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New Jersey Court of Errors and Appeals

Notice of Appeal and Grounds of Appeal. 10

(Served August 11, 1927)

NEW JERSEY SUPREME COURT

THOMAS R. ROBINSON,	} Plaintiff,	20
vs.		
UNEXCELLED MANUFACTURING	} Action at Law	
Co., a corporation,		
Defendant.		

To Joseph H. Edgar, Attorney of Plaintiff:

TAKE NOTICE that the defendant Unexcelled Manufacturing Company, does hereby appeal to the New Jersey Court of Errors and Appeals from the whole and every part of the final judgment entered in the above entitled cause in favor of the plaintiff and against the defendant for thirty-five hundred (\$3500.00) dollars, damages and costs of suit; 30

AND FURTHER TAKE NOTICE that the following are the grounds of appeal which are assigned by the defendant; 40

Notice of Appeal and Grounds of Appeal

1. Because the learned trial judge erred in denying defendant's motion to dismiss complaint in accordance with the notice annexed to the answer on the ground that plaintiff's complaint did not allege or disclose any cause of action
10 against the defendant.

2. Because the learned trial judge erred in denying defendant's motion for a nonsuit on the opening of counsel for the plaintiff for the reason that said opening did not set forth any act of negligence on the part of the defendant.

3. Because the learned judge of the trial court erred in denying defendant's motion for a nonsuit at the end of plaintiff's case.
20

4. Because the New Jersey Supreme Court erred in entering the judgment final in favor of the plaintiff and against the defendant, Whereas, on the entire record judgment should have been entered in favor of the defendant.

Respectfully yours,

30

CHARLES E. HENDRICKSON,
Attorney for Defendant.

Complaint.

SUPREME COURT

MIDDLESEX COUNTY

THOMAS R. ROBINSON,

Plaintiff,

against

UNEXCELLED FIREWORKS COMPANY, a New Jersey Corporation,

Defendant.

10

The plaintiff, Thomas R. Robinson, residing in 20
the Borough of Highland Park, in the County of
Middlesex and State of New Jersey, says:

FIRST: That on or about the 26th day of June 1926 the plaintiff was viewing a certain fireworks display in the City of Perth Amboy, in the County of Middlesex and State of New Jersey, from a location on property owned by the State of New Jersey situate beneath one of the several arches of the Victory Bridge, which is a part of the State 30
Highway route spanning the Raritan River connecting the City of Perth Amboy with the Township of Sayerville in the said County of Middlesex.

SECOND: The fireworks display consisted of what are commonly known as rockets, set pieces, aerial bombs and other types of fireworks which are commonly used in fireworks displays.

40

Complaint

THIRD: That the defendant manufactured the fireworks that were used in the display.

FOURTH: The defendant supplied the fireworks that were used in the said display.

10 FIFTH: The defendant through its agent or agents, whose name or names are unknown to the plaintiff set off the fireworks display.

SIXTH: The defendant through its agent or agents, whose name or names are unknown to the plaintiff, erected certain bases made of metal piping to be used in connection with a certain powder or other explosive charges for the propelling of aerial bombs into the air, the said bases to remain
20 in a fixed position in the ground following the explosion of the said propelling charge, and the said aerial bombs going up in the air to a position where they might explode and provide a display in a harmless and safe manner.

SEVENTH: The defendant was negligent in that it manufactured an aerial bomb which was defective in that it exploded prematurely and forced one of the metal bases consisting of a piece of
30 piping through the air which should have remained fixed in the ground, which said piping struck the plaintiff with great force and violence.

EIGHTH: The defendant was negligent in that it supplied an aerial bomb which was defective in that it exploded prematurely and forced one of the metal bases consisting of a piece of piping through the air, which should have remained fixed in the ground, which said piping struck the plain-
40 tiff with great force and violence.

Complaint

NINTH: The defendant was negligent in that its agent or agents ignited the explosive material used as a propelling charge for aerial bombs in such a careless and negligent manner as to propel through the air a certain metal piping used as a base which should have remained fixed in the
10 ground and which metal piping on being propelled through the air struck the plaintiff with great force and violence.

TENTH: The defendant was negligent in that one or more of the said bases were erected in a careless and negligent manner by the defendant's agent or agents and as a result one of the said bases was blown from the ground through the air
20 and struck the plaintiff with great force and violence.

ELEVENTH: The plaintiff was lawfully present under the arch of the aforesaid Victory Bridge in a position that rendered the plaintiff safe from falling objects, which are normally sent up in the air in connection with the ordinary display of fireworks and was at a point far removed from the place where the said fireworks were being set off. The piping which struck the plaintiff was
30 propelled in such a negligent manner as to fly through the air on an axis nearly parallel with the ground and which flew under the arch of the said bridge where it struck the plaintiff.

TWELFTH: The plaintiff received a severe blow and was greatly hurt, cut, wounded, bruised and injured. His head and face cut and scarred and his left eye was seriously injured, which scars
40 and injuries are of a permanent and lasting nature.

Complaint

THIRTEENTH: The plaintiff was not guilty of negligence that in any way contributed to his aforesaid injuries.

FOURTEENTH: The said plaintiff by reason of
10 said injuries lost a great quantity of blood, and became and was sick, sore, and disordered, and has suffered from the results of said injuries ever since that time.

FIFTEENTH: The hat and clothing of the said plaintiff were damaged and the plaintiff has suffered a pecuniary loss as a result thereof.

SIXTEENTH: By reason of said injuries said
20 plaintiff has suffered and undergone great pain and torment, both of body and mind, and still suffers therefrom.

SEVENTEENTH: By reason of said injuries said plaintiff was forced and obliged to pay out a large sum of money for medicines, hospital expenses and doctor's bills in endeavoring to be healed and cured of his injuries received as aforesaid.

EIGHTEENTH: By reason of the injuries so
30 received by the plaintiff as aforesaid, he has been hindered and prevented from carrying on and transacting his necessary affairs and business most of the time from the date of said injuries to the present date.

NINETEENTH: Plaintiff demands against the defendant, The Unexcelled Fireworks Company, Twenty Thousand (20,000) Dollars.

40

JOSEPH H. EDGAR,
Attorney for Plaintiff.

Answer.

NEW JERSEY SUPREME COURT

MIDDLESEX COUNT

THOMAS R. ROBINSON,

Plaintiff,

vs.

UNEXCELLED MANUFACTURING
COMPANY, INC.,

Defendant.

10

Action at Law

20

The answer of the defendant, a corporation of New York, erroneously impleaded as Unexcelled Fireworks Company, a New Jersey Corporation, having an office and place of business at #22 Park Place, New York, and duly authorized to transact business in the State of New Jersey, to the complaint of the plaintiff says:

FIRST DEFENSE

30

The defendant alleges that plaintiff's complaint does not allege or disclose any cause of action against this defendant, and the defendant hereby and herein sets up and raises the objection that the plaintiff does not allege or disclose any cause of action against this defendant.

40

Answer

SECOND DEFENSE

The defendant is not guilty of the negligence charged in the complaint.

10

THIRD DEFENSE

The defendant violated no duty which it owed to the plaintiff.

FIFTH DEFENSE

The agents of the defendant violated no duty which they owed to the plaintiff.

20

SIXTH DEFENSE

Defendant has no knowledge whether or not plaintiff was viewing the fireworks display at the place and on the date mentioned in his complaint; it admits that there was a fireworks display there to be viewed as part of the exercises in connection with the opening of said victory bridge to the use of the public by the State of New Jersey; that the fireworks display was of the types commonly used in fireworks displays; that it manufactured and supplied the fireworks used in the display; that its agents set off the fireworks; it denies that it erected any metal piping to be used in connection with a certain powder or other explosive charge for the propelling of aerial bombs into the air; that it, or its servants, were in any way negligent in the manufacture of

30
40*Answer*

any bomb or in providing or handling any contrivance for the purpose of firing said bomb or display or any part or feature thereof, or in the ignition thereof, and says that it is in the business of presenting fireworks displays, both in the manufacture and firing thereof; that its business is a lawful one; that it made this display at the request of and under contract with Victory Memorial Bridge Celebration Committee of Perth Amboy, New Jersey, in cooperation with The American Legion and Veterans of Foreign Wars, at a place designated by the public authorities, where this defendant was to set up and make said display; that the types of fireworks used were those called for by its said contract, and such as are commonly used for such displays and purposes, and were contracted for because they explode and produce the effects desired in such a display for the purpose aforesaid; that the explosive force is necessary to produce the result and that explosive force is well known to the public and that is the reason such displays are provided and the reason why so many thousands of people attend and seek to see such displays, and plaintiff well knew the same and that was the reason he was present to see the same; it says that it was the duty of the plaintiff to keep at such distance therefrom as to be safe from any results of the explosive nature of the types of fireworks used on the occasion in question; it says it has no knowledge whether plaintiff was injured in the manner alleged or not, but says that if he were, it was the fault of his own negligence. It denies

10

20

30

40

Answer

that plaintiff was forced and obliged to pay out
a large sum of money for medicines, hospital
expenses and doctors bills; it further says that it
was not guilty of negligence that in any way
contributed to any injury the plaintiff may have
received.

CHARLES E. HENDRICKSON,
Attorney for Defendant.

*To Joseph H. Edgar, Esq., Attorney for Plaintiff
and Thomas R. Robinson, Plaintiff:*

Take notice that before or at the trial of the
above action, I shall move to strike out the
complaint filed herein, on the ground that it
discloses no cause of action against the plaintiff.

Respectfully yours,

CHARLES E. HENDRICKSON,
Attorney for Defendant.

(Replication duly filed.)

30

40

Testimony.

NEW JERSEY SUPREME COURT

MIDDLESEX COUNTY CIRCUIT

April Term 1927

10

THOMAS R. ROBINSON,

VS.

UNEXCELLED MANUFACTURING
COMPANY, a corporation.

Transcript of stenographer's notes of evidence
in the above entitled cause, taken before HON. 20
PETER F. DALY, Circuit Court Judge, and a Jury,
at the Middlesex County Court House, in the City
of New Brunswick, New Jersey, on the eighteenth
day of April, 1927, at 2:35 p. m.

Appearances:

RUSSELL E. WATSON, Esq., JOSEPH H. EDGAR,
Esq., Attorneys for the Plaintiff.

CHARLES E. HENDERICKSON, Esq., Attorney for 30
the Defendant.

A jury being empaneled and found satisfac-
tory, they were sworn.

Mr. Watson: In the complaint the defendant is
mis-named, and the answer sets up the correct
name.

Mr. Hendrickson: The answer is the correct 40
name.

Testimony

Mr. Watson: May we stipulate that the summons and complaint be amended accordingly, that the defendant's name be Unexcelled Manufacturing Company?

10 Mr. Hendrickson: As it is set forth in the answer, Unexcelled Manufacturing Company, Incorporated.

Mr. Edgar opens the case for the plaintiff.

Mr. Hendrickson: I would like to have a little better opening in the matter of what this defective manufacture consisted of. Otherwise I would like to make a motion for a nonsuit. If that is all the plaintiff says he will give me, I will make my motion now. There is no allegation in
20 the complaint, or no allegation in the opening, of what the negligence is, that is a necessary feature for us to defend. I will make my motion:

I move to dismiss the complaint, in accordance with the notice annexed to the answer, on the ground that the plaintiff's complaint does not allege or disclose any cause of action against the defendant.

And a second motion for nonsuit on the opening of counsel in that it does not set forth the alleged
30 negligence that we are to meet. If I may, I submit to your Honor a trial brief and memorandum of law in the matter.

The complaint sets forth in the first paragraph that on the twenty-sixth day of June the plaintiff was viewing certain fireworks display in the City of Perth Amboy, County of Middlesex and State of New Jersey, from a location on property owned by the State of New Jersey, situated beneath one
40 of the several arches of the Victory Bridge, which

Testimony

is part of the state highway route spanning the Raritan River, connecting the City of Perth Amboy with the Township of Sayreville.

This is an allegation that the plaintiff was there voluntarily as a spectator to see this display of fireworks; that he was there of his own accord. 10

The second allegation is that the fireworks display consisted of what are commonly known as rockets, set pieces, aerial bombs and other types of fireworks which are commonly used in fireworks display. That is, that the plaintiff knows what fireworks display is, and that these were no different.

The third allegation that the defendant manufactured the fireworks and supplied the fireworks. 20

And a fifth paragraph.

Then comes the allegation that the defendant set off the fireworks.

Then in the sixth, the defendant through its agents, whose name or names are unknown to the plaintiff, erected certain bases made of metal piping to be used in connection with certain powder or other explosive charges for the propelling of aerial bombs into the air, said bases to remain
30 in a fixed position in the ground following the explosion of the propelling charge, and the said aerial bombs going up into the air in a position where they might explode, and made the display in a harmless and safe manner. That is the knowledge of the plaintiff of what this display and exhibition was that he went to see. Then in the seventh paragraph the plaintiff avers that the defendant was negligent in that it manufactured an aerial bomb which was defective, in that it ex- 40

Testimony

ploded prematurely—that is the language that is important in this motion—and forced one of the metal bases, consisting of a piece of piping, through the air, which should have remained fixed in the ground, which said piping struck the plaintiff with great force and violence. 10

The eighth paragraph states that the defendant was negligent in that it supplied an aerial bomb which was defective. The same allegation. That it exploded prematurely and forced one of the metal bases, consisting of a piece of piping, through the air, which should have remained fixed in the ground, which said piping struck the plaintiff with great force and violence.

20 The Court: That is repetition.

Mr. Hendrickson: My application is that there is no allegation in the complaint setting forth what the negligence is. There is nothing in the complaint except the fact that this bomb exploded. Of course it exploded.

Then the ninth, the defendant was negligent in that its agent or agents ignited the exploding material used as a propelling charge for aerial bombs in such a careless and negligent manner as to propel through the air a certain metal piping used as a base, which should have remained fixed in the ground, and which metal piping, on being propelled through the air, struck the plaintiff with great force and violence. 30

That is a repetition of the same allegation. There is nothing in it except the fact of this explosion.

Then the same language again in the tenth, the defendant was negligent in that one or more of the 40

Testimony

said bases were erected in a careless and negligent manner, and by the defendant's agent, and as a result one of said bases was blown from the ground through the air and struck the plaintiff with great force and violence.

Now, there is nothing in the complaint except the fact of the explosion, as the basis of this action. 10

The Court: There is more than that. Take the seventh, the defendant was negligent in that it manufactured an aerial bomb which was defective in that it exploded prematurely. There is a specific charge that the reason why the plaintiff was struck was because an aerial bomb was defectively manufactured, which defective manufacture caused a premature explosion. The point being that if there was not a premature explosion, this piping would not have been sent through the air in the way in which it was. 20

Mr. Hendrickson: If there had not been any explosion, then the piping would not have been thrown through the air, but my point is that all it amounts to is an allegation that there was an explosion; and I call your Honor's attention to two cases that are so exactly in point that I thought I ought to call your attention to them before we proceeded with the case. 30

In the eleventh paragraph plaintiff alleges that he was lawfully present under the arch of the aforesaid Victory Bridge in a position that rendered the plaintiff safe from falling objects; that is further proof that the plaintiff himself knew that there was some risk connected with a fireworks display; so that his going there voluntar- 40

Testimony

ily is emphasized by the fact that he knew that there was some risk, and if there was some risk, and he voluntarily accepted that risk, then the defendant could not be responsible; which were normally sent up in the air in connection with the
 10 ordinary display of fireworks, and was at a point far removed from the place where the fireworks were being set off. The object which struck the plaintiff was propelled in such a manner as to fly through the air on an axis nearly parallel with the ground. That is conjecture but, of course, that may be correct. It is a matter of proof.

The two cases in this country that I have found are so identically on all fours with this case at
 20 bar, as I diagnose the pleadings, I want to call them to the Court's attention. The first is Scanlon v. Wedger, 156 Mass., page 462. That is a case on appeal in the Supreme Judicial Court of Massachusetts. That was an action at tort for personal injuries occasioned to the plaintiff by the explosion of a mortar used in a display of fireworks September 27, 1888. The facts were apparently absolutely identical with the ones set
 30 forth in the complaint here. The plaintiffs apparently were present at the display of fireworks as voluntary spectators, and were of ordinary intelligence. No fact is stated in the report to show the contrary, nor has any suggestion to that effect been made in the argument. The plaintiffs have not rested their claims at all upon the ground that they were merely travellers upon the highway, or that they were unaware of the natural risk of the display. The bombs or shells were
 40 to be thrown from mortars into the air, it being

Testimony

intended that they should explode in the air and display colored lights, a common form of fireworks such as has long been in use. Under this state of things it must be considered that the plaintiffs were content to abide the chance of
 10 personal injury, not caused by negligence, and that it is immaterial whether there was or was not a valid license for the display. If an ordinary traveller upon the highway had been injured, different reasons would be applicable; and the Massachusetts court cites our New Jersey case of Jones vs. Sutton, that was in Jersey City where fireworks were shot off in front of a political meeting and a party passing up the street was injured. But a voluntary spectator who is present
 20 merely for the purpose of witnessing the display must be held to consent, and he suffers no legal wrong if accidentally injured, without negligence on the part of anyone. The point was raised in that case that there was no license. He takes the risk.

There is another case in Indiana, Conrad vs. Chauve, 93 Indiana, page 476. It follows the Massachusetts case, or it is cited in the Massa-
 30 chusetts case, I think. (Citing case.)

The point I make is that the general rule that goes through all cases of explosives, and in most other cases of tort, that the explosion itself, or the fact itself is not proof of negligence, and I say that the plaintiff should plead and put the defendant on its notice to know what is the nature of the negligence on which they base their claim; that we have a right to know what we did not do
 40 that we should have done, or what we did that we

Testimony

should not have done, and have some notice of it. If we had improper employees to fire them off, inexperienced men, or used improper appliances to discharge such a bomb into the air, those are things that I say should be alleged in the complaint, so that the defendant would have notice of what the negligence is. But, in this case we have nothing here except the fact that the bomb itself exploded; and explosions have occurred on other occasions, and I have in the court two instances that I was able to find. Sometimes we knew that shells have exploded in the cannon on board our battleships and people are hurt. There is not any way that you can tell what a particular bomb or shell is going to do, except by firing it; and these particular shells are used all over the country everywhere, and as the plaintiff alleges in his complaint, they are a very common form of fireworks. While of course everybody is sorry that the plaintiff should be injured or harmed, nevertheless, without proof of negligence, there is no claim of liability against this defendant for this particular injury. The plaintiffs have had plenty of time by notice on the complaint, they have made no amendment whatever to their complaint, and in their opening here today they give us no further information and, therefore, I submit we are entitled to have the complaint dismissed and the action nonsuited.

Mr. Watson: May it please the Court, if the defendant expects the plaintiff, in proving negligence, to prove that there were six ounces of powder in this particular bomb that exploded, instead of two, or that the fuse was a foot long

Testimony

instead of ten inches, or that the man who applied the match, or whatever was used in lighting it, did so a minute or two before he should, or that the mortar from which the bomb was expelled was one-quarter of an inch thick, whereas it should have been an inch thick, that the plaintiff cannot do. We submit to the Court that it is not necessary for the plaintiff to do anything of that kind.

If the opening may be amplified just a little it will be shown—the defendant admits in his answer that it was conducting a display of fireworks which it manufactured, and which were set off by its agents. The plaintiff was standing under an arch of the bridge. The allusion in the complaint to the fact that he was so standing that he was shielded from objects falling from the air, was to rebut any inference that there might be that this projectile had gone up into the air several hundred of feet and then fallen upon him. His position was such that he could have been struck only by some projectile which came from a point near to the earth. The evidence will show that these aerial bombs were being expelled from metal mortars; that they were thrown a great height into the air, where they exploded, giving off a great variety of lights and colors. Shortly before this young man was injured there was an explosion which was not high up in the air, the witnesses will say, but which was from a point near the earth; one or two witnesses who were standing near Mr. Robinson heard something shoot through the air, as they put it. The young man fell to the ground stricken unconscious. This piece of steel, which was warm, the witnesses will

Testimony

say, was found near him, and it was passed from hand to hand by two or three people. Now, that chain of cause and effect, we submit shows there, as alleged in the complaint in paragraph eight, that the bomb was defective in that it exploded
 10 prematurely, the fact that there was an explosion near the earth, the fact that this projectile did not come from up in the air, but came on an axis nearly parallel to the ground; or that as alleged to the ninth paragraph, I think it is, the propelling charge that was used was of an improper kind and was carelessly and negligently used. If nothing more, it is clearly within the line of New Jersey cases laying down the *res ipsa loquitur* doctrine, the hanging electric light wire, the bursting
 20 steam pipe, there are several of them. Here is an agency being operated by the defendant entirely within his control, and the case is within the doctrine of those, if nothing more.

These two cases to which counsel has referred, as he has read the excerpts from them, it seems to me bear upon unlicensed exhibitions, and the assumption of the risk by a voluntary spectator. We do not dispute the doctrine of those cases.
 30 We do not care whether you were licensed or unlicensed.

Mr. Hendrickson: The license question does not come up in this case.

Mr. Watson: He went there as a voluntary spectator. But we say that this opening is sufficient to show a premature explosion, and that a premature explosion in itself raises a presumption of negligence which put the defendant to his
 40 defense.

Testimony

Mr. Hendrickson: Those cases say that is not so; that the explosion itself is an ordinary accident that happens in connection with such a display, and if such a thing does happen, and you are a voluntary spectator there, there is no liability
 10 of the defendant.

Mr. Watson: Just at random, from title "Explosions," 25 Corpus Juris, page 205, in one of the notes (quoting).

Mr. Hendrickson: The case which Mr. Watson cites, of course, starch does not ordinarily explode. Fireworks are made to explode. That is why people go to see them. People know what the nature of them is. And the two cases are exactly in point. The thing that happened in Massachusetts was that the shell exploded prematurely in the mortar, that is all there was to it.
 20

The Court: I do not know that our state would make any such holding as that. I feel that a manufacturer of fireworks is under the duty of using such degree of care as the nature of the product would reasonably require, in the manufacture of fireworks.

There is a charge here, repeated several times, that the reason why this bomb prematurely exploded was because the fireworks were defective. Take even the Massachusetts, it says that an onlooker must expect such explosions of fireworks as are not caused by negligence, and as I understand the New Jersey cases, if there was negligence in the proper manufacture of fireworks, or negligence in the proper setting off of the fireworks, and another is injured from such negligence, the defendant is responsible.
 30
 40

Testimony

There are two distinct charges of negligence in this complaint, and while the word negligent, and negligently, is not repeated so often as you find ordinarily in these complaints, and particularly as to one paragraph, where I would suggest that the word "negligently" be put in, it makes two distinct charges of negligence. It says that this explosion was an explosion that was due to defective manufacture of the fireworks. And the other distinct charge is that these bombs or other fireworks which an onlooker had the reasonable right to expect would go vertically up in the air, and that all he should do, as a matter of prudence, would be to protect himself from the falling embers of the burnt out fireworks, burnt out while they were in the air, yet although he did do that in this case, that negligently, instead of setting off one of those pieces of fireworks so that it would go vertically up in the air, they set it so that it was almost parallel to the ground. There are the two distinct charges in the complaint; and as far as the lack of a detailed opening, Mr. Watson has brought out those two elaborations in about the same manner as I have in my explanation.

I would suggest that in paragraph eleven: "The plaintiff was lawfully present under the arch of the aforesaid Victory Bridge in a position that rendered the plaintiff safe from falling objects which are normally sent up in the air in connection with the ordinary display of fireworks, and was at a point far removed from the place where the said fireworks were being set off, the piping which struck the plaintiff was propelled in such

Thomas R. Robinson—Direct

a negligent manner"—the word "negligent,"—"as to fly through the air on an axis nearly parallel with the ground, and which flew under the arch of the said bridge, where it struck the plaintiff, instead of being arranged to fly vertically in the air." Put the word "negligently" in there somewhere so that they may know.

Mr. Hendrickson: We would like an objection to the amendment in that regard.

The Court: Yes. Do you want it or don't you?

Mr. Watson: Yes, we do want it. I respectfully ask leave of the Court to amend the complaint by inserting the word "negligent."

The Court: That amendment is objected to. The objection is overruled and the amendment is allowed.

Mr. Hendrickson: Prays exception.

The Court: Yes, certainly.

The motion to strike out the complaint, and the motion for a nonsuit are both denied and you may have an exception as to each.

Mr. Hendrickson: I pray an exception.

The Court: Certainly.

Mr. Hendrickson opens the case for the defendant.

THOMAS R. ROBINSON, the plaintiff, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Watson:

Q. Mr. Robinson, where do you live? A. 226 Lincoln Avenue, Highland Park.

Q. How old are you? A. Twenty-three.

Q. Are you single or married? A. Single.

Thomas R. Robinson—Direct

Q. Where did you live last June? A. 226 Lincoln Avenue.

Q. Lincoln Avenue, Highland Park, the same place you live now? A. Yes, sir.

10 Q. Did you go to the Victory Bridge celebration at Perth Amboy on the night of June 24 last? A. Yes.

Q. How did you go? A. I went in Mrs. Holman's car.

Q. Who were in the car with you? A. Mrs. Holman, Edna Holman, Mr. and Miss Roberts, and Clifford Holman.

Q. Mr. and Miss who? A. Roberts.

20 Q. What time did you get to Perth Amboy? A. I should judge around seven-thirty or eight o'clock.

Q. When did the fireworks display begin? A. I believe it was around eight-thirty or nine. I know it was late.

Q. Where were you when the fireworks display began? A. Underneath the Victory Bridge.

30 Q. Where was the fireworks display with reference to the bridge and the water, the Raritan River? A. I should say about two hundred and fifty feet in front of it.

Q. Was it on the down-stream side of the bridge or the up-stream side? A. The down-stream side.

Q. Where were you standing? A. I was standing alongside of the Buick car of Mrs. Holman's.

Q. With reference to the bridge where were you? A. About ten feet under it.

40 Q. This bridge is in arches, is it not? A. Yes, sir.

Thomas R. Robinson—Direct

Q. When you say under it you mean you were under one of the arches? A. I was under one of the arches. I don't remember which one it was.

Q. About how far from the water, from the river were you? A. I don't remember.

Q. Was your car under the arch also? A. Yes, 10 sir; about ten feet under.

Q. And where were you standing? A. Right alongside of the back door of the automobile.

Q. Right or left? A. On the right side.

Q. Who were you standing with, if anyone? A. I was alone.

Q. Were you there when the fireworks display began? A. Yes, sir.

Q. What did you do after the fireworks display 20 began? A. Just stayed there underneath the arch.

Q. What happened to you, Mr. Robinson? A. I was hit with this obstacle and taken to the hospital and that is all I know.

Q. You were hit by what? A. By that piece of metal.

Q. Did you see it? A. No, I didn't.

Q. Just tell us what you saw? Now, tell us 30 again what happened to you? A. I was hit by something and taken to the hospital and that is all I remember.

Q. Did you lose consciousness or not? A. Yes, sir, I did.

Q. Where were you when you lost consciousness? A. Underneath the bridge by the car.

Q. And where were you when you regained consciousness? A. In somebody's automobile.

Q. Had you gotten to the hospital yet? A. No. 40

Thomas R. Robinson—Direct

Q. You regained consciousness before you were taken to the hospital? A. Yes, sir.

Q. How long after the fireworks display began was it that you were struck? A. It was right after the set pieces had been set off.

10 Q. Well, was that ten minutes or an hour or two hours? A. I should say about an hour.

Q. Had there been an aerial bombs set off? A. Yes, quite a few.

Q. About how many? A. That is hard to say.

Q. Well, just as nearly as you can recall. A. I should say about fifteen.

Q. How high in the air did they explode, if you can tell? A. I can't tell that.

20 Q. Well, can you tell with reference to that county building? A. No. They were pretty high. I should judge three or four hundred feet.

Q. When you regained consciousness you were taken to the hospital? A. Yes, sir.

Q. What was your condition? A. My face was cut, my eye was cut, my teeth, two teeth were out, and several were broken.

Q. What about your jaw if anything? A. My jaw was hurt and swelled up.

30 Q. How long were you in the hospital? A. Two weeks.

Q. What hospital were you in? A. Perth Amboy City Hospital.

Q. Who treated you while you were there? A. Dr. Slobodien.

Q. Then where did you go after that? A. I came home and was home about three days, and the folks took me up to my cousin's farm near
40 Buffalo?

Thomas R. Robinson—Direct

Q. How long did you stay there? A. Seven or eight days.

Q. Then where did you go? A. I came back home.

Q. What kind of treatment did you have to have as a result of this accident? A. I had to have 10 several stitches taken in my face and my head.

Q. Whereabouts in your face, Mr. Robinson? A. From my head here right down to here, and then a couple of stitches up here (indicating).

Mr. Watson: The witness first indicates from a point on the left side of his forehead to his chin, and secondly points to a place on the left upper half of his head. 20 Is that right, Mr. Hendrickson?

Mr. Hendrickson: Yes.

Q. Who did that? A. Dr. Smith at the Perth Amboy City Hospital.

Q. Did you have any dental treatment as the result of this accident? A. Yes, sir. I have been going about every two or three Saturdays since that date.

Q. For what? A. Having the fillings replaced, and having a plate made for the teeth that are 30 out. And I have several more teeth to be finished yet.

Q. Who is your dentist? A. Dr. Iredell.

Q. Of this city? A. Yes, sir.

Q. What about your eye? A. My eye about fifty per cent normal now.

Q. Which eye is it? A. My left.

Q. Did you have to wear glasses before the accident? A. No, sir. 40

Thomas R. Robinson—Direct

Q. Before the accident, Mr. Robinson, did you have any difficulty with your speech? A. No, sir.

Q. Do you have difficulty now? A. Yes.

Q. Always, or part of the time, or how often? A. Always.

10 Q. Did you suffer pain as the result of these injuries? A. Yes.

Q. Do you have any pain now? A. In extreme weather my scars affect me.

Q. Where were you employed before the accident? A. A. International Motor Company of this city.

Q. What kind of work did you do? A. Ledger work.

20 Q. Bookkeeper? A. Yes, sir.

Q. Where are you employed now? A. At the International Motor Company.

Q. How long were you out of employment? A. Six weeks.

Q. What was your salary? A. \$22 per week.

Q. What was your hospital bill? A. First week I believe was \$36.75 and the second week was \$40.

30 Q. \$76.75 altogether? A. Yes, sir.

Q. Did you pay it? A. Yes, sir.

Q. I hand you these bills for refreshing your recollection, medical bills; will you tell us what they are and whether you paid them? Look at those and tell us whether you paid them, and if so to whom and how much. A. Paid \$50 to Dr. Benjamin Slobodien of Perth Amboy for treatment while I was at the hospital. Then we have the hospital bills.

40 Q. You have told us about those? A. Yes.

Thomas R. Robinson—Direct

Then we have one here of Dr. Fritts of Binghamton, New York, who dressed my eye on the way up.

Q. How much was that? A. That was only two dollars. Then we have another one from Dr. Davis that I paid in New York for twelve dollars, which was paid. Then we have one from Dr. R. A. Edson, an eye specialist of Buffalo of ten dollars, which was paid. Then we have the bill for my glasses from the Avenue Optical Shop, Buffalo, and that was paid, eleven dollars.

Q. What about Dr. Iredell's bill for the dentistry? A. That has not come in as yet.

Q. Are there any other bills that you have not received as yet? A. No, sir.

Q. What about your clothing? Was your clothing destroyed or damaged? A. I have a suit that was all blood stained and it had to be washed and it is too small. My hat, I had a good Stetson hat and that thing went right through the top here and put a big slit in it.

Q. Is this the hat that you were wearing? A. Yes, sir.

Q. What was its condition just before you were struck? A. It was perfect, practically new.

Q. And this cut in the hat was made by the accident? A. Yes, sir.

Mr. Watson: We offer the hat in evidence, Mr. Hendrickson.

Mr. Hendrickson: I have no objection.

(Hat entered in evidence and marked Exhibit P-1.)

Thomas R. Robinson—Cross

Q. How long had you had the suit? A. About six or seven months.

Mr. Watson: We offer the bills in evidence.

10 The Court: Any objection?

Mr. Hendrickson: No, sir.

The Court: They are admitted.

(Bill of Dr. B. F. Slobodien amounting to \$50 entered in evidence and marked Exhibit P-2.)

(Bill of Perth Amboy City Hospital amounting to \$36.75 entered in evidence and marked Exhibit P-3.)

20 (Bill of Perth Amboy City Hospital amounting to \$40 entered in evidence and marked Exhibit P-4.)

(Bill of Dr. Andrew S. Fritts amounting to two dollars entered in evidence and marked Exhibit P-5.)

(Bill of Dr. Edson amounting to \$10 entered in evidence and marked Exhibit P-6.)

(Bill of Avenue Optical Shop entered in evidence and marked Exhibit P-7.)

30

CROSS-EXAMINATION by Mr. Hendrickson:

Q. Mr. Robinson, it was raining at this time, wasn't it? A. Yes, sir.

Q. Weren't you under the bridge to keep out of the rain? A. Well, our car was parked under the bridge and we naturally stayed there.

Q. You didn't think yourself anything about anything hitting you, did you? A. No, sir.

40 Q. Of course you didn't know what hit you after it hit you, did you? A. No, sir.

Thomas R. Robinson—Cross

Q. How did you get this theory of the thing coming in a low trajectory to you and hitting you?

A. How did we get it?

Q. How do you get that idea that this thing came to you like that and hit you? A. Why, because it left a streak along the top of Miss Holman's automobile where it came through. 10

Q. Well, the way it went through, or hit, would like it came down from above, wouldn't it? A. Not necessarily.

Q. This is the front end of the hat, isn't it? A. Yes, sir.

Q. That exactly fits over your head where it came down and made the mark? A. Yes.

Q. Mr. Robinson, I show you some photographs 20 of the Perth Amboy bridge; can you recognize them by looking at the photographs? A. I recognize the bridge but I don't exactly recognize the arch we were under.

Q. Do you recognize that as a picture of the bridge? A. Where is the bridge?

Q. In there (indicating). A. Yes, now I do.

Q. Do you recognize that picture? A. No, sir, I don't. It was dark when we were there.

Q. You are not familiar with the locality? A. 30 No, sir.

Q. Three pictures that I show you of the bridge shows the arches that you mention, do they not? A. Yes.

Q. Now, can you tell us under which arch you were? A. I believe that the next arch—I believe there is one arch that had a railroad track going through it, and I believe we were under the next arch. 40

Thomas R. Robinson—Cross

Q. That would have been the third arch over then from this end, the railroad tracks going through there? A. Yes, sir.

Q. That picture, do you recognize that? A. No, I can't say I do.

10 Q. Don't you recognize that abutment that comes down there? A. No, I don't.

Q. Is not that the abutment that comes down? A. Yes.

Mr. Hendrickson: I ask to have these five pictures marked for identification for me at this time.

(Photograph marked D-1 for identification.)

20 (Photograph marked D-2 for identification.)

(Photograph marked D-3 for identification.)

(Photograph marked D-4 for identification.)

(Photograph marked D-5 for identification.)

30 Q. When you were struck, Mr. Robinson, you were not underneath the bridge, were you? A. Yes, I was.

Q. How far under the bridge? A. About ten feet under.

Q. How high up in the air did these bombs go that you were looking at? A. They went pretty high.

Q. What? A. They went very high but I couldn't say exactly how high.

40 Q. Two or three hundred feet? A. I imagine that is how far up they went. Around that.

Thomas R. Robinson—Cross

Q. That was a new bridge, wasn't it? A. Yes, sir.

Q. And this was the opening day, wasn't it, the dedication of it? A. Yes, sir.

Q. How did you hear of this fireworks display? 10 A. My friend Clifford Holman asked me if I would go along with him.

Q. Who told you about it? A. My friend Clifford Holman.

Q. You had seen fireworks displays before? A. Yes.

Q. You went there to see one because you thought it was a good one, did you? A. I went along to see the fireworks, and as company for Clifford. 20

Q. And as company for Clifford? A. Yes, sir.

Q. You are working at the same job now that you worked at before you were hurt? A. Yes, sir.

Q. You remember meeting me in your attorney's office last December or January? A. Yes, sir.

Q. Do you remember we arranged at that time with you and your attorney that you would go down and see a doctor that I selected in New Brunswick to examine your injuries? A. Yes, sir. 30

Q. Why didn't you go?

Mr. Watson: I object to that.

Mr. Hendrickson: If your Honor please—

The Court: I will allow it.

Mr. Watson: What do you charge, violation of agreement? 40

Thomas R. Robinson—Cross

A. I had been going to Dr. Sullivan for my examinations and I went to him.

Q. Well, you promised to go there and allow a doctor for me to look at your injuries, didn't you, in Mr. Edgar's office? A. Yes, but Mr. Edgar is my attorney.

Q. What do you mean, he advised you not to go, after I went up? A. Yes, sir.

Q. What?

The Court: He said yes, sir.

Q. You knew why I wanted you to go down there, didn't you, to find out how serious these injuries were? A. Yes, but Dr. Sullivan knows.

20 Q. Was anybody else hurt with you that night? A. No, sir.

Q. Wasn't your friend's car injured? A. The car was injured, the top of the car.

Q. Weren't you standing with your foot on the running board of that car? A. I believe I was.

Q. And didn't the thing that hit you come down through the top of that car and break through the top of the car? A. No, sir. The thing that came up the top of the car, and where the car come to
30 sort of a point, it couldn't go up that way so it went right on through and went through the iron pipe alongside of the top.

Q. Something went through the top of the car, didn't it? A. Yes, sir.

Q. Was that the thing that hit you? A. Yes, sir.

Q. So that it did come down from above, didn't it? A. Yes, sir; it must have.

40 Q. This thing couldn't have come out of the air

Thomas R. Robinson—Re-direct

on a straight line, could it? It had to come down from above, didn't it? A. Well, it came on sort of a level at the top of the car.

Q. That is only your guess, but the fact is that it came first through the top of the car—

The Court: Your statement that is only his guess is stricken out.

Mr. Watson: Besides that is what the question calls for, a guess. He can state the facts. How does he know?

The Court: He is asked now if he saw which way it came.

Q. Whatever hit you came down first through the top of the car? A. Yes, sir.

Q. And through your hat and then hit you on the left-hand side of the face? A. Yes, sir.

Q. How many people were there in front of you at that display? A. There were thousands in front of us.

Q. Thousands of people? A. Yes.

Q. And many of them were between you and the place where we fired the fireworks off? A. Yes, sir.

Q. How far away were they shooting those fireworks? A. I should say about two hundred feet.

RE-DIRECT-EXAMINATION by Mr. Watson:

Q. You were standing where with reference to your automobile? A. I was standing exactly alongside of the back door.

Q. What kind of car was this? A. It was a Buick seven-passenger touring car.

Thomas R. Robinson—Re-direct

Q. To the right side of the car? A. Yes.

Q. Where was the front of the car with reference to the edge of the arch? A. About—the front of the car must have been about ten feet under the arch.

10 Q. The front of the car was ten feet under the arch? A. Yes, sir.

Q. Did you say you had your foot on the running board of the car? A. I believe I did because that is the way I usually stand.

Q. By the rear door? A. Yes, sir.

Q. Was the top up or down? A. Up.

Q. What part of the top was damaged? A. The part right over the door and the brace that
20 holds the framework, the iron framework.

Q. The front door or the back door? A. Back door.

By the Court:

Q. Was the rear part of the car farther from the open air, or the front? A. The rear part of the car was farther.

Q. Was more under the arch than the front, is that it? A. Yes, sir.

30 By Mr. Watson:

Q. Did you ever have any trouble with your eyes before? You said you never wore glasses? A. No, sir.

Q. Do you have any trouble with your eyes now? A. Yes.

Q. What trouble do you have? A. In reading.

Q. You were asked why you went there. Did you read anything in the newspapers of this fire-
40 works display? A. No, sir.

Thomas R. Robinson—Re-cross

Q. What is the deformation at the left side of your lip? A. It is sewed in here, my lip was split apart right there.

Q. The lower lip? A. Yes, sir. And it is sewed inside here.

Q. Where was it split, in the middle? A. 10 Right where that scar is.

Q. In the middle? A. Yes, sir.

Q. And the scar on the outside extends from your lip all the way to your chin? A. Yes, sir.

Q. Was it cut through all the way? A. Yes, sir.

Q. Is there a deformation here at the left side of the mouth? A. No, sir. Right here. 20

Q. Yes. A. Yes, there is slight.

Q. Looks like a little ball there? A. Yes.

Q. Did you have that before the accident? A. No, sir.

Q. You were asked about being examined by the defendant's doctor? A. Yes, sir.

Q. Did you have some personal reason for not wanting to go to see the doctor who was named? A. No, sir. In fact I would go to see him.

Q. You are willing to go? A. Yes, sir. 30

RE-CROSS-EXAMINATION by Mr. Hendrickson:

Q. You speak about something inside of your mouth. Your counsel asked you about something inside of your mouth. What is that? A. It is sewed.

Q. What is that? A. It is where they had stitches. All swelled up.

Q. You have a sister, haven't you, works down 40 in the bank? A. Yes, sir.

Joseph Wataha—Direct

Q. She has a sort of impediment of speech the same as you have, has she not? A. Not that I recall.

Q. What? A. Not that I recall.

10 Q. Now, you are talking better now. You have no trouble in talking have you? A. No trouble in talking but people don't understand me.

Q. There were a number of other automobiles all around you there, were there not? A. Yes, sir.

Q. In back of you or in front of you? A. In back of us.

Q. You were the front automobile? A. Yes, sir.

20 Q. Were the people in the other automobiles looking at the fireworks? A. Yes, sir.

Q. They could not see, could they, underneath the bridge? A. I couldn't say that.

Q. Could you see the bombs up in the air from your position by the rear door of the automobile? A. I could see some of them.

Mr. Hendrickson: That is all.

Mr. Watson: That is all.

30

JOSEPH WATAHA, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Watson:

Q. Mr. Wataha, where do you live? A. 212 Sheridan Street, Perth Amboy.

40 Q. Did you attend the Victory Bridge celebration? A. Yes, sir.

Joseph Wataha—Direct

Q. On the night of June 24, 1926? A. Yes, sir.

Q. Where were you during the fireworks display? A. Why, I was about on the edge of the arch.

Q. Which arch? A. Second arch from in shore out. 10

Q. Second arch from where? A. From in shore to the water edge.

Q. Is there a railroad track runs through one of these arches? A. Yes, sir; through the third arch.

Q. You were in the second? A. Yes, sir.

Q. Do you know Mr. Robinson the plaintiff who was just on the stand? A. Yes, sir; I seen him there. 20

Q. Did you see him there that night? A. Yes, sir.

Q. What arch was he under? A. He was in the second arch.

Q. Same one you were under? A. Yes, sir.

Q. Did you see anything happen to Mr. Robinson? A. Well, I seen him after he was struck.

Mr. Hendrickson: I would like the Court to ask counsel not to lead in any way. 30

The Court: He asked him if he saw anything happen. That is not leading.

Q. What was going on? A. Well, the fireworks—the bombs was going in the air, and just at that bomb, why, one whizzes by us and first thing that man was down.

Q. How do you know it whizzed by you? A. Well, I could feel the whistle, or hear the whistle of it, like a draft, a hot draft. 40

Joseph Wataha—Direct

Q. Where was this hot draft and whistle? A. Well, it seemed that it come from the air.

Q. How near you was it? A. Well, do you mean the fireworks?

10 Q. No, this hot draft and whistle? A. Oh, I couldn't just exactly—I don't say how far but I imagine, I say about ten feet ahead of Mr.—whatever his name is.

Q. You were standing in front of him? A. Yes, sir.

Q. Where was he? A. Why, he was at the rear door of his car.

20 Q. And where was his car with reference to the edge of the arch? A. Oh, I imagine the front of his car must have been about even with the edge of the arch.

Q. And where was the back of his car? A. Oh, about, well, whatever length that the car is, I don't know how long the back is, that much under the arch.

Q. And you were standing in front of the car? A. No; I was right by his front wheel, about.

30 Q. This whiz and draft that you felt, was it above you or below you or beside you or where? A. Well, it seemed that it was just a concussion right around us there. It seemed as though it come from the works you could see, of course, you could see the flash, you know, that the bomb didn't go off right.

Q. Where did you see that flash? A. Why, right ahead of us from where they were shooting them there.

40 Q. Where they were shooting the fireworks? A. Yes, sir.

Joseph Wataha—Direct

Q. And how far ahead of you was that? A. Oh, I imagine 150 feet.

Q. How soon after you saw this flash and heard that concussion did you feel this whiz and draft?

A. Well, I don't say—it wasn't many seconds. 10

Q. Right away? A. Yes, sir.

Q. What happened to Robinson? A. Well, the first I know that he was down and two or three men was near him already at that time.

Q. What became of him? Did you help pick him up? A. No, sir; I did not. I picked up the piece of steel.

Q. Where did you find the piece of steel? A. Right alongside of him. Just where they picked him up from. 20

Q. Well, how near to him? A. Oh, I would say right alongside of his side it must have been.

Q. What was the shape of this piece of steel? A. Well, I imagine it was round, one end of it, and one was a "V" shape, something like that (indicating), where it was spread open.

Q. Could you tell what it had been a part of, or what it had come from? A. Well, I was just—I couldn't just say, but it seemed it was a round piece, I imagine about six inches in diameter, and about eighteen inches long, and the bottom part of it was a claw spread open. 30

Q. As if it had been flattened out? A. Yes, sir; as if it was flattened out and split open.

Q. How much did it weigh about? A. Oh, I imagine about twenty to twenty-five pounds.

Q. Did you notice anything peculiar about it? A. No, I did not.

Q. When you picked it up? A. No. All I 40

Joseph Wataha—Direct

thought it had a kind of a round top on it, it looked to me like big six-inch sewer pipe.

Q. Did you notice anything about its temperature? A. Well, it was warm, luke warm.

10 Mr. Hendrickson: One minute. I object please. I ask counsel not to lead the witness. Several times you suggest an idea. The Court: That was leading. Go on.

Q. What did you do with this piece of steel? A. Why, I give it to a fellow by the name of Yepson to give to the man that got hit with it, because it just damaged my mudguard and I thought it was no need to me.

20 Q. How thick was this piece of steel? A. Oh, I imagine one-half inch, or five-eighths.

Q. Do you know this Mr. Yepson? A. No, I know him by sight, yes.

Q. You handed it to Yepson? A. Yes, sir.

Q. Is he here today? A. No, sir.

Q. Do you know where he is? A. No, sir. Last I hear he was sick. That is all.

Q. Did you see Mr. Yepson here last term of court when this case was up before? A. Yes, sir; 30 but I didn't talk to him.

Q. What happened to the car that Robinson was standing by? A. Why, when I looked I see the right side of their hood was tore open by the rear door.

Q. Do you mean the cover? A. Yes, sir; the cover was tore off. It seemed so that the iron was bent.

Q. What do you mean, what iron? A. The pipe 40 running through, you know, the rim around the hood.

Joseph Wataha—Direct

Q. What kind of a car was this? A. It was a Buick touring.

Q. You mean the rim was bent? A. Yes, it seemed so to me. What holds the top up, the frame around.

Q. How high above the ground was this flash 10 that you saw? A. Oh, I don't think it was—I believe it was right on the ground.

Q. I don't think I asked you how long the fireworks display had been in progress when this occurred? A. No, sir.

Q. How long had you been there? A. For how long I been there? Well, I was there from about eight o'clock.

Q. About what time did this occur, do you 20 know? A. I couldn't tell. It must have been pretty close to ten.

Q. How many people were there watching this display? A. Oh, I imagine about, well, four or five thousand.

Q. How many were in front of you? A. Well, I couldn't just say. Must have been quite a few hundred.

Q. Between you? A. Yes, sir.

30

Mr. Watson: I neglected to ask Dr. Sullivan the amount of his charges, and Mr. Hendrickson has kindly consented that the amount is \$15, and that that be entered on the record as if he had testified to it.

Mr. Hendrickson: That is correct.

Mr. Watson: Cross-examine.

Adjourned until tomorrow, Tuesday, 40
April 19, 1927, at 10:00 a.m.

Joseph Wataha—Cross

Q. You had the iron then last October? A. No, sir.

Q. Why did you tell him you had it? A. I said I had hold of it, but I didn't have the iron. That night, the night of the accident.

10 Q. Who did you make this report to, Mr. Edgar, or to the man who was hurt, Mr. Robinson? A. Why, Mr. Edgar.

Q. How did you come to find Mr. Edgar? A. Why, I got a subpoena.

Q. How did Mr. Edgar know about you? A. Why, he found me by my license plate.

Q. When did you get this subpoena to court? A. I think it was last January.

20 Q. Last term of court? A. Yes, sir. First term.

Q. That is last January or December? A. I think it was either November or January, either one of them two. I didn't know when it was.

Q. How did he know your license plate? A. That I don't know, because my car was right alongside of his, that is all I know.

Q. Did you help carry Mr. Robinson into his car? A. No, sir.

30 Q. Who did? A. I couldn't tell you. It was too dark to see.

Q. You didn't see Robinson before he was hit? A. Yes, sir.

Q. You said yesterday that you imagined he was standing by the door of his car? A. Why, I seen him in the car and out of the car. I seen him there in daylight for one solid hour.

Q. Saw him before he got out of the car? A. 40 Yes, sir.

Joseph Wataha—Re-direct

Q. Saw him at the time he was by the car? A. Yes, sir.

Q. You were standing out in front of his car? A. Right on the side of his front wheel car. Of course in one hour, you know, you can be all over.

Q. Do you know whether Mr. Yepson still has this iron? A. No, sir, that I don't know. 10

Mr. Hendrickson: That is all.

RE-DIRECT-EXAMINATION by Mr. Watson:

Q. Where did you say you lived in Perth Amboy? A. 212 Sheridan Avenue.

Q. How long have you lived there? A. About 20 ten years.

Q. Where are you employed? A. By Wittberg & Son.

Q. Did you ever see Mr. Robinson before that night? A. No, sir.

Q. Did you ever see Mr. Edgar before this case came up? A. No, sir.

Q. Or have anything to do with him? A. No, sir.

Q. How long after Robinson was hurt was it that you picked up this piece of steel? A. Oh, I don't think it was but a few seconds. Just right as soon as they took him up. 30

Q. How long after that was it that you gave it to Yepson? A. I don't think it was but a few seconds. I give it right to him to send with the man in the car.

Q. How long have you known Yepson by sight? A. Oh, I guess I know him for the last fifteen 40 years.

Joseph Wataha—Re-direct

Q. Where does he live? A. That I couldn't tell you.

Q. Do you know whether he lives on Smith Street? A. No, sir.

10 Q. Do you know where he works? A. Why, I know he works for the New York Telephone Company.

Q. How long has he worked for that company? A. Well, as long as I remember.

Q. I show you this bridge picture marked for identification, two of them, these two that I show you are numbered D-4 and D-5 for identification; now look at D-4, does that correctly illustrate the so-called arches of the bridge? A. Yes, sir.

20 Q. D-5, does that also correctly illustrate the so-called arches of the bridge? A. Yes, sir.

Q. What kind of a roof is there to these arches? A. Why, it is kind of a little—it is a crown on them.

Q. What is it made of? A. Concrete.

Q. Is it solid or open? A. Well, the piers is open, but the top is solid.

Q. The roof? A. Yes, sir.

30 Mr. Watson: Do you want to offer these in evidence now, Mr. Hendrickson, so the jury can see them? We offer the Defendant's Exhibits marked for identification D-1, D-2, D-3, D-4, and D-5.

The Court: Have you any objection to that?

40 Mr. Hendrickson: No objection. You might have him identify that picture and then have them all in. It is from the

Joseph Wataha—Re-direct

bridge looking towards the place where the fireworks were fired.

Q. Do you know whether that shows the land looking from the bridge towards the place where the fireworks were discharged? Do you recognize it? A. Yes, sir, I recognize it. 10

Q. Does it correctly portray the lay of the land there? A. Yes, sir. There is the Pardee Steel Works, I can see that.

Q. Was that looking out from under the arch where you sat? A. Yes, sir.

Q. That is the way the country looks? A. Yes, sir. I could almost see myself there.

Q. Down in the extreme right-hand corner is something that looks like a piece of rail. Is that 20 the railroad track? A. It looks like it.

Q. You are not sure? A. No, sir, I am not sure.

Mr. Watson: We offer that in evidence also.

(Photograph entered in evidence and marked Exhibit D-6.)

(Photograph heretofore marked D-1 for identification entered in evidence and marked Exhibit D-1.) 30

(Photograph heretofore marked D-2 for identification entered in evidence and marked Exhibit D-2.)

(Photograph heretofore marked D-3 for identification entered in evidence and marked Exhibit D-3.)

(Photograph heretofore marked D-4 for identification entered in evidence and marked Exhibit D-4.) 40

Laura Wataha—Direct

(Photograph heretofore marked D-5 for identification entered in evidence and marked Exhibit D-5.)

10 Q. Can you show the point on the picture of the place about where those fireworks were displayed? A. I couldn't go by the feet, but I get pretty near it.

Q. It was right in that field in front there? A. Yes, sir.

Q. And about 150 feet as you testified yesterday? A. Yes, sir; that is what I thought, the big ones. Of course the edge of it was closer.

20 Q. You paced it off, did you, to get that distance exactly? A. No, sir, I did not. I could almost guess it. I wouldn't pace it off.

LAURA WATAHA, a witness produced on behalf of the plaintiff, being duly sworn according to law, on her oath, saith:

Direct-examination by Mr. Watson:

30 Q. Mrs. Wataha, are you the wife of Mr. Joseph Wataha the next to the last witness? A. Yes, sir.

Q. Do you live with him at 212 Sheridan Street, Perth Amboy, New Jersey? A. Yes, sir.

Q. How long have you lived in Perth Ahboy? A. All my life.

Q. Did you attend the Victory Bridge celebration the night of June 24, 1926? A. Yes, sir.

40 Q. Did you see Mr. Robinson there that night? A. I did.

Laura Wataha—Direct

Q. Where were you standing? A. I was in the car at the time.

Q. Where was your car? A. It was right behind the Robinson—where Robinson was.

Q. Did you see the car that he came in? A. 10 Yes, sir.

Q. Where was that car with reference to your car? A. Why, I should say the front wheel was right by their back wheel.

Q. Where was their car with reference to the front of the arch of the bridge? A. It was—their front wheel was right under the front of the arch.

Q. How far away was the fireworks display? A. Well, I am not a judge of distance but it was 20 very near to me.

Q. Was the car in which Robinson was, was the front of the car or the back of the Robinson car towards the fireworks display? A. The front of the car was towards the fireworks.

Q. Did you see Mr. Robinson? A. I seen him in the car.

Q. Did you see him outside of the car? A. No, I did not.

Q. Did anything happen while you were there? 30 A. Just at the accident there, I was standing outside and I felt the draft and I knew there was something wrong, I heard a crash, I left the children in the car so I rushed back to the children, I thought probably they were hurt in the car, and I seen Mr. Robinson laying on the ground.

Q. Where was this draft that you felt? A. Seemed to be directly over my head.

Q. Where were you standing? A. I was stand- 40 ing just outside of the arch.

Laura Wataha—Direct

Q. You heard a crash? A. Yes, sir.

Q. Where was the crash? A. Seemed to be behind me.

Q. What did you do then? A. I turned to go back to the children.

10 Q. Was any damage done? A. Why, just the front fender of the car had two nicks in it, but I didn't see it at the time.

Q. The front fender of your car had two nicks? A. Yes, sir.

Q. Was any damage done to the car in which Robinson was or had been? A. The roof in the back was ripped there.

20 Q. Where was Robinson? A. He was laying down at the ground by the car, in between ours and his.

Q. What part of his car was he lying near? A. He seemed to be about in the middle of his car.

Q. What was the distance between your car and their car? A. I couldn't say in feet. It must have been about that wide (indicating).

Mr. Watson: The witness measures—

The Court: About three feet.

30 Mr. Watson: About three feet.

Q. What was done with Mr. Robinson? A. Why, they took him in a car, they carried him away.

Q. When you saw him lying on the ground was he conscious or unconscious? A. He was unconscious.

Q. Was he injured that you could see? A. I didn't see.

40 Q. Did you look at him? A. I just gave a

Laura Wataha—Cross

hasty glance at him. I thought he was dead at the time. He was very white.

Q. Did you see any evidence of any injury at all? A. No, sir; I didn't look.

Q. Where was his hat, did you see it? A. I 10 didn't see it.

Q. You went to your car to take care of the children? A. Yes, sir.

Q. Where did you first see Robinson that night? A. I seen him sitting in the car.

Q. Was his car there when you got there, or did his car come after you got there? A. I am not sure but I think he came after, because we were very early.

20

Mr. Watson: Cross-examine.

CROSS-EXAMINATION by Mr. Hendrickson:

Q. I understand you were there before Robinson came, the Robinson car came? A. Yes, sir.

Q. Did I understand correctly that your car was behind his? A. Yes, sir.

Q. It was alongside of him? A. Our front wheel was just about where his rear wheel was.

Q. You had to get out of your car then to see 30 the fireworks? A. I did, sir.

Q. Did the Robinsons see the fireworks from their car? A. Well, he must have seen some of them because he was ahead of our car. He was directly right in front of the arch where he could see out.

Q. How far did you go out into the crowd ahead of their car? A. Well, first off we went and sat on the bank where all the rest of the people were 40

Laura Wataha—Cross

sitting, but the fire brands kept falling down, and I was afraid I would catch fire from them so I moved a couple of times until finally I got by the arch.

10 Q. You came back then? A. I came back by the front of the arch.

Q. Where your husband was? A. Yes, sir.

Q. Did the car Mr. Robinson was in pull in ahead of you when it arrived there? A. I guess it must have because he was the first car to the front.

Q. But you were in that position first yourself? A. No. We was on the other side. The arch there is room for two cars.

20 Q. I mean you had arrived at that place before their car? A. Yes, sir. But we back out.

Q. So that he pulled ahead of you in order to be in front of you? A. We back out again when we first come in. We was in the front and then we backed out and another car come in front of ours and then we backed in again. There was a car ahead of our car, and then Robinson's car was on the side a little ahead.

30 Q. You mean you pulled out towards the fireworks? A. No. We backed out away from the fireworks and then another car come in ahead of ours, and then we went in again. We was the second car from the front.

Q. Was there any car between your car and Robinson's car? A. No. There was only room for two cars in the arch.

Q. There was great crowd there I suppose? A. There was.

40

Mr. Hendrickson: That is all.

Clifford Holman—Direct

CLIFFORD HOLMAN, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Watson:

Q. Mr. Holman, where do you live? A. 306 10
North Third Avenue, Highland Park.

Q. How long have you lived in Highland Park? A. Twenty-one years.

Q. Is that how old you are? A. Yes.

Q. Are you a friend of Thomas Robinson, the plaintiff? A. Yes.

Q. Did he go with you to the Victory Bridge celebration on June 24, 1926? A. He did.

Q. How did you go? A. By car. 20

Q. Whose car? A. My sister's.

Q. Who drove the car? A. I did.

Q. Who went with you? A. Well, my sister, my aunt and uncle, and Mr. Robinson and my mother.

Q. When you got there what did you do? Where did you go? A. Well, we found we could get down underneath the arch and view the fireworks from there and still be under cover, so 30
I put the car under there.

Q. Do you know what arch of the bridge you were under? A. The second arch.

Q. Second from what? A. From the land.

Q. Do you know how many arches you were from the water? A. I couldn't say that. Three or four.

Q. Which way was the fireworks display, in front of you or in back of you? A. It was off to the east on the left-hand side, you might say, facing. 40

Clifford Holman—Direct

Q. Was it on an open space in front of the bridge? A. Yes, there was a field there.

Q. See if you recognize it from these pictures; I show you D-3 and D-4; do they look like the bridge? A. Yes.

10 Q. Does D-6 look like the land in front of the bridge where the fireworks display was? A. Yes, that is it.

Q. What time did you get there? A. Oh, I should say half-past eight or something like that.

Q. At night? A. Yes.

Q. Where was your car with reference to the front of the arch that you were under? A. Oh, I should say it was ten feet back under.

20 Q. What part of your car was ten feet back under? A. The front bumper, the front of the car.

Q. Were there any other cars there in that arch? A. Yes.

Q. How many others? A. Well, I know there was one off to the left and another one off to the right, and the Wataha car was back beside my rear right fender.

Q. By the Wataha car do you refer to Mr. and Mrs. Wataha who just testified? A. Yes.

30 Q. What kind of a car was your car? A. Buick.

Q. Open or closed? A. Open car, yes.

Q. How many passengers? A. Seven passengers.

Q. After you got there where did you go? A. Well, mostly stayed around the car. We found we could stand underneath the arch and see most everything.

40 Q. Did you stand underneath the arch? A. Yes.

Clifford Holman—Direct

Q. How far away was the fireworks display? A. Oh, I should say one hundred and fifty or two hundred feet.

Q. Were there many people there? A. Yes, a great many. Several hundred in front of us.

10 Q. How long did the fireworks display continue? A. I guess we must have been there, well, at least an hour or so.

Q. Tell us what happened that you saw and observed. A. Well, I was standing on the opposite running board from Mr. Robinson, that is, on the opposite side of the car.

Q. Which side were you on? A. I was on the left-hand side.

Q. He was on the right? A. Yes. And I noticed there was an unusually loud explosion and at the same time a party near me fainted and fell on me, and I fell down to the ground, so I didn't see everything that went on after that on the other side of the car.

Q. From what direction did this unusually loud explosion come? A. Well, from the front.

Q. Can you state it any more definitely than that? A. Well, no. I didn't see the flash but I know it was an unusually loud explosion that seemed to vibrate everything, that is the concussion was very noticeable.

Q. You say this was about an hour after you got there? A. Yes.

Q. During this hour had there been aerial bombs exploded? A. Yes, several.

Q. How high up in the air did they go? A. Two to three hundred feet, I would say.

Q. How did this report that you have just re- 40

Clifford Holman—Direct

ferred to, this unusually loud report, compare with explosions of the aerial bombs that you had seen? A. Well, it was much stronger, you might say, and sounded a whole lot nearer.

10 Q. Somebody fell on you? A. Yes.

Q. Then what did you see when you got up? A. Well, I know there was several people running about and there seemed to be much confusion, but I was busy at the time with this gentleman that fainted.

Q. Did you know that Robinson had been injured? A. Only when they handed me his hat.

Q. Who handed you his hat? A. Oh, I don't remember that.

20 Q. Is this the hat that was offered in evidence yesterday? A. Yes.

Q. Where was Robinson taken? A. To the City Hospital, Perth Amboy.

Q. Did you go there to see him? A. Yes, directly afterwards.

Q. How long had you known Mr. Robinson? A. Every bit of ten years, I guess.

Q. Did he wear glasses before the accident? A. No.

30 Q. Did he have any difficulty with his speech before the accident? A. Not that I ever noticed.

Q. Was his speech natural before the accident? A. Yes.

Q. Did you ever have any difficulty in understanding him before the accident? A. No.

Q. Since the accident what has been the condition of his eyes that you have observed? A. Well, I know his eyesight is not anywhere near
40 as good as it was before.

Clifford Holman—Direct

Q. Does he wear glasses? A. Yes.

Q. How much of the time? A. Well, all the time as far as I know.

Q. Have you observed anything different in his speech? A. Yes. It is not as clear as it was before. There seems to be a slight break in it. 10

Q. How many times have you seen him since the accident? A. Oh, several times. Most every day.

Q. How often have you noticed that break in his speech? A. Well, as a rule it is just—it is most noticeable when he is excited, you might say.

Q. Well, is it something that is present more or less of the time, or a little of the time, or what? A. Yes, it is always there but it seems to be more
20 noticeable at some times.

Q. What damage was done to your car? A. Why this object, whatever it was, grazed along the top of the car for two or three feet, you could see where it scraped along, and then struck a high spot and went through and broke the iron braces that go—hold the top of the car supported, and came out through underneath, and that is where Mr. Robinson was.

Q. How do you know that it grazed along the top of the car? A. Well, there was a scrape along the top of the car, which led me to believe that the object came in a parallel plane. 30

Q. What was the top of the car made of? A. This rubberoid material.

Q. Where was the brace that was broken? A. Along the edge or the side, the right-hand side of the car.

Q. What part with reference to the front and 40

Clifford Holman—Cross

back? A. Well, I should say directly above the rear door.

CROSS-EXAMINATION by Mr. Hendrickson:

10 Q. This scrape on the rubberoid roof, you don't know whether that was there before this accident?

A. I am quite sure it wasn't.

Q. Had you been up inspecting the top of your car before you went to this display? A. If I remember right I washed the car and I didn't notice it there then.

Q. You washed it? A. Yes.

20 Q. How big a mark was it? A. Well, it started just a very fine line and then gradually broadened out until it reached the place where it went through, and then it left a large gap in the roof, in the top.

Q. Was the line four feet or five feet long? A. I wouldn't say that. It wasn't any longer than eighteen inches.

Q. About eighteen inches? A. Yes.

Q. And then after that was the hole through the roof where it went down? A. Yes, sir.

30 Q. Was there anything in the road to stop it, whatever it was, at that place where it went through above the door? A. Yes, these iron braces.

Q. Iron braces that hold up the roof of the car? A. Supports, yes.

40 Q. Your idea is that when this thing came there and hit the iron brace it then went down and hit the plaintiff Mr. Robinson? A. Yes. It grazed along the roof and struck this high spot where it

Clifford Holman—Cross

is padded along the side and broke through there, and the brace, if anything, deflected the blow downward, and Mr. Robinson was standing there and it struck him then.

Q. The course of the iron, whatever it was, from the time it hit this roof of yours was down 10 in a direct line towards the ground, wasn't it? A. Well, yes, it must have deflected it downward.

Q. It first went through Mr. Robinson's hat apparently, didn't it? A. Yes.

Q. And then along the left side of his face? A. Yes.

Q. Now, that piece of steel is just like tubing, isn't it, such as ordinarily holds up the roof of an automobile? A. Yes. Just a half-inch pipe, 20 that is, small piping.

Q. Now, did you see this piece of metal that was supposed to have hit him? A. No, I didn't.

Q. You never saw that. How long was it after this explosion that you have detailed before you fell off the car? A. Well, it seemed to be at the same time.

Q. Instantaneous almost? A. Yes. This shock must have caused this—

Q. Where was this lady who fell on you? A. 30 Standing in front of me.

Q. On the running board? A. On the running board, yes.

Q. Both on your running board? A. Yes.

Q. Was she in your party? A. Yes.

Q. Who was it was standing on the running board? A. An uncle of mine.

Q. It wasn't a lady? A. No.

Q. I misunderstood you. When you got up off 40

Clifford Holman—Cross

the ground where did you go then after you fell off the running board? A. My sister called my attention to the top of the car that was broken.

Q. What did she say? A. She said look at the car; and I went around the other side and looked
10 over the break.

Q. And you didn't see Mr. Robinson? A. No. He had been taken away.

Q. How soon was he taken away after you fell off of your car? A. Well, I wasn't on the ground with this other party any longer than five minutes, so it must have been two or three minutes after it happened.

Q. Why were you on the ground five minutes?
20 A. Well, I was helping bring this man to.

Q. Your uncle to? A. Yes.

Q. He fainted, did he? A. Yes.

Q. That was about five minutes and then you went around the car? A. Yes.

Q. To see where your sister said the roof was injured? A. Yes.

Q. And by that time Mr. Robinson had been taken away? A. Yes.

Q. What car did he go away in? A. I don't
30 know that.

Q. Do you know Mr. Robinson's sister? A. Yes.

Q. Works in the bank? A. Yes.

Q. She speaks very much the same, does she not, as Mr. Robinson? A. I had never noticed it.

Q. You never noticed it? A. No.

Q. Now, the only way you judge that Mr. Robinson's sight is not as good as it was is because
40 he wears glasses? A. No. That is not the only way.

Clifford Holman—Cross

Q. Well, what is it? A. Mr. Robinson does not seem to have the judgment in driving an automobile he had before. I have noticed it just lately.

Q. Well, there are lots of people who drive automobiles who wear glasses, aren't there? A.
10 That is true.

Q. Did you ever wear glasses yourself? A. For a short time but I found I could get along without them.

Q. Could you see these shells explode up in the air from where you were standing on your running board? A. With the exception of one or two that went a little bit higher and back in towards the bridge.

Q. You could see all except one or two? A.
20 A few.

Q. About how many shells were fired off before this accident happened? A. That is hard to say; I should say fifteen or twenty anyway.

Q. Wasn't there more than one hundred? A. More than one hundred?

Q. Yes. A. There could not have been when I said fifteen or twenty.

Q. If I told you there were more than one hundred and twenty-five, what would you think of
30 that? A. Well, it is very hard to say. There was so much going on.

Q. There was so much going on. It was a good display of fireworks, wasn't it? A. Yes.

Q. That is what you went there for, wasn't it, to see the fireworks? A. That was the purpose.

Q. And Mr. Robinson went there for the same purpose? A. He did.
40

John Newman—Direct

while you were there after the accident? A. I couldn't say that. I left immediately as soon as I found Mr. Robinson was hurt.

Q. Were they still firing fireworks when you went away? A. I guess they were.

10 Q. Don't you know that they were? A. No.

Q. What? A. I don't. I was too busy getting the car out.

Q. It was in front of you, close to you, you said? A. But I backed out and went out the other side.

Q. The fireworks were right in front of you when you backed back, weren't they? A. They may have been. I am not sure.

20 Q. Did you see the Niagara Falls display? A. I can't say that I did.

Q. Waterfall? A. No.

Q. What displays did you see there? A. We were looking mostly at the aerial bombs and smaller set pieces there, but I didn't see the Niagara Falls.

Mr. Hendrickson: That is all.

Mr. Watson: That is all, Mr. Holman.

30

JOHN NEWMAN, a witness produced on behalf of the plaintiff, being duly sworn according to the law, on his oath, saith:

Direct-examination by Mr. Watson:

Q. Where do you live, Mr. Newman? A. At 59 Baldwin Street, New Brunswick.

40 Q. How long have you lived there? A. Four and one-half months.

John Newman—Direct

Q. Where did you live before that? A. 310 South Third Avenue, Highland Park.

Q. How long did you live there? A. Five and one-half months.

Q. How long have you lived in and about New Brunswick or Highland Park? A. Eight years. 10

Q. What is your business? A. Salesman for Studebaker cars.

Q. Did you attend the Victory Bridge celebration on the night of June 24, 1926? A. Yes, sir.

Q. What time did you go there? A. Got there a little after eight o'clock.

Q. Where did you stand? A. About right in the center between the fireworks and the bridge.

Q. How far were you in front of the bridge, 20 about? A. I should judge about fifty feet.

Q. How far away were the fireworks? A. About one hundred and fifty, all told, from the bridge.

Q. What was the nature of the fireworks display? A. Well, I seen things go up.

Q. Aerial bombs? A. Whatever you call them, I don't know.

Q. Well, shells that exploded in the air? A. 30 Yes.

Q. How many? A. I couldn't say how many.

Q. Well, a few? A. Quite a few.

Q. How long were you there watching the fireworks display? A. Until it was all over.

Q. Did anything happen while you were there? A. Yes, I seen a fellow get hurt, the fellow that was setting them off. And I seen somebody running there to give him first aid.

Q. Did anything else happen? A. Not that I 40

John Newman—Direct

know of. I know they were saying that somebody got hurt under the bridge, but I didn't see it.

Mr. Hendrickson: I object.

The Court: That is stricken out, of course, what he heard.

Q. Were there any explosions that attracted your attention? A. There was, because the ground shook a little after this, this fellow was laying down on the ground hurt.

Q. What was the nature of that explosion? A. Well, it was an awful loud repeater, that is all I know, and the ground shook very much.

Q. Was it like or unlike other explosions? A. It was unlike.

Q. Did it attract your attention? A. Yes, sir.

Q. What happened in the crowd around you, if anything, at that time? A. Well, I didn't notice much; I seen people running out in the field where they were setting them off.

Q. Did anything happen behind you? A. Not that I noticed.

Q. In which direction did the crowd run? A. On the left of me.

Q. To the left of you. Was there any commotion among the crowd there?

Mr. Hendrickson: I object to that.

A. Well, that I couldn't remember.

Mr. Watson: Cross-examine.

John Newman—Cross

CROSS-EXAMINATION by Mr. Hendrickson:

Q. You saw the crowd move towards the fireworks, you said? A. Well, they were all standing there but I seen a lot of them run out towards where this fellow was setting them off, up around the bank.

Q. You saw the fellow that was hurt? A. Yes.

Q. They ran towards him, that is the man who was firing off the fireworks? A. That is what it was.

Q. Now, you say you saw him hurt. Will you just tell the jury just what you saw? A. What?

Q. You said you saw the man shooting these shells off hurt? A. I didn't see him hurt but I seen him fall down.

Q. Could you see him when he was lighting the shell? A. Yes, sir.

Q. Was he standing up? A. Yes, sir. Well, he was ducked. He wasn't standing up straight.

Q. Was he down on the ground when he lighted the fuse to shoot the shells? A. He was standing on the ground.

By the Court:

Q. Wasn't he lying on the ground, you were asked? A. No, sir.

By Mr. Hendrickson:

Q. Was he down in a stooping position, do you mean? A. Yes, sir.

Q. And then what happened? A. When that went off, as soon as it went up he went right over, he fell over.

Q. What went up? A. This shell, whatever it was that shook the ground.

John Riedy—Direct

Q. You saw the shell go up in the air? A. I didn't see it go up in the air, but I heard the repeat.

Q. You heard what? A. When it blew up.

10 Q. The whole thing blew up as far as you could see? A. Yes. It didn't go up like the rest of them did. It just spread all apart.

Q. The shell didn't go up to explode in the air at all, did it? A. Not that I seen it.

Q. But it did explode, as far as you could see, right there in the mortar where this man was standing? A. Yes, sir.

Q. And there was a great flash there, is that what you saw? A. Well, that I couldn't say.

20 Q. You could say whether you saw any flash or not. A. No.

Q. The only thing that you noticed was the extra loud report? A. That is all. The ground shook.

Q. And the ground shook. And then the crowd ran towards it? A. Yes.

Q. Was it raining at that time? A. Yes, sir; it was just a little rain, just drizzling.

30

JOHN RIEDY, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Watson:

Q. What is your occupation? A. Policeman.

Q. Whereabouts? A. City of Perth Amboy.

40 Q. How long have you been in the Perth Amboy police force, officer? A. Ten years.

John Riedy—Direct

Q. Were you on duty at the Victory Bridge celebration on the night of June 24, 1926? A. I was.

Q. Was there a fireworks display there? A. There was.

Q. How long were you there, Officer? A. I was there from about nine o'clock, nine until quarter to eleven. 10

Q. When did the fireworks display begin? A. Well, shortly after nine o'clock.

Q. Where were you standing patrolling—were you stationary or were you patrolling? A. No. I was there to keep the crowd back right opposite—well, right opposite the bridge on the east side. Holding the crowd back from the fireworks. 20

Q. Well, where were the fireworks with reference to the bridge, Officer? A. The east side.

Q. So then you were between the fireworks and the bridge? A. And the bridge.

Q. How much of a crowd was there? A. Well, I should judge a couple of thousand people.

Q. Did anything unusual happen while you were there? A. Well, when this here explosion went off kind of an unusual sound, it shook the ground and all the people ducked their heads, and about five minutes afterwards somebody said that somebody got hurt over at the bridge, so I pushed through the crowd, and when I got there they said they were taking the man to the hospital. 30

Q. Yes. A. And Mr. Yepson handed me a piece of steel, and he said, this is what hit the man.

Mr. Hendrickson: I object.

40

John Riedy—Direct

The Court: To what he said, yes. Mr. Yepson handed him a piece of steel. The rest is out.

Q. Describe that piece of steel. A. So I took
10 this piece of steel and it was warm. Of course, when I found out the man went to the hospital, I didn't know what I did with the piece of steel, whether I handed it to somebody else, or I dropped it on the ground, but I went back in the crowd to hold the crowd back, on account the fireworks were still going on.

Q. What was the size of this piece of steel? Describe it, Officer, the best you can. A. Well,
20 I figure about it looked to me like a four-inch pipe busted open.

By the Court:

Q. What kind of a pipe, Officer? A. Well, 4-inch pipe, more of a cast iron pipe. Of course I couldn't say.

Q. Well, how long was it? A. Well, I should judge about fifteen or eighteen inches.

By Mr. Watson:

30 Q. And how wide was it? Or what was the shape of it? A. Well, take a 4-inch piece and open it up. Must have been about ten or twelve inches wide after it was flattened out.

Q. About how thick was it, Officer? A. Well, between three-eighths and one-half an inch, I guess. I didn't—

Q. How long did you have it in your hand, Officer? A. Well, about a minute or so. Just to
40 feel.

John Riedy—Direct

Q. Where was Mr. Yepson when he handed this to you? A. Right at the pier there, right at the stanchion there that holds the bridge.

Q. On this picture can you tell? A. Is this coming from Amboy side? 10

Mr. Hendrickson: There is Perth Amboy and there is the bulkhead that is nearest to Perth Amboy, that is this point here (indicating), therefore this is from the top of the bridge looking towards Perth Amboy. This is looking from the east towards the west.

A. Well, we were on the east side of the bridge where the pier runs. 20

By Mr. Hendrickson:

Q. You were out here (indicating), that is where you were if you were east of the bridge?

A. And we walked over under the bridge and right at the point.

By Mr. Watson:

Q. Was Yepson standing under the bridge?

A. Well, not right under the bridge. Right at the pier. 30

Q. Who is this Mr. Yepson, Officer? A. Why, he is first assistant fire chief of Perth Amboy.

Q. How long has he lived in Perth Amboy? A. That I couldn't tell you. I know him for a good many years.

Q. Do you know what his condition is now? A. He is pretty sick.

Q. What is the trouble, do you know? A. I think—they say he has got ulcers of the stomach. 40

John Riedy—Cross
Frank Gunkel—Direct

Q. Is he able to carry on his duties? A. Oh, no.

Q. He is not? A. He is not.

10 Mr. Watson: That is all.

CROSS-EXAMINATION by Mr. Hendrickson:

Q. Mr. Riedy, you say that it straightened out flat? A. Four-inch piece of pipe, it looked to me, bursted open, flattened out.

Mr. Hendrickson: That is all.

By the Court:

20 Q. How far away, Officer, were the fireworks fired from the pier where Yepson was? A. Well, I should judge about 150 to 200 feet, about.

The Court: That is all.

30 FRANK GUNKEL, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Watson:

Q. Officer, you are a member of the Perth Amboy police force? A. Yes, sir.

Q. How long have you been? A. Ten years.

Q. Were you on duty at the Victory Bridge celebration on the night of June 24, 1926? A. I was.

40 Q. What time did you go there on duty? A. Just shortly before nine o'clock.

Frank Gunkel—Direct

Q. How long did you continue there? A. Until the accident occurred to Mr. Robinson.

Q. Was there a fireworks celebration there that night? A. There was.

Q. What kind of fireworks were shot off? A. Well, there was various kinds. The pieces that were set off in the early part of the evening and smaller aerial pieces and large aerial bombs. 10

Q. You say you stayed there until Mr. Robinson was hurt. What happened at that time? A. Well, at the time this unusual explosion of this bomb that failed to go up in the air as it should properly go up, why, there seemed to be an awful trembling noise, an unusually loud report, which give the appearance it was near the ground, and it seemed that there was a quietness right afterward, that something unusual had happened—as though something unusual had happened, and at the same time, why, it seemed to pass over my head in a whizzing noise; at the same time there was a young fellow came up to me and said, Officer, there is a man injured back there. I looked around and I saw the crowd gathered and bending over as though they were bending over someone, so I forced my way through and I found Mr. Robinson on the ground; there were others there trying to assist him in the first aid. 20

Q. Where was he, Officer? A. Just under the arch. Just about. 30

Q. How far away from the fireworks was he when you found him? A. How far from the fireworks?

Q. What was the distance? A. About 150 feet, 200 feet, something like that, approximately that. 40

Frank Gunkel—Direct

Q. Did you observe, Officer, what those aerial bombs were fired from? A. No, I did not, no more than there seemed to be a pipe setting up there. They were set all around the field at the time, this property, but I don't know what they were made of. I didn't examine them. 10

Q. You saw pipe sitting in the ground? A. Yes. It appeared something like that.

Q. Where were the pipes with reference to the place where the fireworks were set off? A. Well, at the time of this unusual explosion they were about one hundred and fifty feet away from the bridge.

Q. The pipes were 150 feet away from the bridge? A. Yes, at the time they were set off, they were being set off there. 20

Q. I mean, were they or were they not at the same place where the fireworks were set off, the pipes in the ground? A. Oh, yes, certainly.

By the Court:

Q. How many pipes were there? A. Well, there were quite a number of them. They were spread all around. Seemed to be in sort of a circle, or semi-circle there, and at the time these unusually large bombs were a further distance away; they were about, as I said, 150 or 200 feet from the bridge. 30

Q. How many pipes or mortars were there for the larger bombs that you speak of? A. Well, there appeared to be about seven or eight, something like that.

Q. And how many men were there putting them off? A. Well, there appeared to be about three or four working over there. 40

Frank Gunkel—Direct

Q. On the big bombs? A. Yes.

Mr. Watson: Cross-examine.

Mr. Hendrickson: No questions.

By the Court:

Q. How many men were working on the smaller bombs, Officer, pipes or mortars, as they call them? 10

A. This same set of men were going from one to the other setting them off.

Q. And there were how many men setting off the fireworks, setting off these aerial bombs? A. Well, all told there were about three or four men doing that.

Q. How did they do it, Officer? Just tell the jury just how did they do it. A. Well, it seems to me the way they done they had a light, sort of a torch like, or something, and went from one to the other and kept going like that. 20

Q. Walking from one place to the other? A. Yes, walk.

Q. What position were they, standing up straight, they would walk straight and then— A. They would bend over.

Q. Bend over? A. And hurry along in a bent position. 30

Q. They didn't lie on the ground to do it? A. I didn't see them lie on the ground, no.

Q. Could you tell us after the torch was put to the fuse, as you say, how long it would take before the bomb would go up in the air? A. Why, it just seemed to take about a fraction of a second.

Q. And how far away would they stand from the bomb when they did that? A. When they lit them? 40

Frank Gunkel—Cross

Q. When they put the torch. A. Why, they would just simply light them and run, hurry along to the next one.

Q. Run? A. Yes, on a swift pace.

Q. How far were these mortars apart? A. 10 Why, I judge they were about fifteen feet apart, probably fifteen feet apart.

Q. Each mortar? A. Yes.

Q. Even the mortars for the smaller bombs? A. Well, I don't know as they were just that distance. Probably ten feet.

Q. But for the larger bombs? A. The larger bombs were about fifteen feet.

20 CROSS-EXAMINATION by Mr. Hendrickson:

Q. Officer, you say there were about four men?

The Court: Three, he said, I think.

A. Three or four, something like that. I would not say positive.

Q. There was one man down by the river firing the set pieces, wasn't there? A. Yes, there was a man down there.

Q. And then you noticed two men working on 30 these mortars, didn't you, one man loading and one man firing? A. Well, there were several men there. There was two or three—three or four men over there all the time. I don't know whether they were all firing them off or not, but they were there in that vicinity all the time. But there appeared to be one man was mostly doing the firing them off.

Q. There were about twenty-two mortars alto- 40 gether there, weren't there? A. Well, that is

Frank Gunkel—Cross

the larger and smaller ones. I don't really know the difference between the mortars; you might explain that to us, what it is.

Q. You call them pipes? A. Well, they were set all around there. Probably that many.

Q. Twenty-two? A. I wouldn't swear to what 10 they were. I didn't have an opportunity to count them.

Q. He would light the mortar and then it would go right up in the air and explode? A. Yes.

Q. And then he would go on to the next one, wouldn't he? A. Yes, sure, he headed on.

Q. Each one, as quick as you saw it light, it would go, wouldn't it? A. Yes.

Q. Men didn't have any time to run away from 20 it? A. He didn't have time to run away from it.

Q. No, not to run away? A. As soon as he lit it he started right up, of course, to get out of the way. Chances are he was afraid he might get burnt from the sparks or something.

Q. Have you any idea how many shells were shot up from those mortars? A. No, I couldn't say exactly; there was quite a number of them.

Q. About 140 or so? A. There was quite a 30 number of them, but I couldn't say.

Edna Holman—Direct

EDNA HOLMAN, a witness produced on behalf of the plaintiff, being duly sworn according to law, on her oath, saith:

Direct-examination by Mr. Watson:

10 Q. Miss Holman, where do you live? A. 306 North Third Avenue, Highland Park.

Q. You are a sister of Mr. Clifford Holman who just testified? A. Yes, sir.

Q. Was it in your car that you and your brother and Mr. Robinson and others went to the Victory Bridge celebration the night of June 24? A. It was.

20 Q. What time did you get there, Miss Holman? A. Why, I don't know exactly. A little before eight.

Q. Where did you put your car? A. We finally parked underneath the bridge, the Victory Bridge.

Q. Where was your car with reference to the edge of the bridge? A. Why, I would say we were about ten feet inside of the bridge.

Q. What part of your car was ten feet inside? A. The front of the car.

30 Q. What kind of a car was it, Miss Holman? A. It was a Buick seven passenger touring.

Q. Open or closed? A. Open.

Q. Where was the fireworks display? A. Do you mean how far away were they?

Q. Well, was it in front of you or behind you? A. In front of us.

Q. How far away? A. Well, a considerable distance. I should say 175 or 200 feet away from us.

40 Q. Did you see the fireworks display? A. I did.

Edna Holman—Direct

Q. Did anything happen to Mr. Robinson? Yes, he was struck by a shell.

Q. Where was he standing when he was truck?

A. He was standing on the right-hand side of the car at the running board.

Q. And where were you when that happened? 10

A. I was on the left-hand side standing on the running board.

Q. Did you hear anything immediately before that? A. Yes. I both heard and felt.

Q. What was it that you heard and felt? A. As I was standing on the running board I heard the bombs going up, and there was an unusually loud concussion, and I had my hand on the side of the car and my arm rested against the top, 20 and I felt a thud but I didn't attach any particular importance to it at the time, because the concussion was so loud, and there were so many people around, both sitting on the car, I thought maybe somebody might have knocked against it, and I didn't know the car had been struck until my attention was called to it later.

Q. What happened to Mr. Robinson? A. He was struck by the shell after it went through the 30 top of the car.

Q. What did he do? A. Well, I didn't see him struck.

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

Q. Well, after you heard this concussion and felt the thud, how long after that was it that you saw Robinson? A. I didn't see him until the next day at the hospital. Well, at least, I saw him, but I didn't know it was him. As I was standing on the right side of the car later some- 40

Edna Holman—Direct

body—one of the by-standers called my attention to the car.

Q. Well, now, before that, I want to find out, you were on the left-hand side of the car and Robinson was on the right? A. Yes.

10 Q. You heard a concussion and felt a thud. What did you observe, if anything, on the other side of the car from you? A. The other side of the car from me?

Q. Yes, did anything happen that took your attention?

20 Mr. Hendrickson: I think I ought to object, because the witness said she didn't see anything there and didn't know anything there until her attention was called to it, after Mr. Robinson was being taken away, as I understand it. I don't see how she could have seen—she could not have seen it, because she said she wasn't there, and her attention wasn't called to it until after Mr. Robinson had moved away.

The Court: I know. There must be some confusion about it.

30 By the Court:

Q. After the thud how long was it that you first saw Robinson?

Mr. Hendrickson: The next day, she said.

A. Why, I saw him, but I didn't know it was him. I saw the men carrying somebody away. I jumped up on the running board to make room, there were several men carrying a young man
40 that passed me, and I jumped on the running

Edna Holman—Direct

board to make room for them, because there was a narrow space there, and I didn't know until a few minutes later, when somebody brought Thomas's hat to my brother that it was he that had been struck.

10 Q. Robinson went down in the car with you, Miss Holman, didn't he? A. Yes, but you see he was standing on one side of the car and we were on the other.

By Mr. Watson:

Q. Now, then, how long after you felt the concussion, heard the explosion and felt the thud, how long after that was it that you saw somebody being carried, or in distress on the other side of
20 your car? A. I think it was only a few minutes, Mr. Watson.

Q. Well, what were you doing during those few minutes? A. Well, I had gone over to the right side of the car, I was sitting in the car when this gentleman come to me and he said to look what happened to your car; so I got out of the car. It was only a few minutes from the time.

Q. Was it all that time before you knew that Robinson had been struck, or somebody, not Rob-
30 inson? A. Yes.

Q. Before you knew that somebody had been hurt? A. Yes.

Q. Had he been carried out of there before you got around to the other side of the car? A. Yes, he had.

Q. This somebody, whoever it was, had been carried away? A. Yes.

Q. What happened to the car? A. Why, this
40

*Condit Atkinson—Cross
Motion for Nonsuit*

CROSS-EXAMINATION by Mr. Hendrickson:

Q. That is only a subpoena to appear and testify? A. As a witness.

10 Q. It wasn't a subpoena to produce this piece of iron? A. No.

Mr. Hendrickson: That is all.

Mr. Watson: We rest.

MOTION FOR NONSUIT

20 Mr. Hendrickson: There is no evidence before us that would change the situation, proving any negligence on the part of the defendant, nor tending to show or suggest any knowledge on the part of the defendant of any defect in this shell which exploded, and it seems to me that without any negligence affirmatively shown by the plaintiff, except what grows out of this accident, the explosion itself, I am in duty bound to ask for a nonsuit at this time.

30 The Court: That motion is denied.

Mr. Hendrickson: Prays exception.

Thomas Jardine—Direct

DEFENDANT'S CASE

THOMAS JARDINE, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

10

Direct-examination by Mr. Hendrickson:

Q. Mr. Jardine, where do you reside? A. Red Bank, New Jersey.

Q. And are you an officer of the defendant? A. I am secretary of the company.

Q. Are you actively in charge of the conduct of the business of this company, the defendant?

A. I assist in charge of it.

Q. Talk to the jury. A. I am.

20

Q. State what experience you have had in the fireworks business. A. I have been in the employ of the company for twenty-eight years. Twenty-three years at the factory and five years in the New York office. The first ten years I was assistant superintendent, and the last thirteen years I was superintendent of the consolidated fireworks branch of the company at Staten Island.

Q. That is the Staten Island plant? A. That is 30 the Staten Island plant.

Q. Is that the plant from which the fireworks came that were shot in this display that you have heard about at the Victory Bridge, Perth Amboy, June 24? A. It is.

Q. Came from the Staten Island plant of which you were the manager for ten years? A. Yes.

Q. Now, you had a contract to fire that display, did you? A. We did.

40

Thomas Jardine—Direct

Q. And who was that with? A. With the Victory Bridge committee of the Victory Bridge.

Q. Part of the dedication exercises was it? A. Yes, part of the exercises.

Q. Were you present when this display was
10 fired? A. I was.

Q. You made with me these pictures that are offered in evidence? A. Yes.

Q. They correctly show the place where these fireworks were fired, do they? A. They do.

Q. Just tell the jury where you were when this particular explosion occurred that gave rise to the accident? A. I was about twenty-five feet from the bridge toward where the fireworks display
20 was fired, about under the—right in front of the second arch of the bridge.

Q. Were you in front of the crowd that was there? A. I was in front of the crowd.

Q. What happened? Can you tell us what happened actually? A. Why, there was a terrific noise, kind of vibration, and no display of fireworks.

Q. That is the shell didn't go up in the air? A. Shell didn't go up in the air.

30 Q. What did the shell do? A. Well, you couldn't see what it did. It must have gone off in the ground or the mortar.

The Court: Strike out the last, what it must have done. He said he did not see.

A. I saw—heard a noise.

Q. One minute.

40 Mr. Hendrickson: I think the witness is simply careful. He said he couldn't see it

Thomas Jardine—Direct

explode, that is what he means, it was in the mortar. He couldn't see it inside in the mortar.

The Court: What I object to is that he said it must have done this, or it must have done that. That, of course, is not compe-
10 tent.

Q. Start again now and tell us what happened? A. There was a terrific noise, a vibration.

Q. What caused the terrific noise and the vibration? A. Explosion of the shell.

Q. What did you do after that shell exploded?
A. I ran forward towards the mortars where the
20 man was firing.

Q. Who was firing the shells? A. Mr. Trempy.

Q. What did you find when you got there where Mr. Trempy was firing this mortar? A. Found Mr. Trempy was just rising from the ground; assisted him up and asked him was he all right. He said he was.

Q. Well, now, describe what else you saw there. A. I saw the excitement around where the shells were being fired, Mr. Trempy and his men, and I saw that the crowd, where one of the mortars had
30 been, the ground—dust was scattered away and there was a hole, small hole in the ground.

Q. How big was the hole? A. Oh, I should say about a foot, eighteen inches in diameter, and probably about twelve inches deep.

Q. Was the mortar there? A. Saw no part, so I couldn't tell. There were mortars there.

Q. Was the mortar there out of which this shell was fired? A. No.
40

Thomas Jardine—Direct

Q. That was completely gone when you got there? A. Completely gone.

Q. What happened in that mortar?

10 Mr. Watson: Is the witness now attempting to testify as an expert, or from his knowledge, or from his observation? May I ask?

Mr. Hendrickson: If counsel objects to it I will withdraw the question and prove it by another witness.

Mr. Watson: Well, maybe the witness is an expert. I object to it unless he qualifies as an expert.

20 The Court: Objection sustained, of course. He has already said he he did not know what happened. Now, if you want to qualify him as an expert as to how it occurred, that is different.

Q. Now, do you know yourself how many shells were fired in this display? I mean of your own knowledge do you know how many shells were shot off that night? A. No, I don't know.

30 Q. Do you know what kind of shells were shot there that night? A. I do.

Q. What kinds of shells were shot there? A. Different sizes, three inch, four inch, five inch, six inch; all various effects, star effects, parachutes, saucissions.

Q. Any eight inch shells? A. A few eight inch shells.

40 Q. Have you made a compilation of the number of such shells which your company, within your experience, have manufactured or sold and fired in their own displays, or sold to other people to fire in displays? A. I have.

Thomas Jardine—Direct

Q. What did you make that compilation from? A. 193,000—

Q. No. What did you make the compilation from? A. From our records, the factory records, list of the shells that are produced from the shops. 10

Q. Have you got a list of the compilation of the number of shells that you manufactured and sold? A. I have.

Q. Similar to these shells that were fired at this display? A. I have.

Q. Will you tell us how many shells your company has sold, either shot itself, or sold to other people to shoot for it, or in their own displays, between January 1, 1917, and December 31, 1926? 20

Mr. Watson: I object to the question on the ground that the evidence is secondary evidence.

The Court: That is true.

Mr. Watson: The records are the evidence.

The Court: He said he bases that compilation upon records.

Q. Did you bring your books with you? A. 30 Yes, the books are here.

Q. Will you produce the book, please?

Mr. Watson: If Mr. Jardine says this is a correct transcript of the books, we will waive it.

The Court: He waives the production of the books, as long as Mr. Jardine says that is a correct compilation from the books themselves. 40

Thomas Jardine—Direct

Mr. Watson: Also as long as the books are in court.

The Court: Yes.

A. It is a correct compilation of the books.

10 Q. How many shells of this kind did your company sell, as I mentioned in the last question, between January 1, 1917 and December 31, 1926? A. 193,554.

Q. And those are shells of three inch, four inch, five inch, six inch, and eight inch type? A. They are.

Q. The same size that were sold—that were shot here in this display? A. Same size.

20 Q. Now, out of all those shells—

The Court: Does that list show the number?

Mr. Hendrickson: Yes, sir; the different sizes. I offer this in evidence.

The Court: It is admitted, there being no objection.

(List entered in evidence and marked Exhibit D-7.)

30 Q. Now, of all that number of shells in that time except this one shell that is in this case, did any of those shells prematurely explode? A. No, they did not.

Q. How do you know that? A. Because I have never had any—some of the shells are fired by our own men and then all were perfect, and never had a report of any others going wrong from the people to whom we sold them.

40 Q. Would you have heard if some of your customers had had them explode? A. We would.

Thomas Jardine—Cross

Q. You always hear, don't you, if anything goes wrong? A. Yes.

Q. Did you have anything to do whatever with the inspection or examination of these shells that were used in Perth Amboy? A. I did not.

Q. Was it raining at the time? A. Near the 10 finish of the show there was a shower.

Q. First part there wasn't much rain? A. No.

Q. Was it simply a drizzle, or a hard rain? A. Well, a light rain near the end of the show.

CROSS-EXAMINATION by Mr. Watson:

Q. How long have you been with the company, Mr. Jardine? A. Twenty-eight years.

Q. You said that there were three, four, five, 20 six and eight inch shells used? A. Yes, sir.

Q. Were these all what I call aerial bombs? A. All aerial bombs.

Q. How many mortars were they fired from? A. Twenty-two, about twenty-two.

Q. What is the construction of those mortars? A. Steel tubing with an iron base about four—three to four foot in height.

Q. They are set in the ground? A. Buried in 30 the ground.

Q. How deep? A. Just leave about six inches protruding above the ground.

Q. How high is the mortar? A. Three to four feet.

Q. So that there is about on a four foot mortar, there would be three and one-half feet of it in the ground? A. Yes.

Q. Six inches above? A. Right.

Q. Three foot mortar, two and one-half under- 40 neath? A. Exactly.

Thomas Jardine—Cross

Q. And one-half above? A. Correct.

Q. Had you seen all the mortars there? A. I saw them, yes.

Q. And these mortars were all buried in that way? A. They were.

10 Q. Then you heard this unusually loud report?
A. Yes, sir.

By the Court:

Q. What was the diameter of those mortars?

A. Varied from three inches to six inches or eight inches.

By Mr. Watson:

20 Q. Did you inspect these mortars, see them
there before the fireworks display began? A. I did.

Q. What is the nature of the soil there they
e buried in? A. Why, it seemed to be hard,
ned to be quite a lot of broken tile or crockery
things of that kind laying on the ground scat-
d.

Q. Well, was it solid or a sandy substance? A.
Didn't dig in it. It seemed to be more gravel;
sand and gravel.

30 Q. Well, just like you would find— A. Didn't
seem to be clay. It seemed to be more of sand and
gravel nature.

Q. How far from the river? A. I should say
about two hundred feet.

Q. And did your men bury these mortars? A.
They did.

Q. Under your direction? A. Under Mr.
Trempey's direction.

40 Q. Was he your superintendent or not? A.
Yes, he had charge of the firing display.

Thomas Jardine—Cross

Q. Then you heard an unusually loud concus-
sion? A. Yes.

Q. The bomb didn't rise? A. No, it didn't
rise.

Q. No display in the air? A. No.

Q. Was that explosion close to the ground? A. 10
Yes.

Q. You rushed to the place and found a hole in
the ground where there had been a mortar? A.
Yes.

Q. The hole was how deep you say? A. I said
about eighteen inches.

Q. And how wide? A. About the same.

Q. What diameter, what size mortar had been
there? A. Six inch. 20

Q. Did you know of the man being hurt that
night and being taken to the hospital? A. Heard
of it afterward.

Q. You didn't know it that night? A. Oh, yes,
I heard of it that night.

Q. You knew it that night, that the man had
been hurt and taken to the hospital? A. Heard
rumors of it later on, and before that also we
heard there was a man had been hurt.

Q. Did you go to the hospital to find out about 30
it? A. No.

Q. Where were these shells manufactured? A.
Staten Island.

Q. Is that the plant of which you were superin-
tendent for so many years? A. It is.

Q. You are thoroughly familiar with the manu-
facture of these shells? A. I am.

Q. How are they manufactured? A. Manu-
factured by hand.

Q. Not by machine? A. Not by machine. 40

Q. What was the composition of this particular shell supposed to be? A. Well, I can't tell.

Q. What? A. I say, I don't know which individual one was located in the mortar. We had hundreds of shells. I couldn't tell what this special shell was. I wasn't there when it was loaded. I was back in the crowd.

Q. What varieties of shells were there? A. We had all kinds; we had star shells, parachute shells, are light shells; different kinds; chain shells; all different effects.

Q. What is the propellant force? A. Propelling force is black powder, which is placed underneath the shell.

Q. What quantity of black powder is used in that shell ordinarily? A. Just depends upon the size of the shell. Three inches is a certain amount.

Q. This was a six-inch, so you said? A. I should say about four ounces of powder.

Q. These shells are made in the Staten Island plant by hand? A. Made by hand, yes.

Q. Do you have men or women workers to do that? A. Men. Experts. Thirty-five or forty years experience.

Q. These 190,000 shells that you referred to were all made in this plant? A. Yes, sir.

Q. By hand? A. Yes, sir.

Q. And you never had a complaint from any one of them but this one? A. We did not.

Q. So in the manufacture of these shells the human equation enters, does it not, Mr. Jardine? A. Made by hand and made by men.

Q. And if the man, in the manufacture of the shell, putting it together, there is always the

chance of—there is always the human element and the chance that a mistake might be made, isn't there? A. Made by men.

Q. Of course. It is not a machine operation? A. No, it is not.

Q. How are these shells set off? A. The shell is dropped in this mortar, iron tube, steel tubing, and from the shell there is a piece of fuse, which we call a match, which protrudes above the top of the mortar.

Q. How long is that fuse? A. About five feet.

Q. For the purpose of the record, this object which has just been produced, is that the kind of mortar that was used there that night? A. Yes, that is the kind.

Q. What size is this? A. Six inch.

Q. That is the kind that was missing? A. That is the kind; yes, sir.

Q. That was buried all but six inches in the ground? A. Yes.

Q. And the propellant charge was supposed to be four ounces of black gun powder? A. Yes.

Q. What was supposed to be in the bomb itself? A. I can't tell which bomb it was, I tell you it had different effects.

Q. Well, let us go through them all; how many different kinds of bombs were there? A. We had stars, roman candles, we had parachutes, we had saucissions, we had hanging chains.

Q. That is four. A. We had cometic, we had festoon chain, jarandola and other effects, whistles.

Q. You have named eight different varieties of shells that were propelled from a mortar from—

Thomas Jardine—Cross

The Court: Why not get from Mr. Trempy what particular kind this was?

Mr. Trempy: Five break star shell.

Q. What was that supposed to be made of? A.
10 Do you mean chemicals? When he says stars, he means little pellets of composition of different colors. Five break would be five different compartments.

Q. Any explosives in them? What explosives were in it? A. Only just a small amount of powder to break the shell open and display the effects, which would be stars.

Q. What kind of powder? A. He said stars.

Q. What kind of powder? A. Just ordinary
20 black powder.

Q. About how much? A. It would be just part of an ounce to break each compartment, each break.

Q. So if this shell was properly manufactured there was not only four ounces of black powder, the propellant, and less than one ounce of black powder in the shell itself? A. No. In each break. In the individual breaks.

Q. How many breaks were there? A. This was
30 a five break shell. Each individual break had so much powder to break it.

By the Court:

Q. How much powder? A. About an ounce.

By Mr. Watson:

Q. In the five breaks altogether? A. About an ounce of powder.

Q. Each break? A. Each break.

40 Q. Four ounces of powder in the propellant and about an ounce in the break? A. Yes.

Thomas Jardine—Cross

Q. You were telling us about the fuse, how long is the fuse? A. About five foot.

Q. What is that made of? A. That is made of cotton yarn saturated in composition made of black powder, or ingredients of black powder, charcoal, salt peter and sulphur made into a
10 paste and just saturated in it.

Q. About how much black powder in the fuse? A. Well, I can't say that. I suppose the fuse would weigh about an ounce.

Q. Only an ounce of black powder in the fuse? A. Yes.

Q. If it is correctly made? A. Yes.

Q. Who makes the fuse? A. Made in the plant.

Q. At Staten Island? A. Yes.

Q. Made in the same way? A. Made by ex-
20 perts, yes.

Q. Made by hand? A. By hand.

Q. Not by machinery? A. Not by machinery.

Q. What is the fuse lighted with? What was the fuse lighted with that night? A. Lighted with a fire like a torch that Mr. Trempy had in his hand.

Q. It is not like a piece of punk? A. Just something they make for the purpose of firing dis-
30 plays, like a torch, only it burns with a flame.

Q. Is that like a kerosene torch, for instance? A. No. It is just a torch like, and burns about four or five minutes and he uses this to light the fuse.

Q. Does it have a flame? A. Oh, yes; it has a flame, just a flame.

Q. It is not a glowing substance like punk, but it has a burning flame? A. It has a burning
40 flame, yes.

Thomas Jardine—Re-direct

Q. Like these torches that are used in parades?

A. Very much like them, only it burns a little different way and burns longer.

Q. How long does it take the fire to travel from the torch to the bomb along the fuse? A. 10 After it has been lit?

Q. Yes. A. Just a second, two seconds, just depends upon the black match that is exposed.

Q. Depends upon what? A. The match that is exposed. The way they light them, they have it about a second when he touched it off, the thing would go off.

Q. Was this five break star shell one of those in which there are several small explosions followed by a final loud explosion in the air? A. 20 Well, no. He said it was a five break star shell, there would be all star effects. No explosion.

Q. No final big bang? A. No.

Q. How many six inch shells were fired, do you know? A. No, I couldn't tell you what proportion of six inch. I should judge about thirty or thirty-five.

Q. How many did you say were fired altogether? A. In the neighborhood of 140.

30 Q. How many six inch mortars were there? A. Well, I can't tell that.

Q. Does Mr. Trempy know? A. Mr. Trempy would know, yes.

Mr. Watson: That is all, Mr. Jardine.

RE-DIRECT EXAMINATION by Mr. Hendrickson:

Q. There are shells that have a final bomb that 40 make a big bang? A. Yes, there are.

Thomas Jardine—Re-cross

Q. That wasn't the shell which is called a five break star shell? A. No.

Q. It is a different shell? A. Different shell, yes.

RE-CROSS-EXAMINATION by Mr. Watson: 10

Q. In manufacturing these shells where do these workmen get the explosives from that they put in the shell? A. Where they get the explosives?

Q. Yes? A. Why, from another department which makes the clusters of the stars.

Q. That work is done in another department? A. Yes. They just assemble.

Q. In other words, when a workman is working 20 on a bomb and it comes time to put the black powder in it, where does he get it from? A. No. The workman puts it together in its entirety. He starts with the powder and makes the shell complete, except he gets the clay, or stars, as I call them, from other places, and the powder and the match.

Q. Where does he get this powder that is used as a propellant? A. Why, he gets it from the powder magazine. We buy it. 30

Q. Does the workman go to a powder magazine and get it, or is it brought to him? A. No; he gets it himself.

Q. He goes and gets it? A. Yes. Simply goes and he gets the powder right out of the original keg.

Q. How many different kinds of explosives are used by your company? A. Different explosives. We have different colors. We are manufacturing 40 fireworks, not explosives.

Thomas Jardine—Re-cross

Q. What kind of explosives, other than black powder, are used by your company?

10 Mr. Hendrickson: I object, unless counsel restricts his question to something that is pertinent to this kind of a shell. There may be many different kinds of explosives and mixtures for different purposes, other than what is in this case.

The Court: I do not know what is in the mind of counsel.

20 Mr. Watson: I have no objection to telling the Court. Here are shells made by workmen, and we are going to argue to the jury that something unusual must have been in this shell, and I want to find out what there was available that this workman might have gotten.

Mr. Hendrickson: I will withdraw the objection.

(Question repeated by stenographer.)

A. No other. We make—

30 Mr. Hendrickson: In the consolidated plant, you mean?

Mr. Watson: The Staten Island plant.

A. We don't manufacture explosives except the fireworks. We buy this powder.

Q. What other kind of explosives, if any, are in the Staten Island plant? A. Nothing except manufacture of fireworks.

Q. Well, you use black powder? A. We use black powder.

40 Q. What other kind of explosives, or propellant, or detonator do you use? A. Nothing. No other.

Thomas Jardine—Re-cross

That is the only propellant we use is black powder.

Q. Are there any other kinds of explosives in the plant used for any other purpose whatsoever?

A. No, there are not.

Q. Was that so when these shells were manufactured? A. It was. 10

By the Court:

Q. Were you superintendent at the time the shells were manufactured? A. No, I was not. Previous to the time.

By Mr. Watson:

Q. You were not superintendent when these were manufactured? A. No, I was not. 20

Q. So that what you are telling us is just hearsay? A. I am telling you my experience of twenty-three years in the plant; I am superintendent of that plant.

Q. When did that twenty-three years end? A. 1921.

Q. When were these shells that were used in 1926 manufactured? A. 1926, 1925.

Mr. Watson: That is all. 30

By the Court:

Q. Just how are they made? A. They are manufactured by hand.

Q. I know, but how? What are the different processes, the different steps? A. I will explain that.

Q. Upon that shell? A. Yes, I would like to explain to you.

Q. That is a correct imitation of a six inch aerial bomb, is it? A. Yes, it is. A tube is made 40

about six inches diameter, of a fine quality rope Manila paper, rolled about six or seven ply.

Q. That is the exterior or skin, is it? A. That is the exterior skin, the first. The inner covering. There is a bag made about five inches long, made
10 of this paper. In the bottom they put a disc made of straw board, fifteen straw board, they put about five discs, and instead of dropping it all the way down, they drop it within about two inches of the bottom, and tuck in this Manila paper over the straw board to make it a solid base. They place in the bag, when it has been completed, the first bag, the stars, whatever the effect is going to be, star shells. When they get the stars in,
20 then a small quantity of powder which breaks the shell; they place in several discs like this with a time fuse.

Q. What is that made of? A. Fifteen straw board. The time fuse is made of a very high quality of hardware paper. In this tube is charged meal powder, and so timed that it is about five seconds, when it is a time fuse that determines the time when it leaves the ground until it reaches the air and bursts. This fuse is
30 placed in the top and the paper extending above it is packed all around it. After that it is wound with a fine quality of shell twine, wound above and around that way and around this way. Maybe they would be only about one-quarter of an inch apart. After that it is covered with another coating of fine Manila paper. It is allowed to dry. And after it is dry they put the propellant charge in, they put another layer of paper which extends
40 down about four inches below. The powder is

placed in there and the bag tied and then another piece of paper put over that. After that is done a piece of fuse, which we call a match, like this, is run to the time fuse, which is here, and also runs around to the bottom to the propellant charge. When the fuse is lit, the fuse lights the
10 propellant charge and at the same time lights the time fuse, it is propelled up in the air, and going up in the air the time fuse is burning through and it breaks out maybe two hundred feet or three hundred feet.

Q. How many different men are engaged in the making of a complete bomb? A. In some cases the man goes right through and completes it himself. In most cases he starts with a bomb and
20 finishes with the bomb.

Q. One man? A. One man; yes, sir.

Q. When you get the powder what examination do you make of the powder? A. Why, when they are opening it up the man who uses it examines it to see whether it is clean. It is very easily told. The powder is usually different grades, fine grades, and it is very easy detecting whether it is good or not.

Q. What examination do you make of this kind
30 of powder that produced 192,000 bombs that never misfired, or never prematurely exploded? What do you do? What do you do in that case? A. Well, the powder, the only thing the powder is for is the propellant charge.

Q. I know it is, but don't you examine it to see whether there is anything else besides powder in it? A. Yes, they do, they examine it, certainly they examine it.

Thomas Jardine—Re-direct

By Mr. Hendrickson:

Q. Where do you get your black powder from?

A. From Du Pont's.

Q. How long have you bought from Du Pont black powder? A. Fifty years.

10 Q. Does it always come even in grain and even in powder? A. Always comes very good. No trouble at all.

Q. What is known as black powder is always the same, isn't it? A. Yes, different grades, different kinds.

Q. The difference in the grades is only in the size of the grain, isn't it? A. That is all.

By the Court:

20 Q. Who makes the fuse? A. It is made by another department.

Q. Not the same men? A. Not the same men; no, sir.

Q. Well, I asked you if the one man made the completed bomb? A. I mean assembling the bomb.

Q. I just wanted to know how many different men were engaged in the making of a bomb? Not mere assembling, but the making from start to finish of the bomb? A. Well, maybe manufacture the colors, probably be one man. One man may mix the composition, and from that man it goes to a man who moulds the stars, or the pellets of color that go in there, that is all, in the case of a star bomb.

30 Q. Just explain that fuse, will you, just what that is made of, and just how it works to a final finish? A. This fuse is made of cotton yarn, 40 which is passed through a composition; the com-

Thomas Jardine—Re-direct

position is black powder wet down, a little starch or something put with it, and this cotton yarn is passed through it, so that it becomes saturated with it, and dried. That is the black match I was speaking of. In the case of this sort, where they want it to go quick they roll it in a paper tube. 10 When it is out like that it goes quick. When it is out it goes like that, goes instantaneous.

Q. How far down does that reach in that bomb?

A. Just about one-quarter of an inch in here to light this fuse, and follows down along the side to reach the propelling charge.

Q. Then the fuse goes all the way through? A. No, sir; this fuse just goes into this first break. When the first break goes off it sets the fuse of 20 the second break.

Q. Then there is another fuse? A. Exactly. One after the other.

Q. One fuse after the other? A. Yes, sir.

Q. What effect does the setting off of each fuse—how many fuses inside of that? A. Four. This one makes five.

Q. The outside one makes five? A. Yes.

Q. When is the explosion supposed to occur? A. This fuse here— 30

Q. The explosion that will force it perpendicularly up in the air? A. It starts as soon as this fuse is lit. This fuse lights that and this goes instantaneous.

Q. It must reach the bottom before it goes up in the air? A. Yes, sir.

Q. Is there a danger of such an explosion before it reaches the bomb fuse? A. We haven't had them. In our experience we haven't had 40 them in 193,000 shells.

Thomas Jardine—Re-cross

Q. If you haven't had them in 193,000 shells, then why did this one explode? A. I don't know.

Q. Well, if you made 192,000 shells that never exploded, then isn't it your assertion that if the
10 thing is properly made that it cannot explode?

Mr. Hendrickson: If I may object.

The Court: I will withdraw it. But it seems to me that along the line of the questioning that you put, that he has been giving expert opinion all the way through. However, if you do not qualify him as an expert, that is different.

20 By Mr. Watson:

Q. Mr. Jardine, you are an expert, aren't you, in the manufacture of these shells? A. Why, I have had charge of the factory for twenty-three years and watched the manufacture.

Q. You are an expert in the setting of them off, aren't you? A. I haven't had so much practice in that. I have set off displays, yes.

Q. How many displays have you set off? A. Two or three, and I have set off my own displays.
30

Q. Over how many years? A. Oh, I suppose about thirty.

Q. Yes. Now, the fuse—is it this exterior fuse that continues down to the propellant charge in the bottom? A. Yes.

Q. That same fuse? A. This fuse here (indicating).

Q. That propels the bomb from the mortar, sends it up in the air straight? A. Correct.

40 Q. Then after it gets in the air this time fuse inside begins to work? A. This one here first.

Thomas Jardine—Re-cross

Q. They work from the top down? A. That is it.

Q. How does the fire get—what sets off that—
A. This fuse lights—this match lights this fuse, at the same time it goes down and lights the propellant charge.
10

Q. The outside fuse lights the powder, time fuse? A. Yes.

Q. And the fuse to the propellant charge practically at once? A. That same thing.

Q. But the propellant charge is instantaneous and the upper charge is a time fuse? A. Exactly.

Q. So in this 192,000 that you sent off before this happened, the propellant worked first, and
20 the time fuse worked afterward? A. I said we had no—we sold 193,500 shells and have never had a complaint.

Q. In this one the time fuse got busy first, didn't it? A. I don't say what happened.

Q. Well, might it be that one of your workmen got the time fuse and the propellant fuse mixed up and got it in the wrong place? A. You can't put a propellant fuse on here. That is a lot of black powder. You couldn't get it on top of the
30 shell.

Q. Couldn't do that? A. Why certainly not.

Q. Well, the thing didn't work anyhow, did it? A. Apparently not.

Q. And you were there? A. I was there, yes.

Q. It blew up with sufficient force to hurl this mortar, so that there was none of it there when you got to the place? A. Yes, that is correct. There was none of it there.

Q. How much does this mortar weigh? A. Oh,
40 I should judge 150 pounds.

Thomas Jardine—Re-cross

Q. I can't lift it. Did you ever hear of any of the other pieces of this mortar? A. No, I have never heard of any of them.

Q. Did you make any investigation to try to find out where the other pieces went?

10

Mr. Hendrickson: I have, but we have never found a piece of them.

A. We never found them.

Q. You have never found them? A. No.

Q. Five ounces of black powder couldn't do that, could they, Mr. Jardine? A. No.

Q. What? A. I should not think so.

Q. You are an expert. Five ounces of black powder could not rend that 150 pound mortar?
20 A. No, it could not.

Q. And send it all over creation so that only one piece afterwards ever was found? A. It could not.

Q. Must have been something else in there, is that so? A. It wasn't the black powder that did it.

Q. Something did it, didn't it? A. Yes.

Q. And it wasn't black powder? A. No.

30 Q. So it must have been something else? A. It must have been something that did it.

Q. Who inspects this black powder? You say the man who puts it in the charge? A. Yes, the expert who has charge of this department.

Q. Does anybody else inspect it? A. We don't open the kegs until they are ready to be used.

Q. Then what you do is, you get in a shipment of a carload of black powder? A. No. Small
40 quantity of black powder. Fifty kegs.

Thomas Jardine—Re-cross

Q. That is opened for use? A. As they need it they open it.

Q. How many kegs do you open at once? A. One keg at a time.

Q. If a man wants to use some of that black powder he goes to the open keg and helps him-
10 self? A. In this case he would get a complete keg. This man would get a keg that had never been opened and take it to his department.

Q. Does he work at a bench? A. A bench, yes. He has a shop.

Q. He takes this keg of black powder and opens it and uses it? A. Yes.

Q. No inspection made of any kind? A. He
20 inspects it when he opens it.

Q. That is by sight and feel? A. And tries it.

Q. How does he try it? A. Take a shell out and put a propelling charge in and try it and see if it is—

Q. Just send one up in the air? A. Occasionally, yes.

Q. Does he do that every time? A. Why, no. Wouldn't have them.

Q. You said he does that occasionally. Does
30 he do it every time? A. I don't know that.

Q. Well, did he do it every time when you were there, when you were working there? A. I can't tell you that.

Q. Well, you must know whether he did or didn't? A. Well, I was superintendent of a plant of 180 people.

Mr. Watson: That is all, Mr. Jardine.

Thomas Jardine—Re-direct

By Mr. Hendrickson:

Q. Mr. Jardine, you say one man makes a shell?

A. One man assembles the shell.

Q. That is, it is strictly a one man job? A. It is.

10 Q. Now, the stars that are in a five star shell—just tell the jury how they are made? A. They are made in moulds, a special department just for making stars; the composition is mixed in one department, taken over into a star maker, who puts this composition in moulds, and it is pressed, and after they are pressed they are taken in a drying room and dried, and when they are dried they are put away in stars, in kegs, marked with
20 the color.

Q. They are made up in large quantities, aren't they? A. Made up in large quantities ahead.

Q. Are they made by machinery? A. Just made by hand press.

Q. A machine operated by hand? A. Yes.

Q. Just squeezes them into little round balls? A. Yes.

Q. And they are dried and they are made up in large quantities. Now, then, the fuse, just tell
30 the jury how they are made? A. Fuses are made in a separate department by one man. The composition is mixed in one department, taken to this match shop, where it is wet, and cotton yarn is run through this composition, and the yarn picks up some of the composition it is passed through, it is rolled off on racks on frames and set up to dry. When it dries it is cut off in six foot lengths.

40 Q. You make long quantities or strips of it at one time? A. Yes.

Thomas Jardine—Re-direct

Q. This is the cotton part? A. Yes.

Q. What do you call that in the trade? A. We call that black match.

Q. That burns very slowly, doesn't it? A. Very slowly, yes.

Q. If you cover it with paper what happens
10 then? A. It makes it very quick, what we call quick match.

Q. Is that the same kind of a match that is there covered with paper, is that the same kind of a match that runs all over in such a display like Niagara Falls? A. That is the same kind.

Q. And the reason it goes so quick over the whole big set piece is because it is covered with paper? A. Because it is covered with paper and
20 confined in the tube makes it quick match.

Q. Covering it makes it work quick? A. Yes.

Q. Is the fuse that runs down the whole length of that shell inside of the cardboard or paper wrapping that connects with the black charge at the bottom first? A. Yes, you see it here.

Q. Is that a covered match? A. That is a covered quick match.

Q. So that it snaps as quick as that, doesn't it?
A. Instantaneous, yes. 30

Q. It goes instantaneously, as soon as the match reaches the—fire reaches the end there?
A. Yes.

Q. Now, then, that shell really consists of five shells, doesn't it? A. Five distinct compartments, five shells.

Q. Each one is really a separate and distinct shell? A. It is.

Q. Connected together by matches through that
40

Thomas Jardine—Re-direct

one that is there? A. Connected with this (indicating).

Q. Where did that come from? A. That came from the ground that the display was fired.

Q. Down at Perth Amboy? A. Down at Perth
10 Amboy.

Q. We picked that up there together? A. Yes, we picked that up.

Q. That went out of a shell that was fired up in the air very probably? A. Yes.

Q. That is between each of these shells, isn't it? A. That is correct.

Q. One of them is the propelling charge, that sends it up, and the other four are separate col-
20 ors or stars? A. Yes.

Q. With a propelling charge of powder inside? A. Exactly.

Q. Do different men gradually work themselves up to the shell makers? How do you get shell makers? A. This man we have who has charge of this department is a man who has had about forty years experience. He has been with us about seventeen years.

Q. There are other men besides that make
30 shells in the world, aren't there? A. Yes.

Q. How does a man work up—how does he get experienced to be able to make a shell? A. By working under this superintendent, and we have many experienced shell makers who have come from Italy, and most of them—

Q. If a man started to work under somebody else— A. He starts to work under somebody else.

Q. Just like a man learning any trade? A.
40 Yes.

Roy R. Trempy—Direct

Q. Before you put such a man to work do you know whether or not that man is safe to make shells or not? A. Certainly do.

Q. How do you find that out? A. We have him pass through the man who has charge of this shop to be examined and found out whether he is
10 an expert shell maker or not.

Q. Do you take shells made by such a man and test them and try them? A. The foreman has charge of that. He does.

Q. I mean the company? A. The company, yes, we do.

Q. Your foreman tries out such shells, don't he, made by a new man? A. Yes, we certainly
do. 20

Mr. Hendrickson: That is all.

Mr. Watson: No further questions.

ROY R. TREMPY, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Hendrickson: 30

Q. Mr. Trempy, where do you reside? A. Forest Hills, Long Island, New York.

Q. What relation do you bear to the defendant company, the Unexcelled Manufacturing Company? A. Salesman.

Q. How long have you been in their employ? A. Seventeen years.

Q. All of that time? A. With the exception of 1918 up until May of 1919. 40

Roy R. Trempy—Direct

Q. Were you out of their employ then? A. I was in the service.

Q. You mean you were in the war? A. In the war; yes, sir.

Q. How long were you in the war? A. From 10 January, 1918 until May, 1919.

Q. Whereabouts, in this country or overseas? A. Three-quarters of the time over in France.

Q. Did you hold any office or were you a private? A. I went in as a private and came back as a second lieutenant.

Q. When you came back did you go right back to work for the defendant? A. Yes, sir.

Q. So that from now back it is seventeen years 20 since you first went into their employ except that period? A. And 1920 from January until May.

Q. 1920, where were you then? A. Taking charge of a fireworks plant in Astoria, Long Island.

Q. Who were you working for there? A. George F. King.

Q. You left them to go back to the Unexcelled? A. Yes, sir.

Q. Are you the man who fired this display at 30 Perth Amboy? A. I am.

Q. Did you fire the shell that exploded? A. I did.

Q. First describe what you had there to fire? How many mortars did you have? A. Twenty-two.

Q. And what were they like? A. They were 40 four inch mortars, six inch mortars and eight inch mortars. They were the steel mortars. We also had paper tubes to fire the three inch shells.

Roy R. Trempy—Direct

The three inch shells do not require steel mortars.

Q. How many of these steel mortars did you have? A. Twenty-two.

Q. How were they set in the ground? A. Buried two-thirds of the way. We dug a trench 10 and set each mortar about ten inches apart.

Q. How far apart? A. Ten inches apart each mortar.

Q. Do you mean ten inches from each other? A. Yes, sir.

Q. Do you mean the next mortar to that would be ten inches away from that mortar? A. Yes, sir.

Q. What is the object of burying them in the 20 ground? A. For safety purposes.

Q. Well, tell us what you mean by safety? A. If the mortar was not buried in the ground the concussion of the shell is liable to throw the mortar over when it hits the powder charge and therefore it may send the break out into the crowd instead of going up into the air.

Q. And they are buried in the ground to hold them upright, are they? A. Yes, sir.

Q. How many shells—did you get the contract 30 for this display yourself as salesman? A. I did.

Q. Do you know what the display was made up of? A. Yes, sir.

Q. How many shells did you have in that display? A. 150 in all.

Q. Of what size, do you remember? A. Three, four, five, six, eight and ten.

Q. Did you have a ten inch shell? A. Yes, sir.

Q. What did you fire that out of, an eight inch 40 mortar? A. A ten inch mortar.

Roy R. Trempy—Direct

Q. You had a ten inch mortar beside? A. Yes, sir.

Q. How many shells did you have of the eight inch type? A. Twenty-seven. Beg your pardon. Eight inch did you say?

10 Q. Yes? A. Six.

Q. Six eight inch shells. Now, how many ten inch shells? A. Four.

Q. How many six inch shells? A. Twenty-seven.

Q. And one of those twenty-seven six inch shells is the one that exploded in the mortar, is it? A. Yes, sir.

20 Q. Do you know how many of the six inch shells had been exploded before this one exploded in the mortar? A. Twenty.

Q. How do you keep track of all these? A. Because there were seven returned to the factory after the show.

Q. You took back seven six inch shells that you didn't shoot? A. Yes, sir.

Q. Did you ever see a shell made yourself? A. Yes, sir.

Q. Whereabouts? A. Staten Island factory.

30 Q. How many have you seen? A. And also at Astoria, Long Island.

Q. How many have you seen? A. Hundreds of them.

Q. How many shells have you shot off yourself? A. Over one thousand.

40 Q. How many six inch shells have you fired off yourself? A. Well, I couldn't say. Around three or four hundred probably. The number of six inch shells vary in a display. They would be more of a smaller shell than there would be a larger shell.

Roy R. Trempy—Direct

Q. How long have you been firing shells? A. Fifteen years.

Q. Are you accustomed to fire for the defendant displays of shells? A. Beg pardon?

(Question repeated by stenographer.) 10

A. Shows where I guarantee a committee that the show will be the best show they have ever had for the money in the state I take entire charge of the show.

Q. Do you mean firing it yourself? A. Yes.

Q. Did you fire all the shells that were fired at Perth Amboy in June? A. I did.

Q. You had twenty-two mortars there. Now, tell the jury how you went about firing the one 20 hundred and odd shells you did fire? A. The shell would be divided up into different effects, and to get the desired effect of a firework display you have to break the monotony and I had a man, Mr. Burns loading for me. He would go along and load the shells and I would follow up by firing the shells. While he was loading the shells there would be a rocket display fired off at a safe distance from the shells so there would be something in the air continually. 30

Q. Tell us how you would light the shells? A. The shells would be placed in the mortar by the man loading for me, and there would be a trench dug and it would be—at this special occasion I was on the east side of the mortars, or down river side. After the shells were loaded I would lie on my stomach and go along and pull the safety matches off and light the fuse.

Q. Just explain what you mean by the safety match? A. The safety match—this is quick 40

Roy R. Trempy—Direct

match, and there is supposed to be six inches, there is six inches of slow match before you reach the quick match; then we have a safety cap put on there to prevent sparks from other pieces of fireworks falling down that would ignite that fuse
10 if it wasn't covered, and that is one of the precautions we use to see those safety caps are there.

Q. You pulled that off? A. We pull that off.

Q. Then what do you do? A. Put the torch light to this end.

Q. Then what happens? A. The shell immediately, instantaneously goes up in the air.

Q. And explodes. Now, then, this one that exploded prematurely, or whatever you call it, exploded when you lighted it, can you tell us anything from your recollection of what happened when you lit that one? Do you remember any of it? A. Everything was a daze, and the only thing I remember is when my men came to me and asked me if I was hurt. I was on my feet at that time.

Q. Do you know whether you lit the fuse or not? A. I did.

Q. You lit the fuse and that is the last you
30 knew. Did you look to see what happened to the mortar or the shell after you got over the daze? A. My first thought was of the people running towards the fireworks display and to avoid any further accident that might be some of them running towards the display might have had matches or cigarettes and might have caused further disorder, and I immediately ordered the set pieces to be fired to get the crowds back, which they did.

40 Q. How much was fired after this accident, how long a time? A. Well, we put the grand

Roy R. Trempy—Direct

finale on, we cleaned everything up in about seven minutes, with the exception of about seven shells.

Q. Those were the seven shells that had not been fired upon that time? A. Yes. We didn't want to fire those because the ground was loosened where the other mortars were buried and we didn't think it was a safe thing to fire the remaining shells. 10

Q. Who decided not to fire those shells? A. I did.

Q. Took them back to the factory? A. Yes, sir.

Q. All the rest of the stuff was fired off? A. Yes, sir.

Q. This was towards the end of the performance? A. We had carried the show on between
20 forty-five and fifty minutes. The show was supposed to have gone an hour.

Q. Have you any doubt yourself that the shell exploded in the mortar? A. No.

Q. You have had enough experience—

Mr. Watson: What does that mean, you have or have not?

The Court: He has no doubt.

A. I haven't any doubt. 30

By Mr. Watson:

Q. That it did? A. Yes.

By Mr. Hendrickson:

Q. You are satisfied that it did explode in the mortar? A. Yes, sir.

Q. That is what you think yourself? A. Yes, sir.

Q. Do you remember at all the hole that was there? Did you see that afterward? A. There 40

Roy R. Trempy—Direct

was a hole where the mortar had been, say about two feet in length and about eighteen inches deep.

Q. How long did you stay there before you went away? A. Until the show was complete.

10 Q. Did you know that Mr. Robinson had been hurt while you were there at the show? A. Not until the chairman of the committee took me to a doctor in South Amboy—in Perth Amboy.

Q. How long afterward was that? A. I should say, well, the show took seven minutes to complete and we were on the highway, I would say, about between ten and fifteen minutes.

Q. Before you went to the doctor? A. Yes.

20 Q. And it was when you went to the doctor that you heard about Mr. Robinson being hurt? A. Yes.

Q. What did you do then? A. After I left the doctor the first thing I did was to go to the hotel and call up the hospital and inquire about who was hurt.

Q. Did you find out who was hurt? A. They didn't know his name at that time. They wouldn't give me the name.

Q. They wouldn't give you the name? A. No.

30 Q. After a shell is shot off in one of these mortars what happens before you put another shell in? A. The mortars are loaded in series. The man loads the whole twenty-two mortars and he goes away, and I am the only one firing the shells myself, and I go along and fire them as to get the desired effects. They would go immediately. It is supposed to be when a shell is in the air breaking, the other shell is supposed to be leaving the mortar, to get the desired effect, except where
40 we have a special parachute shell, we give two or

Roy R. Trempy—Direct

three minutes time, say a minute, to give the spectators a time to enjoy the desired effect.

Q. What do you mean by parachute shell? A. Parachute shell is when the shell reaches its height there is a parachute, suspended from this parachute there is a chain pots or lights that have
10 color hanging from this light as they float in the air, and this parachute holds this pot in the air.

Q. Are those the same thing as stars? A. No.

Q. Same composition as stars? A. Same composition, yes.

Q. Made out of the same composition, with different lights? A. Yes.

Q. Do you know what that composition is? A. The star composition is made up of colors, strontium, barium and then salt peter used in order to
20 make the color function, sulphur, charcoal.

Q. Any fat or grease used to hold them together? A. Well, we use dextrine, or paste.

Q. Did you ever make any stars yourself? A. Not for the Unexcelled Company.

Q. Have you any idea how long you were stunned, when you lost track of things? A. I couldn't say, but it couldn't have been very long, because when I regained my senses I was on my feet and
30 Mr. Burns came up and asked me if I was hurt, and I said no, go on with the show.

Q. Where did you get the bombs that you fired in Perth Amboy? A. From Staten Island factory.

Q. Did you select them yourself? A. They were selected by the programme that was submitted to the committee.

Q. Well, I mean they told you what they wanted? A. No, they didn't know. It was left to the Unexcelled Company and Mr. Jardine and
40 myself arranged the programme.

Roy R. Trempy—Direct

Q. Did you look at each shell before you took it down there to Perth Amboy? A. I wasn't at the factory. I didn't see the shells before they got to Perth Amboy.

10 Q. Where did you first see these shells? A. When I opened up the case to sort out the shells and the different sizes.

Q. Did you tell us what you did when you opened the case? A. We opened the cases, these cases are all packed with excelsior, opened up the cases, took out the different size shells and looked to see if the fuse was intact, and there wasn't any holes in the paper. Then we laid them back, took the excelsior out of the boxes, laid them back
20 into the boxes and put tarpaulins over them from a safety point.

Q. Is that the usual way you handle them when you are shooting displays? A. Yes, sir.

Q. How do your other employes handle the shells when they are shooting a display? A. The same way.

Q. How many men are there in the employ of your company who shoot displays? A. Couldn't say the exact number, but when I go on a show I
30 call for three men that I know are the best in the fireworks game.

Q. That is your judgment? A. That is my judgment.

Q. Well, but now, suppose the company wants to send somebody else besides you to fire a display, who would they send? A. They would send a competent man who had the same schooling as the other.

40 Q. Who is the competent man? Who of your

Roy R. Trempy—Cross

men— A. A man that has been in the employ for a number of years.

Q. Can you give us their names, any of them?

A. Yes.

Q. Who? A. Mr. Charles Tucker, Mr. Ted Tucker, Tim Burns, John Lamonte, Mr. Johnson, 10 Mr. Vochhoven.

Q. Have you ever been to see displays they fired? A. Yes, sir.

Q. Did you ever see the way they handle shells? A. Yes, sir.

Q. Do they handle them the same way you do?

A. There is only one right way to handle them.

Mr. Hendrickson: Cross-examine.

20

CROSS-EXAMINATION by Mr. Watson:

Q. How many six-inch shells did you say you did not shoot? A. Seven.

Q. What was the reason? A. Because the mortars that were previously buried in the ground were loosened by the explosion of the mortar that broke.

Q. How far away were they loosened from the mortar that broke? A. Well, they were not out
30 of order, but the ground was not packed up around them.

Q. How great an area was affected? A. The shell on either side of the shell that was broke was laying at an angle, I should say, of ninety degrees.

By Mr. Hendrickson:

Q. You mean mortar? A. The mortar.

40

Roy R. Trempy—Cross

By Mr. Watson:

Q. What about the next shells? A. The next shells were in order.

Q. So it affected the two adjoining shells? A. Yes, sir.

10 Q. How many six-inch mortars did you have there? A. Eight.

Q. Then three of the eight were affected? A. Three of the eight were affected.

Q. Didn't you fire off the rest of these six-inch bombs? A. I beg your pardon. Two of the six were affected, and one of the eight was affected.

Q. You said there were seven six-inch bombs you didn't set off? A. Yes.

20 Q. Did you set off the rest of your bombs? A. No.

Q. How many bombs didn't you set off altogether? A. 143.

Q. How many did you fail to set off? A. Seven.

Q. What were they? A. Six-inch shells and one eight-inch.

Q. Six inch shells and one eight inch shell were not set off? A. Yes.

30 Q. You had how many mortars left intact? A. Eight.

Q. Left intact? A. I had six six-inch mortars intact.

Q. Then you could have set off the other six-inch shells in those mortars that were left intact? A. Not when there were one hundred people coming over towards the mortars. I did not fire them from a safety standpoint.

40 Q. Well, these mortars were pointed up in the

Roy R. Trempy—Cross

air? A. And the youngsters were on top of the mortars too.

Q. Where was the rest of the display that you set off? A. About two hundred feet in the rear towards the river.

Q. The real reason that you couldn't set these off was because the crowd came on top of you? 10 A. It was.

Q. Your method of lighting the fuse was to draw off the slow end? A. Yes.

Q. And light the quick end? A. Yes.

Q. Why? A. The cover on that fuse was put there from a safety standpoint and you couldn't light them unless you tore it off. And the method of getting an effect of the display, I would be lay- 20 ing down and I would take three fuses in my hand and pull the three off at once and I would lie right there to get instantaneous effects.

Q. Can this be lighted? A. It can.

Q. But in order to get a better effect you disregarded it— A. Slapped the torch fire right to the shell.

Q. You disregarded the safety end of the fuse? A. That wasn't the safety end of the fuse.

Q. Where was the safety appliance that you speak of? A. This is supposed to be a safety ap- 30 pliance.

Q. Yes. A. And I pulled those off and I slapped the torch fire right onto the fuse.

Q. How does an ordinary exhibitor set off these things, does he light it there, or does he pull it off too? A. An expert pulls it off.

Q. But an ordinary person, like myself, if I 40

Roy R. Trempy—Cross

were setting off one, I would light it at the end of the slow fuse? A. That is if you couldn't read, because instructions are on them what to do before you fire them. This is a safety fuse that goes over this.

10 Q. Do you know how many—

Mr. Hendrickson: Safety cover.

A. Safety cover for the fuse. That is to prevent sparks from hitting that and lighting the fuse.

Q. Now, you have produced a red paper cylindrical cover which covers the slow fuse. It was this paper that you tore off? A. Yes, sir.

20 Q. Then after tearing off the paper what would an ordinary person like myself, able to read, do? Would I light it at the end of this slow fuse or at the end of the quick fuse? A. If I didn't know anything about fireworks I would use every precaution and light the end, but that wouldn't make it any safer.

Q. Well, what the instructions tell you to tear off is this red paper thing? A. Yes.

30 Q. They don't tell you to tear this slow fuse off? A. We didn't tear the slow fuse off. We tear the paper off.

Q. You said the instructions tell you to do? A. Yes.

Q. You said if I knew how to read I would tear this off? A. No.

The Court: He did not say if you knew how to read.

40 Mr. Watson: Didn't he say that?

The Court: No.

Roy R. Trempy—Cross

Mr. Watson: He said if I read the instructions.

A. You would tear this cover off, if you read the instructions.

Q. Not this? A. Not that. 10

Q. And this is where you lighted it? A. Yes.

Q. How many ounces of powder of all kinds were in the bomb and the fuse and the whole business? A. From the manufacturing standpoint—

Q. I don't care from what standpoint. How many ounces of powder were there? A. To my knowledge for a six-inch shell there ought to be between four and four and one-half ounces in the propelling charge, and about three-quarters of 20 an ounce of powder in each break.

Q. Then you had nine or ten ounces? A. Yes, sir. That is for a six-inch shell.

Q. Does that include the fuse? A. No.

Q. How much in the fuse? A. Couldn't say.

Q. Any idea? A. That would be getting down to too small a detail.

Q. Less than an ounce? A. I might say an ounce.

Q. Then you had ten or eleven ounces in the 30 whole outfit? A. Yes.

Q. Had you fired other bombs from the particular shell which burst in this case? A. From the particular mortar, do you mean?

Q. From the particular mortar? A. Yes, sir.

Q. Was the mortar all right? A. Yes, sir.

Q. Are you an expert? A. In firing.

Q. In firing. Have you sufficient expert knowledge to say whether ten or twelve ounces of 40 powder exploding in that mortar— A. I am not.

Roy R. Trempy—Cross

Q. (Continuing),—would have sufficient force to burst it? A. I am not.

Q. Have you sufficient expert knowledge to say whether that mortar was sufficiently strong to withstand the explosion of this quantity of powder within it? A. I am.

Q. Did it have? A. Yes.

Q. It did have? A. Yes.

Q. I understand you to say that the mortar was sufficiently strong to withstand the explosion of as much powder as that six-inch shell was supposed to contain? A. It was.

By the Court:

Q. How do you know that, Mr. Trempy? A. A mortar has to be reinforced certain thicknesses from the bottom, and through my schooling I found out we had the mortars manufactured according to the strength of the shell.

By Mr. Watson:

Q. Did you ever have a mortar disappear before? A. No.

Q. Then there must have been something else in this shell? A. No, I would not say so.

Q. Well, if the powder that was supposed to be in it could not have done it, what did do it? A. Several causes. It could possible have happened, that the human element don't understand.

Q. That might be. It might have been caused by something else being in the shell too, might it not? A. Possibly.

Q. Some stronger explosive, is that so? A. Possibly.

40

Mr. Watson: That is all.

Roy R. Trempy—Re-direct

RE-DIRECT-EXAMINATION by Mr. Hendrickson:

Q. How many shells had you shot previously out of the mortar that exploded, before the explosion destroyed the mortar? A. 142.

Q. No, I mean out of the particular mortar that was destroyed by the explosion? A. Eight.

Q. You had previously shot eight shells from it? A. Yes.

Q. Had that mortar been in use before with your company? A. Yes, sir.

Q. That particular mortar? A. Yes, sir.

Q. Has that mortar ever been used by your company? A. Yes, sir.

Q. Look at it and see. I don't know whether it has or not. A. Yes, sir; it has.

Q. What is the six on there? A. Six inches in diameter.

Q. Are all six-inch marked that way? A. Six; yes, sir.

Q. And the other ones the same way? A. Five-inch mortar put a five on.

Q. You answered on cross-examination that was the first mortar that had ever exploded, to your experience? A. It is.

Q. And the first shell that ever exploded prematurely in your experience? A. It is.

Q. Your reason for lighting the instantaneous fuse, I want you to make clear to the jury your reason for lighting the instantaneous fuse, instead of at the slow end; will you please do that again so that they get that? A. Fireworks to make—you can have the best fireworks but yet an inexperienced person firing a firework display can

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Roy R. Trempy—Re-cross

make a bum job of it, and the way to get results in a firework display to make the spectators go home in good humor is to break the monotony and have everything go off just like a three ring circus, something going on all the time, with their
 10 necks being strained they are seeing something, and in order to make a shell leave the mortar while the other is exploding you have to light them in that order.

Q. It does not make any difference as to your personal safety whether you light a slow end or the fast end? A. It does not.

Q. That is, there is not anything careless in lighting it that way? A. No, sir.

20 Q. You light it there because from your experience you would time that next shell from the one that is exploding in the air, is that it? A. Yes, sir.

Q. And by lighting it at the fast end you can tell it will explode— A. Just when I want it to.

Q. At the period you want it to up in the air? A. Yes, sir.

30 RE-CROSS-EXAMINATION by Mr. Watson:

Q. Did you ever have a shell explode in a mortar before? A. No.

Q. Then you don't know by actual experience whether the powder that was in that shell detonating under confinement would rend this mortar or not? A. No, sir.

Q. Because you never had one happen before? A. No, sir.

40 By Mr. Hendrickson:

Q. You have heard of instances, have you,

Thomas Burns—Direct

where a shell did prematurely explode in a mortar?

Mr. Watson: I object to that.

The Court: Objection sustained.

10

THOMAS BURNS, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Hendrickson:

Q. Mr. Burns, you are employed by the Unexcelled Manufacturing Company the defendant?
 A. I am. 20

Q. Where do you live? A. 62 Innis Street, Port Richmond, Staten Island.

Q. How long have you been in their employ?
 A. Twenty years.

Q. Were you present at the Perth Amboy display in June, 1926? A. I was.

Q. What was your occupation there, what were you doing at the display? A. Cleaning and re-loading mortars. 30

Q. Will you tell the jury just what you do to clean a mortar and re-load it? A. Where I could reach the bombs that were left in the mortar with my arm, I did so; and where I could not I had a stick with some nails drove into it to get out the wadding that was left there, and when they were all cleaned I re-loaded them so that Mr. Trempy could fire.

Q. What is left in the mortar after a shell is fired? A. This bottom part here. 40

Thomas Burns—Direct

Q. What happened in Perth Amboy that caused this accident? A. I do not know.

Q. Did you see the— A. I saw a cloud of dust.

Q. You didn't see anything except the dust?

A. That is all.

10 Q. Where were you? A. About ten feet away from the mortar.

Q. Were you looking the other way, or what? A. No. I was looking directly at it.

Q. Did you hear the explosion? A. I did.

Q. What did it sound like? A. Terrific noise and a blast of dust.

Q. Was it anything like the noise of the explosion of the bomb when it is up in the air? A. 20 No.

Q. How did it differ? A. Much louder report.

Q. Was that because it was so near to you? A. Well, I don't know.

Q. Well, now, when you heard this very terrific report and saw the cloud of dust what did you do then? A. Looked for my partner Trempy.

Q. Did you see him? A. Yes, I did.

Q. Where was he when you saw him? A. Coming out of the cloud of dust when I saw him. 30

Q. He was coming out. How many seconds was that after you heard the noise before you saw him coming out of the dust? A. Probably two or three.

Q. Two or three seconds? A. Yes.

Q. What condition was he in? A. Dazed.

Q. Did you go to him? A. I did.

Q. Tell us what you did? Tell the jury. A. I went to Mr. Trempy, asked him if he was hurt 40 and he said—

Thomas Burns—Direct

Mr. Watson: I object to the conversation.

The Court: Go on.

Q. Did he say anything to you? A. He did.

Q. What did he say? A. Continue the show; I 10 am all right.

Q. Who else came up to you then? A. Mr. Jardine, I think.

Q. Have you ever seen a shell explode in a mortar? A. I never did.

Q. At any other place, I mean? A. Never did.

Q. Did you shoot any more shells after the explosion? A. We did not.

Q. Do you know why? A. There were too 20 much of a crowd on the field at that time.

Q. Were all the rest of the fireworks shot in the display? A. They were.

Q. What were the last things that were shot? A. I think the good night piece was the last.

Q. Were there other set pieces? A. There was a waterfall.

Mr. Hendrickson: Cross-examine.

Mr. Watson: No questions. 30

Adjourned until 2:00 p. m.

Charles Tucker—Direct

Afternoon session 2:00 p. m.

CHARLES TUCKER, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

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Direct-examination by Mr. Hendrickson:

Q. Mr. Tucker, where do you live? A. 69 Weiant Avenue, Port Richmond, Staten Island.

Q. Are you an employe of the Unexcelled? A. Yes, sir.

Q. Were you present at Perth Amboy at the time of the display last June? A. I was.

Q. How long have you been in the fireworks business as an employe? A. Thirty years.

20

Q. What were you firing at Perth Amboy? A. I was attending what we call the special works, set pieces and the like of that.

Q. How far away from the mortars were you at the time this shell exploded? A. Oh, I should say about seventy-five feet.

Q. Did you see the explosion of this shell in the mortar? A. I heard the explosion, yes, and seen the dust arise.

30

Q. You knew when it exploded? A. Yes, sir.

Q. Have you ever seen a shell explode in a mortar before? A. I seen it on one occurrence.

Q. Who were you working for then? A. Payne Fireworks Manufacturing.

Q. Where was that explosion? A. Brighton Beach, Coney Island.

Q. Was that at the time they used to give fireworks displays at Brighton Beach? A. Yes, sir; it was on a carnival night, what they call a carnival night.

40

Charles Tucker—Direct

Q. Have you ever loaded shells yourself? A. Yes, sir. No, not made them, but I have loaded the mortars to fire them.

Q. You haven't made shells? A. No, sir.

Q. You have loaded the mortars? A. Just load them.

10

Q. Have you ever fired shells? A. Yes, sir.

Q. How long have you fired shells? A. Thirty years or more.

Q. Did you ever clean out the mortars? A. Yes, sir.

Q. How do you clean out a mortar after a shell is fired? A. Generally take a stick with two nails drove crossways and pull whatever waste is left.

Q. Can you tell when that mortar is clean? A. Yes, sir.

20

Q. Is that the usual way to clean a mortar? A. Usual way.

Q. Did you go over to see Trempy after the explosion? A. No, sir; I did not.

Q. What did you do? A. I just hollered everything all right to go ahead, to continue, and he hollered, yes, light the falls, Niagara Falls.

Q. You shot off Niagara Falls? A. Yes, sir.

Q. When this shell exploded at Brighton Beach can you tell us what happened? Did you see it yourself? A. I seen it and all I could see was a heavy report and a ring of smoke going up in the air.

30

Q. Did it break the mortar? A. No, sir; it did not.

Q. What size shell was that? A. Ten-inch round shell.

Q. Was that as large as this shell? A. Well,

40

Edmund J. Bingle—Direct

not in length. It is ten inches around. Thirty inches we call them. Three times ten. Thirty inches circumference.

Q. It wasn't as large then as this six-inch shell?

A. Not as long as that, no, but bigger around.
10 What we call a round shell.

Mr. Hendrickson: Cross-examine.

Mr. Watson: No questions.

EDMUND J. BINGLE, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:
20

Direct-examination by Mr. Hendrickson:

Q. Mr. Bingle, are you the president of the Unexcelled Manufacturing Company? A. I am.

Q. Were you in the fireworks business before you became president of the Unexcelled? A. I was.

Q. How long have you been president of the Unexcelled? A. Since 1915.

30 Q. Do you know yourself personally all of these men who have been on the stand here? A. I do.

Q. Did you see this fireworks display yourself in Perth Amboy? A. I did.

Q. Were these men with your company sent there to fire this display as capable and competent and careful men as could be supplied for that work? A. In my opinion they are.

Q. What is your opinion based on? A. Well,
40 I have been in the fireworks business forty years,

Edmund J. Bingle—Direct

been manufacturing business since 1892, this is my thirty-six years in which I have been connected with plants manufacturing fireworks, and during that period I have made it my business to become acquainted with all the best men manufacturing fireworks, and think I have been able to do it. 10

The Court: Is there any question that Mr. Trempy and those who assisted him were experienced men?

Mr. Watson: No, sir.

Mr. Hendrickson: Cross-examine.

Mr. Watson: No questions.

Mr. Hendrickson: I ask to offer in evidence a letter dated June 25, 1926, written to the defendant by Mr. Edgar, attorney for the plaintiff. 20

Mr. Watson: No objection.

(Letter entered in evidence and marked Exhibit D-8.)

Mr. Watson: Before the defendant closes may I ask permission of the court to recall Mr. Jardine for two or three questions along a line that I overlooked? I will be perfectly frank, it is a line that has occurred to me since. 30

The Court: That will give the defense the right to reply in an unlimited way.

Mr. Watson: Surely.

Thomas Jardine—Cross

THOMAS JARDINE, re-called:

Further cross-examination by Mr. Watson:

Q. Mr. Jardine, you said that there is about
10 four ounces of black powder in the propellent
charge? A. Yes.

Q. And something less than an ounce in each
of the five— A. Breaks.

Q. Each of the five breaks? A. Yes.

Q. Isn't there a combustible substance in the
breaks themselves? A. The combustible sub-
stance makes a display.

Q. What is that combustible substance makes
a display? A. Just depends upon the color you
20 get.

Q. Well, this particular bomb that Mr. Trempy
has described. A. I don't know what bomb it
was. He said it was a star bomb.

Q. Mr. Trempy said it was a five star break?
A. Yes, but there might have been different ef-
fects, red, green, blue.

Q. Are different substances used? A. They
are.

Q. Well, isn't there a substance that is used al-
30 ways, a combustible substance? A. Certainly is.

Q. That gives off a gas? A. Burns and gives
off a gas, a combustion.

Q. Does that increase the sensibility of an ex-
plosive under confinement, such a gas? A. I
don't get that question.

Q. Does not such a gas—

Mr. Hendrickson: We admit it does.

Mr. Watson: You do admit that?

40

Thomas Jardine—Cross

Mr. Hendrickson: Why, certainly.

Mr. Watson: Very well.

Q. Isn't it a fact, Mr. Jardine, that the sensi-
bility of any explosive is increased by foreign
matter? A. It is. 10

Q. And by confinement? A. I would not say it
increases the sensibility of it. Make more of an
explosion if it is confined, but it would not make
it more sensitive.

Q. The foreign matter makes it more sensitive?
A. I would not say that. Just depends what the
foreign matter is.

Q. There are many kinds of foreign matter
which do make the explosive more sensitive? A. 20
There are.

Q. And confinement increases the force of the
explosion? A. It does.

Q. And the degree of that increase of force is
something that cannot be scientifically measured?
A. That is right.

Q. Is that so? A. Yes.

Mr. Watson: That is all.

Mr. Hendrickson: No questions.

Mr. Hendrickson: That closes our case. 30

Mr. Hendrickson: No rebuttal.

Mr. Hendrickson sums up the case for the de-
fendant.

Mr. Watson sums up the case for the plaintiff.

40

Charge.

Court's charge to the jury by Honorable Peter F. Daly, Circuit Court Judge, as follows:

Members of the Jury: I have been requested by counsel for the defendant to charge as law the
10 following:

"1. The plaintiff must make out and prove to the jury affirmatively the actions done by the defendant or its servants, or the actions it ought to have done and failed to do (every element essential to recovery) which constituted the defendant's negligence and which was the natural and proximate cause of the injury to the plaintiff, to entitle him to recover damages from the de-
20 fendant."

That is true.

"2. The fact of the explosion alone is not proof of such negligence."

That is true.

"3. The plaintiff was a voluntary spectator; a voluntary spectator who is present merely for the purpose of witnessing the display, must be held to consent to it, and to the natural dangers
30 incident to it, and he suffers no legal wrong if accidentally injured without negligence on the part of anyone."

That is true.

The Court's denial of defendant's motions of nonsuit and directed verdict and the like, and they were denied by the Court, are not to be considered by you as a conclusion of the Court as to the liability of the defendant. These are motions
40 that attorneys properly make, because of their

Charge

honest view of the law, merely from the legal standpoint, and do not go to the merits of the case at all. They mean nothing so far as your duty is concerned. The action of the Court is not to be considered by you one way or the other.
10

"4. The duty to the public, of persons who furnish articles not imminently dangerous in kind, but rendered dangerous by or through defect is in general a negative duty, not knowingly so to dispose of the article that it may become a trap to the innocent. The great number of shells, such as the one which exploded giving rise to the case at bar, used with safety, must be taken to place such shells in the class of articles, not imminently
20 dangerous in kind, but rendered dangerous through defect, and defendant is not liable to the public unless the defendant used such shell, knowing of the defect."

That I absolutely deny. That is not the law at all.

"5. If you find that plaintiff was injured as the result of an accident, inevitable or unavoidable, happening unexpectedly and without knowing
30 fault of the defendant, the plaintiff is not entitled to recover and judgment must be for the defendant."

The Court: What does that mean, that they had to know of the defect? I do not understand it.

Mr. Hendrickson: It is the same as the other, without knowledge on the part of the defendant, without defect of the shell.

The Court: If that is what you mean I refuse
40 that also.

Charge

Counsel for the plaintiff requests me to charge:

“1. One engaged in handling fireworks and other dangerous explosives must exercise a degree of care commensurate with the dangers involved.”

10 That is true.

“2. One who manufactures and discharges fireworks for exhibition purposes is under a duty to exercise a reasonable degree of care to safeguard the general public and if he fails to do so he will be answerable for all damages to others that are the natural and proximate result of such default.”

20 “3.” I refuse.

“4.” I refuse.

“5. The manufacture of an appliance that will become highly dangerous, when put to the uses for which it is designed and intended, because of defects in its manufacture”—that is, when it is dangerous, or defects in its manufacture—“owes to the public a duty, irrespective of any contractual relationship, to use reasonable care in the manufacture of such appliances and such duty calls for and requires the exercising of reasonable care in applying reasonable tests to detect defects and deficiencies in the appliances.”

In this case the plaintiff looks to the defendant for a verdict at your hands on the ground that he was seriously injured through the negligence of the defendant, and before he is entitled to a verdict at your hands he must affirmatively prove,

40

Charge

through a preponderance of the evidence, that he was injured as the proximate result of the negligence of the defendant. There cannot be negligence unless there is a violation of duty, and in order to determine whether or not there is negligence you first must know what was the duty of the party against whom negligence is charged.

The defendants in this case were long engaged in the manufacture and display of fireworks. The secretary had been connected with them for twenty-three years, or over, and had been its superintendent in the manufacture of fireworks for almost all of that time. They had engaged men in the manufacture of fireworks, according to their testimony, who had been with them from thirty to thirty-five years; and when I said twenty-three years, that was in connection with some one of the officers. They had men engaged with them in the setting off of the fireworks who had been with them years and years. Of course, if this unfortunate accident was an accident, in its narrow and precise definition, then, of course, the plaintiff could not recover from the defendant. The word accident, in its narrow and precise definition, is something that could not be avoided, something that could not be foreseen; as we use the term accident rather loosely, but now commonly and popularly, an accident means a happening that was not intended by anybody. If this was an unavoidable accident, that could not have been foreseen through the exercise of ordinary foresight and prudence, could not have been avoided through reasonable care, of course the defendant is not responsible.

Charge

The defendant had entered into a contract with the committee that had charge of the celebration of the opening of the new Victory Bridge in this county, running from South Amboy to Perth Amboy, and the fireworks were set off at property
 10 about that bridge; they had the legal right to set those fireworks off; it was not a nuisance in any sense, and it is not so charged; they legally had the right to be there, and they legally had the right and the duty, under their contract, to set off those fireworks. The defendant not only set off the fireworks, but they made the fireworks, that is, they furnished the fireworks. As I have said before, you must first ascertain what is the
 20 duty of a person, before you can charge him with negligence, in a successful way. What was the duty of the defendant? The defendant had the duty to use reasonable skill and care in the manufacture of the fireworks that they were to use, and which they were to supply; and they had the further duty of employing experienced, skilled and careful men in the setting off of those fireworks. We will take the second duty first; did they use
 30 reasonable care in employing skilled, careful and experienced men in the setting off of the fireworks? There is not a syllable of affirmative evidence in this case that goes to show they failed in that duty. They had Mr. Trempy, and two or three assistants, I have forgotten the number, and according to their testimony, which is uncontradicted, they had been engaged in this kind of work for many, many years. Did they use rea-
 40 sonable care and skill in the manufacture of these fireworks, so that those fireworks would be free

Charge

of defects? Because it is admitted that this was the character of a product that, if there were defects in the fireworks, defects in the product, those defects were likely to result in serious danger to others. But the test of duty that they had was
 10 reasonable care, a care commensurate with the character of the product that they were producing. It is in evidence here on the part of the defendant that at least one hundred and ninety-two thousand, or one hundred and ninety-three thousand of bombs similar to these had been set off without any bad results, without any explosions.

Of course, in determining this case, you will
 20 naturally ask yourselves, from the evidence, how did this explosion occur, because it is undisputed upon the part of the defendant that there was an explosion. Mr. Trempy and the other men engaged in this work say there was an explosion. You have before you the pipe or mortar that was used as the receptacle to hold these bombs; it is six inches in diameter; and the bomb was placed in that mortar, and was to be so placed that when the lighted fuse reached the bottom of the bomb
 30 there was such a propelling force that it went practically straight in the air to a height of two or three hundred feet, when it exploded, producing a brilliant and colorful display, and also in many forms. Necessarily, as I get the evidence, there was more or less burning paper or sparks that would naturally drop from the height, but it was not from any such falling sparks, or burning paper, or bursted material, that this injury
 40 arose.

Charge

This young man, the plaintiff, was under an arch of the bridge at the time, according to the undisputed evidence. And what hit him? It is claimed that there was a piece of metal found that was about 18 inches in length, and that looked, according to Officer Reedy, as though it were a pipe that had been bursted and flattened out, and that it was not only fifteen inches in length, but as it was flattened out, was about twelve inches wide. Is there any reasonable doubt, or is there any contention that it was a piece of a bursted mortar that struck Mr. Robinson? Mr. Trempy says that the mortar bursted. What was the cause of the mortar bursting? It was a premature explosion of a bomb. The bomb, instead of going out and going straight up in the air, for some reason exploded before it left the mortar. Now, if 192,000 of these bombs had been successfully set off, without affecting the mortar, without premature explosion, why did this one have a premature explosion? Was it due to something that no ordinary care upon the part of the manufacturer could see, or detect, in its manufacture, or in its inspection? Or was it due to the fact that here was one bomb that was not given that reasonable care and skill in its manufacture, that the manufacturer was under the obligation to give to it? That is substantially the question.

It seems to me there is no doubt that this was an imperfect bomb, and it was because it was an imperfect bomb that there was a bursting of the mortar, and it was because of the bursting and flying of this mortar that this young man, the plaintiff, was injured.

Charge

The question then is, did this defendant use the reasonable care and skill that he was under obligation to use in the manufacture of that mortar? Or, was it the reason that this defective mortar left its factory, because it was not given that reasonable care and skill in its manufacture and inspection and test that it should have been given?

If you find from a preponderance of the evidence in this case that this young man, the plaintiff, was injured as the result of the negligence of the defendant, that the defendant's negligence was the proximate or immediately effective cause of the accident which resulted in the injuries to this young man, then this young man is entitled to a verdict. Otherwise he is not entitled to a verdict.

If you come to the conclusion that he is entitled to a verdict, then it is for you impartially and honestly and dispassionately to say what shall be the amount. If he is entitled to a verdict, then he is entitled to a verdict that will fairly and adequately compensate him for the pain and suffering which he went through as a result of his injuries; for the physical injuries that his body sustained; for the actual loss of time that he sustained, as represented in the value of dollars and cents. He would also be entitled to be reimbursed for such expenses as he reasonably and properly incurred in the reasonable and proper treatment of his physical injuries. Further, he would also be entitled to be compensated for such permanent or continuing injury as, from a preponderance

Defendant's Requests to Charge

if accidentally injured without negligence on the part of anyone."

See Scaulon v. Wedger, 156 Mass. 462 in Supreme Judicial Court of Massachusetts.

10 Courod v. Clawe, 93 Ind. 476.

"The Court's denial of defendant's motions must not be considered by the jury. They are matters of law."

(4)

20 "The duty to the public, of persons who furnish articles not imminently dangerous in kind, but rendered dangerous by or through defect is in general a negative duty, not knowingly so to dispose of the article that it may become a trap to the innocent. The great number of shells, such as the one which exploded giving rise to the case at bar, used with safety, must be taken to place such shells in the class of articles, not imminently dangerous in kind, but rendered dangerous through defect, and defendant is not liable to the public unless the defendant used such shell, 30 knowing of the defect."

(5)

"If you find that plaintiff was injured as the result of an accident, inevitable or unavoidable, happening unexpectedly and without knowing fault of the defendant, the plaintiff is not entitled to recover and judgment must be for defendant."

40

Postea.

NEW JERSEY SUPREME COURT

MIDDLESEX COUNTY

THOMAS R. ROBINSON,	} Action at Law	10
Plaintiff,		
VS.		
UNEXCELLED MANUFACTURING COMPANY, INC.,		
Defendant.		

This case was tried before Judge Peter F. Daly, with a jury at the Middlesex Circuit, on April 18, 20 and April 19, 1927.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for thirty-five hundred dollars (\$3,500.00).

P. F. DALY,
Judge.

Judgment.

This case was tried before Judge Peter F. Daly, with a jury at the Middlesex Circuit, on April 18 and April 19, 1927.

10 The jury rendered a general verdict against the defendant and in favor of the plaintiff for thirty-five hundred dollars (\$3,500.00).

Whereupon it is adjudged that the plaintiff,

Thomas R. Robinson do recover of the said defendant, Unexcelled Manufacturing Company, Inc., the

Damages \$3,500.00 sum of Three Thousand
Costs 56.96 Five Hundred Dollars dam-

20 ————— ages, together with his costs
\$3,556.96 which have been taxed at

the sum of Fifty-Six Dollars and Ninety-Six Cents, making in the whole the sum of Three Thousand Five Hundred Fifty-Six Dollars and Ninety-Six Cents.

Judgment entered April 22, 1927.

30

WM. S. GUMMERE,
C. J.

40

32 32 FEB. 1928

New Jersey Court of Errors and Appeals

THOMAS R. ROBINSON,
Plaintiff-Appellee,

vs.

UNEXCELLED MANUFACTURING Co.,
a corporation,
Defendant-Appellant.

Action at Law.
ON APPEAL
FROM
SUPREME
COURT.

BRIEF FOR APPELLANT.

This appeal is from a final judgment in plaintiff's favor entered in the Supreme Court April 22, 1927, on the verdict of a jury. The case was tried at the Middlesex Circuit, before Circuit Judge Daly, the judgment being for \$3,556.96 damages.

Plaintiff sued to recover damages for personal injuries he received while attending an exhibition of fireworks which was part of a celebration of the opening of the Victory Bridge at Perth Amboy, June 26, 1926.

The gravamen of the complaint was negligence. It was charged:

(a) That the defendant was negligent in manufacturing an aerial bomb which was defective in that it exploded prematurely and forced a piece of the mortar in which it was fired through the air, which struck the plaintiff (par. 7).

(b) That the defendant was negligent in that it supplied a defective aerial bomb which exploded prematurely in the mortar (par. 8).

(c) That the defendant was negligent in that its agent ignited the explosive material used as a propelling charge for aerial bombs in such a careless and negligent manner as to propel through the air a certain metal piping used as a base, which should have remained fixed in the ground (par. 9).

(d) That defendant was negligent in that one or more of the bases were erected in a careless and negligent manner by defendant's servant or agent, and as a result one of the said bases was blown from the ground through the air and struck the plaintiff (par. 10).

The complaint also alleges that the plaintiff was lawfully present under an arch of the Victory Bridge, at a place where he would be safe from falling objects normally sent up in the air in the ordinary display of fireworks and was at a point far removed from the place where the said fireworks were being set off; that the piping that struck the plaintiff was propelled through the air on an axis nearly parallel with the ground and flew under the arch of the bridge where it struck the plaintiff (par. 11).

Defendant's answer alleged:

(1) That the complaint did not set forth a cause of action against the defendant.

(2) That the defendant was not guilty of the negligence charged in the complaint.

(3) That defendant violated no duty which it owed the plaintiff.

(4) In its sixth defense the defendant admitted that there was a fireworks display as part of the exercises in connection with the opening of the Victory Bridge to the use of the public by the State of New Jersey; that the fireworks were of

the types commonly used in fireworks displays; that it manufactured and supplied the fireworks used in the display; that its agents set off the fireworks. Defendant denies that it erected any metal piping to be used in connection with powder or other explosive charge for the propelling of aerial bombs into the air; it denied that its servants were in any way negligent in the manufacture of any bomb or in providing or handling any contrivance for the purpose of firing said bomb, or display, or any part or feature thereof, or in the ignition thereof. Defendant also pleaded that its business was a lawful one; that it made this display at the request of and under contract with the Victory Memorial Bridge Celebration Committee of Perth Amboy in co-operation with The American Legion and Veterans of Foreign Wars, at a place designated by the public authorities; that the types of fireworks used were those called for by its contract and such as are commonly used for such displays, and were contracted for because they explode and produce the effects desired for the purpose aforesaid; that the explosive force is necessary to produce the result and is well known to the public; that plaintiff well knew the same and that was the reason he was present to see the same; that it was the duty of the plaintiff to keep at such a distance as to be safe from the results of the explosive nature of the types of fireworks used on the occasion, and alleged that if plaintiff was injured it was not through the fault of the defendant, but it was the fault of the plaintiff's own negligence.

Annexed to the answer was notice that on or before the trial defendant would move to strike out the complaint on the ground that it did not disclose a cause of action (Record, pp. 8 to 10).

Immediately after the case was opened defend-

ant moved to dismiss the complaint in accordance with the notice annexed to the answer, (1) on the ground that the complaint does not allege or disclose any cause of action against the defendant (p. 12, line 25); (2) because the plaintiff by his own admission was present of his own accord to see the fireworks (p. 13, line 10); (3) that there is no allegation in the complaint setting forth what the negligence alleged is; there is nothing in the complaint except that this bomb exploded (p. 14, line 23), and that the only allegation was that there was an explosion; (4) that the plaintiff went to a place where he knew there was danger and voluntarily accepted the risk of an explosion (p. 16, line 3).

The Court thereupon allowed an amendment to paragraph 11 of the complaint so that it would read that the piping which struck the plaintiff was propelled in such a negligent manner as to fly through the air on an axis nearly parallel with the ground (Record, p. 23, line 1).

The Court thereupon overruled the motion to dismiss and allowed an exception (p. 23, line 29).

At the end of plaintiff's case there being no proof of anything, except that there was an explosion and that plaintiff was struck by something that looked like a piece of pipe, defendant moved for a non-suit on the same grounds as were urged for the dismissal of the complaint. This motion was overruled and an exception allowed (Record, p. 86).

Errors Alleged.

The errors assigned and relied upon are:

(1) Because the Trial Court erred in denying defendant's motion to dismiss the complaint.

(2) Because the learned trial judge erred in denying defendant's motion for a non-suit.

(3) Because the Supreme Court erred in entering judgment final in favor of the plaintiff and against the defendant, whereas on the entire record judgments should have been entered in favor of the defendant (Record, p. 2).

POINT I.

Plaintiff by voluntarily attending the fireworks display in law assumed the risk, and the Court should have dismissed the complaint.

In the complaint it is admitted by the plaintiff that he voluntarily attended the public exhibition of fireworks; that he was standing at the time on property owned by the State beneath one of the several arches of the Victory Bridge, and which was a part of the State Highway route spanning the Raritan River and connecting Perth Amboy with the Township of Sayerville (Complaint, paragraphs 1 and 11).

Plaintiff testified that he went in a friend's automobile with a party of friends to see the fireworks display (p. 24, line 10 and line 25). He was standing about two hundred and fifty feet from the display (p. 24, line 28). The plaintiff heard about fifteen aerial bombs explode several hundred feet in the air (p. 26, lines 15 to 22) when he was struck. Plaintiff did not know what hit him (p. 30, line 40). Plaintiff knew that this was the dedication of the new bridge; he had seen fireworks displays before and went there as a guest of his friend, Clifford Holman (p. 33). No one else was hurt that night (p. 34).

In *Scanlon vs. Wedger*, 156 Mass., 462; 31 N. E. Rep., 642, an accident almost exactly like this happened, except that in the Massachusetts' case plaintiffs were injured by the explosion of a bomb or shell during a display of fireworks in a public highway in Chelsea. The plaintiffs were voluntary spectators and were of ordinary intelligence. A portion of the center of the square about forty by sixty feet was roped off by the police and the bombs were fired off within the space enclosed and no spectators were allowed to be within the inclosure. The bomb exploded in a mortar, and the plaintiffs were lawfully in the highway and near the ropes while in the exercise of due care. It was a common form of fireworks long in use.

The cause of the explosion was not proved. The Court found that the license under which the display was given did not authorize the firing of aerial bombs. Judge Allen said:

"Under this state of things, it must be considered that the plaintiffs were content to abide the chance of personal injury not caused by negligence, and that it is immaterial whether there was or was not a valid license for the display. If an ordinary traveler upon the highway had been injured, different reasons would be applicable." (Citing *Jenne vs. Sutton*, 43 N. J. L., 257; *Conrad vs. Clauve*, 93 Ind., 476.) "But a voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to consent to it, and he suffers no legal wrong if accidentally injured without negligence on the part of anyone, although the show was unauthorized. He takes the risk. See *Pollock on Torts*, 138-144."

Judgment for the defendant was affirmed.

We submit that plaintiff in the case at bar is in precisely the same position as the plaintiffs in

Scanlon vs. Wedger. He admits he went to the display voluntarily, knowing it was to be a fireworks display, and accepting the necessary hazards that accompany the explosion of bombs which are manufactured and exploded for the very purpose of awing and terrifying all who are in the vicinity.

It is respectfully submitted that in the absence of proof of actual negligence plaintiff cannot recover.

POINT II.

The plaintiff did not prove any negligence, other than the explosion itself, and the Court erred in not non-suiting the plaintiff.

In the *Black Tom* cases the proof was not only that there was an explosion but also that it was caused through neglect of the railroad:

New Jersey Fidelity &c. v. Lehigh Valley,
92 L. 467;

Howell v. Lehigh Valley, 94 N. J. L. 213.

No evidence whatsoever was introduced by the plaintiff which in any way tended to show either defective, negligent or careless manufacture of the bomb, or use of any improper mortar, or firing of the bomb by inexperienced operators. The only evidence that plaintiff produced was from a number of eye witnesses, who testified to a crowd of persons being present, estimated at from two thousand to five thousand; the discharge of the fireworks as a part of the celebration of the opening of the Victory Bridge, presumably under public authority; the fact that a number of bombs had gone up into the air and exploded satisfactorily,

and that this particular explosion did not occur until after the display had been in operation an hour or more.

Mr. Holman said that he noticed an unusually loud explosion and at the same time a party near him fainted and fell on him, he fell to the ground, so he did not see anything after that that went on on the other side of the car (p. 57, line 20). The unusual loud explosion came from in front of him; he did not see the flash, but he knew it was an unusually loud explosion that seemed to vibrate everything, that is, the concussion was very noticeable (p. 57). He testified that some object, "whatever it was, grazed along the top of the car" (his automobile) "for two or three feet, you could see where it scraped along, and then struck a high spot and went through and broke the iron braces that go—hold the top of the car supported, and came out through underneath, and that is where Mr. Robinson was" (p. 59, lines 20 to 30).

Mr. Newman testified that the explosion was "an awful loud repeater, that is all I know, and the ground shook very much". It was unlike other explosions (p. 68, lines 10 to 20).

A piece of steel was picked up near the automobile, which it is contended struck the plaintiff, and the witness Riedy testified:

"So I took this piece of steel and it was warm. Of course, when I found out the man went to the hospital, I didn't know what I did with the piece of steel, whether I handed it to somebody else, or I dropped it on the ground, but I went back in the crowd to hold the crowd back, on account the fireworks were still going on.

Q. What was the size of this piece of steel? Describe it, Officer, the best you can. A. Well, I figure about it looked to me like a four inch pipe busted open.

By the Court:

Q. What kind of pipe, Officer? A. Well, four inch pipe, more of a cast iron pipe. Of course, I couldn't say.

Q. Well, how long was it? A. Well, I should judge about fifteen or eighteen inches.

By Mr. Watson:

Q. And how wide was it? Or what was the shape of it? A. Well, take a four inch piece and open it up. Must have been about ten or twelve inches wide after it was flattened out.

Q. About how thick was it, Officer? A. Well, between three-eighths and one-half an inch, I guess. I didn't—

Q. How long did you have it in your hand, Officer? A. Well, about a minute or so. Just to feel" (p. 72, lines 10 to 40).

The testimony showed that this piece of iron which was picked up weighed between twenty and twenty-five pounds (p. 41, line 35), but the witness Wataha noticed nothing peculiar about it, except that it looked like a big six inch sewer pipe (top p. 42). Wataha imagined it was a half inch or five-eighths thick (p. 42, line 20). Wataha picked it up and gave it to a man named Yepson (p. 42, line 25).

Yepson handed the piece of metal to Officer Riedy (p. 71, line 38).

The piece of metal was not produced in Court. The testimony was that Mr. Yepson is First Assistant Fire Chief of Perth Amboy, who has lived in Perth Amboy many years, but was ill at the time of trial with ulcers of the stomach (p. 73). The only testimony as to the location of the mortars was that they were set in the ground about ten or fifteen feet apart (p. 78).

The witness Gunkel said he really did not know the difference between the mortars; that there were about twenty-two in use and that the man firing the bombs would light them in the mortar and they would go up in the air and explode. Gunkel said quite a number of the bombs were used before the one exploded (p. 79).

We respectfully submit that this being all the testimony introduced on behalf of the plaintiff, it was the duty of the Trial Court to grant the motion for non-suit. There was absolutely no evidence introduced which tended to show any negligence whatsoever, except the fact that a bomb exploded close to the ground and that the plaintiff was struck by a piece of metal. There was no evidence even introduced that it was a piece of mortar that struck the plaintiff, because what did strike him was not produced in Court, and it was not identified, other than mentioned above. There was absolutely no evidence that if it were a piece of mortar that struck the plaintiff, the mortar was improper in any respect. It being elemental that mere proof of the happening of an accident does not prove negligence, we submit that the Trial Court's duty was to grant the motion for non-suit at the time it was made.

The doctrine of *res ipsa loquitur* does not apply in this case for the reason that that doctrine applies "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 has 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 was negligent." *Bahr vs. Lombard, Ayres & Co.*, 24 Vr., 233, at page 238.

In that case this Court said:

"Inasmuch as the plaintiff's proofs are silent as to the conduct of the defendants personally, or through their agents, either before or during the accident, and from the further consideration that there is no proof of any of the circumstances preceding, attending or following the explosion from which its cause or location could be ascertained, it is evident that if the defendants were required to offer testimony in their defence it was not because the proofs pointed to any unusual conduct upon their part, but because the plaintiff had presented a case in which all of the relevant facts were so exclusively within the knowledge and control of the defendants that the law imposed upon them the duty of offering explanatory, if not exculpatory, testimony. The existence of such a rule is among the unsettled matters of the law, being asserted in guarded terms in some jurisdictions and emphatically denied in others. In the present case it is not necessary to discuss either the existence of such a doctrine or its harmony with the accepted canons of proof, for the reason that its application, in any event, must depend upon whether the party invoking it had adduced all of the testimony reasonably within his power, for it is in such cases only that the rule in question is applied by those who maintain its soundness."

Bahr vs. Lombard, Ayres & Co., Id., at page 239.

The Court added:

"In any aspect of the law, therefore, it must be conceded that unless a plaintiff has presented the testimony which was reasonably within his power he can derive no benefit from the proposed doctrine."

Again the Court said:

"If this plaintiff, upon the meagre proof thus offered, is entitled to go to the jury, then, in such cases, all that any plaintiff need show, no matter what his actual knowledge of the facts may be, is, that he was injured by some unusual occurrence, while at work for his employer. This is not the law. On the contrary, when the plaintiff's case shows that he has not produced material evidence clearly within his reach, the mere proof by him of the occurrence of an accident by which he was injured does not raise a presumption of negligence which the defendant can be called upon to rebut. A judgment of non-suit ordered in such a case will not be disturbed" (at p. 241).

Should it be contended that the defendant having proceeded and put in its proofs, facts were proved that raised a question of fact for the jury, we urge that on the contrary the evidence introduced by the defendant proved conclusively that the defendant did not know the cause of the explosion, and that it happened although the defendant used the utmost care.

The defendant's evidence showed that the defendant had been in the business of manufacturing and firing fireworks for many years. Mr. Jardine had been in the employ of the defendant for twenty-eight years, twenty-three years at the factory and five years in the New York office. He had been manager of the Staten Island Plant for ten years (p. 87). Mr. Jardine was present when the display was fired and was twenty-five feet from the bridge when there was a terrific noise, kind of vibration and no display of fireworks (p. 88, line 25). Mr. Jardine said that the bomb "must have gone off in the ground or the mortar" (p. 88, line 31). He said that Mr. Trempy was

firing the bombs and after the explosion the witness ran over to where Trempy was and found him just rising from the ground. He found a hole a foot or eighteen inches in diameter and probably twelve inches deep. The mortar from which this shell was fired was not there (p. 89, line 40). Shells of different sizes were fired in this particular display consisting of three, four, five and six inch shells, giving various effects (p. 90, line 30).

Defendant Company, it was proved, had made 193,000 of such shells, similar to the ones which were fired the night in question (p. 91), and not one of them had ever previously exploded prematurely (p. 92, line 30).

Mr. Jardine also testified that the bombs that were fired at this particular celebration were manufactured by hand by expert men workers of thirty-five or forty years experience (p. 96, lines 25 to 30).

Mr. Trempy, who was firing the bombs, had been in the employ of the defendant seventeen years (p. 115), excepting during the period of the war. He testified that the mortars were buried in the ground about ten inches apart in an upright position. The bomb that exploded was what is known as a six-inch shell. Twenty of this same size had been fired before the one which exploded in the mortar (p. 118, line 20). Seven were taken back to the factory after the explosion and were not fired because the explosion had so loosened the other mortars in the ground that it was not considered safe to fire the remaining shells (p. 121, line 10). After the explosion there was a hole where the mortar had been about two feet in length and about eighteen inches deep (p. 122, line 1).

Mr. Trempy also testified on cross-examination that other bombs of the same size had been fired from the particular mortar and that he, Trempy, was an expert in firing (p. 129, line 35). He also testified that the particular mortar had been used before with safety (p. 131).

The witness Burns, who assisted Mr. Trempy in cleaning and reloading mortars (p. 133), testified that he cleaned this particular mortar before the particular shell was dropped into it to be fired, and said that he did not know what happened. He saw a cloud of dust—that is all. He was about ten feet from the mortar, looking at it. He heard a terrific noise and a blast of dust. It was a much louder report than the explosion of a bomb when it is up in the air. After the explosion he looked for Trempy, his partner, and saw him coming out of the cloud of dust two or three seconds later in a dazed condition (p. 136). The witness said he had never before seen a shell explode in a mortar at any other place (p. 137).

Witness Tucker testified that he was assisting in firing the set pieces at the Perth Amboy display. He testified that on one previous occasion, when he was working for Pain's Fireworks Company, he saw a bomb explode in a mortar at Brighton Beach. He said at that time there was a heavy report and a ring of smoke going up in the air, but the mortar did not break. That was a ten-inch shell (p. 139).

Mr. Bingle, President of the defendant Company, testified that he witnessed the display at Perth Amboy, and that the men in his employ who were firing the display were as careful and capable and competent as he could get. He had been in the fireworks business forty years; had been manufacturing since 1892, and had become ac-

quainted with the best men manufacturing fireworks.

This testimony on behalf of the defendant therefore proved that the fireworks were manufactured by a company of long and tried experience; by expert employees of long experience; that mortars that had been tried and tested were used; that experts were firing the bombs. Despite all this care this accident happened. Not only was there no proof offered by the plaintiff as to what caused the explosion, but defendant's witnesses frankly stated they did not know.

We therefore respectfully submit that none of the witnesses called by the defendant after the motion for non-suit was denied, offered any testimony that presented any facts for the consideration of the jury, and that the Trial Court's error in denying the motion for non-suit was in no way cured by the defendant's testimony.

This Court said in *Bien vs. Unger*, 35 Vr. 596:

"In the case before us the plaintiff had the benefit of having the defendants' motion held until the defendants had testified; when, in my opinion, the motion to nonsuit should have been granted. If the trial judge should not have held the motion, then he should have granted it at the close of the plaintiff's case."

It is respectfully submitted that no negligence on the part of the defendant having been proved, the judgment below should be reversed.

CHARLES E. HENDRICKSON, JR.,
Attorney for Defendant-Appellant.

JAMES D. CARPENTER, JR.,
Of Counsel.

32 FEB.T.1928

ACTION AT LAW,—ON APPEAL FROM
SUPREME COURT.

**New Jersey Court of Errors
and Appeals**

THOMAS R. ROBINSON,

Plaintiff-Appellee,

vs.

UNEXCELLED MANUFACTURING Co., a corporation,
Defendant-Appellant.

BRIEF FOR APPELLEE.

POINT I.

THE APPELLEE RESPECTFULLY CONTENDS THAT THE PRESENCE OF THE PLAINTIFF VOLUNTARY AT THE FIREWORKS DISPLAY WAS NOT IN LAW SUCH AN ASSUMPTION OF RISK THAT IT WOULD RELIEVE THE APPELLANT FROM LIABILITY TO THE PLAINTIFF AS A RESULT OF AN EXPLOSION OCCURRING FROM THE NEGLIGENT MANUFACTURE OF AN AERIAL BOMB BY THE APPELLANT; OF THE NEGLIGENT IGNITION OF THE EXPLOSIVE MATERIAL USED AS A PROPELLING CHARGE FOR THE

AERIAL BOMB, AND OF THE NEGLIGENT PROPELLING OF A PIECE OF METAL PIPING USED AS A MORTAR IN WHICH AERIAL BOMBS WERE SET OFF; ALL OR A PART OF WHICH NEGLIGENCE, UPON THE PART OF THE DEFENDANT, RESULTED IN A PREMATURE EXPLOSION WHEREBY A PORTION OF THE MORTAR WAS PROPELLED THROUGH THE AIR ON AN AXIS NEARLY PARALLEL WITH THE GROUND AND IT FLEW UNDER THE ARCH OF A BRIDGE AND STRUCK THE PLAINTIFF.

The evidence shows that the plaintiff was standing on property owned by the State of New Jersey, ten feet under one of the arches of the Victory Bridge.

Testimony of Thomas Robinson, case 24, line 38; case 25, line 2.

Testimony of Joseph Wataha, case 39, line 22.

Testimony of Clifford Holman, case 56, line 17-20.

Testimony of Edna Holman, case 80, line 22-26; case 81, line 8-9.

Testimony of Thomas Robinson, case 25, line 11-15.

Testimony of Joseph Wataha, case 40, line 15.

Testimony of Clifford Holman, case 57, line 20.

Testimony of Thomas Robinson, case 24, line 30.

Testimony of Joseph Wataha, case 41, line 2.

Testimony of Clifford Holman, case 57, line 2.

Testimony of Edna Holman, case 80, line 37.

Testimony of John Newman, case 67, line 23.

Testimony of John Riedy, case 74, line 21.

Testimony of Frank Gunkel, case 75, line 39-40; case 76, line 32.

Plaintiff contends that the act of Thomas Robinson in placing himself under the arch of the bridge and at a distance of one hundred fifty (150) to two hundred fifty (250) feet away from the line of fireworks was such as would ordinarily protect him from the explosions of aerial bombs properly propelled from the mortar and properly exploded in the air. The appellants only case to hold that the plaintiff assumed a risk is the Massachusetts case of *Scanlon vs Wedger*. This case has been misconstrued by the appellant who claims that a person, by voluntarily attending a fireworks display, assumes the risk. In that very case the question of the defendant's negligence as a result of a bomb exploding in a mortar was submitted to the jury. In other words, the case was not decided on the ground of the plaintiff's assumption of the risk but on the ground of lack of negligence on the part of the defendant in setting off the aerial bombs.

In the instant case the very same question of the negligence of the defendant was submitted to the jury and the jury found that the defendant-appellant was negligent. It is, of course, unnecessary to further carry out the point that negligence is a jury question.

It is further respectfully contended by the plaintiff that the plaintiff cannot be held to have assumed the risk ordinarily attendant at fireworks exhibitions or the risk of aerial bombs ordinarily propelled in the air and ordinarily discharged at a great height, in that the plaintiff

placed himself at a considerable distance away from the fireworks and at a point under a closed arch ten feet back from the front of the arch. Plaintiff-Appellee therefore, respectfully submits that plaintiff did not assume the risk and that the Court ruled correctly in refusing to dismiss the complaint.

POINT II.

The plaintiff in replying to the appellant's contention that proof of negligence of the defendant was not shown, respectfully submits the following chart of excerpts of the testimony:

FROM TIME TO TIME DURING THE FIREWORKS EXHIBITION, AIR BOMBS WERE SET OFF. EVENTUALLY THERE WAS AN UNUSUAL EXPLOSION.

Testimony of Joseph Wataha:

"the bomb didn't go off *right*." 40 line, 33-34.

Testimony of Laura Wataha:

"I knew there was something *wrong*." 51 line, 31-32.

Testimony of Clifford Holman:

"it was much *stronger*, you might say, and sounded a *whole lot nearer*." 58 line, 3; (In answer to question of comparison with previous explosions of the air bombs.)

Testimony of John Newman:

"Q. Was it like or unlike other explosions?" A. "*It was unlike*." 68 line, 19-20.

Testimony of John Riedy:

"Well, when this here explosion went off kind of an *unusual sound*—" 71 line, 29.

Testimony of Frank Gunkel:

"and it seemed that there was a quietness right afterward, *that something unusual had happened*—as though *something unusual had happened*" 75 line, 21-23.

Testimony of Edna Holman:

"there was an *unusually* loud concussion" 81 line, 18-19.

THE GROUND SHOOK, THERE WAS A HEAVY CONCUSSION AND A FLASH JUST OFF THE GROUND AT THE LINE OF FIREWORKS.

Testimony of Joseph Wataha:

"Well, it seemed that it was just a concussion right around us there. It seemed as though it come from the works you could see, of course, you could see the flash, you know, that the bomb didn't go off right."

Q. "Where did you see that flash? A. Why, right ahead of us from where they were shooting them there.

Q. Where they were shooting the fireworks? A. Yes, sir." 40 line, 30-40.

"Q. How high above the ground was this flash that you saw? A. Oh, I don't think it was—I believe it was right on the ground." 43 line 10-12.

Testimony of Clifford Holman:

"I know it was an unusually loud explosion that seemed to vibrate everything, that is the concussion was very noticeable." 57 line, 29-32.

Testimony of John Newman:

"Q. Were there any explosions that attracted your attention? A. There was, because the ground shook a little after this, this fellow was laying down on the ground hurt." (Referring to the man who was setting the fireworks off, not Robinson, 67 line 37-38).

Q. What was the nature of that explosion? A. Well, it was an awful loud repeater, that is all I know, and the ground shook very much." 68 line 11-18.

"Q. The whole thing blew up as far as you could see? A. Yes, it didn't go up like the rest of them did. *It just spread all apart.*" 70 line 9-11.

Testimony of John Riedy:

"Well, when this here explosion went off kind of an unusual sound, it shook the ground and all the people ducked their heads." 71 line 28-30.

Testimony of Frank Gunkel:

"Well, at the time this unusual explosion of this bomb that failed to go up in the air as it should properly go up, why, there seemed to be an awful trembling noise, an unusually loud report, *which give the appearance it was near the ground.*" 75 line 16-20.

A HEATED OBJECT WHIZZED THROUGH THE AIR FROM THE LINE OF FIREWORKS OVER THE PEOPLES HEADS IN THE DIRECTION OF WHERE ROBINSON WAS STANDING.

Testimony of John Newman:

"Q. The whole thing blew up as far as you could see? A. Yes. It didn't go up like the rest of them did. It just spread all apart.

Q. The shell didn't go up to explode in the air at all, did it? A. Not that I seen it.

Q. But it did explode, as far as you could see, right there in the mortar where this man was standing? A. Yes, sir." 70, line 1-3; 5-17. (At the same moment the party igniting the fuse to the air bomb was injured. 67 line 37-38).

Testimony of John Riedy:

"and all the people ducked their heads." 71, line 30. (Riedy was standing between the fireworks and the bridge holding the crowd back. 71, line 17-24.)

Testimony of Frank Gunkel:

"and at the same time, (referring to unusual loud report 75, line 19) why, it seemed to pass over my head in a whizzing noise;" 75, line 23-25.

Testimony of Laura Wataha:

"Q. Did anything happen while you were there? A. Just at the accident there, I was standing outside and I felt the draft—" 51 line 29-31.

"Q. Where was this draft that you felt? A. Seemed to be directly over my head.

Q. Where were you standing? A. I was standing just outside of the arch." 51, line 36-40.

Testimony of Joseph Wataha:

"why, one whizzes by us—"

"Q. How do you know it whizzed by you? A. Well, I could feel the whistle, or hear the whistle of it, like a draft, a hot draft." 39, line 36-40.

"Q. Where was this hot draft and whistle? A. Well, it seemed that it come from the air." 40, line 1-2.

"Q. This whiz and draft that you felt, was it above you or below you or beside you or where? A. Well, it seemed that it was just a concussion right around us there. It seemed as though it come from the works you could see, of course, you could see the flash, you know, that the bomb didn't go off right.

Q. Where did you see that flash? A. Why, right ahead of us from where they were shooting them there.

Q. Where they were shooting the fireworks? A. Yes, sir." 40, line 28-40.

"Q. How soon after you saw this flash and heard that concussion did you feel this whiz and draft? A. Well, I don't say—it wasn't many seconds.

Q. Right away? A. Yes sir." 41, line 3-10.

(Wataha was standing a few feet ahead of Robinson. 29 line 21-26, 40 line 16-17 and 27).

THE PATH OF THE OBJECT IS ALSO TRACED BY THE GASHES ALONG THE TOP OF THE HOLMAN CAR ENDING AT A POINT DIRECTLY OVER WHERE MR. ROBINSON WAS STANDING.

Testimony of Edna Holman.

She was standing along the car, she heard the unusual loud concussion and she felt a thud, but she thought maybe somebody had been knocked against it (the car). 81, line 16-27.

"Q. Do you know where Mr. Robinson was before this thud happened? Was he alongside of your car? A. Yes." 84, line, 27-29.

Testimony of Thomas Robinson:

"Q. And where were you standing? A. *Right alongside of the back door of the automobile.*" 25, line, 13-14.

Testimony of Clifford Holman:

"Q. What damage was done to your car? A. Why this object, whatever it

was grazed, along the top of the car for two or three feet, you could see where it scraped along, and then struck a high spot and went through and broke the iron braces that go—hold the top of the car supported, and came out through underneath, *and that is where Mr. Robinson was.*

Q. How do you know that it grazed along the top of the car? A. Well, there was a scrape along the top of the car, which led me to believe that the object came in a parallel plane.

Q. What was the top of the car made of? A. This rubberoid material.

Q. Where was the brace that was broken? A. Along the edge or the side, the righthand side of the car.

Q. What part with reference to the front and back? A. Well, I should say *directly above the rear door.*

Q. This scrape on the rubberoid roof, you don't know whether that was there before this accident? A. I am quite sure it wasn't.

Q. Had you been up inspecting the top of your car before you went to this display? A. If I remember right I washed the car and I didn't notice it there then.

Q. You washed it? A. Yes.

Q. How big a mark was it? A. Well, it started just a very fine line and then gradually broadened out until it reached the place where it went through and then it left a large gap in the roof, in the top.

Q. Was the line four feet or five feet long? A. I wouldn't say that. It wasn't any longer than eighteen inches.

Q. About eighteen inches? A. Yes.

Q. And then after that was the hole through the roof where it went down? A. Yes, sir.

Q. Was there anything in the road to stop it, whatever it was, at that place where it went through above the door? A. Yes, these iron braces.

Q. Iron braces that hold up the roof of the car? A. Supports, yes.

Q. Your idea is that when this thing came there and hit the iron brace it then went down and hit the plaintiff Mr. Robinson? A. Yes. It grazed along the roof and struck this high spot where it is padded along the side and broke through there, and the brace, if anything, deflected the blow downward, and Mr. Robinson was standing there and it struck him then." 59, line, 22-40; 60, line, 1-40; 61, line, 1-4.

Testimony of Joseph Wataha.

"Q. What happened to the car that Robinson was standing by? A. Why, when I looked I see the right side of their hood was tore open *by the rear door.*

Q. Do you mean the cover? A. Yes, sir; the cover was tore off. It seemed so that the iron was bent.

Q. What do you mean, what iron? A. The pipe running through, you know, the rim around the hood." 42, line 31-40.

"Q. You mean the rim was bent? A. Yes, it seemed so to me. What holds the top up, the frame around." 43, line 3-5.

IMMEDIATELY FOLLOWING THE CONCUSSION AND UNUSUAL LOUD REPORT, ROBINSON WHO HAD BEEN STANDING ALONG SIDE OF THE REAR RIGHT DOOR OF THE HOLMAN CAR, WAS FOUND ON THE GROUND UNCONSCIOUS AND SEVERELY INJURED.

Testimony of Thomas Robinson:

Q. "Just tell us what you saw? Now, tell us again what happened to you? A. I was hit by something and taken to the hospital and that is all I remember."

Q. "Did you lose consciousness or not? A. Yes, sir, I did."

Q. "Where were you when you lost consciousness? A. Underneath the bridge by the car." 25 Line 29-37

Testimony of Joseph Wataha:

Q. "How soon after you saw this flash and heard that concussion did you feel this whiz and draft? A. Well, I don't say—it wasn't many seconds."

Q. "Right away? A. Yes, sir."

Q. "What happened to Robinson? A. Well, the first I know that he was down and two or three men was near him already at that time." 41 Line 3-13

Testimony of Laura Wataha:

Q. "Did anything happen while you were there? A. Just at the accident there, I was standing outside and I felt the draft and I knew there was something wrong, I heard a crash, I left the children

in the car so I rushed back to the children, I thought probably they were hurt in the car, and I seen Mr. Robinson laying on the ground." 51 Line 29-36

Q. "Where was Robinson? A. He was laying down at the ground by the car, in between ours and his."

Q. "What part of his car was he lying near? A. He seemed to be about in the middle of his car." 52 Line 19-23

Mrs. Wataha then indicated the distance between the two cars as at about three feet. 52 Line 25-30

THE OBJECT THAT WHIZZED THROUGH THE AIR AND SCRAPED ALONG THE TOP OF HOLMAN'S CAR AND WHICH STRUCK ROBINSON WAS A HEATED PIECE OF METAL.

See testimony set forth above as to hot draft noticed by some of the witnesses.

Testimony of Joseph Wataha:

Q. "How soon after you saw this flash and heard that concussion did you feel this whiz and draft? A. Well, I don't say—it wasn't many seconds."

Q. "Right away? A. Yes, sir."

Q. "What happened to Robinson? A. Well, the first I know that he was down and two or three men was near him already at that time."

Q. "What became of him? Did you help pick him up? A. No, sir; I did not. I picked up the *piece of steel*."

Q. "Where did you find the piece of steel? A. Right alongside of him. Just where they picked him up from."

Q. "Well, how near to him? A. Oh, I would say right alongside of his side it must have been." 41 Line 3-22

(There follows testimony of the shape and size of the piece of metal which will be considered later. 41 Line 23-40)

Q. "Did you notice anything about its temperature? (Referring to the piece of metal) A. Well, it was warm, luke warm. 42 Line 3-4

Testimony of John Riedy.

Q. "Describe that piece of steel. A. So I took this piece of steel and it was warm * * *" 72 Line 9-10

THERE IS AN UNBROKEN CHAIN OF TESTIMONY SHOWING THAT THIS WARM PIECE OF METAL WAS PICKED UP BY WATAHA ALONG SIDE OF ROBINSON, AS SHOWN ABOVE, HANDED TO ONE YEPSON WHO IN TURN HANDED IT TO ONE RIEDY WHO STILL NOTICED THE HEAT.

Testimony of Joseph Wataha.

Q. "What did you do with this piece of steel? (Referring to the piece of metal that Wataha picked up alongside of Robinson on the ground as is shown by the testimony of Wataha on page 41 Line 15-40 and page 42 Line 1-4) A. Why, I give it to a fellow by the name of Yepson

to give to the man that got hit with it, because it just damaged my mudguard and I thought it was no need to me." 42 Line 14-19

The appellant in its brief admits that there was testimony that Mr. Yepson was ill at the time of the trial with ulcers of the stomach. Case 73

Testimony of John Riedy.

"—And Mr. Yepson handed me a piece of steel, * * *" 71 Line 37-38.

"Well it was still warm, luke warm" 42—Line 4

THIS WARM PIECE OF METAL FROM DESCRIPTION OF THE WITNESSES WAS APPARENTLY A PIECE OF A CYLINDRICAL OBJECT THAT HAD BEEN SPLIT OPEN AND FLATTENED OUT.

Testimony of Joseph Wataha.

Q. "What was the shape of this piece of steel? A. Well, I imagine it was round, one end of it, and one was a "V" shape, something like that (indicating), where it was spread open."

Q. "Could you tell what it had been a part of, or what it had come from? A. Well, I was just—I couldn't just say, but it seemed it was a round piece, I imagine about six inches in diameter, and about eighteen inches long, and the bottom part of it was a claw spread open."

Q. "As if it had been flattened out? A. Yes, sir; as if it was flattened out and split open."

Q. "How much did it weigh about?
A. Oh, I imagine about twenty to twenty-five pounds."

Q. "Did you notice anything peculiar about it? A. No, I did not."

Q. "When you picked it up? A. No. All I thought it had a kind of a round top on it, it looked to me like big six-inch sewer pipe." 41 Line 23-40 42 Line 1-2

Q. "How thick was this piece of steel?
A. Oh, I imagine one-half inch, or five-eighths." 42 Line 20-21

Testimony of John Riedy.

Q. "What was the size of this piece of steel? Describe it, Officer, the best you can. A. Well, I figure about it looked to me like a four-inch pipe busted open."

Q. "What kind of a pipe, Officer? A. Well, 4-inch pipe, more of a cast iron pipe. Of course, I couldn't say."

Q. "Well, how long was it? A. Well, I should judge about fifteen or eighteen inches."

Q. "And how wide was it? Or what was the shape of it? A. Well, take a 4-inch piece and open it up. Must have been about ten or twelve inches wide after it was flattened out."

Q. "About how thick was it, Officer? A. Well, between three-eighths and one-half an inch, I guess. I didn't—" 72 Line 18-37

Q. "Mr. Riedy, you say that it straightened out flat? A. Four-inch piece of pipe, it looked to me, bursted open, flattened out." 74 Line 14-17

It is, therefore, respectfully contended that in view of the above set forth testimony that ample proof has been made that there was an explosion that was not of the type of the ordinary fireworks exhibition, that the explosion resulted in an injury to the plaintiff, and that the unusual type of the explosion was such as to warrant a presumption of negligence on the part of the defendant who manufactured and set off the fireworks, either in the negligent manufacture or the negligent ignition of the fireworks or in negligent operation of the round metal mortars used in connection with the display of aerial bombs, which are made for the purpose of being propelled high in the air to explode, leaving nothing harmful remaining. (See additional type matter on page ~~23~~ *for insert here*)

IF, HOWEVER, THE PLAINTIFF DID NOT PROVE ANY NEGLIGENCE OTHER THAN THE EXPLOSION ITSELF AND IF THE COURT ERRED IN NOT NON-SUITING THE PLAINTIFF IT WAS A HARMLESS ERROR THAT WAS CURED BY THE EVIDENCE OF THE DEFENDANT IN SUPPLYING ANY NECESSARY DEFECTS AS TO WARRANT THE QUESTION OF NEGLIGENCE OF THE DEFENDANT BEING SUBMITTED TO THE JURY.

It is a well established and well recognized rule of law in this jurisdiction that the refusal of a non-suit for failure of proofs is not ground for reversal if the defect was afterwards supplied by evidence taken in the progress of the trial.

Dennery vs. Great Atlantic and Pacific Tea Company (Errors and Appeals), 82 N. J. L. 517, 81 At. 861.

See also

Van Ness vs. North Jersey Street Ry. Company, 77 N. J. L. 551, 73 At. 509.

where Justice Parker in the opinion of the Court states, "but it is unnecessary to dwell on this aspect of the case, (whether the trial Court erred in refusing a motion of non-suit at the end of the Plaintiff's case) because in our judgment the evidence for the defendant cured the error, if there was an error, in the trial Court's refusal to non-suit and justified a submission of the case to the jury." This ruling has been repeated again and again in the following line of cases:

Lewis vs. National Cash Register Company, 84 N. J. L. 598, 87 At. 345;

Benoliel vs. Honac et al, 87 N. J. L. 375, 94 At. 605;

Van Cott vs. North Jersey St. Ry. Company, 72 N. J. L. 229, 62 At. 407;

Esler vs. Camden and Suburban Ry Co., 71 N. J. L. 180, 57 At. 113;

Carey vs. Hamberg-Packet Co., 72 N. J. L. 56, 60 At. 179;

Farnsworth vs. Miller et al, 60 At. 1100
Affirmed 74 N. J. L. 599, 70 At. 1100:

Bostwick vs. Willett, 60 At. 398, 72 N. J. L. 21.

A resume of the testimony supplied by the defendant, the appellant in the instant case, will

show that if the necessary proof was lacking at the conclusion of the Plaintiff's case the additional necessary proof was supplied as a result of the direct examination of the defendant's witnesses and as a result of the cross examination of the defendant's witnesses.

Thomas Jardine, Secretary of the defendant Company, testified that there was an explosion, that there "was a terrific noise, kind of vibration, and no display of fireworks" and where the shell did not go up in the air (Case 88) and he further testifies that where the mortar had been there was a hole in the ground and the mortar was completely gone (Case 89 and 90).

Roy Trempy, an employee of the defendant company, who ignited the particular aerial bomb that exploded prematurely, states that he was knocked into a daze (Case 120) and that the aerial bomb exploded in the mortar (Case 121).

A study of the testimony of the defendant's witnesses discloses that the method of manufacture is by hand and the element of human equation enters in the manufacture of these aerial bombs by men (Case 95, 96, 97); that the air bomb which prematurely exploded contained a propellant charge of four (4) ounces of black powder, a fuse containing one (1) ounce of black powder, an explosive charge to break open five (5) different compartments of star shells each break containing one (1) ounce of black powder (Case 97, 98, 99) and a combustible substance in the five (5) star breaks in the aerial bombs that burn and give off a gas which would make more of an explosion if confined, and that foreign matter might make the explosive more sensitive. (Case 142, 143) The witness also explained in detail the method of

construction of such an aerial bomb showing that the explosive charge is at the bottom and that the five (5) star breaks are built up one above the other, over the explosive charge, and that each of the breaks contain a combustible material together with approximately an ounce of powder to make the break and that there is a fuse which runs down the side of the aerial bomb from the top, containing a black powder as explained before and that in the proper operation and manufacture the fuse is ignited at the top, and that the same almost instantaneously ignites the explosive charge at the bottom, at the same time igniting a time fuse for one (1) of the breaks; which is so timed that when the aerial bomb reaches a height in the air of two hundred to three hundred feet the time fuse of the first break reaches its limit and causes the first break to scatter, and that there is a time fuse in each and every successive break that is ignited from the preceeding break. This technical explanation of the manufacture and method is contained throughout the entire testimony of Thomas Jardine on both direct and cross examination.

Plaintiff appellee respectfully contends that in the entire manufacture of air bombs by men, where the human equation enters, the long ignition fuse, commonly known as black match, which burns almost instantaneously must be properly manufactured, that the explosive charge must be properly adjusted, that the first time fuse for the first break which is ignited immediately after the ignition of the black match must be properly manufactured, and that each separate star break with its explosive or scattering charge must be properly manufactured, and that the time fuse of each separate break

must be properly manufactured. (Testimony of Thomas Jardine Case 106, 107 as to the elements in the aerial bombs).

The plaintiff respectfully points out that a great deal of the human equation enters into the manufacture of the aerial bombs in that different individuals make different portions of the bombs; one man may manufacture the color used in the star breaks, one man may mix the composition used in the star breaks, still a third man molds the pellets of colored composition, another man makes the black match fuse. The time fuses for each successive break must, of course, be manufactured. Finally one man assembles the bomb placing in it the propelling charge. (Testimony of Thomas Jardine Case 106, 107, 109).

The type of explosive used in black powder (see testimony of Thomas Jardine) and it is the custom of the workmen to take a powder keg and take out such powder as he needs. (Testimony of Thomas Jardine Case 111).

Testimony of Roy Trempy, who is an expert in the firing of aerial bombs and who understands the manufacture of the same, discloses the fact that ordinarily the entire amount of powder used throughout the bomb in the scattering charges, propellant charge and fuses amounts to ten (10) or eleven (11) ounces (Case 129). The type of mortar used weighed approximately one hundred fifty (150) pounds and stands from three (3) to four (4) feet high and which is of a diameter of six (6) inches (Thomas Jardine Case 93, 95, 109).

The testimony of Thomas Jardine and the testimony of Roy Trempy also discloses the fact that ordinarily the amount of black powder used

for the propellant charge would not effect a mortar of such dimensions as the one used, that the explosion of the entire ten or eleven ounces of black powder used in the bomb, which includes the propellant charge, would not effect the type of mortar used, that the mortar was completely blown to pieces and that about One hundred ninety-three thousand (193,000) aerial bombs had been manufactured before without report of any of them not going off properly.

Plaintiff therefore, respectfully contends that; in accordance with the human equation in the manufacture of the various elements used in the aerial bombs, in the use of the type of powder in the aerial bomb, and in the adjustment of the fuses; the defendant, through its servants, was negligent and or there was further negligence in that there was foreign matter other than the ordinary black powder in the bomb which resulted first in a premature explosion in the mortar and second in the rending to pieces of a metal mortar weighing 175 pounds, standing 3 to 4 feet high and buried in the ground with the exception of six inches at the top in such a manner that no trace of the mortar was found with the exception of the piece that struck the plaintiff, the description of which piece, as hereinbefore set forth, tallying exactly with the type of mortar that was blown apart.

Plaintiff appellee, therefore, respectfully contends that if negligence upon the part of the defendant company was not provd by the plaintiff's case the further proof on the direct and cross examination of the defendant's witnesses cured the defects and that if there was an error upon the part of the trial Court in refusing a non-suit it was a harmless error which was cured by the testimony.

POINT III.

Plaintiff, further respectfully contends that in view of the testimony as set forth above the Court did not err in entering final judgment in favor of the plaintiff and against the defendant and that the decision of the Supreme Court should be affirmed by this honorable Court.

JOSEPH H. EDGAR,
Attorney and of Counsel for Plaintiff-Appellee.

RUSSELL E. WATSON
of Counsel.

(To be inserted at middle of page 17.)

In Bahr vs Lombard et al cited by the Appellant, the Plaintiff's case failed because of his failure to adduce all the testimony reasonably within his power." The Plaintiff respectfully contends that the doctrine of res ipsa locitur does apply in the instant case, Robinson having produced all the evidence at his command as can be seen by the excerpts of the testimony set forth above. Furthermore, the Appellant's allegation in its brief to the effect that no negligence was shown by the Defendant's case is controverted by the facts as hereinafter set forth in this brief.

1871
The first of the year
was a very dry one
and the crops were
very poor. The
winter was also very
dry and the crops
were very poor.