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Summons.

(Filed September 7, 1928.)

The State of New Jersey to Standard Oil Company (a New Jersey Corporation) and Standard Oil Company of New Jersey (a corporation of Delaware, authorized to do business in New Jersey):

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

WITNESS, Hon. Wm. S. Gummere, Chief Justice of the said Court, at Trenton, this 31st day of August, nineteen hundred and twenty-eight.

FRED L. BLOODGOOD,
Clerk.

FRANCIS A. GORDON,
Plaintiff's Attorney.

Complaint.

(Filed September 7, 1928.)

NEW JERSEY SUPREME COURT,

UNION COUNTY.

EDWARD N. GILROY,
Plaintiff,

vs.

STANDARD OIL COMPANY, a New Jersey corporation, and STANDARD OIL COMPANY OF NEW JERSEY, a corporation of Delaware, authorized to do business in New Jersey,
Defendants.

Action at Law.

Plaintiff residing in the Borough of Kenilworth, County of Union, and State of New Jersey, complaining of and against defendants, says:

1. On August 8th, 1927, and at all times hereinafter mentioned, defendant, Standard Oil Company, was and still is a corporation duly organized and existing under the laws of the State of New Jersey.

2. On said date and prior thereto, said defendant owned, controlled, maintained and operated a certain oil refinery in the City of Bayonne, Hudson County, New Jersey, and thereat owned, operated, controlled and maintained buildings, pump houses, pipes, pumps, tanks, gas holders and other apparatus and machinery and appurtenances thereto.

3. On said date and prior thereto, a certain road commonly referred to as Hook Road was a public thoroughfare and public highway used by the public, for which use said defendant herein on or about December 6th, 1904, dedicated a part of its lands as and for part of said highway.

4. On or about December 6th, 1904, said defendant herein undertook and agreed with the Mayor and Council of the City of Bayonne to maintain said road and highway in good order, which agreement became effective in and about February, 1905, and same was for the benefit of the public.

5. On August 8th, 1927, and for a long time prior thereto, said defendant owned, operated and maintained a certain illuminating gas holder located on its lands adjoining said Hook Road and said defendant owned, operated and maintained on its lands on the opposite side of said Hook Road, a certain pump house, locker room, machinery, apparatus and equipment known as Pump House Plant No. 3.

6. On said last date and for a long time prior thereto, said defendant, by its servants, agents and employees carelessly and negligently maintained and operated said gas holder so that large quantities of said illuminating gas were allowed to and did escape therefrom and passed across said Hook Road and into, at and about said Pump House Plant No. 3.

7. On said last date and prior thereto, said defendant, by its servants, agents and employees, carelessly and negligently operated and maintained said Pump House Plant No. 3 and machinery, pumps and apparatus therein so that a fire and explosion occurred at, in and about same.

8. When said explosion and fire occurred, plaintiff was lawfully upon said Hook Road and was an occupant of a certain automobile which was being operated along the same, and the flames of said fire burned said automobile and painfully, seriously and severely burned said plaintiff.

9. On said last date and for a long time prior thereto, said defendant, by its servants, agents and employees carelessly and negligently deposited and permitted to remain on said highway large quantities of oil and oily substances.

10. Said defendant was careless and negligent in that its servants, agents and employees (a) carelessly and negligently and knowingly maintained, operated and permitted to be operated said Pump House Plant No. 3 and its contents and appurtenances thereto while the same were improperly constructed and adjusted and while same were improperly functioning, and while the same were producing friction, excessive heat and sparks and while large quantities of combustible gases and vapors were at, in and about same; (b) carelessly and negligently and knowingly permitted to accumulate and remain at, in and about said Pump House Plant No. 3, large quantities of destructive, highly inflammable and combustible gases and vapors without properly providing adequate and sufficient equipment and devices to prevent the ignition and explosion thereof; (c) carelessly and negligently and knowingly omitted and failed to have said gas holder and Pump House Plant aforesaid and the contents thereof and appurtenances thereto properly and sufficiently inspected, supervised and operated, and negligently and carelessly and knowingly failed and omitted to make sufficient and adequate repairs to said gas holder while same was in a leaky and defective

condition, although said agents, employees and servants knew of such condition for a long time prior to said last date; (d) carelessly and negligently omitted and failed to inspect and failed to keep in good order and failed to keep clean and free of large quantities of oily and greasy substances the said Hook Road adjacent to said Pump House Plant No. 3 and said gas holder.

11. As a result of the aforesaid several acts of negligence, omission and carelessness on the part of the said defendant by its servants, agents and employees, an explosion and fire occurred in and about the said pump house located at Plant No. 3 of said defendant company and said fire was carried and spread across said Hook Road in an instantaneous manner and came upon plaintiff, while lawfully upon same, and as a result thereof, he was seriously, painfully and severely burned in and about the head, face, body and limbs, receiving third degree burns throughout the same, and he was, still is and will be internally injured and he has been and will be badly, horribly and permanently scarred and deformed in and about the head, face, body and limbs, and he has been permanently injured throughout his entire body and limbs and his eyesight has been permanently impaired and his hands and his fingers and his arms have been permanently injured to the extent that he is unable to use the same, and he has been horribly scarred and deformed, and he has suffered severe, painful and excruciating pains, and he will in the future endure great pain and suffering, and as a result of the said physical injuries and carelessness and negligence of the defendant by its servants, agents and employees as aforesaid, the plaintiff has undergone a severe torture, nervous shock, mental anguish and his nervous system has

been shattered and he will undergo the same in the future, and by reason of the said injuries, pain, suffering and nervous shock he has been and will be unable to attend to his usual means of earning a livelihood and will in the future be unable to attend to his usual means of earning a livelihood, and he has been and will be obliged to expend large sums of money for doctors, nurses, medicines and otherwise in endeavoring to cure and relieve himself of his pain, suffering, injuries and nervous shock as aforesaid, and he has otherwise been damaged all in the sum of One Hundred Thousand ($100,000) Dollars.

12. Since the said eighth day of August, 1927, defendant, Standard Oil Company of New Jersey, was and still is duly organized as a corporation under and by virtue of the laws of the State of Delaware, and on or about September 6th, 1927, it was and still is duly authorized to transact business in the State of New Jersey.

13. On or about September 30th, 1927, defendant corporation, Standard Oil Company (a New Jersey Corporation), conveyed said refinery buildings, pump houses, pipes, gas holders, tanks, pumps and other lands, apparatus and machinery belonging to it to the defendant, Standard Oil Company of New Jersey (a Delaware corporation), and said Standard Oil Company of New Jersey (a Delaware Corporation) undertook and agreed and assumed to pay and become liable for any and all obligations and monies legally due to plaintiff from defendant, Standard Oil Company (a New Jersey Corporation), and any and all damages legally due to plaintiff by reason of the matters and things herein set forth.

WHEREFORE, plaintiff demands judgment against defendants in the sum of One Hundred Thousand ($100,000) Dollars.

FRANCIS A. GORDON,
Attorney for Plaintiff.

Answer.

(Filed Sept. 29, 1928.)

NEW JERSEY SUPREME COURT

UNION COUNTY.

EDWARD N. GILROY,
Plaintiff,

vs.

STANDARD OIL COMPANY, a New Jersey corporation, and STANDARD OIL COMPANY OF NEW JERSEY (a corporation of Delaware authorized to do business in New Jersey),
Defendants.

Action at Law.

The defendants, Standard Oil Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office in said State at No. 185 Washington Street, in the City of Newark in the County of Essex, and Standard Oil Company of New Jersey (a corporation authorized and existing under and by virtue of the laws of the State of Delaware authorized to do business in the State of New Jersey), having its principal office and place of business in the State of New Jersey at the foot of 22nd Street, in the City of Bayonne, in the County of Hudson, say that:

FIRST DEFENSE

1. They admit all of the allegations of paragraphs 1, 2 and 5 of the complaint heretofore filed in the above stated cause.

2. They deny all of the allegations of paragraphs 6 and 7 of said complaint.

3. They admit so much of the allegations of paragraph 8 of said complaint as is to the effect that an explosion and fire occurred in the vicinity of Hook Road on August 8, 1927, at a time when the plaintiff was an occupant of an automobile being operated along such road; that said automobile was damaged and that the plaintiff was burned as a result of such explosion or fire. They have no knowledge or information sufficient to form a belief as to the other allegations of said paragraph 8.

4. They deny all of the allegations of paragraphs 9, 10 and 11 of said complaint.

5. They admit all of the allegations of paragraph 12 of said complaint save that they say that the defendant Standard Oil Company of New Jersey was incorporated on August 29, 1927.

SECOND DEFENSE

6. They say that the plaintiff was guilty of contributory negligence.

THIRD DEFENSE

7. They say that at the time and place referred to in the said complaint the plaintiff was employed by the defendant Standard Oil Company and that the injuries or disability suffered by the plaintiff were due to risks incident to the plaintiff's employment by the said defendant, and known to and assumed by the plaintiff.

FOURTH DEFENSE

8. They say that at the time and place referred to in the said complaint the plaintiff was employed

by the defendant Standard Oil Company and that the injuries or disability suffered by the plaintiff were due to risks incident to his employment by the said defendant, which were obvious and apparent to the plaintiff and were assumed by him.

FIFTH DEFENSE

9. They say that at the time and place referred to in the said complaint the plaintiff was in the employ of the defendant Standard Oil Company; that the contract of hiring between the plaintiff and the said defendant was made subject to the provisions of Section II of an act of the Legislature of the State of New Jersey entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule for compensation, and regulating procedure for the determination of liability and compensation thereunder", approved April 4, 1911, being Chapter 95 of the Laws of 1911, and the several acts amendatory thereof or supplemental thereto, which were accepted by both the plaintiff and the said defendant.

10. They say that any personal injury or disability which the plaintiff may have sustained was caused by accident arising out of and in the course of the plaintiff's employment by the said defendant and that the rights and remedies provided by the said act are exclusive.

11. They say that by reason of the premises plaintiff has surrendered any right which he might otherwise have had to be compensated for said injuries or disability, except as in said acts provided through proceedings had before the

Workmen's Compensation Bureau of the Department of Labor of the State of New Jersey.

SIXTH DEFENSE

12. They repeat the allegations of paragraphs 9 and 10 hereof.

13. They say that the defendant Standard Oil Company furnished the plaintiff with medical and hospital services and medicines in accordance with the provisions of said acts and that the said defendant has paid or caused to be paid to the plaintiff and the plaintiff has accepted the sum of $1,382.37 and the further sum of $170.00, making a total of $1,552.37 on account of the compensation which the plaintiff became entitled to receive from the said defendant in accordance with the said acts for the said personal injuries and disability referred to in the said complaint.

14. They repeat paragraph 11 hereof.

SEVENTH DEFENSE

15. They repeat the allegations of paragraphs 9 and 10 hereof.

16. They say that on or about the 6th day of October, 1927, plaintiff entered into a written agreement with the defendant Standard Oil Company of New Jersey pursuant to the provisions of the said acts, a true copy of which is hereto annexed, made a part hereof and marked Schedule A.

17. They repeat paragraph 11 hereof.

EIGHTH DEFENSE

18. They repeat the allegations of paragraphs 9 and 10 hereof.

Answer.

19. They say that on or about the 21st day of March, 1928, the plaintiff agreed with the defendant Standard Oil Company of New Jersey that he would return to work on April 1, 1928, and accept compensation in accordance with the provisions of said acts.

20. They repeat paragraph 11 hereof.

NINTH DEFENSE

21. They repeat the allegations of paragraphs 9 and 10 hereof.

22. They say that on or about the 4th day of August, 1928, the plaintiff filed with the Workmen's Compensation Bureau of the Department of Labor of the State of New Jersey, a petition for compensation from the defendant Standard Oil Company under the said acts and that the rights and remedies provided in said acts and sought to be enforced by said petition are exclusive.

23. They repeat paragraph 11 hereof.

TENTH DEFENSE

24. They repeat the allegations of paragraphs 9 and 10 hereof.

25. They say that by reason of the premises the plaintiff is estopped from alleging that such personal injuries or disability were not suffered by the plaintiff, by accident arising out of or in the course of his employment by the said defendant, Standard Oil Company (a New Jersey corporation), and from claiming and enforcing any other rights or remedies than those provided for by the said acts.

ELEVENTH DEFENSE

26. They repeat paragraphs 9, 10 and 13 hereof.

27. They repeat paragraph 25 hereof.

TWELFTH DEFENSE

28. They repeat paragraphs 9, 10 and 16 hereof.

29. They repeat paragraph 25 hereof.

THIRTEENTH DEFENSE

30. They repeat paragraphs 9, 10 and 19 hereof.

31. They repeat paragraph 25 hereof.

FOURTEENTH DEFENSE

32. They repeat paragraphs 9, 10 and 22 hereof.

33. They repeat paragraph 25 hereof.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendants.

Schedule A.

WORKMEN'S COMPENSATION BUREAU,

STATE HOUSE, TRENTON, N. J.

Name of Employer:
STANDARD OIL CO. OF NEW JERSEY
26 Broadway, New York
Name of injured employee:
EDWARD NORMAN GILROY
Date of Accident:
8 Number of Month
8 Day of Month
1927 Year
Date of preparing this blank.....10/6/27

20. Did the injury result in DEATH? No.
21. Did the injury REQUIRE medical aid? Yes.
22. Will you or your insurance carrier PAY for the medical aid required by law during the first four weeks? Yes.
23. Give probable date of RECOVERY. Unknown.
24. Were the wages fixed by the output? No.
25. If wages were fixed by the hour, state RATE per hour. $.8075 (3 das) $.9325 (3 das).
26. Give number of HOURS in ordinary working day. 8.
27. Give number of DAYS in ordinary working year. 313.
28. State the amount of weekly WAGES. (If fixed by output, see paragraph 23, page 16, Compensation Law.) $41.89.
29. State the weekly COMPENSATION to be paid the injured. $41.89 first 16 wks., $27.93 next 36 wks., $17.00 thereafter.

The undersigned hereby affirms the correctness of the statements given, and guarantees the paying of compensation as stated herein, according to law, for temporary disability and for permanent injury, if any.

Signature of Employer:
STANDARD OIL COMPANY OF NEW JERSEY
J. W. MYERS
By W. G. GILLSON

The undersigned does hereby acknowledge the correctness of the statements on this blank, and agrees to accept compensation at rate given.

Signature of Employee: His mark:
Edward Norman Gilroy's mark X

If signed by mark, same must be witnessed.
Signature of Witness:
E. H. HURTZIG 10/15/27
Signature of Insurance Carrier:

FORM NO. 2

I hereby consent to the filing of the within Answer as in time. September 28, 1928.

FRANCIS A. GORDON,
Attorney for Plaintiff.

Reply.

(Filed Oct. 4, 1928.)

NEW JERSEY SUPREME COURT

UNION COUNTY.

EDWARD N. GILROY,
Plaintiff,

vs.

STANDARD OIL COMPANY, a New Jersey corporation, and STANDARD OIL COMPANY OF NEW JERSEY (a corporation of Delaware authorized to do business in New Jersey),
Defendants.

Action at Law.

Plaintiff, by way of reply to the defenses contained in the answer of the defendants,

(1) Denies all of the allegations contained in defenses designated second to fourteenth, both inclusive, excepting, (1) the plaintiff and the defendant, Standard Oil Company, had a contract of hiring which was subject to the provisions of Section Two of an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule for compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, being Chapter 95 of the laws of 1911 and the several acts amenda-

tory thereof and supplemental thereto, and excepting (2) a petition was filed with the Workmen's Compensation Bureau of the Department of Labor of the State of New Jersey and in such petition the plaintiff herein reserved any and all rights to institute this suit.

FRANCIS A. GORDON,
Attorney for Plaintiff.

Postea.

(Filed Nov. 8, 1929.)

NEW JERSEY SUPREME COURT,

UNION COUNTY.

EDWARD N. GILROY, Plaintiff, *vs.* STANDARD OIL COMPANY (a New Jersey corporation) and STANDARD OIL COMPANY OF NEW JERSEY (a corporation of Delaware, authorized to do business in New Jersey), Defendants.	Action at Law.

The above-entitled action was tried at the Union County Circuit before Honorable Lloyd Thompson, Judge, and a jury on the 28th, 29th, 30th and

Postea.

31st days of October, 1929, and the 1st, 4th and 6th days of November, 1929.

The jury rendered a verdict in favor of the plaintiff, Edward N. Gilroy, and against the defendant, Standard Oil Company (a New Jersey corporation), in the sum of Forty-nine Thousand, Seven Hundred and Twenty-two ($49,722.00) Dollars damages.

The jury rendered a verdict, upon direction of the Court, in favor of the defendant, Standard Oil Company of New Jersey (a Delaware corporation), against the plaintiff, Edward N. Gilroy.

Dated: November 7, 1929.

LLOYD THOMPSON,
Judge.

Judgment.

(Entered Nov. 8, 1929.)

NEW JERSEY SUPREME COURT.

EDWARD N. GILROY,
Plaintiff,

vs.

STANDARD OIL COMPANY (a New Jersey corporation),
Defendant.

Action at Law.
On Postea.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of forty-nine thousand, seven

hundred and twenty-two dollars, besides costs to be taxed *nisi.*

Entered November 8, 1929.

On motion of

FRANCIS A. GORDON,
Attorney.

$49,722.00
71.02

$49,793.02

Notice of Appeal.

(Filed Nov. 16th, 1929.)

NEW JERSEY SUPREME COURT,

UNION COUNTY.

EDWARD N. GILROY,
Plaintiff,

vs.

STANDARD OIL COMPANY, a New Jersey corporation, and STANDARD OIL COMPANY OF NEW JERSEY (a corporation of Delaware authorized to do business in New Jersey),
Defendants.

Action at Law.

To Francis Gordon, attorney of plaintiff, or to whom it may concern:

Sir:

PLEASE TAKE NOTICE that the defendant Standard Oil Company, a New Jersey corporation, ap-

peals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered against it in this cause.

Dated, November 12, 1929.

Yours respectfully,

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant Standard Oil Company, a New Jersey corporation.

[ENDORSED]

Service of a copy of the within Notice of Appeal is hereby acknowledged this 14 day of November, 1929.

FRANCIS A. GORDON,
Attorney for Plaintiff.

Grounds of Appeal.

(Filed December 11, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS

EDWARD N. GILROY, Plaintiff-Respondent, *vs.* STANDARD OIL COMPANY, a New Jersey corporation, Defendant-Appellant.	Action at Law.

The appellant states the following grounds of appeal:

1. The judgment is contrary to law.

2. The Trial Court erroneously refused to nonsuit the plaintiff.

3. The Trial Court erroneously refused to direct a verdict in favor of the defendant, Standard Oil Company, a New Jersey corporation, and against the plaintiff.

4. The Trial Court erroneously charged the jury as follows, with respect to the New Jersey Workmen's Compensation Act (P. L. 1911, Ch. 95, with its amendments and supplements):

> "The whole scheme was set up for the benefit of the employee.
>
> Being remedial in its nature, it is, under the legal principles of construction, to be construed liberally, having in mind the benefits intended to be conferred; and, having in mind the class for whose benefit it is intended,

that benefit should not be limited by the compulsory submission of the employe to the provisions of the Act, where the facts do not squarely bring him within its scope, any more than by his exclusion from its provisions where the facts bring him fairly within it."

10 5. The Trial Court erroneously charged the jury as follows:

"Any person *not* employed by defendant had a right on that road to be protected from injury arising from defendant's negligence, and if so injured, to sue for damages at common law. Anyone who had quit his employment, though only until the next day, was, at that time, not employed and had the same rights."

20 6. The Trial Court erroneously charged the jury as follows:

"I therefore charge you that the plaintiff's injuries in this case cannot be held to have been sustained by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, and he is therefore not required to seek his compensation under that Act, but may lawfully pursue his remedy at common law in
30 the action now being tried."

7. The Trial Court erroneously charged the jury as follows:

"I do charge you, however, that even if you find the plaintiff did sign the so-called Form No. 2 agreement, he must be considered to have signed it subject to the provisions of the Workmen's Compensation Act, one of which (Section 4 of Chapter 149 of the Laws of 1918) is that any agreement settling upon and
40 determining compensation to an injured em-

ploye must be forthwith filed with the Workmen's Compensation Bureau and is not binding unless approved by the Bureau. No such agreement was ever filed and none was ever approved, so that if any ever existed it never became binding upon either party."

8. The Trial Court erroneously charged the jury as follows:

"It is contended by the defendant that even if the Number 2 Form did not bind the plaintiff as to the actual amount of compensation he was to receive for permanent disability, it at least was an agreement accepting a certain method by which the amount would ultimately be determined; but there never was, in this case, any ultimate determination of the amount to be paid, and no amount for permanent disability was paid prior to the beginning of this action."

9. The Trial Court erroneously charged the jury as follows:

"As was said in the case of Larsey *vs.* Hogan & Sons, 239 New York, page 298, at page 301, 'As an agreement for settlement at common law, the claim of the plaintiff would not be discharged or released until full and complete payment and execution. The agreement may have amounted to an accord, but payment only would amount to a satisfaction. Until there was an accord and satisfaction of plaintiff's claims by full and complete payment, the plaintiff was not barred from maintaining his action for negligence.' "

10. The Trial Court erroneously charged the jury as follows:

"This ruling also disposes of the question of whether or not the checks of the defendant to the plaintiff, admitted in evidence, rep-

resenting the exact amount of plaintiff's wages for given periods, and admitted to have been received and cashed, constituted any payment that would preserve the alleged agreement. These payments were endorsed by the defendant as 'Benefits', described by defendant's witness as meaning the payments made under a system of the company whereby the employe would receive the amount of his wages for a limited number of weeks and said to have included the amount he would have been entitled to under the temporary disability provisions of the Workmen's Compensation Act; and likewise as to the four checks, each for the exact amount payable under the Compensation Act, which were never cashed by plaintiff, though never returned to the defendant. None of these checks, nor all of them, represented full payment, and at best they can be set up as offsets or credits against any amount ultimately found to be due the plaintiff, if he should prevail in this action."

11. The Trial Court erroneously charged the jury as follows:

"There is a phrase used in the law, *res ipsa loquitur,* meaning 'the thing speaks for itself'. The principle has been defined by our courts to the effect that 'when through any instrumentality or agency under the management or control of a defendant or his servants, there is an occurrence, injurious to the plaintiff, which, in the ordinary course of things would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care.' This principle is applicable in the case before you."

12. The Trial Court erroneously charged the jury as follows:

"The defendant has a gas plant, container, pumping machinery, and apparatus for the manufacture and distribution of an extraordinarily dangerous element or substance, the conditions calling for the exercise of a correspondingly high degree of care to prevent accident and injury. The maintenance and operations of the plant are in the control of the defendant. Without any act on the part of the plaintiff, an explosion and fire occur whereby he is injured. We thus say, 'The thing speaks for itself'. That is, the very happening of the event, in the absence of explanation, indicates there was want of due care, or may indicate it, or the accident would not have occurred."

13. The Trial Court erroneously charged the jury as follows:

"It is for the jury to say whether such *prima facie* case as was presented by the plaintiff's testimony was met by the evidence for the defendant, the burden of proof remaining throughout on the plaintiff, however, in the whole case, to finally establish the negligence of the defendant as the cause of the accident. This does not mean that the plaintiff must prove the specific cause of the accident in order to show negligence."

14. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"So far as this case is concerned the contract of employment of the plaintiff to render service to the defendant at a designated place known as Kimball Pump House did not cover his movements outside of that place while the plaintiff used the public highway known as Hook Road as the public used it, because he was required to in order to get to and from work, and not because the defendant, as his employer by the terms or implications of its

contract of employment, had the right to require him to use the said road at defendant's will. (Whitney *vs.* Hazard Lead Works, 136 Atlantic, page 105.)''

15. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

''In using the public highway known as Hook Road, as plaintiff did and when he did, he was exposed only to the same risks to which any pedestrians or members of the traveling public in the same position would be exposed. The hazard had no relation to his employment. (Fumiciello's case, 138 Atlantic, 561 at page 562.)''

16. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

''Plaintiff, at the time of the accident, had ceased his work, had left the place where he performed said work and was on his way home. He had at the time no duty to fulfill to the defendant, and the defendant had no duty to fulfill towards him as its employe. The relation of master and servant had ended for the day, plaintiff having finished his work and left the place where his work was being done.''

17. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

''Plaintiff was using the public highway known as the Hook Road in the exercise of a public right of passage, and the defendant, at the time of the accident, owed to the plaintiff the same duty owed to any pedestrian or other member of the traveling public using said public highway and passing by the premises of the defendant.''

18. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"Defendant corporation, in maintaining and operating gas holders adjoining the public highway and in close proximity to members of the traveling public (including plaintiff), was held to a high degree of care for the maintenance of said gas holders and appurtenances thereto, and was required to exercise every reasonable precaution suggested by known dangers. Where the existence of a leak was known, means should have been taken (at once) to avoid injury, and where it should have been known that the leak was likely to occur because of defective conditions of said gas holders, negligence may be imputed. (Anderson *v.* Atlantic City Gas Company, 7 N. J. A. R., page 297, at pages 298 and 299, N. J. Case.)"

19. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"Gas being an extraordinarily dangerous element, an extraordinarily high degree of care and skill is exacted from the defendant and the rule of extraordinary care with respect to its storage and transmission is adjusted, in view of its known dangers and probable entailment, by a standard of care proportionate to the probable dangers. (Anderson *vs.* Atlantic City Gas Company, *supra.* See also Chew *vs.* Commercial Gas Company, 87 N. J. L. 679.)"

20. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"When, through any instrumentality or agency under the management or control of this defendant or its servants, there is an occurrence injurious to the plaintiff which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, af-

fords prima facie evidence that there was want of due care. (Mannon *v.* Vesper Lodge of Independent Order of Odd Fellows, 97 N. J. L. 215, at pages 216, 218. Mumma *vs.* Easton and Amboy Railroad Company, 73 N. J. L. 658.)"

21. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"The testimony for the plaintiff makes a prima facie case for the jury, and on the whole case, it remains for you to say whether such prima facie case was met by the defendant's evidence, the burden of proof remaining throughout on the plaintiff. (Hughes *vs.* Atlantic City Railroad Company, 85 N. J. L. 212. Neibel *vs.* Winslow, 88 *Id.* 91. Fanshawe *vs.* Rawlins, 89 *Id.* 344. Mannon *vs.* Vesper Lodge, *supra.*)"

22. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"Plaintiff is not required to establish by direct evidence the cause of the ignition of the gas, if any there existed, in order to establish the liability of the defendant company for damages resulting from the fire and explosion of the escaping gas, if any existed. (See 25, A. L. R. 262, at page 293 and cases thereunder cited.)"

23. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"Plaintiff is not barred from instituting this suit by reason of filing of a petition with the Workmen's Compensation Bureau and his filing such petition as a matter of law does not constitute an election on his part to receive compensation. (Ellich *v.* Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, Sup. Ct. App. Div. 1929, 226 App. Div. (N. Y.) 32, 234 N. Y. S.)"

Grounds of Appeal.

24. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

> "It appearing, by the evidence in this case that this accident did not arise out of or in the course of the employment of the plaintiff with the defendant by the terms of the Workmen's Compensation Act, the Workmen's Compensation Bureau would have no jurisdiction to award compensation and therefore this plaintiff, not having an alternative remedy before the Workmen's Compensation Bureau had no choice in law to make an election and he is not debarred from instituting this suit."

25. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

> "Even if the plaintiff and the defendant made an agreement, expressed or implied, to adjust the compensation of the plaintiff, employing for that purpose the machinery of the Workmen's Compensation Act, the fact that such agreement, if made, was not carried into effect, does not bar or preclude this plaintiff from maintaining this action at law for damages. (Waters *vs.* Guile, 234 Federal Reporter 532, pages 536 and 537.)"

26. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

> "The fact that the plaintiff received from the defendant medical and hospital services and medicines does not prejudice the plaintiff in any way to a recovery if he is entitled to any money damages on account of defendant's negligence, but the defendant is entitled to have such items so paid by it to be credited on account of any damages, if any you may award to the plaintiff. (Waters *vs.* Guile, *supra.*)"

27. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"The plaintiff is not barred from instituting this action at law by reason of any agreement that may have been made either under the Workmen's Compensation Law or in the nature of a settlement at common law, until there was an accord and satisfaction of plaintiff's claim by full and complete payment, and in this case, as a matter of law, there has never been any full and complete payment of plaintiff's claim so as to constitute an accord and satisfaction. (Larscy *vs.* Hogan, 239 N. Y. 298.)"

28. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"The plaintiff is not barred from instituting this suit at law by reason of the acceptance of any payments that may have been made to him by the defendant, either as a benefit, gratuity or even as part compensation and such payments do not extinguish any cause of action for damages, but you have a right and it is your duty, if you find that the plaintiff is entitled to damages in this case by reason of the defendant's negligence, taking into consideration the law as it has been charged applicable to the case and all of the facts in the case, to subject such damages to a set-off to the extent of partial payments that may have been made by the defendant to the plaintiff. (Fitzgerald *vs.* Harbor Lighterage Company, 234 N. Y. 132.)"

29. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"The plaintiff is not barred from instituting this suit at law for damages by reason of any negotiations in reference to any compensation including temporary and, or perma-

nent disability compensation or by reason of any agreement that may have been made in connection with any compensation for temporary and, or permanent disability, because under the law of the State of New Jersey an agreement between an employer and an injured employee, even when duly signed and which settles upon and determines the compensation due to an injured employe as provided by law (and in this case 'provided by law' includes temporary compensation as well as any final disability compensation) requires that such agreement *shall not bind the employer or the injured employe unless approved by the Bureau*, and in this case it has not been pleaded nor is there any proof that there was such an agreement *approved* by the Bureau in accordance with the law in such case made and provided. (Para. 4, Chapter 149, Laws of 1918—2 Cum. Supp. to C. S., page 3890.)"

30. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"The fact that payments may have been made to the plaintiff by the defendant and that the defendant may have given notice to the Workmen's Compensation Bureau that payments have begun or have been made does not bar this plaintiff from instituting this suit for damages, as the only effect of such notice of payments and of such payments accepted, even if they were as compensation payments, would be to give the defendant in this case the right to credit such payments on account of any damages that may be awarded to the plaintiff in this suit, under the law as charged to you applicable thereunder. (Fitzgerald *vs.* Harbor Lighterage, 244 N. Y. 132.)"

31. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"If you find in this case that there was an agreement made which might or might not have resulted in an award and that under such agreement part payment was made by the defendant, even then, this plaintiff is not barred from instituting this suit, as full payment and complete satisfaction was never made by the defendant to the plaintiff and the Workmen's Compensation Act having no application to the case since the accident did not arise out of or in the course of employment, the plaintiff is not barred by the making of any such alleged agreement or even the acceptance of any payments thereunder (Larscy *vs.* Hogan, *supra.*)"

32. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"The plaintiff is not barred from instituting this suit by reason of the alleged making and existence of the alleged agreement dated October 15, 1927, as it appears from the evidence in this case, from the terms and conditions stated in such agreement, that it is a report containing a statement of wages and an agreement to care for the case according to the terms of the Compensation Bureau and by the statute in such case made and provided, and that this form by law requires the signature of the employe as well as the employer and therefore, being a statement and an agreement in reference to compensation due to the injured employe, it is not binding upon such injured employe unless approved by the Workmen's Compensation Bureau, which does not appear to have been done in this case."

33. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"Whoever uses a highly destructive agency is held to a correspondingly high degree of

care. Care in this sense means more than mere mechanical skill, it includes circumspection and foresight with regard to reasonably probable contingencies (Heyer *vs.* Jersey Central, &c., Co., decided October 14, 1929, Court Errors, 7 N. J. Adv. Rep., page 1067, at page 1070)."

34. At the plaintiff's request, the Trial Court erroneously charged the jury as follows:

"If the alleged faulty acts of the plaintiff simply presents the condition under which his injuries were received and was not in a legal sense the contributory cause thereof, then the sole question for the jury to consider is whether under the circumstances and in the situation in which his injuries were received, they were due to the negligence of the defendant and its officers, servants, agents, and employes."

35. The Trial Court erroneously denied the defendant's request to charge the jury as follows:

"The burden is upon the plaintiff to prove by the greater weight of the evidence that the injuries which he sustained were the natural and proximate result of some negligence on the part of the Standard Oil Company. Negligence in this connection means merely the failure to take such precautions and exercise such degree of care as a reasonably careful and prudent person would have done under all of the surrounding circumstances."

except subject to the following modification:

"I will charge you, in connection with that, that negligence in this case did not mean merely the failure to take such precautions and exercise such care as a reasonably care-

ful and prudent person would have done, but it would be the failure to exercise that degree of care called for by the conditions and circumstances in this case. As I have already charged you, the nature of the plant, a product and substance manufactured, produced, and maintained by this defendant was of an unusually dangerous nature, and then, the degree of care is not the ordinary degree of care, but that high degree of care which a highly dangerous situation correspondingly requires."

36. The Trial Court erroneously denied the defendant's request to charge the jury as follows:

"If the accident arose out of a risk which was known to the plaintiff or which was apparent to him, or which by the exercise of ordinary care, would have been known to him, and which he could have avoided by taking some other route, then he must be held to have assumed the risk, and your verdict must be for the defendant."

except subject to the following modification:

"I cannot charge in that language, because I have already charged that this plaintiff had the same rights on that public thoroughfare as any other member of the traveling public. He was therefore entitled to the same protection against the negligent act of the defendant as any other member of the public would have been entitled to it. Whether or not he could have avoided this accident by taking another route, and whether or not there was a situation or time which should have suggested to him, as a reasonably prudent person, to take another route, would be a matter of possibly affecting the question of whether or not he was contributorily negligent, but whether or not that

situation presented itself, and how he acted in respect thereto, is, as I have previously advised you, a matter for your judgment and your determination."

37. The Trial Court erroneously denied the defendant's request to charge the jury as follows:

"If the plaintiff became entitled to receive compensation from the Standard Oil Company under the Workmen's Compensation Act, you need not consider whether all of such compensation, or all of such compensation due at the present time, has been paid to him. If he is entitled to such compensation, he can enforce the payment of it in an entirely different proceeding from this one, and the fact that it may not all have been paid to him does not warrant you in returning a verdict for the plaintiff in this case, but your verdict must be for the defendant."

38. The Trial Court erroneously denied the defendant's request to charge the jury as follows:

"If you find that after the accident happened, the plaintiff demanded of the defendants, or either of them, compensation under the Workmen's Compensation Act and accepted payment on account of such compensation, such conduct on his part will be a bar to his maintaining this suit and your verdict must be for the defendant."

39. The Trial Court erroneously denied the defendant's request to charge the jury as follows:

"If you find that after the accident, the plaintiff and the defendants, or either of them, executed an agreement under which the plaintiff agreed to accept and the defendants, or either of them, agreed to pay to the plain-

tiff, compensation in accordance with the Workmen's Compensation Act, and that the defendants or either of them, paid any compensation to the plaintiff pursuant to such agreement, and that the plaintiff retained the moneys so paid to him, such agreement and conduct on his part would bar him from maintaining this suit, and your verdict must be for the defendant."

40. The Trial Court erroneously denied the defendant's request to charge the jury as follows:

"If you find that after the accident the plaintiff demanded compensation under the Workmen's Compensation Act and accepted and retained payments made to him by the defendants, or either of them, on account of such compensation, and thereafter filed a petition in the Workmen's Compensation Bureau pursuant to the provisions of the Workmen's Compensation Act to enforce the payment of further compensation by the defendants or either of them, such agreement and conduct on his part would bar him from maintaining this suit, and your verdict must be for the defendant."

41. The Trial Court erroneously denied the defendant's request to charge the jury as follows:

"If you find that the plaintiff executed a written agreement by which he agreed to accept compensation, and the defendants, or either of them, agreed to pay compensation under the Workmen's Compensation Act to the plaintiff for the injuries which he received on August 8, 1927, then he cannot recover in this case, and your verdict must be in favor of the defendant."

42. The Trial Court erroneously denied the defendant's request to charge the jury as follows:

"There is no evidence in this case that the hole in the gas holder was due to corrosion. On the contrary, all of the witnesses who saw the hole after the accident said that the metal around it was in good condition and showed no evidence whatever of corrosion."

43. The Trial Court erroneously permitted counsel for the plaintiff, notwithstanding the timely objection on behalf of the defendant, to ask the witness James H. Scarr the following question:

"Q. Can you tell me whether or not at about the hour of eleven P. M. daylight saving time on the night of August 8, 1927, there was any thunder?"

44. The Trial Court erroneously permitted counsel for the plaintiff, notwithstanding the timely objection on behalf of the defendant, to ask the witness James H. Scarr the following question:

"Q. When did thunder appear? When does thunder appear to have taken place according to the government records that night?"

45. The Trial Court erroneously refused counsel for the defendant to ask the plaintiff, Edward N. Gilroy, the following question:

"Q. Didn't you assume that the company would pay?"

46. The Trial Court erroneously refused counsel for the defendant to ask the plaintiff, Edward N. Gilroy, the following question:

"Q. Do you remember executing a petition for compensation under the Workmen's Compensation Act?"

47. The Trial Court erroneously refused counsel for the defendant to ask the plaintiff, Edward N. Gilroy, the following question:

"Q. What did you telephone him about?"

48. The Trial Court erroneously refused counsel for the defendant to ask the plaintiff, Edward N. Gilroy, the following question:

"Q. Do you know what these checks were for?"

49. The Trial Court, notwithstanding timely objection on behalf of the defendant, erroneously allowed counsel for the plaintiff to ask the following question of the witness Harry W. Faasch:

"Q. How frequently did something go wrong with these engines over the period of a year prior to this accident?"

50. The Trial Court erroneously refused to allow counsel for the defendant to ask the witness, Mary V. Gilroy, the following question:

"Q. How did you get those checks?"

51. The Trial Court erroneously refused to allow counsel for the defendant to ask the witness, Russell N. Keppel, with respect to Defendant's Exhibit D-4, the following question:

"Q. Did that check accompany one of those letters?"

52. The Trial Court erroneously refused to allow counsel for the defendant to ask the witness, Russell N. Keppel, with respect to Defendant's Exhibit D-4, the following question:

"Q. Was this check sent out with one of those letters to the person who was to send it off?"

53. The Trial Court erroneously refused to allow counsel for the defendant to ask the witness, Russell N. Keppel, with respect to Defendant's Exhibit D-4, the following question:

> "Q. Is this the check referred to in that letter?"

54. The Trial Court erroneously refused to allow counsel for the defendant to ask the witness, Russell N. Keppel, with respect to Defendant's Exhibit D-8, the following question:

> "Q. Do you know whether or not all of these checks would have been sent to Mr. Gilroy if he had not signed that agreement?"

55. The Trial Court erroneously refused to allow counsel for the defendant to ask the witness, Russell N. Keppel, the following question with respect to Defendant's Exhibit D-8:

> "Q. How many of these checks were sent to Gilroy after the execution of the agreement?"

56. The Trial Court erroneously refused to allow counsel for the defendant to ask the witness, Russell N. Keppel, the following question:

> "Q. How long did you continue to pay Gilroy accident benefits?"

57. The Trial Court erroneously refused to allow counsel for the defendant to ask the witness, Russell N. Keppel, the following question:

> "Q. Did he do anything pursuant to those letters?"

58. The Trial Court erroneously sustained an objection to the following question propounded

by counsel for the defendant to the witness, Russell N. Keppel:

> "Q. Did you hear from Gilroy after sending him any of those letters?"

59. The Trial Court, notwithstanding the timely objection of the defendant, erroneously allowed counsel for the plaintiff to ask the following question of the witness, Russell N. Keppel:

> "Q. To whom do you make that report?"

60. The Trial Court, notwithstanding the timely objection of the defendant, erroneously allowed counsel for the plaintiff to ask the following question of the witness, Russell N. Keppel:

> "Q. You know that when an agreement for compensation is made, it has to be sent to the Bureau for approval, don't you? Answer yes or no."

61. The Trial Court erroneously refused to allow counsel for the defendant to ask the witness Russell N. Keppell the following question:

> "Q. You were asked by Mr. Gordon about a settlement with Peters and McMorrow. What did Peters and McMorrow receive?"

62. The Trial Court erroneously refused to admit the defendant's Exhibit D-7 for identification in evidence.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant-Appellant.

JOHN W. BISHOP, JR.,
Of Counsel.

PROOF OF SERVICE.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } SS.:

CHARLES F. BYRNE, being duly sworn according to law on his oath, says:

I am employed by the firm of Lindabury, Depue & Faulks, attorneys for the defendant-appellant above named. On the eleventh day of December, 1929, I served a true copy of the foregoing grounds of appeal upon Francis A. Gordon, Esq., attorney for the plaintiff-respondent above named at his office, No. 286 North Broad Street, in the City of Elizabeth, New Jersey, by delivering the same to Frank Welt, the person in charge of his said office, and explaining to him the contents thereof.

CHARLES F. BYRNE.

Sworn and subscribed to before me this 11th day of December, 1929.

HAROLD J. BROWN,
Notary Public of New Jersey.

(Notary Seal.)

(Endorsement.)

Receipt of a copy of the within grounds of appeal is hereby acknowledged this 11th day of December, 1929.

FRANCIS A. GORDON,
Attorney for Plaintiff-Respondent.

Testimony.

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

October Term, 1929.

EDWARD N. GILROY,
Plaintiff,

vs.

STANDARD OIL COMPANY (a New Jersey corporation) and STANDARD OIL COMPANY OF NEW JERSEY (a corporation of Delaware, authorized to do business in New Jersey),
Defendant.

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. LLOYD THOMPSON, Judge, and a jury, at the Union County Court House, in the City of Elizabeth, New Jersey, on the twenty-eighth day of October, A. D. 1929, at 9:30 A. M.

Appearances:

FRANCIS A. GORDON, Esq., attorney for the plaintiff.

MESSRS. LINDABURY, DEPUE & FAULKS (JOHN W. BISHOP, JR., Esq., present; BURTIS S. HORNER, Esq., present), attorneys for the defendants.

(A jury being empaneled and found satisfactory, they were sworn.)

(Mr. Gordon made an opening statement to the jury on behalf of the plaintiff, after which Mr. Bishop made an opening statement to the jury on behalf of the defendant.)

Mr. Gordon: I desire to offer in evidence a map entitled "Street map, Constable Hook, City of Bayonne".

Mr. Bishop: I do not object to the map as irrelevant, but I do not know sufficient about it to concede that the map is a correct map.

(Argument.)

Mr. Bishop: I do not object to the relevancy of the map, but I do feel that you should testify to it.

Mr. Gordon: I will call Mr. Quien.

Lewis Quien, Jr., a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. Quien, where do you live? A. In the City of Elizabeth.

Q. What is your occupation? A. Civil engineer and architect.

Q. How long have you been such? A. Twenty-five years.

Q. In connection with your occupation, have you become familiar with the taking of maps, diagrams and sketches? A. Yes, sir.

Q. Have you, in connection with the practice of your profession, become familiar with the scales as presented or representing locations as reproduced on maps? A. Yes, sir.

Q. Are you familiar with the City of Bayonne? A. Yes, sir.

Q. Are you familiar with the Constable Hook section? A. Yes, sir.

Q. Have you been familiar with the City of Bayonne for any length of time? A. About twenty years.

Q. In what capacities? A. Along the waterfront, building, docks and things.

Q. You have been all around the place? A. And as city architect for the Department of Public Safety.

Q. Are you familiar with the section in the city of Bayonne, known as Constable Hook section? A. Yes, sir.

Q. Are you familiar with the section in the city of Bayonne where Hook Road appears? A. Yes, sir.

Q. I show you a map and ask you if you made this map? A. Yes, sir.

Q. What does it represent? A. This represents Hook Road as it is laid down on the maps and as it is on the property there now.

Q. Do you know whether or not it has changed in the last three years? A. In the last three years? No, sir, it has not changed.

Q. Have you been there? A. Yes, sir.

Q. Are you familiar with the place? A. Yes, sir.

Q. Did you inspect the city maps? A. Yes.

Q. Do you know whether or not this map conforms with the city map? A. It does.

Q. Is this map drawn to scale? A. Yes, sir.

Q. What is the scale? A. 100 feet to one inch.

Mr. Gordon: I offer the map in evidence.

Mr. Bishop: I do not think it is properly proved, but I do not object to it.

Mr. Gordon: If it is objected to, I want the objection, and I submit that the thought of counsel is not an objection.

The Court: It will not be entertained as an objection.

Mr. Bishop: What I question is that all that is proved is that this is a copy of the city map. There is no proof that the city map is correct. With that understanding, I am willing to have it go in.

Mr. Gordon: I want to prove this map. I don't want any concessions.

By Mr. Gordon:

Q. Does that accurately represent the physical conditions that appeared there? A. Yes, sir.

Q. In August, 1927? A. Yes, sir.

Mr. Gordon: Now I offer the map in evidence.

Mr. Bishop: Did you make a survey of that road?

The Witness: Yes, sir.

Mr. Bishop: Then I have no objection to the map at all.

(The map referred to was received in evidence and marked "Plaintiff's Exhibit 1.")

By Mr. Gordon:

Q. I call your attention to plaintiff's Exhibit 1 and ask you to explain to us in what direction the arrow points? A. Towards the north.

Q. Is that towards the City of Bayonne proper? The north? A. No.

Q. Where is it toward? A. The city of Bayonne proper is toward the west.

Q. Will you mark at the top of the arrow the letter "N", please? Will you please indicate west on the map? A. Yes.

Q. Will you please indicate east on the map? A. Yes.

Q. Will you please indicate south on the map? A. Yes, sir.

Q. This map is drawn to scale representing what? A. 100 feet to the inch.

Q. That means that for every inch of line it represents 100 feet? A. Yes, sir.

Q. I direct your attention to a portion of the map which is covered by red crayon, and I ask you what that portion of the map represents? A. That is what is now called the Hook Road.

Q. And in order to reach Hook Road, what street do you go down? A. Twenty-second street.

Q. And then where do you turn? A. To a cross street known as Avenue J.

Q. Then you proceed in what direction? A. Towards the east.

Q. Would that be the east or the south? A. You proceed along Avenue J towards the south.

Q. Hook Road runs at that point parallel with what? A. With a spur line railroad.

Q. And Hook Road runs in what direction at that point? A. East, directly east.

Q. From the west to the east? A. Yes.

Q. And then, continuing on the red marked portion, where does Hook Road run? A. It runs south from this point down (indicating).

Q. As indicated there? A. Yes, sir.

Q. You have indicated a little bend and a continuation still running south? A. Yes.

Q. And then Hook Road reaches lands belonging to whom, if you know? A. Pacific Borax Company and several others.

Q. What kind of concerns are they? A. Industrial works.

Q. The Standard Oil Company works or different concerns? A. Different concerns.

Q. And then it runs along the lands of these other concerns in what direction? A. It follows the railroad.

Q. Before it makes its turn again? A. It runs easterly.

Q. As it runs easterly to a point, what direction does it assume? A. It goes south again.

Q. As it goes south, along what lands does it run on the westerly side? A. Along these various factories.

Q. On the easterly side? A. Standard Oil Company.

Q. Then it takes what kind of a direction? A. Follows the Constable Hook Railroad around to a point here (indicating).

Q. In what direction does it follow the Hook Railroad? A. It follows east and northeast.

Q. And as it runs east and northeast, what does it run parallel with? A. With the railroad.

Q. And as it runs that way, does it come in contact with lands of any other companies than the Standard Oil Company? A. The Orford Copper Company crosses at one point.

Q. I notice on the map on the first section that you have just described of Hook Road running from the north to the south, that on the westerly side of Hook Road there appears a marking "Gas holder 1" and "Gas holder 2". Do you know what kind of structures those markings represent? A. They were tanks.

Q. What kind of tanks? A. Iron tanks.

Q. What was their function or use? A. Storage of oil and gasoline.

Q. Gas or oils? A. Yes.

Q. You don't know the contents of the tank? A. No, sir.

Q. To the east of the road, you have indicated here "Main power house"? A. Yes, sir.

Q. And also, "Pump house"? A. Pump house, yes, sir.

Q. Have you, at my request, enlarged that section of the road that you have just referred to in describing the gas holder number one and gas holder number two? A. Yes, sir.

Q. And have you made a location map of that part of Hook Road of the city of Bayonne? A. Yes, sir.

Q. Will you please take your seat now? A. Yes, sir.

Q. Is this map, which I show you, such enlargement of that section? A. Yes, sir.

Q. Does that accurately represent the location of gas holders one and two? A. Yes, sir.

Q. And is this map drawn to scale? A. Yes, sir.

Q. Does it represent the location of the gas holders in August, 1927? A. Yes, sir.

Q. Prior to the time of any difficulty with either one of these gas holders, does that represent their location before the difficulties?

Mr. Bishop: I object to that. This witness does not know about the difficulty.

Mr. Gordon: I will withdraw that part of the question.

Q. Does it represent the location of the gas holders? A. At the time I made the survey.

By the Court:

Q. When was that? A. March, 1928.

By Mr. Gordon:

Q. What year? A. March 24, 1928.

Q. It was March 24, 1928? A. Yes.

Q. Were the gas holders there in 1927? A. Yes, sir.

Q. That is, gas holders one and two? A. I think they were.

Q. Don't you know? A. I would not want to say positively.

Mr. Gordon: I ask that this map be marked for identification.

(The map referred to was marked "Plaintiff's Exhibit 2 for identification".)

Q. Are these gas holders drawn according to actual measurements? A. Actual survey.

Mr. Gordon: Mr. Bishop has kindly consented that the location has not been changed from 1927.

The Court: Very well. In view of that the map will be received.

Mr. Gordon: I offer the map in evidence.

(The map referred to, which was previously marked "Plaintiff's Exhibit 2 for identification", was received in evidence and marked "Plaintiff's Exhibit 2".)

By Mr. Gordon:

Q. Mr. Quien, is this section drawn to scale? A. Yes, sir.

Q. And the scale is what? A. One inch to ten feet.

Q. That means that for every inch on this location map, of line there are ten feet? A. Yes, sir.

Q. I believe you have already indicated that this is an enlargement of the section which you have described? A. Yes, sir.

Q. Will you point to the map, referred to as Exhibit P-1, and show me where gas holder number one is? A. The first is this lower gas tank.

Q. The one most southerly on the map? A. Yes.

Q. Will you indicate on the larger map where the gas holder is? A. Here (indicating).

Q. Will you show us where gas holder number two is? A. That would be the northerly tank.

Q. Will you indicate on the larger map? A. Here (indicating).

Q. Now, to the right of the road or on the easterly side of Exhibit P-1, you have indicated a main power house. Where does that appear on the enlargement? A. Here (indicating).

Q. How is that marked on your enlargement? A. Two-story brick building, power house number two.

Q. You have indicated on Plaintiff's Exhibit 1 a pump house? A. Yes, sir.

Q. Will you please indicate where the pump house appears on Plaintiff's Exhibit 2? A. Here, this one here (indicating).

Q. Is it so marked? A. Yes, sir, two-story brick building pump house.

Q. And adjoining the portion which is described as a pump house, you have indicated a portion known as a locker room? A. Yes, sir.

Q. What is the width of Hook Road at the place adjoining gas holder number two and the pump house which you have just described on Plaintiff's Exhibit 2? A. Do you mean across the road?

Q. Yes. A. 19.3 feet.

Q. That means nineteen and three-tenths feet? A. Yes.

Q. That is indicated on the map in figures? A. Yes.

Q. From the westerly line, which is the line where the pump house faces on Hook Road, this line here (indicating)—this is the westerly side and this is the north—is that right? A. The westerly side of the building.

Q. I am talking about the westerly side of the building. From the westerly side of the pump house to the easterly line of Hook Road is what distance? A. Fifteen feet.

Q. Will you please mark it? A. Yes.

Q. What is the diameter of gas holder number two? A. Fifty-six feet.

Q. Will you please mark it? A. Yes, sir (indicating).

Q. Draw a line to indicate diameter. That is fifty-six feet? A. Yes, sir.

Q. How about gas holder number one? A. That is fifty-six feet.

Q. This section of Hook Road which you have indicated on Exhibit P-2, runs in what direction? A. North and south.

Q. And then at the top of the map, how does Hook Road run? A. It runs east and west.

Q. Will you show us where Hook Road turns westerly on Plaintiff's Exhibit 1? A. Here (indicating).

Q. Will you mark that with a "W"? A. Yes.

Q. Will you show us where Hook Road runs westerly on Plaintiff's Exhibit 2? A. Yes (indicating).

Q. Take your seat, please. Did you take any pictures of the Standard Oil properties and Hook Road at or about the vicinity of gas holder number two? A. Yes, sir.

Q. When did you take them? A. The same day I made the survey.

Q. Are you familiar with the handling of a camera? A. Yes.

Q. And you are familiar with the development of pictures? A. Yes, sir.

Q. How long have you been handling a camera? A. Twenty-five years.

Q. Did you personally take the pictures which I hold in my hand? A. One of my assistants took them, but I was right there.

Q. Do they accurately represent the conditions that appear on the picture? A. Yes.

Q. When were they taken? A. The day I made this survey.

Q. I show you a picture of a gas holder and ask you if you know which gas holder that is? A. That is known as number two.

Q. Gas holder number two? A. Yes, sir.

Q. Does that accurately represent the condition of the gas holder when you took the picture? A. Yes, sir.

The Court: Did he say when he took it?

Mr. Gordon: The same day when he made the map in March, 1928, and it was stipulated that they have not been moved since.

Q. I show you the photograph, which you have identified as a picture of gas holder number two, and I ask you in which direction the camera was placed while that picture was being taken? A. About opposite gas holder number one.

Q. Looking in which direction? A. Looking towards the north, northwest.

Mr. Gordon: I offer this picture in evidence.

Mr. Bishop: No objection.

(The picture referred to was received in evidence and marked "Plaintiff's Exhibit 3.")

Q. I show you a picture and ask you if you can tell me what that picture represents a site of? A. That is a view of Hook Road taken opposite tank number two looking north.

Q. That is the direction in which this arrow points? A. Yes.

Q. Will you mark north on the map, Plaintiff's Exhibit 2? A. Yes.

Q. Will you mark west? A. Yes (indicating).

Q. And east and south? A. Yes.

Q. Will you please mark on the back of this paper (indicating) "taken looking north"? A. Yes.

Q. Where does that view appear with reference to gas holder number two? A. Gas holder number two would not be shown on that picture.

Q. Where does its view appear with reference to Plaintiff's Exhibit 2? What is there on Plaintiff's Exhibit 2 which indicates this site? A. This was taken from a point standing here, and portions of this here and the rest of this (indicating).

Q. Is this a view of the side of the road where the brick building was? A. Yes, sir; a portion of it.

Q. A portion of the brick building? A. Yes, sir.

Q. And from which side of the road was that taken? A. Taken from here (indicating).

Q. That is, it was taken from the westerly side? A. Yes.

Q. And facing which side? A. Facing north, northeast.

Q. And the smokestack which appears on there is indicated where? A. That is on the power house.

Q. And this is a view of which side of the road? A. A view of the entire road.

Q. On which side of it? A. Mainly on the east side.

Q. Then, as I understand it, this is a view of the road running north and south showing the easterly side? A. Yes, sir.

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

Q. Will you mark that, please, "View of Hook Road opposite gas holders showing north and south or road"? A. Yes, sir.

Q. You say that the stack is attached to what building? A. To the power house.

Mr. Bishop: Is all this going to be offered in the picture?

Mr. Gordon: If you have no objection.

Mr. Bishop: It is not attached to the power house.

Mr. Gordon: Then I object to its going on myself.

By Mr. Gordon:

Q. Will you take that last line off, please? A. All right.

Mr. Gordon: It is stipulated by counsel that this photograph is a view of the east side of the road looking north from gas holder number two, and I have no objection to these markings being erased. I offer it in evidence.

(The picture referred to was received in evidence and marked "Plaintiff's Exhibit 4.")

Mr. Gordon: It is stipulated that this photograph is a view of the east side of Hook Road looking south toward the pump house. I offer that in evidence.

(The picture referred to was received in evidence and marked "Plaintiff's Exhibit 5.")

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Mr. Quien, did you make the measurements at the time you made this survey of the diameter of the gas holders? A. Yes, sir.

Q. And the distance from the road? A. Yes.

Q. I see, in Plaintiff's Exhibit 1, that you have the word "Standard Oil Company" in that portion of the land which lies to the west of the part of Hook Road that is shaded on the map? A. Yes.

Q. And also of that part that lies to the east on the map? A. Yes.

Q. Is that made to indicate that the Standard Oil Company owns the land on that side of the road? A. Yes.

Q. All the way from the railroad down to the turn in Hook Road? A. Yes.

Q. About how much distance is that? A. 820 feet.

Q. So that for 820 feet they own the land on both sides of the road? A. Yes.

Q. You took these pictures yourself? A. One of my men.

Q. That was taken under your direction? A. Yes.

Q. And at the same time this map was made? A. Yes, sir; the same day.

Q. And you also measured the location of these shrubbers and so on? A. Yes, sir.

Q. All the things that are shown there are derived from actual measurement made by you at that time? A. Yes.

Q. You do not know what the conditions were prior to that time or since then? A. No.

Q. What do these three lines across Plaintiff's Exhibit 2 represent? A. They represent a pipe line going across overhead.

Q. Do you know anything about pipe lines underground there? A. No, sir.

Mr. Bishop: That is all.

WILLIAM P. LEE, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. Lee, have you under subpoena here certain maps and agreements, and data of the City of Bayonne? A. Yes, sir.

Mr. Gordon: May I ask Mr. Lee to just step down for a moment and leave his papers there?

(The witness left the stand.)

Mr. Gordon: May I recall Mr. Quien, please?

Lewis Quien, Jr., Recalled—Direct.
William P. Lee, Recalled—Direct.

LEWIS QUIEN, JR., recalled.

Direct examination by Mr. Gordon:

Q. Mr. Quien, I show you a photograph showing two tanks, and ask you whether that photograph is an accurate representation of tanks one and two? A. Yes, sir.

Q. That is looking in what direction? A. That is looking northwest from opposite the gate.

Q. Where is the gate that you are talking about? A. At this point here (indicating).

Q. Will you mark that gate, or is it marked on the map? A. It is marked "gate".

Q. Then this is a picture showing a section of Hook Road with tanks one and two on it looking northerly? A. Yes.

Q. It was taken from a point opposite the gate as appears on the easterly side of Hook Road? Is that correct? A. Yes, sir.

Mr. Gordon: I offer it in evidence.

(The picture referred to was received in evidence and marked "Plaintiff's Exhibit 6".)

Mr. Bishop: No questions.

WILLIAM P. LEE, recalled.

Direct examination (continued) by Mr. Gordon:

Q. Mr. Lee, what is your full name, please? A. William P. Lee.

Q. What is your occupation? A. City Clerk of the City of Bayonne.

William P. Lee, Recalled—Direct.

Q. How long have you been the City Clerk for the City of Bayonne? A. About fifteen years.

Q. Have you with you the records and ordinances and agreements of the City of Bayonne pertaining to the road commonly referred to as Hook Road? A. I have all the papers that I was subpoenaed to bring.

Q. Have you with you an agreement dated on or about December 6, 1904, between the Standard Oil Company and the City of Bayonne? A. Yes, sir.

Q. Have you any other agreements with you dated December 6, 1904? A. Any other agreements other than that? No, sir.

Q. You have produced with the agreements a map or sketch. Is this map or sketch attached to this agreement? A. No, that is a map that I found in the same envelope with the agreement. There is a map attached to the agreement.

Q. Who filed this agreement?

Mr. Bishop: I object to that.

The Court: If he knows.

Mr. Gordon: I will withdraw the question.

Q. Is this agreement taken from the files of the city of Bayonne? A. Yes, sir, in the city clerk's office.

Mr. Gordon: I offer it in evidence.

Mr. Bishop: I object to it.

The Court: It does not appear yet what it is, so I cannot tell whether or not it is relevant to this case.

Mr. Gordon: It is a public record in connection with——

The Court: Even so, it would not be necessarily relevant unless——

Mr. Gordon: It is a public record in connection with the dedication of a strip of property alongside of the property of the Standard Oil Company.

The Court: Is this for the purpose of showing that this Hook Road is a public thoroughfare?

Mr. Gordon: Yes, sir.

The Court: Isn't it conceded?

Mr. Gordon: No, sir.

The Court: I understood that counsel admits that Hook Road, shown on Plaintiff's Exhibits 1 and 2, is a public thoroughfare.

Mr. Bishop: Yes.

The Court: You don't want any more than that, do you, Mr. Gordon?

Mr. Gordon: I just want to see whether or not there is some clause in here that I may want, if your Honor will bear with me for a moment. There is one clause in here that I should like to have in this case.

Mr. Bishop: May I see it? I object to that on the ground that it is irrelevant and incompetent.

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

(The paper referred to was marked "Plaintiff's Exhibit 7 for identification".)

Mr. Gordon: As I understand it, your Honor has stated and it is agreed to by counsel that Hook Road as evidenced by the plaintiff's exhibits in evidence, is a public road?

Mr. Bishop: A public thoroughfare.

Mr. Gordon: A public thoroughfare.

That is all, Mr. Lee.

JAMES H. SCARR, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Scarr, what is your occupation? A. I am in charge of the office of the United States Weather Bureau in New York City.

Q. How long have you been in charge of the office of the United States Weather Bureau? A. In New York City a little less than twenty years.

Q. And as such, are you an official of the government? A. I am.

Q. What does the weather bureau do? A. Primarily it keeps a record of weather conditions in New York City and vicinity, makes a record of them.

Q. When you say "vicinity", have you any records with you showing the winds, lightning, if any, thunder and lightning, if any, on the night of August 8, 1927? A. Yes.

Q. Are these records kept under your direction and supervision? A. Yes.

Q. They are government records? A. They are.

Q. Can you tell me whether or not on the night of August 8, 1927, there were any winds blowing in the vicinity of New York and Constable Hook?

Mr. Bishop: I object to that, if the witness is going to testify to something based upon a memorandum made by someone else.

By Mr. Gordon:

Q. Are you familiar with these records? A. Yes.

Q. How are you familiar with them? A. They are made under my direction and constant supervision, as required by law.

Q. As required by law? A. Yes.

Q. How long have they been under your direction and supervision? A. Well, this record was made on August 8, 1927, and I have been in charge of the records of the office of the weather bureau of New York more than twenty years.

Q. You testify frequently from these records? A. Yes, very frequently.

Mr. Bishop: I object to that as incompetent and irrelevant.

The Court: It simply goes to show his familiarity with them, I suppose.

By the Court:

Q. Mr. Scarr, are the records checked by you? A. Yes.

By Mr. Gordon:

Q. Can you tell me from these records whether or not there were any winds on August 8, 1927, in the vicinity of New York and Constable Hook?

The Court: At what time of day?

Mr. Gordon: At or about the hour of eleven p. m. Daylight Saving Time.

Mr. Bishop: May I cross-examine before the question is answered?

The Court: Yes.

By Mr. Bishop:

Q. Mr. Scarr, where is the station of which you are superintendent located? A. The office is at 17 Battery Place, New York City. That is lower Manhattan Island, the southerly point.

Q. Is that where your observations that are embodied in these records are made? A. Yes.

Q. Were the observations that are embodied in the record made by you? A. No, this record is not made in my own handwriting, no.

Q. Is it made by someone else? A. Yes.

Q. Were you present when it was made? A. Yes—well, I assume that I was.

Q. Were you present at eleven o'clock at night on August 8, 1927? A. No.

Q. When did you leave on that day? A. Well, I couldn't tell you. I usually leave between four and five p. m.

Q. And it is likely that you left around that time on the eighth of August of that year? A. Yes.

Q. When did you come back? A. The next morning about eight o'clock.

Q. So that any records between six o'clock and eight o'clock on the morning of August 9, 1927, were made by someone else in your absence? A. Most of the records are made up from self-recording instruments and are automatically recorded, but I was not present at eleven p. m. on August 8, no.

Q. You did not record the readings of that instrument during that time? A. No, not personally.

Mr. Bishop: I do not think the memorandum is enough from which this witness should be permitted to testify.

By the Court:

Q. And the records of the facts, upon which you were questioned by plaintiff's counsel, are shown by self-recording or automatic instruments? A. Yes, the questions already asked would be.

Q. And is there a record in your files or books or charts then subsequently made by some per-

son connected with your bureau? A. Yes, the reading of the instrument or instrument sheets are translated into figures or words and entered into this book, which is the original record.

Q. Who checks those transcriptions of these automatic records? A. Well, they are checked by various assistants in the office and supervised by myself. The final record is signed by me, because I am responsible for it.

Q. How frequently during the night of August 8, 1927, would records of the nature upon which you were questioned about, be made? A. The record of winds is made continuously, minute by minute.

Q. Is there any record that would show lightning and thunder? A. No self-recording instrument, no. That is a matter of personal observation. That, I might add, would be made by the man who is on duty on this particular night in the regular course of business.

The Court: I think, Mr. Bishop, that in view of the fact that these are official government records, made by those in charge of the government bureau in the manner testified to and checked by the witness himself as is customary, or at least supervised by him, that they should be admissible.

Mr. Bishop: Do I understand that the ruling of the Court extends to matters of personal observation by some person other than this man?

The Court: No.

Mr. Bishop: Or is it confined to the records derived from the self-recording instruments?

The Court: Only from the records derived from the self-recording processes.

(The stenographer read the previous question as follows:)

"Question: Can you tell me from these records whether or not there were any winds on August 8, 1927, in the vicinity of New York and Constable Hook?"

Mr. Bishop: I object to that on the further ground that the presence of winds would be irrelevant in this case.

The Court: The witness may answer the question.

Mr. Bishop: Exception.

A. There were winds, yes.

By Mr. Gordon:

Q. Do you know which way the wind was blowing? A. Yes.

Q. Do you know which way the wind was blowing at or about the hour of nine p. m. daylight saving time? A. Yes, sir.

Mr. Bishop: I object to the evidence of wind conditions at nine p. m. This accident happened at eleven p. m.

Mr. Gordon: I want to follow it up, and I will run it right down to ten, eleven o'clock, and so on.

The Court: He may answer.

Mr. Bishop: The same objection is made as to the other question, and I ask that it may all be taken subject to objection.

The Court: I have allowed him to testify that there were winds blowing, and, as Mr. Gordon says, he intends to connect it up by a continuous process. I shall allow him to answer this question.

Mr. Bishop: Exception. In order to avoid objection to each question, may I have it go to all this evidence as to the wind?

The Court: Yes, there will be a general objection noted to the questions on the subject of wind.

The Witness: The record shows the prevailing direction of the wind between eight and nine o'clock p. m. on Monday, August 8, 1927, daylight saving time, was from the south. I cannot give you the precise direction at any time during the hour from the record which I have.

By Mr. Gordon:

Q. When you say a wind is from the south, which way does it blow? A. Well, it is moving toward the north. You are looking south, and you face the wind, which is a south wind. By the way, in addition to that, the wind was at the rate of twenty miles an hour during that hour.

Q. From nine o'clock until ten o'clock, what can you tell us as to winds, if any, daylight saving time? A. The prevailing direction was from the southwest. There were twenty-two miles movement during the hour, and at one time during the hour, namely, 9:13, it reached a maximum velocity of 44 miles. That was from the south.

Q. And from ten o'clock to eleven o'clock p. m.? A. The prevailing direction was still southwest, and the movement only ten miles.

Q. And from eleven to twelve? A. The prevailing direction was south, the movement, ten miles.

Q. And these hours are daylight saving time hours that you are giving us? A. Right.

Q. You said something about the thunder and rain and lightning? A. No, I don't think I have.

Q. Well, I am going to ask you now. Have you anything that will show by your records as to thunder, rain, and lightning? A. Yes.

Q. What do they indicate as to whether or not there was any rain between the hours of nine and ten o'clock daylight saving time?

Mr. Bishop: I do not want to make further objection if that is based on the self-recording instruments, but if it is not, I do.

By the Court:

Q. Is the matter of rain based on the self-recording or automatic instruments? A. It is. The answer is yes, there was rain.

By Mr. Gordon.

Q. Do you know what precipitation there was, or downfall? A. Yes.

Q. How much? A. .43 of an inch; that is between nine and ten o'clock p. m. daylight saving time.

Q. What was it between ten and eleven o'clock daylight saving time? A. The rain ended at 10:15 p. m. In that fifteen minutes there was a fall of .10 of an inch.

Q. When did it stop? A. 10:15.

Q. P. M.? A. P. M.

Q. When did it start again, if it did start that night? A. At seven minutes past eleven daylight saving time.

Q. Do you know whether or not your records indicate how long the rain continued after seven minutes past eleven daylight saving time? A. Yes, sir.

Q. How long? A. Until 8:35 a. m. the next morning on the ninth.

Q. This was the night of the eighth? Have you any records as to thunder and lightning there? A. Yes, as to thunder.

Q. As to thunder? A. Yes.

Q. And from your experience and knowledge of weather conditions, within what area is thunder heard?

Mr. Bishop: Just a minute; it does not appear that there was any thunder.

The Court: He is testifying as to whether or not there was, and he would first have to show whether it could be within the scope of his observation.

Mr. Bishop: He was not there.

The Court: This is a government bureau, and these are government records, and I think more latitude is allowed under such conditions, than under private records.

By Mr. Gordon:

Q. Can you tell me within what radius thunder can be heard? A. Yes.

Q. What is the radius? A. Heavy thunder can be heard a distance of twenty miles.

Q. And light thunder? A. Well, it varies down to a few miles, of course, but any thunder can be heard beyond ten miles.

Q. Any thunder? A. Yes.

Q. How far is Constable Hook from your observatory point? A. Approximately six miles in a straight line.

Q. Can you tell me whether or not at about the hour of eleven p. m. daylight saving time on the night of August 8, 1927, there was any thunder?

Mr. Bishop: I object to that, because it appears from the testimony of this witness

that that is based upon the observation of someone other than the witness, and recorded by someone other than the witness and not based upon any self-recording instruments.

Mr. Gordon: It is disclosed by the United States Government Weather Bureau records.

The Court: I will allow the question.

Mr. Bishop: Exception.

A. The record shows no thunder at that time.

By Mr. Gordon:

Q. What time was that? At or about eleven o'clock? A. About eleven p. m. daylight saving time on the night of August 8, 1927.

Q. When did thunder appear? When does thunder appear to have taken place according to the government records that night?

Mr. Bishop: Same objection.

A. The last thunder heard prior to eleven p. m. that night was at 7:50—8:50 p. m. daylight saving time.

Mr. Bishop: Exception.

Q. When was the next thunder after that? A. At 12:17 a. m. the morning of the ninth.

Q. In order to have lightning, can you tell me whether or not there must be thunder? A. There must be, yes.

Q. And without thunder there can be no lightning, is that correct? A. Yes—well, I would like to modify that. There are what are sometimes called silent flashes that are so far away that nobody hears it.

Q. But are they the type of flash that gives contacts? A. No.

Mr. Bishop: I object to that. I don't think the witness is qualified to tell that.

By Mr. Gordon:

Q. How long have you been studying weather conditions? A. I have been in the United States Weather Bureau service something over thirty years.

Q. Have you familiarized yourself on lightning and thunder and the operations thereof? A. Yes.

Q. And the accompanying effects of lightning and thunder? A. Yes.

Q. And your bureau is the nearest Government record bureau to Constable Hook?

Mr. Bishop: I object.

Mr. Gordon: I will withdraw the question.

Q. Do you know which is the nearest Government record bureau to Constable Hook? A. Yes.

Q. Which is it? A. The nearest first class Weather Bureau station to Constable Hook is the one at 17 Battery Place, New York.

By the Court:

Q. Is there any other Government station nearer that that? A. In 1927 there was somewhere in Bayonne what we call a co-operative station. That is a station established to measure rainfall and record temperatures, and the observer in charge serves without compensation and makes a report monthly.

Q. Would the bureau of which you have been in charge have been equally as competent as any

other station to ascertain the conditions that were true on this date in question at the location of Constable Hook? A. Yes.

Q. You said that there ordinarily could not be lightning without thunder. Could there be thunder without lightning? A. No.

Q. Is thunder a result of lightning? A. It is.

By Mr. Gordon:

Q. What is the name of the man who recorded the lightning and thunder as per your records?

Mr. Bishop: I object to that as irrelevant.

Mr. Gordon: Counsel objected before because we did not produce that man.

The Court: I allowed the question.

Mr. Bishop: Exception.

A. The record itself does not show, but at that time we had a constant man on this P. M. trick, and unless for some unusual reason he was absent, I can tell you that, if that is sufficient.

Q. Are you in a position to give us his name? A. Yes, within the limitations I have just stated. His name is William G. Riley.

Q. Do you know if he is still in the employ of the United States Government? A. He is not.

Q. Do you know where he is? A. Exactly, no. He comes to the office occasionally. I have seen him within the last few months.

Q. Do you know where he lives? A. No.

Q. Do you know where he is employed? A. I think he is not employed. That is my impression. I don't mean to infer from that that his character is bad or that he was discharged, or anything, but he is a man of independent means, and he resigns

from the Weather Bureau every few years and takes a vacation and then comes back again.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. It is true, is it not, that these thunder storms, especially in the summer time, are very highly localized? A. Yes.

Q. It may be raining sharply at one point and not raining at all at another point six miles away? A. That is possible of a thunder storm, yes.

Q. And that same is true of wind, is it not? A. What do you mean?

Q. I mean that you may have a wind squall, a wind blowing at one place, and six miles away, there may not be the same wind in the same direction? A. That is true.

Q. You said your record showed lightning at certain times. You mean that it showed positively that there was no lightning at other times or that there is merely no record at all at other times whether or not there was lightning? A. The record shows the time and the occasion of the first thunder being heard in each thunder storm, and the time and occasion of the last thunder. That is so far ordinarily as the record of thunder storm goes. The record shows those two.

Q. That is based upon the personal observation of someone, isn't it? A. Yes.

Q. And that was Mr. Riley you spoke of at this time? A. I assume it was.

Q. But you do not know whether he was there or not? A. Well, I presume I should say no; I don't know whether or not he was.

Q. You said the record shows that there was thunder at 8:50 p. m. on the night of August 8?

And thunder at 12:17, that is, shortly after midnight that same night or the next morning. Was there any record of anything at all with respect to thunder in between? A. No.

Q. You have no personal knowledge whether or not Mr. Riley was there between 8:50 and 12:17? A. If he was there at all, he was there at that time.

Q. And you don't know whether or not he was there at all? A. No, I have told you I do not. He was on duty that night, and if the regular man was there who went on night duty, it was Mr. Riley. I am not sure that it was Mr. Riley, but someone was there at that time. Of that I am positive, except that I did not see him.

Q. Is it customary for your people to report every slight flash of lightning, or does it have to reach a certain intensity before it is recorded? A. It has to cause thunder before it is recorded.

Q. There is lightning that does not cause thunder? A. Probably there is, as I have said before, something they call silent flashes, minute and minor discharges of electricity not sufficient to cause an audible sound of thunder. The thunder is the discharge of the electric spark.

Q. It is the noise caused by the discharge? A. Yes, very good; I thank you for the amendment.

Q. And there might be a discharge of an electric spark which nevertheless would not produce a sound that could be heard six miles away? A. Why, yes, the static electrical effect may occur and only make a little snap. You get them if you move in this manner (indicating).

Q. That is the way you use to light the gas by shuffling across the carpet and touching it with your finger? A. Yes.

Q. And you get a spark sufficient to light the gas, but you cannot hear it six miles away, isn't that true? A. Yes.

By Mr. Gordon:

Q. You are sure that there was no thunder from 7:50 p. m. until 12:17 a. m.?

Mr. Bishop: If the Court please, the witness cannot testify that he is sure. He can testify to what his records show.

By Mr. Gordon:

Q. Your records show that? A. Yes.

Q. And as you have said before, those are the official government records? A. They are.

Mr. Gordon: That is all.

Chester F. Smith, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. Smith, did you receive a subpoena? A. I did, sir.

Q. Have you the subpoena with you? A. Yes, sir.

Q. What is your occupation? A. Manager of the Bayonne Works of the Standard Oil Company of New Jersey.

Q. Did you bring with you the daily report or log showing all the operations conducted in the main power house of the Bayonne plant as made by the engineer, switch board operators and other

employes employed in the main power house of the Standard Oil Company of the Bayonne plant on all shifts during the day and night of August 8, 1927? And also all similar records, daily reports or logs made by the employes of the main power house for a period of ninety days preceding August 8, 1927, more particularly the records in regard to the pressure going in and out of gas holders, the percentage of air by volume, the percentage of sulphur content, and the daily record, report, log, or other memoranda made by the employes of the gas compression plant during the day and night of August 8, 1927, and all similar reports made by the employes at said plant of the Standard Oil Company for a period of ninety days prior to August 8, 1927, and the chemist's report of analysis of all crude oils in that apparatus which I have mentioned, and reports of analysis or data showing the ingredients of the gas contained in the gas holders numbers one, two, and three during the day and night of August 8, 1927? A. I feel I have gotten together such reports as I could within the limited time allowed me to get them.

Q. Are there any reports which you feel that you can get which you have not with you? A. I don't know, sir.

Q. Have you made any endeavor to ascertain whether or not there were other reports? A. Within the time allowed me, I have tried to get together the reports that are possible.

Q. You are familiar with the general operations of the plant? A. I am, of course, in charge at the plant, and know the general operation, but not the details.

Q. And the books and records kept by the plant of those operations? A. No, sir.

Q. Do you know what books and records are necessary? A. No, sir, not the detail in connection with that operation.

Q. Can you locate or definitely ascertain whether or not there are any books and records connected with the operation? A. I feel I have gotten together such information that is called for by the subpoena. Whether or not it covers everything, I don't know.

Q. Can you definitely state what records, which have been subpoenaed, have been kept by the Standard Oil Company regarding the operations mentioned in the subpoena during the period of time covered by the subpoena? A. I have brought to the Court the records that I have found dealing with the information contained in the subpoena.

Q. Do you know whether or not there are any records in existence which you have not been able to find? A. To my knowledge, no.

Q. May I have the records that you have produced pursuant to the subpoena?

Mr. Bishop: May I see that subpoena a minute, Mr. Gordon?

Mr. Gordon: Certainly.

Mr. Bishop: It seems to me that the record of ninety days before an accident would have no particular relevancy as to what happened on the eighth of August. Here is a great mass of records. To subpoena records and then require that they be turned over to counsel for examination is not proper.

Mr. Gordon: I don't know how else counsel can offer them until he has examined them. The matter is entirely in control of the defendant.

(Argument.)

Mr. Gordon: In addition to that we also have a right to show the practice of the company for a reasonable period of time in reference to the particular operation as appears by their records.

The Court: I think it will be competent for you to do that. Of course, it is a matter of especial importance as to whether or not this is the time to do that or whether it should not have been done by the process of interrogatories. It depends upon how long it is going to take you to ascertain which of these records are pertinent to this case. In other words, I don't want to hold up the trial of this case while you are looking over a mass of ninety-day records in a production plant like this. If you cannot reasonably lay your hands on what you want to examine——

Mr. Gordon: Will your Honor permit me to withdraw the witness and let one of my associates go over the data with him?

Mr. Bishop: Most emphatically not. That is a request that all of this data, including the chemical analyses, be submitted to somebody else to examine.

Mr. Gordon: I will withdraw the witness and ask that these papers be marked in one bundle for identification.

The Court: That may be done for the present.

(The papers referred to were marked "Plaintiff's Exhibit 8 for identification".)

HUGH THOMAS MCMORROW, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. McMorrow, how old are you? A. Thirty years past.

Q. Where do you live? A. 880 Broadway, Bayonne.

Q. How long have you lived in Bayonne? A. About twenty-nine years.

Q. Are you married? A. Yes, sir.

Q. Do you know the plaintiff in this case, Mr. Edward Gilroy? A. Yes, sir.

Q. How long have you known him? A. About eight years.

Q. Did you know him in the year 1927? A. Yes, sir.

Q. You had been working with him on that day? A. Yes, sir. Well, which day?

Q. On the eighth day of August, 1927. A. Yes, sir.

Q. Where had he been working with you? A. In the lower Hook, what we call the lower Hook, Kimble's Pump House.

Q. That is beyond the gas holders one and two? A. Yes, sir.

Q. When I say beyond, after you turn into Avenue J from Twenty-second Street, then go easterly along Hook Road, and then southerly along Hook Road, you reach gas holder number two, is that correct? A. Yes, sir.

Q. Then you reach gas holder number one? A. I am not sure of that.

Q. Well, this is the further one from the north? A. Yes, that is right.

Q. And then you continue on southerly, is that correct? A. Yes, sir.

Q. Is the pumping house near the trestle railroad or beyond there? Do you know where the gate is? A. Yes, our place is still further on than that.

Q. You have to cross a railroad to get to your place? A. Yes, sir.

Q. You were working then on that day at the Kimble pump house? A. Yes.

Q. And Ed. Gilroy was with you? A. Yes, sir.

Q. What were you working at? A. As a helper.

Q. As a helper to whom? A. To Edward Gilroy.

Q. And your shift was what? A. Three to eleven shift.

Q. Was Ed. Gilroy on the same shift with you? A. Yes.

Q. That is, three to eleven p. m.? A. Yes.

Q. Did you go over Hook Road from time to time? A. Yes, sir, almost every day.

Q. And you went past these gas holders? A. Yes, sir.

Q. Did you ever notice anything in particular prior to August 8, 1927, when you passed the gas holders? A. Yes, sir, I always got the odor of gas.

Q. Where was this odor of gas first apparent to you? When did you first notice it as you were approaching the gas holders? A. Well, on which day?

Q. I mean on prior days? A. Well, I would say, what we call the chemical works, that is, beyond the railroad trestle, from there on.

Q. On this day did you notice any odor of gas? A. Well, not going to work, no, not at three in the afternoon.

Q. You did not notice it at three in the afternoon? A. No, sir.

Q. You had your Ford car with you? A. Yes, sir.

Q. What did you use that for? A. Well, I used it for pleasure and business, going back and forth to work.

Q. Did you go over Hook Road with it? A. Yes, sir.

Q. Did you ever see any other cars going over Hook Road? A. Sure, quite a number.

Q. Did you ever see any jitney buses going over it? A. Yes.

Q. Did you ever see any other vehicles? A. Well, trucks of all descriptions, all transportation goes through there.

Q. On the night of August 8, 1927, when you were on this shift from three to eleven, where was your Ford car? A. Well, that was parked way at the end of the road inside of the company's yard, at the end of that road.

Q. At the end of what road, do you mean? A. At the end of Hook Road.

Q. And it was inside of the company's gate? A. Yes, sir.

Q. And in order to reach your car, did you have to walk anywheres from your place where you were working? A. Yes, sir, we had to walk well, probably four minute walk to reach the car.

Q. At the place where you were working, were there any other men working with you on that shift? A. Yes, sir.

Q. That was in a building? A. Yes.

Q. What kind of building was it? A. One-story.

Q. What do they call it? A. Pump house.

Q. What number was that pump house? A. Since then they have numbered it.

Q. They called it then the Kimble pump house? A. Then it was called the Kimble pump house.

Q. Did you leave the pump house at the end of the shift, or before the shift hour? A. Well, I believe we was privileged to shift a quarter to the hour.

Q. Do you know when you left that shift that night? A. Yes, sir, about ten minutes to eleven.

Q. On the night of August 8, 1927, do you mean? A. Yes, sir.

Q. Who left with you? A. Edward Gilroy, Al. Peters, and Louis Roe.

Q. Did you all leave the Kimble pump house together? A. Yes, sir.

Q. And then where did you all go? A. Why, up to the other end of the yard, and we all got in the car to go home, into my car.

Q. In order to get to your car, you say you walked some distance? A. Yes, sir.

Q. And that took you how long? A. Well, about four minutes or maybe five, not much more.

Q. When you got into your car, where did you sit? A. I was driving.

Q. What kind of Ford car was this? A. 1924 touring.

Q. Did you have any side curtains attached to the car? A. No, not that night, I didn't.

Q. It was open? A. It was an open car.

Q. How many passengers could be accommodated in that car? A. Well, there was four in it then; you could really accommodate five.

Q. Do you mean two in the front? A. Two in the front and three in the back.

Q. What hand drive was this car? Was it a left or right-hand drive? A. It is a left-hand drive, I believe you call it.

Q. And you were driving? A. Yes.

Q. You were in the driver's seat? A. Yes, sir.

Q. And who was sitting alongside of you? A. Edward Gilroy.

Q. So that he was on the right-hand side of the car? A. Yes, sir.

Q. And in the back seat, who was in the car? A. Al. Peters and Louis Roe.

Q. Do you know where Louis Peters is? A. Yes, he was sitting directly in back of me on the left-hand side.

Q. That is where he was? A. Yes.

Q. Where was Roe sitting? A. He was sitting on the right side in back of Gilroy.

Q. Do you know where Roe is?

Mr. Bishop: I object to that.

A. He died from the same accident.

Mr. Bishop: I object to that, your Honor, and ask that that be stricken out.

The Court: Strike it out.

By Mr. Gordon:

Q. Is he alive or dead? A. He is dead.

Mr. Bishop: I object to that.

By Mr. Gordon:

Q. Is Roe alive or dead? A. He is dead.

Q. When you got into the car and you started it, after having to walk about four or five minutes, were you still within the gate? A. Starting the car, yes, sir; we were still inside of the plant.

Q. Were you inside of the gate when you did get in the car? A. Yes, sir.

Q. In order to get to the gate, you had to drive some distance, is that correct? A. Well, a very short distance.

Q. How far was it until you reached the gate? A. I would not say any more than fifty feet.

Q. Then, when you passed the gate, where did the car go? A. Up along Hook Road.

Q. When you say it went up along Hook Road, was your automobile on Hook Road? A. Yes, sir.

Q. And in which direction was it going? A. Well, one part of the road you would be going west, and then you would turn north again, and then you would turn west.

Q. Can you show me on this map where the gate is which leads to that part of the plant where the Kimble pump house was? A. I believe it is about here (indicating).

Q. At the end of the railroad? Do you know where the copper company is? A. Yes.

Q. Did you pass the copper company to get to the gate? A. Yes, sir.

Mr. Bishop: I think that is leading.

The Witness: Past there (indicating), and I believe you turn back here (indicating), and there is a gate on this side, and a gate on that side (indicating).

By Mr. Gordon:

Q. Will you please mark the point where the gates are that you have to get out of in order to get into Hook Road? A. Here (indicating).

Q. They are marked by X's? A. Yes.

Q. They are marked by X's on Plaintiff's Exhibit 1? A. Yes.

Q. Am I correct in assuming that they are beyond the Orford Nickle and Copper Company property as outlined on the map? A. Yes, sir.

Q. You say you entered Hook Road? A. Yes, sir.

Q. You recognize the crayon portion as Hook Road on this map? A. Yes.

Q. Will you indicate now along this crayon portion the course that your automobile took when it left the gate? Just show us. A. When we left this gate here (indicating) we came out here (indicating).

Mr. Gordon: The witness indicates, at the present time, a westerly course, northerly, westerly, northerly course, along Hook Road.

Q. Do you know what the weather was on the day of this accident of August 8, 1927? A. Yes, sir; it was raining very hard.

Q. When you quit work, do you know what the weather was? A. Well, it was raining.

Q. Was there any thunder or lightning when you quit work? A. No, sir.

Q. Were you present then and did you see it yourself? A. I seen it; I was present. That is one thing we watch for, lightning.

Q. Do you know for how long prior thereto there was no thunder or lightning? A. Well, I got here early in the evening; it was the last evening.

Q. Do you know how long after you left your shift the thunder and lightning appeared? A. Well, I wasn't in very good condition after then to tell whether or not there was lightning or not.

Q. Had it appeared up to the time the accident happened? A. No.

Q. As you turned into Hook Road, did you get to that portion of Hook Road which runs north and south, as evidenced by Exhibit P-1, where the gas holders one and two up here adjoining the road? Did you get into that portion of the road? A. Yes, sir.

Q. As you were proceeding towards the gas holders, what, if anything, did you notice in particular? A. A very strong smell of gas.

Q. Do you know how far away you were from the gas holders when you smelled the strong odor of gas? A. Yes, I was right at the trestle.

Q. And the trestle is on the map here, Exhibit P-2, the trestle railroad? A. Yes.

Q. Is that at a point when you have turned into Hook Road running north and south? A. Yes, I believe it is right around here (indicating).

Q. Will you please mark that what you consider to be the trestle? A. Yes.

Q. You marked that trestle here "T" and your initials? A. Yes.

Q. Did you notice the odor of gas there? A. Yes, sir.

Q. You are still employed by the Standard Oil Company, aren't you? A. Yes, sir.

Q. In what department are you employed? A. In the same place, Kimble's pumping house.

Q. As you proceeded along Hook Road, approaching gas holders one and two, what, if anything, was the condition as to the odor of gas? A. Well, as I approached the gas holders, I was very near overcome from the odor of it; in fact, I become sick, and in another minute of time, why, I was acting as though I was drunk. It went right to my head, and the next minute there was fire.

Q. Did you reach a position on Hook Road near that number three pump house? A. I don't believe I know these pumping houses by number.

Q. You know where the gas holders one and two were? A. I just know the gas holders; I don't even know their numbers.

Q. Do you know whether or not there was a pump house opposite gas holder number two? A.

Yes, there is a building there, and since the accident I learned that it was a pump house there.

Q. Do you know whether there was any building connected with the pumping house or not? A. Yes, sir; there was another building.

Q. What did they call that? A. I don't know what they would call it, or what they did call it; I never knew that part of the yard, that is, the location of it.

Q. As you passed gas holders one and two on other occasions, did you ever notice any unusual conditions in that neighborhood? A. Well, always at that trestle, whether they was directly at the holders or not, I smelled gas, but I can always get a peculiar odor in that neighborhood there, between the trestle and the chemical works.

Q. As you approached the gas holders on other occasions, prior to this accident, can you tell me whether or not the odors became stronger? A. Well, I don't know; I can't say whether they were stronger, or whether they were the same every day to me.

Q. Was there a light or a strong odor on these other occasions near the gas holders? A. Well, it always seemed to be a light odor.

Q. You were on Hook Road and driving towards home, is that correct? A. Yes, sir.

Q. And you reached a position in Hook Road at or near these gas holders? A. Yes, sir.

Q. Had you reached the building opposite gas holder number two? A. Well, just about reached.

Q. And then, where was your car? Where was your car? Was it on Hook Road? A. Yes, sir.

Q. Was it in operation? A. In operation.

Q. Did you have any difficulty with the car up to that point? A. No, sir.

Q. You had been driving continuously? A. Yes, sir.

Q. Was it raining? A. It was raining.

Q. Tell us what happened. A. Well, as I—right after I left the trestle, a very strong odor of gas, which is a sweet odor, turned my stomach, and as I—before it had taken any effect on me, it seemed to go to my head, and I wanted to say something to Gilroy about taking the car, when a big ball of fire came out of the fence and seemed to travel underneath the radiator of the car, and the next thing, I landed in the road, and everything there seemed to go afire.

Q. From which side of your automobile did this ball of fire come? A. From the right side.

Q. From what place did it come? A. I seen it coming, and it seemed to be coming out of the fence.

Q. It seemed to be coming from a fence in front of what place? A. Well, right by the building there, as you call the pump house; near there or right at it, rather.

Q. Did you see what happened to that ball of fire? A. Well, it came directly to the front of the radiator of the car and then disappeared, as though the draft of the car had brought it underneath.

Q. Then what happened? A. Well, the next thing I know, I was laying in the road alongside of Gilroy.

Q. Did you hear any noise? A. Only a lot of screaming, and that is all, from the four of us, I guess.

Q. Did you see what happened to Gilroy? A. Well, yes; neither one—we was all—we seemed to be trying to find our sight. We had no sight.

Q. Where did you personally land? A. Well, I believe I landed near—there is a little gate there. I believe I landed somewheres near that gate.

Q. On which side of the road did you land? A. I landed on the right-hand side of the road.

Q. Was that in the direction in which you were proceeding? A. Yes, sir.

Q. Did you observe the conditions in the road after you picked yourself up? A. Yes, sir.

Q. What did you notice in the road? A. The roadway was burning.

Q. The roadway was burning? A. Yes, sir.

Q. Describe this fire that you saw in the roadway. A. Well, it was as a cone, three or four of them burning in the roadway just as a cone.

Q. Do you mean just like a spiral cone? A. Yes, sir.

Q. Were they all together or in different places? A. No, seemed to be spread out over the road.

Q. Have you ever seen gas burning? A. Well, outside of——

Mr. Gordon: I will withdraw the question.

Q. Did you see any other parts of the road other than the parts you were on? Did you see the side of the road? A. No, I can't say that I did.

Q. Did you see the holders? A. Yes, I seen the holder lighten up and go on fire.

Q. As you saw the holder lighten up, where did you first see the flame on the holder? A. Right at the bottom, from the roadway right up. You could see it go right through it.

Q. After it reached the top, what, if anything, did you notice? A. Well, the force had knocked me down again and lifted me right off my feet, and it was just a mass of flame then at the top, and enormous heat.

Q. Where was the mass of flame? A. Right around—it seemed to be at the top of the tank.

Q. When the flames went up the side of the tank and reached the top, what, if anything, happened? A. Yes, the whole thing just blew up and lit up like daylight, it was so bright.

Q. Do you know whether or not a month before this accident you received any orders in reference to going over this part of the road?

Mr. Bishop: I object to that.

The Court: I don't know just what it is going to lead to, but I don't see anything objectionable to so far. I shall allow him to answer it.

Mr. Bishop: Exception.

Mr. Gordon: I will withdraw the question.

Q. Had you ever been stopped from using this road at or near the gas tanks prior to the accident? A. Yes, sir.

Mr. Bishop: I object to that.

The Court: Objection overruled.

Mr. Bishop: Exception.

By Mr. Gordon:

Q. When? A. Well, I don't know particularly what day, but I recall detouring twice through the main yard on account of work going on on that road.

Mr. Bishop: I object to that. What was the work?

The Court: Objection overruled.

The Witness: That I don't know.

By Mr. Gordon:

Q. Did you see what they were doing there? A. When I came out of the other end, I seen men

working, but just what work they were doing, I can't tell, whether they was digging or what.

Q. What happened to Ed. Gilroy? A. Well, that night, he was pretty well burned.

Q. Did you see him? A. Yes, sir.

Q. Where did you see him? A. As we landed out of the car, we landed together on the roadway, and I suggested going back——

Q. Never mind the talk, please. Just what did you do? A. We started to try to get some help or oil to put on ourselves.

Q. Do you know where Ed. Gilroy went or was taken? A. Yes, he went himself into, I believe, the power house.

Q. And that is a building which is on this map here (indicating), north of the pump house? A. Yes, sir.

Q. It is marked "Two-story building, power house number two"? A. Yes, sir.

Mr. Gordon: I am referring now to plaintiff's Exhibit 2.

Q. When he got into that building, what was his condition? A. Well, that I don't know. I didn't see him any more. I wasn't in the building with him.

Q. Did you see his clothing as he was getting to the building? A. Well, yes, it was burning.

Q. In what particular spot was it burning? A. Well, the trousers of his pants, I remember seeing those burn.

Q. Where else was he burning? A. Well, I can't really say. I was burning myself.

Q. When you worked in the pumping house alongside of Ed. Gilroy, did you have occasion to use tools there? A. Well, no—yes, we used them.

Q. Did you lift wrenches and things of that kind? A. Wrenches, yes, sir.

Q. Do you know whether or not Ed. Gilroy, while he worked there, used any tools in his activities? A. Yes, sir.

Q. What kind of tools did he use? A. Well, wrenches of different sizes and——

Q. How were those wrenches used? A. Well, in repairing pumps, packing pumps, it would be required.

Q. What were the weights and sizes of these different kinds of wrenches? A. Oh, I should judge anywheres from a pound to at least five pounds in weight, four pounds in weight.

Q. Did you observe his general physical condition before this accident? A. Well, yes.

Q. Did you know how he was physically? A. Yes, sir.

Q. You had been working alongside of him for how long? A. About seven years.

Q. Did you watch him at his activities on the work? A. Well, I often noticed him, yes.

Q. Did you notice how he handled his work? A. All right, the same as anybody else.

Q. Did he ever have any difficulty in handling any of the tools of his trade? A. No, sir.

Q. Or did he ever have any difficulty in performing any of the duties that he was in charge of? A. No, sir, no trouble.

Q. Are these valves and wrenches that you used small valves or are they large valves? A. They are both, small and large.

Q. In the large ones, did you require the use of any force or energy? A. Oh, yes, sir.

Q. Do you know whether or not Ed. Gilroy turned any large valves? A. Yes, sir.

Q. Did he often turn them? A. Often, yes, sir.

Q. Do you know whether or not there was any climbing done in the pump house in connection with the work going on there? A. Yes, sir.

Q. Who did the climbing? A. Well, it was distributed; each one had done some of it, sometime during the shift.

Q. Did you ever see Ed. Gilroy do any climbing? A. Yes.

Q. Did he ever have any difficulty getting up and down? A. No, sir.

Q. Are there any valves that have to be turned by hand alone? A. Yes, sir.

Q. Are they large or small valves? A. They are large and small.

Q. About what size are these valves that you have to turn by hand? A. The largest is sixteen inch.

Q. That is in diameter alone? A. That is the diameter.

Q. Were you in the same hospital with Ed. Gilroy? A. Yes, sir.

Q. Did you see him while you were in the hospital? A. Yes, sir.

Q. Did you observe his condition while at the hospital? A. Yes, sir.

Q. How frequently did you see him there? A. Well, I seen him—the first three weeks I don't think I seen him, but after that I seen him almost every day; in fact, every day I was with him.

Q. Where was he when you saw him? A. He was in the separate room than me for at least three or four weeks.

Q. Do you know whether or not he was in pain? A. Yes.

Q. Do you know whether he was sitting up or lying down? A. Mostly lying down.

Q. Did he have a nurse in attendance? A. Yes, sir.

Q. Did you see him after those three weeks? A. Yes.

Q. How frequently? A. Every day, then; I was moved into his room.

Q. How long were you in the same room with him? A. I believe seven weeks.

Q. Did you say seven weeks? A. Yes.

Q. During those seven weeks do you know whether or not he experienced any pain? A. Oh, yes.

Q. Did you see him day and night? A. Day and night, yes, sir.

Q. In the night time, do you know whether or not he slept? A. Well, between us, some nights we would sleep, and some nights we would both be awake from pain.

Q. From what? A. From pain.

Q. Did you see Ed. Gilroy since he left the hospital? A. Oh, yes.

Q. You have been in close contact with him? A. Well, not very close.

Q. He is a friend of yours? A. Yes, sir.

Q. Have you noticed any change in his condition from the condition you knew him before this accident? A. Yes, sir.

Q. In what way does he evidence the change? A. Well, I don't think his hands is any good at all to him.

Mr. Bishop: I move that that be stricken out.

Mr. Gordon: I consent that it be stricken out.

Q. You have seen some change in the appearance of his hands? A. Oh, yes.

Q. Have you seen any change in the appearance of his face? A. Yes.

Q. Have you noticed any change in his replies when talking to him? A. Well, yes.

Q. In what respect have you noticed any change? A. Well, he does not seem the same fellow to me at all.

Q. In what respect is he different? A. Well, one time there he was jolly and full of fun.

Q. That was before this accident? A. Before this accident, yes, sir.

Q. And since the accident, what disposition does he have? A. Well, he seems to keep more to himself and don't mingle; seems downhearted, in other words.

Q. When you looked over to your left and saw this flame going up the side of the gas holder, did you notice any particular form of flame when it reached the top of the gas holder? A. Well, it just seemed to open right up into one enormous big flame.

Q. Did it come from any particular spot at the top of the gas holder before it opened up? A. Well, no, I can't say that.

The Court: Gentlemen of the jury, we will recess now until 1:30 o'clock this afternoon. Please be very careful to observe the rules not to discuss this case among yourselves or with anybody else during the recess.

(A recess was had until 1:30 o'clock p. m.)

AFTERNOON SESSION, 1:30 P. M.

Cross-examination by Mr. Bishop:

Q. Mr. McMorrow, where do you live? A. 880 Broadway, Bayonne.

Q. You are still employed by the Standard Oil Company at the same place you were before this accident? A. Yes, sir.

Q. At the point where this accident happened there is a stretch of road known as Hook Road which runs south or north and south between the railroad tracks and the point where it makes a right-angle turn, is that right? A. Running north and south, yes, sir.

Q. There is a stretch there about eight or nine hundred feet long, isn't there? A. Yes, I believe there is.

Q. Just about from where it makes the first bend and leaves the railroad track down to where it makes another right angle turn? A. Yes.

Q. About the middle of that, there is a little offset? A. Yes.

Q. And all the property on both sides of the road for eight hundred or nine hundred feet is the Standard Oil Company's plant? A. I believe it is; I don't know.

Q. And these gas holders and power houses are on both sides of the road? A. Yes.

Q. And there are also some obstructions overhead along the road? A. Yes, there is a trestle before you come there.

Q. It carries some pipes? A. Yes.

Q. How long have you been familiar with that road before this accident? A. To be exact, I would say six and one-half years.

Q. You worked at the plant that long? A. Yes.

Q. You are familiar with the smell of oil that you always find around an oil refinery? A. Yes.

Q. And the smell of tar and various other smells? A. Yes.

Q. That is the usual oil refinery odors? A. Yes.

Q. That is always present all over that plant, isn't it? A. Yes.

Q. That differs from the odor of gas, does it not? A. Yes, the odor of oil does.

Q. Well, the odor that is always present around the refinery? A. Yes.

Q. This gas you speak of smells just the same as the gas you use in a gas stove to cook with, does it not? A. No, I would not say it does.

Q. When you came to work there, you say you came around three o'clock, is that right? A. Yes, sir.

Q. And coming in, you passed the pump house and the two gas holders? A. Yes, sir.

Q. Did you smell any unusual odor at that time? A. Well, no more than any other time.

Q. Just the usual smell that is always present? A. Yes, gas.

Q. And when you came out, you said that when you got to the trestle, you smelled a sweetish odor? A. Yes.

Q. That is a different odor from the odor you smelled when you came in? A. Entirely different, yes.

Q. It was sufficiently different so that you could identify it right away as not being the same odor? A. Yes, sir, I should say it was.

Q. It was pretty strong, wasn't it? A. Yes, coming out, coming home it was.

Q. Is that the same odor you generally smell there by the chemical works? A. Well, yes, similar. It was very strong at the chemical works at all times.

Q. It was strong at the chemical works? A. Yes.

Q. And then you say it got stronger at the gas holder? A. Yes, sir.

Q. But you had not smelled it when you came in at three o'clock? A. No, outside of the usual smell every day about the same.

Q. But this was a different smell, wasn't it? A. At night it was very sweet.

Q. The smell that you smelled coming out this night was different from the smell that you smelled when you came in, wasn't it? A. Yes.

Q. When you got up to the point where this fire or explosion occurred, you said that you felt sick, as I recall it? A. Yes, sir; I did.

Q. That is, this unusual smell was strong enough to upset you? A. Very near overcame me, yes.

Q. But nothing like that happened, of course, when you came in? A. No, sir.

Q. This explosion or flash of fire all occurred very quickly, didn't it? A. Yes, sir.

Q. It happened in just a flash? A. Yes, sir.

Q. And then you picked yourself up in the road, you say? A. Yes.

Q. And some time after that, you went to the hospital, didn't you? A. Yes, sir, shortly after.

Q. While you were in the hospital, I think you said that for the first two or three weeks you did not see Mr. Gilroy? A. Yes, sir, I did.

Q. You mean you did or you did not? A. I did not see him.

Q. Were you in the same room with him at that time? A. Not until the first three or four weeks.

Q. And then, after the first three weeks or so, the two of you shared a room together? A. Yes, sir.

Q. During the time you were in Gilroy's room, or the room you shared with him, did you see anybody else? Did any of your friends come in to see you? A. Yes, sir.

Q. When did they come? A. They was there very near every day visiting or seeing us.

Q. They came in to visit you every day? A. Yes.

Q. They were friends of yours? A. Yes.

Q. Did your relatives come in to see you? A. Yes, sir.

Q. Did they come every day? A. Yes, sir.

Q. So that you saw some friends or relatives every day while you were in there? A. Yes, sir.

Q. After you were moved into the room with Gilroy, did people come in there to visit you? A. Yes.

Q. Every day? A. Yes.

Q. Did anybody come in to visit Gilroy? A. Yes, sir.

Q. Who came to see him? A. I believe his wife and brothers and relatives and friends.

Q. They came in every day? A. Yes, sir.

Q. Did that continue all the time you were there? A. Yes, sir.

Q. How long did you remain at the scene of the accident after you picked yourself up in the road after this explosion? A. Not more than three or four minutes.

Q. Just about for three or four minutes? A. Yes.

Q. You were burning and in considerable discomfort yourself? A. Yes.

Q. Where did you go? To the power house? A. Started to go to the power house and then changed and went to the first aid.

Q. You went to the first aid station? A. Yes.

Q. How far away was that? A. I judge about two city blocks.

Q. About two blocks away? A. Yes.

Q. That is, as soon as you picked yourself up and found you were able to navigate, you started for the first aid station? A. No, sir, I started in three different directions; I started back to the pump house where we had come from and changed my mind and started to go to the power house, and changed again and went to the first aid.

Q. You did all that within two or three minutes? A. Yes, sir.

Mr. Bishop: That is all.

Re-direct examination by Mr. Gordon:

Q. You say that you noticed the gas, or the smell of gas, was very sweet when you reached the trestle? A. Yes, sir.

Q. Was it the same kind of a smell that you noticed when you went to work? A. No, I couldn't say it was as strong.

Q. Was it the same kind of smell? A. It was always a very choking smell of gas there.

Q. At that point? A. Around that point, yes, sir.

Re-cross-examination by Mr. Bishop:

Q. When I examined you before, you said that this sweetish odor that you smelled coming out, you did not smell when you came in? A. No, not the sweetish odor.

Q. It was a different smell when you came out than when you came in, wasn't it? A. Always a choking smell there.

Mr. Bishop: I ask that that be stricken out.

Mr. Gordon: Yes.

By Mr. Bishop:

Q. When I questioned you before, you said that when you came in you smelled the usual odor that you always smell around there, isn't that so? A. Yes.

Q. And coming out you said you smelled a different odor? A. Yes, very sweet.

Q. And different? A. It was different, yes, sir.

Re-direct examination by Mr. Gordon:

Q. How was it different? A. Well, it was sweet, and the other was choking.

Q. The odor of what? A. Of gas.

Q. You know the odor of gas, don't you? A. Yes, sir.

Q. What was this choking odor an odor of? A. More of an acid, making you cough.

Q. What is this choking odor? A. More of an acid to it.

Q. What kind of acid? A. Catching you in the throat and burning you there.

Q. What kind of acid? A. Well, I couldn't tell you what kind of acid; a burning sensation to your throat.

Q. And that was in the air? A. Yes, sir, that always seemed to be in the air around that place.

Q. Around that place? A. Around that place.

Q. Do you know what sulphur smells like? A. I believe I have an idea what it is.

Q. Can you tell me whether or not this smell at this particular point was sulphur?

Mr. Bishop: I object to that as leading.

Mr. Gordon: I will withdraw the question.

Q. Do you know what the smell was at this particular point? A. Yes, sir.

Q. What was it? A. Well, you could say it did smell like sulphur, choking.

Q. Do you know whether or not the gas holder has any sulphur content on it? A. No, sir, I don't.

Mr. Bishop: I object to that.

Mr. Gordon: I withdraw the question.

That is all.

Alexander Peters, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. Peters, where are you employed? A. Standard Oil Company.

Q. You received a subpoena to come here? A. I did.

Q. Where do you work at the Standard Oil Company? A. In the laboratories.

Q. What do you do there? A. Oil testing.

Q. Were you working for the Standard Oil Company in 1927? A. Yes, sir.

Q. You have been working for them ever since? A. Yes.

Q. How old are you? A. Thirty years old.

Q. Where do you live? A. Staten Island, West New Brighton, Staten Island, New York.

Q. What was your work in August, 1927? A. Pump man's helper.

Q. Where were you employed as pump man's helper? A. Kimball's pump house.

Q. That is the same place where Mr. Gilroy was working? A. Yes, sir.

Q. Were you on the shift from three to eleven p. m. under Mr. Gilroy on August 8, 1927? A. Yes, sir.

Q. Do you know whether or not on that day there had been any rain? A. Yes, sir, there was quite a heavy rain that day.

Q. When did you quit work that shift? What time was it? A. I should say about ten minutes to eleven.

Q. And you left with McMorrow? A. Yes, sir.

Q. And with Gilroy? A. Yes, sir.

Q. And with Roe? A. Yes, sir.

Q. You all went out together? A. Yes, sir.

Q. When you left the plant that night, was it thundering at that time? A. No, sir.

Q. Was there any lightning at that time? A. No, sir.

Q. Had there been any for an hour or so before that? A. No, sir, it stopped about eight o'clock.

Q. And up to the time of the accident, had there been any thunder or lightning from eight until eleven or thereabouts? A. No, sir.

Q. Had you been in and out of the pump house during that evening? A. Yes, sir.

Q. Were you mostly inside or outside of the pump house that evening? A. Mostly inside that evening.

Q. As you left the pump house, was there a book there that any of you employes had to have signed up that you were leaving? A. No, sir, not to my knowledge. We had a time book.

Q. Who recorded in the time book? A. The pump man.

Q. As you left the pump house? A. Well, we generally recorded as soon as we came in.

Q. As you left, did anybody record? A. No, sir.

Q. How were you paid? By the shift? A. By the shift.

Q. Were you paid for time after the shift was ended? A. Yes, sir.

Q. I am talking about while you were on your way home. Were you paid for that time? A. No, sir.

Q. If you worked overtime, did you get paid for it? A. Yes, sir.

Q. Where were you going when you left the pump house after the shift? A. I was going home and going to get the car.

Q. Where was the car? A. Inside of the plant, the yard gate.

Q. Did you have to walk any distance to get to the car? A. Yes, sir.

Q. Did you get into the car? A. Yes, sir.

Q. And you were seated in the back, as I remember? A. In the back of McMorrow.

Q. He was on the driver's seat? A. Yes, sir, in the left side.

Q. How many times did you pass gas holders one and two during the time when you went to your work? A. Well, for about two and one-half years that I was working down there, I passed them most every day.

Q. Coming in? A. Coming in and going home.

Q. Were you familiar with that locality there? A. Yes, sir.

Q. You were familiar with the conditions there daily? A. Well, some days you get quite an odor of gas. It depended upon the weather. Some days you would not get so much.

Q. Where would you get the odor of gas? A. Well, from when you came into that trestle before you approach the power house, from about the

trestle down as far as the Borax building there, or the chemical works.

Q. As you are going from the trestle towards the gas holders, did you ever notice any unusual conditions? A. Well, I noticed it on several occasions.

Q. What did you notice near the gas holders? A. Well, a very strong odor of gas.

Q. And as you were coming into the plant and entering Hook Road, and coming in a southerly direction approaching gas holder number two, what, if anything, did you notice on previous occasions?

Mr. Bishop: It seems to me that the time ought to be fixed.

By Mr. Gordon:

Q. Did you notice anything on previous occasions as you would come in and approach the gas holder? A. Well, as I said before, it depended on weather conditions. If it was a foggy, rainy, damp day, you could notice a very strong odor of gas coming in either direction.

Q. Where was it strongest? A. Well, from the bend in the road to the trestle, I would say.

Q. Which bend in the road do you refer to? A. The bend that you are coming into the plant going down towards the trestle, the first bend.

Q. That is in the southerly direction? A. Right.

Q. And you got into the car which was at the plant gate? A. Yes.

Q. And then where did you go? A. Well, we went along the Hook Road.

Q. Did you make a turn? A. We made a turn at the steel barrel, the first turn.

Q. Where is the steel barrel? A. That is the first turn going south at the Hook Road, I believe.

Q. We are speaking of coming home now. A. Yes, I understand that.

Q. Do you know where the copper works are? A. Yes.

Q. Do you know where the first right turn is on your way home? A. Right here (indicating).

Q. Do you know whether the barrel works is there or do you have to make another turn? A. You have to make another turn for the barrel works.

Q. Then what kind of a turn do you make? A. You make another right turn.

Q. A right or a left turn? A. Well, it is a steel barrel and a wooden barrel. Which barrel do you mean?

Q. Which barrel works do you meet first? A. The steel barrel.

Q. Which turn is that? A. Left turn.

Q. Then do you make another turn? A. Yes, you make a right turn.

Q. Then are you in what direction? A. North and south.

Q. You are going north and south? A. Yes.

Q. Where is the second barrel works as you are on that turn? A. Just before you come to the trestle.

Q. Will you mark on this map here where that barrel works is just before you come to the trestle? A. There is a stave shed here (indicating), and this is the barrel works here.

Q. Mark your initials, please, "A. P." A. Yes, sir.

Q. Is that where there is a barrel works? A. There is a barrel works, yes.

Q. That is south of the trestle? A. Yes, sir.

Q. What kind of barrel works is that? A. Wooden barrel.

Q. Is that where you first noticed the odor of gas on your way home that night? A. Yes, sir.

Q. What kind of an odor was it? Was it a light or a strong odor? A. Very strong.

Q. Did you notice it as to its intensity as you were going along? Was it getting lighter or stronger? A. Getting stronger.

Q. Where was it strongest? A. When we just got under the trestle at the watchman's gate, about between the watchman's gate and a few feet north of the watchman's gate, it got stronger as we went along.

Q. Then what, if anything, did you notice? A. There was—when we got up abreast of the pump house, there was a flash, and I found myself out in the road.

Q. From which side of the car did the flash first appear? A. The right side.

Q. In the direction in which you were traveling? A. Yes, sir, the right side in the direction we was traveling.

Q. Where did the flash appear from? What structure, if any? A. It seemed to come from the fence, but it was so quick, I would not be accurate about it, but it came from the right side. I am positive about that.

Q. What house is near the fence there? A. There is a pump house there.

Q. How far in from the fence is the pump house? A. I should imagine about twelve feet or fifteen feet.

Q. Where did you land? A. I was blown out of the left side of the car.

Q. Had your car reached the pump house when the flash happened? A. Yes, sir.

Q. And for a few seconds did you see the other men? A. No, sir.

Q. Did you know what happened to them? A. No, sir.

Q. When you looked back—or did you look back? A. Yes, sir.

Q. Did you see the highway, the road? A. No, sir, I couldn't see it.

Q. What was the matter? A. It was all ablaze.

Q. Where did the blaze go to? A. Why, it went up the side of the container, the last I remember seeing it.

Q. When you say it went up the side of the container, what container do you mean? A. This gas holder.

Q. On the left side of the road? A. Yes, sir.

Q. And then when it went up the side of this gas holder, what happened? A. There was an explosion.

Q. Did you see any flame anywheres other than on the side of the gas holder? A. No, sir, not that I can recollect of.

Q. Did you see the top of the gas holder? A. No, sir, I just saw it going up, and the explosion, and that was all.

Q. After the explosion did you see any flame? A. No, sir, I was on the bend of the road.

Q. Up to the point of this flash, that you say came from the right of the road— A. Yes, sir.

Q. (Continuing) —had there been any difficulty with the operation of McMorrow's car? A. No, sir.

Q. Was there anybody smoking in that car at the time? A. No, sir.

Q. Are you sure of that? A. Positively.

Q. You say you saw the flame traveling up the side of the gas holder? A. Yes, sir.

Q. Do you know the width of that flame? A. I should judge it to be about maybe a foot wide.

Q. Have you seen gas burning? A. Yes, sir.

Q. Have you noticed a gas flame before? A. Yes, sir.

Q. Can you tell me whether or not this was a gas flame? A. Yes, sir.

Q. When the flame reached the top of the gas holder, did you hear any noise or sound? A. I heard this explosion.

Q. What kind of sound was it like? A. Well, it was a dull sort of a report.

Q. After the report, did you see any burning on the top of the holder? A. No, sir, I wasn't at the scene at the time.

Q. You know Ed. Gilroy for quite a while, don't you? A. Yes, sir.

Q. You are a friend of his? A. Yes, sir.

Q. And you worked alongside of him in the pump house? A. Yes, sir.

Q. How long were you boys together in the pump house? A. I was with him about two and one-half years.

Q. Did you see him every day? A. Yes, sir.

Q. Did you see his general condition? A. Yes, sir.

Q. Did you see him working there? A. Yes, sir.

Q. Were you under him? A. Yes, sir.

Q. And working under him, did you notice the apparatus and implements that he handled? A. Yes, sir.

Q. Can you tell us what kind of tools he handled? A. Well, wrenches, mostly wrenches, and tools for packing pumps.

Q. And in connection with the apparatus in the pump house, what other things did he do manually with his hands? A. Open and close valves and manifolds.

Q. And were those valves easy to turn? A. No, some of them are very difficult.

Q. Are they small or large valves? A. They were small and large ones.

Q. And in getting about the pump house, did you see whether or not he walked? A. Yes, sir.

Q. And whether or not he climbed? A. Yes, sir.

Q. And how? With difficulty or with ease? A. He climbed it with ease and worked with ease.

Q. What was his general condition of health when you were working with him? A. Very good.

Q. Was he an active, live boy? A. Yes, sir.

Q. Was there any distortion of his features? A. No, sir.

Q. Were there any scars? A. No, sir.

Q. What was his general disposition? A. Very pleasant and congenial.

Q. He was over you? A. Yes, sir.

Q. Have you seen him since this accident? A. Yes, sir.

Q. When did you first see him in the hospital? A. Well, the first time I saw him was about a little more than three weeks after I was in the hospital.

Q. You were in the hospital, too? A. Yes, sir.

Q. And then were you placed in the same room with him? A. No, I was with Hugh McMorrow.

Q. Were you able to get out of your room and go to his room? A. After the first three weeks I was on the wheel chair.

Q. Did you get into his room? A. Yes.

Q. Did you see him there? A. Yes.

Q. Did you observe his condition? A. Yes, sir.

Q. How frequently did you see him in that room? A. Well, as I improved, I saw him most of the day, because I used to sit in there.

Q. Over what period of time? A. Oh, about eight days.

Q. Then after that, did you leave the hospital? A. Yes, sir.

Q. When you went to visit him in his room in your wheel chair, did you observe his appearance and condition? A. Yes, sir.

Q. Can you tell me whether or not he was suffering from pain? A. Yes, sir.

Mr. Bishop: I object to that as calling for a conclusion, what he observed.

By Mr. Gordon:

Q. What did you observe as to his appearance? A. That he was in very great agony continuously.

Q. He talked to you with ease? A. Very seldom.

Q. Do you know whether or not he had any expression on his face? A. Why, no, I don't think he did, for the simple reason that he was in such great pain that he really wasn't conscious of nothing.

Q. Did you see him after you left the hospital? A. Yes, sir.

Q. Where? A. I saw him about three weeks or a month after I left it. I went up there to visit him.

Q. Was he still there in the hospital? A. Yes.

Q. Was he in bed? A. Yes, sir.

Q. What was his condition then, a month after you left the hospital? A. Still very severe pain.

Q. Where was he burned? A. Face and hands and knee and the ankle.

Q. Did he have a nurse with him? A. Yes.

Q. A month after you came back there, did he have a nurse with him? A. Yes, sir.

Q. Have you noticed any change in his general appearance today? A. Yes, sir.

Q. To what extent? A. Why, he is like a scarecrow now in comparison to what he was. He is not pleasant any more. He is crying half the time. He is not the same fellow at all.

Q. When you went to work on the afternoon three to eleven p. m. shift, on various occasions you say you noticed the odor of gas at these gas holders? A. Yes.

Q. On these various occasions on your way home, can you tell me whether or not there was any difference in the odor? A. Well, some nights you would be riding home in a closed bus, and some nights, if the windows and doors were all open, you would smell it a little bit, because the men in the bus were all smoking, and it was very hard to detect it.

Q. As you approached the gas holder on the night in question, did you observe its position with reference to the ground? Was it high or low? A. No, I didn't notice.

Q. Do you know what it means when the gas holder is high? A. Yes, sir.

Mr. Bishop: I object to that.

Q. Do you work around gas holders? A. No, sir.

Q. Have you seen them go up and down? A. Yes, sir.

Q. Have you found out why they go up and down? A. Yes, sir.

Mr. Bishop: I object to that. He says he has found out why it goes up and down.

Mr. Gordon: I will withdraw the question. That is all.

Cross-examination by Mr. Bishop:

Q. Mr. Peters, you are still working for the Standard Oil Company? A. Yes, sir.

Q. Down south of that trestle is a chemical works? A. Yes.

Q. That is maintained by the company? A. Yes.

Q. They conduct certain refining operations there and use sulphuric acid? A. Yes.

Q. And there is a heavy odor of acid fumes about that point, isn't there? A. Yes.

Q. That is rather a choking odor? A. Yes.

Q. And that is generally present there at that point? A. It depends upon the way the wind is blowing.

Q. You knew the smell of crude oil? A. Yes.

Q. And you know the general odor of tar that is always present in a refinery? A. Yes.

Q. That is always around there too, isn't it? A. More or less, yes.

Q. And there is also a different odor? That odor differs from illuminating gas, does it not? A. Yes, sir.

Q. And when you came into work that night, did you notice any unusual odor as you came in along that road around three o'clock? A. Yes, sir, I did. I noticed I could smell the illuminating gas, because it was very damp, and the reason for my smelling it, at least, I think it was my reason, was that the rain would hold the gas down closer to the ground.

Q. That may be the reason, but did you smell that odor? A. Yes, very slight when I came in—not close up.

Q. Is that the same odor that you smelled at other times? A. No, sir.

Q. It was different that afternoon than on the other afternoons? A. Yes.

Q. Did you report that to anyone? A. No, sir.

Q. Why not? A. Everybody seemed to be talking about it, and everybody seemed to know about it, and I just let it pass by.

Q. You never reported it to anybody? A. No, sir, I did not.

Q. Have you ever smelled it before? A. Yes, sir, I have.

Q. Did you ever report it before? A. No, sir.

Q. Did you ever call anybody's attention to it? A. No, sir.

Q. Were you overcome by it as you came out there? A. When I came out, no, but I complained about it. It was getting very sickening.

Q. What was this odor that was getting sickening? A. The gas from the gas holder, the illuminating gas.

Q. Was it much stronger then than it was when you came in? A. Yes.

Q. Was it very much stronger? A. Yes, sir.

Q. It was stronger than you were smelling it before? A. Yes, sir, much stronger.

Q. You spoke about the wooden barrel works. That is the Standard Oil Company barrel plant run by the company? A. Yes.

Q. And the steel barrel plant is also one of their various operations in that plant? A. Yes, sir.

Q. This flash that you saw occurred very quickly, didn't it? A. Yes, sir, very quickly.

Q. It was a flash-up and then it was over, wasn't it? A. Yes, sir.

Q. As soon as it was over, you were burned, weren't you? A. Yes.

Q. And you were out in the road in a very serious discomfort? A. Yes.

Q. You did not stay around there very long? A. No.

Q. You got right up to the first aid station? A. I looked around to see where my fellow workers were, and the three of us hoped to get to the one point, and we decided not to wait any longer because the pain was so great.

Q. And then you went right up to the first aid place? A. Yes.

Q. You were not there more than a minute or so after the first flash? A. We might have been there three or four minutes.

Q. Two or three minutes? A. Yes.

Q. Did you come to work that afternoon at the same time that Mr. McMorrow did? A. I didn't come down in the same bus, no, sir.

Q. You went to work at the same time he did? A. Yes.

Q. You started in the same shift? A. Yes.

Q. But you did not come in together? A. No, sir.

Mr. Bishop: That is all.

Re-direct examination by Mr. Gordon:

Q. When you are working in the pump house, as part of your duties, you have to gauge the tanks? A. Yes, sir.

Q. And when gauging the tanks, do you smell any vapor and gas from the so-called sour crude? A. We never gauge the crude tanks; the fuel oil tanks we have gauged, but not the crude.

Q. Do you smell vapors and gas from these tanks? A. Yes, sir.

Q. Was the smell of the gas anything like or in any way resembling the smell of the gas in the vapor near these gas holders? A. No, sir.

Q. That was a different gas? A. Yes, sir.

Q. You know the smell of gases when you smell them, don't you? A. Yes, sir.

Mr. Gordon: That is all.

JOHN DOHERTY, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. Doherty, how old are you? A. Forty-eight.

Q. Are you married? A. Yes.

Q. And you live where? A. Bayonne.

Q. Will you try to keep your voice up so we can hear you back here? A. Twenty-six East thirty-second street, Bayonne.

Q. Where are you working now? A. I am working with the Asiatic Petroleum Company.

Q. Are they located at Constable Hook? A. Yes, sir.

Q. How do you get to your work? A. I go down the Hook Road.

Q. That is the same road you used to go down when you worked for the Standard Oil Company? A. The same road only further ahead.

Q. Did you work for the Standard Oil Company? A. I did.

Q. When did you start work for the Standard Oil Company? A. 1915.

Q. When you started around 1915, what was your work there? A. Well, I started as a laborer.

Q. And then what did you do? A. Started then to fire stills about four years, between four and five years.

Q. And then what did you do? A. I went as a helper in the pump house.

Q. Do you know where the pump house number three is? A. Yes.

Q. Do you know where gas holder number two is? A. Yes.

Q. Where is the pump house number three with reference to gas holder number two? A. Well, you mean number three?

Q. Number two pump house. Pardon me? A. Pump house number three?

Q. Perhaps I may be a little confused. Do you know where the trestle railroad is? A. Across the road.

Q. Do you know when you get into Hook Road, walking towards the trestle railroad? A. Yes.

Q. On the right-hand side of the road, do you know that there are some gas holders there? A. Yes.

Q. And they are numbered what? A. Number two and number one.

Q. On the left-hand side of the road, as you go towards the trestle railroad, is there a pump house there? A. Yes.

Q. What do they call that? A. Number three plant pump house.

Q. That is opposite gas holder number two? A. Yes.

Q. Number three plant pump house? A. Three plant pump house.

Q. Will you mark on this map where three plant pump house is, referring to plaintiff's exhibit 2? A. Yes.

Q. Just put a three on it. A. Yes.

Q. That is number three plant pump house. Was that there on the night of August 8, 1927? A. Yes.

Q. What, if anything, was alongside of the pump house? A. Well, there is a vacant building there right alongside of it.

Q. What kind of a building was it? A. It was a building where there was an air compressor, electric air compressor, steam air compressor, a power engine, and they are taken out of there.

Q. Is the building up? A. Not up now.

Q. When did it go down? A. The night of the explosion; the roof went off it, and after that the building was taken down.

Q. And that is the pump house of plant number three? A. Yes, but——

Q. All right. In this pump house where you were working, how many men were working there? A. Two men on the shift.

Q. And in order to get to the pump house, which way did you get into Hook Road? A. Well——

Q. Were you coming towards the railroad when you went to work that day, or were you going away from the trestle railroad when you went to work that day? A. I was coming in eleven o'clock at night.

Q. You were on the eleven o'clock night shift? A. I was on the eleven to seven shift.

Q. And you were in the pump house at plant number three? A. Yes.

Q. That was on August 8, 1927? A. Yes.

Q. In order to get there, you had to go down Hook Road? A. Yes.

Q. That is in the direction towards the trestle railroad? A. Yes.

Q. That would be southerly? A. Yes.

Q. What pumps were there in this pump house on August 8, 1927? A. Well, there is pumps there for pumping light oil and crude pumps.

Q. How many steam pumps were there there? A. Seven pumps there.

Q. And what kind of crude oil did these pumps in the pump house handle? What did they call it? A. They can handle several kinds of oil there, but the oil they were pumping that night was Crane Upton Crude.

Q. Crane Upton Crude was being pumped that night? A. Yes.

Q. Do you know whether or not there was any naphtha and kerosene being pumped that night? A. There was naphtha pumped.

Q. Does the crude oil pump in this pump house operate all the time? A. Well, most continuously for the continuous stills.

Q. Was it operating on the night of August 8, 1927? A. Yes.

Q. In connection with the operation of these crude oil pumps, is there a pump rod? A. Yes.

Q. Is there a pump rod attached to the pumps? A. Yes.

Q. And in connection with those pump rods, do you have to do any packing? A. Well, we never did any packing unless in a case of necessity on the night shift.

Q. When was there a necessity for packing? A. Mostly machinists for packing in the daytime.

Q. If they do not pack it in the daytime, and you had to pack it at night, what was the reason for it? A. Well, if it would leak anything, we would pack it, put a ring in and pack it until the day shift would come in.

Q. This crude pump was operated by pressure? A. Yes.

Q. Do you know how many pounds? A. Well, mostly about sixty to eighty pounds.

Q. And the other pumps had what pressure against them? A. Between forty and fifty when they would be in operation.

Q. You mentioned something concerning leakage that would happen at times. Were there any valves around in line inside or outside the pump house? A. Yes, there were valves outside of the pump house that might leak a little in the stuffing box.

Q. Was there leakage there? A. A little bit, but not much; less or more, there is always a little leakage in the stuffing boxes.

Q. Are the pump rods packed with anything in particular? A. They are packed with a compound of asbestos and rubber packing.

Q. And cotton, too? A. I don't know.

Q. On the night of August 8, 1927, before you reached the pump house on your way for the eleven o'clock shift, where were you walking? A. I was walking on Hook Road.

Q. As you came along Hook Road and turned into that part of Hook Road which leads towards the pump house to the gas holders, did you notice any conditions there of an unusual nature? A. Well, it wasn't very unusual to me, because I work there. Of course, I found a stronger odor of gas there than usual, as I came around that corner.

Q. You say that there was an odor of gas there usually? A. Usual, yes.

Q. Where did you notice the odor of gas usually at that point? A. Well, if the wind was blowing from the direction of the holders, into the pump house, we would get it, and of course——

Q. How frequently would you get that? A. Mostly when the holder would go up.

Q. You would get it when the holder went up? A. Yes.

Q. What was that— A. Mostly in the nighttime.

Q. (Continued)—due to when the holder went up? A. Well, there was more pressure, and there must be a leakage at the head of the seal.

Mr. Bishop: I ask that that part be stricken out.

The Court: Strike out that part of the answer which said there must be a leakage at the head of the seal.

By Mr. Gordon:

Q. Did you ever notice these holders go up? A. I did.

Q. How frequently? A. Well, they mostly went up in the night time oftener than in the daytime.

Q. Are you familiar with the operation of the gas holders? A. I have a little idea, although I wasn't working much around there, but I was working opposite them.

Q. You say you noticed on this occasion, this evening, a stronger odor of gas? A. Yes.

Q. Where were you when your attention was attracted to the stronger odor of gas? A. Just as I come around the corner on the Hook Road to come into the little gate to come into the pump house.

Q. Then you were coming from the north going south? A. Yes.

Q. Did you notice whether or not the degree became stronger? A. Well, I know when I went into the pump house that there was an awful odor of gas in the pump house, because the doors were open and the building was filled with gas.

Q. That was in the pump house? A. In this vacant building.

Q. Do you know where the locker room was? A. Yes, the vacant building, that is where it was.

Q. Which was the locker room? A. The vacant building. There is a vacant building, and this is the pump house (indicating).

Q. Did you go into the locker room first? A. Yes.

Q. Is that where you smelled the gas, in the locker room? A. We smelled it before we got in there.

Q. When you say "we", who was with you? A. Well, there was nobody with me. I went in, and when I went inside, me and the other fellows inside smelled it.

Q. Who was inside there when you got inside?

Mr. Bishop: I move to strike out the answer as to what somebody else smelled.

The Court: Strike it out.

By Mr. Gordon:

Q. Who was inside when you got into the locker room? A. The man that I shifted was in there and his helper.

Q. When you say the man that you shifted, is that the man you relieved? A. The man that I relieved.

Q. They were in the locker room? A. Yes, they were at the door inside.

Q. When you got there, where were they going? A. Well, they were all ready to go home.

Q. What time did you get to the locker room? A. Well, I got in there, as near as I can tell you, about twenty-five minutes to eleven.

Q. Up to that time when you got on Hook Road and came down towards the locker room, was there any thunder or lightning? A. Not that I know of.

Q. And up to the time of the accident, was there any thunder or lightning? A. Well, there was thunder in the early part of the evening.

Q. I am talking about up to the time of the accident when the fire took place; was there any thunder then? A. No thunder that I heard.

Q. And you were there? A. I was there, yes, sir.

Q. When you smelled this gas, what did you do about it? A. Well, I went ahead and changed my clothes as usual, and the gas was so strong that I was intending to call up the company's compression plant to ease up on their engines and tell them about the gas, the awful smell of gas or the gas holder leaking, but I didn't get time.

Q. What is the telephone number? A. Seven seven.

Q. And who was in charge of that telephone number? What is the office there? A. There is three engineers there.

Q. What kind of engineers are there? What is their job? A. To look after gas engines, gas compression engines.

Q. Who is the man you were going to telephone to there? A. The man that was usually on my shift was James Sharkey.

Q. Had you ever called up before about the gas pressure? A. Yes, I called up several times.

Q. To whom did you talk to at the company's compression engineer's office? A. Well, I mostly——

Mr. Bishop: I object to that.

The Court: Mr. Gordon is showing a practice or habit of this man under certain conditions which are supposed to be pertinent to this case, and I suppose, in view of that, as to whom he talked to with reference to those conditions, is pertinent.

Mr. Bishop: The time ought to be fixed.

The Court: Mr. Gordon, do you want to fix the period shortly prior to this date?

By Mr. Gordon:

Q. How frequently before August 8, 1927, did you call up the compression engineer's office about gas pressure? A. Well, I believe I called up about three or four months ahead of that.

Q. How long had that condition existed there in that locality, the smell of gas, I mean?

Mr. Bishop: Does counsel mean the condition at the time of the accident or the condition three or four months pervious?

Mr. Gordon: I will withdraw the question.

The Court: I assume he means the condition that the witness has just been testifying about, on which occasions he would call up the compression engineer to relieve it.

By Mr. Gordon:

Q. How long had there been this strong smell of gas when you called up the compression engineer's office?

Mr. Bishop: I object to that. It does not specify what time you are referring to.

By Mr. Gordon:

Q. Before the night of this fire, how long before that and over what period of time did you call up the compression engineer's office?

Mr. Bishop: I object to that. If the question relates to how long the odor had existed on the night of this accident, then I

object, because this witness could not know anything about it until he got there. If he means how long it existed three or four months before then,——

Mr. Gordon: I will withdraw the question.

Q. How long have you been working in that pump house? A. I have been there at that pump six or seven years.

Q. Do you remember the first time you called up the gas compression engineer's office about pressure? A. About a couple of years before the explosion.

Q. Do you remember how frequently after that you called them up? A. I guess I called up five or six times altogether.

Q. Over what period of time was that? A. Sometimes two months, sometimes one month, sometimes less, according to the pressure of the gas and the direction the wind would be blowing.

Q. Have you ever seen gas escape from the top of the tank?

Mr. Bishop: I object to that. You cannot see gas escape.

Mr. Gordon: There is a way.

The Court: I don't know whether or not you can, but I suggest you ask him the question how the escape of gas from the top is evidenced.

Mr. Gordon: I will accept the Court's suggestion.

Q. Do you know whether or not gas escaped from this tank before? A. Yes, I know the gas escaped from it because I seen it flow out.

Q. How do you know that? A. The vapor from the seal, not from the top, from the top of the seal. Several times I seen it blowing out.

Q. Do you know whether or not this Crane Upton oil that was in the pump house has any vapors? A. Yes, it has vapors.

Q. When you got into the locker room, who was the first man you met there? A. John Moran.

Q. At that time did you know whether or not they were pumping any gas in the holders? A. I don't know whether they were pumping the holders that time or not.

Q. Do you know John Kushnar? A. Yes.

Q. Where was he that night? A. He was in the locker room with me.

Q. What, if anything, did you notice out of the ordinary, other than the smell of gas, which we have already mentioned, when you were in the locker room? A. Well, I noticed there was a reflection of fire and an explosion.

Q. Where was the fire from? A. From the direction of the gas holder.

Q. Was there a brick wall between the locker room and the pump house? A. Yes.

Q. When did the locker building collapse? Before you got out of it or while you were in it? A. As I was getting out of the door, it was coming down.

Q. Did you see gas holder number two after this explosion or after the locker house fell? A. I seen the holder, but I didn't examine it.

Q. Did you notice any conditions around or on the top of the holder? A. I seen a flame at the time, a flame of fire.

Q. And it was coming from where? A. From the seal, the top of the seal.

Q. Did you say the top of the seal? A. Yes.

Q. Where is the seal in the gas holder? A. It is at the head of the ladder that goes up—I can't just explain.

Q. Do you know where it is with reference to the top or the bottom of the gas holder? A. Yes.

Q. Where is it? A. It is about, I would say, halfways.

Q. Are there other seals on the gas holder besides the ones that are halfway? Are there any at the top? A. I can't say now; I don't remember.

Q. Was the holder down when you saw the fire? A. No, the holder was not down when I saw the fire,—the holder was down when I saw the fire.

Q. Then what happened to the holder? A. The holder came burning there.

Q. Did you see it? A. Yes, I seen it.

Q. Did you see any fire around the holder? A. The fire was coming from the top of the seal, and whatever gas was in there was burning.

Q. Did you stay there for any length of time watching this fire? A. No, as soon as the roof came down, I run outside.

Q. Did you notify anybody that there was a fire? A. I stood there a couple of seconds and looked around, and I seen the flame go up, and I run in the pump house and shut down the pumps that was pumping there, in case something else might happen, and then I ran to three plant office and called up two plant office, and whoever answered there——

Q. You called up two plant office? A. Yes.

Q. When you saw the holder with the flames shooting from the holder, how were the flames shooting? A. Shooting right up in the air.

Q. When you saw that, where were the lifts of the holder, up or down? A. I couldn't see then, because the building was between me and the holder.

Q. When you came on duty, where were the lifts of holder number two, up or down? A. The holder was up.

Q. When you were in the locker room changing your clothes, was there anybody in the pump room? A. There was nobody in the pump room that I know of.

Q. Were the pumps working? A. Yes, sir.

Q. During the daytime, do you know what happened to the gas in the gas holders? A. Well, there is never so much pressure in the daytime as what is in the nighttime.

Q. What happened to it? A. Well, it is used up most generally in the can department and barrel factory and elsewhere, and there is never as much pressure as when it is at night, because—

Q. Is the barrel factory working at night? A. No, these places close down.

Q. Are the plants which get their gas from this holder, in operation at night? A. Not at night.

Q. Was the power house in operation at night? A. Yes, it is in operation, but the dynamo is working there.

Q. When you called up about this pressure at various times to the compression engineer's office, what happened?

Mr. Bishop: I object.

Q. What happened to the pressure after you called up about it?

Mr. Bishop: It seems to me that that is calling for a conclusion. He cannot know what happened to the pressure.

By Mr. Gordon:

Q. What happened to the odor of the gas, after you called up? A. Well, it would not be so strong after.

By the Court:

Q. It was not so strong? A. It was not so strong after.

By Mr. Gordon:

Q. Do you know the number of pumps that were in operation in the pump house while you folks were in the locker room getting ready to get in? How many pumps were in operation in that room? A. There were three pumps.

Q. Do you know how long those pumps were unattended in between the shifts? A. Well, I couldn't say how long they had been running before I came in.

Q. I beg your pardon? A. I say I can't say how long they were running before I came in.

Q. How long did it take you to get ready to get inside there? A. Well, I was in there about eleven o'clock?

Q. What time did you get to the locker room? A. Twenty-five mintues to eleven.

Q. And during all that time did you smell the odor of gas in the locker room? A. Yes.

Q. When you got in the locker room at twenty-five minutes to eleven, what men were in the locker room? A. The man that I shifted, John Moran.

Q. Were they there until you were changed with your clothes? A. No, as soon as I came in, they went out and went home.

Q. Then, during that time, from about twenty-five minutes to eleven until about eleven o'clock there was no one in the pumping house?

Mr. Bishop: I object to that as leading.

Q. Was there anyone in the pump house from twenty-five minutes of eleven until eleven o'clock?

A. There was nobody in the pump house that I know of at that time.

Q. Which door were you going out of when the roof caved in, the front or the back door? A. The back door,—well, I don't know whether you would call it the back or the front.

Q. Suppose we call Hook Road the front. A. Well, I went out the back door.

Q. When did it cave in? Before you got out of the door, as you were getting out of the door, or after you got out of the door? A. Well, as I seen the reflection, I made for the door. I heard like a blast, and I made for the door, and as we were getting out of the door, the roof came down.

Q. I show you Exhibit P-4, which is a photograph, and call your attention to a lot of brick on the photograph, and ask you whether or not you know what that debris is from? Do you know where that brick came from? A. Yes, this is the vacant building.

Q. What building was that? A. That is the building where we changed our clothes.

Q. Do you mean the locker room? A. The locker room.

Q. Are those bricks there from the old locker room? A. Yes, sir.

Q. I show you Plaintiff's Exhibit 5 and ask you whether or not you see the bricks on that picture? A. Yes.

Q. Are those bricks there the same bricks that you saw in the other picture? A. The same bricks.

Q. That was the old locker room? A. Yes.

Q. How long did you stay with the company after this fire? A. I guess about twelve months.

Q. And you left of your own accord? A. Yes.

Q. When the shift foreman came there did he have a hose carriage with him? A. I don't know

if he had a hose carriage, but he was getting one out on the road as I came out of the office.

Q. Who handled the hose? A. Well, he was at it, and my helper, the man that was helping me, and I gave a hand myself.

Q. Where was the fire? Where was the hose played? A. The first place we played the hose was in the pump house.

Q. And then where did you play the hose? A. We played it at the pump house and then took it around a little gate and played it on the holder.

Q. What was going on then when you were playing it on the holder? A. There was flames went out of the holder.

Q. Did they go in any particular place? A. It seemed to me about the top of the seal, at the head of the ladder.

Q. Where was the fire over in the pump house? A. Around the window at the crude pump. That window was all in flames, and the room.

Q. Was anything inside the pump house burning? A. No, not inside that I seen burning, only the window frame.

Q. Did you see the pumps or the machinery? A. Yes, sir.

Q. Were there any flames around the valves? A. Yes, outside the window; any oil that was there was burning.

Q. Where was that window frame with reference to the crude pump? A. Right at the end of the pump.

Q. And that pump was running day and night? A. Yes, sir. She was still running.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Mr. Doherty, how long had you been employed at this pumping house prior to this accident? A. About five years.

Q. And during that five years, I understood you to say that on five or six occasions you had occasion to telephone somewhere because of gas? A. Yes.

Q. My recollection is that you said that the last time you did that prior to this accident was three or four months prior to it, is that right? A. Yes.

Q. So that you had not at the time of this accident any need of telephoning anybody to inspect the gas for three or four months? A. Not me.

Q. And you did not telephone on this evening, did you? A. No, I didn't get time.

Q. That is, you did not telephone? A. I did not telephone; I didn't get time.

Q. When you came in that night, you say you came in about half-past ten or twenty-five minutes to eleven? A. Yes, about twenty-five to eleven.

Q. Did you find everything as usual when you got in there? A. Well, everything as usual, only there was an awful strong smell of gas.

Q. There was a strong smell? Was that stronger than usual? A. Well, I believe it was.

Q. Was it quite a good deal stronger? A. Owing to the wet night, I guess.

Q. It was a wet night? A. It was raining so much when I came in. It was wet ahead of that.

Q. It had been raining on and off all the evening? A. Yes.

Q. Was it raining after that? A. It rained heavy after that too.

Q. Was there thunder and lightning? A. Yes, after twelve o'clock or after eleven sometime.

Q. After eleven o'clock? There had been some before, too? A. Yes, sometime in the evening around——

Q. It was going on and off all the evening, wasn't it?

Mr. Gordon: I object to that.

A. Well, I think it stopped around half-past seven or eight o'clock, as near as I can think.

Q. It did not stop raining? A. No, there was some rain, not very much.

Q. It started on and off during the whole evening? A. Less or more rain. Of course, it was heavier than in the evening. Around half-past ten there was very little rain.

Q. It would slow up for a bit and then start off again, on and off all night? A. Yes.

Q. And that was true also of the thunder and lightning, wasn't it? A. I didn't hear any thunder and lightning from around half-past seven or eight o'clock, around that time, anyway.

Q. When you got into the pump house, did you look at the pumps? A. Well, I run into the pump house and shut them down when the gas holder went up.

Q. I mean before that, when you first came on the job. A. No, I changed my clothes first.

Q. Before the man whom you relieved left, did you see that the pumps were all right? A. No, they went home and I changed my clothes.

Q. That is what you did every night? A. That is mostly what we did every night.

Q. There wasn't anything wrong with the pumps, was there? A. No.

Q. You did not find anything wrong with the pumps? A. I didn't find anything wrong with the pumps.

Q. At any time you did not find anything wrong with the pumps that night? A. No, I didn't.

Q. You said something about the roof of the locker room falling in? A. Yes.

Q. Did it fall inside the locker room? A. It fell inside, yes.

Q. It did not fall out or off? It came in? A. Yes.

Q. It caved in? A. Yes.

Q. You just got through the door ahead of it? A. Yes.

Q. You said that you noticed the reflection of a fire and the explosion? A. Yes.

Q. That was just before the roof fell in? A. Just before the roof fell in, yes.

Q. Did you hear anything? A. I heard like a blast.

Q. Where was that? A. Well, it was in the direction of the holder; of course, I didn't——

Q. Where did you see the flash? A. I seen the reflection; I didn't see the flash. I seen the reflection in front of the wall where I was sitting.

Q. Which wall was that? A. Well, I was facing back of the pump house.

Q. You were facing the side away from the road? A. Yes.

Q. And on the side away from the road, you saw the reflection of the light that was shining in from behind you? A. Yes, just a flash up on the wall in front of me, and so I made for the door, and as soon as I got to the door I heard like a burst of wind, and down came the roof.

Q. Did you hear more than one flash? A. I heard a heavy thud as I got outside the door, and the flames shot up in the air.

Q. And then you said you saw the same fire somewhere else? A. Yes.

Q. Where was that? A. I seen the fire shooting from the holder.

Q. Did you see any fire inside of the pump house? A. Yes.

Q. You saw it inside the pump house? A. Inside the pump house.

Q. Where was that? A. Around the window.

Q. There was a wooden window frame in the window? A. Yes.

Q. And that window frame was on fire? A. Yes.

Q. And that was outside, wasn't it? A. Well, it was in the wall between the outside and inside.

Q. The window frame caught on fire? A. Yes.

Q. And except for that wooden window frame, you did not see anything there in the pump house? A. No, only that window frame.

Q. And when did you notice that that was burning? A. When I run in and shut the pumps down.

Q. That was after you had seen the first flash? A. The first flash, when I made for the pumps and shut the pumps down.

Q. You shut them down? A. I shut two of them down, but I don't remember going near the crude pump where this window was at.

Q. At the time you got the two of them shut down, you saw that it was the window frame that was burning? A. I seen it as soon as I went in the door.

Q. The window was broken? A. The window was broken and the sash was on fire.

Q. Do you remember speaking to Mr. Mendam about this accident after it happened? A. Yes, he called me to the office.

Q. You ran over and told him what you saw had happened? A. I told him the holder went up and told him the condition of the pump house and the roof coming out and all of that.

Q. Do you remember telling him that it was raining heavily? A. Yes, it was raining heavily that night.

Q. Do you remember telling that to Mr. Mendam? A. I think I did.

Q. Do you remember telling him that the road was very clean on account of the rain? A. No, not me.

Q. You don't remember that? Would you say that you did not tell him that? A. Well, I say I might have told him it was raining heavy that night.

Q. Would you say you did not tell him that the road was clean? A. I didn't tell him that.

Q. As a matter of fact the road was clean, wasn't it? A. Well, that road is never clean.

Q. It was clean that night from the rain? A. It could not be clean, because it is always muddy.

Q. It had been washed by the rain that night, had it not? A. I can't say.

Q. It had been raining that night? A. Yes.

Q. And earlier in the evening it had been raining? A. Early in the evening.

Q. It had been raining good and hard, too, hadn't it? A. Good and heavy, yes, early in the evening.

Q. You said also to Mr. Mendam that the pumps were all in good condition, didn't you? A. I don't remember if I did.

Q. They were in good condition, weren't they? A. Well, they were in very good condition. I didn't see anything the matter with them.

Q. As a matter of fact, two of them were going below normal speed, weren't they? A. Yes, they were running slow.

Q. They weren't running above normal? There weren't any of them running above normal, were there? A. No.

Q. And before you saw this flash outside, you had not seen any flash inside the pump house? A. I didn't see anything, no.

Q. Or inside of the locker room? A. I didn't see a thing until the flash went up.

Q. The first intimation you had that there was anything wrong was when the flash went up A. Yes, that is the first sight of the fire I seen.

Q. And the only thing you saw in the locker room or pump house up to that time was this reflection on the wall? A. The reflection on the wall, that is what I seen first.

Q. When you came in that night, was that gas strong enough to upset you at all? A. Well, it didn't upset me. I was pretty well used to it. I think it would take a lot of it to upset me.

Q. Was it much stronger than usual? A. Yes, it was stronger.

Q. Was it very much stronger than usual? A. Well, I couldn't say how much it was stronger, but I know it was stronger.

Q. It was stronger than you had seen it at any time for three or four months, wasn't it? A. Yes, I guess it was.

Q. In other words, it was three or four months at least since you thought it was strong enough to make it necessary to call up about? A. It was called up before three or four months, but I didn't call up; the other men called up.

Q. You don't know what the other men called up? A. They told me.

Mr. Bishop: I ask that that be stricken out and that the witness be cautioned not to tell what other people told him.

The Court: Yes, that part of the testimony may be stricken out.

The Witness: Well, I don't mean to say that they told me just when I came here, but——

Mr. Bishop: Just a minute, please. You are not allowed to testify as to what other men told you. You can only tell what you saw yourself.

By Mr. Bishop:

Q. How long did it take to get that fire out on the pump house, on the window frame? A. About fifteen minutes or so.

Q. And then after that you went and turned the pumps on again, didn't you, the ones you had turned off? A. I think that I turned on one of them.

Q. You are not sure whether or not you turned on both? A. I know I turned on one.

Q. You know that you turned on one, and you may have turned on two? A. I can't say for sure.

Q. You never stopped two pump at all? That ran right along? A. She run all the time.

Q. And she kept on running all the rest of the night while you were on duty? A. Yes.

Q. There was nothing wrong with it, and it did not have to be repacked? A. Not that I know of; I don't think so.

Mr. Bishop: That is all.

Re-direct examination by Mr. Gordon:

Q. The pump that you were pumping that night was handling what kind of oil? A. Gas, oil, naphtha.

Q. What happened to the crude pump? Was that pumping all night? A. The pump ran all night during my shift.

Q. The crude pump did? A. Yes, sir.

Q. Do you know where the drip pan is near the crude pump? A. Yes, there is a pan built there of concrete underneath the pump.

Q. When you saw the flame on the inside of that building near the window, near the crude pump, did you see the drip pan near the crude pump? A. Well, I seen it, but it was not on fire.

Q. Was there any fire near there? A. There was no fire that I seen there, only just around the window.

Q. Do you mean on the inside of the building? A. Of course, the window was broke.

Q. The flames were on the inside of the building, weren't they? A. Yes, on the window sashes.

Re-cross-examination by Mr. Bishop:

Q. The flames were on the outside of the window sash, also, and the whole sash was on fire? A. Yes.

Q. The glass was out, and that square frame around where the glass used to be was all aflame? A. Yes.

Q. That is the only fire you saw around there? A. That is the only fire I saw in the pump house.

Mr. Bishop: That is all.

ANTON STRUPAS, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. Strupas, where do you live? A. Rahway.

Q. What is your occupation? A. Photographer.

Q. In 1927 were you a photographer? A. Yes, sir.

Q. In the evening of April 21, 1927, were you at a dinner and dance of the shipping department employes of the Standard Oil Company of New Jersey at Bayonne? A. Yes, sir.

Q. Did you have with you any photographic apparatus? A. Yes, flash light.

Q. How long have you been a photographer? A. Twenty-two years.

Q. I show you a photograph and ask you when that photograph was taken? A. It was taken by me.

Q. Where was it taken? A. Bayonne, in the Y. M. C. A.

Q. What does it represent? A. As I understand it, they had a shipping department dance and dinner.

Q. Is that the people on there that were present when you took it? A. Yes, sir.

Q. Does that photograph accurately represent the people at whom the camera was directed? A. Exactly, it is the picture not re-touched. The original we do not do re-touching.

Q. That is an exact reproduction of the people that were there on April 21, 1927? A. Correct.

Q. I show you a negative and ask you if that is the negative of which the picture in my hand is a print? A. That is correct.

Q. And was that the negative that was employed in the taking and making of this picture? A. Yes.

Mr. Gordon: I ask that the picture be marked for identification.

(The picture referred to was marked "Plaintiff's Exhibit 9 for identification".)

By Mr. Gordon:

Q. Referring now to Plaintiff's Exhibit 9 for identification, did you develop that negative into this print? A. Yes.

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

(The print referred to was marked "Plaintiff's Exhibit 10 for identification".)

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. This negative was taken by you? A. Yes, sir.

Q. Is this full-sized or has it been enlarged? A. That is the original size.

Q. What size is that? A. That plate is fourteen by seventeen, but of course, we cut off.

Q. It is taken with a larger plate, a larger film? A. Yes, but that is the original negative.

Q. You masked out the ends of it? A. Yes.

Q. There is some slight distortion towards the corners of this plate where you were taking a large plate? A. Not exactly; according to what length you use. If you use a short focus lens, a bit of distortion comes, but if you use a long focus lens, no distortion comes.

Q. But there is a little down in this corner here (indicating), is there not? Isn't there a sort of distortion there? A. Well, it is only a quarter of an inch. This party happened to be so close to the camera; that is the reason for that.

Q. But there is some distortion in that corner? A. No, that is only because he is under the camera and this camera was eighteen feet high.

Q. But he was so close to the camera that that accounts for the fact that he is a little lopsided? A. No, because that is taken from the top, but when there is a camera at a height of eighteen feet, there is no distortion here. That is not distortion (indicating).

Q. I just wondered what you thought about that. This picture was printed from a negative taken by you? A. Yes, without any re-touching.

Q. And the date that is on here, dinner dance, shipping department, Bayonne, New Jersey, April 21, 1927, that notation was made by you? A. Made by me at the same time when I took the picture.

Q. And that is the truth? A. Yes, the negative is all marked also.

Mr. Bishop: That is all.

JOHN KUSHNAR, a witness produced on behalf of the Plaintiff, being duly sworn acording to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. Kushnar, how old are you? A. Forty-two.

Q. Will you please keep your voice up so we can all hear you in the back? Please talk a little louder. A. Yes, sir.

Q. Where do you live? A. 135 West Twenty-fourth Street, Bayonne.

Q. Are you married? A. Yes, sir.

Q. What is your business? What do you work at? A. I was on the fur dressing.

Q. Where do you work as a fur dresser? A. Jersey City, in Secaucus, New Jersey.

Q. You worked for the Standard Oil Company at one time? A. No, I work private now.

Q. At one time you worked for the Standard Oil Company? A. Yes, sir.

Q. When did you work for the Standard Oil Company? A. I work three plant.

Q. When did you work there? What year? A. I started 1912.

Q. Did you work all the time with them? A. All the time to 1927.

Q. You worked until 1927? A. Yes.

Q. Did you work the whole year 1927? A. No, not all years; I leave in October, I think.

Q. You left in October, 1927? A. Yes, I can't tell sure, but——

Q. You were there in the summer time, weren't you? A. Yes.

Q. And you were working there when they had a fire near the gas holder number two? A. Yes.

Q. You were working in plant number three pump house, weren't you? A. Yes, sir.

Q. With whom were you working? A. I work for Doherty.

Q. He was the last witness, the man that was on the stand before you? A. Yes.

Q. Were you his boss or was he your boss? A. He was my boss.

Q. And you were his helper? A. Yes, sir.

Q. What did you do in plant number three pump house? A. I helped him.

Q. How long before the fire in the gas holder had you been working as a helper there? A. Yes.

Q. How long had you been working as a helper there before this fire? A. I was—in the summer time, the men get vacations in the pump house, and I was taking the place there.

Q. You were doing relief work? A. Yes.

Q. What shift were you on? A. Eleven to seven I work.

Q. You worked from eleven o'clock at night until seven o'clock in the morning? A. Yes.

Q. Did you walk to the pump house that night? A. Yes, sir.

Q. You came down Hook Road? A. Yes, sir.

Q. What time did you get to the pump house? A. Twenty minutes to eleven.

Q. Before you turned down on that part of Hook Road where the pump house it, you were on another part of Hook Road, weren't you? A. Yes, sir.

Q. And do you remember when you turned into the place, to that part of Hook Road where the gas holders are, and the pump house was? A. Yes.

Q. As you turned into that part of Hook Road, did you notice anything in particular that night. A. (No answer.)

Q. Do you know where the main power house is on Hook Road? A. Yes.

Q. That is before you get to the pump house, isn't it? A. Yes, sir.

Q. When you reached the main power house, were you on Hook Road? A. Yes.

Q. You were going where? A. I come from Hook Road and turned the corner to south.

Q. You turned to go south? A. Yes.

Q. Where is south? Do you know where the trestle railroad is? A. Yes.

Q. Is that where south would be? A. No, that is the Hook; that is a couple of big gates, one trestle, and other crossing down the barrel factory.

Q. Do you know where the trestle is at the barrel factory? A. Yes.

Q. Is that south? A. Yes.

Q. Do you know where the main power house is? A. Yes.

Q. What is that? Is that north? A. Yes, that is north.

Q. Let me show you the map. This map shows power house number two, does it not? A. Yes.

Q. And this is Hook Road (indicating)? A. Yes.

Q. And this is the trestle railroad? A. Yes.

Q. Had you gotten into Hook Road that night on your way to the pump house, which is here (indicating)? A. Yes.

Q. Where were you when you were near the power house? Which side of the road were you on? A. Which side?

Q. Yes. A. I come this way, to the gates up here (indicating).

Q. There is a gate up here opposite the smoke stack? A. Smoke stack on this side (indicating).

Q. Do you know where the smoke stack is? A. Yes.

Q. Had you reached the smoke stack yet? Did you get to the smoke stack? A. Yes.

Q. While you were passing along the road near power house and near the smoke stack— A. Yes.

Q. (Continued)—did you notice anything in particular? A. Gas smell.

Q. How long had you been working for the Standard Oil Company? A. Seventeen years.

Q. Do you know what gas smells like? A. Yes.

Q. Did you smell gas that night? A. Yes.

Q. At the time when you smelled this gas, that is when you were going to work? A. Yes.

Q. And you say that was about twenty minutes to eleven? A. Yes.

Q. At that time was there any thunder or lightning going on? A. I don't know; I no see that time I was work.

Q. When was the last time that evening that you heard thunder? A. No, I was sleeping that evening.

Q. You were sleeping that evening in the early part of the evening? A. Yes.

Q. As you smelled the gas, was it a strong smell? A. Yes, strong smell.

Q. Had you smelled it before coming to work? A. Yes.

Q. And going home from work? A. Yes.

Q. On this night was the smell strong or was it the same as on other nights? A. A little strong because of heavy weather.

Q. It was strong because of the heavy weather? A. Yes.

Q. Did you start going to your locker room? A. Yes.

Q. As you would get nearer to the locker room and the gas holder, did you notice any change in the smell? Was it getting stronger or was it getting lesser? A. Stronger.

Q. Did you get into the locker room? A. Yes, sir.

Q. As you were getting into the locker room, did you notice any smell or odor in the locker room? A. Smell.

Q. What kind of smell? A. Good smell, strong.

Q. It was strong smell of what? A. Gas.

Q. When you got into the locker room, what did you start to do? A. Changed my clothes.

Q. While you were standing there, which way were you looking? Were you looking towards the gas holders or away from the gas holders? A. Looking away from the gas holders.

Q. While you were standing there looking away from the gas holders, what, if anything, happened? A. All at once the whistle blow, and I was coming to ask Mr. Doherty—I was asking how we got to do. He told me when the whistle blow——

Mr. Bishop: I object to what Doherty told him.

By Mr. Bishop:

Q. Did you see anything or hear anything while you were in the locker room changing your clothes? A. I hear explosion.

Q. Then what happened? What did you do? A. I run away.

Q. Where did you run? A. Outside.

Q. Did you go out Hook Road or in the back of the building? A. On the back of the building.

Q. Did you see what happened to the locker room when you got out? A. No, the tiles come out from the roof.

Q. The tiles come out of the roof? A. Yes, come down.

Q. While you were changing clothes in the locker room, where were the men that you were relieving? What had happened to them? A. They was go home.

Q. Who was in the pump house while the pumps were working, and while you were changing your clothes? A. Another shift.

Q. Was there anybody in the pump house while you were changing your clothes? A. The other shift changed and they go home, take a bus and go home.

New Jersey State Library

Q. When they went home, you were changing your clothes? A. Yes.

Q. Was there anybody in the pump house while you were changing clothes? A. No, John Doherty.

Q. Was he in the locker room with you? A. Yes.

Q. Who was watching the pumps while Doherty and you were changing your clothes? A. Nobody watch the pumps; the pump worked itself.

Q. They were pumping crude oil, wasn't they? A. Yes.

Q. And they were pumping naphtha? A. Yes.

Q. And they were pumping kerosene? A. Yes.

Q. Did you see across the road after the ceiling fell through? A. No.

Q. Did you see the gas holder? A. Yes, sir.

Q. What was going on there? A. It was on fire.

Q. Where was the fire? A. On top of the gas holder.

Q. Did you see any flames? A. Yes.

Q. Did you see Hook Road that night? A. Yes.

Q. Did you see any flames there? A. No.

Q. Did you see the automobile there? A. Yes.

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

Q. What happened to them? A. I can't tell.

Mr. Bishop: I object to that.

By Mr. Gordon:

Q. Was it raining when this fire and explosion took place? A. Raining, yes, sir.

Q. Was there any thunder? A. No.

Q. You say that the gas was strong and heavy because of the weather?

Mr. Bishop: I object to that as calling for a conclusion.

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Mr. Gordon: I will withdraw the question.

By Mr. Gordon:

Q. Did you notice when the gas would get strong and heavy there? A. Yes.

Q. When? A. The gas is strong all the time. The rain come and it keeps down the gas. A day like a clear day the gas goes out.

Q. Did you ever telephone anybody about gas? A. No.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Mr. Kushnar, you said on your direct examination, as I recall it, that you had been employed by the Standard Oil Company for seventeen years. That is not quite right, is it? A. That is right, 1912 to 1927.

Q. That is fifteen years. You don't know what the weather conditions were early in the evening of this accident, because you were asleep, is that right? A. No.

Q. When did you wake up that evening? A. Around nine o'clock.

Q. How far away from that point did you live? A. I lived 135 West 24th street. That is on the side of the boulevard.

Q. How far away is your house from this pump house? A. My house?

Q. Yes. A. I can't tell you.

By the Court:

Q. How many miles is it?

By Mr. Bishop:

Q. Is it a couple of miles? A. I don't know; maybe two miles; I can't tell you.

By the Court:

Q. How did you come there? Did you come in a bus? A. No, I walked that night.

Q. How long does it take you to walk? A. Twenty minutes' walk, sometimes more.

By Mr. Bishop:

Q. It rained that night, didn't it? A. Yes.

Q. It was raining while you came along there? A. Yes.

Q. And it continued raining all night, didn't it? A. Yes, sir.

Q. You did have some thunder and lightning later on in the evening, didn't you? A. I couldn't tell you.

Q. You don't remember? A. No, I never see them. I was walking, and I never see the lightning and thunder.

Q. I mean, after this accident was over, there was thunder and lightning later in the evening? A. No, I don't know thunder in the evening.

Q. You don't know anything about that? A. No.

Q. You say that as you came down south on Hook Road after it left the railroad, you smelled gas? A. Yes.

Q. It was pretty strong? A. Yes.

Q. Was it stronger than usual? A. Yes, strong.

Q. It was stronger than usual, wasn't it? A. Yes, sir, pretty strong.

Q. It wasn't always that strong, was it? A. In heavy weather it is always strong.

Q. You mean that it was not any different from what it always was in heavy weather? A. Yes, that evening it was strong.

Q. That evening it was stronger? A. Yes.

Q. So it was stronger than usual that evening? A. Yes, sir.

Q. While you were in the locker room, you said that you were facing, or rather, that you had your back to the road? A. Back to the road, yes, sir.

Q. And there are windows on both sides of the locker room? A. No, my locker is on the road side of pump house; on the other side is desk. We have a locker, and on the east there is a desk there.

Q. Where are the windows in the locker room? A. That is the road (indicating); my locker right in this corner.

Q. Where are the windows? A. The windows is not on this side, just a door.

Q. Are the windows here (indicating)? A. The window is one on this side, and another door on the east side.

Mr. Bishop: The witness indicates that there was a door in the westerly side of the locker room, and he indicates that there was a window in the northerly side of the locker room and that there was a window and a door in the easterly side of the locker room, and to the south side a door ended at the pump house.

The Witness: Yes.

Q. And your locker was up in the northwest corner? A. Yes.

Q. And you were standing by your locker with your back toward the door? A. Yes, I was standing in this corner by the door (indicating), and somebody changed clothes on this side (indicating).

Q. You were facing the other side away from the door? A. Yes, that is the time the whistle blow eleven o'clock.

Q. That is the way you were there when the whistle blew at eleven o'clock? A. Yes.

Q. Then this explosion did not happen until after the whistle blew? A. At the same time the whistle blew. The whistle blew and then the explosion noise and piles and skylight glass started coming down.

Q. What did you see first? Did you see a flash of light? A. No, very heavy noise.

Q. The first thing you noticed was a heavy noise? A. Yes.

Q. Did you see any flash of light? A. Yes.

Q. Where was that? A. Up on the front of the door on the window.

Q. Outside of the front door do you mean? A. Yes.

Q. That is the door towards the road? A. No, another door, a yard door, the east door.

Q. It all happened very quickly? A. Yes.

Q. The roof began to come down right away? A. One after another. I got a couple of pieces in my back too.

Q. You got out pretty quickly, did you not? A. Yes.

Q. When you got out, all you could see was a flame up at the top of the gas holder? A. Yes.

Q. It was right at the top of it? A. Yes.

Q. Was it a big or a little flame? A. A big flame, gas holder come down all the time.

Q. And this flame was right at the top of it? A. Yes.

Q. It was at the top edge, wasn't it? A. Yes.

Q. That is right where the top joins the upright side? A. Yes.

Q. You mean right at the edge? A. Yes.

Q. Was there a door on the south side of the locker room into the pump house, or did you have to go outside? (No answer.)

Q. Was there a door in between the locker room and the pump room, or did you have to go outside? A. I go out in the other door.

Q. There was a solid wall between the two? A. No, empty pump house. That locker was empty that night.

Q. What I am driving at is that there was a wall between the locker room and the pump room? A. Yes.

Q. There wasn't any door in the wall? A. No.

Q. You had to get outdoors to get from the locker room into the pump room? A. Yes.

Q. And the door of the pump room was on the side away from the road? A. Yes.

Q. So you had to go outdoors and then come in again to the pump room? A. Yes.

Q. You say you never telephoned anybody with respect to gas out there? A. No, there is a pump there.

Q. How long had you actually worked in that pump house? A. About three months.

Q. Do you mean that some fellow had three months' vacation? A. No, the shift, each man has two weeks' vacation, and somebody gets sick.

Q. You did not work in the same pump house all that three months? A. Yes.

Q. You say you did not see any flames in the road? A. No.

Q. The only flame that you saw was at the top of the gas holder? A. Yes.

Q. You got out pretty soon after this explosion, did you not? A. Yes.

Q. You got out quickly, didn't you? A. Yes.

Q. Was it still raining when you got out? A. Yes, until three o'clock we put water on it, pressure water, you know, gas fire hose, put it on top of tank.

Q. You got a fire hose out and put it on the tank? A. Yes.

Q. Is that the only place you played the water? A. Another place turn it on the pump house, on the window, that crude pump.

Q. Do you mean the window frame? A. There was fire there, too.

Q. You put that out pretty soon? A. Yes.

Q. Is that the only place you saw any fire around the pump house? A. That is all.

Re-direct examination by Mr. Gordon:

Q. When you got out of the locker room, which door did you get out of? The door facing Hook Road or the easterly side? A. The east side.

Q. That is back of the locker room? A. Yes.

Q. Did you notice what they did to the gas holder after the fire was put out?

Mr. Bishop: What who did?

By Mr. Gordon:

Q. Did you notice what the company men did to the gas holder after the fire was put out? A. Yes, sir.

Q. What did they do there? A. I don't know.

Mr. Bishop: I object to that.

Q. Did you see anybody working on the top of the gas holder? A. Oh, yes, they put water, that is all.

Q. After the fire was out, did you see anybody working on top of the gas holder? A. They go to look up there.

Q. On the top? A. Yes.

Q. Did you go up to look on the top? A. No.

Q. Did you see anything put on top of the gas holder? A. No.

The Court: We will adjourn at this time until tomorrow morning at 9.30 o'clock.

Gentlemen of the jury, please do not let anybody talk to you about this case or do not talk to anybody about it.

(A recess was had until Tuesday, October 29, 1929, at nine-thirty o'clock a. m.)

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

October Term, 1929.

EDWARD N. GILROY

vs.

STANDARD OIL COMPANY (a New Jersey Corporation) and STANDARD OIL COMPANY OF NEW JERSEY (a corporation of Delaware, authorized to do business in New Jersey).

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. LLOYD THOMPSON, Judge, and a Jury, at the Union County Courthouse, in the City of Elizabeth, New Jersey, on the twenty-ninth day of October, A. D. 1929, at 9.30 A. M.

Appearances:

FRANCIS A. GORDON, Esq., Attorney for the Plaintiff.

Messrs. LINDABURY, DEPUE & FAULKS, JOHN W. BISHOP, Jr., Esq. (Present); BURTIS S. HORNER, Esq. (Present), Attorneys for the Defendants.

JAMES A. SHARKEY, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. Sharkey, where do you live? A. 32 West 52nd Street, Bayonne.

Q. Are you married? A. Yes, sir.

Q. You are working for the Standard Oil Company now? A. Yes, sir.

Q. And you got a subpoena from my office to be here? A. Not from your office, no, sir.

Q. From whose office? A. I wasn't subpoenaed at all, only from the company.

Q. The company subpoenaed you? A. Not subpoenaed me.

Q. They asked you to come here without a subpoena? A. Yes.

Q. Where do you work in the company's plant? A. The gas compression plant.

Q. And you are in charge of the gas pumps there? A. Gas compressors.

Q. And they operate so that the gas is sent to the gas holders? A. Yes, sir.

Q. Do you know where gas holders one and two are adjoining Hook Road? A. Yes, sir.

Q. Does the gas which is contained in those holders come from the place where you are operating? A. It goes through our place.

Q. The pressure is applied in your building, is that right? A. Well, yes, it is pumped over.

Q. The pumps? A. Yes.

Q. What kind of gas is this? A. A crude gas.

Q. What do they use it for in the plant? A. Well, we condense the gas into gasoline, and then afterwards we burn it.

Q. For fuel? A. For fuel, yes, sir.

Q. Is that the kind of gas that gets in this tank? A. Yes, sir.

Q. There are times when your pumps are working differently than others, is that correct?

Mr. Bishop: Just a minute. These questions are leading, and I object to the leading question.

By Mr. Gordon:

Q. Your pumps worked how many hours a day? A. Twenty-four.

Q. Do they always work with the same pressure on them? A. Mostly always, yes, sir.

Q. Are there times when the pressure is heavier than it is at other times? A. They vary a few pounds, that is all.

Q. Where do these compressors take suction from? A. Why, we take it from the stills.

Q. Don't you take it direct from the holder? A. From number three holder we do; that is, in 1927 we did.

Q. Yes, I am talking of 1927. A. Yes.

Q. And what pressure is that discharged at? A. I don't believe it is any more than a pound pressure at the plant.

Q. Have you got any records here of the pressure? A. I couldn't say, unless Mr. Miles has it.

Q. Do you keep any records of the pressure? A. We do on our log sheets, yes, sir.

Q. Have you seen the log sheets recently? A. Not recently, no, sir.

Q. Were there log sheets there in 1927? A. Yes, sir.

Q. Do these compressors discharge direct to the holders?

Mr. Bishop: I object to that as leading.

A. Yes, sir.

Mr. Gordon: I will withdraw the last question.

The Court: He asked him, "do they?" The witness may answer yes or no. There is nothing to indicate what his answer should be there.

Mr. Bishop: Exception.

The Court: We have to make a distinction between situations where the witness might understand the purpose of the question and those questions which themselves directly imply the answer. The latter are leading, but the former are not necessarily.

By Mr. Gordon:

Q. Where do they discharge to besides the holders? A. Why, they supply the case and can and different departments—well, at that time they didn't.

Q. They did not at that time? A. No.

Q. They all went to the holders? A. They all went to the holders.

Q. Did they discharge at the full pressure to the holders? A. No, sir.

Q. At that time? A. We regulated the pressure at the plant. We only relieved the pressure of the plant, but the line pressure, I don't believe, is any more than a pound pressure at the most at any time.

Q. How do you reduce the pressure? A. By putting more burners on at the boiler house.

Q. Is there a connecting valve in that line? A. In the line?

Q. Yes. A. Sure, a few of them, but the controlling valve—we use a cock.

Q. How is that cock operated? A. By hand.

Q. When opening the cock or closing it, does that affect the pressure in any way? A. On the line?

Q. Yes. A. Well, it does a little bit, not much.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Do you know anything about the pressure on the gas lines on the night of August 8, 1927? A. Well, they were as usual, I believe; they were as usual.

Q. Were they any higher than usual? A. No, sir.

Q. Do you know how full the gas holder number two was? A. Yes, sir.

Q. How full was it? A. Just a little over half full.

Q. Do you know anything about holder number one? A. Yes, sir.

Q. How full was that? A. Why, number one was a little higher than number two, about a foot or so.

Mr. Bishop: That is all.

Re-direct examination by Mr. Gordon:

Q. You are testifying now from your recollection as to the height of the tank? A. Yes, sir.

Q. You had records at that time? A. Yes, sir.

Mr. Gordon: That is all.

ARTHUR B. KIMBLE, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Where do you live, Mr. Kimble? A. 80 West 39th Street, Bayonne.

Q. You are at the present time in the employ of the Standard Oil Company at Bayonne? A. At the present time?

Q. Yes. A. I am.

Q. What is your occupation there? A. Foreman in the shipping department.

Q. In August, 1927, what was your connection with the company? A. The same as the present.

Q. Were you at the Kimble pump house, the pump house known as the Kimble pump house? A. Yes, sir.

Q. And in that pump house, was Mr. Edward Gilroy, the plaintiff in this case, employed in 1927? A. He was.

Q. You received a subpoena to come here, didn't you? A. I did.

Q. Did you know Ed. Gilroy before the accident? A. Yes.

Q. How long had you known him? A. About ten years.

Q. Had you had occasion to see him continuously? A. Well, continuously, I would say, between eight and nine years.

Q. That is almost every working day? A. Almost every day.

Q. He was there in the same building with you? A. Yes.

Q. You were his employer? A. Yes, his supervisor.

Q. Seeing Mr. Gilroy nearly every day before this accident, did you have an opportunity to ob-

serve his physical condition, his demeanor, and his manner of work at his employment? A. I did.

Q. What was his general physical health? A. Well, I would say good.

Q. What kind of work did Ed. Gilroy do? A. Well, he was a pump man's helper, which partly necessitated climbing tanks, setting lines, repairing pumps.

Q. And in connection with his duties, was he obliged to exercise any mentality? A. To a certain degree.

Q. Can you tell whether or not that mentality is such that he must be adaptable for the work in the plant? A. It is necessary.

Q. And as his supervisor, can you tell me whether or not he was mentally fit for the work he was doing? A. He was.

Q. In connection with his work, what appliances did he have to handle? A. Well, nothing more than wrenches.

Q. What weights were they? A. Well, I would say five or six pounds, a monkey wrench.

Q. And in connection with the apparatus in the pump house, what part of the apparatus was Ed. Gilroy obliged to handle? A. Well, nothing more than a set of lines, and such as that.

Q. Were there valves there? A. Yes.

Q. Did they require any attention? A. Absolutely.

Q. Did they require any work? A. Yes.

Q. These shifts that he was on were how many hours? A. Eight.

Q. Continuously? A. Eight hours continuous.

Q. Did his duties require constant attention to the work in hand? A. Absolutely.

Q. These pumps were always operating in the pump house? A. Well, most always.

Q. Were there any valves of any size or degree in the pump house? A. Well, they run from, I would say, four up to twelve and as high as sixteen.

Q. Do you mean in diameter? A. Well, that is the diameter of the pump line.

Q. And these valves required any manual effort? A. To open and close them, sure.

Q. At times were the valves fast? A. Well, they would be at times, according to the expansion. Sometimes you have trouble operating the valves.

Q. And in opening these valves was there any physical effort required? A. To a certain degree.

Q. You mentioned something about climbing in this building. What heights was he climbing? A. Forty-two feet is the maximum.

Q. Do you mean to say that in this— A. Not on the pump house, on the tanks.

Q. Was Gilroy, at any time, obliged to climb forty-two feet before this accident? A. At all times, that is, during his working hours, not continuous climbing, but——

Q. You mean from time to time? A. Yes.

Q. Did you have occasion to see Mr. Gilroy within the last few days? A. Yesterday was the first I seen Mr. Gilroy in probably a little over a year.

Q. Have you observed any change in his appearance? A. Yes, considerably changed.

Q. Have you noticed whether or not his demeanor has changed in any way? A. Well, yes.

Q. In what respect does he evidence a change of demeanor? A. Well, he seems more distant to me.

Q. You and he never had any difficulties? A. None whatever.

Q. He was always respectful and courteous to you? A. Always.

Q. And you were always friendly and respectful to him? A. Always.

Q. Your relationship in the pump house was cordial? A. At all times.

Q. Have you noticed any other changes in his appearance? A. Well, do you mean in this past year?

Q. I mean yesterday or the day before from the way he was before this accident. A. Referring to before the accident? Oh, yes, there is a change in his appearance.

Q. In what respect? A. Well, his general appearance, his face, his hands.

Q. Do you notice the same facial characteristics that existed before the accident? A. No, quite a change.

Q. Did you have any difficulty in recognizing him when you saw him yesterday or the day before? A. Well, no.

Q. Had you seen him during the year? A. I had not seen him, no, for a year, probably a little better than a year.

Q. Had you seen him at the hospital after the fire? A. I did.

Q. Did you see his changed condition at the hospital after the fire, from the time he was a patient? A. Oh, yes.

Q. And when you saw him then, was there a marked change from the way he was before the accident? A. Oh, yes, a perfect change.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Mr. Kimble, I did not get what you said the nature of your employment was in 1927. A. The nature of my employment? I was in the same capacity as I am now, supervisor of the pump house.

Q. So that Gilroy worked under your direction? A. Supervision at that time.

Q. Was he a friend of yours? A. Well, not any more than a workman for me.

Q. Has he been working for you for quite a while? A. Between eight and nine years.

Q. His work was satisfactory, I suppose? A. Absolutely.

Q. You said you saw Gilroy in the hospital? A. I did.

Q. How often did you see him? A. Well, I judge I was there half a dozen times during the time he was in the hospital.

Q. Where did you see him? Where was he in the hospital? A. In bed in the room.

Q. In a room of his own? A. Well, at one time he was in a room by himself, and at other times he was in the same room with Mr. McMorrow.

Q. You never had any difficulty in getting in to see him when you wanted to see him? A. The first night I went there.

Q. When was that? A. I can't just recall, but it was soon after the accident, and then they told me that I couldn't see him, but they allowed me to look from the hall into the room, but that was all they would.

Q. Was that because of his condition at that time? A. That was because of his condition, they would not allow me.

Q. And after he got better, you saw him when-

ever you liked, any time you wanted to see him? A. Yes.

Q. You generally went in the evening? A. Yes, as a rule I went in the evening.

Q. Were there ever any other visitors there when you went to see him? A. Yes, there was other men there and women, their wives.

By Mr. Gordon:

Q. Did you ever talk business with him when you were there? A. Absolutely not.

By Mr. Bishop:

Q. Did you ever have any business to talk with him about? A. No, nothing pertaining to business.

Mr. Bishop: That is all.

Dan McDade, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. McDade, where do you live? A. 16 West Thirty-third street, Bayonne.

Q. How old are you? A. Twenty-five.

Q. Where do you work? A. Standard Oil Company.

Q. Are you working there now? A. Yes, sir.

Q. Where did you work in 1927? A. Kimble's pump house.

Q. Where were you working on the eighth day of August, 1927? A. Kimble's pump house.

Q. What shift were you on that day? A. Eleven to seven.

Q. Eleven to seven in the morning? A. Eleven at night.

Q. Until seven in the morning? A. Yes, sir.

Q. Did you have occasion to leave the pump house at seven in the morning of August 8, 1927? A. Yes, sir.

Q. Do you remember the night of the accident? A. Yes, sir.

Q. Do you remember what time you quit your employment that night? A. I went to work that night.

Q. Your shift started eleven o'clock? A. Yes.

Q. On your way to work, how did you get to the gate where the pump house is? A. I took a bus.

Q. Where did you pick up the bus? A. Twenty-fifth street, Bayonne.

Q. And then it went down— A. Hook Road.

Q. When it turned into Hook Road, into that section of Hook Road where the holders one and two are— A. Yes, sir.

Q. (Continued) —as it made the turn, did you observe any conditions of an unusual nature? A. Well, no I couldn't——

Q. Why? A. The windows in the bus were closed.

Mr. Bishop: Just a minute. If he did not observe them, I don't think his reasons for not observing them are proper.

The Court: The first part of his answer is sufficiently responsive. Strike out the latter part.

By Mr. Gordon:

Q. Do you remember going to work the day before the accident? A. No, I can't quite remember.

Q. When did you get a subpoena to come to court? A. Yesterday.

Mr. Bishop: I object to that.

By Mr. Gordon:

Q. Have you been talking to anybody since you got the subpoena? A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Mr. Gordon: That is all.

Mr. Bishop: No questions.

PETER E. MAHALSEN, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. Mahalsen, where do you live? A. 24 West 28th street, Bayonne.

Q. Where do you work? A. Standard Oil Company.

Q. Were you working there in August, 1927? A. Yes, sir.

Q. Where did you work in August, 1927? A. Kimble's pump house.

Q. What shift were you on? A. Eleven to seven.

Q. On your way to and from your work, did you go through Hook Road? A. Yes, sir.

Q. Did you pass that section of Hook Road where the gas holders one and two are? A. Yes.

Q. And approaching gas holders one and two on your way to work during the month of August, 1927, before this accident, did you notice any un-

usual conditions there? A. Well, at times there would be a little odor of gas, and at times it would be heavy. It depends on the weather.

Q. Where was it most prevalent? A. Well, between the turn at the stack and the barrel factory.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Did you make any report of this odor of gas to anybody? A. No, I didn't. It is up to the person——

Mr. Bishop: That is all.

Re-direct examination by Mr. Gordon:

Q. Why didn't you report it?

Mr. Bishop: I object to that. I submit that why he did not report it makes absolutely no difference.

The Court: No, I don't think it does.

Mr. Gordon: If it is objected to, I will withdraw that question. That is all.

EDWARD N. GILROY, a witness produced on his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. Gordon:

Q. Mr. Gilroy, do you mind taking off your glasses for a second? A. (The witness removed his eye glasses.)

Mr. Gordon: If the Court please, may I ask that the jury be permitted to inspect this man before he puts on his eye glasses?

The Court: What do you want to do?

Mr. Gordon: I should like him to walk up and down in front of the jury so that they can get a good look at him.

(The witness exhibited himself to the jury.)

Mr. Gordon: Will you please exhibit your face and hands to the jury and your ears?

(The witness complied.)

Mr. Gordon: Walk down here slowly and turn around. Now you may sit down, please.

(The witness complied.)

By Mr. Gordon:

Q. Mr. Gilroy, how old are you? A. Thirty-three.

Q. Please try to keep your voice up so that we can all hear you back here. A. Yes, sir.

Q. Where do you live? A. 204 East Price street, Linden.

Q. Did you ever live in Bayonne? A. Yes, sir.

Q. How long have you lived in the city of Bayonne? A. Thirty-one years.

Q. How long did you say? A. Thirty-one years.

Q. Where were you born? A. Bayonne.

Q. Are you married? A. Yes, sir.

Q. Have you a family? A. Yes, sir.

Q. How many children have you? A. Two.

Q. How old are they? A. One is three and one is seven.

Q. How long have you been married? A. Eight years.

Q. On August 8, 1927, in the daytime, what was your general physical and mental condition? A. Good.

Q. Had you been employed prior to that date? A. Yes, sir.

Q. Where? A. Standard Oil Company.

Q. How long had you been in their employ? A. Eleven years.

Q. And at what work? A. Various different positions.

Q. What did you start at? A. As a laborer.

Q. Then what did you do? A. Worked as a clerk in Kimble's pump house.

Q. After working as a clerk, what did you do? A. Worked as a dock man.

Q. I can't hear you. A. Worked as a dock man.

Q. Did you get more salary when you changed from a laborer to a clerk? A. Yes, sir.

Q. And when you changed from a clerk to a dock man, did you get more salary? A. Yes, sir.

Q. What was the next move that you made? A. Pump man's helper at Kimble's.

Q. Did you get more salary when you changed to pump man's helper? A. Yes, sir.

Q. At the time of the accident what were you working at? A. I was extra pump man.

Q. In that capacity were you getting more than you were getting as a pump man's helper? A. Yes.

Q. How were you paid? Were you paid by the week, by the day, or by the hour? A. By the hour.

Q. When did you get your wages for the hours that you put in? A. At the end of each two weeks.

Q. How much did you get per hour on August 8, 1927? A. Ninety-three and one-quarter cents an hour.

Q. If you did not work, were you paid? A. No, sir.

Q. When did your time of employment commence? A. It depended upon what shift I was on.

Q. Were you working when you were going to the gate?

Mr. Bishop: I object to that as calling for a conclusion.

A. No, sir.

Q. Were you paid while you were on your way to the gate? A. No, sir.

Q. Were you paid while you were on your way from the gate? A. No, sir.

Q. Were you paid when you got into the gate on your way to the pump house? A. No, sir.

Q. Were you paid when you left the pump house on your way to the gate? A. No, sir.

Q. When you got to the pump house, did you have to sign any records? A. No, sir.

Q. When did your time commence at the pump house? A. When I had my clothes changed and properly relieved my man.

Q. When were you timed from? A. Eleven o'clock.

Q. When the shift started? A. Yes, sir.

Q. How long did the shift last? A. Eight hours.

Q. What shift were you on August 8, 1927? A. Three to eleven.

Q. Three to eleven? A. Yes, sir.

Q. That meant that you went on at what time? A. Well, they have a rule down there, they allow the men about fifteen minutes leeway in order to get buses. They call the shift seven to three, three to eleven, and eleven to seven.

Q. When you got to the plant, what time was your shift starting? A. I probably started working that afternoon about a quarter of three.

Q. Do you mean in the afternoon? A. Yes, sir.

Q. What time were you finished? A. About a quarter of eleven.

Q. When you say you were finished, what had you been doing up to a quarter to eleven? A. Acting as pump man.

Q. Was anybody there to relieve you at quarter to eleven? A. Oh, yes.

Q. Who was relieving you? A. I don't just remember, but I believe it was Mr. Connolly.

Q. When Connolly got there, where did you go? A. I started for home.

Q. Where were your working clothes at that time? A. They were in my locker.

Q. Where had they been before they got into the locker? A. I was wearing them.

Q. Had you changed your clothes? A. Yes.

Q. And you put them in the locker? A. Yes.

Q. Was there a key to the locker? A. Each man has his own key.

Q. Did you turn the key? A. I believe I did.

Q. You left your clothes in the locker? A. Yes.

Q. Were you then finished with your work for the shift? A. Yes, sir.

Q. Then did you go out of the building? A. Yes, sir.

Q. And who went out of the building with you? A. McMorrow, Peters, and Roe.

Q. Had they been on the same shift? A. Yes, sir.

Q. Had they been working with working clothes? A. Yes.

Q. Had they changed their clothes? A. Yes.

Q. And they all left the building with you together? A. Yes.

Q. Before you leave the building, what, if anything, do you do towards your general appearance? Do you wash your hands and face? A. Oh, yes; we change our clothes entirely.

Q. And the clothes that you put on are what kind of clothes? A. Clothes that I would wear any place, for dress.

Q. Then you were going in your every day clothes? As you left the building? A. That is right.

Q. In order to get out of that building, do you have to pass through any entrance? A. Yes.

Q. What? A. Pass through a gate that leads out the plant.

Q. Is that gate always open or always closed or how is it? A. It is most always closed.

Q. Can anybody get in that gate? A. Oh, no; there is a couple of watchmen at the gate.

Q. After you get out of the gate and pass the watchmen, where do you get? A. On the railroad tracks.

Q. Then how far do you have to walk to get to Hook Road? A. Probably fifty to seventy-five feet.

Q. Do you know where McMorrow's automobile was? A. Yes, sir.

Q. Where? A. It was—at the opposite end of the main gate there is another gate leading into the other part of the Standard Oil plant.

Q. Do you have to go through another gate before you get to Hook Road, after you leave the pump house? A. Yes.

Q. There are two gates you pass through? A. One on either side of the road.

Q. After you have passed through the two gates, do you finally get to Hook Road? A. You finally pass through one gate and get out on the railroad track and Hook Road.

Q. How far did you have to go before you got into McMorrow's car from the pump house? A. Oh, I should say about four or five city blocks.

Q. I show you a photograph and ask you whether or not you can recognize it? A. Yes.

Q. What does it portray? A. It is the lower hook gate.

Q. Where is it? A. On this side of the railroad track (indicating).

Q. Can you mark it on there with the letter "G"? A. I can't mark a "G" very well.

Q. Let me mark it. Where do you want me to mark it? A. I can't see this very well.

Q. Do you know where the bend of the railroad is? A. Yes.

Q. Do you know where the bend of Hook Road is? A. Yes.

Q. Can you see it on that picture? A. Very well.

Q. Will you direct my hand as to where the bend is? Tell me just where the bend is. A. Right here is the gate (indicating), right where you see this little white spot.

Q. Is that the gate? A. Yes, right in front.

Mr. Gordon: Is there any objection to my marking this with a "G"?

The Witness: That is the waiting room for the jitney bus there, and the gate is right in front of it.

Mr. Bishop: No objection.

By Mr. Gordon:

Q. Directing your attention to this photograph, does it accurately portray the layout of Hook Road as it existed in August, 1927? A. Yes.

Q. That was on the day of this accident? A. Yes.

Mr. Gordon: I offer it in evidence.

Mr. Bishop: I object to that. There is no proof who took it and when it was taken, nor that this witness has ever seen the scene that it purports to portray from the position in which it was taken and therefore he is incapable of judgment whether or not it is an accurate representation.

Mr. Gordon: I ask that it be marked for identification.

(The photograph referred to was marked "Plaintiff's Exhibit 11 for identification".)

Q. When you got to the automobile of McMorrow, did you get out onto Hook Road? A. Yes, we got on Hook Road.

Q. Where did you go along Hook Road? A. Well, we passed several different places.

Q. When you got into the automobile— A. Yes.

Q. (Continued) —did you have anything further to do that day for the company? A. Oh, no.

Q. Were you going on any work at that time for the company? A. No.

Q. Where were you going? A. Going home.

Q. Do you know where the gas holders are on Hook Road, numbers one and two? A. Yes.

Q. Do you know the distance that is from the place where you were working? A. Oh, I should say about three-quarters of a mile.

Q. Have you gone over that ground frequently? A. Yes.

Q. How frequently have you gone over it? A. Twice every day while I was working for eleven years.

Q. Did you see any other vehicles go up and down Hook Road on your travels? A. Plenty.

Q. What kind? A. All kinds of vehicles, any public conveyance of any sort at all.

Q. What kind of public conveyances? A. Express wagons, trucks, jitney buses.

Q. Is there any restriction in travel of these conveyances by any watchmen or employes of the company over this road? A. Not on the road.

Q. Where did you sit in the car? A. To the right of the driver.

Q. Who was the driver? A. Hugh McMorrow.

Q. As you got into the section of Hook Road between the trestle railroad and the left or westerly turn of Hook Road beyond the holders one and two, did you observe any conditions? A. Yes.

Q. What? A. Very strong odor of gas.

Q. You have been working around the oil plant and refinery there for a good many years? A. Yes, sir.

Q. Do you know the smell of gas? A. Yes, sir.

Q. Do you know the smell of tar? A. Yes, sir.

Q. Do you know the smell of sulphur? A. Yes, sir.

Q. Do you know the smell of chemical gases? A. Yes, sir.

Q. Do you know the smell of fuel or illuminating gases? A. Yes, sir.

Q. What kind of a gas was this that you smelled? A. Illuminating gas.

Q. Where had you smelled this kind of a smell before? A. Every time I passed that tank, there would be some kind of a smell there.

Q. On this evening when you left the plant, was it thundering? A. No, sir.

Q. Was it raining? A. Yes, sir.

Q. Was there any lightning? A. No, sir.

Q. Do you recall when, before the time you left the plant, there was thunder and lightning? A. Yes, I do.

Q. When? A. About 8:30.

Q. And after that, do you know whether or not the thunder and lightning stopped? A. It did stop, yes.

Q. Did you hear any thunder or see any lightning from the time it stopped until the time of the accident? A. No, sir.

Q. Was there any thunder or lightning at the time of the accident? A. No, sir.

Q. As you turned in Hook Road at the trestle railroad going northerly, did you notice any change in the intensity or degree of the smell of the gas? A. Yes, a great deal.

Q. Did it become less or more intense? A. More intense.

Q. What, if anything, did you do? A. Well, I took my handkerchief from my pocket.

Q. What did you do with that? A. I attempted to put it over my nose, and at the same time I was about to remark to Mr. McMorrow.

Q. You were about to talk? A. Yes.

Mr. Bishop: I object to that.

Q. As you were going along Hook Road towards the direction of gas holders on your left and the pump house on your right, did you have a view of the road? A. Yes, after I made the turn, yes.

Q. Was there anything in the road to obstruct the passage of the automobile? A. None whatsoever.

Q. You were seated on the extreme right? A. Yes.

Q. In what seat were you? A. The front seat.

Q. The front or the rear seat? A. The front seat.

Q. And as you were going along approaching the gas holder and the pump house, did you observe any unusual conditions? A. Yes, I did.

Q. What? A. Well, I thought there was an unusual glare in one of the windows of the pump house.

Q. Did you look over? A. I did.

Q. What did you see there in the window of the pump house? A. It seemed to be a blue flame or similar—something like that. I didn't have very much chance to look at it.

Q. How far was your car away from the pump house when you noticed it? A. About twenty-five feet.

Q. Was McMorrow driving the car? A. Yes, sir.

Q. Was anything wrong with the operation of the car? A. Not to my knowledge.

Q. Was there any backfire? A. No, sir.

Q. Did you have any difficulty with the engine? A. No, sir.

Q. Was there any smoking by anybody in the car? A. No, sir.

Q. As you went along and you saw this flame to the right of the road at a window in the pump house, where is this window? What part of the pump house is it? A. The northwest corner.

Q. I direct your attention to a number three here and ask you whether or not you can identify that as the northwest corner of the pump house? A. Correct.

Q. And to the north of the pump house were there any other structures at that time? A. Yes, there was some building.

Q. What was that? A. I can't tell you.

Q. Had you seen another structure to and from your work? A. Oh, yes.

Q. As you were about twenty feet away, and you observed this flame in the northwest corner, and you had your handkerchief in your hand, what

did you do? A. I didn't get a chance to do anything.

Q. What happened? A. The flame came out. It seemed to come out from the pump house, one of the windows of the pump house and through the fence.

Q. Then what happened? A. It struck the front of the car, the front right wheel and under the hood.

Q. Did it come from any part of the left side of your car? A. Oh, no.

Q. After it struck the right side of your car, then what happened to the car? A. That is all I remember.

Q. That is all you remember? A. Yes.

Q. Did you again observe the conditions in the highway? A. I couldn't see anything about conditions at that time.

Q. Did you get out of the car? A. I don't know. I got out somewhere, and I don't know how I got out—blown out.

Q. Where did you find yourself after that? A. The next thing I knew I was standing in front of the power house, I would call it, in front of the power house, the little steps there.

Q. What was the condition of your clothing and your body? A. Blazing.

Q. Where? A. All over.

Q. Did you see the road? A. I didn't see it just then.

Q. Did you see the gas holders? A. Not just then.

Q. What part of your wearing apparel was burning? A. Everything; my pants, coat, and the handkerchief in my hand was blazing.

Q. What else? A. My hair; everything was burning, and all the skin was hanging off of my face, and the skin on my hands was hanging down.

Q. What about your feet? A. My ankles were afire, the socks; I didn't have any clothes left. I have never seen the clothes since.

Q. You said you recalled being on the steps of the pump house? A. Yes, sir.

Q. Or the power house? A. The power house.

Q. What power house was that? The number two power house? A. The one on the corner.

Q. Just before you make the left turn? A. Yes.

Q. I now indicate a power house on the map at the northerly end of this section of Hook Road and the north of pump house number three, and I ask you whether or not that is the power house you have in mind? A. That is correct.

Mr. Gordon: May I mark this for the witness?

Mr. Bishop: Do you want to put his initials on?

Mr. Gordon: Just simply a double X for the record.

Mr. Bishop: Yes, and the statement that he indicates the power house as the one that he refers to as the double X.

By Mr. Gordon:

Q. Did you get in the power house? A. Well, I was standing on the steps.

Q. What happened to you? A. We—Mr. McMorrow—we were both going into the power house, when I heard an awful noise like a sky rocket.

Q. Then what happened? A. That is what brought me to my senses. I believe it is, anyway.

Q. When you heard this noise like a sky rocket, what did you do? A. I turned quickly and I saw this flash go up the side of the gas container.

Q. Then what happened? A. It got to the top and there was an explosion, a loud puff and flames.

Q. Did you notice the flames? A. Yes.

Q. Where did it come from in the gas holder? A. Right from the end facing me.

Q. Before you reached that power house, had you heard the gas holder go up? A. Oh, no.

Q. What happened to you while your attention was directed to this flame at the gas holder and the pump? A. Why, the explosion knocked me down, and when I got up, Hugh was gone.

Q. Who is Hugh? A. McMorrow. So I wanted to find some place away from the intense heat. The place was just like on fire all around. The road was full of spirals of fire, and this tank was blazing, so I rushed into the power house.

Q. Where in the road were these spirals of fire? A. It seemed to me that the whole road was covered with them.

Q. When your automobile was going along Hook Road, was it on the road or to the side of the road or where was it? A. It was in the center of the road, I believe. Of course, it is quite a narrow road.

Q. Is it quite a narrow road? A. Yes.

Q. And McMorrow was gone? A. Yes.

Q. What happened to you? A. I run in the power house.

Q. Were there any men there? A. Yes, there were several men in there.

Q. What did they do to you? A. They extinguished the fire and threw oil on me, and I ran in the power house and that was also on fire inside.

Q. Which pump house was on fire? A. The power house.

Q. The power house was on fire? A. Yes.

Q. Where did those flames come from? A. I couldn't tell you.

Q. Did the ambulance arrive? A. It did later on in the evening, about an hour after I was burned, I believe, or a half hour; I am not sure which.

Q. And during that period of time where were you? A. They sat me on a chair. I don't remember just where I was. It was some place in the power house, and they were throwing oil on me continuously to relieve the pain.

Q. Where was this pain? A. All over. I can't explain where it was. My face and hands and legs and ankle.

Q. When the ambulance got there, did the doctor give you anything? A. The first aid doctor gave me an injection of morphine, I believe.

Q. You got a hypodermic? A. Yes.

Q. Then where were you taken? A. To the Bayonne Hospital.

Q. At the hospital were you met by any doctors and internes? A. I didn't know any but Dr. Murray.

Q. Do you remember what they did to you when you were first taken in? A. What clothes was left on me they cut off, because they couldn't take my clothes off any other way. The skin would come with it.

Q. Where was this? A. In the Bayonne Hospital.

Q. Where was this skin attached to your clothes? A. I couldn't get the coat over my hands. They cut the sleeves up and cut the trousers pants and took it off that way.

Q. On both sides? A. I believe so. One hand was as bad as the other.

Q. Were any bandages put over you? A. Oh, yes.

Q. Where? A. I suppose wherever I was burned. I don't quite remember everything.

Q. When did you come to after this? A. I didn't remember very much until about four days after the accident.

Q. About four days after the accident what was the first thing that your attention was directed to? A. Why, I heard quite a commotion.

Q. In your room? A. In my room. I had either been asleep or lying under the influence of drugs, and I came to and heard them talking.

Q. Do you know who had been in the room with you? A. I had no idea.

Q. You knew there was somebody in the room with you? A. I knew there was one of the boys.

Q. Did you ever see that boy in the room with you? A. No, I didn't.

Q. After the someone who was in the room with you was taken out of the room, where were you taken? A. I was taken out of that room. I would not stay there any longer.

Q. Did you ever have any illnesses of any serious nature before this accident? A. Well, I was operated on for appendix.

Q. Did you have any difficulty with that operation? A. I don't think there was anything unusual about it.

Q. How long were you in the hospital with that operation? A. Ten or eleven days.

Q. Did you go back to your work? A. Not right after; I stayed home for awhile.

Q. How long before this accident? A. Probably four or five years.

Q. Other than this operation for the appendix, did you ever have any other matter requiring hospital attention? A. No; I have been off with colds, but I never had any serious sickness.

Q. What was your general condition? A. I would say good.

Q. Did you indulge in any physical activities before this accident? A. What do you refer to? Sports?

Q. Yes. A. Yes, I guess just about the same as the average young fellow—baseball, swimming.

Q. What else? A. Swimming.

Q. What else? A. Hand ball.

Q. What else? A. Boxing.

Q. What else? A. Running.

Q. And those sports formed part of your life right up to the time of this accident? A. They certainly did.

Q. Did you ever have any difficulty in athletics? A. None whatsoever.

Q. In walking or running, pitching a ball, boxing, or swimming, did you ever have any difficulty? A. No.

Q. Did you ever dance before this accident? A. Very much.

Q. Did you go out to social affairs? A. A whole lot.

Q. With your wife? A. Yes.

Q. Did you go to parties? A. Yes.

Q. Did you go regularly? A. Quite regularly.

Q. Did you visit people? A. Yes.

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

Q. Did you go to public places in general? A. Yes, sir.

Q. You had a lot of friends, didn't you, Mr. Gilroy? A. I believe I did.

Q. I show you Plaintiff's Exhibit 9 for identification and ask you if quite a number of these people on this picture were friends of yours in April, 1927? A. Quite a number of them.

Q. Referring to this picture marked "Plaintiff's Exhibit 9 for identification", does that contain your picture in April, 1927, before this accident? A. Yes, sir.

Q. Will you direct my attention to the individual on this picture that represents you? A. Here (indicating).

Mr. Gordon: May I mark that with a "G".

Mr. Bishop: Put a circle around it.

By Mr. Gordon:

Q. Had you seen Plaintiff's Exhibit 9 for identification after the picture was taken in April, 1927? A. Yes, sir.

Q. Was your eyesight good in April, 1927? A. Very good.

Q. Do you recognize the likeness of yourself on the picture in April, 1927? A. Yes, sir.

Q. How was that likeness? A. A good one; I would consider it a good one, yes.

Q. A good likeness? A. Yes.

Mr. Gordon: I offer this picture in evidence.

(The photograph referred to was received in evidence and marked "Plaintiff's Exhibit 9".)

Q. I show you a picture and ask you to take a look at it and tell me whether or not you recognize it as an enlargement of your likeness in Plaintiff's Exhibit 9? A. Yes, sir.

Mr. Gordon: I ask that it be marked for identification.

(The photograph referred to was marked "Plaintiff's Exhibit 12 for identification".)

Q. How was your general heart condition before this accident?

Mr. Bishop: It seems to me that that calls for an expert conclusion on the part of this witness.

Mr. Gordon: I will withdraw the question.

Q. Did you ever have any difficulty with your heart before this accident?

Mr. Bishop: Same objection.

Mr. Gordon: I will withdraw the question.

Q. Did you ever have any pains in the heart before this accident? A. No, sir.

Q. Did you ever have any discomfort in the heart regions before the accident? A. No, sir.

Q. When you were in the hospital a few days after this accident, did you notice any feeling or sensation in and about the heart region? A. It happened—yes, four days after.

Q. What happened? A. When I was in this room, I woke up and heard someone saying, "Don't tell Gilroy".

Mr. Bishop: I object to that.

The Court: Strike it out.

The Witness: When they moved from one room to another, that is what started my heart palpitating, and it gave me an awful lot of trouble.

Q. Did you ever have any difficulty with sleep before this accident? A. No, sir.

Q. Did you suffer from any affections or disturbances in the head? A. No, sir.

Q. What was your general attitude on life? Were you contented? A. I certainly was.

Q. Were you making progress in your work? A. I believe I was, yes.

Q. You were promoted from time to time? A. Yes.

Q. Before this accident did you ever have any difficulty with your eyes? A. None whatsoever.

Q. Was there anything the matter with your ears then? A. No, sir.

Q. Did you ever have any scars or sears from burns on your face? A. No, sir.

Q. Was your hair ever burned before this accident? A. Not before it, no, sir.

Q. Did you have a good head of hair? A. I always had good hair.

Q. Did you have any difficulty in combing that hair before this accident? A. Yes, it was kind of wild.

Q. Did you have any difficulty in handling your comb and brush before the accident? A. No.

Q. Who combed your hair before the accident? A. I did.

Q. You parted it in the center? A. Yes.

Q. And you brushed it down well on each side? A. Yes.

Q. And that is evidenced in this picture, Plaintiff's Exhibit Nine? A. Yes, sir.

Q. What, if anything, was done to your eyes when you were in the hospital? A. They kept compresses on all the time for I don't know how long it was, probably a couple of weeks.

Q. How long were you in the hospital? A. Twelve weeks.

Q. How much of that time were you on your back? A. Probably about nine or ten weeks.

Q. And as you laid on your back, describe your position. A. Well, I had to lay on my back. I couldn't turn either way, because both ears were

burned badly, and I laid out flat with pillows on either side of me and cotton on top of the pillows to rest my hands, so that the linen would not burn my hands, they were so sensitive.

Q. Could you move your hands around? A. If I wanted my hands moved, the nurses would have to move them. I couldn't move them a fraction of an inch.

Q. Were you able to hold a pen in your hand? A. Impossible.

Q. How were your eyes when you were on your back in the hospital? A. I couldn't see.

Q. How long was this treatment being given to your eyes? A. I don't remember the exact time, but it was a long while.

Q. Did you read while you were in the hospital? A. Oh, no.

Q. Please take your eye glasses off. A. Yes, sir.

Q. I notice your right eye shows that the upper eyelid is extended or rather hangs low, and that the lower eyelid hangs low. Did you have that deformity before this accident? A. No, sir.

Q. And the same condition appears in your left eye. Did you ever have that deformity before the accident? A. No, sir.

Q. Your nose appears to bear scars and marks. Was that ever prevalent or present before this accident? A. No, sir.

Q. What was your general complexion before this accident? A. Fair.

Q. How was your skin? Was it smooth or rough? A. Smooth.

Q. Did it present any of the conditions or appearance that it now presents? A. I don't believe it did.

Q. You saw yourself every day? A. Yes, sir.

Q. How were your nostrils before this accident? Were they burned out as they are now? A. I should say they are about twice as large now as they were before.

Q. I notice that there is a mark, a change of color in your neckline, and the lower part appears to be pinky and redder than the rest of your face and the other part of your neck? A. Yes, sir.

Q. How was your complexion and color before this accident, of your neck? A. They were the same color as the lower part now.

Q. That presents a rather ruddy hue. Was your whole face healthy looking? A. Yes, sir.

Q. You were in the outdoors to some extent on athletics? A. Yes, sir.

Q. I notice that your right ear presents the appearance of an injury? A. Yes, sir.

Q. I ask you whether or not there were ever any evidences of that ear before this accident? A. None whatsoever.

Q. Of any injuries? A. No, sir.

Q. Had that ear ever been involved in any injury? A. Before the accident?

Q. Yes. A. No, sir.

Q. Or at any time since the accident, after the accident? A. Not after the accident.

Q. Have you ever been in any other accident than the one on the night in question? A. No, sir.

Q. Will you turn around, please, and—— A. Yes, sir.

Q. I notice that your left ear presents the evidences of an injury. A. Yes, sir.

Q. Was that condition there before this accident? A. No, sir.

Q. Have you any scar marks on your lower extremities? A. Both my ankles and my knee.

Q. Over what area are these scar marks? A. Both ankles and my right knee.

Q. Now, getting to your hands, I notice that your right hand, at a point a little above the wrist, and enveloping the entire hand, presents a scarred and withered condition. Did that condition exist before this accident? A. No, sir.

Q. Your right hand shows the small finger bent over at an angle approximately ninety degrees. Can you tell me whether or not that finger was bent before this accident? A. No, sir.

Mr. Bishop: If the Court please, it seems to me that the conditon of this man speaks for itself, and that it is improper for counsel to characterize these conditons, which are obvious.

Mr. Gordon: They may be obvious to your Honor and to counsel and to this jury, but it is not obvious to the record, which is being made in this case, which may some day have to be looked over.

(Argument.)

Q. In this condition of your hand, which is now apparent to this jury, were these evidences there before this accident? A. No, sir.

Q. Did you ever have any difficulty in using your right hand—— A. No, sir.

Q. (Continuing.) —in your employment at, in and about the pump house? A. No, sir.

Q. Did you have any difficulty in handling anything? A. No, sir.

Q. Can you, at the present time, use that hand for any laborious work? A. No, sir.

Q. Do you write with it? A. I attempt to.

Q. How do you comb your hair? A. I comb my hair. I get it back there somehow.

Q. You don't comb your hair the way you used to? A. No.

Q. How about your left hand? Are you able to handle any implements with your left hand? A. No, I use the two of them together, where I could use one before; one helps the other now.

Q. Do you lift any articles of any weight? A. Oh, no.

Q. Are you able to grip anything with any degree of effort? A. No, sir.

Q. Or rather, strength? A. No, sir.

Q. Have you noticed any change in your weight since the accident? A. Yes, there is a little change.

Q. What, if anything, have you noticed with reference to your head since the accident? A. Well, I have terrific headaches, and there has hardly been a day since this accident that I am not bothered with headaches. Sometimes they are severe, and at other times not so bad. At times I get dizzy spells, especially when I get up in the morning.

Q. Did you ever have any difficulty like this before this accident? A. None whatsoever.

Q. How is your eyesight? A. My eyesight is very poor now, and gives me a great deal of trouble.

Q. Do you experience any sensations around the eyes or in the eyeball? A. Quite a little. I get a pain in my eyeball, and it sends a shooting pain up through my head, and also in the morning when I wake up, it seems as though my eyes have sand in them. I also have pus in the corners of my eyes that annoys me a whole lot.

Q. Will you take your glasses off, please? A. Yes, sir.

Q. Will you close your eyes? A. Yes.

Q. Do you know whether or not your eyes are closed the night through? A. They are not.

Q. They are not? A. No, sir.

Q. What do you experience upon going to sleep at night? A. I have a lot of trouble getting to sleep.

Q. Do you sleep the night through? A. No, sir, very seldom.

Q. You mentioned something about your shoulder. What, if anything, was the matter with your shoulder? A. Yes, sir, that was burned at the explosion. It gave me a lot of trouble for a long time.

Q. Were your wrists burned? A. Yes, sir.

Q. And which knee was burned? A. The right knee.

Q. Do you notice any change in the condition of that knee since the accident? A. Yes, I do.

Q. What? A. If I sit in one position very long, when I go to walk or stand up, I have a prickly feeling there, like pins and needles in it.

Q. How about your ankles? A. The same way with my ankles.

Q. Did you function properly before this accident? A. Yes.

Q. Did you ever require the use of medicines or laxatives? A. No, sir.

Q. And since this accident, have you noticed any change in your general organic operations? A. Very much.

Q. In what respect? A. I have to take laxatives about every second day.

Q. With reference to your kidneys, have you noticed any change in the function thereof? A. A great deal.

Q. How so? A. Well, hardly a night passes but I don't have to get up once or twice to urinate.

Q. Before this accident did you ever have that difficulty? A. No, sir.

Q. Before this accident how was your vigor and activity? Were you alert and able to get about? A. I certainly was.

Q. Did you have any feeling of tiredness? A. Not a bit.

Q. Since this accident, what, if any, conditions do you notice? A. I always have a tired feeling, never have any ambition.

Q. Before this accident was your domestic life regular? A. Yes, sir.

Q. And agreeable? A. Yes, sir.

Q. Did you frequently or normally cohabit with your wife? A. Yes, sir.

Q. And since this accident have you experienced the usual normal desires of a man? A. No, sir.

Q. And at the time of this accident was any part of your mouth or tongue affected by flame? A. Yes, sir.

Q. What was burned there? A. All the inside of my mouth was seared, and the tongue and the throat.

Q. You have a pair of eye glasses that you are wearing? A. Yes, sir.

Q. Who prescribed those eye glasses for you? A. Dr. Harold May.

Q. Who is he? A. He is a specialist in New York.

Q. Who sent you to him? A. The Standard Oil Company.

Q. Do you wear the glasses all the time? A. I have to wear them all the time.

Q. Why? A. If I don't I get a severe headache.

Q. Did you get any directions as to how and when you were to use glasses? A. Constantly.

Q. When you don't use the glasses, how is your vision? A. Very poor.

Q. Can you see things clearly? A. No, sir.

Q. How do you see things? A. I see them at a distance. They are blurry. Sometimes I see double.

Q. When you put the glasses on, do you get any relief? A. A whole lot.

Q. Do you still see with glasses on the way you did before this accident? A. Oh, no.

Q. Have you been working since the accident? A. No, sir.

Q. Did you undergo any pain and suffering while you were in the hospital? A. Plenty.

Q. And have you experienced any pain since leaving the hospital? A. Yes, sir, very much.

Q. Where? A. My back gives me an awful lot of trouble.

Q. While you were in the hospital and lying in bed did you develop any condition on the back? A. I had two sores from lying on my back so long.

Q. When you were home from the hospital, did you have any medical care and attention? A. Yes, sir.

Q. Who was at home with you? A. The nurse, Mrs. McLardy.

Q. How long did she remain at your house? A. Approximately six weeks.

Q. Approximately six weeks? A. Yes.

Q. What were her activities about you? A. Well, she was with me to take care of me in every respect.

Q. What did she do for the six weeks at the house? A. Dressed and undressed me and fed me and dressed my fingers. They had been operated on.

Q. Who operated on them? A. Dr. Pinkerton.

Q. Where did he operate on them? A. At the Bayonne Hospital.

Q. Before this operation, were your fingers bent? A. Yes, sir.

Q. After the operation, did they change in any way? A. They bent more.

Q. Who is Dr. Feranza? A. The Standard Oil doctor.

Q. Who is Dr. Pinkerton? A. Dr. Pinkerton is the doctor that treated me in the Bayonne Hospital.

Q. Do you know whom he works for? A. I believe he was employed at that time——

Q. Never mind what you believe. A. I don't know.

Q. When the nurse left your house for a period of six weeks after you came out of the hospital, were you able to get about the house the way you used to? A. Do you mean before the accident?

Q. Yes. A. Oh, no.

Q. Did you require assistance after the nurse left? A. Yes, sir.

Q. Who took care of you then? A. My wife.

Q. What was your difficulty in getting about? A. A great deal. I couldn't dress myself; I couldn't eat; I couldn't help myself or wash; I couldn't do anything; I couldn't open the door.

Q. How long did that condition persist? A. I don't know the exact time, but it was a long time, almost a year.

Q. When did you first go out of the house to walk? A. I can't say the exact time, but I did make trips to the Standard Oil. They sent a bus up for me occasionally.

Q. When did you go out walking? A. I don't know exactly when it was. It was after I came

out of the hospital, probably I was out of the hospital a couple of months, and I went out for a little walk. I just went across the street to my mother's.

Q. Do you visit your friends now the way you did before? A. I do not.

Q. Do your friends call to see you as frequently as they used to? A. No, sir.

Q. Do you go to social affairs the way you did before? A. No, sir.

Q. Do you go into public places the way you did before? A. No, sir.

Q. And when you got home, do you go out in the evenings? A. No, sir.

Q. What activities do you partake of in the way of diversion, physically? A. None.

Q. Are you able to read the paper? A. Very little.

Q. With reference to your back, do you notice any change in your back since this accident? A. Yes, sir, there is a great deal.

Q. In what respect? A. It pains me all the time.

Q. I notice you used a handkerchief just now. What did you use that for? A. My hands are perspiring.

Q. How frequently do your hands perspire? A. Always perspire. It will be cold and still they will perspire.

Q. Did that condition ever exist before this accident? A. No, sir.

Q. What is this back condition of yours? What do you feel? A. I always have a pain in my back.

Q. Whereabouts? A. Right straight across the small of my back.

Q. Did you ever have that pain before this accident? A. No, sir.

Q. How often does it appear there? A. It is there most all the time.

Q. Does it ever change in its degree? A. Yes, sir.

Q. When do you feel it strongest? A. When I keep in one position like I am now, or else when I walk or do anything.

Q. Have you had any treatments for that? A. Yes.

Q. Who gave them to you? A. The Standard Oil gave them to me first and put on a violet ray machine, and since then Dr. Ward has been treating it.

Q. Where is Dr. Ward's office? A. In Jersey street.

Q. Before this accident how did you hold your hands with reference to your posture? A. I held them naturally, any way I cared to have them.

Q. You dropped your hands to your side? A. If I cared to.

Q. Did you ever experience any sensation of an unusual nature when you held your hands at a dropped posture? A. No, sir.

Q. Now, at the present time and since this accident, how do you hold your hands? A. I try to keep them lifted all the time.

Q. Does that relieve a condition? A. Well, they feel fairly well when I keep them that way.

Q. Do you notice any change in the condition of your hands in the temperature? A. A whole lot.

Q. How is that? A. Well, the heat and the cold affect them, and in the winter time I don't dare go out of the house without mittens.

Q. And in the summer time? A. In the summer time the heat affects them the same way.

Q. In what respect? A. A prickly feeling in the summer time, and in the winter time they just get ice cold and I can't keep them warm.

Q. With reference to your body in general, do you ever experience any sweats?

Mr. Bishop: I object to that as leading.

Mr. Gordon: I will withdraw the question.

Q. You have testified that you use a handkerchief on your hands? A. Yes, sir.

Q. And you do that because of what? A. I perspire so freely.

Q. Are there any other places where there is perspiration present? A. Yes, sir, my whole body.

Q. Did that condition appear before this accident? A. It did not.

Q. Over what area does that perspiration evidence itself after this accident? A. All over, and especially under my arms and feet and hands.

Q. Did you ever experience any unusual conditions before this accident of that nature? A. No, sir.

Q. Even in working in and about the plant? A. No, sir.

Q. In working in the pump house, did you ever have any trouble climbing up to the tanks a distance of about forty-two feet? A. No, sir.

Q. Did you ever have any difficulty in turning any of the valves? A. No, sir.

Q. Or handling wrenches? A. No, sir.

Q. Did you ever try to turn a valve since this accident? A. I did not.

Q. Or climb? A. No, sir, only a stairway.

Q. In climbing stairways, do you notice any change in your condition? A. Yes, sir.

Q. How? A. It is quite an effort for me to climb stairs, and I am winded when I get to the top.

Q. In addition to the headaches, do you experience any other conditions? A. Yes, I have dizzy spells at times.

Q. How frequently do you get those dizzy spells? A. Well, I don't just know how often it is.

Q. How do they affect you? A. I get them most in the morning when I get out of bed.

Q. How long duration are they? A. They don't last very long. It feels as though I am walking on waves when I get up. I am light-headed.

Q. Did you ever experience that before this accident? A. No.

Q. How long does that continue? A. Probably a half hour or so.

Q. Do you ever experience any dizzy spells throughout the day? A. At times I do, yes.

Q. Are they of any duration? A. Well, they vary; sometimes they go away quickly and other times they last longer.

Q. Did you ever have these dizzy spells before this accident? A. No, sir.

Q. Before this accident did you bend over and move about? A. I had to, yes.

Q. Did you have any difficulty? A. No.

Q. Since this accident have you been bending or moving about? A. Well, I bend as much as—sometimes I try.

Q. Do you experience any difficulties in bending? A. Oh, yes.

Q. Where? A. Across my back.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Mr. Gilroy, you had been employed in what you call the Kimble pump house? A. That is correct.

Q. How long did you work there before this accident? A. I believe about eleven years.

Q. In the pump house? A. Well, under Mr. Kimble, or his—or Mr. Burrows, before him in that department.

Q. Now, during that time you worked in eight-hour shifts, didn't you? A. Yes, sir.

Q. And you say that at the time of the accident you were on the three to eleven shift? A. That is correct.

Q. That is, you were paid from three to eleven? A. Paid for eight hours' work.

Q. When you left in the evenings, you left before eleven, didn't you? A. That is correct.

Q. Do you know just what time it was when you got into the car and started down the road the night of this accident? A. I can't very well tell you the exact time, no.

Q. It was some time before eleven o'clock? A. Yes.

Q. It didn't take you very long to go the length of that road? A. No.

Q. Did it take about four or five minutes? A. Probably that.

Q. And it was before eleven o'clock before you got to the scene of this accident? A. Just before.

Q. Yet you were paid up to eleven o'clock, weren't you? A. I was paid for eight hours.

Q. Well, your eight hours are from three to eleven? A. Eight working hours. I worked eight hours and was paid for eight.

Q. From three to eleven? A. Eight hours I worked and was paid for eight.

Q. Weren't you paid for working from three to eleven? A. No, sir, I was paid from the time I relieved my man until I was relieved.

Q. You are supposed to relieve your man and leave at eleven o'clock? A. No, sir.

Q. You said that you were allowed a leeway of fifteen minutes to get the bus? A. Yes.

Q. That is, you were allowed to leave fifteen minutes earlier and you were paid up to eleven o'clock? A. No, sir.

Q. That is not true? A. No, sir.

By the Court:

Q. What time did you get to the plant? A. I arrived at the pump house about 2:30 in the afternoon.

Q. Do you know what time you actually got to your work? A. Probably a quarter to three.

By Mr. Bishop:

Q. You were supposed to work from three to eleven? A. I was supposed to work from the time I relieved my man until I was relieved.

Q. If he relieved you after four hours' work, you would not be expected to be paid for eight hours, would you? A. If I got permission, I would.

Q. You had permission to leave fifteen minutes earlier? A. Yes.

Q. To cover your travel down to the gate? A. That is right.

Q. Out over this road? A. Yes.

Q. You got paid for your fifteen minutes, too? A. No, sir.

Q. At the time of this accident you said you were going along Hook Road and you had come in

over that road about three o'clock, had you not? A. About two-thirty, 2:25.

Q. Did you notice anything unusual as you came in? A. Yes, the smell of gas.

Q. Was it the usual smell that you always smell around the refinery? A. Not around the refinery, around that road.

Q. There is a smell of sulphuric acid or chemicals around there, is there not? A. Yes, but I know the difference between sulphuric fumes and gas fumes.

Q. There were the usual crude oil, tar, and the usual refinery odors there, weren't there? A. Where?

Q. Right around that road? A. Not where I was, near the gas tank.

Q. There was none of that there? A. No, sir.

Q. There was none of that odor there? A. Very seldom, unless the wind was very strong from the stills, and we would get it there. There we got the gas odor.

Q. Did you report that on that day? A. No, sir.

Q. Did you ever report it any other day? A. No, sir.

Q. It was not anywhere near as bad when you came in as it was when you came out? A. No, sir.

Q. It was very much worse when you came out? A. Yes, sir.

Q. This explosion or fire that happened all happened in a second, didn't it? A. Yes.

Q. It happened very quickly? A. Yes, sir.

Q. From the time you saw the first flash until the time you found yourself in the roadway was just a second of time? A. I suppose so.

Q. And the pump house you spoke of had lights inside of it? A. Yes.

Q. It was light that night, wasn't it, eleven o'clock? A. Just before eleven.

Q. That is daylight savings, and it was dark? A. Yes, it was dark.

Q. And the road there is not well lighted, is it? A. No.

Q. And it was raining? A. Yes.

Q. It was a cloudy, thick night? A. Yes.

Q. It had been raining on and off all the evening? A. Yes.

Q. And thunder storms on and off all the evening? A. Yes, sir.

Q. I don't suppose you know whether or not there were any thunder storms after this? A. No, sir.

Q. You do recall that you came along the road riding in this car, and you suddenly saw a flash? A. Yes.

Q. And the next thing you knew you were out in the road in front of the power house? A. That is right.

Q. You were then in front of the power house, and you were badly burned, weren't you? A. Yes, sir.

Q. And you were in great pain? A. I was.

Q. And you were intent upon getting some relief for your injuries? A. That is right.

Q. And you ran into the power house? A. Well, that is where I headed for.

Q. You got there as quickly as you could? A. That is the idea.

Q. You were not paying any particular attention to anything else, were you? A. No, sir.

Q. As a matter of fact, you could not see very well then, could you? A. No, sir; I saw where I was going, though.

Q. But you had some difficulty even in doing that? A. I got there.

Q. And then when you got there, you received assistance, didn't you? A. Inside of the power house? Yes, sir.

Q. And the men in there helped you? A. Yes, sir.

Q. They put oil on your burns? A. That is right.

Q. And they gave you what aid they could until the doctors came? A. Very nice to me.

Q. They did everything they could for you, didn't they? A. Yes, sir.

Q. Was everything all right in the power house? A. All except the fire on the end.

Q. In the power house? A. Yes.

Q. Where? A. Just as I entered.

Q. Was it inside? A. Yes, sir.

Q. And although there was a fire inside, they sat down and took care of you and put oil on your burns? A. I don't know what they did; I know they took care of me. I don't know what they did about the fire.

Q. You don't really know there was any fire there? A. Yes, there was.

Q. Inside? A. I carried some in.

Q. You carried some in? A. Yes.

Q. And that was the fire you spoke of? A. I don't know, but I carried some in.

Q. Was it from the fire you carried in that you saw any other fire? A. Yes, at the end of the pump house, the end of the power house was on fire, the end nearest the pump house.

Q. Was the power house that you were in on fire? A. Yes.

Q. Inside in the room and where you were? A. Yes, sir.

Q. How big is that room? A. I don't know the exact size, but it is a very big place.

Q. Do you know whether or not there was any fire in there before you came in? A. I couldn't tell you that.

Q. But you brought fire in with you? A. I don't know. I am telling you it was on fire in the end. I don't know how it got there.

Q. Did you see anybody trying to do anything about that fire? A. They were working on me. I was more interested in myself.

Q. They did not pay any attention to the fire, but they worked on you? A. I don't know; I am telling you I got plenty of attention.

Q. The fire was not so bad that it kept anybody from helping you, was it? A. I don't know.

Q. And then you were taken to the hospital, weren't you? A. Yes, sir.

Q. And you remained there, I think you said, for twelve weeks? A. Yes.

Q. And during all that time you were treated by a number of doctors? A. Yes.

Q. And you did not pay any of those doctors? A. No.

Q. They were all paid for by the Standard Oil Company? A. I don't know who paid them.

Q. You didn't pay them? A. I didn't positively pay a nickel.

Q. What about this nurse that came home with you and treated you? Who paid her? A. I don't know; I didn't pay her.

Q. You did not? A. No.

Q. Have you any idea who paid her? A. No idea; I never saw any receipts or bills.

Q. Did you ever inquire as to who was going to pay for these doctors? A. No, sir.

Q. Did anybody ever tell you who was going to pay for them? A. No, sir.

Q. What about the nurses in the hospital? Who paid for them? A. I don't know.

Q. Did you ever inquire as to who was going to pay for them? A. No, sir.

Q. Were you ever interested in that at all? A. Never gave it a thought.

Q. Didn't you assume that the company would pay——

Mr. Gordon: I object to what he assumed, as in no way pertinent to the issue in this case and not cross-examination.

Mr. Bishop: It is entirely pertinent and it is cross-examination.

The Court: He has not testified on direct examination anything about the payment of any bills. He testified as to the treatment that he received in connection with the physical injuries and the suffering and the necessary attendance of nurses. The subject of the cost of that treatment was not touched upon in the direct examination at all, so I do not see why it is relevant on cross-examination.

(Argument.)

The Court: The objection is sustained.

Mr. Bishop: Exception. I will ask leave to make this man my witness for certain questions, merely to relieve myself of the necessity of bringing him back.

Mr. Gordon: Do I understand that the defendant is going into its own case now?

The Court: You say that you want to do that in order to relieve the witness from having to attend here? If he is not willing to attend here, you have the right to subpoena him.

Mr. Bishop: He is the plaintiff, and I don't have to subpoena him. He is going to be here.

The Court: I shall direct him to be here. I do not want to confuse the case at this point by having the defense witnesses introduced in between the plaintiff's case, unless it is absolutely necessary to secure testimony, but it seems to me that it is a little out of order at this time. I think that properly should come when you present your own case and your own witnesses. I will undertake to see that the witnesses are here and available. In fact, counsel will agree that they be here.

By Mr. Bishop:

Q. When you were in the hospital, you had people who came in and visited you while you were there? A. Yes.

Q. Regularly? A. Yes.

Q. I suppose not during the first three or four days, or do you know within what time? A. Longer than that. They could not be admitted to see me.

Q. For how long was it before people began to come in to see you? A. I don't know, quite a while.

Q. Was it a week? A. It all depended upon my condition. If I felt well enough to receive visitors, and they were very close to me, the nurse would allow me.

Q. If it was anybody you wanted to see, they allowed him to come in? A. I didn't see them; they came in and looked at me and walked out.

Q. There finally came a time when you talked to them? A. Yes.

Q. How long was that after the accident? A. I don't know; probably a month or a month and a half before I knew what I was talking about.

Q. After five or six weeks you were able to converse with people who came in? A. At times.

Q. And they did come and talk to you at times? A. Yes.

Q. Mr. McMorrow occupied a room with you part of the time, didn't he? A. Yes.

Q. About how long was that? A. How long he occupied it?

Q. How long were you two in the room together? A. I don't just remember, but I know he came in my room after Peters left.

Q. And Peters was in the room with you first? A. That is right.

Q. And then Peters left. Do you know what happened to him? He left the hospital, didn't he? A. Yes.

Q. And then McMorrow came in and he stayed how long? A. I don't know the exact time, but he left just before I left the hospital.

Q. He left just before you did? A. Probably a week before.

Q. And during that time you were able to have some conversation with him from time to time? A. Near the end, yes.

Q. You could speak to him any time you wanted to? A. The last few weeks it was all right.

Q. The last two or three weeks? A. Yes.

Q. It might have been a little more than that? A. Maybe so.

Q. Four or five weeks that you were able to talk to Peters? A. Not intelligently.

Q. Well, you talked to him, didn't you? A. Sometimes I didn't remember I was talking to him. They would tell me the next day, but I didn't know.

Q. When you wanted to see people, you were allowed to see them? A. I never asked for anybody to come.

Q. You never did? A. No, sir.

Q. Did you ever ask for your wife to see you? A. She always came without being asked.

Q. She was there nearly every day? A. Three or four times a day. She was allowed to come in.

Q. She was always allowed to come in, wasn't she? A. I don't know whether she was or not.

Q. You never heard of her not being allowed to come? A. No, I didn't.

Q. As you got into this car and drove down the road, it was raining, wasn't it? A. Yes.

Q. What kind of a car was it? A. An open Ford.

Q. Did it have any side curtains on it? A. No, sir.

Q. None at all? A. No, sir.

Q. As you came down and turned the corner and started north on Hook Road towards these gas holders, you said you noticed an unusually very strong smell of gas? A. Yes.

Q. Did you understand that that indicated a dangerous condition? A. I certainly did.

Q. You knew that? A. Yes.

Q. And yet you went right ahead without any protest? A. I put my handkerchief over my nose to get through it.

Q. Then you said that you realized that if there were any sort of sparks or flame that it was likely to catch fire? A. When did I say that?

Q. You understood that, didn't you? A. Oh, certainly.

Q. And yet you continued right along into the gas without any protest? A. It was just as dangerous going ahead as it was back.

Q. It was more dangerous going ahead, wasn't it? A. I didn't know how far the gas extended. It all depended upon the wind.

Q. It kept getting stronger and stronger the farther you went? A. I found that out later, yes.

Q. And you did not suggest stopping and going back? A. I didn't happen to be driving the car.

Q. You did not suggest it to the person who was driving? A. It came too quickly.

Q. You mean that it came so quickly you did not have time to suggest anything? A. We were traveling when we smelled this gas.

Q. How fast were you traveling? A. Probably fifteen miles an hour.

Q. You say you saw some unusual flame? A. Yes.

Q. Where was that? A. In the pump house.

Q. Didn't that indicate to you that there was danger in approaching any closer? A. It surely did.

Q. And yet you went right on? A. I couldn't stop.

Q. Did you try to stop? A. It was too close to the building.

Q. How much time did you have from the time you saw that until the time this happened? Did it occur in a flash? A. Just about a second or two, about twenty-five feet from the pump house, when I noticed the flash.

Q. That is the first time you noticed it? A. Positively.

Q. You said that you went to the Standard Oil place several days after you left the hospital, if I recollect correctly? A. Yes.

Q. They sent a car for you? A. Yes.

Q. Why did you go there? A. They ordered me to go down.

Q. Who ordered you? A. Dr. Feranza, to see if he couldn't fix my hands up a bit.

Q. Whom did you see when you went there? A. Dr. Feranza.

Q. Did you ever see anyone else? A. I saw several people down there.

Q. Did you ever see Mr. Gillson? A. I believe I saw him one time.

Q. Did you ever see Mr. Keppel? A. Several times.

Q. Did you ever see Mr. Hurtzig? A. I don't remember him.

Mr. Bishop: Will Mr. Hurtzig please stand up?

(A man stood up in the courtroom.)

The Witness: Yes, I have seen him down there.

By Mr. Bishop:

Q. Did you ever see him when you went back there after the accident? A. Back where?

Q. Back to the plant? A. I probably did.

Q. On those occasions when they sent a car for you? A. I remember I seen him; I didn't take any particular notice.

Q. On those occasions you saw Mr. Keppel, too? A. Yes.

Q. And you saw Mr. Gillson? A. Yes.

Q. You saw all three of these gentlemen in the hospital, too, didn't you? A. I don't know; I have seen Mr. Gillson once. I don't remember seeing him, but he told me he was there.

Q. You don't remember seeing him? A. No, I don't.

Q. Do you remember seeing Mr. Keppel there? A. Yes, he was there a few times.

Q. In the hospital? A. Yes.

Q. Do you remember seeing Mr. Hurtzig in the hospital? A. No, I don't.

Q. But you do remember seeing Mr. Keppel in the hospital? A. Oh, yes.

Q. How many times? A. I don't know how many times.

Q. Was it several times? A. Yes.

Q. Did you ever see Mr. Smith in the hospital? A. Yes.

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

Q. How many times did you see him in the hospital? A. Quite a few.

Q. He came to see you quite often? A. Yes.

Q. And Mr. Mettham, did he come to see you? A. I don't remember Mr. Mettham.

Q. You know him? A. Yes.

Q. But you don't remember seeing him? A. No; if he had been there, he must have been in the early part when I was in the hospital.

Q. Did you have any conversations with them when they called to see you? A. Not that I remember, no.

Mr. Bishop: Mr. Gordon, I give notice to produce some letters. Have you got those letters?

Mr. Gordon: I have not; no, sir.

Mr. Bishop: I have also given notice to produce some checks.

Mr. Gordon: I have some checks here.

Mr. Bishop: The witness desires to be excused for a moment.

(The witness left the stand.)

(The witness returned to the stand.)

Mr. Gordon: I desire to have noted on the record what I am producing.

Counsel for the defendant has called for the production of some checks, and the plaintiff herewith produces four checks numbered 1162, 1256, 1336, and 1418. I

don't want to go into the details yet, because I am merely identifying the numbers, that is all.

The Court: If there are any jurors who would like to be excused for a moment, they may retire, but be very careful that there is no conversation with anybody at all.

(A brief recess was had.)

(The jury returned.)

(The witness resumed the witness stand.)

By Mr. Bishop:

Q. You said something about being paid for overtime. You did get paid for overtime, did you not? A. Yes, if we worked overtime.

Q. If you worked overtime, when did your overtime commence? A. It commenced after the hour I was to work.

Q. That is, if you worked overtime this night, your overtime would commence at eleven o'clock, would it not? A. That is the idea.

Q. You received certain letters, did you not, from Mr. Smith of the Standard Oil Company? A. I believe I did get a few.

Q. You received three letters, as a matter of fact. A. What are they about?

Mr. Gordon: I object to any discussion about the contents of any letters now as not cross-examination. The question is: Did he receive any letters. I have no objection to that.

By Mr. Bishop:

Q. I ask you specifically if you did not receive a letter from Mr. Smith dated April 19, 1928? A. I don't know.

Q. You do not know? A. I can't recollect dates.

Q. You do not recollect that date? A. No.

Q. Did you receive a letter from Mr. Smith dated June 9, 1928? A. I will have to give you the same answer.

Q. Did you receive a letter from Mr. Smith dated May 25, 1928? A. I don't know the dates at all.

Q. Did you receive three letters from Mr. Smith? A. I don't remember how many, if I received one or three or six, I don't remember.

Q. You may have received six? A. Maybe I did.

Q. What did you do with them?

Mr. Gordon: I object to that, if your Honor pleases, as not cross-examination, what he did with letters he may have received from Mr. Smith.

The Court: I will allow the question, because it does not appear yet that it is in conflict with the rules. It does not appear that it would do any harm.

Mr. Gordon: I will withdraw the objection.

The Court: When we get down to the contents——

By Mr. Bishop:

Q. What did you do with the letters? A. I gave them to my attorney.

Q. Did you give him all the letters you received from Mr. Smith? A. I believe I did.

Mr. Bishop: Then I ask for the production of three letters from Mr. C. F. Smith, to Gilroy dated April 18, May 25, and June 25, 1928.

Mr. Gordon: Notice to produce has been served, but the only letters or papers that I have are the papers that I have produced.

Mr. Bishop: I ask specifically whether or not you have those letters?

Mr. Gordon: I have not, and I never saw them.

Mr. Bishop: Have you any other letters?

Mr. Gordon: No, sir, I have a letter which contained these checks, which I just gave you, which is in an envelope of the Standard Oil Company, Bayonne refinery, and it is marked "May 17, 1928", addressed to Mr. Edward N. Gilroy, 19 East 31st Street, Bayonne, New Jersey. I do not say he did not give them to me, but I do not know whether I ever had them or not.

Mr. Bishop: Will you make an examination of your papers?

Mr. Gordon: I do not have them. If you have carbons and you want to show them to me, perhaps later on in the case I may not object to their going in.

By Mr. Bishop:

Q. Mr. Gilroy, you received and have produced here four checks. Did you ever see these checks before?

The Court: He has not seen them here yet.

(Mr. Bishop handed the witness the papers referred to.)

A. I believe these are the ones I received.

Q. You received them and turned them over to your attorney? A. Yes, sir.

Mr. Bishop: I ask to have the check number 1162 marked for identification.

(The paper referred to was marked "Defendant's Exhibit 1 for identification.")

Mr. Bishop: I also ask to have a check numbered 1256 marked for identification.

(The paper referred to was marked "Defendant's Exhibit 2 for identification.")

Mr. Bishop: I also asked to have a check numbered 1336 marked for identification.

(The paper referred to was marked "Defendant's Exhibit 3 for identification.")

Mr. Bishop: I ask to have check numbered 1418 marked for identification.

(The paper referred to was marked "Defendant's Exhibit 4 for identification.")

Mr. Bishop: These are the four checks produced by the attorney for the plaintiff in response to a notice to produce.

By Mr. Bishop:

Q. Mr. Gilroy, you remember I asked you to look at this letter and I asked you if you remembered receiving a letter of which this is a copy? A. I don't remember it.

Q. You do not remember it? A. No.

Q. You say you did not receive it? A. Where was that sent to?

Q. Addressed to you at 19 East 31st Street, Bayonne. A. When was it addressed there?

Q. April 19, 1928. A. I don't know whether I lived there then or not; I don't believe I did.

Mr. Bishop: I ask that it be marked for identification.

(The paper referred to was marked "Defendant's Exhibt 5 for identification.")

The Witness: That is not my home and never was.

Q. I show you another letter, or a copy of a letter, addressed to Mr. Ed. Gilroy, Vernon Street, near Michigan Avenue, Kenilworth, New Jersey, dated May 25. You lived there at one time? A. Yes.

Q. You lived there on May 25 of last year? A. Yes.

Q. I ask you if you remember ever receiving a letter of which this is a copy? A. I don't just recollect receiving—I received some letter.

Q. Would you say you may have received that letter? A. I don't know whether I did or not; I can't remember.

Q. You would not say you did not receive it? A. I would not say I did or I did not.

Mr. Bishop: I ask that it be marked for identification.

(The paper referred to was marked "Defendant's Exhibit 6 for identification.")

Mr. Gordon: May I note on this letter that it has not been identified as being received?

Mr. Bishop: This is the letter that he says he does not know whether or not he received.

By Mr. Bishop:

Q. I show you a copy of a letter dated June 9, 1928, and ask you if you ever recall receiving a letter of that nature? A. No, I don't believe I did.

Q. You don't remember whether or not you got that? A. No.

Q. Do you say you did not get it or that you do not remember? A. I never got the letter.

Mr. Bishop: I ask that that be marked for identification.

(The paper referred to was marked "Defendant's Exhibit 7 for identification".)

Q. Do you know how many letters you turned over to your attorney? A. No, I couldn't tell you.

Q. Were there more than three? A. I don't know.

Q. Mr. Gilroy, I show you eighteen checks, and ask you if you ever saw them before? A. My wife took care of all the checks received.

Q. Did you mean that these checks received were taken care of by your wife? A. Probably were, yes.

Mr. Bishop: May I have these checks marked for identification as a single exhibit?

(The papers referred to were marked "Defendant's Exhibit 8 for identification".)

By Mr. Bishop:

Q. There are eighteen checks drawn to the order of Edward Gilroy, marked "Defendant's Exhibit 8 for identification". Do you know whether or not

these checks were cashed? A. They probably were.

Q. By whom? A. My wife.

Q. With your authority? A. If she had to use them, I don't know whether she had my authority or not.

Q. I call your attention to the endorsements on these checks, and ask you whose handwriting they are in. Do you know? Is that your wife's handwriting? A. No.

Q. Is it yours? A. No.

Q. It is not your wife's handwriting? A. No—let me see. That is probably my wife's handwriting (indicating) and that one, and that one, but not that one (indicating); that is not my wife's handwriting. That one (indicating) looks like it.

Q. And that one (indicating)? A. Yes, yes, yes, yes; it looks like it.

Q. What about this one (indicating)? You said that all of them look like your wife's handwriting except these three, is that right? A. Yes.

Q. I ask you to mark an "X" on the ones you say do not look like your wife's handwriting. A. Yes.

Q. Did you ever request any money from the Standard Oil Company? A. I don't think so, only on pay day.

Q. Did you ever receive any? A. I did not, no.

Q. Did anybody receive it for you? A. If my wife received those checks and cashed them, she did.

Q. You know, as a matter of fact, that she did receive them and cashed them, don't you? A. I don't know whether she did or did not.

Q. Do you remember executing a petition for compensation under the Workmen's Compensation Act?

Mr. Gordon: I object to that as not cross-examination and not material to the issue involved at the present time.

The Court: Objection sustained.

Mr. Bishop: Exception.

Q. Mr. Gilroy, I believe you said that you have not done any work since this accident? A. That is right.

Q. Have you tried to do any? A. Oh, yes.

The Court: Please speak louder, Mr. Gilroy.

By Mr. Bishop:

Q. You were offered a position by the Standard Oil Company after this accident, weren't you? A. They told me when I was well enough I could go to work.

Q. They offered you a definite position at a definite salary? A. I don't know of anything of any definite.

Q. They offered to employ you in a clerical job, did they not? A. Oh, no; they said they would try to find something for me.

Q. Didn't Mr. Gillson, in discussing this matter with you, offer you a job to do clerical work? A. He offered me a job.

Q. Did you take it?

Mr. Gordon: I object. I will withdraw the objection.

A. He offered to give me a couple of thousand to open a cigar store. That is the job he offered me.

Q. Didn't he offer you a job with the company? A. He told me he did not know of any job I could handle.

Q. Didn't he offer you a job to do clerical work? A. Positively not. He asked me to write, and he saw I couldn't handle a pencil.

Q. Didn't Mr. Smith offer you a job? A. No, he did not.

Q. Did Mr. Keppel offer you a job? A. No.

Q. Didn't they all say to you that there was a job open for you? A. When I got well enough to do it.

Q. Did you ever try to do it? A. I couldn't do it.

Q. Did you ever try to do it? A. I am telling you I couldn't do it.

Q. Did you ever make an appointment to come around there and see them with respect to going back to work? A. I did not.

Q. You never did? A. No.

Q. Did they ever ask you to come around and see them with respect to going back to work? A. They asked me when I thought I would be able to come back to work.

Q. Did they ever ask you to come at any particular day? A. No.

Q. Did they ever ask you to come, and did they send a car to bring you around to talk it over? A. Not about work, no.

Q. What did they send the car for?

Mr. Gordon: That is objected to as not cross-examination. The only reason I did not object to your questions before was that it went on the question of damages, but this question I object to because it is not cross-examination.

The Court: The witness has testified that he has not had work and not been able to work since the accident. You are cross-examining him on the question of what ef-

forts he has made to avail himself of work or to get work. You are examining him on the question of whether or not those opportunities have not been presented to him and as to how he did or did not take advantage of them.

Mr. Gordon: Then the witness was asked the question before the last about what they did talk to him. Now I submit that he, having denied that it was about a position, that what they did talk to him about is not pertinent to the issue in the case.

The Court: The objection to that question is proper. The last question to which I understand you objected was whether or not they sent a bus to bring him to the plant to talk about a job.

Mr. Gordon: As to that question, I have no objection, but as to what he may have talked about, other than employment, I do object.

(The stenographer read the last question as follows: "Question: What did they send the car for?")

Mr. Bishop: I will withdraw the question.

The Court: That was the question that was being asked at the time the objection was made.

By Mr. Bishop:

Q. Did they ever send a car for you? A. I generally went down there for treatment trying to get my hands fixed to function.

Q. Did they ever suggest or offer to you to send a car down and bring you up and discuss the question of employment? A. They did not.

Q. They never did? A. No, sir, not to my knowledge.

Q. Did they ever write to you with respect to employment? A. No.

Q. What did you do with these letters that you got from Mr. Smith? A. I think I gave them to Mr. Gordon.

Q. Did you read them? A. No; I don't remember.

Q. Did somebody read them to you? A. The mail came to my mother's house.

Q. Didn't you ever receive it? A. Probably she called me up, or I called up, and she told me there was a letter. She probably told me, but I don't remember anything about it.

Q. What was done with these letters? A. Probably destroyed.

Q. They were destroyed without your ever seeing them? A. I think so.

Q. How could you ever give them to your attorney, if they were destroyed? A. I told you I thought I gave them to him.

Q. You did get some letters? A. I don't remember.

Q. You did give something to your attorney? A. Whatever I had in connection with this case I gave to him.

Q. You had some letters, did you not? A. I don't remember.

Q. You said on your direct examination that you received some letters and gave them to him. A. I received letters now and then, but my mind is hazy.

Q. You did know at the time, didn't you? A. Maybe I did at the time then.

Q. Referring particularly to a letter marked "Defendant's exhibit 6 for identification", you

said that you recalled receiving that letter, or, at least, you said you would not say you did not receive it? A. I said I would not say I did either.

Q. You received some letters, didn't you? A. I probably did.

Q. You know perfectly well you received some letters? A. I don't know perfectly well.

Q. But you turned some letters over to your attorney? A. I told you I turned whatever I had.

Q. And that included some letters? A. If it was letters, he got them too, if I received them.

Q. Did you telephone to Mr. Smith on one or more occasions? A. I did.

Q. Did you telephone him with respect to employment? A. No, sir.

Q. What did you telephone him about?

Mr. Gordon: I object to that as not cross-examination. He said it was not in reference to employment, and when we get beyond that point, it is not cross-examination.

The Court: He said it was not in reference to employment, and I don't think it is competent for him to be asked anything further as to what it was.

Mr. Bishop: I pray an exception.

Q. Did you ever go to Mr. Smith's office? A. No, sir.

Q. Did you ever have an interview with Mr. Smith and several other gentlemen in his office? A. No, sir.

Q. Never in your life? A. No.

Q. Not after this accident? A. No.

Q. You know who Mr. Smith is? A. I certainly do.

Q. You turned over four checks to your attorney, is that right? A. I believe it was four, yes.

Q. How did you get those checks? A. They were sent to my mother, I believe, in thirty-first street.

Q. How were they sent? A. I suppose through the mail.

Q. And they were forwarded by her to you? A. No, my wife went out there and got them.

Q. That is, wherever they were mailed, they finally reached you, didn't they? A. That is right.

Q. And if there were any letters accompanying them, the letters reached you, too? A. No, I don't remember.

Q. Did you ever return to the company any checks you received from the company? A. Not to my knowledge.

Q. You kept any checks that came to you, did you not? A. I believe I did, yes.

Q. Do you know what these checks were for?

Mr. Gordon: I object to that as not cross-examination, what they were for. He has identified the checks. If they want to adapt them to a specific purpose, that is part of an affirmative defense, if it is in mitigation of damages or in furtherance of any other theory they may have in mind, but in so far as the testimony now is concerned, the witness was asked to identify certain checks. He has identified them, and that is as far as he may be permitted to be cross-examined with reference to these checks.

(Argument)

The Court: I will sustain the objection.

Mr. Bishop: Exception.

By Mr. Gordon:

Q. Mr. Gilroy, have you had any difficulty with your hearing? A. A great deal.

Q. Since the accident? A. Yes.

Q. What ear? A. The right ear.

By the Court:

Q. Did you have any difficulty before the accident? A. No, sir.

Mr. Gordon: That is all.

Harry W. Faasch, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Gordon:

Q. Mr. Faasch, did you get a subpoena to appear here in court? A. Yes, sir.

Q. When were you subpoenaed? A. When I got home from work last Saturday afternoon.

Q. Did you present that subpoena to your superior? A. Well, I went to my superior's home that evening, and he wasn't home.

Q. Did you see your superior that Sunday? A. I didn't see him; I called him up on the telephone —at least, he called me up.

Q. What were your usual shifts of employment before you got the subpoena? A. At the present time?

Q. Yes. A. At the present time we are working on day shifts from 6.30 to 3.00.

Q. And has your shift been increased in any way since you have been served with the subpoena? A. Well, I can't say as the shift has been increased.

Q. Have your hours of employment been increased in any way? A. Not the hours of employment, no, sir.

Q. Has your time of employment been changed? A. My time has been changed, yes, sir.

Q. From what? A. Well, I have been working on the day shift from 6.30 to 3.00, and now I am working to seven.

Q. Where are you working? A. Number two power house.

Q. With whom? A. With the Standard Oil Company.

Q. Where do you live? A. 36 East 12th Street, Bayonne.

Q. How long have you been with the Standard Oil Company? A. Somewhere between fifteen and twenty years.

Q. Were you working for them in 1927? A. Yes, sir.

Q. Were you working for them in the month of August, 1927? A. Yes, sir.

Q. In what capacity? A. At that time we were—do you mean what was I rated at or doing that night?

Q. On the night of August 8, 1927, what were you working at? A. Engineer.

Q. Where? A. Number two power house.

Q. That is located on Hook Road? A. Yes.

Q. And that is almost at the point where Hook Road makes a westerly turn? A. Yes, sir.

Q. To the north of what was formerly the locker room of plant number three pump house? A. Yes, sir.

Q. On the easterly side of Hook Road? A. Yes.

Q. As indicated on this map where there are two cross marks? A. Yes.

Q. And you were working there that night? A. Yes, sir.

Q. Did the place have any engines or turbine sets in operation that you were working at? A.

We had one turbine and one gas engine in operation.

Q. And this gas engine drew its supply of gas from where? A. Number two gas holder.

Q. How long has that gas holder been in the service of the plant, to your knowledge? Number two gas holder, I mean. A. Well, ever since I have been employed in the power house it has been there, and that must be twelve to fifteen years.

Q. Do you remember being at the power house on the night that Mr. Gilroy rushed in? A. Yes, sir.

Q. Do you remember whether or not at or about that time it was raining outside? A. Well, it wasn't raining very hard at that time.

Q. Can you tell us whether or not at or about that time there had been any thunder or lightning on that night? A. At that time? What day do you mean?

Q. Around eleven o'clock at night. A. Not that I know of, no.

Q. Did you see Gilroy when he entered the power house? A. Yes, sir.

Q. Will you describe to the jury his appearance and conditon? A. Well, that is a very hard thing to do, to describe his exact appearance. The man came running in to me somewhat simlar to a ghost, and he came running in and scared all the boys. He wasn't really on fire; he was smouldering in spots.

Q. He was smouldering? A. Yes, just his clothes were, his clothes were smouldering in different parts of him.

Q. Did you apply anything? A. I personally did not apply anything, but I took him and brought him over to one part of the engine room and asked my helpers there to apply oil to him, which they did.

Q. Do you know where the gas stored in holders one and two comes from, what stills?

Mr. Bishop: If he knows of his personal knowledge.

The Court: He said, does he know.

A. Do I know?

Q. Yes. A. Well, I know it comes from three plant.

Q. Do you know what the practice was with reference to the raw gas that passed to these holders for about five years preceding the accident?

Mr. Bishop: I object to that, in the first place, because it covers an extensive period, and in the second place, I request that it be confined to the witness's own personal knowledge and that anything based upon hearsay or whatever people told him be excluded.

Mr. Gordon: I will withdraw the question.

Q. I direct your attention to plaintiff's exhibit two, to various circles on the westerly side of Hook Road to the north of gas holder number two, marked "scrubbers". Are you familiar with the location of any scrubbers at or about the point indicated on the map? A. I know they are there, yes, sir.

Q. In August, 1927, were these scrubbers in use? A. I believe not.

Q. Do you know what they had been used for? A. I believe they were——

Mr. Bishop: I object to that as irrelevant. It is too long prior to this accident.

Mr. Gordon: I will withdraw the question.

Q. Do you know if these scrubbers have anything to do with the operation and maintenance of the gas holders?

Mr. Bishop: I object to that, unless it is based on the witness's personal knowledge.

The Court: The witness may answer yes or no as to whether or not he knows.

A. At that present time they did not.

By Mr. Gordon:

Q. When they were in use, did they? A. Yes, sir.

Q. What was their function?

Mr. Bishop: He is not qualified as an expert on the use of scrubbers. It does not appear that he knows of his own personal knowledge.

By Mr. Gordon:

Q. Do you know what a scrubber is? A. A scrubber is used to remove sulphur from the gas as much as possible.

Q. Do you remember the last time these scrubbers were cleaned? A. No, sir.

Q. Do you know whether or not the operation of the valves on any engines ever become clogged?

Mr. Bishop: I object to that as irrelevant.

Mr. Gordon: I will withdraw the question.

Q. Are there any engines that were operated with the gas from gas holder number two? A. No, sir.

Q. At or about August 8, 1927, and for three or four months prior thereto? A. Well, occasionally we ran them at that time, and then we shut them down, but that night we had one running.

Q. You say you shut them down prior to August, 1927? A. Yes, sir.

Q. What was the occasion for the engines being shut down that was being supplied with gas from gas holder number two?

Mr. Bishop: I object to that. This man is not an expert on gas.

The Court: What is this man's work?

By Mr. Gordon:

Q. What was your position? A. Engineer that night.

Q. You are familiar with the operation of your engines? A. Yes.

Q. And you are familiar as to the causes and reason when they shut down? A. Yes, sir.

The Court: He may answer.

Mr. Bishop: Exception.

By Mr. Gordon:

Q. What was the cause and reason of your engine shutting down from time to time prior to this accident?

Mr. Bishop: I object to that. It is too indefinite.

Q. How frequently would your engines shut down before this accident? A. Well, they formerly were shut down every evening as the load went off, and started up in the mornings.

Q. Were there any periods of time when the engines were shut down on account of any trouble with the engines?

Mr. Bishop: I object to that as leading.

Q. Were there any other reasons why they were shut down, excepting the hour of the day? A. When the engine went bad.

Q. Did your engine go bad at any time prior to this accident?

Mr. Bishop: I object to this as altogether to indefinite.

Q. Did your engine shut down from time to time prior to this accident?

Mr. Bishop: Same objection.

By Mr. Gordon:

Q. Over a period of years preceding the accident?

Mr. Bishop: Same objection to that.

The Court: He may answer the question, and then I suppose the next question would be, at what time and how frequently.

The Witness: What do you mean? Do we shut them down or do they shut themselves down?

By Mr. Gordon:

Q. Were they shut down because of any difficulties?

Mr. Bishop: I object to that as leading.

Q. Were they shut down regardless of the hour that you were obliged to keep them in operation? A. Yes, sir.

Q. By reason of what? A. Something gone wrong with the engine.

Q. How frequently did something go wrong with these engines over the period of a year prior to this accident?

Mr. Bishop: I object to that as irrelevant.

The Court: I have ruled that he may answer.

(Argument.)

The Court: There is that subdivision "B" charging the permitting of the accumulation of dangerous and inflammable gases. Of course, I do not know, and I cannot say at this time whether what they are proving now is going ultimately to be adequate proof that such was the case, but it is directed toward showing the processes and conditions and the nature of the gas that did leak from the holder, and thereby accumulated in the power house, and if that is so, the purpose of it is competent. It may not be adequate in the end, when all the proof is in, but the competency of it seems perfectly clear under that.

Mr. Bishop: Exception, based upon the ground that this is evidence which tends not to prove that the gas was inflammable or combustible, as charged in specification B, but tends to raise an issue or prove an issue which is not raised in the pleadings, that there was negligence in the manufacture of the gas.

The Court: Exception granted. We will adjourn at this time until 1.45 p. m.

(A recess was had until 1.45 p. m.

AFTERNOON SESSION.

Direct examination (continued) by Mr. Gordon:

Q. Mr. Faasch, the last question about which the discussion took place was: How frequently did something go wrong with these engines for the year prior to the date of this accident? A. Well, that is a hard matter to state. Sometimes an engine may run for quite a long while, and at other times, it may run for a few short hours and go bad.

Q. How frequently? A. Quite often.

Q. What was the maximum amount? A. I can't state how many times.

Q. Was it once? A. Quite often.

Q. Getting down to a period within a week or ten days preceding the night of this accident, had there been any difficulty with your engines? A. Well, we were not running the engines steady at that time. We were only running them on and off, and we had no difficulty with the engines operating at that time.

By Mr. Gordon:

Q. When they were shut down, what was the character of the trouble?

Mr. Bishop: Just a minute. He said that for the period that is now under discussion, that before the accident they had not been running the engines except on and off, and they had no trouble with them.

By Mr. Gordon:

Q. When they shut down before the two weeks, what was the character of the trouble?

Mr. Bishop: I object to that as irrelevant and too remote for the time of this accident.

The Court: Why not ask him if he remembers how near to the date in question was the last time he knows they were stopped for other than the usual purpose of stopping them when they were not needed?

By Mr. Gordon:

Q. I ask that question. A. Well, I can't state the exact time when they were stopped for other purposes except for when they were shut down.

Q. Did you ever make an analysis of the gas applied to your gas engines from gas holders numbers one and two?

Mr. Bishop: I object to that because it does not appear that this man has any qualifications to analyze gas.

By Mr. Gordon:

Q. Who makes the analyses of the gas supplied to your gas engine from gas holders numbers one and two, for the company?

Mr. Bishop: I object to that unless he has seen the analyses made.

The Court: Ask him if he knows of his own knowledge who makes it.

By Mr. Gordon:

Q. Do you know who makes the analyses of the gas? A. Yes.

Q. Who?

Mr. Bishop: I object to that.

A Myself.

Q. For whom do you do that? A. For the Standard Oil Company.

Q. How long have you been doing it for them? A. A period of ten years.

Q. And do you make reports to them? A. Yes.

By the Court:

Q. Is it part of your duties to make it when necessary? A. Yes.

By Mr. Gordon:

Q. How frequently did you make these analyses of the gas applied to the gas engine from gas holders numbers one and two? A. We kept records. They were taken every two hours, to my best knowledge, some years ago, and that was reduced, I believe, to every three days' shifts, but when necessary, when having trouble with the gas, we took it at the direction of the engineer in charge on that shift, whenever he called for it.

Q. What kind of trouble was there with the gas?

Mr. Bishop: I object to that. It does not appear that there was any.

By Mr. Gordon:

Q. Was there any trouble with the gas that you had to take analyses?

The Court: When?

Mr. Gordon: Within a year prior to this accident.

Mr. Bishop: I object to going back that far.

Mr. Gordon: Within ninety days prior to this accident.

Mr. Bishop: I object to that. The question is what the situation was on this night, not ninety days before.

The Court: I think that you ought to get at your evidence by asking what time, if any, it was taken previous to this date, the nearest to that date. Then we will see from what he says whether or not it is competent to show what the analyses disclosed.

Mr. Gordon: I will withdraw the last question.

Q. When you took these hourly analyses, you were taking them right up to the time of the accident, weren't you? A. No, sir.

Mr. Bishop: I object to that as leading.

Q. Well, were you taking them the day before the accident? A. No, sir.

Q. Were you taking them a week before the accident? A. No, sir.

Q. When was the last time you were taking an hourly analysis? A. The day I can't state when the last time was that they were taken, because we stopped taking them when we were not running these engines steadily.

Q. How long before this night of the accident did you stop running the engines steadily? A. Perhaps six months to a year.

Q. And were the engines running the night of the accident? A. One of them was, yes, sir.

Q. What was the purpose of taking the analyses? To determine what?

Mr. Bishop: I object to that. It appears that he had not been doing it for over a year.

The Court: That is so.

Mr. Gordon: I will withdraw the question.

Q. Did you see Mr. Gilroy smouldering, as you said, when he came into the power house? A. Yes, sir.

Q. Did you see the condition of the flesh on him? A. Yes, sir.

Q. How was it? A. Very bad.

Q. Did you observe the gas holder the night of the fire there? A. Yes, I did observe it.

Q. Did you see anything in connection with the gas holder? A. In what way?

Q. What was its condition? What was going on at the gas holder? A. Do you mean as to its height or level?

Q. Well, first I ask you as to its external appearance. Was it in a normal condition or was there anything going on with it? A. There was nothing going on that I could see.

Q. Didn't you see a fire there? A. Well, now, was this previous to the explosion or after?

Q. I am talking about a time immediately succeeding the accident, at the time Gilroy was at your place. A. Oh, after the accident, yes, the whole holder was on fire.

Q. Did you see where the flames were? A. Yes, sir.

Q. Where were they? A. At the first sight I had, at the top of the holder, the flames were burning up. The top of the holder was on fire; the scrubbers were on fire; the pipes leading across the road were on fire, and part of the pump house.

Q. Did you work there at your place the next day, August 9? A. Yes, sir.

Q. Did you see gas holder number two after the fire? A. Yes, sir.

Q. Did you see the top of the holder? A. Yes, sir.

Q. Did you observe any condition on the top of the holder? A. There was a hole in it.

Q. How large was the hole? A. Oh, I should judge big enough to put your fist through.

Q. What kind of an edge was on this hole? Was it a smooth edge or straight, regular, or irregular? A. No, irregular, ragged edge.

Q. After the hole appeared on the top of the holder, did you observe what was done with reference to the holder?

Mr. Bishop: I object.

Mr. Gordon: I withdraw the question.

Q. Do these scrubbers work to receive the gas before they get into the holder or after the gas gets out of the holder?

Mr. Bishop: I object to that, because it is no issue in this case as to whether or not the scrubbers were used. It is whether or not the gas was manufactured properly.

Mr. Gordon: It is not a question of the sale and distribution of the gas; it is a question of the condition of the gas holder and appurtenances thereto, as charged under subdivision 2 in paragraph 10 of the complaint, but if counsel insists on the objection, I will withdraw the question.

Cross-examine.

Cross-examination by Mr. Bishop:

Q. Mr. Faasch, you are not a chemist, are you? A. No, sir.

Q. You are not a graduate engineer, are you? A. No, sir.

Q. When did you come to work that night? A. My shift started eleven o'clock. I was in to work between ten-fifteen and ten-twenty.

Q. Do you know what time it was when Mr. Gilroy came in? A. Approximately about ten-fifty-five, ten-fifty-eight, somewhere around there.

Q. Was it before eleven o'clock? A. Yes, sir, just shortly before eleven.

Q. Had you noticed any unusual conditions when you arrived at your place of work? A. Yes, sir.

Q. What was that? A. The heavy odor of gas.

Q. Did you report that to anybody? A. No, sir.

Q. Was the condition one which seemed to you ought to be reported? A. It is a condition I should have reported, if I had time to do it. I didn't have time to report it yet.

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

Q. I understand you had not been running these gas engines for about a year, steadily? A. No, not steadily.

Q. The work they used to do is being done by other engines in another part of the plant?

Mr. Gordon: I object to this as not being cross-examination.

(Argument.)

Mr. Gordon: I will withdraw the objection.

A. Yes, sir.

Q. Do you know whether or not they had any scrubbers other than those across the road near the gas holders? A. Yes, sir.

Q. They had other scrubbers, didn't they? A. Yes.

Q. For all you know, they were in use this evening?

Mr. Gordon: I object to it unless the witness knows of his own knowledge.

The Court: Reframe your question to include that.

By Mr. Bishop:

Q. Do you know whether or not those other scrubbers were being used this evening? A. I can't say whether or not they were.

Q. You do not know? A. No.

Q. They weren't anywhere near where you were? A. No, sir.

Mr. Bishop: That is all.

Re-direct examination by Mr. Gordon:

Q. When you analyzed the gas, what was the content of sulphur in the gas, if any?

Mr. Bishop: I object to that. He has not made analyses within a year. It does not appear that he is a graduate chemist or that he is properly qualified to make such analyses.

(Argument)

Mr. Gordon: I will withdraw the question. That is all.

EDNA GRANT KRAUSE, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on her oath, saith:

Direct examination by Mr. Gordon:

Q. Mrs. Krause, where do you live? A. In Bayonne.

Q. What is your occupation? A. I work for the City now.

Q. The City of Bayonne? A. Yes, sir.

Q. In what capacity? A. In the department of hygiene clinic.

Q. What do you do there? A. Weigh babies in the baby clinic.

Q. In 1927 what was your work? A. Private nursing.

Q. Where were you employed? A. At the Bayonne Hospital.

Q. Did you see Mr. Gilroy? A. I did.

Q. Did you see him when he reached the hospital? A. No, after he got to the hospital.

Q. When did you first see him after he got to the hospital? A. When he was in the male surgical ward in the hospital in bed.

Q. Do you know when you saw him after he came to the hospital? How many days after he was there? A. That night after he got into the hospital, I took him in the emergency room and I dressed his burns and transferred him to the ward into a bed.

Q. What was his condition and appearance? A. Very poor.

Q. Was he able to talk? A. He could—he talked irrationally.

Q. Did he have any pain and suffering? A. He would not lie in the bed. He would continually

jump and jerk. They had to inject morphine in his arm to keep him quiet, and then every twenty minutes he would start up again, and that continued all night long.

Q. Were you with him all night long? A. Yes.

Q. Did you see him the next day? A. No, I was on the next night.

Q. The second night, were you with him? A. Yes, sir.

Q. Did you see his condition the second night? A. Very, very poor.

Q. Was he rational? A. No, he was irrational.

Q. Was there anything administered to him the second night? A. Morphine.

Q. How about the third night? A. The third night he rested pretty good, but he was still irrational the third night. He complained a lot, and he was irrational at night, and he got irrational again. He would ask for a drink of water, and he would get it, and he would spit it in your face, and that kept on all night long.

Q. How about the fourth night? A. The fourth night, he was pretty restful the fourth night. He began to realize himself.

Q. How long were you in constant attendance at Gilroy's bedside at night? A. Four weeks' night duty.

Q. You were on night duty for four weeks? A. Yes.

Q. Was there any other nurse with you? A. Not at nighttime, no. I was the only nurse.

Q. Did you observe any conditions of burns about him? A. Oh, yes.

Q. Where were those burns? A. He was burned on both ears, his face, his both hands, his ankle, his knee, and his side on the left leg.

Q. Have you seen burns in the hospital on different people? A. Yes.

Q. Do you know what a first degree burn is? A. Yes.

Q. Do you know what a second degree burn is? A. Yes.

Q. Do you know what a third degree burn is? A. Yes.

Q. Do you know what kind of burns Mr. Gilroy had? A. He had third degree burns.

Q. What do third degree burns mean? A. A burn of the nerves and the tissue.

Q. Did you observe the condition about his eyes? A. I certainly did.

Q. What was the condition there with reference to the burns? A. Mr. Gilroy couldn't see out of his eyes for two whole weeks and had terrific pain in his eyes. He felt terrible after he realized what he had gone through. He would open his eyes and would see spots before them, and we had to keep compresses on his eyes for two whole weeks, ice cold compresses on both eyes.

Q. Did you observe his tongue and his mouth? A. His mouth was very, very sore. We had to feed him through a glass tube, nothing hot, everything had to be cold.

Q. How long did that condition continue? A. That kept on for three weeks.

Q. And then after that, was he fed with solids? A. No. Mr. Gilroy was never fed with solids up until about eight weeks, before he could take solids.

Q. When he was fed with liquids, did that have any action upon his organs?

Mr. Bishop: I object to that.

Mr. Gordon: I withdraw the question.

Q. Did you observe anything unusual in the function? A. I did, Mr. Gilroy——

Mr. Bishop: I object.

Mr. Gordon: I will withdraw that question.

Q. What, if anything, did you observe as to the function of his organs?

Mr. Bishop: I object to that. This witness could not see his organs.

Mr. Gordon: As to the result of the functions of the organs.

Mr. Bishop: I object to that.

Mr. Gordon: I will withdraw the question.

Q. In connection with your duties and your attention and administration of Mr. Gilroy, tell us what you did. A. I don't get you, Mr. Gordon.

Q. Were you at his bedside? A. I was.

Q. What did you do there? A. I kept Mr. Gilroy clean. He defecated and wet the bed frequently.

Q. How long did that continue? A. That continued until four weeks.

Q. How frequently? A. Three or four times during the night, Mr. Gilroy's bed had to be changed.

Q. Was it always due to defecation? A. Yes, always.

Q. Did you observe whether or not he slept at night? A. He never slept at night; if he did, he slept with his eyes open.

Q. What do you mean he slept with his eyes open? A. If he was resting, his eyes were half open at any time. He never slept with his eyes closed. They were always half open.

Q. How long did that continue? A. That continued up until four weeks that I was taking care of him.

Q. Were you with him beyond the four weeks? A. No, I had to leave the case.

Q. Did you know him before the accident? A. I knew him before the accident just as I would know anybody else.

Q. Did you know his appearance before the accident? A. Yes, I believe I met him before the accident.

Q. I show you plaintiff's exhibit 9 and direct your attention to a picture enclosed in a circle, and I ask you whether or not that was a good likeness of Mr. Gilroy before the accident? A. That is.

Q. What was the general complexion of Mr. Gilroy before? A. He had a very good healthy-looking red complexion before the accident.

Q. Did you have occasion to observe his demeanor before the accident? A. I beg your pardon?

Q. Did you have occasion to observe how he acted before the accident? A. I certainly did. I seen him down the hospital every morning.

Q. You are a little friendly with him? A. Friendly with Mr. Gilroy.

Q. You visited him at his home since? A. No, I don't visit him.

Q. You received a subpoena to get here? A. I did.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Do you know whether or not it is customary to administer morphine in burning cases? A. I can't hear you.

Q. Do you know whethere or not it is customary to administer morphine in burning cases? A. Yes, I had an order for it.

Q. Do you know whether it is customary in such cases? A. No, it is not quite customary to administer morphine.

Q. In a third degree burn case? A. We never give them morphine. We just treat them as ordinary burn cases would be treated.

Q. Did Mr. Gilroy pay you for your attendance on him? A. No, he didn't pay me.

Q. Who did? A. The Standard Oil Company.

Mr. Gordon: I object to that as immaterial who paid her. We are not asking for any claim for paying her.

The Court: Objection sustained.

Mr. Bishop: Exception.

Q. You have known Mr. Gilroy before this accident? A. I knew him.

Q. He is a friend of yours? A. Well, not so good, only as a patient I knew him.

Q. You had him as a patient before the accident? A. No, I just knew him as I would any other man in Bayonne, seeing him go up and down. I knew he was Mr. Gilroy, that is all.

Q. That is before the accident? A. Yes.

Q. Do you know what doctor treated him? A. Dr. Pinkerton.

Q. You don't know who succeeded you when you went off after the four weeks night duty? A. Miss Green.

Q. But you had nothing to do with him after that? A. Not after that.

Q. You were transferred to day work after that? A. No, I didn't have any day work; I went on another case.

Q. You are a private nurse for Gilroy? A. Yes.

Q. You were not generally on duty in the hospital, but especially? A. I did private nursing.

Q. You were his special nurse? A. Special nurse to Mr. Gilroy.

Q. You did not take care of anybody else? A. No, just took care of him.

Mr. Bishop: That is all.

Leo J. Ward, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Doctor, you are a physician and surgeon in the state of New Jersey? A. I am.

Q. How long have you been engaged in the practice of medicine? A. Eleven years.

Q. Where are you practicing? A. In the city of Bayonne and in the city of Elizabeth.

Q. Did you ever practice exclusively in the city of Bayonne? A. No.

Q. Are you connected with any institutions? A. I am.

Q. Which ones? A. Post-graduate Hospital in New York City, Bayonne Hospital in Bayonne, Greenville Hospital in Jersey City, Alexian Brothers Hospital in Elizabeth, and St. Elizabeth's Hospital in Elizabeth.

Q. In what capacity? A. At the Post-Graduate hospital in New York City, and at the Bayonne Hospital in Bayonne, I am assistant roentgenologist; at the Greenville Hospital, I have charge of

the X-ray department, and at the Alexian Brothers and St. Elizabeth's I have charge of the X-ray and physiotherapy departments.

Q. What is physiotherapy, Doctor? A. The treatment of pathology by physical means.

Q. When you say physical means, what is employed? A. Electricity, massage, light, heat, and water.

Q. What is the purpose of that? A. To try to return the pathological conditions as near to normal as possible.

Q. When you say pathological conditions, does that include the circulation of the blood? A. Yes.

Q. What else? A. Muscles that have lost their function.

Q. What else? A. Joints that are stiffened.

Q. Have you had occasion to have Mr. Gilroy under your observation and care? A. I have.

Q. When did he first come under your observation and care? A. April, 1928.

Q. Did you observe his condition? A. Yes, sir.

Q. Can you tell us then what you found his condition to be? A. He complained a great deal of severe headaches and dizziness. He complained of excessive tenderness and sensitiveness to cold in those portions of the body that had been burned, his hands and feet, and face, shoulders and ankles. He had very marked limitation of motion, particularly in his hands. He had profuse scarring over the face.

Q. Did you apply any form of treatment to him? A. Yes, sir.

Q. What? A. I used various forms of electrics with the hope of returning motion, with the hope of getting rid of the pain that he complained of, some electricity to his head, with the hope of alleviating some of his sleeplessness and nervous-

ness. He complained also at that time and has all the time since of very severe pain in the back.

Q. To what place did you apply the treatment? A. Practically all over his body.

Q. Where was this done? At your home or the hospital? A. At my office.

Q. You have a laboratory there and apparatus for the treatment of patients? A. I have apparatus for the treatment of patients, yes, sir.

Q. Did you have occasion to take any X-ray pictures of Mr. Gilroy? A. I did.

Q. These were taken how recently? A. On the sixteenth of October of this year.

Q. How frequently did you administer treatment to him from April, 1928? A. Every two or three—from two to three days a week.

Q. Up to what time? A. He is still under my care.

Q. Has that treatment in any way shown any effects upon his condition? A. I think that he is a little bit improved, but not very much.

Q. Where was the treatment concentrated? A. Applied to areas of the burns.

Q. You said that you observed conditions presenting evidences of burns in April, 1928? A. Yes, sir.

Q. With reference to his ears, what was the condition in April, 1928? A. As a result of the burns, they were very much shrivelled up and presented the presence of scar tissue.

Q. Did that condition exist and does it exist in both ears at the present time? A. It does.

Q. Is that a condition which can be improved upon in any way? A. Nothing can be done for it.

Q. Will that be a permanent condition? A. It will, yes.

Q. With respect to the burns of his eyes, have you observed—can you tell me what you saw as to the condition of his eyes in April, 1928? A. The eyelids were very much thickened due to the presence of scar tissue. The eyelids were inverted, so that the eyelids are growing into the eyeball toward the direction of the eyeball. The lower eyelids have dropped down. He cannot raise his lower eyelids. He has no control of them at all. The tears continually run down his cheeks. His upper eyelids are discharging a fluid out of proper alignment. It is impossible for him to close his eyelids together properly.

Q. Is that a permanent condition, Doctor? A. It is.

Q. With reference to the nose, did you observe any condition there? A. Yes, his nose is badly scarred. There is no sensation in the end of his nose whatsoever, and his nostrils are very, very wide. There is an abundance of scar tissue both on the outside and inside of his nose.

Q. With reference to the general surface of his face, is there any comparison between that and the normal skin or flesh portions of his body? A. He has not any normal skin on his face. His face is pitted full of scars, and contractions, and his mouth is greatly reduced in size due to the contraction from scar tissue and contractions being inside and outside of the mouth. His chin is very much contracted due to the burns. His neck is contracted, and a limitation of motion has resulted as a result of the formation of scar tissue on the sides of his neck.

Q. Are those conditions permanent conditions? A. They are.

Q. Is there any area of his face which presents a normal aspect? A. Not any.

Q. I direct your attention to an X-ray plate number 1373, and I ask you if you took that picture? A. I did.

Q. And what is it a picture of? A. A picture of the spine, and the lower cervical upper dorsal region of the spine, a picture of the chest, a picture of the lungs and the heart of Mr. Gilroy.

Q. Was it taken personally by you? A. I took it personally and developed it myself.

Mr. Gordon: I offer it in evidence.

(The X-ray referred to was received in evidence and marked "Plaintiff's Exhibit 13".)

Mr. Bishop: When was it taken?

Mr. Gordon: October 16, 1929.

By Mr. Gordon:

Q. I show you another picture dated the same date and ask you if you took that picture? A. I did.

Q. Did you develop it yourself? A. Yes, sir.

Q. And that represents what? A. A lateral view of the lumbar region of the spine of Mr. Gilroy, a side view of the spine.

Mr. Gordon: I offer it in evidence.

(The X-ray referred to was received in evidence and marked "Plaintiff's Exhibit 14".)

Q. I show you another picture and ask you if you took that picture? A. I did.

Q. When? A. On the same date.

Q. What date is that? A. October 16, 1929.

Q. Did you develop it personally? A. Yes.

Q. What does it represent? A. It represents a posterior anterior view of the spine of Gilroy, also the dorsal and upper lumbar region including the sacro-iliac joints.

Mr. Gordon: I offer it in evidence.

(The X-ray referred to was received in evidence and marked "Plaintiff's Exhibit 15".)

Q. I show you another picture and ask you if you took that? A. I did.

Q. What does that represent? A. It represents a picture of both hands of Mr. Gilroy.

Q. When was it taken? A. October 16, 1929.

Q. And you developed the picture yourself? A. Developed it personally.

Mr. Gordon: I offer it in evidence.

(The X-ray referred to was received in evidence and marked "Plaintiff's Exhibit 16".)

Q. I show you another picture and ask you if you can tell me what that represents? A. This is a side view of the picture of both hands of Gilroy taken on October 16, 1929, which I took personally and developed.

Mr. Gordon: I offer it in evidence.

(The X-ray referred to was received in evidence and marked "Plaintiff's Exhibit 17".)

Q. I show you another picture and ask you if you can tell me what that represents? A. That is a picture of the skull of Gilroy taken October 16, 1929, by me personally and developed by me.

Mr. Gordon: I offer it in evidence.

(The X-ray referred to was received in evidence and marked "Plaintiff's Exhibit 18".)

Q. I show you another picture and ask you if you can tell me what that represents? A. This is a picture of both ankles of Gilroy taken October 16, 1929, by me personally and developed by me.

Q. It was developed by you? A. Yes.

Mr. Gordon: I offer it in evidence.

(The X-ray referred to was received in evidence and marked "Plaintiff's Exhibit 19".)

Q. I direct your attention to Plaintiff's Exhibit 13. You said that was a picture of the spine or chest rather of Mr. Gilroy? A. Both.

Q. And does that picture indicate any unusual conditions? A. It indicates a fibroses of both upper lobes of both lungs.

Q. What is fibroses? A. It is a contraction of the normal lung tissue.

Q. What is that due to? A. Due to an irritant.

Q. And in the case of flame? A. Inhalation of flame will do that.

Q. That will do that? A. It will.

Q. Is that a condition which is permanent? A. Yes.

Q. How does that act upon the lungs? A. Destroys the normal amount of breathing space in the lungs, becoming progressively worse over a period of years; the same type of condition is found in war veterans who had inhaled gases.

Q. Have you examined many war veterans, Doctor? A. Thousands.

Q. Are you familiar with the effects of the inhalation of gases on them? A. By the X-ray, yes.

Q. And flame? A. Yes, after explosion.

Q. Does that picture present any other conditions of an abnormal nature? A. It shows arthritis of the bones of the spine in the dorsal region.

Q. What is arthritis? A. Inflammation of the gliding or articular surfaces of the bones.

Q. What is that due to? A. Due to either infection or trauma.

Q. By trauma what do you mean? A. I mean an injury.

Q. Caused by the explosion of what? A. External force.

Q. This arthritic condition is located where? A. It involves the articular surfaces of all the vertebrae in the dorsal region.

Q. What do you mean by articular surfaces? A. I mean the surfaces which slide or glide on each other.

Q. Can you point that out? A. Represented by the places between these bones (indicating). These are the articular surfaces of bone. Those are the surfaces that permit motion.

Q. What is the effect of an arthritic condition on the articular surfaces? A. It makes motion very limited and very painful.

Q. And is that a progressive form of affection? A. It is.

Q. In your opinion, is that a condition that can be cured or relieved? A. Temporarily relieved. It gets worse in spite of treatment.

Q. And in the case of Mr. Gilroy, who has been under your observation since April, 1928, in your opinion, will that condition be relieved? A. Temporarily relieved, as long as he is treated. It will constantly get worse in spite of treatment.

Q. Can you tell me whether or not such a condition is accompanied by pain? A. Very painful.

Q. Where is the seat of pain? A. In the articular surfaces of the bone, the gliding surfaces of the bone.

Q. Is that pain a pain which is constant or recurring? A. Constant pain.

Q. Is it a mild pain or is it of any degree of intensity? A. That depends upon two factors: Upon the degree of involvment of the articular surfaces, and upon how quiet the patient keeps.

Q. In this case is there any marked degree of arthritic condition? A. Yes, very definite degree.

Q. Is it sufficient, in your opinion, to evidence a condition which may or may not cause pain? A. Severe pain.

Q. Would or would it not cause pain? A. It would cause severe pain.

Q. Are there any other conditions of an abnormal or unusual nature evidenced by this exhibit? A. Nothing other than the fibroses mentioned in the lungs.

Q. Over what area does that extend? A. It involves the upper third of both lungs.

Q. Are you in a position to tell me the intensity of that condition from this picture? A. It is sufficiently severe to say that it may terminate the individual's life within a period of ten years.

Q. I show you Plaintiff's Exhibit fourteen and ask you if you can tell me what that represents again? A. That is a side view of the spine, gentlemen, taken by laying the patient on this side (indicating) and putting the X-ray film on the side here. The patient lies on his side on the table, and the X-ray tube shoots through the side of the body, making a side view of the bones of the spine, a so-called lateral view of the spine. This is taken of the lumbar or lower back region.

Q. Does that evidence any conditions? A. These individual little blocks that you see are the individual bones of the spine.

Q. Do they reveal any condition there such as has been referred to in Plaintiff's Exhibit 13? A. This rough elevated edge represents a productive arthritis.

Q. When you use the term "productive arthritis", what do you mean? A. I mean a new growth of bone.

Q. I show you Plaintiff's Exhibit 15 and ask you what that evidences? A. This is what is called a posterior anterior picture, placing the patient on his back, and the X-ray is put behind him in this way (indicating), lying down on his back, and the X-ray tube shoots through him here, so that instead of seeing the bones on edge like in the previous picture, you see them flattened out in this picture. The only difference between this picture and the other one is that we had a side view like this and you were looking through the bones through the side, and you were seeing this edge of the bone, whereas here you see the broad part of the bone from the front.

Q. What do you see from that picture? A. At the lower end of the spine there are two large joints indicated by my thumb, called the sacro-iliac joints. Those are joints that permit motion between the trunk of the body and the lower part of the body and these joints here (indicating), and there is an arthritis in both sacro-iliac joints.

Q. Is that a productive arthritis? A. Productive arthritis.

Q. I show you Plaintiff's Exhibit 16 and ask you to tell us what that represents? A. That is a posterior anterior picture of the hands of Gilroy taken like this (indicating). The hands are

on the film and the X-ray tube is above it and shoots through the hands in that position (indicating).

Q. What does that indicate? A. It indicates that all the articular surfaces of the bones and the place between the joints are very much narrowed due to arthritis. It shows inability to straighten the little finger on either hand. It shows in the bones of the wrist joint an arthritis.

Q. Is that conditon a permanent condition? A. Permanent, absolutely.

Q. What effect has that upon the function or use of both hands? A. It renders it impossible to use them normally.

Q. Did you have occasion to make any tests in the strength and use of his hands? A. I did.

Q. In what manner did you take those tests and when? A. October 16, 1929.

Q. How did you take them, and where did you make them? A. I tested the muscles of the face and the shoulders and of the arms and hands, ankles, and knees, using electrical current over which the patient had no control.

Q. In using this current, where did you apply it with reference to the face? A. All over the face.

Q. How did you apply it? A. By means of an electrode, which is a technical term, applied to him with an electrical applicator.

Q. After applying the current to the face, what, if any, reaction was there? A. I found that the normal elasticity and the normal contraction of the muscles was not present, and it was impossible to cause the muscles to contract with current as he would naturally be able to.

Q. What muscles? A. The muscles of his face and hands and arms.

Q. Can a patient control that action in the face of electricity? A. He has no control over it.

Q. Have you done that before? A. Lots and lots of times.

Q. Is that a regular and approved method of ascertaining the condition of muscles? A. It is the only way, because the patient has no control over it.

Q. What, in your opinion, is the length of time that condition will continue? A. Always.

Q. Is there any part where that condition is absent, or does that extend all over his face? A. His entire face is involved.

Q. You said you made some tests of the shoulder? A. Yes, sir.

Q. Describe those tests, please? A. I found that the motion of his left shoulder is practically normal, but the motion of his right shoulder is very much limited.

Q. In what way is it limited? A. Limited as to motion, limited as to contractility of the muscles.

Q. To what extent? A. Fifty per cent. of his normal use.

Q. What else did you make a test of? A. Of his arms and hands.

Q. And the arms were tested how? A. With the current in the same way over the muscles.

Q. And what was the result of that test? A. I found that the contractility of the muscles was very materially reduced.

Q. How was that evidenced? A. By a failure to be able to produce contractions by means of electricity.

Q. Where there is a contractility of the muscle, what is that for in connection with the use of the arms? A. The only way that we can do anything is by contracting and expanding the muscles.

Q. And when the contractility is affected, what effect has that on the use of the arm? A. The more severe the contractility, the less useful is the limb that is involved.

Q. In this case, to what extent is there any affection or diminution, if any, of the contractility? A. You mean the contractility where? In the arms?

Q. Yes. A. The contractility of the muscles in the arms is reduced approximately fifty per cent.

Q. Does that affect the function or the use of the arms to that extent? A. To that extent, yes.

Q. Did you make a test of the hands? A. I did.

Q. What kind of a test did you make of the hands? A. Tested the contractility of the muscles and the function of the tendons.

Q. The tendons where? A. In the hands, in the fingers.

Q. And with each finger? A. Yes.

Q. In the thumb? A. Yes.

Q. How did you make that test? A. By the use of an electrical instrument to determine the contractility.

Q. Have the patient any control over the reaction of electricity on his hands when such a test is being made? A. Absolutely none.

Q. And as a result of that test, what did you ascertain as to the condition of his hands? A. His hands were useless.

Q. Let me hear that again. What is that again? A. His hands were useless.

Q. Is that a condition which is a permanent condition? A. It is.

Q. Can it ever be placed in a condition where it can be of any use? A. It cannot.

Q. Have you noticed any conditions between the fingers? A. Yes.

Q. What are those conditions, if any, that you have noticed? A. Well, the tissue has produced a webbing of the fingers.

Q. What does it present the appearance of? A. His hands, to me, look like claws rather than human hands.

Q. You made a test of his knees and ankles? A. Why, yes.

Q. What knee? A. Both knees.

Q. What did you find as a result of those tests? A. His knees are not particularly involved. He has some scar on his knees, and his knees are not in bad shape at all.

Q. What about the ankles? A. He has rather marked scarring around the ankles and very marked contraction of the tendon achilles, which is the large tendon in the back of the leg.

Q. And involved in the scar area? A. Yes, involved in the scar area. He has a very definite limitation of motion in the ankle.

Q. Did you inspect the scarred area of his hands? A. I did.

Q. Can you tell me what the effect is of climatic changes on that scarred area, or change of temperature on the scarred area? A. Exceptionally painful.

Q. Do you know whether or not the conditions of the scarred area assume any changes at any time? A. I don't understand the question.

Q. Do they ever break open? A. They do.

Mr. Bishop: I object to that as leading.

Q. What effect has the attempt of motion on scar tissue? A. It may break it open. The scar tissue, you understand, has no function. It has no elasticity, or it has no contractility. It has practically no blood supply.

Q. When it breaks open, what is the method of restoring it? A. Sometimes just ordinary ointment or treating with skin grafts. It depends upon the size of the opening and how persistent it may be.

Q. In the condition of Mr. Gilroy's hands is the scar tissue such that if it breaks open, it can readily be replaced? A. It is not.

Mr. Bishop: I object to that.

Mr. Gordon: I withdraw the question.

Q. Did you examine his ankles? A. I did.

Q. Did you observe any conditions about the ankles? A. Stiffness and limitation of motion and pain in the ankles.

Q. Involved in what area? A. Involving the ankle region and the metatarsal bones of the foot.

Q. Were there any evidences of scar burns there? A. Yes.

Q. Did that condition of the ankle develop into a permanent condition? A. It is.

Q. I show you plaintiff's exhibit 17 and ask you to tell me what that represents? A. That is a side view of the hands, and represents the hands as straight as I could get them. The ideal position, of course, in taking a side view of the hands, is that position (indicating).

Q. When you say that position, how have you placed your hand? A. In a lateral position. We like to get two views of the hand, one posterior-anterior, and one lateral position.

Q. When you say that that is as far as you could get the position of his hands, how far does the position of his hands evidence itself on that picture? A. Well, it is fully as extended as it can go. It is in that position (indicating).

Q. When you say that position, what position is that? A. That is a contracted position of the hands.

Q. To what extent is the hand contracted there? A. Sixty per cent. The ideal position would be to get his hand out like that (indicating) and take the picture. His fingures are bent down that way (indicating). His thumb is down in that fashion and that applies to both hands, both the right and the left hand.

Q. Is that contraction there a permanent condition? A. It is.

Q. I show you Plaintiff's Exhibit 18 and ask you if you can tell me what that represents? A. This is a picture of the left side of the skull of Gilroy, taken by laying the left side of the head down on the film in this manner (indicating), with the X-ray tube above.

Q. What does it show? A. This picture shows no tumor in the brain. Due to his sleeplessness and his headaches and nervousness, I suspected a possible brain tumor, but this shows no brain tumor, and that is why this picture was taken. I thought there might be a brain tumor to account for his nervous symptoms, but there is no indication of it.

Q. I show you Plaintiff's Exhibit 19 and ask you to tell me what that represents? A. This is a picture of the lateral view of each ankle. The lateral view is taken by putting the X-ray film under the part, with the foot on the film like this.

Q. When you say like this, Doctor, just how have you placed your foot on the film? A. Sideways. The X-ray tube is above, and it shoots through, and you will see that is a side view of each foot, one is the right and one is the left foot.

Q. What does that show? A. It shows a very marked new growth of bone at the point where I

have indicated by my finger, a productive arthritis, new bone growing out in this joint.

Q. You say the point indicated by your finger. Where is that? A. The lowest point of the arch of the foot.

Q. Over what area is that new growth of bone? A. It involves the matararsal bones or rather, the tarsal bones of the foot. It is present in both feet. It is here on the right foot (indicating), and the point indicated by my finger on the left.

Q. And that condition is evidence of what? A. Productive arthritis.

Q. What is the function of the tarsal bones? A. They give support to the foot and motion to the foot.

Q. You said that you were engaged in physiotherapy work? A. Yes, sir.

Q. Does that kind of work come to you before the patient is treated by the doctor or physican or after he is treated? A. I am the last one that gets them.

Q. Have you any charge up to date for your services and treatment and X-ray pictures? A. Yes, sir.

Q. What is that charge?

Mr. Bishop: Just a minute. If the Court please, I object to evidence of what this charge is for taking these X-rays.

Mr. Gordon: Outside of the X-rays I will withdraw that part of it.

By Mr. Gordon:

Q. For your care and treatment of this man, what is your charge? A. $294.

Q. That is to date? A. That is to date.

Q. Do you know how long you will have to continue with him? A. I don't know that.

Q. Did you see him at the Bayonne Hospital? A. I did not.

Q. Are you related to Gilroy? A. I didn't know the man until this accident.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Doctor, speaking of arthritis, you stated it could be due to infection or trauma, is that right? A. That is right.

Q. What is the most usual cause of it? A. There is not any such answer to that question. There is no rule of percentages.

Q. It is very frequently caused by infection? A. It is.

Q. And in defining the term, you said that meant external force? A. Yes.

Q. You also said that this condition of fibroses existed? A. Yes.

Q. That might also be due to infection, might it not? A. Not in the location where the fibroses is in this picture.

Q. Fibroses is frequently due to infection, is it not? A. Not in the location where it is shown in this picture.

Q. And in that location, you mean it is never due to infection? A. That is right.

Q. You don't think that a tubercular fibroses— A. I don't think; I know it.

Q. You know that it could not exist at that point? A. That is right.

Q. You said that the condition may terminate his life in ten years? A. Yes.

Q. You don't know, of course, whether or not it will? A. I just go on the average over a wide experience I have in treating veterans' cases.

Q. It is just as true that it may not? A. It is true it may not.

Q. You said his hands were useless? A. Yes.

Q. You don't mean that he cannot do anything at all with them? A. Yes.

Q. He testified himself that he was able to comb his own hair. A. I don't care what he said; that is my opinion I am giving you.

Q. If the man himself says that he can use them for certain purposes, that would perhaps show that your opinion was wrong? A. It might, in your opinion.

Q. No, it is not a question of my opinion. If you can say he can do nothing, and it is a fact he does do something with them, then your opinion is not correct, is it? A. It does not alter my opinion any.

Q. If you saw the man do something with them, would it alter your opinion? A. No, not from knowing what I know about them, it would not alter it any. I have been with Gilroy for a year and a half and know what he can and cannot do with his hands in the way of actually being of use as far as making a living goes.

Q. That is not what was asked you, Doctor. You were asked if he had any use of his hands at all, and you said they were useless. A. We naturally have in mind the point that he can or cannot make a living with his hands.

Q. Is there anything that he can do with his hands? A. Not towards making a living.

Q. I didn't ask you that. I asked you if he could do anything with his hands? A. Not to my knowledge.

Q. You expressed the opinion, as I recall it, on direct examination that his hands were useless? A. Yes.

Q. And that he could do nothing with them? A. Having in mind whether or not he was—his hands were a valuable aid to him in making a living.

Q. I have not asked you that? A. We are not thinking about his hands as decorations.

Q. Of course not, but I asked you if, in your opinion, he can do anything with his hands? A. Nothing that is useful and productive in the way of making a living.

Q. I didn't ask you that.

Your Honor, I move that the answer be stricken out as not responsive.

Mr. Gordon: I consent to it.

The Court: Strike it out.

By Mr. Bishop:

Q. I ask you again, Doctor, if, in your opinion, his hands are utterly useless? You say he can do nothing with them? A. I think he can do something with them.

Q. Then you were not quite accurate before when you said that his hands were utterly useless, were you? A. Thinking of him being a useful member of society, I was accurate.

Mr. Bishop: I ask that that be stricken out as not responsive.

Mr. Gordon: I object to the answer to the question being limited to yes or no.

The Court: I think it is responsive because it tells what his opinion is.

By the Court:

Q. Doctor, having in mind the performance of certain actual motions with regard to a man's personal care of himself, and his handling of situ-

ations aside from his ordinary work and occupation, are his hands in that sense at all useful or to what degree are they? A. I think they are useful in that sense, yes, your Honor.

The Court: That is what we are trying to get at.

Mr. Bishop: That is what I am trying to get at.

The Witness: I think in that sense they are of some use.

By Mr. Bishop:

Q. Considering it from the functional rather than the occupational viewpoint, I think you might say? A. Yes.

Q. The hands are not functionally useless, are they? A. There might be some uses, things that he can do with his hands, from that viewpoint, yes.

Q. You would not say that he was telling an untruth when he said he was able to comb his own hair or undress himself? A. No.

Mr. Gordon: I don't know that he said he could dress himself.

The Court: He said that he could comb his own hair, not the way he used to do it, but as you see it today.

Mr. Gordon: That is all I heard him say.

By Mr. Bishop:

Q. Your opinion is that this is permanent? A. Yes, sir.

Mr. Bishop: That is all.

WILLIAM J. ARLITZ, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Doctor, you are a physician and surgeon in the State of New Jersey? A. Yes, sir.

Q. How long have you been practicing medicine? A. Thirty-eight years.

Q. Are you connected with any institutions? A. Yes, sir.

Q. Which ones? A. I am the consultant at the State Hospital at Graystone Park. I am the consulting surgeon of the Moses Taylor Hospital, consultant of the North Hudson Hospital, visiting surgeon of Christ Hospital, and for twenty years senior visiting surgeon of St. Mary's Hospital.

Q. During your years of practice, have you had occasion to examine men and women who have been injured as a result of burns and other injuries? A. Yes, sir, I have devoted twenty-five years of my professional life to the study and practice of traumatic surgery and neuropathology.

Q. Traumatic surgery is what? A. Surgery that is applied in connection with injuries.

Q. And the other term that you used is what? A. That is the study of the nervous manifestations, morbid nervous manifestations that follow injury.

Q. Have you had occasion to be associated with any large industrial organizations in connection with the examination of persons injured——

Mr. Bishop: I object to that.

The Court: It is just showing his experience.

Mr. Gordon: I want to show the type of people this gentleman has had contacts with.

The Court: People are people. If he has had experience with treating people's injuries, it goes towards his competency. I suppose that the question as to whether or not he is connected with a large industrial organization is intended to show the scope of his experience, and it is permissible to that extent.

A. I am chief surgeon of the Central Railroad of New Jersey. I am in charge of all the surgical activities of the Lackawanna in my immediate locality. I am in charge of the surgical activities of the Lehigh Valley Railroad, and for a period of five years I was the director of the State School for—the State Memorial School for Rehabilitation and in charge of the Compensation Bureau in the Hudson County territory.

Q. What do you mean by the State Rehabilitation School? A. The State School for Rehabilitation is a surgical clinic that is conducted in connection with the compensation bureaus of the state for the betterment of such individuals as may have been traumatized.

Q. That is, people who have been involved in an accident and injured? A. Yes, sir. In other words, to re-establish them so that they may resume some type of occupation, even though it is not their prior occupation.

Q. Do you hold public office at the present time?

Mr. Bishop: I object to that as irrelevant.

The Court: It depends on the public office.

By Mr. Gordon:

Q. I mean involving activities and knowledge acquired during your professional career? A. I am still a director of the school of Memorial Rehabilitation.

Q. Did you examine Mr. Gilroy? A. I did, yes.

Q. Just tell us what your examination consisted of and when? A. This examination took place at my office on the evening of October 16, and the time consumed was probably one and one-half hours.

Q. As a result of your examination, what did you find from your own observations, and what could you see; not what the man may have told you? A. He was entirely disrobed for the purpose of this examination. Firstly, I found that he was suffering with a deformity of the right ear which was the result of a burning of the tissues. He suffered with an eversion of the lower lid of the right eye of considerable import, and he suffered with a lesser eversion of the lid, the lower eyelid of the left eye. His entire face had been burned. The tissues of the face were contracted; the nose was badly scarred. Both of his nostrils had been burned, and the opening was very much larger than normal. All of the tissues about the face indicated that the blood supply was much less than is found in the normal individual. I found that he was suffering with extensive burns of both hands and of both forearms. Both of the little fingers, that is to say, the little finger of the left hand and the little finger of the right hand, were in a state of permanent contraction. In other words, he could neither flex nor extend his fingers at that time, the flexion being almost complete in both of these fingers.

Both hands were, as I have already stated, covered with scar tissue, which was ill-nourished. Function at the wrist joints was moderately good. The function of the fingers, other than the other little fingers, was moderately good. Then the examination was continued, and I found that he had a very marked disturbance of equilibrium, which was determined by placing him in the upright posture with his eyes closed. I found that he had very decided explosive knee jerks, and he had a very profound sweating from both of his arm pits and down both of his sides. I found that his body was generally ill-nourished and that he was generally enfeebled, in a physical sense. My conclusion at that time was that this was a case of marked physical and neurological enfeeblement, which was the end result of the burning of the tissues of the parts of the body that I have already mentioned.

Q. What effect has the personal appearance of an individual on his mental state, where he has suffered burns that have been presented here in his case?

Mr. Bishop: I object to that as a conclusion.

The Court: Is the doctor able to state that as a medical proposition or a conclusion?

By Mr. Gordon:

Q. Doctor, have you had experience in the reactions of individuals on their mental status where they have been afflicted with a deformity of facial feature? A. Yes, sir.

Q. Have you had occasion to examine and observe such reactions over a long period of time in the cases of numerous individuals? A. Yes.

Q. And are you able to tell us in the case of this individual, Mr. Gilroy, what the effect is on his mental state as to the disfigurement that he suffered? A. I am able to state in a general way the state of mind of the individual who becomes conspicuous, because of his deformities. Such individuals are retiring——

Mr. Bishop: It seems to me that the question has been answered.

By Mr. Gordon:

Q. In this case are you able to tell it?

Mr. Bishop: I object to that.

The Court: He said in a general way.

Mr. Gordon: If it is objected to I will withdraw the question.

Q. What is the usual course or condition of scarred tissue in cases of this kind? A. They are ill-nourished. They are largely subject to temperature changes because of their ill-nourished condition. If they are again traumatized, they break down and they heal with a great deal of difficulty.

Q. From your experience and knowledge of men who have been involved in an accident and suffered injuries, and the experience that you have acquired as a result of watching these cases, and your knowledge of Gilroy's case, are you in a position to tell us what, if any work, Mr. Gilroy can do? A. Well, he probably could do some light form of work, if his ego was not harassed by that work. By that I mean if he was not—if his appearance was not criticized. If you could find some congenial employment for him, it might do him good, because he thinks a lot about his deformity. He is distressed by his deformity, and

if you could occupy his mind, it might do him some good. He can't do any hard physical labor. I don't think he is fit for that.

Q. Will his condition ever improve? A. Physically?

Q. Yes. A. I am very doubtful about it.

Q. Have you examined any individuals who have suffered a fibroses condition of the lungs? A. Yes.

Q. Are you familiar with the effect of those conditions and their progressive deterioration of the lungs, if any? A. I am more or less familiar with the fibroses that is the result of inhalation of flame or of chemical irritants.

Q. I direct your attention— A. I might save you that bother by saying to you that I am not sufficiently familiar with the study of the radiographic evidence of fibroses to speak intelligently about it. I speak about it from the clinical standpoint.

Q. In the case where a fibroses is evidenced by an X-ray picture, is that a condition which is progressive or apt to improve?

Mr. Bishop: There is some doubt from his last answer that he is qualified.

Mr. Gordon: I will withdraw the question.

The Court: I think the doctor practically disqualified himself from discussing the X-ray picture at all.

The Witness: I speak from a clinical standpoint only.

By Mr. Gordon:

Q. You know that fibroses comes from a flame entering— A. Yes, I am very familiar with that fact.

Q. I didn't mean to present it to you as a fact, Doctor; that was perhaps an unfortunate expression on my part. Can a fibroses condition come from a flame? A. Yes, sir, it can come from a flame, and it can come from a chemical irritation. A fibroses may also occur in connection with certain occupations continued over a long period of time.

Q. What is the effect on a fibroses condition, if it is acquired from anything other than a flame, when a flame hits it? A. Do you mean if a man had a fibroses to start with and then he had a burning of the respiratory tract?

Q. Yes. A. The probabilities are that the condition would be made worse.

Cross-examination by Mr. Bishop:

Q. A fibroses is also caused by infection, is it not? A. Yes, sir, it sometimes follows a tuberculosis that is partly healed. It also sometimes follows pneumonia. It sometimes follows a bronchitis that is continued over a very long period of time, and it is a condition that sometimes is found in bronchorrhea of elderly people.

Q. In those cases it is very frequently static, that is, it is dormant and does not produce any effects, does it? A. Any person who is suffering with a fibroses is a sick person. The common rule is, in cases of fibroses, if it is recognized, it lessens the general resistance. It means a loss of weight, and individuals of that type are usually referred to a different climate for the betterment of their condition.

Q. In testifying on your direct examination you have told everything that you found the matter with this man? A. Well, there was some things

that are common and characteristic of burns that I did not mention. For instance, he has a very decided webbing of his fingers, which is the end result of the burning, that I did not mention. I may have failed to mention some other things.

Q. There is no disability that you have not mentioned, is there? A. Why, I think I have generally——

Q. You have covered the whole situation as you found it at that time? A. Mostly, I think.

Q. You said he had moderately good function of the wrists? A. That is true.

Q. He has pretty good function of all the fingers except the little fingers? A. That is true. I have already said that.

Q. He has some use of the thumb? A. Yes.

Q. So you would not say his hands are utterly useless? A. I would say this: that his hands could be improved by a surgical operation.

Q. You think it is possible? A. I think if his two little fingers were taken off he would have better hands than he has now, provided the surgeon could assure him that those stumps would heal, but he has got so much scar tissue, it is a doubtful question in that, but those fingers are useless to him.

Q. They are in the way? A. They are in the way, yes.

Q. But the other fingers are useful? A. I have already said they are moderately good, except that they are subject to temperature changes.

Q. You would not say that his hands are entirely useless, would you? A. I would not say that, no. I think the man is in a deplorable condition, but I don't think he is entirely useless.

Q. You think that he could do some light form of work? A. I think it would be good if this man

could forget his appearance; if he could forget his calamity it would be beneficial to him.

Q. Do you mean that employment would be beneficial to him? A. If it was congenial employment, but it would not be beneficial if I constantly looked at his deformities, because that harasses his ego. He is conscious of it, and because of it, he has become melancholy.

Q. If he could get some light employment, there is no reason why he could not do it, is there? A. I have already said it would be good if it was congenial. It is like a man who is profoundly sick mentally and bodily. This man is profoundly sick mentally and bodily.

Q. It would not only do him good, but he is able to do it? A. I think so; I have already said that.

Q. You said that it was doubtful for his condition to improve, but yet it is possible for his condition to improve? A. It may be possible, but it is not probable.

Q. It may do him good to do this light work? A. I think so. That is not going to improve his physical status. It is going to improve the state of his mind.

Q. And if it did he would be better off than he is now, would he not? A. Yes.

Mr. Bishop: That is all.

JAMES H. TRAINOR, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Doctor, where is your office? A.. In Newark.

Q. How long have you been engaged in the practice of medicine? A. Twenty-six years.

Q. Are you connected with any institutions in Newark? A. Yes, sir, St. James and St. Michael's Hospital at Newark.

Q. In what capacity? A. Assistant surgeon.

Q. Do you have occasion to examine persons who have been affected by accidents or injury? A. Yes, I have done quite a lot of that during the last fifteen or eighteen years.

Q. Are you familiar with the after effects of individuals who have been in an accident and suffered burns and traumatic injuries? A. Yes, sir.

Q. Did you examine Edward Gilroy? A. I did.

Q. When? A. Last Friday at your office.

Q. Without telling us anything that he may have told you, but just from your own observation and as a result of your own examination of Gilroy, tell us what you found. A. That he was badly scarred, particularly his face, hands, ankles, part of one ear, the right ear, had been burned off. His nostrils and mouth were burned and had left scars. The little fingers—a rather peculiar thing about the two hands is that the end result was almost identical in each hand; the little fingers were in a chronic state of flexion and were ankylosed. That is, they were stiff, and a webbing occurred after healing between the index and second fingers and between the second and ring fingers, and that same thing obtained on the

other hand. I found that this condition caused considerable loss of function in his hands and forearms, because I noticed that his grip was quite weak. He was unable to fully close his fist, although there was some motion in the wrist, moderate motion in the wrist and fingers and thumb, except in the little fingers. We took his blood pressure and found that it was very low. His systolic was 103.

Q. What do you mean by systolic blood pressure? A. The upper blood pressure.

Q. Emanating from where? A. I put a band around his arm and closed off the blood supply to the hand, and gradually released that pressure, and when the blood came back in the blood vessel at the wrist——

Q. What is that evidence of? A. That this man's resistance is very much impaired. He is way below par as far as resistance is concerned.

Q. What is the normal blood pressure? A. Dr. Jeanway taught us that it was a man's age plus one hundred. That may be a little high. For him, I should say 120—125 systolic would be normal.

Q. What is his pressure? A. 103. I noticed other things about him. He sweated and perspired very profusely, particularly from his arm pits.

Q. Is that a voluntary action or not? A. That was involuntary. He had no control over that. He had very marked tremors of his hands and eyelids; his gait was unsteady, and all his reflexes were increased, particularly his knee jerks.

Q. When you talk of his gait being unsteady, and reflexes, what are those evidences of? A. The whole complex would mean that the man is a very nervous man. He has not as yet recovered from the shock of his harrowing experience.

Q. You saw the evidences of a severe fire burn condition? A. Yes, his face is badly scarred, his whole face, his hands, ankle, and one shoulder shows evidence of it.

Q. How wide an area is there of scar tissue about the shoulder? A. It is not as large as the other parts that were exposed. I think that was the only place he was burned through his clothes.

Q. How about the ankle condition? Was there a scarred area there? A. Yes, they are scarred, but the ankle motions are very good.

Q. In your opinion, are these conditions that are presented permanent conditions? A. Oh, indeed, yes.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Doctor, you say that he had motion in his wrists, is that right? A. Yes, sir, it is not normal; it is less than normal, but there is a moderate degree of motion in each wrist.

Q. About the same in each? A. Yes, sir.

Q. You said that he had motion in all of his fingers except the little fingers? A. Yes.

Q. Did he have motion in the thumbs? A. Yes, the thumbs are better than——

Q. He has some gripping power? A. Yes, but it is diminished. It is below normal.

Q. But he has some use of those hands? A. Indeed, yes, he has some use; he can dress himself.

Q. In your opinion, his hands are not useless? A. No, sir.

Q. Is there any impairment of the function of the ankles? A. The ankle motion is very good, considering the amount of scar tissue that there is about them.

Q. Is there any other impairment of motion anywhere else? A. In the right shoulder joint; that is not normal.

Q. And that is all? A. His general condition.

Q. I mean impairment of motion. A. In the joint?

Q. Yes. A. Yes, that is not all. When he bends, there is a limitation of motion in his back, indicating to me that there was something wrong in his spine, particularly the lower spine in the region of the sacro-iliac joints.

Q. But he has some function of the shoulder, hasn't he? A. Which shoulder? The left one seems to be all right; the right one is impaired, but not as markedly as his little fingers, for instance.

Q. How much impairment is there in that shoulder? A. I should say perhaps about twenty per cent; it is four-fifths good.

Q. What percentage of limitation, if any, is there in the ankles? A. His ankle motions are good.

Q. By good, do you mean normal? A. Not entirely normal, but perhaps nine-tenths good; almost normal. The ankles are badly scarred, but the motions in the joints are good.

Q. Were you able to determine that he could do any work? A. I think, as Dr. Arlitz said, if he had some congenial very light work. He certainly would not be able to do his former work, nor anything heavy.

Q. He could do congenial light work, however? A. If it were very light, something in which he would not have to use his hands much.

Q. He could use them some? A. Yes, but if those hands were bunked, particularly in cold weather and broke down——

Q. Of course, he could not do rough work? A. No, nor any work that would entail his carrying weights of any kind.

Q. Is there any reason why he should not do indoor work? A. He will have to do indoor work. That man could never endure outside work in the winter time.

Q. He could do clerical work, could he not? A. If he is capable.

Q. Do you mean that there is no physical reason why he should not? A. No, he could push a pen or a pencil.

Q. The perspiration that you speak of, is a symptom of nervousness, is it not? A. Yes.

Q. Isn't that sometimes caused by nervousness due to the fact that he is being examined? A. I think not.

Q. Would not that increase his nervousness? A. I don't believe it did. He co-operated with me and knew I was coming here to try to help him. He wasn't nervous because I was there.

Q. The purpose of your examination was to try to help him? A. Yes, and to testify for him.

Mr. Bishop: That is all.

Re-direct examination by Mr. Gordon:

Q. Doctor, you mentioned something about bunking his hands. What did you mean by that? A. Even a slight bunk—the resistance of the scar tissue is so low that even a slight bunk might break down the scar, and it would heal very slowly. The blood supply in the new skin that has formed is much below normal.

Q. You said something about his being able to do some clerical duties or light work. Have you any personal knowledge as to his vision? A. No,

I didn't examine his eyes for vision. I noticed that his eyelids were deformed.

Q. Or did you bear in mind, in giving that answer, anything from a neurological point of view? A. Yes, his nervousness might abate if he had some congenial work. I have the same opinion as Dr. Arlitz in that regard, but it would have to be congenial.

Q. Do you know whether or not a man's occupation would be congenial where he is taken away from people? A. Where he takes himself away because of his deformities?

Q. Yes. A. No, it would be a long while before he will accustom himself to that.

Q. If at all? A. He shuns people now.

Q. Do you know whether or not he will ever be able to adjust himself to an environment of seclusion? A. Not entirely.

Mr. Gordon: That is all.

Re-cross-examination by Mr. Bishop:

Q. Doctor, just what did you mean by an environment of seclusion? A. The man has a face that is terribly scarred, and he shuns people. He wants to keep away from them.

Q. Do you mean, that if he were given some clerical, where he worked in a place by himself, that— A. That would benefit him, I think. It would take his mind from himself.

Q. It would not hurt him to be put at work in a place which was to some extent private? A. I think it would help him, because it would make him forget some of his troubles.

Q. You did not mean to indicate that if he were put to work somewhere that he would not have to meet people, that it would be bad for him? A.

Any sort of work would be congenial for him, but the work would not be congenial if he had to work with other people continuously.

Q. Any position that puts him in a conspicuous or public position would not be good for him? A. No.

Q. But it would not be bad for him to put him in a position where he did not have that? A. If he could get some clerical work to do at home, where his own wife would sympathize with him, he would probably be benefited.

Q. It would not hurt him to be in some office where there are not a great many other people? A. Even a few; I think he would rather be alone.

Mr. Bishop: That is all.

Otis Chapman, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Doctor, you are a physician and surgeon? A. I am.

Q. How long have you been engaged in the practice of your profession? A. Seventeen years.

Q. Are you admitted to practice in the state of New Jersey? A. I am.

Q. Your office is located where? A. 3 Prince street, Elizabeth.

Q. Are you connected with any institutions? A. Alexian Brothers, St. Elizabeth.

Q. Did you have occasion to make examinations and observations of individuals who have been injured by fire and trauma? A. I do.

Q. Where were you educated for the practice of medicine? A. The University of Louisville, Kentucky.

Q. Did you ever have any experience with the United States Government? A. I did.

Q. In what capacity? A. I was on the disability board in France. I was the receiving officer for the hospital center in France consisting of eight hospitals.

Q. And during your experience in that respect, did you have contacts with a number of the boys who were injured by fire? A. Yes, I rated disabilities on them.

Q. Can you tell me the number of individuals that came under your observation during your experience with Uncle Sam? A. I don't know how many. It was a day and night proposition. At the group of eight hospitals we had, they came in by trainloads, three or four or five trainloads in twenty-four hours. Those people had to be taken care of, each man seen personally before he could go to bed.

Q. Did you see them? A. I did, every man that came in there.

Q. And the number ran into the hundreds or thousands? A. Thousands.

Q. In your private experience, that is, your private practice, have you come across various cases of injury by fire? A. Yes, I was a mine surgeon for four years.

Q. Where? A. West Virginia.

Q. Did you see a number of cases where the after effects of fire appeared? A. Yes, they are common in the mines.

Q. Are you familiar with the after effects on an individual of normal type, where he has been injured in a fire and burned? A. Yes.

Q. Did you examine Mr. Gilroy, the plaintiff in this case? A. I did.

Q. When? A. A week back, and since that time I have gone over him again for some other things I checked up on.

Q. Without telling us anything that Mr. Gilroy told you, but just merely from your examination and study of the man, can you tell us, first of all, what your examination consisted of, and then what you found his condition to be? A. The man was stripped entirely. He has a scarring about his eyes, which is more noted on the right, burn scars which cause an outturning of the lower lids, particularly the right one, to the extent that the eye cannot be completely closed. Part of the ball is visible when he shuts his eyes. He has been burned about the face, particularly about the point of the nose and about the nostrils and mouth, some deformity about the top of the nose. His right ear has been burned partly off. His left ear has been burned some to a lesser degree. There are some burn marks about his shoulders. His hands, forearms, they had third degree burns, to the extent that he has not only scarring of the hands, but he has atrophy, that is, a wasting of the soft tissue, particularly noticeable in the palms of the hands. He has a webbing of his fingers on both hands, particularly the first, second, and third. He has a permanent contracture of both little fingers. He has a weakness in his thumbs. He has a weakness in his grasp. He has some inability to fully dorsally flex the hands, that is, he cannot get them up all the way. He has a muscular rigidity in the left side of his back below the last ribs, extending down to the tip of the sacro-iliac, which causes some difficulty in bending. He has scarring around the ankles.

which is rather extensive, but does not involve any of the deep moving structures about the joint. He has a low blood pressure, being 102 before effort, and being 105 after effort. He has a pulse rate of 96 before effort and a pulse rate of 120 after effort.

Q. What was it after? A. Jumping across the room on one foot and back again.

Q. I said, what was it after? A. 120. He has sweating of the arm pits; a profuse sweating. He has an inability to maintain his station or equilibrium with his eyes closed; he has a tendency to pitch. He has reduction in hearing in his right ear. I think I have named the things I found.

Q. Were you able to see the inside of his right ear? A. No, I didn't go all the way in, no.

Q. Are these conditions that you have observed permanent conditions? A. Yes, I think so.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Doctor, there was not any loss of function in the ankles, was there? A. No, I didn't find any in the ankles, to any marked degree, that is, to any degree I could measure.

Q. No measurable amount? A. No, none that I could measure.

Q. Didn't he have pretty good function of the wrists? A. He had some limitation in dorsal flexion particularly, that is, back flexion.

Q. He had fairly useful wrist joints? A. Yes, he had fairly useful wrist joints.

Q. Aside from the little fingers, he had fair motion in the fingers, didn't he? A. There was some limitation and weakness, but he had, I should say, fair motion. The webbing interferes some. That is, if he brings one finger down at a time,

he has trouble getting them down, because the webbing is holding onto the other fingers.

Q. He had fair use of his thumbs? A. There is considerable weakness in his thumbs.

Q. No limitation of motion? A. There is flexion in his thumbs, but they are quite weak.

Q. He has some gripping power? A. He has some.

Q. His hands are not entirely useless, I take it? A. They are not entirely useless, no.

Q. He has some function? A. Yes.

Q. Some use of them? A. Yes, some use.

Q. How did you test his hearing? I think you said his right ear—— A. With a watch.

Q. And in doing that, you relied on what he told you? A. No.

Q. As to whether or not he heard you? A. No.

Q. How could you tell whether or not he heard it? A. Closing his eyes and using a tuning fork and a watch.

Q. When you used them, you would sound them and ask him if he heard them? A. With the tuning fork, yes, but he did not understand how to tell me about a tuning fork.

Q. But you would depend upon his statement as to whether or not he heard it? A. Yes, but those statements can be checked with the fork.

Q. There wasn't any limitation of motion in the shoulders? A. Not to any great degree.

Q. None that you could measure? A. No, none that I could measure. There was some hesitancy on getting full elevation. It would be forced.

Mr. Bishop: That is all.

Re-direct examination by Mr. Gordon:

Q. Doctor, you said something about some gripping power. Has there been any impairment of

his gripping power? A. There has been a marked impairment of his gripping power.

Mr. Gordon: That is all.

The Court: Gentlemen of the jury, we are going to adjourn until 10.30 tomorrow morning instead of 9.30, because of other engagements that the Court has until that time.

My attention has been called to the fact that there may be some newspaper reports of this trial from day to day. If that is so, I want to warn you that it is improper for you to read any newspaper accounts or comments or anything that would lead you to form any opinion or have any effect upon your minds with regard to this case. This is a very important case, and it is taking quite some time to try it, and it is important to both sides that you do not form any opinion of any kind with regard to it, or talk it over among yourselves or with any other person until you have heard all the evidence on both sides and received your instructions and had your own deliberations.

You cannot form any conclusion with regard to this matter until all of that has been done, and nothing outside of the courtroom should be allowed in any way to influence you. You will please bear that very carefully in mind when you are outside between sessions. You will return to this courtroom at 10.30 tomorrow morning.

All the witnesses will also return at the same time without further subpoena.

(A recess was had until 10.30 o'clock Wednesday, October 30, 1929.)

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

October Term, 1929.

EDWARD N. GILROY
vs.
STANDARD OIL COMPANY (a New Jersey Corporation) and STANDARD OIL COMPANY OF NEW JERSEY (a corporation of Delaware, authorized to do business in New Jersey.)

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. LLOYD THOMPSON, Judge, and a jury, at the Union County Court-House, in the City of Elizabeth, New Jersey, on the thirtieth day of October, A. D. 1929, at 9:30 A. M.

APPEARANCES:

FRANCIS A. GORDON, Esq.,
Attorney for the Plaintiff.

MESSRS. LINDABURY, DEPUE & FAULKS,

JOHN W. BISHOP, JR., Esq., (Present)

BURTIS S. HORNER, Esq., (Present)
Attorneys for the Defendants.

WILLIAM E. BOZAN, a witness, called on behalf of the plaintiff, being first duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Doctor, you are a physican and surgeon in the State of New Jersey? A. I am.

Q. And your office is locaetd where? A. Martin Building, Elizabeth.

Q. How long have you been engaged in the practice of medicine? A. About twenty years.

Q. Have you specialized in any particular branch of medicine? A. In the eye, ear, nose and throat.

Q. For what period of time? A. About sixteen.

Q. Are you connected with any institutions in the County or elsewhere? A. Yes.

Q. Which ones? A. I am the visiting surgeon at the St. Elizabeth's Hospital, and at the Alexian Brothers Hospital, visiting eye, ear, nose and throat.

Q. And such cases as may require attention of the eye, ear, nose and throat are referred to you for consultation at these hospitals? A. They are.

Q. You also have a general practice? A. In the eye, ear, nose and throat.

Q. You specialize on that? A. Yes, sir.

Q. Did you have occasion to examine Edward Gilroy? A. I did.

Q. When? A. On the 21st of October, 1929.

Q. Where was this examination held? A. At my office.

Q. How long did it take? A. About a half hour.

Q. Just describe to the Court and the Jury what you did and what you found as a result of your examination. A. I found the patient——

Q. In doing so, Doctor, please omit any statements that may have been made by Gilroy to you, and do not give us any conclusions that may be founded on any statements made by Mr. Gilroy to yourself. A. I found him with scars on his face, his nose, his ears and his eye-lids. I found his vision in his right eye to be twenty-two hundredths

according to its ciliary, and his left eye twenty-two hundredths.

Mr. Bishop: I think this must be based upon statements that Gilroy made to him.

By Mr. Gordon:

Q. Were your findings based on any statement that Gilroy made to you? A. No.

By the Court:

Q. Were they based on tests made by you? A. Yes. On examination of the eyes, I found the same to have an error of refraction, which, when corrected with lens, gave him twenty one hundredths vision in the right eye and twenty one hundredths vision in the left eye.

Q. What else did you find? A. I found that the lower lids of both eyes were contracted, a condition known as ectropion.

Q. What is that? A. A pulling down of the lower lid, so that the punctum did not receive the fluid, and the tearing comes over the face.

Q. Is that tearing a continuous condition? A. Yes.

Q. What is it due to? A. Contracture of the lid.

Q. Is it a condition that is apt to improve or get worse? A. No, the scars contract.

Q. What else did you find? A. The upper lids are also scarred and contracted upward, making it almost impossible to close or meet both lids in each eye.

Q. Is that a permanent or temporary condition? A. That is permanent.

Q. Anything else? A. That is all.

Q. From your examination and findings, are you able to determine what loss of vision there is, if any, in the eyes of Gilroy? A. The part normal—there is about fifty to sixty per-cent. loss of vision.

Q. Is that a condition which is permanent? A. I think so.

Q. To what extent does the use of eye-glasses, which he is wearing, assist him, if at all? A. It brings his vision from twenty-two hundredths to twenty one hundredths.

Q. Has he normal vision with the use of glasses? A. No.

Q. What, if anything, should be done to his eyes at the present time, with reference to the sight? A. Those lids should be taken care of.

Q. In what way? A. It should be operated and the scars removed, and I think they should be skin-grafted to keep the lids together.

Q. What is the nature of such an operation? Describe it. A. It is a plastic operation that is done by removing the scar of the skin, of the lids, and a piece of skin taken from another part of the body and transplanted there.

Q. Is that done under a general anesthetic? A. Sometimes.

Q. (Continued) —or is the patient awake? A. Sometimes there is a local anesthetic, and sometimes it is general.

Q. After such an operation is performed, will that in any way increase the vision of the eyes? A. No.

Q. What effect, if any, would the result of such an operation have? A. It would be a prevention of further loss of vision by the constant running and irritation of the tears and inability to close the lids.

Q. Is that the only purpose that such an operation is advisable? A. Well, cosmetic purposes, to look better.

Q. After such operation is performed, will there still be scars around his eyes? A. Oh, yes.

Q. Will there still be a deformity there? A. Yes.

Q. And will the vision still be between fifty and sixty per-cent. diminished? A. I think so.

Q. Do you know how long a period such an operation is likely to require his being under medical care and attention? A. That is very slow, because those graftings are not sewed on; they are just laid on, merely grafted on, and it may take maybe four to five weeks.

Q. After such an operation is performed, is there any reasonable assurance that it will be successful? A. Fairly good reason to think so.

Q. What would you consider a fair and reasonable cost of such an operation? A. An operation like that altogether would probably cost him $400 to $500.

Q. If this operation is performed, and that tearing condition is relieved, will he have the tearing condition entirely relieved? A. If it is successful, he will.

Q. With his vision diminished between fifty and sixty per-cent., are you in a position to tell us whether or not he is able to apply himself to close and confining work requiring the use of the eyes? A. Well, I would not say he could do clerical work very long.

Q. You would not say that? A. No.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Doctor, with reference to this loss of normal vision of fifty to sixty per-cent., I think you said, that is improved by his glasses, is it not? A. No, that is total.

Q. I know, but when he wears his glasses, the loss of vision is less than that? A. No, that is with the correction.

By the Court:

Q. Doctor, do you mean that, using his glasses, he has fifty to sixty per-cent. diminishment? A. Yes, Judge.

Q. But if he did not use glasses, he would have more than that diminishment? A. He would.

Mr. Bishop: No questions.

Morris Maas, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. Maas, what is your occupation? A. Clinical chemist.

Q. Where are you employed? A. Bayonne Hospital, Bayonne, New Jersey.

Q. How long have you been engaged in that occupation? A. Nineteen years.

Q. How long have you been connected with the Bayonne Hospital? A. Two years and three months.

Q. Where were you in August, 1927? Were you there? A. I was.

Q. Just what is the work of a clinical chemist at the hospital? A. Making qualitative and quantitative analyses.

Q. Of what? A. Urine, blood, sputum.

Q. For whom? A. For the doctors in the care of the patients.

Q. Do you do that in all cases requested of you at the hospital? A. Yes.

Q. Are you in constant attendance at the hospital? A. Yes, sir.

Q. And you had been in constant attendance at the Bayonne City Hospital in August, 1927? A. Yes, sir.

Q. Were you familiar with the case of Mr. Gilroy while at the hospital? A. Only from the laboratory end of it.

Q. Did you make tests of urine analyses and blood count examination of Gilroy? A. I did.

Q. Have you had any experience in clinical chemistry in any other places besides the Bayonne Hospital? A. Yes.

Q. Where? A. Philadelphia General Hospital in Philadelphia, Rockefeller Institute in New York.

Q. How long were you with the Rockefeller Institute? A. A little over three years.

Q. What kind of work were you doing there? A. The same work, more or less, research.

Q. Where else? A. University of Pennsylvania.

Q. What kind of work were you doing there? A. Clinical chemistry.

Q. You mentioned the Philadelphia Hospital. What kind of work were you doing there? A. Clinical chemistry in the laboratory.

Q. Any other places? A. No, I have a laboratory of my own, for some years, in Philadelphia.

Q. A private practice? A. Yes.

Q. Did you make urine analyses tests of Gilroy? A. I did.

Q. When? A. Beginning August 8; that day I came to work at the hospital.

Q. After he was brought into the hospital? A. Yes.

Q. Did you see his condition when at the hospital? A. Only when I went up to him to examine his blood.

Q. As a result of your examination, what did you find as to his blood count test at that time? A. (Referring to papers) His hemoglobin on August 8, 1927, was eighty-seven per cent; color index, one. His erythrocytes, which means red blood corpuscles, were 4,790,000 per cubic millimeter of blood. His leukocytes, those are the white cells—per cubic millimeter of blood, were 13,200. The color of the erythrocytes, or the red blood cells, were normal. Then, by a certain method, we do what is known as a differential blood count, wherein we study the cellular element of the human blood, after having smeared it upon a slide. The small lymphocytes, under normal conditions, you find between twenty-one and twenty-five per cent. He has twenty-two per cent.

Q. Indicating what? A. Within the normal ratio. The large lymphocytes were one per cent; large mononuclears, one per cent; transitionals, one per cent., with an increase of polymorphonucleic leukocytes, seventy-two per cent. of those.

Q. What does that indicate? A. It indicates that there is going on in the body some change, due to infection or burn will cause it; pneumonia

will cause it; practically any disease, excepting typhoid fever; that usually does not cause that.

Q. What else did you find? A. That is all, in his blood.

Q. Now, with reference to this urinalyses——

Mr. Bishop: Did this gentlemen take the specimens himself?

The Witness: Yes, I don't go in the room and take them. The nurse brings them to me, to my laboratory, with the man's name attached to the urine.

By Mr. Gordon:

Q. Which nurse? A. Miss Grant.

Q. Do you know Miss Grant? A. Yes, I know the nurses.

Q. Did you get it from Miss Grant? A. Yes, they bring them to the laboratory. They do not hand them to me personally. Occasionally they do, and at other times they set them in the ice box with a slip on with the name, John Smith, or so on.

By the Court:

Q. Doctor, is that method that you describe of receiving these various specimens for your work from the patients, the ordinary method in the hospitals? A. Throughout America.

Q. The nurse in attendance on the patient brings the specimen to your place? A. Yes, of course, I can't go to the patient to get the urine from him.

Mr. Bishop: No objection.

By Mr. Gordon:

Q. As to the urinalyses test? A. I have taken so many urine tests that I think I can save a lot of time by saying that from the ninth of August,

the first one I received the morning after the admittance of the patient, practically all the way down to about September 7, 1927—it will save a lot of time, because they are all alike.

Q. What did you find? A. There is present albumen and some granular casts; some sylindrical casts; some hyaline casts; and there are present an occasional pus cell here and there. In some of the urine, you would find a red blood cell. That is practically the condition of his urine all the way down to September 7, when he started to show quite marked improvement and kept improving until the twelfth, when it started coming back somewhat to the original condition, and then became normal again and remained normal.

Q. When did the urine become normal? A. The urine was the first normal—the first normal urine I had on Gilroy was on the nineteenth day of September. That urine is without a question the same as any normal person, but it became abnormal after that.

Q. When did it become abnormal after that? A. It became abnormal on the twenty-sixth.

Q. The twenty-sixth of September? A. Yes, sir, there was a slight change in the constituents which made it somewhat abnormal.

Q. In what respect did it evidence an abnormal condition? A. There will be a trace of albumen.

Q. Did that condition persist for any length of time after the twenty-sixth of September? A. No, sir.

Q. Was he relieved of those conditions after the twenty-sixth of September, the presence of albumen? A. No, on one or two occasions there was some more albumen appeared.

Q. Please give me the latest date that you have there of the presence of albumen in the urine?

A. The latest date was the other day. I think someone brought me the urine to the hospital.

Q. I don't want that; I want what you got out of the orderly work at the hospital. A. That is the twenty-sixth of September.

Q. Did you make a test of urine brought to you recently? A. Yes.

Q. Who brought you the urine? A. I don't recall; I think—I am not certain——

Q. We have to have positive evidence. A. Those things are left in the office, and the man's name put on, and the office gives them to me. That is the routine in the hospital.

Q. You are under subpoena to be here? A. Yes, sir.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Mr. Maas, after September 7 you said there was a marked improvement in the condition concerning the analyses? A. After September 7?

Q. Yes, and then on the twelfth there was some relapse? A. Yes, on the seventh the urine was not quite normal, but practically normal, a very little——

Q. Nothing seriously wrong? A. No.

Q. And that condition continued until the twelfth? A. It continued until the tenth. That was an error on my part. It became better on the eleventh, and then became better on the twelfth, and then, the thirteenth, fourteenth, and sixteenth was normal, and the eighteenth it became slightly abnormal.

Q. Those were just slight variations from normal? A. Yes, very minor. A patient may show a lack of albumen in the afternoon due to some food

he has been eating, and sometimes the food will cause some albumen to be secreted by the person who is not so well, and the same evening that albumen may be normal, and that condition may go on for weeks.

Q. That does not indicate any serious condition? A. No.

Q. And this abnormality that you found on September 26, was that serious or slight, as you characterize by traces of albumen? A. No, there is just a trace of albumen.

Q. Isn't it true that a normal individual, a man who is well, may show a trace of albumen at times? A. Yes, after strenuous work, a man who picks up a heavy barrel on a truck, or a man out rowing or running will sometimes.

Q. It is sometimes shown by normal individuals when there is no apparent cause? A. Yes, they don't complain of anything at all, but you can find some albumen in their urine.

Q. That does not indicate any serious condition? A. No, sir, not the presence of albumen.

Q. So far as you know, since September 26, he has been normal, in that respect? A. Yes, sir.

Q. Referring to this blood count that you speak about, does that show any serious condition? A. No, sir, I would not say serious; it was abnormal.

Q. But those abnormalities occur sometimes in people who are apparently perfectly well, do they not? A. No, I should not say that.

Q. Well, any burn case would show some of those abnormalities? A. Yes, it would not have to be a third degree burn, just a burn of the hand where the tissue came in contact with something hot. It would show an increase of the leukocytes.

Q. And that is nothing particularly serious, is it? A. No.

Q. And that cleared up, didn't it? A. Well, that wasn't repeated.

Q. You did not repeat those tests? A. Not the blood count.

Q. You only did that on the ninth after he came in? A. Yes, it is routine to do a full count of the patient on admission.

Q. You did not find any condition which indicated the necessity of making a further blood count? A. That is not up to me. The doctor in charge of the patient is the one who orders me to do those things. I don't do those things at my own command.

Q. So that all of these tests, including the analyses and blood count, were done at the request or suggestion of the attending physician? A. At the strict orders of the man who takes care of him.

Q. Who gave those orders? A. Dr. Pinkerton.

Mr. Bishop: That is all.

Re-direct examination by Mr. Gordon:

Q. On the fourth day after his admission to the hospital, what did the presence of albumen indicate in this case?

Mr. Bishop: Just a minute. This is a clinical chemist who knows what he found.

Mr. Gordon: But on cross-examination, the door was opened when he was asked if it was serious, and he qualifies the condition.

(Argument.)

Mr. Gordon: I will withdraw the last question.

Q. At what particular period were you referring to that the presence of albumen was not serious? A. On the twenty-sixth of September.

Q. With reference to three or four days after he was admitted to the hospital, was it serious?

Mr. Bishop: I object to that.

(Argument.)

The Court: If Mr. Gordon will so frame his questions as to ask this witness what such a condition would indicate in the average person, he may do it, but what it indicated in this particular man is a different thing.

By Mr. Gordon:

Q. Will you be kind enough to read the result of the urinalyses tests of this man for the first four days? A. Color, amber; appearance, cloudy; reaction, acid; specific gravity, 1028; albumen, one plus; indigen, one plus; microscopic findings, cylindrical casts, one plus; granular casts, one plus; hyaline casts, one plus; epithelial casts, one plus; pus cells, one plus; that is the first analysis I made of the man on August 9, the morning of the ninth, following the day of admittance.

Q. Did you make one on the tenth? A. On the eleventh.

Q. Will you please read what the findings were on the eleventh? A. Color, dark amber; appearance, cloudy; reaction, highly acid; specific gravity 1022; albumen, marked trace; bile, a trace; hyaline casts, a few; epithelial cells from the kidney, a few; pus cells, a few.

Q. When was the next one? A. On the thirteenth.

Q. Please tell us what it was then? A. The color was dark amber; appearance, cloudy; reaction, acid; specific gravity 1020; albumen, 1 plus; several hyaline casts were seen; a few epithelial cells from the bladder; some pus present. That is all.

Mr. Gordon: That is all.

Ambrose F. Dowd, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Doctor, you are a physician and surgeon in the state of New Jersey? A. Yes.

Mr. Bishop: I will admit his qualifications.

Mr. Gordon: I think the jury would like to hear something about the doctor's experience.

Q. How long have you been engaged in the practice of your profession? A. Nineteen years.

Q. Where is your office located? A. 239 Broadway, Newark.

Q. Where did you receive your education in connection with the practice of medicine? A. University of Vermont.

Q. Are you connected with any institutions at the present time? A. Yes.

Q. What are they? A. I am connected with the women's and children's hospital, the Hospital for Crippled Children, St. James Hospital, Irvington General Hospital, Bethany Hospital, Mountain-

side Hospital, St. Mary's Hospital, New Jersey Rehabilitation Commission as consultant in nervous and mental diseases.

Q. How are you connected with those institutions? A. As consultant of nervous and mental diseases.

Q. Do you occupy any official position in the state? A. Yes.

Q. What? A. Member of the New Jersey State Board of Control.

Q. During your years of the practice of medicine, have you specialized in any particular branch of medicine? A. Nervous and mental diseases.

Q. Did you have any experience with the government during the war? A. I served during the war with the American expeditionary force.

Q. In what capacity? A. Consultant in nervous and mental diseases.

Q. Where? A. In France.

Q. During that experience with the government, did you have occasion to examine many of the boys who were injured by fire and shot as a result of contacts with fire? A. I saw a number who were in contact with fire and shot of one kind or another. I saw many more who were not, who were merely suffering from nervous and mental diseases incident to their experiences.

Q. Approximately how many of these cases of all kinds where there were mental afflictions involved came under your observation during your war experience? A. We handled many thousands. We handled them rapidly and sent them back rapidly, so it would be impossible to estimate.

Q. Did you have an occasion to make an examination of Edward Gilroy, the plaintiff in this case? A. Yes.

Q. Did you hear the testimony of Mr. Maas, the clinical chemist, who just testified? A. Yes, I heard it.

Q. Did you hear the statement as to the conditions he found in the urine of Mr. Gilroy on the dates of August 9, 1927 to August 13, 1927? A. Yes, I heard those things.

Q. Are you in a position to tell me from such facts what those conditions indicate? A. Well, I would think that they indicate the existence of an inflammatory condition of the kidneys. It would be impossible to say from those reports whether it was sub-acute or acute. It might even occur in a chronic condition.

Q. When did you examine Mr. Gilroy? A. October 27, 1928.

Q. When else? A. I saw him for a few moments this morning.

Q. Without telling us anything that Mr. Gilroy may have told you or without basing your conclusions and findings on anything he may have told you, will you please describe to the jury what your examination consisted of and what you found as a result of such examination? A. I found a deformed right ear due to scar tissue and loss of tissue; marked scarring of the face, about the nose and eyes, with a drawing down and outward of the lower lids, and undue exposure of the eyeballs because of his inability to close his eyelids; a marked scarring at the inner corner of the left eye. Scars are adherent about the eye and not adherent to the conjunctiva. There is marked scarring on both hands, with loss of tissue of the small muscles of the hand, particularly the muscles between the small bones of the hand, and with some webbing between the fingers. There is a marked tremor of his head, of his lips, and marked

tremulousness of his upper lids. His station was unsteady, markedly unsteady; his gait was unsteady. He was perspiring very freely. His hands were tremulous. His heart was moderately enlarged, and its action was irregular. The pulse rate at that time was 122 a minute, and the blood pressure at that time was 150 millimeters of mercury systolic. He had a rigid back and a rigid neck. His attitude was general Parkinsonian.

Q. What is that ordinarily? A. It is an expression that covers the loss of facial expression, a rigid attitude, a rigidity connected with general tremulousness.

Q. What is that an evidence of? A. Evidence of a number of things.

Q. In this particular case? A. It suggests a degeneration of ganglia there at the base of his brain, due to toxemia. I cannot say that it any more than suggests it, because it is not a well-developed Parkinsonian syndrone.

Q. What do these conditions in general present to you? What kind of an effect do they have on a man so far as his mental state is concerned? A. He is intellectually clear. He was emotionally disturbed, of course, and volitionally disturbed and inadequate, of course, but I can't tell why, from the objective findings alone.

Q. Doctor, assuming that a man thirty-three years of age, in good health, on the night of August 8, 1927, is riding along a road in an automobile, and he is suddenly enveloped in flame, and an explosion occurs, and he is thrown to the roadway, and thereafter suffers third degree burns to the hands, to the face, to the ears, parts of the ankles; he is burned in and about the shoulder; he is thereupon brought to a hospital, where he remains

for a period of twelve weeks; that during the first month of that period of time he is obliged to receive and does receive injections to allay the pain and produce sleep every night; that thereafter he is brought to his home, and he continues to remain at home for a considerable period of time, and that he is in general dejected and uninterested in his surroundings, and he presented the conditions that you found on the date of your examination; can you tell me what the condition is, if any, as to his nervous system?

Mr. Bishop: Just a minute. There is one thing about that hospital question that I object to, and that is the statement that he received injections or something to make him sleep every night for one month.

(Argument.)

Q. (Continued)—that he had received injections to put him to sleep nights for many days after his being brought to the hospital. Will you please answer the question now?

Mr. Bishop: I renew the objection, because it is my recollection that he slept without these things on the fifth or sixth day.

The Court: I think, that unless you go back to find the exact testimony on that subject, it would be safer for you to make your question in such a way that it implies that he was required to have morphine injections at least for the first four or five nights of his presence in the hospital, and that thereafter, for at least a month, his nights were sleepless.

Mr. Gordon: I accept your Honor's suggestion, and with that correction of the facts presented in the question, I ask that the question be answered.

A. Objectively, he presents the signs that I have already mentioned, suggestive of a Parkinsonian syndrone, due to degeneration of his facial ganglia. He is depressed, apprehensive, and agitated because of his scars, and because of his inability to participate in work and meet his responsibilties.

Q. What is this Parkinsonian affliction? A. It is a condition due to degeneration of the basal ganglia in general, and of the globus pallidus in particular.

Q. How does that affect the patient? A. It gives him a mask like appearance and makes all purposeful movements inco-ordinate, so that he cannot perform them accurately or satisfactorily to himself or anyone else.

Q. Is that a form of mental instability? A. There are not very many mental changes in that particular thing.

Q. Is it a form of nervous affection? A. Yes, it is a nervous affection. It is not mental.

Q. Is that a condition which is apt to be permanent? A. Yes, that is very likely to be permanent.

Q. And can a person who is in this condition adjust himself to work? A. You are speaking of Gilroy?

Q. Yes. A. I don't think he can.

Q. Why? A. Well, he has a rigidity, he has a disturbance of station and gait; he has tremulousness; he has the scarred and deformed, and weak, almost useless hands.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Doctor, there is nothing wrong with this man's mind, is there? A. Nothing wrong with his intellect. He is emotionally disturbed. He is volitionally disturbed by his predicament. That is not intellectually.

Q. He understands his surroundings? A. Perfectly.

Q. He understands what is said to him? A. Perfectly.

Q. And he has no difficulty in expressing himself? A. None whatever.

Q. And he is perfectly able to comprehend things as he did before, so far as you know? A. Yes, I think so.

Q. You said that this Parkinsonian condition was suggested by his condition? A. Yes.

Q. I think you said it was only suggested by his condition? A. It is very strongly suggested. I think it exists. There are some features lacking.

Q. What features are lacking? A. He has not the festinating gait that a well developed case has. I mean by that a propulsive gait, so that when he starts to go forward, the speed of the walk increases and winds up in a run. He has not that as yet. He has not the intense rolling pill tremor of a well-developed case yet, but he has the other features.

Q. He has some of the symptoms, but not all of them? A. Yes, that is about right.

Q. And while you believe that that is what is the matter with him, you could not say that positively? A. My opinion is that he has that. All the features are rarely present in a case. My opinion is that he has.

Q. I am asking you if you are able to say that positively. A. It is my positive opinion that he has.

Q. Your examination was directed towards his nervous and mental condition, wasn't it? A. It was directed to everything he presents. When you do a neurological examination, you try to find out everything that is the matter with the man.

Q. You have not attempted to estimate the extent of the disability to his hands or measure the impairment of function in the joints and things of that sort? A. No, I have simply described them as I saw them.

Q. And you would not say, for instance, that his wrist joints have been rendered useless? A. There is no pronation there, and there is not much supination. There is some flexion and extension, but the usefulness is markedly impaired. I would not put it in terms of percentage, but it is markedly impaired.

Q. You say you thought Gilroy could not adjust himself to work? A. I don't believe he can.

Q. Do you mean that there is nothing that he can do? A. There may be some small things that he can do. I don't think he will do them consistently and successfully over any period of time.

Q. But there are some things he can do? A. Yes, from time to time.

Q. Do you think it might be beneficial for him to attempt to do them? A. I think it is beneficial for every man to be busy.

Q. If he engaged in such work as he is able to do, it would be likely to benefit him? A. It would not hurt him; it might help.

Q. The possibility of help exists? A. As far as that goes, I think it is possible; I think that every man who is doing something is being benefited.

Q. You think that some light employment would probably help him? A. Yes.

Q. There is no reason why some light employment wouldn't help him? A. Light employment or some light occupation. I would not name it this moment, just what it is.

Q. You spoke of stiffness of certain muscles. Did you attribute that to his nervous condition? A. I attributed that probably to some injury to his back at some time; possibly when he was thrown out of the automobile.

Q. Do you think that is nerves? A. No, I think that is physical.

Q. Do you mean muscular? A. Muscular.

Q. It is some condition of the muscles? A. I think so, probably fibroid masses.

Q. You had never seen the man before October 27, 1928? A. Never.

Q. And since that time you have never seen the man until you say you saw him a few minutes this morning? A. This morning.

Q. You don't know what his condition was before? A. No, of course not.

Q. You said that you found his heart enlarged and irregular. You don't know whether that condition existed before or not, do you? A. I don't know; in all likelihood, it did.

Q. It is likely that it existed before August, 1927? A. Yes, that is what I had in mind when I answered the question.

Q. Do you mean that this was something that existed prior to this explosion? A. Yes.

Mr. Bishop: That is all.

Re-direct examination by Mr. Gordon:

Q. Doctor, what do you refer to particularly about the heart condition, if any, that existed prior to August 8, 1927, the year of the fire? A. Just to its general enlargement, to a moderate degree.

Q. Does it in any way affect the functions of the heart? A. His heart was iregular, somewhat intermittent, when I examined him.

Q. That was in October, 1928? A. Yes.

Q. I am talking about August, 1927. Do you know what his condition was then? A. I don't know what it was, except when I examined him. I doubt that that heart appeared—it might have appeared. It was a year or more before that, and that could have happened.

Q. You don't know how long prior to October, 1928, it existed? A. No, it might have existed all his life; it might not have existed more than six months.

Q. You are not prepared to state that that condition existed in August, 1927? A. No, I couldn't say that. Nobody can say that.

Q. Is this Parkinsonian disease a disease which improves or makes progress and accentuates itself? A. It does not improve; it either progresses or is stationary.

Mr. Gordon: That is all.

Re-cross-examination by Mr. Bishop:

Q. You said that this condition of his heart may have existed all his life? A. It may have been all the time.

Q. You cannot say? A. I cannot say.

Q. You cannot say that it did not exist prior to this explosion? A. I can't say that.

Q. You cannot say that it did not come on after? A. I can't say that.

Q. You do not know? A. All I can say is that there it is.

Q. He may have had it since birth? A. Yes.

By Mr. Gordon:

Q. Could a fire and an explosion have brought that about, being blown out of a car? A. I don't believe it could.

Mr. Gordon: That is all.

Esther McLarty, a witness produced on behalf of the plaintiff, being duly sworn according to law, on her oath, saith:

Direct examination by Mr. Gordon:

Q. Mrs. McLarty, what is your occupation? A. Graduate nurse.

Q. You are a registered nurse? A. Yes, sir.

Q. Where do you live? A. 124 Avenue C, Bayonne.

The Court: Please talk a little louder so that the jury can hear you.

The Witness: Yes, sir.

By Mr. Gordon:

Q. How long have you been a registered nurse? A. 1922.

Q. In 1927 were you connected with the Bayonne hospital? A. Yes, sir.

Q. In August, 1927, did you see Mr. Gilroy at the hospital? A. August what date?

Q. In the month of August? A. Yes.

Q. Do you know when you first saw him there? How long after he was brought in did you see him? A. August 9.

Q. Were you on day duty or night duty? A. On day duty.

Q. Did you observe his condition when you saw him on the day of the ninth of August? A. Well, when I was called to the hospital, they were dressing the burn cases, four of them. Gilroy was dressed, and I assisted on the others, and I didn't see his burns until the next day.

Q. That was August 10? A. Yes.

Q. Was he constantly under your observation from August 10? A. Yes.

Q. Can you, in a general way, describe the conditions you found? A. Well, he was just simply—it looked like a mass of burned flesh to me with the skin hanging down.

Q. From where? A. From his face, and his hands, and his ears, and his ankles, and his knee, part of his shoulders, as I remember it.

Q. Do you know whether or not he presented any evidence of pain and suffering? A. Well, he appeared to me the first few days to be in shock. He didn't have so much pain that I could observe the first few days.

Q. And after the first few days? A. He suffered terrible.

Q. Have you seen burn cases? A. Yes.

Q. Was this a light or a serious case of burn? A. Oh, it was very serious.

Q. Do you know whether or not he was given anything to relive him of his pain and suffering? A. Well, we were very careful about administering narcotics, because it is not indicated in burn cases, so on duty, I didn't give him anything during the day.

Q. You do not know what happened at night? A. Just from the report. I don't remember it now.

Q. What appearance did the burned area present? A. Well, after this skin dropped off, of course, the area underneath presented an appearance probably like raw meat.

Q. Do you know how his bladder and bowel condition was? A. Well, he was incontinent.

Q. Was that an emphatic irrgularity or a mild one? A. That was, I would say, during the time that he was in this condition of shock.

Q. Was he in a serious condition there? A. Oh, yes, sir.

Q. Did he talk? A. He talked irrationally.

Q. How long a period of time did that cover? A. I should say from the first few days, possibly a little longer.

Q. How long were you with him? A. I was with him eighteen weeks.

Q. Eighteen weeks? A. Yes, sir.

Q. How many of those weeks were you with him at the hospital? A. Twelve.

Q. And after that where were you with him? A. I was at home six weeks.

Q. In the daytime? A. Yes.

Q. What did you do during the six weeks at home? A. I gave him general nursing care, attended to him, dressed him, massaged his face, and he had—his right ear was not cleared up, and I kept hot compresses on that.

Q. Do you know how long his eyes— A. (Continued)—we dressed his fingers; his fingers were in splints, and we dressed those.

Q. Do you know how long his eyes were covered up? A. I should say three weeks; I am not quite certain.

Q. After that, were there treatments given to the eyes? A. Yes.

Q. Over what period of time was that condition? A. I think—I don't say all the time he was in the hospital, but quite a period of time, we kept drops in his eyes.

Q. Was it up to within a couple of weeks before he left the hospital?

Mr. Gordon: I will withdraw the question.

Q. Can you tell me up to within what time he left the hospital? A. I can't tell you definitely.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. You were the special nurse for Gilroy? A. Yes.

Q. You were not generally on the floor, but you took care of him alone? A. Yes, I was the special nurse.

Q. You said that he talked irrationally for the first few days? A. Yes, he did.

Q. And after that, did he continue to talk? A. Well, then he had a period of time where he did talk irrationally, and they said it was due to a kidney condition he had.

Mr. Bishop: I ask that that be stricken out.

The Court: Strike it out. Do not tell anything that somebody else told you.

By Mr. Bishop:

Q. This condition of irrationality cleared up? A. Then it occurred.

Q. It recurred? A. Yes.

Q. And it cleared up again? A. Yes, sir.

Q. And for quite a considerable period while he was in the hospital he was quite rational, wasn't he? A. Yes, sir, later on he was.

Q. And that was for the last eight weeks or so? A. Yes, I would say yes.

Q. And that is after the first two or three weeks? A. After about the first four weeks.

Q. He became perfectly rational? A. Yes, I think he was rational most of the time.

Q. Did anybody visit him during that period? A. During the first four weeks?

Q. No, after the first four weeks? A. Yes, he had some visitors.

Q. Did he have quite a number of visitors? A. No, not quite a number; they were really at my discretion. If he had a day where I thought he could stand——

Mr. Bishop: Just a minute.

A. (Continuing)—stand seeing people, I allowed him to have some visitors; other times, he was not so well, and I restricted visitors.

Q. You used your own judgment as to whether or not he should see people? A. Yes.

Q. There was not any general regulation that he could not see people, was there? A. Well, in the beginning there was.

Q. How long did that continue? A. That continued a period where he was so seriously ill.

Q. The first three or four weeks? A. Yes.

Q. Did his wife see him during that period? A. Yes, sir, she came in.

Q. You always let her come in? A. Yes.

Q. Whenever she wanted to? A. Yes, sir.

Q. There was no time, that you recall, that you excluded his wife after the first two or three weeks? A. No.

Q. Did she see him even during the first two or three weeks? A. Yes, she came up to look at him.

Q. Other people saw him after the first three or four weeks, didn't they? A. Yes.

Q. Quite a number of other people? I don't mean at first, but I mean over the whole period he saw quite a number of different people? A. It seemed to me to be the same people that came regularly to see him.

Q. Did they come fairly regularly? A. Yes, they came.

Q. Did he ever express the desire to see any particular person? A. No, he was not keen about seeing people.

Q. Did he ever ask for his wife? A. Not in the beginning he didn't.

Q. I mean during the whole period? A. Oh, yes, he would ask if his wife had called up or if she had come in.

Q. Did he ever ask that she be sent for, that he would like to see her? A. I think he did.

Q. When that was done, was word sent to her? A. As far as I know, it was.

Q. Did she come in response to those requests? A. Yes, she always responded.

Q. So that whenever he wanted to see his wife, he did see her? A. As far as I can recollect, he did.

Q. Do you remember Mr. Gillson coming to see him while he was in the hospital?

Mr. Bishop: Stand up, please, Mr. Gillson.

(A man stood up in the courtroom.)

A. Yes, sir, I remember seeing him.

Q. Did he come to see him several times? A. I believe he did.

Mr. Bishop: Mr. Hurtzig, will you stand up, please?

(A man stood up in the courtroom.)

Q. Do you remember Mr. Hurtzig coming to see him? A. I remember—I don't know how many times, but I do remember him visiting the hospital.

Q. More than once? A. I couldn't say.

Q. You saw him there? A. I saw him, yes.

Q. Do you know Mr. Keppel? A. Yes, sir, I knew him to see.

Q. Do you know him by sight? A. Yes, sir.

Q. Did he visit Gilroy in the hospital? A. Yes, he did.

Q. On several occasions? A. On several occasions.

Q. Were you present during these visits? A. Well, I wasn't present all the time. I may have been in or I might have been out of the room, I can't say.

Q. You don't recall particularly? A. No, I don't.

Q. You were paid for your services to Gilroy? A. Yes, I was.

Q. By whom?

Mr. Gordon: I object to that as immaterial.

The Court: Objection sustained.

Mr. Bishop: Exception.

That is all.

THOMAS WILLIAMS, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. Williams, what is your occupation? A. Insurance.

Q. In connection with your work as an insurance man, are you familiar with the expectancy and mortality tables? A. I am.

Q. How long have you been in the insurance business? A. Twenty-five years.

Q. Can you tell me what the established mortality expectancy or expectancy rate is of a man thirty-three years of age?

Mr. Bishop: I object to that.

Q. Have you the Carlisle table of mortality? A. No.

Q. Which one have you? A. The American Experience Table of Mortality.

Q. Is that the table which is used by the insurance companies in tabulating the expectancy of life? A. Yes, it is used by probably ninety-five per cent. of the American insurance companies.

Q. Your office is where? A. 1201 East Grand Street, Elizabeth.

Q. How long have you been in business? A. Seventeen years.

Q. How old are you? A. Fifty-three.

Q. You say that the American experience table is in use by about ninety-five per cent. of the companies? A. The American experience table of mortality is. The Carlisle table is very little used.

Q. Have you any other tables of mortality which are in use by the companies? A. No, because the

American experience table is generally used. I don't know of any company that uses any other.

Q. Can you tell me from the American experience table what the expectancy is of a man thirty-three years old?

Mr. Bishop: I object to that on the ground that the witness has not been properly qualified.

The Court: In what respect?

Mr. Bishop: It does not appear that he has made any particular study of mortality or what these tables are based on.

The Court: I hardly think that would be necessary. The mortality tables in general use in connection with the insurance are recognized by state laws as evidence. This man has testified that he is in a business in which that is generally used, and which gives him a knowledge of what table is generally used. Of course, we cannot get anybody in the courtroom who had any part in the preparation of the table. He has testified from a table generally used in that business, and I am satisfied that the evidence may be competent. It would be just the same as if he were testifying as an engineer concerning certain calculations from the engineering standpoint, that were made up from mathematical tables in use in that profession. I will allow the question.

Mr. Bishop: Exception.

A. At age thirty-three the expectation of life is 33.21 years.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. The experience tables from which you testify are based upon the experience of the mortality of persons in normal health? A. They are.

Q. So that this expectancy is the expectancy of a person who was in normal health? A. Well, that is, these tables are promulgated on the basis of taking one hundred healthy males at the age of ten, assuming they are healthy.

Q. You would not say that that is the expectancy of life of a man who had an enlarged and irregular heart? A. I don't think I am qualified to say on that. I am not a physician.

Q. You said that this showed the expectancy of the man? A. Yes.

Q. You are a life insurance man yourself, are you not? A. Yes.

Q. You know whether you would accept that table as showing the expectancy of a man who had an enlarged and irregular heart? A. I might answer that by saying that I recall a specific case——

Q. No, no, you cannot tell that.

The Witness: Well, it has to do with the heart. I might say that judging from this case that I have in mind——

Q. You must answer the question. A. Naturally, I would say that a man with an enlarged heart probably might be rejected.

By the Court:

Q. The experience tables are made up, are they not, if you know, to test the average expectancy of life of the average man in normal condition? A. Yes.

Q. And that is all they do? A. Yes, they are the basis from which the rates are made. The American experience table of mortality is promulgated by the congress of insurance actuaries, for the purpose of arriving at rates for life insurance, and they are based upon persons in normal health.

Mr. Bishop: That is all.

JOHN T. KLASE, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gordon:

Q. Mr. Klase, what is your occupation? A. Photographer.

Q. How long have you been engaged as a photographer? A. Fourteen years.

Q. Are you familiar with the process involved in the enlargement of pictures? A. I am.

Q. You live where? A. 57 Irving Street, Rahway, New Jersey.

Q. I show you Plaintiff's Exhibit 9 and ask you whether you saw that before? A. I did.

Q. I show you Plaintiff's Exhibit 12 for identification and ask you if you saw that before? A. I did.

Q. I show you Plaintiff's Exhibit 10 and ask you whether you saw this plate before or the negative, rather? A. I did.

Q. Did you, at my request, make an enlargement of the person who is enclosed in a circle on Plaintiff's Exhibit 9? A. I did.

Q. Is Plaintiff's Exhibit 12 for identification an enlargement in exact proportion of the person

who is enclosed in the circle on Plaintiff's Exhibit 9? A. It is.

Q. Has there been any change in enlarging the photograph? A. No, sir.

Q. Has there been any change in the character or feature of the individual? A. No, sir.

Q. Did you personally do the work? A. I did.

Q. And you have the plate or negative Plaintiff's Exhibit 12 for identification with you? A. The negative is here, yes, sir.

Mr. Gordon: I offer Exhibit 12 for identification in evidence.

(The picture referred to, which was previously marked "Plaintiff's Exhibit 12 for identification," was received in evidence and marked "Plaintiff's Exhibit 12.")

Q. Did you, at my request, take pictures of Mr. Gilroy within the last few days? A. I did.

Q. I show you six photographs and ask you if you took those photographs? A. I took them.

Q. Have you the negatives of those photographs with you? A. I have.

Q. When were they taken? A. Sunday afternoon.

Q. Do you mean last Sunday afternoon? A. This last Sunday, yes.

Q. Do these photographs accurately represent the individual whose picture was taken? A. They do.

Q. Were they personally developed by you? A. Yes, sir.

Mr. Gordon: I offer them in evidence.

Mr. Bishop: I object to them on the ground that they are not the best evidence. The man himself is here and was examined

by the jury very closely, and the introduction of these photographs is not the best evidence. It is secondary evidence after the primary evidence has been produced and offered.

Mr. Gordon: In the first place, there can be no prejudice to the defendant, if these photographs are merely secondary evidence, and the injuries themselves have already been exposed by the plaintiff to the jury, so that, so far as the objection is concerned that they are secondary evidence, I think that eliminates that proposition. There can be no prejudice to the defendant. Going a step further, I desire to call your Honor's attention to the case of Haring vs. Banks, 146 Atlantic.

The Court: Is that a New Jersey case?

Mr. Gordon: Yes, sir, it was decided within a very short time ago.

(Mr. Gordon hands paper to the Court.)

The Court: Of course, Mr. Gordon, this decision does not indicate whether the parts, of which the picture was taken, in this case, had been exhibited to the jury prior to the introduction of that particular picture. The situation here is that the original man himself has been on the stand and has been actually in this case exhibited to the jury specifically and very deliberately, so I am not sure that your cases are parallel. The ordinary rule is that evidence of this kind is secondary. I do not know that it is competent for the Court to decide the rule of evidence merely on the question of whether or not, in this particu-

lar case, it can be prejudicial or not prejudicial, and if the rule exists, the rule will have to be obeyed.

Mr. Gordon: An additional ground for the purpose of introducing these photographs is that in matters of this kind, the testimony of the witness is reduced to stenographic minutes. The conditions, which are visualized by the jury, are not in the minutes or in the record, and so, in the event that a record may be made of this case, I submit that there should be in that record for record purposes as much, if not all, that the jury were able to visualize.

Mr. Bishop: If your Honor please, as to that, that does not make bad evidence good. I know that case which has been referred to. The member that was photographed in that case had not been exhibited to the jury. The photograph did not show a condition that then existed, but a previous condition which had existed. This is evidence which goes solely to the question of fact as to which the jury is finding.

Mr. Gordon: May I offer them, if your Honor please? Then perhaps your Honor will make a formal ruling.

I offer in evidence this photograph, identified by the witness as having been taken of the plaintiff on Sunday, October 27, 1929, and I understand that is objected to. I ask that they be marked for identification as one exhibit.

The Court: Are you offering them in evidence or are you asking that they be marked for identification?

Mr. Gordon: I ask that they be marked in evidence.

The Court: You are offering them now in evidence, and they are objected to as not the best evidence?

Mr. Bishop: Yes, sir.

The Court: Objection sustained.

Mr. Gordon: Exception.

Mr. Bishop: No questions.

(The photographs referred to were marked "Plaintiff's Exhibits 20 to 25, inclusive, for identification".)

Mary V. Gilroy, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on her oath, saith:

Direct examination by Mr. Gordon:

Q. Mrs. Gilroy, how old are you? A. Twenty-seven years.

Q. You are the wife of Edward Gilroy, the plaintiff in this case? A. For eight years.

Q. You are the mother of his children? A. Yes.

Q. How long have you been married? A. Eight years.

Q. You have two children? A. Yes.

Q. You have lived continuously with Mr. Gilroy during your married life? A. I have.

Q. And he is living with you at the present time at home? A. He is.

Q. Did you know his general condition before the accident of August, 1927? A. Yes, I did.

Q. Did he ever indicate or complain of any pains in the heart region? A. No, he never did.

Q. Did he ever suffer from any illnesses of a serious nature other than ordinary colds or appendicitis? A. No, he did not.

Q. What was his general physical condition? A. Very good.

Q. Did he go to work regularly? A. Yes, sir.

Q. Did he eat his meals regularly? A. Yes.

Q. And how did he sleep? A. Very good.

Q. What was his general disposition at home? A. He had a very nice disposition, very good.

Q. Was he jovial? A. Yes, he was very jolly, always full of fun, always liked pleasures of all kinds.

Q. Did you see him when he went to work on the morning of August 8, 1927? A. Yes, in the afternoon.

Q. You saw him in the afternoon? A. Yes.

Q. He went on the shift from what time to what time? A. He left the house about 2.30. I didn't see him then until I saw him in the hospital that night.

Q. When he left the house, how was he? A. Very good health.

Q. When you got to the hospital, where did you see him? A. I saw him downstairs in the ward in bed.

Q. Can you describe his condition at that time? A. It was very poor. He didn't know me. The priest was standing there and said——

Q. Did he recognize you? A. No.

Q. Do not give us any conversations. Did you see him after that? A. Next morning I saw him.

Q. Where? A. Upstairs in his room.

Q. What was his condition then? A. Very bad.

Q. Did he talk? A. No.

Q. Were you with him for any length of time? A. No. I just walked in and looked at him and then out again.

Q. Did you see him after that? A. Yes, I did, that night again.

Q. Did you talk to him? A. No.

Q. Did he talk to you? A. No.

Q. Did you see him the next day? A. Yes.

Q. Did you talk to him the next day? A. No.

Q. Did he talk to you the next day? A. No.

Q. The day after that, did you see him? A. Yes.

Q. Did he talk to you? A. No, he did not.

Q. Did you talk to him? A. Yes, I just told him I was there.

Q. When was that? A. Three days after.

Q. About what time? A. In the morning.

Q. Did he recognize your voice? A. Yes, he did.

Q. Did you see his eyes? A. No, they were covered with pads.

Q. Do you know how long his eyes were covered? A. Well, for at least three weeks.

Q. Did you see him at the hospital after the first three or four days? A. Yes, I did.

Q. How frequently did you call there? A. Well, I called in the afternoon and in the evening.

Q. On these occasions, when you called, did you stay for any length of time? A. Yes, I stayed for quite awhile.

Q. Did you observe his condition then? A. Yes, he was very much in pain.

Q. Did you know how long he suffered pain? A. Well, I could say for at least a month steady from the time I went, he was in pain.

Q. How long was he at the hospital? A. Twelve weeks.

Q. During the twelve weeks that you visited him, do you know whether or not he suffered pain after the first month? A. Yes, he did.

Q. Continuously or at different periods? A. At different periods.

Q. Do you know where those pains were? A. Very much in his hands, and his ankles, and his knee.

Q. Did you see his face while it was being dressed? A. Yes, it was just like a raw piece of meat.

Q. And his hands? A. Yes.

Q. After the time that he was out of the hospital and he got home, did you see Mrs. McLarty there? A. I did.

Q. She was his day nurse at the hospital? A. Yes.

Q. And she stayed at your house for awhile? A. For six weeks.

Q. What was she doing at your house? A. She took care of my husband, dressed his hands.

Q. Do you know whether or not, while Mrs. McLarty was taking charge at your house, he endured any pain? A. Yes, he did very much.

Q. Have you observed any change in his demeanor and his appearance? A. Yes, I have.

Q. In what respect has his demeanor changed? A. Well, he is now—his disposition is very much changed. He is always cranky, and every little thing gets on his nerves, and in the morning, when he gets up, he is always complaining of very bad headaches and dizziness.

Mr. Bishop: I move that what he complains of be stricken out.

Mr. Gordon: I think that under the rule where a mother can tell what a child complains of, the wife can certainly tell what a husband complains of. However, I will withdraw the question and consent that that part be stricken out.

By Mr. Gordon:

Q. You say that his disposition has changed? A. Yes.

Q. How is that evidenced? A. Well, he is very cranky now, and every little thing gets on his nerves. He can't stand the children. If they get noisy or anything, he seems to complain of every little thing.

Q. Did he act that way before this accident? A. No, he didn't; no, sir.

Q. Did you notice his attitude towards his children before this accident? A. Yes.

Q. What was it? A. He was very much affectionate towards them, playing with them at times.

Q. How is he now? A. They seem to get on his nerves an awful lot.

Q. Have you seen your husband sleep at night? A. Yes, I have.

Q. What is the appearance of his eyes when he sleeps at night? A. They are always wide open.

Q. How does he sleep at night? A. He is very restless. He always has to sleep with his hands in an upward position, and if he dozes off to sleep, his hands work down by his sides, he jumps right in fright, and it is just like in nightmares. He seems to always jump in his sleep so much he never rests good.

Q. Did that condition ever exist before this accident? A. No, it did not.

Q. Do you see him during the day since he has been home? A. Yes.

Q. Do you notice how he acts around the house? A. Yes, if he just walks, or anything, he seems to be very tired all the time.

Q. Did you ever notice anything else? A. Yes, his back seems to ache him a great deal.

Mr. Bishop: I object to that.

Mr. Gordon: I consent that that be stricken out about the back seeming to ache.

Q. Did you ever see his eyes in the daytime? A. Yes.

Q. Did you ever see any condition there? A. Well, when he gets up in the morning, there is a great deal of matter in the corner of his eyes.

Q. During the day, does his attitude change at times? A. Yes.

Q. In what respect? A. Well, he is just—just seems to sit, and he is very melancholy.

Q. How does he show that? A. He seems to just sit there; he don't talk or anything; just sits there all the time and never bothers talking. He seems very despondent.

Q. Did you ever have that difficulty with him before? A. No.

Q. When he retires at night, does he stay in bed all night? A. No, he is very restless and gets up during the night.

Q. When he gets up during the night, do you know what for? A. Well, he has to go two or three times during the night to the bathroom, and then he is very restless; he twists and turns a great deal.

Q. Did those conditions ever exist before this accident? A. No.

Q. Do you know whether or not your husband ever indulged in sports before this accident? A. Yes, he did.

Q. Did you see him? A. Yes, I did.

Q. Did you go out with him before the accident? A. I did.

Q. Did you go to dances? A. I did.

Q. Do you dance? A. Yes.

Q. Do you know whether or not before the accident he could dance? A. Yes, he could.

Q. Did he dance? A. He did.

Q. Did he take you out? A. Yes, sir.

Q. Did he take you out after you were married? A. Yes.

Q. Did you visit people? A. I did.

Q. With him? A. Yes.

Q. Did they come to your house and visit you? A. They did.

Q. Do you go to dances with him now? A. No.

Q. Did you go to public places with him before the accident, such as theatres and gatherings? A. Yes.

Q. Did you go frequently to those places? A. Yes.

Q. Do you go out as often as you used to? A. No.

Q. Does he get out as often as he used to? A. No, he don't.

Q. Did you go to public parties before this accident? A. I did.

Q. And you met lots of people? A. Yes.

Q. Was he with you? A. Yes, he was.

Q. Does he go out to public parties now? A. No, I don't.

Q. Does he go out? A. No, he does not.

Q. Did you go to the seashore in the summer time when he was well, before this accident? A. Yes.

Mr. Bishop: I object to this as leading.

Q. During the summer time where did you go? A. We went out to all sorts of public places for pleasure.

Q. What kind of public places? A. Seashores.

Q. What else? A. Different places of amusement.

Q. What kind of places of amusement? A. We went for dancing and for sports.

Q. When you went to the seashore, what, if anything, was done there by your husband and yourself? A. We both went bathing.

Q. Since this accident, has your husband gone bathing? A. No.

Q. Do you know whether or not he went to the seashore? A. No, as far as I know he didn't.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Mrs. Gilroy, I show you a bundle of eighteen checks, which have been marked "Defendant's Exhibit 8 for identification", and I ask you if you ever saw any of these before?

Mr. Gordon: I object to this as not cross-examination. I never asked her a word about any checks.

The Court: They have not been offered in evidence yet. I will allow him to go as far as identifying her signature on them, just for the purpose of identification.

A. Yes, sir, that is my signature.

By Mr. Bishop:

Q. Just look through them and see if you signed the endorsements on all of them? A. I did.

Q. How did you get those checks?

Mr. Gordon: I object to that as immaterial.

The Court: Objection sustained.

Mr. Bishop: I am perfectly willing to make her my witness for the purpose of identifying these checks and to show how

they were received. If I am not to be allowed——

The Court: I think that you should follow the same procedure as in the case of the plaintiff, not at this phase of the trial. This is the plaintiff's case. Either counsel will agree to have Mrs. Gilroy here, or I will direct that she remain here for you.

Mr. Bishop: I don't intend to offer them in evidence.

The Court: You may call her when your case is reached.

Mr. Bishop: Very well.

By Mr. Bishop:

Q. Mrs. Gilroy, you said that you visited your husband in the hospital? A. I did.

Q. You visited him every day while he was there? A. Yes.

Q. And you always were able to get in to see him when you came? A. Yes.

Q. Nobody ever kept you out or tried to keep you out? A. The nurse asked me if I would want to see him, and I said yes.

Q. Did he at times send for you and did you get massages that he would like to see you? A. No, I always went myself.

Q. And you were there every afternoon and evening? A. Yes.

Q. Were you ever there while anyone else was there? A. No.

Q. No one else was ever present while you saw him? A. Maybe some of the members of his family; that is all I remember.

Q. There were times when other relatives were there at the same time? A. Yes.

Q. Do you remember ever seeing Mr. Gillson there? A. No, I don't.

Q. You know Mr. Gillson, don't you? A. Yes, I do.

Q. And you know Mr. Hurtzig? A. No, I don't.

Q. Do you know Mr. Keppel? A. No, I don't believe I do.

Q. Did you ever see Mr. Gillson at the hospital? A. No, I didn't.

Q. Did you ever see him at your home while your husband was away? A. No.

Mr. Gordon: I object to that as not cross-examination.

Mr. Bishop: I will withdraw the question. That is all.

The Court: We will recess now until 1.30 o'clock this afternoon.

Gentlemen of the jury, I have cautioned you a good many times not to talk about this matter, and I know that you will not forget it. However, it is so easy to do so, and it is so important that you do not do it, that it is the custom of the Court to give that admonition every time there is a recess.

You will return at 1.30 o'clock.

(A recess was had until 1.30 o'clock p. m.)

Afternoon Session.

Mr. Gordon: The plaintiff rests.

(The plaintiff rested.)

Mr. Bishop: If your Honor please, I have a motion to make, which I anticipate will be a somewhat extended argument. I do not know whether the Court will exclude the jury during the motion or not.

The Court: I think it will be better.

The Court: Gentlemen of the jury, there is now going to be an argument by counsel on various questions of law in connection with this case, which ordinarily are not the province of the jury at all. For that reason you will be excused while that argument is going on, and the court officer will take you to one of the other rooms of the court.

(The jury retired.)

Mr. Bishop: If the Court pleases, I move for a nonsuit in this case upon several grounds. In the first place, I base the motion upon the ground that the plaintiff has so far failed to offer sufficient evidence to show any negligence on the part of the defendant in this case.

In that connection, I will review very briefly the evidence along certain lines.

(Argument.)

In addition to that ground, the evidence shows no negligence on the part of the defendant in the manner specified in the pleadings, or in any other manner. The evidence shows no knowledge by the defendant of the alleged dangerous and destructive conditions. It shows no opportunity to repair them. It shows contributory negligence on the part of Gilroy, that he knew the risk, and voluntarily went ahead. In addition to all those things, I also urge that the evidence in this case shows a state of facts under which the Workmen's Compensation Law of this state became operative.

(Argument.)

Mr. Gordon: If your Honor pleases, on the question of negligence, it strikes me that in this case, there has been, if anything, an unusual liberality of proof.

(Argument.)

The Court: While it appears from the argument that if we go out and traverse the field of law into other states, very extensively, we find decisions encouraging the contention of both sides, I should like an opportunity to examine these cases that have been submitted to me, and the rather voluminous briefs in connection with the Compensation Law itself, and ascertain, if I can, what rule in New Jersey seems to be applicable to the facts proved in this case. I shall reserve decision on this motion until tomorrow morning and announce my decision at that time.

In the meantime we will call the jury back so that this case may be regularly adjourned until tomorrow morning.

(The jury returned.)

The Court: Gentlemen of the jury, an adjournment will now be taken until 9.30 o'clock tomorrow morning. You will follow the instructions that have been previously given to you with regard to not discussing this case.

(A recess was had until 9.30 o'clock Thursday, October 31, 1929.)

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

October Term, 1929.

EDWARD N. GILROY

vs.

STANDARD OIL COMPANY (a New Jersey Corporation) and STANDARD OIL COMPANY OF NEW JERSEY (a corporation of Delaware, authorized to do business in New Jersey).

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. LLOYD THOMPSON, Judge, and a Jury, at the Union County Courthouse, in the City of Elizabeth, New Jersey, on the thirty-first day of October, A. D. 1929, at 9.30 A. M.

Appearances:

FRANCIS A. GORDON, Esq., Attorney for the Plaintiff.

MESSRS. LINDABURY, DEPUE & FAULKS (JOHN W. BISHOP, Jr., Esq., present; BURTIS S. HORNER, Esq., present), Attorneys for the Defendants.

The Court: Gentlemen of the jury, we still have something to dispose of in connection with the matters of yesterday afternoon when you retired, and we shall have

to ask you to retire again at the present time until you are called.

(The jury retired.)

The Court: I shall now decide this motion. The Plaintiff has brought his action at common law for damages claimed to have been sustained by reason of physical injuries to the plaintiff as a result of an explosion and fire at the Defendant's premises, an oil refinery in the city of Bayonne, on August 8, 1927, about eleven o'clock at night, when the Plaintiff was leaving for his home with several other persons in an automobile, after completing his work as an employe of the defendant.

He was on the shift whose time was supposed to have ended at eleven o'clock. His work was that of a pump man's helper. It is alleged that the explosion and fire was due to the defendant's negligence. At the conclusion of the Plaintiff's case, the Defendant moves for a non-suit on three grounds:

First, that no negligence on the part of the Defendant has been proved.

Second, that the Plaintiff has been guilty of contributory negligence.

Third, that the personal injuries resulted from an accident arising out of and in the course of the Plaintiff's employment, and that Plaintiff's remedy was solely and exclusively under the provisions of the Workmen's Compensation Law, chapter 95 of the Laws of 1911, and the acts amendatory thereof and supplemental thereto.

As to the first ground, there is evidence from which the jury might infer negligence in the absence of any explanation on the part of the defendant. Whether it will infer such negligence is for the jury to say.

The doctrine of *res ipsa loquitur* applies, in my opinion. That principle is that when through any instrumentality or agency under the management or control of the defendant or servants, there is an occurrence, injurious to the plaintiff, which, in the ordinary course of things, would not take place, if the person in control were exercising due care, the occurrence there, of itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care.

The defendant here was engaged in the manufacture and storage of highly inflammable and combustible gas adjacent to a public highway. The danger of fire and explosion under certain conditions was known to the defendant and its servants. The defendant was therefore under the duty of exercising a high degree of care in the protection of the public against any injury arising from these conditions. An explosion and fire did occur, and the plaintiff was injured thereby.

As the case stands, it is proper for the jury to consider whether or not there was a failure to use the degree of care required, and therefore, negligence on the defendant's part.

As to the question of contributory negligence, that is also a question for the jury, whether the plaintiff so acted or so failed

to act as to help bring about the injury to himself.

As to the third ground urged in the motion for nonsuit, the Defendant's answer set up as one of the defenses to the suit, that the plaintiff was an employe of the defendant at the time of the accident; that the contract of hire between the plaintiff and the defendant was made subject to the provisions of Section 2 of the Workmen's Compensation Law; that the injuries were caused by an accident arising out of and in the course of the plaintiff's employment by the defendant, and by reason thereof, the plaintiff was deprived from any remedy, redress, or compensation except in the manner and under the procedure provided in the Workmen's Compensation Law; that the contract of hiring was a surrender by the parties of all their rights to any other method, form, or amount of compensation or determination than as provided in Section 2 of the Act in question. A copy of the alleged contract of hiring is attached to and made a part of the answer. It purports to have been signed by the plaintiff.

The plaintiff's reply admits that he and the defendant had a contract of hiring, which was subject to the provisions of Section 2 of the Workmen's Compensation Law. Under subdivision 9 of Section 2, such contract of hiring is presumed to have been made with reference to the provisions of Section 2, unless certain things set forth in the subdivision 9 are done to take the contract without Section 2.

Motion.

None of these things are claimed by the plaintiff to have been done, so that the issue comes solely to the question of whether or not the injuries suffered by the plaintiff in this case resulted from an accident arising out of and in the course of his employment by the defendant.

The proof discloses that on the night in question the plaintiff, whose shift was an eight-hour one ending at eleven o'clock, discontinued his work about fifteen minutes before eleven, changed his clothes, entered with three other men in an automobile, and started to leave for home; that he had begun his work about a quarter before three; that it was customary to allow the employe about ten or fifteen minutes leeway to change their clothing and depart; that the customary method of proceeding away from the defendant's premises was to go out of a gate onto a road known as Hook Road and along that road by a circuitous route until it finally led to the general public highway running to the main part of the City. Hook Road, at a slight point and for a distance thereof, divides the total area of the defendant's plant in two. At or about the location of this road, where the plaintiff was riding in a car, when the accident occurred, there are two gas holders or containers on the one side, and a pump house and locker room building on the other. There is an overhead pipe or apparatus, part of the defendant's operating equipment, extending over the road from one side to the other. The defendants claim to own the fee in this road subject to

public easement over the bed of the road. The plaintiff claims that this road is a public thoroughfare independent of the defendant's premises. The defendant admitted in the course of the trial that the road is a public thoroughfare.

It was on this road, separating to the extent mentioned the two parts of the defendant's plant area, and at or near the gas holders and pump house on either side, that the plaintiff and his companions were driving at the instant of the fire and explosion. These seem to be all the essential facts bearing upon the question of whether or not the accident arose out of and in the course of plaintiff's employment by the defendant.

Do these facts, in the light of the decisions by our courts of New Jersey or elsewhere present a case in which it may be fairly concluded that this accident did arise out of and in the course of employment?

It seems to be generally held in the decisions that in any given case the question of whether or not an accident arose out of and in the course of employment depends upon the facts in the given case. In the instant case the plaintiff had completed his period of work, entered a privately owned and operated automobile, proceeded to the defendant's exit gate and out of it to a public thoroughfare, and after traveling a considerable distance on this thoroughfare and while still on it, came to the vicinity of certain buildings and gas holders owned by the defendant, located within their private lands off the road which the public was entitled to use and which the plaintiff was

using (presumably as a member of the public, because his work was finished and he was without the defendant's enclosures) and that when nearing these buildings, a fire and explosion occurred.

It is difficult to see how, under those conditions, the plaintiff was in a position different from any other members of the travelling public, so far as concerned his right to be protected against the negligence of the defendant, and, if the plaintiff's position was no different, his recourse for injury was the same.

Any person not employed by the defendant had a right on that road to be protected from injury arising from the defendant's negligence, and if so injured, to sue for damages at common law. Anyone who had quit his employment, though only until the next day, was at that time not an employe and had the same rights.

I cannot find any case in which the employe, having quit his work and gone without the confines of his place of employment along a public thoroughfare, not to return until some subsequent period of his work should have again ensued, and has been injured under such conditions, has been held to have sustained that injury by reason of an accident arising out of or in the course of his employment.

On the contrary, there appear to be numerous cases holding that accidents happening to one on his way home from his work, having fulfilled his duty to his master, and off his master's premises, are not regarded as arising in the course of his

employment. It has even been held where the highway was in fact owned in fee by the employer but dedicated to public use, as in this case.

For the foregoing reasons, the motion for a non-suit is denied.

Mr. Bishop: I pray an exception be noted. There is one more ground, your Honor, upon which the motion is based and that is the assumption of the risk by the employe.

The Court: In order that it may not appear on the record that the Court has omitted that ground, I will also say that in the opinion of the Court it does not appear from the proof thus far in the case that the risk of the injury sustained in this case was such as properly should be held to have been assumed by the employe.

Mr. Bishop: I pray an exception be noted to the denial of the motion.

(The jury returned.)

William J. Donahue, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Doctor Donahue, what is your profession? A. Neurologist and psychiatrist.

Q. Are you a physician and surgeon licensed to practice in New Jersey? A. Yes, sir.

Q. How long have you been engaged in the practice of your profession? A. Twenty years.

Q. Have you any specialty? A. Nervous and mental diseases.

Q. How long have you been specializing along those lines? A. Fifteen years.

Q. Where did you study medicine? A. Long Island College Hospital, Brooklyn.

Q. Are you connected with any hospitals or institutions in the State of New Jersey and elsewhere? A. Yes, sir. Associated with the Newark City Hospital as neurologist and psychiatrist; associate neurologist at the Newark Eye and Ear Infirmary; associate neurologist at St. Michael's Hospital, Newark, and consultant in neurology and psychiatry in a number of other hospitals in this section of the state.

Q. Do you hold any official position in the state? A. None.

Q. Have you ever? A. No, sir.

Q. How long have you made a special study of neurology and psychiatry? A. Fifteen years.

Q. You are licensed to practice in New Jersey? A. Yes.

Q. Did you know Mr. Gilroy, the plaintiff in this case? A. I met him once.

Q. When? A. Last year.

Q. Do you recall the date? A. I could get the date from the date of my examination.

Q. Have you got that with you? A. Yes, on the nineteenth of April, 1929.

Q. The nineteenth of April this year? A. Yes.

Q. Did you examine him? A. I did.

Q. Along what particular lines, if any, was your examination directed? A. It was for the specific purpose of making a neurological examination and report on the same.

Q. Did you go over him generally? A. There were two other physicians there at the time.

Q. What did you find as to Gilroy's condition at the time you examined him? A. I entered into

the question of the history and Gilroy informed me that he sustained severe burns during August, 1927, and that he was hospitalized until sometime in November, 1927. He had sustained some burns, some of which were on the face, some on the arms, and some on the body. Now he complained of headaches, shooting pains through the forehead and head, that he was very nervous, and that everything got on his nerves, and the least little noise excited him. He cited that a puff of the gas range lighting at home caused him to jump, and that when driving in a car and meeting another car, at an intersection, he had general weakness and fright. He said it seemed that all the blood of his body rushed up to his head and that he suffered excessive sweating in the armpits, even in cold weather; that he had pain across the small of his back, which was stiff in the morning on arising and after sitting awhile, and that his back tired on walking, and that he found it necessary to lie down, and that his sleep was disturbed; and that if he was awake until three or four o'clock in the morning, the slightest noise would awaken him later on the morning, and he did not get his proper rest. He said that if his hands hung down at the side that the fingers would burn and tingle, and that the ankles, which showed scars, also tingled, and that in cold weather his fingers, face, and all the sites of the burns stings. He said that on account of the injury to his eyelids that his eyes shed more tears than usual, and that it was more so in winter and in windy weather. I went into the examination then. Physically he showed multiple scars due to the burns which he sustained; some eversion, turning out of the eyelids, due to the scar of the face, and that he was very tremulous. The examination of his teeth showed

that many were distorted and deviated, and his gums showed marked recession and evidence of an intense pyorrhea. The eversion of the eyelids was greater in the left than on the right side due to the greater scar on that side. He showed excessive sweating both in the palms of the hands and in the armpits and the armpits especially so. In testing him for the reflex activity of the nervous system, we found that these reflex actions were a little bit more quickened than they are usually and normally in men, and in testing him out for coordination by standing him upright with his eyes closed, we found out that he swayed a little bit more from one side to the other than a usual man would. In testing him out for tremulousness of the hands and fingers, we found that that was also increased more so on the right side than on the left. We noticed that wherever he had the scars on the hands or arms, neck or face that there was a contraction of the tissue and a limitation of motion of that part due to that skin contraction. We could find no physical cause for many of the symptoms he outlined, and in reference to his complaint about his agitation and nervousness at home or while driving in the car or the complaint of the blood rushing to his head, the stiffness in his back, and the fact that he could not sleep could not be corroborated as being due to any physical cause. The examination of his back, aside from a slight limitation due to a scar of a burn, showed no limitation of the deeper structures. Assisted by the examining physician, his back could go through the proper movements and did not elicit any evidence of pain.

Q. Doctor, have you finished? A. Just about, Mr. Bishop.

Q. Did you find any evidence of impairment of his mental faculties? A. None, nor was there any claim.

Q. He was perfectly rational? A. Yes, sir.

Q. Was he able to understand things that were said to him as a normal person would? A. Yes, sir.

Q. Do you know what a Parkinsonian sindrom is? A. Yes, sir.

Q. Have you examined or treated cases of that complaint? A. Quite frequently.

Q. Do they fall within your specialty? A. Yes, whenever they come into the hospital they are referred to our service.

Q. Do you know what the symptoms of that complaint are? A. Yes.

Q. Did you find any of those symptoms in this man, the plaintiff? A. I did not.

Q. What is your opinion as to whether or not he is suffering from a Parkinsonian sindron? A. He shows no evidence of it. He showed no evidence of it to me.

Q. From your examination of him, did you form any opinion as to whether or not he is able to do any work? A. I did, yes.

Q. What was that opinion? A. Well, I came to the conclusion that he had an industrial handicap on account of the result of physical injuries he sustained, which is permanent and partial to a degree to be estimated; that in addition he was handicapped industrially temporarily and totally by neuro-psychiatric disability which I elicited in my examination, the exact duration of which I stated was not known.

Q. Do you mean that it existed at the time of your examination or that it had existed and had cleared up, and you did not know when it had

cleared up? A. It existed at the time of my examination.

Q. You consider that condition permanent? A. Temporarily and totally.

Q. Not permanently? A. Not permanent, temporary and totally.

Q. But you think that would clear up? A. Yes. I stated that the course of the condition was long drawn out and that the expectation existed that the neurolosis could be improved by the correction or removal of any underlying physical causes and by the resumption of industrial activity, and suitably chosen work, where due consideration will be given to his physical capacity.

Q. In your opinion, was he able to do some work at the time? A. Yes.

Q. There were kinds of work that he could do? Yes, I thought it would be a good measure of treatment. I thought that if something could be gotten for Gilroy, some light work—I did not recommend, I would not recommend his return to the plant where he had this definite psychic trauma, which we call it. The shock and the fright which he experienced by his accident would be sufficient, to my mind, as a physician, not to recommend that he go back to that plant to work until he had fully recovered his composure and his stability, but I did recommend that he do some work. It is not a good thing, medically, for men who sustain injuries or accidents of this or any other kind to stay around the house. They get to be a nuisance to themselves and to the family, and they are ill at ease and discontented, and they smoke too much, and many of them drink too much and they cultivate bad habits, and it is not good for the morale of the man himself, or for American industry or his family or society. No man is utterly

ruined, and I can cite that for the reason that during the war——

Mr. Gordon: I object to the statement that no man is utterly ruined. I don't think it is applicable in this part of the case.

The Court: Strike out that part of the testimony which said that no man is utterly ruined.

By Mr. Bishop:

Q. Doctor, what is your opinion as to whether or not this man is utterly ruined? And incapacitated, Mr. Gilroy, I mean. A. I don't believe he is. Gilroy is an industrially capable individual in a selected activity. There are many fields in which he could be engaged to his satisfaction and receive proper remuneration.

Cross-examination by Mr. Gordon:

Q. Doctor, who were the other doctors that examined with you at that time?

Mr. Bishop: I object to this as utterly irrelevant as to the effect of these doctors' opinions.

Mr. Gordon: He has been talking about "we could find".

The Witness: I spoke editorially, Mr. Gordon.

Q. There was an examination that you had? A. I had the man for an hour subsequent to the time the other physicans finished with him.

Q. Were you present when the other physicians made an examination? A. Yes.

Q. And then you examined him yourself? A. Yes.

Q. Were they present then? A. No, they were outside.

Q. You made the statement that "we could find". A. Editorially speaking, Mr. Gordon.

Q. Mr. Gilroy did not present any evidences of a man who was a drinking man, did he? A. No.

Mr. Gordon: That is all.

Re-direct examination by Mr. Bishop:

Q. Doctor, do you know what arthritis is? A. Yes.

Q. Did you ever examine or treat it? A. Yes, sir.

Q. Did you find any symptoms of arthritis in Mr. Gilroy? A. No.

Q. What is your opinion, if any, as to whether or not he was suffering from arthritis? A. At the time of my examination he showed no symptoms. There was some stiffening of some joints where the skin contracted and limited motion over the joint.

Q. That was due to what? A. Burn and scar.

Q. Was that due to a skin contracture? A. Skin contracture.

Q. Did it indicate any arthritic condition of bone or joint? A. No, sir. It was a condition of the skin and the scar that went over the joint.

Q. Doctor, will hair or a beard grow on a scar tissue where the skin has been entirely removed? A. No, usually not.

Q. Did you notice whether or not his hair or beard is growing normally? A. On his face the growth was quite a normal growth; on the back of his neck there was no growth, and on his hands

and arms and back and legs there was no growth of hair.

Q. Did you examine or look at the sides of his face where his beard usually grows? A. Yes.

Q. What did you find there? A. Evidence of hair growth.

Re-cross-examination by Mr. Gordon:

Q. Doctor, you cannot see arthritis with the naked eye? A. Well, in examining joints, you can tell whether or not an arthritis is present.

Q. And a diagnosis of arthritis is usually confirmed by X-ray pictures? A. We had to make arthritis diagnoses long before we had the X-ray.

Q. I said confirmed. A. It does not always do it.

Q. The customary method is to confirm the diagnoses of arthritis by X-ray pictures? A. It is not.

Q. Don't you use X-ray pictures in determining arthritis? A. Sometimes, but you are not misled by the conclusion.

Q. When a man complains about an injury to the back and he has a stiffening in the back, don't you attribute that to the fact that there is something the matter there? A. It may be physical, or it may be psychic.

Q. If the X-ray pictures showed that there was something the matter there in the way of an arthritis, would you attribute it to arthritis? A. I doubt very much that the X-ray pictures would show arthritis that was not evident to physical examination.

By Mr. Bishop:

Q. Was it evident to a physical examination if a man complained of a stiffness in bending? A. Not because he complained of it.

By Mr. Gordon:

Q. Then, because he complained of it, you did not believe it? A. I examined him, and found out there was no evidence of it.

Q. You mean that you could not see any marks? A. I put him through the motions necessary to prove whether or not that existed.

Q. If a man complained of a stiffness in the back and he had a pain there, were you in a position to say he did not have that? A. Yes.

Q. You say he did not have it? A. I say it was not arthritis that caused it.

Q. You say he did not have a pain in the back? A. No, I can't say that. He told me he had a pain.

By Mr. Bishop:

Q. What about the motions you put him through? A. There was no limitation of motion. He was able to move his back except where the scar tissue where he had been burned was.

Q. That was on the shoulder? Did you find any objective signs of arthritis? A. No, sir.

By Mr. Gordon:

Q. Doctor, did you find any scar tissue on the back where the pains were complained of? A. No, sir.

Q. There were no burns there, were there? A. No.

Mr. Gordon: That is all.

FREDERICK W. ISLES, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Isles, where do you live? A. Bayonne.

Q. How old are you? A. Thirty-six.

Q. Where are you employed? A. Standard Oil Company of New Jersey, Bayonne refinery.

Q. In what capacity are you employed there? A. General foreman, gas department.

Q. What are your duties in that capacity? A. Supervising the reloading operation of gas, distribution, and gasoline extraction.

Q. Who has charge of the gas holders and pipes? A I do.

Q. Who has charge of the gas holders and pipes through which the gas is transmitted? A. I am in general charge of that.

Q. Who has charge of the inspection? A. In a routine way, our lineman, and I make occasional inspections of that.

Q. Does that come within your department? A. Yes, sir, assisted by our mechanical forces.

Q. Do you know gas holder number two? A. Yes, sir.

Q. Is that the gas holder which was involved in this accident? A. Yes, sir.

Q. Do you remember the occurrence of an accident on the eighth of August, 1927? A. I do.

Q. Were you at the plant on that day? A. Yes, sir.

Q. During what hours were you there? A. Between 8.15 and 4.30, and then at the time of the fire.

Q. Do you mean 8.15 at night? A. Daytime.

Q. You left about what time in the afternoon?

A. 4.30, to the best of my recollection. I may have stayed a little over time, but I usually left at 4.30.

Q. Did you pass those gas holders on the way in and out? A. No, sir.

Q. Did you personally inspect the gas holder? A. I did.

Q. Do you recall when you last saw it prior to August 8, 1928? A. I may have seen it on that very day. I didn't make a close inspection of it, what I would call a close inspection of it, that day of the accident.

Q. When was the last time you had made a close inspection of it? A. Within a short time. My testimony at the time—my belief at the time——

Q. Never mind what your testimony was. What is your recollection now as to when you last inspected it? A. About four days prior to the accident.

Q. What was the nature of that inspection? A. I made a complete inspection on the holder for soundness of the plates of the outside and of the roof by going completely around it, by going up on the roof, by stamping on the plates, and, in other words, convincing myself that it was in perfect operating condition.

Q. When you visited the gas holder about four days prior to this accident, did you go up on the top of it? A. I did.

Q. Did you go up on the top of it again after the accident? A. Yes, sir.

Q. Did you see anything wrong with it when you went up on top at that time? A. I did not.

Q. I mean after the accident. A. After the accident, yes, sir.

Q. When you were up there the last time before the accident, what condition did you find there? A. In perfect condition.

Q. Did you find any change at the time you went up on it after the accident? A. I did.

Q. What was the nature of that change? A. There was a hole in the top lift on the north side, and an indentation of the plates in the neighborhood of that hole.

Q. Had you examined, when you were up there before the accident, the part of the gas holder where this hole was? A. Yes, sir.

Q. What did you find at the time of the examination before the accident? A. As far as I could see, the entire top was in perfect condition, no holes, plates solid, and in every way the holder presented the necessary perfect condition for operation.

Q. Was there any gas in it at the time? A. There was.

Q. What about the odor of gas? Do you know what the kind of gas in that holder smells like? A. Yes, sir.

Q. Could you tell by the odor whether or not there was any gas escaping? A. I could.

Q. What did the odor indicate at the time you were up there before the accident? A. That there was no gas escaping from the holder.

Q. You were not there at the time of the accident? A. No, sir.

Q. You can tell us about the construction of that holder, can you not? Describe the nature of it. A. Well, that holder and the holder type of gas holder consists of a water filled tank in which lifts work up and down, and the lifts are very much like an inverted collapsible drinking cup. They are exactly as if you would take a collapsible drinking cup and invert it into a bowl of water, and the movements of that collapsible cup up and down in the bowl of water are exactly those of a

gas holder. The gas is admitted under the moving lifts, and the gas pressure, as it is admitted, causes those lifts to move up and down. First the roof over the lift moves upwards, and as it reaches the extremity of the upward motion, it picks up the second ring, and that moves upward too, and if there is a third ring, that is picked up, as the second ring moves upward. Our holders had two, a top lift and a bottom ring.

Q. How many movable portions were there to these holders? A. Two.

Q. When the first movable section raised to the point where it started to lift the second movable section, was there any kind of a seal to prevent the gas from getting out from between those two sections? A. Yes.

Q. What was the nature of that? A. I can illustrate it by my hands this way (indicating). It is formed by a turning upward of the lower rim of the moving top lift, and the filling of that upturned part with water, and that part grips the upper rim of the lower lift, so that as the top lift moves upward, it picks up the bottom lift that way (indicating), and the joint is sealed by a ring of water.

Q. How deep is that water? A. In the holder, I don't recall exactly, but it was sufficiently deep for all operating pressures. I would say it was fourteen to eighteen inches deep. Our designs and records would show that.

Q. What about the second movable lift? Was there a seal at the bottom of that? A. Formed by the water in the tank itself.

Q. That is, a tank would correspond to the bowl of water in our illustration? A. Yes.

Q. And when the bottom lift, that is the second movable lift, got up to the top of that water, what would happen? A. Motion would stop, un-

less—motion would certainly stop, but if the gas admission was continued, some gas would escape from the bottom of that lift.

Q. But would the upper two lifts raise any higher? A. They would not.

Q. When the two movable lifts got up to the top limit, as high as they could go, would they strike anything at the top? A. They would not.

Q. There was nothing for them to come into contact with? A. No, sir.

Q. Do you know the usual and customary method of constructing gas holders? A. Yes.

Q. How did this gas holder compare with the usual customary method of construction? A. Just the same.

Mr. Gordon: I object to it unless he knows when this gas holder was put up.

I will withdraw the objection.

A. Yes.

Q. The question was: How did this compare with the ordinary and customary method of construction of gas holders? A. It was constructed in the usual way.

Q. Was it according to the usual approved design? A. According to a design formerly much used, but other designs have come into use recently. In other words, it was a customary design up to very recently.

Q. At the time of this accident, was it designed in the usual way? A. Yes.

Q. That had been customarily in use? A. Yes.

Q. If there was a leakage of gas from one of these gas holders, to whom would it be reported? A. To me.

Q. To whom should it be reported? A. To me.

By the Court:

Q. Who would report it to you? A. Whoever discovered it. My engineers, my linemen.

Q. Whose duty was it to report it? A. Anyone connected with the gas department, my engineers, my linemen, my assistants. Any of the gas department employes, and besides which, any member of the refinery would consider it his duty.

Mr. Gordon: I object to what a member of the refinery would consider his duty. He cannot qualify the operations of the minds of anybody else.

The Court: Strike it out.

Mr. Gordon: Your Honor will pardon me for objecting to the court's question?

The Court: It is not any more admissible if I ask it than if counsel asked it.

Mr. Bishop: I have four photographs that I should like to have marked for identification, so that I may intelligently refer to them in my examination.

(The photographs referred to were marked "Defendant's exhibits 9, 10, 11 and 12 for identification" respectively.)

By Mr. Bishop:

Q. I show you a photograph which is marked "Defendant's exhibit 9 for identification" and ask you if you were present when that photograph was taken? A. I can't say.

Q. Can you state what the photograph shows? A. Yes, that is a photograph of the hole in the top of the holder, which I saw following the fire.

Q. Does that fairly and accurately represent correctly the conditions of the portion of the gas

holder which it showed at the time you saw it the day after the accident? A. Yes.

Mr. Gordon: I don't recall that the witness said he saw it the day after the accident.

By Mr. Bishop:

Q. Did you see it the day after the accident? A. I did.

Q. I show you a photograph marked "Defendant's exhibit 10 for identification" and ask you what that represents? A. The same hole taken from another angle.

Q. Does it show the top of the gas holder? A. Yes.

Q. Does it fairly and correctly represent the condition which you saw there on the day after the accident? A. Yes.

Q. I show you a photograph marked "Defendant's exhibit 11 for identification" and ask you to look at that. A. The same thing.

Q. Does that fairly and accurately represent the condition of the top of the gas holder as you saw it on the day after the accident? A. Yes.

Q. I show you another photograph marked "Defendant's exhibit 12 for identification" and ask you what that represents? A. The same thing, the top of the holder, in the neighborhood of the hole.

Q. Is that a fair, correct, and accurate representation of the portion of the gas holder that it portrays as it existed on the day after the accident, and as you saw it? A. Yes.

Mr. Bishop: I offer these four photographs in evidence.

Mr. Gordon: I should like to ask a question or two before they are admitted, if your Honor please.

The Court: For what purpose?

Mr. Gordon: If your Honor please, to find out whether or not anything has been applied to these photographs and the physical object changed to affect that physical object, and I also object to it on the ground that it is not the best evidence and that the negative is necessary.

The Court: I will overrule the objection.

Mr. Gordon: I withdraw the objection. I should like to have the opportunity to ask one or two questions, and then I may consent to them going in evidence.

The Court: I will allow the questions to be asked, inasmuch as this witness did not himself take the photographs.

By Mr. Gordon:

Q. In reference to these exhibits, I call your attention to objects which appear in the photographs marked "Defendant's Exhibits 10, 11, and 12" for identification, and I ask you what this object is (indicating)? What is this object here where my pencil is pointing? A. A pile of canvas, tarpaulins, ropes.

Q. And this is what? A. The same.

Q. And this is what (indicating)? A. The same.

Q. What does it cover? A. Nothing.

Q. What is underneath the canvas? A. The walk of the holder, around the top of the water tank.

Q. Is that canvas part of the holder before the fire? A. No, sir.

Q. It was put on after the fire? A. No, sir, it was put on during the fire. I saw it while it was in use during the fire to prevent the addition spreading of flames from the hole.

Mr. Gordon: If your Honor please, I submit that the picture does not represent accurately the tank after the fire. Something has been put on the picture.

By Mr. Bishop:

Q. Is this pile, that you describe as a pile of canvas, on the left of the holder that contained gas? A. No, it is on the walkaway around the top of the tank of the holder at which the fire was.

Q. Is it on the tank itself? A. There is a walkway permanently affixed to the top, and it is on that walkway.

Q. It is not on the portion that contained gas? A. It was on the portion that contained gas, and was applied to it. It was right on the holder at the time of the fire.

Q. It was taken off the hole, wasn't it? A. Yes, at the time that the fire was over, it was removed, probably by one of the firemen there, and laid aside after it had served its purpose. When the firemen came there, the first thing they did was to try to quench it, and there was the gas coming from this big hole, and they put the canvas over it and tried to quench it. It was used merely to cut the flame, so as to quench it, and that has been laid aside, evidently, in that picture.

Q. Does that appear at all in the picture marked "Defendant's Exhibit 9"?

Mr. Gordon: I withdraw the objection at this time and I have no objection to the pictures going in evidence as they are.

A. It does not, because one cannot see it because of this column at the right.

By Mr. Bishop:

Q. This seems to be an opening between——

Mr. Gordon: I object to what it seems to counsel.

Mr. Bishop: I will withdraw that.

Q. I call your attention to Defendant's Exhibit 9, to a point which I indicate marked "1". What is that? A. That is the edge of the water tank, of the hole.

Q. What is this, marked "2"? A. I beg your pardon, the first mark which you put on is the edge of the second lift of the holder, and the mark, the place marked "2" shows the edge of the top of the lift.

Q. In these pictures marked "Defendant's Exhibits 10, 11, and 12", I call your attention to the pile of canvas, that Mr. Gordon has called your attention to, and I ask you whether or not that is on the top lift of the holder or on the second lift of the holder? A. On neither.

Q. What is it on? A. On the walkway around the water tank.

Q. That is the bottom? The portion of it that does not move up and down? A. Yes.

Q. It is not on the first movable lift? A. No.

Q. And it is not on the top movable lift? A. No.

Mr. Bishop: I offer these pictures in evidence.

(The pictures referred to, having previously been marked "Defendant's Exhibits 9, 10, 11, and 12 for identification" respec-

tively, were received in evidence and marked "Defendant's Exhibits 9, 10, 11 and 12" respectively.)

Q. When you went up on this tank three or four days before the accident, what was the condition of the water seals between the lifts? A. Perfect.

Q. When you went up on the tank after the accident, what was the condition of the water seals between the lifts? A. Not visible. They were not engaged. You could not tell the condition.

Q. Was the tank up or down when you went on after the accident? A. Down.

Q. You testified to finding a hole at the top of the tank? A. Yes.

Q. Did you examine the metal around the edges of the hole? A. Yes.

Q. What was its condition? A. Ripped.

Q. What was the physical condition of the metal itself? A. The metal itself is perfect in the sense that it was not pitted or corroded. It was torn under stress.

Q. How thick was that metal? A. Three-sixteenths of an inch or thereabouts. That is the customary plate thickness for holders of that size.

Q. Did you examine the tank again after the accident? A. Yes.

Q. Had anything been done to it before you made the next examination? A. No.

Q. When was the next examination? A. The day after the fire, do you mean?

Q. You said you went up the day after the fire. Now, after that did you examine it again? A. No, not carefully.

Q. Did you cause it to be repaired? A. I did.

Q. On any of your previous inspections of the

tank, had you ever discovered any hole or defect in it? A. No.

Q. Had any hole or defect in it ever been reported to you by anyone? A. No.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. Whereabouts is your office, Mr. Isles? A. The main office of the refinery.

Q. What street is that on? A. It does not show here.

Q. It is outside this section here, isn't it (indicating)? A. Yes.

Q. In other words, it is around twenty-second street somewhere? A. No, it is in the lower portion of the yard.

Q. You have to go through Hook Road to get to your place? A. No.

Q. The fact is that you did not pass these gas holders and you have not been passing them to and from work, have you? A. I have. I have made a point——

Q. Didn't you, on direct examination a few moments ago, say you did not pass on the way in or out? Don't you remember saying that in answer to Mr. Bishop's question? A. Yes, that is very true.

Q. Isn't it a fact that you did not pass these gas holders on you way in or out? A. Yes, that is very true.

Q. When you made an inspection of this gas holder four days prior to this thing, did you make a record of that inspection? A. Not that I can find.

Q. Not that you can find? A. No.

Q. Did you make a record of it? A. No.

Q. Why did you say that it was one that you couldn't find? A. Because it is obviously desirable that if we have a written record, we present it, but we have no written record of it.

Q. Do you know whether or not you made a written record? A. No, sir.

Q. You do not know that? A. No.

Q. Do you make records of inspection? A. Not ordinarily, sometimes I do.

Q. When you made your inspection four days before this accident, what time was it? A. During the day, probably the morning; I would say the morning.

Q. Was it between 8.30 and 4.00 in the afternoon? A. Yes.

Q. That was a day inspection? A. Right, yes, sir.

Q. When was this tank put up, if you know?

Mr. Bishop: I object.

A. I can't tell you when it was put up. It was put up before 1922.

Q. Do you say that this tank was constructed as ordinary tanks were built? A. Yes.

Q. Built when? What year? A. I would say before—well, as they are continuing to be built now. They are a prevalent design which is being —I don't say it is being superceded; there are other designs coming in. I would say holders are being made and built exactly along the same lines now.

Q. This is an old tank, isn't it? A. You might say it is old.

Q. It has been up there about eighteen years and maybe more? A. I couldn't say that.

Q. Maybe twenty years? A. I couldn't say. Our records would show.

Q. You are the general foreman of the gas department in charge of the inspection? A. Yes.

Q. You are familiar with the usual forms of inspection? A. Yes.

Q. You are familiar with the approved methods of inspection? A. Yes.

Q. How long have you been engaged in inspecting work? A. I have been in the gas industry since 1917.

Q. I ask you how long you have been engaged in inspecting work? A. 1917.

Q. That is about twelve years? A. Yes.

Q. Are you familiar with the standard and approved methods of inspection of accident prevention of the American Gas Association? A. No, I would not say I inspected according to those.

Q. Do you know what they are? A. Not exactly, no.

Q. Isn't that a part of the work that you are supposed to know something about?

Mr. Bishop: I object. I object to whether or not the standards of some association are part of his work.

Mr. Gordon: I will withdraw the question.

Q. Do you know who the American Gas Association is? A. Yes.

Q. That is composed of gas makers throughout the United States, isn't it? A. Yes.

Q. Just tell us what you did when you made your inspection. A. The first thing that I did was to go there with my assistant.

Q. What is his name? A. Mr. William K. Remsen.

Q. I am talking of the inspection of four days prior to this accident. A. Yes.

Q. What did you do? A. Then we looked around it. I looked around, and Mr. Remsen stood around the platform around the top of the tank, and I went up on top. I personally walked around it, and stamped on the plates and assured myself that the metal was fit and able to hold the gas in safety.

Q. That is all you did? A. Yes.

Q. You are sure about that? A. Yes.

Q. And that is all that Mr. Remsen did? A. Yes.

Q. You are sure about that? A. Yes.

Q. Is that method of testing employed by the other men that you send out under you? A. No.

Q. What do they do? A. I would prefer to have the men who actually did the inspection from the boiler makers' standpoint give his method of procedure, because when I wish an inspection made for metal strength and make one of absolute positiveness, I would have our mechanical department do that and the boiler makers.

Q. Four days before this accident was there any need for a special inspection of this tank? A. I considered it so.

Q. You did consider it so? A. Yes.

Q. What was the cause of the special inspection four days before the accident? A. Because of the character of the gas that we were putting in the holder.

Q. What was that gas? A. Highly sulphurous.

Q. What is the effect of a highly surphuric content on the metal? A. Apt to be corrosive.

Mr. Gordon: That is all.

Re-direct examination by Mr. Bishop:

Q. You examined this tank after the accident, didn't you? A. I did.

Frederick W. Isles, for Defendants—Re-cross.

Q. And you examined the hole that you found? A. I did.

Q. What evidence of corrosion did you find around that hole? A. There was none.

Q. After the accident, did there appear to be any weakness of the metal in the neighborhood of that hole or anywheres else in the upper lift of the tank?

Mr. Gordon: I object to that as not redirect examination.

The Court: He has testified to the conditions.

Mr. Gordon: I will withdraw the objection.

A. No.

By Mr. Bishop:

Q. Did you find any evidence of corrosion anywhere else on the tank? A. No.

Q. Did you look for it? A. I did, yes.

Re-cross-examination by Mr. Gordon:

Q. You went on your tour of inspection among other things to detect the odor of gas? A. Yes, that would have been one sign which would have indicated to me the improper condition of the holder.

Q. So that where there is an odor of gas, that is a sign that there is an improper condition of the holder? A. Not necessarily, no.

Q. That is one sign? A. Taken into consideration with other things, yes.

Mr. Gordon: That is all.

WILFRED E. HALSEY, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Halsey, where do you live? A. Roselle Park, 311 Clay avenue, Roselle Park.

Q. Where are you employed? A. Standard Oil, Bayonne, New Jersey.

Q. How long have you been working there? A. Twenty-one years.

Q. What is the nature of your employment? A. General foreman, boiler maker.

Q. You are a boiler maker? A. Boiler maker.

Q. How long have you been engaged in that sort of work? A. Thirty years.

Q. During that time have you ever built any gas holders? A. No, sir.

Q. Have you ever repaired any? A. Yes, sir.

Q. Have you ever inspected any? A. Yes, sir.

Q. Do you know gas holder number two, which is involved in this accident? A. Yes, sir.

Q. Were you at the plant at the time of the accident? A. No, sir.

Q. Did you ever inspect that gas holder number two? A. Yes, sir.

Q. Did you inspect it before the accident? A. Outside inspection, yes, sir, July 29.

Q. On July 29 of what year do you mean? A. 1927.

Q. What did you do on that inspection? A. I gave a hammer inspection on the outside to see if there was any weak sheets in it.

Q. Just what does that mean, a hammer inspection? A. That is going up on the roof with a brass hammer and testing all the sheets.

Q. How did you test it? A. By tapping them. I can tell by the sound if any sheet is light.

Q. Did you go over the whole top of the top lift? A. Yes.

Q. Did you go over the sides of it and the angle around the edge? A. Yes, sir.

Q. What condition did you find on that top lift on the twenty-ninth of July, 1927? A. Good condition. That is a new roof on that tank.

Q. Did you find any weak spots in it? A. None at all, no.

Q. You did not detect any odor of gas? A. No, sir.

Q. Do you know the odor of gas? A. Yes, sir.

Q. Did you make any other inspection of the other lifts? A. I inspected the top lift. The bottom lift was under water.

Q. The second lift was under water? A. Yes.

Q. What about the shell outside? A. The shell of the tank itself? That is a heavy shell and is full of water, and we generally look it over, but there is no inspection needed on that at all.

Q. That is full of water? A. That is full of water.

Q. Did you go around the tank? A. Yes.

Q. What about the walk at the top of the shell? There is a walkway there? A. There is a walk around the top of the tank.

Q. Did you go around that? A. Yes.

Q. As you walked around the upper lifts— A. We always walk around that walk to inspect our seals.

Q. Did you do that on July 29? A. Yes.

Q. What condition did you find the seals to be? A. Good condition.

Q. While you were doing that did you smell any gas? A. No, sir.

Q. What about the top of the tank? You were up on the tank, weren't you? A. The roof?

Q. Yes. A. I found it in good condition.

Q. How long were you up on the roof of the tank? A. I guess about an hour or an hour and a half.

Q. What were you doing during that hour or hour and a half? A. Tapping all the sheets on the roof.

Q. Do you mean with this brass hammer you spoke of? A. Yes.

Q. You spent that much time tapping and testing it? A. Yes, we go over every sheet, and I can tell if there is a weak sheet, because I do that day in and day out.

Q. While you were doing that, did you smell any gas? A. No, sir.

Q. Was there any gas in the holder while you were doing that? A. Yes, sir.

Q. How soon did you see this tank after the accident? A. 8.30 the next morning.

Q. 8.30 of what day? A. August 8, the eighth day, the morning of the accident.

Q. Do you mean the morning before the accident or after the accident? A. The morning of the accident.

Q. Do you mean before it happened or after it happened? A. After it happened.

Q. The morning after the accident happened, you saw it at 8.30? A. Yes, I seen it at 8.30.

Q. Did you go up on top of it again? A. I went up on top of it, yes.

Q. Did you look at the shell again, the section that was full of water? A. Yes, I did.

Q. What condition was that in? A. The tank itself? The tank itself was all right; nothing wrong with the tank itself.

Q. Could you see the second lift, the middle lift? A. No, it was under water.

Q. What about the top lift, the roof, as you call it? A. The roof was above water. It is always above water.

Q. Did you go up on that? A. I did.

Q. What kind of examination did you make of that? A. I looked over the roof and looked over the hole in the roof.

Q. Did you go over the roof plates again? A. No, sir, I didn't.

Q. Did you look at them? A. I did.

Q. Did you walk around on them? A. I did.

Q. In doing that, did you notice anything to indicate any weakness in them? A. No.

Q. Did you find anything wrong at any point? A. No, only the hole in the roof, that is about all.

Q. Just keep your voice up, please. A. Only the hole in the roof.

Q. Where was that hole? A. Right near the outside top lift on the roof itself, about six inches from the guide.

Q. Was it at the edge or in the center? A. The center of what?

Q. The center of the roof. A. No, right at the edge of the roof.

Q. How near to the point where the top of the roof joins the side plates was it? A. I would say about right close to it.

Q. How big was this hole? A. About four and a half or five inches in diameter. It couldn't break the rivets on the side, that is, part of the rivets, but on the roof, it parted them.

Q. Do you mean the rivets broke? A. Yes.

Q. Did you observe the condition of the metal around the hole? A. The metal was in good condition.

Q. Did you look for any evidence of corrosion? A. I did.

Q. Did you find any? A. No, sir.

Q. Do you know what, if anything, is done to the inside of those tanks to protect them from corrosion?

Mr. Gordon: I object to that.

A. Yes, sir, I have done it, it is painted with wax taling.

Q. What does that do? A. Preserves the sheet.

Q. What effect has it with respect to corrosion? A. The gas does not attack the sheets.

Q. Do you know whether or not that had been done with this tank? A. Yes, sir.

Q. When did you next see the tank after the accident? A. I didn't bother with the tank. I wasn't allowed to go near that tank for three weeks.

Q. Was anything done to that during that period? A. No, sir.

Q. Did you finally go inside of it? A. Yes, sir.

Q. Did you examine the inside of it? A. I did.

Mr. Gordon: I object to it three weeks after the accident. It is too remote now.

Mr. Bishop: There is evidence that nothing had been done to it in the meanwhile.

Mr. Gordon: I submit that he cannot know that unless he was around there all the time.

A. There would be nothing——

The Court: The objection should have been made at the time that the question was asked, Mr. Gordon. However, you will not be prevented on cross-examination from referring to it.

By Mr. Bishop:

Q. Did anyone beside you or your people under your direction do anything to the inside of that tank? Did you or any one of your subordinates do anything to the inside of that tank during this interval? A. No, sir.

Q. Do you know whether or not, when you went into it, the condition was the same as it was on the day after the accident? A. Yes, it was in good condition.

Q. Do you know whether or not it was in the same condition that it was on the day after the accident? A. I don't know. I wasn't inside of it the day after the accident.

Q. Do you know whether or not anything had been done to it between the day of the accident and the time you went inside, which would change its condition? A. No, sir, nothing was done to it.

Q. What condition did you find it in when you went in after the accident? A. I found it in good condition.

Q. Did you look over the inside of the top lift? A. Yes, I looked over both lifts. I looked over the shell.

Q. What condition did you find the metal of those lifts to be in? A. I found the buckles from fire, but the metal itself is in good condition.

Q. What evidence did you find of corrosion on the inside of those lifts? A. I found no evidence of corrosion.

Q. Do you mean you found no evidence of corrosion anywhere? A. No, sir.

Q. What condition was the painting, the inside of the wax taling? A. The wax taling was still on there.

Q. Did you make any particular examination in the vicinity of the hole? A. I did, it was a ragged hole.

Q. What condition was the metal on the inside of the tank when they worked around that hole? A. Good condition.

Q. What evidence of corrosion was there? A. No evidence of corrosion at all.

Q. What evidence of any kind of weakness was there in the metal? A. There was no evidence shown at all on any part of the holder.

Q. Did you repair the tank? A. I did.

Q. Was that done by you? A. It was done by my assistants.

Q. Did you supervise the work? A. I supervised the work, yes, sir.

Q. After it was repaired, was the tank put back into service? A. No, sir.

Mr. Gordon: I object to this as immaterial.

Mr. Bishop: I will withdraw the question.

Q. You were not there on the night of the accident at all, were you? A. No, sir.

Q. When was the last time you were there prior to the accident? Was that the twenty-ninth of July? A. Yes, sir, the last time I was around that hole.

Q. Prior to the accident, I mean. A. I pass that holder maybe twice a day, in the morning and in the afternoon.

Q. Do you remember passing it on the day of the accident? A. I pass it every day.

Q. Do you remember passing it on that day? A. I couldn't say just what day it was. I can't say that, but I know——

Q. Did you ever, in passing that gas holder prior to this accident, detect any odor of gas? A. No, sir.

Q. You know the odor of gas, don't you? A. I do.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. Mr. Halsey, you worked under Mr. Isles as one of his inspection men? A. No.

Q. Who has charge of the inspection of the tanks? You or Mr. Isles? A. I get orders to inspect from the department where the tank is located, and I inspect the tank and report conditions to the department.

Q. Who has charge of the general inspection of tanks? You or Mr. Isles? A. I have.

Q. Then Mr. Isles is not the inspection foreman, is he? A. No, sir.

Q. Was he, in August, 1927, the inspection foreman? A. No, sir, he wasn't.

Q. You are sure about that? A. Yes.

Q. Who had charge of the inspection of the tanks? A. I did.

Q. And not Mr. Isles? A. No, sir.

Q. And you went there on July 29 to make an inspection and to test it? A. On the twenty-ninth? Yes, on the outside, yes.

Q. That is over two years ago? A. I know it is.

Q. Can you give me some other dates when you inspected that tank before July? A. I couldn't say, because the last time we had it for general overhaul—I could tell you that.

Q. Did you inspect the tank in the month of May, 1927? A. No, I didn't.

Q. How about the month of June? A. No, sir.

Q. Mr. Halsey, how many tanks are at that plant that you inspect? A. 780.

Q. In telling us the date when you inspected gas holder number two, as of July 29, 1927, are you doing it from your recollection? A. No, sir.

Q. Are you doing it from records? A. No, just by Mr. Isles' orders. I know that is the date that he told me to do it.

Q. Then you are testifying now to what somebody told you about a date? A. Oh, no, no.

Q. Are there any records that you have refreshed your recollection from? A. I have no records, but I know when that there tank was inspected that our manager was going on his vacation, and I left him and inspected the holder. I know when he went on his vacation.

Q. You and Mr. Isles have been talking this matter over, have you not? A. I was not.

Q. Have you been talking it over with anybody? A. No, sir.

Q. You never talked this matter over with anybody? A. I have, certainly, off and on.

Q. With whom did you talk over the proposition of inspecting this on July 29, 1927? A. I never talked that over with anybody.

Q. Didn't you tell anybody at all that you inspected this tank on July 29, 1927? A. I told the attorney here, yes.

Q. When did you tell him that? A. I guess about a month or two months ago.

Q. Up to that time, how did he know that you had inspected this tank in July?

Mr. Bishop: I object to that.

Mr. Gordon: I will withdraw the question.

Q. Did you make a report of that inspection to anybody? A. We don't make reports unless we find some conditions that needs repairs.

Q. You did make reports, didn't you? A. When we find conditions such that need repairing.

Q. Don't you make any reports of your inspection? A. Not if there is nothing wrong, because I inspect too many.

Q. Do you keep log books? A. No, sir.

Q. Do your men make reports? A. No, sir.

Q. Are there any records of these inspections? A. No, sir.

Q. Did you inspect the tank in the month of August, 1927? A. No, sir.

Q. Were you on your vacation in August, 1927? A. Yes, sir.

Q. When? A. The last two weeks in August.

Q. On August 8, 1927, were you on duty? A. Yes, I was on duty.

Q. Was Mr. Isles on duty at that time, if you know? A. Yes, he was there.

Q. And four days before August 8, 1927, which would be August 4, 1927, were you on duty? A. August 4?

Q. Yes. A. I guess I was on duty.

Q. Do you know what day of the week July 29, 1927, was? A. I think it was on a Tuesday.

Q. Did you look it up? A. No, sir.

Q. You just remember that two years back July 29, 1927, was on a Tuesday? A. I know about what date we went in there.

Q. You just recall that July 29, 1927, was on a Tuesday, without looking it up? A. I never looked it up. I couldn't say.

Q. Your shift starts when? A. 7.20 to 4.30.

Q. Is that in the afternoon? A. All day.

Q. It started from 7.20 in the morning until 4.30 in the afternoon? A. Yes.

Q. How many men have you under you? A. At this time I had 231 men.

Q. You personally went to gas holder number two on July 29, 1927? A. Yes, sir.

Q. And none of the men of the 250 men under you went there with you? A. No, unless there is some work to be done.

Q. But you were there personally on July 29, 1927? A. Yes, sir.

Q. You were there just to inspect it? A. Yes, sir.

Re-direct examination by Mr. Bishop:

Q. Mr. Halsey, you are a boiler maker, aren't you? A. Yes, sir.

Q. What are these men that are under you, these 231 men? What do they do? A. They are foremen, clerks, boiler makers.

Q. Do they inspect? A. They do when I give them orders, when I find anything wrong, I give them orders to look it over thoroughly.

Q. They do not make inspections unless you find something wrong on your inspection? A. Yes.

Q. You don't know whether Mr. Isles looks those tanks over from time to time? A. No, sir.

Q. You are not prepared to say that he does not? A. The way I remember this is that Mr. Isles met me and told me to look the whole holder over.

Q. You don't know whether he looked it over or not himself, do you? A. No.

Q. You are not prepared to say that he did not look it over himself? A. I don't know. I didn't see him there.

Q. He was not there the day you were there? A. No.

Q. You don't mean that he never inspects them? A. I can't say.

Q. Of course, Mr. Isles does not have anything to do with the boiler makers' department? A. No, different department entirely.

Q. Do you inspect these tanks frequently? A. I inspect tanks throughout the yard. Any tank that comes up for cleaning or repairs, that is my duty to look them over.

Q. Do you make any regular routine inspection at stated intervals? A. No, I have nothing to do with that. I don't do that.

Q. You only inspect when somebody asks you to? A. That is it, yes.

Q. You don't know what, if any, other inspection was made? A. I don't know, no.

Re-cross-examination by Mr. Gordon:

Q. Did you put a new top on the tank afterwards? A. No.

Q. You used the old top? A. We re-rolled it and put it back, put a whole new sheet right where the sheet was punctured. We put a new sheet in.

Q. Was there a plug where that hole was punctured? A. No.

Q. Was there a plug near there? A. No.

Q. Did you look for it? A. What kind of a plug?

Q. I mean a plug that fits into a hole? A. No.

Q. There wasn't any plug there? A. No.

Q. When did you put the new top on? A. Seven years ago.

Q. That was before this thing happened? A. Yes.

Q. You rolled a new sheet entirely after it happened, to the whole top? A. No, the roof is still on there with the exception of what we call a sketch plate.

Q. You say the wax taling inside the tank was there after the fire? A. Yes.

Q. The fire did not melt the wax? A. On the side towards the fire, it melted it off.

Q. That was not in perfect condition, was it? A. That wasn't, no.

Q. The wax taling wasn't there, was it? A. No, sir.

Q. You did not put the wax taling on? A. No.

Q. You don't know how that was put on? A. I know how it is put on.

Q. You don't know how it was put on at that particular spot where the fire was? A. Sure.

Q. Were you there when it was put on? A. Yes, I was there.

Q. You were there then? A. Yes.

Q. You are around the plant at all times, aren't you? A. Yes.

Q. You are there at any time when you have to be there? A. I am all over the plant.

Q. Are you there when the taling is put on? A. I give orders to put it on.

Q. Were you there when the taling was put on gas holder number two? A. Yes.

Q. You were there July 29, 1927? A. Yes.

By Mr. Bishop:

Q. You said that on a certain portion of this tank where there had been a fire, the wax taling was melted off? A. Yes.

Q. What was the condition of the metal at that point? A. The metal was good.

Q. What evidence of corrosion was there? A. No evidence of corrosion.

Q. You spoke of a plate on the top of the tank? A. Yes.

Q. You said you put in a small sketch plate? A. Yes.

Q. About how big was that plate that you put in? A. The plate was two feet six inches by four feet.

Q. That is the plate that you put in? A. Yes.

Q. How big was the top of the tank? A. Thirty-five feet—sixty-five, I mean. I ain't sure what the diameter of that tank is. I got so many of them.

Q. How many plates are there in the top of that tank? A. I know on the lift itself there is ninety plates, and on the roof itself there is about thirty-five plates.

Q. How big is each of these thirty-five plates? A. They run six by eleven, different sizes.

Q. How big was this sketch plate that you put on afterwards compared to the regular plate? A. It is only a little small sketch plate, that is all it was.

Q. Did you do anything else to any other part of the roof? A. No.

Q. Or to any other part of that lift? A. Yes, we had to take those sheets out and re-roll them, the lift itself.

Q. Why was that? A. It buckled.

Q. Do you mean warped by the fire? A. Yes.

Q. What did that re-rolling consist of? A. We had to take them out of there, because you can't put a buckled sheet in. Any sheet that has been in a fire we never put them back on account of the crystallization. You are liable to get a crack.

Q. What did you do with the shell? A. On the shell we always make a practice of putting new sheets on.

Q. Did you replace any new sheets in the shell? A. Yes.

Mr. Bishop: That is all.

EDWARD WHITEHEAD, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Whitehead, where are you employed? A. Standard Oil Company.

Q. How long have you been employed there? A. Since 1919.

Q. I show you four photographs marked "Defendants' Exhibits 9, 10, 11, and 12", and ask you who took them? A. I did.

Q. When? A. The day after the accident.

Q. Just look at them. A. August 9.

Q. What do they show? A. It shows a hole in the top of the holder.

Q. Does it correctly and accurately represent the conditions as you saw them at the time you took the picture? A. Yes, sir.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. Will you please put a circle around the hole on that picture in ink, where the hole is supposed to be? A. Yes.

Q. Mark the other one where the hole is? A. Yes, sir.

Q. Who was present when you took the pictures? A. I was sent over to see Mr. Isles.

Q. Who was present? A. Mr. Isles, at the time.

Q. What is his position with the company? A. Well, at that time he was supervisor of the gas compression plant.

Q. Of the gas compressing plant? A. Yes.

Q. Which plant? A. We only had one gas compressor plant down there.

Q. Was he foreman of the inspection? A. I couldn't tell you what Mr. Isles' duties are.

Q. You did not know then, did you? A. I knew he was foreman of the gas compressing plant.

Q. What is your position with the company? A. Engineer.

Q. In what department? A. Engineering department.

Q. Do you take all the photographs for the company? A. Construction lines.

Q. You are the official photographer of the company on construction? A. You could not call it official photographer.

Q. You took all the photographs for the company on construction? A. Not exactly all of them.

Q. How many pictures have you taken before you took these pictures on construction?

Mr. Bishop: I object to that as irrelevant.

Mr. Gordon: He says this is an accurate picture of this hole, and I want to go to his credibility.

The Court: It does not require any particular skill to take a photograph. The man saw the thing that he took, and then there is the picture, and he says it is an accurate representation. I think that is as far as you can go.

By Mr. Gordon:

Q. Did you make a note when you took the photograph? A. Only on the time sheets.

Q. Where did you make that record? A. On the time sheets.

Q. Whom did you give it to?

Mr. Bishop: I object to that as irrelevant.

New Jersey State Library

Mr. Gordon: He said he took it on August 9, and the minutes will show it.

By Mr. Gordon:

Q. You did say you took it August 9? A. The day after the accident.

Q. August 9? A. Yes.

Q. You made a report of it, didn't you? A. On the time sheets. We charge our time out.

Q. To whom did you give the time sheets?

Mr. Bishop: I object to that as irrelevant.

Mr. Gordon: It goes to his credibility as to whether or not he made a report and whether or not it was on August 9.

I will withdraw the question.

Q. What was your position at that time? A. Engineer.

Q. In the pump house? A. In the pump house.

Q. Whereabouts? A. Construction engineer.

Q. Did you supervise the construction of tanks? A. No, sir, designing them and building tanks.

Q. For the plant? A. Yes.

Q. How long have you been a construction engineer? A. Since 1925.

Q. Was this an old tank or a new tank? A. Well, I couldn't tell you that. I have been with the company only ten years.

Q. From your knowledge as a construction engineer, was this an old or a new tank? A. I would say fifteen years old.

Q. Have you the time sheets here? A. No, sir.

Mr. Gordon: That is all.

JAMES J. WARD, a witness produced on behalf of the defendants, being duly sworn, according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Ward, where are you employed? A. Gas compression plant, Standard Oil Company.

Q. What is the nature of your duties? A. Lineman.

Q. As such, what did you do? A. I am put in charge around through the yard and different places and inspect gas holders.

Q. Are you in Mr. Isles' department? A. Yes, sir.

Q. Do you know what gas smells like, that is, illuminating gas? A. Yes, sir.

Q. Do you know the smell of crude oil? A. Yes, sir.

Q. Do you know the smell that you find in a distillery and around an oil refinery? A. Yes, sir.

Q. Is that the same smell as illuminating gas? A. No.

Mr. Gordon: I didn't know there was any distillery around an oil refinery.

(Argument.)

Q. And is that smell of the oil refinery crude oil and tar? A. They have different smells.

Q. Are they anything like the smell of illuminating gas? A. No.

Q. Do you know the difference? A. Yes, sir.

Q. Do you know the kind of gas that was in these gas holders at the plant? A. Illuminating gas.

Q. Do you know the smell of it? A. Yes, sir.

Q. Do you know the difference between that and the other smells around the refinery? A. Well, I certainly do, some of them.

Q. Where were you on the day of this accident? Were you there at the plant? A. I was home.

Q. Do you know where gas holder number two is? A. Yes, sir.

Q. Have you seen it? A. Yes, sir.

Q. Did you ever inspect it? A. Yes, sir.

Q. When did you last inspect it prior to this accident? A. Well, I was on the holder about—I was there in the morning between nine and ten o'clock and in the afternoon again about three o'clock.

Q. How close to the holder did you go then?

Mr. Gordon: I object to that.

A. I was home when the fire occurred.

Q. What time did you go home on that day? A. 4.30.

Q. Where were you prior to 4.30 on that day? A. Well, I was going around doing some work.

Q. On the day of the accident did you make any inspection of this gas holder number two? A. Yes, sir.

Q. When did you do that on the day of the accident? A. Between nine and half-past nine in the morning and around three o'clock in the afternoon.

Q. How often did you do that regularly? A. Well, I inspected, as a rule, every morning.

Q. Why did you do that? A. That is my orders.

Q. Whom did you get them from? A. Mr. Isles.

Q. What is the nature of the inspection which you make? How close do you come to them? A. I go up on the gas holder and walk around the platform.

Q. Does that go all the way around the tank? A. Yes, sir.

Q. How full was it then? A. Well, I should judge about two sheets in it on the top lift.

Q. The top lift was two sheets up? A. Yes.

Q. Had the bottom lift started to come up then? A. Just about started, I think.

Q. What, if anything, did you find at the time of those inspections? A. I found it all O. K.

Q. Did you smell any gas? A. No, sir.

Q. Did you go all around the tank on the platform? A. Yes, sir.

Q. That is, at the top? A. Around the platform.

Q. Did you go all the way round, a complete circle of the tank? A. Yes.

Q. Did you see anything unusual? A. No, sir.

Q. Did you smell anything unusual? A. No.

Q. Did you hear anything unusual? A. No.

Q. Did you see any holes in the tank? A. No, sir.

Q. Did you smell any escaping gas? A. No, sir.

Q. You say you were there during the afternoon? A. Yes.

Q. About what time? A. Around three o'clock.

Q. How close to the tank did you go then? A. I went up around the tank the same as I went in the morning.

Q. At that time what conditions did you find? A. O. K.

Q. Did you see anything wrong? A. No, sir.

Q. Did you hear anything wrong? A. No, sir.

Q. Did you smell anything? A. No.

Q. Did you smell any gas? A. No.

Q. Did you go all the way around the top of the tank on the platform? A. Yes, sir.

Q. Did you see any holes or openings? A. No, sir.

Q. Did you smell anything to indicate the presence of holes? A. No, sir.

Q. Was there any gas in the tank at that time? A. Yes, sir.

Q. How high was it then? A. About as high as it was in the morning.

Q. About the same height? A. Yes, sir.

Q. How often do you make inspections of this character? A. Once a day.

Q. Why did you go up twice on this day? A. I happened to be around over there doing some work, and I just took a walk around it.

Q. Do you pass those tanks going in and out from your work? A. No, not going in and out.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. How old are you, Mr. Ward? A. About forty-eight.

Q. How long have you been with the company? A. Well, I have been with them the last time since 1916.

Q. And before that? A. I was with them about three years before that.

Q. So that you have been with them about sixteen years altogether? A. About that, I guess.

Q. And what is your position with the company? A. Well, as a lineman, putting in charts and inspecting holders.

Q. What do you mean by a chart? A. It is made by a party that uses the gas just to see how much gas it used.

Q. It keeps a record of the gas that is used? A. Yes.

Q. Do you punch up a place when you have made an inspection? Are there time clocks? A. No, I don't, but I fill out a report and it is on file.

Q. How many tanks or gas holders do you inspect in your travels around the plant during the day? A. Only one at the present time.

Q. Only one now? I mean then, in 1927. A. We had two then.

Q. What else did you do besides inspecting these two gas holders? A. I told you I put in the charts.

Q. Over this whole plant? A. Not all the plant.

Q. A considerable distance away from the gas holders? A. Some were a good distance away from the gas holders.

Q. Are some of them perhaps a mile or two away? A. They are.

Q. And at different times of the day you were along different spots and places? A. Yes, sir, certainly.

Q. And your inspection of this gas holder was only a daily inspection, once a day? A. That is all.

Q. But this particular day you inspected it twice? A. Yes, I was up on the holder twice.

Mr. Gordon: That is all.

James A. Sharkey, called as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct examination by Mr. Bishop:

Q. Mr. Sharkey, how old are you? A. Thirty-five, going on thirty-six.

Q. Will you please try to remember to speak loud enough so that the jury can hear you? A. Thirty-five.

Q. Where do you live? A. 32 West 52nd street, Bayonne.

Q. By whom are you employed? A. Standard Oil Company.

Q. How long have you been working for the Standard Oil Company? A. Nineteen years and about six months.

Q. Where do you work for them? A. Engineer at the gas compression plant.

Q. How long have you been employed in that capacity? A. Well, I believe it is going on seven years, since the plant started.

Q. How far is the place where you do your work from gas holder number two? A. About four or five hundred yards.

Q. How far is it from the pump house number three? A. About the same.

Q. How do you get into that place? A. There is different—do you mean to the plant?

Q. Yes. A. There is different roads going in there.

Q. I mean how do you go? A. I come down to the gate on the bus and walk in through the plant.

Q. Do you go over Hook Road? A. No, sir.

Q. You don't travel over Hook Road? A. No, sir.

Q. Do you know where gas holder number two is? A. Yes, sir.

Q. Can you see it from the building where you work? A. Not from the building, no. We can walk outside the building out to the trestle and we can see it.

Q. What are your duties? A. Why, engineer in charge of the plant, that is, on the three to eleven and eleven to seven. Of course, on days Mr. Isles is our superior.

Q. Do you run an engine? A. Run engines and stills and have charge of gas holders.

Q. Are you the foreman on your shift? A. After Mr. Isles is gone, yes, sir.

Q. Did you work on August 8, 1927, the day of this accident? A. Yes, sir.

Q. What shift were you on then? A. Eleven to seven.

Q. Do you mean from eleven at night until seven in the morning? A. Yes, sir.

Q. On the night of August 8, when did you get there? A. Why, at the plant?

Q. Yes. A. I would say between half-past ten and twenty-five minutes of eleven.

Q. Do you mean around ten-thirty? A. About ten-thirty.

Q. What was the weather like at that time? A. Well, at that time it was cloudy, and shortly before eleven it started raining. I couldn't just exactly tell you what time.

Q. Was it raining when you came to work? A. Not when I came in, no.

Q. Had it rained early in the evening, if you know? A. Well, I couldn't tell you that. I was sleeping.

Q. When you came out there, I think you said twenty-five minutes of eleven, you got to the engine room? A. Yes, sir.

Q. Was the man there that you relieved? A. Yes, sir.

Q. Who was he? A. Mr. Coots.

Q. Did you make any observation at the time you started work or before starting work as to the condition of gas holder number two? A. When I started work? Holder number two? I wasn't at the holder. We have a signal system in the engine room registering the height of the holder.

Q. Was that working that night? A. I believe it was.

Mr. Gordon: I object to that and move that that be stricken out, what he believes.

By Mr. Bishop:

Q. Do you know whether or not it was? A. I couldn't say.

Q. Did you see it working at any time during that evening? A. No, because the holder went on fire, and the height of the holder was not high enough to register the light. It is a lighting system.

Q. Were those lights working on any other holders that night? A. No, only on number two holder.

Q. Did you see the height of the holder when it caught fire? A. I was there shortly after. I would say——

Q. How soon? A. I would say five minutes.

Q. What was the height of it then?

Mr. Gordon: I object to that, five minutes after the accident.

Mr. Bishop: I think it is relevant.

Mr. Gordon: I will withdraw the objection.

A. It was just a few feet over the first lift, the bottom lift. That would be a little over half full.

Q. A little over half full? A. Yes, sir.

Q. How long did you watch it? A. Why, I went in there, and I had to close the inlet valves on the holder. The holder was on fire, and I had to close the valves on the holders to stop the gas from going in.

Q. Did you close them? A. Yes.

Q. Did you come back to the holder? A. I was at the holder then.

Q. That is, the inlet valves were at the holder? A. Yes.

Q. Did you close them? A. Certainly.

Q. What effect did that have? A. It stopped any flow of gas from going in there.

Q. How long did you remain in the vicinity? A. Well, I can't just exactly say. I would say twenty minutes or so.

Q. Was the holder still burning when you left? A. Yes, sir.

Q. So you don't know how long it took to exhaust the gas in the holder? A. No, Mr. Isles came there and he took charge of the situation. I had to go back to the engine room.

Q. Did you see any fire on the road? A. No, sir, not on the road, no, sir.

Q. Did you see any fire anywhere except at the top of the gas holder? A. At the windows in the pump house, the frame was burning.

Q. Were you there until that was put out? A. Certainly.

Q. How high was the gas holder when you left? A. Why, it was less than half full, because I had burners. I had put burners on to empty the holder.

Q. When did you do that? Before you left or after? A. I did that as soon as I found the holder was on fire, before I got to the holder.

Q. You threw additional burners on to it to draw the gas out? A. Yes, sir, to empty the tank.

Q. And after you did that, you came to the holder and turned off the inlet valves? A. Yes, sir.

Q. And notwithstanding all that, was the holder still burning when you left? A. Yes, sir.

Q. That is, twenty minutes later? A. Yes, sir.

Q. And only a little less than half full? A. Less than half full, yes.

Q. How was it when you got there? A. A few feet over half full. That is, one lift was up, and the top lift was up a few feet.

Q. How much did it go down during the twenty minutes that you were there? A. Probably a sheet and a half.

Q. Can you put that in feet? A. I would say about five feet.

Q. It went down about five feet in the twenty minutes that you were there? A. Five or six minutes.

Q. Did you do anything with respect to fighting the fire? A. No, sir, I had other duties to attend to.

Q. Who put out the fire around the window in the pump house? A. The fire department, I believe.

Q. Did you go into the pump house? A. No, sir.

Q. You spoke of some light system and signal? A. Yes, sir.

Q. What did that indicate? A. Why, when the holder rose to about three and one-half sheets, that would be the first lift and half of the next sheet on the upper lift. We would have a blue light lit in the engine room. I can't just explain the working apparatus.

Q. Does that light before the holder gets up to the top of the first lift and the second lift starts up? A. No, they are out.

Q. Does it show any light until the second lift has gotten up part of a sheet? A. No, sir, only when it is up halfway, half a sheet.

Q. Only when the second lift has gone up a second sheet? A. Yes.

Q. Up to that time does it show any light at all? A. No, not before that.

Q. Do you know whether or not those lights were in operating condition prior to this accident? A. I couldn't say.

Mr. Gordon: I object to that. He was not there on the day of the accident. He was there on the night of the accident.

By Mr. Bishop:

Q. Were the lights working the night before?

Mr. Gordon: I object to that as immaterial.

Mr. Bishop: I am going to connect it up.

Mr. Gordon: I submit that what happened the night before with the electric light has nothing to do with the night of the accident.

I will withdraw the objection.

(The stenographer read the last question as follows):

"Question: Were the lights working the night before?" A. Yes, sir.

Q. What about the night after? A. We didn't use that holder.

Q. Well, on the other holders? A. It is only on number two holder.

Q. There aren't any lights on the other holder? A. Number one and two holders were flowing. Both valves on the tank were flowing. We used to pump into number two, and the gas would flow from number two into number one, and number two is a lighter holder than number one. Number two—I believe it was number two, but I am not quite sure, but I think it was number two—was the holder that was a little higher, maybe a foot or so, than the other.

Q. When you saw this holder for the first time, was it high enough to light the light the night of the accident? A. I didn't see it.

Q. I mean when you got there. A. No, no, sir.

Q. How much higher would it have to go when you got there to light the light? A. I would say within a foot or so.

Q. How much further could it go than it was at the time you saw it, the night of the accident? A. Well, almost the entire lift.

Q. How much was that, in feet? A. Well, I am not quite sure about the width of the sheets on the holder, but I believe they are three feet, and that would be——

Q. How many sheets are there on the second lift? A. Three.

Q. How many sheets of the second lift were up when you first saw it? A. Not quite a half sheet.

Q. So that there were two and one-half sheets more that it could have gone up? A. Yes.

Q. That is, before it got full, is that right? A. Yes.

Q. And that would make about how many feet, the two and one-half sheets? A. About eight feet, or seven and a half feet or so.

Q. So that when you first saw it, it was within eight feet of being full, is that right? A. No, sir, that is not—I beg your pardon—no, I am right, eight feet.

Q. What first called your attention to this? A. I was out at the plant looking over the stills and receiving tanks and so forth, and it was raining very hard at that time, and I just came in the door, and I walked to the front of the engine room with the big sliding doors, and I seen the flare, and with that I felt the concussion in the air, and the whistle——

Q. Was that sudden? A. Yes.

Q. What did you do then? A. I hollered to my assistant "There is a fire some place".

Q. Then what did you do? A. Then I looked over, and I says, "I believe it is——"

Q. Never mind what you said. What did you see? A. Then I didn't see anything, only just a flare.

Q. Where was that? A. Towards the right of me, the right of the engine room towards the holders.

Q. What did you do? A. I telephoned to Mr. Isles.

Q. Then what did you do? A. I went over to the holder.

Q. How soon after you had seen the flash and the flare and then the concussion did you get over to the holder? A. Within five minutes, I would say.

Mr. Bishop: That is all. Cross-examine.

Cross-examination by Mr. Gordon:

Q. Your engine room is how far away from the gas holder number two? A. Probably about four or five hundred yards. I can't just exactly tell you.

Q. That is about twelve to fifteen hundred feet? A. Yes.

Q. And you felt the concussion at the engine room? A. Yes, that is, in the doorway. I was standing in the doorway.

Q. And you also saw the illumination? A. The flare.

Q. That came from where? A. Towards my right.

Q. Was that where the pump house was or the gas holders? A. Well, the gas holders—both of them.

Q. You saw the flare from both the fires? A. Well, I would not—I mean there is a pump house and the gas holders are right in the vicinity.

Q. That section was all lit up? A. Yes.

Q. It was quite a large illumination? A. Yes.

Q. There was quite a large stream of fire shot up in the air? A. Yes.

Q. When you had been out looking the stills over and you came back into the compression plant, was anybody else there besides you? A. Yes, sir.

Q. Who? A. My assistant.

Q. What is his name? A. Mr. Pensa.

Q. You keep records? A. Yes, sir.

ANTHONY J. PENSA, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Pensa, where do you live? A. 762 Richmond Terrace, New Brighton, Staten Island.

Q. Where do you work? A. Standard Oil, Bayonne refinery.

Q. How long have you been employed there? A. Fourteen years.

Q. What is the nature of your work? A. Assistant engineer.

Q. Where? A. Bayonne refinery, gas compression plant.

Q. Were you employed in the same capacity on the eighth of August, 1927? A. I was.

Q. What shift were you on that day? A. Eleven to seven.

Q. When did you reach there? A. About ten-thirty.

Q. By what route did you get to the place where you worked on that evening? A. By the Hook Road, started down at this right turn here (indicating).

Q. Did you walk past the road— A. I walked past number two holder.

Q. Did you say number two gas holder? A. Number one and two.

Q. About what time did you do that? A. Between 10.15 and 10.20.

Q. How long have you been working around the oil refinery? A. Fourteen years.

Q. Are you familiar with the smells of oils? A. Very much.

Q. You are familiar with the smells of oils that exist around such places? A. Yes.

Q. And around this place? A. Yes.

Q. Are you also familiar with the smell of gas? A. Yes, sir.

Q. Do you know the difference between the smell of gas and the smell of these other things? A. Yes.

Q. Is there a difference? A. There is.

Q. Can you state the time at which you passed these two gas holders? A. Between 10.15 and 10.20.

Q. How close to them did you pass? A. Well, I should judge about five feet, seven feet, between five and seven feet.

Q. Did you walk in the road? A. Yes, sir.

Q. On which side of the road did you walk? A. On the right-hand side.

Q. What was the weather conditions? A. It was stopped raining at that time; it was cloudy. It had been raining before that.

Q. Was it dry or damp? A. Damp.

Q. Was it windy or still? A. No, it was calm.

Q. Had it been raining earlier in the evening? A. Oh, yes.

Q. Do you know whether or not there had been any thunder or lightning earlier in the evening? A. There was.

Q. About when did you notice that? A. I judge about between eight and nine.

Q. Was that mild or heavy? A. Mild.

Q. As you came along past the gas holders, what, if anything, did you smell? A. Nothing unusual, the same smell that you smell all over the yard.

Q. Do you know the odor of illuminating gas? A. I do.

Q. Do you know the odor of the kind of gases in these holders? A. Yes, sir.

Q. Did you smell any odor of that gas? A. No, sir.

Q. How long were you in the vicinity of these gas holders? A. About five minutes.

Q. During any of that time did you smell any odor of illuminating gas? A. No, sir.

Q. After you passed the gas holders, where did you go? A. Went to the gate right between the power house and the pump house, or the locker room, in fact, not the pump house.

Q. Is that a second gate? A. There is one gate from out of what we call the barrel factory gate, and another gate on the other side of the trestle, and there is another gate beyond that.

Q. Were you coming north or south? A. I was going north.

Q. You were going north? A. Going north.

Q. Where did you get onto Hook Road? A. Right here at this right angle here (indicating). I came out about this direction (indicating).

Q. You came out onto Hook Road there? A. Yes.

Q. Just trace the course that you walked along Hook Road, please. A. Right there (indicating).

Q. Where did you enter Hook Road? A. Right there (indicating).

Q. You are indicating a point to the south of the marks "OT and HCMcM" on the map? A. Yes.

Q. And then in which direction did you walk? A. Walked up.

Q. You are indicating a northwesterly direction. Now you are indicating a northerly direction along Hook Road toward the Constable Hook Railroad? A. Yes.

Q. At what point did you leave Hook Road? A. I would judge about right here (indicating).

Q. You are indicating a point about midway between the pump house and the main power house? A. Yes.

Q. In order to reach that point did you pass both the gas holders? A. Yes, sir.

Q. Did you appreciate that the presence of gas on that road, illuminating gas from these holders, would create a danger?

Mr. Gordon: I object to what this witness would appreciate.

(Argument.)

Mr. Bishop: I will reframe the question and omit the word *appreciate.*

By Mr. Bishop:

Q. Did you know of anything in the vicinity of these gas tanks which would create a dangerous condition?

Mr. Gordon: I object to that as a conclusion on the part of the witness. I submit that all he can testify to is as to what he saw that was there or what he could detect that was there by the senses. It is for the jury to say from all the facts and circumstances whether or not what he saw, if he saw it, did or did not create a dangerous condition.

The Court: I will allow the question.

Mr. Gordon: Exception.

(The stenographer read the last question as follows:)

"Question: Did you know of anything in the vicinity of these gas tanks which would create a dangerous condition?"

A. Well, I was smoking a cigarette at the time, and I guess if there was gas too heavy there——

Mr. Gordon: I move to strike out that guess.

The Court: Strike it out.

The Witness: I was smoking a cigarette.

By Mr. Bishop:

Q. Do you know whether or not it would be safe to smoke a cigarette in the presence of illuminating gas? A. Why, certainly.

Q. Would it be safe? A. No, not if there was any there.

Q. Did you detect any gas there? A. No, sir.

Q. Did you make any effort to detect it? A. No, I just stood there three minutes and finished the cigarette. That was the last smoke.

Q. You mean you stood there and finished the cigarette before you went inside? A. Yes.

Q. And during any of the time that you stood there finishing that cigarette, did you smell any gas? A. No, sir.

Q. What did you do with the cigarette? A. Threw it on the ground and stamped on it.

Q. You stamped on it? A. Yes.

Q. Then what did you do? A. Went in the gate on the way into the plant.

Q. What time did you get to the plant where you were working? A. About 10:30.

Q. What did you do when you got there? A. Went in and changed my clothes and shifted my man.

Q. That is, you mean you went in and relieved somebody? A. Yes, sir.

Q. After you had done that, did you make any observations as to the condition of the gas holders? A. I looked at the gas holders. I always looked at both gas holders on the way in. That is my object to come in that way, to see the height of the holders.

Q. How high was gas holder number two when you came in? A. Between three and three and one-half, just about started out on the second lift.

Q. What do you mean by three and one-half? A. You can't judge very good from the ground, just exactly a foot and a half.

Q. What was the situation of the first movable section? A. All the ways up.

Q. What was the condition of the second section? A. Starting up.

Q. What was the condition of the second section? Was it all the way up? A. The first section was all the ways up; the second section was only a foot or a foot and a half up.

Q. How much could the second section go before it got full? A. About seven or eight feet.

Q. At the time you saw it how far up was it? A. A foot or a foot and a half.

Q. Then you went on to work? A. To the plant.

Q. After you got your clothes changed and relieved your man, what did you do? A. I looked over the log sheets and saw that the light was out in the engine room. That signals the holder, the blue light.

Q. Was the holder, at the time you observed it, at a situation where it would light the light? A. No, sir.

Q. What would the holder have to do in order to light the light?

Mr. Gordon: I object to that unless he knows that the holder was in good working condition and everything connected to it responded properly on the light, and that the light could work.

The Court: The question was: What would the holder have to do in order to light the light? Of course, naturally, it is assumed that it is in a condition to do it. It does not assume that that condition existed then, but ordinarily, what does the holder have to do?

(The stenographer read the last question as follows:)

"Question: What would the holder have to do in order to light the light?" A. In order to light the light, it would have to be between three and one-half and four sheets, the blue light, what we call the blue light.

Q. Would or would not the holder, at the time you saw it on the way in, have to move either up

or down in order to light that light? A. It would have to move up.

Q. How far? A. About a foot.

Q. What would make it move up? A. The flow of gas going in.

Q. After you had relieved your man and noted that the light was not burning, what did you do next? A. Well, I started to make out the log sheet. We have the log sheets.

Q. Then what did you do? A. And as I was making out the log sheets, Mr. Sharkey was in the building at the time and he spied the flame.

Q. Of course, you cannot testify to what somebody else did. What did you see or do? A. I got orders to go over to see where the fire was.

Q. From whom did you get that order? A. Sharkey.

Q. Had you seen any fire up to that time? A. No, sir, I had my head bent down like this man (indicating), writing the log sheets.

Q. What did you do then? A. I ran out of the door about a distance of seventy-five to one hundred yards.

Q. What did you see? A. I seen the holder on fire.

Q. How high was the holder then? A. About three sheets.

Q. Was it higher or lower than when you saw it when you came in? A. Lower.

Q. How much lower was it? A. Well, I should judge about half a sheet.

Q. What would that be in feet? A. About a foot and a half lower.

Q. About eighteen inches lower than when you saw it on the way in? A. Yes.

Q. How long was that after you passed it? A. That was about forty minutes.

Q. Did Mr. Sharkey come out with you or did he come out after you? A. He came out after I came back. I told him that the holder was on fire.

Q. Then what did you do? A. I slowed down the engine and put on more burners.

Q. Did you stay in the engine room? A. Yes.

Q. You did not go to the fire? A. No, sir, I went out afterwards.

Q. But you did not go out at that time? A. No.

Q. How soon afterward did you get there? A. About half-past twelve.

Q. When you ran out to the point one hundred yards from the engine room, where you were working, could you see the road? A. Absolutely.

Q. Could you see it all the way up to the gas holders? A. Absolutely.

Q. Did you see any fire on it? A. No, sir.

Q. Where was the fire that you saw? A. On the holder, on the side of the pump house.

Q. What part of the pump house? A. It looked like the window to me.

Q. Do you mean the window frame? A. Yes, sir.

Q. Where was it on the holder? A. On the roof.

Q. What part of the roof? A. On the northern end of it, the side towards the gas, the north.

Q. Was that the only place you saw any fire? A. Yes, sir.

Q. Did you see any fire in any ditch anywhere? A. No, sir, I didn't.

Q. You did not go inside of the pump house? A. I didn't go outside. I didn't come beyond that railroad. That railroad stopped me from coming over.

Q. Have you any idea what time it was when you first went out? A. About two minutes after eleven.

Q. And at that time did you see any fire in the road? A. No, sir.

Q. Did you see any fire anywhere else, except around the window of the pump house and the top of the tank? A. No, sir.

Mr. Bishop: That is all.

Cross-examination by Mr. Gordon:

Q. How long have you been working for the Standard Oil Company? A. Fourteen years.

Q. Are you working for them now? A. Yes, sir.

Q. On the night of August 8, 1927, which way did you get into Hook Road? From what street? A. Do you want me to point it out on the map?

Q. Yes. A. The company road comes along here east and west (indicating).

Q. You can get into Hook Road from that company road to the west of Hook Road? A. Yes.

Q. Could you get in there at that point there (indicating)? A. No.

Q. Right up there (indicating)? A. Yes.

Q. In which direction is your pump house or compression plant? A. Here (indicating).

Q. You are indicating a northerly direction? A. Yes.

Q. So you had to go along the road northerly? A. Yes.

Q. You are familiar with that Hook Road? A. Yes, sir.

Q. And as you were walking northerly, were you walking on your right-hand side of the road or left-hand side of the road? A. Right-hand.

Q. You are sure about that? A. Absolutely.

Q. There is no question about that? A. No, sir.

Q. Were you pretty well over on the right-hand side? A. Well, I would not say I was in the middle of the road; I would not say I was on the left-hand side.

Q. Were you pretty well over on the right-hand side? A. No, I wasn't.

Q. How far were you from the extreme right of the road? A. I will say about three feet.

Q. You are sure of that? A. Yes.

Q. You are positive of that? A. Yes, sir.

Q. And you were going in a northerly direction? A. Yes, sir.

Q. You were three feet from the easterly side of Hook Road, and you were going in a northerly direction? A. Right.

Q. You are positive of that? A. Yes.

Q. Do you know the width of Hook Road? A. I do not.

Q. Do you know that it is nineteen and three-tenths feet from side to side? A. I do not.

Q. Don't you know what nineteen feet is? A. No, sir.

Q. How do you know what a foot and a half is? A. I said about a foot and a half.

Q. Do you know what about nineteen feet is? A. I do.

Q. Do you know that Hook Road is about nineteen feet? A. About, yes.

Q. So that if you were walking three feet from the easterly side, you were about sixteen feet from the westerly side, weren't you? A. I guess so.

Q. You are sure of that? A. According to your measurements.

Q. I mean according to actual figures. A. All right.

Q. You went to school? A. Absolutely.

Q. You know how to figure? A. I do.

Q. You know that sixteen and three make nineteen? A. Right.

Q. How far in from the westerly side was gas holder number two? A. I should judge about two feet.

Q. You say that gas holder number two was about two feet from the westerly side inside on the property? A. Yes, sir.

Q. Then, if you were sixteen feet from the westerly side, and the gas holder is two feet, you were eighteen feet from the gas holder, weren't you? A. I didn't say eighteen feet; I said about. The measurements I give was about. I mean not within a foot or two of it.

Q. If you were about three feet from the right side of your road, you were about sixteen feet from the left side, weren't you? A. According to the measurements.

Q. And beyond that the gas holder was at least two feet more? A. Right.

Q. So that you were about eighteen feet from the gas holder? A. Right.

Q. Do you remember stating on direct examination that when you passed the gas holder you were about five to seven feet away from it? A. Yes, sir.

Q. How could you be seven feet away from the gas holder if you were eighteen feet away? A. I didn't walk in a straight line.

Q. You were walking in a crooked line that night? A. Yes, sir.

Q. You remember that too? A. Absolutely.

Q. Had you been drinking? A. No, sir, I don't drink. That is one bad habit I don't have.

Q. Do you know the fence in front of the property where the gas holder is? A. Yes, sir.

Q. Was it there that night? A. It was.

Q. How high is that fence? A. I judge about five feet, maybe more.

Q. Don't you know it is higher than that? A. I will say it is higher than that.

Q. You passed that fence how frequently? A. I passed it for the last eight years, I guess.

Q. And you don't know how high it is? A. No, sir.

Q. You saw it every day? A. I never took notice particular to the height of it.

Q. You did take notice that on this night you lit a cigarette, didn't you? A. I always light a cigarette there, along there; that is our last smoke.

Q. On a public road? A. Yes, sir.

Q. Would you say the fence was over five feet? A. I guess it is. I wouldn't say it is lower.

Q. Would you say it is over nine feet? A. No, I would not say it is over nine feet.

Q. Do you know? A. That it is over nine feet?

Q. Yes. A. No, I don't know that.

Q. Will you state that it is not over nine feet? A. I don't think it is.

Q. Will you state that it is not? A. I don't think it is.

Q. Is that five or seven feet high? A. It is not five feet.

Q. Is it eight or nine? A. I will say between six and nine.

Q. That would be about seven and a half feet high? A. In between those two figures.

Q. How wide are the sheets? A. On the gas holder?

Q. Yes. A. I should judge about three feet.

Q. Do you mean in width? A. Yes.

Q. How long are they? A. I couldn't tell you that.

Q. You know their height but you do not know their length? A. No, sir.

Q. This was a rainy night? A. Yes, it was.

Q. Was it dark? A. Well, I would not say so dark.

Q. There wasn't any moon out? A. No.

Q. There weren't any stars out? A. No.

Q. And there wasn't any particular illumination there? A. No.

Q. And yet you saw the tank moving a foot and a half, didn't you? A. I didn't say I seen it move.

Q. You saw it was a foot and a half up? A. Yes.

Q. You saw that in the dark? A. Yes.

Q. And you saw that before the fire? A. There is a light there.

Q. There is a light there? A. Absolutely.

Q. And you could see by that light that it was a foot and a half high? A. Yes.

Q. You looked at that light? A. There is a light right there at the bottom.

Q. And you saw it a foot and a half high? A. Right.

Q. It was raining pretty hard just before you went into the plant? A. No, it wasn't raining.

Q. It wasn't raining at all then? A. No.

Q. You stood there three minutes? A. I should judge about three minutes.

Q. You had your watch out? You looked at your watch? A. I always look at it.

Q. You always look at it in the dark? A. There was a light there.

Q. Is that light over the tank or near the tank or where is it? A. Near the gate.

Q. It was not on the tank? A. There is a light on the tank.

Q. On the tank there is a light? A. Absolutely.

Q. Did you look under the light to see what time it was? A. There is a light right at the gate there.

Q. Did you look at the watch underneath the light? A. I have a luminous dial on my watch.

Q. And you looked at the watch and saw your luminous dial and you saw the time? A. Yes.

Q. And you knew it was 10:15 to 10:20? A. I judge it was that time.

Q. Didn't you see by looking? A. Yes, I seen after I got up to the gate to go into work.

Q. You looked at your watch and saw 10:15 on the watch? A. 10:15 at the barrel factory gate, yes.

Q. And what time did your shift start? A. Eleven o'clock.

Q. And this was forty minutes before shift time, and you were standing smoking a cigarette? A. Yes.

Q. You were standing out in the rain? A. No, it wasn't raining then.

Q. You say it was calm that night and there were no winds blowing? A. Nothing to brag about.

Q. Without bragging about them, were there any winds blowing? A. No.

Q. Wasn't there a southwest wind blowing that night? A. I am not a weather bureau.

Q. Wasn't there a wind blowing at that time? A. No, it was calm.

Q. There wasn't any wind blowing between ten and twenty miles an hour? A. I couldn't judge that.

Q. You were standing there three minutes? A. Yes.

Q. And there was no wind blowing? A. Nothing to talk about.

Q. Do you talk about it when it is under twenty miles? A. I talk about it when it is about sixty miles.

Q. If you talk about a wind when it is over sixty miles, when do you talk about noticing the smell of gas? How strong must that be? A. Ordinarily I detect it home very easy.

Q. And this night, in the rain, you did not detect any gas? A. No.

Q. Did you make a report of it? A. No. Why should I?

Q. Did you tell anybody there was no smell of gas? A. Of course not.

Q. You didn't tell anybody at all that you did not notice any gas that night? A. Why should I?

Q. You did not make any report of it to anyone? A. No, sir.

Q. You never discussed it with anybody? A. No.

Q. And yet you were called here as a witness to tell us that you did not smell any gas? A. I am asked a question, and I will answer it.

Q. You had never been asked about it before you were in Court? A. No.

Re-direct examination by Mr. Bishop:

Q. You have been questioned before about this accident, haven't you? A. Right after the accident the safety man brought me up and asked me about it. That was all. He didn't ask me about the smell of gas.

Q. Did anybody else question you? A. No, sir.

Q. I questioned you, as a matter of fact, haven't I? A. Up in the personnel office, do you mean?

Q. No, over here. A. In regards to smell?

Q. I mean various occurrences, yes. A. Well, there is a difference in illuminating gas and the gas that is usually around the holder.

Q. Haven't I asked you questions about this matter? A. Oh, yes, sure.

Q. And you have answered them? A. Yes.

The Court: We will recess at this time until 1:30 o'clock this afternoon.

(A recess was had until 1:30 o'clock p. m.)

Chester F. Smith, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Smith, you are connected with the Standard Oil Company, aren't you? A. Yes, sir.

Q. In what capacity? A. Manager of the Bayonne Works.

Q. Are you familiar with the property of the Standard Oil Company in the neighborhood of Hook Road? A. I am.

Q. I call your attention to a map marked "Plaintiff's Exhibit 1", and I call your attention to a red mark which is labeled "'Hook Road". A. Yes, sir.

Q. There is a portion of Hook Road that runs along adjacent to Constable Hook Railroad from a point marked "Land belonging to others", around to where there are two "X" marks, which one witness put there. Who owns the land to the north and the west of that portion of Hook Road?

Mr. Gordon: That is not the best evidence.

The Court: Is this witness competent to testify as to who owns it?

The Witness: I have been connected with the Standard Oil since 1908, and I feel that I know what property is owned by the company. I have reviewed deeds. I can't say that I have reviewed deeds of all the property.

The Court: I suppose Mr. Smith could testify that this property is used and controlled by the Standard Oil Company, but as to the actual title, that is something else.

By Mr. Bishop:

Q. Do you know whether or not the Standard Oil Company occupies and uses that property? A. They do, sir.

Q. And what about the property to the north of that portion of Hook Road that runs east and west over the portion marked "Land belonging to others"? A. The part to the north they occupy, and the part to the west they occupy.

Q. What about the land on both sides of the portion of Hook Road that runs north and south from the point on Constable Hook Railroad near the structure marked "Power house" down to the west portion? A. Yes, they occupy that in its entirety on both sides.

Q. I show you a deed and ask you if you know what that is? A. That deed covers the property.

The Court: In the first place, he has not looked at the deed.

By Mr. Bishop:

Q. Is that a document with which you are familiar? A. It is a document covering——

Mr. Gordon: I object to that as not the best evidence. I offered an agreement the other day, and it was objected to.

(Argument.)

The Court: I will allow the question until you get to the point where I can see whether or not this witness is competent to say what that instrument conveys in the way of title. Of course, it may also be true that even though that deed—I don't know whether or not it is a deed—conveyed certain lands that this witness could identify, if he can, it does not show necessarily that the company owned them under that deed on the day of this accident.

Mr. Bishop: I can connect that up. If I prove they are still in possession of these premises, that certainly raises a presumption.

Mr. Gordon: Exception. I also want to make another objection on the record to the fact that this evidence is now incompetent and immaterial and in no way relevant or pertinent to the issue involved in view of the fact that it now stands admitted as to the allegations in the complaint, which are not denied, that this part of the road had been dedicated as a public road.

Mr. Bishop: It has always been admitted, and it has never been questioned.

The Court: The deed itself has not yet been offered in evidence. I will allow the question to be answered.

By Mr. Bishop:

Q. Is this an instrument with which you are familiar? A. My answer to that is that I have a copy of it. I have not seen the original.

Q. Have you ever examined it? A. Not the original.

Q. Will you examine this and tell me if you know what it is (handing a paper to the witness)? A. Yes, sir, I identify that as covering a deed to the property in the area of gas holders marked one and two.

Q. Does that deed include the premises on both sides of Hook Road? A. Yes.

Mr. Gordon: I object to that as incompetent and immaterial to the issue, and on the further ground that where a person owns lands immediately adjoining a place used as a public highway, even though they may own the fee or reversional interest in that public highway, they still owe the same duty to people on the highway, and therefore, I don't think it makes any difference, and I will object to it.

The Court: Objection overruled.

Mr. Gordon: Exception.

The Court: You may have an opportunity to interrogate the witness as to his knowledge of the contents of this deed as being the property in question here before the paper is admitted into evidence. I have not admitted it yet. I have allowed him to testify that he knows what it is. He says now it is a deed for the property covering the land shown on this map in this case.

By Mr. Bishop:

Q. How long have you been connected with the Standard Oil Company? A. I was first employed in the latter part of 1908, and after working a year and attending college, I returned in 1913, and I have been there since.

Q. When you were first connected with them in 1908, do you know whether or not the Standard Oil Company was in possession of this property on each side of Hook Road? A. Because it was occupied by them at that time I assume it was.

Mr. Gordon: I ask that that be stricken out.

By Mr. Bishop:

Q. Was it occupied by them at that time? A. Yes.

Q. Were they using it? A. They were.

Q. Did they have their plant constructed on it? A. They did.

Q. Do you know whether or not they had their plant constructed on it continuously since 1908? A. They have.

Mr. Bishop: I think that alone raises a presumption of title. It is over twenty years' possession.

The Court: Are you going to rest your case on that presumption? Then you won't need to put the deed in evidence.

Mr. Bishop: I intend to offer the deed in evidence, and I offer in evidence an original deed which bears the notation of the register of Hudson County, showing that it has been recorded, which, under the statute, makes it admissible.

Mr. Gordon: I object to the offer on the ground that in view of the admissions already made in this case that this is a public highway and the fact that part of the lands have been dedicated for public use, constituting Hook Road, that it is entirely incompetent and immaterial to the issue, and it has no bearing upon the issue now.

The Court: The objection, so far as that ground is concerned, is overruled, but I am not yet satisfied that this witness has shown that he can identify the description and boundaries in that deed as being the land shown on this map. He has testified that he knows the company has been in occupation and in physical possession, but that does not prove that this deed covers the land.

Mr. Gordon: I desire to cross-examine now for one question or two before it is admitted.

By Mr. Gordon:

Q. Have you with you the map of the property situated at Constable Hook, Hudson County, surveyed November, 1807, by R. C. Bacot, city surveyor of Jersey City? A. I have not.

Q. Do you know where a stake or other monument intended to locate the beginning point of lot number two on that map is? A. It was shown to me.

Mr. Gordon: I object to what was shown. Do you know of your own knowledge?

A. No, I can't say that I do.

Mr. Gordon: I object. The man does not even know where the beginning point is.

The Court: Is there any competent evidence that the description in this deed corresponds to this map unless you put somebody on the stand who has prepared and outlined the boundaries?

Mr. Bishop: I am willing to rely upon the proposition that it has been shown that this company has been in the actual occupation and possession of this property for over twenty years, since 1908. That raises a presumption of ownership unless some evidence to the contrary is shown.

Mr. Gordon: I except to the remarks of counsel as a legal proposition and as immaterial to the issue involved in the case. The statement of counsel is no proof.

Mr. Bishop: I don't make the statement as proof.

The Court: It will not be construed as proof, of course.

Mr. Bishop: My attention has been called to the fact that I have offered the deed.

Mr. Gordon: I will withdraw the objection.

Mr. Bishop: I ask to have the deed marked in evidence.

(The paper referred to was received in evidence and marked "Defendant's Exhibit 13.")

By Mr. Bishop:

Q. Were you familiar with the property occupied by the company at Constable Hook at any time prior to 1908? Had you known that property before you went to work for them? A. Of course, I have been residing in Bayonne all my

life, so I have naturally had an idea where the Standard Oil Company was located.

Q. Do you know whether or not they had been in the occupation of the property on both sides of Hook Road prior to the time you entered their employ? A. No, I would not say so.

Q. You do not know? A. No.

By the Court:

Q. How long did you say you were with the company? A. Started in 1908.

Q. At this location? A. Yes, I just worked a year and then went to college and came back in 1913 and had been there since.

By Mr. Bishop:

Q. What are the hours of work for the shifts at the Kimble pump house, or rather, what were the hours of work in 1927? A. Seven to three, three to eleven, and eleven to seven.

Q. Seven to three in the morning? A. And three to eleven in the afternoon.

Q. And eleven at night to seven the next morning? A. Yes, sir.

Q. Are the men paid for that period of eight hours?

Mr. Gordon: I object to that. The facts in this case are as to what this man was paid for, and this is not the best evidence. I object on the ground also that this particular question is incompetent. In other words, the issue in this case does not go as to what the men were getting. The issue goes to what Gilroy was getting for the time he worked, when he worked.

The Court: The practice as to payment is some evidence. It is not conclusive evidence. If that were the only evidence, I should charge the jury that it did not bind the plaintiff in this case. I presume the evidence is intended to be supplemented by proof, and if it is not, I shall charge the jury. One of the issues is whether or not this accident arose out of and in the course of the employment of the plaintiff by the defendant. That being an issue, any testimony which might reasonably be expected to disclose the relationship of the employer and the employe is competent, and for that reason, I shall allow him to answer this question.

Mr. Gordon: Exception.

(The stenographer read the last question as follows:)

"Question: Are the men paid for that period of eight hours?" A. Those men in the Kimble pump house are paid by the hour, and their shift is from three to eleven, eleven to seven, and seven to three, and they are working eight hours.

Q. If they work overtime on the three to eleven shift, when does that overtime commence? A. It starts after eleven o'clock.

Q. Have the men any authority from the company to leave prior to eleven o'clock?

Mr. Gordon: I object to that as immaterial. If they did leave against authority, that does not keep them within the confines of authority.

The Court: I will allow it.

Mr. Gordon: Exception.

(The stenographer read the last question as follows):

"Question: Have the men any authority from the company to leave prior to eleven o'clock?" A. We have always recognized that the shift may have the privilege of relieving one another a few minutes before regular quitting time.

Q. Do you know anything about the payment of Gilroy's expenses for nurses and hospital treatment? A. I was identified with the Bayonne Hospital and in that capacity there, as well as at the yard, I made arrangements whereby the nurses in connection with the Gilroy case were paid directly from the hospital. I am satisfied, of course, that the company has paid the hospital for that expense.

Q. Do you know whether or not the hospital bills for the hospital services were paid? A. Not seeing the checks, of course, I can't answer yes on that, but I am positive they were, from the standpoint of those cases being all handled that way.

Q. Did the company authorize the payment of the hospital bill? A. Through our doctor, they are authorized.

Q. Did you ever have any talk with Gilroy after this accident? A. Oh, yes, indeed.

Q. On what occasions? A. I think principally in the hospital. I have talked to him on several occasions after he left the hospital, by 'phone, with respect to coming——

Mr. Gordon: I object to what it was in respect to. If he wants to have the con-

versation, we will get the time and place and then we will have the conversation.

The Court: The answer is complete when you say you have had conversations.

By Mr. Bishop:

Q. When and where was the first time, as near as you can recall, that you talked to him after the accident? A. That is very hard to state the exact time. It was in the hospital, of course. I was up there the night of the accident, but, of course, I wasn't talking to him, and the morning of the accident, I wasn't talking to him.

Q. How many times did you talk to him in the hospital? Do you know? A. Many times, I would say.

Q. How many? A. I can't state; I don't know. It was my custom to visit these men in the hospital and frequently during the week.

Q. And regularly during all the time that they were there? A. The first part, yes; the latter part it was not quite so regular.

Q. In your conversations with Gilroy, was he rational? A. Why, yes.

Q. Did he understand what was said to him? A. Yes.

Q. Did he make rational replies? A. Yes.

Q. What were the subjects which were discussed with him at the times?

Mr. Gordon: I object to that.

Mr. Bishop: I have a right to show what the negotiations were and the conversations between a representative of the company and this man.

Mr. Gordon: I should like to have the time fixed as to the conversation and what was said at the conversation.

The Court: I don't think the defendant should be limited to the exact hour of the conversation alleged to have been held with the plaintiff and himself. Any conversation that he may have had bearing on this subject is certainly competent, and what the plaintiff himself said to the representative of the defendant without having to fix a definite hour. I will allow it.

A. As far as the hospital is concerned, I don't recall ever talking about anything other than his condition, and how he was getting along, and how the hospital was taking care of him and so forth, but I do recall——

Q. Was there ever anything said as to the payment of the hospital and medical bills? A. No, I can't say that there was.

Q. After he left the hospital did you ever talk to him? A. By 'phone on one or two occasions.

Q. Did he call you or did you call him? A. I wrote him a letter in connection with coming back to work, and I believe we had an appointment to come down a certain time, but he could not keep this appointment and 'phoned me. That is about all I recall having said to him.

Q. What was the subject of your conversation with him? A. It is so long ago, I can't answer that question.

Q. Did you have any other conversations with him? A. No.

Q. Did you ever discuss with Gilroy the question of employment after the accident? A. No, I can't say that I did.

Q. Did you ever discuss with him the payment of compensation?

Mr. Gordon: I object to that as immaterial in this case as to whether or not he discussed with him the question of compensation. If it is a question of a compensation agreement, that is the best evidence, if they have the agreement, and that agreement should be produced, and then when it is produced, I have another objection to it.

The Court: The question of compensation might be material as connected with the matter of what compensation or recompense or money he may have received on his account in mitigation of damages in this case. It seems to me that anything of that sort must be relevant. I will allow it.

Mr. Gordon: Exception.

(The stenographer read the last question as follows:)

"Question: Did you ever discuss with him the payment of compensation?" A. I can't say I have.

Q. I show you three letters marked "Defendant's Exhibits 5, 6, and 7, for identification", and I ask you to examine them? A. There is a letter May 25 that I feel quite certain I signed; the other two I don't recall. It is so long ago.

Q. That is Plaintiff's Exhibit 6 for identification (indicating). Can you state whether or not that is the letter you refer to when you said he telephoned you as a result of a letter you wrote him? A. No, I can't say.

Q. Do you know whether or not that letter was sent to him?

Mr. Gordon: I object to that unless he personally mailed it.

A. No, I can't say that I do.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. You have been with the company for how long? A. Since 1908; that is, not continuous.

Q. Do you know whether or not in 1904—do you know the contents of any agreement that the company may have made in 1904 with the City of Bayonne? A. I have read the agreement of 1904.

Q. You know that Hook Road is used by the public?

Mr. Bishop: Just a minute. This is not an attempt to prove something. That is conceded.

The Court: It has been admitted directly and unequivocally that this is a public thoroughfare, and they are bound by that just as strongly as if a thousand people came here and said so.

Mr. Gordon: That is all.

Ann Murnane, a witness produced on behalf of the defendants, being duly sworn according to law, on her oath, saith:

Direct examination by Mr. Bishop:

Q. Miss Murnane, where are you employed? A. Department of Labor, Workmen's Compensation Bureau.

Q. Where? A. Secretary to the Deputy Commissioner Corbin.

Q. Will you please speak louder? A. Secretary to Deputy Commissioner Corbin in the Workmen's Compensation Bureau.

Q. In that capacity, have you the custody of certain records of the Workmen's Compensation Bureau? A. I have charge of all the records of compensation.

Q. Have you the custody of a petition for compensation filed by Edward Norman Gilroy? A. I have.

Q. Have you that with you? A. I have.

Q. Will you produce it?

Mr. Gordon: Is that the original petition?

A. That is the original.

By Mr. Bishop:

Q. I show you a copy of something that purports to be a copy of this petition, and I ask you if that is a correct copy of the original petition? A. That is a correct copy.

Q. And that original petition is on file in the Department of Labor? A. Yes.

Mr. Bishop: I offer in evidence, in order to relieve us of the necessity of keeping the original document here, a certified copy of a petition for compensation filed by Edward Norman Gilroy with the Compensation Bureau.

Mr. Gordon: I object to the offer of this petition, if your Honor pleases, on the ground that it is incompetent, irrelevant, and immaterial and in no way binding upon

this plaintiff. If your Honor decides to look at the petition, your Honor will see. I refer to line thirty-nine, and the latter part of it.

The Court: You are not objecting to it on the ground that it is not the best evidence?

Mr. Gordon: No.

(Discussion at the bench.)

Mr. Bishop: I offer it in evidence.

(The paper referred to was received in evidence and marked "Defendant's Exhibit 14.")

Q. Is there an answer to that petition on file? A. Yes, there is.

Q. I ask you to examine this, which appears to be a certified copy of the answer, and tell whether or not that is a true copy of the answer which is on file? A. Yes, it is.

Q. That is a correct copy of the answer? A. Yes.

Mr. Bishop: I ask that it be marked for identification.

Mr. Gordon: I should like to see the original answer now before this is marked for identification.

The Court: You are offering a copy to be marked for identification?

Mr. Bishop: Yes.

(The paper referred to was marked "Defendant's exhibit 15 for identification.")

Mr. Gordon: If your Honor please, I object to the entry of this paper.

Mr. Bishop: It has not been offered yet.

By Mr. Bishop:

Q. Do you know what form two is under the Compensation Act? A. Yes.

Q. Is there a form two on file in this case. A. I don't think so; no, I have no form two.

Q. You have not it with you? A. No, that is probably in the Trenton office.

Q. Are these kept in the Trenton office? A The Trenton office.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. The papers that you have are in response to a subpoena? A. Yes, they are.

Q. Have you the subpoena with you? A. Yes I have.

Q. May I see it, please? A. Yes. (The witness handed a paper to Mr. Gordon.)

Mr. Bishop: If the Court please, I object to this.

The Court: What is the purpose?

Mr. Gordon: I want to know whether or not form two is subpoenaed.

Mr. Bishop: It does not make any difference whether or not it was subpoenaed.

The Court: I do not think it makes any difference, if the witness said she has not got it here.

Mr. Bishop: If a stranger wandered in here with the document, I would have a right to have the document whether or not it was subpoenaed.

Mr. Gordon: That is all.

WILLIAM A. PINKERTON, a witness produced on behalf of the Defendant, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Doctor, what is your profession? A. Phsyician and surgeon.

Q. Are you licensed to practice in New Jersey? A. Yes, sir.

Q. How long have you been engaged in the practise of medicine and surgery? A. I graduated in 1900. I was in the hospitals of Bayonne and New York for about two years after that, and then four or five years I practised in Virginia. Since then I have been in Bayonne practising medicine.

Q. Are you connected with any hospitals or institutions? A. I am visiting surgeon to the Bayonne Hospital.

Q. Do you do general practice? A. Yes.

Q. Are you connected in any way with the Standard Oil Company? A. I do hospital cases for them; any cases admitted to the hospital, I have been taking care of them.

Q. You take care of them in connection with your duties in the Bayonne Hospital? A. Only the hospital cases.

Mr. Gordon: I don't recall that the witness says he takes care of these cases in connection with his duties. The question before that was: If he took care of these cases, and he says, for the Standard Oil Company at the hospital. The next question is: Did he take care of them in connection with his duties at the hospital? Either he does it for the company or he does not do it for the company.

The Court: You may elicit that on cross-examination.

Mr. Gordon: The question was leading. I will withdraw the objection.

By Mr. Bishop:

Q. Doctor, did you know Mr. Gilroy? A. Yes, I know him since treating him. I didn't know him before.

Q. Did you treat him in the hospital on the eighth of August, 1927, and thereafter? A. Either on the last part of the eighth or the early morning of the ninth, I went in there some time during the night. My records show the eighth, but I can't swear that it wasn't after twelve o'clock.

Q. Was he under your charge while you were in the hospital? A. Until he left the hospital he was under my care.

Q. Did you see him at frequent intervals? A. Daily, several times at first, several times a day.

Q. Did you treat him? A. Yes.

Q. What condition was he in when you first saw him? A. He was suffering from severe burns to his face, hands, forearms, shoulders, and knees, ankles.

Q. What was the condition of the lumbar region of his back? A. There were no burns on his back that I discovered.

Q. Were there any injuries at all there that you could discover? A. No.

Q. Did you continue to treat him? A. I treated him while he was in the hospital, and I saw him once or twice after he left the hospital, at his home.

Q. Did he improve under your treatment? A. Yes, he was discharged as improved. He was not quite well when he went home. He had not quite healed up.

Q. You have seen him on one occasion since? A. I saw him after he left the hospital. I saw him once, and then I went on a vacation early in November. I always take November myself. I saw him after I returned, some time in December, and I have since examined him twice, once in October, 1928, and the last time, April 19, 1929.

Q. Was there any improvement between the time you last saw him in the hospital and the time you made those examinations? A. Yes, he has improved in his appearance. He has picked up his strength. His color has got better. His hands have improved to a certain extent.

Q. Can you tell whether or not he has any use of his hands? A. He has partial use of his hands.

Q. Both hands? A. Both hands.

Q. Do you know whether or not hair or beard grows in scar tissue? A. It depends entirely how deep your skin is entirely destroyed. If the hair follicles are destroyed, it would not.

Q. Do you know whether or not he has any hair or beard? A. I don't recall; I don't recall that.

Q. Have you seen him on the stand in court?

Mr. Gordon: I object to that. He says he does not recall.

Q. Were you paid for the treatment you rendered to Gilroy? A. Yes, I was paid.

Q. By whom? A. By the Standard Oil Company.

Q. Were you paid for all of it? A. The bill that I rendered.

Q. Did you, during the time you were treating Gilroy, perceive the urinalyses which were made by Mr. Maas? A. Yes, they were made under my direction.

Q. Were they reported to you? A. Yes, those slips were put in the chart, and we see them on our rounds when we visit the patient, and read the reports when they come up from the laboratory.

Q. Did you hear him testify the other day? A. Yes.

Q. Did the condition of the urine shown by the analyses he testified to—what did that indicate? A. That indicated some severe injury or inflammatory condition in the body, the reaction of the kidneys to that violent upset.

Q. Could that condition be caused by burns? A. Yes, it very frequently is.

Q. Does it indicate any organic kidney disease? A. No, not necessarily, if it clears up.

Q. Did this clear up? A. It did, entirely.

Q. Do you know what arthritis is? A. Yes, sir.

Q. Did you hear Dr. Ward's testimony? A. Yes.

Q. Do you recall that he testified that this man had a progressive arthritis in the lumbar region of the back? A. Yes.

Q. Did you find any symptoms of that while the man was under your care? A. None.

Q. In your opinion, at the time the man was discharged from your care in the hospital, had he any arthritis? A. I didn't find it. In my opinion, he did not have it. I examined him very carefully the whole time.

Q. Was there any injury in the region of the back described by Dr. Ward? A. No.

Q. In your opinion, is arthritis likely to be caused by a burn? A. I have never seen a case caused by a burn.

Q. Do you believe a burn could cause it? A. I don't believe so. I don't say that it could not; I never have seen a case in the twenty-eight years of my practice caused by it.

Q. Do you think that burns in some regions other than the lumbar region of the back could produce an arthritis in the lumbar region of the back? A. I don't think so.

Q. While Mr. Gilroy was under your care, did you observe any symptoms of any lung trouble? A. No, he didn't have any symptoms of lung trouble.

Q. Did you see any signs of lung trouble in the subsequent examinations you made of him? A. No.

Q. Did you notice anything unusual about his lungs and their condition? A. No.

Q. What about his heart? A. He had a little irregular heart action while he was in the hospital. He had palpitation and he complained of his irregular heart action.

Q. Is that unusual? A. I don't think so, in his case. He was suffering a great deal, and he was very nervous.

Q. Did that condition improve or clear up? A. It improved.

Q. Did he have a normal heart, so far as you could tell, the last time you examined him? A. The last time I examined him, yes.

Q. When was that? A. The last time I examined him for the heart was—I looked over him physically. I examined him in October for loss of use. I didn't examine his heart at that time.

Q. When did you last examine that? A. I don't recall exactly.

Q. Did you examine it when he left the hospital? A. Some time before he left.

Q. Was there anything wrong with it at the time you made that examination? A. Nothing except an irregular heart action. He was a very nervous individual and his heart would palpitate and get irregular on the slightest provocation.

Q. Is it your observation of this man that he is nervous while being examined? A. Do you mean the last examination?

Q. While being examined? A. Yes, he is still a nervous individual.

Q. Would the fact that he was being subjected to an examination have any effect on his heart action? A. It might.

Q. What would that effect be? A. Causing an irregularity, sometimes rapid heart action.

Q. Due to what? A. Nervousness.

Q. Nervousness caused by what? A. His action of mind on his nerves that control the heart. That is, one very often will get a patient that comes into the office for examination, and because they are in there, they are excited, and the heart goes very fast, and if you let them calm down, and examine them a little later, sometimes it stops.

Q. Did you take his blood pressure? A. I don't recall.

Q. You spoke of examining him since he left the hospital? A. Yes.

Q. Did you discover any symptoms of arthritis on those examinations? A. No, sir.

Q. Did you form any opinion as to whether or not he had an arthritis at the time of those examinations?

Mr. Gordon: I object to that. He cannot form an opinion if he did not find any.

Mr. Bishop: I asked him if he found any symptoms, and if he formed any opinion as to whether or not he had it.

Mr. Gordon: I will withdraw the objection.

A. If I found no symptoms, I would not think of arthritis.

By Mr. Bishop:

Q. If he had arthritis, would he have the symptoms of that? A. Yes, sir.

Q. What do you know about Mr. Gilroy's mental condition while he was in the hospital? A. He was very nervous while in the hospital.

Q. After the first three or four weeks, was he rational? A. He was rational at all times.

Q. Even from the start? A. Yes.

Q. Did he understand things that were said to him? A. Oh, yes. At night, I imagine he would wander in his sleep from suffering, but he understood anything that you said to him.

Q. Did he make rational replies when you spoke to him? A. Yes.

Q. During the last eight weeks of the twelve weeks he was there, was he rational at all times when you observed him? A. Absolutely so.

Q. During all that period was he improving? A. Yes, he was improving.

Q. Did you find any symptoms of any mental disease or impairment? A. I found none.

Q. The last time you examined him, did he have any use of his hands? A. Yes, he has partial use of his hands. They are very weak, and he cannot move the little finger, but the others he has partial use of, and also partial use of the wrist joint.

Q. Is he able to do any work? A. Very light work.

Q. Could he, in your opinion, do clerical work? A. I think he could use a pen, yes.

Q. What would you say as to the probable effect on his condition of doing some light work? A. I believe it would help him.

Q. How long do you think he has been able to do some light work? A. I think the first time I

examined him in April, the time he left the hospital, he could have done a little.

Q. April of what year? A. That is October, 1928, the first time I saw him.

Q. Then he could do some light work? A. I think he could have done a little. On the second examination he had improved a little more.

Q. What about his condition at the time he left the hospital? Could he have done any work then? A. He could not work then.

Q. About how soon after he left the hospital, in your opinion, was he able to do some? A. I can't answer that. I saw him in December. I didn't see him after that. He wasn't able at that time to do anything.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. Doctor, you said something about having been in Virginia somewheres? A. Yes, I am a native of Virginia.

Q. Whereabouts? A. Near Charlottesville. I am a graduate of the University of Charlottesville.

Q. Is that in North Carolina? A. No, Virginia.

Q. You say that when Mr. Gilroy left the hospital in October, he could do light work? A. I didn't say that. At the time I examined him in 1928, October, 1928, I thought at that time he was able to do a little.

Q. When did he leave the hospital? A. Early in November, around the first of November, 1927.

Q. And you say that when you examined him before he left the hospital, he could do light work? A. No, I didn't say that.

Q. When could he do light work, in your opinion? A. I testified, I believe, that at the time I

examined him after he had left the hospital in October, 1928, I thought at that time he could.

Q. A year later? A. Yes.

Q. You saw him when after that? A. In April, 1929.

Q. After you felt that he could do light work in October, you still wanted to look at him? A. I was requested to examine him by the Standard Oil Company.

Q. That was in April, 1929? A. Yes.

Q. You are not a neurologist? A. No, sir.

Q. And you do not claim to be a specialist in any particular branch of medicine? A. I am a surgeon, and I do specialize in that.

Q. You are not a specialist on the eyes? A. No.

Q. Nor on the mental or nervous afflictions? A. No, sir.

Q. You specialize somewhat on industrial work, don't you? A. Yes, that and in general surgery.

Q. You are continuously employed by the Standard Oil Company? A. No.

Q. You have been doing work for them for how many years? A. There has never—do you want me to explain my position? I am not continuously employed. There has been no contract, and I only take the cases when they request me in the hospital.

Q. And over what period has that been? A. Probably six or seven years.

Q. And at the present time you do get cases from them? A. I still do, yes.

Q. And they pay for the services that you render? A. I render my bill the same as I would any other private individual.

Mr. Gordon: That is all.

HERBERT VOGEL, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Dr. Vogel, what is your profession? A. Physician and surgeon.

Q. Are you licensed to practice in New Jersey? A. I am, sir.

Mr. Gordon: I will concede the doctor's qualifications as an X-ray man. I know him.

By Mr. Bishop:

Q. Are you licensed to practice in New Jersey, Doctor? A. I am.

Q. How long have you been so licensed? A. 1922.

Q. Are you connected with any institutions here in Elizabeth? A. I am, sir, the Elizabeth General Hospital.

Q. Anything else? A. And the All Souls Hospital of Morristown.

Q. Any other institutions? A. No, sir.

Q. In what capacity are you connected with those institutions? A. Roentgenologist to these institutions.

Q. Have you made any special study of the subject of X-ray and X-ray photographs and methods? A. I have, sir, I do that exclusively and have since 1917.

Q. Are you a specialist along that line? A. I am.

Q. Are you familiar with X-ray plates and the manner of reading them and what they show? A. Yes, sir.

Q. I show you an X-ray plate marked "Plaintiff's Exhibit 14" and ask you to examine that? A. Yes, sir.

Q. Doctor, on examining that X-ray plate, do you find any evidence of any diseased condition of the spine? A. This is a picture of the lumbar spine in what is termed a lateral view or lateral position of the lumbar spine. I don't find any evidence of a pathological process in this vertebrae.

Q. Do you find any evidence of arthritis or progressive arthritis? A. No, sir, I don't.

Q. In your opinion, did the person, whose spine is represented by that photograph, have a progressive arthritis or any other kind of an arthritis in the region shown by the photograph? A. No, sir.

Q. Now I show you Plaintiff's Exhibit 15 and ask you to examine that photograph? A. This is a picture of the lumbar spine in what is known as the anterior posterior position, or looking from before backward and also includes the sacro-iliac region as well as the lower ribs.

Q. Do you find any diseased or pathological condition in the bones or joints appearing in that photograph? A. I don't find any diseased process in those structures, seeing the picture.

Q. Do you find any evidence of progressive arthritis or any other kind of arthritis in the bones or joints? A. I do not.

Q. Do you find any in the vertebrae? A. No, sir.

Q. In your opinion, did the person, whose bones are shown by that photograph, have any kind of an arthritis, progressive arthritis or otherwise, in the region shown by the photograph? A. No, sir.

Q. Does that show the lungs? A. No, sir.

Q. Do you mean it does not show them? A. No, sir.

Q. Are you able to detect, in that photograph, any evidence of a fibroses of the lung? A. No, sir; the lungs are not shown at all in this photograph.

Q. I show you another photograph marked "Plaintiff's Exhibit 13", and ask you to examine that. Before you go to that, may I ask you one question? I spoke of a progressive arthritis. I wish to speak of a productive arthritis. Did you find in the other two plates which you examined any evidence of a productive arthritis? A. I found no evidence of any variety of an arthritis, productive or unproductive.

Q. Upon examining this picture, do you find any evidence in that picture of any diseased condition of the bones or joints which are portrayed in the picture? A. This is a picture or a photograph of the dorsal spine; the upper portion of the spine and ribs are also seen in the picture, and I find no arthritic process or other pathological condition about the dorsal vertebrae, and no bone injury of the ribs.

Q. Do you find anything wrong with them at all? A. No.

Q. Do you find a productive arthritis? A. No, sir.

Q. Do you find any kind of an arthritis at all? No arthritic process at all.

Q. Any indications of it? A. No, sir.

Q. Do you find any evidence of anything wrong with either one of the lungs? A. This picture was taken apparently for the spine, because the lung detail is not satisfactory. You cannot take a lung picture the same as a spine picture.

Q. Why not? A. The amount of bone space that is necessary to outline the spine simply obliterates the lung markings in the lung.

Q. Does that photograph show the lungs? A. It shows the pleural cavity on either side, but so far as outlining the lungs is concerned, it does not. There is a blurring there.

Q. Does that show any evidence of a fibroses of either lung? A. I would not say so, from the picture. It is not a satisfactory picture to refer to lung detail.

Q. Could you state from that picture that the person of whom it is taken had a fibroses of either lung? A. I could not say that they did have.

Q. Does that show anything from which anybody could say that? A. I would not venture any opinion of the lung detail whatever, because of the fact that the lung detail is not satisfactorily shown in the picture. In the first place, the lungs are not outlined, and the lung markings are all exaggerated due to the fact that the patient breathed during the taking of the picture, and the amount of the back portion necessary to outline the spine will not give you the lung detail.

Q. What is the effect of the patient breathing while taking the picture? A. The effect in the lungs is that there is a blurring of the lung outlines.

Q. Is that due to motion during the time of exposure? A. It is.

Q. What would be required, if anything, if you were desirous of establishing whether or not the person, whose members are shown by this photograph, had a fibroses of the lungs? A. A picture taken with the usual technique for taking the lung tissue.

Q. Was this picture taken with the proper technique for taking the lung tissue? A. Not for lung tissue, no, sir.

Q. I show you another photograph marked "Plaintiff's Exhibit 19". Having examined that picture, can you state whether or not it shows any evidence of arthritis in the bones of the ankles or feet which are shown in it? A. I see no evidence of an arthritic process in either foot. One is marked right and the other one is marked left, lateral views of both ankles.

Q. Is there either productive arthritis or any other kind of arthritis shown there? A. No, sir.

Q. Do you see any pathological bone condition whatever? A. I do not.

Q. In your opinion, did the person whose bones are shown on that photograph, have in the region appearing in the photograph any arthritis, productive or otherwise? A. No, sir.

Q. Or any other bone disease or abnormal condition? A. The bone structure appears as normal bone structure.

Q. I show you another photograph marked "Plaintiff's Exhibit 16", and having examined that, I ask you to state whether or not that shows any condition of arthritis, productive or otherwise, of the bones of the wrists? A. Not in the bones in the wrists.

Q. Does it show any other abnormal or pathological disease or bone condition in the wrists? A. No, sir.

Q. Does it show any in the thumbs? A. No, sir.

Q. Does it show any in the first, second, and third fingers on either hand? A. No, sir.

Q. Does it show any productive arthritis at any of those regions? A. No, sir, it does not.

Q. Does it show any other bone disease or abnormal condition? A. Not in the fingers mentioned, no, sir.

Q. Does it show anything with respect to arthritis in the little fingers? A. Both little fingers appear flexed, whether due to position or a condition existing in the fingers. The appearance of the first interphalangeal joint of the right finger appears normal, but that of the left side does show some cartilaginous erosion of the articular surfaces, or the first interphalangeal joint.

Q. Does it show any productive arthritis? A. It is not a productive type, no. It is simply an erosion of the cartilages. The articular surfaces have become somewhat flat, so to speak, or in closer proximity. The cartilage has apparently been atrophied or disappeared.

Q. Does it show any abnormal bone structure? Does it show any accretion or growth on the bone? A. No, it does not.

Q. In your opinion, except in the little fingers in the respects you mentioned, does the person, whose hands are shown by that photograph, have any productive arthritis or any other kind of arthritis? A. No, sir.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. Doctor, X-ray technicians differ on interpretations, do they not? Some men read a picture one way and others read it another way? A. Customarily, it is not considered, amongst the leading profession, a satisfactory interpretation to receive an interpretation from a technician. An interpretation by a competent physician is a recognized correct interpretation of X-ray pictures.

Q. Physicians who specialize in X-ray work similar to this have occasion to differ among themselves as to the interpretation of plates? A. Yes, sir, indeed.

Q. And those interpretations are very frequently honest interpretations, although they may be at variance with the interpretations of others, isn't that so? A. Well, of course, everybody is apt to make a mistake.

Q. And everybody is apt to have a different opinion than someone else, and they are entitled to a different opinion?

Mr. Bishop: I object to what people are entitled to.

Q. Doctors who read X-ray pictures differ in their interpretations, do they not? A. Provided they are people who have not had very marked experience in the work, but I would say that most people of considerable experience, and taking pictures in the proper and recognized manner, as a rule, arrive at pretty much the same conclusion.

Q. But they differ sometimes then, don't they? A. Occasionally.

Q. You studied these pictures as you were seated in the chair? A. Yes.

Q. You looked at them very carefully, didn't you? A. Yes, sir.

Q. This is not the first time you looked at those pictures? A. No, sir.

Q. You looked at them yesterday? A. I did.

Q. And you studied them yesterday? A. Yes, sir.

Q. Why did you have to study them over again today?

Mr. Bishop: I object to that. He looked at it again today because I asked him to.

Mr. Gordon: I want to know why he had to study them today if he studied them yesterday?

The Court: I think it is proper on cross-examination. The doctor can take care of that.

A. It is not my custom to hasten over things, but rather to deliberate, and also to recognize the film markings, the right and left side. They are written on all of them with the lead marker, which does not render it very readily visible.

Q. You were not studying the side of the pictures today, were you? A. Looking at the pictures to determine which was the right and left hand and which was the right and left foot to make sure that both feet were represented as such.

Q. Weren't you studying the parts also today? A. Well, I would say a review of the parts, not necessarily study.

Q. Why did you have to go over your work of yesterday, if you are usually deliberate? A. Well, I consider that deliberation.

Q. Then you were not satisfied with your examination of yesterday, were you? A. Yes, sir.

Q. Then why did you re-study it today? A. It is frequently my custom to review pictures that I have taken.

Q. And even you have to look them over twice, don't you? A. It is not a bad custom whatever to do that, frequently three times or more.

Mr. Gordon: That is all.

William K. Remsen, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Remsen, where do you live? A. Brooklyn.

Q. Where are you employed? A. Standard Oil Company at Bayonne.

Q. How long have you been employed there? A. October 16, 1922.

Q. What was the nature of your duties? A. Assistant superintendent of the gas department.

Q. Is that Mr. Isles's department? A. Yes, sir.

Q. Who do you work under? A. Mr. Isles.

Q. Is that what you were doing in August, 1927? A. Yes, sir.

Q. Were you at the plant on August 8, 1927? A. Yes, sir, in the daytime.

Q. During what hours? A. 8.15 to 4.45.

Q. During that time did you have occasion for any reason to pass the gas holders numbers one and two? A. I can't recall.

Q. Are you familiar with the odor of illuminating gas? A. Yes, sir.

Q. Is that the kind of gas that was in these gas holders? A. No, sir, not illuminating gas of the city type.

Q. Are you familiar with the odor of the kind of gas that was in these holders? A. Yes, sir.

Q. Is that the same as the general odor of oil and so on that is always present over the oil refineries? A. Well, it is somewhat similar, the gas and the oil.

Q. Can you tell the difference? A. Yes.

Q. Do you know when you last visited these gas holders prior to the accident? A. Well, I may have visited them that day, but I can't recall because my duties take me around the whole plant.

Q. Do you know when you did last visit them? A. Within a week. I accompanied Mr. Isles on an inspection of those gas holders.

Q. Within a week of the day of this accident? A. Yes.

Q. Do you mean a week before it? A. Before.

Q. How close to them did you go on that occasion? A. I went right on the gas holder.

Q. You mean up on the top of it? A. On the walk around it.

Q. Did you go up on the roof of it? A. No, sir.

Q. Did anybody go up on it? A. Yes, sir.

Q. Who did? A. Mr. Isles.

Q. Did you see him go up on it? A. I did.

Q. Where does the walk that you refer to run? Where is that? A. It runs entirely around the floor part of the gas holder, about maybe twenty feet from the ground.

Q. Is that at the top of what they call the tank, the immovable portion of it? A. Yes.

Q. It runs around that? A. Yes.

Q. At the time you were up there, how high above that was the roof where Mr. Isles went? A. About twenty feet.

Q. At that time what did you do up on that walk? A. Well, I simply stayed at the walk as sort of a watchman in case anything should happen to him. I was there ready to render assistance.

Q. Did you walk around the walk? A. I followed him around; as he circled the top of the roof, I circled around the walk.

Q. Did he go all the way around the top of the roof? A. Yes.

Q. Did you go all the way around the walk at the top of the tank? A. I did.

Q. While you made the circle of the top of the first section of that tank, did you notice or did you look for any unusual or improper condition? A. I looked for it, but I didn't notice any.

Q. Did you smell any gas? A. No, sir.

Q. How long were you up there? Do you know? A. I would say about ten minutes.

Q. During any of that time, did you smell any gas? A. No, sir.

Q. Do you know about what time of the day that was? A. Well, sometime around midday. I think a little in the afternoon. I can't recall exactly.

Q. What time did you leave during the day of this accident? A. In the neighborhood of 4:45.

Q. Did you pass those gas holders on the way out? A. No, sir.

Q. Your path did not take you by there? A. No, sir.

Q. When did you next see the gas holder after the accident? A. About 7 A. M., or a little thereafter on August 9.

Q. Was that the day after the accident? A. Yes, sir.

Q. What was the position of the tank at that time? A. It was entirely collapsed.

Q. Down? A. Down.

Q. Where was the top of it? Where was the roof with relation to the walk? A. It was even with the walk.

Q. When you were on it after the accident, did you go on the roof? A. I simply stepped on it. I didn't walk across it.

Q. Did you see anything unusual about the condition of the roof? A. I saw a hole.

Q. Did you examine the hole? A. I did.

Q. What condition did you find the metal around the hole to be in? A. Well, it was in good condition, as if a new break, if that is what you mean.

Q. Was it bent or not? A. It was bent.

Q. Was it corroded or not? A. It was not.

Q. Did it show any evidence whatever of corrosion? A. No, sir.

Q. Did you look particularly for that? A. No, sir.

Q. Could you have seen it if it had been corroded? A. Yes, sir.

Q. Did you see any other holes beside that one? A. No, sir.

Q. Around the point where the hole was, the edges on the inside, did you see any pitting or pin holes in the metal? A. No, sir.

Q. Did you see any etching or eating away of the metal by anything? A. No, sir.

Q. Do you know what wax taling is? A. Yes, sir.

Q. What is that used for? A. It is used for coating metal to prevent rust or corrosion or attacks by gases.

Q. Does it prevent it? A. It does.

Q. Do you know whether or not the inside of this tank was coated with that? A. It was.

Q. Did you see any evidence or traces of that on the inside of the tank after the accident? A. Yes, sir.

Q. Did you go into the tank after the accident? A. No, sir.

Q. Did you look in it? A. Yes, sir, when it was being repaired after the accident, I looked into it. I didn't go inside; I looked in through the manhole.

Q. Did they have the manholes open? A. Yes.

Q. And they have part of the plate cut off or cut out? A. Yes, sir, mostly all cut off.

Q. In the vicinity of the hole? A. Yes, sir.

Q. At that time, what was the condition of the inside of the tank? A. Well, other than where the hole was, it was in good condition.

Q. Did you see anywhere around that hole or the plates or anywhere else any evidence of corrosion or pitting? A. No, sir.

Q. Could you see whether or not the wax taling on the inside of the tank had been affected in any way by the fire? A. I couldn't see on the inside, but it was a searing on the top where the fire had burned the top plate.

Cross-examination by Mr. Gordon:

Q. Mr. Remsen, where do you live in Brooklyn A. 4010 Quentin Road.

Q. How long have you been working for the Standard Oil Company? A. Since October 16, 1922.

Q. You are still working for them? A. Yes.

Q. You are still in the same position? A. Yes, sir.

Q. You stated that you and Mr. Isles went up to the tank together and that Mr. Isles went on top of the tank, and you went on the walk? A. Yes, sir.

Q. You said also something about your being there in case anything happened to Mr. Isles? A. Yes, sir.

Q. What did you think was likely to happen to Mr. Isles? A. It is customary to make two go on all inspections of tanks or gas holders or anything around the plant.

Q. That is because something is likely to happen, isn't it?

Mr. Bishop: I object.

A. Not likely.

Q. Does it? A. No, sir.

Q. Has it happened? A. No, sir.

Mr. Bishop: I object to that.

The Court: This seems to be proper cross-examination.

Mr. Bishop: There is no time or place fixed.

By Mr. Gordon:

Q. What did you expect was likely to happen to Mr. Isles while you stood on the walk?

Mr. Bishop: I object to that.

The Court: He did not say anything was likely to happen. He said in case anything did happen.

By Mr. Gordon:

Q. What did you think could happen?

Mr. Bishop: I object to that as irrelevant and incompetent.

The Court: Objection overruled.

Mr. Bishop: Exception.

(The stenographer read the last question as follows:) "Question: What did you think could happen?"

A. Well, anything is liable to happen, of course. It is a rule of the company that two men should make all inspections of any tanks or gas holders or any dangerous positions—not that they are dangerous at the time, but that is just the company's rule.

Q. Did Mr. Isles ever make any inspection under the directions from your department? A. I believe he did, but I couldn't say.

Q. Was it part of his duty to make inspections from orders issued from your department? A. Yes, sir.

Q. And were those orders in writing?

Mr. Bishop: I object to that unless it is shown that this witness knows about it.

The Court: He said under the direction of his department.

By Mr. Gordon:

Q. Are you the assistant superintendent of your department? A. I am.

Q. Do you issue orders to Mr. Halsey? A. No, sir, not directly.

Q. Do you hand them to Halsey from somebody else? A. Mr. Isles is the superintendent.

Mr. Bishop: I object to that.

The Court: If he is a part of the transaction, he can testify to it.

By Mr. Gordon:

Q. Do you get orders from Mr. Isles? A. I do.

Q. Do you give them to Mr. Halsey? A. Yes, sir.

Q. In writing? A. Sometimes.

Q. You keep records, don't you? A. We do.

Q. How many gas tanks did you inspect? A. Three.

Q. When? A. About a week previous to August 8. I don't know the exact date.

Q. How many gas tanks are there subject to your inspection in the yard? A. There were four.

Q. Is that the only number of tanks that you inspect in this refinery? A. The only number of gas tanks.

Q. How many other kind of tanks do you inspect?

Mr. Bishop: I object, unless it appears that this witness inspects some tanks other than gas tanks.

The Court: I presume that question is being asked to show how much of his time was being occupied in inspecting anything.

Mr. Gordon: And also to test his credibility as to how he remembers this date and this particular tank.

Mr. Bishop: Exception.

By Mr. Gordon:

Q. How many gas or oil tanks do you inspect in the refinery? A. Four gas tanks and four oil tanks.

Q. How frequently do you make these inspections? A. No periodic time.

Q. They are not regular inspections, are they? A. Not by me.

Q. This was a special inspection, wasn't it? A. It was.

Q. The superintendent and the assistant superintendent went up? A. Yes, sir.

Q. What kind of gas was in that tank the day you made the inspection? A. Refinery gas.

Q. You said it was not the same as the city illuminating gas? A. Yes, sir.

Q. In what respect was it different? A. Well——

Mr. Bishop: I object to that unless he is qualified to tell. He does not show that he knows what the contents of city illuminating gas was.

The Court: But in answer to your question on direct examination, he said it was not city illuminating gas, so if he knows that it was not, he must have some idea what it was.

Mr. Bishop: Exception.

(The stenographer read the last question as follows:)

"Question: In what respect was it different?" A. Well, I can't give you the technical analyses, but the gases we have is from crude oil, oils around the refinery, where illuminating gas is not made from that.

Q. It is a raw gas, isn't it? A. Yes, it is raw.

Q. And it had in it a high sulphuric content, didn't it?

Mr. Bishop: I object to that.

By Mr. Gordon:

Q. Did you inspect this gas holder? A. No, sir.

Q. You never inspected the gas holder? A. No, sir.

Q. You don't know what was inside of it, do you? A. Not from inspection.

Q. Isn't it a fact, that most of your work, practically all of your work, is confined to your office? A. No, sir.

Q. You get out on the refinery? A. Yes, sir.

Q. Do you get out there quite frequently? A. Yes, sir.

Q. Do you get out to any other place than this gas holder? A. Yes, sir.

Q. You say you did not smell any gas around the holder? A. No, sir.

Q. You did not smell any at all? A. No, sir.

Q. You are sure about that? A. Yes, sir.

Q. When were you there before August 8, 1927? A. I can't say the exact date.

Q. How long before? A. I can't tell you the time or date before.

Q. Was it a month before? A. It was less than that.

Q. Was it within a few weeks before? A. Naturally, my position would take me there.

Q. Was it or was it not within a few weeks before? A. Yes.

Q. Was that a special inspection too? A. No, sir.

Q. That was an ordinary inspection? A. I didn't say it was an inspection.

Q. Why were you there? A. My duties take me around the whole gas system to see if things are in proper order.

Q. You would go around and do not inspect? A. Well, it is part of my regular duties. I would not call it a special inspection.

Q. Did you inspect a couple of weeks before August 8, 1927? A. In line of duty, yes.

Q. Did you or did you not inspect, whether or not it was in line of duty? A. I did.

Q. Did you inspect a couple of weeks before August 8? A. Yes.

Q. Did you make a record of it? A. No, sir.

Q. Do you keep a log of inspections? A. No, sir.

Q. When, before that, did you make an inspection? A. I don't know.

Q. When you made the inspection two weeks before August 8, who was with you then? A. Probably the lineman, a man by the name of Ward.

Q. Doesn't he make the inspections? Isn't that his job? A. We don't call those inspections.

Q. What do you call looking it over? A. It is just routine work.

Q. When is it an inspection? A. When it is gone into thoroughly, the metal in the roof or

different parts of the mechanical work is inspected.

Q. Up until two weeks before this accident there wasn't any going over thoroughly, was there?

Mr. Bishop: I object to that.

By Mr. Gordon:

Q. Did you go over it thoroughly within two weeks of the accident? A. Within two weeks?

Q. Yes. A. No, sir, I did not.

Q. And within a week before the accident, did you go over it thoroughly? A. No, sir.

Q. All Mr. Isles and you did together was to go to the roof of this place, wasn't it? A. Mr. Isles went over; I didn't.

Q. Does he go around inspecting regularly too? A. Well, by regular, do you mean periodical? Or in line of his duties?

Q. Periodically, at stated times, I mean? A. No, sir.

Q. Were you ever inside of gas holder number two since you have been employed by the company? A. No, sir.

Re-direct examination by Mr. Bishop:

Q. Mr. Remsen, do you know whether or not Mr. Isles visits these gas holders at intervals? A. He does.

Q. Do you know whether or not he visits them at regular intervals?

Mr. Gordon: I object to that unless he has with him the records.

The Court: He may ask him, if he knows.

A. Do you mean regular periodic intervals?

Q. Regular intervals. A. Do you mean twice a month or the first of each month?

Q. Yes. A. No, sir, he don't.

Q. Does he visit them frequently? A. Yes.

Q. About how frequently does he visit them?

Mr. Gordon: I object to that unless the witness knows of his own knowledge.

By Mr. Bishop:

Q. Do you know about how frequently he visits them? A. No, sir.

Q. He visits them sometimes when you are not with him? A. He does.

Q. And at times you visit them with him? A. Yes.

Q. And at times you visit them without him? A. Yes.

Q. And when you visit them with more or less regularity—— A. Yes.

Q. (Continued)—do you visit them frequently? A. Yes.

Q. About how frequently do you visit them? A. Generally weekly.

Q. How many times a week? A. I couldn't say.

Q. Do you, at times, visit them oftener than once a week? A. Yes, sir.

Q. On those occasions do you go close to them? A. Yes, sir.

Q. Do you recall any occasion that you have been on the roof of them? A. No, sir.

Q. Do you go up on the walk? A. Yes, sir.

Q. About how often do you do that? A. At least once a week, sometimes more frequently, if you are in the neighborhood.

Q. If you are in the neighborhood, is it your practice to go up on the walk and walk around it? A. Yes, sir.

Q. What reason have you for doing that? A. Well, inspection of equipment attached to the gas department.

Q. If you noticed anything wrong when you were up on top of that walk, would you do anything about it? A. Certainly.

Q. What would you do? A. I would remedy it.

Q. Can you recall any occasion previous to this accident when you did notice anything wrong with it? A. Yes, sir.

Q. When was that? A. Several years or months before; I can't recall just how long.

Q. Had you noticed anything wrong in less than several months prior to this accident? A. No, sir.

Q. And during several months prior to this accident you had been up and walking around that walk about once a week? A. Yes.

Q. At least once a week? A. Yes.

Q. And during that interval, did you notice anything wrong with it? A. No, sir.

Q. Did you smell any gas? A. No, sir.

Q. On the occasion when you said you did notice something wrong, what was done? A. It was patched. There was a small hole in it and it had been patched.

Q. Where was that? A. In one of the lifts, what we call them.

Q. How long before this accident was that done? A. More than six months. I don't know how long.

Q. And you did not discover anything wrong within six months prior to this accident at any time? A. No, sir.

Re-cross-examination by Mr. Gordon:

Q. What was the matter with that hole? What caused it? A. It was due to a steam jet which we have to heat the water in the seal.

Q. And the seal went bad? A. Not the seal.

Q. What went bad? A. Just the side of the plate. The steam jet opened against the metal and burned a hole through it.

Q. A hole was burned through the metal through steam? A. Yes, sir.

Q. You are sure about that? A. Yes, sir.

Q. There is no question about that on gas holder number two? A. No, sir.

Q. You know about it? A. Yes, sir.

Q. Did you have any record of that? A. I believe the record where it is repaired——

Q. You have a record of that? A. I couldn't say.

Q. This walk is how far below the roof of the tank or the holder? A. Depending upon how much gas is in it.

Q. When the holder is all the way up, how far below is it? A. About twenty-five feet.

Q. What is the height of the sheets? What is the width of the sheets? A. About five feet.

Q. It is not a foot and a half, is it? A. No, sir.

Q. It is five feet, isn't it? A. Yes, sir.

Q. And when the holder is at its complete height, it is about forty feet from the ground, isn't it? A. The roof?

Q. Yes. A. Yes, sir.

Q. And when it is half from the ground it is twenty feet from the ground, isn't it? A. About that, a little less, I think.

Q. How was your attention directed to the hole that you repaired about six months before? A. By a slight bubbling in the water.

Q. Who noticed that? A. I can't recall if I noticed it or the man who goes around in the morning called by attention to it. I don't know which of us.

Q. At that time, did you smell gas? A. Yes, sir.

Q. What kind of a smell was it? Was it an oil smell or a gas smell? A. Sort of an oil, sulphuric smell.

Q. Sulphur? A. Slight odor.

Q. Where is the sulphur from? A. Sulphur is from the crude oil.

Q. In the gas that is in the holder? A. No, sir, not from the oil that is in there.

Q. Where did the sulphur come from? A. It is originally crude oil.

Q. Does not the sulphur get into the inside of the tank? A. A small amount.

Q. Does not that produce corrosion? A. Yes, sir.

Mr. Gordon: That is all.

Re-direct examination by Mr. Bishop:

Q. Did you ever see any evidence of corrosion around this gas holder number two? A. No, sir.

Mr. Bishop: That is all.

The Court: We will adjourn at this time until 9:30 o'clock tomorrow morning.

(A recess was had until 9:30 o'clock, Friday morning, November 1, 1929.)

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

October Term, 1929.

EDWARD N. GILROY

vs.

STANDARD OIL COMPANY (a New Jersey corporation) and STANDARD OIL COMPANY OF NEW JERSEY (a corporation of Delaware, authorized to do business in New Jersey).

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. LLOYD THOMPSON, Judge, and a jury, at the Union County Court House, in the City of Elizabeth, New Jersey, on the first day of November, A. D. 1929, at 9:30 A. M.

Appearances:

FRANCIS A. GORDON, Esq., attorney for the plaintiff.

Messrs. LINDABURY, DEPUE & FAULKES (JOHN W. BISHOP, JR., Esq., present; BURTIS S. HORNER, Esq., present), attorneys for the defendants.

JOHN J. BRENNAN, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Brennan, you are working for the Standard Oil Company, are you not? A. Yes, sir.

Q. How long have you been working for them? A. In Bayonne plant I have been working the last fifteen years, since 1914.

Q. Where do you live? A. Bayonne, 952 Boulevard.

Q. What is the nature of your employment? A. Right now?

Q. No, on August 8, 1927? A. I was night superintendent.

Q. What duties did you perform in that capacity? A. Well, they took care of all the process work, and everything connected with the plant in general.

Q. Were you present at the plant on the night of August 8, 1927? A. Yes, I was.

Q. When did you get there? A. Twenty minutes past eleven.

Q. You got there about twenty minutes after eleven? A. Yes, sir.

Q. Had you been there earlier in the day? A. No, I had not,—well, I left that morning; I was working the night before and left that morning.

Q. What time in the morning did you leave? A. About half-past seven.

Q. What route did you leave by? Did you go past these gas holders on the way out? A. No.

Q. When had you last seen them prior to the accident? A. Well, I can't say just when.

Q. Did you visit the scene of the accident or explosion on the night of the accident? A. Yes, sir.

Q. Was any fire still burning when you got there? A. Yes.

Q. Where was that fire? A. Right at the edge of the roof of number two gas holder.

Q. Did you see any other fire anywhere else? A. No, I did not.

Q. Did you see any fire in the road? A. No.

Q. Or did you see any fire in any ditch alongside of the road? A. No.

Q. Or did you see any fire in or about the pump house number three? A. No, sir.

Q. What was the weather when you got there? A. It was raining very heavily.

Q. What do you know about the weather for an hour or so prior to that? A. I can't say.

Q. What time was it when you left your home? A. Probably ten minutes past eleven.

Q. What was the weather then? A. It was raining.

Q. How was it raining? Was it raining hard? A. It was raining very heavily, yes, sir.

Q. How long did you remain in that vicinity? A. Well, I remained there until the fire was extinguished, burned out.

Q. Did you examine the gas holder at any time after the fire? A. Yes, sir, the following morning.

Q. And at what time in the morning did you examine it? A. About 6.30.

Q. What kind of an examination did you make? A. Why, I went on top of the platform around the holder where the hole was and looked over the hole.

Q. Where was that hole with respect to the point where you saw the fire the night before? A. Right at the same point.

Q. The same point where the fire was? A. Yes, sir.

Q. Did you find a hole there? A. Yes, sir.

Q. Did you examine it? A. Yes, sir.

Q. Did you examine the metal around it? A. Yes, sir.

Q. What did you find the condition of the metal around the hole to be? A. It appeared to be in good condition to me.

Q. Did you find any evidence of corrosion? A. I did not.

Q. Did you look for it? A. Yes.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. Why did you look for corrosion there? A. Well, just to see the condition of the metal.

Q. Was corrosion apt to be there? A. Well, I don't—there may have been.

Re-direct examination by Mr. Bishop:

Q. Did you see any corrosion? A. No, sir.

Q. Did you see any evidence of any corrosion? A. No, sir.

Q. Did you see anything to lead you to suspect that there was any corrosion? A. No, sir.

Mr. Bishop: That is all.

Re-cross examination by Mr. Gordon:

Q. You looked at it from the outside? A. From the tear.

Q. You looked at it from the outside? A. Yes.

Q. Were you on top of the tank? A. Yes.

By Mr. Bishop:

Q. Did you look inside of the hole? A. Yes.

By Mr. Gordon:

Q. What could you see inside of the hole? Wasn't it dark? A. It was, but the angle iron was dented in and you could see the angle iron and the top ring sheet where it was pushed away from the angle iron.

Q. Could you see underneath the roof of the tank? A. No, you could not.

By Mr. Bishop:

Q. Did you examine the edges of the torn metal? A. You could not see the torn metal very well; it was torn, but you could not see underneath it, just see the tear.

Q. You could see the edges of it, could you not?

Mr. Gordon: I object to that as leading.

Q. Could you see the edges of it? A. Yes, you could see the edges of the tear.

Q. Was there any evidence of corrosion around the edges of the tear? A. No.

By Mr. Gordon:

Q. The hose had been played on that spot for quite a while, had it not? A. Yes, sir.

Mr. Gordon: That is all.

EDNA GRANT KRAUSE, a witness produced on behalf of the defendants, having been previously sworn, testified as follows:

Direct examination by Mr. Bishop:

Q. Mrs. Krause, you rendered certain services to Mr. Gilroy as a nurse? A. Yes, I did.

Q. You were paid for those services? A. Yes.

Q. Did Mr. Gilroy pay you? A. No.

Q. Who paid you? A. The Standard Oil Company.

Mr. Bishop: That is all.

Mr. Gordon: That is all.

JOHN MORAN, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Moran, where do you work? A. Now I work as a pipefitter's helper.

Q. Whom do you work for? A. Standard Oil of Bayonne.

Q. Whom did you work for on August 8, 1927? A. Standard Oil Company.

Q. What was your job then? A. I was pumpman at the time.

Q. Where? A. Number three plant pump house.

Q. Is that anywhere near these gas holders? A. Yes, pretty close to it.

Q. How close to them is it? A. Well, I figure about between thirty-five to forty feet from the pump house to the gas holders is about that distance.

Q. What shift were you on that night? A. I was on three to eleven shift.

Q. Do you mean from three in the afternoon until eleven at night? A. Yes, sir.

Q. You came out there about three o'clock? A. Well, I just come on about half-past two.

Q. You came in around half-past two? A. Yes.

Q. You changed your clothes and got ready to work? A. Yes.

Q. How did you come in? A. I think I walked to work that afternoon; I think I walked.

Q. What road did you come over? A. I come straight down Twenty-second street road, down all the ways.

Q. Did you walk on Hook Road at any time? A. No, just go up to the power house. It is called Hook Road from the power house down.

Q. That is, from where the road leaves the railroad? A. Yes.

Q. And it turns south? A. Yes.

Q. You walked down there? A. Yes.

Q. Did you pass the gas holders? A. No, not at that point I didn't pass the gas holders. I got into the pump house, between the pump house and the locker room and the power house.

Q. How close to the gas holders did you come when you came to work around half-past two? A. I was about twenty-five to thirty feet from the gas holders, from number two gas holder.

Q. Did you smell any gas? A. No, sir, I didn't smell no gas.

Q. Do you know the smell of gas? A. Yes, sir.

Q. During the time you worked there in your pump house, that you said was forty feet from the gas holders—is that right? A. Yes, about thirty-five to forty feet from the pump house, about that distance.

Q. You were in the pump house? A. Yes, I was in the pump house, mostly all the time around there, and outside at times.

Q. You came outside at times between three and eleven? A. Yes.

Q. During any of that time between three and eleven o'clock on the afternoon of this accident, did you smell any gas? A. No, I didn't smell any gas except the same as the gas around the yard all the time, the usual smell of oil and gas, not any special smell like any leaks.

Q. Did you smell any illuminating gas in this gas holder? A. No, sir.

Q. Do you know what the smell of that gas is? A. Yes, I know what the smell of that gas is.

Q. When did you leave? A. I left the pump house about 10:35.

Q. Where did you go then? A. I went south about one block before I got on the jitney.

Q. Did you go anywhere to change clothes? A. No, sir; no, sir.

Q. At the time you left your pumps, what were they doing? A. There were three pumps operating at the time I left.

Q. Was there anything wrong with them when you left? A. No, them pumps were all right.

Mr. Gordon: I object to that as calling for a conclusion.

By Mr. Bishop:

Q. Do you know whether or not your pumps were in good order on that day? A. Yes, they was in good order.

Q. Do you know whether or not they were in good order when you left them? A. Yes.

Q. Do you know whether or not they were very heated? A. No, sir.

Q. Were they very heated when you left them? A. No, sir, not as I know of, because we generally run them pumps from twenty pounds to maybe sixty pounds pressure.

Q. Do you know whether or not the pumps were so hot that they cause flames or fire? A. I never seen it happen. I don't know anything about that. I never seen it happen.

Q. Did it happen the afternoon or night while you were there? A. A fire?

Q. Yes. A. No, no fire.

Q. When you left the pump house, you said you went south? A. I went south about one block before I boarded the jitney.

Q. How did you go south? Did you go on the road or through the plant? A. I went through the plant.

Q. And finally you came to the road? A. Yes.

Q. Where did you get out onto the road? A. I turned to my right about ten yards, and then I went to my left again and went south again and got on the jitney.

Q. How far south of these gas holders did you get on the jitney? A. I would say about thirty to forty yards.

Q. Thirty to forty yards south of the gas holder? A. Yes.

Q. During any of that time did you smell any gas? A. No, sir.

Q. Where did you go on the jitney? A. I went home and passed by the gas holders.

Q. You passed the gas holders? A. Yes, sir.

Q. While you were passing the gas holders, did you smell any gas? A. No, sir, I did not.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. You are still working for the company? A. Yes, sir.

Q. And you keep records of your work and make reports? A. Yes, we have a book there we put reports down in and what tank we are pumping and what we are using all the time and what pumps are going.

Q. How were you feeling in August, 1927? Were you in pretty good health? A. I was pretty good.

Q. Did you have a cold that night? A. No, sir, not that I know of.

Q. You might have had a cold in the head? A. No.

Q. Was your sense of smell pretty good that night? A. Yes, pretty good.

Q. These pumps get overheated sometimes, don't they? A. Not as I know of. I don't know of any pumps getting overheated while I have been there on my shifts.

Q. Doesn't the packing sometimes get out, and don't you have to re-line them? A. Well, once in awhile you get a packing, a leak.

Q. Where are the leaks in the pumps when you have to put the packing in?

Mr. Bishop: I object to that.

Q. Where are these leaks when you have to put the packing in? A. The pumps where they work, you know, they have piston rods working back and forth, and the packing comes loose once in awhile.

Q. Is that the north end or the south end of the building? A. The south end.

Q. You quit the pump house on August 8, 1927, about twenty-five minutes to eleven? A. Yes, about twenty-five to eleven I left the locker room.

Q. At that time, did you see your relief men? A. Yes.

Q. Who were they? A. John Doherty relieved me that night.

Q. Doherty had gotten there when you got out of the building? A. Yes.

Q. You were both in the locker room practically about the same time? A. Yes, sir, we was in the locker room.

Q. And you had an assistant that night, or you were working with somebody else on the shift? A. I had an assistant that night.

Q. What was his name? A. Anthony Binnis.

Q. And Mr. Binnis was in the locker room changing clothes with you? A. Yes.

Q. Who came in with Doherty? A. John Kushnar.

Q. They were there that night, weren't they? A. Yes.

Q. There is no question about that? A. Sure, they were there that night.

Q. And you were all in the locker room changing your clothes? A. Yes.

Q. Were you there when the trouble happened, or had you gotten away before that? A. I was gone away before that.

Q. You don't know what happened shortly before the gas holder went up, do you? A. No, I don't know anything about that.

Q. You were away from the plant then? A. Yes.

Q. It did not take you long to get away? A. No.

Q. You were gone twenty-five to eleven, as I recall it? A. I got on the jitney about 10:40.

Q. That is about twenty minutes of eleven? A. Yes.

Q. So that you were away from that place for almost twenty minutes before anything happened? A. I guess I was.

Q. While you men were in the locker room together, the pumps were in operation, weren't they? A. Yes, sir.

Re-direct examination by Mr. Bishop:

Q. Were those pumps pumping oil or gas that night? A. One pump was crude oil and two with light oil.

Q. All pumping oil? A. Yes, there was three pumps.

Re-cross-examination by Mr. Gordon:

Q. You said something about light oil. Do you know about kerosene and naphtha? A. Yes, sir.

Q. Did they pump that stuff, too? A. They pumped gasoline once in awhile.

Q. Were they pumping any of that stuff on that night? A. No, not gasoline.

Q. Did you keep records of what they pumped that night? A. Yes, it is down there.

Q. Did you keep records of what they pumped that night? A. Yes, we have a book down there.

Mr. Gordon: That is all.

TIMOTHY J. KELLY, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Kelly, where do you work now? A. Standard Oil company.

Q. Where did you work in August, 1927? A. Well, the same plant.

Q. How long have you been working at that plant? A. Since 1927, a little over twenty-two years.

Q. A little over how many years? A. A little over twenty-two years.

Q. Do you mean since 1907? A. 1907, I mean.

Q. What time in 1907? A. The twenty-first day of May.

Q. Do you know where Hook Road is? A. Yes.

Q. I call your attention to a portion of Hook Road that runs south from Constable Hook Railroad down to a point where there is a right angle turn. You understand how that map works? A. Yes.

Q. Do you know who was in possession and occupation of the land on each side of that part of Hook Road when you first went to work there?

Mr. Gordon: I object to that as immaterial.

The Court: I will allow it.

Mr. Gordon: Exception.

A. The copper works had a part of it.

Q. What about this plant in here (indicating) where the main power house and gas holders were? A. That belonged to the Standard Oil Company.

Q. On both sides of the road? A. Yes.

Q. And all the way down to this right angle? A. Yes.

Q. It was built on——

Mr. Gordon: I object to that as leading.

The Court: I think that if you will ask the witness if the Standard Oil Company was operating its plant there during all the time that he was with them——

By Mr. Bishop:

Q. Was the Standard Oil Company occupying its plant on the land on both sides of the road of that section during all the time you have been with them? A. As far as I know they were.

Q. As far back as you can remember? A. Yes.

Q. Clean back to May, 1907? A. Yes, they were.

Q. I show you a photograph marked "Plaintiff's Exhibit 4" and ask you if you know what that represents? Do you know what road that is? A. Yes.

Q. What road is it? A. Hook Road.

Q. I show you another photograph marked "Plaintiff's Exhibit 5", and ask you what road that represents? A. The same thing. It is the same branch of it, as far as I can see.

Q. I ask you what this picture represents, marked "Plaintiff's Exhibit 6", if you know? A. That is a gas holder.

By the Court:

Q. You will have to speak louder so that everyone can hear you. What is this road? A. This road comes along——

By Mr. Bishop:

Q. Is that what they call Hook Road? A. Yes, that is a branch of it.

Q. I call your attention to some pipes and things that cross overhead over the road? A. They are crossing over the road.

Q. That is plaintiff's Exhibit 6, what are those things for? Do you know?

Mr. Gordon: I object to that unless he knows of his own knowledge.

The Witness: They use them for steam, I think.

Mr. Gordon: I object to what he thinks.

The Witness: I am thinking of what I know.

By Mr. Bishop:

Q. Who uses them? A. Standard Oil.

Q. What are these pipes overhead here on the company's cross-road? Do you know who uses them? A. Standard Oil also.

Q. I call your attention to a lot of pipes on Exhibit P-4 that go across the road. Do you know who uses them? A. The same branch, the same company.

Q. Where were you on the night of the accident? A. I was firing stills.

Q. How near were you to the place where the accident happened? A. Well, I would say about five blocks away from it.

Q. How did you get into the place where you were doing your work? A. Came right through there (indicating).

Q. Do you mean over that same road? A. Yes.

Q. What shift were you on? A. Three to eleven.

Q. What time did you come to work that day? A. I got in there about twenty after two.

Q. About half-past two? A. About twenty after two.

Q. What road did you come along to go to work? A. Down Twenty-second Street and into Hook Road and down to the plant.

Q. Did you go along through Hook Road? A. Yes.

Q. How far down Hook Road did you go? A. Down to the end.

Q. Did you go as far as these gas holders? A. Yes, sir.

Q. Did you pass them? A. Yes.

Q. How close did you pass to them? A. Well, I can't really answer that question.

Q. Did you go down the road past them? A. We went through the center of the road about as fast as we can go.

Q. Were you walking? A. I was on the bus.

Q. When you went in about half-past two that afternoon, did you smell any gas? A. No.

Q. Do you know what illuminating gas smells like? A. Yes.

Q. Do you know what the kind of gas in that gas holder smells like? A. Yes, I know a little about that.

Q. Did you smell anything like that? A. No.

Q. When did you leave? A. 10.45.

Q. How did you leave? A. I got the bus coming out at 10.40.

Q. When did the bus go? Where did it go? A. It came up the Hook Road.

Q. When did you get on? A. Pretty close to the time; to 10.45, she was leaving.

Q. You got on pretty close to 10.45? A. Yes.

Q. Where did you go on it? A. I got on down at the end of the road—not the end of the road, but at the railroad, as far as the bus runs.

Q. Do you mean down at the place where the bus stops? A. Yes, as far as she goes.

Q. What did you do after you got on? A. I sat down.

Q. What did the bus do? A. She pulled out.

Q. What road did she go along? A. She came up the Hook Road and up Twenty-second street.

Q. Did she pass the gas holders? A. Yes.

Q. About what time did she pass them? A. Well, I would say about ten to eleven.

Q. About ten minutes to eleven? A. Yes.

Q. Did you smell any gas as you went past them? A. No.

Q. What did you do after that? A. I went on home.

Q. What was the weather like when you came to work that afternoon? A. Well, it was warm and cloudy a little.

Q. Was it dry or rainy or wet? A. It was wet.

Q. Did it rain that day at all? A. No, it didn't rain. It started off in the evening to rain.

Q. Did it rain before you went home? A. No.

Q. Did it rain hard or light? A. It rained hard most of the shift.

Q. It rained most of the shift that you were on? A. Yes.

Q. How hard did it rain? A. It rained good and hard.

Q. When did the rain stop? A. I don't know when it stopped, but I came home and went to bed, and it was raining then.

Q. It was still raining when you left? A. Yes.

Q. Was there any thunder and lightning? A. There was.

Q. Did you hear it or see it? A. Yes.

Q. When was that? A. Well, there was somewhat a bit strong from the lightning around half-past eight, around that time; I didn't take the exact time of it.

Q. Was there any more? A. There was.

Q. When was that? A. There was a crash off in between. There was some on and off between there.

Q. Between what? A. I mean lightning on and off from half-past eight until I went home.

Q. Was there any lightning around at the time you went home? A. There was one bolt of lightning there before I got on the bus.

Q. About when was that? A. I would say about 11:40—10:40 I mean and 10:45.

Q. What kind of lightning was that? A. I didn't pass any remarks about it. I was running down for the bus then.

Q. You were running for the bus? A. Yes.

Q. While you were running for the bus, was it while you were running for the bus that you saw this lightning? A. Yes.

Mr. Gordon: I object to that as leading.

By Mr. Bishop:

Q. When did you see this lightning? A. Just before I got on the bus.

Q. Did you hear any thunder? A. Yes.

Q. Was it mild or sharp or how was it? A. It sounded to be heavy.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. Mr. Kelly, you have been working for this company for twenty-two years? A. Yes, sir.

Q. And you are still working for them? A. Yes.

Q. Do you have a family? A. No.

Mr. Bishop: I object to that as irrelevant.

By Mr. Gordon:

Q. Are you married? A. Yes.

Q. Where do you live? A. 154 West Ninth street Bayonne.

Q. In 1907 were you familiar with this place when you first started to work? A. Yes.

Q. You knew all about both sides of the road, didn't you? A. Well, I went through it before I worked there, and that is how I learned it.

Q. You knew that the Standard Oil Company operated certain parts of the road? A. Yes; I didn't know what they operated, but I know—I found out what they had on both sides of the road.

Q. You didn't know that they operated both sides of the road, did you? A. Oh, yes, because I worked there.

Q. Did you see the gas holder there when you first started to work? A. Yes.

Q. That is twenty-two years ago? A. Yes, sir.

Q. Gas holder number two was there? A. Well, I didn't look what number was on it.

Q. That is the same one that was in the fire? A. That I couldn't tell you.

Q. Don't you know whether or not they ever changed that gas holder before? A. They could have changed it unknown to me.

Q. And you would not know it? A. No, they could have had it done over, and I would not know anything about it.

Q. Do you mean to say that if they put up a new gas holder, you would not have known anything about it? A. No.

Q. Although you were passing there every day? A. Yes, but the gas holder was there (indicating). I wasn't passing there. I was only working there.

Q. You were working there? A. All over the plant.

Q. Do you know whether or not the gas holder was there when you started to work twenty-two years ago? A. Yes, sir.

Q. This gas holder that was involved in this fire? A. Yes, sir.

Q. When you came down in the afternoon, you were in the bus? A. Yes, sir.

Q. And the bus shot through there pretty quickly? A. Yes.

Q. It goes through very fast, doesn't it? A. As fast as it can go, I guess.

Q. When you came home that night, it was raining, and the bus went through fast again, didn't it? A. Yes.

Q. The windows were closed at night when it was raining? A. Yes, they were closed.

Q. Where does the bus stop after it passes the gas holders? A. It stops at the main gate, the next one.

Q. Is that over here (indicating)? A. Up near the main gate.

Q. Near the brick building? Is this the main gate or before you come to the trestle railroad? A. Yes.

Q. Where did you work that night? Beyond the trestle railroad? Did you have to go over the trestle railroad? A. I worked down in the heart of the yard.

Q. And the bus goes quite some distance from the gas holders before it stops, doesn't it? A. Yes.

Q. In other words, that bus goes down Hook Road and around here and past the copper works? A. Yes.

Q. Did you get on the bus before the copper works? A. Yes.

Q. Down at the end of the bus line? A. Yes.

Q. That is where the bus stops, isn't it, at the end of Hook Road? A. Yes.

Q. And on each side there are gates into the company's plant? A. Yes.

Q. When you left that night, Moran went with you? A. No.

Q. Wasn't he on the same bus with you? A. I don't know.

Q. Do you know Moran? A. Yes.

Q. Did you talk to him about this case? A. No.

Q. Did you talk to anybody about this case? A. No, I didn't.

Q. Are you sure about that? A. Yes.

Q. When did you first tell anybody that you did not smell gas that night?

Mr. Bishop: I object to that.

The Court: He says he has not talked about the case. I think that question is relevant on that.

Q. When did you tell anybody that you did not smell gas that night? A. Nobody was talking to me about it.

Q. You did not tell anybody about it, did you? A. No.

Q. When did you tell anybody that it was lightning that night? A. When I was questioned about it.

Q. To whom did you talk about this case? A. A man by the name of—the safety man that works in the safety department.

Q. How long after the fire was that? A. I can't tell you.

Q. How many months or weeks after the fire was it? A. I can't tell you; it was quite long.

Q. Was it a year after the fire? A. No.

Q. Was it six months after the fire? A. I don't think so.

Q. Don't you know? A. No, I got no record of it.

Q. Did you make a record at the time? A. No.

Q. Did you sign any statement at the time? A. I signed my name to what I put down there.

Q. Do you know when that was done? A. No.

Q. Do you know how many months it was after this fire? A. No.

Q. Did somebody ask you whether or not it was lightning or raining that night when he took your statement? A. Yes, he did.

Q. Did you see that statement since this trial? A. No.

Q. When did you see it last? A. I didn't see it since.

Q. Since you signed it? A. No.

Q. You have been sitting in this courtroom for how many days? A. This is the fourth, fifth, six days already.

Q. And you have not talked to anybody about the case since you have been in the courtroom, have you? A. No.

Mr. Gordon: That is all.

Thomas J. Mahon, for Defendants—Direct.

THOMAS J. MAHON, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Mahon, in answering my questions, will you please talk loudly enough so that everybody can hear you? A. Yes.

Q. Where are you employed? A. Standard Oil Company, Bayonne.

Q. How long have you been working for the Standard Oil Company? A. Twenty-seven years.

Q. Where have you been working for them? A. I have been working on number three plant for twenty years.

Q. Where did you work before that? A. I worked in the power house in another part of the yard called number one yard.

Q. Where were you working on the eighth of August, 1927? A. I was going to work at ten minutes after ten.

Q. What was the place where you were employed at that time? A. Number three plant.

Q. In what part of number three plant? A. All number three plant.

Q. What was the nature of your job? A. On that night I was acting foreman.

Q. What shift were you on? A. Eleven to seven.

Q. When did you come to work? A. I came to work about ten minutes of ten.

Q. How did you get into the yard? A. I got in by bus.

Q. What road did the bus follow into the yard? A. The Hook Road.

Q. The Hook Road? A. Yes, sir.

Q. Did it go anywhere near these gas holders? A. We passed around by them in the Hook Road.

Q. Did it go down the road past them? A. Yes, sir.

Q. What time did it do that? A. About ten minutes after ten we passed them holders.

Q. Do you know what the gas in the gas holders smells like? A. Yes, I should say I did.

Q. Did you smell that gas as you passed it ten minutes after ten? A. No, I was on the bus.

Q. Where did you go? A. I went to the—three-quarters of a mile below that on the south side.

Q. What did you do? A. I went to my dressing room and changed my clothes.

Q. Then what did you do? A. Then I relieved my man.

Q. Then what did you do? A. Well, I should say about eleven p. m. I was ready to get out of my dressing room.

Q. About ten minutes of what? A. About eleven p. m.

Q. You were ready to leave your dressing room? A. Yes, sir.

Q. What was the weather like that evening? A. It was raining pretty heavy.

Q. Was there any thunder or lightning? A. Not that I seen.

Q. At eleven o'clock what did you do? A. Well, I was getting out on the job at eleven p. m.

Q. Where did you go? A. Well, at the time I was getting out, and I heard an explosion.

Q. When was that? A. Eleven p. m.

Q. What did you do when you heard that? A. Well, I heard the explosion, and I seen the reflection of fire in the air, and I beat it towards the fire as fast as I could.

Q. What direction did you go? A. On the west side, the westerly side.

Q. The westerly side of what? A. The westerly side of where my locker—where I changed my clothes.

Q. Where did you go from there? A. I went westerly towards where this fire was.

Q. Did you go on the road? A. No, sir.

Q. Did you go through the plant? A. Through the plant.

Q. Did you come to the road? A. Yes.

Q. Where did you reach the road? A. I reached the road at the pump house opposite this holder.

Q. How soon did you get to the pump house? A. Well, I can't exactly say whether it would be five or ten minutes, but I got there as fast as I could, anyway.

Q. What did you find when you got there? A. I found that number two gas holder on fire.

Q. Where was the fire on that gas holder? A. It was up on the top of the gas holder.

Q. Did you see any fire in the road? A. No, there was a wooden frame on the window on this pump house, and it was on fire.

Q. Was anything else on fire? A. There was a manifold running between the road and this pump house, and there was a pool of oil and water down under this manifold, and that also was afire.

Q. Did you go inside the pump house? A. Well, yes, I went in to get the hose and play the water on it to get that fire out.

Q. Which fire? A. The fire on this window, and this pool of oil under the manifold, the oil manifold.

Q. Was this oil manifold on the inside or outside of the pump house? A. No, it is between the

pump house on the road and outside of the pump house on the road.

Q. Did you stay there while the fire was put out? A. Yes, we stayed there until the fire was out.

Q. How long did it take to put out the fire on the window frame? A. Just about a minute or two. When we got the water on it, it didn't last no time.

Q. How long did it take to put out the fire in the manifold? A. Just a couple of minutes. When we got water on it we put it out in a hurry.

Q. How long did it take to put out the fire on top of the gas holder? A. I should say it was about around two o'clock when we had the fire out, to say it was out.

Q. It burned until about two o'clock? A. I should say about that time.

Q. How high was that gas holder at the time you got there? A. At the time that I got there it was down on a level with the seal, that is the first lift.

Q. What about the second lift? A. The first and second was down at a level with the bottom seal.

Q. They were all the way down? A. All the way down at the time I got there.

Q. The fire was where on that gas holder? A. Well, I would say about the top of it, because it was all one piece at the time.

Q. How long have you been familiar with Hook Road at this point? A. Well, on that part of Hook Road, about twenty years, I would say.

Q. During all that time, who has been using the land on each side of Hook Road? A. Well——

Q. I mean where the gas holder was? A. For my twenty years, I seen them two gas holders

there and the pump house on the other side. That is all I could tell you. I guess the Standard Oil was——

Q. They have been there as long as you can remember? A. Yes, that is twenty years.

Q. I thought you said you had been there longer than twenty years? A. Yes, but not in that part of the yard; I have been there twenty-seven years, but not in that part of the yard.

Cross-examination by Mr. Gordon:

Q. You answered counsel for the company that you knew what gas smells like? A. Yes.

Q. You have smelled it before? A. Yes.

Q. How frequently passing the gas holder——

Mr. Bishop: Just a minute. He did not say he ever smelled it passing the gas holder.

By Mr. Gordon:

Q. Did you ever smell it passing the gas holder? A. Yes, I did.

Q. How frequently? A. I actually think it never came from the holder itself; it came from the yard. I always got the smell since the first time I went down there when I was entering the yard.

Q. You are sure there wasn't any lightning at that time? A. No, sir, not that I seen.

Q. When you passed the gas holder on your way home, you were in the bus? A. Well, I was going into that place the next morning I went home.

Q. Coming in, you came in on the bus? A. Yes.

Q. And that passed right by the gas holder? A. Yes.

Q. It was making the usual bus stop in that neighborhood? A. Yes.

Q. They shoot right through, don't they? A. Yes.

Mr. Gordon: That is all.

JOHN DONNENWIRTH, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Donnenwirth, where do you work? A. Standard Oil Company.

Q. How long? A. Twenty-six years.

Q. Where? A. Bayonne.

Q. What part of the plant? A. At the time of the accident, number two plant.

Q. Where were you at the time of the accident? A. Number two plant office.

Q. How near the scene of the accident is that? A. Between two and three hundred yards.

Q. You passed the scene of the accident going to and from that? A. No, sir.

Q. How long have you been familiar with Hook Road? A. Well, I know Hook Road all that time, that twenty-six years.

Q. During all that time, do you know who has been using the land on each side of Hook Road between the point where it leads to Constable Hook Railroad and that right angle turn down to the south? A. The Standard Oil Company had apparatus on that land both sides of the road.

Q. What about the land from there on to the end of the road on the east portion that runs north and south? Do you know who has been using that all the time? A. Part of it belonged to the copper works.

Q. Is that north or south of the road? A. That would be south.

Q. I am talking about north of the road. This is the north end of the map (indicating). East of this—north of this part of the road, that runs by the railroad here (indicating). A. That is occupied by the Standard Oil Company.

Q. During what time? A. To my recollection as far back as 1910.

Q. Was anybody else ever occupying it during the time you worked for the Standard Oil Company? A. Not as I know of.

Q. The Standard Oil Company occupied it all the time you worked for them? A. Yes, sir.

Q. How long is that? A. Twenty-six years.

Q. Where were you on the night of the accident? A. Working three to eleven shift.

Q. I believe you said you did not pass the gas holders going to or coming from your work? A. No, sir.

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

Q. About how far away were you? A. Between two and three hundred yards.

Q. What first called your attention to it? A. Why, I was sitting in the office talking to my relief.

Q. Don't tell us what you said; just what you saw. A. All of a sudden this flash came. It seemed to me to be lightning, and I run right outside.

Q. Did you hear any thunder? A. Not to my recollection.

Q. What did you do? A. I went right back in again and took off my shoes.

Q. What did you see when you ran outside? A. I seen a fire.

Q. Where did you see it? A. In the direction of the gas holders.

Q. What did you do? A. Went inside and took my shoes off and put on the boots and put on a coat and went directly over to the scene of the fire.

Q. How long was it between the time you saw the first flash and the time you go there? A. About five minutes.

Q. What did you find when you got there? A. I found the top of the gas holder on fire.

Q. How high was the gas holder at that time? A. It was up about two feet.

Q. What part of it was up two feet? A. That is the inside shell.

Q. Where was the fire? A. On top of the gas holder.

Q. On top of what portion? A. Around the edge.

Q. Of what shell? A. The inside shell.

Q. Did you see any fire in the road? A. Not in the road itself.

Q. Did you see any fire in the pump house? A. On the window frame and in the ditch outside of the pump house between the pump house and the road.

Q. Anywhere else? A. No.

Q. Did you stay and help fight the fire? A. Yes, sir.

Q. How long did you stay? A. I left there one o'clock.

Q. Was it out then? A. Yes, sir.

Q. How long did it take to put out the fire on the window frame? A. About ten minutes.

Q. How long did it take to put out the fire in the ditch? A. I should judge a little over an hour —not the ditch——

Q. Yes. A. About ten minutes.

Q. How long did it take to put out the fire on the gas holder? A. Somewheres around an hour.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. You started with the company in what year? A. 1903.

Q. And in the year 1904 or thereafter do you remember when Hook Road was laid out? A. No, I can't say as I do.

Q. You don't remember when Hook Road was laid out? A. That Hook Road, to my knowledge, has been an old road.

Q. And everybody has been coming in and out over it, hadn't they? A. Yes.

Q. And buses? A. Not at that time, not in 1904.

Q. Later on the buses came over it? A. Yes.

Q. And men who had their own cars drove over that? A. I don't think so very many had cars in 1904.

Q. I mean later on. A. Yes.

Q. I mean when the automobiles became more popular and cheaper? A. Yes.

Q. And there were quite a few of them coming over the road in recent years? A. Yes.

Q. And they often come over that road? A. Yes.

Q. And that is how the men get in and out of the plant to get to their work? A. Those that work on the lower end.

Q. They go down Hook Road until they get to the gates? A. Yes.

Q. And that has been used as a public road, hasn't it? A. Yes.

Q. And when you got there in 1903, were the gas holders there then, gas holders one and two? A. I don't remember; I don't think so.

Q. Were they there a few years after you got there? A. They were building them shortly after that.

Q. About two or three years after? A. Somewheres in around that time.

Mr. Gordon: That is all.

Harry Wolf, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Bishop:

Q. Mr. Wolf, you are employed by the Standard Oil Company? A. Yes.

Q. And you have been for how long a time? A. About thirty-nine years or a little better.

Q. Where have you been employed during all of that period? A. Well, in Lima, Ohio, until 1895, and in Bayonne since 1895 in October.

Q. You have been employed in Bayonne since October, 1895? A. Yes, sir.

Q. Are you employed in the same plant that you are still working in? A. Well, I was employed

in the upper end of the plant, what they call two plant for a good many years, up until 1913, somewhere around there.

Q. It is all the same general plant divided up into different divisions that you call one, two, and three plant? A. Yes.

Q. But it is all the same company's plant, isn't it? A. Yes.

Q. What you call number two plant joins number three plant, does it not? A. Yes, sir.

Q. And during all that time, have you been familiar with Hook Road? A. No.

Q. How long have you known Hook Road? A. Well, what I recall back is around 1907, somewhere around there. I can't recall the date when they built their plant. That was the first I was familiar with that road, but I don't know what date that was.

Q. Prior to the time they built what you call the three plant, do you know who occupied the land that it now stands on? A. No, sir, I don't.

Q. You don't know who had possession of it? A. No, sir.

Q. Who has possession of it now? A. The Standard Oil Company uses both sides now, down to the copper works, the borax road.

Q. How long have they been doing that? A. To my knowledge, since they built their plant, but I can't tell you what date that was, whether it was 1903 or 1904, or 1905.

Q. It was somewhere around 1903 or 1904 or 1905? A. Yes, around there some place.

Q. So that since 1903 or 1904 or 1905 they have been using both sides of that road, to your knowledge? A. Yes.

Q. I show you a photograph marked "Plaintiff's exhibit 4" and ask you if you recognize what

that represents? A. Yes, that represents a road down past the power house there on this south of the railroad track.

Q. Do you know what these things are that cross the road overhead? A. They are pipe lines.

Q. Whose pipe lines? A. Standard Oil.

Q. I show you a picture marked "Plaintiff's Exhibit 5" and ask you if you know what that represents? A. Yes, that is the road right outside of the pump house, three plant pump house.

Q. I ask you if you know what all these things are that go over across the road, out over the road? A. Yes, those are lines carrying the different stuff, steam, gas, etc.

Q. Whose lines? A. Standard Oil Company.

Q. How long have they been there? A. Some of them have been there ever since their plant has been built across those roads, steam lines.

Q. They have been there ever since the plant was built? A. Yes.

Q. Is that true of the lines that are shown in this picture, some of them? A. I think they have some even across there (indicating), built across, steam lines.

Q. I show you Plaintiff's Exhibit 6. Do you recognize that? A. Yes, that is a gas holder, the road alongside the gas holder and the boiler house, three plant pump house.

Q. What are all these things that cross the road overhead? A. Oil and steam lines.

Q. Whose? A. Standard Oil.

Q. How long have they been there? A. Ever since the property has been built.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. What is your present position in the company's plant? A. In charge of the gathering of slop oil from different parts of the yard.

Q. How about any oil on the roads? A. Well, we don't generally have oil on the roads; if there are any there, we pick it up.

Q. Did you ever see any oil in the ditches? A. Yes.

Q. And near this pump house? A. Yes.

Q. When you come past gas holders one and two, which you have identified on the pictures, going in a southerly direction, you go along Hook Road, is that correct? A. Yes.

Q. And then there is a bend and you continue southerly again? A. Yes.

Q. Then you come to certain plants, don't you? A. You come to the copper or borax company.

Q. The borax company runs along Hook Road on the right side of the road as you are going easterly? A. No, the borax property stands down in off Hook Road.

Q. Do not the people of the borax plant go onto Hook Road? A. Yes.

Q. Do they use that road? A. Yes.

Q. What is next to the borax plant? A. Chemical works.

Q. Which chemical works? A. General.

Q. About how many employes do they employ? A. I don't know.

Q. Quite a number? A. I can't answer that.

Q. You have been around the plant about how many years? A. About thirty-four.

Q. And you have seen the chemical plant outfit, haven't you? A. Not inside.

Q. You have seen the men going in and out of the place? A. Sometimes, a few of them.

Q. It is quite a large plant? A. It takes up the building, but I don't think there are a big number of men.

Q. Then men that work in there go in and out of that building onto Hook Road? A. Some of them.

Q. Some of them drive onto Hook Road? A. I don't know.

Q. What is the next property after you pass the borax and the chemical works on Hook Road or adjoining? A. The steel barrel factory.

Q. Belonging to what company? A. The Standard Oil.

Q. A separate corporation? A. No, sir.

Q. What is the next company as you go along? A. I don't know who owns the property there down towards the Hook on the right side of the road, no.

Q. When you get on further, before you get to the main gate at the end of the road, do you pass the copper works? A. Yes.

Q. Do they own the property alongside of the road? A. They are supposed to.

Q. And the employes go in and out of their plant onto Hook Road? A. They don't have any any more.

Q. Did they? A. They do when they work.

Q. How recently? A. I don't know what year they shut down.

Q. Within the last five years? A. It has been before that, I guess.

Q. Ten years? A. Well, they was running during the war.

Q. During the war they were running in 1918? A. I think so; I won't say for sure.

Q. Within a year of that? A. I won't say when they was running; I don't know.

Q. You don't know when they were running? A. No.

Q. Did they shut down twenty years ago? A. No.

Q. Did they shut down fifteen years ago? A. No, I don't think so.

Q. Did they shut down between ten and fifteen years ago? A. I would not say.

Q. You remember other things? You remember when these pipe lines were there? A. It is necessary to go there when they built the plants.

Q. Do you remember when the streets were laid out? A. No.

Q. Was your attention ever called to the fact that there were streets laid out and dedicated? A. No.

Q. It was never called to that? A. No.

Q. You were just asked whether there were pipes across the road? A. Nobody asked me but you.

Q. Didn't Mr. Bishop ask you if there were pipes across the road? A. No.

Q. He did not ask you that? A. He showed me that picture, that is all.

Q. Are there pipes across the road? A. Overhead.

Q. How high overhead? A. About twenty feet.

Q. It does not interfere with the public going underneath, does it? A. Not at all.

Q. Do you remember when those pipes were put up? A. I don't remember just when they was put up, but they was put up at the time the plant was built.

Q. Do you remember when the pipes were put up, the condition of Hook Road? A. No.

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

Q. Do you remember when Hook Road was paved? A. No.

Q. Do you know who paved it? A. Why, I suppose the Standard Oil. We repair it, anyhow.

Q. You keep it in repair? A. Yes.

Q. And the public uses it? A. Yes.

Q. When you get past the copper works, what companies are there that go to the end of Hook Road? A. There is the Vacuum.

Q. Do you mean the Vacuum Oil Company? A. Yes.

Q. That joins Hook Road before you get to the main gate? A. Yes.

Q. What other company? A. Asiatic Oil Company.

Q. Do they have quite a number of employes? A. The Asiatic has not so many.

Q. But the Vacuum Company has? A. Yes.

Q. And they use Hook Road? A. Yes.

Q. And they go all through Hook Road underneath these pipe lines into Avenue J? A. Yes.

Q. And then that is true of the Borax employes? A. Some of them, yes.

Q. And it is true of the General Chemical outfit? A. Some of them.

Q. And it is true of the Vacuum and the Asiatic? A. Yes.

Q. And there are concerns and employes going past Hook Road or over Hook Road to these companies that do not work there, aren't there? A. What do you mean?

Q. I mean that there are people who do business with these concerns? A. Yes.

Q. And they use automobiles and pass over Hook Road? A. Yes.

Q. They go in and out towards this plant and about these plants? A. Yes.

Q. And they go underneath these pipes lines that you mentioned before? A. Yes.

Q. And before you get to the main gate at the end of Hook Road, there is the Dutch Shell? A. That is the Asiatic Company.

Mr. Gordon: That is all.

Louis W. Klugman, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Doctor, what is your profession? A. Physician.

Q. Are you licensed to practice medicine in New Jersey? A. Yes.

Q. How long have you been so licensed? A. Sinice 1918.

Q. You have been in active practice all that time? A. Yes, sir.

Q. Where? A. At Bayonne, New Jersey.

Q. You are in active practice now? A. Yes.

Q. Do you know Mr. Gilroy, the plaintiff in this case? A. Yes, sir.

Q. That is, Edward N. Gilroy? A. Yes, sir.

Q. Did you ever treat him for anything? A. Yes, sir, I did.

Q. What did you treat him for? A. Pleurisy.

Q. Over how long a period did that treatment extend? A. One week.

Q. Where did you treat him? A. At his home.

Q. Was he at his home during that entire week? A. Yes, sir.

Q. Is that where you saw him? A. I saw him six times during that week.

Q. Where was that? Was it at his home each time? A. Yes, sir.

Q. When was that? A. March 29 to April 4, 1927.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. Did he pay your bill? A. Yes, sir.

Q. After you left, he was all right, wasn't he? A. Yes.

Q. He was in good health? A. Yes, sir.

Mr. Gordon: That is all.

Mr. Bishop: If the Court please, I offer in evidence a certified copy of the answer filed to Gilroy's compensation petition, which was identified yesterday as a true copy of the original in possession of Miss Ann Murname, marked "Defendants' Exhibit 15 for identification."

Mr. Gordon: That is objected to on the ground that it is incompetent, irrelevant, and is a self-serving declaration on the part of the defendant. The only probative value the petition may have had was on the proposition that any statements therein contained over the mark or signature of this plaintiff might be admissions against interest. This is self-serving, and I object to it.

(Argument)

The Court: I will admit it for the present time for the purpose of proving only that

the defendant did file an answer to the plaintiff's petition in the Workmen's compensation proceedings, but not for the purpose of evidence as to any claim or his contention or statement of fact with regard to the happening of this accident that is contained in such statement. I shall charge the jury when the proper time comes to disregard any statements of fact or representation in that with respect to the matters that have been the subject of this trial. That is the only way I can admit it.

Mr. Bishop: I have no quarrel with that. If that deals, as I think it is intended to, with the question of affirmative allegations of fact in this petition, I have no exception, but if it is intended to exclude from the consideration of the jury the question of the admission or denial of allegations made in the petition, then, to that extent, I would like to have an exception to it.

The Court: I shall charge the jury that the issues in this case of the responsibilities of the parties in this matter are being tried in this Court, and were not tried in the Workmen's Bureau or by any papers filed therein.

Mr. Gordon: I pray an exception to the Court's ruling.

(The paper referred to was received in evidence and marked "Defendants' Exhibit 15.")

The Court: I should like to add to the record, in this connection, that I am admitting this paper because, under the plead-

ings, the question of the remedy in this case is one of the issues. It will be a matter of law only possibly, but being an issue, I must admit, for the purpose of deciding that issue, anything that has any relevancy to that particular point or issue. That does not mean that it is necessarily going to be a question for the jury. It is one of the issues in this cause.

Mr. Bishop: I offer in evidence four checks that were marked "Defendants' Exhibits 1, 2, 3 and 4, for identification," and which were produced by counsel for the Plaintiff in response to a notice, and were identified by the Plaintiff as checks received by him and turned over to his counsel.

Mr. Gordon: I object.

The Court: Are those the checks that were not cashed?

Mr. Bishop: Yes, sir.

Mr. Gordon: I object to this because they are not evidence of payment, and the only relevancy they can have to the issues involved is on the question as to whether or not they may be in mitigation of damages. Not having been used or cashed, they have no relevancy to the issue involved in the case.

The Court: Are they endorsed?

Mr. Gordon: None of them are endorsed.

Mr. Bishop: In reply to that, I may state that this looks to me like an attempt to blow hot and cold. These checks were received by this man. They were retained by him. They were never returned or

tendered back again. They have been retained by his counsel and never tendered back or returned, and they are relevant, for the purpose of showing that. It is alleged in this case that there was an agreement made to accept and pay compensation, and they are relevant for the purpose of showing that the payments were made up to a certain point and checks actually delivered since that time, and not only that, but that there never was any protest or anything said that these checks ought not to have been received or anything of that sort, and they were never tendered back again.

The Court: I don't suppose they could be either accepted or proved as payment, because a check is not necessarily payment, no matter how good the reputation of the maker of the check may be, and how good they might practically be, but at least, they were sent, and they were retained up to this time, and it seems to me that the same principle would apply, whether or not they were cashed, as applies in the case of checks actually endorsed and cashed. I can see no harm in admitting these any more than admitting the others. And I will allow them to be received.

Mr. Gordon: Exception.

(The checks referred to, which were previously marked "Defendants' Exhibits 1, 2, 3, and 4 for identification", were received in evidence and marked "Defendants' Exhibits 1, 2, 3, and 4", respectively.)

MARY V. GILROY, a witness produced on behalf of the defendants, being duly sworn according to law, on her oath, saith:

Direct examination by Mr. Bishop:

Q. Mrs. Gilroy, I show you four checks, which are marked "Defendants' Exhibits 1, 2, 3, and 4", and ask you if you ever saw those before? A. I did.

Q. How did you get them? A. I was called—my in-laws called me and told me there was some mail at their home in Bayonne for me, when I lived in Kennilworth, and I asked them what it was.

Q. That is, they reached you through the mail? A. No, they called me and told me.

Q. They were mailed to you at an address which you had lived? A. I believe they were.

Q. And after they were received there, somebody informed you that they were there? A. Yes.

Q. And you arranged to get them? A. Yes.

Q. So that they did ultimately come to you through the mail? A. I believe they did, as far as I know.

The Court: Did she receive them?

Mr. Bishop: She said she received them.

By Mr. Bishop:

Q. What did you do with them when you got them? A. Well, I took them and gave them to my husband.

Q. The other day when you were on the stand, Mrs. Gilroy, you identified a bunch of eighteen checks, which were marked together as Defend-

ants' Exhibit 8, and you said, as I recall it, that all those checks were endorsed by you? A. No, not all of them.

Q. Which of them were not? A. That one wasn't (indicating), and that one; that is all, just those two.

Q. Do you know who endorsed them? A. I believe my brother-in-law did.

Q. Were all those checks cashed? A. They were.

Q. And you got the money on all of them? A. Yes.

Q. Where did you get those checks? A. They were usually left at the hospital or at my home for me.

Q. In Bayonne? Do you know where they came from? A. From the Standard Oil Company, I assume.

Q. They were all cashed by you? A. They were.

Mr. Bishop: If the Court please, I offer these checks in evidence.

Mr. Gordon: There is no objection, because they are evidentiary, as I understand it, in mitigation of damages.

Mr. Bishop: They are not offered for that purpose solely.

Mr. Gordon: I object to them unless they are offered upon no other ground.

Mr. Bishop: They are offered for whatever they may prove. There is an allegation in this case that compensation was paid and accepted.

Mr. Gordon: I except to the statement that compensation was accepted. That is not binding on us in this case.

The Court: They are relevant for proving material facts in this case, and they will be admitted. The Court will instruct the jury as to what they do prove.

(The checks referred to, which were previously marked "Defendants' Exhibit 8 for identification" were received in evidence and marked "Defendants' Exhibit 8".)

By Mr. Bishop:

Q. Mrs. Gilroy, I show you a carbon copy of a letter marked "Defendants' Exhibit 5 for identification". Did you ever see such a letter as that? A. No, I didn't.

Q. And you never received a letter to that effect?

Mr. Gordon: That is not the question.

A. No, I didn't.

Q. You never saw a letter to that effect? A. No.

Q. I show you a letter marked "Defendants' Exhibit 7 for identification", and ask you if you ever saw a letter like that, to that effect? A. No, I didn't.

Q. You never saw that letter? A. No, I didn't.

Q. What about the letter marked "Defendants' Exhibit 6 for identification"? A. No.

Q. You never saw that? A. No.

Mr. Bishop: That is all.

Cross-examination by Mr. Gordon:

Q. Mrs. Gilroy, you knew that these checks were being cashed from time to time? A. Yes.

Q. Do you notice the amounts of the checks? A. Yes.

Q. Do you notice that quite a number of them are for $83.78? A. Yes.

Q. Do you know how that amount was arrived at and what that represents?

Mr. Bishop: I object to that unless she knows; not her belief or guess. Let her answer yes or no.

By Mr. Gordon:

Q. Do you know how that figure was made up? A. Yes.

Q. How? A. It was my husband's wages.

Q. Do you mean full wages for two weeks? A. Yes, two weeks.

Q. Did you notice these checks here that were not cashed? A. Yes.

Q. And they are made up for what amounts? A. $34.

Q. Is that when they stopped cashing checks? A. Yes.

Q. Did you have any understanding when you were getting checks for your husband's full wages? A. I did.

Mr. Bishop: I object to that.

The Court: She could not very well make an understanding.

Mr. Gordon: That is all.

RUSSEL N. KEPPEL, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bishop:

Q. Mr. Keppel, where are you employed? A. Standard Oil Company.

Q. Where? A. Now?

Q. Yes. A. New York.

Q. Where were you employed in 1927? A. Bayonne.

Q. And how long did you remain in Bayonne after 1927? A. Until February of this year.

Q. What was your position over there at Bayonne? A. Personnel manager.

Q. What is your position now? A. Manager of personnel for the company.

Q. What is the difference between your position now and your position while you were in Bayonne? A. While in Bayonne it was local, and now it deals with the company.

Q. You do the same work for all the company's plants now that you formerly did for the Bayonne plant? A. Well, not exactly. At that time, for example, I did have general supervision of the annuities and benefits and in connection with the medical work and industrial rehabilitation. There is some little distinction between the local basis and the company basis.

Q. Did you, in those days, know anything about the payment of compensation? A. Yes, I did.

Q. Did that come under your charge? A. Yes.

Q. Did you approve of payments before they were made? A. Yes.

Q. Did you deal with compensation matters? A. Yes.

Q. Do you know Edward N. Gilroy, the plaintiff in this case? A. Yes.

Q. Have you ever seen him before you saw him in this court room? A. A number of times.

Q. How long have you known him? A. Well, my particular acquaintance began immediately following the accident.

Q. Had you known him before that? A. Known of him, yes.

Q. Did you know him by sight before that? A. I didn't know his name was Ed. I knew his name was Gilroy.

Q. Where did you see him after the accident? A. The first time was the morning of the ninth, that being the morning following the accident. The men employes, who had been burned, including Ed. Gilroy, were in the ward.

Q. In the ward where? A. In the Bayonne Hospital, and we made arrangements to have them put in a private room and so forth.

Q. When did you next see him? A. In his room.

Q. How often did you see him? A. Well, every day for quite some time, and then practically every day while he was in the hospital, and several times at his home, and once or twice at the plant.

Q. Did you visit him regularly at the hospital? A. Yes.

Q. At any of the times when you visited him, did you talk to him or have any conversation with him? A. Practically every time, except the first day or two after the accident, of course.

Q. Was he rational when you talked to him? A. Oh, yes.

Q. Did he understand what you said to him? A. Yes.

Q. Did he make rational replies? A. Yes.

Q. Was there ever anybody else there when you saw him? A. Sometimes.

Q. Did you ever discuss with Gilroy the subject of the payment of compensation under the New Jersey Workmen's Compensation Act?

Mr. Gordon: That is objected to on the ground that the affirmative defense in this case pleaded is a written agreement, and if there had been any negotiations, they are merged in that agreement.

(Argument.)

Mr. Gordon: It is stipulated that Mrs. McLarty was paid by the Standard Oil Company for her nursing services to Mr. Gilroy.

The Court: We will recess at this time until two o'clock p. m.

(A recess was had until 2.00 p. m.)

Afternoon Session.

(The trial was resumed.)

The Court: I have decided to permit the testimony to be taken on the subject of conversations between the plaintiff and the representatives of the defendant bearing upon the point of whether or not there was any agreement reached, valid in law, fixing definitely the amount to be paid the plaintiff as liquidated damages, but as to whether or not there was any election of remedies based on any valid consideration or payments by check legally barring the

plaintiff from any right to sue the company, the legal effect of such facts as the testimony shall disclose, I shall charge to the jury at the proper time or consider on any motions made at the conclusion of the testimony in this case.

Mr. Gordon: Exception.

Russel N. Keppel resumed the stand and testified further as follows:

(The last question was read as follows:)

"Question: Did you ever discuss with Gilroy the subject of the payment of compensation under the New Jersey Workmen's Compensation Act?" A. Yes.

Q. When did those discussions take place? A. Well, they were really several, a number of them.

Q. State when they were and what was the nature of them. Describe what happened. A. As I recall it, about two weeks, somewhere around that time, the question arose—I think he asked the question about his benefits. I mentioned the fact that we were not altogether sure as to whether it was to be handled as a compensable case or under the compensation act, but we did not go into that very much at the time, except that I made that particular statment.

Q. Is there any difference between the amount to be paid him if you handled it under the Compensation Act or if you handled it otherwise? A. Yes.

Q. Did he know that? A. I mentioned the fact that—of course—if it was a compensation case, he

would get full benefits, and course, if it was not a compensation case, he would come under our sickness benefits, which were half pay.

Q. What were the full benefits? A. His full weekly wages.

Q. What did that include? A. Wages and the seventeen dollars a week for temporary disability.

Q. Do you mean that the seventeen dollars a week was part of the amount that was to be paid to him?

Mr. Gordon: I object to that as leading.

Q. How was the amount to be paid to him, making it under the full benefit scheme? A. It included the seventeen dollars a week for temporary disability plus additional benefits that the company paid under the company's benefit plan.

Q. What was the seventeen dollars a week for? A. Temporary disability.

Q. Under what act? A. The Compensation Act.

Q. Was that the amount to be required to be paid under the Compensation Act? A. Yes.

Q. What further conversation did you have? State in substance what you said and what he said. A. Some time later he mentioned the fact that a number of people had spoken to him about the fact that it was not under the Compensation Case, and I said that, "Well, we assumed that it was, and we were handling it as such," and then also made the statement——

Q. On what basis were you paying him? A. On the basis that it was a compensation case.

Q. Did he know that?

Mr. Gordon: I object, as to whether or not this witness can tell what Gilroy knew. It is calling for an operation of the mind.

Q. What had you told him, if anything, as to the basis on which you were paying him? A. I told him that we were paying the acts and benefits, and, as I said before, I mentioned the fact that first there was some question in our minds what it was, and if it was an accident case, we paid full benefits including seventeen dollars a week, and if it was not, we paid half pay, sickness benefit.

Q. What did you pay him? A. We paid the full benefits, and I mentioned that fact at the time.

Q. Did you have any further conversations with him? A. As I say, some time later he mentioned—raised the question as to whether or not he was really a case that came under the Compensation Case.

Q. What did he say about that? A. He said a number of people had spoken to him about it, and called his attention to the fact that it did not, and in return I said, "Well, of course, that is a matter that would have to be settled before certainly—before very long" and that I would be around some time in the near future and we would take up that particular phase of the thing.

Q. Did you come around again? A. Yes, I came around one morning with Mr. Hertzig, and Mrs. Gilroy was present at the time. As I recall, the situation went about like this: She was about to leave, and I said that I would prefer that she stay, that I was going to speak to Ed. about signing the compensation form, and I did. I spoke to him about it, and she remained, and he said that if I did not mind, he would prefer to talk it over with somebody and also keep it over night, and I said in return that that is perfectly all right. As a matter of fact, we did not want

to press him on the matter, and he said that in all probability there would be no question about it, and he would have it ready in the morning.

Q. What compensation form do you mean? A. We call it compensation form two.

Q. I show you a document and ask you if you recognize that? A. That is the document.

Q. Did you ever see it before? A. Yes.

Q. Where? A. This is the form that I had with me when we had this conversation that I just referred to.

Q. What did you tell him about it? A. I told him it was an acceptance that would require the acceptance of compensation, and in return he said that he would like to keep it over night and show it to somebody, and in order—in all probability, there would be no question about it, and that I could return in the morning and he would have it for me.

Q. What did you say to that? A. Well, I said, "All right, no great rush about it. I don't have to have it in the morning. You can have it for whatever time you want and discuss with whomever you choose this particular form".

Q. When did you next see it? A. I waited several days, as I recall it; I would say possibly four or five days, and Mr. Hertzig and I went back, and we again—he had the form there, and Mr. Hertzig read it to him.

Q. Who produced the form on that occasion? A. He had the form with him.

Q. Was anything said about it? A. Well, we asked him if he was ready to sign it, and he said he was.

Q. Who produced the form? A. He did.

Q. Then what happened? A. As I say, Mr. Hertzig read the form and handed it to him for signature, and he made his mark here and Mr. Hertzig witnessed it.

Q. Did you see him do it? A. Yes, I did.

Q. Did you see Mr. Hertzig witness it? A. Yes.

Q. That was done in your presence? A. Yes, sir.

Q. And is this the document (indicating)? A. That is the document.

Q. I offer the document in evidence.

Mr. Gordon: If your Honor please, I object to it on the ground that this is an agreement, a copy of which is purported to be annexed to the answer, and which is set up as a special defense in this case. I object to it on the ground that it is not an agreement, which upon the face of it appears to have the approval of the Workmen's Compensation Bureau and is therefore not binding upon the plaintiff. I object to it on the ground that it is incompetent, irrelevant and immaterial.

The Court: I understand it is being offered here on the question of whether or not it has anything to do with the actions with reference to making the election of his remedy at this time. In view of my previous ruling, on this whole line of testimony, I am going to admit it for that reason, but whether or not it is binding upon this plaintiff in view of what subsequently transpired, I will determine later.

Mr. Gordon: Exception.

(The paper referred to was received in evidence and marked "Defendant's Exhibit 16.")

By Mr. Bishop:

Q. Do you know whether or not after this agreement was made any payments were made to Gilroy? A. Oh, yes, we continued to pay benefit checks every two weeks as previously.

Q. Do you know how long you continued to pay that? A. Well, let us see. I think that was sometime—I would have to refer to the date—sometime in October, I think. We continued to pay full—make full benefit checks until April, the following April.

Q. I show you some letters marked Defendant's Exhibits 5, 6, 7 for Identification" and ask you if you ever saw the originals of them? A. Yes, sir.

Q. Did any of those enclose checks? A. This one did (indicating).

Q. Please refer to the number? A. D-7 for Identification.

Q. That enclosed a check? A. Yes.

Q. I hand you another letter and ask you did that enclose a check? A. Yes.

Q. Do you know whether those were ever sent out? A. Oh, yes.

Q. Do you know whether that was sent out (indicating? A. Yes.

Mr. Bishop: I offer these letters in evidence.

Mr. Gordon: I object and I should like to ask the witness one or two questions.

By Mr. Gordon:

Q. You have referred to Defendant's Exhibit 7 for Identification as a letter that you knew was sent out? A. Yes, sir.

Q. Did you send that letter out? A. I initialed it.

Q. Did you personally mail it? A. No, sir.

Q. I show you Defendant's Exhibit Five for Identification and ask you whether or not you personally mailed that letter? A. No, sir.

Q. I show you Defendant's Exhibit Six for Identification and ask you whether or not you mailed that letter personally? A. No, sir.

Mr. Gordon: Then I object to it, if your Honor pleases.

The Court: There does not seem to be sufficient proof yet to establish the fact that the letter was sent.

Mr. Bishop: I will go a little further, if the Court please.

By Mr. Bishop:

Q. What did you do with these letters after you initialed them? A. Sent them to the manager for his signature and mailing. I think I dictated two of them.

Q. I show you a check. Look on the back of it and see the number that it bears. A. D-4.

Q. Did that check accompany one of those letters?

Mr. Gordon: I object to it. He says he did not mail the letter.

The Court: Objection sustained.

By Mr. Bishop:

Q. Was this check sent out with one of these letters to the person who was to send it off?

Mr. Gordon: I object.

The Court: Objection sustained.
Mr. Bishop: Exception.

(Argument)

By Mr. Bishop:

Q. Is this a check referred to in that letter?

Mr. Gordon: I object to that. He has no knowledge of knowing whether or not that is the check referred to in that letter.

(Argument.)

The Court: Objection sustained.
Mr. Bishop: Exception.

By Mr. Bishop:

Q. When did you last see this check and this letter (indicating)? A. It is dated June 9; it must have been June 9.

Q. When you last saw them, were they together? A. I believe they were; this is dated June 8.

Q. Did you send the check and the letter out from your office together?

Mr. Gordon: I object to that.

The Court: He has already said he did not mail the letter, but I will allow him to answer that anyway.

A. Yes.

Mr. Bishop: Now I offer in evidence again Exhibit D-7 for Identification.

Mr. Gordon: I make the same objection as before, that there is no proof of mailing.

The Court: Objection sustained.
Mr. Bishop: Exception.

By Mr. Bishop:

Q. Did you ever have any further talks with Gilroy? A. I had a number of them.

Q. After this agreement was executed, that you have just referred to, did you have any further talks with Gilroy? A. Yes, I saw him a number of times after that.

Q. How many times? A. I don't know.

Q. Where? A. Well, I saw him several times, and a number of times there in the hospital while he was there, and I saw him several times at his home, and saw him twice down in the plant.

Q. Do you know whether or not any checks were sent to him pursuant to this agreement?

Mr. Gordon: I object to that as a conclusion on the part of the witness.

The Court: He should be asked whether the checks were sent to him.

Q. I show you a bundle of eighteen checks, which are marked "Exhibit——"

The Court: Has it not been testified by the plaintiff that the checks were received?

Mr. Bishop: Yes, but I want to show why they were sent to him.

(Argument.)

By Mr. Bishop:

Q. Do you know whether or not all of these checks would have been sent to Mr. Gilroy if he had not signed that agreement?

Mr. Gordon: I object.

The Court: Objection sustained.

Mr. Bishop: Exception.

Q. How many of these checks were sent to Gilroy after the execution of the agreement?

Mr. Gordon: I object to that. The checks speak for themselves, and the agreement is in evidence.

The Court: The agreement shows the date; the objection is sustained.

Mr. Bishop: Exception.

The Court: The fact is in evidence by those two checks of documents.

By Mr. Bishop:

Q. How long did you continue to pay Gilroy accident benefits?

Mr. Gordon: I object to that as calling for a conclusion. It includes the term "Accident benefits". If he paid moneys, the payments themselves are matters of interpretation later on.

The Court: Objection sustained.

Mr. Bishop: Exception.

Q. I show you a check dated August 22, 1927, which is one of the checks marked "Exhibit D-8," and I ask you how much that check is for?

Mr. Gordon: I object to that, the check speaks for itself. It is in evidence.

Q. I show you a check dated August 22, 1927, for $31.43 and ask you what that is for? And how that amount is made up? A. It includes $17 covering temporary disability plus additional benefits that the company provides, that is, sufficient to be equivalent to full weekly wages.

Q. Can you state what period that was for? A. Two weeks preceding August 22, August 9 to August 19.

Q. I show you another one for $10.46 dated August 23, and ask you what period that is for? A. August 9 to August 15.

Q. Is that made up the same way.

Mr. Gordon: How much is that check, please?

Mr. Bishop: $10.46.

A. That is—these benefit checks were made up on the basis on which I just stated.

Q. I call your attention to the fact that all the other checks in this exhibit are for $83.78, and I ask you how that is made up? In the first place, what period does each check cover? A. Each check covers two weeks.

Q. How do you know the period for which they cover? A. Well, we try to—well, of course, the dates on the back here—we always——

Q. What do those dates represent? A. His two weeks; the same two weeks that would have been covered—covering two weeks' benefits for the same period that would have been covered by his pay envelope.

Q. What do those dates on the back of these checks indicate? A. They refer to the periods for which the benefits are payable.

Q. Here are four checks marked "Defendant's Exhibits 1, 2, 3, and 4." I ask you to look at those checks and tell me what those amounts are for and how they were made up?

The Court: What are the amounts, please?

Mr. Bishop: They are each for thirty-four dollars.

A. Those cover two weeks at seventeen dollars a week, covering temporary disability.

Q. What do you mean by covering temporary disability? A. By the law we are required to pay $17. Well, we pay him——

Mr. Gordon: I object to that. These checks were never cashed.

The Court: That will be another question. He is just testifying now what the amounts represent.

A. Well, these amounts cover the $17 a week which was to apply on the disability that would be later determined.

Q. Under what act were they payable? A. Compensation act.

Q. After your interview with Gilroy at which this paper was signed, you say you saw him again? A. Several times, quite a number of times.

Q. Did you talk to him? A. Yes.

Q. What was the subject of those discussions? State what you said and what he said, as nearly as you can. A. I don't remember the subject of all of them all the times I saw him.

Q. State it in substance. A. Well, for a time I usually dropped in to see him.

The Court: We are concerned here, I suppose, with what he talked to him on the subject of money, remuneration, compensation, or claims for damages or anything of that sort. I don't want him to go over all his conversation.

By Mr. Bishop:

Q. Did you talk to him after that about compensation? A. Yes, we did; I did.

Q. Did you talk to him about re-employment? A. Yes.

Q. What was the nature of the conversation about those two subjects? A. Along about—I think some time in March—I can't determine the date or approximate date—it seems to me it was some time in March, as I recall it—we talked about his——

Q. Do you mean March of what year? A. 1928. We talked about his settlement of the case and asked him to come down and we arranged for him to come down. When he came down to my office——

Q. Where was that? A. At the plant. Mr. Gilson was also present at the time, and I told him that he could come down to work or come back to the plant. We had a position for him, and I described essentially about what we expected, and also, of course, what compensation would be finally determined, which the company would pay, and then Mr. Gilson, of course, had some discussion with him at the time. I presume you don't want me to give that?

Q. You can state what Mr. Gilson said to him in Mr. Gilroy's presence and what Gilroy said to Mr. Gilson. A. There was some discussion about Gilroy going into some kind of business, and we talked about his coming back to the plant and also about the prospects of his going into business. If he went into business, we would make a payment of several thousand dollars, and in addition pay according to the final judgment of permanent disability. On the other hand, if he could come

back to the plant, we would have a position for him. The result of that was that he said he would think it over, and he left.

Q. What did Gilroy say with respect to coming back? A. Well, he said he would think it over. Of course, there were some discussions about both propositions while we were there, and he stated he would think it over and let us know.

Q. How long do you think this conversation took? A. There at that time?

Q. Yes. A. I don't know; I would say maybe an hour or so.

Q. And then when did you see him again? A. Some short time later.

Q. Had you had any communications with him in the meanwhile? A. I rather presume we had. I don't just recall any specific communication, but one reason I recall it is that he came down to the plant and said he would return to work, return to the plant.

Q. Was he receiving payments at that time? A. Yes, he was.

Q. By these checks that I have shown you? A. Yes.

Q. Did you have any further talk with him the second time that he came back to the plant? A. Well, we had some discussion about the time when he would return.

Q. What was the nature of that discussion? A. As I remember, it was the latter part of March that we talked about it. He raised the question as to whether the effect of—he said something about it being cold in case he came in. It bothered his hands, and in reply to that, I said essentially that any time that was the case, of course, he could go home. In other words, we would en-

deavor to take care of any situation that arose in that connection, and the time that he said that he would come down would be the first of April. That was our understanding, that it would be the first of April, so at the time that discussion took place——

Q. What year? A. 1928.

Q. That is when he was to come back to work? A. That is right.

Q. When did you next see him? A. That was the last time, I think, I saw him.

Q. Was that the last communication you had with him? A. No, I wrote some letters to him.

Q. Did he do anything pursuant to those letters?

Mr. Gordon: I object to that as calling for a conclusion.

The Court: Objection sustained.

Mr. Bishop: Exception.

Q. Did you hear from Gilroy after sending him any of those letters? A. I don't recall that we did. We sent him one letter saying that we had expected him to come back.

Mr. Gordon: I object to the contents of any letter unless proof is shown that it was sent.

The Court: Objection sustained.

Mr. Bishop: Exception.

Q. That is the last time you saw him? A. Yes.

Q. Was Gilroy rational at the time you talked to him? A. Yes.

Q. At all the times you talked to him was he rational? A. Yes.

Q. Did he appear to understand what was said to him? A. Yes.

Q. Did he make rational answers? A. Yes.

Mr. Bishop: Cross-examine.

Cross-examination by Mr. Gordon:

Q. Mr. Keppel, you have been with the Standard Oil Company how long? A. Over nine years.

Q. What is this personnel manager's position? What does it mean? A. Well, essentially, at the time I had general supervision of employment.

Q. You say you had general supervision of employment? A. Yes.

Q. Did you examine the men when they are employed? A. I don't personally, but that came under my——

Q. They are examined by doctors when they are employed? A. Yes.

Q. That is, under your direction and supervision? A. Yes.

Q. And they are not put to work unless they are in good health, are they? A. That is right.

Mr. Bishop: I object to that.

Q. As the general personnel manager, you keep track of the men while they are in the employ of the company? A. Yes.

Q. And under your supervision and direction, they are given periodic examinations, aren't they?

Mr. Bishop: I object to this as utterly irrelevant.

Mr. Gordon: I will withdraw the question.

Q. You also take charge of the settlements with the men when they get hurt? A. Yes.

Q. And some of them are settlements under the Compensation Law? A. Yes.

Q. Quite a few of them are? A. Yes.

Q. You are familiar with the procedure where there is a settlement under the compensation law, arn't you? A. Yes.

Q. And you have been familiar with it for how many years? A. Well, a matter of several years.

Q. When you give a man a payment as compensation, you have to get a receipt from him, don't you, and file it with the department? A. We execute form two.

Q. Answer the question yes or no, please. When a man is given money as compensation, you take a receipt from him, don't you? A. I am trying to distinguish as to what part of the compensation——

Q. I mean any kind of compensation, from start to finish.

Mr. Bishop: I object.

Mr. Gordon: I will withdraw the last question.

Q. When you first give a man compensation, you take a receipt from him, don't you? A. No, we send an announcement of that. I am trying to distinguish between your steps.

Q. You understand my question, when you give a man a check? A. Yes.

Q. You know what it is to give a man a check? A. Yes.

Q. When you are giving it to him as compensation, you take a receipt for it, don't you? A. No.

Q. You make a report that you paid compensation, don't you? A. Yes.

Q. To whom do you make that report? A. We make a report——

Mr. Bishop: I object to what reports he makes. The question is whether or not he makes a payment.

The Court: I will allow the question.

Mr. Bishop: Exception.

By Mr. Gordon:

Q. To whom do you make a report of payment of a check as compensation? A. Make a report to the New York office, and we send, when the final determination is entered into, there is a report sent in to Trenton, department of labor.

Q. What do you mean by the final determination? A. Permanent disability.

Q. You know that when an agreement for compensation is made, it has to be sent to the Bureau for approval, don't you? Answer yes or no.

Mr. Bishop: I object to that. That is a matter of law.

The Court: This is proper cross-examination. He has been examined by you on direct on the whole subject of his dealings with this man and payments and all on the subject of compensation. I will allow the question.

Mr. Bishop: Exception.

A. Final agreement.

Q. What do you call final agreement? A. Final determination of permanent disability.

Q. Then, if you settle with the man, before the final disability was determined upon, you would not send it for approval, would you? A. (No answer).

Q. Do you remember settling with McMorrow? A. Generally, yes.

Q. Do you remember settling with Peters? A. I remember that we did, yes.

Q. When did you settle with them? After you determined the permanent disability? A. Well, I would have to check up on the dates.

Q. Did you check up a final settlement in this case? A. Not a permanent disability.

Q. Did you have a final settlement of agreement to accept compensation under the Workmen's Compensation Law? A. As I say, not as a permanent disability.

Q. As to any disability? Did you? A. Well, we had this acceptance.

Q. Do you mean this form two? A. Yes.

Q. You had form two approved in other cases, didn't you? A. Not that I know of.

Q. Didn't you handle McMorrow's case and Peter's case? A. As I say, I didn't handle the final disposition of that case.

Q. Didn't you handle form two in that case? A. Yes.

Q. And didn't you have form two approved in those cases? A. I don't remember.

Q. Will you say that you did not? A. I say I don't remember.

Q. Isn't it a fact that form two is the form you submit for approval to the Board? Didn't you have form two approved by the Board? A. In these cases?

Q. In all cases where there are settlements under the Workmen's Compensation Act. A. We send form two to the Workmen's Compensation Bureau at Trenton. My understanding is——

Q. Do you send form two for approval or don't you? A. We send it as a notice to them.

Q. Do you send it for approval? A. That is not my understanding.

Q. Is the approval placed on form two?

Mr. Bishop: I object to that.

Q. Do you ever check up these forms after filing? A. I didn't those.

Q. How long after a form is made out are you supposed to file it in New Jersey? A. Well, we had the practice after filling it out to send it in as soon as we could get through with it.

Q. In this case here you did not send the form down until after a suit was started by someone, did you? You did not file this form with the Workmen's Compensation Bureau until September 29, 1928, did you? A. September 29, 1928?

Q. Yes, sir. A. Well, we sent it down, as I remember, sometime in October.

Q. Don't you know that the answer in this case says that this form was filed September 29, 1928? A. All I am saying is that we sent the one—that was after it had been signed—sometime in the middle of October.

Q. You knew that a suit was started here in an action at law in August, 1928, didn't you? A. I didn't know the dates.

Mr. Bishop: There is no statement in this answer that the form was filed in 1928.

(Argument.)

Mr. Gordon: I will withdraw the last question.

Q. If you are in charge of these things, why did you and Mr. Gilson hold conferences with him?

Mr. Bishop: I object to that.

Mr. Gordon: I will withdraw the question.

Q. You say that about four or five days after you saw him, you came back to get the paper, is that right? A. That is right.

Q. Did you have the paper prepared when you went there? A. Yes.

Q. Was it dated the day you prepared it? A. I believe it was.

Q. How long after you prepared it did you bring it there? A. I don't know; it might have been the next day or within a couple of days.

Q. You dated the signature on this paper as October 15, didn't you? A. That is right.

Q. And the paper, the date of the preparatory blank was October 6, wasn't it? A. That is right.

Q. The amount of the weekly wages that Gilroy was getting was $41.89, according to the time he used to put in, is that right? A. I believe it is.

Q. And double that amount is $83.78, isn't it? A. That is right.

Q. And the Workmen's Compensation Law, under the Compensation Act, only requires payment during temporary disability of $17 a week? A. Yes.

Q. So you were giving Mr. Gilroy a present under the Act, weren't you? A. According to our benefit plan we pay $17 a week, which is understood, and which, of course, I called his attention that it included the $17 temporary disability, but our benefit plan in case of accident happens to be more generous than the State Compensation. The result is we pay the equivalent of full pay, which includes $17 a week compensation during the temporary disability.

Q. This was for benefits then? Was it the full salary? A. Including the $17 that we are required to pay under the said compensation act.

Q. $17 a week is compensation, isn't it? A. That is right.

Q. And that is distinguishable from benefits? A. It is included in that.

Q. It is a distinguishable feature from the benefit, is it not? That is a legal obligation, isn't it? Do you call that a benefit when you pay what the law requires? A. Perhaps I should use a different word. According to our accident plan, we pay the equivalent of full pay for sixteen weeks, and two-thirds pay a year, which happens to be more generous than the State Compensation requires us to pay.

Q. Seventeen dollars a week is what the Compensation Law calls compensation, does it not? A. That is true.

Q. And that is compensation? A. Yes.

Q. And that is not a benefit, is it, when a man is being paid what the law says he should get? A. That is right.

Q. Will you explain to the Court and jury why these four checks have stamped on the back of them "Benefits", the ones that he did not cash? A. It happens to be on the stamp that includes a date.

Q. Everything was benefits, wasn't it? A. I didn't say so. The $17 is the amount of the check.

Q. You went to see this man immediately after the accident, didn't you? A. All of them.

Q. You were there the next morning? A. That is right.

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

Q. Did you see him the second day after the accident? A. I believe I did.

Q. You spoke to him? A. I think so.

Q. You spoke to him the second day after the accident? A. I didn't say that. I am not sure as to just when we spoke following the accident. The first day we did not speak to him.

Q. Did Gilroy recognize you the morning after the accident? A. I don't know.

Q. Did you see him at the hospital the morning after the accident? A. Yes.

Q. What did you go there for? A. To see that they were taken care of. Everything was being done that could be done.

Q. Didn't Mr. Smith arrange for that? A. He also did, and so did I.

Q. It needed two of you to do that? A. It wasn't entirely necessary, but we were naturally interested in them.

Q. Then two weeks after he was in the hospital, you had a discussion with him about compensation, didn't you? A. He raised the discussion.

Q. He raised the discussion? A. He raised the question about his benefit check.

Q. Didn't you say to him that the company was not altogether sure if it was a compensation case? A. I said it was a question about that, that is right.

Q. You had been making an investigation, hadn't you? A. The question had been up for a discussion.

Q. In your office there was a question as to whether or not this was a compensation case, wasn't it? A. I assume naturally it was.

Q. There was a question about it, wasn't there? A. There was, at first.

Q. Then when you did some figuring, it was not, is that right? A. After awhile we were advised that it was.

Q. When you sent these checks, which were compensation checks dated in May, 1928, and in June, 1928, and in April, 1928, they were after you had some kind of an agreement for compensation, weren't they? A. Yes, sir.

Q. Did you send him any receipts at that time to sign for compensation? A. No, we did not.

Q. You say when you went there with this Exhibit D-16 the first time you went there you were along or with Mr. Hertzig? A. With Hertzig.

Q. And at that time you told him what was in the paper? A. That is right.

Q. You are sure about that? A. I told him what we were there for.

Q. You were there to get him to sign the compensation agreement? A. That is right.

Q. Did he understand what you were talking about? A. I assume he did.

Q. And within the next few days when you came back later, Mr. Hertzig read this paper to him? A. He read it to him before.

Q. When you came back a few days later— A. When we first presented it to him.

Q. Didn't you say that Hertzig read it to him when he signed it? A. That is right.

Q. If you told him what it was three or four days before and you had left it with him for three or four days, why did you read it to him again? A. Because I assumed that Hertzig wanted to make sure that the man knew what he was signing.

Q. Was there any question about his understanding what he was doing? A. Not so far as I know.

Q. Isn't it a fact that about six weeks after this accident, when you were making payments, you asked him for a receipt, six weeks after the accident? A. I don't recall it.

Q. Will you deny it? A. No, I just don't recall it.

Q. You remember everything else? A. I remember what I stated.

Q. Do you remember seeing him about four weeks after the accident, about a month after the accident? A. I saw him a number of times.

Q. Do you remember saying this to him: "Ed, how is your condition?" Do you remember saying that to him about four weeks after the accident? A. Not specifically. I inquired as to his condition, certainly.

Q. Do you remember a discussion about the accident and the company contending that it was an act of God, about a month after the accident? A. There were a number of discussions concerning how it happened.

Q. Do you remember telling him that the company claimed it was an act of God, a month after the accident? A. No.

Q. Was there any discussion about it being an act of God? A. Not that I remember.

Q. Will you deny that you said it? A. I don't remember that I said it. I don't believe I said it.

Q. Do you remember then saying to Mr. Gilroy: "The company is not responsible. However, I think they are going to take care of you"? Do you remember telling him that about a month after the accident? A. No. We were taking care of him, as a matter of fact, and had right straight along.

Q. Under this plan that you had worked out? A. That plan has been in existence before this accident occurred.

Q. Do you remember about thirteen weeks after the accident seeing Mr. Gilroy at his home? A. That would be about four months after?

Q. Three months after? A. Oh, yes, three months, I beg your pardon. I don't remember specifically. I was up to his home several times.

Q. Do you remember talking with him about taking the matter up on the question of his getting full salary until he was able to work? A. I remember essentially this conversation: I don't know as it transpired there in his home. I remember he 'phoned in and said some question about why his payments had been cut to two-thirds. I think he talked with Mr. Hertzig, and Mr. Hertzig came in to see me and took the matter up with New York, and the result was that we continued to pay him the full benefits.

Q. Do you mean to say that they actually cut his checks two-thirds? A. No, we did not.

Q. Who did the cutting there? A. According to the plan, he would get sixteen weeks' full pay.

Q. Then he was to get full wages after that, too, wasn't he? A. No, he was to get two-thirds, and when he raised the question as to why it was cut to two-thirds, that is the time we took the matter up with New York about his saying about being cut two-thirds, and an exception was made in his case, and he continued to be paid the equivalent of his full pay.

Q. Even though it was a compensation case? A. Yes.

Q. Didn't he say to you that he may have to sue some day, about thirteen weeks after this ac-

cident, and didn't you say to him, "Don't do that. I am sure the company will take care of you as long as you live"? A. I don't recall that conversation.

Q. Do you deny that thirteen weeks after this accident, Gilroy was still talking about a lawsuit? A. My understanding was that he was going to—that the compensation was entirely satisfactory—not entirely, but was satisfactory.

Q. Will you deny that thirteen weeks after this accident he was talking to you about a lawsuit? A. I don't remember a discussion at that time about a lawsuit.

Q. When was there talk about a lawsuit? A. Some time later.

Q. How long? A. As I recollect it, it was some time before our discussion concerning his returning to work.

Q. Had you received a report about his returning to work from Dr. Pinkerton? A. I did not receive a report from him personally. I did not see any report, but I inquired from our doctors, and also from Mr. Gilpin as to whether or not the doctors had examined him and whether or not the question of his being physically fit to come back.

Q. You have been in court here all week? A. No, sir; I have not.

Q. You have been here most of the week? A. No, I haven't.

Q. Did you hear Doctor Pinkerton testify? A. Yesterday, yes.

Q. The company doctor? A. I heard Doctor Pinkerton.

Q. Did you hear him say he examined him on October 28th and then he thought he was able to go to work? A. Yes.

Q. In March, 1928, had you a report that he was then able to go to work? A. I did. I had a report that he was able to come in.

Q. In March, 1928? A. Yes.

Q. That he was able to go to work then? A. Not to return to his regular duties.

Q. That he was able to go to work in March, 1928? A. That was our report.

Q. You were to put this boy back to work in March, 1928? A. Not on his regular work.

Q. In and about the plant where this explosion and fire happened? A. In the plant, yes.

Q. In March, 1928? A. That is true.

Q. You have identified some checks here, August 9th to August 19th, and on August 9th to August 15th. Why were those checks split up this way, if they covered that period of time and they were supposed to be full benefits? A. Well, I—my thought would be that it covered a fractional part of the pay period.

Q. If you add those checks together what is the total of them? A. $41.89.

Q. That is one week's salary, isn't it? A. (No answer.)

Q. According to your paper here you stated that was a complete benefit and compensation proposition to make his week's salary? A. That is right.

Q. And yet it covered a period from August 9th to August 19th on one and August 9th to August 15th on the other? A. It would be a question of determination just when and how his pay period came.

Q. A week is a week, no matter how it works out? A. Yes.

Q. And there are seven days in a week? A. Six days, in his case.

Q. That would embrace $41.89, according to your agreement that you had signed in October, would it not? A. That is right.

Q. Will you please explain why these so-called benefits, which included compensation, covered a period embracing August 9th to August 19th, ten days? A. My point is that it covered a fractional part of his pay period. In other words, we endeavored to give these checks out at the same time that he would receive his pay envelope, so that he had money just as though his pay came in.

Q. One of these checks is dated August 22nd? A. That is the date of the check.

Q. And the other is dated August 23rd, isn't it? A. That is right.

Q. He did not get his pay checks a day apart, did he? A. No, he did not.

Q. That does not answer it, does it? A. No, it don't. I assumed that it was figured on the basis of a fractional part of his pay period. Just what the ten dollars and how it is figured, I can't recollect at this time.

Q. They were both cashed on the same day, August 25th, 1927, and marked paid? A. That is right, probably given to him at the same time.

Q. You make written reports to your company? A. Yes.

Q. You make written reports to your company in regard to transactions had with employees? A. Well, it depends on what transaction you are referring to.

Q. This kind of transaction, such as the one you claim to have had on October 15th, 1927? A. Probably sent a letter through; did not make any special report. It was a report itself.

Q. They become part of a particular case, don't they, part of the file? A. If there was such a one.

Q. And it is a matter of record, so far as the company is concerned? A. It would be.

Q. Have you any authority to bind your company without first getting instructions from your superiors? A. No, I haven't, on that case.

Q. Didn't you inquire of Doctor Pinkerton after you had spoken to Gilroy about coming back to work, and didn't Doctor Pinkerton tell you that the company must be crazy to have that man around the plant? A. Never had that conversation.

Q. What kind of work were you going to give him around the plant in March, 1928? A. Well, what we had planned to have him do was to come in and go down to Kimbal's pump house, and propably do whatever he could, carry some samples.

Q. Did you expect him to turn some valves? A. No.

Q. Did you expect him to climb some ladders? A. No.

Q. Or swing or turn a wrench? A. No. That didn't even enter our heads. He wasn't able to do it.

Q. Mr. Gilroy spoke to you about going into business in March, 1928, didn't he? A. That is so.

Q. And at that time you were talking about paying him several thousand dollars on a final judgment? A. That is true.

Q. If he had compensation coming to him, didn't you know the exact amount the compensation would be? A. We thought that we would pay that in addition to compensation, to whatever the final compensation for permanent disability was agreed upon.

Q. You were ready to give him even more? A. Yes, sir.

Q. Did you have authority to make that settlement? A. Mr. Gilson put that proposition up to him, and I was there at the time.

Q. And then Gilroy said he was coming back to work? A. He said he was around the first.

Q. You told him where he was going to go to work? A. He said what would it be, and I told him he would have something extremely light, and it was a question of his coming in, and it would no doubt be helpful to him.

Q. And at that time you had this paper signed, didn't you? A. That is true.

Q. You are sure about that? A. Well, that was in October, and these other conversations took place sometime in the latter part of March.

Q. Have you a file where you keep records of where you file form number two? A. We keep it in his file.

Q. And in his file, can you tell me the dates from his file when this form was filed with the Department of Labor of the State of New Jersey? A. I could by checking the forms that were involved in it.

Q. If a man goes back to work, the minute he goes back to work his temporary compensation stops, doesn't it? A. That is true.

Q. And that was one reason why you wanted to get him back to work, wasn't it? A. We were not hasty about it; didn't want to be, at any rate.

Q. That was one of the reasons why you wanted to get that man in your plant to work, wasn't it? A. Well, I don't think that that was a large part of the proposition.

Q. Was it any part of the proposition? A. Not that I recall. The doctor said that he was able and we acted on the basis of their report.

Q. And on that he would have been stopped in his temporary compensation, would he not? A. On what?

Q. On his going back to work? A. Well, he would get his pay while he was there.

Q. If he would go back to work he would be stopped on temporary compensation? A. That is right. He knew it. He would be in, and we would be paying his wages in his pay envelope, instead of by check.

Q. Then why did you offer to send him checks, in April and May, if this man was able to go back to work on the first of April? A. Because he didn't.

Q. You recognized that, although he was ready to go back to work and the doctor told you that? A. He did not come in.

Q. The doctor told you he could come in on the first of April? A. That is what he told us.

Q. And yet you sent him checks for—in April and May? A. $17 to apply on permanent disability.

Q. Permanent or temporary, you did not know what the permanent disability was, did you? A. Whatever it would be.

Q. Did you tell him that in the back of the checks, or did you just simply put the same old rubber stamp on? A. That is the check.

Q. You knew that if this man was able to go back to work, you would not be obligated to pay him any more disability compensation under the law? A. That is right.

Q. And you knew that you could compel him to go before a doctor and be examined to determine his permanent disability before you had to pay him any more monies, isn't that right? A. I believe it is.

Q. Don't you know? Haven't you been personnel manager for a number of years handling those things? A. That is true.

Q. Did you send him notice to submit to a physical examination on or about the first of April, 1928? A. I did not.

Q. Before the Commissioner of Labor or its doctors? A. I did not.

Q. You were in pretty close touch with this case, weren't you? A. Fairly close.

Q. It was a very important matter, wasn't it? A. Yes, we were interested in the man, too.

Q. The third week that Gilroy was in the hospital could you see his hands? A. I don't think so.

Q. Could you see his eyes when you came to see him? A. I don't recollect.

Q. When was the first time Gilroy could see you after the accident? A. I don't recollect just when it was.

Q. Was it the first week? A. I don't remember.

Q. Was it the first month? A. I just haven't any way in which I can get my judgment in the matter.

Q. You remember everything else, don't you? A. I remember what I have said.

Q. You remember that you went there with Mr. Hertzig and you told him the first day, and then you re-read it to him? A. Yes.

Q. But you do not remember the first time this man looked into your eyes and you could look into his? A. I don't fix the date.

Q. You don't know whether it was a week? A. I think it is more than that.

Q. You don't know whether it was a month? A. I am not sure.

Q. Was it over a month or under a month? A. I am not sure.

Q. Do you know when he could hold a pen in his hand after this accident? A. Not the specific date.

Q. Do you know whether it was a month or two months after the accident? A. Not the specific date.

Q. Do you know approximately? A. No, I don't.

Q. And yet you were ready to have him sign a paper before he could even sign his name? A. Well, he was able to take it in his hand at the time.

Q. And make a mark? A. Yes.

Q. And that is what he made? A. Yes.

Q. And you saw him make that mark? A. Yes.

Q. And Hertzig saw him make it? A. Yes.

Q. And just you two were alone in the room with Gilroy on his back, is that right? A. I believe that is correct.

Q. And you were the only employees of your company who were present when that mark was supposed to have been made to this paper? A. Yes, and at the time I presented it to him his wife was there.

Q. But when it was signed on the so-called 15th day of October, 1927— A. That is correct.

Q. (Continued) —just two members of the company and Ed. Gilroy were present, is that right? A. I think that McMorrow was in the same room at the time; I am not sure.

Q. Are you sure about that? A. I am not sure.

Q. Why, didn't you know McMorrow was out of the hospital then? A. I would have to check on the date.

Q. Are you sure about this signing, if you have to check up on the date? A. I am sure about the signing.

Q. You know that, don't you? A. Oh, yes.

Q. Have you any records here in court to show if and when you mailed form two to Trenton? A. I have not. Whether or not Mr. Gilson has, I don't know.

Q. You never had that approved, did you? A. Approved by whom?

Q. Approved by the Commissioner of Labor. A. It was not necessary.

Q. Did you or did you not? A. No, it wasn't necessary. That was our assumption.

Q. You had other forms two approved? A. Not that I know of. We sent them to him.

Q. For approval? A. I don't know; I didn't know it was required to prove form two.

Q. When you made an agreement of settlement, what did you put it on? Did you put it on form number one, two, or three? A. Form three for settlement of permanent disability.

Q. Did you have form three approved? A. No, we didn't settle the matter of permanent disability with him.

Q. Then you never made a settlement with this man for his permanent disability, did you? A. That is correct.

Q. And the only kind of a settlement you tried to make with him was one for a temporary disability? A. That he accepted compensation.

Q. The only kind of settlement you tried to make with him was one for a temporary disability? A. The matter of permanent disability would be later determined.

Q. The only one you had made with him up to that point was the one for temporary disability? A. I don't know whether it covered temporary. We were paying according to the Act.

Q. You were paying him the same as the act? A. According to our benefit plan.

Q. And that happened to be a full week's salary? A. That is correct.

Q. Until you started to give him $17 a week? A. That is correct.

Q. And when he would not take that, you sent him checks again two or three times, is that right? A. That is correct.

Q. And then he was ready to go to work while he was getting those checks? A. Around the first of April, 1928; not to return to his regular employment, though.

Mr. Gordon: That is all.

Re-direct examination by Mr. Bishop:

Q. You were asked by Mr. Gordon about a settlement with Peters and McMorrow. What did Peters and McMorrow receive?

Mr. Gordon: I object to that, as to the amount they received. It is immaterial and not pertinent, because if there is any question about that amount, I will call Mr. McMorrow and Mr. Peters on that issue.

(Argument.)

The Court: I shall sustain the objection, using my own discretion, because I don't think it is proper for the jury to have matters concerning the payment of amounts of either damages or obligations under the law or voluntary settlements with other parties involved in the same accident. The whole tendency would be to confuse the issue in this case, and no questions whatever have

been asked on direct examination with reference to the amount paid, or whether anything was finally paid. Form number two was filed in this case, but there was no permanent payment or final payment made. It is immaterial whether or not there was in the other two cases. I will sustaint the objection.

Mr. Bishop: Exception.

The Court: Gentlemen of the jury, we will recess at this time until Monday morning, until 10.30 o'clock, in order that I may dispose of the criminal business previous to that time. The recess that you are now going to take will be considerably longer than you have had heretofore, because it will be over the week-end. There will be considerable possibility of contacts with people in your going and comings through the week-end recess, so that at this time I wish to caution you very, very carefully and emphatically not to allow anybody of any source, even your families, to approach or discuss with you any phase of this case. If anybody should attempt to do so, it is your duty to report it to the court. There is no intimation from the court that anybody at the instigation of either side will approach you, but oftentimes there are people who consider it their privilege to do that, without knowledge of the seriousness of it, and it will be for you to refuse to discuss the matter with anybody at all in any possible way, directly or indirectly. If it should come to the attention of the court and counsel that anybody had done that

with you, it will involve a mistrial in this case. It has been a long, expensive proceeding so far, and it would be a matter of great regret if a mistrial should have to be declared and all this matter gone over again because of somebody's perhaps even unintentional violation of the law in this respect. I am putting the responsibility upon your shoulders to see that nothing like that happens.

(A recess was had until 10.30 o'clock Monday morning, November 4, 1929.)

Mr. Bishop: I should like the record to show that I have submitted twenty-four requests to charge with the Court's permission to withdraw or modify or submit additional requests at the end of the trial.

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

October Term, 1929.

EDWARD N. GILROY,

vs.

STANDARD OIL COMPANY (a New Jersey corporation) and STANDARD OIL COMPANY OF NEW JERSEY (a corporation of Delaware authorized to do business in New Jersey).

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. LLOYD THOMPSON, Judge, and a Jury, at the Union County Courthouse, in the city of Elizabeth, New Jersey, on the fourth day of November A. D. 1929.

Appearances:

FRANCIS A. GORDON, Esq., Attorney for the Plaintiff.

Messrs. LINDABURY, DEPUE & FAULKS, JOHN W. BISHOP, Esq. (Present), BURTIS S. HORNER, Esq. (Present), Attorneys for the Defendants.

ERNEST U. HURTZIG, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Bishop:

Q. Mr. Hurtzig, where are you employed? A. Standard Oil Company of New Jersey, Bayonne Refinery.

Q. How long have you been employed by that company? A. Since the 16th of January, 1919.

Q. Were you in the employ of the company during August, September and October, 1927? A. I was.

Q. What was the nature of your position? A. Office manager in the personnel department.

Q. Do you know Edward Gilroy, the plaintiff in this case? A. I do.

Q. Did you ever see him before this trial? A. I did.

Q. Where did you see him? A. In the hospital at Bayonne.

Q. How many times did you see him? A. I saw him twice in the hospital.

Q. Was anybody with you when you saw him on those occasions? A. Mr. Keppel was there.

Q. When was the first time you saw him? Do you remember the date? A. Some days prior to October 15.

Q. What year? A. '28—1927 it was.

Q. I show you a paper marked Defendant's Exhibit 16 and ask you to examine that and tell us whether or not you have ever seen it before? A. Yes, sir.

Q. Did you ever see that paper in Gilroy's presence? A. I did.

Q. Did you ever see it in his possession? A. I did.

Q. When was that?

Mr. Gordon: If your Honor please, I object to this question on the ground that it is incompetent, irrelevant, and immaterial to the issues involved in this case. I submit, if your Honor pleases, that any further testimony in connection with this paper is not testimony that supports a legal defense in this case.

The Court: I have permitted all the testimony on the subject of whether or not there has been any other agreement as to compensation in this case, either under the Workmen's Compensation or as a common-law agreement, so that I will admit this also and allow you an exception.

Mr. Gordon: Exception.

May I for the purposes of the record and in order to save time state that I enter an objection to all questions directed toward any negotiations or any factor in connection with the alleged making of this exhibit, which is directed to the attention of the witness?

(The stenographer read the last question as follows):

"Q. When was that?" A. October 15, 1927.

Q. Had you ever seen it in his possession before that day? A. Yes, it was handed to him several days prior to that date.

Q. Who handed it to him? A. Mr. Keppel.

Q. Was there any conversation between Gilroy and Keppel at that time in your presence?

Mr. Gordon: That is objected to on the ground that any conversations are merged in that written agreement, if there was a paper, that is good in law.

The Court: That objection is well-founded.

Mr. Bishop: I don't think so, if your Honor please. It is competent to show what that man knew about that document and what knowledge he had when he signed it.

The Court: Do you mean knowledge of fact or of law?

Mr. Bishop: The contents of the document.

The Court: I have allowed him to be examined on that ground.

Mr. Bishop: I cannot ask leading questions, if your Honor please.

The Court: I will allow it, for the purpose mentioned.

Mr. Gordon: Exception.

(The stenographer read the last question as follows):

"Q. Was there any conversation between Gilroy and Keppel at that time in your presence?" A. There was.

Q. State the substance of that conversation, as you recall it.

Mr. Gordon: I object to the substance; I ask for the conversation.

The Court: Yes. I don't think the witness ought to interpret the conversation.

By Mr. Bishop:

Q. State what was said, as near as you can recall it. A. Mr. Keppel told him that he had a compensation form number 2 that he brought to him and asked if he would sign it. Mr. Gilroy said that he would like to look it over before he signed anything. Mr. Keppel said, "All right, no immediate hurry. We will leave it here with you and come back later."

By Mr. Gordon:

Q. Who said that? A. Keppel said, it and Mr. Gilroy, "All right".

By Mr. Bishop:

Q. Where was that paper left when you left Mr. Gilroy's room? A. With Mr. Gilroy in his room at the hospital.

Q. When did you next see him? A. The Saturday forenoon on October 15, 1927.

Q. Where was it then? A. In his room at the hospital.

Q. Whose room? A. Gilroy's room at the hospital, the one we were in when we left it with him.

Q. How long was that after you had gone after leaving it with him? A. I don't recall the exact number of days, but I should say we probably went there on Tuesday.

Q. Was it overnight? A. Several days.

Q. And on the second occasion that you were there what took place? A. Mr. Keppel asked Mr. Gilroy if he were ready to sign the form, if he had looked it over.

Q. What did Gilroy say? A. He said he had. Said he didn't see any particular objection to signing it. Seemed to be ready to do so.

Q. Well, did he sign it? A. He signed it with his mark "X".

Q. I call your attention to a mark on this exhibit and ask you who made that mark, mark "X", opposite the words "Edward Norman Gilroy's mark", who made that "X" mark? A. Edward Gilroy.

Q. Did you see him do it? A. I did.

Q. Whose signature is that underneath the printed line "If signed by mark same must be witnessed"? A. I signed that. That is my signature as witness and I put the date there, too.

Q. Where did you do that? A. Right in his presence, resting on the dresser which was standing at one side of his room.

Q. Was there any conversation between Mr. Keppel and Mr. Gilroy or between you and Mr. Gilroy on the occasion of that visit with respect to this document? A. Only that I asked him if he had read the blank and he knew what it was, and he said yes, and as to question 29, he asked if he was only going to get the full amount $41.89 for sixteen weeks.

Q. What response did you make to that? A. I told him as far as the form was made out that would be the amount that he would receive for the first sixteen weeks according to the company's plan.

Q. Did you hear Mr. Keppel have any other conversation with him? A. I don't know that there was anything particular about the form itself. Passed the time of day, and nice kind of weather, and that is about all.

Q. Was there anything said about the matter of compensation or making of compensation payments? A. Only in as far as the blank states there. That is all that I remember.

Cross-examination by Mr. Gordon:

Q. Now, Mr. Hurtzig, what is your full name? A. Ernest H. Hurtzig.

Q. What does the "'H" stand for? A. Herman.

Q. And you spell your name "H-u-r-t-z-i-g? A. H-u-r-t-z-i-g. Not with an "e".

Q. Always spell it that way? A. Yes.

Q. How long have you been with the Standard Oil? A. Since the sixteenth of January, 1919.

Q. 1919 or 1918? A. 1919.

Q. What were you doing before you were office manager in the personnel department? A. How long——

Q. No. What were you doing before you were office manager in the personnel department? A. I was employment manager at the Case and Can Department of the Standard Oil Company.

Q. And before that what were you doing? A. I went there as an assistant timekeeper to begin with.

Q. Before that what were you doing? A. Before I entered the Standard Oil Company's employ?

Mr. Bishop: I object. I cannot see what he did before is relevant.

The Court: I presume it is leading back to something that might affect his credibility. I cannot tell. But I will allow it for a moment or two, to see how far it goes.

Q. You were doing what before that? A. I was a bookkeeper and cashier and had the hiring of people in an office.

Q. Where? A. H. R. Brewer & Company, 58 Liberty street, New York.

Q. Law blank people? A. Yes, they manufacture, or at least they print law books.

Q. Are you a lawyer? A. I am not.

Q. Studied law? A. No.

Q. Familiar with the Workmen's Compensation Law? A. I had nothing to do with the Workmen's Compensation Law except to follow out directions from my New York office as to what to do in cases.

Q. Do you fill out the forms? A. No, I do not fill out the forms.

Q. Who fills out the forms? A. Mr. Gilson, as far as I know.

Q. What do you do in the office as manager? A. See that the company's directions as pretaining to employes and their welfare and so forth are carried out.

Q. Do you have to go around witnessing papers as manager, is that part of your duties? A. I do, yes.

Q. It is? A. Yes.

Q. Two of you go? A. Not exactly two.

Q. In this case two of you went? A. Yes.

Q. Who read the paper over the first time? A. Mr. Keppel did.

Q. Were you there when he read it? A. I was.

Q. You heard him read it? A. Yes.

Q. You are sure about that? A. Aboslutely positive.

Q. Gilroy understood everything you said to him? A. I don't know what Gilroy understood, but he read it to him.

Q. Gilroy understood what you were talking about the first time you were there? A. I believe so.

Q. He acted rationally? A. He seemed to be normal.

Q. He acted rationally, didn't he? A. Positively.

Q. Sir? A. Positively.

Q. And yet, on the second occasion you read it over again, didn't you? A. I did.

Q. Well, if he understood it on the first occasion what was the need of reading it over on the second occasion? A. I never asked anyone to sign anything unless I feel sure that they know what they are signing, because I would not sign anything myself.

Q. You were sure four or five days before this that Gilroy knew what was in that paper, didn't you? A. Yes, but he had asked to have it left there so that he could look it over.

Q. And after you had read it to him and after he looked it over then you read it to him again? A. Yes, sir.

Q. Then what happened to the paper? A. He signed it.

Q. And then what happened to it? A. Then I took it and put it in my file in the office.

Q. And then what happened? A. That is all that happened to it.

Q. And it stayed in your office? A. Where it belonged.

Q. Who made the report to Trenton? A. I suppose Mr. Gilson did. I reported to him on the seventeenth of October.

Q. Yes. A. Mr. Gilroy, Mr. McMorrow and Mr. Peters had all signed our copy of the Compensation form number two.

Q. On the seventeenth of October? A. Yes, sir; that was Monday.

Q. And up to that time Mr. Gilson had no report from you that the agreement had been signed, had he? A. Compensation form number two.

Q. Look at me, please. Up to that time Mr. Gilson had no report that the agreement form number two had been signed, had he? A. Not from me.

Q. Or from anybody? A. I don't know.

Q. Well, you had charge of it, didn't you? A. Mr. Keppel had charge of it.

Q. Keppel and you were familair with it? A. Yes.

Q. You knew up to October 15 it hadn't been signed? A. It was signed on the fifteenth.

Q. Up to October 15 it hadn't been signed, had it? A. No, it hadn't been signed.

Q. And you never reported to Mr. Gilson before October 15 it had been signed, had you? A. No.

Q. Now, you are sure of that? A. Certainly.

Q. Positive of that? A. Yes, because I would not report it if he hadn't signed it.

Q. Exactly. Who was in this room? A. Gilroy was in the room; Mr. Keppel was in the room; I am not sure whether Hughey McMorrow was in the room or not, but he had been in there.

Q. Was a nurse in the room? A. The nurse was in the room.

Q. Which nurse, the day nurse or the night nurse? A. Mrs. McClarty.

Mr. Gordon: Mrs. McClarty, stand up, please.

Q. Was she in the room when that paper was signed? A. I believe she was.

Q. Are you sure about that? A. I am quite certain.

Q. Why didn't you ask her to sign it? A. I did.

Q. As a witness? A. I did.

Q. You asked Mrs. McClarty to sign this paper as a witness? A. I asked if she would.

Q. What did she say? A. Said she didn't like to do that professionally; they don't like to get mixed up in any kind of documents.

Q. You did that what date? A. On the fifteenth of October.

Q. 1927? A. Yes, sir.

Q. You asked the lady who just stood up, Mrs. McClarty, to sign that paper? A. I asked if she would.

Q. She said she didn't like to do it? A. Yes.

Q. Now you are sure of that? A. I am quite sure.

Q. What kind of weather was it? A. Very nice day.

Q. Clear? A. I believe so.

Q. You know you were there in the forenoon? A. Yes.

Q. You know it was Saturday? A. Yes, sir.

Q. What day of the week was November 15, 1927, a month later? A. I don't know.

Q. How do you remember this date in particular as being a Saturday? A. Because I know it was Saturday because I wanted to get off at twelve o'clock and we had to go down to the home of Mr. Peters.

Q. That is the way you remember this was Saturday? A. Particularly, and then I looked it up on the calendar, too.

Q. You looked it up on the calendar? A. Positively.

Q. Been studying this case since you have been around the courtroom? A. Certainly I have looked it over.

Q. And you talked it over? A. Yes, sir.

Q. Where is the dresser in this room? A. Standing against the wall somewhere.

Q. Which wall? As you go in the room, on the right side, left side, or front of you? A. As far as I remember it was on the right-hand side going into the door.

Q. Are you sure of that? A. It was at that time.

Q. You are sure of that? A. I am quite sure.

Q. Do you remember calling there at the hospital about four weeks after the accident, two or three days after Peters left the hospital? A. At the hospital?

Q. Yes, sir. A. No, I don't recall.

Q. When did Peters leave the hospital? A. Some time in September, I believe.

Q. And on October 15 you were going to get Peters' signature to the papers also, weren't you? A. Yes, sir.

Q. After he left the hospital? A. Yes, sir. At his home.

Q. Now, don't you remember that the first time you saw Mr. Gilroy was two or three days after Peters left the hospital? A. Two or three days after?

Q. Yes. A. No, I don't recall that.

Q. Don't you know Peters left on the Saturday before Labor Day? A. I don't know what day he left the hospital.

Q. You are sure, however, that the Saturday was on the fifteenth, aren't you? A. October 15 it was.

Q. That you are sure about? A. I looked it up on the calendar.

Q. Do you know Mrs. Gilroy? A. I have seen her.

Q. Was she there when you first brought the paper there? A. She was in the room.

Q. Do you know Mrs. McMorrow? A. No, I do not.

Q. Was she there when you first left the paper there? A. I don't recall that she was.

Q. Will you say that she was or that she was not? A. I won't say either, because I don't know.

Q. You don't know who was there when you left the paper there? A. Mrs. Peters was there.

Q. Mrs. Peters was there? A. Mrs. Gilroy.

Q. Was Mrs. McMorrow there? A. I don't know.

Q. Don't you know who was there when you came with Keppel with this paper the first time? A. Mrs. Gilroy was sitting at the chair, on a chair, and she started to get up and I was introduced to her.

Q. Do you remember when Mr. Keppel came the first time that he asked Mr. Gilroy how he is getting along and then said: "Ed, this accident was caused by an Act of God, for which the company is not responsible; however, I think the company will take good care of you"; did Keppel say that the first time? A. I don't recall it.

Q. Weren't you there with him? A. Yes.

Q. Will you deny it? A. I would deny that I heard it, that I know anything about it.

Q. Weren't you there? A. Possibly.

Q. Would you say that it didn't take place? A. I won't say. I can't say.

Q. Do you remember calling again the next day with Keppel and at that time Gilroy had his eyes covered, do you remember that? A. The next day?

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Q. Yes. A. No, not the next day.

Q. Do you remember the first time you came there his eyes were covered? A. I don't remember that they were covered.

Q. You don't even remember whether his eyes were covered? A. He was lying on the bed.

Q. You were giving a man a paper to sign and you didn't even know whether his eyes were covered or not? A. I don't think that his eyes were covered.

Q. You don't know? A. Well, I will say no.

Q. Do you remember Mr. Keppel said to Mr. Gilroy that he wanted him to sign a receipt? A. No.

Q. That Gilroy said he wanted to be let alone, that his eyes were covered and that he was in great pain and that he wanted to be let alone, do you remember that conversation? A. It didn't take place in my presence.

Q. Do you remember Keppel said: "This is just a receipt so that I can show the company you are receiving money"? A. No.

Q. And do you remember that Ed. said: "My wife will sign checks and this ought to be enough receipt until I get on my feet so I know what it is all about"? A. No.

Q. That didn't take place, did it? A. Not in my presence.

Q. Well, you were there, weren't you? A. I was there.

Q. You have been there several times before? A. Twice at the hospital.

Q. While you witnessed this paper? A. Yes, took it up there and witnessed it.

Q. Where was this paper taken from Ed Gilroy when you came to sign it? Where did he pull it from? A. It was on the dresser, as far as I can recall now.

Q. On the dresser that was on the right side of the wall? A. Yes.

Q. As you came in the door, on the right side there was a dresser? A. Yes.

Q. And from that dresser this receipt was taken and signed? A. Yes.

Q. You are sure of that? A. Yes, it was signed there, too.

Q. It was on the top of the dresser and signed? A. It might have been in the drawer.

Q. It was signed when you got there? A. It was not. It was signed after I got there.

Q. Where was the paper taken from that was brought over to Gilroy's bed to sign that you witnessed? A. He didn't sign it at all; he was sitting up when we came in the room.

Q. Where was the paper? A. On the dresser.

Q. Who got the paper from the dresser? A. I don't remember who picked it up.

Q. Was it in the dresser or on top of the dresser? A. I don't remember.

Q. Didn't you see this paper when you came in? A. No, not when I came in.

Q. Didn't you see who produced the paper and where it was produced from? A. As I recall it, from the dresser.

Q. It was not put in a drawer of the dresser, was it? A. Well, I don't know.

Q. And you were not present at any other conversations, were you? A. Not in the hospital.

Q. Or with Mr. Gilson and Mr. Gilroy? A. In the hospital?

Q. Anywheres? A. No, I know Mr. Gilson——

Q. Were you present at any other conversations with Gilson and Gilroy? A. One time I came into the room to leave some mail with Keppel, and I walked out again, and he was there. I don't know what the conversation was.

Q. Was McMorrow in the room? A. I am quite certain he was.

Q. You had spoken to McMorrow? A. Yes, sure.

Q. He signed his form that day also? A. Yes.

Q. The same day? A. Yes, sir.

Q. Form 2? A. Form 2.

Q. Why didn't you ask McMorrow to witness his friend's paper?

Mr. Bishop: I object to that.

A. I don't know why I didn't to tell the truth.

Q. You asked the nurse? A. Yes.

Q. You are familiar with the company's plan, aren't you? A. Somewhat.

Q. And you say that day Gilroy asked you on form number 2 about the sixteen weeks on the company's plan in answer to twenty-nine? A. Yes.

Q. What was the sixteen weeks for? A. That was because that is the way it was printed on the form or typewritten.

Q. What was it for? A. I don't know. You will have to ask Mr. Gilson that.

Q. You didn't know anything about that? A. That is none of my business.

Q. You don't know how many weeks he was to get paid for under the temporary authorization? A. Only as directed on the form there.

Q. That was all figured out how long this man was going to be sick after October 15? A. I don't suppose so.

Q. You had scheduled the temporary compensation then, had you not, as sixteen weeks? A. Yes, on thirty-six weeks at two-thirds of his pay, and then at the rate of seventeen dollars per week thereafter.

Q. Did you keep records of what this man actually got? A. Yes, our office did.

Q. Your department? A. Yes.

Q. And you know that he was paid thirty-three weeks' full pay, don't you? A. I do.

Q. And when you started to give him seventeen dollars a week, there was a kick. You know that, too, don't you? A. I believe so.

Q. If you were only supposed to give him sixteen weeks, why did you give him thirty-three weeks? A. Mr. Gilson said to do so.

Q. This was a special case, wasn't it? A. Yes, sir, I regarded it as such.

Mr. Gordon: That is all.

WILLIAM G. GILLSON, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Bishop:

Q. Mr. Gillson, where are you employed? A. Standard Oil Company, 26 Broadway, New York.

Q. In what capacity? A. I am in the annuities and benefits department in charge of accident work particularly.

Q. How long have you been there? A. Eight or nine years in that capacity. I have been with the Standard Oil all told, including my military service, which is creditable under our plan, for a period of about twelve years.

Q. You were there in 1927? A. I was.

Q. Did you have anything to do with the matter of Workmen's Compensation? A. I did. I handled all cases for the Standard Oil of New Jersey.

Q. Do you know Ed Gilroy? A. I do.

Q. Did you ever have any talks with him? A. I did.

Q. When was that? A. As I recollect it, and I have refreshed my memory from the records of my file, my first conversation with Gilroy was just a few words at the Bayonne Hospital in the latter part of August, 1927. My next conversation was, as I recall it, as my record indicates, was in January, 1928, in New York, at which time he was over there being inspected by our doctors, and also over there with a view to determining whether an operation on his eyes should be undertaken. My next contact with him——

Q. What conversation took place between you and Gilroy, or between Gilroy and anybody else in your presence at that time? A. At which time?

Q. This last conversation you have just spoken about.

Mr. Gordon: That is January, 1928?

Mr. Bishop: Yes.

By Mr. Bishop:

Q. With respect to the payment of compensation? A. There was—the only conversation with respect to payment of compensation was between Mr. Gilroy and myself.

Q. What was the nature of that conversation? A. The nature of the conversation was that we felt that the case was under compensation, that we were ready to have the permanent disability estimated whenever Mr. Gilroy desired.

Q. What did you say to Gilroy and what did he say to you? A. Mr. Gilroy at that time had—that was my first intimation that Mr. Gilroy was not entirely caught up on the view that compensation covered his case.

Q. Was he in receipt of payments at that time? A. He was, at my direction, yes.

Q. What was being paid to him then? A. The full accident benefit rate computed in accordance with the annuities and benefit plan. I can explain that, if you desire me to.

Q. Was there any compensation being paid to him? A. He was receiving an allowance equivalent to his full salary, which, of course, took into account the compensation due him. This is the policy which the Standard Oil Company has had in effect since 1920.

Mr. Gordon: I object to that. We don't want to go into their policies, because we may have to have some more of them brought out. It is not binding on this plaintiff what their policy was.

The Court: What happened in this particular case is the thing that is material. Strike out that part of the answer about the policy.

By Mr. Bishop:

Q. Do you know whether or not Mr. Gilroy knew how this amount was made up? A. I assumed that he did.

Mr. Gordon: I object to what he assumed.

The Witness: I didn't know of my own knowledge.

The Court: Strike out that part of the answer beginning he assumed.

By Mr. Bishop:

Q. Was the matter of the amount he was receiving discussed with him by you? A. I don't quite

understand your question. What do you mean by matter of the account?

Q. Did you tell him anything about how much he was going to receive and how it was made up?
A. He understood that he was——

Mr. Gordon: I object to what he understood.

The Court: Objection sustained.

The Witness: Mr. Gilroy——

Mr. Gordon: I submit that the witness should be cautioned not to volunteer any information. He knows the value of objections.

The Court: The answer that he gave was objected to and the Court sustains the objection. I presume that the witness is now answering it in a different form.

(The stenographer read the last question as follows):

"Q. Did you tell him anything about how much he was going to receive and how it was made up?"
A. No, he didn't have to tell me that.

Q. Did you tell him anything about how much he was going to receive and how it was made up?

Mr. Gordon: I object to that as leading.

The Court: I will allow it.

A. I didn't have any specific conversation with Gilroy as to just how this payment was made up, for the reason—if I may be permitted to qualify my answer—that I assumed he understood it.

Mr. Gordon: I move that that be stricken out, and I again ask that the witness be cautioned not to volunteer information.

The Court: Strike out that part of the answer as to what he assumed.

By Mr. Bishop:

Q. Do you know whether or not Mr. Gilroy had ever been informed of the nature of the company's compensation——

Mr. Gordon: I object to that unless it appears he personally knows it.

The Court: He could not know it unless he informed him himself. If anybody informed him in his presence, he may answer it or——

The Witness: I did neither.

By Mr. Bishop:

Q. Do you know whether or not he was ever furnished with a written or printed statement of the plan?

Mr. Gordon: I object unless it was his own personal knowledge.

The Court: He may answer.

The Witness: I do not.

Q. In his discussions with you, was Mr. Gilroy rational? A. Entirely so.

Q. Did he appear to understand the matters discussed? A. He did.

Q. Did he know or appear to know that he was receiving money? A. He did.

Q. Did he seem to know what it was for? A. He did.

Mr. Gordon: I object to that. There was not any assumption about what the money was for. How could he say what it was for?

He said he seemed to know what it was for, and that is a conclusion on the part of the witness.

The Court: I think the testimony should be limited to conversation.

By Mr. Bishop:

Q. What was the rest of the conversation you had with Gilroy on that occasion? A. Are you referring to the January, 1928?

Q. Yes. A. Nothing of any import, so far as the compensation phase is concerned, except, as I have said before, that I advised Mr. Gilroy that whenever he was ready, we were ready to have the permanent disability estimated.

Q. What reply did he make to that? A. He didn't seem inclined at the time to give me any definite answer on it.

Q. What did he say? A. I don't recall, of course, the exact wording of his reply.

Q. When did you next see him? A. I next saw him—and this is a matter I fix the date because I have looked at my file—on February 15 at my office.

Q. What year? A. 1928—at which time he came with a gentleman, who I understand is his brother-in-law, to discuss with me his case in quite some detail, and in order that we might arrive at some definite settlement, if that could be done.

Q. What was the nature of the conversation between you at that time? What did he say and what did you say? A. At that time, as I recall it, Mr. Gilroy and this gentleman, that I refer to as his brother-in-law in the absence of knowledge of his name, stated to me that they felt that it was considerable question as to whether or not this case came under compensation or under common law,

and in view of that, they desired to make a lump sum settlement, which would take into account what they considered to be proper in view of Mr. Gilroy's injuries. In reply I stated to them that from the outset I had believed that the coverage of the case was compensation and that that was the company's attitude in the matter, and that we had nothing to offer in the line of any substantial settlement, which might take into account the compensation that the Compensation Law did not govern. However, in that same conversation with Gilroy, I stated that while we were ready and willing to pay these benefits during his temporary disability and also to pay him such amount of compensation for his permanent injury as any doctor employed by the Workmen's Bureau might determine, a few additional thousand dollars, if I could get the company's approval to it, as a pure gratuity. That was the substance of our conversation with Mr. Gilroy and his brother-in-law, as I understand the relationship to be, and they left the office with the understanding that we would hear further from them.

Q. Did you hear further from either one of them? A. No, sir.

Q. Or rather, from Gilroy? A. My next talk with Mr. Gilroy was on March 8, 1928, at which time I was called to the Bayonne Refinery by Mr. Keppel to participate in a conference with Gilroy with reference to the matter of his returning to work, and the final wind-up, if possible, of his compensation case.

Q. Going back just a little, after your conference with Gilroy in February, at which time you stated the matter of compensation was discussed, and the company's attitude defined, were any payments made to him? A. He was in receipt of compensation during all that period.

Q. Were payments made to him after that conference in February? A. They were.

Q. Going back to your conversation with him in March, state, if you will, what was said by Gilroy or to Mr. Gilroy in your presence either by you or anyone else? A. As I say, Mr. Keppel and myself and Mr. Gilroy were in Mr. Keppel's office, and at that time, as I now recall the conversation, —I don't attempt to recollect the exact words used —as I recall the conversation, we said to Mr. Gilroy that we thought we had been liberal with him in the matter of temporary disability and the payment of these accident benefits, and that we therefore hoped that in the near future that he would be fit to take up some work which would terminate the running of the temporary disability and which would permit the fixing of the permanent award. At that time, and then in connection with that conversation, the matter of a job for Mr. Gilroy came up. Mr. Keppel very definitely said to him that the Refinery, meaning the management of the Refinery, would make a place for him. The nature of the job was not exactly gone into, but an understanding—as I recollect the situation at the time, Mr. Keppel had in mind some light position.

Mr. Gordon: I object to that. Mr. Keppel has already stated what he had in mind. He cannot tell us what Keppel had in mind.

The Witness: He told it to me.

Mr. Gordon: If the Court please, that certainly is not competent, what he told to him, in the absence of the plaintiff.

The Witness: The plaintiff was there.

Mr. Gordon: If your Honor please, if he wants to tell that story that Keppel told him that after Keppel's testimony last week, I have no objection.

The Witness (continuing): Some light position down at the pump house where Mr. Gilroy formerly worked. I don't know whether or not—I can't recall at this time—whether we fixed then in our own minds the compensation he would receive for this sort of work, although, if I may be permitted to say, my recollection of the matter is that it was going to be approximately $150 a month. It was to be a salaried job. Mr. Gilroy at that time stated that he would be glad to let us know about this matter at a little time in the future, and he stated that at that time he did not feel inclined to hurry back to work, for the reason that the weather was cold, and the cold weather affected his hands, and that he did not want to come back prematurely. Mr. Keppel and I agreed that we had no rush about his coming back to work, but hoped that within a matter of two or three weeks he would return.

Q. What did you say to him about that? A. We advised that we hoped that he would see fit to come back within a few weeks as soon as the weather broke, and he indicated to our satisfaction——

Mr. Gordon: I object.

The Witness: Well, he stated at that time, as I recollect it, that he would come back.

By Mr. Bishop:

Q. Was any money paid to him after that? A. He was in receipt of these full pay accident benefits at my direction until March 26, 1928, inclu-

sive, after which date the payments were terminated for the reason that Mr. Gilroy did not return to work as we thought he was then able to do, and as he stated he would do.

Q. What was the next conversation you had with him? A. Let us see, that is March 8, 1928. I don't recall any specific dates after that.

Q. Did you have any further conversation with him? A. My contact with the case was over then except in so far as to direct Mr. Keppel and Mr. Hurtzig what should be done in connection with the writing of letters to him. I have seen him since, of course, in a perfectly friendly way and all during this trial I have seen him some time since and before.

Q. You said that he received checks which were, as I recall it, the equivalent of his full salary for a certain period? A. It so happened in this case that it is equivalent to his full salary. I can explain that, if you will permit me.

Q. How is that made up? A. Under our annuities and benefits plan, in the case of an accident, regardless of the service, the man's hourly rate, in the case of a man at the Bayonne Refinery, is multiplied by 8, multiplied again by the hourly rate he receives, multiplied again by the number of days per year that he ordinarily works, and divided by 52. That gives us what we call his accident benefit rate, and this accident benefit rate, of course, includes his compensation.

Q. In what cases is the man paid at that rate? A. In every case of accident, unless it is shown to the satisfaction of the annuities and benefits department that he was wilfully negligent or recklessly exposed himself to the injury. That is the very unusual case.

Q. What about the accidents occurring when he is away from the plant?

Mr. Gordon: That is objected to as not binding in this case. There has been no custom pleaded here, and I think we have gone far enough. We have no knowledge of the existence on the part of this plaintiff of any contract to which this custom is pleaded as a part of the contract.

The Court: I will allow the question.

Mr. Gordon: Exception.

(The stenographer read the last question as follows: "Q. What about the accidents occurring when he is away from the plant?")

A. As to accidents occurring outside of the plant, and, as we consider it, outside the scope of employment, those are sickness cases, and we pay half pay under our plan to the wage earners, depending upon his length of service.

Q. What amount do you pay when a man is injured by accident arising out of and in the course of his employment? A. We pay accident benefits, which, as I say, is computed in accordance with the provisions of our benefit plan.

Q. What amount do you pay when he is injured by an accident that does not arise out of and in the course of his employment? A. If that accident occurs outside of the plant, outside of the scope of his employment, as, for instance, if the man is hit by a trolley car or injured by an automobile, we pay half pay, provided he has sufficient service. That is what we call a sickness case.

Q. How did you pay Gilroy? A. We paid Gilroy accident benefits, because, as the case was submitted to me at the outset——

Mr. Gordon: I object to that.

By Mr. Bishop:

Q. How long did you pay him the full amount of his wages? A. The inclusive dates during which he received this full accident benefit rate were from August 9, being the day following the injury, and that is in accordance with the terms and provisions of our plan, to and inclusive of March 26, 1928, a period of thirty-three weeks.

Q. Was he paid anything after that? A. He was paid $17, at the rate of $17 per week.

Mr. Gordon: I object to that. There is no evidence in this case that this man was paid. He got checks, but they were not cashed.

The Court: I must let him answer the question. If you think it is not so, you may cross-examine or you may rebut, but the question is competent.

The Witness: I shall be glad to answer that by saying that I directed that the payment be reduced from the full accident benefit rate to the compensation strictly due in accordance with the New Jersey Workmen's Compensation Law.

By Mr. Bishop:

Q. How much was that? A. At the rate of $17 per week, and the payments were paid bi-weekly, as is the usual custom of the company.

Q. Do you know whether or not any payments were made to him? A. Whether they were actually received or——

Q. Do you know whether or not any checks were sent to him? A. To my knowledge I can't say

whether they were actually sent, because I am in New York, and they were sent from Bayonne.

Q. Did you authorize the sending of checks to him for a particular period? A. I certainly did. I authorized payment at the rate of $17 per week effective March 27, 1928.

Q. Did you thereafter direct the discontinuance of those payments? A. I directed the discontinuance of the payments when it appeared that none of them were being returned cashed, and our records were becoming hopelessly confused by these accident checks. That was the reason why.

Cross-examination by Mr. Gordon:

Q. Mr. Gillson, you are a lawyer? A. I am, sir.

Q. Admitted in New York? A. Admitted in New Jersey.

Q. How long? A. Since 1921, June.

Q. Been handling quite a number of compensation cases for the Standard Oil Company? A. I have.

Q. Familiar with the various terms and provisions of the statute and laws applicable thereto? A. I am.

Q. And more particularly familiar with the laws of 1924 with reference to the filing of forms? A. am thoroughly familiar with that.

Q. Do you know what form one is? And form two is? A. I do.

Q. And form three? A. I do.

Q. When you have form two, is that submitted to the employe for signature? A. It is.

Q. Then what do you do with it after that? A. Put it in the file of our local refinery.

Q. Do you file it with the department? A. Filed with the local works, wherever the work handling——

Q. Do you send a copy to the department? A. I do.

Q. Before the man signs it or after he signs it? A. Immaterial, Mr. Gordon. If I may explain——

Q. No. Just answer my question. Do you mean to say you send an agreement to the department before a man signs it? A. Yes, indeed, very often.

Q. You know that is not according to law, don't you? A. I know that according to——

Q. Yes or no. A. Well,——

Q. Is it or isn't it according to law? A. According to the strict letter of the statute I would not say that it was.

Q. You know that paragraph two of chapter eighty-seven, laws of 1924, requires that form number two shall be signed by the employe? A. Yes.

Q. That is the agreement that you are talking about? A. Yes, sir.

Q. That is the agreement you mailed to Trenton? A. Yes, sir.

Q. Now, you sent a number two form down to Trenton in this case, didn't you? A. I did.

Q. You sent it down under date of October 27, 1927, before it was signed, didn't you? A. October 6 I sent it down.

Q. And it was filed there October 7? A. That may be true.

Q. And it was submitted to the department as a copy of an agreement under the statute? A. Yes, certainly.

Q. It wasn't even signed and you sent it down as a copy as an agreement? A. It didn't have to be signed.

Q. Don't you know that the law requires form two must be signed? A. Except in so far as the Bureau permits an employer to deviate from the provisions of that law.

Q. Under the letter of the law it requires a signature, doesn't it? A. The letter of the law says so, but the administration is otherwise.

Q. You are familiar with form number two instructions on the Workmen's Compensation Bureau forms, aren't you? A. Why, I have seen them. We print our own, as you know.

Q. Oh, you print your own? A. Oh, yes.

Q. That is substantially in compliance with the act, isn't it? A. Yes.

Q. You know that under the instructions issued by the department that form number two is supposed to be an agreement? A. It is an agreement; I understand it to be.

Q. Did you submit an agreement to the department before it was even signed? A. Why, of course.

Q. Before you knew that the man would accept it? A. Why, of course; I can explain the reason if you want me to.

Q. Your lawyer will give you a chance to explain that. Then on October 15 you got this paper and put it in the file after you filed one in Trenton? A. That is correct.

Q. This marked paper? A. That is correct.

Q. The one that Hurtzig witnessed. A. I recognize Hurtzig's signature.

Q. He gave it to you, didn't he? A. Oh, no. It has been in the Bayonne refinery file.

Q. Hurtzig didn't turn this paper over to you? A. He didn't have to.

Q. Did he report it to you? A. He reported that it had been signed and put in the file at the Bayonne refinery.

Q. You never saw it from that time on, did you? A. No.

Q. Not until this case came up? A. Until this case was in the course of preparation.

Q. You prepared this case? A. I did not.

Q. This is your signature on this paper here which I showed you as a paper that was filed in the department? A. That is not my signature.

Q. W. G. Gillson is not your signature? A. You will notice under there there is a little "K". That is my secretary.

Q. Sent out under your direction? A. Yes, indeed.

Q. With your authority? A. With my full authority.

Q. I show you form number three. A. Yes.

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

Q. That wasn't signed either, was it? A. By Mr. Gilroy?

Q. Yes. A. No. You will see there it says there is a reason why it wasn't.

Q. He declined in May, 1928. A. Yes, he had declined up to that time.

Q. You knew in March, 1928, that he had declined, didn't you? A. I didn't know that he positively would decline. I knew that up to that time that he had declined.

Q. You stopped compensation benefits and directed seventeen dollars a week in March, didn't you? A. I stopped the accident benefit and directed the payment of compensation strictly in accordance with the law after March 27, 1928.

Q. You knew in April, 1928, that your checks were not coming back as cashed, didn't you? A. I did.

Q. You knew then that Gilroy was not standing by any proposition that you claimed to be in existence, of compensation? A. That is correct.

Q. Then why didn't you make a report to the department on or about the first of April instead of when you did on or about the first of June? A. Because I had talked these cases over with Commissioner of Labor, the Honorable Andrew F. McBride a number of times. He was fairly conversant with all of them. And I finally did send a letter of transmission with that form.

Q. There was doubt in your mind that this was a compensable case? A. There never was any in my mind. I rather— That was my thought from the outset.

Q. That it was a compensable case? A. That it was a compensable case.

Q. That is your department, compensation work? A. That is my department.

Q. You thought a man that was injured on a public highway was injured in the course of employment? A. I most certainly do.

Mr. Gordon: I ask this be marked for identification.

Q. After he finished his work, is that right? A. Yes, indeed.

Q. After his shift was over? A. Yes, indeed.

Q. And he left the company's gates? A. Yes, indeed.

Q. Did you ever have a case like this? A. Yes, indeed, I did, yes.

Q. In the courts? A. I did, yes.

Q. I said in the courts. A. I never had any occasion to test one out. We don't contest such cases, Mr. Gordon.

Q. In the courts at common law? A. Did I ever have any?

Q. Yes. A. I never had occasion to try one, as I say.

Q. You settled a common law case of this kind? A. Do I settle?

Q. Did you settle a common law case of this kind? A. I don't recall.

Q. Well, then you never had a case like this before, did you? A. Oh, I have handled cases in compensation which are similar, in my opinion.

Q. You keep them under compensation? A. Oh, of course.

Mr. Gordon: I ask this be marked for identification, the blank dated October 7.

(Paper marked P-26 for identification.)

Q. You were ready to put Mr. Gilroy back at the pump house, weren't you? A. As I understood it, yes.

Q. Around March 8, 1928? A. No. Around sometime later than that, a week.

Q. A week later than that? A. Yes. Sometime around April 1.

Q. About April 1? A. That is right.

Q. At that time had you had a report from Dr. Donahue? A. Dr. Donahue examined him only to testify in this case.

Q. At that time did you have a report from Dr. Donahue? A. No.

Q. At that time did you have a written report from Dr. Pinkerton that this man could come back to work? A. No.

Q. Now you say he could go to work around the pump house around April 1? A. That was my thought of the matter, yes.

Q. What work would you let him do at the pump house in the Standard Oil refinery at Bayonne? A. Mr. Gordon, we have men down there with legs off.

Q. I know it. A. This man could not serve——

Q. I want to know what kind of work you would let this man do at the pump house in Bayonne. A. Why I would have put him at a clerical job.

Q. In the pump house? A. Yes, sure. As I said a sort of an arrangement in order to afford him employment.

Q. To stop the temporary disability compensation? A. Not necessarily.

Q. Well, didn't you say that would be the effect of it if he got back on full pay? A. It would most certainly be the effect of it.

Q. What was there to prevent you from discharging him a month or two months after that? A. Absolutely nothing. Under any law.

Q. His full pay was $41 and some odd cents a week, wasn't it? A. That was his accident benefit, $41.89 as I recall it.

Q. That was his full pay before he was hurt? A. That was made up, yes, of a——

Q. Before he was hurt he was making $41 and some odd cents a week? A. Yes.

Q. You were going to put him back at $150 a month? A. Approximately.

Q. That was less than the full pay, wasn't it? A. If you will recall what I said, I hadn't fixed on any rate, but as I recollect it we were going to fix his rate something like $150 a month.

Q. He was making around $45 a week before this accident, wasn't he, with overtime? A. I don't know anything about how many hours he might have put in on the average as overtime, I don't know.

Q. Never checked that part of the records? A. Because it was immaterial from the compensation standpoint.

Q. Wasn't his straight salary approximately $45 a week without overtime? A. No. It was at the time of this injury, as I recollect it, he worked three days a week at eight-three and three-quarter cents per hour, and on three other days ninety and one-quarter, therefore there was a split arrangement. He worked at two different jobs, as I recollect it at this time.

Q. You were out of contact with this case after March 8, 1928? A. Without looking at my file I just could not carry the story—recollect anything further. I wasn't out of contact with it, you understand. I was in constant telephonic communication with Bayonne on this and any other number of cases.

Q. When you saw Ed. Gilroy in January, 1928, you told him that you were ready to fix the permanent disability at that time? A. I said whenever he was ready we were ready to take him in and have the disability estimated by any of the doctors of the Workmen's Compensation Bureau.

Q. Well, at that time the man had not been ready to go back to work, was he, in January, 1928? A. No, he was getting ready. He was gradually improving.

Q. I know but in January, 1928, his temporary hadn't ceased, had it? A. In my opinion, no.

Q. How could you tell when to start the permanent? A. In January?

Q. Yes. A. I wouldn't have started permanent in January.

Q. What is the idea of talking to him about permanent if he wasn't through with temporary? A. If you will just pardon me, I said to him whenever he was ready I would be glad to take him to any of the examining physicians for the Commission and have their opinion.

Q. And as early as January, 1928, he would not give you any answer about that, would he? A. No. No definite answer. Very correct.

Q. Then around February, 1928, his brother-in-law was there? A. That is correct.

Q. Came to see you? A. That is right, in my office.

Q. Well, at that time you heard him say something about getting a lump sum? A. Yes, we were discussing the case in general with all its possibilities.

Q. There was a question in February about workmen's compensation, wasn't there? A. What do you mean by a question? A legal question?

Q. As to whether or not this was a workmen's compensation case. A. As I have already stated it is now apparent that there was a question all along; but not in my mind.

Q. Mr. Gillson, you have been experienced with these cases? A. Yes, indeed.

Q. You know when a man falls in line with the point of view, don't you? A. What do you mean, the point of view?

Q. That is what you said a few minutes ago when you and Gilroy had a talk in January that it didn't appear as if he had caught up with the view of the company. A. That is right.

Q. You know when a man catches up with the view of the company, don't you? A. If you will just let me answer that question I will be glad to do it. I mean that was my first intimation that he wasn't entirely satisfied with the arrangement that he had about committed himself to.

Q. In January, 1928? A. Yes. Very late in that month, as I recall it, when he was over to New York, being examined by the doctors.

Q. Then in February he wasn't caught up with the view yet, was he? A. In February he was not and in March he still wasn't.

Q. In March he wasn't caught up with the view? A. Oh, no.

Q. And he has not caught up with the view yet, has he? A. Apparently not, Mr. Gordon.

Q. In March, 1928, did you see him in New York? A. In March, 1928?

Q. Yes. A. I may have. It just has slipped my memory.

Q. Didn't you have him over to New York in the Spring of 1928? A. I say he may have been over. I won't say.

Q. Haven't you refreshed your recollection as to the visits that Mr. Gilroy made? A. I have refreshed my recollection and I have stated——

Q. Will you deny that Gilroy visited you in New York and you had five doctors examine him in the early part of 1928? A. I will neither deny nor affirm it.

Q. You don't remember it? A. I don't remember any specific occasion when he came over in March. I remember the occasion in Bayonne.

Q. In the Spring of 1928 isn't it a fact that you had Mr. Gilroy in your office and that you had five doctors examine him? A. The spring is a period of how many months, two or three months, and that is quite a long period.

Q. According to the way when I went to school it started March 21 and lasted until June 21. A. I don't recall. I can't recall. I do not know that he was examined by the doctors in New York.

Q. You were present, weren't you? A. I am always present in these cases.

Q. Have you given us all the conversations that you had with Gilroy? A. As nearly as I can recollect them. I still don't recollect——

Q. You have refreshed your recollection from your records, haven't you? A. Yes, indeed.

Q. Don't you know Gilroy was over to see you in the Spring of 1928, and you had five doctors examine him? A. Five doctors?

Q. Yes, sir. A. No, I can't remember that there were.

Q. How many doctors were there that examined him in the early part of 1928?

Mr. Bishop: I object to that as utterly irrelevant how many doctors examined him.

Mr. Gordon: I want to test this man's credibility as to the number of times and what was said when he saw this man.

Q. Do you know Dr. Denno? A. Very well.

Q. And Dr. Schoenleber? A. Dr. Schoenleber.

Q. Do you know Dr. Snodgrass? A. Very well.

Q. Weren't they in your presence at an examination when you had Mr. Gilroy there in the early part of 1928, in the Spring? A. Most certainly. Not in my office. It would be my duty to go over in their office.

Q. You took Gilroy over to their office? A. I may have. I wouldn't deny that.

Q. You don't remember that conversation? A. Specifically I don't remember a conversation as to——

Q. With him in the Standard Oil Building at 26 Broadway. A. Certainly. That is right there, if it occurred.

Q. And there were two other doctors than the ones I have mentioned to you? A. There may have been. I don't know who they are.

Q. You are in charge of the annuities and benefits department? A. Yes, sir.

Q. When you have men examined by doctors it is for the purpose of reports for your department, isn't it? A. For my department?

Q. Yes. To fix the benefits and the annuities. A. Oh, no.

Q. It is for the purpose of information to be turned over to your department? A. Information and report by the medical department.

Q. To your department? A. Which is entirely a separate department.

Q. To your department? A. Not necessarily. They have their own records.

Q. Don't you base annuities and benefits on reports made to you from the medical department? A. Sometimes.

Q. In this case you don't even know the doctors who examined him for these benefits? A. Do you mean the doctors who examined him?

Q. In this particular matter. A. I still don't remember the occasion.

Q. Do you still remember he was there? A. I don't remember. I said I will neither deny nor affirm. If I remember it I would be glad to tell you about it.

Q. Do you remember writing to the Department of Labor? A. In this case?

Q. Yes, sir. A. In connection with this and with Mr. Peters and Mr. McMorrow's case. Also Mrs. Rowe.

Q. I show you your signature to a paper and ask you if that is your signature? A. It is.

Q. And it is on a letter which is dated May 29, 1928, isn't it? A. That is correct.

Q. And it is in reference to the case of Mr. Edward N. Gilroy, isn't it? A. That is correct.

Q. Do you remember writing in this letter: "Gilroy has consistently maintained that his case

does not come within the scope of the New Jersey Workmen's Compensation Law, although he accepted an allowance equivalent to full salary during his temporary disability and all necessary medical treatment at our expense"? A. Now, what is your question? Do I remember those exact words?

Q. Yes, sir? A. No, sir, I do not.

Q. Will you refresh your recollection by this letter over your signature? A. Yes, sir. I will say that my secretary is very exact and if those words appear here, as you have read them, undoubtedly I said them.

Q. And you know the word "consistent" means consistent, don't you? A. I do. I know the meaning of the word consistent.

Mr. Gordon: I ask this letter be marked for identification.

(Letter marked P-27 for identification.)

Q. In May, 1929, why didn't you state in a letter to the Workmen's Compensation Bureau that on October 15, 1927, Edward Gilroy signed an agreement to be under the Workmen's Compensation Law? A. Because it is unnecessary.

Mr. Gordon: That is all.

Mr. Bishop: Defense rests.

Mr. Gordon: I move to strike out the testimony of the witnesses Keppel, Gillson, and Hurtzig on the ground that they do not establish any matters of defense in this case.

The Court: Motion denied.

Mr. Gordon: I ask an exception, please.

PLAINTIFF'S REBUTTAL TESTIMONY.

Mr. Gordon: I offer in evidence P-27 marked for identification, the letter Mr. Gillson identified over his signature.

Mr. Bishop: May I see it?

Mr. Gordon: Yes, sir.

(Letter heretofore marked P-27 for identification entered in evidence and marked Exhibit P-27.)

Mr. Gordon: I offer in evidence P-26 for identification, being the form number two from the files of the department of the Workmen's compensation bureau which is identified by Mr. Gillson as having been issued with his approval.

Mr. Bishop: I object to it upon the ground that under the provisions of the statute reports back to the compensation bureau are not evidential.

Mr. Gordon: I am not offering it as evidence of what the report contains. I am offering it on rebuttal as to matters over the signature of Mr. Gillson on rebuttal testimony.

Mr. Bishop: The statute says they shall not be used as evidence against any employer in any action at law.

Mr. Gordon: That only applies as to form number one as to how accidents happen, and that is the form I returned to the department man just now. I submit the statute is right here and it says the first reports of accidents, paragraph four, page 403 of the laws of 1924, only refers to the first report of accidents. And this is form number two; not the first report.

The Court: That is what is being offered?

Mr. Gordon: Yes, sir.

I offer it for the purpose of showing——

The Court: This is the same form, Mr. Bishop, that you yourself have already introduced as the alleged agreement, is it not?

Mr. Bishop: I assume it is a copy. We put in evidence an original signed by the man.

The Court: The rule you are invoking applied to this paper which is form number two, it would apply equally to the paper you have offered, would it not, which is also form number two?

Mr. Bishop: I think that is correct. I thought it was broader than it is, but it applies only to the first report.

The Court: It only applies to form number one. It will be admitted.

(Form heretofore marked P-26 for identification entered in evidence and marked Exhibit P-26.)

EDWARD GILROY, the plaintiff, recalled.

Direct examination by Mr. Gordon:

Q. Mr. Gilroy, did you ever discuss with Mr. Keppel or Mr. Hertzig, at the Bayonne City Hospital, in the month of October, 1927, the question as to whether or not your case was to be handled as a compensable case under the Compensation Act? A. The subject was never brought up.

Q. Did Mr. Keppel ever tell you that if it was a compensation case you would get full benefit,

and if it was not a compensation case you would come under the sickness benefits, which were half pay? A. Did not.

Q. Did he ever tell you, or did you ever have a discussion with him, where you stated to him that a number of people had spoken to you about the fact that the case was not under the compensation law, and that he, Keppel, told you that the company assumed it was, and were handling it as such? A. The word compensation was never mentioned by Mr. Keppel to me. Never.

Q. Was it ever mentioned to you by anybody? A. It was not.

Q. Did any of your checks ever have the word compensation on them? A. No, sir; they did not.

Q. Did you ever cash a check having "compensation" at $17 a week? A. No, sir, I did not.

Q. Did Mr. Keppel ever call at the hospital in company with Mr. Hurtzig in October, 1927, at a time when Mrs. Gilroy was present and she was about to leave? A. Not to my knowledge.

Q. Did you ever see that? A. I did not.

Q. Did you ever hear it? A. No, sir.

Q. Did you ever hear Mr. Keppel ask Mrs. Gilroy to say, that he was going to speak to you about signing a compensation form? A. No, sir, I did not.

Q. Did he ever talk to you about a compensation form in her presence? A. No, sir, he did not.

Q. Did you ever ask Keppel to keep a compensation form over night in the hospital to sign? A. No, sir, I did not.

Mr. Gordon: May I have that exhibit, please?

Q. I direct your attention to Exhibit D-16 and ask you if you ever signed that paper? A. First time I have seen this paper.

Q. You are sure about that, Mr. Gilroy? A. Positively.

The Court: What paper was that?

Mr. Gordon: D-16, a paper with a mark on it, witnessed by Mr. Hurtzig, October 15, 1927.

The Court: That is the one offered as the alleged agreement?

Mr. Gordon: Yes, sir.

Q. Did you ever tell Mr. Keppel that you would have the paper ready for him in the morning? A. I did not.

Q. Did he ever tell you that it was an acceptance? A. He did not.

Q. Did he ever tell you it was all right, there was no great rush about it, "I don't have to have it in the morning?" A. No, sir; he did not.

Q. And that you could have it for him at whatever time you wanted? A. No, sir.

Q. Did he and Hurtzig ever come back four or five days later and present the paper to you for signature? A. No, sir.

Q. Was a paper ever taken from the dresser in the room that you were in in the Bayonne City Hospital and presented to you for signature by Hurtzig and Mr. Keppel? A. No, sir.

Q. Who was your nurse in constant attendance at that time? A. Mrs. McClarty on days, and now Mrs. Crouse.

Q. Did Hurtzig ever read this so-called agreement D-16 to you? A. He read nothing to me.

Q. Did Keppel ever read it? A. No, sir, he did not.

Q. Did you ever read it? A. Couldn't read it.

Q. Did anybody ever read this paper to you? A. No, sir.

Mr. Bishop: I object to whether anybody ever read it—well, I will withdraw that objection.

Q. Did you ever tell Keppel that you were ready to go back to work around the first of April, 1928? A. I positively did not.

Q. Did you ever tell Mr. Gillson—or did Mr. Gillson ever tell you around March 8, 1927, to try to come back to work around the first of April? A. He did not.

Q. Or 1928, rather? A. No, sir.

Q. Was there ever any discussion about your going back to work at full pay at $150 a month? A. No, sir.

Q. Was there ever any discussion with you about going back to your pumps in the Spring of 1928? A. The pumps was never mentioned.

Q. Was there ever any discussion about putting you back to work? A. They talked work, yes.

Q. When? A. I don't remember the exact date.

Q. Now, did Keppel see you a number of times at the hospital? A. I won't say how many times he saw me. He wasn't allowed in the room.

Q. Do you remember him being at the hospital about four weeks after you were there? A. I can't say the exact time, but——

Q. Do you remember Keppel being there at the hospital a couple of days after Peters left the hospital? A. I do.

Q. And at that time do you recall what was said? A. Yes.

Q. What? A. Mr. Keppel came over to my bed, I had compresses on my eyes, couldn't see, came over to my bed and said, "Ed, this is Mr. Keppel".

Q. Yes. A. He said: "I have a receipt here I want you to sign." So I said, "What is the idea of the receipt?" He said, "Well, we just want to make a record in the office that you have been receiving your full salary."

Q. What did you tell him? A. I got quite annoyed; I told him I didn't care to be bothered with receipts at the present time, but if he was looking for receipts he could get the return checks as my wife was cashing all the checks for my full salary.

Q. Then what happened? A. He walked out of the room. That is the last I saw Mr. Keppel, until my house.

Q. Did he ever talk to you about compensation at your house? A. He did not.

Q. Did he leave any receipt with you that day? A. No, sir; he did not.

Q. Did you have any discussion with Keppel as to the conditions under which your full salary was being paid? A. No, sir, never.

Q. Did you ever have any discussion with Keppel about a suit at law? A. I told him I would start suit at law.

Q. What did he say to you? A. He said, "Ed, don't do that, the company will take care of you; you don't have to work."

I said, "What do you mean?"

He said, "We will continue your full salary."

I said, "Salary would not repay me for what I have gone through and the condition it has left me in."

He said, "Oh, don't worry, we will take care of you as long as you live."

That is the only conversation he had with me as far as I know at the house.

Q. Did you see Mr. Gillson in March, 1928? A. I have seen Mr. Gillson two or three times and I can't say dates, the exact dates at any time.

Q. Did Mr. Gillson and Mr. Keppel see you together at any time? A. Yes, sir; they did.

Q. When? A. Well, it was the early part of March. I couldn't give you the exact date. I mean some time after January, January or February or March. I am not sure which it was. In the spring.

Q. Was there any talk about that time about your going back to work around April 1? A. The date wasn't mentioned, no.

Q. What did they say to you? A. They talked work to me and I was very much surprised.

Q. Then what happened? A. They asked me—they kept me there for probably half an hour trying to get me to say I would come back to work.

Q. What did you say to them? A. I told them I couldn't possibly come back to work. In the first place they had to carry me back and forth to work in one of their cars. I was just about able to walk.

Q. This was in 1928? A. Yes, sir.

Q. Did you ever see Gillson at the New York office? A. Yes, sir, I did.

Q. Who was with you? A. Why, I believe I went once—the first time I went over there I went for a doctor's examination, at the company's request, in the company's car.

Q. Yes. A. The second time I went over I believe I went with my brother. I may be wrong.

Q. Yes. A. And the last two times I went with my brother-in-law, Mr. Moore.

Q. Do you remember the visit with your brother-in-law, Mr. Moore? A. I do.

Q. Where is your brother? A. My brother is in Charlotte, North Carolina.

Q. How long has he been there? A. He has just been transferred. He was with the General Motors in Newark and they have sent him down as credit manager down in Charlotte.

Q. Do you remember the conversation when your brother-in-law, Mr. Moore, was there? A. The idea of my going over that day was to make a settlement with the company.

Q. And at that time did you discuss with them the question of accepting compensation? A. I positively did not.

Q. Was there ever any talk that you were to get compensation? A. Mr. Gillson said he hoped whether I came—he never said it was compensation, he didn't tell. His idea may have been compensation and I disagreed. It was altogether—we had different viewpoints. That was the first time it was mentioned as far as compensation was concerned. The reason it was brought up that day I believe Mr. Gillson knew I came over for settlement and he tried to hold me under compensation, at least to make me think it was compensation.

Q. And you have consistently maintained that it was not compensation? A. Positively.

Q. What was the talk about a settlement at that time between Gillson and you? A. After I had been examined by the doctors.

Q. How many? A. Well, the exact number I can't tell you. Probably four or five doctors and the nurse.

Q. And where was this? A. In the Standard Oil Building of New York, with Mr. Gillson, in their presence.

Q. What happened there? A. Well, the doctors didn't give me a very thorough examination; just looked me over and then sympathized with me. The

nurse started to talk about my condition and she felt very sorry for me. Mr. Gillson went over and had a whispered conversation with the doctors—of course I don't know what he said—and then he came back to me and asked me if I could hold a pencil. It was impossible to hold a pencil, I couldn't close my fingers. So then he asked me if I ever thought about my future. I can't tell you the exact words but I will tell you somewheres near it. I told him that my future—what I was worrying about more than anything else was my health.

Mr. Bishop: Is this rebuttal of anything that has been testified to?

Mr. Gordon: It is Mr. Gillson's conversation that he is talking about and I am giving the full conversation.

Mr. Bishop: It is not denial of anything Mr. Gillson said.

The Court: Mr. Gillson said either that there was not that conversation or that he did not recall it. He could not even recall how many doctors were there.

Mr. Bishop: This does not rebut that.

The Court: This is rebutting his statement, I suppose, that he does not recall there was any such conversation. He was there, or it is alleged that he was there. He says that as far as he knows he was not.

Mr. Bishop: The description of what happened in an interview which the witness says he does not remember and cannot say whether he remembers it or not, is not rebuttal of that testimony.

The Court: Mr. Gordon asked Mr. Gillson if those were all the conversations—

that is when Mr. Gillson was on the stand—were all the conversations he had with this plaintiff on the subject of his injuries and compensation. He said yes. His attention was called to the January meeting in New York when the doctors were present and he said he did not recall that one. Having said what he did testify to were all of them, I think it is proper rebuttal to show, if it can be shown, that there was another one, and that it was not all.

Mr. Bishop: He has shown that. The testimony is not as to whether there was another one, but what the nature of it was, and what took place, and what was said, and I say that is not proper rebuttal.

Mr. Gordon: I am asking about a conversation which Mr. Gillson admitted that Mr. Gilroy's brother-in-law was present, and he gave his remembrance of the conversation as to what was said, what was talked about, there was a discussion there about adding a couple of thousand dollars to a lump sum, after the Workmen's Compensation doctors would determine what the permanent disability was. That was his testimony. Now I think I have the right to show what the conversation was. He said it was one thing. This man was there and he has a right to say what it really was, if it was different.

The Court: Is the conversation the witness is now talking about not the one which Mr. Gillson said he did not recollect?

Mr. Gordon: No, not that one at all. A different conversation between Mr. Gillson and this man at which Mr. Moore was present.

The Court: If that is the case it must be proper in rebuttal, Mr. Bishop. I thought at first it referred to the one he did not know about.

Mr. Gordon: I will withdraw the last question.

Q. Do you remember the conversation between Mr. Gillson, your brother-in-law, Mr. Moore, and yourself, when you were there in March, 1928? A. I can't absolutely, but I can remember some of it.

Q. Give us what you remember of it. A. Well, I didn't do very much talking; Mr. Moore done most of it.

Q. What did he say to Mr. Gillson and what did Gillson say to him? A. He went in and asked Mr. Gillson what the company was going to do for me. Mr. Gillson asked him what he thought they should do. He said, "I would not take this man's injuries for a million dollars."

Mr. Bishop: Just a minute. I move that be stricken out.

The Court: It is part of the conversation at which Mr. Gillson was present and testified about. I will strike out that last statement, and ask the witness to confine himself as to what was said would be taken, without commenting on the nature of it.

Q. Mr. Gilroy, just tell us what Mr. Gillson said about giving to you, if anything, and what you said in reference to it. A. Mr. Moore asked him for $75,000.

Q. What did he say?

Mr. Bishop: I object to that. I move to withdraw a juror and declare a mistrial. I think this line of testimony is highly improper.

The Court: Mr. Bishop, you certainly opened the way for what was said in this conversation when you examined Mr. Gillson in defense as to that particular conversation. I do not see how I can select from what was said on that conversation, on the occasion of that conversation, so as to allow in what you think is proper to let in, and exclude what you do not think is proper. This was a conversation between the defendant's representative and the plaintiff, and somebody with him, all being present. Mr. Gillson testified as to such a conversation. If it was not complete, the plaintiff certainly may show, in rebuttal, what the complete conversation was.

I do feel, however, I will say to plaintiff's counsel that there ought not to be much latitude taken with reference to statements concerning what ought or ought not to be allowed as damages in this case, because that is going to be a question for this jury to determine, and I do not want arguments of any of the parties, or any of their witnesses on that question of the amount of damages, if any damages at all will be allowed. So far as the conversations relating to the question of whether there ought to be compensation under the Workmen's Compensation law, or compensation at the common law, in an action of this sort, I am perfectly willing to admit it.

Mr. Gordon: I will try to restrict it to specific matters that Mr. Gillson himself brought out.

The Court: I want to say now also that I direct that there be stricken from the record all reference to the amount of damages that should be paid in this case, and I shall charge the jury at the proper time that it is absolutely immaterial what was said, claimed, or argued at any time before this case reaches their hands, at the conclusion of the trial, as to the amount of damages, so far as it affects their action.

Mr. Bishop: Now I have a further objection to this: It is proper rebuttal——

Mr. Gordon: I will withdraw the last question. There is nothing before the Court now, if your Honor please.

Mr. Bishop: You have all this improper matter on the record before the jury now. It is not time to withdraw the question.

Q. I will ask you, Mr. Gilroy, if Mr. Gillson ever submitted a proposition to you to settle this case for a lump sum, such amount as permanent disability was fixed by the compensation doctors, and a few additional thousand dollars; did he say that to you? A. He never mentioned compensation doctors to me.

Q. Did you ever tell him that you would be satisfied with any compensation, standard of compensation? A. I did not.

Q. Did you ever tell him that you would take payment for your damage and your suffering under the Compensation Law? A. No, sir, I did not.

Edward Gilroy, Plaintiff—Recalled—Cross.

Q. Or any part of it? A. No, sir, I did not.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Now, Mr. Gilroy, you said a few minutes ago that you stated to somebody that your wife was going to cash a check, is that right? A. I beg pardon.

(The question was repeated by stenographic reporter.)

A. That is right.

Q. Cash checks. You knew to cash them they had to be endorsed? A. Positively.

Q. Was she authorized to endorse them in your name? A. By me.

Q. Then why did you say the other day, when I was cross-examining you, when you first testified, that you didn't know whether she had authority to cash checks or not?

Mr. Gordon: I did not understand that.

Mr. Bishop: Oh, yes, he said that. I showed him the checks and asked him if they had her endorsements, and he said three of them didn't, and I said, she was authorized to endorse them, wasn't she, and he said I don't know.

A. Well, as far as I know she is authorized.

Q. You were the person who had to authorize her, weren't you? A. Positively.

Q. And you did authorize her, didn't you? A. Yes, sir. When I was able to.

Q. You didn't see Mr. Keppel and Mr. Hurtzig in the hospital at any time, did you? A. No, sir.

Q. Never saw them there at all? A. No, sir.

Q. Never saw either of them there? A. Yes, sir.

Q. Which one? A. Keppel.

Q. You never saw Mr. Hurtzig there? A. No, sir.

Q. Did you ever see him at all since this accident? A. Yes, sir.

Q. Before this trial commenced? A. Yes, sir.

Q. Where did you see him? A. Down at the Standard Oil plant.

Q. Where? After this accident? A. Oh, yes.

Q. Seen him several times, haven't you? A. Once.

Q. You saw him once, haven't you? A. Yes.

Q. Do you remember saying the other day when you were on the stand that you had never seen Mr. Keppel? A. Did I say that?

Q. My recollection is that you did. Do you remember saying it? A. I didn't say I didn't see Keppel.

Q. You didn't say that? A. No, sir.

Q. Well, if you did say that you were mistaken, weren't you?

Mr. Gordon: I object to that. Your question was directed to Hurtzig?

Mr. Bishop: I am talking about Mr. Hurtzig.

The Court: I think we had better go back here. I am confused myself. You mentioned Mr. Hurtzig and then took it up with Mr. Keppel.

Mr. Bishop: I did not mean to mention Mr. Keppel.

Q. You have seen Mr. Hurtzig, haven't you? A. I told you I saw him once at the company plant before the trial.

Edward Gilroy, Plaintiff—Recalled—Cross.

Q. Do you remember testifying the other day that you had never seen Mr. Hurtzig? A. Yes. The question was asked and I answered it.

Q. You said you had never seen him? A. In the hospital I was asked.

Q. Weren't you asked if you had never seen him at all? A. No, sir; I don't believe so.

Q. That is your recollection? A. Yes, sir.

Q. So that when you said you hadn't seen him you merely meant you hadn't seen him in the hospital? A. I believe I was asked the question did I see him in the hospital.

Q. You have seen him outside of the hospital? A. Once.

Q. Did you ever see him and Mr. Keppel together? A. Yes, sir.

Q. But you never saw them together in the hospital? A. No, sir.

Q. Saw Mr. Keppel quite a number of times in the hospital, didn't you? A. I won't say a number of times.

Q. Several times? A. Oh, yes.

Q. And you saw Mr. Gillson several times in the hospital, didn't you? A. Never saw Mr. Gillson in the hospital.

Q. Not in the hospital? A. No, sir.

Q. You saw him several times after you left the hospital? A. Oh, yes.

Q. Quite a number of times? A. Yes.

Q. There was some discussion about going back to work on several of these occasions, wasn't there? A. No, sir.

Q. What did you mean when you said they talked work? A. I told you the last time I can remember of them talking to get me back to work.

Q. There was a discussion at one at least of the interviews that you had with Mr. Gillson? A. Not

on my part. No discussion. They just talked work.

Q. They talked work? A. Yes.

Q. But you refused to discuss it? A. Yes, sir.

Q. Did you ever ask for compensation in this case? A. I did not.

Q. Did you ever demand compensation in this case? A. No, sir; I did not.

Q. What do you mean by compensation? A. I don't know. I have learned since this case it is a state law.

Q. You knew that before, didn't you? A. Well, I had heard of it; yes, sir.

Q. Knew it when you went to work the first time? A. Yes, sir.

Q. You knew that you were employed under a state law that entitled you to compensation if you were injured, weren't you? A. While working at the plant, yes.

Q. Did you know anything about the company's benefit plan? A. Yes, sir.

Q. You knew what that was? A. Yes, sir.

Q. And you knew that under— A. I think I did.

Q. You knew that gave you the amount you were entitled to under the Compensation Act and something more, didn't you? A. No, sir.

Q. What did you think you were getting this money for? A. As Mr. Gillson says a gratuity.

Q. You thought all this was a gratuity? A. Yes.

Q. All these checks for so much a week you thought that was all a gratuity? A. That is what they gave me to understand all the time I was in the hospital.

Q. That was a pure gratuity? A. Yes, sir.

Q. What about the checks for $17 a week? A. I gave them to my attorney, Mr. Gordon.

Q. Yes, but you got some, didn't you? A. Certainly I got some.

Q. What did you think those were for? A. Compensation.

Q. Under the Workmen's Compensation Act, didn't you? A. Yes.

Q. What did you do with them? A. I gave them to Mr. Gordon.

Q. You didn't send them back to the company? A. I don't know what happened after that. I gave them to Mr. Gordon.

Q. How long did you keep them before you gave them to Mr. Gordon? A. Oh, when I received them I gave them to him.

Q. You gave them to him as soon as you received them? A. Yes, sir.

Q. Well, now, let us see, when did you first retain Mr. Gordon? A. Oh, I couldn't tell you the exact date.

Q. Well, about what time? A. I am not positive.

Q. Well, how long was it before this suit was started? A. Well, I couldn't tell you that either.

Q. Well, was it six months before or a month before? A. It is over a year and a half ago, I believe.

Q. What? A. Over a year and a half ago.

Q. What was over a year and a half ago, when the suit was started or when you retained Mr. Gordon? A. When I retained Mr. Gordon.

Q. Was it in the summer? A. I can't tell exactly when it was.

Q. Well, when you came over to see Mr. Gillson in New York had you already engaged Mr. Gordon? A. No, sir. Right directly after that.

Q. Right directly after that? A. Yes, sir.

Q. How long after that? A. I believe either the same day or the following day.

Q. Was that the time you saw them in New York or Bayonne? A. New York, with my brother-in-law.

Q. You saw them after that in Bayonne, didn't you? A. I don't believe I did.

Q. You didn't go over to Bayonne to the plant at all and discuss anything with them? A. No.

Q. Didn't they send a car for you to take you around to the plant one day? A. No, sir, not to my knowledge.

Q. In March? A. I don't believe so.

Q. Where was it that you talked to Gillson and Keppel when you said they talked work to you? A. Down the Standard Oil Company plant.

Q. At the plant? A. Yes.

Q. And that was after this visit to New York of January or February? A. If it was, I don't recollect.

Q. It was in March, as a matter of fact, wasn't it? A. I don't recollect, I tell you. I can't remember the exact dates, but I believe the last time I consulted anybody connected with the Standard Oil was over in Mr. Gillson's office.

Q. So that you did not see anybody connected with the Standard Oil Company after you retained Mr. Gordon, is that right? A. Yes—I did see someone else.

Q. Who? A. A messenger was sent over to me in Kenilworth.

Q. But you never returned these checks to the Standard Oil Company, did you? A. Oh, no.

Q. Why didn't you return them? A. Well, I was advised by my attorney.

Q. Did he advise you to keep them? A. He kept them.

Mr. Bishop: That is all.

MRS. ESTHER MCLARDY, recalled as a witness by the plaintiff, in rebuttal, having been previously sworn, testified as follows:

Direct examination by Mr. Gordon:

Q. Mrs. McLardy, were you on day duty at the Bayonne City Hospital during the month of October, 1927? A. Yes, sir.

Q. And you are in charge of Mr. Gilroy's case? A. Yes, sir.

Q. Did Mr. Hurtzig at any time during the time you were on duty at that hospital ask you to sign a receipt as a witness? A. No, sir, he did not.

Q. Did you ever see a paper like this or this paper in Gilroy's room? A. No, sir, I did not.

Q. Who cleaned Mr. Gilroy's bed? A. I did.

Q. Who arranged the furniture in the room? A. I did.

Q. Who straightened out the dresser? A. I did.

Q. Who was familiar with what was in that room all day long? A. I think I was.

The Court: You asked the witness if Mr. Hurtzig ever asked her to sign a receipt.

By the Court:

Q. Did Mr. Hurtzig ever ask you to sign any paper? A. No, sir.

Mrs. Esther McLardy, Recalled—Cross.

Cross-examination by Mr. Bishop:

Q. Did you ever see Mr. Hurtzig in the hospital? A. Well, I remember seeing him.

Q. Did you see him and Mr. Keppel together in the hospital? A. No, I don't recall, Mr. Bishop.

Q. Are you prepared to say that they never came together? A. No, I am not prepared to say that.

Q. They may have come together? A. Possibly.

Q. And they may have come together more than once? A. It is possible, but I never remember seeing them together.

Q. Was there any other nurse that did anything to these men during the day? A. No, sir.

Q. You were not always in the room all the time, were you? A. Except when I had to go out to the lavatory or something of that sort.

Q. You saw Mr. Keppel in the hospital quite a number of times? A. Yes, I did.

Q. You saw Mr. Hurtzig several times? A. No, I just remember seeing Mr. Hurtzig—I remember his face in the hospital. That's all I remember about him.

Q. So you cannot tell how many times he called? A. No.

Q. You would not say he did not call more than once? A. No, sir.

Q. You would not say he did not call with Mr. Keppel? A. No, I would not say that, because I never saw them together.

Mr. Bishop: That is all.

Mrs. Edward N. Gilroy, Recalled—Direct—Cross.
Catherine McMorrow, for Plaintiff—Direct.

Mrs. Edward N. Gilroy, recalled as a witness by the plaintiff, in rebuttal, having been previously sworn, testified as follows:

Direct examination by Mr. Gordon:

Q. Mrs. Gilroy, during the month of October, 1927, or at any other time, did Mr. Keppel or Mr. Hutrzig, both of them being together, ever ask you to remain in the room, that they wanted to discuss the signature of a paper by Mr. Gilroy? A. No, they didn't. I never saw either one of those men at the hospital.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. You never saw Mr. Keppel at the hospital at all? A. I never did.

Q. Did you see Mr. Hurtzig at the hospital there? A. I saw that man for the first time in this court room.

Q. Did you ever see anybody from the Standard Oil Company in the hospital? A. No.

Q. Nobody at all? A. Not in my presence, no.

Mr. Bishop: That is all.

Catherine McMorrow, a witness called on behalf of the plaintiff, in rebuttal, being first duly sworn, according to law, on her oath saith:

Direct examination by Mr. Gordon:

Q. Mrs. McMorrow, do you remember being at the hospital a few days after Mr. Peters left the hospital? A. Yes, sir.

Q. Was your husband in the hospital then? A. Yes, sir.

Q. In whose room? A. In Mr. Gilroy's room.

Q. Your husband is Mr. McMorrow? A. Yes, sir.

Q. When was this that you were there? A. Do you mean the time or the day?

Q. The time. A. Between ten and eleven in the morning.

Q. What day? A. I don't know what day.

Q. What month was it in? A. In September.

Q. How do you fix it as September? A. Because Mr. Peters left the hospital just before or on Labor Day, and this was a few days after that.

Q. Did you see anybody at the hospital? A. Yes, there was two men from the Standard Oil.

Q. Do you recognize any of them in court to-day? A. One man I recognized.

Q. Which one? A. Mr. Hurtzig.

Q. What was there about him in particular that attracted your attention to him? A. Great big black mustache.

Q. Did you see Mr. Hurtzig or hear what he said on that occasion? A. Mr. Hurtzig didn't say nothing to me, but Mr. Kimble said something.

Q. What did he say to Gilroy? A. Mr. Kimble went to Mr. Gilroy and he said, "This is Kimble, Ed." He said, "I have a receipt for you to sign here". Mr. Gilroy wasn't well that day, and he said, "Go away, I don't want to sign it, because I don't feel well, and my wife signs receipts for me on those checks that you send".

Q. At that time were Mr. Gilroy's eyes open? A. No, Mr. Gilroy had bandages on his eyes.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. Who else was in the room when all this happened? A. My husband.

Q. Nobody else? A. Nobody else.

Q. The nurse was not there? A. Not that I remember.

Q. You say you saw Mr. Hurtzig there? A. Yes, sir.

Q. And Mr. Keppel? A. Yes, sir.

Q. Do you recall the date? A. Not the date, sir, but I know that it was right after Labor Day, a few days after Labor Day, after Mr. Peters left.

Q. Just tell us again what happened and what was said that afternoon. A. I was in the room with my husband and Mr. Gilroy when Mr. Kimble and Mr. Hurtzig came to the door, and Mr. Kimble said, "Am I intruding?" And the men said, "No, come right in", and he walked over to Mr. Gilroy and said, "Ed, I have a receipt for you to sign." Mr. Gilroy said, "Oh, I don't want to sign nothing today at any time, because I am sick, and my wife signs the receipts on those checks".

Q. Did you hear anything else said? A. Then that is all. Mr. Kimble put the paper in his pocket and they went away.

Q. He put what paper in his pocket? A. That he had.

Q. Did he have a paper? A. The receipt paper, whatever that was.

Q. Did you see a paper produced? A. No, I had my back turned, but I could hear the paper rattling.

Q. If you had your back turned, how could you see the paper being put in his pocket? A. Because I turned around just when I heard the paper rattling, and saw there was a paper.

Q. And you saw him put the paper in his pocket? A. Yes, sir.

Q. Was there anything else said? A. No, sir, he just said good-bye.

Q. What kind of paper was it? A. I think it was a white paper.

Q. How big was it? A. I don't know. I didn't see how big it was. It was just a white paper going into his pocket I saw.

Q. There was absolutely nothing else said? A. Nothing that I heard of.

Q. Did he speak to you? A. Well, he said good morning.

Q. Who said good morning? A. Mr. Kimble.

Q. Did Mr. Hurtzig say anything? A. No, Mr. Hurtzig stood at the door.

Q. Did he speak to Mr. McMorrow? A. I suppose he said good morning.

Q. Don't you know? A. No, sir.

Q. You were there all the time, weren't you? A. Yes, sir.

Q. You remember definitely just these words you have repeated? A. Well, I was listening to what was going on.

Q. But you were not listening to what they said to your husband? A. No, they weren't talking to my husband.

Q. Don't you know whether they said good morning to him or not? A. Well, I guess they said good morning to him.

Q. You don't know positively they did? A. No, sir, I don't know for positive.

Q. You remember certainly whether or not they said anything to you? A. I know they said good morning to me.

Q. Both of them? A. No, Mr. Kimble.

Q. Weren't you interested in what they said to your husband? A. No, I wasn't listening to what

they said to my husband. I had to leave the room then.

Q. Why did you have to leave the room? A. Because I had my little girl with me, and she had to go to the bath room.

Q. You did not leave, however, until after they had this conversation with Mr. Gilroy? A. Yes, they left then with me.

Q. The same time you did? A. Yes.

Q. You did not pay any attention to whether or not they spoke to your husband, did you? A. No, I didn't pay no attention.

Mr. Bishop: That is all.

HUGH MCMORROW, recalled as a witness by the plaintiff, in rebuttal, having been previously sworn, testified as follows:

Direct examination by Mr. Gordon:

Q. Mr. McMorrow, you are the husband of the lady who was just on the witness stand? A. Yes.

Q. You did not hear what she said in this court room? A. No.

Q. You were out in the hall, weren't you? A. Yes.

Q. Do you remember a couple of days after Peters left the hospital that your wife was visiting you? A. Yes, sir.

Q. Did you see Mr. Keppel and Mr. Hurtzig at the hospital at that time? A. Yes, sir.

Q. Do you know when that was? Do you know what month it was in? A. It was in the early part of September.

Hugh McMorrow, Recalled—Cross.

Q. What happened? A. Well, I recall Mr. Keppel and Mr. Hurtzig coming into the room. My wife was there. He asked me how I was, and how I was feeling, and he said, "Pardon me, if I am intruding". I said, "Not at all, come right in". He said, "I just want to see you, Ed." He said, "It is about a paper I want you to sign as a receipt for your full checks". Gilroy said, "Oh", he said, "for God's sake leave me alone. Don't bother me." He said that he was in great pain, and at the time he did not want to be bothered at all with any papers.

Q. Did he sign any papers? A. He did not.

Q. Do you know when you were transferred to Gilroy's room? A. I do, the same day Peters went home.

Q. Do you know how many days you had been in the room before these men called? A. Well, not exactly the date, but I recall Peters wanting to go home for Labor Day; I think it was probably a day after or two days after Labor Day.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Bishop:

Q. How long after that did this conversation take place? A. Why, immediately after Labor Day.

Q. You were moved into the room, you said, one or two days after Labor Day? A. No, sir, before Labor Day, the day Peters went home.

Q. And at that time, two or three days after Labor Day, did this happen? A. Yes, sir.

Q. You were not there in October, were you? A. Yes, I was.

Q. Were you still in the hospital in October? A. Yes.

Hugh McMorrow, Recalled—Cross.

Q. When did you leave? A. I am sure it was the 23rd day of October.

Q. You remember that Mr. Keppel and Mr. Hurtzig did come there together? A. Yes, sir, they did.

Q. Did you ever see them there together at any other time? A. Three times I met Mr. Keppel and Mr. Hurtzig together in the Bayonne Hospital.

Q. Three times they came together? A. Yes.

Q. When were those three times? A. One time I am after speaking of, and another time I met them in the hall. They had a paper for me to sign, and I told them I would not consider signing any papers, that I had in mind bringing suit against the company.

Q. You did sign them finally, didn't you? A. Yes, about five days later.

Q. So that they were in the hospital three times to your knowledge? A. To my knowledge, yes, they were.

Q. When was this visit that you have just spoken of when you met them in the hall? A. Well, I am not sure of the date. I think it was near the middle of October. Probably it might have been the 12th or the 14th, around that time.

Q. Didn't they leave some papers with you? A. Yes, sir, they left a paper with me.

Q. They let you have it to look over and think over? A. Yes.

Q. And you did look it over and think it over for four or five days? A. I don't know as I studied it much myself.

Q. You got some advice on it? A. I sent it to a friend of mine, yes.

Q. You got whatever advice you wanted? A. Yes.

Q. Did you ever talk over with Mr. Gilroy the subject of compensation? A. I did not.

Q. It was never mentioned by him in your presence? A. No, sir.

Q. You have had this document; during the time you had this paper for four or five days, didn't you mention that fact to Mr. Gilroy? A. No, I didn't. I don't believe he was aware I had the paper.

Q. You were in the room with him at that time? A. I was in the room at the time.

Q. But you were out at the time you met Mr. Hurtzig and Mr. Keppel in the hall? A. I met Keppel and Hurtzig in the hall coming up the stairway.

Q. You don't know where they had been, do you? A. Well, from the place where I seen them, they was just entering the hospital, coming into the hospital.

Q. Then you saw them again four or five days later after that? A. Four or five days later the same two men came back and received a paper from me.

Q. You signed it? A. Yes.

Q. What was that paper? A. Well, I don't recall just what was on it. There was some figures on it.

Q. It was a compensation form, wasn't it? A. Well, I don't know whether it was a form or what it was. Really, I had taken my friend's advice on it, and they advised me to sign the paper.

Q. What was the paper? A. I don't recall the exact wording on the paper.

Q. You had plenty of time to read it, if you wanted to? A. I didn't seem to bother so much with it.

Q. Weren't you interested in what was on it? A. Well, in fact there wasn't much on it.

Q. Did you read it? A. I probably read it.

Q. You probably did? And you had plenty of time to read it, didn't you? A. Yes.

Q. You had all the chance in the world?

The Court: Was this paper, which the witness is talking about here today, any paper in which the plaintiff is concerned?

Mr. Bishop: This was what the testimony shows that the same form was presented to these various men, and that they all signed it at the same time.

The Court: That does not bind the plaintiff to anything, does it?

Mr. Bishop: No, but I take it that it is testimony and some corroboration of what the witnesses have said; the fact that these other men were treated in the same way and shown the paper and given an opportunity to look these papers over. That is all.

Re-direct examination by Mr. Gordon:

Q. After you met these men in the corridor, did you see them go into Gilroy's room? A. Not the two of them. Mr. Gillson said—he probably put his head in the door and said, "How are you, Ed.?"

Q. Gillson said that? A. I beg your pardon, Mr. Keppell.

Re-cross-examination by Mr. Bishop:

Q. You are well disposed toward the Standard Oil Company, aren't you? A. I don't quite understand what you mean.

Q. You feel kindly toward the company, don't you? A. Yes.

Q. You are still employed by them? A. No.

Q. You have not any grievance or dissatisfaction against them? A. None at all.

Mr. Bishop: That is all.

Martin J. Moore, a witness called in behalf of the plaintiff, in rebuttal, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Gordon:

Q. Mr. Moore, you are the brother-in-law of Mr. Gilroy? A. I am.

Q. And you were at a visit at Mr. Gillson's office with Mr. Gilroy in the spring of 1928? A. I was.

Q. Please answer this question yes or no. At that time and at that occasion was there ever any discussion about accepting compensation? A. No, sir.

Q. Under the compensation law? A. No, sir.

Mr. Gordon: Cross-examine.

Mr. Bishop: No questions.

Mr. Gordon: I offer in evidence the calendar for the year 1927 as taken from the Union County Court list calendar for the May Term, 1927.

Mr. Bishop: The Court will take judicial notice of the calendar.

The Court: The Court will take judicial notice of it. Is there any objection to using this calendar?

Argument.

Mr. Bishop: The Court takes judicial notice of this calendar.

Mr. Gordon: It may want to refresh its recollection as to it. I offer it in evidence.

(The paper referred to was received in evidence and marked Plaintiff's Exhibit 28.)

Mr. Gordon: The plaintiff rests.

(The plaintiff rested in rebuttal.)

(The defendant rested.)

The Court: We will recess at this time until 2:15 o'clock this afternoon.

(A recess was had until 2:15 o'clock p. m.).

Afternoon Session.

The Court: Gentlemen of the Jury, there is going to be another motion made at the present time, and you will kindly retire into the other room until that motion is completed.

(The jury retired.)

Mr. Bishop: If the Court please, I move for the direction of a verdict in favor of the defendant, the Standard Oil Company of New Jersey, a corporation of Delaware, on the ground that there is no evidence whatsoever of any negligence on the part of that company. It is set up in the pleadings and not denied that the Delaware corporation—I am referring to them as the New Jersey corporation and the Delaware corporation—after this accident occurred, made some agreement with

the New Jersey corporation, under which it assumed its liabilities. That is an agreement upon which the plaintiff is not entitled to sue, and all the evidence is that whatever was done in the way of operation of this plant, whatever negligence, if any, occurred, was not that of the Delaware corporation. I make it especially on that ground with respect to the Delaware corporation.

(Argument.)

The Court: What was your original motion?

Mr. Bishop: The original motion was for a direction of a verdict in favor of the Standard Oil Company of New Jersey, a Delaware corporation.

The Court: The motion is granted.

Mr. Gordon: Exception.

Mr. Bishop: I move for a direction of a verdict in favor of the first named defendant, the Standard Oil Company, a New Jersey corporation, and I base that motion upon the following grounds:

The first is that there is no evidence of any negligence on the part of that defendant.

(Argument.)

The next ground upon which I base the motion is that the plaintiff himself knew this risk. The plaintiff himself knew the conditions, knew the risk, knew that as he approached there that gas kept getting worse and worse, and he never did one thing to prevent this accident. He never made any attempt or suggestion to take another route or anything else. He acquiesced into rushing deliberately into this danger, and he said he knew it was dangerous. He never considered it desirable either to call anybody else's attention to it or to delay or to detour or take any other route. With

full knowledge of the danger, and his eyes wide open, he went deliberately right into it.

The third or next ground is that the plaintiff himself was guilty of contributory negligence, that he was guilty of negligence and guilty of a disregard of such care and precaution for his own safety as a reasonably prudent man would exercise under like conditions.

(Argument.)

The fourth ground is that under the facts made out in this case, the Workmen's Compensation Act, Section 2, which is compulsory compensation, the provisions of the statutes are applicable as a matter of law. They are applicable, not because of anything the parties did after the accident, but because of something they did before the accident, and they are applicable because of the conditions of employment, and the conditions read by the law into the contract of employment, and because this accident happened or occurred out of and in the course of Gilroy's employment.

(Argument.)

An additional ground is that after the accident happened, the parties elected on the one hand to pay and on the other hand to accept compensation. I am not referring now to any written agreement, but to the fact that this man was tendered and accepted compensation.

(Argument.)

In addition to that, the parties did agree specifically after compensation had been paid for a time by a written document that compensation was to be paid. He was to receive certain compensation therein stated. The payment of compensa-

tion required by law was guaranteed by the company, and the man agreed to accept compensation at those rates. And there again, that is a complete bar to the maintenance of this suit.

Now he went further than that. He filed a petition for compensation. In other words, he invoked the machinery set up by the Compensation Law in compensation cases to compel payment of compensation. It is true he attempted to reserve rights out from under the Compensation Act, but he is inclined to have his cake and eat it both, and that does not make anything that is legally effective.

(Argument.)

There is one thing more. In this petition of his, which he says is filed properly for the purpose of protecting his rights without prejudice, he says this: There is a question in there, "Have you made claim to your employer for compensation?" How did he answer that question? He says, "Yes, I have made claim upon my employer for compensation." That is just exactly what the employer says he did, and that is why they tell him they gave him all these checks, and that is sworn to and verified by him under oath, and done in his own attorney's office. He had all the advice in the world. He was not urged into it or deceived into it or tricked into it by any representative of the Standard Oil Company. That is his own statement to the Court. "I have requested compensation from my employer." That is what Gilroy says himself. I say that shows that Gilroy elected to treat this originally as a compensation case.

Finally he comes to the point where he thinks he would be better off if he did not make that concession, and he changes his mind and files this

petition in this cautious, guarded reservation of his rights, and he admits in that petition that he has theretofore demanded compensation. He does not return the checks that are paid to him for compensation; he keeps them.

So I say that under all that, it appears conclusively that not only was this properly a compensation case under the law, but it was recognized by the parties as a compensation case and treated as a compensation case, and it continued to be treated as a compensation case up to the time this man retained counsel, and that after that, he was not so sure it was a compensation case that he was willing to throw his right of compensation aside. No, he was not even willing to let go of the checks he got for compensation, which he admitted was compensation. Under all of these circumstances, and in view of that, I submit that under the cases I have referred to before—page 16, point two of my memorandum—that even if it were so—which I do not concede—that this act did not apply because of the facts, I say, at least, they are border line cases, and in such a case the parties agreed and treated it right from the start as a compensation case. Under those circumstances, having done that and having continued to do it, and having been in possession of these four compensation checks at the time of this trial, and having said in his petition in the Bureau that he has demanded compensation, I say it is a compensation case, and for that reason, a verdict should be directed for the defendant.

(Argument.)

For all these reasons, I submit that the defendant is entitled to a direction of a verdict.

Argument.

Mr. Gordon: With reference to the allegations of the complaint and the proofs that have been adduced before the Court and jury in substance on the question of negligence, the uncontradicted evidence in this case is that on the right side of Hook Road there was a fire on their property, that Hook Road became ignited, and that there were substances on Hook Road that burned.

(Argument.)

The Court: I shall decide this motion at the opening of court on Wednesday morning. I want to examine the authorities in the light of the proof given today and the arguments this afternoon. We will have the jury recalled at this time.

(The jury returned.)

The Court: Gentlemen of the jury, the decision on the motion that has been made during your absence from the courtroom will be handed down by the Court on Wednesday morning at the opening of court. If that decision should be against the plaintiff, the case will be disposed of then at that time. If it should be the other way, the case will go to your hands, but it will go to you on Wednesday, if at all, and you will return Wednesday morning at 9:30 o'clock.

(A recess was had until Wednesday morning, November 6, 1929, at 9:30 o'clock a. m.)

Motion for a Direction of Verdict.

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

October Term, 1929.

EDWARD N. GILROY,

vs.

STANDARD OIL COMPANY (a New Jersey corporation) and STANDARD OIL COMPANY OF NEW JERSEY (a corporation of Delaware, authorized to do business in New Jersey).

Transcript of stenographer's notes of evidence in the above entitled cause, taken before HON. LLOYD THOMPSON, Judge, and a Jury, at the Union County Court-house, in the city of Elizabeth, New Jersey, on the sixth day of November, A. D. 1929.

Appearances:

FRANCIS A. GORDON, Esq., Attorney for the Plaintiff.

MESSRS. LINDABURY, DEPUE & FAULKS (JOHN W. BISHOP, JR., Esq., present; BURTIS S. HORNER, Esq., present), Attorneys for the Defendants.

The Court: The motion for the direction of a verdict is denied. The motion for a direction of a verdict for no cause of action against the one

defendant is granted, and in my charge to the jury I shall make such direction.

Mr. Bishop: Exception to the denial of the motion for a direction of a verdict.

Mr. Gordon: I have already noted my exception to your Honor's ruling as to that part, and I should like to have the record show it.

(The Plaintiff rested in rebuttal.)

(The Defendant rested in sur-rebuttal.)

(Mr. Gordon made a closing address to the jury on behalf of the Plaintiff, after which Mr. Bishop made a closing address to the jury on behalf of the Defendant. Mr. Gordon then made a reply to the jury on behalf of the Plaintiff.)

(The Court charged the jury as follows):

The Court's Charge.

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

October Term, 1929.

EDWARD N. GILROY

vs.

STANDARD OIL COMPANY (a New Jersey corporation) and STANDARD OIL COMPANY OF NEW JERSEY (a corporation of Delaware, authorized to do business in New Jersey).

Before: Hon. LLOYD THOMPSON, Judge, and a Jury.

Elizabeth, N. J. October 28, 29, 30, 31, November 1, 4, and 6, 1929.

Court's charge to the Jury by Honorable LLOYD THOMPSON, Judge, as follows:

Gentlemen of the Jury: This has been a protracted trial, and it has necessitated your attendance beyond the time which you would ordinarily be expected to serve on jury duty. The case is one of very great importance to both the plaintiff and the defendant, and it has merited the close attention that the Court has noticed you have given to it, and that both counsel have mentioned in their summing up. I am certain that counsel for both parties join with the Court in expressing appreciation for the manifest interest that you have shown, and with which you have followed the testimony from day to day. I think you have the confidence of all that when you get to the jury room, the result of your deliberations will be a verdict founded upon your best judgment on the merits of this case.

As you already know, this action is brought by the plaintiff against the defendants at common law for damages claimed to have been sustained by reason of physical injuries to the plaintiff as the result of an explosion and fire at the defendants' premises, an oil refinery in the city of Bayonne, on August 8, 1927, about eleven o'clock at night, when the plaintiff was proceeding to his home with several other persons in an automobile, after completing his work as assistant pump man, employed by the defendants.

You will note that there are two defendants: one, the Standard Oil Company, a New Jersey corporation; and two, Standard Oil Company of New Jersey, which is a Delaware corporation authorized to do business in New Jersey. At the time of the occurrence upon which this action is founded and prior thereto, the premises whereon the alleged negligence, if any, was committed, were owned and operated by the defendant Standard Oil Company, the New Jersey corporation, and any duty owed either to employes or to the public regarding the care, maintenance, and operation of the premises and its appurtenances was owned by the Standard Oil Company, the New Jersey corporation, and it alone could have been responsible for any act of negligence or violation of duty whereby anyone was injured on the night in question.

The other defendant, the Standard Oil Company of New Jersey, the Delaware corporation, was not incorporated until August 29, 1927, twenty-one days after the date of this accident. The agreement of the latter organized corporation to assume the liabilities of the earlier one is an agreement between the two corporations them-

selves, and one to which the plaintiff was not a party.

I therefore direct you, at the outset, to find no cause of action against the defendant Standard Oil Company of New Jersey, the Delaware corporation.

With the consent of counsel—I think there will be no dispute about it—at the conclusion of my charge, you may take a memorandum of the two corporations indicating the one which the Court charges you there can be no verdict rendered against, because of the confusion of names. They are so similar that I do not suppose that counsel wants to risk the confusion that might be involved in returning a verdict.

The next question to which your attention should be directed is that of the relationship between the plaintiff and the defendant at the time of the accident, whether it was that of employe and employer or not; and whether, if the plaintiff was the employe of the defendant, this accident arose out of and in the course of his employment.

It is necessary to consider this question first, because under the laws of this state, every contract of hire shall be presumed to have been made with reference to the provisions of Section 2 of Chapter 95, Laws of 1911, known generally as the Workmen's Compensation Law, and its amendments and supplements, unless certain things set forth in Paragraph 9 of Section 2 are done to take the contract without Section 2, which things are not claimed to have been done in this case.

The plaintiff admits, in his reply, that he and the defendant had a contract of hiring, which was subject to the provisions of Section 2 of the Work-

men's Compensation Law. If this accident arose out of and in the course of his employment, as the phrase is used in Section 2, then, under the provisions of that section he had surrendered his right to any other method, form, or amount of compensation or determination thereof than as provided in Section 2 of the Act, and he could not bring his common law action into this court, but must proceed to collect such compensation as may be due him by proceeding under the Workmen's Compensation Act and take his compensation in the amount and in the form prescribed by that Act.

While the plaintiff admits that he had the contract of hiring, which would have limited him to the Workmen's Compensation Act for his remedy if the accident arose out of and in the course of his employment, he denies that the accident did arise out of and in the course of his employment, and claims that it occurred while he was traveling on a public thoroughfare as a member of the public after his work was ended, and under such circumstances as had ended for that day the relationship of employe and employer in the case of himself and the defendant.

It appears from the undisputed testimony that on the night in question, plaintiff, whose shift was an eight-hour one ending at eleven o'clock, discontinued his work about fifteen minutes before eleven, changed his clothes, entered with three other men an automobile owned and driven by one of them, and started to proceed to his home; that he had begun his work on his shift about a quarter before three in the afternoon; that it was customary to allow the employe about ten or fifteen minutes leeway in leaving his work to change

his clothing and depart; that the employes' customary method of proceeding away from the defendant's premises was to go out of a gate, which would be closed behind them, and onto a road known as Hook Road, and along that road by a circuitous route until it finally led to other highways running to the various parts of the city of Bayonne; that Hook Road, at a certain point, and for a distance thereof, divides the area of the defendant's grounds or plant into two parts or sectors, and runs between them; that at or about the location on this road where the plaintiff was riding in the car, there are two gas holders or containers on the one side and a pump house and locker room building on the other; that there is an overhead piping apparatus, a part of the defendant's operating equipment, extending over the road from one side to the other; that the defendant owns the fee in this road, subject to a public easement for travel over it; and that it was on this road, separating to the extent mentioned the two parts of defendant's plant area, and at or near the gas holders and pump house on either side, that the plaintiff and his companions were driving at the instant the fire and explosion occurred.

Defendant's counsel admitted on the record in open court that the road is a public thoroughfare.

These seem to be all of the essential facts bearing upon the question of whether the accident arose out of and in the course of plaintiff's employment by the defendant.

Do these facts, in the light of the decisions of our courts, present a case in which it may be fairly concluded that this accident did arise out of and in the course of the employment? I find no New

Jersey case in which the same state of facts existed as in the case we have before us, so that in deciding the question, we have to be guided as well as we can by the general principles laid down by our courts as governing this sort of cases, applying those principles to the facts presented in the testimony here.

It is to be noted, in the first place, that the Workmen's Compensation Act is what is known as remedial legislation, that is, legislation that enlarged or enhanced the remedy a workman previously had at common law for injuries arising out of his employment. It inaugurated a scheme of procedure by which the employe might more directly, more readily, and more certainly receive compensation for his injuries. It even cut off, in a proceeding under the Act, certain common law defenses theretofore possible under the common law on the part of the employer, such as negligence of a fellow employe, assumption of risk inherent in the employment, and contributory negligence, not wilful, on the part of the employe. The whole scheme was set up for the benefit of the employe.

Being remedial in its nature, it is, under the legal principles of construction, to be construed liberally, having in mind the benefits intended to be conferred; and, having in mind the class for whose benefit it is intended, that benefit should not be limited by the compulsory submission of the employe to the provisions of the Act, where the facts do not squarely bring him within its scope, any more than by his exclusion from its provisions where the facts bring him fairly within it.

In the instant case, the plaintiff had completed his period of work, entered a privately owned and

operated automobile, proceeded to the defendant's exit gate and out of it to a public thoroughfare, and after traveling a considerable distance on this thoroughfare, and while still on it, came to the vicinity of certain buildings and gas holders owned by the defendant and located within their private lands, off the road which the public was entitled to use, and which plaintiff was using (presumably as a member of the public, because his work was finished and he was without the defendant's enclosures) and that when nearing these buildings the fire and explosion occurred.

It is difficult to see how, under these conditions, the plaintiff was in a position different from any other member of the traveling public, so far as concerns his right to be protected against the negligence of the defendant; and if his position was no different, his recourse for injury was the same. Any person not employed by defendant had a right on that road to be protected from injury arising from defendant's negligence, and if so injured, to sue for damages at common law. Anyone who had quit his employment, though only until the next day, was, at that time, not employed and had the same rights.

I cannot find any case in which the employe having quit his work, gone without the confines of his place of employment, in an independent conveyance, and along a public thoroughfare, under no further duty to or control of his employer, and not to return until some subsequent period of his work should have again ensued and has been injured under such conditions, has been held to have sustained that injury by reason of an accident arising out of or in the course of his employment.

I therefore charge you that the plaintiff's injuries in this case cannot be held to have been sustained by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, and he is therefore not required to seek his compensation under that Act, but may lawfully pursue his remedy at common law in the action now being tried.

The next question, then, for decision, is the issue of whether or not the plaintiff entered into an agreement with the defendant whereby, though not required by law to proceed under the Workmen's Compensation Act, the plaintiff, nevertheless, voluntarily bound himself to settle the question of his compensation by the method set out in that act for the determination of the amount to be paid him for permanent disability.

The defendant claims that there was such an agreement and has put in evidence as proof thereof the so-called Form 2 agreement used in Workmen's Compensation cases, purporting to have been signed by the plaintiff by his mark while still in the hospital, and which two witnesses for the defendant say he did sign, knowing the contents thereof.

The plaintiff flatly denies that he signed the paper in question at all; he says that he was asked to sign a paper represented to him to be a receipt for the salary he had been receiving since the accident; that he remarked that the checks were a sufficient receipt and that he refused to sign anything at all, and never did.

A nurse, claimed by defendant's witness to have been asked to sign as a witness at the time, testified that she was not so asked and never saw the paper signed.

This situation in the testimony presents a question of fact, and, therefore, is for the jury to decide, not the Court. I do charge you, however, that even if you find the plaintiff did sign the so-called Form No. 2 agreement, he must be considered to have signed it subject to the provisions of the Workmen's Compensation Act, one of which (Section 4 of Chapter 149 of the Laws of 1918) is that any agreement settling upon and determining compensation to an injured employe must be forthwith filed with the Workmen's Compensation Bureau and is not binding unless approved by the Bureau. No such agreement was ever filed and none was ever approved, so that if any ever existed it never became binding upon either party.

It is contended that the plaintiff himself filed a petition under the Workmen's Compensation Act to have the compensation determined. The petition was put in evidence, but it contains a reservation of the plaintiff's common law rights and is therefore qualified and limited by its terms to that extent.

It is contended by the defendant that even if the Number 2 Form did not bind the plaintiff as to the actual amount of compensation he was to receive for permanent disability, it at least was an agreement accepting a certain method by which the amount would ultimately be determined; but there never was, in this case, any ultimate determination of the amount to be paid, and no amount for permanent disability was paid prior to the beginning of this action.

Counsel for the plaintiff has read to you in his summing up a letter from one of the representatives of the defendant stating that the plaintiff has consistently refused to be bound by the Compensation Act.

As was said in the case of Larsey *vs.* Hogan & Sons, 239 New York, page 298, at page 301, "As an agreement for settlement at common law, the claim of the plaintiff would not be discharged or released until full and complete payment and execution. The agreement may have amounted to an accord, but payment only would amount to a satisfaction. Until there was an accord and satisfaction of plaintiff's claims by full and complete payment, the plaintiff was not barred from maintaining his action for negligence."

This ruling also disposes of the question of whether or not the checks of the defendant to the plaintiff, admitted in evidence, representing the exact amount of plaintiff's wages for given periods, and admitted to have been received and cashed, constituted any payment that would preserve the alleged agreement. These payments were endorsed by the defendant as "Benefits", described by defendant's witness as meaning the payments made under a system of the company whereby the employe would receive the amount of his wages for a limited number of weeks and said to have included the amount he would have been entitled to under the temporary disability provisions of the Workmen's Compensation Act; and likewise as to the four checks, each for the exact amount payable under the compensation act, which were never cashed by plaintiff, though never returned to the defendant. None of these checks, nor all of them, represented full payment, and at best they can be set up as offsets or credits against any amount ultimately found to be due the plaintiff, if he should prevail in this action.

We next come to the question of negligence. This action is founded upon the alleged negligence of the defendant. It is necessary for the

plaintiff, in order to recover, to establish to your satisfaction by a fair preponderance or weight of the evidence the negligence of the defendant in this case, and, further, that the injuries sustained by the plaintiff were proximately caused by such negligence.

Negligence, as defined by the law, consists in the failure to use such care as a reasonably prudent and careful person would use in a given situation, taking into consideration the time, place, and other conditions present, from which failure injury to another's person or property results and is proximately caused thereby.

Where the situation presents unusual conditions, or unusual risks inhere therein, a higher degree of care is exacted by the law upon the part of those in control of the operations and conditions in the case.

Quoting from the decision of one of our courts: "Gas being an extraordinarily dangerous element, an extraordinarily high degree of care and skill is exacted, and the rule of ordinary care with respect to its transmission is adjusted, in view of its known dangers and probable entailments, by a standard of care proportionate to the probable dangers." That is the case of Anderson *vs.* Atlantic City Gas Company, 7 New Jersey Advance Reports, number 14, page 298.

Quoting further from this case: "Parties manufacturing and distributing gas are held to a high degree of care in the maintenance of their pipes and containers and are required to exercise every reasonable precaution suggested by known dangers. Where the existence of a leak is known, means should be taken to avoid injury, and where it should have been known that a leak was likely to occur because of defective conditions, negli-

gence may be imputed, if the conditions are not remedied. In other words, the gas pipes and containers are under the direct control of the gas company, and the gas company is responsible for any negligence in not taking the ordinary and proper methods to prevent anyone from being injured by reason of gas escaping in the streets."

There is a phrase used in the law, *res ipsa loquitur,* meaning "the thing speaks for itself". The principle has been defined by our courts to the effect that "when through any instrumentality or agency under the management or control of a defendant or his servants, there is an occurrence, injurious to the plaintiff, which, in the ordinary course of things would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care."

This principle is applicable in the case before you. The defendant has a gas plant, container, pumping machinery, and apparatus for the manufacture and distribution of an extraordinarily dangerous element or substance, the conditions calling for the exercise of a correspondingly high degree of care to prevent accident and injury. The maintenance and operations of the plant are in the control of the defendant. Without any act on the part of the plaintiff, an explosion and fire occur whereby he is injured. We thus say, "The thing speaks for itself". That is, the very happening of the event, in the absence of explanation, indicates there was want of due care, or may indicate it, or the accident would not have occurred.

It is not always true that the mere happening of the accident constitutes negligence, but if the

occurrence is one which in the ordinary course of events would not occur if due care had been used, and the occurrence is left unexplained by the defendant, or is not met by evidence that due care had been used, then negligence may be inferred.

In this case, the defendant has presented testimony intended to show that it did exercise due care, that it provided against all dangers reasonably to be anticipated, and that the accident was beyond its control and without its fault.

If the testimony satisfies you that the defendant discharged its full duty in this respect, then there can be no recovery against it.

It is for the jury to say whether such *prima facie* case as was presented by the plaintiff's testimony was met by the evidence for the defendant, the burden of proof remaining throughout on the plaintiff, however, in the whole case, to finally establish the negligence of the defendant as the cause of the accident.

This does not mean that the plaintiff must prove the specific cause of the accident in order to show negligence. As was said by our Court of Errors and Appeals in the case of Bahr *vs.* Lombard: "Today a single plant will comprise a multitude of diverse appliances, the apparatus of one being for the most part, totally ignorant of all the others; while not one citizen in thousands knows anything in regard to the character and construction of any of the new mechanical processes with which he is met at every turn, still less of the dangers incident to their operation. Under these changed conditions, to compel plaintiffs in every case to ascribe some specific act as negligence, would be to make a recovery for injuries dependent upon the possession of a

special technical knowledge, and to grant immunity to the users of dangerous agencies in proportion to the success with which the special element of danger was concealed from the public."

The defendant has pleaded contributory negligence on the part of the plaintiff. Contributory negligence is the doing of something by the plaintiff which helped to bring about the injuries sustained by him, which a reasonably prudent and careful person would not have done, or the failure by the plaintiff to do something which would have avoided the injury and which a reasonably prudent and careful person would have done to avert it.

If the plaintiff was guilty of contributory negligence, as thus defined, then he cannot recover against the defendant. That is the law, and it does not make any difference how small the degree of such contributory negligence may be. If it is present at all, and the injury can be attributed as proximately caused in any degree by the contributory negligence, it defeats the plaintiff's right to recover.

The defendant contends in this case that the plaintiff was warned of the presence of gas by his own admission, by the smell of it as he proceeded along the road, the smell of it being sufficiently strong to cause the plaintiff to place his handkerchief over his nose and mouth to lessen the inhalation, and that it was his duty to go back rather than forward to avoid any injurious consequence.

It is for you to say, as jurymen, whether the plaintiff's conduct in the situation in which he found himself was or was not that which was to be expected from a reasonably prudent and careful person under the circumstances. If it was not, he was guilty of contributory negligence and could not recover.

Court's Charge.

The burden of proof to establish contributory negligence is upon the defendant who asserts it, just as the burden of proof is always on the plaintiff to establish the negligence of the defendant. It is true, however, that the defendant is not limited to proving affirmatively contributory negligence by its own independent witnesses. He may prove it by the plaintiff's own witnesses or the plaintiff himself, either on cross-examination or by the admissions of the plaintiff during the testimony.

The situation in which Gilroy found himself, in this case, is one upon which you are to pass judgment as men of reason, applying the principles of ordinary reasonable men to the question of whether or not, when he discovered the presence of this gas to the extent he did, the reasonable thing for him to do was to go back or go forward; whether or not he, or you yourselves, or anyone in his position could have determined in the time that he had for consideration what was the safe thing to do, whether or not there was as much risk proceeding back through the fumes of gas as there was proceeding forward and out of them to where he was going. In other words, was he able to properly estimate and sufficiently competent to estimate under the conditions where the most risk lay, and where the danger was least? If he could not, then the question for you to decide is: Did he do the reasonable, prudent thing in going forward, or did he fail to do anything that he should have done to avert it, or could he have done anything that would lead reasonable men to suppose that he could avert it?

That is the question for you to decide in this case, and that is the only evidence, so far as I recollect, that would bear upon the question of

any conduct on the part of Gilroy concerning the possibility of contributory negligence on his part.

You are not bound by my statement that that is the only evidence on that subject. If there is any other, all matters of evidence are for your recollection, and you do not have to take the Court's suggestion as to what was or was not in the case on that subject. That is simply as I recalled it.

It is not my purpose to attempt to review all the evidence in this case concerning the matter of the degree of care that was exercised by the plaintiff in the maintenance and operation of this plant where the accident occurred. In the first place, it is too voluminous and would take too much time. In the second place, I should hesitate to attempt to review it, because of the risk that I might leave out something in my review, which would thereby escape your attention in your own deliberations.

The law puts upon you the responsibility of listening to and weighing all of the evidence. It is for you to determine whether or not, in view of this occurrence and in view of the facts elicited by the testimony of the defendant's witnesses, there has been proved on its part the exercise of such degree of care as these particular conditions require, and in view of the legal principles and rules which I have charged you as being the law of this state on that subject. It is a question of fact as to whether or not they discharged their responsibility and duty in that respect, bearing in mind always that it is the duty of the plaintiff to prove the negligence of the defendant, and also the legal principle that when it has proved the occurrence of a certain accident beyond the control of and unaffected by any conduct of the plaintiff,

then the defendant is called upon to meet with some explanation the situation as to what it had done to guard against the occurrence of such accident and the resulting injuries. Applying this principle to the facts in the case, it is for you to say whether or not the defendant in this case was guilty of negligence.

If you find, in view of all the facts and the testimony, that it was guilty of negligence, and you find at the same time that the plaintiff was not guilty of any contributory negligence on his part, then of course you would come to the question of damages to be awarded to the plaintiff in this case.

If you find that there was contributory negligence on the part of the plaintiff, even though there was negligence on the part of the defendant, then there can be no recovery, and your deliberations end at that point.

Concerning damages in the case, the elements are these: The bodily injuries sustained; the pain undergone; the effect on the health of the sufferer according to its degree and its probable duration, as likely to be temporary or permanent; the expense incidental to attempts to cure or lessen the extent of the injury; the pecuniary loss sustained through inability to attend to business or profession, which, again, may be of temporary character, or may be such as to incapacitate the party for the remainder of his life.

The law says that, when a person is injured through the negligence of another, he may have, at your hands, such fair compensation for the pain and suffering that he endured as you think will fairly compensate him for that. That is for the actual pain and suffering itself, irrespective of the permanent results and the nature of the injuries. One does not have to suffer the agony of injury

and pain without being compensated for it, if it is due to the negligent act of another, and if he was himself free from contributory negligence in the incident out of which it arose.

Then he should also be awarded a fair compensation, taking into consideration the extent and duration or the permanency of the injuries or any part of them; the degree to which they will incapacitate him from earning his living either to the extent that he was heretofore able to earn it or any extent at all; also as to the effect on his future health and well being, his personal comfort, his ability to indulge in the same recreations and pleasures which the normal man ordinarily is able to indulge in the health that Gilroy had, as was testified here, before this accident occurred. All of these things are matters for you to take into consideration and seriously consider in attempting to arrive at the amount of money which will compensate him, as nearly as you can judge, for all these things.

Something has been said by counsel for the defendant with respect to the amount of money damages asked for in the complaint in this case. That, as you have been told, is the sum of $100,000, and that, of course, is merely what the plaintiff has asked you to give. The only thing that that does is to limit you to that amount as a maximum. It does not, however, carry with it any evidence or any authority as to what is the reasonable amount. You are the sole judges of that, and it is for you to determine, and you alone.

Counsel for the defendant has mentioned the fact that that amount of money, the maximum amount, would result in the plaintiff having an annual income of approximately twice as much as the greatest amount that he had ever heretofore

earned, and that he would, upon his death, have also the principal still to dispose of or to give to his personal representatives.

If the amount of his earnings were the only element for which you were to compensate in the case, that matter would be more important on that phase of it than otherwise it is, but you must remember also that it is not merely the loss of earning capacity that you are estimating as the damages in this plaintiff's case. As I have pointed out to you, he has suffered physical pain. He has endured very serious and long continued interruption of his normal activities, as the testimony shows, and they are still considerably interfered with and interrupted. He is deprived to a certain extent of the indulgence in the ordinary recreations and pleasures of a normal healthy man, such as he was, if the testimony of the plaintiff's witnesses with regard to the physical injuries is all true and believed by you.

Those are elements besides his actual money loss in wages that are to be considered. I do not mean to intimate to you at all that those additional elements would bring the sum up to $100,000. That is entirely aside from my province; it is solely yours, and I have no suggestion to make whatever as to what amount you will ultimately determine as a fair compensation for this plaintiff, if you come to the question of awarding him any damages at all. I merely suggest that you keep in mind what are the elements of damages in every respect when you come to fixing the amount.

There has also been a suggestion somewhere in this case—I believe it came out in the testimony before there was time for objection—that a certain sum of money had been asked of the plaintiff. That also is a matter that you do not take

any cognizance of in your deliberations. This question of the amount of money is dependent solely upon your judgment of the evidence here as to what has happened to this man and the responsibility of the defendant, if there is any, for it, and you will pay no attention whatever to what sums were mentioned by any party. You may remember that I ordered all such testimony stricken out of the record, and it is my duty to charge you at the present time that in all cases where the Court ordered testimony stricken from the record or ordered an answer to be stricken out, it was done because such answer would have been illegal evidence and inadmissible evidence, incompetent, irrelevant, or immaterial, and it is therefore your duty to disregard it because that is a matter of law, and the Court is compelled to decide it, and you are bound by the Court's decision in such matters as that.

Before I leave the question of damages, I want to call your attention to the fact that if you should find for the plaintiff, you are to take into consideration as a credit and offset against any amount of damages that you determine, the amounts of the payments made by the checks of the defendant, introduced in evidence and admitted to have been cashed and the money received by the plaintiff. All of those are payments of which he has received the benefit and should be deducted from any amount that you determine to be his proper damages in this case, and then the difference would be the net amount of the verdict you would render, if you render any verdict in his favor at all.

I have been requested by the plaintiff to charge you as follows:

Court's Charge.

"1. So far as this case is concerned the contract of employment of the plaintiff to render service to the defendant at a designated place known as Kimball pump house did not cover his movements outside of that place while the plaintiff used the public highway known as Hook Road as the public used it, because he was required to in order to get to and from work, and not because the defendant, as his employer by the terms or implication of its contract of employment, had the right to require him to use the said road at defendant's will. (Whitney *vs.* Hazard Lead Works, 136 Atlantic, page 105.)"

I charge you that that is so.

"2. In using the public highway known as Hook Road, as plaintiff did and when he did, he was exposed only to the same risks to which any pedestrians or members of the traveling public in the same position would be exposed. The hazard had no relation to his employment. (Fumiciello's case, 138 Atlantic, 561 at page 562.)"

I charge you that that is so.

"3. Plaintiff, at the time of the accident, had ceased his work, had left the place where he performed said work and was on his way home. He had, at the time, no duty to fulfill to the defendant, and the defendant had no duty to fulfill towards him as its employe. The relation of master and servant had ended for the day, plaintiff having finished his work and left the place where his work was being done. (Caton *vs.* Summerlee and M. I. & S. Conpany, 39 Scot. L. R. 762.)"

I charge you that that is so.

"4. Plaintiff was using the public highway known as the Hook Road in the exercise of a public right of passage, and the defendant, at the

time of the accident, owed to the plaintiff the same duty owed to any pedestrian or other member of the traveling public using said public highway and passing by the premises of the defendant."

That is true.

"5. Defendant corporation, in maintaining and operating gas holders adjoining the public highway and in close proximity to members of the traveling public (including plaintiff), was held to a high degree of care for the maintenance of said gas holders and appurtenances thereto, and was required to exercise every reasonable precaution suggested by known dangers. Where the existence of a leak was known, means should have been taken to avoid injury, and where it should have been known that the leak was likely to occur because of defective conditions of said gas holders, negligence may be imputed. (Anderson *vs.* Atlantic City Gas Co., 7 N. J. A. R., page 297, at pages 298 & 299.) (N. J. Case.)"

I have already charged you, in substance, to that effect, and I repeat that that is so.

"6. Gas being an extraordinarily dangerous element, an extraordinarily high degree of care and skill is exacted from the defendant, and the rule of extraordinary care with respect to its storage and transmission is adjusted, in view of its known dangers and probable entailment, by a standard of care proportionate to the probable dangers. (Anderson *vs.* Atlantic City Gas Company, *supra.* Also Chew *vs.* Commercial Gas Company, 87 New Jersey Law, 679.)"

I have already so charged you, and I repeat it.

"7. When, through any instrumentality or agency under the management or control of this defendant or its servants, there is an occurrence

injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care. (Mannon *vs.* Vesper Lodge of Independent Order of Odd Fellows, 97 New Jersey Law, 215, at pages 216, 218. Mumma *vs.* Easton and Amboy Railroad Company, 73 New Jersey Law, 658.)"

I have already charged you to that effect.

"8. The testimony for the plaintiff makes a *prima facie* case for the jury, and on the whole case, it remains for you to say whether such *prima facie* case was met by the evidence for the defendant, the burden of proof remaining throughout on the plaintiff. (Hughes *vs.* Atlantic City Railroad Company, 85 New Jersey Law, 212. Niebel *vs.* Winslow, 88 *Id.* 91. Fanshawe *vs.* Rawlins, 89 *Id.* 344. Mannon *vs.* Vesper Lodge, *supra.*)"

I have already charged you to that effect and I repeat it.

"9. Plaintiff is not required to establish by direct evidence the cause of the ignition of the gas, if any there existed, in order to establish the liability of the defendant company for damages resulting from the fire and explosion of the escaping gas, if any existed. (25 A. L. R. 262, at page 293 and cases thereunder cited.)"

That I have charged you, and I will repeat it.

"10. If you find that the plaintiff is entitled to a verdict in his favor, then you may award to him such an amount as you consider a fair and reasonable sum for the bodily injuries sustained; the pain and suffering undergone; the effect on

the health of the plaintiff according to its degree and its probable duration, as likely to be temporary or permanent; the expense incidental to attempts to cure or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to his employment, which, again, may be of temporary character, or may be such as to incapacitate the plaintiff for the remainder of his life, and you may take into consideration in fixing these elements of damage the scarred condition of the plaintiff, his deformity and disfiguration and his mental anguish suffered, that you, from the evidence find reasonably may be attributed to the negligence of the defendant and to the injuries suffered by the plaintiff as the result of such negligence. (Goble *vs.* Delaware, etc. R. Company, 3 N. J. L. J. 176, Sparks *vs.* Citizens Coach Company, 6 N. J. L. J. 365.)"

That is true, and I so charge it.

"11. If you find the plaintiff is entitled to a verdict in his favor, then, in addition to the pain and anguish that the plaintiff suffered and the injuries sustained, you may take into consideration, in estimating plaintiff's damages, the impairment of plaintiff's ability to enter into the usual activities for both pleasure and profit. (Kasisky *vs.* Central Jersey Power and Light Company, 4 N. J. Miscellaneous R. 130.)"

That is true, and I charge you that.

The plaintiff has submitted additional requests to charge as follows:

"1. Plaintiff is not barred from instituting this suit by reason of filing of a petition with the Workmen's Compensation Bureau, and his filing such petition as a matter of law does not constitute an election on his part to receive compensa-

tion. (Ellich *vs.* Hamburg Amerikanische Packetfahart Actien Gesellschaft, Sup. Court, Appellate Division 1929, 226 Appellate Division New York 32, 234 N. Y. S.)"

I so charge you.

"2. It appearing, by the evidence in this case that this accident did not arise out of or in the course of the employment of the plaintiff with the defendant, by the terms of the Workmen's Compensation Act, the Workmen's Compensation Bureau would have no jurisdiction to award compensation and therefore this plaintiff, not having an alternative remedy before the Workmen's Compensation Bureau, had no choice in law to make an election, and he is not debarred from instituting this suit."

I so charge you.

"3. Even if the plaintiff and the defendant made an agreement, express or implied, to adjust the compensation of the plaintiff, employing for that purpose the machinery of the Workmen's Compensation Act, the fact that such agreement, if made, was not carried into effect, does not bar or preclude this plaintiff from maintaining this action at law for damages. (Waters vs. Guile, 234 Federal Reporter, 532, pages 536 and 537.)"

I so charge you.

"4. The fact that the plaintiff received from the defendant, medical and hospital services and medicines does not prejudice the plaintiff in any way to a recovery, if he is entitled to any money damages on account of defendant's negligence, but the defendant is entitled to have such items so paid by it to be credited on account of any damages, if any you may award to the plaintiff. (Waters *vs.* Guile, *supra.*)"

That is true.

"5. The plaintiff is not barred from instituting this action at law by reason of any agreement that may have been made either under the Workmen's Compensation Law or in the nature of a settlement at Common Law, until there was an accord and satisfaction of plaintiff's claim by full and complete payment, and in this case, as a matter of law, there has never been any full and complete payment of plaintiff's claim so as to constitute an accord and satisfaction. (Larscy *vs.* Hogan, 239 New York 298.)"

That is true, and I so charge it.

"6. The plaintiff is not barred from instituting this suit at law by reason of the acceptance of any payments that may have been made to him by the defendant, either as a benefit, gratuity, or even as part compensation, and such payments do not extinguish any cause of action for damages, but you have a right and it is your duty, if you find that the plaintiff is entitled to damages in this case by reason of the defendant's negligence, taking into consideration the law as it has been charged applicable to the case and all of the facts in the case, to subject such damages to a set off to the extent of partial payments that may have been made by the defendant to the plaintiff. (Fitzgerald *vs.* Harbor Lighterage Company, 234 New York, 132.)"

I have already charged you to that effect, and I repeat it.

"7. The plaintiff is not barred from instituting this suit at law for damages by reason of any negotiations in reference to any compensation including temporary and/or permanent disability compensation or by reason of any agreement that may have been made in connection with any com-

pensation for temporary and/or permanent disability, because under the law of the State of New Jersey an agreement between an employer and an injured employe, even when duly signed and which settles upon and determines the compensation due to an injured employe as provided by law (and in this case 'provided by law' includes temporary compensation as well as any final disability compensation) requires that such agreement shall not bind the employer or the injured employe unless approved by the bureau, and in this case it has not been pleaded nor is there any proof that there was such an agreement approved by the bureau in accordance with the law in such case made and provided. (Paragraph 4, chapter 149, laws of 1918, 2 Cum. Supp. to C. S. page 3890.)''

That is true.

''8. The fact that payments may have been made to the plaintiff by the defendant and that the defendant may have given notice to the Workmen's Compensation Bureau that payments have begun or have been made does not bar this plaintiff from instituting this suit for damages, as the only effect of such notice of payments and of such payments accepted, even if they were as compensation payments, would be to give the defendant in this case the right to credit such payments on account of any damages that may be awarded to the plaintiff in this suit, under the law as charged to you applicable thereunder. (Fitzgerald *vs.* Harbor Lighterage, 244 New York, 132.)''

That is true.

The plaintiff's additional request to charge number nine I decline to charge, as I have already charged it in substance, and it is useless to repeat it, and the same is true of request number ten.

The plaintiff also requests the Court to charge that: "Whoever uses a highly destructive agency is held to a correspondingly high degree of care. Care in this sense means more than mere mechanical skill; it includes circumspection and foresight with regard to reasonably probable contingencies." This is quoted from the case of Heyer *vs.* Jersey Central, decided October 14, 1929, Court of Errors and Appeals, 7 New Jersey Advance Reports, page 1067, at page 1070.

As that is a pronouncement of law by our highest court, I charge you, of course, that it is true as a matter of law.

Further the plaintiff requests the Court to charge that the defendant sets up that the plaintiff was guilty of contributory negligence, and as this is an affirmative defense on the part of the defendant, the burden of proof is on the defendant to establish such affirmative defense by a fair preponderance of the evidence.

I have already charged you that.

The plaintiff further requests the Court to charge that in order to disentitle the plaintiff to recover, it must not only appear that he was negligent, but that his negligence proximately contributed to the negligence of the servant and its officers, servants, agents, and employes who caused the injuries to the plaintiff.

I have already charged you that.

The plaintiff further requests the Court to charge that if the alleged faulty acts of the plaintiff simply present the condition under which his injuries were received and was not in a legal sense the contributory cause thereof, then the sole question for the jury to consider is whether, under the circumstances, and in the situation in which his injuries were received, they were due to the neg-

ligence of the defendant and its officers, servants, agents, and employes. (Jackson *vs.* Geiger, Court of Errors and Appeals, 100 New Jersey Law, 330 at page 334.)

That is true.

The defendant has made the following requests to charge:

"1. You must not allow yourselves to be influenced in any way by any sympathy that you may have for the plaintiff or by the fact that the defendant is a corporation, but you must decide the case fairly and impartially upon the evidence submitted to you and upon nothing else."

Of course, gentlemen, that is one of the first principles of law. The parties are in a court of justice, where the verdicts can be given only upon the evidence as disclosed by the testimony. The law, as you know, is no respecter of persons, and it does not distinguish a corporation from a person in connection with the award of damages or the responsibility for negligence. It is true that this is a large corporation, but a large corporation or a small corporation, or a wealthy person or a poor person has exactly the same rights in our courts, and their rights should be respected in exactly the same manner by juries. Of course, we are all human, and we sometimes have to take special care to see that our sympathies, when they are enlisted, do not affect our judgement as to what is just and right. I simply call this to your attention so that in deciding this case, you will let it be absolutely upon the merits and the facts alone, and not upon the condition of the parties to the action.

"2. The mere fact that this accident happened, or the mere fact that this suit has been pushed to trial are not of themselves any evidence that the

defendant was negligent or that the plaintiff is entitled to recover."

Of course, that is true.

"3. The burden is upon the plaintiff to prove by the greater weight of the evidence that the injuries which he sustained were the natural and proximate result of some negligence on the part of the Standard Oil Company."

I have already charged you to that effect.

"3. (Continued) Negligence in this connection means merely the failure to take such precautions and exercise such degree of care as a reasonably careful and prudent person would have done under all of the surrounding circumstances."

I will charge you, in connection with that, that negligence in this case did not mean merely the failure to take such precautions and exercise such care as a reasonably careful and prudent person would have done, but it would be the failure to exercise that degree of care called for by the conditions and circumstances in this case. As I have already charged you, the nature of the plant, a product and substance manufactured, produced, and maintained by this defendant was of an unusually dangerous nature, and then, the degree of care is not the ordinary degree of care, but that high degree of care which a highly dangerous situation correspondingly requires.

"4. If the accident arose out of a risk which was known to the plaintiff or which was apparent to him, or which, by the exercise of ordinary care, would have been known to him, and which he could have avoided by taking some other route, then he must be held to have assumed the risk, and your verdict must before the defendant."

I cannot charge in that language, because I have already charged that this plaintiff had the same rights on that public thoroughfare as any other member of the traveling public. He was therefore entitled to the same protection against the negligent act of the defendant as any other member of the public would have been entitled to it. Whether or not he could have avoided this accident by taking another route, and whether or not there was a situation or time which should have suggested to him, as a reasonably prudent person, to take another route, would be a matter possibly affecting the question of whether or not he was contributorily negligent, but whether or not that situation presented itself, and how he acted in respect thereto, is, as I have previously advised you, a matter for your judgment and your determination.

"5. If the plaintiff by his own negligence has contributed in any degree to the happening of the accident, he is not entitled to recover, and your verdict must be for the defendant."

That is true.

"6. The mere fact that the gas escaped from the gas tank or that after the accident a leak was found in the gas tank, are not, of themselves, sufficient to establish negligence on the part of Standard Oil Company. You must be satisfied by the greater weight of the evidence that the leak occurred through some negligence on the part of the Standard Oil Company, or that it had existed for so long a time that the Standard Oil Company was negligent in not discovering and repairing it."

That is true as a general proposition concerning the responsibility of negligence, and I charge you to that effect.

"7. If you find that the Standard Oil Company caused a reasonably careful inspection to be made of the gas tank and found no leak or defect in it, and that after such inspection, and before the lapse of the time within which a reasonably careful person would have caused another inspection to be made, the accident occurred, and that the leak was not caused by any negligence on the Standard Oil Company's part, then your verdict must be for the defendant."

That is true.

"8. Even if the Standard Oil Company was negligent in allowing the gas to escape, this alone would not entitle the plaintiff to recover unless the escaping of the gas was the proximate cause of the plaintiff's injury. If the act of some person other than the defendant caused the ignition of the gas and the resulting explosion, then your verdict must be for the defendant."

That is true.

"9. If you should resolve all of the questions that I have referred to in favor of the plaintiff and should come to a consideration of the amount of damages to which the plaintiff may be entitled, it will be your duty to credit the defendant with the amount of all payments made by the defendant to the plaintiff on account of or by reason of his injury."

I have already charged you that.

"10. The fact that the plaintiff has brought suit for the amount stated in his complaint is no proof whatever that he is entitled to recover this amount or any other amount, nor is there any proof whatever that the plaintiff is entitled to recover either this amount or any other amount."

I will charge the first part of that request as true, that is, the fact that the plaintiff has brought suit for the amount stated in his complaint is no proof whatever that he is entitled to recover this amount or any other amount, but I refuse to charge you that there is no proof whatever that the plaintiff is entitled to recover either this amount or any other amount. That is for you to decide.

Requests numbers eleven, twelve, thirteen, and fourteen have been withdrawn by counsel, as I understand it.

"15. If the plaintiff became entitled to receive compensation from the Standard Oil Company under the Workmen's Compensation Act, you need not consider whether all of such compensation, or all of such compensation due at the present time, has been paid to him. If he is entitled to such compensation, he can enforce the payment of it in an entirely different proceeding from this one, and the fact that it may not all have been paid to him does not warrant you in returning a verdict for the plaintiff in this case, but your verdict must be for the defendant."

I have already charged you concerning the matter of whether or not the plaintiff is within the provisions of the Workmen's Compensation Act to the effect that, as a matter of law, he is not. This statement, as made in the request, would be true, if he were entitled to collect under the Workmen's Compensation Act.

"16. Even if the plaintiff was ignorant of the provisions of the Workmen's Compensation Act, this does not, in any way, alter or impair the effect or the applicability of the provisions of that statute. Every one is presumed to be familiar

with the provisions of the Workmen's Compensation Act. In determining this case, you must act upon the presumption that the plaintiff was familiar with its provisions and effect."

That is true.

"17. If you find that after the accident happened, the plaintiff demanded of the defendants, or either of them, compensation under the Workmen's Compensation Act and accepted payment on account of such compensation, such conduct on his part will be a bar to his maintaining this suit and your verdict must be for the defendant."

I refuse to charge you any differently than I have already charged on that subject.

"18. If you find that after the accident, the plaintiff and the defendants, or either of them, executed an agreement under which the plaintiff agreed to accept and the defendants, or either of them, agreed to pay to the plaintiff compensation in accordance with the Workmen's Compensation Act, and that the defendants or either of them, paid any compensation to the plaintiff pursuant to such agreement, and that the plaintiff retained the moneys so paid to him, such agreement and conduct on his part would bar him from maintaining this suit, and your verdict must be for the defendant."

I refuse to charge on that any further than I have previously charged.

"19. If you find that after the accident the plaintiff demanded compensation under the Workmen's Compensation Act and accepted and retained payments made to him by the defendants, or either of them, on account of such compensation, and thereafter filed a petition in the Workmen's Compensation Bureau pursuant to the provisions of

the Workmen's Compensation Act to enforce the payment of further compensation by the defendants or either of them, such agreement and conduct on his part would bar him from maintaining this suit, and your verdict must be for the defendant."

I refuse to charge on that point any further than I have already charged you.

"20. If you bring in a verdict in favor of the defendants in this case, this does not mean that this plaintiff will receive nothing; notwithstanding such a verdict, he will be entitled to receive the compensation payable to him in accordance with the provisions of the Workmen's Compensation Act, and can compel the payment of such compensation by the Standard Oil Company in the proceeding which he has already instituted for that purpose."

Of course, I cannot charge you that, because it would be inconsistent with my previous charge that the Workmen's Compensation Act does not apply in this case, for if I have correctly stated the law to you, the plaintiff, if your verdict should be favorable to him, could not enforce his claim under the Workmen's Compensation Act. It does not mean, however, that the defendant might not voluntarily submit to a claim under that act, but that is a matter with which neither you nor the Court nor any one of us at this time have anything to do. You decide this case in the light of the law and the facts in this action, and not in connection with any other form or any other possible remedy.

"21. The fact that the Court has denied a motion for nonsuit and a motion for direction of a verdict for the defendant must not be deemed by

you as indicating that the Court believes that the plaintiff is entitled to recover and should not affect your decision in any way. Notwithstanding the denial of these motions, you are entirely at liberty to bring in a verdict for the defendant. If, after considering all of the evidence, you believe either that the plaintiff's injuries were not the natural and proximate result of some negligence on the part of the Standard Oil Company and that no negligence on the part of the plaintiff contributed in any way thereto, or if you find that after the accident, the plaintiff demanded or agreed to accept compensation, then, notwithstanding the denial of such motions, it is your duty to bring in a verdict for both defendants."

Of course, the jury is never to be affected in its verdict by the matter of what motions may have been denied by the Court in the course of the trial. There has been a motion made here at the conclusion of the plaintiff's case by the defendant's counsel for a nonsuit upon grounds which seemed to him to warrant the granting of such a motion. He has a perfect right to argue to the Court that the plaintiff, up to that point, has not made out a case, and it is his duty to his client, if he thinks so, to move for a nonsuit. It is also equally true that at the conclusion of the case, if, in the opinion of the Court, the plaintiff has still not made out a case, or if he had made one, that it has been met on the defendant's part, and a direction of verdict is requested by the defendant, that opinion would have to be so positive, in order for such a motion to be granted, that the Court could say, as a matter of law, from the evidence itself, that the motion ought to be granted; but where there are disputed questions of fact on various phases of the case or any phase of it, it

is the duty of the Court to permit the question to go to the jury for a decision upon those facts in connection with the law, as charged to it by the Court, and the motion for a direction of a verdict would, in that case, be denied. That does not prejudice the defendant in any way, so far as your deliberations are concerned.

Other than I have just charged you on this point, I shall say nothing. I will say, however, that if you believe, after considering all the evidence, that the plaintiff's injuries were not the natural or proximate result of some negligence on the part of the Standard Oil Company, then you should bring in a verdict for the defendant.

"22. If you find that the plaintiff executed a written agreement by which he agreed to accept compensation, and the defendants, or either of them, agreed to pay compensation under the Workmen's Compensation Act to the plaintiff for the injuries which he received on August 8, 1927, then he cannot recover in this case, and your verdict must be in favor of the defendant."

I refuse to charge that on that point any differently than I have already charged on that subject.

"23. The fact that the agreement executed by the plaintiff to accept compensation does not specifically state the total number of weeks during which such compensation was to be paid has no materiality whatever. The agreement is an agreement to accept such compensation as he may be entitled to under the Act according to the extent of his injuries and in case any dispute should arise as to this question, the number of weeks and the total amount to be paid can be determined in a proceeding before the Workmen's Compensation Bureau for that purpose."

I also refuse to charge on request number twenty-three any differently than I have already charged upon the same point.

"24. There is no evidence in this case that the hole in the gas holder was due to corrosion. On the contrary, all of the witnesses who saw the hole after the accident said that the metal around it was in good condition and showed no evidence whatever of corrosion."

Gentlemen of the Jury, you have heard the evidence in this case, and you will recall whatever the testimony was on that point. That is a matter for you to determine yourselves.

"25. In rendering your verdict in this case, you are to pay no attention whatever, and are not to consider in any way, any testimony which the Court has directed to be stricken out. Such testimony was improper and should be utterly disregarded."

I have already charged you on that.

"26. The fact that certain witnesses have testified to amounts which they or someone else believed should be paid in settlement is no evidence whatever that the plaintiff in this case is entitled to such amount or to any other amount and should not influence you in any way in returning your verdict."

I have already charged you to that effect.

"27. The fact, if you find it to be a fact, that the defendant paid or offered to pay the plaintiff some sum in addition to what he would be entitled to under the Compensation Act is not an admission of liability in this case, and is not any evidence whatever of liability in this case."

That is true.

I think I neglected to state to you, gentlemen, in connection with the plaintiff's damages, if you come to consider them, that there was testified that he had incurred a liability of $294 for medical services and expenses in connection with these injuries. That is an item that you should properly take into consideration in estimating his damages.

The Court: Has either counsel anything to suggest that I have not touched upon in my charge that should be brought to the attention of the jury?

Mr. Gordon: I merely desire to note just a single exception, which I have already noted, in effect, that is to the release of the defendant Standard Oil Company of New Jersey, the Delaware corporation.

Other than that, I have no exceptions to note to any part of the Court's charge.

The Court (to the jury): Gentlemen of the Jury, it seems that the case is now going to your hands, and I know you will give it all the attention it warrants.

I shall give you this memorandum, that I previously indicated. It reads as follows: "The Standard Oil Company is the defendant left in the case at the present time. If any verdict is rendered against any defendant that is the one to be charged." You may take that memorandum with you, so that if you should find any verdict, you will have the proper name of the defendant.

(The jury retired.)

PLAINTIFF'S REQUESTS TO CHARGE.

(1)

"So far as this case is concerned the contract of employment of the plaintiff to render service to the defendant at a designated place known as Kimball Pump House did not cover his movements outside of that place while the plaintiff used the public highway known as Hook Road as the public used it, because he was required to in order to get to and from work, and not because the defendant, as his employer by the terms or implications of its contract of employment, had the right to require him to use the said road at defendant's will. (Whitney *vs.* Hazard Lead Works, 136 Atl. 105.)"

(2)

"In using the public highway known as Hook Road, as plaintiff did and when he did, he was exposed only to the same risks to which any pedestrians or members of the traveling public in the same position would be exposed. The hazard had no relation to his employment. (Fumiciello's case, 138 Atl. 561 at page 562.)"

(3)

"Plaintiff, at the time of the accident, had ceased his work, had left the place where he performed said work and was on his way home. He had at the time, no duty to fulfill to the defendant, and the defendant had no duty to fulfill towards him as its employe. The relation of master and servant had ended for the day, plaintiff having finished his work and left the place where his

work was being done. (See Caton *vs.* Summerlee and M. I. & S. Co., 39 Scot. L. R. 762.)"

(4)

"Plaintiff was using the public highway known as the Hook Road in the exercise of a public right of passage and the defendant, at the time of the accident, owed to the plaintiff the same duty owed to any pedestrian or other member of the traveling public using said public highway and passing by the premises of the defendant."

(5)

"Defendant corporation, in maintaining and operating gas holders adjoining the public highway and in close proximity to members of the traveling public (including plaintiff), was held to a high degree of care for the maintenance of said gas holders and appurtenances thereto, and was required to exercise every reasonable precaution suggested by known dangers. Where the existence of a leak was known, means should have been taken (at once) to avoid injury, *and where it should have been known* that the leak was likely to occur because of defective conditions of said gas holders, negligence may be imputed. (Anderson *vs.* Atlantic City Gas Company, 7 N. J. A. R., page 297, at pages 298 and 299, N. J. Case.)"

(6)

"Gas being an extraordinarily dangerous element, an extraordinarily high degree of care and skill is exacted from the defendant and the rule of extraordinary care with respect to its storage and transmission is adjusted, in view of its known dangers and probable entailment, by a standard of

care proportionate to the probable dangers. (Anderson *vs.* Atlantic City Gas Company, *supra.* See also Chew *vs.* Commercial Gas Company, 87 N. J. L. 679.)"

(7)

"When, through any instrumentality or agency under the management or control of this defendant or its servants, there is an occurrence injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords prima facie evidence that there was want of due care. (Mannon *vs.* Vesper Lodge of Independent Order of Odd Fellows, 97 N. J. L. 215, at pages 216-218. Mumma *vs.* Easton and Amboy Railroad Company, 73 N. J. L. 658.)"

(8)

"The testimony for the plaintiff makes a prima facie case for the jury, and on the whole case, it remains for you to say whether such prima facie case was met by the defendant's evidence, the burden of proof remaining throughout on the plaintiff. (Hughes *vs.* Atlantic City Railroad Company, 85 N. J. L. 212. Niebel *vs.* Winslow, 88 *Id.* 91. Fanshawe *vs.* Rawlins, 89 *Id.* 344 Mannon *vs.* Vesper Lodge, *supra.*)"

(9)

"Plaintiff is not required to establish by direct evidence the cause of the ignition of the gas, if any there existed, in order to establish the liability of the defendant company for damages resulting from the fire and explosion of the escaping

gas, if any existed. (See 25, A. L. R. 262, at page 293 and cases thereunder cited.)"

(10)

"If you find that the plaintiff is entitled to a verdict in his favor, then you may award to him such amount as you consider a fair and reasonable sum for the bodily injuries sustained; the pain and suffering undergone; the effect on the health of the plaintiff according to its degree and its probable duration, as likely to be temporary or permanent; the expense incidental to attempts to cure or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to his employment, which, again, may be of temporary character, or may be such as to incapacitate the plaintiff for the remainder of his life, and you may take into consideration in fixing these elements of damage the scarred condition of the plaintiff, his deformity and disfiguration and the mental anguish suffered, that you, from the evidence, find reasonably may be attributed to the negligence of the defendant and to the injuries suffered by the paintiff as the result of such negligence. (Goble *vs.* Delaware, etc. R. Co., 3 N. J. L. J. 176, Sparks *vs.* Citizens' Coach Co., 6 N. J. L. J. 365.)"

(11)

"If you find the plaintiff is entitled to a verdict in his favor, then, in addition to the pain and anguish that the plaintiff suffered and the injuries sustained, you may take into consideration, in estimating plaintiff's damages, the impairment of plaintiff's ability to enter into the usual activities for both pleasure and profit. (Kasisky *v.* Central Jersey Power and Light Co., 4 N. J. Misc. R. 130.)"

PLAINTIFF'S ADDITIONAL REQUESTS TO CHARGE.

(1)

"Plaintiff is not barred from instituting this suit by reason of filing of a petition with the Workmen's Compensation Bureau and his filing such petition as a matter of law does not constitute an election on his part to receive compensation. (Ellich *v.* Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, Sup. Ct. App. Div., 1929, 226 App. Div. (N. Y.) 32, 234 N. Y. S.)"

(2)

"It appearing, by the evidence in this case that this accident did not arise out of or in the course of the employment of the plaintiff with the defendant by the terms of the Workmen's Compensation Act, the Workmen's Compensation Bureau would have no jurisdiction to award compensation and therefore this plaintiff, not having an alternative remedy before the Workmen's Compensation Bureau had no choice in law to make an election and he is not debarred from instituting this suit."

(3)

"Even if the plaintiff and the defendant made an agreement, expressed or implied, to adjust the compensation of the plaintiff, employing for that purpose the machinery of the Workmen's Compensation Act, the fact that such agreement, if made, was not carried into effect, does not bar or preclude this plaintiff from maintaining this action at law for damages. (Waters *vs.* Guile, 234 Federal Reporter 532, pages 536 and 537.)"

Plaintiff's Additional Requests to Charge.

(4)

"The fact that the plaintiff received from the defendant medical and hospital services and medicines does not prejudice the plaintiff in any way to a recovery if he is entitled to any money damages on account of defendant's negligence, but the defendant is entitled to have such items so paid by it to be credited on account of any damages, if any you may award to the plaintiff. (Waters *vs.* Guile, *supra.*)"

(5)

"The plaintiff is not barred from instituting this action at law by reason of any agreement that may have been made either under the Workmen's Compensation Law or in the nature of a settlement at common law, until there was an accord and satisfaction of plaintiff's claim by full and complete payment, and in this case, as a matter of law, there has never been any full and complete payment of plaintiff's claim so as to constitute an accord and satisfaction. (Larscy *vs.* Hogan, 239 N. Y. 298.)"

(6)

"The plaintiff is not barred from instituting this suit at law by reason of the acceptance of any payments that may have been made to him by the defendant, either as a benefit, gratuity or even as part compensation and such payments do not extinguish any cause of action for damages, but you have a right and it is your duty, if you find that the plaintiff is entitled to damages in this case by reason of the defendant's negligence, taking into consideration the law as it has been charged applicable to the case and all of the facts

in the case, to subject such damages to a set-off to the extent of partial payments that may have been made by the defendant to the plaintiff. (Fitzgerald *vs.* Harbor Lighterage Company, 234 N. Y., 132.)"

(7)

"The plaintiff is not barred from instituting this suit at law for damages by reason of any negotiations in reference to any compensation including temporary and, or permanent disability compensation or by reason of any agreement that may have been made in connection with any compensation for temporary and, or permanent disability, because under the law of the State of New Jersey an agreement between an employer and an injured employe, even when duly signed and which settles upon and determines the compensation due to an injured employe as provided by law (and in this case, 'provided by law' includes temporary compensation as well as any final disability compensation) requires that such agreement *shall not bind the employer or the injured employe unless approved by the Bureau,* and in this case it has not been pleaded nor is there any proof that there was such an agreement *approved* by the Bureau in accordance with the law in such case made and provided. (Para. 4, Chapter 149, Laws of 1918—2 Cum. Supp. to C. S., page 3890.)"

(8)

"The fact that payments may have been made to the plaintiff by the defendant and that the defendant may have given notice to the Workmen's Compensation Bureau that payments have begun or have been made does not bar this plaintiff

from instituting this suit for damages, as the only effect of such notice of payments and of such payments accepted, even if they were as compensation payments, would be to give the defendant in this case the right to credit such payments on account of any damages that may be awarded to the plaintiff in this suit, under the law as charged to you applicable thereunder. (Fitzgerald *vs.* Harbor Lighterage, 244 N. Y. 132.)"

(9)

"If you find in this case that there was an agreement made which might or might not have resulted in an award and that under such agreement part payment was made by the defendant, even then, this plaintiff is not barred from instituting this suit, as full payment and complete satisfaction was never made by the defendant to the plaintiff and the Workmen's Compensation Act having no application to the case since the accident did not arise out of or in the course of employment, the plaintiff is not barred by the making of any such alleged agreement or even the acceptance of any payments thereunder. (Larscy *vs.* Hogan, *supra.*)"

(10)

"The plaintiff is not barred from instituting this suit by reason of the alleged making and existence of the alleged agreement dated October 15, 1927, as it appears from the evidence in this case, from the terms and conditions stated in such agreement, that it is a report containing a statement of wages and an agreement to care for the case according to the terms of the Compensation Bureau and by the statute in such case made and

provided, and that this form by law requires the signature of the employe as well as the employer and therefore, being a statement and an agreement in reference to compensation due to the injured employe, it is not binding upon such injured employe unless approved by the Workmen's Compensation Bureau, which does not appear to have been done in this case. (See Chapter 187 of the Laws of 1924, page 402—2 Cum. Supp. to C. S., page 3905), which provides:

" '2. Any employer not carrying compensation insurance, shall make report of any accident or compensable occupational disease causing a disability extending beyond the waiting period prescribed by paragraph thirteen of the Workmen's Compensation Act, or causing any permanent injury. Such report shall be prepared and sent immediately upon the employer's having knowledge of the disability or injury named above, and shall be made out in duplicate upon forms to be secured from the Workmen's Compensation Bureau. One copy shall be mailed to the above bureau and one copy kept on file by the employer. Within three weeks after the accident, or the obtaining of knowledge of compensable occupational disease, the employer operating under section 2 of the compensation act, shall send to the Workmen's Compensation Bureau *a second report,* containing a statement of wages and *an agreement to care for the case according to the terms of the compensation law. This form shall be signed by the employe as provided thereon and by the employer.* Immediately upon the employe's recovering so as to be able to resume work, the employer shall file with the bureau *a final report,* setting forth the length of disability, the nature and extent of per-

manent injury, if any, and the compensation payable for each. *This form shall also be signed by the employer and the employe.*' (L. 1924, c. 187, p. 402.)''

PLAINTIFF'S ADDITIONAL REQUESTS TO CHARGE.

(1)

''Whoever uses a highly destructive agency is held to a correspondingly high degree of care. Care in this sense means more than mere mechanical skill, it includes circumspection and foresight with regard to reasonably probable contingencies. (Heyer *vs.* Jersey Central &c. Co., decided October 14, 1929, Court Errors, 7 N. J. Advance Reports, page 1067, at page 1070.)''

(2)

''The defendant sets up that the plaintiff was guilty of contributory negligence and as this is an affirmative defense on the part of the defendant, the burden of proof is on the defendant to establish such affirmative defense by a fair preponderance of the evidence.''

(3)

''In order to disentitle the plaintiff to recover, it must not only appear that he was negligent, but that his negligence proximately contributed to the negligence of the servant and its officers, servants, agents, and employees who caused the injuries to the plaintiff.''

Defendant's Requests to Charge.

(4)

"If the alleged faulty acts of the plaintiff simply presents the condition under which his injuries were received and was not in a legal sense the contributory cause thereof, then the sole question for the jury to consider is whether under the circumstances and in the situation in which his injuries were received, they were due to the negligence of the defendant and its officers, servants, agents, and employees. (See Jackson *vs.* Greiger, Ct. of E. A. 100 N. J. L. 330, at page 334.)"

DEFENDANT'S REQUESTS TO CHARGE.

(1)

"You must not allow yourselves to be influenced in any way by any sympathy that you may have for the plaintiff or by the fact that the defendants are corporations, but must decide the case fairly and impartially upon the evidence submitted to you and upon nothing else."

(2)

"The mere fact that this accident happened, or the mere fact that this suit has been pushed to trial are not of themselves any evidence that the defendant, was negligent or that the plaintiff is entitled to recover."

(3)

"The burden is upon the plaintiff to prove by the greater weight of the evidence that the injuries which he sustained were the natural and proximate result of some negligence on the part

of the Standard Oil Company. Negligence in this connection means merely the failure to take such precautions and exercise such degree of care as a reasonably careful and prudent person would have done under all of the surrounding circumstances."

(4)

"If the accident arose out of a risk which was known to the plaintiff or which was apparent to him, or which by the exercise of ordinary care would have been known to him, and which he could have avoided by taking some other route, then he must be held to have assumed the risk and your verdict must be for both of the defendants."

(5)

"If the plaintiff by his own negligence has contributed in any degree to the happening of the accident, he is not entitled to recover and your verdict must be for both of the defendants."

(6)

"The mere fact that the gas escaped from the gas tank or that after the accident a leak was found in the gas tank, are not, of themselves, sufficient to establish negligence on the part of the Standard Oil Company. You must be satisfied by the greater weight of the evidence that the leak occurred through some negligence on the part of the Standard Oil Company, or that it had existed for so long a time that the Standard Oil Company was negligent in not discovering and repairing it."

(7)

"If you find that the Standard Oil Company caused a reasonably careful inspection to be made of the gas tank and found no leak or defect in it, and that after such inspection, and before the lapse of the time within which a reasonably careful person would have caused another inspection to be made the accident occurred, and that the leak was not caused by any negligence on the Standard Oil Company's part, then your verdict must be for both of the defendants."

(8)

"Even if the Standard Oil Company was negligent in allowing the gas to escape, this alone would not entitle the plaintiff to recover unless the escaping of the gas was the proximate cause of the plaintiff's injury. If the act of some person other than the defendant's caused the ignition of the gas and the resulting explosion, then your verdict must be for both of the defendants."

(9)

"If you should resolve all of the questions that I have referred to in favor of plaintiff and should come to a consideration of the amount of damages to which the plaintiff may be entitled it will be your duty to credit the defendants with the amount of all payments made by the defendants or either of them to the plaintiff on account of or by reason of his injury."

(10)

"The fact that the plaintiff has brought suit for the amount stated in his complaint is no proof

whatever that he is entitled to recover this amount or any other amount nor is there any proof whatever that the plaintiff is entitled to recover either this amount or any other amount."

(11)

"Defendants allege in their answer and the plaintiff in his reply admits that the plaintiff was employed by the defendant, Standard Oil Company, under a contract of hiring which was subject to the provisions of Section 2 of the New Jersey Statute commonly known as 'The Workmen's Compensation Act.' If you find that the plaintiff was injured by an accident arising out of and in the course of his employment, he is entitled to receive only the compensation payable under the terms of that statute, and as such compensation is determined in an entirely different proceeding than this one, he is not entitled to recover anything in this suit, and you should bring in a verdict for both of the defendants, without considering any other questions in the case."

(12)

"Employment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. In other words, the employment may begin in point of time before the work is entered upon and in point of place before the work to be done is reached and may continue in point of time after the work is finished or suspended, and after the employe has left the place where the work is done. The rule extends to and includes adjacent premises customarily used as a means of ingress to

and egress from the employer's plant, which are so near the employer's plant as to be subjected to risks incidental to the operation of such plant."

(13)

"If the plaintiff was injured while passing to or from his work by the customary route over premises not owned by the employer, but in such proximity and relation to the employer's plant as to be subject to any risks incidental to or created by the operation of such plant, the injury is one arising out of and in the course of the employment just as though it had happened while the employe was engaged in his work at the place of its performance and your verdict must be for both of the defendants."

(14)

"Even though you find that at the time of the accident in this case the plaintiff was on his way home after finishing his work over a roadway not owned or controlled by the defendant, Standard Oil Company, nevertheless, if you find that this roadway was so close to premises of the Standard Oil Company, as to be subjected equally with them to the risks created by the conduct of its business and that the accident in which the plaintiff was injured was the result of such a risk, then the plaintiff is entitled to be paid the compensation provided by the Workmen's Compensation Act and your verdict in this case must be for both of the defendants."

(15)

"If the plaintiff became entitled to receive compensation from the Standard Oil Company under

the Workmen's Compensation Act, you need not consider whether all of such compensation, or all of such compensation due at the present time, has been paid to him. If he is entitled to such compensation he can enforce the payment of it in an entirely different proceeding from this one, and the fact that it may not all have been paid to him does not warrant you in returning a verdict for the plaintiff in this case, but your verdict must be for both of the defendants."

(16)

"Even if the plaintiff was ignorant of the provisions of the Workmen's Compensation Act this does not in any way alter or impair the effect or the applicability of the provisions of that statute. Everyone is presumed to be familiar with the provisions of the Workmen's Compensation Act. In determining this case you must act upon the presumption that the plaintiff was familiar with its provisions and effect."

(17)

"If yon find that after the accident happened the plaintiff demanded of the defendants, or either of them, compensation under the Workmen's Compensation Act and accepted payment on account of such compensation, such conduct on his part will be a bar to his maintaining this suit and your verdict must be for both of the defendants."

(18)

"If you find that after the accident the plaintiff and the defendants, or either of them, executed an agreement under which the plaintiff agreed to accept and the defendants, or either of them,

agreed to pay to the plaintiff compensation in accordance with the Workmen's Compensation Act, and that the defendants, or either of them, paid any compensation to the plaintiff pursuant to such agreement, and that the plaintiff retained the moneys so paid to him, such agreement and conduct on his part would bar him from maintaining this suit and your verdict must be for both of the defendants."

(19)

"If you find that after the accident the plaintiff demanded compensation under the Workmen's Compensation Act and accepted and retained payments made to him by the defendants, or either of them, on account of such compensation and thereafter filed a petition in the Workmen's Compensation Bureau pursuant to the provisions of the Workmen's Act to enforce the payment of further compensation by the defendants, or either of them, such conduct on his part would bar him from maintaining this suit and your verdict must be for both of the defendants."

(20)

"If you bring in a verdict in favor of the defendants in this case, this does not mean that this plaintiff will receive nothing; notwithstanding such a verdict, he will be entitled to receive the compensation payable to him in accordance with the provisions of the Workmen's Compensation Act, and can compel the payment of such compensation by the Standard Oil Company in the proceeding which he has already instituted for that purpose."

Defendant's Requests to Charge.

(21)

"The fact that the Court has denied a motion for nonsuit and a motion for the direction of a verdict for the defendant must not be deemed by you as indicating that the Court believes that the plaintiff is entitled to recover, and should not affect your decision in any way. Notwithstanding the denial of these motions, you are entirely at liberty to bring in a verdict for both of the defendants if, after considering all of the evidence you believe either that the plaintiff's injuries were not the natural and proximate result of some negligence on the part of the Standard Oil Company and that no negligence on the part of the plaintiff contributed in any way thereto, or if you find that after the accident plaintiff demanded or agreed to accept compensation, then, notwithstanding the denial of such motions it is your duty to bring in a verdict for both the defendants."

(22)

"If you find that the plaintiff executed a written agreement by which he agreed to accept compensation and the defendants or either of them agreed to pay compensation under the Workmen's Compensation Act to the plaintiff for the injuries which he received on August 8, 1927, then he cannot recover in this case and your verdict must be in favor of both defendants."

(23)

"The fact that the agreement executed by the plaintiff to accept compensation does not specifically state the total number of weeks during which such compensation was to be paid has no material-

ity whatever. The agreement is an agreement to accept such compensation as he may be entitled to under the Act according to the extent of his injuries and in case any dispute should arise as to this question, the number of weeks and total amount to be paid can be determined in a proceeding before the Workmen's Compensation Bureau for that purpose."

(24)

"There is no evidence in this case that the hole in the gas holder was due to corrosion, on the contrary, all of the witnesses who saw the hole after the accident said that the metal around it was in good condition and showed no evidence whatever of corrosion."

(25)

"In rendering your verdict in this case, you are to pay no attention whatever and are not to consider in any way, any testimony which the Court has directed to be stricken out. Such testimony was improper and should be utterly disregarded."

(26)

"The fact that certain witnesses have testified to amounts which they or someone else believed should be paid in settlement is no evidence whatever that the plaintiff in this case is entitled to such amount or to any other amount and should not influence you in any way in returning your verdict."

(27)

"The fact, if you find it to be a fact, that the defendants or either of them paid or offered to

pay the plaintiff some sum in addition to what he would be entitled to under the compensation act is not an admission of liability in this case and is not any evidence whatever of liability in this case."

Mr. Bishop: If the Court please, I should like to have exceptions noted to portions of the Court's charge. I ask that they be noted on the following portions:

(1) I except as to so much of the Court's charge as submits to the jury the question of whether the accident arose out of and in the course of the plaintiff's employment.

(2) I except to so much of the Court's charge as is to the effect that, as a matter of law, the accident did not arise out of and in the course of the plaintiff's employment.

(3) I except to so much of the Court's charge as is to the effect that the Workmen's Compensation Act of the State of New Jersey is a remedial act for the sole benefit of the employe.

(4) I except to so much of the Court's charge as to the effect that the plaintiff was using the road as a member of the public.

(5) I except to so much of the Court's charge as is to the effect that anyone who quits work is not thereafter in the course of his employment, within the meaning of the Workmen's Compensation Act.

(6) I except to so much of the Court's charge as is to the effect that the plaintiff's injuries cannot be held to have been due to an accident arising out of and in the course of his employment. The Court made that specific statement, and I take exception to it.

Exceptions.

(7) I except to so much of the Court's charge as is to the effect that even if the plaintiff did sign form number two, he did so in view of the requirements, of knowledge of the requirements, that the agreement had to be approved by the Workmen's Compensation Bureau, on the ground that form number two is not required to be approved by the Workmen's Compensation Bureau or anybody else, and that it takes its effectiveness not from any approval, but from the fact that it is signed by the parties.

(8) I except to so much of the Court's charge as is to the effect that the agreement on form number two, even if signed, was not binding on the parties.

(9) I except to so much of the Court's charge as is to the effect that no amount was paid for permanent disability prior to this suit.

(10) I except to so much of the Court's charge as is to the effect that the agreement on form number two is not valid as an agreement to determine the amount that the plaintiff should be entitled to in accordance with the Compensation Act.

(11) I except to so much of the Court's charge as is to the effect that the acceptance and cashing of the eighteen checks was not an acceptance of compensation or an acceptance of the provisions of the Compensation Act, or recognition of the agreement that the case is to be governed by that act.

(12) I except to so much of the Court's charge as is to the effect that the retention of the four compensation checks for seventeen dollars a week, drawn at the rate of seventeen dollars a week, was

not an acceptance of the Compensation Act or recognition of the agreement or legal status that the case should be governed by the provisions or determined in accordance with the provisions of that statute.

(13) I except to so much of the Court's charge as is to the effect that the checks are only evidential as payments in mitigation of damages, particularly because that excludes the value of the checks as the evidence of an agreement.

(14) I except to so much of the Court's charge as is to the effect that the doctrine of *res ipsa loquitur* governs in this case.

(15) I except to so much of the Court's charge as is to the effect that the plaintiff need not prove the specific cause of the accident.

(16) I except to so much of the Court's charge as is to the effect as to whether or not there was as much reason in Gilroy's going back, when he smelled the gas, as in going forward. That is a matter for the jury, or may affect the question of his contributory negligence.

The Court: I told the jury that it was for them to determine whether the defendant's conduct was such that, in its opinion, it would have been the act of a reasonably prudent man to go back or to go forward. How do you take exception to that?

Mr. Bishop: I excepted to so much of the Court's charge as submitted to the jury the question, as a matter of fact, as to whether there was more danger—your Honor said something to the effect that it might have been just as dangerous in going backward as forward.

The Court: It was for the jury to determine whether or not in that situation——

Exceptions.

Mr. Bishop: I take exception to that portion of the charge for the reason that the evidence was that what wind there was was blowing away from the direction they were coming and was carrying the gas away from them and not towards them, and that the gas was not as thick back where they had come from as it was ahead of them.

The Court: There is nothing in what I said to prevent the jury from taking that into consideration, because all that I said was that it was for them to decide whether, under all the conditions that were there, he should or should not have gone back or forward.

Mr. Bishop: I except to that portion of the charge that I have referred to.

(17) I also take exception to the granting of the plaintiff's first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth requests, and the plaintiff's additional requests to charge numbered one, two, three, four, five, six, seven, and eight, nine and ten.

(18) I also take exception to the granting of the plaintiff's request to charge to the effect that "Whoever uses a highly destructive agency is held to a correspondingly high degree of care. Care in this sense means more than mere mechanical skill; it includes circumspection and foresight with regard to reasonably probable contingencies."

(19) I also take exception to the granting of the plaintiff's request to charge to the effect that "If the alleged faulty acts of the plaintiff simply presents the condition under which his injuries were received and was not in a legal sense the contributory cause thereof, then the sole question for the jury to consider is whether, under the

circumstances, and in the situation in which his injuries were received, they were due to the negligence of the defendant and its officers, servants, agents, and employes.

(20) I also take exception to so much of the Court's charge as is to the effect that any agreement that was made, while it may have been an accord, was not a satisfaction, because the full amount was not paid. It is my view that when any payment is made pursuant to an agreement, the promise to pay the balance is the satisfaction.

(21) I except to so much of the Court's charge as is to the effect that none of the checks were in payment of compensation. I think that is a question for the jury to determine whether or not they were, and particularly with respect to the last four checks, because the plaintiff's own testimony was that they were for compensation.

(22) I also except to so much of the Court's charge as is to the effect that it is for the jury to say whether or not the *prima facie* evidence of negligence has been met by the defendant, on the ground that, in my view, there was no *prima facie* evidence of negligence.

(23) I also take exception to the Court's denial of the defendant's third request to charge except to certain modifications, and to the additional statement that was made by the Court in dealing with that request, which I do not conceive to be a correct statement of the law.

(24) I also take exception to the Court's denial of the defendant's fourth request to charge except as modified, and to the additional statement made in connection with that request.

Exceptions.

I also take exception to the Court's denial of the defendant's requests to charge numbers fifteen, seventeen, eighteen, nineteen, and twenty, and the denial of the defendant's twenty-first request to charge, except as charged. It was refused in part, and so far as it was refused, I pray an exception.

I also take an exception to the denial of the defendant's requests to charge numbers twenty-two, twenty-three, and twenty-four.

That is all.

Exhibit P-1.

Street Map of Constable Hook, City of Bayonne, N. J.

(Hook Road Designated in Red on Original Map.)

(*Opposite*) ☞

STREET MAP OF CONSTABLE HOOK CITY OF BAYONNE, N. J.

SCALE 1"=100.0'

REPRODUCTION IS REDUCED TO SCALE 200 Ft = 1 In.

0 100 200 300 400 500 600

N

W E

S

EAST 23RD ST.

EAST 22ND STREET

EAST 21ST ST.

AVENUE "I"

AVENUE "J"

CONSTABLE HOOK RAILROAD

NATIONAL DOCKS R.R.

MAIN POWER HOUSE

GAS HOLDER "2"

GAS HOLDER "1"

"2 PUMP HOUSE

"2 THIS PART OF ROAD APPEARS ON ACCOMPANYING ENLARGED MAP

STANDARD OIL CO.

A.P.

HOOK ROAD

STANDARD OIL CO.

PACIFIC COAST BORAX CO.

LANDS BELONGING TO OTHERS

CONSTABLE HOOK ROAD

RAILROAD

THE OXFORD NICKEL & COPPER CO.

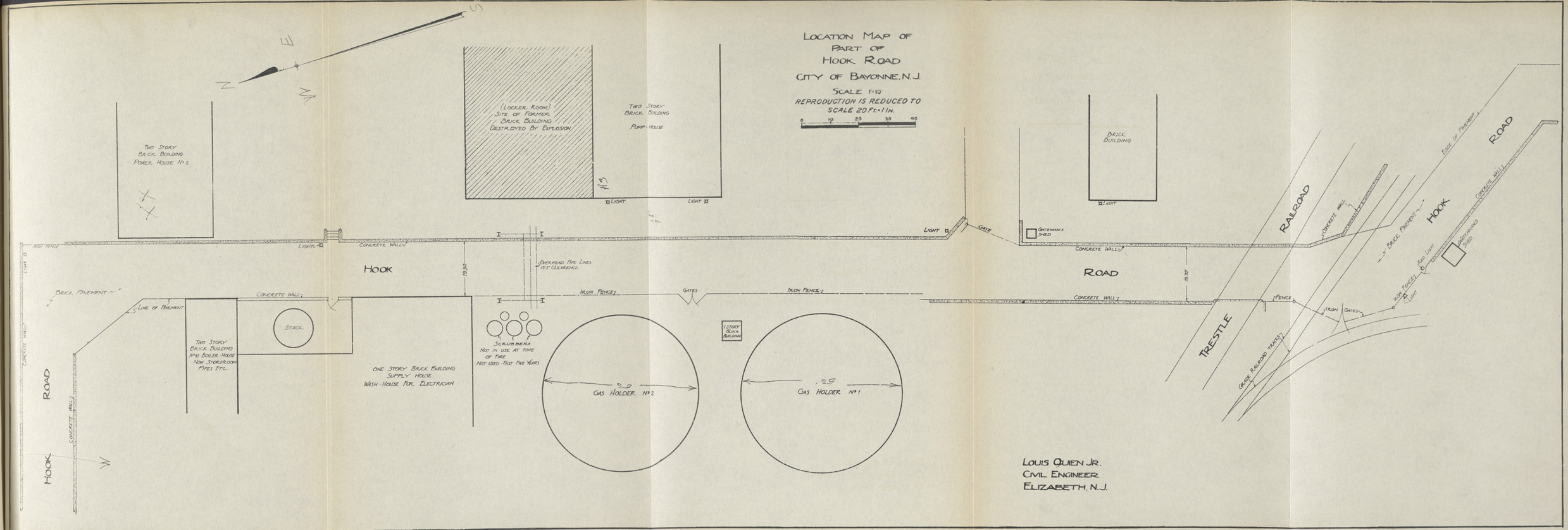
X X

LOUIS QUIEN JR.
CIVIL ENGINEER
ELIZABETH, N. J.

Exhibit P-2.

Location Map of Part of Hook Road, City of Bayonne, N. J.

(*Opposite*) ☞


LOCATION MAP OF
PART OF
HOOK ROAD
CITY OF BAYONNE, N.J.
SCALE 1:10'
REPRODUCTION IS REDUCED TO
SCALE 20 Ft.=1 In.
0 10 20 30 40
LOUIS QUIEN JR.
CIVIL ENGINEER
ELIZABETH, N.J.
TWO STORY BRICK BUILDING POWER HOUSE N°2
(LOCKER ROOM) SITE OF FORMER BRICK BUILDING DESTROYED BY EXPLOSION
TWO STORY BRICK BUILDING PUMP HOUSE
BRICK BUILDING
LIGHT
GATE
GATEMAN'S SHED
POST FENCE
CONCRETE WALL
HOOK ROAD
OVERHEAD PIPE LINES 15'± CLEARANCE
BRICK PAVEMENT
LINE OF PAVEMENT
IRON FENCE
GATES
TWO STORY BRICK BUILDING N°1 BOILER HOUSE NOW STOREROOM PIPES ETC.
STACK
ONE STORY BRICK BUILDING SUPPLY HOUSE WASH-HOUSE FOR ELECTRICIAN
SCRUBBERS NOT IN USE AT TIME OF FIRE NOT USED PAST FIVE YEARS
1 STORY BRICK BUILDING
GAS HOLDER N°2
GAS HOLDER N°1
RAILROAD
TRESTLE
EDGE OF PAVEMENT
RED LIGHT
WATCHMANS SHED
GRADE RAILROAD TRACKS
FENCE
IRON GATES

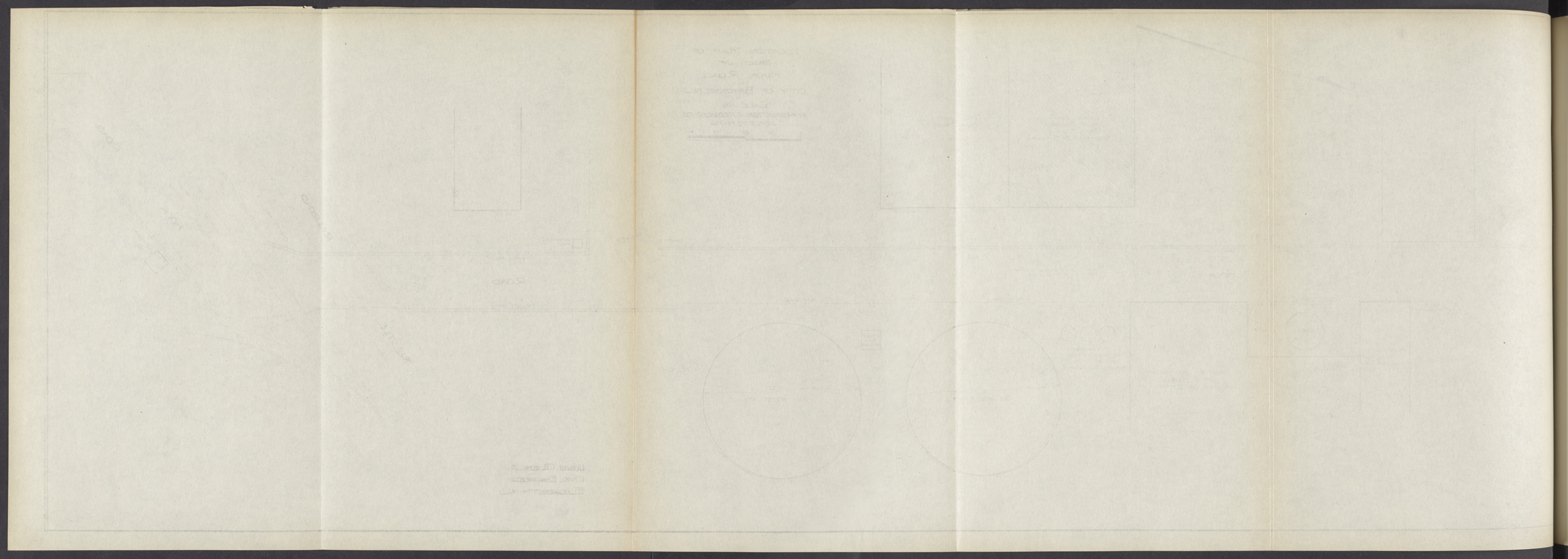


Exhibit P-3.

Photograph of Gas Holder No. 2.

(*Opposite*) ☞

Exhibit P-4.

Photograph—View of East Side of Road, Looking North From Gas Holder No. 2.

(*Opposite*) ☞

Exhibit P-5.

Photograph—View of East Side of Hook Road, Looking South Toward Pump House.

(*Opposite*) ☞

Exhibit P-6.

Photograph—Showing a Section of Hook Road With Tanks Nos. 1 and 2, Looking Northerly.

(*Opposite*) ☞

Exhibit P-7.

Marked for identification only; not admitted in evidence.

Exhibit P-8.

Marked for identification only; not admitted in evidence.

Exhibit P-9.

Omitted by consent.

Exhibit P-10.

Omitted by consent.

Exhibit P-11.

Marked for identification only; not admitted in evidence.

Exhibit P-12.

Photograph of Edward N. Gilroy.

(*Opposite*) ☞

Exhibit P-13.

Omitted by consent.

Exhibit P-14.

Omitted by consent.

Exhibit P-15.

Omitted by consent.

Exhibit P-16.

Omitted by consent.

Exhibit P-17.

Omitted by consent.

Exhibit P-18.

Omitted by consent.

Exhibit P-19.

Omitted by consent.

Exhibit P-20.

Marked for identification only; not admitted in evidence.

Exhibit P-21.

Marked for identification only; not admitted in evidence.

Exhibit P-22.

Marked for identification only; not admitted in evidence.

Exhibit P-23.

Marked for identification only; not admitted in evidence.

Exhibit P-24.

Marked for identification only; not admitted in evidence.

Exhibit P-25.

Marked for identification only; not admitted in evidence.

Exhibit P-26.

WORKMEN'S COMPENSATION BUREAU, STATE HOUSE,

TRENTON, N. J.

P 26
D LS
Ident
11/5/29
G D Z

STANDARD OIL COMPANY OF NEW JERSEY
26 Broadway
New York

EDWARD NORMAN GILROY
(name of injured employee)

Date of preparing this blank 10/6/27

Date of Accident: Number 8 of month. Day 8 of Month Year. 1927

20. Did the injury result in DEATH? No.
21. Did the injury require medical aid Yes.
22. Will you or your insurance carrier PAY for the medical aid required by law during the first four weeks? Yes.
23. Give probable date of RECOVERY. Unknown

The undersigned does hereby acknowledge the correctness of the statements on this blank, and agrees to accept compensation at the rate given.

: :
: :
: :

(Signature of employee) (His mark)
If signed by mark, same must be witnessed.

(Signature of witness)
Form No. 2

Leave this blank.....
OCT 7 1927

24. Were the wages fixed by the output? No.
25. If wages were fixed by the hour, state RATE per hour $.8075 (3 das)
$.9325 (" ")
26. Give number of HOURS in ordinary working day. 8
27. Give number of DAYS in ordinary working year. 313
28. State the amount of weekly WAGES. (See paragraph 23, Compensation Law.) $41.89
29. Weekly compensation to be paid injured employee. (Temp.) (Total) (Disab) $41.89 first 16 wks. $27.93 next 36 wks. $17.00 thereafter
Other $.....

The undersigned hereby confirms the correctness of the statements given, and guarantees the paying of compensation as stated herein, according to law, for temporary disability and for permanent injury, if any.

STANDARD OIL COMPANY OF NEW JERSEY
J. W. MYERS, By W. G. Gillson

Exhibit P-27.

STANDARD OIL COMPANY OF NEW JERSEY
Annuities and Benefits Department
26 Broadway

NEW YORK May 29, 1928.

Re: Your file No. 80754, Edward N. Gilroy, Injured 8/8/27.

J. W. MYERS Exhibit P 27
11/4/29
G D Z

P. 27 Id
11/4/29
G D Z

MAY 31 1928

Workmen's Compensation Bureau,
State House,
Trenton, N. J.

Gentlemen:

In reference to your F. U. Form dated May 18, 1928, we are enclosing Form No. 3 covering the accidental injury sustained by Edward N. Gilroy on August 8, 1927. You will note that this form has not been signed. Gilroy has consistently maintained that his case does not come within the scope of the New Jersey Workmen's Compensation Law although he accepted an allowance equivalent to full salary during his temporary disability and all necessary medical treatment at our expense. We have suggested to him that we will be glad to have an estimate of his disability made by the Workmen's Compensation Bureau but thus far he refuses to have such examination made for this purpose. We are now paying, however, compensation on account of a permanent disability

which is not yet determined, having up to the present time made payments for about nine weeks. Our estimate of disability is approximately 66⅔% of total, the injury affecting both hands which were severely burned and the use of which is greatly impaired.

We do not know how this matter can be brought to a conclusion and think that even if a hearing is listed, Gilroy will not attend. However, we submit the above information for your consideration. At the present time Gilroy resides at Vernon Street (near Michigan Avenue) Kenilworth, N. J.

Very truly yours,

J. W. Myers,
By W G Gillson

WGG/EK

Exhibit P-28.

Calendar for the Year 1927 as Taken From the Union County Court List Calendar for the May Term, 1927.

(*Opposite*) ☞

Exhibit D-1.

Bayonne, N. J. Apr. 25, 1928 No. 1162

BAYONNE TRUST COMPANY 55-121

Pay to
the Order of EDWARD N. GILROY.....$34.00
Exactly Thirty four Dollars.....Dollars

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned:
L. A. RIFFERT
Attorney

J. T. WEYDEMEYER
Attorney

Endorsed:
Benefits from 4-10 to 4-23-28

Exhibit D-2.

Bayonne, N. J. May 14, 1928 No. 1256

BAYONNE TRUST COMPANY 55-121

Pay to
the Order of EDWARD N. GILROY.....$34.00
Exactly Thirty four dollars.....Dollars

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
L. A. RIFFERT
Attorney

J. T. WEYDEMEYER
Attorney

Endorsed:
Benefits from 4/24/28 to 5/7/28

Exhibit D-3.

Bayonne, N. J. May 24, 1928 No. 1336

BAYONNE TRUST COMPANY 55-121

Pay to
The Order of EDWARD N. GILROY.....$34.00
Exactly Thirty four Dollars no cents.....Dollars

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
L. A. RIFFERT
Attorney

J. T. WEYDEMEYER
Attorney

Endorsed:
Benefits from 5/8/28 to 5/21/28.

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Exhibit D-4.

Bayonne, N. J. Jun 8, 1928 No. 1418

BAYONNE TRUST COMPANY 55-121

Pay to
the Order of EDWARD N. GILROY.....$34.00
Exactly Thirty four Dollars no cents.....Dollars

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
L. A. RIFFERT
Attorney

J. T. WEYDEMEYER
Attorney

Endorsed:
Benefits from 5/22/28 to 6/4/28

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Exhibit D-5.

Marked for identification only; not admitted.

Exhibit D-6.

Marked for identification only; not admitted.

Exhibit D-7 for Identification.

J J 10/29/29

COPY.

June 9, 1928.

Mr. Edward N. Gilroy,
19 East 31st Street,
Bayonne, N. J.

Dear Mr. Gilroy:

Enclosed please find this Company's check in the amount of $34.00 covering compensation payment for the period from May 22nd to June 4, 1928, inclusive, two weeks at the rate of $17.00 per week.

We are informed by our Accounting Department that your compensation checks from April 10th, 1928 have so far remained uncashed. Unless you wish to cash these checks so that they can be returned to our Bank for cancellation, we feel that it will be inadvisable for us to tender any further compensation payments for the present.

Yours very truly,

(Sgd) C. F. SMITH.

LEJ.MS
Enc.

Exhibit D-8.

STANDARD OIL COMPANY (New Jersey)
Bayonne Refinery

J J 10-29-29 Admitted 11-1-29 (18 checks)

Bayonne, N. J. Aug 23 1927 192— No. 4362

332
S-D

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$10.46
Ten Dollars Forty Six Cents.....Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY (New Jersey)
Bayonne Refinery

Countersigned
L. A. RIFFERT Attorney
J. T. WEYDEMEYER Attorney

(Endorsed)

Benefits
from 8/9 to 8/15
Edward N. Gilroy
Credited to the account of
Mary Gilroy
with
BANK OF SOUTH HUDSON
Bayonne, N. J.
Endorsement guaranteed
10183
Bank of South Hudson
PAID
Aug 24 1927
Bayonne, N. J.

(Perforated)
PAID
8 25 27

Exhibit D-8.

Bayonne, N. J. Aug 22 27 192— No. 4354

S-D

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$31.43
Thirty One Dollars Forty Three Cents.....Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY (New Jersey)
Bayonne Refinery

Countersigned
L. A. RIFFERT
Attorney

J. T. WEYDEMEYER
Attorney

STANDARD OIL COMPANY (New Jersey)
Bayonne Refinery

(Endorsed)

Benefits
from 8/9 to 8/19
Edward N. Gilroy
Credited to the account of
Mary Gilroy
With
BANK OF SOUTH HUDSON
Bayonne, N. J.
Endorsement guaranteed
10183
Bank of South Hudson
PAID
Aug 24 27
Bayonne, N. J.

(Perforated)

PAID
8 25 27

Exhibit D-8.

Bayonne, N. J. Sep 1 1927 192— No. 4408

8332

Bayo Hosp

STANDARD OIL COMPANY (New Jersey)
Bayonne Refinery

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Exactly Eighty Three Dollars Seventy Eight Cents .....Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY (New Jersey)
Bayonne Refinery

Countersigned
L. A. RIFFERT
Attorney

J. T. WEYDEMEYER
Attorney

(Endorsed)

Benefits
from 8/16/27 to 8/29/27
Edward N. Gilroy
(Rubber Stamp—Illegible)
George Kough
Mechanics Trust Co. of New Jersey
PAID
Sept. 6 1927
2nd Teller

(Perforated)

PAID
9 7 27

Exhibit D-8.

Bayonne, N. J. September 15 1927 No. 4468

8332
16 E 31st

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Exactly Eighty Three Dollars Seventy Eight Cents .....Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY (New Jersey)
Bayonne Refinery

STANDARD OIL COMPANY (New Jersey)
Bayonne Refinery

Countersigned
L. A. RIFFERT, Attorney
J. T. WEYDEMEYER, Attorney

(Endorsed)

Benefits
from 8/30/27 to 9/12/27
Edward N. Gilroy
BANK OF SOUTH HUDSON
Bayonne, N. J.
PAID
Sep 17 1927

(Perforated)

PAID
19 27

Exhibit D-8.

Bayonne, N. J. September 29, 1927 No. 4523

BAYONNE TRUST COMPANY 55-121

Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY..... $83.78
Exactly Eighty Three Dollars Seventy Eight Cents .....Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY (New Jersey)
Bayonne Refinery

STANDARD OIL COMPANY (New Jersey)
Bayonne Refinery

Countersigned
A. P. ARNOLD
Attorney

J. T. WEYDEMEYER
Attorney

(Endorsed)

Benefits
from 9/13/27 to 9/26/27
Edward N. Gilroy
(Rubber Stamp—Illegible)
George Kough
Mechanics Trust Co. of New Jersey
PAID
Oct. 3 1927
2nd Teller

(Perforated)

PAID
10 4 27

Exhibit D-8.

Bayonne, N. J. October 13, 1927 No. 34

8332
Bayo Hosp

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Exactly Eighty Three Dollars Seventy Eight Cents .....Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
L. A. RIFFERT, Attorney
J. T. WEYDEMEYER, Attorney

(Endorsed)

Benefits
from 9/27/27 to 10/10/27
Edward N. Gilroy
Lou Sugal
Mechanics Trust Co. of New Jersey
PAID
Oct 15 1927
Central Bayonne Branch

(Perforated)

PAID
10 17 27

Exhibit D-8.

Bayonne, N. J. October 27, 1927 No. 100

8332
Bayo Hosp

Standard Oil Company of New Jersey
Bayonne Refinery

Bayonne Trust Company 55-121
Member Federal Reserve System

Pay to
The Order of Edward N. Gilroy.....$83.78
Exactly Eighty Three Dollars Seventy Eight Cents .....Dollars
Par in New York City through Northern New Jersey Clearing House.

Standard Oil Company of New Jersey
Bayonne Refinery

Countersigned
L. A. Riffert
Attorney

J. T. Weydemeyer
Attorney

(Endorsed)

Benefits
from 10/11/27 to 10/24/27
Edward N. Gilroy
Lou Sugal
Mechanics Trust Co. of New Jersey
Paid
Oct 31 1927
Central Bayonne Branch

(Perforated)

Paid
11 1 27

Exhibit D-8.

Bayonne, N. J. Nov 10 1927 192— No. 171

8332

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Eighty Three Dollars Seventy Eight Cents.....
..... Dollars

Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
A. P. ARNOLD
Attorney
J. T. WEYDEMEYER
Attorney

(Endorsed)

Benefits
from 10/25 to 11/7
Edward N. Gilroy
Lou Sugal
Mechanics Trust Co. of New Jersey
PAID
Nov 14 1927
Central Bayonne Branch

(Perforated)

PAID
11 15 27

Exhibit D-8.

Bayonne, N. J. Nov 25 1927 192— No. 255

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Eighty Three Dollars Seventy Eight Cents..... Dollars
.....

Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
A. P. ARNOLD
Attorney

J. T. WEYDEMEYER
Attorney

(Endorsed)

Benefits
from 11-8 to 11-21-27
Edward N. Gilroy
Lou Sugal
Mechanics Trust Co. of New Jersey
PAID
Nov 26 1927
Central Bayonne Branch

(Perforated)

PAID
11 28 27

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Exhibit D-8.

Bayonne, N. J. December 9, 1927 No. 347

8332
16 E 31st

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Exactly Eighty Three Dollars Seventy Eight Cents .....Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
L. A. RIFFERT, Attorney
J. T. WEYDEMEYER, Attorney

(Endorsed)

Benefits
from 11/22/27 to 12/5/27
Edward N. Gilroy
Lou Sugal
Mechanics Trust Co. of New Jersey
PAID
Dec 12 1927
Central Bayonne Branch

(Perforated)

PAID
12 13 27

Exhibit D-8.

Bayonne, N. J. Jan 6 1928 192— No. 506

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Exactly Eighty Three Dollars Seventy Eight Cents .....Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
L. A. RIFFERT
Attorney

J. T. WEYDEMEYER
Attorney

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

(Endorsed)

Benefits
from 12/20/27 to 1/2/28
Edward N. Gilroy
Lou Sugal
Mechanics Trust Co. of New Jersey
PAID
Jan 6 1928
Central Bayonne Branch

(Perforated)

PAID
1 7 28

Exhibit D-8.

Bayonne, N. J. Jan 20 1928 192— No. 577

Bayonne Trust Company 55-121
Member Federal Reserve System

Pay to
The Order of Edward N. Gilroy.....$83.78
Eighty Three Dollars Seventy Eight Cents.....
..... Dollars
Par in New York City through Northern New Jersey Clearing House.

Standard Oil Company of New Jersey
Bayonne Refinery

Standard Oil Company of New Jersey
Bayonne Refinery

Countersigned
L. A. Riffert, Attorney
J. T. Weydemeyer, Attorney

(Endorsed)

Edward N. Gilroy
Benefits
from 1/3/28 to 1/16/28
Lou Sugal
Mechanics Trust Co. of New Jersey
Paid
Jan 23 1928
Central Bayonne Branch

(Perforated)

Paid
1 24 28

Exhibit D-8.

Bayonne, N. J. February 2, 1928 No. 656

8332

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Exactly Eighty Three Dollars Seventy Eight Cents .....Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
A. P. ARNOLD
Attorney

L. A. RIFFERT
Attorney

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

(Endorsed)

Benefits
from 1/17/28 to 1/30/28
Edward N. Gilroy
Lou Sugal
MECHANICS TRUST CO. OF NEW JERSEY
PAID
Feb 4 1928
Central Bayonne Branch

(Perforated)

PAID
2 6 28

Exhibit D-8.

Bayonne, N. J. Feb 17 1928 192— No. 713

16 E 31st

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Eighty Three Dollars Seventy Eight Cents.....
..... Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
A. P. ARNOLD
Attorney

J. T. WEYDEMEYER
Attorney

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

(Endorsed)

Benefits from 1/31/28 to 2/13/28
Edward N. Gilroy
Lou Sugal
Mechanics Trust Co. of New Jersey
PAID
Feb 20 1928
Central Bayonne Branch

(Perforated)

PAID
2 21 28

Exhibit D-8.

Bayonne, N. J. March 3, 1928 No. 851

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Eighty Three Dollars Seventy Eight Cents.....
..... Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
L. A. RIFFERT
Attorney

J. T. WEYDEMEYER
Attorney

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

(Endorsed)

Benefits
from 2/14 to 2/27
Edward N. Gilroy
Lou Sugal
Mechanics Trust Co. of New Jersey
PAID
Mar 6 1928
Central Bayonne Branch

(Perforated)

PAID
3 7 28

Exhibit D-8.

Bayonne, N. J. Mar 22 1928 192— No. 959

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Eighty Three Dollars Seventy Eight Cents.....
..... Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
L. A. RIFFERT, Attorney
J. T. WEYDEMEYER, Attorney

(Endorsed)

Benefits
from 2/28 to 3/12/28
Edward N. Gilroy
Emma C. Hendrickson
Mechanics Trust Co. of New Jersey
PAID
Mar 28 1928
Central Bayonne Branch

(Perforated)

PAID
3 29 28

Exhibit D-8.

Bayonne, N. J. Dec 23 1927 192— No. 414

8332

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Eighty Three Dollars Seventy Eight Cents.....
..... Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
A. P. ARNOLD
Attorney
J. T. WEYDEMEYER
Attorney

(Endorsed)
Edward N. Gilroy
Emma C. Hendrickson
Benefits
from 12-6 to 12-19-27
Mechanics Trust Co. of New Jersey
PAID
Dec. 24 1927
Central Bayonne Branch

(Perforated)
PAID
12 27 27

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Exhibit D-8.

Bayonne, N. J. Mar 29 1928 192— No. 1007

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

8332
16 E 31st.

BAYONNE TRUST COMPANY 55-121
Member Federal Reserve System

Pay to
The Order of EDWARD N. GILROY.....$83.78
Eighty Three Dollars Seventy Eight Cents.....
..... Dollars
Par in New York City through Northern New Jersey Clearing House.

STANDARD OIL COMPANY OF NEW JERSEY
Bayonne Refinery

Countersigned
L. A. RIFFERT, Attorney
J. T. WEYDEMEYER, Attorney

(Endorsed)

Benefits
from 3/13/28 to 3/26/28
Lou Sugal
Mechanics Trust Co. of New Jersey
PAID
Apr 3 1928
Central Bayonne Branch
Edward N. Gilroy

(Perforated)

PAID
4 4 28

Exhibit D-9.

(*Opposite*) ☞

Exhibit D-10.

Photograph.

(*Opposite*) ☞

New Jersey State Library

Exhibit D-11.

Photograph.

(*Opposite*) ☞

Exhibit D-12.

Photograph.

(*Opposite*) ☞

Exhibit D-13.

D 13
J. J. 10/31/29

THIS INDENTURE made the twentieth day of January, one thousand nine hundred and two, between Warren Delano, Junior, and Frederic A. Delano, as joint tenants and not as tenants in common, said Warren Delano, Junior, being of East Orange, Essex County, New Jersey, and said Frederic A. Delano, being of Chicago, Illinois, parties of the first part, and Standard Oil Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, party of the second part.

WITNESSETH: That the said parties of the first part, for and in consideration of the sum of one dollar and other valuable consideration in lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged, and the said party of the second part, and its successors, forever released and discharged from the same by these presents, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and to its successors and assigns, forever, ALL of the following described lands and premises, situate, lying and being at Constables Hook, in the City of Bayonne, in the County of Hudson and State of New Jersey:

FIRST TRACT: BEGINNING at a stake or other monument intended to locate the beginning point in the description of Lot No. 2 on "Map of prop-

erty situated at Constables Hook, Hudson Co., N. J., Surveyed Nov. 1847 by R. C. Bacot, City Surveyor of Jersey City''; thence running along the first course of said description North twenty-four degrees East and along lands now or late of the Standard Oil Company eleven feet and seventy-two one hundredths of a foot to the Southerly line of land conveyed by Warren Delano and others to the Constable Hook Railroad Company, by deed dated August 29th, 1882, and recorded in Book 370 of Deeds for said County on pages 686, etc.; thence along said line South seventy-four degrees twenty-five minutes east as the needle pointed in 1898 one thousand sixty-two feet and thirty-nine one hundredths of a foot to the Northerly corner of land conveyed by the parties of the first part hereto to the Standard Oil Company, by deed dated May 13, 1897, and recorded in Book 673 of Deeds for said County, pages 251, etc.; thence along the westerly line of said land so conveyed south six degrees twenty-one minutes thirty-two seconds east one thousand two hundred thirty-five feet and ninety-two one hundredths of a foot to the northerly line of another tract of land conveyed by the aforesaid deed of Warren Delano and others to said Constable Hook Railroad Company; thence Westerly along said Northerly line, the curves and courses thereof one thousand three hundred and eleven feet more or less to line of lands now or formerly of the Bergen Port Chemical Company; thence along the easterly line of said lands north fifteen degrees thirty-five minutes East four hundred seventy-six feet and nine-tenths of a foot to the northeasterly corner of said Bergen Port Chemical Company's lands; thence along the Northerly line of said land north seventy-four degrees thirty-four min-

utes forty seconds west two hundred seventy-four and sixty-seven one-hundredths feet to the northerly corner of said lands and said westerly line of Lot No. 2 on the aforesaid Bacot map, being also the division line between lands of the parties of the first part and of the Standard Oil Company; thence along said last line North fifteen degrees twenty-five minutes, twenty seconds east as the needle pointed in 1898 eight hundred fifty-four feet and thirty-three one hundredths feet to the place of Beginning. Containing thirty-seven acres be the same more or less.

Second Tract: Beginning at the northwesterly corner of lands conveyed by the parties of the first part to Robert M. Thompson by deed dated September 16th, 1901, said point being in the southerly line of the right of way conveyed by deed of said parties of the first part to the National Docks Railway Company, by deed dated October 9th, 1899; thence running southerly along the division line between lands of the parties of the first part and lands conveyed to said Thompson as aforesaid to the exterior line of solid filling on the northerly shore of Kill von Kull as the same has been fixed by the Riparian Commissioners of the State of New Jersey; thence westerly along said exterior line for solid filling to a point therein distant one hundred feet westerly at right angles from the line first run; thence northerly parallel with the first course and one hundred feet westerly at right angles therefrom to the southerly line of the right of way of said National Docks Railway Company; thence easterly along the same to the place of beginning.

Together with the right, title and interest of the parties of the first part of, in and to the lands

under water in Kill von Kull in front of the land last above described, together with the right to build docks and wharves thereon as riparian owners and all other riparian rights so far as the same are now owned by the said parties of the first part.

Said premises having been conveyed to the parties of the first part in part by deeds of Sheriff of Hudson County recorded in Book 601 of Deeds for said County, pages 580 and 585, etc.; and by deed of DeWitt Van Buskirk and wife dated May 20, 1895, recorded in Book 626, of Deeds for Hudson County on pages 52, &c.; said first tract in part by deed of Edward P. Griffin, dated July 18th, 1898, and recorded in Book 702, pages 484, etc.

Subject to the rights of the public, if any, in and to a certain strip of land crossing the tract secondly above described and commonly known as the Old Hook Road, but which strip it is not intended hereby to dedicate.

Also subject to all rights which may be owned or possessed by the City of Bayonne to lay and maintain water pipes as granted by the following instruments.

Deed from Warren Delano and others to the Mayor and Council of the City of Bayonne, dated February 11th, 1882, recorded in Book 364 of Deeds for said County on pages 719, &c.

Deed Joseph Charles Tracy &c to Mayor and Council of the City of Bayonne dated March 23rd, 1882, recorded Book 365 of Deeds for said County on page 450.

Deed Warren Delano and others to Mayor and Council of the City of Bayonne, dated October 16th, 1883, recorded in Book 388 of Deeds for said County on pages 414 &c.

Exhibit D-13.

Deed Joseph Charles Tracy &c to Mayor and Council of the City of Bayonne, dated October 12, 1883 and recorded in Book 388 of Deeds for said county on page 416 &c.

Also subject to a right of way twenty feet in width for a private road as the same has been established by an agreement dated the twenty-seventh day of November, one thousand nine hundred and one, and made between the Standard Oil Company, the parties of the first part and others, which said private road it is not intended hereby to dedicate.

Also subject to the alternative right of way for water pipe as mentioned in the deed made by the parties of the first part to the National Docks Railway Company, dated October 9th, 1899, and recorded in Book 734 of Deeds for Hudson County, on pages 116 &c.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the above described premises and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises together with the appurtenances, unto the said party of the second part, its successors and assigns, to its and their own proper use, benefit and behoof forever.

And the said Warren Delano, Junior and Frederic A. Delano, for themselves, their heirs, executors and administrators, do covenant, promise and

agree to and with the said party of the second part, its successors and assigns, that they have not made, done, committed, executed or suffered any act or acts, thing or things whatsoever, whereby or by means whereof, the above mentioned and described premises or any part or parcel thereof now are, or at any time hereafter shall or may be impeached, charged or encumbered, in any manner or way whatsoever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Warren Delano Jr. (L. S.)
Frederic A. Delano (L. S.)

Signed, Sealed and delivered in the presence of:

Simeon W. King,
O. Gasty

Witness to Warren Delano Jr.

A. T. Burr
H. B. Koch

(Revenue stamps in the amount of $198.75 attached and properly cancelled.)

Exhibit D-13.

State of New York, }
County of New York, } ss.:

Be it remembered that on this ninth day of April, one thousand nine hundred and two, before me, a Master in Chancery of New Jersey, personally appeared Warren Delano, Junior, who I am satisfied is one of the grantors in the within Indenture mentioned; and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

DeWitt Van Buskirk
Master in Chancery
of New Jersey

Exhibit D-13.

State of Illinois,
County of Cook, } ss.:
City of Chicago,

Be it remembered that on this Third (3rd) day of April (1902) one thousand nine hundred and two, before me, a Commissioner of Deeds for New Jersey at Chicago, in Illinois, personally appeared Frederic A. Delano, who I am satisfied is one of the grantors in the within Indenture named; and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

Simeon W. King,
A Commissioner of Deeds for the State of New Jersey residing at the City of Chicago, in the County of Cook and State of Illinois.

[seal]

Endorsed:

Received in the office of the Register of the County of Hudson, N. J., at 10:30 o'clock A. M., April 30, 1902.

And recorded in Book 803 of Deeds for said County on page 317 &c.

James C. Clark,
Register.

Exhibit D-14.

D-14
J. J. 10/31/29

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU
TRENTON, N. J.
EMPLOYEE'S CLAIM FOR COMPENSATION

EDWARD NORMAN GILROY, *Petitioner,*	Received at Trenton.....
VS.	Claim Petition No.....
THE STANDARD OIL CO., *Respondent.*	Date of Accident....., 19.....

Attorney for Petitioner, Francis A. Gordon, 286 North Broad St., Elizabeth, N. J.

To the Workmen's Compensation Bureau of New Jersey:

The claimant respectfully alleges the following facts:

1. What is your name? Edward N. Gilroy.
2. Where do you live? Vernon Street, Kenilworth.
3. Sex Male. 4. Age 31. 5. Married Yes.
6. By whom were you employed at the time of the accident? (Give name and business address) Standard Oil Company, Bayonne Plant, Bayonne, N. J.

Exhibit D-14.

7. What was the business of your employer? Oils, petroleums, etc.

8. Did you give written notice to your employer at the time you were hired, or later, that the Compensation Law should not apply to you? No.

9. Did you receive such notice from your employer? No.

10. Did your employer have knowledge of your accident? Yes.

11. Did you notify your employer of your accident? Yes.

12. If so, on what date? August 8, 1927.

13. Have you made claim to your employer for compensation? Yes.

14. What was your regular occupation, and what kind of work were you doing at the time of the accident? Pumpman.

15. When did the accident happen? August 8, 1927—11 P. M.

16. Where did the accident happen? Hook Road, Bayonne, New Jersey.

17. What was the nature of the accident, and how did it happen? While petitioner was in an automobile which was proceeding along Hook Road, a public thoroughfare, adjoining and running between the lands and buildings of the Standard Oil Company, a fire and explosion occurred on the plant of the Company in one of its buildings which carried with it a fire that swept across aforesaid road severely injuring and burning the petitioner. The fire and explosion was due to the negligence and

Exhibit D-14.

carelessness on the part of the respondent by its servants, agents and employees in connection with the maintenance of its machines, pump buildings and operation of its plant.

18. On what date were you compelled to stop work because of the injury? August 8, 1927.

19. On what date were you well enough to work again? Am still disabled.

20. If still disabled, on what date do you think you will be able to work? Do not know.

21. Give nature of any injury from which you will recover. Do not know at present time.

22. If any permanent injury has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ, explain fully. My head, face, neck, ears and hands and legs were involved in third degree burns, my eye-sight has been impaired, and my nervous system has been shattered.

23. Were your wages fixed by piece-work? No.

24. If so, what was your average weekly wage?

25. If wages were fixed by the hour, state rate per hour. 93¼¢ per hour.

26. Give number of hours in an ordinary working day. Eight.

27. Give number of days in an ordinary working week. Six.

28. State the amount of weekly wages. $44.76.

29. How much money have you received from your employer as compensation (not medical aid) since your accident? None.

Exhibit D-14.

30. Has your employer promised to pay you any compensation? Yes.

31. If so, how much? Has never been determined.

32. Was medical aid required? Yes.

33. Did you receive medical, surgical or hospital service? Yes.

34. Did you request your employer to furnish these services? Yes.

35. Were they furnished? Yes.

36. If so, between what dates? From the date of accident to present time.

37. If not, what sum did you expend for medical, surgical or hospital services? None, though I have contracted medical bills.

38. Give name and address of physician and hospital. Bayonne City Hospital. Dr. Pinkerton, Dr. Mays, Dr. Ward and other hospital doctors.

39. What other facts are there which you believe important? This petitioner is advised that he has an action in tort for damages sustained through the negligence of the defendant by its servants, agents and employees and therefore prays that the matters herein be held in abeyance until the institution and determination of such suit. The respondent claims petitioner is subject to the Workmen's Compensation Law. Petitioner is desirous of protecting his rights. The filing of this petition is without prejudice to such rights the petitioner may have in the premises.

40. Are you willing that the Compensation Bureau endeavor to secure compensation for

you, by agreement before calling for an official hearing? See answer to #39.

41. If you are unwilling state reasons. See answer to #39.

Your Petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your Petitioner from the said defendant, under the act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper, and this petitioner refers to ans. #39 containing his reservation of rights thereunder.

And your petitioner will ever pray, etc.

his
(EDWIN X N. GILROY)
mark
Vernun Street, Kenilworth, N. J.

Exhibit D-14.

STATE OF NEW JERSEY }
COUNTY OF UNION } ss.:

EDWARD N. GILROY of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; and that he has read the same and is familiar with the contents thereof; and that the matter and things therein set forth are true according to the best of his knowledge and belief.

his
(EDWIN X N. GILROY)
mark

Subscribed and sworn to before me, this 3rd day of August, 1928, at Elizabeth, N. J.

(Signed) McDONALD HARRIS,
A Notary Public of N. J.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

Exhibit D-14.

To the Respondent

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act.

We hereby notify you that unless an answer shall within ten days after the service of this notice, be filed in duplicate with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

Workmen's Compensation Bureau

(Seal) .....

Secretary.

I hereby certify that the foregoing is a true copy of the Petition filed in this matter.

Charles E. Corbin
Deputy Commissioner.

Exhibit D-15.

D-15
JJ 10/31/29

Admitted
11/1/29

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU
TRENTON, N. J.

RESPONDENT'S ANSWER TO EMPLOYEE'S CLAIM PETITION

EDWARD N. GILROY,
Petitioner.

VS.

STANDARD OIL COMPANY,
Respondent.

Claim Petition
No. 8861.
September 21, 1928.

Attorney for Respondent, Lindabury, Depue & Faulks, 763 Broad St., Newark, N. J.

In answer to Claim Petition filed in this cause:

1. What is the petitioner's name? Edward N. Gilroy.
2. Where does he reside? Says he resides at Vernon Street, Kenilworth, N. J.
6. Was the petitioner in your employ at the time of the accident? Yes.
7. State your business. Manufacture and sale of petroleum and its products.
8. Did you receive written notice from the Petitioner at the time of hiring, or later, that the

Exhibit D-15.

Compensation Law was not to apply to him? No.

9. Did you give such notice to him? No.

10. When did you first have knowledge of this accident? Immediately after its occurrence on August 8, 1927.

11. Did you receive notice of this accident from the Petitioner? See answer to Question 10.

12. If so, on what date? See answer to Question 10.

13. Has any claim for compensation been made? Yes.

14. What was the Petitioner's regular occupation, and what kind of work was he doing at the time of the accident? Regularly employed as Pumpman and having finished his shift had started for home in an automobile and was proceeding along on road which runs through respondent's plant.

15. When did the accident happen? August 8, 1927 at about 11 P. M.

16. Where did the accident happen? Bayonne Refinery, Bayonne, N. J.

17. What was the nature of the accident, and how did it happen? As petitioner was going home in an automobile after having finished his shift and while riding along a roadway which runs through respondent's plant, an explosion occurred at a point within the precincts of the plant.

18. On what date was the petitioner compelled to stop work because of injury? August 8, 1927.

Exhibit D-15.

19. On what day was the injured well enough to work again? Was able to resume work about 3/1/28 and certainly able as of date compensation for temporary disability was terminated, namely, March 27, 1928.

20. If still disabled, on what date do you estimate he will be able to work? See answer to Question 19.

21. Give your understanding of the nature of any injury from which he should recover? See answer to Question 22.

22. Give your understanding of any permanent injury which has resulted, either amputation or loss of usefulness of any member or impairment of any physical organ. Explain fully. Petitioner's burns have fully healed but he has a permanent disability, the nature and extent of which is undetermined. As a result of these burns there is impairment of use of both hands and a scarring of the face. The exact degree of permanent disability has not been determined due to petitioner's refusal to submit himself for examination by a physician of the Compensation Bureau.

23. Were the wages fixed by piece-work? No.

24. If so, what was the average weekly wage of the injured?

25. If wages were fixed by the hour, state rate per hour. Worked 3 days each week at 80¾¢ per hr. and 3 days at 93¼¢ per hr.

26. Give number of hours in an ordinary working day. 8.

27. Give number of days in an ordinary working week. 6.

Exhibit D-15.

28. State the amount of weekly wages. $41.89.

29. How much money have you paid the injured as compensation (not including medical aid) since the accident? From 8/9/27 to 3/26/28—33 wks. @ $41.89 per wk., a total of $1,382.37 as and for temporary total disability; also 10 wks. @ $17. on account of permanent disability, nature and extent of which is undetermined.

30. Have you promised to pay compensation? Yes.

31. If so, how much? Percentage permanent disability not definitely determined.

32. Was medical aid required? Yes.

34. Were you requested to supply the necessary medical service required by law? Yes.

35. Did you furnish this service? Yes.

36. If so, between what dates? Aug. 9, 1927 to and including Jan. 31, 1928.

37. If not, give reason for failure to do so. See 35.

38. Give name of physician and hospital rendering service at your direction. Dr. W. A. Pinkerton, Dr. A. J. Molloy, Dr. C. J. Larkey, Dr. L. J. Ferenczi, Bayonne Hospital, Bayonne, N. J.

39. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reasons for this conclusion. Respondent contends this case is one for settlement in accordance with the New Jersey Workmen's Compensation Law. Accordingly, compensa-

tion was offered by respondent and accepted by petitioner at the rate of full pay during 33 weeks of temporary total disability, or from Aug. 9, 1927 to March 26, 1928, the total payment for such disability having amounted to $1,382.37. In addition 10 weeks' compensation at $17. per week has been paid on account of permanent disability, the nature of and extent of which is undetermined. Because petitioner has not cashed checks amounting to $170. in part payment of permanent disability, the exact percentage of which has not been determined, respondent has suspended further payments but is willing to resume such payments provided petitioner will cash checks amounting to $170. and submit himself for examination with view to determining exact percentage permanent disability, either by Company physician in consultation with physician selected by petitioner and/or his attorney or by a physician selected by the Workmen's Compensation Bureau.

(Signed) W. F. Quick, Ass't. Sec'y.
Standard Oil Co. of N. J.
26 Broadway
New York City.

I hereby consent to the filing of the within Answer as in time. September 28, 1928.

(Signed) Francis A. Gordon
Attorney for Petitioner.

Exhibit D-15.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

W. F. QUICK, the Assistant Secretary of the Standard Oil Company, of full age, being duly sworn according to law, on his oath deposes and says: That he is the respondent named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

(Signed) W. F. QUICK, Asst. Secy.
(Respondent)

Subscribed and sworn to before me, this 26 day of September, 1928 at New York.

(Signed) CHARLES E. HILL.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

I hereby certify that the foregoing is a true copy of the Answer filed in this matter.

CHARLES E. DORBIN
Deputy Commissioner.

(Seal)

Exhibit D-16.

WORKMEN'S COMPENSATION BUREAU, STATE HOUSE, TRENTON, N. J.

D-16 JJ 11/1/29

STANDARD OIL COMPANY OF NEW JERSEY
26 BROADWAY NEW YORK

Date of preparing this blank 10/6/27.

20. Did the injury result in DEATH? No.

21. Did the injury REQUIRE medical aid? Yes.

22. Will your insurance carrier PAY for the medical aid required by law during the first two weeks? Yes.

23. Give probable date of RECOVERY. Unknown.

The undersigned does hereby acknowledge the correctness of the statements on this blank, and agrees to accept compensation at the rate given.

Edward Norman Gilroy's mark : X :
(Signature of employee.) : :

(His Mark.)

If signed by mark, same must be witnessed.

E. H. HURTZIG 10/15/27
(Signature of witness.)

FORM NO. 2.

Date of Accident.
Number 8 of Month.
Day 8 of Month.
Year. 1927

EDWARD NORMAN GILROY
(Name of injured employee.)

Leave this blank.....

24. Were the wages fixed by the output? No.

25. If wages were fixed by the hour, state RATE per hour $.8075 (3 das)
$.9325 (" ")

26. Give number of HOURS in ordinary working day 8

27. Give number of DAYS in ordinary working year 313

28. State the amount of weekly WAGES (See paragraph 23, Compensation Law.) $41.89

29. Weekly compensation to be paid injured employee. Temp.) Total) Disab.) $41.89 first 16 wks. $27.93 next 36 wks. $17.00 thereafter

The undersigned hereby affirms the correctness of the statements given, and guarantees the paying of compensation as stated herein, according to law, for temporary disability and for permanent injury, if any.

STANDARD OIL COMPANY OF NEW JERSEY

J. W. MYERS, By W. G. Gillson

New Jersey Court of Errors and Appeals

EDWARD N. GILROY, *Plaintiff-Respondent,* *vs.* STANDARD OIL COMPANY, a New Jersey corporation, *Defendant-Appellant.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*

BRIEF FOR PLAINTIFF-RESPONDENT.

Plaintiff-respondent, (hereinafter referred to as plaintiff) was the employee of defendant-appellant (hereinafter referred to as defendant) at its Bayonne refinery, the night of August 8, 1927, and he worked as a pumpman at Kimble's pump house. Completing an eight-hour shift, he changed clothes and left for home with three fellow employees. Passing out of the plant and through a gate, he reached Hook Road, a public thoroughfare. There he entered an automobile belonging to and driven by Hugh T. McMorrow, one of his companions. Hook Road runs in a circuitous route. The automobile reached a point about three-quarters of a mile from Kimble's pump house and was proceeding northerly.

Off the easterly side of Hook Road, defendant owned and operated a pump house known as #3 Plant Pump House. Off the westerly side of this road, it owned and operated two gas holders known as Holders 1 and 2.

As the auto approached, a flame appeared in Plant 3 pump house. A big ball of fire seemed to come out of the fence in front of it. The

fire came across the road directly to the front of the automobile and against its right side.

There was an explosion at Plant 3 pump house. A locker room adjoining the pump room there came down.

Flames were in the roadway. They travelled westerly to gas holder #2. Starting at the bottom from the roadway they travelled up to the top and the gas holder became a mass of flame and blew up.

Plaintiff, enveloped in flame, was thrown from the automobile to the roadway and was horribly burned.

Plaintiff charged negligence at common law.

At the trial which occupied seven days defendant contended (a) it was not negligent, (b) plaintiff's contributory negligence (c) an agreement to accept statutory compensation; payments as statutory compensation; plaintiff's estoppel to sue at common law; and (d) the accident arose out of and in the course of plaintiff's employment and therefore plaintiff must accept statutory compensation under Section 2 of the Workmen's Compensation Act.

On this appeal defendant argues "a" "b", and "d". As to "c" the learned trial court in a charge reflecting great care, attention and study of the case, disposed of this contention adversely to defendant (Charge of court, Case, p. 640, ll. 13 to 40, p. 641 and p. 642, and to l. 38.). No challenge to this ruling is now discussed in the brief of counsel. The entire charge is found, Case, p. 633 to and inclusive of p. 671.

(Italics in this brief are mine unless otherwise noted.)

Defendant suggested the ruling of the learned trial court on the motion for a non-suit was of doubtful validity but is not raising this point. (Defendant's brief page 31, lines 1 and 2.)

I.

THE DENIAL OF THE MOTION FOR A DIRECTION AND THE CHARGE OF THE COURT WERE PROPER.

Defendant Was Guilty of Negligence.

Defendant admits Hook Road is a public thoroughfare (Case, p. 57, ll. 10-20 and 30-40).

It was admitted that the part of Hook Road where the accident happened had been dedicated as a *public road* (Case, p. 418, ll. 27-37).

Defendant claims, "it was in no sense a thoroughfare," (Brief, p. 5, ll. 27-28, and ll. 31-33).

> "As the trial judge pointed out, it 'Divides the *total* area of defendant's plant in two' (R., p. 341, l. 28)."

In the record, page 341, lines 28, 29 and 30, the language of the learned trial court is

> "Hook Road, *at a slight point and for a distance thereof,* divides the total area of defendant's plant in two."

At page 637, lines 11 and 12 in the charge:

> "Hook Road, at a certain point and for a distance thereof."

The Road does not divide the *total area* of defendant's plant and the testimony of Smith, defendant's manager at Bayonne (Case, p. 417, ll. 20-28) and Exhibit P. 1 (Case, p. 697) establishes that defendant did not occupy lands adjacent to a substantial part of the road to the east and the south.

It appears that for 820 feet the defendant owns the land on both sides of the road (Case, p. 53, ll. 30-34).

Defendant states "Hook Road had been dedicated by defendant to public use," (Brief, p. 5) and reference in part is to the complaint (p. 3). The complaint alleges (Par. 3, Case, p. 3, ll. 4-10) that "defendant * * * dedicated a *part* of its lands as and for *part* of said highway."

Exhibit P. 1 drawn according to Scale 1″=100 feet has been reproduced to 200 feet=1″ and it clearly appears on this exhibit that the Oxford Copper Co. have a frontage of approximately 350 feet. Southeast of the area where the gasholders and pump house are located and for a distance of approximately 350 feet Hook Road runs along lands of others. It then takes a southerly course and runs approximately 500 feet *along lands of others.* The plants at this place identified by defendant's witness Wolf, (employed at Bayonne since 1895) (Case, p. 496, ll. 37 and 38) were the Borax Plant (Case, p. 499, ll. 20-30) and the General Chemical Works (Case, p. 499, ll. 30 and 31). After the chemical works is defendant's steel barrel factory (Case, p. 500, ll. 12-16) and (p. 500, ll. 19-24) he did not know who owns the next property down towards the Hook on the right side of the road.

Past the copper works and going to the end of Hook Road are the Vacuum Oil Co. and Asiatic Oil Company (Case, p. 502, ll. 10 to 18).

Hook Road is referred to in *a deed* as an *old road.* (Defendant's Exhibit 13, Case, p. 747, ll. 20-24).

It Is Used as a Public Thoroughfare.

A number of cars go over it. Jitney buses, trucks of all descriptions and all transportation go through there (Case, p. 77, ll. 10-20). All kinds of vehicles go up and down Hook Road (Case, p. 172, ll. 39-40), including public conveyances of any sort at all, express wagons, trucks and jitney buses.

It has been an old road and everybody has been coming in and out of it and a number of automobiles have been coming over the road in recent years (Case, p. 495, ll. 23-40). It has been used as a public road (Case, p. 496, ll. 10-11). People who work in the Borax plant and the Chemical Works use that road (Case, p. 499, ll. 26-40). Employees of the Vacuum Oil Company and the Asiatic Oil Company all go through Hook Road (Case, p. 502, ll. 20-30). There are people who do business with these concerns who use automobiles and pass over Hook Road going in and out, towards these plants (Case, p. 502, ll. 35-40). There are overhead pipes crossing the road (Case, p. 498, l. 10). These pipes do not interfere with the public going underneath it (Case, p. 501, ll. 28-32).

It was separate and apart from the plant.

Defendant's witness, Pensa, testified:

"A I always light a cigarette there, along there, *that is our last smoke.*

Q *On a public road?* A Yes, sir" (Case, p. 412, ll. 18-21).

The accident happened on the part of Hook Road adjacent to what is known as gas holders 1 and 2 (on the westerly side) and adjacent to No. 3 plant pump house (on the easterly side).

The statement in defendant's brief that Hook Road is a narrow *passageway* (Brief, p. 7),

according to the Exhibits is rebutted by the clear and convincing testimony as to the origin, creation nature *and actual use* of Hook Road. Defendant suggests the photographs show a part of Hook Road and adjacent thereto where the accident occurred is occupied by structures and equipment and myriads of pipe lines and appliances that extended to the road on each side as well as overhead across it.

Because defendant has overhead pipe lines across a public road does not destroy the legal situation in regard to the obligation of the defendant to the traveling public. *Black* v. *Central Railroad Co.*, 85 N. J. L. 197. Surely the owner of the Prudential Building at the corner of Bank and Broad streets in the City of Newark, New Jersey, owes an obligation to persons traveling on Bank street underneath the arch which connects the Prudential Building with the building on the other side of the street, and similar structures might be mentioned where a public street has overhead structures.

The term "passageway" is synonomous with "*road.*" Its actual width is 19.3 feet. Many of our modern highways are only paved 16 to 20 feet. Some of our busiest streets in old sections of our large cities are only large enough for two vehicles to pass abreast and some are not wide enough for this. The width of the road does not destroy the fact that it is a *public road and a public* thoroughfare.

The right of the public in the user of a road, cannot be extinguished excepting by act of the Legislature.

Hoboken Land and Improvement Co. v. *Mayor, etc.*, 36 N. J. L. 540 at page 545.

Hook Road at place of accident, runs approximately north and south (Exhibit P. 1, Case, p. 697, and P. 2, Case, p. 699) and is 19.3 feet wide (Exhibit P. 2, Case, p. 699, Case, p. 48, ll. 38-40).

The Pump House.

Enclosed by an iron fence and a concrete platform (Exhibit P. 5, Case, p. 705) and fifteen feet in from the *easterly line* of Hook Road (Case, p. 49, ll. 10-15) is a two-story, brick building marked "*Pump House*" (Exhibit P. 2, Case, p. 699; Case, p. 48, l. 28). It is No. 3 plant pump house (Case, p. 113, l. 28) and adjoining it is the site of a former brick building known as a locker room (Case, p. 48, l. 34).

Leaks In and About Machinery.

The pump house contained seven pumps (Case, p. 114, l. 42), operating almost continuously for continuous stills (Case, p. 115, ll. 14-17). The pressure is 60-80 lbs. (Case, p. 115, ll. 34 and 35). To the pumps, a pump rod is attached and when necessary (if they leak) the pump rods are packed on the night shift (Case, p. 115, ll. 24-33). Outside of the pumping house are valves that might leak a little in the stuffing box (Case, p. 117, ll. 7, 8, 9) where *there is always a little bit* of leakage more or less.

> Moran, for defendant, testified that the pumps have piston rods working back and forth, *and the packing comes loose once in a while* (Case, p. 474, ll. 30-40).

Vapors.

The Crane Upton Oil in the pump house had vapors (Case, p. 122, ll. 8 and 9).

No One in Attendance.

Alongside the pump house had been a locker room (Case, p. 114, ll. 1 and 2, Exhibit P. 2, Case, p. 669). The night of the explosion, the room went off. The building was taken down (Case, p. 114, ll. 10-20). There were two men working on a shift (Case, p. 114, ll. 19 and 20). Mr. Doherty was on the eleven to seven shift on the night of August 8, 1927 (Case, p. 114, ll. 26-31). He reached the *locker room* about twenty-five minutes to eleven (Case, p. 118, ll. 34 and 35). Three pumps were in operation while he was *in the locker room* getting ready (Doherty, Case, p. 125, ll. 10-14).

He testified that no one was *in the pump house* from twenty-five minutes of eleven until eleven o'clock (Case, p. 125, ll. 39-40 and Case, p. 126, ll. 4 and 5).

Kushner, Doherty's helper, reached the pump house twenty minutes to eleven (Kushner, Case, p. 140, l. 19). While he was changing clothes in the locker room, the men Doherty and he were relieving, went home (Case, p. 143, ll. 30-40).

A Dangerous Environment.

Doherty and Kushner were in the locker room *and nobody was watching the pumps, which were pumping crude oil, naphtha and kerosene* (Case, p. 144, ll. 10-18). Moran left the pump house about 10:35 (Moran, Case, p. 472, ll. 20 and 21). When he left, there were three pumps operating (Case, p. 472, ll. 26-28; Case, p. 476, ll. 10-12).

Gas was in the pump house with excessive pressure from the Gas Compression plant.

Doherty went into the pump house and an awful odor of gas was there. The doors were open and the building was filled with gas (Case, p.

117, ll. 31-40). It was so strong that he intended to call up the company's compression plant to ease up on their engines and tell them about the gas, but didn't get time. There are three engineers to look after gas compression engines and he was going to telephone James Sharkey on this shift.

The defendant had knowledge of a leaky gas holder due to excessive gas pressure at the compression plant.

He had called up several times before about the gas pressure (Case, p. 119, ll. 10-28).

He called up about three or four months before August 8, 1927.

He had been working in that pump house six or seven years. The first time he called up the gas compression engineer's office about pressure was about a couple of years before the explosion. (August 8, 1927). He called up five or six times altogether. Over a period of time of sometimes two months, sometimes one month, sometimes less, according to the pressure of the gas and the direction the wind would be blowing.

When Doherty called up the compression engineer's office about the pressure, the odor of gas after that would not be so strong (Case, p. 124, ll. 27-41; Case, p. 125, ll. 6-7). *Sharkey never denied this.*

At the compressors where Sharkey worked, gas is sent to holders 1 and 2 (Sharkey, Case, p. 153, ll. 27-30).

These pumps work twenty-four hours a day (Case, p. 154, ll. 13-14). There is a controlling valve operated in a line by using a hand cock (Case, p. 155, ll. 36-40). The gas compression

plant is about four or five hundred yards from holder No. 2 and pump house No. 3 (Case, p. 392, ll. 16-20).

The Signal System.

A signal system is in the engine room of the compression plant to register the height of the holder (Case, p. 393, ll. 37-39). Gas is admitted to the holder under moving lifts and the gas pressure causes those lifts to move up and down (Case, p. 357, ll. 4-6). When the holder rises to a certain height, a blue light shows in the engine room (Case, p. 396, ll. 20-30). As to this signal system working,

Sharkey on direct:

"By Mr. Bishop:

Q Do you know whether or not it was? A I couldn't say."

(Case, p. 394, ll. 7-10).

and (Case, p. 397, ll. 4-6):

"Q Do you know whether or not those lights were in operating condition prior to this accident? A I couldn't say."

Pressure.

When the fire occurred, Sharkey had to close the inlet valves on the holder to stop the gas from going in (Case, p. 394, ll. 35, 36, 37) and put burners on to empty the holders (Case, p. 395, ll. 26-28). After turning off the inlet valves and throwing additional burners on to draw the gas out of the holder, the holder was still burning twenty minutes later when Sharkey left (Case, p. 395, ll. 30-40). The fire and explosion happened at 11:00 P. M. (Defendant's witness, Mahon, Case, p. 488, ll. 30-40). The fire burned until about 2:00 o'clock at the gas holder (Case, p. 490, l. 20).

Gas Holder #2.

Its condition, what it contained, its maintenance and operation. The conditions in its vicinity.

Fenced in by an iron fence and iron gate on a concrete elevation and off the *westerly side* of Hook Road are two gas holders, numbered 1 and 2. (Exhibit P. 6, Case, p. 707). The diameter of each is 56 feet. (Exhibit P. 2, Case, p. 699; Case, p. 49, ll. 16-23).

These holders contained a crude gas (Case, p. 153, ll. 37-40) used for fuel (l. 41) that is pumped over from the gas compression plant (ll. 24-27). North of plant three pump houses and the locker room on the easterly side of the road, is number 2 *power house.* (Faasch, Case, p. 224, ll. 27-38), where a turbine and gas engine in operation drew its supply of gas from holder two (Case, p. 224, l. 40; Case, p. 225, ll. 6 and 7).

Unusual Pressure at Night.

During the day-time, there is not so much pressure to the gas in the holders as at night (Case, p. 124, ll. 12-15, Doherty). It is used up most generally in the can department and barrel factory and there is never as much pressure as it is at night (ll. 16-20). The plants which their gas from this holder are not in operation at night (ll. 22-23).

The Holder—Its Age.

Gas holder two has been in service twelve to fifteen years. (Faasch, plaintiff's witness, (Case, p. 225, ll. 8-12). It is an old tank (Isles, p. 366, ll. 36 and 37) and was there when defendant's witness, Kelly started to work *twenty-two years ago* (Case, p. 483, ll. 27-29; Case, p.

484, ll. 14-18). Mahon, defendant's witness, saw the two holders there *twenty years* (Case, p. 490, ll. 38 and 39; Case, p. 491, ll. 7-8). Donnenwirth, defendant's witness, testified the holders were *built shortly after 1903, somewheres in around two or three years after that time.* (Case, p. 496, ll. 13-19).

Content Condition.

Sulphur coming from crude oil got into the tank; and produced corrosion (Case, p. 464, ll. 23-28). The gas defendant was putting in the holder was highly sulphurous (Isles, Case, p. 368, ll. 30-40) and was apt to be corrosive on the metal (Case, p. 368, ll. 35-36).

More than six months previous to the accident (Case, p. 462, ll. 34-36), Remsen, Assistant Assistant Superintendent of the Gas Department (Case, p. 450, ll. 8-9) noticed something wrong with the gas holder (Case, p. 462, ll. 14-16). A steam jet used to heat water in the seal (sill) of the holder opened against the metal and burned a hole through the side of the plate. *A hole was burned through the metal by the steam* (Case, p. 463, ll. 4-18). It had been patched (Case, p. 462, ll. 30-31). His attention was directed to the hole by smelling a sort of oil sulphuric odor and a bubbling of water (Case, p. 464, ll. 4-6, and ll. 14-16).

Isles, general foreman, Gas Department (Case, p. 354, l. 15) in charge of gas holders and pipes (ll. 19-30) testified on cross examination:

> "Q *Four days* before this accident was there any need for a *special inspection* of this tank? A I considered it so.
>
> Q You did consider it so? A Yes.
>
> Q What was the cause of the *special* inspection *four* days before the accident? A

Because of the character of the gas that we were putting in the holder.

Q What was that gas? A *Highly sulphurous.*

Q What is the effect of a *highly sulphuric* content on the metal? A Apt to be corrosive."

At page 369, he testified (ll. 27-32):

"Q You went on your tour of inspection among other things to detect the odor of gas? A Yes, that would have been *one sign* which would have indicated to me the *improper condition* of the holder."

The Escaping Gas.

During the month of August, before the accident, Mahalsen, approaching gas holders 1 and 2 on his way to work, noticed an odor of gas which at times would be heavy. It depended on the weather (Case, p. 164, ll. 38-40; Case, p. 165, ll. 4-8).

Peters, a pump man's helper (Case, p. 98, ll. 37-38) passed the holders about two and a half years, coming in and going home almost every day. Some days, he got quite an odor of gas. It depended upon the weather (Case, p. 100, ll. 26-37). That night going from the trestle towards the gas holders (northerly), he noticed a very strong odor of gas *near the gas holder* (Case, p. 101, ll. 1-12). On defendant's cross examination (Case, p. 109, ll. 27-36):

"Q And when you came into work that night, did you notice any unusual odor as you came in along that road *around three o'clock?* A Yes, sir, I did. I noticed I could smell the illuminating gas, because it was very damp, and the reason for my smelling it, at least, I think it was my reason, was that the rain would hold the gas down closer to the ground.

Q Did you report that to anyone? * * * A No, sir.

Q Why not? A *Everybody seemed to be talking about it and everybody seemed to know about it, and I just let it pass by.*

Q You never reported it to anybody? A No, sir, I did not.

Q Have you ever smelled it before? A Yes, sir, I have.

Q Did you ever report it before? A No, sir.

Q Did you ever call anybody's attention to it? A No, sir.

Q Were you overcome by it as you came out there? A When I came out, no, but I complained about it. It was getting very sickening.

Q What was this odor that was getting sickening? A *The gas from the gas holder, the illuminating gas.*

Q *Was it much stronger then than it was when you came in?* A *Yes.*

Q Was it *very much stronger?* A Yes, sir.

Q It was stronger than you were smelling it before? A Yes, sir, *much stronger*" (Case, p. 110, ll. 6 to 27).

Faasch, employed in No. 2 *power* house, as engineer (Case, p. 224, ll. 25-30) arrived to work between 10:15 and 10:20 P. M. that night (Case, p. 237, ll. 9-11), he noticed an unusually heavy odor of gas when he arrived (Case, p. 237, ll. 18-21).

"Q Did you report that to anybody? A No, sir.

Q Was the condition one which seemed to you ought to be reported? A It is a condition *I should have reported*, if I had time to do it. I didn't have time to report it yet" (Case, p. 237, ll. 22-26).

Doherty (Case, p. 112, ll. 20-32) was going in a southerly direction to work at No. 3 pump house (Case, p. 114, ll. 30-40) on the 11 o'clock

night-shift of August 8, 1927 (Case, p. 114, ll. 29-30). Turning into Hook Road towards the pump house and gas holders, he found a stronger odor of gas there *than usual.* Usually a gas odor was there (Case, p. 116, ll. 20-30). This odor was noticed there *if the wind was blowing from the holders into the pump house* (Case, p. 116, ll. 30-34).

The holder leaked. The odors were escaping gas.

The vapors were seen.

> "Q Do you know whether or not gas escaped from this tank before? A Yes, I know the gas escaped from it because I seen it flow out" (Doherty, Case, p. 116, ll. 38-40).

And at page 122, lines 4-6:

> "Q How do you know that? A The vapor from the seal (sill) not from the top, from the top of the seal? Several times I seen it blowing out."

The gas holder leaked. There was a hole in it.

The day after the accident, Edward Whitehead, took photographs "Defendant's Exhibit 9 to 12" inclusive. They show a hole in the top of the holder (Case, p. 384, ll. 10-25).

Isles, defendant's witness, saw a hole in the top lift on the north side and *an indentation of the plates in the neighborhood of that hole* (Case, p. 356, ll. 6-9). He testified:

> "When the firemen came there, the first thing they did was to try to quench it, and there was the gas coming from this *big hole* and they put the canvas over it and tried to quench it" (Case, p. 362, ll. 29-33).

The edge of the hole was ripped. It was torn under stress (Case, p. 364, l. 22 and ll. 25-26).

Halsey, defendant's general foreman and boiler maker (Case, p. 370, ll. 16-17) the morning after the accident (Case, p. 372, ll. 24-27), saw a hole about 4½ or 5 inches in diameter (Case, p. 373, ll. 33-34). The rivets broke (l. 37). It was a ragged hole (Case, p. 375, ll. 40-41).

Brennan, defendant's witness, testified the hole was right at the same point where the fire was (Case, p. 467, l. 40). On cross examination, he testified (Case, p. 468, ll. 20-24):

> "Q Why did you look for corrosion there? A Well, just to see the condition of the metal.
>
> Q Was corrosion apt to be there? A Well, I don't—THERE MAY HAVE BEEN."

Conditions in the Road.

Oil Was in the Road.

Doherty (at Case, p. 132), testified on cross examination (ll. 10 and 20):

> "that road is never clean."

Defendant repairs the road and the public uses it (Case, p. 502, ll. 1-10). If there is any oil on the road, defendant picks it up (Case, p. 499, ll. 10-11).

Mahon, defendant's witness testified on direct examination (Case, p. 489, ll. 28-30).

> "There was a manifold running between the road and this pump house and there was a pool of oil and water down under this manifold, and that also was afire."

And at Case, pp. 489 and 490:

> "Q Was this oil manifold on the inside or outside of the pump house? A No, it is between the pump house on the road and outside of the pump house on the road."

Harry Wolf, called by defendant on cross examination testified (Case, p. 499) he saw oil in the ditches and near the pump house.

Donnenwirth, defendant's witness, saw *fire in the ditch* outside of the pump house between the pump house and the road (Case, p. 494, ll. 32-34; Case, p. 489, ll. 27-40; Case, p. 490, ll. 4-5). It took about ten minutes to put the fire out in the ditch (Case, p. 495).

Donnenwirth saw fire on the window frame and in the ditch outside of the pump house between the pump house and the road (Case, p. 494, ll. 31-34).

The Weather.

James H. Scarr, in charge of the office of the United States Weather Bureau in New York City (Case, p. 58, ll. 10-11) testified *Constable Hook is approximately six miles in a straight line from his observatory point* (Case, p. 65, ll. 33 to 35). Thunder was last heard prior to 11 P. M. on the night of August 8, 1927 *at 7:50 P. M.* (8:50 P. M. Daylight Saving Time) (Case, p. 66, ll. 26-28). The next thunder after that was *at 12:17 A. M.* the morning of the 9th (ll. 31-32). *In order to have lightning, there must be thunder* (Case, p. 66, ll. 33, 34 and 35), *but any thunder can be heard beyond 10 miles* (Case, p. 65, ll. 29-30). The rain stopped at 10:15 P. M. (Case, p. 64, l. 30) and it started that night at 7 minutes past 11 o'clock, Daylight Saving Time. It continued until 8:35 A. M. the next morning on the 9th (Case, p. 64, ll. 39-40). From 10 o'clock to 11 o'clock and from 11 to 12, the prevailing direction of the wind was *southwest* and the movement was ten miles (Case, p. 63, ll. 30-40). When a wind is from the south, it is *moving towards the north.* You are look-

ing south and you face the wind which is a south wind (Case, p. 63, ll. 20-22).

McMorrow quit work on the night of August 8th, about ten minutes to eleven (Case, p. 78, ll. 8-11). There was no thunder or lightning then (Case, p. 81, ll. 20-21). Thunder and lightning had not appeared up to the time of the accident (Case, p. 81, ll. 32-33).

Peters quit work about ten minutes to eleven (Case, p. 99, ll. 12-14). When he left it was not thundering (Case, p. 99, ll. 12-14), and there was no lightning (Case, p. 99, ll. 21-22). It stopped about eight o'clock (l. 24) and up to the time of the accident, from eight until eleven or thereabouts, there had not been any thunder or lightning (Case, p. 99, ll. 25-27).

Doherty's testimony was as to some thunder and lightning in the evening (Case, p. 129, ll. 4-6). "Well, I think it stopped around half-past seven or eight o'clock, as near as I can think" (Case, p. 129, ll. 11-12). There was thunder and lightning *after* 12 o'clock or *after* eleven some time (Case, p. 128, ll. 40-41).

Kushner was going to work about twenty minutes to eleven (Case, p. 142, ll. 6-7). "I was walking and I never see the lightning and thunder" (Case, p. 146, ll. 26-27).

Gilroy testified there was lightning and thunder about 8:30 (Case, p. 173, ll. 39-41; Case, p. 174, l. 4). It stopped (Case, p. 174, ll. 6-7) and he did not hear any thunder or see any lightning from the time it stopped until the time of the accident (Case, p. 174, ll. 8-10) and there was no thunder or lightning at the time of the accident (Case, p. 174, ll. 11-12).

Faasch was at the *power house* when Gilroy rushed in (Case, p. 225, ll. 13-15). He (Faasch) did not know of any thunder or lightning (Case, p. 225, ll. 19-34). He was in to work about 10:15 and 10:20 (Case, p. 237, ll. 9-11) and Gilroy came in somewhere around 10:55 or 10:58 shortly before eleven (Case, p. 237, ll. 12-16).

Pensa testified as to thunder or lightning *earlier* in the evening, *between 8 and 9* (Case, p. 402, ll. 8-12). He started his shift at eleven o'clock (Case, p. 414, l. 22).

Timothy J. Kelly passed the gas holders about ten minutes to eleven (Case, p. 481, ll. 15-17). His testimony is:

"Q Was there any thunder and lightning? A There was.

Q Did you hear it or see it? A Yes.

Q When was that? A Well, there was somewhat a bit strong from the lightning around half-past eight, around that time; I didn't take the exact time of it.

Q Was there any more? A There was.

Q When was that? A There was a crash off in between. There was some on and off between there.

Q Between what? A I mean lightning on and off from half-past eight until I went home.

Q Was there any lightning around at the time you went home? A There was *one bolt of lightning there before I got on the bus.*

Q About when was that? A I would say about 11:40-10:40 I mean and 10:45.

Q What kind of lightning was that? A I didn't pass any remarks about it. I was running for the bus then.

Q You were running for the bus? A Yes.

Q While you were running for the bus, was it while you were running for the bus that you saw this lightning? A Yes.

Mr. Gordon: I object to that as leading.

By Mr. Bishop.

Q When did you see this lightning? A Just before I got on the bus.

Q Did you hear any thunder? A Yes.

Q Was it mild or sharp or how was it? A It sounded to be heavy." (Case, p. 481, ll. 37-40, Case, p. 482, ll. 4-35.)

He did not tell anybody of lightning that night until questioned about it (Case, p. 485, ll. 38-40). He does not know the name of the man whom he spoke to and how long after the fire it was (Case, p. 486, ll. 4-16).

Thomas J. Mahon came to work that night about ten minutes after ten (Case, p. 487, ll. 33-34). He was ready to get out of his dressing room about 11 P. M. (Case, p. 488, ll. 20-26). "Q Was there any thunder or lightning? A Not that I seen." (Case, p. 488, ll. 29-30).

John Donnenwirth (Case, p. 493) was between two and three hundred yards away from where the accident happened (Case, p. 493, ll. 29-32). He testified "All of a sudden this flash came. It seemed to me to be lightning and I ran right outside" (Case, p. 493, ll. 38-40). At (Case, p. 494, ll. 4-5) he testified, on direct:

"Q Did you hear any thunder? A Not to my recollection."

Defendant seriously argues (defendant's brief, p. 34) the only conclusion that can properly be drawn from all of the evidence, was that gas holder No. 2 had been struck by lightning within a short time before the fire and explosion occurred and it was this occurrence and not defendant's negligence that led to the presence of the gas on Hook Road in the vicinity of this gas holder which exploded and caused plaintiff's injuries.

Defendant relies upon a very unsatisfactory and uncertain and indefinite statement of a single witness, a Mr. Kelly.

The facts as to lightning and thunder were presented by plaintiff by definite, clear and convincing proofs from official sources and the witnesses, McMorrow, Peters, Doherty, Kushner, Gilroy and Faasch. Defendant's witnesses, Pensa, Mahon and Donnenwirth corroborate them. *Kelly stands alone.*

Defendant fails to explain if the gas was due to Holder No. 2 being struck: (a) Why gas accumulated in the highway for a considerable period of time prior to the day and night of the occurrence; (b) Why gas was noticed by Doherty in the pump house at 10:43; (c) Why the fire first appeared in the pump house and not on Hook Road or to the west thereof.

The vast preponderance of evidence showed there was no lightning at or about the time of the accident.

If the testimony of Kelly is worthy of any consideration that at *10:45* there was a bolt of lightning, this was not proof *the gas holder had been struck by lightning,* because the probabilities are that the gas holder would have been a mass of flame before the plaintiff and his companions reached that point on Hook Road adjoining the gas holder which was just as the 11 o'clock whistle blew.

It is very singular in this case that the identical spot where there was an indentation on the plates (and Halsey had been hammering the plates) should be the identical place where lightning struck.

The suggestion is made that the metal around the hole was clean and there was no sign of corrosion. The evidence showed that the hose had been played on the tank for three hours, from eleven to two. When Brennan examined the hole, he testified there might have been corrosion there.

The suggestion is further offered that the plate in which the hole was found, had been dented in. If this suggestion was intended to convey the thought that an object from above, struck the tank and fell into it, the defendant fails to explain why it did not produce such object from the inside of the tank, if its employees, as testified, were at, on and about the tank immediately after the accident. Witnesses were produced to identify the condition of wax taling inside of the tank, but no one appeared to present any physical object that may have fallen into the tank or that was lying at, in, or about the place where the hole was. The size of the hole is described as from four and one-half to five inches and large enough for a man's fist. A piece of metal must have formerly covered the space where the *"indented"* hole appeared, and this is not accounted for. If there were any other indentations at, on, or about the hole, they must have resulted from the so-called hammer test made by the defendant's own employees in a careless and negligent manner.

The Accident.

Doherty was coming from the north *going south* (Case, p. 117, ll. 30-31), approaching the gate to come into No. 3 plant pump house (ll. 26-30). *At that time,* he found a stronger odor of gas there than usual (Case, p. 116, ll. 20-30).

About twenty minutes to eleven (Case, p. 140, ll. 7-8), Kushner turned southerly (ll. 37-38) into Hook Road where the holders and pump house were (Case, p. 140, ll. 25-28). Passing along the road near the power house, he noticed a strong gas smell (Case, p. 141, ll. 17-18). He had smelt it before coming to work. On this night, the smell was a little stronger because of heavy weather (ll. 20-26). Getting nearer to the locker room and gas holder, the smell was stronger (ll. 28-30). In the locker room, there was a smell or odor.

Faasch, working in the No. 3 pump house *to the north* of what was formerly the locker room of plant No. 3 pump house on the *easterly* side of Hook Road, on the night of August 8th, 1927 (Case, p. 224, ll. 24-38), noticed unusual conditions when he arrived at his place of work at 10:15 to 10:20 (Case, p. 237, l. 10; Case, p. 237, ll. 18-26).

McMorrow, proceeding *northerly* (Case, p. 81, ll. 12-13), noticed a very strong smell of gas (Case, p. 82, ll. 4-6). He was on Hook Road driving towards home and had just about reached the building opposite gas holder No. 2 (ll. 28-34). The automobile was in operation and he had no difficulty with the car up to that point. He had been driving continuously (ll. 35-41). After he left the trestle, a very strong odor of gas, which is a sweet odor, turned his stomach and before it had taken any effect on him, it seemed to go to his head and he wanted to say something to Gilroy about taking the car when a big ball of fire came out of the fence and seemed to travel underneath the radiator of the car and the next thing he landed in the road and everything there seemed to go afire (Case, p. 84, ll. 5-15). *This ball of fire came from the right side;*

it seemed to be coming out of the fence. It came directly to the front of the radiator of the car and then disappeared as though the draft of the car had drawn it underneath (Case, p. 84, ll. 15-28). He landed on the right side of the road (Case, p. 85, l. 5) and noticed the roadway was burning (Case, p. 85, ll. 10-12).

> "Q Describe this fire that you saw in the roadway. A Well, it was as a cone, three or four of them burning in the roadway just as a cone.
>
> Q Do you mean just like a spiral cone? A Yes, sir.
>
> Q Were they all together or in different places? A No, seemed to be spread out over the road."

He saw the holder lighten up and go on fire (Case, p. 85, ll. 28-41). He first saw the flames on the holder right at the bottom and could see it go right up from the roadway. After the flame reached the top, the force knocked him down and lifted him off his feet and the holder was just a mass of flames then at the top. It seemed to be at the top of the tank. When the flames went up on the side and reached the tank, the whole thing just blew up and lit up like daylight (Case, p. 86, ll. 4-7).

Peters, describing the accident: "When we got up abreast of the pump house, there was a flash and I found myself out in the road." (Case, p. 103, ll. 20-22). *The flash first appeared on the right side while we were traveling* (ll. 23-26). *It seemed to come from the fence* (ll. 28-29). There is a pump house near the fence there. The pump house is about twelve or fifteen feet in from the fence (ll. 33-37). The flash happened when the car reached the pump house (ll. 40-41). The road was all ablaze (Case, p. 104, l. 12). The blaze went up the side of the container (ll. 13-14), the

gas holder (ll. 17-18) on the left side of the road (l. 19), and when it went up the side of this gas holder, there was an explosion (ll. 20-23). There was no one smoking in the automobile at the time (ll. 37-38). The flame traveling up the side of the gas holder was about a foot wide (Case, p. 104, ll. 40-41); (Case p. 105, ll. 4-5). It was a gas flame (ll. 9-10).

Gilroy testified that as he turned into Hook Road at the trestle railroad, going northerly, he noticed the smell of gas was more intense (Case, p. 174, ll. 13-18). He took his handkerchief from his pocket (ll. 19-20) and attempted to put it over his nose and at the same time was about to talk to McMorrow (l. 24). Approaching the gas holder and the pump house, he noticed unusual conditions (Case, p. 174, ll. 40-41). He testified:

"A Well, I thought there was an unusual glare in one of the windows of the pump house.

Q Did you look over? A I did.

Q What did you see there in the window of the pump house? A It seemed to be a blue flame or similar—something like that. I didn't have very much chance to look at it.

Q How far was your car away from the pump house when you noticed it? A About twenty-five feet.

Q Was McMorrow driving the car? A Yes, sir.

Q Was anything wrong with the operation of the car? A Not to my knowledge.

Q Was there any backfire? A No, sir.

Q Did you have any difficulty with the engine? A No, sir.

Q Was there any smoking by anybody in the car? A No, sir.

Q As you went along and you saw this flame to the right of the road at a window in the pump house, where is this window?

What part of the pump house is it? A The northwest corner."

He testified he didn't "get a chance to do anything." (Case, p. 176, l. 4.) "The flame came out. It seemed to come out of the pump house, one of the windows of the pump house and through the fence" (ll. 6-9). "It struck the front of the car, the front right wheel and under the hood." (ll. 10-12.) It did not come from any part of the left side of the car (ll. 13-14). He got out of the car, but didn't know how—blown out (ll. 24-25). The next thing he knew he was standing in front of the power house (ll. 26-27), blazing all over (ll. 30-31). McMorrow and he were both going into the power house when he heard an awful noise like a sky rocket (Case, p. 177, ll. 32-33). Turning quickly, he saw a flash go up the side of the gas container to the top, then an explosion, a loud puff and flames (Case, p. 177, ll. 37-41). The place was just like on fire all around. The road was full of spirals of fire (Case, p. 178, ll. 15-16). It seemed that the whole road was covered with these spirals of fire (ll. 19-21). The automobile was going along Hook Road in the center of the road; it is quite a narrow road (Case, p. 178, ll. 22-26).

Faasch testified after the accident the whole holder was on fire (Case, p. 235, ll. 29-30). The top of the holder was on fire; the scrubbers were on fire; the pipes leading across the road were on fire and part of the pump house (Case, p. 235, ll. 35-38).

Doherty noticed there was a reflection of fire and an explosion (Case, p. 122, ll. 22-23). The fire was from the direction of the gas holder (ll. 24-25). The lower building collapsed as he was getting out of the door (Case, p. 122, l. 30).

The hose was played first in the pump house (Case, p. 127, ll. 10, 11, 12). Then it was taken around the little gate and played on the holder (ll. 13-14). The fire in the pump house was around the window at the crude pump; that window was all in flames *and the room* (ll. 23-24). There were flames around the valves; outside the window; any oil that was there was burning. The window frame was *burning at the end of the pump.* That pump was running day and night. It was still running (Case, p. 127, ll. 28-40).

On cross examination, he testified that he saw fire *inside the pump house around the window* (Case, p. 131, ll. 9-10), and when he noticed what was burning, he ran in and shut the pumps down, but does not remember going near the crude pump where this window was (ll. 20-28). Speaking about this accident, after it happened, to a Mr. Mendham at the office of the company, he says: "I told him the holder went up and told him the condition of the pump house and the roof coming out and all that" (ll. 39-41, Case, p. 131).

It took about fifteen minutes to get the fire out on the pump house window frame (Case, p. 134, ll. 14-16).

Kushner heard an explosion in the locker room (Case, p. 143, l. 20). He ran outside. (Case, p. 143, ll. 22-23). The tiles came out from the roof of the locker room (ll. 29-30). He saw the gas holder on fire, and the flames on Hook Road (Case, p. 144, ll. 20-30). On cross examination, he testified:

> "The whistle blew and then the explosion noise and piles and skylight glass started coming down.

> Q What did you see first? Did you see a flash of light? A *No, very heavy noise.*" (Case, p. 148, ll. 17-21.)

and when he got out, he saw the flames up at the top of the gas holder (ll. 37-38). The hose was played out on the tank (Case, p. 150, ll. 13-14). He testified further:

> "Q Is that the only place you played the water? A Another place turn it on the pump house on the window, *that crude pump.*
> Q Do you mean the window frame? A There was fire there, *too.*" (Case, p. 150, ll. 15-20.)

Sharkey says he saw the fire at the top of the gas holder, at the windows in the pump house and the frame work (Case, p. 395, ll. 13-14 and 20-23).

Pensa, defendant's witness, saw the fire on the side of the pump house (Case, p. 408, l. 23) but it looked like the window to him (ll. 24-25).

Mahon, defendant's witness, saw a wooden frame on the window in the pump house on fire (Case, p. 489, ll. 25-27). He says:

> "Q Was anything else on fire? A There was a manifold running *between the road and this pump house,* and there was a pool of oil, and water down under this manifold, and that also was afire.
> Q Did you go inside the pump house? A Well, yes, I went in to get the hose and play the water on it to get that fire out.
> Q Which fire? A The fire on this window, and this pool of oil under the manifold, the oil manifold."

The case was properly one of res ipsa loquitur.

Proof of the occurrence of an accident does not raise a presumption of negligence. Where testimony proves the occurrence causing injuries *and discloses circumstances from which the*

negligent conduct of the defendant is a reasonable inference, a case is presented which calls for a defense.

Bahr v. *Lombard Co.,* 53 N. J. Law 233;
Excelsior Elec. Co. v. *Sweet,* 57 N. J. Law 224; 59 N. J. Law 441.

Whenever a thing which produced an injury is shown to have been under the control and management of the defendant and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care.

20 R. C. L. Section 156, at page 187.

Where it is shown that the accident is such that its real cause may be the negligence of defendant, and that whether it is or not, is within the knowledge of the defendant and not within plaintiff's knowledge, plaintiff may give required evidence of negligence *without himself explaining the real cause of the accident,* by proving the circumstances thus raising a presumption that if defendant does not choose to give the explanation, the real cause was negligence on part of defendant.

Newark Elec. Co. v. *Ruddy,* 62 N. J. Law, p. 505.

See also

Sheridan v. *Foley,* 58 N. J. Law, p. 230.

In *Bahr* v. *Lombard, supra,* the Court of Appeals at page 238, said:

"Today, a single plant will comprise a multitude of diverse appliances, the operators of one being, for the most part, totally

> ignorant of all the others; while not one citizen in thousands knows anything in regard to the character and construction of any of the new mechanical processes with which he is met at every turn, still less of the dangers incident to their operation. Under these changed conditions, to compel plaintiffs in every case to ascribe some specific act as negligence, would be to make a recovery for injuries dependent upon the possession of a special technical knowledge, and to grant immunity to the users of dangerous agencies in proportion to the success with which the special element of danger was concealed from the public."

At page 239 *Bahr case, supra,* the Court said there was no proof of any of the circumstances *preceding, attending* or *following the explosion from which its cause or location could be ascertained.*

In the case at bar, *plaintiff showed* as circumstances *preceding the accident* (a) a public highway and its uses; (b) a pump house with pumps in continuous operation pumping crude oil, naphtha and kerosene the night of the accident; (c) the pumps unattended; (d) the pump house filled with gas and also containing vapors; (d) leakage in and about machinery; (e) and excessive gas pressure from a gas compression plant, which existed from time to time; (f) an old gas holder; (g) a leaky condition as evidenced by a strong odor of escaping gas near the holder for a considerable period of time prior and also immediately preceding the accident; (h) an unusually heavy odor of gas during the day and on the night of the accident; (i) gas visibly escaping from the holder; (j) oil on a dirty road. Plaintiff showed, as *attending the accident,* the absence of any other contributing circumstances including lightning; a flame in the pump house; a ball of

fire coming from the right out of the fence in front of the pump house; cones of fire and the roadway aflame; the fire and flame coming in a direct path from the pump house to the gas holder then up the side to a place where, at the top of the holder, there appeared to be an opening, at the time of the fire. The flash and flame appeared in a definite place in the pump house; an explosion in the locker room adjoining the pump house; a wide spread area of gas in the immediate vicinity of the pump house and gas holder. *Attending* and *following the accident, the fire in the pump house; around the window at a crude pump;* a window in flames; flames around valves; the gas holder itself aflame.

Plaintiff produced all the material evidence at his command and therefore met the test required in that respect in the Bahr case, *supra.* All of this presented evidence indicated a failure and/or misoperation in the pump house, gas holder, compression plant and their appurtenances which, individually and collectively, were dangerous instrumentalities owned, maintained and operated by the defendant in close proximity to a public highway. The cause or location of the difficulty could be ascertained by the defendant from the proofs of the plaintiff and the circumstances were such that the negligent conduct of the defendant was a reasonable inference and called for explanation.

Defendant is chargeable with known dangers and probable entailment of an extraordinarily dangerous element. (*Anderson* v. *Atlantic City Gas Company,* 7 N. J. Advance Reports, p. 297, at pp. 298 and 299). The existence of the leak was known and means should have been taken to avoid injury. A leak was likely to occur, and should have been known, because of the

defective condition of the holder and its contents and the existing pressure. The conditions in the pump house were such that there was a known danger which was likely to produce damage, and negligence could therefore be inferred. Where gas escapes when the pressure is unusually heavy, the jury is at liberty to find that the maintenance and operation was negligent. (See *Chew* v. *Commercial Gas Company,* 87 N. J. L. 679, at p. 680).

The plaintiff was not obliged to show by direct evidence the cause of the ignition of the company's property.

In 25 A. L. R., at page 262, the note is:

> "The rule deducible from the reported decisions is that, in view of the highly dangerous character of gas and its tendency to escape, a gas company must use a degree of care to prevent the escape of gas from its pipes proportionate to the danger which it is its duty to avoid, and that if it fails to exercise this degree of care, and injury results therefrom, the company is liable, provided the person suffering the injury, either in person or in property, is free from contributory negligence."

At page 286, the note is:

> "It has been held that where gas leaked from a gas company's pipes through the negligence of the company, and an explosion resulted, injuring persons or property, the person damaged was not bound to prove what was the intervening agency which caused the explosion. Luengene *v.* Consumers' Light, Heat & P. Co. (1912) 86 Kan. 866, 122 Pac. 1032."

And at page 293, of said notes:

> "Direct evidence as to the cause of the ignition of gas is not necessary in order to establish the liability of a gas company for

damages resulting from an explosion of gas. Coffeyville Min. & Gas Co. *v.* Carter (1902) 65 Kan. 565, 70 Pac. 635, 12 Am. Neg. Rep. 594; Bradley *v.* Shreveport Gas, E. L. & P. Co. (1917) 142 La. 49, 76 So. 230; Peterson *v.* Tidewater Power Co. (1922) 183 N. C. 243, 111 S. E. 8. See also McClure *v.* Hoopeston Gas & E. Co. (reported herewith) ante, 250."

Plaintiff's evidence showed an old, leaky and defective gas holder containing a crude gas and excessive pressure from a compression plant. A considerable accumulation of gas was permitted to reach the highway and in turn to gather in large quantities in the pump house, where there was *a dangerous environment for gases and vapors.* (*Sarno* v. *Gulf Refining Co.,* 99 N. J. L. 340).

It is quite certain that there was a fire which started in the pump house where there was a dangerous environment and where there was no one in attendance. The flame came from the pump house and into the road.

The large accumulation of gas in a public highway caused a rapid and dangerous flame to suddenly envelop the plaintiff who was helpless in a passing automobile. By permitting such accumulation of dangerous gas in a public highway defendant created a dangerous menace to the traveling public.

The plaintiff's case presented adequate proof to sustain the *res ipsa loquitur* rule.

In the case of *Mannon* v. *Vesper Lodge of Independent Order of Odd Fellows,* 97 N. J. L. 215, at pages 216, 217 and 218 (Court of Errors and Appeals), the Court said:

"The question for solution, therefore, is whether the explosion of the gas machine

being conceded, as well as the control thereof by defendant or its agents, and the existence of a duty of care on the part of the defendant toward plaintiff, there was evidence for the jury of a breach of that duty. This question, we think must be answered in the affirmative. It is settled in this court that when, through any instrumentality or agency under the management or control of a defendant or his servants, there is an occurrence injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care. This is the rule of *res ipsa loquitur*, as laid down in Mumma *v.* Easton and Amboy Railroad Co., 73 N. J. L. 658, citing numerous cases. So, that even on the conceded facts it would seem that an inference of negligence from this explosion of the gas-making plant was permissible. But there was more in the case. There was evidence that gas had escaped in such quantity as to be smelt for some months before the explosion; that when burners were lighted the flame would often flare up a foot or so and often go out; that noises were heard from time to time; that Stryker, who kept the little store and attended to the management of the gas plant for the defendant, had been told from time to time by several witnesses that the machine was leaking; one witness testified that he had twice warned Stryker that there was danger, especially in improper charging, which he observed, and that 'if he didn't quit using the machine, he and a whole lot of other people would be blown to Halifax.' The testimony for defendant tended to negative the escape of gas, but this merely raised a dispute of fact, and it appeared on defendant's case that the machine had not been inspected for about a year prior to the accident. This evidence, with the conceded facts already stated, plainly made it a jury

question whether due care had been exercised in the management of the machine, and if not exercised, whether the accident resulted from that lack of care. There was no question in the case of plaintiff having held back any material evidence at his command, as in Bahr *v.* Lombard Ayres & Co., 53 *Id.* 233, or Levendusky *v.* Empire Rubber Co., 84 *Id.* 698. Nor was there, as a court question, adequate counterproof, as in McCormack *v.* Standard Oil Co., 60 *Id.* 243.

The testimony for plaintiff made a *prima facie* case for the jury, and on the whole case it remained for the jury to say whether such *prima facie* case was met by the evidence for defendant, the burden of proof remaining throughout on the plaintiff. Hughes *v.* Atlantic City Railroad Co., 85 N. J. L. 212; Niebel *v.* Winslow, 88 *Id.* 191; Fanshawe *v.* Rawlins, 89 *Id.* 344."

The defendant claims (p. 39 of Defendant's Brief) the *res ipsa loquitur* doctrine has no application to cases where plaintiff has alleged specific acts of negligence and on the trial thereof relies on proof of a certain state of facts to establish it. In such cases, defendant claims the plaintiff is not entitled to the benefit of the doctrine of *res ipsa loquitur,* but must rely upon his proof.

I cannot find any authority in law to support this statement. The doctrine of *res ipsa loquitur* is a presumption which flows from a certain state of facts and by that presumption the proof is created. The cases of *Dentz* v. *Pennsylvania Railroad Co.* and *Cook* v. *American Smelting and Refining Co.,* cited, do not support the statements in the brief of the learned counsel.

Plaintiff did not, nor does he now, claim that he established *the precise cause of the accident.* Plaintiff did establish a state of facts from which

the only reasonable inference arose, that the happening was due to the negligence of defendant.

The plaintiff's proofs clearly establish a *prima facie* case of defendant's negligence. What defendant contends, in fact, is that when the plaintiff submits all of the facts within his knowledge and control, in accordance with the established law, that thereupon he must confine himself to a specific cause for the happening of the event, proof of which, supported by attendant circumstances, justifies the application of the maxim of *res ipsa loquitur* and the inference of negligence.

It was never intended that a litigant, who unsuccessfully attempts to prove by direct evidence *the precise cause,* shall estop such litigant *from relying upon the presumption applicable to the proof.* See *Cassidy* v. *Old Colony St. R. Co.,* 184 Mass. 156, 68 N. E. 10.

Where the evidence *shows the precise cause* of an accident, there is no room for the application of the doctrine of *res ipsa loquitur.*

If, at the close of the evidence, the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence and the jury are jusified in relying upon a presumption unless *they are satisfied that the cause has been shown to be inconsistent with it.* See *Cassidy case, supra.*

In *Louisville & S. I. Traction Co.* v. *Worrell* (Appellate Court of Indiana, 1908) 44 Ind. App. 480, 86 N. E. 78, the Court said, p. 82:

> "Where various acts of negligence are independently pleaded, it is only necessary to prove such facts averred as amount to a cause of action * * *. As to the right of appellee to rely upon the rule referred to, Thompson in his work on Negligence

says: 'The plaintiff in an action for personal injuries is not deprived of his right to rely on the doctrine of *res ipsa loquitur* by reason of having averred the particular act of negligence complained of, *where such act is the one which legal inference tends to establish.*' 6 Thompson Negligence, sec. 7643. In the case at bar the particular acts of negligence charged are such as its legal inference tends to establish. An unsuccessful attempt to prove by direct evidence the precise cause of an accident does not estop the injured party from relying upon the presumption applicable to it." (Citing Cassidy Case.)

In *Atkinson* v. *United Railroads of San Francisco,* (Cal. 1925) 71 Cal. A. 34, 234 Pac. 863, the Court said page 867:

> "In adopting a rule for this state, we are of the opinion that it was not intended to declare an absolute and unqualified rule, that is, one so drastic as to deny plaintiffs in all cases, and under all circumstances, the benefit of the doctrine of *res ipsa loquitur, merely because they have voluntarily gone further than the law required them to go, in particularizing the specific acts of negligence upon which they relied for a recovery;* but that it was intended that the more liberal rule should be followed which restricts plaintiff, in his proof and recovery, to the specific act alleged, and relieves the defendant from the burden of exculpating himself from any other acts of negligence than those alleged, but which does not, so far as those particular acts of negligence are concerned, deprive plaintiff of the benefit of the doctrine of *res ipsa loquitur.*"

Plaintiff respectfully submits that there was nothing in the state of facts at the conclusion of the plaintiff's case which explained away the presumption of negligence or raised any quesiton under the circumstances as to the negligent

conduct of the defendant. At the conclusion of the plaintiff's case, there was no doubt as to whether the accident was unavoidable, or whether there were any conditions consistent with such a presumption, or whether the cause of the accident could be attributable to the act of God, or unknown causes as to negligence. See 20 R. C. L., Section 155, at page 185.

There was no probability in the case that arose from the testimony, that the injuries were occasioned by one of two causes, for one of which the defendant might not have been responsible as contended in the defendant's brief (pp. 40-41).

The proofs excluded any idea that there was any mismanagement or carelessness in the operation of the automobile in which the plaintiff was an occupant, or that there was any misconduct or negligence on the part of the plaintiff, or that the fire and explosion and subsequent fire originated anywhere else than in defendant's pump house enclosed and in off the road where negligent operations and conditions existed and where a dangerous environment existed.

There was sufficient evidence that the conditions of the leakage of gas in the gas holder and excessive pressure had existed for such a space of time as would have afforded the defendant sufficient opportunity to make proper inspection and take proper care and it had ample notice of the conditions existing in and about the gas holder, and the gas compression plant and pressure signal system. Defendant knew the men on the shifts were relieved at various periods instead of the specified time prescribed for the ending of one shift and the commencement of another, and therefore, knew or should have known, of the likelihood of the apparatus in the

pump house being left unattended for an appreciative space of time, while such apparatus was continuously in operation, pumping dangerous fluids, such as crude oil, naphtha and kerosene, in a dangerous environment where vapors and combustible gases were accumulating and where such apparatus would be likely to become out of order as it had in the past, by reason of defective packing and other conditions attendant and pertaining to the situation at the pump house including the pressure.

Defendant knew that the conditions which might have produced the accident were prevalent in that it knew that the road itself (a public highway) was fertile field for the instantaneous spread of flame, when such flame ignited large quantities of oil leakages in ditches adjoining the property, in manifolds and pipe lines crossing the public road and in the accumulation of large quantities of illuminating gas fed from a defective gas holder.

Contributory Negligence.

Plaintiff's testimony with reference to contributory negligence clearly showed that the accident happened very suddenly, that he noticed the smell of gas as he turned into Hook Road and he took a handkerchief and attempted to put it over his nose. He *suddenly saw* the glare in the window of the pump house *when the car was about twenty-five feet away* (Case, p. 174). He didn't get a chance to do anything (Case, p. 176). (See also Case, p. 206, ll. 20-40 and Case, p. 207, ll. 1-32.) The question was clearly one of fact under the circumstances.

Negligence was established sufficient to make a *prima facie* case. Contributory negligence, as

an issue was properly submitted to the jury by the charge of the learned trial court (Case, pp. 646-7; Case, p. 648, ll. 4-5).

As to the motion for a direction of the verdict at the conclusion of the entire case, the evidence as to inspection and care of the gas holder, did not overcome the presumption of negligence established on the plaintiff's case.

On the other hand, the defendant's case clearly established that (a) Hook Road was an old road and used as a public thoroughfare; (b) leaky packings; (c) the signal system in the compression plant not working, although there was an excessive gas pressure shortly prior to the accident and defendant's employees negligently and carelessly omitted to notify the gas compression plant; (d) a very old gas holder containing gas with a *highly sulphurous content* and apt to be corrosive; (e) a holder defective and in need of repair six months before the accident and then patched; (f) four days before the accident, a *special inspection because of the kind of gas being pumped*; (g) a big hole at the top of the holder, where the fire was and the plates indented; (h) oil between the road and the pump house; oil in the ditches; (i) terrific pressure when the fire broke out; (j) no lightning; and (k) fire in the pump house.

Defendant produced four employees regarding inspections and observations whose testimony apparently did not outweigh the *prima facie* negligence established. Testimony of these inspections and observations showed a weak and defective holder six months before, and a dangerous content in the holder four days before the accident.

The learned trial court properly submitted the issues of negligence and contributory negligence. The question as to whether or not the defendant's testimony out-weighed the presumption of the plaintiff's case, was properly submitted to the jury, and the motion for a direction was properly denied.

II.

Defendant Is Liable at Common Law.

The plaintiff did not receive injuries from an accident arising out of and in the course of employment.

The New Jersey Workmen's Compensation Statute applies only when the accident arises (a) out of *and* (b) in the course of employment.

Bryant v. *Fissell,* 84 N. J. Law, 72;
Steers v. *Dunnewald,* 85 N. J. Law, 499.

The bounds of the Workmen's Compensation Act must be fixed by concrete cases as they arise.

O'Mara v. *Mirch,* 7 N. J. Adv. Rep., p. 1099.

It is a remedial law of prime import and should be liberally and broadly construed.

O'Mara case, supra, at page 1101.

The operation of the law should not be stretched by any extravagant principle of inclusion.

28 Ruling Case Law, Section 50, pp. 755-756.

If the injury does not fall within the Act, the Common law remedy is not affected by it.

Smith v. *International Company,* 98 N. J. L. 574 (E. & A.).

The accident did not happen *in the course* of employment.

Plaintiff finished his work and was on his way home.

He was an extra pump man at Kimble's pump house, (Case, p. 167, ll. 25-30) paid by the hour (l. 35) and if he did not work, was not paid (Case, p. 168, l. 1). His shift on August 8, 1927, was eight hours, from three to eleven (Case, p. 168, ll. 30-40). The men are allowed about fifteen minutes leeway in order to get to buses (Case, p. 168, ll. 30-40). That day, he started about a quarter of three (Case, p. 169, ll. 1-10) and finished about a quarter of eleven (ll. 1-10).

Chester F. Smith, manager of the Bayonne Works, testified, the men in the Kimble pump house are paid by the hour and their shift is from three to eleven, eleven to seven and seven to three, and they are working eight hours (Case, p. 424, ll. 20-30). He said, "We have always recognized that the shift may have the privilege of relieving one another a few minutes before regular quitting time." (Case, p. 425, ll. 10-13.) A man was there to relieve Gilroy at a quarter of eleven (Case, p. 169, ll. 13-14). When the relief man came, Gilroy started for home (Case, p. 169, l. 18). He changed his clothes (Case, p. 169, l. 24) and placed them in the locker (l. 25). He was then finished with his work for the shift (l. 30). He went out of the building with McMorrow, Peters and Roe who had been on the same shift and who had also changed their clothes. They all left the building together (ll. 3-40).

To get out of the building, he passed through an entrance that leads *out of the plant* (Case, p. 170, ll. 10-20). The gate there is most always

closed (l. 19) and there are a couple of watchmen there. By passing the watchmen you get to the railroad tracks and then have to walk fifty to seventy-five feet to get to Hook Road (Case, p. 170, l. 30).

The McMorrow car was about four or five city blocks from the pump house (Case, p. 171, l. 3).

When Gilroy went into the automobile, he had nothing further to do that day for the company (Case, p. 172, ll. 20-25). He was not doing any work at that time for the company (ll. 26 and 27). He was going home (l. 28).

> "An accident arises in the course of the employment if it occurs while the employee is doing what a man so employed may reasonably do *within a time during which he is employed and at a place* where he may reasonably be during that time."
> *Bryant case, supra,* at page 77.

and

> *McNicol's case,* 215 Mass. 497, L. R. A. 1916, A, 306, 102 N. E. 697.
> "An injury is received *'in the course of'* employment when it comes while the workman is *doing the duty* which he is employed to perform."

In *James Colucci* v. *Edison Portland Cement Co.,* 94 N. J. Law, 542, at page 545, the Court said:

> "Did the accident arise *in the course* of Leo's employment? Of course, if he deliberately *stopped work* and recorded himself as leaving at one thirty-four A. M. as shown by the time clock, *and departed about his own affairs,* whether to go to sleep in his own bed at home *or on a pile of brick in the defendant's dryer-house,* or to do anything else he chose, there could be no recovery, for, obviously, the accident did not arise *in the course of the employment.*"

The accident happened after work ended, about three-fourths of a mile away from the place Gilroy was employed, on a public road, in a private conveyance.

In *Longhurst* v. *John Stewart & Son (1916),* 85 L. J. K. B. N. S. (Eng.) 1328, (L. R. A. 1917 D. pp. 119-120), Lord Cozens-Hardy, *M. R.* said:

> "I think two propositions are established by the authorities: (a) the employment of a workman does not begin until he has left a public road and it does not end until he has reached a public road; while on the road, he is exercising his right as a member of the public, and not any right arising out of his contract of employment; (b) when the workman is on the employer's land, he would be a trespasser but for the contract of employment; and he is within the protection of the Act although the accident may happen when he is not actually at work, but is only going to or returnnig from his work."

In *Comstock, et al.* v. *Bivens, et al.,* Colorado 1925, 239 Pacific Rep. 869, the Court held that in the absence of special circumstances bringing the accident within the scope of the employment, no compensation is recoverable by an employee who is injured while on his way to or from work.

Rourke's Case, Mass. 1921, 129 N. E. 603, at page 604, the Court held the day's work of the claimant came to an end when he dropped his tools, rang in his time, left the place of his employment and entered upon the public highway. While not conclusive in the determination of the incidents of the employment, it is worthy of consideration that thereafter the employer, under the contract of employment, had no legal right to command the services of the claimant and he was under no duty of obedience thereto.

Minarcsik v. *Blank,* Supreme Court (N. J.) 1926, 102 N. J. L. 231, 234.

"* * * the boy had *finished his work* of delivering milk some little time before the accident and was on his way home; that he had stopped for a few minutes to engage in a game of snowball with some other boys on the street; that, *after finishing* the game, *he resumed his way home;* and that it was then that the accident happened. Manifestly, therefore, the accident did not arise out of and in the course of his employment."

Timothy Mack, petitioner v. *John E. Laird, respondent,* 6 N. J. Misc. Reports, pages 887 and 888: New Jersey Department of Labor, Workmen's Compensation Bureau.

Mack was employed as a grinder or cider presser at a plant located at Scobeyville, Monmouth County, New Jersey.

Around six P. M., about the usual quitting time, he was told by employer to return and work overtime. He got into his own automobile and started driving along the public highway leading from Scobeyville to his home at Colt's Neck, Monmouth County and had proceeded along the highway a distance of at least two miles when his automobile collided with an automobile truck operated in an opposite direction by a person having no connection with his employer.

It was held that the injuries so sustained did not arise out of and *in the course of his employment.*

Christine O'Brien, Administratrix of the Estate of John O'Brien, deceased, appellant, v. *Central Railroad Company of New Jersey, respondent,* 7 New Jersey Advance Reports, page 680, at page 682:

"* * * the decedent was not at the time of his injury engaged in his employment,

whether that was interstate or intrastate. West Side Station is a considerable distance from Communipaw and is not a part of defendant's yards where the decedent was employed. * * * The decedent had left the premises of his employment and was on a public highway three hours before his injury''

Gruber v. *Mercy,* N. J. Supreme Court, 7 N. J. Misc. Rep. 241 at 242.

''The plaintiff was going to work. She had been employed by the defendant but four days, and without prior arrangement of any kind, or without any understanding arising out of the terms of her employment, the latter invited her and her companion, a man named Potoker, to get in his car, saying 'he would take them down.' In the course of the trip, an accident happened, and plaintiff was injured. The act of the employer was simply one of courtesy, wholly disconnected from the relation of master and servant. The learned trial judge rightly held that the injury did not 'arise out of and *in the course of'* the plaintiff's employment.''

In *Reed* v. *Bliss & Van Auken Lumber Co., et al.,* Mich. 1923, 196 N. W. 420, the Court held that where an employee was paid off Saturday noon, and owed no further duty to his employer until the next Monday, and got into and drove from the premises in an automobile of another employee, and arriving in the street, was killed by a railroad engine, over which the employer had no control, the accident did not arise out of or *in the course of the employment, within the Workmen's Compensation Law.*

At page 421, the Court held:

''An examination to the authorities is convincing that it is a general rule that an accident does not arise out of and in the course of the employment, when it occurs while the

employee is on his way to work, before he has reached the premises of the employer, or when he is on his way home and has left the employer's premises. Mr. Bradbury, with the citation of numerous authorities (Bradbury on Workmen's Comp. 3rd Ed. p. 468), thus states the rule: 'Ordinarily, when an employee is injured while traveling to or from his place of work on his employer's premises, and the employee is not paid for the time consumed in going and coming, the means of conveyance is not furnished by the employer, and the employee has departed from or has not yet reached the employer's premises, the injury does not arise out of the employment.'

"And in Ruegg on Employer's Liability and Workmen's Compensation, 337, it is said:

" 'In one sense, it may be said to be part of his duty to get to such place, but if his method of traveling is not controlled by the employer, if he is a free agent, it is thought this qualified duty is not sufficient to raise, at the time, the relation of employer and workman.

" 'The same may be said with respect to the time occupied in returning home from work, and of intervals allowed for meals when spent off the employer's premises.'

"In Caton *v.* Summerlee & Mossend Iron & Steel Co., Ltd., 39 Scot. L. R. 762, in denying liability it was said by the Lord Justice-Clerk:

" 'The deceased at the time of the accident had ceased his work, had left the place where he did it, and was on his way home. He had at the time no duty to fulfill to his master, and his master had no duty to fulfill towards him. The relation of master and servant had ended for the day; he having fulfilled his work and left the place where his work was being done.'

"And in Bell *v.* Armstrong, Whitworth & Co., Ltd., 12 B. W. C. C. 138, it was said by the Master of the Rolls:

" 'It is said here that the employers ought to be liable. The answer is that an accident of that sort does not arise out of and in the course of the employment. It is conceded, and it is well established by authority, that if the employee met with a similar accident in going to the place of business in the morning, or at any time in returning home from the place of business, that would be outside of the act, *and no authority whatever has been produced to establish that an employee is entitled to compensation in respect of an accident occurring in the public street when the employee was not there on the employer's business, and when he was not there pursuant to any duty which he owed to the employer.'*

"In Devoe *v.* N. Y. State Rys., 218 N. Y. 318, 113 N. E. 256, L. R. A. 1917-A, 250, it was said:

" 'An employee is not insured generally against accident while working for the street railway corporation. At home or on the street he may meet with accident not arising out of or in the course of his employment. The act does not cover such cases. The employee gets up in the morning, dresses himself, and goes to work because of his employment, yet if he meets with an accident before coming to the employer's premises or his place of work that is not a risk of his occupation but of life generally.'

"This court has recognized this general rule." Citing Hills *v.* Blair, 182 Mich. 20, 148 N. W. 243; Guastelo *v.* Michigan Central R. R. Co., 194 Mich. 382, 160 N. W. 484 L. R. A. 1917 D, 69; Lipinski *v.* Sutton Sales Co., 220 Mich. 647, 190 N. W. 705 * * *

"It is a matter of common knowledge that in our industrial centers thousands of workmen daily leave the plants where they are employed and emerge into the street with its

dangers from street cars, railroad trains, automobiles, trucks and other hazards."

In the matter of *Lampert* v. *Siemons*, 235 N. Y. 311, at page 313:

"Had there been no strike, Lampert's employment would have ended when he left the factory at 134 W. 39th street. His work was indoor work as foreman of the operating room. There was no work for Lampert to do for his employer after he left the factory at night and before he reached there in the morning. Therefore, all the authorities agree that while going to and from his work, Lampert if injured did not come under the Workmen's Compensation Law, as such injury would not have arisen in the course of his employment. (Tallon *v.* Interborough Rapid Transit Co., 232 N. Y. 410; Matter of Schultz *v.* Champion Welding & Mfg. Co., 230 N. Y. 309; Matter of Kowalek *v.* N. Y. Consolidated Railroad Co., 229 N. Y. 489; Matter of Mcinerney *v.* B. & S. R. R. Corp., 225 N. Y. 130; Walters *v.* Staveley Coal & Iron Co., L. T. D., 4 B. W. C. C. 303, House of Lords, 1911.)"

The Accident Happened on a Public Road.

The status and use of Hook Road was discussed *supra.*

Whitney v. *Hazard Lead Works, et al.*, Supreme Court of Connecticut, 136 Atlantic Reporter, page 105, at page 106:

"The employees of a business concern cannot, as a general rule, be regarded as *in the course of their employment* while going to or returning from the place of their employment. We say this is the ordinary rule—'because the ordinary contract of employment of a workman to render service at a designated place does not cover his movements outside of that place. *He uses the highways* as the public uses them, because he must, and not because his employer by the

terms or implications of his contract of employment has the right to require him to use them at the employer's will.' Lake *v.* Bridgeport, 102 Conn. 337, 343; 128 A. 782, 784."

Palko v. *Taylor-McCoy Coal & Coke Co., et al.,* Supreme Court of Pa., 137 Atlantic Reporter, page 625, at page 626:

"Deceased was instructed on the day of the accident, to perform this extra work, and, after his regular work was finished, he left for home to get something to eat, intending to return. *In going home, he used the path customarily taken by the employees, which ran through the property of defendant, the land of another coal company, and over a bridge. While passing through the adjacent property,* he was struck by a dinkey engine and instantly killed. * * *"

At page 627:

"Nor did the instructions constitute a new engagement dating from the hour when the orders were given; no pay was to be received for his time in the interval. *The working hours of his regular employment had closed. No further contractual relation existed as to it, and the injury occurred off the premises.* The new employment would not commence until his return, and wages would be paid for the time he actually worked thereafter. To carry appellant's claim to its utmost, the employment would continue from the moment orders were given until he returned, though he might not be needed for some hours, during which time the employer would be subjected to liability. This, as indicated above, is not the rule.

"The court below was correct in holding that there was no employment in the interval of time between the ending of his regular working hours and the beginning of his new work, *during which time he was off the employer's premises.*"

Ferreri's Case, Supreme Judicial Court of Maine, 138 Atlantic Reporter, page 561, at page 562:

> "(2) Petitioner, then, was injured while *on a public highway,* on his way to his place of work. His injury was not received in the course of his employment. Roberts' Case. 124 Me. 129; 126 A. 573."

In *Williams* v. *Smith,* 193, 108 L. T. N. S. (Eng.) 200; 6 B. W. C. C. 102, the Court held that a workman did not suffer injury by accident arising out of or in the course of his employment, where he was injured on his way home from work, *along a public footpath, although the path had been dedicated to the public by the employers over whose land it ran.* (Cited in L. R. A. 1916 A. page 60.)

In *Edwards* v. *Wingham Agricultural Implement Co.,* 1913, 3 K. B. (Eng.) 596, Court held that compensation is not recoverable where a workman had concluded his work, and was injured while riding to his home on a bicycle, along the main road. (Cited in L. R. A. 1916 A, page 61.)

In *Bell's Case* (Supreme Judicial Court of Mass. 1921) 130 N. E. 67, at page 68, the Court said:

> "Accidents which happen to an employee on his way home from work, but not on the employer's premises, as a rule are not regarded as arising in the course of his employment. Ordinarily, he has then ceased to be engaged in his employer's business, and is not doing anything he was employed to do. Donahue's Case, 226 Mass. 595; 116 N. E. 226; L. R. A. 1918 A. 215; Rourke's Case, 237 Mass.; 129 N. E. 603. If he is injured on the public street, he does not come within the benefit of the act, unless his work is of a kind which is pursued on the highway

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> and he is engaged at the time of the accident in the actual work for which is employed, and not merely using the highway in the exercise of the public right of passage. Keaney's Case, 232 Mass. 532; 122 N. E. 739."

In *Clark* v. *Voorhees*, 231 N. Y. 14, N. Y. Ct. of Appeals, 1921, the employee was employed as a salesman of the employer, a wholesale dealer in fruit. On the day of the accident, employee left the employer's place of business for the purpose of going to a restaurant between four and five hundred feet away, to get a cup of coffee, and while on a public street going to such restaurant, he was struck with an automobile and died from the injuries sustained. The Court held that the death did not arise out of and in the course of employment. The Court held at page 17:

> "When the decedent left the employer's place of business for the purpose stated and while walking in the street, he was not doing anything which he was employed to do or anything incident to or in connection with the employment. It was no more a part of his employment than it would have been had he started for his own home for the purpose of getting his breakfast. The business of the employer ended when he got into the street."

Orange Gardner, Employee. Employers Liability Assurance Corporation, Limited, Appt. (Mass. Supreme Judicial Court, 1924), 32 A. L. R., page 804, at page 806:

> "* * * *At the time of the accident in the case at bar the employee was not using the street as a motorman in the performance of his duties, but as one of the public.* Donahue's Case, 226 Mass. 595, L. R. A. 1918 A. 215; 116 N. E. 226; 14 N. C. C. A. 491. Cook's Case, 243 Mass. 572; 29 A. L. R. 114; 137 N. E. 733, rests upon its peculiar facts

and is distinguishable. In crossing the street the motorman was exposed to the same danger of being struck by an automobile or otherwise injured that pedestrians generally are subjected to.

"Keaney's Case, 232 Mass. 532; 122 N. E. 739, is not a decision in favor of the employee's contention. In that case *a teamster, while driving* upon a highway, stopped his horses and got off his wagon for the purpose of picking up some papers carried in his hat, which had blown off, and was struck and fatally injured by a passing automobile. It was held that *his employment while on the street exposed him to the particular injury he received.*

"If the employee in the present case in crossing the street had slipped and stumbled and thereby received an injury, it is plain that the risk was no greater than that of an unemployed person under the same conditions.

"It follows that the employee, when injured, was acting wholly outside of his contract of employment. The danger from which he suffered was not due to exposure to a special risk, but was one to which an ordinary member of the public was equally exposed. The decree must be reversed and decree entered for the insurer."

The plaintiff was in a private conveyance.

The automobile was a Ford car and belonged to Hugh Thomas McMorrow and all the men got into the car to go home (Case, p. 78, ll. 10-20). McMorrow was driving (Case, p. 78, l. 25).

Kinslow's Case, Supreme Judicial Court of Maine, 136 Atlantic Reporter, page 724:

"In Robert's case, 124 Me. 129; 126 A. 573, the court held as an established rule that injuries received by an employee in going to and from his work on a public street or in a public conveyance are not injuries received

in the course of his employment, *unless the means of conveyance is furnished by the employer.*

"This rule seems to apply plainly to the instant case, *for the means of conveyance by which the petitioner was riding was not one furnished by the employer,* but one furnished by himself when going to and from his work on the public street.

"The rule just stated as found in Robert's Case is in harmony with the great weight of authority in this country; and the mandate must therefore be: Appeal sustained."

Diaz v. *Warren Bros. Co.,* (Supreme Court of Errors of Conn. 1920) 111 Atl. Rep. 206:

"Injuries to a workman did not arise out of and in the course of his employment within the Workmen's Compensation Act, where they were received after he had quit work for the day when he attempted to board a motor truck to return home the truck which had been used in the work being also on its homeward journey, but not then under the control of the employer, who rented it by the day and was under no obligation to furnish transportation."

In *Orsinie* v. *Torrence, et al.,* 113 Atl. 924, at page 925:

"This state of facts does not bring the case within the principles of Swanson *v.* Lathan & Crane. In that case furnishing of transportation by the employer was a part of the contract of employment, and the injury rose out of a hazard of the transportation which he furnished. *In this case the employer did not furnish transportation.* He did no more than to pay the wages which the rules of the labor union required him to pay. The fact that because of the location of the work this wage included a sum measured by the cost of transportation by trolley to and from the work is of no more significance than if it had included a sum measured by the additional cost of food at

that place. The claimant was left free to buy his own transportation or not. As soon as he left the employer's premises, the contract of employment ceased to operate directly or indirectly either as controlling his movements *or as affecting the hazards to which he was subjected.*''

In the case of *Dominguez* v. *Pendols,* California District Court of Appeal First District, 46 Cal. App. 220; 188 Pac. 1025, the Court said, page 1026:

> ''The logical difference between a situation where the employee is proceeding to work in a conveyance or by a means used by the general public, and where he is proceeding to work by means of an instrumentality furnished to him as an employee, by his employer, is indicated in one of the English cases discussed in the Ocean Accident case, *supra.* Leach *v.* Oakley Street & Co., 4 B. W. C. C. 91. In the quotations from this English case, which is inserted in the Ocean Accident decision, it is indicated that in order to recover under the Workmen's Compensation Act, it is necessary for the employee to have suffered his injury not because of a danger to which he was exposed as a member of the general public, but by reason of a danger to which he was exposed as an employee in his particular employment. And it seems to us that this is not only the logical dividing line, but it is the dividing line contemplated by the very purposes of the compensation laws in their effort to place upon an industry the burden of injuries directly due to the hazard incidental to the industry. In the present case, if deceased had been riding upon a public conveyance, although he was on his way to his work, he would have been subject to the same dangers as any other member of the general public, and if he suffered an accident, it would be as a member of the general public and due to a risk which he, in common with other members of the public, ran.'' * * *

The accident did not arise *out of* the employment according to *Bryant case, supra.*

> An accident arises out of the employment when it is something *the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it.* A risk is incidental to the employment when it belongs to or is connected with *what a workman has to do in fulfilling* his contract of service. A risk may be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the employment *owing to the special nature of the employment.*

(84 N. J. L. at p. 76):

> "As was said by Mr. Lord Justice Buckley in Fitzgerald *v.* Clarke & Son (1908) 2 K. B. 796, 'The words "out of" point, I think, to the origin and cause of the accident; the words "in the course of" to the time, place and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words *"out of" involves,* I think, *the idea that the accident is in some sense due to the employment.* It must be an accident resulting from a risk reasonably incident to the employment.' "

The case cites the English case of *Armitage* v. *Lancashire & Yorkshire Railroad Co.,* 1902 (2 A. B. 178) where the accident *was not one of the risks to which it was within the scope of the employment of the workman to submit.* Recovery was denied because the act of a third party was not a risk reasonably contemplated by the em-

ployee in undertaking the employment. Gilroy's accident happened by reason of something dangerous that originated on defendant's premises *off the road* and a considerable distance from where plaintiff was employed.

The pump house and locker room were situated behind a concrete wall and an iron fence. The gas holders were likewise on defendant's property, within an enclosure.

Plaintiff's employment in no way involved his assumption of any risks incidental to the operation of the pump house compression plant and holders.

There was nothing in what he had to do in fulfilling his contract of employment that involved on his part a knowledge of pending perils as incidents of employment in respect to the operation and maintenance of the pump house compression plant and gas holders.

> "It 'arises out of' the employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. If the injury can be seen * * * to have been contemplated by a reasonable person *familiar with the whole situation* * * * then it arises 'out of' the employment * * * The causative danger *must be peculiar to the work,* and not common to the neighborhood. Ferreri's Case (Me.) 138 Atl. 561 at p. 562. * * * It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."
>
> *McNicol Case, supra.*

It is to be noted that in McNicol's case (which is the leading case in Massachusetts), the Court

views the accident as of the time *after the event* has occurred to find whether its origin is in a risk connected with the employment, but in New Jersey, the accident must arise from a risk which might have been contemplated by a reasonable person, *when entering the employment as incidental* to it, and *then* the act applies.

An employee, when he becomes bound by the limitation of the act agrees to come within its scope only when the risks are such that may have been contemplated to have been reasonably incident to the employment at the time he began the same, and not to include risks of danger which were not within that contemplation.

To include an injured employee within the scope and operation of the Compensation Act "the injury to the employee shall have been foreseen as a result of his engaging in the employment." 28 R. C. L., page 797.

In *Schmoll* v. *Weisbrod & Hess Brewing Co.*, Sup. Ct. 1916, 89 N. J. Law, p. 150, it was held that a brewing company was not liable to pay compensation for the death of one of their collectors, caused by an assault by an unknown person which he was in the locality where lawless characters congregated and assaults and murders occurred with greater frequency than in any other part of the city, where there was no evidence at all to show why the assault was committed, and it might have been the result of an accident or of revenge from some fancied personal wrong. The Court held at page 152 that:

> "the *employer* ought not be chargeable when any risk which the place where the work was to be performed entailed by reason of some peculiar and ordinary situation existing there, unless it is made to further appear that he was aware of such added risk."

Likewise, the converse should be true. The *employee* should not be compelled to submit to the Workmen's Compensation Act by any extraordinary situation and added risk of danger of which he knew nothing.

In the opinion in the *Schmoll case,* the Court apparently makes the liability of the employer depend upon his knowledge of the danger and seems to imply that there could be no liability unless the employer could reasonably have anticipated the danger. Of course, the applicant cannot recover unless he shows that the accident arose out of the employment and in the absence of any evidence at all to show this fact, the application was properly dismissed. Anticipation may be considered an element of negligence, but negligence is not the foundation of the Workmen's Compensation Act. Therefore, when the Court says that the employer must reasonably anticipate the danger, it must be taken to mean that the employer contemplated the danger at the time the employment began.

The contract of the employee with the employer is that he will come within the scope of the Act whenever injury results from an accident that is reasonably incidental to the employment. A concealed danger and menace known to the employer and of which the employee is ignorant cannot be said to be a risk reasonably incidental to the employment.

In *Reeves* v. *Dady Corporation,* Conn. 1921, 113 Atl. 162, at page 166, the Court said that:

> "Employees who engage in fighting during working time are in the course of their employment, but if injury occurs, it does not arise out of the employment. This is a clear departure from their work to serve exclusively their own ends. *The risk was not a risk of the employment.*"

The rights and duties are reciprocal.

Gilroy contracted to come within the Act as to those risks which were naturally incidental to the employment. His injury was not due to a danger naturally incident to such employment.

Under the common law cases of master and servant, a risk that was considered as reasonably incidental to employment was such risk of danger obvious to the servant, or discoverable by the exercise of ordinary care on the part of the servant.

See *Regan* v. *Palo,* 62 N. J. L. 30.

Johnson v. *Devoe Snuff Co.,* 62 *Id.* 417, at p. 423.

Dillinberger v. *Weingarten,* 64 *Id.* 292, at p. 298.

The theory of such law rested upon the fact that the wages of the servant had been fixed in view of the hazard.

Burns v. *Del. & Atl. Tel. & Tel. Co.,* 70 *Id.* 745, at p. 752.

While Gilroy became obligated by the Act to accept compensation for any injuries that arose from risks reasonably incident to the employment and of which he might have contemplated upon entering the said employment, he did not assume to become bound by the Act for risks not *incident thereto* at a considerable distance from the place he worked. The *employer* is not liable for every accident that occurs on his premises as was said in *Washburn Case, Me. 1924, 123 Atl. 180,* at page 181:

> "The statute cannot be legitimately construed in the light of providing that every accident that may happen to the employee even while he is on the premises of his employer shall be of the essence. Each case is to be decided upon the particular facts

> and there must not be too clamorous insistence in pressing any claim beyond safe limits * * *''

and in *White* v. *Eastern Manufacturing Company,* 1921 Me., 112 Atl. 841 at page 843, the Court held that the Compensation Act

> "cannot be justly or legally extended to the degree of making the employer an insurer of his workmen against all misfortunes, however received, while they happen to be upon his premises. Such was not the intent of the statute.''

So too, does the *employee* not obligate himself to become bound by the Act for every injury he received in the course of the employment. He reserves unto himself the right to sue by a common law action on negligence for those injuries that *arise out of extraordinary risks not usually incident to the employment.* For as was said in the Bryant case, *supra,* the Compensation Act at its best only gives partial compensation.

And while a liberal construction is to be given to the Act, the Court's language in *Menke* v. *Hauber,* Kan. 160 Pac. 1017, should be noted:

> "This court has always recognized the obligation resting upon it to give to the compensation law a liberal construction in order to carry into effect the provisions of the legislature but *we have no right to extend its construction to cover enterprises and industries not within the scope and intent of the law.''*

Gilroy's duties must be ascertained from his contract of employment. He was employed at Kimbel's pump house, a considerable distance from gas holders Nos. 1 and 2.

In *Murch* v. *Thomas Wilson,* Mass., 1897, 47 N. E. 111, the Court held:

> "The parties entering into a contract for service by one of them make their arrange-

> ments *in reference to the subject matter to which the contract relates,* and the rights and liabilities depend on the contract, as applied to the subject with which they are dealing. The employee impliedly agrees to assume all the obvious risks of the business in which he contracts to work * * *"

The accident occurred outside of the zone of plaintiff's employment.

Gilroy worked at Kimbel's pump house. The McMorrow automobile was at the opposite end of the main gate, where there is another gate before you get to the railroad track and Hook Road (Case, p. 170, ll. 28-41).

In order to reach McMorrow's car, Gilroy had to go about four or five city blocks from the pump house (Case, p. 171, ll. 4-6). He then had to cross the railroad track and go fifty to seventy-five feet before reaching Hook Road (Case, p. 170, ll. 20-30).

Then after reaching Hook Road, he would have to travel past the plants of the Vacuum Oil Company, the Asiatic Oil Company, the Oxford Copper Works, and then a considerable distance on Hook Road until he reached the plant of the Chemical Works, and on that road for a considerable distance, and then to the lands of the Borax Works and, finally, after travelling about three-quarters of a mile, he would reach that section of Hook Road to which the gas holders were adjacent. (See plaintiff's Exhibit 1, p. 697; Case, p. 499, ll. 20-30; Case, p. 502, ll. 10-30).

Gas holders Nos. 1 and 2 on Hook Road (where accident occurred) are about three-quarters of a mile from where he was working (Case, p. 172, ll. 28-33).

In *Caton* v. *Summerlee & M. I. & S. Co.,* 39 Scotch L. R. 762, it was held that injury did not arise out of and in the course of employment of a laborer who, at the conclusion of his day's work, was knocked down and killed by a passing engine *230* yards from where he was working, while walking home along *a private railway track belonging to his employer, which many of the men employed at the same place were in the habit of using in going to and from their work.* The Court there said:

> "The deceased at the time of the accident had ceased his work, had left the place where he did it and was on his way home. He had at the time no duty to fulfill to his master, and his master had no duty to fulfill towards him. The relation of master and servant had ended for the day, he having fulfilled his work and left the place where his work was being done."

In *Hills* v. *Blair,* 148 N. W. 243, at page 246, where compensation was denied the Court said:

> "The protection of the law does not extend, except by special contract, beyond the locality or vicinity of the place of labor."

~~Ruegg on Employers' Liability, etc., page 377:~~

> * * * "it is shown here that deceased left the locality and sphere of his employment at a time when work was suspended, that he was doing nothing within the scope of his employment, was not under the direction or control of his employer and went away for purposes of his own, going where and as he pleased. *Though he was travelling on his employer's premises* when injured, he was then *950 feet away* from where any duty in the line of his employment called him and had selected his own route. But a short distance from where he left the car house, he could have turned by a public street onto a wagon road, along which he could have gone to his home, and a safe foot-path was also

> available to him along the right of way. The custom of employees to travel along the railroad in going to and from their work, when it is shown that there was another and safe way which they might have taken, is not of controlling importance. *At the same distance deceased was injured, from the place of employment, they would be at most but mere licensees.* * * *"

As to cases cited by defendant.

Terlecki v. *Straus,* (defendant's brief, p. 16).

Plaintiff was on the premises of the employer and had not yet completed preparations for leaving the work at which she had been employed. The Court there says that it was reasonably necessary that the petitioner comb her hair and "remove the particles of wool *before leaving the factory.*"

In the case at bar, Gilroy had already changed his clothes, placed them in the locker and had *left the place where he was employed.*

Zabriskie v. *Erie Railroad Co.* (defendant's brief, p. 17).

Plaintiff was injured *during the hours of his employment on the employer's premises* and in connection with a practise that was reasonably within the contemplation of the employment. As the learned Court said at page 159:

> "It was within the contemplation of both parties to the employment, that such an exigency was an incident which, ex necessitate, inhered in the terms of the contract, and for the damages arising out of which the defendant must respond, within the contemplation of the statute."

Bolos v. *Trenton Fire Clay, etc. Co.* (defendant's brief, p. 17).

The accident happened during the time in which the plaintiff was employed and at a place where he reasonably could have been and had been during that time. The act of getting to the place where his truck was located was on *incident of employment* and Bolos was injured in the same manner as if he were on a public highway *and performing a duty in connection with his employment.*

Gilroy was not injured during the hours of his employment and the injuries were not suffered while he was fulfilling any duties of his employment.

Rachels v. *Pepoon* (defendant's brief, p. 18).

Rachels was injured *within the hours that he* necessarily would be employed in going over the route he usually travelled if he was using one of the trucks furnished by the truck owner. When he was injured he was *within those hours on the route* but in a hired automobile which he drove himself. The learned Court said:

> "*It did not happen while* he was about his *own business and personal* affairs, *but after the conclusion thereof.* Under the facts in this case we think his service began when he left Passaic and proceeded toward Hoboken. While his actual work began in the latter place, yet to reach there was *an act within and necessary in his service toward his employer.* Such would seem to have been the practice and custom on all other occasions *when his means of transportation was one of the trucks in his employer's service.*"
> at pages 684, 685, 135 Atl.

Gilroy was not injured within the hours of employment but after he was through and while he was about *his own business and personal affairs.*

Gane v. *Norton Hill Colliery Co.* (defendant's brief, p. 19).

The injuries happened while *on the premises of the employer.* The employee was injured in crossing certain tracks on which coal tracks ran and the employer had rights in these tracks. The accident arose out of a peril which existed in a place where the plaintiff reasonably had to anticipate *an obvious peril when he entered the employment.*

In the *Gane case, supra,* the Court said in part:

> "I must not be taken to lend any colour to the suggestion that a workman is entitled to the protection of the Act *during the whole period necessary* to get to his own house from the factory where he is employed."
> (1909) 2 K. B. 539.

The Court further said at page 548:

> "He was quitting his employment, *still upon the premises of the employer* (although of course that is in itself by no means decisive), *at a place under the employer's control, and at a place where he was authorized to be by the employment for the purpose of leaving the premises,* as he was obliged to leave, when his day's work was over."

DeConstantin v. *Public Service Commission* (defendant's brief, p. 20).

The learned Court said, in addition to the quotation in defendant's brief:

> "But, on the contrary, if the employee at the time of the injury has gone beyond the premises of the employer, or has not reached them, and has chosen his own place *or mode of travel, the injury does not arise* out of his

employment nor is it within the scope thereof."

Gilroy went beyond the premises of the employer. He had chosen his own mode of travel, namely, the automobile of a fellow employee.

Merlino v. *Connecticut Quarries Co.* (defendant's brief, p. 25).

The employee lingered within a *danger zone* as an incident to his term of employment. It was concededly a *danger zone, created by the business of the employment* and the employer cooperated in the maintenance of a commissary kept open at quitting time *within the danger zone* and in effect invited employees to stop there on their way home. It was expected that when a whistle was blown an employee *within the danger zone* would seek shelter when blasts were fired in the neighborhood of the commissary. The Court held that *the inducement to linger within the danger zone* was fairly within an agreed incidental term of the *contract of employment.*

Gilroy was not within any recognized danger zone so as to create an abnormal exposure to a peril that was affixed to the contract of employment. The traveling public passed over Hook Road to and fro without any warning that a *danger zone* existed.

Gilroy was not injured in what is recognized as a street accident where the employment requires the employee to be continually or frequently in the street, as draymen or messengers. See 28 R. C. L. 93, pp. 805, 806.

As to the *Cudahy Packing case,* (defendant's brief, p. 21) (a Utah case) the liability rested because there was no other method or means of

approach to the plant except *over railroad tracks on a highway* in such close proximity to the plant that the employees had no election or option in determining or selecting approach.

In the case at bar, it appears there were other methods of approach.

Hook Road was not the sole means of access to defendant's plant.

> "Q Had you ever been *stopped* from using this road (referring to Hook Road), *at or near the gas tanks prior to the accident?* A *Yes, sir.*
>
> Mr. Bishop. I object to that.
>
> The Court. Objection overruled.
>
> Mr. Bishop. Exception.
>
> *By Mr. Gordon.*
>
> Q When? A Well, I don't know particularly what day, *but I recall detouring twice through the main yard on account of work going on on that road.*
>
> Mr. Bishop. I object to that. What was the work?
>
> The Court. Objection overruled.
>
> The Witness: That I don't know.
>
> *By Mr. Gordon.*
>
> Q Did you see what they were doing there? A When I came out of the other end, I seen men working, but just what work they were doing, I can't tell, whether they was digging or what." (Case, p. 86, ll. 20-41; p. 87, ll. 4-5.)

Frederick W. Isles worked in the lower portion of the yard (Case, p. 365, ll. 19-20) and did not have to pass these holders on his way in or out (Case, p. 365, ll. 32-34).

Sharkey testified the gas compression plant was four or five hundred yards from the gas holders

(Case, p. 392, ll. 10-20) and there were *different roads* going in there (Case, p. 392, ll. 23-24).

Pensa, defendant's witness testified he was going north on Hook Road (Case, p. 402, l. 38). *He got on Hook Road approaching it at a right angle* (Case, p. 402, ll. 40-41). *He entered it a a point to the south of the marks "OT" and "HCMcM" on the map* (Case, p. 403, ll. 10, 11, 12) (Exhibit P. 1, p. 697), (south of the gas holders and pump house).

Brennan, night superintendent did not have to go past the gas holders on his way out (Case, p. 466, ll. 35-36).

Moran, pump man at No. 3 plant pump house, close to the gas holder (Case, p. 470, ll. 30-40) came down 22nd street road down all the ways (Case, p. 471, ll. 12-28). He did not walk on Hook Road at any time.

> "Q That is, from where the road leaves the railroad?
> A Yes.
> Q And it turns south? A Yes.
> Q You walked down there? A Yes.
> Q Did you pass the gas holders? A No, not at that point I didn't pass the gas holders. I got into the pump house between the pump house and the locker room and the power house."

and (Case, p. 473, ll. 18-32):

> "Q When you left the pump house, you said you went south? A I went south about one block before I boarded the jitney.
> Q How did you go south? Did you go on the road or through the plant? A I went through the plant.
> Q And finally you came to the road? A Yes.
> Q Where did you get out onto the road? A I turned to my right about ten yards and

then I went to my left again and went south again and got on the jitney.

Q How far south of these gas holders did you get on the jitney? A I would say about thirty to forty yards.

Q Thirty to forty yards south of the gas holder? A Yes."

Mahon walked three-quarters of a mile below the gas holder on the south side (Case, p. 488, ll. 14-15).

See *Rauch* v. *Standard Shipbuilding Corporation,* 181 N. Y. S., at page 513:

"Where the *working day of employees* in a ship-yard, *which could only be reached by boat, began and closed at the ship-yard,* an employee killed while conveyed in a boat chartered by employer at the order and expense of the government, after having completed his week's work and receiving his pay therefor, did not die from injuries which arose 'out of and in the course of his employment' within the Workmen's Compensation Act."

His presence on the highway did not produce a causal connection between the employment *and the* injuries *suffered.*

The peril was not *on* the highway.

The peril was not *obvious* to, or anticipated by the plaintiff as in a case where railroad tracks cross *a public highway* and where locomotives and cars are in operation. Plaintiff could have been injured in various ways at this particular place and yet it could not be said *that the use of the highway at that point* annexed to the contract of employment such perils as incident to the employment.

Gilroy might have been struck by an automobile owned and operated by a third person.

In *Leveroni* v. *Travelers' Ins. Co., Fumiciello's Case* (Supreme Judicial Court of Mass. 1914), 107 N. E., page 349, the Court said:

> "It is plain that if, as the record states, *it was necessary for him to pass over the railroad location,* it formed no part of the employer's plant; nor was it in any way connected therewith or in their control as was the common stairway used by employees in Sundine's case, 218 Mass. 1, 105 N. E. 433. The contract of employment did not provide for transportation or that he should be paid for the time taken in going and returning to his place of employment, and when the day's work had ended the employee was free to do as he pleased. *If he had chosen to use the public ways, and had been injured by a defect or passing vehicle, the administrator could not recover against the employer because there would be no causal connection between the conditions of employment and the injuries suffered.* McNicol's Case, 215 Mass. 497; 102 N. E. 697; Holness *v.* McKay & Davis (1899) 2 K. B. 319.
>
> "The principle is the same and equally applicable where the employee uses a private way or crosses the land of another, either as licensee or trespasser. The decree for the insurer was properly entered and should be affirmed.
>
> "So ordered."

He might have been injured as a result of explosion of a chemical container on a track belonging to one of the factories located along Hook Road. He might have been injured at a point further down on Hook Road near one of the other factories, and away from Kimble's pump house, and as a result of a dangerous instrumentality that originated in a factory other than that of the defendant. In any event, there was no hazard which the plaintiff was in a position to anticipate at this particular part of Hook Road from operations in defendant's plant

in and off the road, which could in any way fix itself as a peril reasonably incident to employment, when and after the employment was entered into.

The danger, if any there existed, was not in the road itself. It was adjacent to the road. The pump house where the fire originated and the gas holder where the leaky conditions existed from which the gas flowed and the gas compression plant were all located in off the road and behind enclosures that were considered private property. There was no causal connection between the accident and the employment.

The United States Supreme Court in the Cudahy Packing Case, ruled that the basis, *under the special facts of each case is that the employment itself involved peculiar and abnormal exposure* to a common peril *which was annexed as a risk incident to the employment.* The Court further held that in view of the facts and circumstances peculiar to the case it was fairly open to the State Supreme Court to conclude that sufficient appears to save it from constitutional objection. The exposure of the plaintiff, by reason of the employment, was to a common peril, if any there existed, in the gas holder compression plant and pump house to which the general public was subjected, and not beyond that to which the general public was subjected. It was not a *peculiar* and *abnormal exposure* that was annexed as an incidental risk.

In *Kowalek* v. *New York Consolidated Railroad Company,* 229 N. Y. Reports 489, at page 494:

> " * * * The Statute is not applicable to an injury which arises through a danger or hazard disassociated from or not inherent in the nature of the employment as its source

> and to which the employee *would have been equally exposed apart from the employment.* This conclusion is affected by the fact that the employee would not, except for the employment, have been where such danger or hazard existed. The injury does not arise out of the employment unless the hazard causing it is, within rational apprehension, and attribute of or peculiar to these specific duties of the employment. *The fact that the contract of employment exists and necessitates the acts of performance may or will occasion for the employee risks not reasonably incidental to the character of the work or employment.* For the injuries caused by or flowing from *those risks,* the statute does *not* direct or permit compensation." (Citing numerous cases.)

The *Cudahy Packing case, supra,* is decided in connection with the Utah Act which provides for compensation to every employee whose employment is subject to the act, if injured by accident arising out of *or* in the course of employment.

In *Roberts case* (Me.) 126 Atl. 573 (Case, p. 574), the Court, referring to the Cudahy case, said:

> "In applying the conclusions arrived at in the different jurisdictions, heed must be given to the language of the Act of that jurisdiction. For instance, the Utah Act (Comp. St. Laws 1917, S. 3113 as amended by Laws 1919 C. 63) covers accidents, *wherever occurring* and either arising out of *or* in the course of employment. A *difference which might well account for the extent to which the court went in that case;* the accident happening in a public street."

In the case of *Bountiful Brick Company* v. *Industrial Commission,* which was also a Utah

case, the Supreme Court, 251 Pac. 555, at page 556, held:

> *"It is the greater degree of exposure to the peril which arises as an incident to the employment which sustains the causal relation between the employment and the accident."*

In this case, the employer permitted an opening in the fence of its premises to remain, which amounted to an invitation to the employees to use the most direct and shortest route taken which, in its selection, *required traversing the private right of way of a railroad.* The danger was an *obvious* one and was written into the contract of employment *as an incidental peril,* by the implied consent of both parties as the result of their conduct.

Any peril that *lurked in the road* from the gas holder compression plant and pump house was not an obvious danger, peril or hazard necessarily connected with or contemplated by the employment and the degree of exposure to any such danger, peril or hazard was of a common degree, equally applicable to any member of the traveling public and not *obviously peculiarly and abnormally an exposure* to a common peril which arose as an incident to employment.

The judgment should be affirmed with costs.

Respectfully submitted,

FRANCIS A. GORDON,
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Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

EDWARD N. GILROY, Plaintiff-Respondent, *vs.* STANDARD OIL COMPANY, a New Jersey Corporation, Defendant-Appellant.	Action at Law. On Appeal from New Jersey Supreme Court.

BRIEF FOR DEFENDANT-APPELLANT.

Preliminary Statement.

This is an appeal from a judgment entered in the Supreme Court on November 8, 1929 against defendant-appellant upon a verdict in favor of plaintiff-respondent for $49,722 (R., p. 16), such parties being hereinafter respectively termed "defendant" and "plaintiff."

The action is one at common law for damages resulting from personal injuries sustained by plaintiff while an employee of defendant at its refinery in Bayonne, New Jersey, as the result of defendant's alleged negligence. On August 8, 1927 shortly after plaintiff had completed his work for the day, and as he was on his way home on a road leading out of the plant and just as he was passing one of the gas holders owned and used by the defendant in the manufacturing operations it carried on at the refinery there was an explosion of gas, seriously injuring him. The judgment under review awarded plaintiff damages for these injuries.

The cause was tried before Honorable Lloyd Thompson, a Judge of the Union County Court of Common Pleas, to whom it was referred for that purpose.

Admittedly the contract of hiring in force between plaintiff and defendant when the accident occurred upon which the suit is founded was subject to the provisions of Section 2 of the Workmen's Compensation Act (R., p. 14, p. 635, l. 37). Plaintiff, however, contends that this accident was not one "arising out of and in the course of his employment," and that therefore the provisions of the Compensation Act do not bar him from recovering damages in a common law action for the injuries he so sustained. In this view he was upheld by the trial judge, who refused a motion for a non-suit, as well as one for the direction of a verdict in defendant's favor based in part upon the ground that plaintiff's rights and remedies resulting from the accident were exclusively those provided for by the Workmen's Compensation Act, and charged the jury as follows:

> "The plaintiff's injuries in this case cannot be held to have been sustained by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, and he is therefore not required to seek his compensation under that act, but may lawfully pursue his remedy at common law in the action now being tried" (R., p. 640).

Each such motion was also based upon the further ground of a total absence of evidence of negligence on defendant's part causing plaintiff's injuries, but the question of the existence of such negligence was submitted to the jury and decided by it in plaintiff's favor, whereupon the judgment was entered from which this appeal is taken (R., p. 16).

On behalf of defendant we respectfully submit that the learned Trial Judge clearly erred in denying such motions and in his charge to the jury with respect to each such defenses to the action. If either of these contentions is upheld the judgment below must, of course, be reversed.

The Grounds of Appeal Intended to be Argued.

The grounds of appeal will be found on pages 19 to 38 of the Record. Those intended to be argued fall into the two following general classes:

(a) Plaintiff and defendant having accepted the provisions of Section 2 of the Workmen's Compensation Act, plaintiff's sole and exclusive remedy for the injuries so sustained was the payment to him of the amounts for temporary and permanent disability secured to him by that Act (Grounds of Appeal 1, 2, 3, 4, 5, 6, 14, 15, 16 and 17; R., pp. 19, 20, 23, 24).

(b) The evidence failed to disclose any negligence of defendant resulting in injury to the plaintiff (Grounds of Appeal 1, 2, 3, 11, 12, 13, 18, 19, 20, 21, 22, 34, 35 and 40; R., pp. 19, 22, 23, 24, 25, 26, 31, 34).

Some of these grounds of appeal cover the denial of the above-mentioned motions and others thereof the granting and refusing to grant certain of plaintiff's and defendant's respective requests to charge the jury, all to defendant's prejudice. Defendant amply preserved its right to each such ground of appeal by a proper exception duly noted on the Record (R., p. 344, ll. 24, 25; p. 632, ll. 4, 5; pp. 691-696).

Statement of the Case.

Plaintiff was injured on August 8, 1927. He had then been employed in defendant's refinery at Bayonne, New Jersey, for eleven years. At the time of the accident resulting in his injuries and for a long time prior thereto his position was that of an extra or assistant pump man in what was known as the Kimball Pump House, one of the many structures devoted to the manufacturing operations carried on by defendant in this refinery (R., p. 167, ll. 10, 25). His employment by defendant was admittedly subject to the provisions of Section 2 of the Workmen's Compensation Act (R., p. 14, p. 635, l. 37).

Defendant's said refinery, as well known, and as appears by the map, Exhibit P-1 opposite page 696 of the Record, occupied many acres of land in the Constable Hook section of Bayonne which lies, generally speaking, between the main line of The Central Railroad Company of New Jersey and the Kill von Kull. Part of the manufacturing operations there carried on by defendant involved the pumping into and storage in tanks and holders of petroleum products of many kinds, including gasoline, naphtha, oils and various gases, one of these gases being illuminating gas. As such operations were necessarily continuous, the employees engaged therein worked on three eight hour shifts (R., p. 423, ll. 20-30; p. 424, ll. 23-29; p. 168, ll. 36-40).

Plaintiff lived in Bayonne during the eleven years he was employed by defendant prior to the day the accident happened resulting in his injuries. His testimony disclosed that he had used "Hook Road", shown on Exhibit P-1, opposite page 696 of the Record, in going to and from his place of work "twice every day while I was work-

ing for eleven years'' (R., p. 172, l. 35). As appears from such exhibit and the testimony of the plaintiff and his witnesses, this road extended from the foot of Avenue J in Bayonne and terminated at a gate in the refinery near the Kimball Pump House in which plaintiff worked, and was the only way by means of which plaintiff could reach or leave his place of work (R., p. 44, l. 22; p. 86, l. 20; p. 172, l. 20). As also appears from such exhibit, Hook Road, except for about 200 feet where it crossed property of the Orford Nickel & Copper Company, extended for its entire length over lands owned by defendant. For a short distance it abutted lands of other manufacturers. Before reaching the gate at the end thereof inside of which plaintiff worked, Hook Road for a distance of 820 feet bisected a portion of defendant's refinery (R., p. 53, l. 20). It was on this portion of the road that the accident resulting in plaintiff's injuries happened while he was on his way home at the end of his day's work in the Kimball Pump House (R., p. 172, l. 27; p. 197, ll. 1-35). Hook Road had been dedicated by defendant to public use under an agreement made between it and the City of Bayonne, which required defendant to maintain the roadway thereof in good order and repair (R., p. 3; p. 53, l. 25). It was in no sense a thoroughfare as it was only used or capable of being used as a means of reaching defendant's refinery and the other manufacturing plants which it served, from the residential portion of Bayonne. As the Trial Judge pointed out, it ''Divides the total area of defendant's plant in two'' (R., p. 341, l. 28).

Exhibit P-2, appearing opposite page 698 of the Record, is an enlarged view of the section of Hook Road which, as just stated, bisected the part of defendant's refinery over which plaintiff was traveling when the fire and explosion which in-

jured him occurred. This exhibit, together with Plaintiff's Exhibits P-3 to P-6, inclusive, (R., pp. 698-707), show the refinery structures and apparatus of defendant occupying and lining both sides of this section of the road.

One of these structures was Gas Holder No. 2 which, as appears from Exhibit P-2, (R., pp. 698, 699), was located on the westerly side of the road almost opposite a pump house on the easterly side thereof. It was opposite this gas holder where the explosion occurred causing plaintiff's injuries (R., p. 83, l. 33). This gas holder contained illuminating gas manufactured and used within the refinery (R., p. 387, l. 38; p. 110, l. 22; p. 173, l. 31) and had a diameter of 56 feet (R., p. 49, l. 20). This section of Hook Road was only 19.3 feet wide (R., p. 48, l. 37) and any one traveling over it was, therefore, necessarily never distant more than a few feet from the tanks and other refinery structures which lined both sides thereof. The side of Gas Holder No. 2 nearest to Hook Road was distant only 4 or 5 feet from the westerly side of the road and the pump house opposite it was located not more than 15 feet from the easterly side of the road (R., p. 49, l. 14; Exhibit P-2, R., pp. 698, 699). At this point overhead pipe lines of the refinery also crossed the road (R., pp. 48-49; p. 498, l. 33).

Exhibit P-3, opposite page 700 of the Record, is a photograph of Gas Holder No. 2 and of the iron fence separating it from Hook Road. Exhibit P-4, opposite page 702 of the Record, is a photographic view of the east side of Hook Road looking north from Gas Holder No. 2. Exhibit P-5, opposite page 704 of the Record, is a photographic view of the east side of Hook Road looking southward toward the pump house opposite Gas Holder No. 2. Exhibit P-6, opposite page 706, is a photographic view of both sides of this section of the

road. These photographs show that both sides of the section of Hook Road where the accident occurred were occupied by refinery structures and equipment which defendant used in its manufacturing operations, including the gas holder that exploded, a power house, a pump house and myriads of pipe lines and other refinery appliances that extended practically to the road on each side thereof, as well as overhead across it.

We especially direct the attention of the Court to these six exhibits of plaintiff for they show that at the time the accident resulting in plaintiff's injuries occurred he was not only still within the limits of the refinery where he worked for defendant but entirely surrounded by the structures and appliances it used in there carrying on the very manufacturing operations in which plaintiff was employed by defendant. As these exhibits demonstrate, the portion of Hook Road where plaintiff was injured formed a narrow passageway between the parts of defendant's refinery portrayed thereby. There could hardly be a more direct and positive showing of an employee being subjected to the risk of his employment than was plaintiff twice each day as he traveled to and from his work over the very place where the accident in question happened. We emphasize this now because the sole basis of the right claimed by plaintiff to maintain a common law action for the injuries he sustained, and the sole ground upon which the trial judge permitted him to do so, is that at the time the accident causing his injuries occurred plaintiff had finished his work for the day and his use of Hook Road in leaving defendant's refinery was therefore merely as a member of the general public, and bore no relation to his employment by defendant.

The eight hour shift on which plaintiff worked on the day of the accident began at three o'clock

in the afternoon and ended at eleven o'clock in the evening (R., p. 76, l. 16; p. 168, l. 33). The accident occurred almost, if not quite, at the very instant that a blast of a whistle announced the ending of the shift on which plaintiff had worked (R., p. 148, l. 15; p. 198, l. 34). It was the practice of the men on this shift to arrive at their work shortly before three o'clock, then to relieve the men on the previous eight hour shift, and to stop their work about fifteen minutes before eleven o'clock, change their clothes and start for home (R., p. 78, ll. 1-8; p. 168, ll. 35-40; p. 169, ll. 1-10, 20-30; p. 425, ll. 8-13). This program was followed by plaintiff on the day of the accident. He quit work in the Kimball Pump House about a quarter of eleven, changed his clothes, entered an automobile owned by a fellow employee that was parked near this pump house, and after passing through a gate into Hook Road, proceeded in this automobile over Hook Road on his way home (R., pp. 169, 170, 171, 172). As this automobile neared Gas Holder No. 2, located as aforesaid, its occupants experienced an almost overwhelming smell of illuminating gas. Almost immediately and as the automobile reached a point on Hook Road between Gas Holder No. 2 and the pump house on the westerly side of the road, a fire and explosion occurred simultaneously. The fire, so the plaintiff and two other of the occupants of the automobile testified, appeared to sweep across the road from the fence on the pump house side of it to Gas Holder No. 2, which instantly became involved in flame and exploded. It was abundantly established without contradiction that the pumps in the pump house were in good condition and that the fire did not originate in the pump house (R., p. 129, ll. 35-40; p. 130, ll. 1-2; p. 131, ll. 18-20; p. 133, ll. 1-15; p. 135). The evidence relating to its occurrence and the happening of the explosion

leads irresistibly to the view that in some unexplained way illuminating gas had escaped from Gas Holder No. 2, that the escaping gas enveloped the roadway between this holder and the pump house opposite it and came in contact with a spark or flame, thereby causing the fire and the explosion injuring plaintiff.

We shall deal with the possible causes for the fire and explosion under Point II of defendant's Argument, which treats with its alleged negligence. It is sufficient now to say that the record convincingly discloses the absence of any negligence on defendant's part that could have caused either the escape of gas or the fire or explosion.

In our opinion, the facts hereinbefore reviewed must inevitably require this Court to determine that plaintiff's sole right to be compensated therefor is the one afforded him by the Workmen's Compensation Act. In that event, it will, of course, be unnecessary for it to consider the evidence relating to defendant's alleged negligence. Plaintiff's right to have the fullest possible benefit of the Workmen's Compensation Act has been conceded by defendant ever since the happening of the accident on which this action is based (R., p. 9, ll. 10-28; p. 755, ll. 1-2; p. 762, ll. 30-31).

ARGUMENT.

I.

The accident resulting in plaintiff's injuries arose out of and in the course of his employment. He is therefore precluded from pursuing any remedy therefor other than the one provided by the Workmen's Compensation Act.

Plaintiff's contract of employment by defendant was, as has been shown, admittedly subject to the provisions of Section 2 of the Workmen's Compensation Act of 1911 (R., p. 14; p. 635, l. 37), the pertinent portions of which Act as in force at the time he was injured read as follows:

> "7. When employer and employe shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section II of this act, compensation for personal injuries to or for the death of such employe *by accident arising out of and in the course of his employment* shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of the proof of such fact shall be upon the employer.
>
> "8. *Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section II of this act, and an acceptance of all the provisions of section II of this act,* and shall bind the employe himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those con-

ducting his business during bankruptcy or insolvency.''

It follows that if the accident upon which this suit is based arose out of and in the course of plaintiff's employment the action cannot be maintained and the judgment below must be reversed. Plaintiff contends, however, that the accident did not so arise and that he is therefore at liberty to sue at common law for the injuries it inflicted upon him. Throughout the trial of the cause such contention was sustained by the trial judge who refused defendant's motions for a non-suit and for the direction of a verdict in its favor, each of which was based in part upon the ground that the accident was one so arising, and charged the jury ''That the plaintiff's injuries in this case cannot be held to have been sustained by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act'' (R., p. 640).

The accident did arise out of and in the course of plaintiff's employment.

Plaintiff's claim to the contrary and the rulings and charge of the Trial Judge sustaining it are based upon two grounds, viz.: (1) that prior to the occurrence of the accident plaintiff had completed his day's work and would not again be in the employ of defendant until he returned thereto on the following day, and (2) that at the time the accident happened plaintiff had left defendant's enclosures and was on a public road on his way home, and therefore only had the same relation to defendant as any other member of the public. This is shown by the following extract from the charge of the Trial Judge to the jury:

''In the instant case, the plaintiff had completed his period of work, entered a privately owned and operated automobile, proceeded to

the defendant's exit gate and out of it to a public thoroughfare, and after traveling a considerable distance on this thoroughfare, and while still on it, came to the vicinity of certain buildings and gas holders owned by the defendant and located within their private lands, off the road which the public was entitled to use, and which plaintiff was using (presumably as a member of the public, because his work was finished and he was without the defendant's enclosures) and that when nearing these buildings the fire and explosion occurred.

"It is difficult to see how, under these conditions, the plaintiff was in a position different from any other member of the traveling public, so far as concerns his right to be protected against the negligence of the defendant; and if his position was no different, his recourse for injury was the same. Any person not employed by defendant had a right on that road to be protected from injury arising from defendant's negligence, and if so injured, to sue for damages at common law. Anyone who had quit his employment, though only until the next day, was, at that time, not employed and had the same rights.

"I cannot find any case in which the employe having quit his work, gone without the confines of his place of employment, in an independent conveyance, and along a public thoroughfare, under no further duty to or control of his employer, and not to return until some subsequent period of his work should have again ensued and has been injured under such conditions, has been held to have sustained that injury by reason of an accident arising out of or in the course of his employment" (R., pp. 638, 639).

* * * * * *

"So far as this case is concerned the contract of employment of the plaintiff to render service to the defendant at a designated place known as Kimball Pump House did not cover his movements outside of that place while

the plaintiff used the public highway known as Hook Road as the public used it, because he was required to in order to get to and from work, and not because the defendant, as his employer by the terms or implication of its contract of employment, had the right to require him to use the said road at defendant's will'' (R., p. 653, l. 1).

* * * * * *

''In using the public highway known as Hook Road, as plaintiff did and when he did, he was exposed only to the same risks to which any pedestrians or members of the traveling public in the same position would be exposed. The hazard had no relation to his employment'' (R., p. 653, l. 19).

* * * * * *

''Plaintiff, at the time of the accident, had ceased his work, had left the place where he performed said work and was on his way home. He had, at the time, no duty to fulfill to the defendant, and the defendant had no duty to fulfill towards him as its employe. The relation of master and servant had ended for the day, plaintiff having finished his work and left the place where his work was being done'' (R., p. 653, l. 27).

That each such holding is entirely without warrant in law will, we submit, readily appear by applying to the undisputed facts of the case the well founded principles laid down by this Court and the Supreme Court in construing the New Jersey Workmen's Compensation Law, and other well considered authorities construing similar legislation in other jurisdictions. They establish that the test of whether an accident arises out of and in the course of the employment is not whether the accident happens while the employee is on his employer's premises, or on the premises of another, or on a public highway, or at not more than any given distance from the employer's premises,

but whether his employment subjected the employee to the risk of the accident. By applying this test to the facts of the present case it will be found that the accident in question did result from the risk to which plaintiff's employment by defendant subjected him for each of the four following reasons:

1. *The accident happened within the time the plaintiff reasonably required after quitting his work to leave the place where he was employed and while he was taking not only the route he uniformly took for this purpose with the knowledge and consent of defendant, but the only route that it was possible for him to take in leaving that place.* Happening within such a time and place, the risk of the accident was as directly an incident of plaintiff's employment as would have been the case had it happened while he was working in the Kimball Pump House.

2. *Using as plaintiff did, twice daily, with defendant's knowledge and consent, and as the only means of ingress and egress to and from his place of work, the portion of Hook Road which passed within a few feet of Gas Holder No. 2, in connection with and solely because of his employment in defendant's refinery (of which refinery the gas holder and the section of Hook Road on which it was located form a part), the risk of injury to him therefrom by a fire or explosion occurring when he was on the road in the immediate vicinity of the gas holder was due directly and solely to such employment.* It was plaintiff's employment and nothing else which caused him to be at the very place where the accident in question happened when it did happen. He cannot, therefore, be properly regarded as then being on Hook Road merely as a member of the general public who might occasionally use it.

3. *The accident occurred while plaintiff was still within the zone of danger created by the operation of defendant's refinery.* By reason of this fact he was then still directly subjected to the risk of danger which his employment involved. If this risk was any different at the place where the accident occurred than it was at the place where plaintiff worked during his eight hour shift, the difference was merely one of degree, not of kind. The risk of his being injured where he was and by the very accident which caused his injuries was necessarily involved in his employment. He was no less likely to be injured by the accident that happened because it happened when he was on a public road. Had he been actually at work for defendant at the time and place when and where he was injured, or had that place been defendant's private property instead of property subjected by it to the public easement of a road, neither his exposure to the accident which happened nor the injuries which he sustained therefrom would have been any less. In either case the danger zone of defendant's refinery operations, the danger of the very accident happening that did happen, and the resulting injuries to the plaintiff therefrom would have been the same.

4. *The place where plaintiff was when the accident occurred was, in fact, as much within the limits of defendant's refinery as was the pump house where he worked during his eight-hour shift.* No one examining the photographs, Exhibits P-3 to P-6 inclusive, above referred to (R., pp. 700-707), can, we believe, properly question this. The danger of traveling through the narrow passageway that the portions of Hook Road shown on these photographs afforded between the parts of defendant's refinery which extended to each side thereof, would have been the same if this passageway, instead of being on a public road, had been

on defendant's privately owned property and the iron fences extending along each side thereof had not been there.

We shall now review as briefly as possible a few of the many decisions applying these principles, which seem to us to conclusively refute plaintiff's claim of right to maintain this action.

In *Bryant, Adm'x.* v. *Fissell,* 84 N. J. L. 74, 75, the Supreme Court, after defining "an accident" as "an unlooked for mishap or untoward event which is not expected or designed", it was held that for an accident to arise out of and in the course of employment, it must only result from a risk reasonably incidental to the employment. This case has been repeatedly cited by this Court with approval.

In *Terlecki* v. *Strauss,* 85 N. J. L. 454; 86 N. J. L. 708, this Court affirmed on the opinion below an award of compensation to an employee who was injured after her work had been completed and while she was combing her hair in a passageway some distance from the machine at which she had been working. The opinion was delivered by Mr. Justice Swayze, who said:

> "We have no doubt that the accident happened in the course of employment. It would be entirely too narrow a construction to limit the benefit of the statute to the time the workman is actually employed at his machine. He must have time to reach his machine *and to get away from his employer's premises.* * * *
>
> "The question whether the accident arose out of the employment is perhaps more doubtful. The employment was not indeed the proximate cause of the accident, but it was a cause in the sense that *but for the employment the accident would not have happened.* The employment was one of the necessary antecedents to the accident."*

* Italics here and elsewhere are ours unless otherwise stated.

In the instant case plaintiff was injured not only before he could get away from his employer's premises, but as the result of a risk he could not avoid in leaving them.

In *Zabriskie* v. *Erie R. R. Co.*, 85 N. J. L. 157; 86 N. J. L. 266, an employee of the Railroad Company was killed while crossing Market Street in the City of Paterson as the result of being struck by an automobile not owned by his employer which was being operated on that street. Although the accident happened during the hours of his employment the employee was not then engaged in his work, but crossing the highway to go to a toilet. As in the instant case, it happened when the employee was not at his place of work, had left his employer's premises, and was on a public highway. Yet both the Supreme Court and this Court held it was an accident arising out of and in the course of his employment.

In *Bolos* v. *Trenton Fire Clay &c. Co.*, 102 N. J. L. 479; 103 N. J. L. 483, this Court affirmed a judgment on the opinion below upholding the right of an employee to benefits under the Workmen's Compensation Act on the following facts: After finishing his lunch in a barn upon his employer's premises located at a distance from the point where he was employed, the employee jumped on the running-board of a truck to return to his place of work. To reach it he had to travel for some distance along a public street. As the truck turned off this street into the employer's yard, the employee was thrown from the running-board and sustained injuries which resulted in his death. The opinion pointed out that the decision was not based upon the fact that the workman was riding on a truck owned by his employer, and stated that if he had been walking back to the brick shed and had been struck by the same truck and injured, such an injury would have been incidental to de-

cedent's employment. As in the instant case, the accident happened on a public highway. It happened before the employee had actually started to work in the afternoon.

Rachels v. *Pepoon,* 135 Atl. 684; 139 Atl. 923 (not officially reported). Pepoon worked for Rachels, who was a wholesale newspaper dealer taking delivery of his papers in Hoboken and distributing them by trucks to his customers, who were local retail dealers. Pepoon was a helper on one of these distributing trucks. The trucks were hired by Rachels and the drivers were furnished by the truck owners. Pepoon's duty was to ride on one of these trucks from Passaic to Hoboken, to there assist in assorting and preparing the papers, and from there accompany the trucks over the route in the distribution and delivery to Rachels' customers. On the night of the injury, Pepoon requested Rachels to grant him leave to attend to some personal affairs that would detain him beyond the departure of the trucks from Passaic to Hoboken. This privilege was accorded him upon his promise that he would be in Hoboken at 3 A. M. to take up his work and duties there. After attending to the personal affairs which thus kept him in Passaic, Pepoon undertook to go from there to Hoboken in an automobile which he hired or borrowed and which he drove himself. While making this journey his car came in collision with another car and he received injuries from which he died. The Supreme Court in affirming a judgment of the Workmen's Compensation Bureau awarding compensation for Pepoon's death and in an opinion which this Court adopted as its own in affirming the judgment below, said:

> "Under the facts in this case we think his service began when he left Passaic and proceeded toward Hoboken. While his actual

> work began in the latter place, yet to reach there was an act within and necessary in his service toward his employer. Such would seem to have been the practice and custom on all other occasions when his means of transportation was one of the trucks in the employer's service."

It will be observed that as in the instant case Pepoon when he was killed had not reached the place where he ordinarily started work for the defendant, and that the accident which resulted in his death occurred on a public highway distant from that point. The danger of the accident that resulted in Pepoon's death was merely the one involved in his reaching his place of work. In the instant case there is the additional circumstance that the danger of the accident which happened was one created by the defendant. Plaintiff's accident was, therefore, even more directly connected with his employment than was the accident resulting in Pepoon's death, as in the latter's case the danger, although incidental to his employment, was not one his employer had created.

In *Gane* v. *Norton Hill Colliery Co.* (1909), 2 K. B. 539, cited with approval in *Terlecki* v. *Strauss, supra,* a workman was injured while leaving his work and crossing the lines of a railroad owned and controlled by the employer. There were two other ways available to him but the one he used was the shortest and one commonly used by the workmen with the employer's knowledge and consent. The Court of Appeals unanimously upheld the right of the employee to benefits under the British Workmen's Compensation Act. Cozzens-Hardy, M. R., said (pp. 543-544):

> "What was the duty of this man? What was really the implied term of his employment? *That he should, when his day's work was over, without loitering, and with all rea-*

> *sonable speed, leave the Colliery premises by the accustomed and permitted route.* That is what he did. It was in the course of his doing so that the accident happened. I feel bound to say, in point of law, that this accident which happened in the neighborhood of the pit's mouth, close to the screen on the Colliery premises, was an accident which happened in the course of his employment. The course of the collier's employment is plainly not limited at one end by the moment when he gets to the place where he is to use his pick, or at the other end by the moment when he comes up from the pit. *It must include a reasonable interval of time and of space during which the employment lasts.*''

Farwell, L. J., in a concurring opinion, also pointed out that the act of coming to and going from work is a necessary incident to the employment, and Kennedy, L. J., stated (p. 548) that the circumstance that the injury occurred while the man was on the master's premises was not decisive.

In *Field* v. *Charmette Knitted Fabric Co.* (N. Y. App. 1927), 156 N. E. 642, Cardozo, C. J., in delivering the opinion of the New York Court of Appeals, said at page 643:

> ''* * * The rule is well settled that an employee, even after closing time, is in the course of employment until a suitable opportunity has been given to leave the place of work.''

In *DeConstantin* v. *Public Service Commission,* 83 S. E. 88 (W. Va. 1914), the Court, although denying compensation, stated the rule determining whether an accident arises out of or in the course of employment as follows (p. 89):

> ''The employment is not limited to the exact moment of arrival at the place of actual work, nor to the moment of retirement therefrom. *It includes a reasonable amount of*

> *time before and after the actual work.* * * * If a workman is injured on the premises of the employer * * * and in pursuit of the usual way of leaving the same, is held to be within the course of employment and to have arisen out of the same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer and by the only way of access, or the one contemplated by the contract of employment, must also be regarded as having been incurred in the course of the employment and to have arisen out of the same. *If, in such case, injury does not occur on the premises, but in close proximity to the place of work and on a road or other way intended and contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern.*''

In *Cudahy Packing Co.* v. *Industrial Commission,* 207 Pac. 149 (Utah 1922), a workman employed by the Cudahy Packing Company was killed while on his way to work in the defendant's plant. He was riding on a highway that led to the plant and while still a considerable distance therefrom was struck by an engine on the Denver & Rio Grande Western Railroad Company's line which crossed this highway. In upholding an award of compensation benefits the Utah Supreme Court said in part as follows:

> ''The courts generally agree in principle respecting the elements to be considered in determining what accidents are included in the words 'arising out of and in the course of the employment'. * * * It is not, however, necessary or desirable in the determination of this case to attempt a definition of these terms or to differentiate between accidents arising out of or in the course of the employment. If there is liability for the injury under consideration, it must be founded upon the inferable fact that the danger incident to crossing this railroad track, by reason of its location

and proximity to the packing plant, must be held to have been within the contemplation of the parties at the date of the employment. The accident would therefore both arise out of and occur in the course of employment. No other theory finds support in the decisions of the reported cases. It is admitted that deceased was not on the premises of the plaintiff at the time of the accident. He was not at that time engaged in any actual work connected with his employment. The engine that ran down the automobile was in no way under the control of the plaintiff, nor was it engaged in any work for or in plaintiff's behalf. * * *

"Some stress is laid in the argument on the fact that the roadway over which deceased was traveling was a public highway. No reason or principle is suggested why that fact should be controlling in determining the liability for this accident. * * * If the Workmen's Compensation Law authorizes or permits a recovery for an injury to an employe going to or returning from work over private property under particular circumstances or surroundings, *there does not seem to be any logical reason why such liability should not exist in favor of a workman going to or returning from work over a public road under like circumstances or surroundings.* If the liability exists, it is by reason of the fact that the plant or manufacturing establishment is so located that there is no other method or means of approach except over railroad tracks or other dangerous places, *and that the same are in such close proximity to the plant that the employee has no election or option in determining or selecting his way of approach.*"

The case was appealed to the United States Supreme Court, where it is reported as *Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418 (1923), and the judgment below there affirmed. Mr. Justice Sutherland, who delivered the opinion, said in part as follows:

"The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory though it need not be the sole or proximate cause. * * * *The fact that the accident happens upon a public road or at a railroad crossing and that the danger is one to which the general public is likewise exposed is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree.*

* * * * * *

"Here the location of the plant was at a place so situated as to make the customary and only practicable way of immediate ingress and egress one of hazard. Parramore could not, at the point of the accident, select his way. He had no other choice than to go over the railway tracks in order to get to his work; and he was in effect invited by his employer to do so. *And this he was obliged to do regularly and continuously as a necessary concomitant of his employment, resulting in a degree of exposure to the common risk beyond that to which the general public was subjected. The railroad over which the way extended was not only immediately adjacent to the plant but, by means of switches, was connected with it and in principle it was as though upon the actual premises of the employer.*

"We attach no importance to the fact that the accident happened a few minutes before the time Parramore was to begin work and was, therefore, to that extent, outside the

> specified hours of employment. The employment contemplated his entry upon and departure from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose. See *Gane* v. *Norton Hill Colliery Co.* (1909), 2 K. B. 539, 544; *DeConstantin* v. *Public Service Commission, supra.*"

In *Bountiful Brick Co.* v. *Industrial Commission,* 251 Pac. 555 (Utah, 1926), the facts involved were similar to those in the Utah case just shown to have been ruled upon by the United States Supreme Court save that in the former case the employee had no choice but to take the route he was using when killed, while in this case the employee might have reached his work by a longer and safer route. In sustaining an award of compensation, the Utah Supreme Court said:

> "He traveled over the route which was generally used by other employees—the natural, practical, customary route. That his employment contemplated and included in itself the manner of so going to and from his work is, we think, a fair and necessary conclusion.
>
> "The employee, in crossing the track at any time, was exposed to a peril which is common to all, but *by virtue of his employment he was required to cross the track regularly and continuously, thus being peculiarly and abnormally exposed to a common peril.*"

This case was also appealed to the United States Supreme Court, where it is reported as *Bountiful Brick Co.* v. *Giles,* 276 U. S. 154 (1927), and the judgment below unanimously affirmed, the Court saying:

> "Employment includes not only the actual doing of the work, but a *reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the express or implied*

consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance. In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached.''

In *Guastelo* v. *Michigan Central R. R. Co.,* 160 N. W. 484-485 (Supreme Court of Michigan, 1916), it was held that the protection of the law extends to reasonable time and space for the employee to leave the locality or zone of his work, and while he is in proximity, approaching or leaving his place of employment by the only means of access thereto.

Merlino v. *Connecticut Quarries Co.* (Sup. Ct. Err., Conn. 1918), 104 Atl. 396, is a well considered case much in point. Merlino was employed in a quarry and finished his day's work at 5:30 P. M. He went over a pathway on his employer's premises from the quarry in which he worked to a commissary situated upon such premises. There after talking for a short time with another workman he picked up his child who had come to meet him and proceeded along a road leading to his dwelling. While traveling on this road he was killed by a stone thrown by a blast set off on his employer's premises in the course of the work carried on there. Nearly ten minutes had elapsed between the time when Merlino quit work and the blast that proved fatal to him, and he might easily have been out of danger had he not stopped at the commissary and not encumbered himself with some boxes and his child. In reversing a judgment

of the Court below vacating an award of compensation, Beach, J., said:

> "The injury arose out of the employment, *at a place within the danger zone created by the business of the employer. That being so, the only question remaining is whether it was fairly consistent with the performance of the contract of employment that Merlino should be at or about the place at or about that time.*"

The Court found that the Quarries Company had consented that its employees on quitting work might stop at the commissary for refreshments and that Merlino in lingering within the danger zone as he did was within his agreed incidental term of his employment. In the instant case there was no lingering for plaintiff used all possible dispatch in quitting his immediate place of work and attempting to leave the refinery, but had been unable to get without the danger zone necessarily resulting from the operations carried on within the refinery when the accident happened.

The authorities relied upon by plaintiff in the Court below, and which doubtless will be again urged in this Court, as warranting the maintenance of the action, were of the class holding that as a general rule injuries sustained by an employee in going to or returning from his day's work on a public road, in the absence of an arrangement by the employer for his transportation, are not to be regarded as arising out of and in the course of his employment. We do not question that this may be the general rule, nor that an accident occurring to an employee on a public highway while he is using it as one of several routes he is free to follow in going to and from his work is ordinarily not one so arising. But authorities laying down these general principles have no application here where the accident oc-

curred not only (1) within both a place and time it was reasonably necessary for plaintiff to use in arriving at and leaving the refinery in which he worked but (2) in the danger zone created by its operation, and in effect, and in fact, within its limits.

To Summarize: At the time of the accident the plaintiff, although leaving his work and traveling with all possible diligence over the only route he could take in so doing, had not yet had time to reach a point where he was no longer subjected to the danger arising from the operation of the plant in which he worked. He was injured solely by reason of a danger which his employment made it impossible for him to avoid. As the United States Supreme Court said in *Cudahy Packing Co.* v. *Parramore, supra,* such danger was:

> "A necessary concomitant of his employment resulting in a degree of exposure to the common risk beyond that to which the general public was subjected."

When the accident resulting from this danger happened, the plaintiff was still within the limits of his employer's premises. It is, we submit, difficult to conceive of a situation coming more directly within the provisions of the Workmen's Compensation Act.

Being remedial legislation, it has been uniformly held that the Workmen's Compensation Act is to be liberally construed. The fact that plaintiff's injuries were such that this Act might not result in his being as liberally compensated therefor as he might be in an action at law is undoubtedly the sole reason for the unusual situation this action presents, viz., that of an employee insisting that he was not within the scope of the Act when injured. But the severity of plaintiff's injuries can, of course, not entitle him to curtail

and limit the application of such beneficial legislation in order to exclude himself from its provisions.

The patent errors which the learned trial judge committed both in refusing to direct a verdict for the defendant and in the above quoted extracts from his charge to the jury, undoubtedly resulted from his misconception of the purpose of our Workmen's Compensation Law, with regard to which he said:

> "The whole scheme was set up for the benefit of the employee".

Being a remedial law, it must be construed liberally as to the benefits intended to be conferred upon employees (R., p. 638, l. 19; p. 691, l. 23; p. 19, l. 30).

II.

The learned Trial Judge erroneously applied the doctrine of res ipsa loquitur.

We respectfully submit that he did so (a) in refusing to direct a verdict in favor of defendant, and (b) in his charge to the jury, both to defendant's prejudice. (R., pp. 644, 645; Exceptions, R., p. 693, ll. 14-20; Grounds of Appeal, Nos. 11, p. 22; 12, p. 23; 13, p. 23; 20, p. 25; 21, p. 26; 22, p. 26).

The complaint specifically alleges four and no other grounds of defendant's alleged negligence resulting in injury to plaintiff. They are as follows:

> "(a) Carelessly and negligently and knowingly maintained, operated and permitted to be operated said Pump House Plant No. 3 and its contents and appurtenances thereto while

the same were improperly constructed and adjusted and while same were improperly functioning, and while the same were producing friction, excessive heat and sparks and while large quantities of combustible gases and vapors were at, in and about the same; (R., p. 4, ll. 17-26).

"(b) carelessly and negligently and knowingly permitted to accumulate and remain at, in and about said Pump House Plant No. 3, large quantities of destructive, highly inflammable and combustible gases and vapors without properly providing adequate and sufficient equipment and devices to prevent the ignition and explosion thereof; (R., p. 4, ll. 26-33).

"(c) carelessly and negligently and knowingly omitted and failed to have said gas holder and Pump House Plant aforesaid and the contents thereof and appurtenances thereto properly and sufficiently inspected, supervised and operated, and negligently and carelessly and knowingly failed and omitted to make sufficient and adequate repairs to said gas holder while same was in a leaky and defective condition, although said agents, employees and servants knew of such condition for a long time prior to said last date; (R., p. 4, ll. 33-40; p. 5, ll. 1-3).

"(d) carelessly and negligently omitted and failed to inspect and failed to keep in good order and failed to keep clean and free of large quantities of oily and greasy substances the said Hook Road adjacent to said Pump House Plant No. 3 and said gas holder" (R., p. 5, ll. 3-11).

At the close of plaintiff's case the situation as to each such ground of complaint was as follows:

(a) There was no evidence of any negligence in connection with the maintenance or operation of Pump House Plant No. 3 (this being the pump

house on the opposite side of the road from Gas Holder No. 3) or to indicate that it or any of its appurtenances were improperly constructed or adjusted, or functioned improperly by way of producing friction, excessive heat or sparks, or otherwise.

(b) Plaintiff's witnesses disagreed as to whether any dangerous gases or vapors had accumulated in the neighborhood of Pump House No. 3 and Gas Holder No. 2 any appreciable length of time before the fire and explosion occurred. None of them who testified to the existence of such a condition claimed that defendant was notified or should have known thereof.

(c) Plaintiff failed to offer any proof of failure or neglect on defendant's part to have either the gas holder or the pump house or its appurtenances properly and sufficiently inspected, supervised or operated prior to the accident, or to indicate that the gas holder had been in a leaky or defective condition.

(d) Plaintiff offered no proof to indicate that defendant had failed to inspect or to keep clean and free of oily and greasy substances Hook Road adjacent to said pump house and gas holder.

In short, plaintiff's evidence established the happening of the fire and explosion resulting in his injuries, but failed to indicate that they had resulted either from defendant's alleged negligence or any other negligence on its part. Notwithstanding this, the Trial Judge declined a motion for a non-suit based in part on the ground that evidence had been adduced from which an inference of defendant's negligence could properly be drawn, saying:

> "The doctrine of *res ipsa loquitur* applies in my opinion" (R., p. 339, l. 10).

Although this ruling was, in our opinion, of doubtful validity, we are not raising this point. When, however, the evidence had been closed the full situation had been developed and any possible inference of defendant's neglect removed. Not only had defendant then established the absence of any negligence on its part that could have been the proximate cause of plaintiff's injuries, but the uncontradicted evidence showed that the accident causing them had resulted from a cause entirely beyond its control. Either of these things being true, it was clearly the duty of the Trial Court to grant defendant's motion for the direction of a verdict in its favor (R., p. 625).

When defendant's motion was refused (R., p. 631; Exception, p. 632), the evidence showed without contradiction:

(a) *Conditions in the pump house were normal and could not have caused the fire or explosion.*

On the night of the accident there was nothing wrong with any of the pumps (R., p. 127, l. 6; p. 140, l. 1; p. 134, l. 27). Mr. Doherty, who operated them at the time of the accident, testified that they were in very good condition; that there was nothing the matter with any of them, and that they were running slowly (R., p. 132, l. 32). Both he and his assistant, Mr. Kushnar, testified that there was no flash or fire inside the pump house, and that there was no fire at the pump house except around its window frames after the explosion happened (R., p. 133, l. 1; p. 135, l. 8; p. 150, l. 22). Mr. Moran, who operated the pumps on the 3 to 11 P. M. shift on the day of the accident, and who was relieved by Mr. Doherty, also testified that they were in good order, and that there was nothing wrong with them up to the time he left Pump House No. 3 at about 10:30 (R., p. 472, l. 25; p. 473, l. 9). He further testified that

he had never seen the pumps hot enough to cause any fire. Several other witnesses testified that there was no fire in the pump house that night save only that the window frames caught on fire after the explosion occurred (R., pp. 127, 131, 135, 150, 395, 408).

(b) *Defendant had no notice of any accumulation of gas or other vapor on Hook Road prior to the occurrence of the accident.*

Each of the witnesses who testified to having noticed an accumulation of any gas on Hook Road prior to the occurrence of the accident, also testified that he made no report of this to defendant (Doherty, R., p. 119, l. 10; Kushnar, R., p. 141, l. 40; p. 142, l. 6; p. 145, l. 14; Peters, R., p. 110, l. 3; Faasch, R., p. 237, l. 20; Mahelson, R., p. 165, l. 15, Plaintiff, p. 199, l. 3).

(c) *Gas Holder No. 2 was of a type customarily in use. It had been frequently and carefully inspected prior to accident and found to be in perfect condition.*

The gas holder was made of steel and consisted of three sections. The first thereof, which was not movable, and which was filled with water, was known as the lower lift. The second and third sections were each movable. The bottom of each of the movable lifts was protected by a water seal to prevent the escape of gas. The inside of the tank was coated with wax tailings to protect it against corrosion and this was an effective method of doing so. The holder was so constructed that when the two upper lifts had gone up to the limit of their motion, there was nothing for the top of the upper lift to strike (R., pp. 356-358). Just before the accident the holder was only a little over half full, having seven or eight feet more to go before it would be full (R., p. 156, l. 21; p. 405, l. 20).

There was no evidence whatever that this gas holder had at any time been operated improperly or subjected to any abnormal pressure. It was regularly and thoroughly inspected by defendant.

On July 29, 1927, ten days prior to the accident, Mr. Halsey, an experienced boilermaker employed by defendant, made a thorough inspection of the holder. In the course of doing so he went up on its roof and tested all of its sheets with a brass hammer, examining not only the top of the holder but the sides and the angle around the edge of the upper lift. The lower lift, which was full of water, was in good condition. He walked around the holder on a walk at the top of this lift which is shown on Exhibit P-3, opposite page 701 of the Record. He found the water seals in good condition. He found no weak spots in the holder or detected no odor of escaping gas at any part of it. His inspection lasted about an hour and a half (R., pp. 370-372).

About four days prior to the accident the holder was again inspected by Mr. Isles, general foreman of defendant's Gas Department, who was responsible for its being in good condition. At that time he went on the top of the holder and completely over it, stamping on the plates. He found them solid and the holder in perfect condition. The water seals were perfect. Although the holder was then full, Mr. Isles found no odor of escaping gas (R., p. 354, l. 10; p. 355, l. 9; p. 356, l. 14; p. 364, l. 8). At no time prior to the accident had he discovered any hole or defect in the holder, nor had any hole or defect therein been reported to him by anyone, although he was the person to whom any leakage should have been reported (R., p. 364, l. 8; p. 365, l. 1; p. 358, l. 37).

At the time he made this examination Mr. Isles was accompanied by Mr. Remson, another employee of defendant, who then examined the top

of the lower lift of the holder while Mr. Isles was going over the top of the holder. In doing this he walked completely around the holder on the walk located at the top of the upper lift and found no unusual or improper condition. Although he particularly examined for the odor of escaping gas he did not detect any (R., p. 450, l. 35; p. 452, l. 2).

Another of defendant's employees, Mr. Ward, at Mr. Isles' direction as a rule inspected this gas holder every morning, going up on it and walking around the platform shown on Exhibit P-3, opposite page 700 of the Record (R., p. 388, l. 33). On the day of the accident he inspected the holder twice, the first time between nine and half past nine in the morning and the second time about three o'clock in the afternoon (R., p. 388, l. 25). On each of these occasions he walked around the tank on the platform. He detected no escaping gas and found the holder in good condition (R., pp. 389, 390).

(d) *The only conclusion that can properly be drawn from all of the evidence was that Gas Holder No. 2 had been struck by lightning within a short time before the fire and explosion occurred, and it was this occurrence and not defendant's negligence that led to the presence of the gas on Hook Road in the vicinity of this gas holder which exploded and caused plaintiff's injuries.*

The day of the accident had been a stormy one with frequent heavy rain accompanied at times by thunder and lightning (R., p. 64). Mr. Scarr, in charge of the United States Weather Bureau in New York City, testified that the last thunder before the accident occurred at 8:50 P. M. (R., p. 58, l. 9; p. 66, l. 26; p. 69, l. 39). Mr. Peters and Mr. Doherty, two of plaintiff's witnesses, fixed this time at about eight o'clock (R., p. 99, l. 25;

p. 129, l. 11). Plaintiff himself testified that it thundered and lightninged at about 8:30 P. M. (R., p. 173, l. 39). Mr. Kelly, a witness for defendant, says there was a bolt of lightning at about 10:40 or 10:45 P. M. (R., p. 482, l. 19).

Gas Holder No. 2 contained illuminating gas (R., p. 387, l. 38; p. 110, l. 22; p. 173, l. 31), which was the kind of gas present on Hook Road at the time and place of the accident (R., p. 110, l. 20; p. 173, l. 30).

An inspection of Gas Holder No. 2 after the accident showed that there had been a hole torn in the roof of the upper lift near the edge of the roof of the holder. This hole was about 4½ or 5 inches in diameter and big enough for a man to put his fist through it (R., p. 236, l. 10; p. 356, l. 1; p. 373, l. 33; p. 452, l. 37). This hole is shown on the photographs Exhibits D-9 to D-12, opposite pages 739 to 743 of the Record. The metal around the hole was clean and there was no sign of corrosion (R., p. 364, l. 24; p. 373, l. 39; p. 374, l. 1; p. 375, l. 32; p. 376, l. 1; p. 382, l. 31; p. 452, l. 30; p. 453, ll. 1 to 38; p. 469, l. 27). This would have been impossible if the hole had been there for any substantial length of time before the accident, because the gas in the holder was of a high sulphuric content, which would probably have resulted in corrosion (R., p. 368, l. 33). In addition to all this, it was shown that the plate in which the hole was found *had been dented in.*

> "The angle iron was dented in and you could see the angle iron and the top ring sheet where it was pushed away from the angle iron" (R., p. 469, l. 10).

Mr. Scarr, the Government's Weather Bureau expert, testified that static electricity in the air might easily cause "a spark sufficient to light the gas" (R., p. 70, l. 24; p. 71, l. 1). It had been raining on and off all the evening and was still

raining at the time of the accident. The plaintiff so testified (R., p. 200, l. 10).

As the situation stood at the close of the evidence there was, therefore, not only no evidence of negligence on defendant's part, but the proofs showed (a) that the gas which exploded came from Gas Holder No. 2; (b) that defendant had fully performed any duty that the law could have imposed upon it to frequently and thoroughly inspect this holder; (c) that it had been in perfect condition shortly prior to the explosion; (d) that this gas only escaped from the holder because the holder was struck by lightning, and (e) that this condition was not known to defendant or had existed for such length of time to charge it with knowledge thereof. The Trial Judge should, therefore, have granted defendant's motion for a direction of a verdict in its favor, and his refusal to do so constitutes reversible error.

We further submit that upon the evidence as it thus stood at the close of plaintiff's case the learned Trial Judge erred to the prejudice of the defendant in charging the jury as follows:

> "There is a phrase used in the law, *res ipsa loquitur,* meaning 'the thing speaks for itself'. The principle has been defined by our courts to the effect that 'when through any instrumentality or agency under the management or control of a defendant or his servants, there is an occurrence, injurious to the plaintiff, which, in the ordinary course of things would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care'. This principle is applicable in the case before you.
>
> "The defendant has a gas plant, container, pumping machinery, and apparatus for the manufacture and distribution of an extraordinarily dangerous element or substance, the conditions calling for the exercise of a cor-

respondingly high degree of care to prevent accident and injury. The maintenance and operations of the plant are in the control of the defendant. Without any act on the part of the plaintiff, an explosion and fire occur whereby he is injured. We thus say, 'The thing speaks for itself'. That is the very happening of the event, in the absence of explanation, indicates there was want of due care, or may indicate it, or the accident would not have occurred.

"It is for the jury to say whether such *prima facie* case as was presented by the plaintiff's testimony was met by the evidence for the defendant, the burden of proof remaining throughout on the plaintiff, however, in the whole case, to finally establish the negligence of the defendant as the cause of the accident. This does not mean that the plaintiff must prove the specific cause of the accident in order to show negligence.

"When, through any instrumentality or agency under the management or control of this defendant or its servants, there is an occurrence injurious to the plaintiff which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care (Mannon *vs.* Vesper Lodge of Independent Order of Odd Fellows, 97 N. J. L. 215, at pages 216, 218. Mumma *vs.* Easton and Amboy Railroad Company, 73 N. J. L. 658).

"The testimony for the plaintiff makes a *prima facie* case for the jury, and on the whole case, it remains for you to say whether such *prima facie* case was met by the defendant's evidence, the burden of proof remaining throughout on the plaintiff (Hughes *vs.* Atlantic City Railroad Company, 85 N. J. L. 212. Neibel *vs.* Winslow, 88 *id.* 91. Fanshawe *vs.* Rawlins, 89 *id.* 344. Mannon *vs.* Vesper Lodge, *supra*).

"Plaintiff is not required to establish by direct evidence the cause of the ignition of

> the gas, if any there existed, in order to establish the liability of the defendant company for damages resulting from the fire and explosion of the escaping gas, if any existed (See 25 A. L. R. 262, at page 293 and cases thereunder cited)." (R., pp. 644, 645; Exceptions, R., p. 693, ll. 14 to 20; Grounds of Appeal No. 11, p. 22; 12, p. 25; 13, p. 23; 20, p. 25; 21, p. 26; 22, p. 26.)

Such charge, in so far as it applied the doctrine of *res ipsa loquitur* to the facts of the case, was erroneous for the following reasons:

(1) It is fundamental that negligence is a fact which must be proved. It will not be presumed. *McCombe* v. *Public Service Railway Co.* (Ct. of E. & A. 1920), 95 N. J. L. 187; *Donus* v. *Public Service Railway Co.* (Ct. of E. & A. 1926), 102 N. J. L. 644. Even the doctrine of *res ipsa loquitur* clearly imports that there must in each case be something in the facts that speaks of the negligence of the defendant. *Adriance* v. *Schenck Bros.* (Ct. of E. & A. 1920), 95 N. J. L. 185; *Conover* v. *Delaware, Lackawanna & W. R. R. Co.* (Ct. of E. & A. 1918), 92 N. J. L. 602.

In *Noonan* v. *Great Atlantic, &c., Tea Co.,* 104 N. J. L. 136, this Court said:

> "The doctrine of *res ipsa loquitur* has been a number of times defined, and applied, in none better we think than in the case of *Bahr* v. *Lombard,* 53 N. J. L. 233, 238, where, in quoting from Smith on Negligence, Justice Garrison, speaking for this Court, says:
>
> " 'In such cases each will depend upon its own facts, with this understanding, that where a certain course of action has been pursued by any person without injury to others, and he, upon changing that course, injures another, the thing (unexplained) speaks for itself that such person has been negligent; or, if something unusual happens with respect

> to the defendant's property, or something over which he had control, which injures the plaintiff, and the natural inference on the evidence is that the unusual occurrence is owing to the defendant's act, the occurrence, being unusual, is said to speak for itself that such act is negligent.'
>
> "Justice Garrison then added:
>
> " 'It is evident that *this phase clearly imports that there must, in each case, be something in the facts that speaks of the negligence of the defendant.*'
>
> "The case has been many times cited with approval both in this and other jurisdictions, and is the settled law of this State."

The manufacture and storage of gas is, of course, not negligence *per se;* nor does the fact of the occurrence of an explosion make the doctrine applicable. *Marshall* v. *Welwood* (N. J. Sup. Ct. 1876), 38 N. J. L. 339; *Levendusky* v. *Empire Rubber Mfg. Co.* (Ct. of E. & A. 1913), 84 N. J. L. 698; *Cook* v. *American Smelting & Refining Co.* (Ct. of E. & A. 1923), 99 N. J. L. 81, 84.

(2) The doctrine of *res ipsa loquitur* has no application to cases in which the plaintiff has alleged specific acts of negligence and on the trial thereof relies on proof of a certain state of facts to establish it. In such cases he is not entitled to the benefit of the doctrine of *res ipsa loquitur,* but must rely upon his proof. *Dentz* v. *Pennsylvania Railroad Co.,* 75 N. J. L. 893; *Cook* v. *American Smelting & Refining Co.,* 99 N. J. L. 81, 84, 85. In the latter case this Court said:

> "The complaint alleges that the deceased was in the employ of Babcock & Wilcox Company, who were erecting a certain boiler for the defendant company at its plant, and, while deceased was so lawfully employed, a steam flange blew off the main line, caused from the negligence of defendant, its agent, servant or

employe, causing an explosion, as a result of which deceased was blown into the air and fell to the ground receiving injuries from which he died.

"The plaintiff having thus alleged negligence on the part of the defendant, carried the burden of proving it by circumstances from which defendant's want of due care would be an ultimate inference. This the plaintiff failed to do, and therefore the doctrine of *res ipsa loquitur* did not apply. *Bien* v. *Unger,* 64 N. J. L. 596.

"The proof submitted on behalf of the plaintiff failed to show that the accident to her intestate was the result of any lack of care on its part which the defendant company owed to the deceased. The result was that the direction of a verdict for the defendant company was proper. *Piver* v. *Pennsylvania Railroad Co.,* 74 N. J. L. 619.

"A plaintiff to succeed must show by evidence, not only such circumstances as would justify the inference of the defendant's negligence, but which would exclude the idea that the accident was due to a cause with which the defendant was unconnected. *McCombe* v. *Public Service Railway Co.,* 95 N. J. L. 187."

(3) It is abundantly settled that the doctrine does not apply in cases where it appears that the injuries were occasioned by one of two causes, for one of which the defendant is responsible, but not for the other. In such cases plaintiff must fail if the evidence does not show that the injury was the result of the former cause; if, under the testimony, it is just as probable that it was caused by the one as the other, plaintiff cannot recover. *Stumpf* v. *D. L. & W. R. R. Co.,* 76 N. J. L. 153; *Cass* v. *Sanger,* 77 N. J. L. 412. As stated by this Court in the case of *Suburban Electric Co.* v. *Nugent,* 58 N. J. L. 658, in the absence of direct evidence, the plaintiff must show existence of such

circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, and exclude the idea that it was due to a cause with which the defendant was unconnected. See also *Maher* v. *Magnus* (Ct. of E. & A., 1923), 99 N. J. L. 514.

(4) And, finally, it is settled that the doctrine does not apply unless the condition that produced the accident was in fact brought to the previous notice of the defendant or failing in proof of such actual notice, that the condition had existed for such a space of time as would have afforded the defendant sufficient opportunity to make proper inspection as to the safety of the place. *Rom* v. *Huber,* 93 N. J. L. 360, affirmed 94 N. J. L. 258.

Even though the doctrine of *res ipsa loquitur* could be said to have been applicable at the time of the motion of non-suit, it certainly was not applicable at the time of the motion for direction of a verdict. If applicable at the time of the motion of non-suit, it only gave rise to an inference of negligence, which defendant had the right to rebut or explain. The burden of proof remained with plaintiff. *Hughes* v. *Atlantic City R. R. Co.* (Ct. of E. & A., 1913), 85 N. J. L. 212.

And where, as in this case, any presumption of negligence that may have existed at the close of the plaintiff's case was entirely wiped out by the subsequent uncontradicted proof, the question became one for the Court to decide. *Cox* v. *Scott* (Ct. of E. & A., 1927), 104 N. J. L. 371.

And as was expressly held by this Court in *Hummer* v. *Lehigh Valley R. R. Co.,* 75 N. J. L. 703. The rule is

> "that 'in an action for negligence the trial judge is not justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence, as with

the existence, of negligence in the defendant'."

For the reasons above stated, we submit that the judgment of the Court below should be reversed, with costs.

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