows (p. 61) :

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Q. Before you never saw it repeat? A. I never saw it, but people told me to come up and repair it, and I fixed it for them, but after the accident it repeated forty or fifty times.”

The witness Martin was the man who with Cook was charged with the duty of inspecting and repairing. His knowledge was evidential no matter how he got it.

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V.

The Court erred in striking out the testimony of the witness Martin as to anything prior to the time of the accident.

The witness Martin was the Assistant Superintendent in charge with Cook (p. 58), and particularly charged with the duty of inspecting these machines. He had testified that information had come to him that the machine had repeated prior to this accident; that he had told the superintendent about the accident of Joseph Fina, and that the superintendent had told him that he would throw the son of a b— out. That he had seen the superintendent Mr. Cook fix it himself many times; that he himself had fixed it many times and that it might last a week and might not last a day. Yet if the ruling of the court is to be taken at its face value, all of this testimony prior to the accident is stricken out.

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VI.

The Court erred in refusing to permit the answer to the question:

“Q. How came it, Mr. Martin, that you referred the defective condition of this press to Mr. Cook?”

Bearing in mind the relations of Mr. Martin and Mr. Cook as superintendent and assistant superintendent, with Martin in direct control, this question should have been permitted to be answered.

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It is respectfully submitted that the judgment should be reversed and venire de nova granted.

Respectfully submitted,

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