

# New Jersey Court of Errors and Appeals

JAMES CAMPBELL,

*Defendant in Error,*

*vs.*

T. A. GILLESPIE COMPANY,

*Plaintiff in Error.*

*In Tort.*

*On Error to New  
Jersey Supreme  
Court.*

## **Brief of Defendant in Error.**

### STATEMENT OF CASE.

This action was brought by the plaintiff, James Campbell, against the defendant, T. A. Gillespie Company, to recover damages for injuries done to the plaintiff by the defendant under the following circumstances :

On the twenty-first day of February, 1902, the defendant was engaged in constructing a water plant and in connection therewith was laying a line of water pipe from the reservoir of the plant to and through the Township of Little Falls in the State of New Jersey. This pipe line was composed of pipes about four feet in diameter, laid in sections, and joined together by rivets and calked at their intersections to render them water tight. In joining and fastening the sections of the pipe, it was necessary to use certain tools, amongst which were sledges, hammers,

drift pins and rivets. There were holes along the edges of each section of pipe through which rivets were driven to hold the sections together. The drift pins, which were made of a tapering piece of steel varying in length and diameter, were used as follows: the smaller end was inserted in the rivet holes; the larger end being struck by a hammer or sledge forced the rivet holes together, so as to facilitate the insertion of the rivets. The end of the drift pin, which was struck with sledges or hammers, would in the course of time, flatten down and form what is known as a burr.

On the nineteenth day of February, 1902, the plaintiff, an employee of the company, was ordered by the defendant to go to this line of pipe and calk the sections that had been joined together. At the same time a gang of men was ordered by the defendant to rivet the pipes together in advance of the plaintiff, who had already been sent there as a calker. The plaintiff was directed by the defendant to follow up the riveters and to calk the pipes together as fast as they were riveted, although he was not a member of this gang and was not under the orders of their foreman.

On the twenty-first day of February, working in compliance with these orders, the plaintiff had just completed a piece of calking and was looking at the seam that he had calked. His position was directly opposite that of the gang of riveters and across the pipe from them. While in this position one of the riveters struck a drift pin which they were using for the first time on that job, a blow on the head with a hammer and

a piece of steel composing the battered head or burr which had formed at the head of the drift pin from the constant blows which it had received at other times, was knocked off and was driven or flew across the space separating the plaintiff from the gang of riveters, and struck him in his right eye, causing him to entirely lose the sight of his right eye and impairing the sight of his left eye.

The drift pin that caused this injury was in a very dangerous and defective condition, and was the only one of the size which it was necessary to use on this particular job, available to the employees or supplied to them by the defendants.

The action was tried in the September term, 1902, at the Passaic Circuit of the Supreme Court and resulted in a verdict of fifteen hundred dollars for the plaintiff. The defendant now seeks to have the judgment reversed because of the refusal of the court to order a non-suit at the close of the plaintiff's case, because of the refusal of the court to direct a verdict in favor of the defendant company at the close of the evidence, and for certain portions of the judge's charge.

#### ARGUMENT.

It is the plaintiff's contention that by reason of the three propositions hereinafter set forth, the refusal of the Court to order a non-suit at the close of the plaintiff's case was perfectly proper, the refusal of the Court to direct a verdict in favor of the defendant at the close of the

evidence, was proper, and those portions of the judge's charge to which the defendant excepted, were proper.

The propositions are as follows :

1. That there were defective tools supplied by the defendant, and that the tools supplied were not reasonably safe.

2. That the defendant did not use reasonable care in the selection of reasonably safe tools ; and further

3. That there were no reasonably safe tools supplied by the defendant.

That this contention is well founded, and that a violation of any or all the defendant's duties in that behalf would entitle the person injured thereby to recover damages will be seen by a review of the evidence and the authorities hereinafter cited.

### I.

*That there were defective tools supplied by the defendant, and that the tools supplied were not reasonably safe.*

This is proven by the testimony of William Campbell ; he testified that Mr. Jones (the superintendent of the defendant) came to where he was working and ordered him to go to Little Falls that afternoon to work on a rush job. Jones said that he had sent John McClung to get the tools ready and that they would be all right for use. That he (Campbell) should do the riveting and McClung and the plaintiff should do the calking. They arrived and started to work the next morning. McClung had the tools there,

To quote the witness's testimony from this point (p. 18, l. 20.) "When I started to work, Mr. Jones came around and inquired how it was. I said, 'We have a poor lot of tools,' he said, 'They are the best we have got and there is no *blacksmith on the job, go ahead and work with them.*' We worked that day and the following day. This man James (the plaintiff) was on the other side calking, and I had been working in the pipe and came out. The holes were bad; I had been using two drift pins; this *third drift pin* was in the rivet heater's can that he heats the rivets in; I told him to throw me over that pin to drive the holes better—to pull the pipe closer. It is necessary to have the pipes closer; he threw over *this pin* and I struck it the second time when the piece flew off; I saw it go across the pipe and Jim helloed 'My God, something hit me in the eye.' I turned around and said, 'I know it.' I helped him over the pipe and he told me *to get the pin* for him." Witness identified the pin and the place where the piece in question was knocked off. (Pp. 18 & 19.) Witness also swore *that this pin was one of the defective ones that he had shown to Mr. Jones, when he mentioned that the tools were poor* (p. 11, l. 10); also that the time of the accident was the first it had been used since the attention of Jones had been called to the pin (p. 19, l. 8). That witness immediately after the accident secured pin which he identifies at trial (p. 18, l. 21). That Mr. Jones was the superintendent and had charge of the pipe work upon which plaintiff was working (p. 19, l. 25). Witness also testified *that it was necessary to use the third drift pin to*

*draw the holes together at time of accident (p. 21, l. 18, &c.) ; that it was necessary to use this particular size drift pin, namely  $\frac{7}{8}$  ; that there were no more drift pins of that size to be secured, although there were a number of pins of other sizes (p. 22, l's. 20, &c.) Witness swears positively that on this job it was necessary to use a 7-8 pin and that there were no others to be secured with the exception of the one secured, as is shown by the fact, that he made a careful search and examination throughout the tool chest and all other places where tools were kept (p. 22, l. 20, &c. and p. 23, l. 1 to 20). Witness showed his ability to identify size and quality of pins (p. 20, l. 20 &c. and p. 24, l. 1, &c.). He again testifies positively that Supt. Jones was in charge of their party (p. 25, l. 30 to 35). He again testifies as to the necessity of using a  $\frac{7}{8}$  pin and as to his careful search in the store house, etc., after the accident to find other 7-8 pins and that there were none (p. 26, l. 7, &c.) ; that it was the custom of the defendants along the line to "dress" the drift pins in need of repair and that there was no blacksmith on the job at the time of the accident (p. 27, l. 10, &c. and p. 26, l. 33, &c.) ; also that it is dangerous to use a pin in that condition (p. 28, l. 20, &c.).*

John McClung testified that he was sent to Little Falls to get the tools to start the job ; that he got them and took them to the job. When asked "Did you get the best you could find ?" He replied, "Yes, sir." (p. 29, l. 2, &c.) He testified that he was ordered to get the tools by Supt. Jones (p. 29, l. 8). On cross-examination by Mr. Corbin, he testified that he secured the tools from a large tool box, which box stood in

front of the store house (p. 29, l. 20, &c.); that amongst the tools he secured were three drift pins, one  $\frac{7}{8}$ , one  $\frac{3}{4}$ , and one  $\frac{5}{8}$ , (p. 30, l. 10); that in this large box of tools, from which he had taken the drift pins, there were only about a dozen pins of different sizes (p. 30, l. 19, &c.).

On re-direct examination by Mr. Ward, when asked if Supt. Jones had told him where to go for them, he answered, "He did not say where; he said to go and get the tools, because he surmised I knew where to go (p. 32, l. 38, &c.) Asked "That was the only place to get tools?" A. "Yes, sir" (p. 33, l. 1). Witness also testified that there was no blacksmith on the job at that time (p. 33, l. 3).

Frederick Younger testified that he was working for the defendant company; that he went with McClung to get the tools for the job (p. 33, l. 33); also that he had helped pick them out; asked "What was the condition of them?" He replied, "We got the best tools we could get" (p. 33, l. 34). He identified the drift pin which he had helped McClung to select and take to the job and also indicated the place where the piece of steel was knocked off, causing the accident (p. 34, l. 10, &c.). On cross examination as follows: Q. "You did not try to get any in the <sup>the</sup> Are House?" A. "No, we got the best tools we could find around."

James Wardlow testified that he was working on the pipe line at the time of the accident. He identified the pin and indicated the place where the piece, inflicting the injury, had been knocked off (p. 36, l. 30 &c.).

Patrick McMahon testified that he had been a

blacksmith for over thirty-one years; that he had been in the practice of making drift pins (p. 37, l. 30, &c.). Being shown the drift pin, and asked his opinion as to the fitness of the pin in question to work with, he replied, "My opinion is that it is not fit to work with unless it was 'dressed'" (p. 37, l. 32, &c.), Q. "*Is that a safe tool to work with?*" A. "*No, sir.*" Q. "*Why not?*" A. "*There is too much of a head on it. That burr ought to be cut off and made the same as a new pin.*" Q. "*Is that liable to fly off when it is struck?*" A. "*Yes, sir.*" (P. 38, l. 7, &c.)

#### PROPOSITION 2.

2. *That the defendant did not use reasonable care in the selection of reasonably safe tools.*

This proposition of the plaintiff's is substantiated and proven by proposition number 1 entire, but the plaintiff further proves and substantiates Prop. 2 by the evidence of the witnesses as follows:—

William Campbell testified that when he was directed by Supt. Jones to go to Little Falls, Jones said he had sent McClung to get the tools so that they would be out all right for use; that when they had started to work on the job Supt. Jones came around and inquired how they were getting along. William Campbell (witness) said, "We have a poor lot of tools." Jones replied, "*They are the best we have got and there is no blacksmith on the job. Go ahead and work with*

them." (P. 18, l. 22, &c.) He testified that the injury was caused by one of these poor tools, a drift pin, which he identified at the trial; that the drift pin, size  $\frac{7}{8}$ , was the only one of that size available to the workmen; he made careful search for other drift pins of this size but was unable to find them (p. 22, l. 30, &c., and p. 23, l. 1 to 20); that it was absolutely necessary to use this size (p. 26, l. 5, &c.) and that there was no blacksmith on the job (p. 26, l. 34). That it was the blacksmith's duty to dress the tools (p. 26, l. 16); also: Q. "When these heads become that way and flatten down, what should be done?" A. "It is proper to 'dress' them. They are sent to the blacksmith to have him 'dress them.'" (P. 26, l. 18, &c.) Again in cross-examination: Q. "That is the only time you went up to inspect any pins?" A. "I had no right to go when this other man was sent to furnish the tools." (P. 27, l. 8, &c.) Also that it was the custom and that they usually had a blacksmith on the T. A. Gillespie line to "dress" the tools, and that when they got bad tools, they sent them back (p. 27, l. 20, &c.); that it was dangerous to use a tool in that condition (p. 28, l. 20, &c.). This evidence shows plainly that the defendant or that the Supt. who had charge of the work had full knowledge of the defective tools; that he told the workmen that they were the best they had and ordered them to proceed with the work.

John McClung testified that he was sent by the Supt. to get the tools (p. 28, l. 36); that he got the best tools he could find (p. 29, l. 2); that he was ordered to get the tools by Supt.

Jones (p. 29, l. 8) ; that he got the tools from the regular tool box (p. 29, l. 20), and when asked whether there was a bin inside the ~~tool box~~<sup>regular tool box</sup>, he replied, "I don't know that." (P. 30, l. 26.) He testified that Superintendent Jones did not tell him where to get the tools because he surmised that he (McClung) knew where to go (p. 32, l. 38). He was asked, Q. "*That was the only place to get the tools ?*" A. "*Yes, sir.*" Q. "*Was there any blacksmith on the job at that time ?*" A. "*Not at that time.*" Q. "*There was shortly before that ?*" A. "*Yes, sir.*" (P. 33, l. 1 to 10.)

Frederick Younger testified that he helped McClung to select the tools and that they got the best they could find (p. 33, l. 35). Again "We got the best tools that we could find around" (p. 35, l. 20).

Patrick McMahan, whose testimony will be found on page 37, &c., testified that the tool in question was not a safe one for a man to work with.

The defendant's neglect or failure to use reasonable care in supplying reasonably safe tools is shown first by the fact that contrary to their usual custom there was no blacksmith on hand to repair defective tools, a practice certainly necessary in the exercise of reasonable care ; second, although the workmen made a careful search for better tools, they were unable to find that the company had supplied a single reasonably safe tool of the size required. The only one that was supplied by the defendant was the one that caused the injury, and that this was not reasonably safe was proven by ex-

pert witnesses ; third, that the workmen called the attention of the Supt. who had entire charge of the work for the defendant, to the defective tools, and were ordered by him to continue to work with them as they were the best they could get.

Even if there were good tools to be secured (which the plaintiff has proved was not the case) the workmen were not bound to go behind the statement of the Supt., that the defective tools in question were the best to be had. Such a statement, if untrue, was negligence, and negligence only of the defendant.

### PROPOSITION 3.

*That there were no reasonably safe tools supplied by the defendant.*

This proposition is embodied in and substantiated by proposition number 1. Counsel feels that he might have gone farther in proposition 1 and might have stated that there <sup>was</sup> no reasonably safe tools supplied.

William Campbell testified that the tools they were using on the job were shown to Supt. Jones ; that Mr. Jones was told that they were defective, but told the witness to go ahead and use them as there were no better tools to be had (p. 18, l. 21) ; that there were no more drift pins to be found of that size ( $\frac{7}{8}$ .) (p. 22, l. 21.) He repeats this statement on p. 23, l. 11 ; that there were drift pins of other sizes, but they would not do for the work (p. 23, l. 14) ; that  $\frac{7}{8}$  pins were the proper pins (p. 23, l. 20).

On the same page he indicates his ability to identify pins of different sizes. He testified that he went to the store house after the accident to see if he could get any more pins, better than those they had used, but could find none of the required size ; that it was necessary to use this size on the work (p. 26, l. 5 to 40) ; that the pin was dangerous to use (p. 28, l. 2).

John Mc Clung testified that they got the best pins they could find (p. 29, l. 2). That the tool box from which they got the tools was the only place where tools could be gotten (p. 33, l. 1) and again that they got the best they could get (p. 33, l. 35).

Frederick Younger assisted McClung in getting the tools, testified that they got the best tools they could get (p. 33, l. 34), and again that they got the best tools they could find around (p. 35, l. 19).

James Wardlow identified the pin that had caused the accident.

Patrick McMahan testified that the pin that caused the accident was defective and dangerous to use.

To sum up the evidence adduced to prove this proposition we have shown that the employees who were capable of distinguishing good and bad tools, took the best that they could find, and that these "best" were defective. It has farther been shown that these defective tools were the only ones that were supplied the defendant. This, of course, proves the proposition that there were no good tools supplied. It may be urged, however, that the defendant proved that there were other tools from which the workmen could

have their selection. It may be true that there were other tools, but it is clearly shown by the plaintiff's witnesses that there were none of the required size ( $\frac{7}{8}$ ), and that this size was necessary for the work in hand.

#### DEFENDANT'S CASE.

Thomas Millson testified in behalf of the defendant that *the proper pin to use was a  $\frac{7}{8}$*  (p. 45, l. 30).

William Culligan testified that the Campbells were skilled workmen (p. 49, l. 20); that there were a number of pins around the works of different sizes, but does not, throughout his entire testimony, state that there was a single pin in good condition of the necessary  $\frac{7}{8}$  size supplied by the defendant.

John Shilling testified that he had seen three or four drift pins at the office (p. 51, l. 38), but does not throughout his entire testimony, state that there was a single drift pin of the necessary size ( $\frac{7}{8}$ ) supplied by the defendant.

Jacob Harold testified that there were a number of drift pins in different places around the works (pp. 53 & 54). Neither does he state that there was a single drift pin of the necessary size reasonably safe and supplied by the defendant. He worked for the defendant company.

Charles Harold testified that there were drift pins around the works, but does not testify as to their size; that there were five or six pins in the box from which McClung had gotten the tools, but does not state their condition or size. Also that the tool box was kept in a public place so that the men could go to it and help

themselves. He worked as a mechanical engineer for the defendant company. (Pp. 56 and 57.)

Thomas Mahoney testified that he was employed by the defendant. That there were drift pins around the works, and to quote his own language, "Some of them were old and some of them were in good condition, as far as I could judge." (P. 59, l. 19.) He left the works, at Little Falls in Nov. and did not return until March, following the accident. This man had not been at the works for some time prior to or after the accident, therefore his testimony is of no value, but he does not testify to the size of the drift pins, nor does he state that there were any drift pins of the required size at the works when he left or when he returned. (Pp. 57 to 60.)

William Neery testified that there were a number of drift pins in different places on the works, but does not state their size nor does he say that there were any of the required size. His recollections are indistinct. (P. 61 to 63.)

William Jones testified that he was the Superintendent for the defendant of the work at Little Falls at time of accident; that the Campbells were good workmen and understood the business. He did not remember whether or not he had gone to this particular job while they were working. He did not positively state nor deny that he had a conversation with William Campbell about the condition of the tools, but simply said that he did not remember the incident. He testified there was no blacksmith on the job at time of accident; that there were a

number of drift pins around the works *but he did not deny that there were no drift pins reasonably safe of the required size supplied by the company for this work* (pp. 63 to 66) nor state any pins of that size were supplied.

Walter C. Hopper testified to nothing relevant in this case.

John McClung, a witness formerly sworn for the plaintiff, testified in behalf of the defendant that most of the drift pins that he selected for the work were in a serviceable condition. But he did not state that the drift pin which caused the accident, was in a serviceable condition. He testified that the drift pins he got were the best he could find. He did not contradict his testimony for the plaintiff.

Frederick Gubelman, vice-president and chief engineer of the defendant, testified that there were a number of drift pins at the works, but did not state their size nor that there was a single pin of the required size supplied by the defendant. When shown pins with their heads hammered into a burr, he stated that they were not dangerous, thus raising a question of fact for the jury, as it had been testified on the part of the plaintiff that such pins were dangerous. (P. 69 to 74.)

#### REBUTTAL.

James Campbell, recalled, positively testifies that he also saw Supt. Jones at the place of the work on the day of accident.

William Campbell, recalled, positively identified the pin produced in evidence as the one that had caused the accident and the one that he had

used the day of the accident. Requested to measure the pin with the rule, he did so and found the small end barely 13-16 of an inch in diameter. He also testified that it was a blacksmith's work to repair the pin.

#### ARGUMENT.

In this cause there was no question of contributory negligence brought up.

The testimony as given above both on the part of the plaintiff and the defendant shows beyond a doubt that there were defective tools supplied by the defendant. In fact it proves conclusively that there were no tools but defective ones, of the required size supplied. John McClung was sent by Supt. Jones who had entire charge of the work, to get the tools for the job. Frederick Younger accompanied him. They went to a certain place, where the defendant had conspicuously placed a box as a receptacle for tools. This box had been placed there so that the men on the work might go to it and select whatever implements they had occasion to use. Both McClung and Younger testified that this was the only place of which they knew where they could get such of them as they desired, and as they had been instructed to bring to the work. They also testified that this was the usual place to get the tools and that there was no other place where they could get them. McClung said that Supt. Jones had not directed him where to get them because he surmised that McClung knew. This proves that the box from which they get the tools was the usual place, if not the only place, where the de-

defendant supplied them. These men were not bound to go to any other place than the usual one designated by the defendant. McClung and Younger selected from this box the best tools that were therein, amongst which was the drift pin that caused the accident. They selected these tools and the defective drift pin with the utmost discretion and the greatest caution and as they both positively testify, they selected the best that were supplied by the defendant and were in this box. They both also testify that the drift pin, size  $\frac{7}{8}$ , which they selected, was the best one they could get. If this box were placed there by the defendant to supply tools to its men and if it were the usual place for getting tools and the only place where these men were in the habit of and knew they could get them, and if from the tools thus supplied by the defendant, these men after careful examination, selected the best they could get, and if these "best" were defective, not reasonably safe, and caused the accident, surely the defendant was negligent and did not supply reasonably safe tools, but supplied only defective ones, nor could the defendant have used reasonable care in the selection of these tools thus supplied. But further William Campbell and others testify that it was necessary to use a  $\frac{7}{8}$  drift pin on this particular job. Thomas Millson, a witness for the defendant, testified that this was the proper size pin to use. After the selection of the tools, McClung and Younger took them to the job. Thereafter, while using these tools, William Campbell testified, Supt. Jones came to them and asked how they were

getting along. Campbell replied that the tools were in a bad condition but the Supt. in charge of the work and acting for the defendant company assumed the risk and directed the men to continue in the use of these defective implements, as there were no better ones to be had. This alone proves the contention that only defective tools were supplied by the defendant. Supt. Jones does not deny this conversation but merely states that he does not remember the incident, whereas two witnesses for the plaintiff, William Campbell and James Campbell, testify that Supt. Jones was there. Even had there been other tools, which is denied by the plaintiff, the Supt.'s order that they continue in the use of the defective ones constitutes a new issue, which is, that at that point defective tools and only such were supplied by the defendant for this work. There is no attempt on the part of the defendant to contend that the drift pin in question was not the cause of the accident. They weakly contend that the drift pin was not unfit for use; but that it was dangerous was proven by expert witnesses. This raised a question of fact that was decided by the jury, having been properly left to them by the trial Justice. It was proven conclusively that the defendant supplied this drift pin, which was identified as the one used on the work and as causing the accident. It was shown that it was necessary to use a drift pin of this particular size and that it was the only available pin of that size supplied by the defendant. This is not contradicted by the defendant's witnesses, none of whom swear that there was another pin of this size anywhere

on the works and especially in the tool box, although they state there were drift pins of other sizes. Patrick McMahon for the plaintiff, stated positively that the drift pin in question was a dangerous one and not fit for use. This was substantiated by other witnesses.

#### ASSIGNMENT OF ERRORS.

The defendant assigned errors in the following instances :

1. Because at the trial the Justice refused to non-suit the plaintiff, when non-suit should have been ordered for one or more of the following reasons :

(a) " Because the plaintiff did not show that the defendant had not exercised reasonable care to provide the employees with safe, proper and sufficient tools."

This assignment was purely one of fact and is easily determinable by the evidence. It is fully considered under the first, second and third propositions of this brief, which show beyond all doubt that the defendant was derelict in their duty in this respect to the plaintiff.

The testimony on the part of the plaintiff proved that the men were ordered by the Supt. to get the tools. They went to the only place where they knew they could obtain the tools, which was the usual place the defendant kept them and was a box placed by the defendant at a point, accessible to the men, where tools were supplied by the defendant. These men selected the best tools supplied by the defendant. They selected the  $\frac{7}{8}$  drift pin, which size was necessary

to use on the job. This pin was defective and dangerous but was the only one supplied by the defendant. Before using it a complaint was made about the tools to the Supt. who ordered the tools to be used and said they were the best to be had on the job. The drift pin was used and caused the accident, by reason of its dangerous condition. These facts were fully proven by the plaintiff, and plainly show negligence on the part of the defendant. The plaintiff's case was made by prima facie proof and in consequence, it was proper not to order a non-suit. "The Court should not non-suit a party where he makes out his case by prima facie proof but should put the defendant upon his defense for the purpose of rebutting the conclusions deducible from the facts and circumstances proved by the plaintiff."

Plotts vs. Rosebury, 4 Dutcher, 146.

This is such an elementary rule of law and has been upheld so universally that it is unnecessary to cite other authorities.

(b) "Because the defect, if any, in the tool, whereby the injury was caused, was obvious to the servant who was using the tool, and the defendant could not be held liable for the negligence of that servant." This question is one purely of law and the contention of the defendant is summed up in those parts of the trial Justice's charge as follows: "In order to entitle the plaintiff to a verdict you must find that the company failed to furnish, fairly in the reach of the workmen, drift pins fit for use, safe use. If they failed to use reasonable care and skill to do this thing and out of that failure this injury

sprung, as one of the causes, that being one of the causes of the injury, then the company is responsible. *But if the company failed to do its duty, no fault on the part of any of these persons (employees) will absolve the company from responsibility.*”

Under the evidence embodied in propositions one, two and three of this brief, it is clearly shown that the company did fail to furnish, “fairly within the reach of the workmen” drift pins safe for use, and in not so doing, it was guilty of negligence and therefore made itself liable, and even though the fellow employees of the plaintiff were negligent in using defective tools, yet this does not exculpate the defendant for its negligence in supplying defective tools.

This is shown from a review of the following authorities :—

In *Cole vs. Warren Mfg. Co.* it was held that it was no error for the trial Justice to refuse non-suit, also (syllabus) on writ of error based only on exceptions to such refusal, held (syl. 3) that the defendant’s duty to the plaintiff could not be delegated to fellow servants to the exculpation of the master.

(Syl. 7) *That recovery for master’s negligence was not barred, even although negligence of the plaintiff’s fellow servant, the machinist may have contributed to the injury.* (Syl. 8.) That the trial judge was right in his ruling and that the judgment should be affirmed. In the opinion written by Justice Collins, as follows : “The element of common employment seems lacking ; but, if it were not, the risk was the master’s not the servant’s, for the duty was the master’s and

could not be delegated so as to work his exculpation.—Assuming Corcorans act to have been negligent it was argued for defendant that his fellow servant was remediless for its result; *but the argument was not well founded, for such negligence, when combined with that of the master, is without legal effect*” ; and cites Paulmier vs. Railway Co., 34 N. J. L., 151 ; Railroad Co. vs. Steinbrenner, 47 N. J. L., 161, as in point.

Colt vs. Warren Mfg. Co., 44 Atl. Rep., 647.

(Court of Errors and Appeals of New Jersey, Nov. 21, 1899) In Daniel Knutter vs. N. Y., & N. J. Tel. Co. it was held (syl. 3) where there is negligence in the performance or non-performance of some duty that is imposed by law upon the master for the safety of the injured servant, the master is responsible, irrespective of the rank of the negligent employee.

Knutter vs. N. Y. & N. J. Co., 67 N. J. L., 646.

In Smith vs. The E. R. R. Co. it was held (syl. 2) for the negligence of the trackmen, charged with the inspection and repair of the and tracks road bed, where such negligence causes injury to a trainman traveling thereon, the railroad company is responsible.

Smith vs. E. R. R. Co., 67 N. J. L., 637.

In Palmier vs. The E. R. R. Co. it was held (syl. 3) where a servant receives an injury occasioned in part by the negligence of his master and in part by that of a fellow servant, he can maintain an action against his master for such injury. (Syl. 4.) Contributory negligence to

defeat a right of action, must be that of the party injured. In the opinion by Chief Justice Beasley are the following extracts:

“The jury has found the negligence of the defendants, and if we add to this negligence in the engineer, we reach the conclusion that the injury to the intestate was the result of these two conjoint causes. For an injury so caused, I think the defendants are liable—but the servant does not agree to take the chance of any negligence on the part of his employer, and no case has gone so far as to hold that where such negligence contributes to the injury, the servant may not recover.”

Palmier vs. E. R. R. Co., 5th Vroom, 151.

Elmer vs. Locke held (syl.) a brakeman in the employ of a railroad corporation may maintain an action against the corporation for personal injuries occasioned, while in the exercise of due care, by the fall of trestle work supporting a portion of spur track, which was intended for use for an indefinite period of time, if the fall is caused partly by the defective construction of the trestle work, and partly by the negligence of the fellow servants of the plaintiff.

Elmer vs. Locke, 135 Mass., 575.

Troxler vs. Southern R. R. Co. held (syl. 2) failure to furnish proper and safe appliances whereby a servant is injured, cannot be attributed to the negligence of a fellow servant.

Troxler vs. Southern R. R. Co., 44 L. R. A., 313.

That the combined negligence of a master and a co-servant makes the master liable may be

seen by a review of the following authorities :

Franklin vs. Vinona & St. P. R. Co.,  
37 Minn., 409.

B. & R. Co. vs. Mackenzie, 81 Va., 71.

Loughlin vs. State, 105 N. Y., 159.

Grand Trunk R. Co. vs. Cummings,  
106 U. S., 700, and others too numer-  
ous to cite.

That it is negligence on the part of an em-  
ployer not to furnish reasonably safe tools to his  
employees, is a well established rule of law in  
this state and needs the citation of no authori-  
ties.

Electric Co. vs. Kelley, 28 Vroom,  
100.

Steamship Co. vs. Ingedregsten, 28  
Vroom, 400.

Combell vs. Belleville Stone Co., 30  
Vroom, 226, and others.

2. The defendant company assigned error be-  
cause the trial Justice refused at the close of the  
evidence, to direct a verdict for the defendant,  
for one of the following reasons :

(a) Because it appeared from the evidence that  
there were safe and sufficient pins available for  
the use of the fellow employees of the plaintiff  
and the defendant could not be held responsible  
for the failure of the employees to use such a  
pin.

(b) Because the defendant had supplied safe  
and sufficient pins which were available for the  
use of the plaintiff and his fellow employees.

(c) Because negligence on the part of the de-  
fendant was not shown.

These three assignments raised questions of fact, which facts have been wholly considered under the first, second and third propositions of this brief.

As will be seen by reference to these propositions, there were no safe and sufficient pins available for the use of the fellow employees of the plaintiff of the size required. The evidence on the part of the plaintiff clearly shows this, particularly the testimony of McClung, Younger and Wm. Campbell, and is not contradicted in any respect by the testimony of the defendant. Assuming, however, that the defendant had presented testimony in contradiction of the plaintiff's witnesses, it was nevertheless, even on this assumption, a question of fact for the jury and as such, properly left to them by the trial Justice. Their verdict should therefore, on this question, be final.

As the evidence plainly shows that there were no safe or sufficient pins supplied by the defendant, this was clearly negligence on its part, but assuming that this was denied by the defendant, there again a question of fact was raised. That questions of fact should be left to the jury is a well settled proposition of law, as will be seen from the following authorities. In *Dettmering vs. English* it was held (syl. 2) at the close of the whole evidence the trial Judge direct a verdict for the defendant on the ground that the single question presented, was whether the wall in question should have been braced, and that upon the evidence, it appeared that bracing was unnecessary, held that under the circumstances appearing in the case there was a question for

the jury and it was erred to withdraw it from them by a direction.

Dettmering vs. English, 64 N. J. L., 16.

In Comben vs. The Belleville Stone Co., it was held (syl. 2)

“Where there is a fair dispute in the evidence or two classes of conclusions can reasonably be reached from it whether the injury was a result of negligence of the master to exercise the care required to provide proper machinery and appliances for the use of the servant, or a proper place in which to perform his work, or whether the injury was the result of obvious danger or risk to the servant or the want of ordinary care on his part, to observe dangers within his knowledge, then a case is made which should be submitted to the jury for their determination.” And also (syl. 3) “when, at the close of the case of the plaintiff, there exists upon the evidence a substantial dispute whether the injury arose from the negligence of the fellow servant or not, a motion to non-suit on this ground cannot prevail.” In this case Lippincott J. in his opinion said, “where two inferences can be drawn from the evidence upon questions of negligence, a case is presented which calls for the opinion of the jury. Barr vs. Lombard, &c., 24 Vroom, 233; D., L. & W. R. R. Co., vs. Shelton, 26 Vroom, 342.”

Comben vs. The Belleville Stone Co., 59 N. J. L., 227.

In action for personal injuries by railroad trains, where there are doubtful and qualifying

circumstances, the question of negligence or want of proper care must be left to the jury.

Bonnel vs. D., L. & W. R. R., 10 Vroom, 189.

Central R. R. of N. J. vs. Moore, 4 Zab., 824.

N. J. R. R. &c. Co. ads. West, 3 Vr., 95.

N. J. Express Co. vs. Nichols, 3 Vr., 166.

Where the evidence leaves the fact in uncertainty whether the plaintiff by his negligence caused the injury of which he complains, or contributed to it such a way but for it the plaintiff would not have received harm from the defendant's negligence, it is the duty of the Judge to submit the evidence under proper instructions.

Orange & Newark R. R. Co. vs. Ward, 18 Vr., 560.

Berry vs. Penn. R. R. Co., 19 Vr., 141.

In a conflict of testimony where the facts found by the jury will sustain the verdict, the court will not set it aside, although in their opinion the jury from the evidence might have found otherwise.

Bonnel vs. D., L. & W. R. R. Co., 10 Vroom, 189.

Knickerbocker Ice Co. vs. Anderson, 2 Vroom, 333.

James vs. Harvey Cox, 238.

It must be a plain case that would justify a reversal for refusing a non-suit.

C. R. R. Co. vs. Moore, 4 Zab., 824.

N. J. Ex. Co., 3 Vr., 166.

The test is whether there is any testimony from which the jury can reasonably conclude that the facts sought to be proved, are established.

Bowen vs. Shannon, 14 Vr., 596.

If the case presents a fairly debatable question whether or not the plaintiff was guilty of contributory negligence, a solution of that question is for the jury.

P. R. R. Co. vs. Rider, 13 Vr., 180.

If the testimony leaves the question in doubt it is for the jury and not for the court to determine.

City R. R. Co. vs. Lee, 21 Vroom, 435.

It must not only appear to the court that the verdict is against the weight of evidence, but it must clearly appear that such is the case; that there cannot be any doubt of it.

Am. & Eng. Ency. Law, vol. 16, p. 556 n.

Orm vs. Bishop, 7 Halstead, 153.

And the preponderance of evidence against the verdict must be very strong.

Am. & Eng. Ency. Law, vol. 16, p. 556 n.

Orm vs. Bishop, 7 Halstead, 153.

“A non-suit should not be granted nor a verdict ordered for the defendant if the evidence is conflicted and leaves the mind in a state of some doubt.”

This decision cites a number of others in point.

Baumann vs. Hamburg American Packet Co., 67 N. J. L., 250.

(d) Because negligence was shown, if at all, by fellow employees in the use of the pin, whereby the accident was caused, and for such the company is not liable.

It is uncontradicted in this case, in fact admitted by the defendants, that William Campbell was an expert workman. It plainly appears from the evidence of the plaintiff as shown in the three propositions of this brief, that defective tools only were supplied. It is shown upon the part of the plaintiff that this defective tool, in the hands of this expert workman, was the cause of the plaintiff's injury. The question under this assignment therefore is resolved as to the fact of the defective tool being supplied in propositions one, two and three. The question as to the liability of the defendant under the statement set forth in this assignment is fully discussed and their liability plainly shown by the authorities under assignment one, sub-section (b), and the law set forth in these authorities applies equally well to the present assignment.

3. The defendant assigned error because in charging the jury, at the trial of the cause, the presiding Justice left it to the jury to determine whether the defendant had provided or taken reasonable care and skill, to provide reasonably safe tools in the several places referred to in the testimony, which charge was illegal and to the injury of the plaintiff.

This assignment, it would seem, is an epitome of the previous assignment and raised again a question of the facts and the law. At the expense of repetition, counsel insists that it was

clearly shown on the part of the plaintiff at least and in some respects substantiated by the defendant, that this injury was caused by the use of a defective pin in the hands of an unquestionably competent workman, and that the defect of this tool was known to the Supt. That the tool in question was used by him, was the only one supplied by the company of the necessary size, it was shown by the plaintiff particularly by the witness, Wm. Campbell, that it was necessary to use this particular size and it must be assumed that he knew his business.

The defendant attempted to show that there were other tools available. This may be true of other sizes than that required, but as to the particular size in question, there is not a scintilla of proof on the part of the defendant that there was a single drift pin supplied by the company of the necessary size other than that that was used and caused the accident. In fact, the defendant made no attempt nor pretence of denying this particular fact. That the justice presiding properly left it to the jury to determine whether or not the defendant had provided safe tools under the evidence produced by the plaintiff, has been fully shown by the authorities on this point cited under assignment (2) sub-sections (a), (b) and (c) as this was surely a question of fact for the jury.

4. The defendant assigned error because in charging the jury at the said trial, the Justice who presided charged that the fault or negligence of the brother of the plaintiff would not entitle the defendant to the verdict of the jury, the particular charge being in the words follow-

ing: "It does not appear that the plaintiff knew the tools with which the fellow workmen were working; he had no opportunity of determining whether they were safe; his brother had; his brother might have been to blame for using such a tool, but the fault of the brother in that way would not entitle the defendant to your verdict. No fault on the part of the fellow servant will exonerate the defendant if the defendant failed to do its duty." The fact that Wm. Campbell was a brother of the plaintiff does not in the slightest degree affect his status as a fellow workman, and it cannot seriously be contended by the defendant that in this respect his relationship would have any different bearing on the case than if he were an absolute stranger.

The trial Justice did not err in charging as above. This question is fully discussed under assignment (1), sub-section (b) wherein the law on this point is fully set forth and decision cited.

5. Because at the trial the Justice who presided refused to charge the jury as follows when thereunto duly requested:

"If the jury found that Wm. Campbell knew or ought to have known that the pins which he was using were defective, the defendant could not be held liable even if no proper pins were provided."

This exception to the refusal of the trial Justice to charge as requested, is entirely unfounded on principles of law. This question is likewise thoroughly covered in the discussion of assignment (1) sub-section (b) wherein decisions are set forth and authorities cited to show that

the trial Justice would have erred if charged as requested and his refusal was entirely proper.

6. Defendant assigned error because at the trial the presiding Justice refused to charge the jury as follows: "If the defect in the pin used by Wm. Campbell was obvious, then it was negligence on his part to use it, and the defendant can not be held liable for the use of such a pin."

This assignment is similar to those heretofore discussed and raises the same question as assignment (1) sub-section (b) and may be disposed of under the authorities thereunto cited; that the trial Justice properly refused such request and would have erred in charging as requested is fully shown by the authorities under the said assignment and sub-section.

Assignments 7, 8 and 9 are purely formal and call for no discussion other than reference to this entire brief.

Contributory negligence on the part of the plaintiff is not contended by the defendant to have occurred.

It should not be said that the verdict is excessive.

#### CONCLUSION.

It is submitted that the law <sup>of</sup> ~~on~~ the evidence warranted the verdict and it should not be disturbed.

Z. M. WARD,

JOHN M. WARD,

*Attorneys of Defendant in Error.*

## NEW JERSEY

# Court of Errors and Appeals

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JAMES CAMPBELL,

*Defendant in Error,*

*vs.*

T. A. GILLESPIE COMPANY,

*Plaintiff in Error.*

In Tort.

On Error to Supreme Court.

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### Brief of Corbin & Corbin, for Plaintiff in Error.

James Campbell was in the employ of the Gillespie Company as caulker and riveter of steel pipes. He had twenty years' experience in that business (p. 12, l. 17; p. 17, l. 22). On February 21st, 1902, he was caulking the seam of a four-foot steel water-pipe at Little Falls. His brother, William Campbell, was working on the opposite side of the pipe, driving rivets. John McClung was inside the pipe. Two other men were also in the party, helping. All were men of experience and skill (pp. 10, 11). To bring the ends of pipe exactly together, so that the rivet holes in one would fit those of the other, the riveters used "drift-pins," being round pieces of steel about seven inches long, small at one end and larger at the other. These were driven with hammers into the holes to draw them together for the

insertion of the rivets (p. 24). William Campbell was driving a drift-pin when a bit of the frayed head of it flew off and struck James, who was a few feet away, in the eye, destroying the sight of that eye (pp. 10, 18). James sued the company for the loss of his eye, claiming that the employer had failed in its duty to take care to provide proper drift-pins for the work, the claim being that those which were provided were battered and frayed by the hammering incidental to their long-continued use. He recovered the judgment now brought up for review.

## I.

*The measure of the employer's duty is that he take reasonable care to provide reasonably suitable tools for his servant's use, and no breach of that duty was shown.*

"It is incorrect to characterize the master's duty as an absolute duty to furnish his servant with reasonably safe implements and appliances. On the contrary it has been settled by many concurring decisions in this court and the Supreme Court that the master's duty does not require him to insure the reasonable safety of tools with which, or places about which, his servant is employed, but will be satisfied by his exercising reasonable care that such tools and places shall be reasonably safe for his workmen's use."

"The mere fact that the appliance furnished by the master turned out to be unsafe will not evince the master's liability."

*Baldwin v. Atlantic City R. R., 35 Vr. 232, 234.*

"Where appliances for work are needed, the duty is on the master to use reasonable care in their selection, and he cannot escape it by delegation; but carelessness in their use, or failure to use them on the part of his servant, whereby injury is received by a fellow-servant in the same common employment, is not chargeable to the master, no matter what may be the grade or authority of the servant."

*McLaughlin v. Camden Iron Works, 31 Vr. 557, 559.*

The work of pipe laying by the Gillespie Company has been going on through the summer at various places on the Jersey City Water Works and elsewhere, but was discontinued at the approach of winter (p. 15, 16, 23) and the tools all brought to Little Falls and put in the company's buildings there. There was a little piece of connecting pipe to be put in at Little Falls, the place where the tools were stored, and in February, 1902, Campbell, the plaintiff, who had been in the employ of the company for ten years, and who was temporarily working in Paterson for them (p. 9), was told by Supt. Jones to go to Little Falls next day and do the caulking on that small job and the other men would do the riveting; at the same time the Superintendent told John McClung to go up the next day "and bring out the tools and have them on the job." McClung and William Campbell were the riveters, Wardlaw was the heater (p. 12, l. 36, p. 20). The work occupied two days and was nearly finished when the accident occurred (p. 13, l. 30). McClung got the caulking tools, which were hammers, drift-pins, wrenches, snaps and bolts (p. 17, l. 1). James Campbell went to the tool box and got his own caulking tools, which were a hammer and a flat tool like a cold chisel. There were two places where McClung could have got tools; one in the large tool box outside of the storehouse, where he did, in fact, get them (p. 29-30), and which, he says, contained about one dozen drift-pins, of which he took three or four, or he could have gone inside the storehouse where he knew there were other tools (p. 30, l. 18 to 40). In his direct examination, he said (p. 29, l. 2):

"Q. Did you get the best you could find? A. Yes, sir."

On cross-examination (p. 30), he testified:

"Q. How many were in the tool box? A. May be a dozen.

"Q. You took out as many as you thought they would need? A. Yes, sir.

"Q. Did you go inside the warehouse? A. I don't think I did.

"Q. You found what you wanted in the box outside?

A. Yes, sir.

"Q. Were there not tools inside? A. Yes.

"Q. Did you ask anybody for any tools? A. No sir."

Again on p. 31, l. 16:

"Q. At night after that first day; after you brought the tools down, where did you leave them? A. I left them beside the job.

"Q. Were you working there all the next day? A. Yes, sir.

"Q. Did you leave them there the next night? A. Yes, sir.

"Q. And they were there the third day, when the accident happened? A. Yes, sir.

"Q. Did you have occasion to go after any tools except the first time? A. Yes; different times.

"Q. Who sent you? A. Nobody sent me.

"Q. Whatever you wanted you went up and got? A. Yes, sir.

"Q. The warehouse was open? A. We got the key.

"Q. Did you see the box at the door with all the drift pins lying in it? A. Not at this particular job where the accident happened; I didn't have to go up then.

"Q. How many times during these two days had anybody gone up there to get tools? A. Different times; three or four, anyhow.

"Q. Who went up besides you? A. William Campbell went up at one time.

"Q. He went up there to get tools? A. Yes, sir.

"Q. When you wanted tools you would go and get them? A. Yes, sir.

"Q. This little job that you men were doing was all the work that was going on at that time? A. Yes, sir."

McClung further said that the superintendent did not tell him where to go for the tools. "He said to go and get the tools because he surmised that I knew where to go" (p. 32, l. 38).

Younger, who was with McClung helping to get the tools, fully corroborated his testimony (pp. 34, 35);

they got some tools inside, but did not attempt to get any drift-pins inside, getting what they thought they wanted out of the box which was outside. He said there were a number of drift-pins in the box, but could not say whether or not there were as many as twenty or thirty (p. 35, l. 10).

McClung testified that he took three sizes of drift-pins, seven-eighths, three-quarters and five-eighths of an inch. Uncertain how many he took, but took as many as he thought were needed (p. 30, l. 9). As the work proceeded William Campbell also went up at one time and got tools when wanted (p. 31, l. 38).

William Campbell says (p. 22), they had been using two pins all day, and finally he picked up a third pin, which he says was seven-eighths, and that one was the one which broke. Admits that he saw a large number of pins about three-quarter inch and other sizes at the warehouse, but not seven-eighths (pp. 22, 23). He says:

"Q. You didn't go there and examine every pin to see if there was any seven-eighths? A. I certainly did.

"Q. You didn't go through all these tool boxes? A. There were only two.

Q. There was one big box and a lot of small boxes? A. Yes, sir.

"Q. They had been brought in from the job? A. Yes, sir."

It appears that a pin of the next smaller size could be utilized, and that the pin used was not full seven-eighths, but the matter of size has no apparent relation to the accident (p. 45, l. 26 to 37; p. 75, l. 30 to 40).

The office where some of the tools were was about twenty-five or thirty yards from the work (p. 52, l. 16). The storehouse (p. 55, l. 29; p. 56, l. 29), where McClung obtained the chief supply, was about a third or half a mile, as one had to walk around the filter plant to get to it (p. 20, l. 31; p. 54, l. 36); some tools were obtained from there. He brought them on a truck (p. 28-29). They also got some at the blacksmith's shop. (Younger, p. 35.)

As to the number of pins on hand which could have been had for the asking, the further evidence is as follows:

McClung says, in the box outside the building, where he got them, there were "may be a dozen" (p. 30, l. 20), and there were others inside.

Younger, who was with McClung, says there were a number in the box outside, but could not say whether as many as twenty or thirty (p. 35, l. 16).

Culligan, one of the foremen, says there were put into the large box, outside the filter plant, fifteen or sixteen drift-pins, and that he had taken twenty-five or thirty over to the warehouse besides (p. 48, l. 30 to 40), and that on the shelves and in the boxes in the warehouse there were forty or fifty (p. 49). He took away fifty or sixty after the accident in good condition (pp. 49-50); some new.

Schilling, who was doing work near where Campbell was working, but not in gang on the day of the injury, got about four drift-pins in the box near the office, and there were still three or four left in it (p. 51, l. 30).

Harold, walking boss, says: "In the box, about fifty feet from where the work was going on, were all kinds of tools, drift pins among others. Ordinarily six or eight were kept in the box, and at the storehouse he had seen all of twenty or twenty-five (p. 55, l. 20) in serviceable condition; that at the storehouse there was a box of tools outside and five or six boxes inside, all open, with pins; that there were at least six or eight serviceable pins right on the work (p. 54, l. 25), and probably twenty-five or thirty at both places."

Charles Harold saw five or six drift-pins in the box near the office while the men were working (p. 56).

Mahoney, storekeeper, made an inventory of all the tools soon after the accident and before the spring work commenced; some were in boxes, and some forty or fifty in a bin in the warehouse; in all there were about one hundred and forty or one hundred and fifty (p. 58, l. 35). Some had been used more, some less; there were new ones at the blacksmith's shop (p. 59).

Neery, watchman at storehouse, saw McClung and others come and get tools, and saw them take from five to fifteen from the storehouse (p. 61). Thinks there were about two hundred in the boxes and bin at that time.

Jones, superintendent, says men made no complaint about tools; that there were drift-pins in the tool box and in the tool house; that there were all of a dozen boxes of tools in the house, and at least one hundred drift-pins of different sizes, some of which were new, and all of which were accessible to the men, and also tools at the office, one hundred and fifty feet from where they were working (p. 64-65).

Gubelman, chief engineer, says at least one hundred drift-pins were on the work available for the men and to be had for the asking (p. 72, l. 11).

## II.

*Where a master has taken reasonable care to provide safe tools, an injury received by his servant because of carelessness in their use or failure to use them by a fellow-servant is not chargeable to the master.*

"Of course a master must use reasonable care to furnish safe and suitable materials for what is essential to a given piece of work, but, when he performs that duty, a failure to use them or negligence in their use is not chargeable to him."

*Curley v. Hoff, 33 Vr. 758, 763.*

So, where a boiler-maker was supplied with proper tools, but, by direction of a foreman, undertook to do the work with other tools, held that the master was not liable and the foreman was a fellow-servant.

*Maher v. Thropp, 30 Vr. 186.*

*Campbell v. N. J. Dry Dock Co., 32 Vr. 382.*

So, where a belt was fastened at a splice with belt fasteners, a large number of which were on hand, and when the belt parted the employee whose duty it was

to splice it used an insufficient number for the purpose. Held, the master was not liable for the resulting injuries.

*Hurley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31.

So, where a lever which the injured party was using to pry up an iron door broke while it was being used, and it appeared that the master had supplied a stock of lumber of proper size for levers, which the injured servant could have obtained at any time for the asking. Held, the master not liable for the injuries.

*Allen v. G. W. & F. Smith Iron Co.*, 160 Mass.

557.

Upon this point the following authorities are cited :

*McAndrews v. Burns*, 10 Vr. 117.

*O'Brien v. American Dredging Co.*, 24 Vr. 291.

That William was a co-employee of his brother James there can be no doubt. James thus describes the method of work : "There are holes in the pipe, and the rivet goes in, and these men form a head, and after they form a head I \* \* \* came around with the caulking tools (pp. 13, 14). Q. That is a chisel that you hammer? A. Yes, sir. Q. And you forced the steel tight to make it water-tight? A. Yes, sir."

Plainly they were co-employees. All five were engaged in the one duty of connecting up the pipe and making it water-tight. They were all working under the same employer, the same superintendent, and upon the same work.

### III.

*The employee assumes all the risks and perils usually incident to the employment, including those which he should take knowledge of by observation.*

In this case the servant had been twenty years in the business of riveting and caulking pipes, and must have known that drift-pins become frayed and blunted with every blow struck upon them, the head upon them

constantly changing and bits of the frayed part occasionally flying off. The fact was perfectly obvious, and whatever danger that fact involved was well known to the employee.

William Campbell testified that the head of the drift-pin gradually curls up with use, and sometimes a piece would fly off (pp. 27, 28). Millson said the same thing (p. 44, l. 14; p. 47, l. 33). It is a very common practice for the workmen to knock off the burs when they form by curling up on the tool (p. 45, l. 16; p. 72, l. 22).

The company had laid about one hundred miles of these pipe lines in New Jersey during the past twelve years (p. 69, l. 38), driving about ten million rivets (p. 70, l. 30), and during all this time had used the drift-pins without re-forging them, simply throwing them away after they were too short (pp. 70, 71; p. 67, l. 28), and yet no accident had ever occurred by their use (p. 71, l. 13). If so improbable as not to be foreseen, there was no negligence on the part of anyone, but the possibility of the flying off of a bit of steel is as manifest almost as that of the flying of chips under the blows of an axe, and plaintiff knows of that possibility. It would exist at every blow of the hammer.

The methods of using the tools in vogue at the time of the accident was the one which had been in vogue for many years, and was perfectly well known to the servant.

"A 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. \* \* \* \* \* Where a machine becomes defective during use, and, consequently, more dangerous to operate, and such a defect is an obvious one which might have been discovered by the servant

by the use of reasonable diligence, he is presumed to have taken upon himself the risks incident to its further use while out of repair, and, if injury results to him from such use, the master is not liable. In other words, the servant assumes all the risks and perils usually incident to the employment, and included in such risks and perils are those which it is a part of his duty to take knowledge of by observation." *Coyle v. Griffing Iron Co.*, 34 Vr. 609-612.

*Johnson v. DeVoe Snuff Co.*, 33 Vr. 417.

*Foley v. Jersey City Elec. Light Co.*, 25 Vr. 411.

*Chandler v. Coast Elec. Railway Co.*, 32 Vr. 380.

#### IV.

*The plaintiff in error was not liable because the required inspection was the duty of a fellow-servant and was incidental to the use of the tool.*

The condition of the pin must vary with every blow upon it, and the inspection must necessarily go along with the use. Such an inspection is a recognized exception to the doctrine of the *Ingebregsten* case, 28 Vr. 400, holding the master liable to inspect tools furnished to servants. In that case this exception is stated as follows :

"If the employee's duty to inspect or repair apparatus is incidental to his duty to use the apparatus in a common employment with fellow-servants, then the master is not responsible to the fellow-servants for the default of said employee."

This doctrine is explained in *Hustis v. Banister Co.*, 34 Vr. 465, 469; affirmed 35 Vr. 279.

The Court said: "The use of any instrumentality of human action involves some inspection and may involve repair because of that very use. It is with such inspection and such repair only that the law charges the servant to the relief of the master, and it is plain that the use must be direct. The engineer runs, and therefore must inspect his engine, but not the shafting or machinery to which he transmits power. The turner

runs, and therefore must inspect his lathe, but not the shafting that brings him power. Inspection while in use and inspection incidental to use are not convertible expressions."

The present case is clearly one of inspection incidental to use, and, if there was neglect at all in that regard, it was the neglect of the fellow-workmen who continued to use the tool after inspection would have revealed its dangerous character.

The number of blows on the pin before the accident is immaterial. If the defect was apparent and was such as to forewarn any careful person of the possibility of the accident, then the negligence was that of the fellow-servant. If it was not apparent, then there was no negligence on the part of any one. The first blow may have caused the defect. It may well be, too, that the danger did not become apparent until the blow which caused the injury, in which case no fault could be imputed to any one.

This point was expressly raised on the motion to direct a verdict, one of the grounds stated being "that negligence has been shown, if at all, by fellow-workmen in the use of the pin, if there be any negligence" (p. 76, l. 35).

The judgment should be reversed.

CORBIN & CORBIN,  
*Attorneys of Plaintiff in Error.*

March, 1903.

NEW HAVEN

1850

1851

1852

1853

# INDEX.

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	PAGE
Writ of Error . . . . .	1
Declaration and Plea . . . . .	2
Postea . . . . .	5
Motion to Nonsuit . . . . .	40
Motion to Direct Verdict . . . . .	76
Defendant's Requests to Charge . . . . .	77
Charge . . . . .	78
Exceptions to Charge . . . . .	83
Assignments of Error . . . . .	84

## PLAINTIFF'S WITNESSES.

### HARRY WILLARD.

Direct . . . . .	6
Cross . . . . .	7

### JAMES CAMPBELL.

Direct . . . . .	8, 75
Cross . . . . .	12
Re-direct . . . . .	17

### WILLIAM CAMPBELL.

Direct . . . . .	17, 75
Cross . . . . .	19
Re-direct . . . . .	26
Re-cross . . . . .	27

### JOHN McCLUNG.

Direct . . . . .	28
Cross . . . . .	29

### FREDERICK YOUNGER.

Direct . . . . .	33
Cross . . . . .	34

	PAGE
<b>JAMES WARDLOW.</b>	
Direct.....	36
Cross.....	36

<b>PATRICK McMAHON.</b>	
Direct.....	37
Cross.....	38

### DEFENDANTS' WITNESSES.

<b>WALTER B. JOHNSON.</b>	
Direct.....	40
Cross.....	41

<b>THOMAS MILLSON.</b>	
Direct.....	3
Cross.....	46

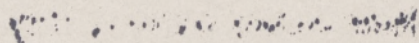
<b>WILLIAM CULLIGAN.</b>	
Direct.....	48
Cross.....	50

<b>JOHN SCHILLING.</b>	
Direct.....	51
Cross.....	52

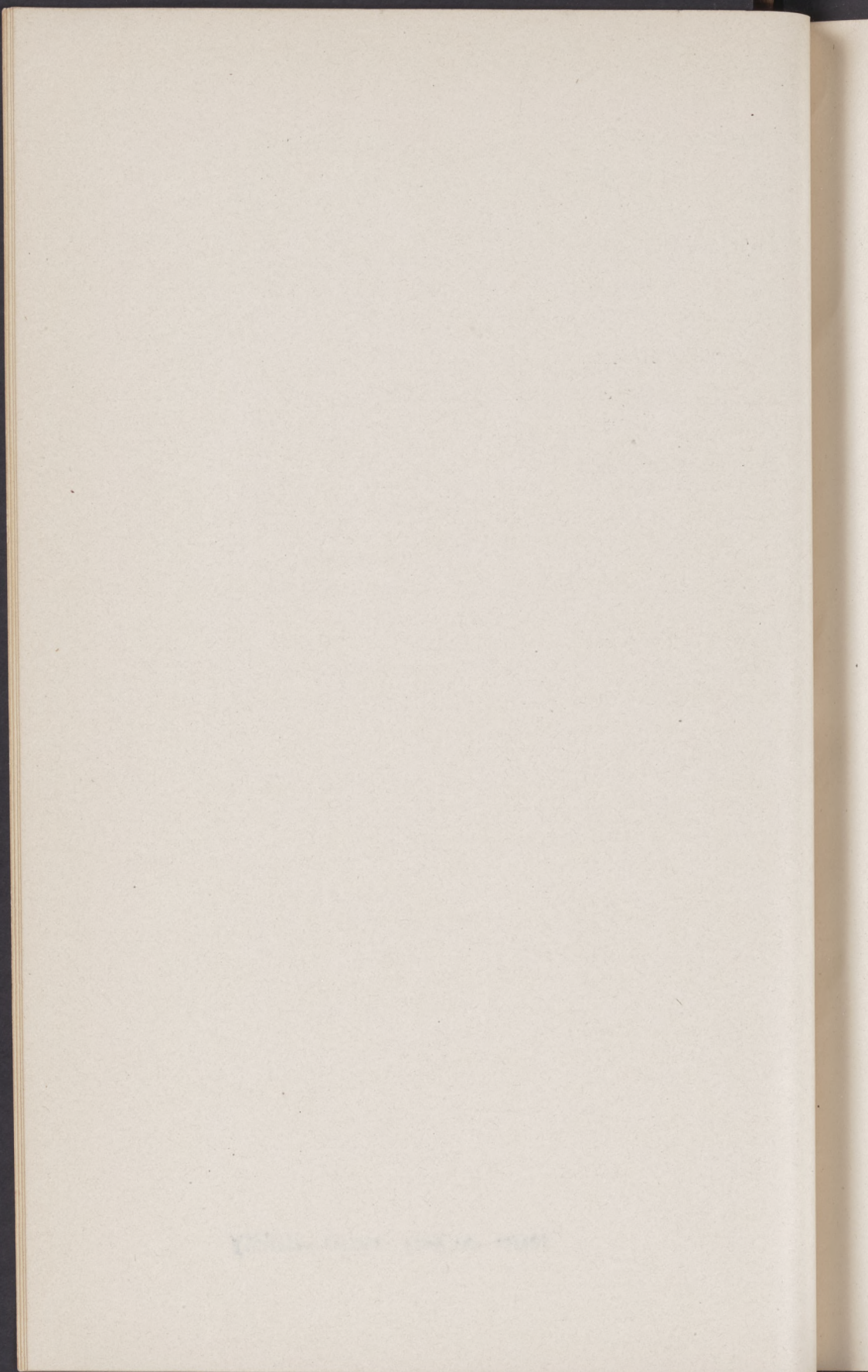
<b>JACOB HAROLD.</b>	
Direct.....	52
Cross.....	55

<b>CHARLES HAROLD.</b>	
Direct.....	56
Cross.....	57

<b>THOMAS MAHONEY.</b>	
Direct.....	57
Cross.....	59



WILLIAM NEERY.	PAGE
Direct.....	61
Cross.....	62
WILLIAM F. JONES.	
Direct.....	63
Cross.....	65
WALTER C. HOPPER.	
Direct.....	66
Cross.....	68
FREDRICK GUBELMAN.	
Direct.....	69
Cross.....	73



## WRIT OF ERROR.

(Returnable Nov. 25, 1902.)

STATE OF NEW JERSEY, ss:

The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature.

GREETING:

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you, between James Campbell, plaintiff, and the T. A. Gillespie Company, a corporation, defendant, in an action of tort, manifest error hath intervened to the great damage of the said defendant as is said; we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed, that you distinctly and openly send under your seal the records and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the twenty-fifth day of November, nineteen hundred and two, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to law ought to be done.

WITNESS, William J. Magie, Esquire, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the tenth day of November, nineteen hundred and two.

S. D. DICKINSON,  
Clerk.

CORBIN & CORBIN,  
Attorneys.

## DECLARATION AND PLEA.

New Jersey Supreme Court of the twenty-eighth day of July, in the year of our Lord nineteen hundred and two.

PASSAIC COUNTY, SS:

- 10 The "T. A. Gillespie Company," the defendant in this suit, was summoned to answer unto James Campbell, the plaintiff therein, in an action of tort, and thereupon the said plaintiff by Z. M. Ward and John M. Ward, his attorneys complains for that whereas, heretofore, to-wit, on the twenty-fifth day of February, in the year of our Lord uineteen hundred and two, at the Township of Little Falls, in the County of Passaic, and State of New Jersey, the said defendant was engaged in the construction of a water plant, and
- 20 among other things in connection therewith, was constructing and laying a line of water pipe from the reservoir of said water plant, in the Township of Little Falls, through divers roads and ways in the said Township, which pipes were about four feet in diameter and were laid in sections and joined together by use of rivets and were calked at the different connections so as to render them water tight; that in fastening and joining together said iron pipes it was necessary to use certain tools and appliances, to wit, iron or steel
- 30 hammers, sledges, rivets, and an appliance known and designated as a drift pin which said drift pin was made of iron or steel and was about seven inches in length, the diameter at the top being about an inch and tapering down to the bottom, the diameter of which was about half an inch, and was used to enlarge the holes through which the rivets passed and to make firm and secure the rivets.

And the plaintiff avers, that on the day and year aforesaid, at the Township of Little Falls, in the

40

County of Passaic, he was employed by the said defendant and put to work on the said iron pipe and directed to calk the seams and joints where the sections of the pipes came together.

And the plaintiff avers, that on the day and year aforesaid at the Township of Little Falls aforesaid, the said defendant also employed certain other men, and set them to work on the said iron pipe line near the place where the plaintiff had been put to work and directly opposite him, and said defendant ordered them, the said other workmen, to rivet the ends of the sections of said pipes together, and furnished them for the purpose of riveting as aforesaid with certain tools, to-wit, hammers, sledges, rivets and certain appliances known as a drift pin, which drift pin was about seven inches in length, made of iron or steel, the diameter at the top being about an inch and tapering down to the bottom, the diameter of the bottom being about half an inch, which drift pin was used to enlarge the hole for the rivets and to make secure and firm the rivets aforesaid, by placing said drift pin in the hole and driving it in and placing it against the rivets and striking said drift pins heavy blows on the head thereof with a sledge hammer.

And the plaintiff avers, that the said drift pin when in use as aforesaid was subjected to a great many heavy blows from said sledge hammer and unless made of good and sufficient material and properly constructed and maintained as such, the top thereof would soon become battered and split in pieces and thereby endanger the surrounding workmen.

And the plaintiff avers, that the drift pin, made of iron or steel, about seven inches in length, one inch in diameter and tapering down to about half an inch in diameter at the bottom furnished by the said defendant on the day and year aforesaid to be used, and used

as aforesaid was, improperly and insufficiently made and constructed and had been used and maintained by the said defendant in about its business for so long a time that the head thereof had become battered and worn to such an extent that the battered head extended out over the side and was in a scaley condition and pieces thereof liable to fly off at any time  
10 upon being struck thereupon with a hammer or sledge, and the said defendant knowing the same negligently furnished, directed and ordered it to be used by its servants, agents and employees as such, all of which was unknown to the said plaintiff, so that by reason of the improper and insufficient construction of the said drift pin and the battered and worn condition of the same as aforesaid and the negligent furnishing of the same by the defendant for the use aforesaid and while it was being hammered upon  
20 with an iron hammer or sledge by the said certain other employees under the direction and control of the defendant as aforesaid, in the course of their employment, a piece of the iron composing said battered head was knocked or broken off and by reason thereof was driven or flew with great force or violence across the said pipe to where the said plaintiff was working as aforesaid and struck him the said plaintiff in the right eye with great force and violence, and by reason thereof the said plaintiff's right eye was so injured  
30 that he became totally blind in said eye, and that his other eye has become greatly injured and damaged by reason thereof and so has remained from hence hitherto.

And the plaintiff avers, that by reason thereof he has suffered and still is suffering great pain, injury and agony and has become sick, wounded, diseased and disabled and has been unable to pursue his usual vocation and has so remained and continued for a long space of time, to wit, from thence hitherto, and  
40 was forced and obliged to lay out and expend divers

large sums of money in and about the endeavor to be healed and cured of the above mentioned injuries and to regain the sight of his right eye, to wit, the sum of five hundred dollars.

By reason of the foregoing premises the said plaintiff says that he has suffered and sustained great damage, to wit, in the sum of ten thousand dollars and therefore he brings his suit, etc., to wit, at the city of Paterson, in the County of Passaic and State of New Jersey. 10

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

Afterwards, that is to say, on the eighth day of 20  
October, A. D. nineteen hundred and two, at a Circuit Court held at Paterson, in and for the County of Passaic, by his Honor, Jonathan Dixon, one of the Justices of the Supreme Court of the State of New Jersey, according to the form of the statute in such cases made and provided, comes as well the within named plaintiff as the within named defendant, by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being summoned, also come, who, to speak the truth, 30  
of the matters within contained, being chosen, tried and sworn, upon their oaths say that the defendant is guilty in manner and form as the plaintiff hath within complained against it, and they assess the damages of the said plaintiff on occasion thereof, over and above his costs and charges by him about his suit in this behalf expended to the sum of fifteen hundred dollars, and for those costs and charges to be taxed.

JONATHAN DIXON,

Justice of Supreme Court. 40

# New Jersey Supreme Court.

PASSAIC COUNTY.

10	JAMES CAMPBELL,	}	<i>In Tort.</i>
	<i>vs.</i>		
	THE T. A. GILLESPIE CO.		

Stenographer's transcript of testimony taken on the trial of the above stated cause, at Paterson, on the seventh day of October, 1902, before his Honor, Jonathan Dixon and a jury.

20

## APPEARANCES.

For the Plaintiff, Z. M. WARD & SON.

For the Defendant, WILLIAM CORBIN, ESQ., of Corbin & Corbin, and MICHAEL DUNN, ESQ.

## PLAINTIFF'S CASE.

HARRY WILLARD, a witness produced on the part of the plaintiff, being duly sworn according to law, on his oath testifies as follows:

30

*Direct examination by Mr. Ward.*

Q. You reside here in Paterson? A. I do.

Q. What is your specialty? A. Eye, ear and throat.

Q. Did you examine Mr. Campbell, this man here?

A. Yes, sir.

Q. When did you examine him? A. Last night.

Q. Will you tell us his condition as to his eyes?

A. The right eye sight is gone completely and can never be restored; the condition is such that the pupil of the eye is completely clouded; the sight

40

can never be restored because that pupil can never be restored.

Q. What effect will it have on the other eye? A. There is always a tendency to set up sympathetic aphthemia of the other eye, which invariably follows unless it is removed.

Q. In order to save that eye what do you think is necessary? A. The only safe procedure is to remove the bad eye. 10

*By the Court.*

Q. What is the probability of this sympathetic irritation setting up in this case? A. If it passes a stage of anywheres from ten weeks to two or three years, the probabilities become less, although it may come in any time from one week to fifty years; we cannot know whether an irritation will set up within twenty-four hours. 20

Q. How probable is such a condition in this case? A. It is entirely conjectural.

*Cross-examination by Mr. Corbin.*

Q. How long have you been in Paterson? A. About four years.

Q. How long have you been practicing your profession here? A. Four years.

Q. Are you graduated from any medical college? A. Yes. 30

Q. What college? A. New York Homoepathic and Medical College, Class of 1896.

Q. And after your graduation you came here? A. Not directly afterwards.

Q. Where did you go next? A. I first took a hospital course in New York City and followed that with a post-graduate course.

Q. Your only practice has been here? A. My only practice in my specialty; I have practiced medicine. 40

Q. Where is your office in Paterson? A. No. 197 Ellison street.

Q. Where was your home before you came to Paterson? A. Ridgewood.

Q. You never saw Mr. Campbell until last night? A. Never.

Q. And you then examined this eye? A. I did.

10 Q. You know nothing of the history? A. Nothing whatever.

Q. You know nothing about the history of the case? A. Only what he told me happened.

Q. He told you it happened by a flying piece of steel, did he? A. Yes.

Q. Whether anything will happen to the other eye you can only say is purely conjectural? A. Purely.

Q. That is all.

20

JAMES CAMPBELL, the plaintiff, produced as a witness in his own behalf, being duly sworn according to law, on his oath testifies as follows:

*Direct examination by Mr. Ward.*

Q. How old are you now? A. Thirty-eight.

Q. Where do you now reside? A. In 301 Grand street.

Q. You live in Paterson? A. Yes, sir.

30 Q. How long have you resided in Paterson? A. Sixteen years.

Q. What is your business? A. Boilermaker.

Q. Where have you worked the most of that time? A. I have worked on and off for the most of my time for the T. A. Gillespie Company.

Q. What have you averaged a day for your work for the last year or two? A. Two dollars and seventy-five cents a day.

40 Q. Were you working for the Gillespie Company last February? A. Yes, sir.

Q. About the twenty-first of February? A. Yes, sir.

Q. Where were you working then? A. Little Falls.

Q. Were you working in Paterson also for them?

A. Yes, sir.

Q. Were you injured at Little Falls? A. Yes, sir

Q. Do you recollect the day it was? A. Yes, sir; Friday.

Q. What day of the month? A. The twenty-first. 10

Q. Where were you injured? A. On the right eye.

Q. At what place? A. At Little Falls.

Q. What were you doing? A. I was caulking.

The two pipes come together and one overlaps the other and there are holes in them to drive rivets in, and after the rivets are in I come along and make it water-tight with the caulking tools.

Q. That is what you were doing? A. Yes, sir.

Q. Who directed you to do that work? A. William Jones, the superintendent. 20

Q. For whom? A. The T. A. Gillespie Company.

Q. Of what? A. Of the pipe line.

Q. How long had he been such superintendent?

A. I don't know; he has been there since I was working on the line.

Q. Where were you working just before you were told to do that? A. I was working on the First National Bank taking it down after the fire.

Q. For whom? A. The T. A. Gillespie Company.

Q. Who was the superintendent there? A. William Jones. 30

Q. Did you have a conversation with him about going up to Little Falls? A. Yes, sir.

Q. Tell us what it was? A. He said that there was a pipe to be connected in Little Falls and that the water was off, and for me to go up and do the caulking, and the other men would do the riveting, and he told John Mc Clung to go up the following day and bring out the tools and have them at the job.

Q. Did you have anything to do with the riveting?

A. No, sir.

Q. Who did? A. William Campbell and John McClung.

Q. Does riveting have anything to do with caulking?

A. No, sir.

10 Q. What happened? A. I was looking at the seam, and they were on that side of the pipe; I could hear them striking on a tool; and as I was looking a piece flew over and hit me on the eye.

Q. How large was that pipe? A. About four feet.

Q. In diameter? A. Yes, sir; a four-foot pipe.

Q. Where were the riveters at the time that the piece flew off; which side were you on? A. I was on one side—this side, and they were on the other.

Q. They were on the opposite side? A. Yes, sir.

20 Q. And after the piece of steel flew over and hit you, what did you do? A. I put my hand on my eye and I felt it was blood, and it was all here (indicating)—the white of the eye; I holloaed; “I am killed,” and the two men helped me over the pipe, and I says: “Get the drift pin; that is what it came off.”

Q. What made you think it was the drift pin? A. Nothing else could do it; they were hammering on it.

Q. At the time, were you hammering? A. No, sir; I was looking at the seam.

30 Q. Are your tools anything like drift pins? A. No, sir; nothing.

Q. Is that the kind of a drift pin that should be used for that business? A. They use a pin, but not that kind.

*By the Court.*

Q. Is that the one that you got at the time? A. Yes, sir.

*By Mr. Ward.*

40 Q. What happened after you were taken over the

pipe? A. I went up to the office; while I was going up to the office I met the walking foreman, and he told me to go to the doctor's; I went to Dr. McAlister, and the doctor said it was a bad case.

Q. What did he do for you? A. He just put a bandage on it and told me to go to the hospital.

Q. Did you go to the hospital? A. Yes, sir.

Q. How long did you remain in the hospital? A. 10  
Four weeks and five days.

Q. And then you came out? A. Yes, sir.

Q. What did you do then? A. I was not able to do anything; I could not work any; I had two jobs, but I had to give them up again.

Q. Why? A. The sight gave way.

Q. Which sight? A. The other eye went bad on me, and I could not go on a scaffolding.

Q. Why couldn't you? A. It takes a man with two eyes, let alone one, to take care of himself. 20

Q. Can you see anything with the right eye? A. No, sir; nothing whatever.

Q. Did you try to do riveting or boiler-making since that? A. I could not do that any more; it gets black, and there is like a cloud before me.

Q. Is there any work that you can do, anything whereby you can recover anything for your services? A. I am doing a little now, but not at my own kind of work.

Q. Do you suffer very much? A. Yes, sir. 30

Q. How does it affect you now as to suffering? A. The pain comes up right through the head.

Q. How is the other eye when you read or work? A. It feels pretty weak.

Q. Did you have good eyesight before? A. Yes, sir; very good.

Q. Were you a regular man? A. Yes, sir.

Q. And able to do your best work straight along? A. Yes, sir.

*Cross-examination by Mr. Corbin.*

Q. How long have you been working for the Gillespie Company? A. I guess I have been working on and off since the first line went through; I guess about ten years.

Q. Always as a caulker? A. Both riveting and caulking.

10 Q. You worked on the construction of the Newark line? A. The work that came down from Butler.

Q. That is twelve years ago, is it not? A. About ten years.

Q. And you were working ever since, up to the time of the accident? A. On and off.

Q. And for ten years you had been caulking and riveting? A. I have been following that business for twenty years.

Q. That is riveting and caulking? A. Yes, sir.

20 Q. The other Campbell is your brother? A. Yes, sir.

Q. And at the time you were working on this pipe he was in charge of the gang? A. That I don't know, he had nothing to do with it.

Q. This was a short piece connecting up with the works? A. Yes, sir.

Q. Who was helping you in caulking? A. Nobody was helping me.

Q. You were the only caulker? A. Yes, sir.

30 Q. Who was helping your brother at riveting? A. John McClung.

Q. You three were all that were there; was there nobody else beside you three on the job? A. There were four besides me.

Q. Who else was there when the accident happened? A. Jimmie Wardlow, Billy Campbell—(interrupted.)

40 Q. You were working within about fifteen feet of him? A. Yes, right across the pipe.

Q. Before it happened you were about fifteen feet away? A. Somewhere about that—fifteen feet.

Q. This was a short piece? A. Yes, and a connection.

Q. You could not get further away than that and do the work? A. That was a closing in sheet.

Q. How many sheets did you put in? A. Two.

Q. You were all there within a few feet of the 10 work? A. That was already in and I was following up the riveters.

Q. In following up how far were you from them? A. Right across the pipe, about four feet.

Q. Who was inside the pipe? A. I don't know who was in.

Q. Who was inside do you know? A. I don't know.

Q. Which man was doing the hammering when the pin flew? A. I don't know.

Q. It was your brother? A. I don't know; I was 20 not looking at them.

Q. Your brother was in charge of them? A. I don't know; I was hired by William Jones.

Q. Mr. Jones was not there at the time of the accident? A. No; he was in Paterson, I think.

Q. Had you been working the day before? A. Yes, sir.

Q. And the day when the accident happened? A. Yes, sir.

Q. This was the second day of the job? A. The 30 second day of the job.

Q. Was it nearly finished? A. Yes, pretty well finished.

Q. What is it that you were doing that you call caulking? A. The pipe comes together and one overlaps the other like this—(interrupted.)

Q. They are first riveted together? A. Yes, there are holes in this pipe and the rivet goes in, and these men form a head and after they form a head I—(interrupted.)

Q. That is what they call riveting? A. Yes, sir.

Q. It is just like a steam boiler? A. Yes, sir.

Q. Go on? A. And then I came around with the caulking tools.

Q. That is a chisel that you hammer? A. Yes, sir.

Q. And you forced the steel tight to make it water-tight? A. Yes, sir.

10 Q. Or "tamping," sometimes? A. I have called it caulking.

Q. You say you were looking at the seam that had been caulked? A. I had finished it; I was just looking at the seam like that.

Q. Did you have your tools on it? A. I had my hand on the pipe like that.

Q. What for? A. To see if it was all right.

Q. Had you finished it? A. We generally look at it about every four or five inches we do.

20 Q. You had finished it and you were looking to see that it was all right? A. Yes, sir.

Q. What were the others doing? A. I was not looking at what they were doing; I know I heard them hammering.

Q. You know what they were doing? A. I know that they were there to do the riveting.

Q. What is this drift pin for? A. It is for making the holes larger or for drawing the seams together.

30 Q. When you put two ends together and the holes don't come opposite, and you do this to drive them together, then you put this pin in to drive them together? A. Yes, sir.

Q. How many holes are there? A. That is according to the size of the pipe.

Q. In a four-foot pipe? A. That I don't know.

*By the Court.*

Q. How far apart are they? A. Seven-eighths of an inch apart.

*By Mr. Corbin.*

Q. How far apart are the holes? A. Seven-eighths of an inch apart; if the holes are seven-eighths of an inch there is generally seven-eighths of an inch between the holes.

Q. Then there would be one hundred rivets in a pipe? A. Eighty or eighty-five; somewhere around that. 10

Q. On one circumference? A. Yes, sir.

Q. You say Mr. McClung brought the tools down for this work? A. He was sent up for them.

Q. Did he bring your tools? A. No.

Q. Where were your tools? A. I got my own tools.

Q. He was sent up the evening before? A. He was sent up the evening before we went up.

Q. And that morning when the accident happened, where were your tools? A. We got our tools in the tool box. 20

Q. At the store house? A. Yes, sir.

Q. Where? A. I went to the tool house over alongside the depot at Little Falls.

Q. Was the store house open? A. Yes, sir.

Q. Did you go in? A. Yes, sir.

Q. You picked up what tools you wanted? A. Yes, sir.

Q. The tools from the main job had been brought in and kept at that place? A. It was supposed to be a store house. 30

Q. There was a storekeeper there? A. I seen a boy there.

Q. The door was open? A. Yes, sir.

Q. And you took what you wanted? A. Yes, sir.

Q. Did McClung go at the same time that you did? A. He got them the day before.

Q. Did he leave them on the job all night? A. Yes. 40

Q. How was it different with you? A. Because I went to work with my own tools.

Q. Where did you put them at night? A. I laid them inside the pipe and covered them over with dirt.

Q. Was McClung along the same time you got your tools? A. No, sir.

10 Q. There were a number of tool boxes there? A. It was the big tool box that I got mine out of.

Q. The tool boxes had all been brought there? A. Yes, sir.

Q. This job that you were working on was all the pipe work that was going on? A. It was pretty near.

Q. The line had been practically completed? A. It was not completed but it was closed down.

Q. How long had it been closed down? A. I could not exactly say.

20 Q. Some months? A. They generally close down in the bad weather when there is frost or when they cannot get digging the ditches.

Q. Was it two or three months? A. Eight or ten weeks, somewhere around that.

Q. And you say you don't know what your brother was doing on the other side. Why did you have your tools from the store house? A. I got the tools that ought to be used there; I didn't look around to see what others were there.

30 Q. You think they were driving a drift pin to get the two pipes together? A. Sure; I knew they were driving a drift pin.

Q. What tools did you get for your own work? A. Caulking tools.

Q. What are they? A. A flat tool something like a cold chisel only they are not sharpened, and a hammer.

40 Q. What tools did they use? A. I don't know what tools they were using; I know what I would use.

Q. What tools would you get? A. You need to get a keg of coal—that is the first thing.

Q. What tools? A. Hammers and drift pins.

Q. What else? A. Wrenches.

Q. What else? A. Snaps.

Q. What are they? A. What you form the head of the rivet with.

Q. Anything else? A. Some bolts. 10

Q. That is all? A. That is about all.

Q. Their duty is to bring the two ends of the pipe together, and to put in hot rivets and make a head on them? A. The pipe is already put together and they are sent to put the rivets in, in the holes and after they do that I come along with the caulking tools to make it tight.

Q. The same thing as is done in a boiler shop? A. Yes, sir.

Q. Only this is done out of doors? A. Exactly. 20

*By Mr. Ward.*

Q. How long had you been following the caulking work exclusively all the time? A. I began at it over twenty years ago.

Q. For this company? A. I guess when they first put the line through here it was somewheres around ten years ago.

Q. That is what you have been doing all that time? A. Yes, sir. 30

Q. That is all.

WILLIAM CAMPBELL, a witness produced on the part of the plaintiff, being duly sworn according to law, on his oath testifies as follows:

*Direct examination by Mr. Ward.*

Q. What is your business? A. Boiler maker.

Q. Are you working in Paterson now? A. Yes, sir. 40

Q. What at? A. Structural iron work.

Q. Did you work for the Gillespie Company? A. Yes, sir.

Q. Up to what time? A. Up to about a month after the accident occurred to James Campbell.

Q. What were you doing just before that? A. I was on the First National Bank Building.

10 Q. What were you doing? A. Tearing down the tower and Mr. Jones came and told me that he had a job in Little Falls; that it was a rush job, and that he wanted me to go up there in the afternoon; that he had sent John McClung to get the tools ready, and the tools would be out all right for use; that I should do the riveting and that John McClung and James was to do the caulking. We were to go up that afternoon, but we didn't get the tower pulled down, and we started up the following morn-

20 ing, and McClung had the tools there. When I started to work Mr. Jones came around and inquired how it was. I said "We have a poor lot of tools." He says, "They are the best we have got and there is no blacksmith on the job, and go ahead and work with them," We worked that day and the following day this man James was on the other side caulking; and I had been working in the pipe and came out. The holes were bad; I had been using two drift pins. This third drift pin was in the rivet heater's can that

30 he heats the rivets in; I told him to throw me over that pin to drive the holes better—to pull the pipe closer; it is necessary to have the pipe closer; he threw over this pin and I struck it the second time when the piece flew off; I saw it go across the pipe and Jim holloaed "My God! something hit me in the eye." I turned around and I said, "I know it." I helped him over the pipe and he told me to get the pin for him.

Q. (Showing witness an iron pin) Is that the pin?

40 A. Yes, sir.

Q. Where is the piece that was knocked off? A. I don't know where it is.

Q. Show us where it came off? A. Right here (indicating.)

Q. Was that in the same condition then as it is now? A. That was the first it had been used.

Q. Had you seen this pin when you spoke to Mr. Jones and told him that the tools were poor? A. 10 Yes, sir; I had seen all of them.

Q. Did James have anything to do with your work? A. No, sir.

Q. Did he know about this pin? A. Not to my knowledge; he knew nothing about the tools that were used.

Q. You say the piece flew off? A. Yes, sir; I saw this piece fly across the pipe and Jim put his hand over his eyes and I saw something very clearly flow out—something like the white of a fresh egg, run 20 down his fingers; I got the pin when he asked me and I went to the office and told Mr. Herold.

Q. Who was he? A. The walking foreman.

Q. What was Mr. Jones? A. Superintendent.

Q. Did he have charge of these pipe works? A. Yes, sir.

Q. What was James' condition before this as to his eyesight? A. He had very good eyesight.

Q. What was his health usually? A. An able-bodied man, he always was. 30

*Cross-examination by Mr. Corbin.*

Q. When Mr. Jones came down to Paterson to see you at the First National Bank, you and your brother were working there? A. Yes, sir.

Q. And he spoke to both of you about finishing up this job at Little Falls? A. Yes, sir.

Q. Did you go up that same day or the next day? A. That same day.

Q. But you didn't do any work that day? A. No, sir; McClung was sent up first to have the job ready, but we didn't get the tower down in time that day.

Q. Had he been working for the Gillespies before?

A. Yes, sir.

Q. At what kind of work? A. Riveting.

10 Q. And caulker, too? A. No, sir; I never saw him caulk.

Q. He was the man working with you at the time the accident happened? A. Yes, sir.

Q. You were the man who struck the blow? A. Yes, sir.

Q. Where was McClung? A. Inside the pipe.

Q. You were outside? A. Outside.

Q. Any other man working there? A. Mr. Wardlow.

20 Q. What was he working at? A. He was a heater.

Q. You and McClung were the two riveters? A. Yes.

Q. McClung went up and got the tools? A. Yes, sir.

Q. When did he do that? A. The afternoon before we started to work; Mr. Jones sent him up that afternoon to get the tools, and that we would be there, but we didn't get the tower down before night.

30 Q. The next day you started to work? A. Yes, sir.

Q. How far was the store house from the place where you were working? A. I should judge, by the way you have to go around to it, about half a mile.

Q. You had to go around the filter plant? A. Yes, sir.

Q. There was an office nearer than that? A. Yes, sir.

Q. What were they for? A. They were all for tools.

Q. Where did McClung get the tools from? A. I could not say; I was not there.

Q. He had got them before you got there? A. Yes, sir.

Q. The first evening that you got there, they were already there? A. Yes, sir.

Q. You located them all right? A. I didn't know where he had them. 10

Q. Did they remain right there by the pipe? A. I don't know where they remained.

Q. When was it that you saw Jones there? A. He must have called when we were starting to work; he was on the job before he went to the city; he lives at Little Falls, and he came over to see how we were doing before he went to the city.

Q. How many drift pins were you using this day? A. We were using two pins; we had a third pin, and it was necessary to use the third to draw the holes together. 20

Q. Were you not using more than three? A. No, sir.

Q. These holes, you say, were bad? A. They didn't come together.

Q. You had to force them with a drift pin? A. Yes, sir.

Q. You had three pins then? A. Yes, sir.

Q. It was the third pin that broke off when you hit it? A. Yes, sir. 30

Q. What did you hit it with? A. The hammer.

Q. This piece flew off? A. Yes, sir.

Q. How far was your brother from you? A. I should judge about six feet.

Q. Right across the pipe? A. Yes, but he was more to one side than the other.

Q. Had you been using the pin the day before? A. No, sir.

Q. Do you mean to say you worked all day and that you only had two pins? A. Yes, sir; this pipe was 40

all connected and the pipe is fitted for the connections and half the time you have only to use one drift-pin unless the holes come bad.

Q. How many did McClung bring down? A. Three.

Q. How many did you have on the job? A. That was all.

10 Q. You had needed only two up to that time? A. Only two.

Q. Didn't you have any more in the keg? A. No, sir.

Q. Three were all that you brought? A. Yes, sir.

Q. That was enough, was it? A. That was plenty.

Q. Did you have any occasion to send for any more tools at all up to the warehouse? A. Yes.

Q. Who went for the tools? A. I told Mr. Herold  
20 and he sent them by his son.

Q. You didn't ask for any more drift-pins? A. There were no more drift-pins in seven-eighths.

Q. How do you know? A. I know it myself.

Q. When did you know it first? A. Right after the accident.

Q. Did you see the bin with drift-pins in? A. You could not get at that half the time.

Q. There were one hundred and fifty pins in it? A. No, sir.

30 Q. What? A. There were no more seven-eighths pins in it.

Q. Did you go over all that there were there? A. Yes; half the time you could not go there and afterwards I got in and looked.

Q. It was open after the accident? A. Yes, sir.

Q. There were about one hundred and fifty pins there? A. No, sir; not of this size.

Q. How many were there? A. I could see lots of three-quarters.

40 Q. You didn't go there and examine every pin to

see if there was any seven-eighths? A. I certainly did.

Q. You didn't go through all these tool boxes? A. There were only two.

Q. There was one big box and a lot of small boxes? A. Yes, sir.

Q. They had been brought in from the job? A. Yes, sir. 10

Q. At the time of the accident were there not at least one hundred and fifty pins there? A. Not seven-eighths.

Q. Five-eighths and other sizes? A. Yes, but they would not do for the work.

Q. These pins are made small at one end and large at the other end? A. Yes, sir.

Q. As a matter of fact what you are using is called three-quarters? A. Seven-eighths.

Q. Three-quarters is the proper pin? A. No, sir; 20  
seven-eighths is the proper pin.

Q. They all taper? A. Yes, sir.

Q. Big at one end and little at the other? A. Yes, sir.

Q. I show you half a dozen pins now; that is the kind you use? A. Yes, sir, that (indicating) is a three-quarter; so is that (indicating); this one (indicating) is seven-eighths.

Q. Where is the three-quarter measured? A. 30  
They taper from the point.

*By the Court.*

Q. What part of the pin is it that measures five-eighths or seven-eighths? A. It is made so that you can drive the hole to spread it.

Q. At what part of the pin is it measured? A. What they call the belly.

Q. Is that called the head? A. Yes, sir.

*By Mr. Corbin.*

Q. (Showing witness two pins) What are these?

A. I called that seven-eighths.

Q. (Showing witness another pin) what is that bigger one? A. That is an inch.

10 Q. You drive that down until you get the holes together—you sledge it down? A. Until we can get a bolt in it and drive that home.

Q. So that the two holes are opposite each other?

A. Yes, sir.

Q. So that the bolt will go in? A. Yes, sir.

*By the Court.*

Q. A head is made by the use of it? A. Yes, sir.

Q. You don't make the head on purpose, but it is formed by hammering? A. Yes, sir.

20

*By Mr. Corbin.*

Q. This head that we see on some of these is formed by hammering? A. Yes, sir.

Q. And the more it is hammered the more it wears down? A. A pin like that ought to be dressed when it gets that way.

Q. And a pin will get so short that you cannot use it at all? A. Yes, sir.

30 Q. You use this same sort of pins in boiler making? A. Yes, sir.

Q. And in riveting? A. Yes, sir.

Q. It is to bring the holes opposite each other? A. Yes, sir.

Q. And then when the holes are opposite and you get the bolt in and it is riveted you take the pin out? A. Yes, sir.

Q. What was the thickness of the plate in the pipes? A. I should judge seven-sixteenths or three-eighths of an inch; I am not positive.

40 Q. Flow pipes? A. Yes, sir.

Q. About forty-eight inches in diameter? A. Yes, sir.

Q. Right at the pumping station at Little Falls? A. Yes, sir.

Q. You were working connecting up? A. It was all connected for us to rivet it.

Q. A pipe was laid in the trenches and you were bringing the holes together and tightening it up? A. 10 Yes, sir.

Q. There were four men on the work? A. There were five men—six with Jim.

Q. Tell us who they were? A. Myself and my brother, Mr. McClung, Fred Younger, and Jim Wardlow and one of the Neery boys.

Q. What was Wardlow doing? A. Wardlow was heating.

Q. What was Younger doing? A. Younger was holding on. 20

Q. Inside the pipe? A. Yes, sir; and sometimes he held on the outside.

Q. What was McClung doing? A. McClung was inside the pipe, putting up the bolts for him.

Q. And the boy that you spoke of, what was he doing? A. I don't know whether he was inside the pipe or not, then.

Q. What was his duty? A. A passer.

Q. Who was in charge of the party? A. Mr. 30 Jones.

Q. You were the head man of the party? A. I was not paid the wages or entered on the pay roll as a foreman.

Q. Who was the head man there? A. We took our orders from Mr. Jones.

Q. In his absence were you not to look after the others? A. I don't know; he always depended upon me to work.

Q. You gave directions to the other men, didn't 40

you? A. Well, they were going by what I said; yes, sir.

*By Mr. Ward.*

Q. When you went up to the store house after the accident, what did you go up for? A. To see if I could get any more drift pins better than the ones  
10 we were using.

Q. You could not find any? A. Not in this size pin.

Q. Was it necessary to use this size pin for that particular work? A. Yes, sir; absolutely necessary.

Q. Whose duty was it to repair these tools? A. The tool dresser, or blacksmith.

Q. When these heads become that way and flattened down, what should be done? A. It is proper  
20 to dress them; they are sent to the blacksmith to have him dress them.

*By the Court.*

Q. What do you mean by having them dressed? A. To have that burr taken off and made the same as a new one; the same as that one there (indicating).

Q. Does he do that by cutting off the burr or by hammering it out? A. By hammering it out.

30 *By Mr. Ward.*

Q. You had nothing to do with the dressing yourself? A. No, sir.

Q. You are not a blacksmith? A. There was no blacksmith on the job.

*By Mr. Corbin.*

Q. When was it that you went up to the store house about pins? A. After the accident occurred.

*By the Court.*

Q. How soon after? A. Right about an hour after.

*By Mr. Corbin.*

Q. That is the only time that you went up to inspect any pins? A. I had no right to go when this other man was sent to furnish the tools. 10

Q. Now, you say when these got smaller they were taken to the blacksmith shop and hammered down; did you ever know that to be done? A. Yes, sir.

Q. Is it not a matter of fact that when they are worn down so that they don't do their work they are thrown away? A. When they get short they are dressed.

Q. How? A. By hammering out.

Q. Did you ever know that to be done? A. Yes, sir. 20

Q. Where? A. Right on the line for the Gillespies.

Q. Who did you see do it? A. I have seen it done at the blacksmith's on the line.

Q. Can you tell when? A. When they get bad tools like that we send them back.

Q. It is made of soft steel? A. I could not say whether it is or not.

Q. Just as soon as you begin to use them they flatten? A. Yes, sir. 30

Q. And the longer they are used the more they will flatten? A. Yes, sir.

Q. And they generally form a head? A. Yes, sir.

Q. And when they get done they are thrown away? A. They don't always get down after they are dressed.

Q. The condition of this head changes with her blow? A. Yes, sir.

Q. It gradually curls up? A. Yes, sir.

Q. It is just like a cold chisel in that respect? A. Yes, sir.

Q. If a man makes a miss-blow and happens to hit it on the side he is liable to knock a piece off? A. Not always.

Q. Sometimes? A. Sometimes it might.

10 Q. Have you ever known a man to make a miss-blow and hit the hand of the man who was holding? A. No man holds it.

Q. You have seen a man make a miss-blow and glance off? A. I have seen it spring up and snap, if a man was hitting it with the handle.

Q. You have known pieces to come off? A. Yes, sir.

*By Mr. Ward.*

20 Q. This shows that it has been knocked off by a blow? A. Yes, sir.

Q. If a head cuts that way it is dangerous to use it, is it not? A. Yes, sir.

Q. That is all.

JOHN McCLUNG, a witness produced on the part of the plaintiff, being duly sworn according to law, on his oath testifies as follows:

*Direct-examination by Mr. Ward.*

30 Q. You are working for the Gillespie Company? A. Yes, sir.

Q. How long have you been working for them? A. Three or four years off and on.

Q. Were you working here on the Bank in February after the fire taking down some parts of the bank there? A. I worked awhile—one day, I think.

Q. Were you sent up from there to Little Falls after any tools? A. I was sent up there to get the tools out to start the job.

40 Q. What tools were you to get out? A. To get the riveting tools.

Q. Did you get them? A. Yes, sir.

Q. Did you get the best you could find? A. Yes, sir.

Q. Where did you take them. A. Loaded them on the truck and took them over to the job.

Q. Who ordered you to go for them? A. Mr. Jones.

Q. What is his business for the company? A. 10 Superintendent.

Q. (Showing witness a piece of iron) Is that one of the pins that you took there? A. I could not say that I didn't take any in that condition.

Q. Were you there when James Campbell was hurt? A. I was there; yes, sir.

Q. Did you see him after he was hurt? A. No, sir.

*Cross-examination by Mr. Corbin.*

Q. When you went up to get the tools where did you find them? A. In the large tool box. 20

Q. Where was the tool box? A. Up at the store house.

Q. Inside or outside? A. Outside.

Q. This was the first day that you went up? A. Yes.

Q. No work was done that day? A. No; sir.

Q. What tools did you get? A. Riveting hammers— (interrupted).

*By the Court.*

30

Q. How many riveting hammers did you get? A. Two or three.

*By Mr. Corbin.*

Q. Go on. A. Forge, holding on sledges—(interrupted).

Q. How many sledges did you get? A. One or two; I am not sure which—two, I think—and snaps.

Q. How many? A. Two, I think— $\frac{5}{8}$  and  $\frac{7}{8}$ ; two or three wrenches, some bolts. 40

*By the Court.*

Q. A large number of bolts, I suppose? A. Only three or four.

*By Mr. Corbin.*

Q. Drift pins? A. Yes, sir.

10 Q. How many did you get? A. One  $\frac{7}{8}$ , one  $\frac{3}{4}$  and one  $\frac{5}{8}$ .

Q. Did they use different sizes? A. On this particular job there was three different sizes of rivets.

Q. Did you get any more than the three? A. I don't know whether I got any more than the three or not.

Q. You took three different sizes? A. Yes, sir.

Q. Where did you get these pins from? A. Out of the tool box.

20 Q. How many were in the tools box? A. Maybe a dozen.

Q. You took out as many as you thought they would need? A. Yes, sir.

Q. Did you go inside the ware house? A. I don't think I did.

Q. There was a bin inside? A. I don't know that.

Q. You found what you wanted in the box outside? A. Yes, sir.

Q. Was not there tools inside? A. Yes.

30 Q. Where was the large tool box; was it inside or outside? A. Outside.

Q. That had also been brought down from the work? A. Yes, sir.

Q. Did you ask anybody for any tools? A. No, sir.

Q. You found in that box what you thought was necessary? A. I asked for the keys to go into the office—(interrupted).

Q. Who gave you the keys? A. This boy, Neary.

40 Q. He was there in charge of the store house? A. I think it was he.

Q. You were working on the job at the time of the accident? A. Yes, sir.

Q. Where were you? A. Inside the pipe.

Q. You didn't see the accident? A. No, sir.

Q. You are a riveter? A. Yes, sir.

Q. A caulker, too? A. Yes, sir.

Q. How many years have you worked at the business? A. Ten or twelve, on and off. 10

Q. You men that work at that business generally work at both; you caulk sometimes and rivet sometimes, according as the work requires you? A. Yes, sir.

Q. At night after that first day; after you brought the tools down, where did you leave them? A. I left them beside the job.

Q. Were you working there all next day? A. Yes, sir. 20

Q. Did you leave them there the next night? A. Yes, sir.

Q. And they were there the third day, when the accident happened? A. Yes, sir.

Q. Did you have occasion to go after any tools except the first time? A. Yes; different times.

Q. Who sent you? A. Nobody sent me.

Q. Whatever you wanted you went up and got? A. Yes, sir.

Q. The warehouse was open? A. We got the key. 30

Q. Did you see the box at the door with all the drift pins lying in it? A. Not at this particular job where the accident happened; I didn't have to go up then.

Q. How many times during these two days had anybody gone up there to get tools? A. Different times; three or four, anyhow.

Q. Who went up besides you? A. William Campbell went up at one time.

Q. He went up there to get tools? A. Yes, sir. 40

Q. When you wanted tools you would go and get them? A. Yes, sir.

Q. This little job that you men were doing was all the work that was going on at that time? A. Yes, sir.

Q. How large a gang had been at the place riveting, caulking the pipes before? A. About twelve or  
10 fourteen men.

Q. They had been working in two or three places? A. That is riveting and caulking; there were different gangs on this working.

Q. What line was this where you say there were twelve or fifteen men on, and that it had been laid off? A. It was connecting for the pump station to this new filter plant.

Q. That was a short line? A. Two short lines.

Q. A few hundred yards? A. Something like  
20 that.

Q. Had you been working on the Jersey City pipe line? A. Yes, sir.

Q. These same men had been working there before? A. Yes, sir.

Q. That work has stopped, too? A. Yes, sir.

Q. How many had been working on that when that was going on? A. At one time fifty or sixty; maybe more.

Q. That had to shut down, too? A. Yes, sir.  
30

*By Mr. Ward.*

Q. Who told you where to get the tools when you went to Little Falls to get them? A. I didn't know; I don't know whether Mr. Herald did or not.

Q. You say Mr. Jones sent you for the tools? A. Yes, sir.

Q. Did he tell you where to go for them? A. He didn't say where; he said to go and get the tools  
40 because he surmised that I knew where to go.

Q. That was the only place to get tools? A. Yes, sir.

Q. Was there any blacksmith on the job at that time? A. Not at that time.

Q. There was shortly before that? A. Yes, sir.

*By Mr. Corbin.*

Q. That was when the working was all going on? 10  
A. Yes, sir.

Q. You knew where the warehouse was? A. Yes, sir.

Q. Did you go to the office at any time to get the tools? A. Yes, sir.

Q. That is all.

FREDERICK YOUNGER, a witness produced on the part of the plaintiff, being duly sworn according to law, on his oath testifies as follows: 20

*Direct examination by Mr. Ward.*

Q. Did you work for the Gillespie Company last February? A. Yes, sir.

Q. What were you doing there? A. I was holding on.

Q. Did you get the tools that were taken there? A. Yes, sir.

Q. Who with you? A. Me and Jack McClung.

Q. Where did you get them? A. Up to the store- 30  
house.

Q. What storehouse? A. Up on the hill.

Q. Did you pick out the tools there? A. Yes, I helped to pick them out.

Q. What was the condition of them? A. We got the best tools we could get.

Q. Did you take them to the works? A. Yes, sir.

Q. Where were they kept there? A. We put them down in the pipe to go to work; we didn't start to work that day; I and Jack McClung went 40

home and the next day Billy and Jimmy Campbell come on the job.

Q. What was William Campbell doing? A. Driving rivets.

Q. Did you see him drive rivets with the drift-pin that you got? A. Yes, sir.

Q. Would you know that drift-pin if you saw it? A.  
10 Yes, sir.

Q. Did you see it before it was used? A. Yes, sir.

Q. Did you see it after it had been used? A. Yes.

Q. (Showing witness a pin) Was that off before it was used? A. No, sir.

Q. Was it off after? A. Right after he was hurt.

Q. Tell us what you know of the accident? A. I was in the pipe and Billy was driving the pin in for  
20 me to put a head on it, and young Wardlow said to me, "Campbell got hurt in the eye." and I came out and investigated the tools. I asked what he got hurt with and Billy says, "With the drift-pin."

*Cross-examination by Mr. Corbin.*

Q. You were inside or outside the pipe? A. I was inside the pipe.

Q. You didn't see the accident? A. No, I did not.

30 Q. All you know about the drift-pin was what Billy had pointed out after the accident? A. Yes, sir.

Q. All that you know was what he told you; you could not see it? A. I was inside the pipe.

Q. You could not see it? A. No.

Q. When you and McClung went up the day before to get the tools you went to the warehouse? A. Yes, sir.

Q. Where did you get the tools that you wanted?  
40 A. We got them out of the tool box.

Q. Inside or outside? A. Outside; I went inside to get some and I got some in the blacksmith's.

Q. Where did you get the drift-pins? A. We got them out of the box.

Q. How many did you get? A. I could not say just how many we got.

Q. About how many? A. Two or three.

Q. You cannot remember how many? A. No, 10  
sir.

Q. You took what you thought they would need?  
A. Yes, sir.

Q. How many were in the box? A. There may have been a number.

Q. Twenty or thirty? A. I don't know.

Q. Who took them out? A. I and Jack McClung.

Q. You didn't try to get any in the warehouse? A. No, we got the best tools that we could find around. 20

Q. You got riveters and caulking tools and you picked out as many as you thought they would need?

A. Yes, sir.

Q. You did not ask anybody anything about it?  
A. No, sir.

Q. You are not a riveter or caulker yourself? A. I am an iron worker.

Q. Have you had any experience in riveting or caulking? A. No, I have never done any riveting, but I work in that line of work. 30

Q. Holding-on? A. Holding-on and helping and driving rivets, but not to amount to anything.

Q. You were ranked as a laborer on the job? A. No.

Q. What is your business? A. Bridge work.

Q. When you were holding-on or helping in the riveting another man drove it? A. Yes, sir.

Q. Was your work all inside the pipe? A. When the gang was outside I was in, and when they were inside I was out; I had to be on the opposite side. 40

Q. The rivets are sometimes put in from the outside and sometimes from the inside? A. Yes, sir.

Q. These were red-hot rivets? A. Yes, sir.

Q. You were holding-on there? A. Yes.

Q. You were always on the opposite side from where the men were working with the drift pins? A. Yes, sir.

10 Q. That is all.

JAMES WARDLOW, a witness produced on the part of the plaintiff, being duly sworn according to law, on his oath testifies as follows:

*Direct examination by Mr. Ward.*

Q. Where were you working last February 21st?

A. I was working up at Little Falls on the pipe line.

Q. What were you doing there? A. I was heating  
20 rivets.

Q. For whom? A. For the Gillespie Company.

Q. Whom were you heating them for? A. For Billy Campbell.

Q. Did you see James Campbell there? A. Yes, sir.

Q. Did you see anything happen there? A. I seen him get hurt in the eye with a piece of steel.

Q. Did you see the drift-pin that was being used at the time? A. Yes.

30 Q. (Showing witness a pin) Is that the pin? A. Yes.

Q. Where did it break? A. Right there. (indicating.)

Q. Did you see James' eye at that time? A. I seen the white stuff run out and he was holding it like that (indicating.)

*Cross-examination by Mr. Corbin.*

Q. You were working for Campbell? A. Yes, sir.

40 Q. You were not working for the Gillespie Com-

pany? A. No, sir; I went up there to take a man's place.

Q. Campbell got you to go up there and take another man's place? A. Yes.

Q. You were not working for the Gillespie Company there? A. No, not then.

*By Mr. Ward.*

10

Q. Are you now? A. No, sir.

*By Mr. Corbin.*

Q. You would pick up the pin sometimes and hand it to Campbell when he wanted it? A. Yes, sir.

Q. Do you know how many pins he had there? A. Three or four.

Q. Do you know whether he had any more or not? A. I didn't see any more.

Q. That is all.

20

PATRICK McMAHON, a witness produced on the part of the plaintiff, being duly sworn according to law, on his oath testifies as follows:

*Direct examination by Mr. Ward.*

Q. What is your business? A. Blacksmith.

Q. How long have you been in that business? A. Since I was born.

Q. Do you live in Paterson? A. Yes.

30

Q. How long? A. Thirty-one years.

Q. Have you been in the habit or practice of making what are called drift-pins? A. Sometimes.

Q. I will show you that pin and I will ask you what condition is that in? A. It would be in good condition if this was pointed out and in good shape for a man to strike on it.

Q. In your opinion is it fit to work with as it is? A. My opinion is that it was not fit to work with unless it was dressed.

40

Q. Is there any trouble in dressing pins? A. No, sir—just cut off the burr and point it out a bit.

Q. Is that a common practice in fixing up these pins in the shops? A. Yes.

Q. (Showing witness a pin.) There is a new pin? A. That is pretty ship-shape; that ought to be square on the end.

10 Q. Is that a safe tool to work with? A. No, sir.

Q. Why not? A. There is too much of a head on it; that burr ought to be cut off and made the same as a new pin.

Q. Is that liable to fly off when it is struck? A. Yes, sir.

*Cross-examination by Mr. Corbin.*

Q. You are a blacksmith? A. Yes, sir.

Q. And sometimes you have dressed drift pins? A.

20 Yes, sir.

Q. For whom? A. For the rolling mill.

Q. When was that? A. About a year ago.

Q. They brought some drift pins to you to be dressed? A. Yes, sir.

Q. What did they use them for? A. Why, in the bridge shop.

Q. Putting bridges together? A. Yes, sir.

Q. Is that the only time you have dressed drift pins? A. No; I dressed them thirty years ago in

30 Cooke's shop.

Q. You have made drift pins? A. Yes, sir.

Q. You took bar steel and cut it down and tapered an end? A. Yes, sir.

Q. You have been accustomed to make them a good many years? A. Yes, sir.

Q. You make them of soft steel? A. Yes, sir.

Q. You think it would be better to have the end square? A. Yes, sir.

Q. If you leave it square, the first blow would be  
40 liable to cause it to break? A. Yes, sir.

Q. Does not that tapering down anneal it, making the steel tougher; every blow makes the head tougher? A. It makes it flatter.

Q. Does it not make it tougher? Does it not anneal it? A. It does not anneal it, no, sir; you have to put it in the fire if you want to anneal it.

*By the Court.*

10

Q. That is made with a tapered end? A. They are all made that way.

Q. You think it would be better if the end was a little square? A. Yes, sir.

*By Mr. Corbin.*

Q. You would taper it square some? A. Yes, sir.

Q. What do you mean by saying that the head should be more square? A. It is a better way.

Q. You mean on account of the unevenness of cutting the steel? A. Yes, sir. 20

Q. The first three blows will take care of that? A. That is all right.

Q. I show you this short one that is worn down the side; that is the way the steel wears? A. Yes, sir.

Q. Cold chisels wear that way? A. Yes, sir; and hot chisels.

Q. You use a plain head, and the hammer gradually works a square head? A. Yes, sir. 30

Q. That is the way with all kinds? A. Yes, but most of these like that are worked with the hammer, but these pins, if they are made that way, they should not be.

Q. They should be made softer? A. Yes, sir.

Q. The softer they are the faster the head will form? A. If they were made out of solid steel they would break and there would be more eyes knocked out, I guess.

Q. That is all. 40

## PLAINTIFF RESTS.

10 Counsel for the defendant moves for a non-suit, on the ground that the plaintiff has not shown that the defendant has not exercised reasonable care to provide the employes with safe and proper tools and with sufficient tools, and that the defect, if any, was obvious to the servant, who was using the tool.

THE COURT—It seems to me that there is testimony here that must go to the jury. Motion to non-suit will be over-ruled.

20 Counsel for defendant thereupon prays an exception to the refusal of the Court to grant the motion to non-suit, which is allowed, and the same is sealed accordingly.

JONATHAN DIXON, [L. s.]  
Just. Sup. Ct.

## DEFENDANT'S CASE.

30 WALTER B. JOHNSON, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, testifies as follows :

*Direct examination by Mr. Dunn.*

Q. You are a practising physician? A. Yes, sir.

Q. Where do you reside? A. 170 Broadway, Paterson.

Q. Do you make a specialty of any branch of medical science? A. Yes, sir.

Q. What? A. Diseases of the eye and ear.

40 line? Q. How long have you been a specialist in that A. About twenty years or more.

Q. What institutions are you connected with in that line, here or elsewhere? A. I am surgeon to St. Joseph's Hospital; also to the General Hospital, and also to the Paterson Eye and Ear Infirmary.

Q. Are you acquainted with James Campbell? A. Yes.

Q. When did you first see Mr. Campbell? A. I first saw him in St. Joseph's Hospital some time in 10 February, in the capacity of visiting the hospital; he was in the eye ward.

Q. Did you treat his eye? A. Yes.

Q. What condition is it now in? A. The eye has only perception of light; that is to say, the eye is able to tell light from dark.

Q. What can you say to us as to its getting any better than it is? A. I don't expect that there will ever be any improvement in it.

Q. What are the probabilities of its being any 20 worse? A. I don't think it will get any worse.

*By the Court.*

Q. It has no use? A. It has no use as an organ of vision.

Q. What do you say about the danger to the other organ; do you think that any sympathetic trouble may arise in the other eye? A. I should judge it is very conjectural, inasmuch as this man was under my care in the hospital, and if it had been advisable to 30 remove that eye it would have been removed before now. I consider that the other eye is in no material danger.

*Cross-examination.*

Q. You attended to him in the hospital? A. Yes, sir.

Q. Didn't you want to take his eye out there; didn't you say that that was the proper remedy? A. I said when I first saw Mr. Campbell, that in the case of a 40

workingman, who had received an injury of that character, it was a question whether it was not advisable to remove the eye at once.

Q. The last week or two that he was there, didn't you say that it was necessary in order that he might move the other eye? A. No, sir; I did not.

Q. What did you say? A. I don't recall that I  
10 made any remark of that character whatever.

Q. What other doctor was there attending him?  
A. I can't say.

Q. He was in the hospital at that time? A. Yes.

Q. Do you mean to say that that eye has a perception of light? A. Yes.

Q. Is not the pupil of that eye gone entirely? A. The pupil does not receive the light.

Q. How do you know that he receives light? A. I made a note of it on my last examination.

Q. He came to you and wanted you to examine him?  
A. I have examined him and treated him ever since  
20 he was hurt.

Q. Didn't you want fifty dollars to come here to testify as a witness? A. Yes, sir; I want to make an explanation—(interrupted.)

*By Mr. Dunn.*

Q. What was the explanation that you wanted to make? A. I only wanted to say that being steadily  
30 called to appear in Court and consuming my entire morning, it is necessary for me to charge what I would make during my office hours, and unless I am employed as an expert in such a case, I will not testify in any case.

*By Mr. Ward.*

Q. You are employed as an expert by the Gillespie Company here? A. Yes, sir.

Q. And you expect to be paid accordingly? A. I  
40 expect to.

Q. Do they expect to pay you fifty dollars? A. They don't know how much they expect to pay me because I have not rendered them a bill.

Q. Do you think it is worth fifty dollars to come here as a witness? A. Yes, sir; I do.

Q. That is all.

THOMAS MILLSON, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, testifies as follows: 10

*Direct examination by Mr. Corbin.*

Q. Where do you live? A. Paterson, New Jersey.

Q. What is your occupation? A. Boilermaker.

Q. How long have you been boilermaker? A. About twenty-five years.

Q. Have you had to do with riveting pipes out of doors also? A. Not so much as making them in the shop. 20

Q. What concern are you connected with that makes them in the shop? A. The New Jersey Pipe Company.

Q. Are they here in Paterson? A. Yes, sir.

Q. How much experience have you had in making them? A. We have made nearly all the pipe that has been laid in New Jersey; the pipe lines for Newark and Jersey City and pipe for the filter plant.

Q. That means how many miles? A. About one hundred and fifty miles. 30

Q. How many rivets does that amount to? A. I couldn't tell you.

Q. Give us an approximation?

THE COURT—Call it hundreds of thousands.

Q. Roughly speaking, what does it amount to? A. I couldn't tell you.

Q. In making pipe in your factories do you use drift pins? A. Yes, sir. 40

Q. Are they used in putting the pipe together in the shop as they are made? A. Yes, sir; as a key to draw the work together.

Q. To bring the holes opposite each other? A. Yes, sir.

Q. What are they made of? A. Soft steel.

Q. Tell us how you would make one? A. Take a  
10 round piece and taper it down to a point and draw it up a little at the end.

Q. Look at these two; is that the kind of pin that you use? A. Yes, that is about the general shape.

Q. When you use them and strike them on the head with a hammer, what is the result? A. The head curls over.

20 THE COURT—It is undisputed that after a time hammering the head of a pin tends to make a head on it and flatten it out. They are made out of soft steel, and taper at both ends.

Q. How long do they remain serviceable? A. You could wear one out in a week; it depends upon the number of blows.

Q. I mean, do they shorten as you use them? A. Yes, sir.

Q. What makes them shorten, usually? A. When they get too short or when the head goes so far down  
30 that it is inconvenient to use them they are thrown away.

Q. Do you do anything to them when you once make them until they are finally thrown away? A. No, sir.

Q. Is there any such thing as dressing them? A. We never did.

Q. How many years have you used them? A. We have had the pipe business for the last twelve years.

Q. How many do you use in your shop at a time?  
40 A. We have about twenty of them.

Q. You mean in constant use? A. Yes; each gang has about six or seven pins in use.

Q. Are they using them all day? A. Yes, sir.

*By the Court.*

Q. Being used all day they last about a week? A. Some last longer than others. Some curl up more rapidly than others. Where they use them once on the line we use them four times. We make a pipe in four lengths—four sheets. 10

*By Mr. Corbin.*

Q. After they are made you use them a number of times? A. Yes, very often; when the heads curl up the men knock the burs off.

Q. Do you know whether it is the practise? A. Yes, it is in our factory.

Q. Have you ever known of any other practice elsewhere? A. No, sir. 20

Q. Do you know what the thickness of this pipe was that they were working on at Little Falls? A. There were three thicknesses.

Q. What were they? A.  $\frac{3}{8}$ , 5-16 and  $\frac{1}{4}$  inch.

Q. Does the drift pin have to be the very size; could you use a  $\frac{5}{8}$  for a  $\frac{3}{4}$ ? A. Oh, you could; yes, sir.

*By the Court.*

30

Q. How? A. The drift-pin is measured about two-thirds of the way up. Possibly you could use a  $\frac{5}{8}$  pin and drive it in a  $\frac{3}{4}$ , but it would not be what you would use.

Q. If you had a selection of pins? A. You would take the size that suited the hole.

*By Mr. Corbin.*

Q. In classifying the pins you measured them about two-thirds of the way up? A. Yes. 40

Q. Do you happen to know the thickness of the pipe at the place where they worked with a diameter of forty-eight inches? A. Some of the four feet pipe is 5-16 inch.

Q. If it was thirty-six inches? A. That was  $\frac{1}{4}$  inch thick.

Q. What would be the size of the holes for thirty-  
10 six inch? A.  $\frac{5}{8}$ .

Q. How much for the four feet pipe? A.  $\frac{3}{4}$  inch.

*By the Court.*

Q. For a five feet pipe? A.  $\frac{5}{8}$  inch.

*By Mr. Corbin.*

Q. What are the size of the holes on the Jersey City line? A. On the 5-16,  $\frac{3}{4}$  of an inch.

Q. Does the rivet that you put in fit it? A. The  
20 hole is larger than the rivet, about 1-16.

*Cross-examination by Mr. Ward.*

Q. You sold all this pipe to the Gillespie Company? A. No, we have not sold it all to the Gillespie Company.

Q. You have been furnishing the pipe? A. On the Jersey City work?

Q. On all their work? A. Yes, sir.

Q. Did you furnish the pipe where the accident  
30 occurred? A. Yes.

Q. What was your business before you went into the pipe business? A. Boilermaker.

Q. What did you do? A. I was a practical boiler-maker.

Q. What do you do now? A. I am President of the company.

Q. You oversee the boilermaking? A. Yes, sir.

Q. Do you mean to say that you drive one of  
40 these drift pins clearly down until they are useless?  
A. Yes, sir.

Q. How far would you drive a pin like that before you ceased to use it? A. If it was too small so as to go in the hole.

Q. Would you use that with a burr on like that (showing witness a pin)? A. Yes, I think so.

Q. If you did, it would break off, wouldn't it? A. It would curl up.

Q. And break off with a blow; don't you think it would be dangerous? A. They do, all of them; yes, sir. 10

Q. That is dangerous, is it not?

THE COURT—Is it necessary to ask that question?

Q. This is the kind of pin that you use? A. Yes.

Q. Is it not made different; is it not a different manufacture? A. I don't think so.

Q. What is your best judgment about that? A. It is a drift pin; that is all I know. 20

Q. Is that drift pin the same make; I mean, as to the burrs? A. I believe it was originally; it isn't now; it has been pretty well used and burred up.

*By Mr. Corbin.*

Q. In your experience with these drift pins did you ever have an accident? A. No, sir.

Q. How many years have you spent at it? A. Twenty-five years. 30

*By Mr. Ward.*

Q. You never knew any of the pieces of the pins to fly off and hit any one in the eye? A. They will fly off, but I have never had an accident with anybody; they never hit anybody.

Q. That is all.

WILLIAM CULLIGAN, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath testifies as follows:

*Direct examination by Mr. Corbin.*

Q. Where do you live? A. I live in Nutley, New Jersey.

10 Q. Did you have to do with the work at Little Falls? A. Yes, sir; some of it.

Q. What was your position? A. Foreman.

Q. Foreman of what? A. Of the laying of the pipe and riveting.

Q. What time did the work shut down before February? A. The second of January.

Q. Where were the tools brought? A. They were all put in a large box in front of the filter plant.

20 Q. Where was this box? A. Right near the front door of the filter plant.

Q. Is that near the office or near the warehouse that has been spoken of? A. It is not near there; it might be one hundred and fifty yards from the warehouse or a little farther away from the office.

Q. Do you know whether it was taken to the warehouse afterwards? A. I couldn't say.

Q. How many drift pins were there as near as you can say? We were using twelve or fourteen while we were working.

30 Q. How many were there all told in the box? A. I couldn't say exactly.

Q. As near as you can tell us? A. I should say about fifteen or sixteen.

Q. Do you know how many were in the warehouse? A. In the spring I took twenty-five or thirty over there.

Q. After the accident? A. Yes, around the first of May.

40 Q. What was their condition? A. Some new ones and some used a little and some old ones.

Q. Where were these in the warehouse? A. On the shelves that are there and some were in the box.

Q. How many were in that? A. I couldn't say exactly.

Q. How many were in the house? A. I should judge forty or fifty different sizes—that is over at the Greenwood Lake warehouse.

Q. You know the warehouse that has been spoken of at Little Falls? A. Yes. 10

Q. That is where you took them? A. Yes, sir.

Q. Had they been used on the Jersey City job? A. Yes, sir.

Q. And had they all been reassembled at Little Falls? A. Yes.

Q. And you took them over to resume work on the Jersey City job? A. Yes.

Q. Do you know the Campbells? A. Yes, sir.

Q. Were they skilled at this work? A. Yes, I consider both of them good men. 20

Q. They understood riveting and caulking? A. Yes.

Q. Did they work near you? A. I have known them since April, 1896.

Q. And they have been working near you since that time? A. Yes, sir, off and on since.

Q. Do you know about the box down at the office? A. Yes; sir, right off the filter plant in front of the building. 30

Q. That is not the warehouse? A. No.

Q. You think there were fifteen or twenty pins in the box? A. That is what I left there.

Q. And you think up at the other place there were fifty or sixty? A. Different sizes; yes, sir.

Q. When you took them away after the accident to resume work on the Jersey City work what was the condition of the pins? A. I considered them all right, when I took them away. 40

Q. Some you said were new? A. Yes, sir; one or two new ones.

Q. And some had been used; and some less? A. Yes, sir.

Q. Were you put on the work? A. Yes, sir.

Q. How long have you been working at this work of riveting? A. About twenty years.

10 Q. Riveting pipe in the field? A. I have been in the boiler shop.

Q. It is the same work in the boiler shops? A. Yes, sir.

Q. Did you ever have any accidents of this kind? A. I never knew of anybody losing their eye through a drift-pin.

Q. Did you ever know of a serious accident, with this exception? A. Not from a drift-pin.

20 Q. What was the thickness of the pipe; do you know what pipe they were using? A. I do not know.

*Cross-examination by Mr. Ward.*

Q. You didn't see this pipe at all? A. I saw it all but one or two sheets.

Q. What time did you go away from there? A. The second of January.

Q. You didn't come back until the spring? A. The first of May.

30 *By Mr. Corbin.*

Q. Were the tools that you took away in the middle of May the tools that you left there in January? A. Some of them were.

Q. Did you, in April or May when you took these tools away, take the drift pins that you left in January? A. I couldn't say positively.

40 Q. Did you find the same quantity there that you left there, as far as you can tell? A. The tools were all taken from the filter plant over to the warehouse.

Q. You got them at the warehouse? A. Yes, I was there when they fetched them there.

Q. That is all.

JOHN SCHILLING, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, testifies as follows :

*Direct examination by Mr. Corbin.*

10

Q. Where do you live? A. Little Falls.

Q. What were you doing last February when this accident occurred? A. Working for the T. A. Gillespie Company.

Q. Were you at Little Falls? A. Yes, sir.

Q. Where were you working? A. I was working on the filter plant.

Q. Had you been on the pipe line? A. Yes, sir.

Q. What day? A. I am not sure whether it was a 20 day or two days before.

Q. Were you working with the Campbells? A. No, sir; they were not through yet; I put in the last piece of pipe before they came.

Q. Were you around there at the time the Campbells were working? A. Yes, sir.

Q. Did you use drift pins in what you did? A. Yes, sir.

Q. Where did you get them? A. In the office.

Q. Where is the office? A. About fifty feet from 30 where we were working; a little shanty half out on the road.

Q. How many did you use? A. About four.

Q. What was their condition? A. They were all in pretty good condition that I had.

Q. How many were there at the office? A. I got four, and there were three or four left.

Q. Did you get any from the warehouse? A. No, sir.

Q. That is farther off? A. That is farther off. 40

*By the Court.*

Q. What became of those that you had when you finished using them? A. I left them there at the pipe, on the ground.

*By Mr. Corbin.*

10 Q. How long was that before they came up? A. I am not sure whether they came a day after or two days after.

Q. Was that where the tool box was that was spoken of? A. The tool box lay between the office and where they were putting in the pipe.

Q. How far from where they were putting in the pipe? A. Twenty-five or thirty yards.

20 Q. What was the size of that pipe? A. It was a closing-in pipe; reduced from forty-eight inches to thirty-six inches.

Q. It was a different size at the ends? A. Yes; from forty-eight to thirty-six.

Q. Do you know the thickness of that piece? A. No, I do not know.

Q. How long have you been accustomed to use drift pins? A. Not very long; not over a year.

*Cross-examination by Mr. Ward.*

30 Q. In using drift pins, you didn't use them only as a helper? A. That is all; as a helper to connect up

Q. That is all.

JACOB HAROLD, a witness produced on behalf of the defendant, being duly sworn on his oath according to law, testifies as follows:

*Direct examination by Mr. Corbin.*

Q. Where do you live? A. Jersey City.

40 Q. Were you working at the Little Falls plant at the time of this accident? A. Yes, sir.

Q. What was your position? A. I was walking boss.

Q. Were you present on the ground at the time of the accident? A. No, sir.

Q. Where were you? A. I was at the storeroom on the Greenwood Lake station.

Q. Is that what is called the storehouse? A. Yes, sir. 10

Q. Were there tools in that house? A. Yes, sir.

Q. Are there any other places where there were tools kept? A. Yes, sir.

Q. Where? A. In a box close by where this pipe was put together.

Q. How far away? A. This box was about fifty feet from that line.

Q. Were there tools in the box? A. Yes, sir.

Q. Were there drift pins in this box near there? A. Yes, sir. 20

Q. How many? A. I couldn't say just how many; at the time they were on this work there were all kinds of tools belonging to it.

Q. Do you know whether there were drift-pins in this box at the time of the accident? A. I can't say.

Q. Do you know how many were ordinarily kept in it? A. Six or eight.

Q. How many were at the storehouse? A. I have seen there all of twenty or twenty-five.

Q. What was their condition? A. All seemed to me to be a little used, except there were a few of that size that were new that I saw there. 30

Q. What was the condition of the others? A. They had been used.

Q. Were they serviceable? A. Serviceable always.

Q. Are these storehouses accessible to the men who are working on the line? A. Yes, sir.

Q. If they need tools, what would they have to do to get tools? A. They would have to go to the tool house and get whatever they wanted. 40

Q. Who was in charge of the tool house? A. A young man of the name of Neary.

Q. That was right on the ground? A. Yes, sir.

Q. When they got to the storehouse was a supply of tools open for them to select from? A. Yes; there were small tool boxes inside there.

Q. How many of these boxes were there? A. There  
10 might have been five or six. There was a large box outside and there were also tools in the box, where the men were working.

Q. Were they available for the men? A. Yes, sir; the tools were kept there at hand.

Q. How many drift-pins serviceable for the work were available in either of these places—the boxes of tools, or the warehouse; how many drift-pins suitable for the work were there? A. I can't say just how many—five or six.

20 Q. Of one size? A. Different sizes.

Q. You speak of six or eight that you think were suitable for this purpose on the ground; at what place do you mean? A. Well, taking the office, and the warehouse and the box.

Q. How many were there of all sizes? A. I can't say other than that there was six or eight right there.

Q. Where? A. On the work.

Q. What I mean, is how many were there of all sizes on the work at the office and in the warehouse  
30 altogether? A. It would be a guess on my part—  
from twenty-five to thirty.

Q. What did you mean when you spoke of six or eight on the work? A. You see there was an office on the work and there was an office on the railroad work—at the storehouse.

Q. How far away? A. Well, a third of a mile, I should say.

Q. On the work you call the office? A. Yes.

Q. At the storehouse; do you call that on the work?

40 A. No, sir; that was on the railroad.

Q. Where were you the day of the accident? A. I was at the storehouse.

Q. Had you been there the day before? A. Yes, sir.

Q. Was any application made to you for tools? A. No, sir.

Q. Any complaint made to you? A. No, sir.

*Cross-examination by Mr. Ward.*

10

Q. You were the walking boss? A. Yes, sir.

Q. What duties did the walking boss perform? A. He looks after the plans and lays out the work for the men.

Q. You have nothing to do with the pipe line? A. Yes, sir.

Q. What did you have to do with it? A. I had the plan of it.

Q. That is all; is it not? A. Yes, sir,

20

Q. You are not a mechanic? A. No, sir.

Q. You were working up in the trenches where they were digging? A. Yes, sir.

Q. You had nothing to do with the pipe line there? A. Yes, sir; I had full charge of the filter plant, under Mr. Jones.

Q. Mr. Jones had charge of things generally? A. Yes, sir.

Q. Where were these tools kept? A. We had a store-room; a general supply place; there was a box, 30 I should think about fifty feet away from the actual work that was going on at this time. We also had a box on the work where the pipe gang would put their tools as well as in the boxes.

Q. Any other place? A. No, up at the store-room there were boxes that held pipefitters' tools.

Q. These tools were scattered around in these various places that you have been speaking about?

A. Yes, sir.

Q. And no one knew except you and the foreman 40

where the tools were? A. All the men knew that were working with the tools.

Q. How do you know about the tools being in good condition if you are no mechanic? A. From seeing them used on the work.

Q. That is all you know about the work? A. That is all; yes, sir,

10 Q. That is all.

CHARLES HAROLD, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, testifies as follows :

*Direct examination by Mr. Corbin.*

Q. Where do you live? A. Jersey City.

Q. Are you a son of Mr. Harold, who just testified?

20 A. Yes, sir.

Q. You were engaged on this work at Little Falls?

A. Yes, sir.

Q. What were you doing? A. Mechanical engineer; running an engine.

Q. Were you there while the Campbells were finishing? A. I was on the work, but not right where they were.

Q. Did you see this tool box? A. Yes, sir.

30 Q. How far was it away from where they were working? A. Forty or fifty feet.

Q. Did you see what was in it; whether there was any drift pins? A. There were drift pins in it.

Q. Do you know how many? A. I should judge about five or six.

Q. Where were you at the moment the accident happened? A. I was not there; I think I had gone early for dinner and came back—(interrupted)

Q. Did you ever have to carry tools or get them?

A. No, sir; not for Campbell.

40 Q. But was that part of your duty to get them the

tools? A. It was the duty for anybody that was told.

Q. Did you do that at any time? A. Not for Campbell.

Q. Well for others? A. Yes, sir.

Q. What were you doing on that day when the accident happened, do you remember? A. I can't say what I was doing that day. 10

*Cross-examination by Mr. Ward.*

Q. That box was kept in a public place, was it not? A. Yes, sir.

Q. And it was always open? A. Yes, sir.

Q. Anyone could go to it and help themselves? A. Yes, sir.

Q. That is all. 20

THOMAS MAHONEY, a witness produced on behalf of the defendant, being duly sworn according to law, testifies as follows :

*Direct examination by Mr. Corbin.*

Q. Where do live? A. Paterson.

Q. What is your business? A. Working on the pipe line.

Q. Last February, when this accident happened were you employed at Little Falls? A. No, sir; I was not; I was employed in Paterson on the First National Bank. 30

Q. When had you been up there? A. I left the place on the fifteenth of November.

Q. When did you go back there? A. I went about the first of March, or middle of March.

Q. Were you at the storehouse? A. Yes, sir.

Q. Did you see the tools that were there when you went back? A. Yes, sir. 40

Q. Had you been back there at all between November and March? A. No, sir.

Q. Did you make any list or inventory of the tools there? A. Yes, sir.

Q. When was that? A. Sometime in the latter part of March.

Q. In what place? A. In the storehouse.

10 Q. Is that what is called the warehouse? A. Yes, sir.

Q. Did you observe what was there in the way of drift pins? A. Yes, sir.

Q. What was there? A. There was a quantity of drift pins; I can't say just how many; but at the time I made a note of them; but I should say, perhaps one hundred of all sizes.

Q. Was there a bin there? A. Yes; about six or eight feet from the office.

20 Q. How many pins were there in that? A. I should say, perhaps forty or fifty.

Q. Was that bin there when you were there in the fall? A. Yes; I took some drift pins out of that in August of this year.

Q. When you made your inventory, did you find drift pins anywhere else besides in the bins? A. Yes; I found drift pins belonging to the derrick gang; they also had a box.

30 Q. Where was that box? A. In the main storehouse; in the blacksmith box there were some new ones that had been in that box when it came from the pipe line, but it lay in the storehouse all that year.

Q. Do you remember how many drift pins, in all, you found? A. I can't say; but at the time I made an itemized account of it and gave it to Mr. Jones; I should say, between all sizes, one hundred and forty-five or one hundred and fifty.

Q. How long? A. All along.

40 Q. Before you went away in November; how long before that? A. Not very long; these tool boxes

came down from the pipe line and I took them in the storehouse and took the tools out.

Q. When did you take the tools out; when was that? A. I think in the latter part of October or the first of November.

Q. Where did you put the drift pins? A. I put them in one of these bins, where you go in—as you go in. 10

Q. Was it inside? A. Yes, sir.

Q. Was it covered or open? A. It was open.

Q. What can you say as to the condition of these pins that were in the bin as to whether they were new or old, or used or not used? A. Well, they were not new; they had been made some time and they had been put on the pipe line and some of them were old and some were in good condition, as far as I could judge.

Q. The new ones were not in that bin? A. No, sir. 20

Q. Where were the new ones? A. In the blacksmith box. I guess he must have made them up in his leisure time. I don't know when the box came down.

Q. Do you know where the shelves were? A. Yes, sir; on the opposite side of the building.

Q. Were they open? A. Yes; but I don't think there were any drift pins; they were used for pipe fittings; such as elbows—(interrupted) 30

Q. At what time? A. I don't think there were pins there at any time.

Q. It was in the blacksmith box? A. Yes, sir.

Q. Where was that? A. In this room on the floor.

Q. Was that open? A. Yes, sir; it was not open; it had a lid to it, but there was no lock on it.

*Cross-examination by Mr. Ward.*

Q. That box came down from the work up the line?  
A. Yes, sir. 40

Q. And with the tools that had been used on the line? A. Yes, sir.

Q. Whose tools were they? A. T. A. Gillespie Company's.

Q. Was the work on the pipe line at Little Falls stopped? A. Yes, sir.

Q. You went away from there when? A. The fif-  
10 teenth of November.

Q. You didn't go back until when? A. About the first of March.

Q. You are not a mechanic? A. No, sir.

Q. You never had any experience with drift pins of any kind? A. Yes, sir; I have been storehouse keeper for the last four or five years for the T. A. Gillespie Company.

Q. Were you at that time? A. Not at that particular time.

20 Q. Where were you storehouse keeper? A. I was storehouse keeper at the depot.

Q. Didn't you take a lot of tools from there? A. Yes, sir.

Q. Where did you take them to? A. Latimer, Mass.

*By Mr. Corbin.*

Q. When did you do that? A. The latter part of  
30 October or first part of November.

Q. Was that the same time that the gangs came away from the work up there? A. Yes, sir.

*By Mr. Ward.*

Q. The work at Little Falls had all been through with, when you went away? A. No, sir; the work had been shut down for the winter.

Q. They had all gone away? A. Yes; from the pipe line.

40 Q. That is all.

WILLIAM NEERY a witness produced on the part of the defendant, being duly sworn according to law on his oath, testifies as follows :

*Direct examination by Mr. Corbin.*

Q. Where do live? A. Little Falls.

Q. Were you working for the Gillespie Company? 10  
A. Yes, sir.

Q. What were you doing? A. I was watchman at the storehouse.

Q. Did you have a key to the storehouse? A. Yes, sir.

Q. Do you remember anybody coming down for some tools on that job that Campbell was hurt on? A. I think it was the man who was helping that came down.

Q. What did they get? A. They got drift pins; 20 they got rivet sets, hammers and wrenches—all the tools they needed.

Q. Did they get any tool box? A. Yes, sir; they took a tool box.

Q. Do you know whether they took some drift-pins? A. Yes, sir.

Q. How many did they take? A. I should judge from five to fifteen.

Q. Where did they get them? A. In the store- 30 house.

Q. Out of which part of the storehouse? A. I could not say whether out of the bins or boxes.

Q. Do you remember this pin that has been spoken of in the storehouse? A. Yes, sir.

Q. Do you remember whether there was any drift pins in there at that time? A. I cannot remember that.

Q. How many drift pins, as far as you can remember were in the storehouse? A. Around two hundred 40 at that time.

Q. How long were you in charge of the storehouse? A. Three or four weeks.

Q. Were you there before or after Mahoney? A. After Mahoney.

Q. Do you remember this man or the Campbells coming up again to get the tools? A. No, sir; I cannot remember.

10

*Cross-examination by Mr. Ward.*

Q. Who did you say got the tools? A. I think the man who was helping—Younger. He was the only one that I could say positive for sure.

Q. You know McClung? A. Yes, sir.

Q. He was not there at all, was he? A. I could not say.

Q. He was not there at that time when the pins were got? A. No sir; not as I know of.

20

Q. Did you see James Campbell there looking for tools? A. No, sir.

Q. Didn't he come there for tools and didn't you tell him that he would have to get his own tools, and that you didn't know where the tools were? A. No, sir; the day they came for tools they were carrying the tools in the rivet box.

Q. Didn't James come and get his own tools? A. No, sir; not as I remember.

Q. Didn't you tell him you didn't know one tool from another? A. No, sir; I did not.

30

Q. You live up there yet? A. Yes, sir.

Q. Who are you working for now? A. T. A. Gillespie Company.

Q. What are you doing now? A. In the storehouse.

Q. This two hundred pins—what became of them? A. They were sent to the line when they started up, down below.

Q. When were they sent? A. March or April.

40

Q. By degrees or altogether? A. By degrees.

Q. Who took them away? A. A man came for them.

Q. Who delivered them to him? A. I did.

Q. Did any one else? A. No, sir.

Q. No one else had any account of them? A. No, sir; only me.

10

*By the Court.*

Q. Did you keep any account of the tools that they took away? A. No, sir.

Q. Did you keep a record of the tools that you say Younger took away? A. No, sir.

Q. Nobody took a record of them? A. No, sir.

Q. That is all.

WILLIAM F. JONES, a witness produced on the part 20  
of the defendant, being duly sworn according to law  
on his oath, testifies as follows:

*Direct examination by Mr. Corbin.*

Q. Where do you live? A. Little Falls.

Q. What is your occupation? A. Superintendent  
for T. A. Gillespie Co.

Q. Were you superintendent on this work at Little  
Falls last February? A. Yes, sir.

Q. Do you remember sending the Campbells up 30  
there to do a piece of work towards the finishing of  
that job? A. Yes, sir; I sent James Campbell and a  
man named McClung from Paterson.

Q. How about William Campbell? A. I guess I  
sent him too.

Q. What was the work that was to be done? A.  
Riveting three seams—what we call a closing-in  
piece, or a connection.

Q. Had these men been in your employ before for  
riveting? A. Yes, sir.

40

Q. Did they understand the business? A. Yes, sir.

Q. Did you go up while they were on the work? A. I don't remember that I did; I don't believe I did while they were on the work.

Q. Where were they when you sent for them? A. On the First National Bank.

10 Q. After you sent them from the First National Bank when did you next see them? A. After the closing-in piece was about riveted; after the accident I went up there.

Q. Did any of these Campbells make any complaint to you about the tools—that they were working with on the job? A. No, sir.

Q. Were you up there at all while they were working? A. Not until after the accident, that I remember.

20 Q. Were there drift pins there when you sent them up to go to work? A. Yes, sir.

Q. Where were they? A. They were in the tool-box and the tool-house.

Q. That is that? A. The tool-house is right at the station at Little Falls.

Q. Is that the warehouse? A. Yes.

Q. How many tool boxes are there? A. All of a dozen.

30 Q. How many drift pins? A. Different sizes; I should say there was one hundred, at least.

Q. Were there any new pins? A. Yes, sir.

Q. Were there some that had been used? A. Yes.

Q. Where had they come from? A. They came from Fairfield.

Q. Were these accessible to the men if they wanted them? A. Yes, sir.

Q. Do you know about any other tools, at the office or in chests, that were not in the storehouse? Yes,  
40 sir; there were tool boxes and in the office; at the fil-

ter plant there were a couple of cases of riveting tools and drift pins.

Q. How far was that from the place where they were working? A. About one hundred and fifty feet.

Q. How far was the storehouse from where they were working? A. About four thousand feet.

Q. Previous to the accident, while that work was in progress with these Campbells, was there any complaint or notice brought to you at all about the tools? 10  
A. No, sir.

Q. What sizes of pins did you have at the storehouse? A. From five-eighths of an inch to an inch.

Q. Did you tell either of the Campbells that this was a hurry-up job? A. Not that I remember.

Q. Was it a hurry-up job? A. No, sir.

Q. Did you ever have a complaint with either of them like this; that William Campbell complained of the tools and you told him he would have to use them? A. No, sir; I don't remember seeing Campbell from the time I sent him to Paterson until after the accident, and then I saw William Campbell there working. 20

Q. After the accident? A. After the accident; I was in Paterson the day of the accident.

*Cross-examination by Mr. Ward.*

Q. You are working for the Gillespie Company now? A. Yes, sir. 30

Q. And you are superintendent yet? A. Yes, sir.

Q. And you had charge of this work? A. Yes, sir.

Q. You were not up there on this work on the day that they commenced working? A. No, sir; I believe I was in Paterson, over at the bank.

Q. Did you go there before you came down in the morning? A. No, sir.

Q. On Thursday? A. No, sir; Mr. Herold was in charge there. 40

Q. This was the finishing up on the work there?

A. Yes, sir.

Q. No blacksmith was on that job? A. No, sir; not at that time.

Q. You live up there? A. Yes, sir.

Q. Do you live up there? A. Yes, sir.

10 Q. You were living there at that time? A. Yes, sir.

Q. You live there yet? A. Yes, sir.

Q. Are you working on the job there now? A. I have charge of the work over at Fairfield and at Secaucus.

Q. Fairfield and Secaucus—is that a pipe line? A. Yes, sir.

20 Q. What was the thickness of this pipe that these men were working on? A. The closing-in piece was a quarter of an inch.

Q. Do you remember the size of the holes in the ends? A. Three-quarters of an inch and five-eighths of an inch. On one end it was three-quarters of an inch and on the other end five-eighths of inch.

Q. That is all.

WALTER C. HOPPER, a witness produced on the part of the defendant, being duly sworn according to law on his oath, testifies as follows:

30 *Direct examination by Mr. Corbin.*

Q. Where do you live? A. 166 Butler street, Paterson.

Q. What is your occupation? A. At present inspector of the Passaic Water Company.

Q. Were you in the Gillespie Company's employ last February? A. No, sir; I was working for the East Jersey and Passaic Water Companies.

40 Q. Previously had you been in the employ of the Gillespie Company? A. For a short time.

Q. Were you in their employ at the time the Newark pipe line was laid? A. Yes; the East Jersey Water Company and all their construction work.

Q. And the construction of the second Newark line? A. Yes, sir.

Q. And the construction of the line of the Great Notch? A. No, sir.

Q. And the Jersey City? A. The Jersey City ex- 10  
tension, yes, sir.

Q. What was your position? A. Inspector.

Q. Are you familiar with those tools called drift pins? A. Quite familiar.

Q. Were they used on the Newark pipe line? A. Yes, sir.

Q. How many? A. It would run into the thousands.

Q. Were they used on all of these lines? A. Yes, 20  
sir.

Q. How long do they continue to use them before they are thrown away? A. They are generally used until they get so short that they cannot use them any more.

Q. Then they are thrown away? A. Yes, sir.

Q. How many rivets were driven under your supervision? A. I should run it in the millions—a couple of millions, I should say.

Q. Did any accident happen from the use of these drift pins? A. None to my knowledge. 30

Q. Over how many years does your experience extend? A. Between four and five years with the East Jersey Water Company.

Q. Did you ever have any repair ships on this work? A. Yes, sir; about three.

Q. Are these pins used there? A. Yes.

Q. Any accident there? A. Not to my knowledge.

Q. Is the use there similar to the use in the field?  
A. Yes, the same. 40

*Cross-examination by Mr. Ward.*

Q. How short would you consider a drift pin would have to be to put it out of use? A. Probably three or four inches. A new pin is about eight inches long, I should judge. They would use that pin to about four inches.

10 Q. (Showing witness a pin) about the length of that? A. Yes, they can use that; that is all right.

Q. What is your business; are you a mechanic? A. Yes, sir.

Q. What? A. I am a machinist by trade.

Q. That is all.

JOHN McCLUNG, a witness already sworn, called on the part of the defendant, testifies as follows:

*Direct examination by Mr. Corbin.*

20 Q. Were the drift-pins which you selected as you have sworn in serviceable condition when you selected them? A. Most of them were; yes.

Q. Those that you took down to the work were they in good condition—serviceable? A. Pretty fair.

Q. That was your judgment? A. In my judgment I took the best I could get.

Q. My question is whether they were in serviceable condition, in your judgment, when you selected them?

30 A. They were not the best and they were not the worst; they were fair.

Q. They were used for the next two days at the work, during the work? A. At different times.

Q. When they were needed? A. Yes, sir.

Q. Where did you get them from—from what box of tools? A. The regular tool box—a large tool box at the store house.

Q. Inside or outside? A. Outside of the store house.

*Cross-examination by Mr. Ward.*

Q. (Showing witness a pin). Supposing that this was one of them, would you consider that in good condition to work with? A. Very poor condition.

*By Mr. Corbin.*

Q. When you selected the pins you didn't select 10 any in that condition? A. No, sir.

*By Mr. Ward.*

Q. What condition do you mean it was not in then?  
A. I didn't take any pins like that at all.

Q. Knocked off here (indicating)? A. No.

Q. That is all.

FREDRICK GUBELMAN, a witness produced on the part of the defendant, being duly sworn according to 20 law on his oath, testifies as follows :

Q. Where do you live? A. Jersey City.

Q. What is your occupation? A. I am an engineer.

Q. In whose employ? A. In the employ of the T. A. Gillespie Co., at present.

Q. What is your rank in their employ? A. Chief Engineer and Vice President.

Q. How long have you been working at pipe line 30 work with this company? A. Twelve years.

Q. What was your experience first, and state what lines you have been in? A. I started twelve years ago as a draughtsman for the pipe manufacture company—the New Jersey Pipe Co., and afterwards left there to take a position for the Gillespie Co. and finally became Vice President and Chief Engineer.

Q. How many miles of pipe line has the Gillespie Company or firm laid in this State? A. Something 40 over one hundred miles.

Q. Have you had to do with all of it? A. Yes, sir.

Q. Are you familiar with all these lines? A. Yes, sir.

Q. These pipes in question on which the Campbells were working—what was the thickness of that work? A. Five-sixteenths of an inch.

10 Q. That is the size of the pipe? A. That was a taper piece reduced from one size to another. One end was thirty-six inches and the other forty-eight inches.

Q. What was the size of the rivet holes? A. One end was thirteen-sixteenths of an inch and the other was eleven-sixteenths, one-sixteenth difference in the size of rivets.

Q. Are these the sizes of the holes or the sizes of the rivets? A. The size of the holes; the rivets  
20 were five-eighths and three-fourths.

Q. One-sixteenths smaller? A. Yes, sir.

Q. At the time this work was done by the Campbells, were there any hurry job or any occasion for hurry at that time? A. No, sir; there was not.

Q. Were there any such orders given with respect to the job, as far as you know? A. No, sir.

Q. Have you had the supervision of the work of laying these pipe lines in New Jersey? A. Yes,  
30 sir.

Q. Speaking roughly, how many rivets have been driven under your supervision in this work from the beginning to the end? A. I suppose about ten millions?

Q. How many in the shop and how many in the field? A. Two and a half in the field and the balance in the shop.

Q. Are these drift pins used in the work in the field? A. Yes, sir.

40 Q. And in the shop? A. Yes, sir; in the shop also.

Q. Is the process the same? A. Yes, sir; exactly the same.

Q. How long do you use them? A. Until they wear out.

Q. Is there any blacksmithing, forging or any repairing done to them after they have been first put to use? A. I have never known of such being the case.

Q. You simply use them until they get too short? 10  
A. When they get too short they either threw them away or destroy them.

Q. Has any accident ever occurred to your knowledge in the use of drift pins except the one under consideration? A. There never has any occurred.

Q. Are you informed sufficiently to say whether this is the usual way of putting such riveting work together? A. Yes, that is the only way I have ever known of.

Q. Of what are these pins made of? A. Soft ho- 20  
mogeneous steel it is known as.

Q. Do you buy or make them? A. We make the pins but buy the steel.

Q. Are you a civil engineer? A. No, I am a mechanical engineer.

Q. Do you mean that you have a degree of mechanical engineer? A. Yes.

Q. Were you educated as such? A. Yes, sir.

Q. In putting the pipes together how many of these are used? A. It depends on how easy the 30  
joint is made. If it goes together hard they have to use more of them than if it goes together easy. Three or four are sufficient.

Q. How many rivets in a circle such as these men were making? A. On the forty-eight inches there would be one hundred, on the thirty-six inches seventy-four or seventy-six, as I recollect.

Q. At the time this was done, February, 1902, was any pipe laying going on? A. No, sir; we were not

doing any other work at that time except this little piece. The rest was all done.

Q. Where were your tools? A. Up at Little Falls—all that we have in the East; we have another organization out in Pittsburg. All that we had in the eastern work we had at Little Falls.

Q. Where at Little Falls? A. At the general store-  
10 house at Little Falls.

Q. Do you know about how many drift pins you had? A. I know that all those that came from the Jersey City line where we had a great many men working—there must have been at least one hundred.

Q. Were the tools in the store-house available to the use of the men at Little Falls? A. Yes, sir.

Q. How available? What did they have to do to get their hands on them? A. They simply had to go to the store-house and tell what they wanted or get them  
20 themselves—ask the man in charge to open the door.

Q. Did you ever know or hear of such a process as reforging or repairing tools of this character? A. No, sir; when these tools got to that condition as described here to-day the men generally knocked these burrs off with a hammer. If a curl shows that does not begin to crack, they knock it off with a hammer.

Q. Have you seen them do it? A. Yes, sir; I have never seen any of these go back to the blacksmith shop to be redressed.

30 Q. I show you this pin produced by the plaintiff; will the point of that pin go into the rivet holes of the pipe which you have described? A. No, sir; it would not go into any hole of that pipe; that is, on those pipes that they were fitting on that day.

Q. What does it measure? A. A pin of that kind measures slightly over seven-eighths of an inch, and the holes thirteen-sixteenths of an inch, or one-sixteenth of an inch less than the end of that pin.

Q. I show you these pins which I have produced  
40 here now; are these the sort of pins used in that

work? A. They are generally or about what that would be.

*Cross-examination by Mr. Ward.*

Q. You use the pins as long as they can be used by hammering them on the head and when they get so short that they cannot be used, you throw them away? A. Yes. 10

Q. How short would they have to be before you would throw them away? A. Ordinarily about four inches.

Q. You never got them fixed? A. No, sir; it does not pay.

Q. When they are bent down like that (indicating) do you consider them safe for the men to work with? A. The fact that it curls over shows that it is good, when they begin to crack they knock them off.

Q. Would it not be dangerous? A. If he continues to hammer, why it will drop off. 20

Q. Take that one (showing witness a pin)? A. I don't know whether it has been dropped off or knocked off.

Q. (Showing witness another pin). There is another pin; do you consider that a safe tool to work with? A. Yes, sir.

Q. Perfectly safe. A. Yes, sir; the very fact that it curls that way shows that the steel is soft.

Q. You are not a blacksmith? A. No, sir. 30

Q. You are not an iron worker? A. No, sir; but I know something about it as a profession.

Q. You never worked at it? A. Yes, sir.

Q. Where? A. At Stevens Institute, Hoboken.

Q. Did you work at iron work? A. Yes, sir.

Q. What did you do? A. I made chisels and all sorts of things of that kind.

Q. You are Vice President of the Gillespie Co. now? A. Yes, sir. 40

Q. Where were you in February last? A. I was probably in the New Jersey office.

Q. You had not been to Little Falls? A. Yes, sir; I was there.

Q. Were you there in February? A. I had been there.

Q. Did you know that the water was being taken  
10 out to have this work done? A. I did not.

Q. Didn't you know that the water had been taken out so that the pipes could be laid? A. The pipe was not laid long enough to be bothered by the water.

Q. That was a short job? A. A couple of days.

Q. That was the finish of that work? A. Yes, sir.

Q. Did you have a blacksmith taking care of the tools? A. I am unable to say.

Q. Why not? A. I generally left those details to  
20 the Superintendent.

Q. You left the management of the tools to the Superintendent? A. Very greatly; not entirely.

Q. You left the furnishing of the tools to him? A. No, sir; I did not.

Q. Do you know where these tools were made? A. I could not swear where these identical tools were made.

Q. Do you where any of the tools were made? A. Some at Little Falls and some at Fairfield.

30 Q. Then you had a blacksmith shop there? A. Yes, sir.

Q. But you had none at the time these men were working? A. The work these tools were made for were shut down.

Q. That is all.

Counsel for defendant offers in evidence these pins heretofore produced.

DEFENDANT RESTS.

REBUTTAL.

JAMES CAMPBELL, the plaintiff, being recalled, testifies as follows:

Q. When you went up there to work, in doing this job as you have described, did you see Mr. Jones also on the work? A. Yes, sir.

Q. When? A. The day before the accident—that 10 was Thursday.

Q. Can you see any out of that eye? A. No, sir; none whatever.

Q. Can you distinguish light from dark? A. No, I cannot distinguish either darkness or light.

Q. When Dr. Johnson came to see you did he tell you that eye would have to be taken out to save the other? A. Yes, he told me, "such eyes as that we generally take out."

Q. That is all.

20

NO CROSS-EXAMINATION.

WILLIAM CAMPBELL, a witness already sworn, being recalled, testifies as follows:

Q. I see that the bottom of that pin is battered up some, can you explain that? A. That is where the holder on knocked it against the inside after I drove it in.

Q. Was that pin in the hole at the time you 30 struck it? A. Yes, sir.

Q. It is a seven-eighths, and that pin is not three-fourths across, it is not more than five-eighths.

*By the Court.*

Q. Measure it? A. That pin will go in a seven-eighths hole.

A. How wide is the widest diameter? A. About thirteen-sixteenths.

40

*By Mr. Ward.*

Q. The holes in the boiler, were they all of uniform size or some larger? A. Fifteen-sixteenths.

Q. Is that the pin? A. Yes, sir; I will swear that that is the pin.

Q. What about the fixing of tools on the job when they got out of order? A. They are generally repaired by the blacksmith.

Q. Do you know that to be done? A. Yes, sir.

*Cross-examination by Mr. Corbin.*

Q. Just look at that point of the pin with that rule over it whether the point of that pin is not fully fifteen-sixteenths of an inch? A. It is barely thirteen-sixteenths.

Q. Is not that widest part fully fifteen-sixteenths of an inch? A. No, sir; I don't think it is.

Q. Is not that fourteen-sixteenths of an inch? A. Not quite; no, sir.

Q. That is all.

DEFENDANT RESTS— CASE CLOSED.

Counsel for the defence moves that a verdict for the defendant be granted, on the ground that it now appears that there were safe pins available for the use of the men working with the plaintiff, and also that it appears that pins available were supplied for the purpose, and also on the ground that negligence on the part of the defendant has not been shown, and also that negligence has been shown, if at all, by fellow workmen in the use of the pins, if their be any negligence.

THE COURT—The motion is refused; it is a question of fact, I think.

Counsel for the defendant thereupon prays an exception to the refusal of the Court to direct a verdict for the defendant; which is allowed, and the same is sealed accordingly.

JONATHAN DIXON, [L. s.]

Just. Sup. Ct.

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DEFENDANT'S REQUEST TO CHARGE.

1. If the jury find that proper drift pins and a sufficient number of them had been provided by the defendant which the workmen might have had for use for the asking, defendant cannot be held liable, even though there were some other pins open to the plaintiff's use which were not in good repair. 20

2. William Campbell, the man who struck the blow that caused the injury, was a fellow-servant with the plaintiff, and if suitable pins were provided by the defendant, which were available and could be had for the asking by the workmen, then the defendant is not liable.

3. If the jury find that William Campbell knew or ought to have known that the pins which he was using were defective, the defendant cannot be held liable, even if no proper pins had been supplied. 30

4. If the jury find that the plaintiff had an equal opportunity with the defendant of knowing that the pins supplied or selected for use were defective, the defendant cannot be held liable, even if the defendant had failed to supply a sufficient number of proper and serviceable pins.

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5. If the jury find that the defendant kept on hand a sufficient number of pins which were safely adapted for use and which could have been obtained at any time for the asking, the defendant is not liable for an injury resulting from the use of an imperfect pin selected by the workmen.
- 10 6. If the defect in the pin used by William Campbell was obvious, then it was negligence on his part to use it, and the defendant cannot be held liable for an injury resulting from the use of such a pin.

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### CHARGE OF THE COURT.

#### GENTLEMEN OF THE JURY:

20 It appears that on the twenty-first of February last, the plaintiff, while in the employ of the defendant company, was struck in the eye by a piece of steel which flew off from a drift pin which his brother, William, was striking, while he was in the employ of the defendant company; and in consequence of that wound the plaintiff has lost the use of his eye, and he seeks in this suit to recover compensation from the defendant for that loss.

30 In order that he succeed the evidence must satisfy you that the defendant company failed to discharge its duty to him as a workman. Its duty was to exercise reasonable care and skill to furnish to the workmen reasonably safe tools to do their work. That is as clear a statement as I can give you of the duty of the company toward the workmen engaged in its service. Its duty was to exercise reasonable care and skill to furnish reasonably safe tools to the workmen for the doing of the work. Of course, the company as a mere corporation cannot do anything;  
40 it has to act through its agents, and so the duty comes

down to this—that some agents of the company must furnish reasonably safe tools, or must exercise proper and reasonable care and skill to see that they are furnished, for the doing of the work. Now, it appears that the company had a number of drift pins—a number of the sort of pins that were used in this service and generally of the kind to which this pin that did the injury belonged. How many pins they had 10 is a matter of a great deal of variety of evidence; the witnesses vary largely when they undertake to say how many pins the company had. These drift pins appear to have been stored in three general places, and in these three places there were various boxes in which the pins were kept. Now, if in these places the company had provided, or had taken proper care and skill to provide, reasonably safe drift pins, the company's obligation was at an end, and there can be no recovery against it in this case. It appears 20 that Mr. Younger and Mr. McClung were the persons who actually picked up or got the very drift pin and one or two others with which these men were working. McClung and Younger were fellow-servants with the plaintiff, and if they, through negligence or through lack of good judgment, made a poor selection of tools and selected unsafe tools when there were tools provided by the company that were reasonably safe, the plaintiff cannot hold the defend- 30 ant responsible for that. If the company furnishes tools that are reasonably safe and that are within the reach of the workmen, so that they can have them for asking, or by reasonable care could get them and if the workmen do not get safe tools but select those that are unsafe, why then the company is not responsible. The responsibility of the employer begins and ends when it has seen that reasonable care and skill have been exercised to provide reasonably safe tools. There may 40 be unsafe tools among them, but the men who are

engaged in the work are bound to exercise their own skill to select safe tools out of the number furnished, and when they fail to do that and their fellow workman is injured, the company is not responsible. That brings me down to several requests which the defendant asks me to charge; and, first, I am asked to charge, and I do charge :

10 " If the jury find that proper drift pins and a sufficient number of them had been provided by the defendant which the workmen might have had for use for the asking, defendant cannot be held liable, even though there were some other pins open to the plaintiff's use which were not in good repair." And even though there were other pins open to the plaintiff's fellow-workmen which were not in good repair, for they were bound to exercise their skill to select proper and safe tools, and if they did not the company

20 is not responsible. If all the tools were unsafe and the workmen did the best he could, and then out of the improper tool which was used the plaintiff was hurt, the company would be responsible. It must not be the fault of the workmen; it must be the fault of the company; it is the breach of this duty to see that proper skill and care are exercised to supply proper tools that makes the company liable. There must be a breach of that duty before you can find your verdict for the plaintiff.

30 " *Second*—William Campbell, the man who struck the blow that caused the injury was a fellow-servant with the plaintiff and if suitable pins were provided by the defendant, which were available and could be had for the asking by the workmen, then the defendant is not liable."

That is clearly the law.

40 " *Third*—If the jury find that William Campbell knew, or ought to have known, that the pins which he

was using were defective, then the defendant cannot be held liable even if no proper pins had been supplied."

That request relates to another proposition which I might as well state now, and that is this—that if the evidence shows that the plaintiff contributed by his own fault and so received the injury, he cannot recover, but in this case I perceive no evidence upon which any fault can be alleged against the plaintiff. It does not appear that the plaintiff knew the tools with which his fellow-workmen were working; he had no opportunity of determining whether they were safe. His brother had; his brother might have been to blame for using such a tool, but the fault of the brother in that way will not entitle the defendant to your verdict. No fault on the part of the fellow-servant will exonerate the defendant, if the defendant failed to do its duty. If a man is injured through the joint negligence of his employer and a fellow-servant, he may sue and recover from the fellow-servant, or from the employer, or from both. Both are responsible, and neither can say that the fault of the other exonerates him. When the plaintiff himself is to blame, then he cannot recover. That is another proposition which you will bear in mind. If you find any evidence that satisfies you that the plaintiff himself was to blame, then he cannot recover.

"*Fourth*—If the jury find that the plaintiff had an equal opportunity with the defendant of knowing that the pins supplied or selected for use were defective, the defendant cannot be held liable even if the defendant had failed to supply a sufficient number of proper and serviceable pins."

That again you see, is a repetition of what I have just said. In order to entitle the plaintiff to your verdict, you must find that the company failed to furnish, fairly within the reach of the workmen, drift

pins fit for use, safe use. If they failed to exercise reasonable care and skill to do this thing, and out of that failure this injury of the plaintiff sprung as one of the causes, that being one of the causes of injury, then the company is responsible, otherwise, not. No fault on the part of the plaintiff's brother, no fault on the part of McClung, no fault on the part of Younger,  
 10 no fault on the part of any fellow-workman, will make the company liable; but if the company failed to do its duty, no fault on the part of any of these persons will absolve the company from responsibility; fault on the part of the plaintiff himself would—so you have the law of the case. First, did the company fail to exercise or have exercised, proper care and skill to supply reasonably safe drift pins for the workmen, and out of that failure, did the injury to the plaintiff spring?

20 If you answer both of these questions in the affirmative, and do not find fault in the plaintiff, then award your verdict for the plaintiff. If you answer either of them in the negative, or find fault in the plaintiff, you will give your verdict for the defendant. If you give your verdict for the plaintiff you must assess his damages. He has practically lost the use of an eye, the doctors say. They unite in saying that the loss of that eye is, for all practical purposes, complete.  
 30 As to the other eye, they say that while there is a possibility, they unite in saying that there is no probability, that he will lose the use of that eye. One eye is useless for all purposes of vision, but the other eye is good and likely to remain so.

If he recovers your verdict he is entitled to be compensated for the suffering he has endured, for the loss of time, and for the disability that has come to him and that will continue from the want of that eye.

## DEFENDANT'S EXCEPTIONS.

Counsel for the defendant prays an exception to that part of the charge of the Court which left it to the jury to determine whether or not the company in the several places referred to in the testimony had provided, or had taken reasonable care and skill to provide, reasonably safe tools; which is allowed, and the same is sealed accordingly. 10

JONATHAN DIXON, [SEAL.]

Justice Sup. Ct.

Counsel for the defendant also prays an exception to that portion of the charge of the Court which was to the effect that the fault of the brother, William Campbell, will not exonerate the company; which is allowed, and the same is sealed accordingly. 20

JONATHAN DIXON, [SEAL.]

Justice Sup. Ct.

Counsel for the defendant also prays an exception to the refusal of the Court to charge as requested in the third and sixth requests; which is allowed, and the same is sealed accordingly. 30

JONATHAN DIXON, [SEAL.]

Justice Sup. Ct.

## ASSIGNMENTS OF ERROR.

The Assignments of Error of The T. A. Gillespie Company, plaintiff in error; afterwards, that is to say, on the twenty-fifth day of November, nineteen hundred and two, in the Court of Errors and Appeals in the last resort in all causes of the State of New Jersey, comes the said The T. A. Gillespie Company, 10 by Corbin & Corbin, its attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited in the said bill of exceptions, and also in the giving of verdict and judgment aforesaid, there is manifest error, to wit :

1. Because at the trial of the cause at the Passaic Circuit of the New Jersey Supreme Court, the Justice who tried the cause refused to non-suit the said James Campbell when thereunto moved, in behalf of 20 the said The T. A. Gillespie Company, whereas, by the law of the land a non-suit should have been ordered, for one or more of the following reasons alleged in behalf of said motion, to wit :

(a.) Because the plaintiff did not show that the defendant had not exercised reasonable care to provide the employees with safe, proper and sufficient tools.

(b.) Because the defect, if any, in the tool whereby 30 the injury was caused, was obvious to the servant who was using the tool, and the defendant could not be held liable for the negligence of that servant.

2. Because at the trial of the cause at the Passaic Circuit of the Supreme Court, the Justice who tried the cause refused to direct a verdict for the defendant when thereunto moved in behalf of said defendant; whereas, by the law of the land, the Court should have directed such verdict, for one or more of the following reasons alleged in behalf of said motion, to 40 wit:

(a.) Because it appeared from the evidence that there were safe and sufficient pins available for the use of the fellow employees of the plaintiff, and the defendant could not be held responsible for the failure of such fellow employees to use such pins.

(b.) Because the defendant had supplied safe and sufficient pins, which were available for the use of the plaintiff and his fellow employees. 10

(c.) Because negligence on the part of the defendant was not shown.

(d.) Because negligence was shown, if at all, by fellow employees in the use of the pin whereby the accident was caused, and for such the company was not liable.

3. Because in charging the jury at the trial of the cause, the Justice who presided at the trial left it to the jury to determine whether or not the defendant had provided or had taken reasonable care and skill to provide reasonably safe tools in the several places referred to in the testimony, which charge was illegal and to the injury of the defendant. 20

4. Because in charging the jury at said trial, the Justice who presided at the trial charged that the fault or negligence of the brother of the plaintiff would not entitle the defendant to the verdict of the jury, the particular part of the charge being in the words following: 30

"It does not appear that the plaintiff knew the tools with which the fellow workmen were working; he had no opportunity of determining whether they were safe. His brother had; his brother might have been to blame for using such a tool, but the fault of the brother in that way will not entitle the defendant to your verdict. No fault on the part of the fellow servant will exonerate the defendant if the 40

“defendant failed to do its duty;” which charge was illegal and to the injury of the defendant.

5. Because at the trial the Justice who presided, refused to charge the jury as follows, when thereunto duly requested:

10 “If the jury found that William Campbell knew, or  
“ought to have known, that the pins which he was  
“using were defective, the defendant cannot be held  
“liable, even if no proper pins had been supplied;”  
which refusal to charge was illegal and to the injury  
of the defendant.

6. Because at the trial the Justice who presided, refused to charge the jury as follows, when thereunto duly requested:

20 “If the defect in the pin used by William Camp-  
“bell was obvious, then it was negligence on his part  
“to use it, and the defendant cannot be held liable for  
“an injury resulting from the use of such a pin;”  
which refusal to charge was illegal and to the injury  
of the defendant.

7. Because the verdict of the jury in said cause was contrary to the charge of the Justice who presided at the trial thereof.

30 8. Because the verdict of the jury in said cause was contrary to law.

9. Because the judgment in said cause was given in favor of James Campbell and against The T. A. Gillespie Company, whereas, by law it should have been given against the said James Campbell and in favor of The T. A. Gillespie Company.

Wherefore, the said plaintiff in error, The T. A.  
40 Gillespie Company, prays that the judgment aforesaid,

by reason of the errors aforesaid, may be reversed and for nothing holden, and that it may be restored to all things which it has lost by reason of said judgment.

Dated December, 1st, 1902.

CORBIN & CORBIN,  
Attorneys of Plaintiff in Error.

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