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Notice of Appeal.

(Filed May 27, 1919.)

To Messrs. Pitney, Hardin & Skinner, Attorneys of Plaintiffs:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Yours respectfully,

COLLINS & CORBIN,
Attorneys of Appellant.

Grounds of Appeal.

(Filed June 27, 1919.)

The appellant states the following grounds of appeal:

(1. *Motion for Non-suit.*)

Defendant's motion for a non-suit should have been granted for one or more of the following reasons:

1. The plaintiffs have failed to prove facts sufficient to constitute a cause of action.

2. That Congress, having taken jurisdiction of the subject matter and having enacted statutes thereon to provide for the safe transportation of explosives in interstate commerce on land, and the Interstate Commerce Commission, in accordance with the directions of said statutes, having made rules and regulations governing the subject matter, and the explosives in question in this suit having been in the course of transportation on land in interstate commerce, the plaintiffs cannot succeed unless they prove a violation of said statutes or the rules and regulations of

the Interstate Commerce Commission above referred to. This they have failed to do.

3. The plaintiffs, having failed to prove any negligence on the part of the defendant in respect of the starting of the fire, the plaintiffs cannot succeed on any assumption of negligence on the part of the defendant in respect of the starting of the fire.

4. The facts in this case do not permit the Court properly or legally to allow the case to go to the jury upon the doctrine of *res ipsa loquitur*.

5. Assuming that the Court holds that there may have been some other duty to which the defendant was subject which is not covered by the statutes of the United States and the rules and regulations of the Interstate Commerce Commission above referred to, there is no proof of any violation of any such other duty, if any existed.

6. Since there is no proof from which any proper inference could be drawn of any negligence on behalf of the defendant in respect of the starting of the fire, the plaintiffs may not recover legally upon any assumption of negligence in respect of the starting of the fire; and if it is sought to hold the defendant legally responsible because of the conduct of its employees after the fire started, then the plaintiffs may not succeed in this case on this theory, because all of the facts proven show that the fire, when discovered, was in a car, and that such car was either itself an ammunition car or a car containing explosives, or ammunition, or was in immediate vicinity of cars contaning explosives and ammunition; and, therefore, the only inference which a jury could be permitted to draw is that any one going near such fire would be in great danger; and, therefore, the defendant cannot be held responsible, because its employees under these circumstances of emergency did not attempt to go near the fire to put it out.

Grounds of Appeal—(Motion for Non-suit).

7. There being no proof of negligence on the part of the defendant with respect to the starting of the fire, if it is sought to hold the defendant responsible because of the alleged negligence of its employees after the fire started, the defendant cannot be held liable on such ground because there is no allegation in the complaint under which such alleged negligence might properly be left to the jury.

As to the plaintiffs, insurance companies, for one or more of the following additional reasons:

8. Because the policies in question in the standard clause contain the following: "If this company shall claim that the fire was caused by the act of neglect of any person or corporation, private or municipal, this company shall on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured upon receiving such payment." And there is no proof of any assignment.

9. Because the policies put in evidence in this suit each contain in the standard clause the following: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riots, civil war or commotions, or military or usurped power, or by the order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered from fire in neighboring premises (or) unless fire ensues, and, in that event, for damage by fire only, by explosion of any kind or like; * * * "

There is no proof in this case that the sugar insured was destroyed by fire ensuing from explosion.

10. Because whatever payments were made by the plaintiffs, insurance companies, to the plaintiffs,

Frederick H. Howell, *et als.*, were voluntary payments, and there is nothing to show that the plaintiffs, insurance companies, were under any legal duty to make such payments under the terms of their several policies, and by doing so to obtain any right of subrogation thereunder.

11. Because there is no proof that the sugar for the value of which payments were made by the plaintiffs, insurance companies, to the plaintiffs, Frederick H. Howell, *et als.*, was destroyed by fire, and for all that appears, the destruction of said sugar may have been caused entirely by explosion, and there is no evidence from which the Court and jury can determine what, if any, damage was caused to the sugar by fire and what was caused by explosion, and therefore there is no basis to find any damage accruing to the plaintiffs, insurance companies, under the policies and the proof.

(II. *Motion to Direct Verdict.*)

Defendant's motion for a direction of verdict should have been granted for one or more of the following reasons:

12. The plaintiffs have failed to prove facts sufficient to constitute a cause of action.

13. That Congress, having taken jurisdiction of the subject matter and having enacted statutes thereon to provide for the safe transportation of explosives in interstate commerce on land, and the Interstate Commerce Commission, in accordance with the directions of said statutes, having made rules and regulations governing the subject matter, and the explosives in question in this suit having been in the course of transportation on land in interstate commerce, the plaintiffs cannot succeed unless they prove a violation of said statutes or the rules and regulations of the

Interstate Commerce Commission above referred to. This they have failed to do.

14. The plaintiffs, having failed to prove any negligence on the part of the defendant in respect of the starting of the fire, the plaintiffs cannot succeed on any assumption of negligence on the part of the defendant in respect of the starting of the fire.

15. The facts in this case do not permit the Court properly or legally to allow the case to go to the jury upon the doctrine of *res ipsa loquitur.*

16. Assuming that the Court holds that there may have been some other duty to which the defendant was subject which is not covered by the statutes of the United States and the rules and regulations of the Interstate Commerce Commission above referred to, there is no proof of any violation of any such duty, if any existed.

17. Since there is no proof from which any proper inference could be drawn of any negligence on behalf of the defendant in respect of the starting of the fire, the plaintiffs may not recover legally upon any assumption of negligence in respect of the starting of the fire; and if it is sought to hold the defendant legally responsible because of the conduct of its employees after the fire started, then the plaintiffs may not succeed in this case on this theory, because all of the facts proven show that the fire, when discovered, was in a car, and that such car was either itself an ammunition car, or a car containing explosives or ammunition, or was in immediate vicinity of cars containing explosives and ammunition; and, therefore, the only inference which a jury could be permitted to draw is that any one going near such fire would be in great danger; and, therefore, the defendant cannot be held responsible, because its employees under these circumstances of emergency did not attempt to go near the fire to put it out.

18. There being no proof of negligence on the part of the defendant with respect to the starting of the fire, if it is sought to hold the defendant responsible because of the alleged negligence of its employees after the fire started, the defendant cannot be held liable on such ground because there is no allegation in the complaint under which such alleged negligence might properly be left to the jury.

19. There is no proof that the omission of any of the alleged duties which it is alleged in the complaint the defendant omitted was the proximate cause of the injury complained of to the plaintiffs, or any of them.

20. There is no proof that the performance of any of the alleged duties set forth in the complaint would have prevented the injury of which the plaintiffs, or any of them, complain.

As to the plaintiffs, insurance companies, for one or more of the following additional reasons:

21. Because the policies in question in the standard clause contain the following: "If this company shall claim that the fire was caused by the act of neglect of any person or corporation, private or municipal, this company shall on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured upon receiving such payment." And there is no proof of any assignment.

22. Because the policies put in evidence in this suit each contain in the standard clause the following: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riots, civil war or commotions, or military or usurped power, or by the order of any civil authority, or by theft, or by neglect of the insured to use all reason-

able means to save and preserve the property at and after a fire, or when the property is endangered from fire in neighboring premises (or) unless fire ensues, and, in that event, for damage by fire only, by explosion of any kind or like; * * *'' There is no proof in this case that the sugar insured was destroyed by fire ensuing from explosion.

23. Because whatever payments were made by the plaintiffs, insurance companies, to the plaintiffs, Frederick H. Howell, *et als.*, were voluntary payments, and there is nothing to show that the plaintiffs, insurance companies, were under any legal duty to make such payments under the terms of their several policies, and by doing so, to obtain any right of subrogation thereunder.

24. Because there is no proof that the sugar for the value of which payments were made by the plaintiffs, insurance companies, to the plaintiffs, Frederick H. Howell, *et als.*, was destroyed by fire, and for all that appears, the destruction of said sugar may have been caused entirely by explosion, and there is no evidence from which the Court and jury can determine what, if any, damage was caused to the sugar by fire and what was caused by explosion, and therefore there is no basis to find any damage accruing to the plaintiffs, insurance companies, under the policies and the proof.

(III. *Requests to Charge.*)

The Trial Judge refused to charge one or more of the following requests submitted in behalf of the defendant. (The numbers in brackets correspond to the numbers of the requests, as submitted.)

25. (2)

The sole duty of the defendant to the plaintiffs in respect to the explosives received by it for interstate

transportation by land and still in the course thereof was to comply with the statutes of the United States and the regulations of the Interstate Commerce Commission respecting the same; and the plaintiffs are not entitled to recover unless the jury shall find that the defendant failed to so comply and that such failure was the proximate cause of the injury complained of by the plaintiffs.

26. (4)

The "explosive" placard in evidence is not a regulation of the Interstate Commerce Commission.

27. (5)

The words "Keep Fire Away" on the "explosive" placard in evidence do not constitute a requirement that fire should be extinguished.

28. (6)

There is no evidence in this case but that the explosives in defendant's cars were in all respects carried, conveyed, transported, handled and held by the defendant in compliance with the statutes of the United States and the regulations of the Interstate Commerce Commission respecting the safe transportation of explosives in interstate commerce by land.

29. (7)

There is no evidence from which the jury can legally infer that the defendant did not furnish sufficient watchmen or guards on its premises on the night of July 29 and the morning of July 30, 1916.

30. (8)

There is no evidence from which the jury can legally infer that the defendant did not provide sufficient fire-fighting apparatus on its premises on July 29-30, 1916.

31. (9)

There is no evidence from which the jury can legally infer that the defendant did not observe the usual custom of railroads in respect to the fire protection afforded at Black Tom on July 29-30, 1916.

32. (10)

There was no legal duty resting upon the defendant in respect of its terminal at Black Tom, to furnish fire hydrants in addition to those furnished by the City of Jersey City, the said terminal being within the limits of that municipality.

33. (11)

There was no legal duty resting upon the defendant in respect of its terminal at Black Tom, to furnish its own fire protection, in addition to that furnished by the City of Jersey City, the said terminal being within the limits of that municipality.

34. (12)

There was no legal duty resting upon the defendant in respect of its terminal at Black Tom, to furnish men and equipment to extinguish fires, in addition to the men and equipment of the municipality of Jersey City, within the limits of which the said Black Tom terminal is.

35. (13)

The Court has taken judicial notice of the fact that by reason of the war in Europe, there was common knowledge of German propaganda, as a result of which persons favorable to Germany, either at the instigation of the German Government or on their own initiative, sought to destroy munitions which otherwise would go to the enemies of their Fatherland. If it is assumed that this knowledge reached the attention of the officials of the defendant, it should also be assumed that such knowledge likewise

reached the municipal authorities of Jersey City, and that any necessary police protection to take precautions against incendiarism or other criminal acts within the limits of Jersey City would be furnished by such municipality, and the defendant cannot be held legally responsible for failure, if any, to furnish its own police protection for such purpose.

36. (14)

There is no evidence in this case of the presence of any unauthorized persons on the premises at Black Tom on the night of July 29-30, 1916.

37. (15)

There is no evidence in this case that any unauthorized person had access to the explosives or other dangerous articles in the custody of or on the premises of the defendant on the night of July 29-30, 1916.

38. (16)

There is no testimony of any witness from which the jury can draw any legal inference as to what caused the starting of the fire which was discovered on the premises of the defendant on the night of July 29-30, 1916.

39. (17)

If the jury believes the testimony of Dr. McKenna, the expert produced by the plaintiffs, that "There was nothing which could be called a law of nature which determines for us beforehand what would be the effect of large masses of explosives exploding * * * , and that each case stands on its own bottom," then the jury may not find a verdict against the defendant based upon its failure to take precautions other than it did take.

40. (18)

The defendant can only be held legally responsible for the results of its conduct reasonably to be expected, and under the proofs in this case it was not reasonably required to expect explosion of T N T in the cars on its premises as a result of fire.

41. (19)

The plaintiffs in this case cannot upon their complaint herein recover any damages against the defendant by reason of any alleged negligent conduct of defendant's employees after the discovery of the fire on its premises.

If the Court refuses to charge No. 19, then we respectfully request the Court to charge No. 20 as follows:

42. (20)

If the jury finds that the defendant was not negligent in respect of the starting of the fire and that the said fire was either in a car of explosives or ammunition or was immediately adjacent to cars containing explosives or ammunition, then a condition of emergency existed by reason of which the defendant cannot be held responsible for errors of judgment on the part of its employees or any of them in respect of what they did or failed to do concerning the putting out of the fire.

If the Court refuses to charge No. 20, then we respectfully request the Court to charge No. 21 as follows:

43 (21)

If the jury finds that the defendant was not negligent in respect of the starting of the fire and that the said fire was either in a car of explosives or ammunition or was immediately adjacent to cars containing explosives or ammunition, then the jury

should consider whether the situation thus disclosed was not an emergency, and if the jury finds that the situation was that of emergency, then it may not find the defendant legally responsible for the errors of judgment of its employees in respect of what they did or failed to do concerning the putting out of the fire.

44. (22)

The defendant can only be held responsible in damages for the failure to exercise reasonable care under the circumstances, and the jury in considering the circumstances and the degree of care exercised may consider the fact that there were four watchmen on the premises in the immediate vicinity of the cars containing the explosives on the night of the explosion in question, in addition to the watchmen employed by the defendant.

45. (24)

The undisputed evidence is that Johnson barge No. 17, with 1,005 cases of T N T and 417 cases of detonators (all obtained elsewhere), moored at North Pier at Black Tom some time on Friday, July 28, 1916, and there is no evidence that the defendant had any knowledge whatever of the materials thus laden on said Johnson 17 at that time; and the jury must find under the law as contained in the anchorage regulations of the United States Government that a boat thus laden should not have been moored at Black Tom pier, but should have proceeded to the anchorage ground as designated in the said United States regulations, and that the act of mooring here thus laden at the North Pier at Black Tom was an unlawful act.

46. (25)

If the jury find that the Johnson 17 contained 1,005 cases of T N T and 417 cases of detonators

(all obtained elsewhere) was unlawfully moored at Black Tom Pier, and that the T N T subsequently exploded on the night of July 29-30, 1916, and caused the injury complained of by the plaintiff, the jury cannot legally find the defendant responsible for such injury.

47. (26)

There is no evidence in this case from which the jury can legally hold the defendant responsible in respect of the materials on Johnson barge No. 17, or for the results of any explosion of such materials.

48. (27)

If the jury find that the T N T on the Johnson barge 17 exploded and caused the injury of which the plaintiffs complain, the jury cannot legally find the defendant responsible.

49. (28)

The plaintiffs in this case having complained that the injury which they suffered was occasioned by the first of the two explosions, which the proofs show occurred at or near Black Tom on the night of July 29-30, 1916, the jury cannot legally hold the defendant responsible for such injury unless it finds that the explosion of the T N T cars on land on the premises of the defendant was the first of the two explosions.

50. (29)

In view of the fact that the regulations concerning the transportation of explosives and other dangerous articles on land in Article 1647 contain a prohibition against the loading of such materials as detonators and high explosives in the same car or storage place, and of the evidence in this case in respect to the danger of thus loading such articles on the same carrier, the jury may legally find that the presence on Johnson barge 17 of the detonators and T N T con-

stituted negligence on behalf of the proprietor of such barge.

51. (30)

It is the undisputed fact that there were two explosions at or near Black Tom on the night of July 29-30, 1916, one thereof upon the land at the place indicated by the crater as shown in the Exhibit P. 16, and the other on a barge at the site of the crater in the bed of the river, as shown by the Exhibit D. 12, and that the defendant, if held responsible at all, can only be held responsible for the effects of the explosion on land, and it is the undisputed fact that each of such explosions, directly or indirectly, damaged the warehouses containing the sugar, for the loss of which damages are claimed in this suit, and there is no evidence from which the jury can determine how much of the damage to the said sugar was caused by the effects, direct or indirect, of the first explosion and how much was caused by the effects, direct or indirect, of the second explosion; and in default of such proof, the jury can legally find a verdict against the defendant, if at all, only for nominal damages.

52. (31)

The jury is not at liberty to allow the plaintiffs, or any of them, any interest in respect of any sum found to be due them, or any of them.

In respect solely to the insurance company plaintiffs, the defendant respectfully requests the Court to charge as follows:

53. (32)

The insurance company plaintiffs cannot legally recover against the defendant except in respect of a sum of money legally required to be paid by them to the copartnership plaintiffs in pursuance of the re-

spective policies of insurance on the sugar in question.

54. (33)

There is no proof in this case by which the jury can determine how much injury was occasioned to the sugar of the co-partnership plaintiffs in the warehouses by reason of the explosion or explosions and how much was occasioned by fire ensuing, and therefore the jury can, in respect of the amount of insurance paid by the said insurance companies to the plaintiffs and claimed in this suit, allow only nominal damages, if any.

(IV. *Exceptions to Charge.*)

The Trial Judge erroneously charged the jury in one or more of the following respects:

55. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

(a) It neglected to watch or guard said premises and waters adjacent thereto through employees sufficient in number and competence, and to properly instruct the same, to prevent incendiary or accidental fires; * * * "

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the following language:

(b) "Now, first of all, the law says that the burden rests upon the plaintiff to make out by the greater weight of the evidence that the negligence which he has charged in his written complaint against the defendant existed and was the proximate cause of the loss of which the plaintiffs complain and for which in this suit they seek to have a recovery in damages. That does not mean that they are obliged to make

out all of those specifications of negligence which I have read to you, for if they make out any one of those specifications of negligence, or two or more of them, by the greater weight of the evidence and show by the greater weight of the evidence that that one specification, or two or more specifications of negligence were the proximate cause of the loss and that they existed on the part of the defendant company, that would give them a right to have a recovery and to have you assess their damages at such sum as they shall have proven by the greater weight of the evidence."

56. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It permitted unauthorized persons upon said premises and especially upon or in the vicinity of said explosives, ammunition or munitions af war; * * * "

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

57. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It permitted vessels not connected with the transshipment of said explosives, ammunition and munitions of war to lie moored at said north pier: * * * "

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

58. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It permitted or neglected to prevent barges or lighters having no business at said north pier, and wholly or partially laden with such explosives and munitions of war, to lie moored to said north pier or moored to similar barges moored thereto, or to lie in the vicinity thereof; * * * ''

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

59. ''The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It neglected to isolate or separate the railroad cars containing such explosives and munitions of war, and improperly accumulated or bunched the same in the same locality on said premises, and take precautions for quick isolation in case of fire; * * * ''

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

60. ''The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It neglected to provide employees sufficient in number and competence and to properly instruct the same for the purpose of discovering and extinguishing any incendiary or accidental fire. Such insufficient, incompetent and uninstructed employee or employees as the defendant had, were negligent in guarding, discovering and reporting the fire hereinbefore alleged; * * * ''

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the

part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

61. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It neglected to provide sufficient apparatus and employees for the purpose of fighting and extinguishing fire upon said premises, in said railroad terminal; * * * "

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

62. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It neglected to provide sufficient means or communication or alarm of fire."

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

63. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It neglected to watch or guard said premises and waters adjacent thereto through employees sufficient in number and competence, and to properly instruct the same, to prevent incendiary or accidental fires;

It permitted unauthorized persons upon said premises and especially upon or in the vicinity of said explosives, ammunition or munitions of war;

It permitted vessels not connected with the transshipment of said explosives, ammunition and munitions of war to lie moored at said north pier;

It permitted or neglected to prevent barges or lighters having no business at said north pier, and wholly or partially laden with such explosives and munitions af war, to lie moored to said north pier or moored to similar barges moored thereto, or to lie in the vicinity thereof;

It neglected to isolate or separate the railroad cars containing such explosives and munitions of war, and improperly accumulated or bunched the same in the same locality on said premises, and take precautions for quick isolation in case of fire;

It neglected to provide employees sufficient in number and competence and to properly instruct the same for the purpose of discovering and extinguishing any incendiary or accidental fire. Such insufficient, incompetent and uninstructed employee or employees as the defendant had were negligent in guarding, discovering and reporting the fire hereinbefore alleged;

It neglected to provide sufficient apparatus and employees for the purpose of fighting and extinguishing fire upon said premises, in said railroad terminal; and

It neglected to provide sufficient means of communication or alarm of fire.

And then the plaintiff charges that,

The loss of the merchandise of the said plaintiff was caused by the defendant's neglect of duty aforesaid.

Now, first of all, the law says that the burden rests upon the plaintiff to make out by the greater weight of the evidence that the negligence which he has charged in his written complaint against the defendant existed and was the proximate cause of the

loss of which the plaintiffs complain and for which in this suit they seek to have a recovery in damages. That does not mean that they are obliged to make out all of those specifications of negligence which I have read to you, for if they make out any one of those specifications of negligence, or two or more of them, by the greater weight of the evidence and show by the greater weight of the evidence that that one specification, or two or more specifications of negligence, were the proximate cause of the loss and that they existed on the part of the defendant company, that would give them a right to have a recovery and to have you assess their damages at such sum as they shall have proven by the greater weight of the evidence."

64. (a) "Now, then, we find that Section 1643 of the regulations provides as follows:

Careful men must be chosen to handle explosives, the platform and the feet of the men must be as free as possible from grit, and all possible precautions must be taken against fire. Suitable provision must be made, outside of the station when practicable, for the safe storage of explosives, and every effort possible must be made to reduce the time of this storage. * * * "

And after so charging, the Trial Judge then erroneously permitted the jury to consider said regulation as applicable to the circumstances of the case and erroneously permitted the jury to impose upon the defendant a duty other than that specified in said regulation, using the following language:

(b) "Now, then, I charge you, gentlemen, that the rule of law that is to be extracted from these regulations and the statute in pursuance of which they are passed is that the defendant railroad company was under a duty in the transportation and custody of the cars of explosives, ammunition and inflam-

mable substances in the particulars indicated, to exercise a degree of care commensurate with the risk of danger reasonably to be anticipated, and the defendant railroad company is liable for damages to the plaintiffs for any failure to exercise such care if the failure to exercise such care was the proximate cause of the injury and loss to the plaintiffs.

I charge you that the standard of care imposed upon the defendant railroad company under the regulations of the Interstate Commerce Commission in so far as such regulations cover the field of the measure of the defendant's duty is the same as the defendant railroad company was under without them, namely, a degree of care commensurate with the risk of danger reasonably to be anticipated."

65. "And we find in Section 1666 the following:

A certified car for the dangerous explosives specified in paragraph 1661 must be protected by attaching to each outside end, and side door, the lower edge, not less than four and one-half feet above the car floor, a standard placard twelve by fourteen inches, on which appears in conspicuous red and black printing on strong tag board the following notice: EXPLOSIVES (to be printed in red); HANDLE CAREFULLY. KEEP FIRE AWAY (to be printed in red). And then follows a statement of what is declared on the placard to be condensed rules for handling the car * * *.

This car must not be placed in a passenger train, nor in a mixed train if avoidable.

Cars containing explosives must be near center of train and may be together if desired; must be at least 15 cars from engine and 10 cars from caboose when length of train will permit.

This car must not be placed next to cars bearing the inflammable or the said acid placard or cars containing lighted heaters. Whenever it is possible to avoid so doing, it must not be placed next to tank

cars or flat cars or next to carloads of lumber, poles, iron, pipe, or other articles liable to break through end of car from rough handling.

The air and hand brakes on this case must be in service.

In shifting have a car between this car and engine whenever possible, and do not cut this car off while in motion.

Avoid all shocks to this car and couple carefully.

Avoid placing it near a possible source of fire.

Engines on parallel track must not be allowed to stand opposite or near this car when it can be avoided.

This placard must be removed from car when the explosives are unloaded."

And after so charging, the Trial Judge then erroneously permitted the jury to consider said regulation as applicable to the circumstances of the case and erroneously permitted the jury to impose upon the defendant a duty other than that specified in said regulation, using the language set forth in Ground of Appeal No. 64 (b).

66. "Now, under that Section 1643 which I was reading a moment ago appears this:

That if a shipment of explosives is not removed within 48 hours after notice of arrival at destination, it must be disposed of by return to the shipper, or by storage at the expense of the owner, or by sale, or when necessary to safety by destruction under supervision of a competent person."

And after so charging, the Trial Judge then erroneously permitted the jury to consider said regulation as applicable to the circumstances of the case and erroneously permitted the jury to impose upon the defendant a duty other than that specified in said regulation, using the language set forth in Ground of Appeal No. 64 (b).

67. "Now, under that Section 1643 which I was reading a moment ago appears this: * * * And further, that

Unauthorized persons must not have access to explosives or other dangerous articles at any time while such articles are in the custody of the carrier."

And after so charging, the Trial Judge then erroneously permitted the jury to consider said regulation as applicable to the circumstances of the case and erroneously permitted the jury to impose upon the defendant a duty other than that specified in said regulation, using the language set forth in Ground of Appeal No. 64 (b).

68. "And then Section 1689 provides, speaking of cars containing explosives:

They must be coupled carefully and all unnecessary shocks must be avoided. Other cars must not be cut off and allowed to strike a car containing explosives. They must be so placed in yards or on sidings that they will be subject to as little handling as possible, and be removed from all danger of fire."

And after so charging, the Trial Judge then erroneously permitted the jury to consider said regulation as applicable to the circumstances of the case and erroneously permitted the jury to impose upon the defendant a duty other than that specified in said regulation, using the language set forth in Ground of Appeal No. 64 (b).

69. "Now, then, we find that Section 1643 of the regulations provides as follows:

Careful men must be chosen to handle explosives, the platform and the feet of the men must be as free as possible from grit, and all possible precautions must be taken against fire. Suitable provision must be made, outside of the station when practicable, for the safe storage of explosives, and every effort pos-

sible must be made to reduce the time of this storage.

And we find in Section 1666 the following:

A certified car for the dangerous explosives specified in paragraph 1661 must be protected by attaching to each outside end, and side door, the lower edge not less than four and one-half feet above the car floor, a standard placard twelve by fourteen inches, on which appears in conspicuous red and black printing on strong tag board the following notice: EXPLOSIVES (to be printed in red); HANDLE CAREFULLY. KEEP FIRE AWAY (to be printed in red). And then follows a statement of what is declared on the placard to be condensed rules for handling the car. * * *

This car must not be placed in a passenger train, nor in a mixed train if avoidable.

Cars containing explosives must be near center of train and may be together if desired; must be at least 15 cars from engine and 10 cars from caboose when length of train will permit.

This car must not be placed next to cars bearing the inflammable or the acid placard or cars containing lighted heaters. Whenever it is possible to avoid so doing, it must not be placed next to tank cars or flat cars or next to carloads of lumber, poles, iron, pipe, or other articles liable to break through end of car from rough handling.

The air and hand brakes on this car must be in service.

In shifting have a car between this car and engine whenever possible, and do not cut this car off while in motion.

Avoid all shocks to this car and couple carefully.

Avoid placing it near a possible source of fire.

Engines on parallel track must not be allowed to stand opposite or near this car when it can be avoided.

This placard must be removed from car when the explosives are unloaded.

Now, under that Section 1643 which I was reading a moment ago appears this:

That if a shipment of explosives is not removed within 48 hours after notice of arrival at destination, it must be disposed of by return to the shipper, or by storage at the expense of the owner, or by sale, or when necessary to safety by destruction under supervision of a competent person.

And further, that

Unauthorized persons must not have access to explosives or other dangerous articles at any time while such articles are in the custody of the carrier.

And then Section 1689 provides, speaking of cars containing explosives:

They must be coupled carefully and all unnecessary shocks must be avoided. Other cars must not be cut off and allowed to strike a car containing explosives. They must be so placed in yards or on sidings that they will be subject to as little handling as possible, and be removed from all danger of fire.

Now, then, I charge you, gentlemen, that the rule of law that is to be extracted from these regulations and the statute in pursuance of which they are passed is that the defendant railroad company was under a duty in the transportation and custody of the cars of explosives, ammunition and inflammable substances in the particulars indicated, to exercise a degree of care commensurate with the risk of danger reasonably to be anticipated, and the defendant railroad company is liable for damages to the plaintiffs for any failure to exercise such care if the failure to exercise such care was the proximate cause of the injury and loss to the plaintiffs.

I charge you that the standard of care imposed upon the defendant railroad under the regulations of the Interstate Commerce Commission in so far as such regulations cover the field of the measure of the

defendant's duty is the same as the defendant railroad company was under without them, namely, a degree of care commensurate with the risk of danger reasonably to be anticipated."

70. "I charge you that the standard of care imposed upon the defendant railroad under the regulations of the Interstate Commerce Commission in so far as such regulations cover the field of the measure of the defendant's duty is the same as the defendant railroad company was under without them, namely, a degree of care commensurate with the risk of danger reasonably to be anticipated."

71. "Now, then, gentlemen, that brings you to this interesting inquiry: What is the degree of care commensurate with the risk of danger reasonably to be anticipated which it was the duty of the defendant in this case to exercise with respect to these explosives in regard to the particulars in which the plaintiff has complained the defendant was negligent?"

72. "How do you ascertain such care? Well, the law says that a high degree of care—which is only another way of saying reasonable care—is the duty of every person when he is handling something which is apt to be dangerous and which he has reason to anticipate will be dangerous to others if he does not handle it carefully. Now, then, you can readily see that such a rule is a rule of relation; it has regard to all of the circumstances in which a man finds himself placed at the time he is called upon to act."

73. "And therefore, the law said that they must use care which would be commensurate with the risk of injury to persons in the neighborhood that would ensue if such care were not used."

74. "Another claim made by the defendant, as I understand it, is that even if the loss occasioned, if any was occasioned, by the Johnson 17, was not the original or the sole cause of the destructive effects or

results on plaintiff's property of which complaint is made here, that still if it was an independent cause and it did cause some loss to the plaintiff and you cannot say, because the evidence does not make it clear, how much of the loss was due to the explosion on Johnson 17 for which the defendant was not responsible, if it was not responsible, and how much was due to the other explosion or to the fire that ensued from either of them why, manifestly, you could not say how much the ~~defendant~~ plaintiffs ought to have, and, therefore, you would have to say that the best that could be said for them in that particular would be that they would be entitled to six cents damages; because the law makes it incumbent upon the plaintiff to make out by the greater weight of the evidence not only what was the cause of his loss, but the extent of it, how much it was.

Now, in response to that, of course the plaintiff says that the explosion on Johnson 17 was simply one link in a chain of consequences which flowed from an original act of negligence on the part of the defendant. They say that the first explosion was the explosion that took place on the land, and that everything that occurred after that was an unbroken concatenation, a complete series of links, all of which were traceable as to their original legal source to the negligence on the part of the defendant company, the Lehigh Valley Railroad Company; and if they have made that out by the greater weight of the evidence, then, of course, it follows as a legal consequence, that the plaintiff is entitled to recover all the loss that has been shown by it to have resulted from both explosions. You can readily see that this proposition that I am trying to elucidate to you is merely a matter of cause and effect. If the defendant has been shown by the greater weight of the evidence to have caused all the loss, why, then, of course, the defendant must necessarily pay all the

damage. If it has not been shown to have occasioned all the loss, but has been shown to have occasioned some of the loss by its legal fault, then, of course, it ought to pay so much damage as it has been shown to have caused, and if the jury cannot say how much that damage was, because that has not been made clear in the evidence, but they are satisfied that it did cause some loss, why then, manifestly, the jury could only say under the circumstances that the defendant would be obligated to pay nominal damages."

75. "Now, in determining, gentlemen, whether or not care proportioned to the risk has been exercised, you must bear in mind that the criterion is, what would a reasonably prudent and cautious man have done under the circumstances? * * * And in determining that question you ask yourselves whether or not a reasonably prudent and cautious man would have had watchmen and guards upon the premises to watch these inflammable and explosive substances and whether or not he would have had as great or greater a number of guards and watchmen than the defendant had in this case, and whether or not he would have had guards of more competence, and then you ask yourselves whether or not such a reasonably prudent and cautious man would have depended, and to what extent he would have depended, upon the activities of the so-called Dougherty detectives."

76. "And then you would ask yourselves furthermore, to what extent a reasonably prudent and cautious man would have permitted persons to come upon that property at night, what challenge would he have used to ascertain whether they were authorized or not."

COLLINS & CORBIN,
Attorneys of Appellant.

Complaint.

(Served July 30, 1918.)

New Jersey Supreme Court

HUDSON COUNTY.

Frederick H. Howell, Thomas A. Howell and James H. Post, co-partners doing business under the firm name of B. H. Howell, Son & Company, Home Insurance Company, Hartford Fire Insurance Company, Globe & Rutgers Fire Insurance Company, National Fire Insurance Company of Hartford, Aetna Insurance Company, North British & Mercantile Insurance Company, Sun Insurance Office and London Assurance Corporation,

Plaintiffs,

vs.

Lehigh Valley Railroad Company, a corporation,

Defendant.

Action at Law.

Complaint.

The plaintiffs, Frederick H. Howell, Thomas A. Howell and James H. Post, copartners doing business under the firm name of B. H. Howell, Son & Company at 129 Front street, New York City, Home Insurance Company, a corporation of the State of New York, with its principal office and place of business at No. 56 Cedar street in the City of New York, Globe & Rutgers Fire Insurance Company, a corporation of the State of New York, with its principal office and place of business at No. 111 William

street in the City of New York, National Fire Insurance Company of Hartford, a corporation of the State of Connecticut, with its principal office and place of business in the City of Hartford, Connecticut, Hartford Fire Insurance Company, a corporation of the State of Connecticut, with its principal office and place of business in the City of Hartford, Connecticut, Aetna Insurance Company, a corporation of the State of Connecticut, with its principal office and place of business in the City of Hartford, Connecticut, North British & Mercantile Insurance Company, a corporation of the United Kingdom of Great Britain and Ireland authorized to transact business in the United States, with its principal office and place of business at No. 76 William street in the City of New York, London Assurance Corporation, a corporation of the United Kingdom of Great Britain and Ireland, authorized to do business in the United States, with its principal office and place of business at No. 84 William street in the City of New York, and Sun Insurance Office, a corporation of the United Kingdom of Great Britain and Ireland authorized to do business in the United States, with its principal office and place of business at No. 54 Pine street in the City of New York, say that:

First Count.

1. The plaintiffs, Frederick H. Howell, Thomas A. Howell and James H. Post, are and were at all times herein mentioned copartners doing business under the firm name of B. H. Howell, Son & Company, hereinafter called the plaintiff copartnership. The plaintiffs, Globe & Rutgers Fire Insurance Company and Home Insurance Company are corporations of the State of New York. The plaintiffs, National Fire Insurance Company of Hartford, the Hartford Fire Insurance Company and the Aetna Insurance Company are corporations of the State of Connecticut. The plaintiffs, North British & Mer-

cantile Insurance Company, London Assurance Corporation and Sun Insurance Office are corporations of the United Kingdom of Great Britain and Ireland duly authorized to transact in the United States the business of insurance. The defendant is, and at all times herein mentioned was, a corporation organized, created and existing under and by virtue of the laws of the State of Pennsylvania.

2. At all times herein mentioned the plaintiff copartnership was the owner of certain merchandise, to wit, raw sugar of the fair market value of $429,038.61, which merchandise had been placed, prior to the 29th day of July, 1916, in the custody of one National Storage Company at its warehouses, known as National Dock Stores, situated at Communipaw, Jersey City, New Jersey, which warehouses were situated on land constituting a portion of the peninsular known as Black Tom Island and hereinafter described, and immediately adjoining the premises hereinafter described as used, occupied and controlled by the defendant.

3. The defendant, at all the times herein mentioned, was a railroad common carrier and as such was in the use, occupation and control of a certain tract of land, docks, piers and bulkheads, together with rights of access thereto and wharfage rights in connection therewith, situate on a certain peninsular extending into the waters of New York Bay from the shores of Communipaw, Jersey City, Hudson County, New Jersey, such peninsula being commonly known as Black Tom Island, which tract of land, docks, piers, bulkheads and wharfage rights, including a certain pier known as the North Pier, situate at the northeasterly portion of said premises, were used and occupied by the defendant as a railroad freight terminal in its said business of transportation, for the making delivery of such freight to the consignees there-

of and for the transshipment thereof to barges and lighters.

4. Subsequent to the outbreak of the present war in Europe, and for a long time prior to July 29, 1916, the defendant had used the said Black Tom Island railroad terminal in considerable part in connection with the transportation and transshipment of vast and inordinate quantities of explosives and explosive or highly inflammable ammunition and munitions of war, known to the defendant to be such, and had used such Black Tom Island railroad terminal for the purpose of storing or allowing to remain therein large numbers of railroad cars laden with general merchandise including inflammable chemicals, known to the defendant to be such.

5. The transshipment of quantities of explosives, ammunition and munitions of war hereinbefore specified was, during such period, carried on by means of barges or lighters moored by defendant's consent to the said docks, piers and bulkheads and particularly to that portion thereof known as the North Pier.

6. On July 29, 1916, and for some days prior thereto the defendant had caused to be accumulated at said Black Tom Island railroad terminal a large number of railroad cars of explosives, explosive projectiles, ammunition and munitions of war, and at the close of the day of Saturday, July 29, 1916, there was so accumulated on the defendant's said Black Tom Island railroad terminal premises a large number of railroad carloads of such explosives, explosive projectiles, ammunition and munitions of war, and there was also loaded on barges or lighters moored to said North Pier or lying alongside vessels moored to said North Pier a further vast quantity, equivalent to many carloads, of such explosives, explosive projectiles, ammunition and munitions of war, including barges whose cargo included both high explosives and detonating fuses.

Complaint.

7. At the close of day of Saturday, July 29, 1916, there were moored to said North Pier of the defendant's said premises or immediately adjacent to said premises or lying alongside barges so moored to said pier ten barges or lighters, the greater number of which had no proper business or reason for being at said pier, and which barges or lighters were fully loaded with a great quantity of the said explosives, explosive projectiles, ammunition and munitions of war, or with other similar explosives and munitions of war not transported over the defendant's railroad, including barges whose cargo included both high explosives and detonating fuses.

8. The explosives, explosive projectiles, ammunition and munitions of war hereinbefore alleged as being, at the close of business on July 29, 1916, and just prior to midnight of that day, upon the defendant's said premises or upon said barges or lighters moored or lying adjacent thereto, consisted of vast quantities of trinitrotoluol (known as T N T) smokeless powder for cannon, black rifle powder, picric acid, gun cotton and nitrocellulose, and also a quantity of detonating and other fuses or other igniting medium of various kinds, which explosives and ammunition were either in bulk or were contained in shrapnel or other explosive shells, cartridges and munitions of war.

9. In the early morning of July 30, 1916, a fire started on the premises so used, occupied and controlled by the defendant, and a great casualty of fire and explosion occurred, as the result of which said merchandise belonging to the said plaintiff was destroyed, to the value of $370,045.05.

10. Prior to the 30th day of July, 1916, the said plaintiff, copartnership, owner of said merchandise, had duly insured the same against the hazards specified in, and in accordance with the provisions of the standard

fire insurance policy of the States of New Jersey and of New York, with the co-plaintiffs. Such standard fire insurance policy contained, among other things, a provision to the effect that if the insurance company should claim that the fire was cause by the act or neglect of any person or corporation such insurance company should, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom. Subsequent to the said 30th day of July, 1916, there was paid to the said plaintiff owner by the co-plaintiffs, sums as follows:

Hartford Fire Insurance Company.....	$85,594.07
Home Insurance Company	76,891.78
Globe & Rutgers Fire Insurance Company....	54,091.17
National Fire Insurance Company of Hartford	24,060.45
Aetna Insurance Company	21,561.64
North British & Mercantile Insurance Company	42,859.48
Sun Insurance Office	11,094.34
London Assurance Corporation	8,866.44
	$325,019.37

11. Plaintiffs charge that, under the law applicable to said railroad common carrier and the regulations of the Interstate Commerce Commission for the transportation of explosives and other dangerous articles, as prescribed under the Act of Congress of March 4, 1909, and acts supplemental thereto or amendatory thereof, it became and was the duty of the defendant, in connection with such explosives, explosive projectiles, ammunitions and munitions of war, to exercise all reasonable care to prevent fire or explosion upon the said premises and to control and extinguish the same, the extent of such duty being commensurate with the nature and risk of the situation hereinbefore set forth, to take all reasonably possible precautions against fire, and to keep fire away; to make all reasonable and suitable provision for the

safe storage thereof outside of station; to prevent unauthorized persons from having access thereto on said premises; and to take all reasonable and necessary precautions for quick isolation in case of fire.

12. Plaintiffs allege that the defendant neglected to perform such duty in the following respects:

It neglected to watch or guard said premises and waters adjacent thereto through employees sufficient in number and competence, and to properly instruct the same, to prevent incendiary or accidental fires;

It permitted unauthorized persons upon said premises and especially upon or in the vicinity of said explosives, ammunition or munitions of war;

It permitted vessels not connected with the transshipment of said explosives, ammunition and munitions of war to lie moored at said North Pier;

It permitted or neglected to prevent barges or lighters having no business at said North Pier, and wholly or partially laden with such explosives and munitions of war, to lie moored to said North Pier or moored to similar barges moored thereto, or to lie in the vicinity thereof;

It neglected to isolate or separate the railroad cars containing such explosives and munitions of war, and improperly accumulated or bunched the same in the same locality on said premises, and take precautions for quick isolation in case of fire.

It neglected to provide employees sufficient in number and competence and to properly instruct the same for the purpose of discovering and extinguishing any incendiary or accidental fire. Such insufficient, incompetent and uninstructed employee or employees as the defendant had, were negligent in guarding, discovering and reporting the fire hereinbefore alleged;

It neglected to provide sufficient apparatus and employees for the purpose of fighting and extinguishing fire upon said premises, in said railroad terminal; and

It neglected to provide sufficient means of communication or alarm of fire.

The loss of the merchandise of the said plaintiff was caused by the defendant's neglect of duty aforesaid.

Second Count.

13. Plaintiffs repeat the allegations of the complaint as contained in paragraphs designated 1-12 inclusive of the First Count, as if at length recited herein.

14. For a long time prior to said 29th day of July, 1916, it was matter of public knowledge and was known to the defendant, that evilly disposed persons were abroad in the land, seeking, through the medium of fire and explosion and in other ways, to occasion damage to property, and especially to munitions of war which conceivably might eventually be destined for the warring European nations.

15. Plaintiffs charge that the duty of the defendant was not only as set forth in paragraph 11 herein, but it became and was the further duty of the defendant to take all possible precautions in view of the situation so existing.

16. Plaintiffs allege that the loss of the merchandise of the said plaintiff was caused by the neglect of the defendant in performing such duty, in the respects set forth in paragraph 12 herein.

17. That the said fire and explosion hereinbefore specified in paragraph 9 herein was caused by incendiarism.

Plaintiffs demand as damages the sum of $370,045.05, together with interest from July 30, 1916.

(Signed) PITNEY, HARDIN & SKINNER,
Attorneys for Plaintiffs.

Answer.

Answer.

(Filed August 27, 1918.)

Defendant, Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, having its principal office in the State of New Jersey, at the foot of Washington street, Jersey City, says that:

First Defense to First Count.

1. It has no knowledge nor information sufficient to form a belief as to the allegations of paragraph 1, except that it admits that it is, and at all the times mentioned in the complaint was, a corporation organized, created and existing under and by virtue of the laws of the State of Pennsylvania.

2. It has no knowledge nor information thereof sufficient to form a belief as to the allegations of paragraph 2, except that it admits that the warehouses, or some of them, of the National Storage Company, were situated on land known as "Black Tom Island," immediately adjoining the premises described in said paragraph as used, occupied and controlled by the defendant.

3. It admits the allegations of paragraph 3.

4. It denies the allegations of paragraph 4; and says that it used said railroad terminal as a general freight terminal for the delivery and transshipment of all kinds of merchandise transported by the defendant, as a common carrier of freight, of which merchandise certain explosives, ammunition and munitions of war formed a small proportion; and it further says that it did not at any time use said terminal for the purpose of storing or allowing to remain thereon large, or any, numbers of railroad cars laden with general merchandise, including inflammable, or any, chemicals; and it says that the said railroad cars that were in said terminal on July 29, 1916,

and prior thereto were placed there solely for the purpose of making delivery of the contents thereof, in accordance with its legal duty as an interstate common carrier of freight.

5. It admits that the transshipment of certain quantities of explosives, ammunition and munitions of war was carried on by means of lighters or barges; it denies that the defendant undertook the transshipment thereof, and it denies that the said barges or lighters were moored by defendant's consent to the said docks, piers and bulkheads or any of them, except while the said barges or lighters were actually being loaded.

6. It denies the allegations of paragraph 6, except that it says that on July 29, 1916, there were certain cars containing explosives, explosive projectiles, ammunition and munitions of war at its said terminal; and except that it says that on said date there were two barges moored to said North Pier, partly loaded, one with shrapnel and the other with trinitrotoluol.

7. It has no knowledge nor information thereof sufficient to form a belief as to the allegations of paragraph 7, except that it says that if the barges or lighters therein described were moored to said North Pier, as alleged in said paragraph, the mooring thereof was contrary to law and without the consent of this defendant.

8. It has no knowledge nor information thereof sufficient to form a belief as to the allegations of paragraph 8, except that it says that on said date there were upon the defendant's said premises certain cars containing shells, shrapnel and other ammunition and munitions of war, including trinitrotoluol, but not including smokeless powder, black rifle powder, picric acid, gun cotton or nitrocellulose; and it further says that there were no detonating or other fuses, or any other igniting medium of any kind upon its said premises.

Answer.

9. It admits that in the early morning of July 30th, 1916, a fire occurred on the premises so used, occupied and controlled by the defendant, but it has no knowledge nor information thereof sufficient to form a belief as to whether said fire started on said premises; it admits that a fire and explosion occurred, but it has no knowledge nor information sufficient to form a belief as to whether, as a result thereof, any merchandise belonging to the plaintiff was destroyed, nor whether the same was of the value alleged in said paragraph.

10. It has no knowledge nor information thereof sufficient to form a belief as to the allegations of paragraph 10.

11. It admits that on the dates mentioned in the complaint there were in full force and effect certain regulations of the Interstate Commerce Commission, prescribed by it under authority of an Act of Congress of March 4, 1909, and an Act of Congress of February 4, 1887, as amended, for the transportation in interstate commerce of explosives and other dangerous articles of freight, and that the said regulations were applicable to the defendant in respect to its care, custody and control of said explosives, ammunition and munitions of war while the same were in the course of transportation in interstate commerce; it further says that on said dates the defendant was subject exclusively to said acts and regulations in its said transportation of said explosives, ammunition and munitions of war; it denies that said paragraph 11 correctly recites said regulations, and prays reference to the original of said regulations for a correct statement of its legal duty in the premises.

12. It denies all the allegations of paragraph 12.

Second Defense to First Count.

1. On July 30, 1916, and for many days prior thereto the defendant was a common carrier engaged in inter-

state commerce and foreign commerce, and therein transporting by land ammunition and munitions of war, including explosives.

2. As such common carrier defendant was compelled by law to receive, carry, convey and transport the said ammunition and munitions of war, including explosives, in the course of interstate and foreign commerce, provided the same were packed, marked, loaded and handled, and when offered for transportation were in proper condition to transport in accordance with and pursuant to the Act of Congress of the United States entitled "An Act to promote the safe transportation in interstate commerce of explosives and other dangerous articles, and to provide penalties for its violation," approved March 4, 1909, and the Act of said Congress entitled "An Act to regulate commerce," as amended June 18, 1910, and the regulations prescribed by the Interstate Commerce Commission by authority of said Acts.

3. The ammunition and munitions of war and explosives that exploded on July 30, 1916, were packed, marked, loaded and handled, and when offered for transportation were and until and at the time of said explosion continued to be in proper condition to transport in accordance with said Acts of the Congress of the United States and the regulations prescribed by the Interstate Commerce Commission by virtue thereof and were carried, conveyed and transported and held by the defendant in the course of interstate and foreign commerce lawfully and strictly in accordance with said Acts and regulations.

Third Defense to First Count.

1. The presence of such explosives as were on July 30, 1916, on the premises of the defendant did not constitute a nuisance.

Answer.

2. The explosion mentioned in the complaint was due to a fire caused by incendiarism, of which defendant had no knowledge or suspicion.

3. Said fire occurred notwithstanding due diligence by the defendant to prevent incendiarism.

First Defense to Second Count.

1. It repeats and makes part hereof the allegations contained in paragraphs 1 to 12, inclusive, of its First Defense to First Count.

2. It denies the allegations of paragraph 14.

3. It denies the allegations of paragraph 15.

4. It denies the allegations of paragraph 16.

5. It admits that the fire and explosion described in the complaint was caused by incendiarism; and it says that the defendant had no knowledge or suspicion of said incendiarism and that said fire occurred notwithstanding due diligence by the defendant to prevent incendiarism.

Second Defense to Second Count.

Defendant repeats and makes part hereof the allegations of its Second Defense to First Count.

COLLINS & CORBIN,
Attorneys of Defendant.

Reply.

(Filed October 23, 1918.)

The plaintiffs, in reply to the answer of the defendant, say that:

Reply to First Defense to First Count.

1. The plaintiffs deny that the said railroad cars that were in said terminal on July 29, 1916, and prior thereto, were placed there solely for the purpose of making delivery of the contents thereof in accordance with the legal duty of the defendant as an interstate common carrier of freight, as alleged in paragraph 4 of the first defense to the first count.

2. The plaintiffs deny that the mooring to said North Pier of the barges or lighters loaded with explosives or munitions was without the consent of the defendant, as alleged in paragraph 7 of the first defense to the first count.

3. The plaintiffs deny that on said dates the defendant was subject exclusively to the said Acts of Congress and the said regulations of the Interstate Commerce Commission in its said transportation of said explosives, ammunitions and munitions of war, as alleged in paragraph 11 of the first defense to the first count.

Reply to Second Defense to First Count.

4. The plaintiffs deny the allegations of paragraphs 2 and 3 of the second defense to the first count.

Reply to Third Defense to First Count.

5. The plaintiffs deny the allegations of paragraph 1 of the third defense to the first count.

Reply.

6. The plaintiffs have no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 2 of the third defense to the first count.

7. The plaintiffs deny that said fire occurred notwithstanding due diligence by the defenant to prevent incendiarism, as alleged in paragraph 3 of the third defense to the first count.

Reply to First Defense to Second Count.

8. The plaintiffs repeat the allegations of paragraphs 1, 2 and 3 of the reply to the first defense to the first count.

9. The plaintiffs deny so much of the allegations of paragraph 5 of the first defense to the second count as alleges that the defendant had no knowledge or suspicion of said incendiarism and that said fire occurred notwithstanding due diligence by the defendant to prevent incendiarism.

Reply to Second Defense to Second Count.

10. The plaintiffs deny the allegations of paragraphs 2 and 3 of the second defense to the second count.

Objection in Point of Law to Second Defense to Second Count.

11. The plaintiffs will object to the second defense to the second count on the ground that the same is immaterial and irrelevant.

PITNEY, HARDIN & SKINNER,
Attorneys for Plaintiffs.

Order to Amend Answer.

(Filed March 24, 1919.)

On due notice to the plaintiffs' attorney, it is ORDERED that the answer filed by the defendant in this cause be amended as follows:

(a) By striking out the Third Defense to the First Count; and that the plaintiffs' reply thereto be also stricken out.

(b) By substituting for paragraph 5 of the First Defense to the Second Count the following:

"5. Defendant has no knowledge or information thereof sufficient to form a belief as to whether the fire and explosion described in the complaint were caused by incendiarism, and it further says that if the said fire and explosion were caused by incendiarism it had no knowledge or suspicion thereof and the same occurred notwithstanding due diligence by the defendant to prevent incendiarism."

This order is made on condition that if at the trial of the action the plaintiffs shall offer in evidence the original answer, no objection shall be made on the part of the defendant to its admissibility as an admission by the defendant.

Dated Mar. 21st, 19

WM. M. SPEER,
Judge & Sup. Ct. Com.

Entered March 24, 1919,
on motion of

COLLINS & CORBIN,
Deft's. Attys.

Postea.

Postea and Judgment.

(Filed April 8, 1919.)

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

FREDERICK H. HOWELL, *et als.*, *Plaintiffs*, *vs.* LEHIGH VALLEY RAILROAD COMPANY, a corporation, *Defendant.*	*Action at Law.* *Postea.*

This case was tried before Judge William H. Speer (to whom it had been referred by the Supreme Court Justice holding the Hudson Circuit) with a jury, at the Hudson Circuit on March 24th, 26th, 27th, 28th, 31st and April 1st, 2nd and 3rd, 1919.

The jury rendered a general verdict against the defendant and in favor of the plaintiffs as follows:

Against the defendant and in favor of the plaintiffs Frederick H. Howell, Thomas A. Howell and James H. Post, co-partners doing business under the firm name of B. H. Howell, Son & Company, for $36,854.09, and also for the sum of $5,811.78 for interest thereon; making a total of forty-two thousand, six hundred and sixty-five dollars and 87/100 ($42,665.87).

Against the defendant and in favor of the plaintiffs Home Insurance Company, Hartford Fire Insurance Company, Globe & Rutgers Fire Insurance Company, National Fire Insurance Company of Hartford, Aetna Insurance Company, North British & Mercantile Insurance Company, Sun Insurance Office and London Assurance Cor-

Postea.

poration, for $325,019.37, and also for the sum of $52,-306.06 for interest thereon; making a total of three hundred and seventy-seven thousand, three hundred and twenty-five dollars and 43/100 ($377,325.43).

WILLIAM H. SPEER,
Judge.

Judgment.

NEW JERSEY SUPREME COURT.

Frederick H. Howell, Thomas A. Howell and James H. Post, co-partners doing business under the firm name of B. H. Howell, Son & Company; Home Insurance Company, Hartford Fire Insurance Company, Globe & Rutgers Fire Insurance Company, National Fire Insurance Company of Hartford, Aetna Insurance Company, North British & Mercantile Insurance Company, Sun Insurance Office and London Assurance Corporation,

vs.

Lehigh Valley Railroad Company.

Action at Law.

On Postea.

Pitney, Hardin & Skinner, Attorneys.

Judgment entered this eighth day of April, A. D. nineteen hundred and nineteen, for the sum of forty-two thousand, six hundred & sixty-five dollars & eighty-seven cents damages in favor of Frederick H. Howell, Thomas A. Howell and James H. Post, co-partners doing business under the firm name of B. H. Howell, Son & Company; and for the sum of three hundred and seventy-seven thousand, three hundred and twenty-five dollars and forty-three cents damages in favor of Home Insurance Company, Hartford Fire Insurance Company, Globe & Rutgers Fire Insurance Company, National Fire Insurance Company of Hartford, Aetna Insurance Company, North

$ 42,665.87	
377,325.43	
$419,991.30	
58.68	
$420,049.98	

Judgment.

British & Mercantile Insurance Company, Sun Insurance Office and London Assurance Corporation, and fifty-eight dollars and sixty-eight cents costs.

WM. S. GUMMERE, *C. J.*

A true copy,

ENOCH L. JOHNSON, *Clerk.*

Drawing of Jury.

FIRST DAY.

NEW JERSEY SUPREME COURT.

FREDERICK H. HOWELL, *et als.*

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Tried March 24, 1919, before Hon. William H. Speer, and a jury.

For plaintiffs:

Pitney, Hardin & Skinner, Esqs. (Mr. Hardin, Mr. Skinner, Mr. Corwin Howell).

Butler, Wyckoff & Campbell, Esqs. (Mr. Campbell, Mr. Whipp).

For defendant:

Collins & Corbin, Esqs. (Mr. Collins, Mr. Hobart).

Also Mr. L. M. Garrison, Mr. Edgar H. Boles, Mr. R. W. Barrett.

Special appearance:

Congleton, Stallman & Hoover (Mr. Stallman).

The Court. The case may be moved. It is case number 85. The jury may be impanelled in that case.

Mr. Stallman. In this case I would like to make a special appearance, enter the special appearance of our firm with respect to two notices that have been served upon us, one of which is addressed to the King of England and the other to the Republic of France, which in substance calls upon those two parties to come in and defend this action; and I would like to especially object to these two notices on the ground that Peck, Stallman and Hoover are not the agents or attorneys of either

His Majesty the King of England or the Republic of France for the purpose of receiving service of any papers in this suit; and secondly, that such a notice is not authorized by our law or our practice; and thirdly, that there is nothing in the notice to show why or for what reason either the King of England or the Republic of France is in this suit in any way.

Mr. Garrison. It is a fact, is it not, that your firm is attorney for the King of England and the Republic of France in a suit arising out of this same cause of action?

Mr. Stallman. Yes, in another action.

Mr. Collins. We have given notice in this suit to them of the trial.

The Court. You simply want to enter objection to appearing specially, on the record?

Mr. Stallman. Yes.

The Court. All right; it may be entered.

Twelve men were called as jurors and took their seats in the jury box.

Mr. Skinner. I would like to ask you gentlemen collectively, each thinking it out for himself, if any one of you is in any way connected with the Lehigh Valley Railroad Company. If so, I ask you to indicate it. If you say nothing I will take it for granted that you are not.

(No reply.)

And is any one of you—has any one of you any business relations with the Lehigh Valley Railroad Company of any kind or any business or social relations with the officials of the Lehigh Valley Railroad Company?

(No reply.)

Juror No. 5 was challenged by Mr. Skinner, and replaced as a juror by Matthew C. Buckley.

Juror No. 10 was challenged by Mr. Garrison. Replaced by Thomas Farley.

Mr. Skinner. I would like to ask Mr. Buckley and Mr. Farley the same questions I asked the other gentlemen, as to whether they have any relations, business or social, with the officials of the Lehigh Valley Railroad, or any relations at all with the Lehigh Valley Railroad Company?

Mr. Buckley. I want to say this: That I don't think I ought to serve on this jury inasmuch as I sustained loss by the explosion.

Mr. Skinner. I am perfectly willing, with the consent of counsel, that Mr. Buckley should be excused.

Mr. Garrison. All right.

Mr. Buckley is excused by consent. Replaced by Mr. Pray.

No. 6 Juror, Mr. Force, challenged by Mr. Skinner. Replaced by Philip Kinlon.

No. 7 Juror, challenged by Mr. Garrison, replaced by Mr. Wollen.

Mr. Skinner. I would like to ask Mr. Wollen and Mr. Pray the same questions that I asked these other gentlemen, as to whether they have any relations at all with the Lehigh Valley Railroad Company, or any of its officials, any business or other connections?

Juror No. 5. I got a son works as a clerk in the Pennsylvania.

Mr. Skinner. Mr. Kinlon is on the list, I notice, as inspector. Is that correct?

Mr. Kinlon. Yes.

Mr. Skinner. And what sort of inspector is it?

Mr. Kinlon. Hudson County Mosquito Extermination Commission.

Juror No. 8 challenged by Mr. Skinner, replaced by Mr. Boovall.

Juror No. 12 challenged by Mr. Garrison. Replaced by William F. Curry.

Mr. Skinner. Mr. Curry, have you any relations of any kind with the Lehigh Valley Railroad Company?

Mr. Curry. No, sir.

Mr. Skinner. Or any social relations with any of its officials?

Mr. Curry. No, sir.

Mr. Garrison. Under your Honor's ruling am I permitted to ask whether any of these gentlemen as they take their seats in there suffered any from this explosion?

The Court. Yes, I think you have that right under the statute, because the object is to see whether these men are satisfactory to you so that you may intelligently exercise the privilege of challenge.

Mr. Garrison. May I ask if any of you gentlemen suffered in any way from the Black Tom explosion on the 29th and 30th of July, 1916? Of course, I mean by "suffered," did you suffer any loss to any personal property?

Juror No. 5. I did.

Juror No. 3. Glass broken.

Mr. Garrison. 3 and 5. Any of the others?

Juror No. 1. Glass broken in store.

Mr. Garrison. 1, 3 and 5. Would your Honor permit a challenge for cause as to numbers 1, 3 and 5?

The Court. Well, if you will state the cause and make out your case, of course I will have to.

Mr. Garrison. My cause is that these gentlemen suffered from the same accident which is the subject matter of this suit, and it would in some way, I think, weigh against their partiality or impartiality.

Mr. Collins. Perhaps counsel will consent that they be excused?

Mr. Skinner. I do not think we could consent, sir. It does not seem to us that the ground alleged is sufficient.

I haven't myself any idea that the breaking of a few panes of glass is going to prejudice the minds of these jurors, and if that were to be a ground for disqualification I think it would be quite widely extended—

The Court. I am not passing upon the challenge now, because no challenge has actually been interposed for cause. If one is interposed then it would have to be made out in the ordinary way, and I will determine upon the facts as thus elicited whether the challenge is made out or not.

Mr. Skinner. We were asked if we would consent.

The Court. Yes, and I gather that you do not consent.

Mr. Garrison. If your Honor please, we challenge for principal cause Juror No. 1, No. 3, Mr. Sullivan, and No. 5, Mr. Buckley; because being that they each have suffered property loss by reason of the same accident which is the subject matter of the suit in this action.

The Court. Well, you may go on and establish the cause.

Mr. Garrison. By interrogation of the witness?

The Court. Well, he will have to be sworn; that is the only practice that we know.

(Juror No. 1, S. FREUDENBERGER, sworn on his *voir dire.*)

The Court. Take your seat in the box.

By Mr. Garrison.

Q Mr. Freudenberger, did you suffer any property loss by reason of the explosion at Black Tom which took place on the 29th and 30th of July, 1916? A We suffered damage, but it was made good by the Glass Company,—virtually no pecuniary loss.

Q You have no suit pending? A No, sir.

Q You do not contemplate bringing any suit for any loss that you had? A No, sir.

Drawing of Jury.

Mr. Garrison. I will withdraw my challenge as to Mr. Freudenberger. Now, Mr. O'Sullivan.

(Juror No. 3, MR. CHARLES O'SULLIVAN, sworn on his *voir dire.*)

By Mr. Garrison.

Q Mr. O'Sullivan, did you suffer any property loss by reason of the explosion? A No.

Q At Black Tom on the night and morning of July 29th and 30th, 1916? A No; the insurance company stood the loss.

Q Well, did you suffer a loss without compensation to you? A Yes.

Q And you have no claim? A No.

Q And you don't intend to make any? A No.

Mr. Garrison. I withdraw my challenge to No. 3. Now Mr. Pray.

(Juror No. 5, MR. JOHN PRAY, sworn on his *voir dire.*)

By Mr. Garrison.

Q Mr. Pray, did you suffer any property by reason of the fire and explosion at Black Tom on the 29th and 30th of July, 1916? A Yes, sir.

Q Were you compensated by the insurance company? A No, sir.

Q And you still have a claim against the Lehigh Valley Railroad Company, did you? A Well, my loss was not so great that I would make a claim; it was only about five lights of glass.

Q But you still have whatever right of action you have? You have not been paid for it, in other words? A No, I have not been paid for it.

Q You may examine.

Examination by Mr. Skinner.

Q Would the fact that you lost five lights of glass, Mr. Pray, in any way warp your judgment upon the testimony that may be presented in this case so that you could not try it fairly? A It would not change me any way.

Mr. Garrison. I will withdraw my challenge as to Mr. Pray.

The Court. Very well; you may take your seat.

The Clerk. Mr. Buckley was excused by consent.

Mr. Garrison. I thought Mr. Farley was excused by consent.

The Clerk. No, sir; it was Mr. Buckley.

Mr. Skinner. Mr. Farley is still in the jury box.

The Clerk. Mr. Matthew C. Buckley was excused by consent.

Mr. Garrison. Then Mr. Farley is still there?

The Clerk. Yes, sir.

The Clerk. Has counsel for the defendant any challenge to make?

Mr. Garrison. Mr. Curry, the last man in the box; Mr. William F. Curry.

Mr. Collins. As I have it, the plaintiff has three challenges and we have three.

The Clerk. That is correct. Has the counsel for the plaintiff any challenge to make?

Mr. Skinner. I challenge Mr. McAvoy, No. 4.

(The clerk called Walter F. Allardice as Juror No. 4.)

The Clerk. Has the counsel for the defendant any challenge to make?

Mr. Garrison. No. 6.

(The clerk called the name of Thomas F. Parker as Juror No. 6.)

Mr. Skinner. Now may I ask Mr. Parker the same question as the other gentlemen, if you have any connection with any one connected with the Lehigh Valley?

The Juror. No; but I am connected with the New England Steamship Company.

Mr. Skinner. Have we any consent from the other side? The gentleman said he is employed by the New York and New Haven Railroad, in the New England Steamship Company.

Mr. Garrison. I am willing that he should go, if you are.

Mr. Skinner. Excused by consent.

(The clerk called Richard A. Clarke as Juror No. 6.)

Mr. Skinner. Mr. Clarke, have you any connection with the Lehigh Valley Railroad Company, in any way?

The Juror. No, sir.

Mr. Skinner. We will excuse No. 1.

(The clerk called Nicholas Roehrenbeck as Juror No. 1.)

Mr. Garrison. We will excuse No. 1.

(The clerk called Joseph Ryan, who did not appear.)

(The clerk then called William Buckley as Juror No. 1.)

Mr. Skinner. I would like to ask Mr. Buckley what his occupation is?

The Juror. Stationary engineer.

Mr. Skinner. Have you any connection of any kind with the Lehigh Valley Railroad Company, Mr. Buckley?

The Juror. Not that I know of.

Mr. Skinner. Jury satisfactory to the plaintiff.

The Clerk. Defendant any challenges to make?

Mr. Garrison. No. 8.

(The clerk called Joseph H. Thompson as Juror No. 8.)

The Clerk. Has the counsel for plaintiff any challenge to make—any further challenge?

Mr. Skinner. Mr. Thompson, have you any connection with the Lehigh Valley Railroad Company?

The Juror. No, sir.

Mr. Skinner. Jury satisfactory.

The Clerk. The defense has exhausted their challenges.

Mr. Garrison. I would like to ask any of the gentlemen who have been called since I last asked the question, whether any of you suffered any damage by reason of the explosion on July 29th and 30th, 1916? I assume none of you did. We have no challenge.

The Court. The jury may be sworn.

(Jury sworn.)

Mr. Skinner. May I ask the Court to announce to the witnesses who are under subpoena that they should return on the adjourned day?

The Court. All the witnesses who are here in the case of Frederick H. Howell and others against the Lehigh Valley Railroad Company will come back on Wednesday morning at 10 o'clock without any further order or process to fetch them here.

Now, I understand that is all you desire to do this morning.

Mr. Collins. Yes.

The Court. So we will adjourn, gentlemen, until 10 o'clock on Wednesday morning, and please remember that on that morning, and every other morning until this case is concluded, you are expected to be promptly in your seats, because the case will take quite a length of time and we do not want to waste time by anyone straggling in after the time for the session has arrived. So we will adjourn until 10 o'clock on Wednesday morning.

ADJOURNED TO MARCH 26, 1919.

Plaintiffs' Opening.

Case continued March 26, 1919.

The Court. Now, you may open the case if you are ready.

Mr. Campbell. With the permission of the Court, and gentlemen of the jury: This suit is brought by a group of parties called plaintiffs against the Lehigh Valley Railroad Company, called the defendant, to recover a sum which, with interest, amounts proximately to about $425,000, for damages by reason of the Black Tom explosion on the 30th day of July, 1916. As most of you gentlemen know there was a great casualty of fire and explosion at Black Tom. As the result of that casualty of fire and explosion the goods belonging to these plaintiffs were destroyed. We say those goods were destroyed and that casualty occurred by reason of a failure of duty, a lack of care on the part of the Lehigh Valley Railroad Company, or as it is commonly known, that it occurred through their negligence.

Now, the real question that you gentlemen, therefore, have to determine is, Did the Lehigh Valley Railroad Company fail in any duty which it owed in connection with the conduct of its business and its property? That is the question, a vital question to these plaintiffs here, a question of great importance to you in the community in which you live and from which you have been chosen to try this case.

Extending into the waters of the harbor—most of you men know the situation but in case some of you are not familiar with the detail—extending into the waters of the harbor is a long narrow peninsula of land jutting out from Communipaw, which is called Black Tom Island. It is not an island at all, because it has been filled in, so that it is what is called a peninsula or narrow strip of land. The main part of that land was occupied by the Lehigh Valley Railroad Company in the conduct of its business, but this land was also in

part occupied by a corporation known as the National Storage Company, which was engaged in the business of warehousing. Our people had, prior to July 30, deposited with the National Storage Company over 25,000 bags of raw sugar. As the result of the explosion and the fire the warehouses of the National Storage Company were destroyed and the loss which we claim here was occasioned. Now, the plaintiffs, gentlemen, consist of two groups of parties. Mr. Frederick H. Howell, Mr. Thomas A. Howell and Mr. James H. Post were copartners in business, in the sugar business, and they, prior to the 30th day of July, 1916, had deposited, caused to be deposited this raw sugar, twenty-five thousand and odd bags, in the National Storage warehouses. The explosion absolutely destroyed the warehouses in question and the great bulk of the sugar, with the exception of one small lot, was never heard from thereafter. There was a small lot in one of the warehouses which was damaged slightly, I think $5,000. The entire value of the sugar was $370,000, which with interest amounts to about $425,000.

Prior to the fire Howell and Company had insured this sugar against fire with a number of insurance companies, and those companies constitute the second group of plaintiffs. Those companies are the Home Insurance Company of New York; the Hartford Fire Insurance Company; the Globe and Rutgers Insurance Company; the National Insurance Company of Hartford; the Aetna Insurance Company; the North British and Mercantile Insurance Company; the Sun Insurance Office, and the London Assurance Corporation. After the casualty these companies paid to Howell and Company $325,000. The contract of insurance provided that if the loss was occasioned by the wrongful act of anybody and if the companies had to pay, then they stepped *pro rata* into the shoes of the party to whom they paid; so that the insurance companies are here, having stepped to that extent into the shoes of B. H. Howell and Company.

Now, that will give you the general sketch of the parties who are here before you in this case.

The Lehigh Valley Railroad Company used this long peninsula as a terminal. The tracks came—the peninsula was about, I think, a mile and a half long—and the tracks as they approached the terminal yard came down on the north side. The warehouse buildings were on the south side, and at the extreme end of the peninsula and extending over a very considerable space were the yard, the terminal yard of the railroad. You will see it when we get the maps here, in detail. There were twenty or thirty long tracks and it was a very big terminal yard. Now, extending out from this yard at the north was a long pier—the distances will be given to you by the witnesses—that pier was used for trans-shipping a certain kind of merchandise which I will describe in a moment. This terminal was used by the railroad company, as we understand it, for several purposes. The cars were kept there as a place to keep them, and cars were brought there for the purpose of either being put on floats and taken through the harbor or the contents trans-shipped to vessels and the freight proceeded, carried on its way.

Now, this North Pier, about which there will be considerable said here, was a long pier which jutted out beyond the land, and that pier was, at the time that we are discussing here, called the ammunition pier, the powder pier, and it was used for trans-shipping quantities of explosives, ammunition and powder, which the railroad company brought to this terminal. Now, subsequent to the beginning of the war the railroad company began to receive and to carry in its business quantities of explosives, high explosives, ammunition for cannon, inflammable chemicals—the various kinds of explosives and chemicals largely used in connection with the conduct of the war. The process, as we understand it, was this: that the railroad company brought these cars to the yard, that they were kept there in the yard

until such time as they could be moved down on this North Pier, that then there were moved, as many as could be moved, down onto this North Pier. There the contents were taken out, were transferred to barges or lighters, and these barges or lighters then proceeded down the harbor to Gravesend, where they discharged their cargo to ocean-going steamships, which took them to wherever they were destined on the other side of the ocean. Now, this had been proceeding for many months. We will show you the quantities of explosives—at least the railroad's statement of the quantities of explosives and ammunition which it had carried for a very considerable time before. It was no new business; it had been proceeding for upwards of a year and perhaps longer.

Now, that, gentlemen, was the general situation of the yard and of the business which the Lehigh Valley Railroad was conducting at this yard upon July 30.

Now we come to the night of Saturday, the 29th of July, and Sunday, the 30th of July, because those were the days and that was the time to which your attention will be directed in this case. There were in that yard on Saturday, the 29th day of July, 228 railroad cars of all kinds, as we understand it. There were, on the evening of Saturday, the 29th of July, in the railroad yard—and I am not speaking now of the North Pier, but of the big railroad yard—there were eight cars, loaded with what are called high explosives, and each car contained 57,500 pounds of high explosives, a total of about 450,000 pounds of high explosives in those railroad cars. A high explosive is, as will be shown, the most powerful explosive that is used in connection with warlike operations. So bear in mind first, that there were in this yard eight cars which contained, each car contained 57,500 pounds, or a total of upwards of 450,000 pounds of high explosives. In addition to that, there were in this railroad yard 15 cars containing ammunition for cannon with ex-

plosive projectiles. Now, we understand that to mean what you commonly know as shells—in other words, they were the shells used in cannon, and they had in them the propelling charge which would tend to send the shell its distance, and they had in them the exploding charge which is calculated to explode when the shell reaches its destination. In other words, they had 15 cars loaded with what we know as shells, or shrapnel. Shrapnel is a particular kind of shell. In addition to the eight cars and the fifteen cars there were three cars of wet nitrocellulose, which we understand to mean gun-cotton, wet. That it is explosive we do not claim. That it is inflammable we do—and highly inflammable. Then there were five cars of what is called benzol—a chemical known as monochlorbenzol, or benzol, which is an inflammable chemical. Now, gentlemen, these are the cars which the railroad company admit to have been in that yard. Whether there were other cars there or not will be for you gentlemen to determine, but in a way it does not make much difference to us because on their own statement, their own admission, these were the cars, the number of cars which I have stated to you, which they admit to have been there.

Now, how did they know that these cars contained these explosives and ammunition which I speak of? Well, in the first place, the papers, their own records, their bills, waybills I believe they are called, expressly contain the statement, and they admit that they knew that there were eight cars of high explosives and fifteen cars of ammunition for cannon with explosive projectiles and these other cars I have mentioned, and in addition to this these cars were placarded under the law, as they must be. The cars of explosives and the cars of ammunition for cannon had what we call the explosive placard. You gentlemen will see it in a minute. It is in red, in big red letters—"Explosives. Keep fire away," with other warnings which will be read to you. The other cars

contained the inflammable placard, a placard containing the word "Inflammable" in red; so that there is no question but what the railroad company knowingly had these cars, so laden, in their possession and that they had absolute knowledge of what the contents were.

Now, on the morning of Sunday, July 30, a fire occurred on those premises, and we shall show you that this fire occurred in the cars in the railroad yard, that it did not occur anywhere else, but it started—notice I say started—that it began, started in the railroad cars in the railroad yard, not on the North Pier, and nowhere else except in the yard among those cars. That fire, starting comparatively small, gradually increased. It involved other cars. It started somewhere between 12:15 and 12:45 in the morning of Sunday, July 30. It burned and, gradually becoming a great conflagration, involved other cars, until at 2:08—eight minutes past 2, or five minutes past 2, there occurred what probably most of you gentlemen know as the first great explosion.

As the result of that explosion these warehouses which were immediately adjacent were wrecked. Fire broke out in these warehouses; the warehouses in which the bulk of this sugar was contained were burned to the ground.

Now, I am not going to tell you the measure of duty under which the defendant railroad was. It is admitted that it was under a measure of duty to do certain things with reference to the situation there. What that measure of duty is you will not take from me; you will not even take it from my friend the eminent counsel on the other side, Judge Garrison. The Court will tell you what that measure of duty is. But what we say they failed in is this, this is our indictment against the Lehigh Valley Railroad Company, and the question which you gentlemen will have to determine after this case has been submitted to you for your decision: We say, first, that they failed to guard those explosives against any incendiary fire or

to prevent and discover accidental fire before it was too late. That is what we say first; that they failed in their duty to take care to guard and watch those explosives, to prevent any incendiary fire, or to watch out for and promptly discover any accidental fire. And we say second that they failed to provide adequate apparatus and means to promptly fight such a fire before it was too late, and that these statements cover the ground of our charge against the Lehigh Valley Railroad, in connection with its failure of duty under the circumstances as they existed there at that time.

Now, my friends on the other side, I think, need not waste any time in saying that this railroad company was a public carrier and as such had to take the goods. We admit it. They don't have to waste any time in saying that these explosives and ammunition were in the course of interstate commerce between this country and Europe. We admit it. We don't even raise any question in this case that these explosives and munitions were properly there, but what we do say is that when the railroad company had those explosives, when they had what was in effect an arsenal of explosives there, they did not take the care there which the law requires them to take.

Now you gentlemen have heard me say what we expect to prove, and say that we will prove that this fire started in the railroad cars in the railroad yard. We state that with all frankness, and we suggest, if counsel on the other side take issue with that they will tell you at the start where they claim the fire started, and whether they claim that it started in the yard or whether they claim that it started somewhere else, and if so, where. And we say, furthermore, that we expect to show that this first explosion took place in this railroad yard in the neighborhood of where the fire started, and we say if the counsel on the other side, in stating their case to you, take issue on this point, let them tell you with equal frankness where they say that this first explosion took place.

Now, gentlemen, a question here—one issue will be what fire protection they had for the yard. And remember, in listening to this evidence, the question is what fire protection they had for the cars in the yard. It is not a question of what protection they had in the storage plant. That may have been more perfectly protected. But the question here is, What fire protection did they have in the yard? Bear this in mind. Now, the railroad company will say presently that they had eight watchmen on the premises, and the question is—and watch very carefully, because you are twelve watchmen to watch this issue, watch and see—how many watchmen they did have watching these explosives. We say and we expect to prove that they had less than a single watchman watching those explosives and they say they had eight; and the question for you to determine will be, What human watching, then, did they have over those explosives in the yard?

Now, one other question and I am done. Much—some—of our testimony we are obliged to take from the ranks of the enemy. We had no men there watching this, watching for evidence. We have got to go into the enemy's camp and take men who are in their employ and who have been in their employ, and, therefore, you will naturally watch and you will see whether those men are frank in what they say.

Now, gentlemen, this is our case. We cannot prove it all at once. We prove it fact by fact. We ask you to patiently listen to the evidence and we believe that in conclusion we will be justified in asking you, and we shall ask you for a verdict for the plaintiffs on the ground that the railroad company did fail in the duty which it owed in connection with the guarding and watching of that yard.

Mr. Hobart. If your Honor please, and gentlemen of the jury: We hear a great deal these days about what is called the Red Terror, the modern name of which is Bolshevism, which is spreading through Europe and which

is a disregard of all law and order, and disobedience of constituted authority. As we read of those things which are going on in that land over there we should thank God and take courage we live in a land where the laws must be obeyed, by railroad companies as well as by insurance companies or anybody else. There are certain laws of the land which we must all obey, small or great, rich or poor, big or little, and those laws of the land are the laws which are established by our constituted authorities, and when they have been established they are the law and the only law which controls the particular circumstances.

So we assert, in the first place, in answer to this so-called indictment, that in the management of these cars, in the handling of these explosives, in the transfer and shipment of these explosives we complied in every particular with the law of the land that is applicable to such form of business. We have a legislative body known as the Congress of the United States, and Congress, long before this catastrophe, had announced certain rules, certain laws, certain regulations under which the common carriers, such as the defendant in this case was and is, not only had the right to carry articles of this kind, but they were under the legal duty of so carrying them, and if they failed to carry them they would be subject to suit for failing to carry out their legal duty; and so we say in the first place that the articles that were at the Black Tom terminal at the time of these explosions were there, not by our choice, but because by law we were compelled to have them there.

Now, this same law and the same regulations made under it also prescribe how they shall be carried, and what shall be done with them, and we say that we complied with those laws and rules in every small particular, with regard to the manner of shipping the goods, with regard to the manner of loading them, with regard to the manner of packing them, with regard to the manner of marking

them, with regard to the manner of holding them temporarily.

This was not a storage yard as has been suggested, not at all. Such guarding as there was in that yard was merely incidental to the further moving of the goods onto barges or lighters.

Now, this company, as I said, was a common carrier. It has hundreds of connecting points. It runs through several different states. It connects with practically all the large railroad systems of the United States. As a common carrier it is obliged to receive and carry when the proper charges are offered every kind of merchandise that is offered except those which are specifically excluded, and they do not include any of these articles which are in question in this case.

As you perhaps know, the principal terminal points of the company are at Jersey City, of which Black Tom Island terminal is merely one of two or three, and Buffalo and Niagara Falls, with various connecting points in New Jersey, New York and Pennsylvania.

Now, the Black Tom Island terminal, as it has been called, was used principally—indeed, I may say oxclusively for the delivery of the freight. No passenger lines ran there at all. It was, as has been described to you, a narrow neck of land running into New York harbor far removed—literally several miles removed from the ordinary business and residential sections of the city, as far removed as it was possible to have such a terminal anywhere in New York harbor. This terminal, at the outer end thereof, stretching toward Liberty Island, was divided into a number of tracks, some twenty or perhaps thirty tracks, the exact number will appear on the maps and in the evidence that will be produced before you. There is the pier which they call the North Pier. Now, in order to increase the safety and the method of handling these goods—they would have to take and they would have to transfer from time to time, whenever the

consignee was ready for them—the company some months before this catastrophe planned to have the goods transferred on this one pier only, rather than scatter the cars throughout the yard; and as a matter of convenience for that purpose, the tracks which immediately adjoined the track leading to the North Pier would be used for the temporary placing of cars that were not yet ready to be transferred or trans-shipped, and so it happened that on the night of this accident there were in the yard and on the North Pier the cars to which counsel for the plaintiff has referred. On those points we have no disagreement. It is all a matter of record, and we have already stated to counsel and it will be shown in the evidence in the case just what our records show as to the cars that were there and where they were and what they contained.

Now, the course of business of handling that kind of merchandise is rather important for you to understand right at the beginning. At that point there are no delivery tracks in the sense that you can drive your wagon or automobile up to the freight cars and take delivery of the goods that may be consigned to you—nothing of that kind. There are delivery sections of the yard further down, but not anywhere near the North Pier. The method of handling the business was this: The cars that were to be unloaded would be sent out to the North Pier, a pier some four or five hundred feet long, and when they arrived on the North Pier then they would be unloaded directly from that pier directly to barges or lighters, and in turn the barges or lighters would be towed, or in some cases perhaps by their own power, would be taken down to the loading places fixed by the United States Harbor Regulations, where they were in turn transferred to ships for export or wherever they happened to be going, or transferred to other railroads, as the case might be.

Now, the management in the handling of those cars containing such articles—I mean the handling of them with regard to the transfer and trans-shipment—was no part of the railroad's business. The railroad had nothing whatever to do with that. The duty of the railroad was finished as soon as those cars were in the proper place for unloading in that terminal. Indeed there may be a legal question as to whether their duty was not finished when they had sent notice to the consignee of the arrival of the various cars; but that is a matter which perhaps will take further discussion later in the case. But this point that I now want to impress upon you so that you will understand the drift of the testimony in that connection is that the railroad did not transfer these goods to their own barges, had nothing whatever to do with them; they were all handled over by the consignees or by lighterage, because the towing companies act as agent for the consignees, whoever they might be; and they had full charge of the unloading and transfer of those articles, and when these goods arrived in the yard there was a system by which the railroad company or its agents would notify, usually by telephone, sometimes by mail, the consignee of the fact that certain cars had come, which were said to contain certain articles, among them—call them high explosives or whatever you will, whatever they might be; whatever the waybill showed. Then these cars in turn would be taken out on the North Pier and remain there for unloading at whatever time the consignees or their representatives might designate.

Now, there were times—and indeed on this occasion—when it was impossible to tell with any degree of certainty just how many carloads—this was all handled in carload lots, by the way—there were times when it was impossible to tell how many carloads could be made use of on any one particular day, and that is due to the fact that the sailing time of the various vessels to which they might be consigned was more or less uncertain, and

due to the fact that in some—in most cases—these various articles would be the last to be loaded on the vessel, and their sailing time would depend to some extent—to a very large extent—upon when they had their cargo on board. So that there was no way of approximating what might be termed a fixed schedule. The matter had to be handled in the most convenient way under those peculiar circumstances and when the companies were ready to unload the cars they would send word down and the cars would be immediately taken down to the North Pier, or somewhere on the North Pier, where they were unloaded, or, at any rate, ready to be unloaded.

Another point that is important for you to notice in connection with this matter of unloading, is that it was all done during the day time. There was no night work allowed there. All the transferring or trans-shipping had to be done during the day and was in fact done during the day, and all done by people with whom the railroad had no connection whatever either directly or indirectly.

Now, it is quite true that on the occasion of this catastrophe there were, as already has been stated to you, two explosions, describing them as what might be called bulk explosions. There were innumerable smaller explosions, literally hundreds, of some of the shells, or of some other of the smaller particles of them, of the contents of the cars—mostly shells, probably, but there were two explosions that might be described as the big explosions.

Counsel for the plaintiff seems very confident as to where the first explosion occurred. We challenge him to prove it. We are very much interested in that ourselves. We would like to know. We have been trying for many months to find out where it occurred. We agree with him that it was the first explosion that did the damage to the plaintiff in this action, because that was the explosion that knocked the top off the warehouses and knocked down some of their walls, and per-

haps set fire to some of them; and if we could show where that took place we could do considerably more than we have thus far been able to do. There was another explosion, and there is no doubt that one of the explosions was on the water. Now, the railroad company had nothing whatever to do with any boats or any barges or any articles that may have been in boats or barges on the water, and if you find from the evidence in this case that the explosion that damaged these plaintiffs was on the water, why, then we shall urge upon you that that is the end of the matter so far as this defendant is concerned, because we had nothing to do with that.

Now, they have limited their allegations of negligence to two specific charges. It is hardly accurate, let me say before I take them up in detail—It is hardly accurate to say that the sole question for you in this case is, Did the company fail in its duty to the plaintiff? That is not the question. The question is, Did the company fail in any of the particular matters which are either charged in the complaint or which are proven before you? Because we are called upon to meet only those things that are specifically alleged against us in the complaint, and concerning which proof has been produced in support.

Now, in discussing those points which have been specifically named in the complaint there are certain things that you ought to be informed of and the nature of our proofs before the case begins, and that is the object, of course, of this opening. They say, in the first place, that we failed to guard against incendiary fires and that we failed to prevent or guard against accidental fires. I challenge them to prove whether this was incendiary or not. I listened with great interest to see whether or not that was a part of the opening but you will notice that the counsel limited his statement in that regard to a statement of the facts, as he put it, that the fire started in the yard, and that it started because we failed to guard against either incendiary or accidental fires. We would

like to know whether it was incendiary. If he has any proof on it we challenge him to produce it. But we deny, as a matter of fact, that there was any negligence on the part of the company with respect to guarding against either incendiary or accidental fires.

You have to remember the situation. It is quite true that there were eight watchmen there, and they were on the job that night, and they were on duty that night, and they were punching buttons that night, that being part of their job, or some of it, to send in word by means of a so-called detector system by which there might be a record kept of just where they were at every hour—they were obliged to punch them every once or so often, I think it was every hour. They were on duty; they were watching, and they did not see this fire until it was too late to put it out or to prevent its further spreading—wherever it started.

Now, then, it is claimed—before I take up the second point, let me urge upon you further that you must remember that this is not a place where anybody that is strolling down the street can walk into at his convenience and do whatever he likes in there. It is a railroad yard with a gate at one end; it is far removed from the ordinary populous center of the city; no one can get to it except by two ways—one by means of a boat through New York harbor, and the other by means of approaching this gate, passing the watchmen stationed at that point, and proceeding on down into the yard. At night, after the work for the day has ceased it is what is called a dead yard. That means that after dark, or after a certain hour in the evening, there is no movement of trains of any kind, no cars were shifted or shunted after a certain early hour in the evening. The yard was absolutely dead. There were no employees there except the watchmen. Hence, of course, there was no danger from any sparks from engines or anything of that kind.

Defendant's Opening.

Now, we deny as a matter of fact that there was any failure to properly guard that yard under the circumstances as existed there that night.

Then they say in the next place that we failed to provide proper apparatus. Now, the fact of the matter is that the company not only had the ordinary protection from the city fire department, with several mains of the city running into the yard and connected up with the standard hydrants, but they had gone much further and they had provided a fire system of their own, partly in the warehouses, partly in the yard. They had nearly four thousand feet of hose on various hose carts in different parts of the yard, available at any time if there had been an opportunity to make a prompt use of them. They had special tanks, three separate and distinct tanks, one contained a hundred thousand gallons of water, and another fifty—each of the others, I think, contained fifty. In addition to all that they had their own separate and distinct system of pumps. They had their own separate and distinct supply connected with the salt water of the harbor which could be put into operation under proper conditions. So they had done far more than merely rest content with the supply that was furnished by the city and with the hydrants which were connected with that supply. They had all kinds of fire protection. The details of that will take several hours to prove to you or explain to you and we shall undertake to do that, if necessary, so that you may understand that so far as the fire apparatus is concerned there is absolutely no basis for the charge that this company did not exercise the measure of care that the law requires of it in that regard.

Now, there are one or two other things that I want to speak of that are incidental to some of the things that I have already mentioned, which it is important for us to have in mind.

Defendant's Opening.

When we start out with the statement that on the night of this explosion there were four hundred and fifty thousand pounds of high explosives it sounds very dangerous. As a matter of fact there were four hundred and fifty thousand pounds. We do not question that. But do not get the idea in your head that this was some sort of dynamite or some sort of material just floating around loose in the car like coal or wood. Nothing of that kind. This so-called high explosive was carefully packed by the consignors, carefully observed by inspectors before it was allowed to start on its journey, carefully watched over all of the time as it proceeded; placed in small boxes containing a certain number of pounds, and all strictly in accordance with the Act of Congress and the regulations to which I have already called your attention. So that the mere fact of having four hundred and fifty thousand pounds of high explosives, or any other kind of explosives which it is permissible to carry, has no bearing on the accident at all, because we had to carry it, providing it was properly packed and marked, and it was in this case.

Then the inference is sought to be thrown out to you that the railroad company or its agents knew that this was very high explosive, and very dangerous, and therefore we are—it is sought to charge us with some unnecessary or some excessive degree of care in regard to it. That is not the fact. We know nothing whatever about those explosives, except what appears in the waybills, or what appears on the placard. They do not tell us what it is, they do not say just what material it is, nothing of the kind. They have these placards, one marked "Inflammable," and the other marked "Explosives" or "High Explosives"—I think it is marked "Explosives." But the explosive placard applies to a variety of kinds of explosives. And bear in mind these placards are all fixed by the Act of Congress and the regulations, not by us, and the only information we have about these cars—

they are all sealed when they are delivered to us—the only information we have about them is that they contain—are said to contain what are called high explosives—but that applies to T N T, it applies to ammunition for cannon, and maybe it applies to some other things. Those are the only two in question in this case, as high as high explosives are contained.

Now, bear in mind this, that the only difference between high explosives and any other kind of explosives—this is important—it is not any more dangerous to carry one than the other. The only difference is that the high will go off by what is called detonation, something violent has to strike it, and any other kind of explosives, that is merely a trade name as it were—any other kind of explosive will go off if it acquires a sufficient degree of heat, it will go off by combustion, as it might be expressed.

Now, reference has been made also to some cars of some nitro-cellulose—I believe the ordinary name of that is gun-cotton—as if that were some crime to have some gun-cotton there, but the fact of the matter is that the gun-cotton did not explode at all, nothing happened to that, except it burned up in the fire—did not even explode after it got afire, and that is the fact with regard to some of these cars of these so-called high explosives, they did not explode either, some of them just burned up.

So that to say that merely because we had a certain quantity—as the inference is sought to be called to your attention—merely because we had a certain quantity of so-called high explosives, we therefore were obliged to take some extraordinary method of guarding it other than that specified by the Act of Congress and by the men appointed to determine the rules and regulations under which that very thing shall be carried; that, I say, is going beyond what the law requires of us. So the thing in a nutshell as far as the defendant is concerned gets down to this: We say that we complied with the law, we did everything that the law requires of us. We did not

use these cars for storage purposes or for holding these cars for a moment longer than it was absolutely necessary, in order to comply with the directions and orders of the consignees as to where they wanted them and when they wanted them. We know nothing at all about the value of this sugar. Of course, that is a matter that the plaintiffs will know about. We have nothing to say about that because we know nothing about it. But we do say that as far as these charges of negligence are concerned we disallow them most emphatically. We say that we did all that the law required; we measured up strictly to the measure of duty which the law imposed upon us in carrying and handling these articles. We had to carry it whether we wanted to or not. We hadn't any choice in the matter, and when we carried them we complied strictly with the law which our representatives have announced shall control any business of that kind, and if we did comply with the law, then, as I said at the beginning, this is a government of law; we stand by the law, and we must decide this case according to the law and nothing else.

SECOND DAY.

MARCH 26, 1919.

PLAINTIFF'S TESTIMONY.

Mr. Campbell. If the Court please, we have asked the defendant to produce the lease of June, 1913, from the National Storage Company to the Lehigh Valley Railroad, and the map which constitutes part of that lease.

Mr. Garrison. Have you got that? Was it done by written notice?

Mr. Campbell. Certainly.

Mr. Garrison. I guess Mr. Boles has it. He is before—

Mr. Campbell. I have a copy. Let me have the maps, please, Mr. Whipp. Where is the map? I want the map.

(Map placed on easel.)

Mr. Campbell. Mr. Garrison, here are copies of the lease and the map. Will you take a look at them?

Mr. Garrison. No.

Mr. Hobart. Are those the ones that we furnished some time ago?

Mr. Campbell. Same ones you furnished.

Mr. Garrison. Put them in.

Mr. Campbell. Offer the lease.

(Paper marked Exhibit P. 1.)

Mr. Campbell. Shall we have the map marked also?

(Map marked Exhibit P. 2.)

Mr. Campbell. There are two maps here.

(Map marked Exhibit P. 2a.)

Mr. Campbell. This paper, gentlemen, which has been offered in evidence, is a lease dated June 24, 1913, from the National Storage Company, a corporation of the State of New Jersey, to the Lehigh Valley Railroad. It leases to the Lehigh Valley Railroad Company what I

don't think the defendant will take exception to, the entire Black Tom Island Peninsula, with the exception of Stores A, E, F, G, H, I, J, L, S, M, O, P, Q and R, and it also provides that the Railroad Company may use for its own purposes the ground floor of Stores M and O.

Mr. Garrison. That is to the Lehigh of New Jersey?

Mr. Campbell. Lehigh Railroad Company of New Jersey.

Mr. Garrison. Not this defendant.

Mr. Campbell. Not this defendant. And I have asked you to produce the assignments from the Lehigh of New Jersey to this defendant.

Mr. Garrison. I assume Mr. Boles has it. As I told you he is detained before the United States War Corporation and cannot get here.

Mr. Campbell. Is there any question raised but what this lease was assigned to this defendant?

Mr. Garrison. There is none. We will produce it.

Mr. Campbell. You will produce it?

Mr. Garrison. We will produce the document when Mr. Boles gets here. If you have a copy of that put it right in.

Mr. Campbell. I haven't a copy of the assignment with them. Now, gentlemen, this—where can we put this.

(Map placed on easel.)

This is a map attached to the lease showing the property leased to the Lehigh Valley Railroad Company of New Jersey, and in turn leased by them or assigned by them to this defendant. Those white lines are railroad tracks. Coming down past these buildings which are warehouses—there are three great warehouse structures which are in turn divided into different stores,—so where you see "A, B, C, D, E and F" they are all separate stores in the one building; then there comes the next building, with "G, H, I, J, L, F," which are

separate warehouses in the next building, the second building; and then you finally come to the third building, "N, O, P, Q, R," which are separate stores in the third building. Now these white lines, as they get down toward the end spread out and represent railroad tracks. This is a pier toward the south. This is another pier. The first one I pointed out is known as Pier 6—Pier 5. Now this is water here, and here. The other details will be shown you later. North, gentlemen, is in that direction; south is in this direction. The north line is there on this map. The north line is in that direction. You will have to bear that in mind in listening to the testimony.

Mr. Skinner. May we speak of that as being easterly?

Mr. Campbell. Generally we speak of that as being easterly, and that means to the north and that to the south.

This second map, which is printed P. 2a, simply a strip which connects up at the extreme westerly end, and which, so far as we are concerned, we think there is no significance to the situation. Now this map may be pinned up there.

I will ask Mr. Davidson to take the stand.

ROBERT W. DAVIDSON, sworn.

Direct examination by Mr. Campbell.

Q What is your business? A We are sugar commission merchants.

Q What is the name of the business? A B. H. Howell, Son and Company.

Q And is it a corporation or a co-partnership? A Co-partnership.

Q Who composed the firm on ~~June~~ July 30, 1916? A Frederick H. Howell, James H. Post, Thomas A. Howell.

Q These are the gentlemen who are plaintiffs in this action? A Yes.

Robert W. Davidson, direct.

Q What is your connection with that firm? A Assistant cashier.

Q Did the firm of B. H. Howell and Company have to your knowledge sugar in the National Stores Company the 30th day of July, 1916? A They did.

Q Is the paper I show you a warehouse receipt which they obtained from the National Storage Company? A It is.

Mr. Campbell. I offer this receipt in evidence.

(Paper marked P. 3.)

Mr. Campbell. This, gentlemen, is a warehouse receipt from the National Storage Company, National Docks Stores, dated March 13, 1916, acknowledging that they have received in stores at National Docks from S. S. Guildhall—that means from the ship called the Guildhall—25,378 bags sugar and 51 bags sweepings as per the back of this receipt, subject to the order of B. H. Howell, Son and Company. The endorsement on the back shows that there were in store E 3870 bags; in store G 3096 bags; in store H 3210; in store N 5050, and in store O 10,152 bags —a total of 25,378 bags, and that there were in store G in addition 5 bags of sweepings—in store H one bag of sweepings, in store N 15 bags of sweepings, and in store O 30 bags of sweepings, a total of 51 bags of sweepings. And the certificate also contains the endorsement, "Of which some bags were torn and mended, some stained, and 622 damaged, of which 120 of these damaged ones were in store O and 502 in store N." It also contains the statement that there were released on 9/8/16—which I take it to be the 8th day of August, 1916—

The Witness. September.

Mr. Campbell. September—from store E, 3870 bags of sugar.

Q Mr. Davidson, was any of that sugar recovered, received by your firm? A Only the 3870 bags.

Q Was that damaged or undamaged? A Part of it was damaged.

Q The rest of the sugar was totally destroyed? A It was.

Mr. Garrison. What was the amount of salvage?

Mr. Campbell. 3870.

Q Before that sugar went into the warehouse was it weighed? A Yes.

Q Who weighed it? A The seller and the buyer.

Q Who did the weighing? A Oh! For us, James F. Johnson & Company.

Q You were the buyers, were you? A Yes.

Q Who were James F. Johnson and Company? A Weighers; city weighers.

Q Public weighers? A Yes.

Q Government weighers? A No.

Q Before the sugar goes into the warehouse is it weighed by government authorities? A It is.

Q Was it weighed at this time by government authorities? A It was.

Q Have you any certificates or papers showing it was weighed by government or other authorities? A Yes, sir.

Q Have you them here? A Yes.

Q Will you let me have them? Have you the certificates from the weighers? A I have the certificate from the government.

Q From the government? A Of the weight.

Q This paper which you produce, which you say is the government certificate, contains a statement of the weight? A Yes.

Q Does it contain a statement of the warehouse into which it went? A No, sir.

Q It contains a statement of the total weight? A Yes.

By the Court.

Q Did you receive that at the time the goods were put into the warehouse? A Yes.

Q And it was a part of that transaction? A Practically, yes.

Mr. Campbell. I offer it.

(Paper marked P. 4.)

Mr. Garrison. What do you call that paper?

The Witness. Government weight return, or a custom house return.

Mr. Garrison. Government weight return.

By Mr. Campbell.

Q Will you tell what the weight showed on this government weight return? A The government weight return shows 8,263,141 pounds gross; 64,026 pounds tare, and 8,199,115 pounds net.

Mr. Garrison. Just for my information: what does tare mean under those circumstances?

The Witness. The bags.

Mr. Garrison. The weight of the bags is deducted from the gross weight of the sugar and the net the difference?

The Witness. Yes; that is what they charge us the duty on. Now, in liquidation these weights are slightly changed; it is only a few pounds, so it is not significant.

Q Have you any documents showing how many pounds went into the respective warehouses?

Mr. Garrison. I thought you gave us that.

A You will have that on those bills you have.

Q How do you know how many pounds of sugar went into specific warehouses? A We know the total weight

of the cargo, the number of bags in each store, and we average it.

By the Court.

Q What is the process by which you average? How do you indicate what the bag weighs? A Usually a bag weighs in the neighborhood of 320 pounds, but we take the average from the full weight of the cargo, dividing by the number of bags received.

Q Divide it by the number of bags? A Exactly.

By Mr. Campbell.

Q Will you tell us the number of pounds in each warehouse?

The Court. You can tell it yourself.

Mr. Garrison. Isn't that a mere matter of multiplying 3870 by 320?

The Court. You just divide the number of bags in each warehouse into the number of bags, the gross number of bags that were weighed in.

The Witness. That is the idea.

Q Have you a record there of the number of bags in each warehouse? A No; I haven't it here. You have the records there.

Mr. Garrison. Your last question is directed to the number of pounds in each warehouse, isn't it?

Q Did you get the number of bags?

Mr. Garrison. You have the number of bags to start with.

Mr. Campbell. Oh! On the warehouse receipt.

The Witness. That is it.

Q In determining the number of pounds in each warehouse, how did you say it is done? A By average.

Mr. Garrison. What average did you take here?

A Divide the total weight of the cargo by the total number of the bags put in the store.

Mr. Garrison. What was that figure when you arrived at it?

A You would have to figure the weight per bag and multiply that by the number of bags in each store.

Mr. Garrison. What figure did you arrive at as the weight of your bag in this case?

A I do not recollect. I can soon figure it.

Mr. Campbell. We can all figure it.

A That is simply a question of mathematics. That is all.

Q Will you tell us the number of pounds of sugar in each of the warehouses according to your calculation in the manner which you have described? A In store G, 1,000,658 pounds; store H, 1,037,504 pounds; store N, 1,632,211 pounds; store O, 3,281,228 pounds.

Mr. Garrison. This is net, is it?

A Yes. Sugar. Store E seems to be mislaid for a moment—Store E, 1,250,823 pounds.

Q Have you given us store O?

Mr. Garrison. I do not think you will find that those agree. I have deducted the other storehouses from the total and I do not get just the same result.

A Now, that is very possible. You see, 622 bags of damaged sugar did not weigh what the sound weight was. The marine insurance company reimbursed us for this loss which we have credited on our claim.

Q That we will bring out in a minute. Have you given us the number of pounds of sugar in warehouse O?

The Court. Yes; 3,281,228.

Q Do those weights you have mentioned correspond substantially with the certificates of the other weighers? A It did.

Q How is the quality of sugar determined? A By testing—the larioscope test.

Q Who is that done by? A The buyer, the weigher, and the New York Sugar Trade Laboratory; the buyer and the seller have a tester each and then both—and the New York Sugar Trade Laboratory also makes a test. They are independent of either.

Q Was that done in this case? A It was.

Q Have you certificates to that effect? A I have.

Q And what was the quality of the sugar as expressed in terms of the trade? A The average test for the cargo was 95.7311%.

Mr. Garrison. Has that a trade name—Grade A, or Grade B or something?

A No; it is Cuban centrifugal sugar, testing that percentage of purity.

Mr. Campbell. I will bring that out in a minute.

Mr. Garrison. All right.

Q Is the market value of sugar determined based on sugar of a certain degree of fineness? A Of course.

Q And what is that degree of fineness? A 96% for raw sugar.

Q That is when you have a market quotation for raw sugar that means sugar of 96 degrees test? A Correct.

Q Now this sugar you tested somewhat less than 96? A It did.

Q In determining the value of sugar testing more or less than 96, is there a regular addition or deduction which you make to or from the market price? A There is .04 of one cent less for anything testing under 96 down down to 94, and .025—for information—when it tests over 96. In this case it was under.

Q At what price of the market value of sugar have you calculated the value of this sugar? A My recollection is that we have it stored at about 5½ cents—I do not know what that—

Mr. Garrison. May we have that answer stricken out?

The Court. Yes; I will strike that out.

Q In your memoranda calculating the value of this sugar at this time? A Oh!

Q At what market price have you calculated the value of this sugar? A 5¼.

Mr. Collins. By "this time" do you mean July 30?

Mr. Campbell. Yes. I mean at the time of this casualty.

A 5¼.

Q You have calculated, therefore, what this sugar is worth at the rate of 5¼ cents? A Yes.

Q When you say sugar in the market is worth 5¼ cents, is there any custom that anything else is to be added to it? A Well, marine insurance.

Q In other words, by the custom of the business, there is always added to the quoted market price a certain fixed item for marine insurance; is that right? A Yes.

Q And what is that fraction you add for marine insurance? A .01575.

Q Decimal point 0 1 5 7 5? A Right.

Q Now, adding that decimal point to 5¼ cents gives you a certain fraction as the market value of sugar based on a 5¼ basis. What is it? A 5.26575.

Q In determining how much less than standard this sugar is worth you make a certain deduction from that, do you? A Based on the test.

Q And what deduction do you make for sugar testing the degree less than 96 which this sugar tested? A 010756.

Q Making the net result of the value of this sugar under the methods that you have calculated, what? A 5.254994.

Q Now, in computing your loss on this sugar, have you given credit for any sums? A We have.

Q What credit was that? A Collected from the Marine Insurance Company on the damaged sugar, of 622 bags.

Q Well, that was on account of the sweepings, was it? A No, sir.

Q It was not on account of the sweepings? A No, sir. There were several bags of sweepings out of the cargo. In store N there were—pardon me—in store N there were 502 bags of damaged sugar, upon which we gave credit of $352.27. This is a calculation of—

Q What you are talking about is credit you gave to the insurance companies? A Of course.

Q The insurance companies? A Certainly.

Q Now, have you any calculations showing what the valuation of this sugar was in the respective warehouses by the figures you have indicated to the Court and to the jury? A Yes, by adding them up.

Q Well, will you state it? State what they are in each warehouse? A Store G.

Mr. Garrison. If the Court please, I have understood heretofore that this witness who is assistant cashier, was merely doing some figuring. I did not understand that he qualified as knowing the value of sugar.

Mr. Campbell. I am not putting him on for that. I am assuming sugar was 5¼. I intend to bring that out by independent witnesses.

Mr. Garrison. That is what I thought, that you asked him the value.

Mr. Campbell. Well, I meant the computation.

Mr. Garrison. All right. I understand you mean computation.

Q Mr. Davidson, this marine insurance you speak of is marine insurance on the 622 bags which were damaged at the time they went in the store? A Yes.

Q That is it? A Yes.

Q Now, go ahead and answer the other question. Give us the figures, your computation of the value of that sugar and at each warehouse, based upon a market value of 5¼ cents? A You said something prior—pardon me—to the damaged sugar.

Mr. Collins. He has not finished with the damaged sugar.

Q What I asked you was, if this marine insurance you speak about was not the marine insurance you received with reference to the 622 bags of damaged sugar mentioned on the back of this warehouse receipt? A Yes, but—

Mr. Collins. Only part of it.

Q And that you gave credit for in making up this claim? A Yes, now you ask me what the value outside of that credit—

Q That is right? A Before the credit was taken.

Q No, after deducting the credit, give us the value? A $52,584.52, store G; store H, $54,520.77; store [redacted], $85,430.32; store O, $172,344.12.

Q A total of how much? A I am looking for store E first. Store E was $64,751—no, that is wrong; you must have another sheet there, Mr. Campbell.

Mr. Campbell. Well, I don't know if this is the memorandum you wish (handing paper to witness).

Q Excluding store E, Mr. Davidson, what is the total value you have given us in the other stores? A I haven't added that up.

Q Well, will you please add them up. Get the figures down, because we want to get the total? A Yes, sir. My calculation is $364,869.73.

Q That sum which you have just mentioned is the result of your computation of the value of the sugar in warehouses other than E, based upon a market value of 5¼ cents; is that right? A Yes, sir.

Q And that relates to the sugar that was absolutely destroyed? A Yes, sir.

Q Now, was there any damage—how much was the damage to this sugar in warehouse E? A A dollar damage—we figured $5,758.54.

Q The total damage to the sugar in warehouse E was $5,758.34? A $5,758.34.

Q Which added to the other figure makes a total damage of how much? A $370,638.07.

Q $370,628.07; is that what you make it? A That is the way I calculated just now from the figures here.

Q Now, how did you determine the damage to the sugar in warehouse E? A In taking it out there were 819 bags still sound, and 3,051 bags damaged. This was all weighed and tested. We calculate the sound value of the 3,870 bags at the sound weight and test, and then we calculate the 3,051 bags damaged at its weight and test, and the 819 bags at the sound weight and test, taking a total—, adding cooperage and taking the difference.

Q In that way, the damage to the sound bags in warehouse E was determined? A Yes.

Q Now, had your firm insured this sugar prior to the fire? A It did.

Q Now, are these policies which you have given me the policies which the Howell Company had in existence at that time? Have you a list of them, a record of them? A I have a record of it.

Q Well, will you put into the record the policies of insurance, giving the name of the company? A You don't want to get the policies?

Q What? A You don't want to read from that?

Q Well, whichever way you find most convenient. Which do you prefer? Which do you find most convenient? A Well, you might verify these as we go along. Then we know when we are through it is accurate.

Q Very good. A Store E—do you have them by stores?

Mr. Campbell. No, I have them by companies.

The Witness. Well, there is where we—

Q You do it your own way; that is the best way. You are so much— A All right, sir. In store E we have Globe & Rutgers insurance for $33,825; National, for $25,000—

Q National Insurance Company of Hartford? A Yes.

Q Yes? A Home, $2,000; London, $1,800; Aetna, $4,500. In store G, Globe & Rutgers, $29,325; National, $32,675; Home, $1,500; London, $1,600; Aetna, $3,500. Store H, Home, $35,800; Sun, $13,000; Home again, $1,500; London, $1,600; Aetna, $4,000. Store N, Hartford, $50,000; Globe & Rutgers, $36,750; Home, $2,500; London, $2,200; Aetna, $6,000. Store O, Home, $44,200; B. & N.—I don't quite know what that is— I have a memorandum here, M. B. & N.; I am not quite sure what insurance company that may mean.

Q North British & Mercantile? A Yes, that is it.

Q North British & Mercantile? A $50,000; Hartford, $50,000—

Q Well, North British & Mercantile, $50,000? A Yes, sir.

Q Yes? A Hartford, $50,000; Globe & Rutgers, $10,100; Home, $4,500; London, $5,125; Aetna, $12,000.

Q Is that the end of your record? A No, sir. We had sprinkler insurance. Does that have anything to do with this?

Q No; that has not anything to do. Now, is that the end, Mr. Davidson? A Well, I am not positive. You had those policies, so I had not a chance to compare them with the books.

Q Now, are these policies which I show you the policies which were in the possession of B. H. Howell, Son & Co. on this date? A They were.

Mr. Campbell. I offer these policies in evidence.

Mr. Garrison. Are they all standard clauses?

Mr. Campbell. They have all standard clauses.

Mr. Garrison. Why can't we agree that one go in, and that the amounts will vary as they are testified to by the witnesses? If there is any different clause I would like to have you offer one of each class.

Mr. Campbell. I understand there may be riders which may not be in the same language, but I do not understand it makes any difference.

Mr. Garrison. Not to us. The standard clause is all we care about. I think we can arrange this out of court.

Mr. Campbell. I think we can save time by arranging it out of court.

The Court. All right.

Mr. Campbell. Very good. There is no question.

Q Now, Mr. Davidson, will you give us the amounts that were paid to you by the several insurance companies? State the amounts that were paid to you by each of the insurance companies? A Well, I haven't got a record showing our receipt of that by insurance companies.

Q You have not?

Mr. Garrison. We can work that out.

Robert W. Davidson, cross.

Mr. Campbell. Is there any objection if I read into the record here these amounts and then we can go into it?

Mr. Garrison. No objection at all.

Mr. Campbell. Paid by the Hartford Fire Insurance Company, $85,594.07; by the Home Insurance Company, $76,891.78; by the Globe & Rutgers Fire Insurance Company, $54,091.17; by the National Fire Insurance Company of Hartford, $24,060.45; by the Aetna Insurance Company, $21,561.64; by the North British & Mercantile Company, $42,859.48; by the Sun Insurance office, $11,094.34; by the London Assurance Corporation, $8,866.44; a total of $325,-019.37.

Cross examination by Mr. Garrison.

Q How much did you say was sound after the fire, or after the explosion in warehouse E? A 819 bags.

Q At what price were those 819 bags calculated? A We have that calculated at 5.17674.

Q Give me that again? A 5.17674.

Q Now, is that the same price at which you calculated the contents of warehouse G, for instance? A Evidently not, I didn't make up this bill personally.

Q Why not? Can you tell us why not? Can you tell us why you charged us more for sound sugar that you got from one place than you allowed us for damaged sugar that you got in another place? A Well, this was taken out in September.

Q Well, it was taken out after the fire and explosion, wasn't it? A Yes, but it wasn't delivered until September.

Q And when did you calculate the other, as of what date? A It must have been the day following the fire.

Q I did not catch that? A The day following the fire, I presume.

Robert W. Davidson, re-direct.

Q Monday, I presume, because the fire was Sunday. You mean on Monday? A Monday, the day following.

Q Well, you can't give any other explanation as to why there was a different allowance made to us for the sugar that was sound than was charged against us for the sugar that you lost? A I can't this morning, but I think—

Q What is that? A I cannot this morning until I verify my records.

Q All right, sir. If you can't, you can't.

Mr. Garrison. I haven't any further questions now.

Re-direct examination by Mr. Campbell.

Q Mr. Davidson, I do not think you understand. When was this sugar taken out of the warehouse? A In September.

Q In September. Now, at that time what was the value of the sound sugar?

Mr. Garrison. He does not know.

A I haven't the records here to give that to me. I was not prepared for that question.

Q Will you prepare a computation showing the figures that Judge Garrison has asked for? A All right.

Q Will you prepare that? A Yes.

Q I don't mean now; I mean come back later. A I know what you mean.

Mr. Campbell. Very good. Any more, Judge?

Mr. Garrison. No; that is all.

(Witness excused.)

HERBERT S. CONNELL, sworn.

Direct examination by Mr. Campbell.

Q What is your business, Mr. Connell? A Brokerage in raw sugar.

Q How long have you been in that business? A About twenty-nine years.

Q How is the market for raw sugar made? A By sales in the open market between the—the actual sugar.

Q Are those sales reported; do they get to the knowledge of the men in the trade? A Yes.

Q How? A Why, it is often the sales are reported by brokers in their daily reports, usually so reported; sometimes sales may be made between an owner of sugar and the refiner, not through a broker; in such cases the sales are often confirmed by the refiners or by the merchant seller.

Q Are the brokers constantly mixing around the market? A Yes, they are.

Q And in that way you get the information? A Exchanging information about sales, and so forth.

Q Now was there any trading done on Saturday, the 29th day of June?

Mr. Garrison. If you are going to ask him about specific prices I would like to ask him a question or two.

Cross examination by Mr. Garrison.

Q Mr. Connell, you spoke about these prices that the brokers made sales or bought sugar having been reported. Reported to whom? Is there a sugar exchange? A There is a sugar exchange, yes; but the exchange quotations are not the basis of the legitimate market.

Q Yes. What are the basis of the legitimate market? A The sales which establish the legitimate market are made—are openly reported on the street, reported by

brokers to their sellers and quoted in market reports issued by brokers and statistical papers issued by sugar—recognized authorities, and those are taken as the basis of the actual and official market of quotations.

Q Your sugar trade journals come out periodically? A They come out periodically.

Q You do not receive them from day to day? A No.

Q What is the daily thing that keeps you— A The brokers' daily market reports are regarded as official.

Q Are they written down so that they pass from hand to hand, in writing? A Yes; they are mostly private reports, issued by each individual broker to their customers, but they are also issued by the brokers as a matter of courtesy to the refiners and are kept on file.

Q And each broker that is in this business reports all of the sales that he knows of to the refiner, or only those he makes himself? A All the sales that he obtains information about—we exchange information among the brokers.

Q Is there some one place where buying and selling of sugar is done, like there is a stock exchange? A Well, only on the sugar exchange. These sales are not made on exchange. No, there is no one place, we sell at various refiners.

Q These sales that are not made on the sugar exchange, tell us how they are made? Are they in some one room or each other's offices? A Each individual broker receives from his customers a list at the opening of the market or during the course of business of such sugar as he has to sell, and those offerings the broker in turn puts before the various refiners or such refiners as he thinks most likely to be interested in them.

Q How does he get it before the refiner? A Personally. Goes to the refiner's office and sees the buyer for that refiner and gives him a list of his offerings.

Q Do you have a set price from the seller below which you won't take a bid? A Yes, we always have—well, we

have a limit below which we cannot sell without consultation with sellers, but we are often allowed to get a counter bid and submit those.

Q You report those back to your immediate principal? A Yes, sir.

Q And then you also report those around to the different refiners? A I usually put a list of our offerings before most of the refiners. At times we may know that certain refiners are most interested in a particular position.

Q We are talking about sales? A Our sales are reported generally to all the refiners.

Q And they keep them on file? A Yes.

Q And do you keep a record yourself of the daily sales? A Yes, we do.

Q That is all.

Re-direct examination by Mr. Campbell.

Q Now, was there any trading done on Saturday, July 29, 1916? A There was not. The market was closed on that day.

Q In other words, that was a holiday, was it? A In the sugar trade in the summer months, it was customary for both the buying department of the refiners and the brokers' offices who offer for the sellers to be closed.

Q There was no market on Sunday, July 30th? A No, there was not.

Q What was the market on Monday morning, July 31? A The market on Monday morning, July 31, was 5¼ cents for 96 test—cost and freight for 96 test, centrifugal sugar.

Q The quotation is given as 5¼ cents c and f? A Yes.

Q What does c and f mean? A It means practically f. o. b. or free on board, value of that sugar with the freight added.

Q Now, by custom is there anything in reference to marine insurance? A If the marine insurance has been paid by the seller, as is quite often the case, that is in turn added, that is added to the price, and refunded by the buyer.

Q You heard Mr. Davidson testify the extent and the amount of the marine insurance charged? A I did. It varies in actual figures according to the price of the sugar. It is usually a percentage rate based on the value of the sugar.

Q He gave a fraction which I don't remember. A Which I suppose was the insurance figured on the actual value of that sugar—actual f. o. b. price on that sugar.

Q That was the correct figure as you understood it? A I can't testify exactly as to that, but it was approximately correct.

Q Therefore, when you say that a market price of sugar for sugar tested 96 degrees, was 5¼ c and f, it adds up 5¼ plus a small fraction? A Yes.

Q Now was there an active market on Monday morning? A Yes, the market opened quite strong and active on Monday morning. The exchange quotations, which are not the basis of the legitimate market, but affect it to some degree, were considerably higher than for the close on Friday, and there were the general market was held at a higher price.

Q Can you give us an idea of the extent of the transactions on Monday morning? A My recollection is that there were about forty thousand bags of Cuba sugar sold to refiners on that morning, and also a moderate quantity, three to four thousand tons, of non-privileged or full duty sugars, at the same level.

Q When you say Cuban—this sugar that we are talking about of Howell, was Cuban sugar? A That was Cuban sugar.

Q So that you had a pretty active market on Monday, did you? A We did.

Q What did you say the market price was? A At 5¼ cents cost and freight, basis 96.

Q What was the last preceding market prior to Monday? A It was the sale made toward the close of the day on Friday, the 28th, of Cuban sugar in a nearby float position, at 5⅛ cents cost and freight.

Q Was that a large sale or a small sale? A About seven thousand bags—not a large sale as sales go.

Q As far as you know was that the only transaction on Friday? A As far as I recollect it was the only transaction on Friday.

Q Your witness, Mr. Garrison.

Re-cross examination by Mr. Garrison.

Q How do you recall with such particularity these figures, Mr. Connell? Of 1916? A Well, I have refreshed my mind recently on the actual figures, although I had a clear recollection of the market.

Q Have you the records that you have in your office that contains these figures? A I have.

Q You have them here with you? A I have, yes.

Q About what is an average sugar market? A You mean in the volume of business done?

Q Yes, number of bags sold. A Well, it varies a great deal; we sometimes sell several hundreds of thousands of bags in a day. I have known as much as a hundred thousands tons of sugar or more, which is seven hundred thousand bags, roughly, but sometimes the transactions are quite small. Seven thousand bags is a moderate transaction.

Q Well, is there some average? Of course, these very large numbers that you have mentioned are not the average? A No, they are not.

Q I suppose seven thousand bags was below the average? A That would be below the average. That would be hard to say, what average daily sales are, unless I figured them up by the total transactions of a day.

Q If a single broker has for sale, say twenty-five or thirty thousand bags, is it likely to affect the price at which he will sell them in contrast with having seven thousand, or six thousand, or five thousand bags? A That is often so, yes.

Q You are likely to get a higher price for the smaller amount than the larger? A Sometimes the other way. Depends on the condition of the market.

Q Why would a man be likely to get a larger price for a larger amount than for a smaller amount? A Because the refiner would not care if it—a question of some time paying an advance on the market. The refiner would not care to pay any advance on a small quantity of sugar. If he wanted sugar badly he would wait until he could get a full quantity before paying the higher price. A small quantity—you might find a little at an advance for that reason.

Q Weren't there some sales on Monday, July 31st, at 5⅛? A There were none that I have any recollection. I can say there were none.

Q Do you—have you looked through your records? Are you sure of that? A I have.

Q Have you got a sugar trade journal that will show the transactions with them? A Willard & Gray, Statistical Journal, I have that with me, yes.

Q I ask you to look at that and say whether or not there are some sales recorded on July 31, at some less figure than 5¼? A I may say before looking at it there may have been some sales of non-privileged sugar at a lower price, but at an equivalent price because of the fact that those sugars carried different charges in the way of duty.

Q Look first and testify about your explanation afterwards. A On July 31st I find reported in Willard & Gray's Statistical Journal of August 3rd, the first issued after that date, twenty thousand bags Cuban, prompt, basis 96 degrees, at 5¼ cents, cost and freight, to the American

and Federal; twenty thousand bags Cuban, August shipment, basis 96 degrees, at 5¼ cents, cost and freight, to the Federal; forty-three hundred tons San Domingo, and Surinams and Perus, prompt, and August shipment, basis 96 degrees, at 5⅛, c. and f., to the Federal, which is the equivalent of 5¼, cost and freight, for Cuban, there being a difference of approximately a quarter of a cent in the—I mean one-eighth of a cent in the duty. I may say the difference in duty was as I first started to say, about a quarter of a cent, but at times the San Domingo sugars sold at a slight premium, so that that is the price for San Domingo—I will have to correct myself—would be above the basis of 5¼, cost and freight, for Cuban; it would be an equivalent of about 5⅜ cents, cost and freight, for Cuban. The duty difference is about one-quarter.

Q Now, August 3, I notice three thousand seven hundred bags, Cuban in store, basis 96 per cent., at 5.75 cents, Howell. That means Howell is the purchaser? A Howell was the buyer.

Q 5.75 would be 5¾? A That would be 5¾ delivered, but only 4.73 cents in bond, which we will say, cost and and freight, or cost and insurance extra. The market had declined before the end of the week.

Q In store means what? A It means sugar is in warehouse.

Q What does the word prompt mean? A Prompt means sugars either on the dock, not yet stored, or in a nearby position to arrive.

Q August 1st, I notice twenty-one thousand bags, Cuban, prompt, basis 96 per cent., at $5\frac{3}{16}$ cents? A $5\frac{3}{16}$, cost and freight. The sale was made on August 1st, which was Tuesday, I think.

Re-direct examination by Mr. Campbell.

Q You were asked by counsel on the other side with reference to a smaller amount or larger amount. Wouldn't it all depend on the trend of the market? A Very fre-

quently, yes. The offerings are regulated very much by market conditions.

Q Whether a larger amount or smaller amount sold for more or less would depend on the market, wouldn't it? A Very much. On supply and demand conditions.

Q That is all.

Mr. Garrison. That is all.

EARLE KNOBLOCH, sworn.

Direct examination by Mr. Campbell.

Q What is your business, Mr. Knobloch? A Sugar broker.

Q You are a member of what firm? A The firm of Nevers & Callahan.

Q How long have you been in that business? A Oh, about twenty years, I guess.

Q Did the firm of Nevers & Callahan occupy any semi-official position with reference to quotations of sugar in July, 1916? A Why, yes, in reference to sale of—or semi-official quotations covering the price to be paid for Hawaiian sugars both to Western refiners and to New York refiners who had bought its sugars under contract.

Q In other words, as I understand it, you had been accepted by consent by parties to these big Hawaiian sugar contracts as arbiters or quoters of quotations for sugar? A Yes; the firm of Evers & Callahan have done that for quite a number of parties and we are still doing it.

Q Have you heard Mr. Connell testify with reference to how market is made in sugar? A Well, not altogether. I happened to be absent from the room at the time.

Q Well, how is the market for raw sugar made? A Why, the market is made by—made on transactions with the different brokers around the street to make every day —well, there is no exchange for sugar, for sale of sugar.

Q It is an open market? A Yes; we have an open market, an interchange between ourselves, brokers, buy-

ers, sellers and everybody, what transactions are doing, and keep the trend of the market in that way, so at the end of the day we know fairly accurately what has transpired in the sugar market during that day, and they so report the market.

Q Well, now, were you familiar with the market for sugar in July, 1916? A Yes.

Q There was no market on Saturday, was there; Saturday, July 29th? A Well, according to my records, there was no market on Saturday, July 29th.

Q That was a holiday? A That was a holiday, and most Saturdays in the summer time are holidays, and no business transacted.

Q Of course, there was none on Sunday? A None on Sunday.

Q What was the market for raw sugar on Monday—raw Cuban sugar? A You want duty paid price or cost and freight?

Q C. and f., degrees 96. A It is all right to refer to my records to be exact about it?

Q Yes, go ahead; what is the use of guessing. A What is the date?

The Court. July 31, 1916.

Q Monday, July 31, 1916. A Why, on that date we quoted a double market; that is, the 5⅛ basis, 96, cost and freight, for prompt sugars, and we were quoting 5¼ for August shipment. At that time there was a peculiar condition existed in the market. There was a great many nearby sugars offering and refiners appeared to be holding off and trying to "bear" the market, not buying these nearby sugars, but buying the sugars in a more distant position. They seemed to be amply supplied with nearbys, but bearing the market down on nearbys, they would get the distant positions at a different price. The sales that were reported on that day show forty thousand bags of Cubas, afloat, for prompt shipment, at 5¼.

Earle Knobloch, direct.

Q What was the market for sugar on the Friday before? A On Friday previous to that?

Q The Friday previous; that would be Friday, the 28th. A On Friday, the 28th, the market was quoted the same way—prompt—no, that is the 31st—wait a minute—28th—on the 28th there was one sale of Cubas, sixty-eight hundred bags sold at 5⅛, basis 96, cost and freight.

Q And that was the only sale on that day? A That was the only sale that day, and I sold that lot of sugar myself to Arbuckle. I remember the sale very distinctly—

Q That was the only sugar— A —because the market previous to that was 5¼, and we had to accept 5⅛ on this lot, as the market seemed to be just about to tumble.

Q That was the only transaction of that day?

Mr. Garrison. In Cubas, he says.

A In Cubas, yes.

Mr. Garrison. There were some others that were not Cubas? A Yes.

Mr. Garrison. (Aside.) What are you hunting for?

The Witness. I am trying to see what the market was.

Mr. Garrison. You are getting near it now—July 31. What are you trying to find, Friday, the 28th?

A What did he ask for?

Mr. Garrison. The market on the 28th.

A You asked for the market on the 28th?

Q Yes; I asked if there was any other transaction in Cubas except the one sale to Arbuckle. A On the 29th?

Q On the 28th, Friday. A No; that was the only transaction.

Q And there were no transactions at all on Saturday? A No; that was a holiday.

Mr. Campbell. Your witness, Judge.

Earle Knobloch, cross.

Cross examination by Mr. Garrison.

Q Now, on Monday, you say you were offering Cubas, prompt, at 5⅛? A That is Monday, July 31?

Q Yes; Monday, July 31. A No; not Monday; on Monday the market, although a sale had been made on Friday at 5⅛, cost and freight, the sale that I made, the offering appeared to be weak; on Monday, July 31, the market opened up rather strong and excited, due to the fact—due to the fact that it was supposed thirty to fifty thousand tons of sugar stored in the National Stores had been destroyed by an explosion over the week end; that might have been Sunday or Saturday; I do not know which.

Q You stated that you made offerings on Monday, July 31, at 5⅛, as I understand it, and explained— A No, I did not; not on Monday.

Q Look at this other record of yours. I think that is what you said before. Look at your record here for July 31 and tell me if you did not say you made offers for prompt at 5⅛. A No; we did not make offers. That is the way the market was quoted on July 31, based on this sale we made on the 28th.

Q You carefully explained to us that the refiners were trying to "bear" the market at that time and were buying far away sugar in preference to prompt sugar, and then you explained that prompt sugar was 5⅛ and far away sugar was 5¼; that was the situation on Monday, wasn't it? A No; on Monday the situation was altogether changed.

Q What date were you talking about when you told us that? A We were talking about on the 28th. The market on Friday, the 28th, was in that position; that is when I sold that lot of sugar at 5⅛, as against the previous market of 5¼.

Q What did you make offerings on the 31st—at what prices did you make offerings on the 31st for Cuban

Herbert S. Connell, recalled.

sugar, 96 test, prompt, on the 31st? A On the 31st I think I sold Cuban sugar—

Q I did not ask you what you sold. I asked at what you made offerings. A It is possible that I made offerings; at any rate, at nothing below 5¼.

Q Isn't it also possible you made them at 5⅛? A No, sir.

Q Didn't you testify before that you did? A No, sir; if I did it was an error.

Q All right; if it is an error, all right.

Re-direct examination by Mr. Campbell.

Q You had an active market on Monday at 5¼? A 5¼ actual market, and there was nothing offered below 5¼ at the opening.

Q That is all.

HERBERT S. CONNELL, recalled.

By Mr. Campbell.

Q You were asked by counsel how you happened to remember the market as far back as this at that time; didn't you and I have considerable consultation with reference to the sugar market? A Very shortly after the fire, yes.

Q And that is one of the things that impresses the market on your mind? A Yes; but the fact of the fire impressed it very clearly on my mind. I remembered the condition of the market at that time in all but the details.

By Mr. Garrison.

Q The fire made considerable difference in the price? A It affected the tendency of the market. It is very difficult to say what the market on the following week would have been, but inasmuch as there was only one small sale at the close on Friday it might have reacted to the normal level of 5¼, and might not.

Q Your inference is that the destruction of that much sugar made the price higher? A It confirmed the higher market, unquestionably.

EDGAR H. BOLES, sworn.

Direct examination by Mr. Campbell.

Q You are the general solicitor of the Lehigh Valley Railroad Company? A Well, since Federal control I am general counsel. Mr. Barrett is general solicitor.

Q But in 1916 you were general solicitor? A Yes, sir.

Q And your office was in the City of New York? A Yes.

Q And Mr. R. W. Barrett was assistant general solicitor, was he not, at that time? A Yes, sir.

Q I show you a letter and ask you if that is the signature of Mr. Barrett? A Why, I can recognize that as his signature, yes.

Q That is his signature? A If it is not it is the best imitation I ever saw.

Q That letter is addressed to me? A Yes.

Q And it bears what date? A August 28, 1916.

Q That letter refers to two plans, does it not? A You have read it more than I have—yes, two blueprints.

Q And would you say that the blueprints I now show you are the blueprints referred to in that letter? A No; I would not say that, because I do not know anything about it.

Q Where is Mr. Barrett? A I do not know—if he would tell me what he is getting at we might agree on it.

Mr. Campbell. These two blueprints were sent me by Mr. Barrett and I want to prove them.

The Witness. Mr. King.

Mr. Garrison. Have Mr. King come over here.

A You were asking where Mr. Barrett was. He has a relative who is dying in Philadelphia from an operation

yesterday and he had to go over there this morning. He will be here tomorrow. Mr. King, did you make those plans?

Mr. King. I did.

The Witness. Did you put the red lines here?

Mr. King. Yes.

Mr. Campbell. I understand no question is raised but that these two plans are the plans which accompanied this letter.

The Witness. Yes; I will admit it if that is what you want. I would like—that letter ought to go in because it says they are only approximately correct.

Mr. Campbell. We offer the letter in evidence.

(Letter marked in evidence P. 6. Note: There is no Exhibit P. 5.)

Mr. Campbell. We offer the plans.

(Plans marked P. 6-a and P. 6-b.)

Mr. Campbell. This letter is as follows:

"Lehigh Valley Railroad Company, Legal Department, 143 Liberty street, New York. August 28, 1916. F. B. Campbell, 54 Wall street. (That happens to be myself.) Dear Sir: Pursuant to our phone conversation on Friday, August 25, I am sending you herewith two blueprints showing tracks, buildings and car locations at our National Docks Terminal, Jersey City, on July 29, 1916, and August 1, 1916. I beg to call your special attention to the fact that the car locations outlined on both of these maps are only approximately correct. The number of cars shown on each siding, pier and track is correct, but neither the exact location nor the order in which the cars had been placed could be accurately determined. Very truly yours, R. W. Barrett, Assistant General Solicitor."

The plans referred to, the first of which is the plan marked P. 6-a, is this plan, and the map is marked "Lehigh Valley Railroad, New York Division; plan showing tracks, buildings and car locations as of July 29th east of pier No. 5, National Docks, Jersey City, New Jersey; office Division Engineer, Jersey City, New Jersey, August 7th, 1916."

The other plan—

The Court. Why waste time over this? The jury can read that.

Mr. Campbell. I thought I would just show it to the jury.

The Court. You can show it to them, but why waste time reading the whole contents of it to them? They can read it.

Mr. Campbell. The other plan referred to is the plan which you gentlemen see here. Those plans might be put up.

Q Mr. Boles, were these the plans furnished by the railroad company to the city authorities that were used before at the coroner's inquest over the death of Dough erty? A I cannot say. I think it is probable.

Q Were you there? A No, sir.

Q At this time did the Lehigh Valley maintain general offices in the City of New York? A Yes.

Q And what officers had offices there at this time? A The president, two vice-presidents, various officers of the traffic department, several officers in the operating department; I do not know how far down the list you want me to go.

Q Who were the officers at this time?

Mr. Garrison. I object as immaterial.

The Court. There may be some mystic purpose. If there is I would like to hear it. I do not know what it is myself.

Mr. Campbell. Do you wish me to state the purpose?

The Court. I would like to hear it. I do not see any relevancy myself.

Mr. Campbell. It bears this relevancy: There is in the complaint an allegation which bears on the second cause of action, that it was a matter of common knowledge and was known to the defendant that there were during a considerable time prior to this explosion reports—it was known in the community that there were reports of incendiarism in munition plants—

Now, I presume that that is a matter of which the Court will take judicial notice. We propose to substantiate that allegation by papers published in the City of New York, and it, therefore, is important or desirable to us, if we get to that point, to show that the railroad company had general offices in the City of New York at this time.

Mr. Garrison. But you are asking about a lot of individuals.

The Court. That does not enlighten me any. You simply ask who were the officers. He has told you further that they had officers there; they were in New York. What difference does it make who they were?

Mr. Campbell. Very well, I will leave it that way. That is all.

Mr. Garrison. That is all. Find out about that assignment.

By Mr. Campbell.

Q Have you got the assignment of the lease? A I have, a copy of it.

Q Copy of it. Will you let us have it, please? A Yes.

Q And have you got the original? A (Aside.) Will you bring me my bag over?

Q Have you the original of that map referred to in Colonel Dunn's report? A Yes. This is not simply an assignment, Mr. Campbell. The lease by the National Storage Company was made to the Lehigh Valley Railroad Company of New Jersey; subsequently the Board of Utilities of this state gave authority to the Lehigh Valley Railroad Company of New Jersey to lease all its property to the Lehigh Valley Company and Pennsylvania Company, and under that lease the Pennsylvania Company operated the New Jersey property. This is the agreement of lease which was approved by the Utilities Board embracing all the New Jersey property.

Q So that the possession of Black Tom passed in that way into the hands of the defendant, Lehigh Valley Railroad Company? A The possession of various facilities there did. The storage warehouses never passed into their possession.

Q But the rights under the lease?

The Court. As I understood it, Secretary Garrison admitted here sometime ago that the defendant company was operating under the lease.

Mr. Campbell. Under the lease; that is all right.

Mr. Garrison. We do admit that. Do you want this in the record? (Referring to so-called assignment.)

Mr. Campbell. Well, if it is admitted on the record, that is all we want. However, may we have that assignment marked in evidence?

The Court. He says it is not an assignment.

Mr. Campbell. Well, the paper.

(Paper marked P. 5 in evidence.)

(Witness excused.)

Mr. Skinner. We now desire to read interrogatories and the answers to interrogatories, the interrogatories being submitted by us to the defendant.

Mr. Collins. Wouldn't it be a good plan for you to read the questions and one of us to read the answers?

Mr. Skinner. Yes, sir. (Reading.)

"Describe by means of plans or otherwise the premises testified in paragraph 3 of the complaint as the same existed on July 29th, 1916, prior to the casualty described in the complaint, indicating the location of railroad tracks, giving the respective numbers of, other designation thereof, piers, including the so-called North Pier, buildings and other structures thereon, including by appropriate indication or description on said map or otherwise, the location of all fire apparatus, structural or movable, embracing fire hydrants and water pipes, and the means and location of telephoning, automatic or other means of indicating the discovery of alarms of fire."

(*By Judge Collins.*) "A Attached hereto is a map showing the premises specified in paragraph 3 of the complaint, as the same existed on July 29, 1916, prior to the casualty described in the complaint, showing the location and numbers of the railroad tracks thereon, the piers, buildings and other structures, the location of all fire apparatus, structural or movable, embracing fire hydrants and water pipes, and the location of telephonic and automatic means for communicating the discovery or alarm of fire, which map is entitled: "Plan showing location of water pipes, hydrants, valves, meters and hose connections at National Stores, Jersey City, New Jersey." A particular description in respect of the location of fire apparatus, fire hydrants and water pipes, and the means and location of telephonic,

automatic or other means for communicating the discovery or alarm of fire, is as follows:

There were three pumps as follows: (1) One electric pump at the tank at the east end of Store R, which would pump 1,500 gallons of water per minute; (2) a steam pump at Store F which would pump 1,200 gallons of water per minute; (3) a steam pump at the oil yard at the west end of the premises, which would pump 1,500 gallons per minute. All of the said pumps were connected with a twelve-inch fresh water main. All of the said pumps were also equipped so that they would pump salt water into the said twelve-inch main in case the same was found to be necessary. The two 1,500-gallon pumps were connected with the American District Telegraph Company system in the following manner:

If the electric current supplying the power for the 1,500-gallon per minute pump located at the east end of Store R were in any manner interfered with or shut off, a signal to this effect would be recorded at the central office of the American District Telegraph Company at No. 75 Montgomery street, Jersey City, New Jersey. Likewise, if the steam pressure which furnished the power for the 1,500-gallon per minute pump located at the oil yard at the west end of the property dropped below fifty pounds per square inch, a like signal would be recorded at the said central office of the American District Telegraph Company.

Attached to the said 1,500-gallon electric pump were six outlet manifolds, each with an outlet of 2½ inches in diameter, to each of which a standard fire hose also of a diameter of 2½ inches could be attached. Both of the steam pumps were similarly equipped. With reference to the buildings of the National Storage Company, the said pumps were located as follows:

The 1,500-gallon electric pump was located in a brick building near the easterly end of Store R, and about thirty feet easterly therefrom. The 1-200-gallon steam pump was located in a steel and corrugated iron building at the easterly side of Store F, and immediately adjacent thereto. The 1,500-gallon steam pump was located in a brick building at the west end of the said premises, and about 200 feet west of the westerly side of Warehouse BB.

There were twenty-four three-way standard Corey hydrants, each outlet having a diameter of 2½ inches, to which could be attached a standard fire hose also of a diameter of 2½ inches. Each hydrant could throw one, two or three streams of water at the same time, according as hose was attached to one, two or three of the outlets. All of these hydrants were connected with a twelve-inch water main which was in turn connected with the Jersey City water supply, also with a salt water supply through the pumps hereinbefore described; also with a steel tank located on top of a tower eighty feet high at the easterly end of Store R, the said tank containing 100,000 gallons of fresh water at all times. The said twelve-inch water main had also five two-way steam tug boat connections, into which connection salt water could be pumped by either fire boats or tug boats.

With reference to said buildings the hydrants were located as follows:

Beginning at the easterly end of the National Storage Company's warehouses the hydrants were located as follows:

The first hydrant was located northeast of Store R and about the middle thereof, about five feet from the wall of the same.

The second was located directly north of the said Store R, and about eighty feet from the wall thereof.

The third was located in the driveway to the north

of Store P, and about eighty-five feet from the wall thereof.

The fourth was located in the driveway northeast of Store M and northwest of Store N about eighty-five feet from the northerly walls of the said stores.

The fifth was located east of the north end of Store M, about twenty feet from the northeast corner of said store.

The sixth was located at the southeast corner of Store M, about ten feet from the corner.

The seventh was located in the driveway, eighty-five feet from the north wall of Stores K and L, and about midway between the said stores.

The eighth was located in the driveway about eighty feet from the northeast corner of Store F and the northwest corner of Store G, and midway between the said stores.

The ninth was located between the northerly end of Stores F and G, about twenty feet from Store G and sixty feet from Store F.

The tenth was located at the southwest corner of Store G and about twenty feet therefrom.

The eleventh was located in the driveway about eighty-five feet north of the north wall of Store C.

The twelfth was located in the driveway about eighty-five feet north of the office of the Lehigh Valley Railroad Company located on the northerly end of covered Pier 4.

The thirteenth was located in the driveway about twenty-five feet from the northwest corner of Store No. 3.

The fourteenth was located on the open ground to the west of Store 3, about ninety feet from the west well of the same.

The fifteenth was located in the open space to the south of the driveway, about ninety feet from the

same and about forty-five feet north of the northwest corner of the grain transfer elevator.

The sixteenth was located in the open space about forty-five feet north of the northwest corner of the grain transfer elevator.

The seventeenth was located about fifteen feet to the north of the north wall of the new grain elevator, and about sixty feet west of the northwest corner of the same.

The eighteenth was located directly west of the carpenter shop, and about ten feet from the westerly wall thereof.

The nineteenth was located in the driveway, at the north side thereof, about 300 feet southeast of Warehouse BB.

The twentieth was located southeast of the pump located near Warehouse AA, and about seventy-five feet from the said pump.

The twenty-first was located near the southeast corner of Warehouse BB, and about seventy-five feet therefrom.

The twenty-second was located near the northeast corner of Warehouse BB, and about 100 feet therefrom.

The twenty-third was located southwest of Warehouse AA and west of Warehouse BB, and near the driveway entering the premises. Said hydrant was located about 100 feet west of Warehouse BB and twenty-five east of the said driveway.

The twenty-fourth was located northwest of the northwest corner of Warehouse AA, and about eighty feet therefrom.

All of the said hydrants described as being located in the said driveway were equi-distant, the approximate distance of one from the other being about 160 feet.

There were also nineteen two-way 2½-inch hydrants, each outlet having a diameter of 2½ inches, to which could be attached a standard fire hose also 2½ inches in diameter. All of these two-way hydrants were connected either with a six-inch fresh water main (which was connected with the Jersey City water supply), or with a six-inch salt water main (which was connected with the steam pump located at Store F, as hereinbefore described). The said fresh water main was also connected by means of valves with the said 100,000-gallon tank hereinbefore described. Each hydrant could throw one or two streams of water at the same time, according as hose was attached to one or two of the outlets.

The first two of these hydrants were located at the southerly end of the pump house containing the 1,500-gallon electric pump, and about five feet from the wall thereof.

The third was located northeast of the northeast corner of Store R, and about 100 feet therefrom.

The fourth was located north of Store P and about seventy-five feet from the wall thereof.

The fifth was located at the southwest corner of Store N, and about twenty-five feet therefrom.

The sixth was located at the southeast corner of Store M, and about five feet therefrom.

The seventh was located at the northeast corner of Store M, and about five feet therefrom.

The eighth was located about 15 feet from the driveway, and about 70 feet from the northeast corner of Store M.

The ninth was located about 15 feet from the driveway, and about 70 feet north of the northeast corner of Store I.

The tenth was located southeast of the corner of Store F, and about 5 feet therefrom.

The eleventh was located northeast of the corner of Store F, and about 5 feet therefrom.

The twelfth was located 15 feet from the driveway, and about 70 feet north of the northwest corner of Store F.

The thirteenth was located northwest of the corner of Store A, and about 20 feet therefrom.

The fourteenth was located at the northwest corner of Store 3, and about 55 feet therefrom.

The sixteenth was located in the open space north of the grain transfer elevator and about 40 feet from the north wall thereof.

The seventeenth was located near the north wall of the boiler house of the grain transfer elevator, and about three feet therefrom.

The eighteenth was located southwest of Warehouse BB, and about 90 feet therefrom.

The nineteenth was located near the southwest corner of Warehouse AA, and about 15 feet therefrom.

Immediately prior to the said fire of July 30th, 1916, there were eight watchmen on duty at said yard.

There were also fire fighting appliances as follows:

3,600 feet of 2 1.2 inch standard fire hose on ten hose carts located as follows:

2 at the easterly end of Store M, each carrying 400 feet of the said standard hose.

1 at the northerly end of Pier 6, carrying 300 feet of the said hose.

2 at the easterly end of Store F, each carrying 400 feet of the said hose.

1 at the north end of covered Pier 5, carrying 300 feet of the said hose.

2 at the easterly end of Store 3, each carrying 400 feet of the said hose.

2 at the steam pump located near Warehouse BB, each carrying about 300 feet of the said hose.

The said hose carts were equipped with nozzles, with spanner wrenches and with hydrant wrenches. Each set of hose was equipped with the standard couplings used by the Jersey City Fire Department.

On the roof of the block of Warehouses N to R inclusive, there was 100 feet of standard hose equipped with nozzles, wrenches and couplings similar to the hose carried on the said hose carts; there were also 100 feet of hose with similar equipment on the roof of the block of Warehouses G to M, inclusive; there were also 100 feet of hose similarly equipped on the block of Warehouses A to F.

On Pier 6 there were 200 feet of said standard hose equipped with three nozzles, with spanners and with couplings.

On Pier 5 there were 200 feet of said standard hose, similarly equipped.

On Pier 4 there were 1,100 feet of said standard hose, also similarly equipped.

In Store 3 there were 100 feet of said standard hose, similarly equipped.

In the building known as the Grain Transfer Elevator, there were 550 feet of said standard hose, with similar equipment.

There was also a 100 gallon two-wheel chemical engine located east of Store F and at the northerly end of Pier 5, equipped with 100 feet of hose and charged with a solution of bicarbonate of soda and sulphuric acid.

In Storehouse AA there were 400 feet of 2½ inch hose, equipped with nozzles, spanners and couplings; in Storehouse BB there were 500 feet of 2 1.2 inch hose similarly equipped.

On the ground floor of each store from A to R inclusive, there was located one three-gallon Child's fire extinguisher. On Pier 4, five of the said fire extinguishers were located. In the building known as

the Grain Transfer Elevator, seven of the said fire extinguishers were located, and in the building known as the New Grain Elevator there were five one-quart Pyrene fire extinguishers.

Four of the said Child's fire extinguishers were located in Storehouse AA, and seven of the said extinguishers in Storehouse BB. Two of the said extinguishers were located in the pump room at the westerly side of Warehouse BB.

At the pump house adjacent to Store F there were two poles, each 19 feet long; six hook poles, each 13 feet long; two hooks, with chains and ropes; one length of hose 20 feet long, with three 2½ inch connections at the one end and one three and one-half inch connection at the other end, with nozzles; two nozzle holders; three hose slings for dragging hose; one hose roller for dragging hose over the edge of roofs of houses and cars; four nozzles to be attached to hose, and three revolving cellar nozzles.

On Pier 6 there were four 50 gallon water barrels filled with water; and eighteen 3-gallon iron pails, all filled with water; one ladder 38 feet long; and one ladder 30 feet long.

On Pier 5 there were four 50-gallon barrels and nine 3-gallon iron pails, all filled with water; one ladder 38 feet long; and one ladder 30 feet long.

On the ground floor of Warehouse R there were two 50-gallon barrels and five 3-gallon iron pails, all filled with water.

On each warehouse known as N, O, P and Q respectively, there were two three-inch water pipes, one being at the front, and the other at the rear, and extending from the ground to the roof, each pipe being equipped with two 2½ inch hose connections. In each of said warehouses there were twelve 50-gallon water barrels and 36 3-gallon iron pails, all filled with water. The block consisting of these warehouses was

equipped with four Metropolitan fire ladders, two at the front and two at the rear, extending from the ground to the roof and with platforms connected with each floor.

In the block of warehouses consisting of Stores known as G, H, I, K, L and M, there were ten 50-gallon water barrels and thirty 3-gallon iron pails, all filled with water in each store. In said block there were six Metropolitan fire ladders, three at the front and three at the rear, extending from the ground to the roof and with platforms connecting with each floor of each of the said stores. There were also twelve 3-inch water pipes, six in the front and six in the rear, extending from the ground to the roof, with 2½ inch hose connections.

In the block of warehouses consisting of stores known as A, B, C, D, E and F, there were ten 50-gallon water barrels and twenty 3-gallon iron pails, all filled with water, in each store. There were also six Metropolitan fire ladders of the same construction and relative location as set forth above in block consisting of Stores G to M. There were also twelve water pipes of the same construction and relative location as described in the block consisting of Stores G to M.

In the building known as Store 3 there were three 50-gallon water barrels and six 3-gallon iron pails, all filled with water; one ladder 27 feet long; one ladder 22 feet long; and one hook pole 21 feet long.

In the building located on Pier 4 there were twenty-four 50-gallon water barrels and seventy-six 3-gallon iron pails, all filled with water; one ladder 30 feet long; and two ladders, each 27 feet long.

In the building known as the Grain Transfer Elevator there were thirteen 50-gallon water barrels and fifty-two 3-gallon pails, all filled with water; thirty-

one hand fire grenades; an open sprinkler system consisting of a 4 inch water pipe running the entire length of the roof and with sprinklers at regular intervals, and connected at each end by water pipes with the 6 inch water line system hereinafter described. There were also fire escapes at each end of the building with a platform landing at each floor.

In the warehouse known as BB there were fourteen 50-gallon water barrels and fifty-four 3-gallon iron pails, all filled with water.

In the warehouse known as AA there were eight 50-gallon water barrels and thirty 3-gallon iron pails, all filled with water.

There was also an electric fire alarm, with 18 stations, connected with the railroad office at Pier 3 and with two steam pump stations hereinbefore referred to; also two fire alarm stations, Nos. 671 and 672, connected with the Jersey City Fire Department. There was also a watchman's electric time detector with 11 stations connected with the railroad office and Stores A to R, inclusive, and a separate similar detector with several stations connected with Warehouses AA and BB.

All of the Lehigh Valley Railroad Company's tug boats, fifteen in number, were equipped with steam fire pumps, hose and nozzles, and were subject to call in case of fire. All of the Lehigh Valley Railroad Company's steam lighters, five in number, were also equipped with steam fire pumps, hose and nozzles, and were also subject to call by telephone, in case of fire. The steam tugs belonging to the Standard Oil Company and serving the Eagle Oil Works immediately adjacent to the premises hereinbefore described were equipped with steam fire pumps, hose and nozzles, and were subject to call by telephone or by fire whistle. The tugs of the Central Railroad Company of New Jersey, whose property is immediately ad-

jacent to the premises hereinbefore described on the northerly side thereof, were also likewise equipped with steam fire pumps, hose and nozzles, and were by arrangement subject to call by telephone or fire whistle. All of the drill engines serving the yards of the Lehigh Valley Railroad Company on the premises referred to and adjacent thereto were equipped with hose and nozzles, and were subject to telephone or telegraph call, or other orders, in case of fire.

The said premises were supplied by the following mains:

A 12 inch main connected with the Jersey City water supply at the pump house at the westerly end of the premises. The said 12 inch main extended from the point mentioned along the southerly line of the driveway north of the said stores to the 100,000-gallon water tank located east of Store R. A 10 inch main connected with the said 12 inch main at a point northwest of Store No. 3, about seventy feet therefrom. The said 10 inch main parallels the 12 inch main to a point about 50 feet from the said 100,000-gallon steel tank, whence it takes a southerly direction and is connected directly with electric pump located east of Store R, as hereinbefore described.

A 6 inch main connected with a 6 inch main of the Jersey City water supply at a point northwest of Store AA, and about 175 feet therefrom. The said main extends in a southerly direction to the southerly side of the said premises, and extends from thence in an easterly direction, paralleling the said 10 and 12 inch mains, to a point directly north to the electric pump located east of Store E; thence in a southerly direction to the said pump. The said main is connected with the said pump and with the 100,000-gallon tank hereinbefore described.

A 6 inch salt water main began at the pump house at the westerly end of the said premises, running

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south therefrom to a point near the southerly line of the premises; thence in an easterly direction paralleling the 6 inch, 10 inch and 12 inch mains to a point directly north of the pump house east of Store R. The said 6 inch salt water main connected with the steam pump located east of Store F.

The 12 inch main hereinbefore described supplied all of the three way standard Corey hydrants and the 10 inch main, the hose connections on piers, and the open sprinklers on Pier 4, 5 and 6, the 10 inch main supplied the sprinkler system hereinbefore described protecting all of the piers and warehouses. The two 6 inch mains supplied all of the standard two way hydrants.

In addition to the water supply furnished by the water mains and pumps hereinbefore described, a primary water supply was furnished by three steel gravity tanks located as follows:

(1) A 100,000-gallon tank was located on an 80-foot steel tower east of the easterly end of Store R, and about seventy-five feet therefrom. This tank was filled with water. This tank furnished a primary water supply to the 12 inch main with a pressure of about 45 pounds to the square inch.

(2) A 50,000-gallon steel gravity tank was located on the top of Store P. This tank furnished a part of the primary supply for the automatic sprinkler system in stores and piers hereinafter described. This tank was filled with water.

(3) A 50,000-gallon gravity tank was located on top of Store E. This tank furnished a part of the primary water supply for the automatic sprinkler system hereinafter described. This tank was filled with water.

American District Co.'s Fire Protection System.

The said premises were protected by the American District Telegraph Company's fire protection system. This system was installed in March, 1915. All stores and piers on the said premises were connected with the central office of the American District Telegraph Company at No. 75 Montgomery street, Jersey City, New Jersey, by two independent pairs of wires. One pair of these wires was called the water flow circuit, and was connected with the dry alarm valves and the manual fire alarm boxes. The other pair of wires called the supervisory circuit, was connected with the different supervisory devices at all gate valves, dry air pressure valves, steam pressure valves, tank floats, tank thermometers, and the electric pump.

In addition to these circuits, there was installed on the premises in connection with the water flow circuit a transmitter, which consisted of a clock mechanism and an individual number wheel. When actuated electrically by any of the devices connected with the sprinkler system, this transmitter sent signals to the central office of the company located at No. 75 Montgomery street, Jersey City, N. J.

Also in connection with the supervisory circuit, there was a transmitter containing five different clock mechanisms, each with an individual number for the different classes of devices, and when any of the supervisory devices operated, the transmitter was electrically actuated and also transmitted a signal to the central office designated above from the particular clock mechanism that had been operated by any of the devices. At the central office these circuits were connected to their own individual registers, and when the signals above described were sent in they were automatically recorded on a tape showing the number of the transmitter mechanism that had been operated.

The five clock supervisory mechanisms controlling the buildings indicated were as follows:

(a) One 5 clock supervisory transmitter controlled the different devices in the following buildings and at the following places:

One clock signal, No. 34, controlled all gate valves in Warehouses N, O, P, Q, R and on Pier 6; also eight post indicating valves; also one outside stem and yoke valve in the pump house at the east end of Store R.

Signal 43 controlled the dry air pressure on the alarm valves in buildings N, O, P, Q and R.

Signal 35 controlled the gravity tank floats in the tank located east of Warehouse R.

Signal 153 controlled thermometers—one in the tank on Storehouse P and one in the steel tank east of Storehouse R.

Signal 521 controlled the electric pump in the pump house east of Storehouse R.

(b) One three clock supervisory transmitter controlled the different devices in the following buildings and at the following places:

Signal 321 controlled all gate valves in Warehouses G, H, I, K, L and M and on Pier 5; also 9 post indicating valves.

Signal 421 controlled the dry pressure alarm valves in Warehouses G, H, I, K, L and M.

The other clock on this transmitter was not in use.

(c) One 4 clock supervisory transmitter controlled the different devices in the following buildings and at the following places:

Signal 313 controlled all gate valves in Warehouses A, B, C, D, E and F; also in Pier 4; also Warehouse No. 3; also ten post indicating valves.

Signal 514 controlled the float in the steel gravity tank located on Storehouse E.

Signal 315 controlled the thermometer in the gravity tank located on Storehouse E.

Signal 322 controlled the air pressure in the dry alarm valves in buildings A, B, C, D, E and F.

(d) A 2 clock supervisory transmitter controlled the different devices in the following buildings and at the following places:

Signal 133 controlled all gate valves in Ware house AA, also one gate valve in the pump house located near Warehouse AA, also one post indicating valve.

Signal 233 controlled the dry air pressure valves in Warehouse AA.

(e) A 1 clock supervisory transmitter controlled the following device at the following location:

Signal 433 controlled the steam pressure in the steam pump located near Warehouse AA.

The clock mechanisms and individual number wheels controlling the water flow circuits were as follows:

Signal	Wheel	135	controlled	Warehouse	AA.
"	"	141	"	"	A and B
"	"	45	"	"	C and D
"	"	62	"	"	E and F
"	"	44	"	"	G and H
"	"	43	"	"	I and K
"	"	63	"	"	L and N
"	"	54	"	"	N and O
"	"	312	"	"	P and Q
"	"	134	"	"	R
"	"	142	"	"	Pier 5
"	"	53	"	"	Pier 4 & Warehouse 3
"	"	52	"	"	Pier 6.

In addition to the above automatic signals there were installed the following manual fire alarm boxes:

Five boxes on Pier 4, Signal 453, located as follows:

1 near the office of the north end of the pier.

1 on the west platform of the pier, near the center.

1 on the east platform of the pier, near the center.

1 on the south end of the pier.

1 on the balcony or second story, west side, center of pier.

Two boxes on Pier 5, Signal 534, located as follows:

1 on north end of pier.

1 on south end of pier.

Two boxes on Pier No. 6, Signal No. 65, located as follows:

1 on the north end of the pier.

1 on the south end of the pier.

Four boxes in Warehouse AA, Signal No. 434, located as follows:

1 on east side of the building.

1 on west side of the building.

1 on north side of the building.

1 on south side of the building.

The sprinkler system upon which the mechanism above described operated was known as the Rockwood Dry Pipe Valve System. This system was installed in all of the warehouses and on all of the piers. It consisted of soft steel pipes attached to the ceilings of each floor of the warehouses by wrought iron hangers. The said pipes transversed the entire length of each ceiling, and were located in accordance with the rules of the National Board of Fire Underwriters. The construction of the said sprinkler system was in accordance with the rules of the said fire underwriters. Attached to the pipes referred to above were Esty Sprinkler heads, made of fusible metal. These were arranged at regular intervals on said pipes in all the warehouses and piers, and the total number thereof was about fifteen thousand.

Mr. Skinner. (Reading.) "State in terms of railroad carloads and fractions thereof, if any—"

The Court. Is the next answer long?

Mr. Collins. Yes, several pages.

The Court. All right, we will adjourn at this point until two o'clock, gentlemen.

RECESS.

AFTERNOON SESSION.

Mr. Skinner. I was about to read the second interrogatory.

The Court. Yes.

Mr. Skinner. "State, in terms of railroad carloads and fractions thereof, if any, the quantity of explosives, explosive projectiles, ammunition and munitions of war and explosive or inflammable material or substances upon said premises at the close of business on July 29, 1916, specifying respectively the car numbers and name or initials of railroad to which such car belonged, the billed contents, the billed weight, the way bill references to station, date and other particulars of origin, the name of consignor and of consignee, and the date and time of day of arrival of such car at such Black Tom railroad terminal."

Mr. Collins. Your Honor will see that it is a sheer waste of time to read that whole answer.

The Court. It would have appeared to me so, but I do not want to control it, if they want it read. Why not give the summation of it, of each one of those things. They cannot remember it.

Mr. Campbell. I see no necessity of reading car numbers and initials.

Mr. Collins. This shows eleven cars of what are called high explosives and gives their weight, and each one is 57,500 pounds, and the length of time on hand two days; then there are three cars of wet nitrocellulose, and the quantities are 53,641, 54,682 and

61,553. ~~There~~ They were on hand six days. Then, there are sixteen on that page of cars of ammunition for cannon, and they had been there, some of them four days, three, four, one, four, one nine days, one eleven days and one a part of a day. There were two cars of combination fuses, 45,000 pounds and 60,000 pounds, six days. There were four cars of benzol—five cars of benzol; they ranged from 57,000 to 60,000, and they had been there one of them two days, one nineteen days, one thirteen days, one thirty days, one twenty days, and there was one car of toluol, 8,663 pounds, eighty-four days.

Following this is the particulars of the origin of each car and the name of the consignor and the consignee. There is the DuPont Powder Company, quite a large number of cars; the consignee was C. J. Medzikhovsky, Barksdale, Wis. And there are three cars for Aetna, Ind., and the consignor the Aetna Explosive Co., G. W. Sheldon & Co. consignee. Then, there are about a dozen cars for the Bethlehem Steel Company—seventeen—the origin Redington, Pa., Bethlehem Steel Co., consignee and consignor. There are two cars from Waterbury, Conn. The Scovell Manufacturing Co. consigned to Bethlehem Steel Co. There are five cars, the place of origin Niagara Falls, N. Y., the Hooker Electric Co. consignor and the same company the consignee. One car from Jersey City, consignor G. H. Nikolas, the consignee C. Bischoff Co.

The following is the complete answer to Interrogatory No. 2:

2. The following is a list of the cars which, according to the shipping orders or waybills, contained explosives, or explosive projectiles, or ammunition, or munitions of war, or inflammable materials or substances; containing the car numbers and initials, the contents and weight thereof, as shown by the ship-

ping orders or waybills, and the number of days each of said cars had been on hand at Black Tom terminal prior to July 29, 1916:

Car		Lading	Weight lbs.	On Hand
C. St. P. M. & O.	33602	High Explosives	57500	2 days
C. & N. W.	129112	" "	57500	2 "
C. St. P. M. & O.	32452	" "	57500	2 "
C. & N. W.	139900	" "	57500	2 "
C. & N. W.	135762	" "	57500	2 "
C. St. P. M. & O.	32194	" "	57500	2 "
C. St. P. M. & O.	30484	" "	57500	2 "
C. & N. W.	131112	" "	57500	2 "
C. & N. W.	137046	" "	57500	2 "
C. & N. W.	126960	" "	57500	2 "
C. St. P. M. & O.	30832	" "	57500	2 "
Wabash	67166	Wet nitrocellulose	53641	6 "
C. P.	128766	" "	54682	6 "
P. R. R.	517708	" "	61553	6 "
P. M.	52932	Ammunition for cannon	85369	3 "
Erie	102070	" " "	86366	4 "
P. R. R.	11832	" " "	101256	4 "
P. L.	517981	" " "	101256	4 "
P. L.	536124	" " "	101256	4 "
H. V.	32020	" " "	62541	3 "
G. T.	26343	" " "	62541	3 "
B. & A.	37330	" " "	86366	3 "
P. L.	517930	" " "	103600	3 "
N. C. & St. L.	10194	" " "	61600	3 "
P. R. R.	84422	" " "	100800	3 "
C. & E. I.	61659	" " "	85369	4 "
L. V.	85282	" " "	86366	1 "
C. C. C. & St. L.	54578	" " "	84000	4 "
P. & R.	14537	" " "	48156	9 "
P. & R.	12275	" " "	92322	11 "
P. R. R.	84146	" " "	103600	part day
N. H.	77254	Combination fuzes	45000	6 days
N. H.	84321	" "	60000	6 "
N. Y. C.	90340	Benzol	57949	2 "
O. W. R. & N.	10729	"	60372	19 "
A. T. & S. F.	49825	"	58286	13 "
M. P.	19657	"	60301	13 "
C. I. & L.	2888	"	60052	20 "
N. H.	86161	Toluol	8663	84 "

The following list gives the particulars of the origin of each car, and the names of the consignor and of the consignee:

Car		Origin	Date of Bill of Lading or Waybill 1916	Consignor	Consignee
C. St. P. M. & O.	33602	Barksdale, Wis.	7/19	DuPont Powder Co.	C. J. Medzikhovsky
C. & N. W.	129112	"	7/19	"	"
C. St. P. M. & O.	32452	"	7/20	"	"
C. & N. W.	139900	"	7/19	"	"
C. & N. W.	135762	"	7/19	"	"
C. St. P. M. & O.	32194	"	7/20	"	"
C. St. P. M. & O.	30484	"	7/19	"	"
C. & N. W.	131112	"	7/19	"	"
C. & N. W.	137046	"	7/19	"	"
C. & N. W.	126960	"	7/19	"	"
C. St. P. M. & O.	30832	"	7/19	"	"
Wabash	67166	Aetna, Ind.	7/18	Aetna Ex.	G. W. Sheldon
C. P.	128766	"	7/19	plosive Co.	& Co.
P. R. R.	517708	"	7/19	"	"
P. M.	52932	Redington, Pa.	7/25	"	"
Erie	102070	"	7/24	Bethlehem Steel Co.	Bethlehem Steel Co.
P. R. R.	11832	"	7/24	"	"
P. L.	517981	"	7/24	"	"
P. L.	536124	"	7/24	"	"
H. V.	32020	"	7/25	"	"
G. T.	26343	"	7/25	"	"
B. & A.	37330	"	7/25	"	"
P. L.	517930	"	7/25	"	"
N. C. & St. L.	10194	"	7/25	"	"
P. R. R.	84422	"	7/25	"	"
C. & E. I.	61659	"	7/24	"	"
L. V.	85282	"	7/27	"	"
C. C. C. & St. L.	54578	"	7/24	"	"
P. & R.	14537	"	7/19	"	"
P. & R.	12275	"	7/17	"	"
P. R. R.	84146	"	7/27	"	"
N. H.	77254	Waterbury, Conn.	7/22	" Scovell Mfg. Co.	"
N. H.	84321	"	7/22	"	"
N. Y. C.	90340	Niag. Falls, N. Y.	7/24	Hooker Elec. Co.	Hooker Elec. Co.
O. W. R. & N.	10729	"	7/7	"	"
A. T. & S. F.	49825	"	7/12	"	"

Car		Origin	Date of Bill of Lading or Waybill 1916	Consignor	Consignee
M. P.	19657	"	7/3	"	"
C. I. & L.	2888	"	7/3	"	"
N. H.	86161	Jersey City, N. J.	4/11/16	G. H. Nikolas Co.	C. Bischoff Co.

The defendant by the foregoing answer does not intend thereby to commit itself as to the characteristics or properties of any of the contents of said cars, and does not thereby commit itself to an admission that the contents of said cars were as stated in the waybills or bills of lading—the only information of the defendant as to said contents being that given on the face of said waybills or bills of lading.

Defendant has no information by which it would be possible to fix the time of day of the arrival of the above cars at said terminal, and is therefore unable to answer interrogatory No. 2 in any further detail.

Mr. Skinner. "3. State the manner in which the railroad cars or other repositories containing the explosives, explosive projectiles, ammunitions and munitions of war and explosives or explosive or inflammable substance specified in the preceding interrogatory were marked or placarded by way of indication of the nature of the contents thereof."

Mr. Collins. "Without committing itself as to the characteristics or properties of any of the contents of said cars, the defendant answers that all of the cars mentioned in the answer to Interrogatory No. 2 which were billed as containing 'high explosives' and 'ammunition for cannon' (except car P. & R. 14537), were marked with a so-called 'explosive' placard, of which the following is a copy:

At the top of each is 14", and at the top of it the name of the company. Explosives—printed in red. Underneath that—Handle Carefully. Then—Keep

Fire Away, printed in red. Blank—station. Blank—19 hundred—and 16, I suppose would be filled in.

'Condensed Rules for Handling This Car.

1. This car must not be placed in a passenger train nor in a mixed train if avoidable.

2. Cars containing explosives must be near center of train and may be together if desired; must be at least 15 cars from engine and 10 cars from caboose when length of train will permit.

3. Cars containing explosives must not be placed next to cars bearing the inflammable or the acid placard or cars containing lighted heaters. Whenever it is possible to avoid so doing, they must not be placed next to tank cars or flat cars or next to carloads of lumber, poles, iron, pipe, or other articles liable to break through end of car from rough handling.

4. The air and hand brakes must be in service.

5. In shifting have a car between this car and engine whenever possible, and do not cut this car while in motion.

6. Avoid all shocks to this car and couple carefully.

7. Avoid placing it near a possible source of fire.

8. Engines on parallel track must not be allowed to stand opposite or near this car when it can be avoided.

9. This placard must be removed from car when the explosives are unloaded.'

The cars mentioned in Interrogatory No. 2 which were billed as containing 'wet nitrocelluolse,' 'benzol' and 'toluol' (and also car P. & R. 14537), were marked with a so-called 'inflammable' placard, of which the following is a copy:

Blank—railroad company. Inflammable. Keep lights and fires away. Handle carefully. Blank—station—19—1916—

1. This car must not be next to a car containing explosives.

2. Do not enter with exposed flame, nor with lighted lantern, until car has been ventilated and vapors allowed to escape.

3. When lading requiring this placard is unloaded from box or stock cars, agents, yardmasters and conductors must remove the placards. Tank cars must retain placards until cleaned. (Par. 1903.)

The cars mentioned in Interrogatory No. 2 which were billed as containing 'combination fuses' were not marked with any placard."

Mr. Skinner. Interrogatory No. 4. "State the number of railroad cars or tank cars containing naphtha, gasoline or other volatile, inflammable or explosive liquids or gases, or containing chemicals, on said Black Tom Island premises at the close of business on July 29, 1916, and prior to the explosion and fire of July 30, 1916, and the manner in which said cars were marked.

"5. State, by means of said plan, the location on said Black Tom Island premises at the close of business on July 29, 1916, and prior to the fire and explosion of July 30, 1916, of said cars containing said explosives, explosive projectiles, ammunition and munitions of war and explosive or inflammable material or substances."

Mr. Collins. "4 and 5. There were no cars or tanks of naphtha or gasoline at the time of the accident. All the cars said to contain inflammables or explosives are mentioned in the answers to Interrogatories Nos. 2 and 3. In addition to said cars there were certain other cars containing chemicals, none of which were marked 'explosive' or 'inflammable.' All the cars that were on said premises at the close of business on July 29, 1916, and prior to the explosion

and fire of July 30, 1916, are indicated by number and initial on the map described in answer to Interrogatory No. 1 and attached thereto. Said map also indicates the location of each of said cars, and the contents of each car, so far as shown by the bill of lading or waybill—the notation on said bill of lading or way bill being the only information which the defendant has as to the contents of said cars."

Mr. Skinner. Sixth interrogatory. State the number of railroad cars placarded, as required by the Interstate Commerce Commission, with the placard bearing the notice: "Explosives," "Keep fire away," or with a placard bearing the notice, "Inflammable," "Keep lights and fires away," which railroad cars were transported by the defendant, Lehigh Valley Railroad Company, to its said Black Tom Island terminal during the period from August 1st, 1915, to July 29th, 1916, inclusive, give us the number of said cars for each month separately, except as to the month of July, 1916, for which month give the number of such cars as were transported each day thereof.

Mr. Collins. Answer: To sixth interrogatory.

Without committing itself as to the characteristics or properties of the contents of any of the cars referred to in this interrogatory, and without committing itself as to whether or not the said cars did in fact contain the articles described in the bill of lading or waybills, the defendant answers that the following is a statement of the number of such cars transported by it to the Black Tom Island terminal for each month during the period from August 1, 1915, to June 30, 1916, arranged according to months and contents of cars, as described in the bills of lading or waybills:

1915	*Ammunition for Cannon*	*Wet Nitrocellulose*	*Fuses*	*High Explosives*	*Benzol*	*Total*
Aug.	53	4				57
Sept.	89	13	2			104
Oct.	128	56	2			186
Nov.	77	19				96
Dec.	199	34				233
1916						
Jan.	220	49				269
Feb.	232	23	4			259
March	301	32	1			334
April	234	37		10		281
May	259	32		10		301
June	300	26	2	37	7	272

Those of the above cars which were billed as containing "ammunition for cannon" and "high explosives" were marked with the so-called "explosive" placard, described in the answer to interrogatory No. 3; those of the above cars which were billed as containing "wet nitrocellulose" and "benzol" were marked with the so-called "inflammable" placard, described in the answer to interrogatory No. 3; those of the above cars which were billed as containing "fuses" were not marked with any placard.

The following is a statement of the number of such cars transported by it to the Black Tom Island Terminal for each day during the period from July 1st to July 29th, 1916, arranged according to days and contents of cars, as described in the bills of lading or waybills:

Interrogatories and Answers.

	Ammunition for Cannon	*Wet Nitrocellulose*	*Fuses*	*High Explosives*	*Benzol*	*Total*
July						
1	10			2		12
2	4					4
3			3	2		5
4		2	1	2		5
5		5	1			6

Mr. Skinner. One high explosive.

Mr. Collins. It is changed in this. I suppose that is right. One high explosive is erased, and fuses written in instead. I suppose it is an error. It is your copy. I mean it is the original, the one you handed to me. The "1" has been erased and the "high explosives" put in under "fuses."

	Ammunition for Cannon	*Wet Nitrocellulose*	*Fuses*	*High-Explosives*	*Benzol*	*Total*
July						
6	6	1				7
7	7					7
8	6					6
9	5	4	1	7		17
10			1	8	1	10
11	8			3	1	12
12	11	4		1		16
13	6	1				7
14	8				1	9
15	6	1	1	1		9
16	3		1	3		7
17		1			2	3
18	6	3				9
19	8					8
20	5				2	7

	Ammunition for Cannon	*Wet Nitrocellulose*		*Fuses*	*High-Explosives*		*Benzol*	*Total*
July								
21	8				2			10
22	9			1				10
23	3		3	1			1	8
24				1				1
25	7			2				9
26								
27	7				6			13
28	3				11		1	15

Mr. Garrison. They call on us for a further answer as to July 29th. We have supplied it. On July 29th, 1916, no such cars were transported by defendant to the Black Tom Island terminal.

Mr. Collins. That makes a total, then, for July, of 232 cars.

"Those of the above cars which were billed as containing 'ammunition for cannon' and 'high explosives' were marked with the so-called 'explosive' placard, described in the answer to interrogatory No. 3; those of the above cars which were billed as containing 'wet nitrocellulose' and 'benzol' were marked with the so-called 'inflammable' placard, described in the answer to interrogatory No. 3; those of the above cars which were billed as containing 'fuses' were not marked with any placard."

Mr. Skinner. Seventh interrogatory. "State the number of railroad cars containing merchandise other than those containing explosive or inflammable material or substances which were on the said Black Tom Island premises at the close of business on July 29th, 1916, and prior to the fire and explosion of July 30th, 1916, and the number thereof which were on that portion of said premises lying easterly

and southerly of an imaginery line projected across said premises running northeast and southwest through the southeastern corner of Warehouse R adjoining said premises and parallel with the easterly line, which line is the line of solid filling of said Black Tom Island premises."

Mr. Collins. Answer to seventh interrogatory:

"All the railroad cars which were on the premises known as the Black Tom yard are shown on the map described in the answer to interrogatory No. 1 and hereto attached. If by the expression 'Black Tom Island premises' in this interrogatory the plaintiff refers to that part of the defendant's terminal which is located west and north of the imaginery line described in interrogatory No. 7, then the defendant answers that it has no records or other data by which it would be possible to answer said interrogatory."

Mr. Skinner. Eighth interrogatory:

"State what barges, lighters, schooners or other vessels were at the close of business on July 29th, 1916, and prior to the fire and explosion of July 30th, 1916, moored to the North Pier of said Black Tom Island premises or lying alongside of vessels moored to said pier, together with the character and quantity of the cargo on each of said vessels. If the said cargo had been loaded on said barges, lighters, schooners or other vessels by the defendant, or with its knowledge, state which of said cargoes and when the same had been so loaded."

Mr. Collins. Answer to eighth interrogatory:

"The vessels which were moored to the north pier at the close of business on July 29th, 1916, or which were lying alongside of vessels moored to said pier on said date were:

Moran barge No. 64.

Moran barge No. 20.

Johnson barge Frank.
Ackerman barge Paulina.
Ackerman barge Jet.
Ackerman barge Thompson.
Ackerman barge Rockwell.
Schooner George W. Elsey.

After the close of business on said date, and prior to the fire and explosion of July 30, 1916, vessels known as "Johnson barge No. 11" and "Johnson barge No. 17" were moored—in the case of the former, alongside of the Johnson barge "Frank" hereinabove mentioned, and in the case of the latter, alongside of the north pier—without the defendant's knowledge or consent at the time of said mooring.

None of the cargo was loaded by this defendant on any of said vessels, except the said schooner "George W. Elsey," which was in the process of being loaded with salt during the business hours of July 29, 1916. The cargoes on certain of the other vessels were loaded, on July 29, 1916, but not by this defendant, as follows:

On Moran barge No. 64 there were loaded on July 27, 1916, the contents of the following cars as indicated on the billing therefore:

Mr. Skinner. Judge Collins, the cargoes on certain of the other vessels you read were loaded on July 29th. It evidently is not in this copy. That is crossed out in our copy.

Mr. Collins. It should be crossed out.

Mr. Garrison. The insertion below shows the right thing.

	Car		*Contents*	*Weight*
R. I.	37954	Comb. Fuses		56160 lbs.
N. H.	72192	"	"	56160 "
L. V.	86456	"	"	56160 "
N. Y. C., St. L.	27117	"	"	49060 "
Erie	105020	Ammunition for Cannon		86366 "
N. Y. C.	248407	"	" "	67200 "
C. P.	123132	"	" "	72800 "
B. & A.	39526	"	" "	71475 "
S. P.	21499	"	" "	71475 "
U. P.	123964	"	" "	101256 "
L. S. M. S.	85754	"	" "	86366 "
L. & M.	101543	"	" "	86366 "
F. W. D.	6369	"	" "	84000 "
			Total,	944844 "

On Moran barge No. 20 there were loaded on July 26 and 27, 1916, the contents of the following cars as indicated on the billing therefor:

	Car		*Contents*	*Weight*
Erie	111334	Ammunition for Cannon		86366 lbs.
L. S. M. S.	89763	"	" "	86366 "
C. M. St. P.	503894	"	" "	71475 "
P. R. R.	36633	"	" "	92400 "
P. R. R.	42135	"	" "	58875 "
P. R. R.	34395	"	" "	101256 "
P. R. R.	48523	"	" "	101256 "
R. I.	45033	"	" "	84000 "
N. H.	74214	"	" "	62541 "
L. V.	82801	Fuses		58080 "
			Total,	802615 "

On Johnson barge "Frank" there were loaded on July 20, 1916, the contents of the following cars as indicated on the billing therefor:

C. & N. W.	141052	High Explosives	57675 lbs.
C. St. P. M. & O.	30764	" "	" "
" "	29468	" "	" "
C. & N. W.	121346	" "	" "
C. & N. W.	139326	" "	" "
		Total,	288375 "

Defendant does not know the contents of the vessel "Paulina."

The schooner "George W. Elsey" was partly loaded with salt.

On Ackerman barge "Jet" there were loaded on July 21, 1916, the contents of the following cars as indicated on the billing therefor:

P. R. R.	560340	Nitrocellulose	58202 lbs.
N. Y. C. H. R.	105815	"	58185 "
		Total,	116387 "

On Ackerman barge "Thompson" there were loaded on July 24, 1916, the contents of the following cars as indicated on the billing therefor:

C. N. W.	137802	High Explosives	45140 lbs.
C. St. P. M. O.	33126	" "	49855 "
C. N. W.	102844	" "	49855 "
		Total,	144850 "

On Ackerman barge "Rockwell" there were loaded on July 20, 1916, the contents of the following cars as indicated on the billing therefor:

C. N. W.	131186	High Explosives	57675 lbs.
C. N. W.	136992	" "	57675 "
C. N. W.	128866	" "	57675 "
C. N. W.	135256	" "	57675 "
C. S. T. P. M. O.	30200	" "	57675 "
C. N. W.	134538	" "	57675 "
C. N. W.	109592	" "	57675 "
P. L. E.	32442	Nitrocellulose	57471 "
N. Y. C.	221004	"	58069 "
		Total,	519265 "

In making the foregoing answer, the defendant does not thereby admit that the cargoes of the above named vessels (except the schooner "George W. Elsey") were in fact still on the said vessels at the close of business on July 29, 1916, and prior to the fire and explosion of July 30, 1916; it has no knowledge as to whether said cargoes, or any of them, or any part thereof, had been delivered after the loading thereof on said vessels, and it has based the foregoing answer on its records showing the dates of loading and the contents of said cars as indicated on the billing therefor, but it has no record or other information to show whether said cargoes, or any of them, were delivered subsequent to the loading, or whether any of said cargoes, or any part thereof, were on said vessels, or any of them, at the time of said fire and explosion."

Mr. Skinner. Ninth interrogatory: "Show by means of plan the topographical condition of said premises after the fire and explosion referred to in the complaint as answered by the defendant, with especial reference to the location, size, depth and description

of the excavated area or areas caused by said explosion or explosions, such plan being similar to a certain plan or map prepared in the office of the division engineer of the Lehigh Valley Railroad Company and entitled, Lehigh Valley, New York Division, plans showing tracks, buildings and car locations as of August 1st, 1916, east of Pier No. 5, National Docks, Jersey City, N. J.; office of the division engineer, schedule 12; August 7th, 1916.

Mr. Collins. Answer to the ninth interrogatory: "The condition of said premises after the fire and explosion referred to in the complaint, so far as relates to the location and size of the excavated area caused by said explosion, is indicated by the dotted line on the map described in the answer to interrogatory No. 1 and hereto attached, said line being indicated on said map as "Outside line of crater." The said excavated area or crater was approximately 375 feet long, 175 feet wide, and from 7.7 to 10.5 feet deep."

Mr. Campbell. I offer in evidence this "inflammable" and "explosive" placard.

(Marked P. 8 and P. 7 in evidence.)

Mr. Garrison. I presume plaintiff is going to put in these placards as provided by the Interstate Commerce Commission—

Mr. Campbell. We now offer these alone.

Mr. Garrison. I object to them alone.

The Court. What is the objection?

Mr. Garrison. The objection is that unless the regulations prescribing the placing of these placards be put in evidence, the placards themselves are irrelevant and immaterial. It is like offering a part of a document.

The Court. I think I will overrule that objection.

Mr. Garrison. Exception.

The Court. This is simply offered for the purpose of showing what things were on the cars, and not the authority by which they were put on the cars.

Mr. Campbell. Judge Garrison, I want to offer that letter, and I want to know whether you will interpose any objection to it, and whether we will have to be put to strict proof.

May I show these to the jury?

(Referring to the placards P. 7 and 8.)

The Court. Certainly.

(They are shown to the jury.)

Mr. Garrison. What do you want to know about this?

(Side bar discussion between Mr. Garrison and Mr. Campbell.)

Mr. Collins. They ask us to admit what purports to be a copy of a letter.

Mr. Garrison. Wait until he gets the offer. We do not know what his offer is.

Mr. Campbell. Better let the witnesses stay.

ANDREW L. VAN BLIGHT, sworn.

Direct examination by Mr. Campbell.

Q Your business, Mr. Blight? A Insurance.

Q And what is the name of your firm? A Hutchinson, Ravinus & Company.

Q Where are your offices located? A 45 Wall street.

Q And anywhere else, any other city? A Philadelphia.

Q Were you authorized by the Lehigh Valley Railroad Company to do any act in reference to the collection of insurance arising out of the Black Tom casualty? A Yes.

Q And what officers of the Lehigh Valley authorized you? A Why, through Mr. Kirsch, the insurance department.

Q What is Mr. Kirsch's position? A His position is insurance commissioner.

Q And what were Mr. Kirsch's instructions to you in reference to the matter?

Mr. Garrison. Were they in writing?

A They were in writing, according to the receipt which you gave me in your office, Mr. Campbell.

Mr. Garrison. I think if these instructions were in writing we ought to have them.

Q I want to know what instructions the Lehigh Valley Railroad gave the firm of Hutchinson, Ravinus & Company?

The Court. He says they were given in writing by the superintendent of insurance of the company, and if they were, I suppose the writing is the best evidence.

Q Were those instructions given in writing?

The Court. He says they were.

A Yes; I am quite sure they were.

Q Where is that writing? A Why, in our office. I know that the adjustment was a compromise settlement for a fixed sum.

Q I am asking you now your instructions, your authority to act for the Lehigh? A Well, I cannot recall.

Q Did you have any conference with any of the officers of the railroad company in reference to that adjustment? A None other than Mr. Kirsch.

Q Where was Mr. Kirsch's office? A 143 Liberty street.

Q How often did you see Mr. Kirsch with reference to the matter? A Why, I cannot recall; possibly half a dozen times.

Q When you saw him did he give you written instructions or oral instructions? A That I can't recall. I would have to look up our file.

Mr. Campbell. Judge, is there any real question about this?

Mr. Garrison. I don't know what you are trying to prove. Tell me what you are trying to prove.

Mr. Campbell. Mr. Ravinus—

Mr. Garrison. Don't tell the jury, tell me.

(Mr. Campbell speaks to Mr. Garrison.)

Q Well, Mr. Van Blight, will you bring us such written authority as you have in the matter in the morning? A I will try to obtain it.

Q Please? A I can't tell whether I secured that or whether our Mr. Jennings, of the Philadelphia office, secured it.

Q Can you find out by morning for us? A I will try, yes.

Q Thank you. All right, sir. Without regard to your authority, did you get from the Lehigh Valley Railroad Company yourself a list of the cars said to have been destroyed in this casualty? A No. There was no mention as to the cars destroyed.

Q Will you please look at the papers I now hand you and after refreshing your recollection see whether you obtained from the Lehigh Valley Railroad Company any list of cars?

Mr. Garrison. I object to that.

The Court. I sustain the objection. There is no evidence on earth yet to show that this man had any knowledge of these papers, when they were drawn, either oversaw them or himself made them

out or that he knew at all that they were correct, if they were made out. He cannot refresh his recollection from a paper of that kind.

A Well, I can see here—

The Court. Well, don't see. We can see, too, if we look at it.

Q Are these records in your New York office or Philadelphia? A Well, Mr. Campbell, the records were partly in Philadelphia and partly in our New York office. I have not refreshed myself in this case at all.

Q Did you hand the list which I now hand you to the adjusters for the insurance company? A No, the letter was delivered—

Mr. Garrison. He didn't ask you that. Read the question.

A No.

Q Will you look at the letter signed by you there? A Yes, but you asked about the insurance companies. I did not send to the insurance companies.

Q Well, you sent it to whom? A Mr. Greer, of the General Adjustment Bureau.

Q Mr. Greer represented the insurance companies, did he not? A Yes.

Q Then you sent it to Mr. Greer of the General Adjustment Bureau, who represented the insurance companies? A Yes, yes, I did.

Q Then before submitting that list to Mr. Greer did you confer with any official of the Lehigh Valley Railroad Company in reference to it? A Why, I asked Mr. Kirsch for that information.

Q Didn't you get that list from the Lehigh Valley Railroad Company?

Mr. Garrison. I object to that as to form.

The Court. I sustain the objection. It is a leading question.

Q From whom did you get it? A I don't recall now; I presume from Mr. Kirsch.

Mr. Garrison. I ask to have that stricken out.

The Court. I think I will strike the presumption out. It does not appear it rests on recollection.

Q This list which you have, which I now show you, you submitted to the Lehigh Valley Railroad Company, did you not?

Mr. Garrison. I object to that form of question.

The Court. I will sustain the objection. It is a leading question and he has already answered it once.

Mr. Campbell. All right, Judge, we will prove it.

Q Mr. Blight, will you get such information as you have and return in the morning? A I don't know whether I can obtain it by morning, Mr. Campbell, and I will have to get, if it was in our Philadelphia office, and have them look up those records.

Q You come back in the morning with such information as you can? A Yes.

Q Thank you.

Mr. Garrison. If the point is to prove the cars destroyed we will give you all the information we have as to the cars destroyed.

Mr. Campbell. Mr. Garrison, the object is—

Mr. Garrison. If that is what you want you need not waste any further time; we will furnish you all the evidence we have of every car destroyed.

Mr. Campbell. The object—

Mr. Garrison. I object to the object. I have not asked any object.

Mr. Campbell. We will go on.

(Mr. Campbell confers with the counsel for defendant at their table.)

Mr. Campbell. Very well. In the morning, Mr. Blight, if you please.

The Court. Do you want to ask him anything on what he has already been interrogated on?

Mr. Garrison. No; I don't care to.

Mr. Campbell. Mr. Garrison, we wish to offer the following letter from Mr. Barrett:

Mr. Garrison. I think you better prove it. Mr. Barrett is not here and that is not a copy of the letter. I mean it does not contain Mr. Barrett's signature.

Mr. Campbell. I will call Mr. Connelly.

JAMES M. CONNELLY, sworn.

Direct examination by Mr. Campbell.

Q What is your business? A Inspector of Combustibles, Jersey City Fire Department.

Q And were you such in July, 1916? A Yes, sir.

Q And shortly after the Black Tom explosion did you make any inquiry of the Lehigh Valley officials as to the cars of explosives which were on the Black Tom Island terminal at the time? A Yes, sir.

Q And in answer to that what reply, if any, did they make to you? A I got in touch—

Mr. Garrison. I object. I think we ought to have the writing.

The Court. You have a right to ask him whether it was in writing.

By Mr. Garrison.

Q Was it in writing? A Yes, sir.

James M. Connelly, direct.

By Mr. Campbell.

Q They sent you a writing, did they? A Yes, sir.

Q When you got that writing what did you do with it? A Lawyer Hendrickson and several other lawyers were investigating to sue for damages, and they came up to me and asked me to give them whatever information I had, and, of course, I done so.

Q And you gave the paper to Mr. Hendrickson here, Mr. Charles E. Hendrickson? A Yes, to take a copy.

Q Have you looked for the original letter? A I found the original letter, but I did not find the number of cars. I don't know. I mislaid it. It has been through so many hands.

Q You found the original letter. This paper you have is the original letter? A Wait a minute. Is that the original? There was so many copies of that made. Wait a minute. That ain't the letter, the original, I am quite sure.

Q Sir? A That is the original letter; I am quite sure of it.

Mr. Garrison. He says that paper is the original letter.

A As near as I can remember now.

Q Well?

Mr. Garrison. If that is Barrett's signature we can tell.

Mr. Campbell. No.

Q This paper which you now hand me shows it was a typewritten signature? A Yes.

Q You won't say that is the original letter? A Well, as near as I can remember just now. There was several lawyers came to me and wanted copies, and I gave it to them all. I don't know whether—

Q Now, the original letter which you received you say you handed to Mr. Hendrickson? A Yes, sir.

Q And Mr. Hendrickson kept it a day or two? A And took a copy of it.

Q And then he returned it to you? A Yes, returned it to me.

Mr. Garrison. You are testifying.

Mr. Campbell. I beg your pardon. I am inclined to lead.

The Court. I will overrule the objection because it came after the question and answer had been given. I think it is quite as well not to go any further with it.

Mr. Campbell. I quite understand.

Q What papers did Mr. Hendrickson return to you? A A letter that I received from Mr. Barrett and the list, the number of cars of different kind of explosives that arrived during the months of June and July.

Q That is your best recollection? A Yes, sir.

Q What did you do with the original letter? A Why, as I say, I left around the desk, and several lawyers came and wanted to get copies, and, of course, I let them all take copies of it and it got misland.

Q Have you recently endeavored to find it? A I have—before I came here.

Q What efforts did you make? A Well, I searched all around where I have papers and this is the only remnant I could find.

Q All you could find is the paper you have in your hand? A Yes, sir.

Q That is all.

Mr. Garrison. No cross.

Q You have not been able to find the list—either the list or the original letter? A No, sir; no list.

CHARLES E. HENDRICKSON, JR., sworn.

Direct examination by Mr. Campbell.

Q What is your business, Mr. Hendrickson? A Lawyer.

Q Here in Jersey City? A Yes, sir.

Q And in August and September did you make any inquiry of Mr. Connelly with reference to the cars at Black Tom? A I did.

Q And what was the result of that inquiry? A I got a letter—I got from him oral statements which I made memorandum of, and I got a letter from him from the Lehigh Valley Railroad Company to which was annexed some very long sheets, too wide for an ordinary typewriter machine, and they had on it data with regard to cars at the Black Tom at the time of the accident.

Q What did you do with that—with those papers which you got from Mr. Connelly? A I asked him to loan them to me while I took them down and had them copied, told him I would return them to him that same day, and I took them down to my office and had Miss Cross, or Mrs. Bergen, I mean, to make copy of it, and of the letter, had them compared, took them back to Mr. Connelly, and I mailed you the copies that I had made.

Q Now, are the papers which I now hand you the papers which you mailed me? A I believe that they are. I have no doubt as to the fact. They look identical with the ones that I sent. If they are the ones that were enclosed in the letter sent to you they are the ones. I believe they are without any question.

Q Was this lady who copied them in your office? A No; she was a public—she had an office across the hall, public stenographer's office; my own office happened to be busy at the time, and I asked her to make them for me and paid her for it.

Q Is that lady in court? A She is.

Q Mrs.— A Mrs. Bergen.

Q Mrs. Bergen, yes. Did you do any comparing of the papers after you got them from Mrs. Bergen? A No; I asked her if she had compared them, and she done lots of work for me, I have known her sixteen years, her work is accurate, and her statement to me that she had compared them satisfied me that they were accurate.

Cross examination by Mr. Garrison.

Q Were you acting for anybody, Mr. Hendrickson, at this time? A I was acting for Mr. Campbell.

Q The attorney for the plaintiff in this suit? A Yes, sir.

Q Did you ascertain when you went to Mr. Connelly that there were many lists and much information furnished to him from day to day by the Lehigh Valley, in respect of the explosives that were being received at Black Tom? A My recollection is that he furnished me two lists, one of which simply had on it, as I recollect, the number of cars per day for the month of July, for I think the Lehigh Valley and the Central Railroad, both, and this list, and I copied the other lists.

Q Those were the results of daily reports and daily receipts of cars at these terminals, as I understand? A My recollection is that the list which had the number of cars for each day was furnished to me all at once. That is my recollection.

Q Didn't you make a copy of that? A Yes.

Q I understood you to say that with respect to this paper that Mr. Campbell has handed to you you did not compare it with the original? A I did not compare it myself.

Q That is all.

MRS. THERESE C. BERGEN, sworn.

Direct examination by Mr. Campbell.

(Mr. Charles E. Hendrickson, Jr., returned to the stand and made the following statement:)

Mr. Charles E. Hendrickson, Jr. I would like to make a correction. The letter itself was written in my own office. That I did compare myself, but the three sheets on the wide machine I did not compare.

Direct examination by Mr. Campbell.

Q Mrs. Bergen, what is your work? A I am at present stenographer to the United States District Judge, Thomas G. Haight.

Q What was your work in July or August and September, I think, 1916? A The same.

Q And were you doing work for other persons at that time? A I at that time had desk room in the office of McDermott & Foley, public stenographers in Jersey City, and I did other work there for myself.

Q Now about September 12th, I think it was, did Mr. Hendrickson ask you to do a piece of work for him? A Miss McDermott asked me. I was at that time doing some work in her office and Mr. Hendrickson brought the work in for her to do, it was her office, and she was very busy at the time, and I offered to do the work, and did it.

Q Now, did the work require—was there any peculiarity in doing the work? A Yes, there was. The copy required a typewriter much longer than the ordinary machine, and Miss McDermott had no such machine in her office, and I believe we borrowed a machine from either a concern on the 6th floor of the Union Trust building, an insurance office, or from an insurance office on the first floor, I have forgotten which, but it was either one. We borrowed a wide carriage machine.

Q Will you look at the papers on the Judge's desk there and tell me if any of those papers are the papers

which you copied at that time? A I copied the three wide sheets.

Q Purporting to contain schedules of cars and other information? A The first column is headed "Car Number," so I assume that is correct.

Q Did you copy them correctly? A I thought so when I got through comparing them.

Q And you compared them? A Yes.

Q And the papers which you hold in your hand and which you have identified are copies of the papers so handed you by Mr. Hendrickson? A Yes.

Q Then what did you do with the originals? A I delivered the original and copy to Miss McDermott to take whatever action she saw fit.

Q Did you copy the letter itself? A I could not say that I did not, except that I have heard Mr. Hendrickson say he copied it, so I judge I did not.

Mr. Campbell. We offer the letter and schedules in evidence.

(Marked P. 9.)

Mr. Campbell. Had we better mark the schedule separately from the letter?—Mark it all.

Q Thank you, Mrs. Bergen.

Mr. Campbell. I will read the letter to the jury. The letter is dated Sept. 11, 1916. "In re Fire and explosion at National Docks. James W. Connelly, Esq., Inspector of Combustibles, 244 Bay street, Jersey City, N. J. Dear Sir: In accordance with your favor of the 28th ultimo, I am sending herewith, a list of all cars of explosives on hand at National Docks, from July 26th to 29th, 1916, inclusive, together with the disposition thereof. I call your attention to the fact that we are not allowed to furnish, except upon demand of the proper legal authorities of a state or municipality, some of the facts requested in your com-

munication. I have, however, secured all of the information you desired and assume that, in accordance with the terms of the Interstate Commerce Act, the same will be used solely by yourself or the proper legal officers of the County or Municipality. I call your attention to the column entitled 'Billed Contents.' I have given you, in this column, the information contained on the billing of all the cars referred to, which is the lawful tariff designation for the contents of the various cars and the only information we have in respect thereto. Will you kindly let me know if I can be of any further assistance to you. Very truly yours, R. W. Barrett, Assistant General Solicitor."

The first sheet of the schedule is attached. "Cars Explosives on hand July 26th to 29th Inclusive." Then follows two sheets, and on the last sheet appears the expression: "The first 35 cars arrived up to the 26th, following which are shown the cars arrived in the terminal on 26th, 27th, 28th and 29th. Statement shows 102 cars handled as follows: Delivered, 30; Destroyed, 29; Damaged, 4; Diverted after fire, 39. Total, 102."

Mr. Campbell. Now, Judge Garrison, I want to read from the interrogatories in the other case the interrogatory as to 228 cars in the yard. Any objection?

The plaintiff now reads from the answers of the defendant Lehigh Valley Railroad in the case known as the Plate Glass Case, the case of the New Jersey Fidelity and Plate Glass Company against the railroad, the following answer to interrogatory: "State how many of said cars containing or marked as containing explosives or explosive munitions were on said pier on the night of July 30, 1916." Answer: On the assumption that the pier referred to in these interrogatories is intended to include all the lands and premises com-

monly known as the Black Tom yard at Jersey City, defendant answers that the total number of cars on the night of July 30, 1916, was 228."

ANDREW L. VAN BLIGHT, recalled.

Direct examination by Mr. Campbell.

Q Do you desire to amplify the testimony which you have given in certain particulars? A If I can.

Q Did you in the month of September get from any official of the Lehigh Valley Railroad Company a list of cars destroyed in the Black Tom Island fire? A I sent such a list to Mr. Grier. I have no absolute recollection of where I received that. I can presume, but I have no information to give definitely on the subject, either here or in my files. There is only one place where I can secure it. I cannot recall, Mr. Campbell.

Q For the moment you cannot say whether you got it— A I cannot, and I haven't any information on file other than the copies of these letters, and if I were to secure a copy of the list of those cars you have there I could not say whether I secured that list from Mr. Kurtz or whether it was sent to my office.

EZEKIEL TOWNES, sworn.

Direct examination by Mr. Skinner.

Q Your name is Ezekiel Townes? A Yes.

Q Where do you live now? A I live 251 Hanover street, Brooklyn.

Q In July, 1916, where did you live? A I lived at Black Tom Island.

Q Do you remember anything happening on the 30th of July, 1916, Ezekiel? A Only that night I remember the explosion.

Q There was an explosion? A Yes, sir.

Q Where were you that night and where were you particularly when the explosion happened? A When the

explosion happened I was at Pacific avenue at Father Meehan's church.

Q Before that, before the explosion, had you been anywhere near Black Tom? A I was asleep; I was in the bed, sir.

Q You lived on Black Tom, eh? A Yes, sir.

Q Whereabouts? A Well, I lived the north side of the island.

Q Yes? A Yes, sir.

Q In what? A Well, it was a shanty that was built by Jenkins Company. I was watchman for them.

Q What was it built on? A On spiles.

Q On the spiles on the left side of Black Tom Island? A Yes, sir.

Q A shanty on these spiles? A Yes, sir.

Q Can you see this map from where you sit? A I can see it pretty good.

Q Just let me point out some of the portions of the map that will enable you to understand it. Come down here. Was there a pier on the easterly end of Black Tom called North Pier? A Yes, sir.

Q Do you see it right there? A Yes, sir.

Q Over at the right-hand side of the map? A Yes, sir.

Q Now, then, going to the left and generally in a westerly direction along this map do you see we come to storage warehouses? A Yes, sir.

Q Do you remember those? A Yes, sir.

Q And so on up to the Gray Transfer Elevator and over to the west? A Yes.

Q And down here on the easterly end of the map and to the left of the pier you see a lot of tracks? A Yes, sir.

Q Do you remember what was on those tracks July 30, 1916? A Well, there were loaded cars.

Q Loaded with what? A Supposed to be ammunition by the sign. I saw what the sign was; the sign read "Explosive."

Q Did you see them? A See the signs?

Q Yes. A Yes, sir.

Q Was that the first time that you had seen them or did they have cars with signs on like that long before that? A Ever since they were bringing explosive in there they had those signs.

Q How long had that been going on, roughly? A I could not say roughly, because it started when the Bethlehem Steel Company commenced to bring this powder over the Lehigh Valley, I do not know when.

Q Was it a month or six months or a year before the Black Tom explosion in July? A I can't say a year or six months, but it was not so very long.

Q On this north side of the tracks that you have just been speaking about up at the top of the map, up in through here, do you see a place marked "Pile Stockade"? A Yes, sir.

Q Was your house or shanty anywhere near that? A My house was in the middle of that.

Q In the middle of that pile stockade? A Yes.

Q Take your seat. You said that when the explosion came you were over at Pacific avenue? A Yes, sir.

Q Before that time had you seen anything of fire on Black Tom? A That was when my wife woke me up.

Q When was that? A Well, I was asleep.

Q When was it, in the night or day time? A Around noon time, around twelve o'clock as near as I can get at it.

Mr. Garrison. You mean midnight.

A Midnight, yes, sir.

Q And she woke you up? A Yes, sir.

Q When she woke you up what did you see? A When I went to the door I see probably a fire alongside the cars, crawling up.

Q Did she have any trouble waking you up? A Yes; she had a little trouble.

Q You were sleeping soundly, were you? A Yes, sir.

Q Can you tell us where this fire alongside of the cars was with reference to your house; where was it from your shanty? A Well, it was catecornered from my shanty and mostly southwest.

Q Southwest? A Yes, sir.

Q Yes. Now, would southwest as you understand it be down across the map like that? A No; it would come more the other way, more toward the store houses a little bit.

Q A little bit more toward the left? A Yes.

Q Just let me take this pointer here, and your shanty was in the center you say? A Yes.

Q So I will put the tip of the pointer right in the middle of that block marked "Pile Stockade." A Yes.

Q And I have the pointer practically at right angles to that, straight up and down. A Yes, sir.

Q Now, I will slant it a little bit southwest until you tell me to stop. You tell me to stop when you think it indicates. A That is near enough; I think so.

Q About like that? A Yes.

Mr. Garrison. That is near what? What have you got there?

A It was only catecornered.

Q Yes.

Mr. Skinner. A line drawn, Judge Garrison, from the—

A A little more around, I guess.

Q More yet? A It was catecorner, all I can say.

Q I will go just as far as you say. A Well, I will say I judge there. It wasn't straight.

Mr. Skinner. Now, let us indicate upon the record, if the other side agrees, that a line drawn from the

center stockade, under the words "stockade," to the most westerly one of four cars or to the car marked on this map "P. R. R."—P. R. R. 298273, is the direction given by the witness of the location of the fire, from that point to the center of the stockade (indicating.)

Q Now, Ezekiel, that gives us the direction it was. Now, about how far from your house was it in feet? A I couldn't tell you, sir.

Q Did you see it from the inside of the house, from a window or porch, or were you out on the ground when you first saw it? A I just opened the door and looked.

Q Well, from that door can you give us some idea of the distance, using this room, perhaps, as an illustration? Now, from where you sit right here in the witness box, was it any further away than down to the other wall, clear to the other end of the room, or was it not as far as that? A As far as I can come to it from my shanty door to the first track, was 35 feet.

Q Well, was this fire that you saw alongside of the car on the first track? A On the third.

Q On the third? A Yes, sir.

Q The car was on the first track? A Yes, sir.

Q Well, now, the first track was about 35 feet away from your shanty door, and I suppose you know the usual distance that tracks are apart when they run— A Well, five gauge, don't you know; that is a five gauge, and then between that I don't know how much it is exactly.

Q Well, would you say roughly five or six feet? A Six feet?

Q Five or six feet, yes? A Well, the tie is eight feet long.

Q No, I don't mean between the rails, but from one track to the other track? A Well, I never measured it. I guess a railroad man can tell you the distance better than I can.

Q Well, you think it was on the third track. Now, was the fire that you saw on the side of the car—alongside of the car on the side nearest to you, or farthest away from you? A Well, I couldn't exactly say whether it was because—the yard was full of cars, and all I know it was on one corner. It seemed to me to be.

Mr. Garrison. In one corner?

The Witness. Yes, like right alongside of the door, you know, alongside of the door.

Mr. Collins. "On the corner of the car," it seems to me.

Mr. Garrison. Alongside of the car.

The Witness. Yes, like here is the end of the car; it was coming up alongside.

Q Well, at that time that you looked out your shanty door and saw the fire, Ezekiel, was it a little fire or big fire? A It was quite a fire; it seemed as tall as a man over the car to me.

Q And before that how long had you been sleeping? A I couldn't tell you. I was asleep early in the night; I didn't sleep no time.

Q Do you know what time you went to bed? A No, sir, I didn't know.

Q Had you been in bed more than an hour? A Oh, I guess so. My wife, she was up ironing.

Q Well, at the time you looked out of the shanty door did you see any other fire than this one you are telling about? A That is all.

Q Did you see any other fire that night at all except this one? A That is all.

Q I mean, the Black Tom, or near it? A That is all.

Mr. Skinner. Cross examine.

Ezekiel Townes, cross.

Cross examination by Mr. Garrison.

Q Ezekiel, how do you know your wife had a hard time waking you up that night? A Well, she says she did.

Q Well, all right. When you looked out this southwestly direction that you speak of, there were two tracks on which there were no cars whatever at that time; is that right? A Yes, sir.

Q Now, then, was the fire that you saw on the third track, the first track that had cars on it? A Well, that was the third track from my place.

Q And was it on this third track that had cars on it, the third track from your place where the fire was? A Where the cars was.

Q What? A Where the cars was, yes; where the loaded cars was; that was the third track over.

Q It was the first track that had cars on, is what I am trying to find out? A Yes.

Q And it was on that track that had cars there that you saw the fire? A Yes, sir.

Q At which end of the car was it that was on fire? A The right-hand end.

Q Had you looked at it, at the left-hand end—had you looked at it? A It looked like it was—it was more towards left—well, this is left, isn't it? That is right.

Q More this way, wasn't it? A Yes, going towards the town.

Q Going towards the town? A Yes.

Q Did it seem to be in the middle of the car or end of the car? A It seemed to be alongside.

Q And it seemed to be in the car? A It was crawling alongside, not in the car; alongside.

Q And could you see on the ground whether there was any fire on the ground or not? A I didn't; I didn't have time, sir.

Q The only thing you saw was the wood burning of the car? A That is all, sir.

Ezekiel Townes, cross.

Q And the shells were going off? A Coming off, yes, sir.

Q Going off very rapidly? A Yes, sir.

Q Making a lot of noise? A Yes, sir.

Q And that scared you and you went away with your family; is that so, right away? A Yes, sir.

Q On a boat? A Yes, sir.

Q Went away right away? A Yes, sir.

Q It was no place to stay with those shells going off? A No, sir.

Q You didn't go in the yard, did you, at all? A No, sir.

Q Got right on a boat alongside your house? A Right alongside the house.

Q Alongside the shanty? A Yes, sir.

Q Who else was at your house that night besides yourself and your wife? A My two children.

Q What are their ages? A One is 16 and the other is about five or six.

Q There had not been any explosion—except these exploding shells—there had not been any explosion before you left? A No, sir; the explosion was after I got away.

Q And where were you when the explosion took place? A Pacific avenue, Father Meehan's church.

Q And how far is that up in the town? From the water's edge, where you landed? A Oh, it is quite a ways.

Q Quite a ways? A Yes, sir.

Q Can you estimate the length of time between the time that you saw the fire, and the time of the explosion, this big explosion? A Well, I cannot estimate the time, but I know I had killed up an hour, anyway, or more; an hour, anyway, I mean to say.

Q An hour anyway? A Yes, sir.

Mr. Garrison. Nothing further.

Ezekiel Townes, re-direct.

Re-direct examination by Mr. Skinner.

Q Mr. Townes, you testified at the Coroner's inquest, didn't you? A Yes, sir.

Q At the time that you looked out and first saw this fire, was there any explosion then? A Only these shells going off.

Q You heard shells going off? A Yes, sir.

Q So that the fire had gotten that far when you first saw it? A Yes, sir.

Mr. Garrison. I object to the form of that question, about how far it had gotten.

Mr. Skinner. Well, I will withdraw it.

The Court. All right, strike it out.

Q Do you mean now that there were no cars at all between you as you stood in the door, and the fire as you saw it, nothing to obstruct your view? A Nothing to obstruct my view, only just saw the fire.

Q Nothing, I see. Do you remember testifying in another suit that was brought by the Plate Glass Company and at the Coroner's inquest as well? A Sir?

Q You testified twice, didn't you? A Yes, sir.

Q Well, now, don't you remember—I want to see if this refreshes your recollection at all—

Mr. Garrison. I object to refreshing this witness' recollection in any such fashion, if you Honor please.

Mr. Skinner. I haven't finished.

Mr. Garrison. The witness has not shown that he needs his recollection refreshed by anything. There is no basis for it.

The Court. Well, the point is, if that question is not finished, I will permit it to be finished.

Q (Question repeated by the stenographer.) Well, now, don't you remember—I want to see if this refreshes your recollection at all—(Mr. Skinner continuing.) I am

going to show you a copy of the testimony at the Coroner's inquest, and call your attention to your testimony there, and ask you whether it refreshes your recollection. I want to ask first—

Mr. Skinner. I want to ask first if Judge Garrison will require formal proof of the copy. Probably, you have one of your own.

Mr. Garrison. I do not require any formal proof of the copy. I will object to the form of the question, because he has not laid any ground for showing this witness needs his recollection refreshed by anything, or about anything. As I understand, you may not refresh a witness' recollection unless he has shown that he needs to have it refreshed. Now, this witness has not shown the slightest hesitancy about any question; he has not shown he has any recollection that needs any refreshment, and I respectfully submit that until that is shown counsel has no right to refresh his recollection.

The Court. I think the only object of the examining counsel is to refresh the witness' recollection—if that is so, the objection to this question is well taken. If there be another object, I can readily see how this might be a relevant thing.

Mr. Garrison. I can only deal with the question as it is asked.

Mr. Skinner. Well, I will ask a question along the line of Judge Garrison's objection:

Q Ezekiel, is your recollection of what you saw the night of the fire, July, 1916, as good now as it was when you testified at the Coroner's inquest? A I think I have not forgotten much of it; I don't think so; I don't think I have forgotten much of it.

Q Well, the testimony before the Coroner was taken in August, 1916, a little less than a month after the fire. Do you think—what would you say as to whether your

recollection, as you testified then, was any clearer than it is now, nearly three years after?

Mr. Garrison. I object to that question. I cannot understand the right counsel has to cross-examine his own witness. He has not shown the slightest hostility or slightest inability to answer any question that is asked him.

The Court. Oh, there isn't any question about his right to do it. The Court of Appeals in Morris against State, has distinctly ruled otherwise; and in the case of State against Didiamus, in 86 Atlantic Reporter, the point decided is that if the witness being called by one party and expected by that party to testify to one thing, disappoints the reasonable expectations of the party who called him, he has a right, in order to nullify the evidence, of the witness, to prove what he said on another occasion under oath, and thereby destroy all the evidence he has put in.

Mr. Garrison. I haven't seen any evidence but what this witness testified to everything they expected him to.

The Court. Well, I think by implication there seems to be some evidence of disappointment.

Mr. Garrison. Your Honor is a better inferer than I am. If they will take the ground that this witness has not come up to their expectations, that is one thing, and you will deal with it. Until they do, I do not think they have any right to violate the ordinary rule of cross-examining their own witness.

Q (Question repeated by the stenographer.)

"Q Well, the testimony before the Coroner was taken in August, 1916, a little less than a month after the fire. Do you think—what would you say as to whether your recollection as you testified then was any clearer than it is now, nearly three years after?"

The Court. Well, I will admit that question—

Mr. Garrison. Exception.

The Court. —if counsel wishes to press it.

Mr. Garrison. Exception.

Q (Last question repeated by the stenographer.)

Mr. Skinner. Did he answer that?

The Stenographer. No.

The Court. Do you want him to answer it?

Mr. Skinner. I thought simply it was my duty to get an answer to the question. It had not been answered yet.

The Court. I am not impuring your duty. If you want the answer you may have it.

Mr. Skinner. I will withdraw the question.

Q Ezekiel, just one question. Are you sure now that there were two tracks without anything on them between you and the track that the car was on? A Am I sure?

Q Yes. A I said that all I know was that it was over on the third track from me. I don't know anything about—

Q Were there any cars on the— A First track?

Q —first track or on the second track? A It was on the third track cars was.

Q You are sure of that? A Yes.

Q Now, I ask you, were there any cars on the second track? A I didn't see none; there might have been; but I could see the fire perfectly. I didn't look all up and down, you know.

Q I see. I see.

Mr. Skinner. That is all.

Mr. Garrison. I want to ask just one further question.

Lottie Townes, direct.

By Mr. Garrison.

Q Ezekiel, could you see the shells that were going off when you first looked at this fire? A I only could see a blast at that time.

Q But you could see the blast? A Yes.

Q Did that seem to be coming from this car that was on fire? A Yes, sir.

Q When you first looked? A Yes, it seemed so.

Q And there was only one car on fire when you first looked? A When I first looked.

Q And out of that car these shells seemed to be shooting? A Yes, sir.

Mr. Garrison. That is all.

(Witness excused.)

LOTTIE TOWNES, sworn.

Direct examination by Mr. Skinner.

Q Mrs. Townes, you are the wife of Ezekiel Townes, the last witness? A Yes, sir.

Q Did you say yes? A Yes.

Q Do you remember the night of July 29th, and early morning of July 30th, 1916? A Yes, sir.

Q Do you remember the Black Tom explosion? A Yes, sir.

Q Did you live on Black Tom? A Yes, sir.

The Court. Speak up louder, don't be frightened.

A I am not frightened at all.

The Court. Then don't be mild about it.

A Well, I think if you like I did—

By Mr. Skinner.

Q Did you have to wake your husband up that night? A Yes, sir.

Q Did you have to call him? A Yes, sir; three times.

Q Did you have any trouble in getting him awake? A Yes, sir.

Q Now, won't you call or talk just as loud now as you had to talk to Zeke that night to get him awake, to these gentlemen? A Well, I don't know; I don't know how I could do that.

Q Well, talk the way you are talking to Zeke and that will do? A Well, I just shook him and told him to get up. The first thing I heard was shots, like a gun going off, and I easy wake, and I was awake at the time on account of my foot—I have a broken arch—

Q Yes. A —and shook him, and I told Zeke that there is some one shooting.

Q Did he wake up? A Yes, sir—well, I am ahead of my story. First I smelled smoke, and I shook him, and I says, "I smell smoke," and he says, "It is only the detectives cooking the coffee." Well, I know they generally did do that, so I let it go. I was satisfied. Well, then I heard shooting, and I shook him again, and he says, "Oh, it is only the detectives shooting," so I let that go until I heard a large report, and it shook the building we was living in.

Q Now, then, when you first spoke to him about it and tried to wake him— A I smelt smoke.

Q —have you any idea what time it was? A No, sir.

Q How long after that was it that you tried to wake him the second time? A Well, I couldn't say.

Q Well, did you lie there? A Oh, just a few minutes.

Q Five minutes, ten minutes, three minutes? A Well, I guess around five minutes.

Q It was about five minutes? A I am only guessing at it, for to tell you the truth I don't know.

Q After smelling smoke did you yourself see any fire? A I did when I got up, and I was afraid to go to the door until my husband got up, and then when he got up I went behind him.

Lottie Townes, cross.

Q What did you see? A I seen the car all ablaze, and large red balls of fire going straight up in the air.

Q Did you see anything else afire than that? A No, sir; not even a spark on the ground. It was clearer than this room is now. I even noticed, because I went out there more than once and put out the fire on the ties myself, with my own hands.

Q You have? A Yes, sir.

Q In what, in the yard? A No—in the yard right in front of my door where the tracks are along there.

Q I see. Before this, you mean? A Yes, sir; before the explosion.

Q Where was the car that was shooting out balls of fire? A Just slanting from my house, the same as my house set there it was right over like that. You can judge about how three tracks would go; it was right on the third track, for I looked good myself. I was thinking more of my home, which I lost, everything I had and almost lost my life.

Q Then your husband rowed you away? A In the rowboat, yes, sir.

Cross examination by Mr. Garrison.

Q Were you in bed at the time you speak of? A Yes, sir; we all was in bed; my children was sound asleep, and I woke them up myself.

Q When you first woke up you didn't go to the door? A No, sir; I was really afraid.

Q You didn't go at any rate? A No, sir.

Q And when you first woke up did you hear this shooting? A No, sir.

Q How long— A I smelt the smoke and then a view —after I laid there a while awake, I heard the shooting.

Q Yes; and that was like revolver or guns going off? A Yes, like a gun.

Q Did you go to the door then? A No, sir.

Q You did not go to the door as I understand until you woke your husband? A No, sir.

Q That is right. And when you got to the door was the whole car on fire? A Yes, sir; all going up. I didn't notice the sides of the car, but I only noticed the top of the car, the fire was going up.

Q Was there any fire on the ground at all? A Not a spark.

Q It was all confined to the car? A Yes, sir; all in the one car.

Q And only one car wasn't there? A Yes, sir.

Q There were no cars between you and the third track, were there? A Well, I know there was a car on the second track, I wouldn't be sure, I am quite certain.

Q It wasn't between you and the car that was on fire? A No. I can tell you, the car was right in front of our door on the second track.

Q There was only one car on the second track between you— A Yes, the second track.

Q —and the car that was burning on the third track? A Yes, sir.

Q And as I understand it, the first track was vacant entirely, the second track had one car on it, and the third track had a great number of cars on it, and one of them was on fire? A Yes, sir.

Q It was just shooting out of that one car that was on fire? A Only the one car, yes, sir. I didn't notice any more cars.

Q That is where the shooting came from? A Yes, sir.

Q You could see these red balls going up in the air? A Yes, sir.

Q And hear the reports like a revolver or cannon? A Yes, sir.

Q You did not mean to say, Mrs. Townes, did you, that just before this fire and explosion you went over there

and put out any fire on any ties? A Long before the explosion, yes, but it was not that day.

Q No, long before the explosion? A Yes, sir.

Q It was in the day time, wasn't it? A Yes, sir.

Q There were never any engines down there at night? A Yes, sir; they did drill with the cars in there sometimes in the night.

Q Not at night time? A In the night, yes sir.

Q Not after six o'clock at night? A No; I can't say just for sure, but it was late anyway.

Q Late in the afternoon? A Yes; around five o'clock, and about like that; might have been later; I heard the cars running there during the night when we were sleeping. It was after six or seven then.

Q When you said long before, what did you mean by long before? A I mean that is different times; I didn't mean on the same day of the explosion.

Q No, I know you didn't. When you said long before I want to know what you mean by long? A A week or so, like that, two or three days, like that, you would go there and find the ties smoking.

Q I want to know how long it was. What is your best recollection that you can give us as to how long before? A I think it was less than a week, but I will say a week or so, because I put it out myself with salt water.

Q Yes; you said that. What first woke you up this morning? A The smoke.

Q The smoke woke you up? A The first thing that woke me up was the pains in my foot.

Q Then you were awake before you had any evidence of anything? A Yes, sir.

Q How long had you been awake when you first had evidence of anything? A I couldn't say.

Q How long had you been awake before you heard anything or smelt anything or knew anything about any fire? A I wasn't awake so long.

Q Well, how long? A Oh, I don't know.

Lottie Townes, re-direct.

Q How long was it before you heard the shooting that you went out and looked at the fire and saw the fire? A Well, I didn't time myself.

Q No; I understand you didn't time yourself. A I couldn't say what time it was, because I set on the bed, I didn't go out to the door.

Q You have no idea how long it was at all? A No, sir, I don't.

Q How long was it after you left the shanty when you got up to the church where you heard the explosion, the big explosion? A No, sir; I didn't get to the church; it is my husband was ahead of me with the baby.

Q How near were you to your husband? A I was away, way behind him.

Q How long was it between the time that you left your house and the time you went up in Jersey City, following your husband and the baby, and heard the explosion, the big explosion? A I couldn't tell you what time it was.

Q Was it five minutes? A Because I walked—

Q Was it five minutes? A It was longer than five minutes.

Q Ten minutes? A I guess it was longer than that; I couldn't say.

Q Fifteen minutes? A Well, I couldn't say.

Q You really don't know, do you? A No, sir.

Q That is all.

Re-direct examination by Mr. Skinner.

Q How many times before this night had you seen ties burning or smouldering? A Oh, I seen them burning lots of times; I couldn't say, sir.

Q When you first smelt smoke that night, what did you think it was?

Mr. Garrison. I object.

The Court. I think I will sustain the objection.

Lottie Townes, re-direct.

Q When you first smelt the smoke—do you remember that? A Yes.

Q Now, how long after that was it that you tried to waken your husband? A I woke—I shook my husband then when I smelt the smoke.

By the Court.

Q What did he do when you shook him? A He went back to sleep again.

Q All right. Then how long was it before you shook him again? A I guess about five minutes, I guess.

By Mr. Skinner.

Q Well— A Might have been a little longer.

Q Let's see. Of course, you were not holding a watch on him, were you? A Sir?

Q You were not holding a watch to tell just how long it was, were you? A No, sir.

Q Well now, was it as long between the two times that you shook your husband to waken him as it was from the time that you left the island and got up to where the explosion was? A No, sir; no, sir.

Q Was it as long as that? A No, sir.

Q I don't suppose you have any other way then of telling us about how long it was? A No, sir; the fact was I wasn't thinking about no time.

By Mr. Garrison.

Q You are really only guessing as to the time? You are just making a guess? A Yes, sir.

By Mr. Skinner.

Q You thought it was any shorter than five minutes? A It might have been a little longer, sir; I couldn't say, because I didn't call him until I heard the shots again.

Q That is all.

Arthur M. King, direct.

ARTHUR M. KING, sworn.

Direct examination by Mr. Campbell.

Q Mr. King, what is your occupation? A Division engineer.

Q Employed by whom? A Lehigh Valley Railroad.

Q And were you such in 1916? A Yes, sir.

Mr. Campbell. Now, Judge Garrison, will you let me have the original of the map of plate 1, the original of plate 1 in Colonel Dunn's report?

(Mr. Garrison produces a map.)

Mr. Garrison. They are both there.

Q I show you a plan and ask you if that was prepared in your office in January of 1917? A That was prepared in my office, yes, sir. The date of the plan is 17th of January, and I assume it was—

Q 1917? A Yes, sir.

Q Now, you did not prepare this plan, I take it, from your own knowledge? A Partially, sir; yes, sir.

Q Well, did you have personal knowledge of the location of the cars shown on this map? A I had personal knowledge of some of them, yes, sir.

Q Well, which ones did you have personal knowledge of? A Of the—I located the car bodies after the explosion not before.

Q Oh! Well, state which particular car bodies you located? A Well, I don't believe I can tell you exactly all of them. A lot of these cars all through this territory, and these—

Q Well, I will put the question in another way. The information shown on the map with reference to the yard was either information which you had personal knowledge of, or which was given you by the Lehigh Valley people? A Yes, sir.

Q From the records of the Lehigh Valley? A Yes, sir.

Arthur M. King, direct.

Q So much of this map as purports to show the location of barges was given you by other people, was it?

Mr. Garrison. Other than the Lehigh Valley people.

Q Other than the Lehigh Valley people? A I can't recall just where I got that information now; I can't remember. I haven't seen these things in two years. I can't recall where they came from.

Q Do you recall whether it was of your own knowledge? A I recall a sketch of these schooners and barges, but I can't recall—

Mr. Garrison. You are asked if it was your own knowledge.

Q Was it your own knowledge?

Mr. Garrison. Did you know the boats were there?

A I know some of the boats were there.

Q Which boats? A I remember seeing the schooner there.

Q That is the "George W. Elsey?" A Yes; and I recollect the "Moran, 20" and the "Jet" was still there.

By Mr. Garrison.

Q You are not talking about what happened after the explosion? A Yes, sir.

Q That is not what he asked you. Is the information derived from what you saw before the explosion or after the explosion? A After the explosion as far as the schooner is concerned.

Q What was the substance of this knowledge? What ~~specials~~ vessels were there after the explosion? A I recollect the schooner—

Q The schooner "George W. Elsey?" A And the "Moran, 20" and the "Jet," I think were there, and I can't tell which one of those on the north side of the

north pier were there; it seems to me there was one there at least.

Q Yes; you don't remember which one that was? A I can't recall it, no, sir.

Q Well, where did you get the information which enabled you to supplement your own knowledge in connection with the making of this map? A I can't recollect where I got it. It was the sketch showing the lands.

Q Did that sketch come from the Lehigh Valley people or from others? A That I can't say. I don't remember now where it did come from.

Mr. Campbell. Well, have you any objection, Judge Garrison, to the maps going in evidence? I offer them in evidence.

Mr. Garrison. I don't know. I don't know anything about it. What map is this?

(Counsel confer.)

Mr. Garrison. I will cross examine the witness a moment.

Cross examination by Mr. Garrison.

Q Do you recall receiving a communication from a Colonel Dunn, who was acting for the Bureau of Explosives in respect to this matter? A I can't say whether it was from a Colonel Dunn or not.

Q I mean from some of his employees? A It might have been from some of his employees, yes.

Q I now show you a pencil sketch, and ask you whether that is the sketch that you referred to as having been furnished to you and which you transmitted on to this map you drew? A That looks very much like. I believe it is.

Q Yes, and that came from somebody that was connected with Colonel Dunn, didn't it? A I think it was. I can't say exactly. I think it was, but I am not sure.

Arthur M. King, re-direct.

Mr. Garrison. I have no objection to the document going in evidence. The paper I showed the witness is marked "D. 2 for identification, D. A. N. M. C. C."

(Map marked Exhibit P. 15.)

Re-direct examination by Mr. Campbell.

Q Mr. King, you prepared these other plans that have been offered in evidence, did you not, the one marked Plaintiff's Exhibit 6. A and 6. B, and this big interrogatory map—what is the big one?

Mr. Collins. I don't think it has been marked.

Mr. Garrison. It was attached to the interrogatories.

Q They were prepared in your office? A Two of the smaller ones, yes.

Q But the big one, was it prepared in your office? A No, sir; prepared under my instructions.

Q Under your instructions by other people? A Yes, sir.

Mr. Garrison. I suppose that big map better be given a number.

(Big map, formerly referred to as the interrogatory map, marked Exhibit P. 16.)

Q Now, all of these maps were prepared from information furnished you? A Yes, sir.

Q Plus such information as you got after the accident by examining the ruins? A Yes, sir.

Q Will you step down here for a minute. I am told this map which is plaintiff's exhibit A contains on it two hundred and twenty cars. Will you see if that is correct? A Count them up?

Q I hate to bother you, but shall we take it as that, Judge?

Mr. Garrison. I don't know.

Arthur M. King, re-direct.

Mr. Campbell. Can it be stated as that subject to correction?

Mr. Garrison. It may be stated as that until I count them.

Mr. Campbell. All right. Count them.

Mr. Garrison. I make two hundred and fourteen on what we call Pier 7. That is out here.

Mr. Campbell. I was told it was two hundred and twenty.

Mr. Garrison. Maybe they are. It is very hard to count them.

Mr. Campbell. Will you count them, please, Mr. King. I would like to have you count the number of cars shown in the yard on this map, plaintiff's exhibit P. 6a.

Mr. Garrison. He means on Pier 7.

He does not mean back of Pier 7. (Witness complies.)

Mr. Campbell. Mr. King, we will have that in the morning. Perhaps that will be better, and I will ask you one or two questions.

By Mr. Campbell.

Q Will you examine track 17 on the map which you have before you, P. 6a, and tell me how many cars are there shown on track 17, not on the north pier, but in the yard? A It appears one on—not including the—

Q Not including the north car? A One car shown there.

Q Now, will you please examine the big interrogatory map—please examine this plaintiff's exhibit 15, and tell me how many cars are shown on track 17? A Five.

Q Five cars. Now, will you please examine the big interrogatory map and tell me the number of cars shown on track 16? A Sixteen.

Arthur M. King, re-direct.

Q And then please examine the other map, P. 6a, and tell me the number of cars shown on that map? A Fifteen.

Q There is one more car shown on track 16 on the interrogatory map than there is shown on track 16 on the first mentioned map? A Yes, sir.

Q Now, please examine this plaintiff's exhibit 15, and tell me how many cars are shown on track 15? A Fifteen.

Q So the same number of cars are shown on track 15 on this map, plaintiff's exhibit 15, as are shown on the smaller map, plaintiff's exhibit P. 6a? A Yes, sir.

Q And that is one less car than is shown on the big map? A Yes, sir.

Mr. Garrison. In the interest of saving time I will object to any further examination along this line as immaterial and irrelevant.

The Court. Well, I don't know as it is exactly immaterial or irrelevant, but for the life of me I do not see what advantage we are getting by trying to show these discrepances. If they are there they are there.

Mr. Campbell. I thought it was easier to put them right on the record than as a matter of argument.

The Court. But the difficulty will be that after you have got them on the record they will still be a matter of argument, and will still be argued.

Mr. Collins. What is the purpose of showing—

The Court. I think it was Justice Holmes who said once that there are some things in law we ought to do as a concession to the shortness of human life. I think possibly this is one.

Q Mr. King, what is the length of the Black Tom peninsula from the gate down to the end of the pier? A I can't give that offhand, but it is in the neighborhood of a mile.

Arthur M. King, re-direct.

Q Is the gate shown on this map here? A No, sir.

Q Isn't it more than a mile? A That is the National Storage—what we call Black Tom.

Q From the gate up— A Upon the hill.

Q The entrance to the Black Tom premises down to the end here; isn't it more than a mile? A I do not think it is much more than a mile. I can give you that pretty closely another time.

Q Will you get it for us? A Yes, sir.

Q How many acres are comprised in the eastern end of the peninsula constituting the railroad yard? A I don't know; I have not figured it up.

Q Can you give us that? A Yes, sir.

Q Can you give us the distance from the pump house near the Warehouse F, to the bulkhead line from which the pier projects? A I can take off the map now if you want.

Q Will you do it please? A Yes, sir.

(Witness measures on map.)

Q Do it on the big map? A Sixty-six inches.

Q You mean it is more than sixty-six inches?

By the Court.

Q What is the scale of the map? A Twenty-five feet to the inch.

Q Sixty-six times twenty-five feet then? A Yes.

By Mr. Campbell.

Q How many feet is that?

Mr. Garrison. Sixty-six times twenty-five.

Q What is the length of the north pier? A Nineteen times twenty-five.

Q What is the distance from Store R to the bulkhead line? A Thirty-four times twenty-five.

Herbert G. Walmsley, direct.

Q What is the distance from the north bulkhead line to the south bulkhead line of R.? A You don't have any north bulkhead line. You mean across the property?

Q Yes, across the property? A Twenty-four and one-half times twenty-five.

The Court. We will adjourn now until ten o'clock tomorrow morning. 10

(Adjourned to Thursday, March 27, 1919, at 10 A. M.)

THIRD DAY.

(Trial resumed March 27, 1919.)

HERBERT G. WALMSLEY, sworn.

Direct examination by Mr. Skinner. 20

Q Mr. Walmsley, what is your occupation? A I am a marine engineer.

Q Where are you now employed? A On the U. S. Mine Planting Service, General Mills.

Q What is your answer? A The General Samuel Mills.

Q You called it something? A U. S. Mine Planting Service.

Q You want to speak so the jury can hear you plainly. 30 In July, 1916, what employment were you in? A On the U. S. cable steamer Joseph Henry.

Q Do you remember anything of particular notice on the morning of July 29 and July 30 at Black Tom? A Yes, sir; on July 29th—

Q Now; do you remember it? A Sir?

Q You remember something that you noticed that night? A Yes.

Q Where were you? A We was laying on the west side of Bedloe's Island, to the west dock, they call it. 40

Q West side of Bedloe's Island? A That is just the —Black Tom just sets in an angle like this, about—I should say about five or six hundred yards, as far as I can judge.

Q And in what direction generally is Black Tom from the place where you were stationed that night? A Well, that is—

Q Do you know the points of the compass there? A No, sir; not there; no, sir.

Q Well, what did you see? A Well, sir, I seen a fire upon the railroad tracks.

Q When was your attention first drawn to that? A My attention was first drawn to that very near one o'clock in the morning.

Mr. Garrison. I could not hear that.

Mr. Skinner. Very near one o'clock in the morning.

Q And from what point did you view it? Did you look out from this mine laying vessel, or this Joseph Henry ship? A Yes.

Q What did you see? A Well, I seen a fire over there.

Q Over where? A Black Tom. There was a fire there about midway between the dock and the warehouse and about, as far as I can judge, about the length of this building from the water's edge.

Mr. Garrison. When you say "building" do you mean the room?

A Yes, about the length of this room.

Mr. Garrison. From the water's edge.

A Probably it may have been a little bit more. You could not judge the exact distance.

Q Well, here is a map of Black Tom, hung up here. Can you see it from where you are? A Yes, sir. I can't get a very good view of it.

Q Come down here. There is a long line that runs across the map like that, and we speak of the direction to the end of the map as being, generally speaking, the westerly direction, and up to the top of the map here as northerly and the bottom of the map southerly.

Mr. Hardin. Show him the warehouses. He spoke of them.

Q Do you get the points, easterly and westerly? A Yes.

Q Now, out here on the easterly end of the island there are some piers; do you remember them? A Do you mean the Statue of Liberty Island?

Q No; Black Tom Island. A I do.

Q Out at the easterly end you see piers? A Yes, sir.

Q And here at the back of the map off to the end of the island you see storage warehouses indicated? A Yes.

Q Now, understanding that that direction generally is northerly, Bedloe's Island, where you were would be in what direction on this map from this property? A I could not just exactly place it there. If I could take a pencil I could give you a sketch of the place where we were from where the storehouse was. Take, for instance, if these were the storehouses on Black Tom Island, you take the Statue of Liberty standing here—

Q That is just the danger— I want you to get it on this map. A I can't—

Mr. Campbell. Why not let him make his map? He offers to make a sketch.

Mr. Garrison. Mr. Barrett, whereabouts would the Statue of Liberty be? We can agree on it if you can tell us where it was.

Mr. Barrett. About here.

Mr. Skinner. Is that right, Mr. Campbell?

Mr. Campbell. That is the general direction, yes.

Mr. Barrett. It is just a little north of east.

Q See if this will help: Bedloe's Island is off the map. I am pointing off to due east of this map and diagonally across the map.

Mr. Campbell. North of east.

Q Now, with Bedloe's Island off there, you would be looking from there towards Black Tom in this direction, running across the map diagonally to the left. Do you see that? Unless you get Liberty Island located with reference to the map you cannot tell us intelligently anything about it.

Mr. Garrison. Why don't you let him draw his own sketch?

Q Can you get that? A I do not understand it.

Mr. Garrison. Let him draw his own sketch for us and then we can apply it to this map.

A If I knew just exactly the points of the compass to the Statue of Liberty, laying out the Statue of Liberty, then I would know better.

Mr. Campbell. Northeast and southwest.

Q From the Statue of Liberty to Black Tom Island was almost due west. When you looked from the Statue of Liberty—

Mr. Campbell. Southwest.

Q Well, there is the "north" line right there. According to the location that Mr. Barrett gives to Liberty Island it was almost due west; you would be looking at the setting sun if you looked from Liberty Island to Black Tom.

Mr. Garrison. You mean Black Tom would be almost due west. Is he going to draw?

A I just want to locate the island. You say this is Bedloe's Island?

Mr. Garrison. Mark that with a "B."

A We will take for granted this is the Jersey shore, coming up around here. Then we will say over here is Ellis Island.

Mr. Garrison. All right. Mark that "JS"—Jersey Shore—"NJS," you would better make it.

Mr. Skinner. I would like to conduct this examination, Mr. Garrison.

Mr. Garrison. All right; I will sit down.

Q Now, counsel on the other side kindly supplies us with a geodetic survey map of New York Bay and Harbor. I want you to look at that and get the location of Black Tom Island with reference to Bedloe's Island. Let's see if we can find it. Here is Bedloe's Island. A Yes; right here.

Q And there is Black Tom right over there; see? A Yes.

Q From Bedloe's Island to Black Tom is just a little north of west; see? A Yes.

Q And do you get the lay of it from there? A Yes.

Q This is counted north, isn't it? A Yes.

Q And this is south? A Yes.

Q And this is west? A Yes. We will take the west side; say this is the west side; our dock is right here.

Q Wait a moment, please.

Mr. Skinner. This need not go on the record. Don't you see that from here Bedloe's Island from Black Tom is nearly west? Now, look at that big map up there. Just as those gentlemen said, Bedloe's Island would be off that way; see?

A Yes.

Mr. Skinner. You would be looking west to that island. Do you see that? There is Bedloe's Island off over here. Here is the pier. Don't you get that?

A I don't know.

Q Well, without attempting to locate, Mr. Walmsley, any more definitely by the map, just tell us as you would yourself describe it—take your seat—where, on Black Tom Island you saw the fire?

A Voice. Wait a minute. The stenographer is not in his seat.

A From Black Tom Island—we were on the west side of the island, right at the dock—it is called the west dock—and we looked in over on the—well, I don't know just—the east side—no, the north side of it, I guess—well, anyhow, we was laying onto the west dock.

Q Now, looking from there to Black Tom Island, where on Black Tom Island was the fire that you saw? A It was about midway between the pier and the big warehouse and up in the railroad tracks.

Q And about how far from the—was there not water on both sides of Black Tom? (No answer.)

Q Water ran along the side of Black Tom, didn't it? A Well, it run down along on the side we was on. I did not know it was an island before until today.

Q On the side you were on was water? A Yes.

Q How far from the water side that you were looking at in on the island was the fire that you saw? A In from the water's edge?

Q Yes. A I should judge it was the length of this building, anyhow.

Mr. Garrison. You say "building" again.

A The length of this room.

The Court. We had this room measured once. It is about 68 feet.

Mr. Garrison. The Judge says the room is about 68 feet.

The Court. We measured it once, and that is about it.

Herbert G. Walmsley, cross.

Q How long did you look at it? A I looked at it about fifteen minutes.

Q Then what did you do? A I went to bed then.

Q And up to the time you went to bed had there been any explosion? A No explosions; only it sounded like guns a-shooting off.

Q After you got in bed was there an explosion? A Yes, sir.

Q Did you hear it? A I did, sir; yes, sir.

Q You did not see it? A No, sir.

Q Now, up to the time that you went to bed did you see any other fire than this one on Black Tom Island that you have described ? A I seen another fire about two or three hundred yards up in that direction from the warehouse on the railroad tracks.

Q Was that farther away from you than the other one that you have described, the first one? A Oh, yes; that was—

Q Yes? A Yes, sir.

Q And did you see any fire on any boat? A No, sir.

Cross examination by Mr. Garrison.

Q What is the crew of this cable steamer Joseph Henry? A The number of the crew, sir?

Q Yes; how many were in the crew? A About forty-two, in all told.

Q And what was your office or title; what were you? A Myself? I was assistant engineer at that time.

Q Yes; were you on duty that night? A Well, I was not on duty, but I was on board.

Q I could not hear that last.

(Answer repeated by the stenographer.)

Q Yes. There were other men there? There were other men that were on deck that were on duty, I suppose? A Yes—well, no, sir, not on deck, but we had men on board that was on duty. I had one man in the forward

part, in the boiler room, and the oiler on watch. When the oiler goes to bed the fireman, he stays up all night.

Q Is there anybody who patrols the deck all night; is there any watch on deck? A No, sir; there is no watch on deck, sir.

Q And you just happend to be up on deck before you went to bed; you had no business up there; you were not doing any work? A Yes; I was called up. I was called up by the oiler.

Mr. Garrison. Repeat that, please.

(Answer repeated.)

Mr. Garrison. He has a cold or something. It is hard to hear him.

Q What time was it you were called up by the oiler? A That was about twelve o'clock, sir.

Q Do you mean by that that is the time you got up on deck? A No, sir; I went down in his room! I did not go on deck then.

Q When you were called up by the oiler you were called to go in the engine room? A Yes.

Q How did you come to go up on deck? A At about twelve o'clock the oiler came and called me up and he said the fireman could not get any water in the boilers, so I went down below to see what the trouble was. I located the trouble and got the water in the boilers, and then we came back up again and I was standing in my room washing my hands. The oiler was standing out in the engine room speaking to me. So he says there must be a riot over in Jersey tonight.

Q A what? A A riot.

Q That was on account of what? What made him say that? A Because it sounded like guns a-shooting; it sounded like guns a-shooting.

Q That attracted your attention? A That attracted our attention. So, in the meantime, this oiler goes back

aft on the stern of the boat, and he looks over and comes back to me and says there is a fire over on Black Tom.

Q Did you have to go forward or aft to see the fire? A We had to go aft, sir.

Q Your nose was in toward the shore? A The shore, yes.

Q I see. Now, when you got back there how large was the fire? A Why, it was—it looked—from where we were it looked to be about four or five feet high.

Q Four or five feet high? A Yes.

Q Do you mean it was going that high up in the air, or going that high off the ground? A I could not tell whether it came out of the ground or what, but what the fire was, it looked to be a box car.

Q Yes. A And the blaze was spreading all the time, and it looked about five feet high.

Q Do you mean five feet all told or five feet above the top of the car? A No; five feet all told.

Q From the bottom of the fire to the top, or what? A Yes.

Q Did the top of it seem to be above the box car or what? Did the top of the fire seem to be about as high as the box car or above the top of the box car? A No, it didn't appear to be quite so high as the top of it.

Q And it was about five feet from the bottom of the fire to the top of the fire? A Yes.

Q Could you see anything coming out of the fire; could you see these shucks coming out of the fire, these shells or what was making this blaze? A I could not see that until after the explosion. Then I could see these shells popping out.

Q I want to know before the explosion, when you saw this fire first, and before that you heard these "guns" go off? A Yes.

Q When you got on the deck and got on the stern and looked over toward Black Tom, you saw this fire about five feet high from top to bottom? A Yes.

Q And it seemed to be in a box car? A Yes.

Q Did you see anything shooting out of that at all; did you see the things that made the noise? A No; I could not see the things that made the noise, but I could hear them very distinctly.

Q You could hear them but could not see them? A No, sir.

Q You stayed back there about fifteen minutes, you say? A Yes; I stayed back there about fifteen minutes.

Q Did any other car in that neighborhood where the first car was seem to get on fire during those fifteen minutes? A Just the one, sir.

Q And during those fifteen minutes did you see some other fire some other place? A Yes; I seen one more fire.

Q What did that look like? A That looked like it was right on the railroad track, right on the ground.

Q Right on the ground? A Yes.

Q And how far was that and what direction was it—I will ask those questions separately—how far was it from this first car that you saw on fire? A It was about —I should say about three hundred yards probably from the warehouse up the track.

Q And you were over here somewhere on Bedloe's Island? A Yes, sir.

Q You looked across this way? A Yes, sir.

Q You fixed the first fire in here somewhere, haven't you? A Well, if that is the warehouses.

Q No, here are the warehouses? A Well, the first fire was in between the warehouse and the dock.

Q Well, here are the warehouses back here and here is the dock out here. The warehouses are marked with letters O, P, Q and R. This is the end of the dock. Here is the water's edge that you spoke of.

Mr. Skinner. I object to that statement, characterizing as the water's edge that he spoke of.

Mr. Garrison. Well, let the witness come down and characterize the water's edge that he spoke of.

The Court. Well, I will strike so much of it as to the remarks, "water's edge that he spoke of."

Mr. Garrison. Will you come down and point out where you say the water's edge was?

The Witness. I don't think I can point it out on that.

Mr. Garrison. Well, we will see.

(The map being referred to is marked J. V. for identification.)

Mr. Garrison. Now, Mr. Walmsley, if you will come down here just a minute.

(Witness leaves the witness chair and goes to the map.)

Q Do you see right here, in that part of the map, it says Bedloe's Island? Do you see that? Bedloe's I.? A Yes.

Q Do you see there it says Black Tom—Black Tom—do you see that? A Yes.

Q Now, there is the edge of Black Tom, isn't it? Where I have my finger? A I think it is.

Q Well, you think it is? There is nothing beyond that; that is water? A Yes.

Q Now, do you see that sort of hump there on the top? A Yes.

Q Now, that is this hump here; that is that thing there (indicating).

Mr. Hardin. How do you know that?

Mr. Garrison. Well, can't we agree on anything?

Mr. Skinner. Well, I do not propose to take your guess; that is all.

Q Just look here, young man. Do you see here from this end, where this end is, do you see from the top of that end? A Yes.

Q You came across like that from Bedloe's Island, didn't you? A Yes, sir.

Q Now, that runs you out like that, doesn't it? Isn't that Bedloe's Island out there? A Well, I am not sure; I am not sure about it.

Q Well, what can make you sure? Can you tell us on this map? If we use this map can you tell us? A I told you I don't know anything about these maps.

Q Well, assuming the maps are right? They are made by the United States Government. A I know that; but I don't know anything about them and it is hard for me to locate the place on there.

Q Well, now, isn't that your dock there? Isn't that little piece of land that sticks out here toward Bedloe's Island—isn't that over near the warehouse? A If that represents the dock, it is; it is on the west side of the island.

Q Isn't that on the west side of the island? A Yes.

Q Exactly; and you look right across that way at this Black Tom, don't you? A Yes, sir.

Q All right. Then whereabouts is the water's edge that you say you started from to put this car back from the water's edge some five or six hundred yards or feet? A Where is the warehouse there?

Q Here is the warehouse, along there; and here are the piers out at the end, and Bedloe's Island out here. Now, if you looked out there, what did you see? What was the water's edge you were talking about? A Well, the water's edge was between the dock and the warehouse.

Q Well, precisely. Wasn't this it here? This is all water in here? A I don't know; I can't see it.

Q You can take our word it is water. You must take somebody's word for it, if you can's see it. This is water all around, and these things are piers that stick out into the water. This is the end of the bulkhead over here. Now, what water was it that you saw? What

edge of the water was it that you were talking about? A Well, the only way I can tell you is the water that comes down between the piers; the piers were sticking out.

Q Well, here they are. And that is water's edge you were talking about? A Yes.

Q And was the first fire between this water's edge—I am pointing between the extreme north pier and the first ridge No. 2? A The first fire?

Q Yes, the first fire that you saw, how far back was it from this water's edge? A I can judge; I couldn't say for sure; because I have never been over there; but I judge it was the length of this room.

Q You judge it was about 68 feet then back from the water's edge, is that right? A Yes, as near as I can judge.

Q Back in here somewhere? A Yes.

Q Now, tell us where the second fire was that you saw during those fifteen minutes? A Well, the second fire was up to the right.

Q You mean near the storehouse or further away from where you were—nearer to where you were or further away from where you were? A Well, it was further away from where I was.

Q Well, then, it was down here some place toward the warehouse; is that right? A No, it was up toward the—it was up toward the direction of Ellis Island. In that direction; toward Ellis Island.

Q Well, was it further back in the yard or nearer toward you? That is what I am trying to get at. Was it further away from you or toward the warehouses, or was it nearer to you than the first fire? A The first fire was nearer.

Q The first fire was nearer. All right. Now how big was that second fire? A About the size of that table there.

Q About the size of that counsel table? A Yes, sir. It looked about that size.

Mr. Garrison. About seven feet by four, would your Honor say?

The Witness. Well, I wouldn't say exactly.

Mr. Garrison. No, we are not trying to pin you down.

Mr. Skinner. The jury might be interested to get the location of Bedloe's Island.

Mr. Garrison (indicating). Gentlemen, that is Bedloe's Island out here, and this is Black Tom—Black Tom, general direction. Can you see that in the back? Do you want to take it and look at it?

A Juror. Yes.

(The map is handed to the jurors.)

Q How high was the second fire that you saw? A Second fire, it was a blazing up, I should say, roughly speaking, eight feet.

Q Was it higher than the first fire? A Well, this was from the ground I seen it; this fire was on the ground.

Q The first one was on the ground? A Yes.

Q The second fire, you mean, was on the ground? You are not sure whether the first fire was on the ground or not? A I am not sure whether the first fire was on the ground or not.

Q You are rather inclined to think it was not on the ground, aren't you? You are rather inclined to think it was inside of the car? A Well, if it was inside of the car you couldn't see it.

Q Well, I mean it was not on the ground, but from the car floor? A It looked as though it may have been broken out; it may have been broken out from the inside.

Q Yes; that is what I had in mind? A Of course, I don't know that for sure, because the fire I seen was on the outside of the car, blazing on the outside.

Herbert G. Walmsley, re-direct.

Q Naturally, if it was on the inside and the door was shut, you couldn't see it. Well all know that. Now, then, did anything like fire works or shells or anything of that sort seem to come out of the second fire? A No, sir.

Q Or did there seem to be more than one car? A Oh, no; that was on the railroad track.

Q That was on the railroad track? A That was right on the ground; that was not a car, at all.

Q That was not a car; that was on the tracks? A That was on the tracks; yes, sir.

Q On the tracks, or between the tracks? I don't suppose you could tell which? A I don't know that; I think it was on the ground; it seemed to be on the ground.

Q And was anything coming out of that? A No, sir.

Q No shells or fireworks, or anything? A (No answer.)

Q Well, the matter did not strike you as very serious? You went off to bed? It didn't strike you this was a big fire? A Yes; I knew there was dynamite and stuff —well, I didn't know it, but I seen them bringing cars out there with red flags on them; people told me it was dynamite and stuff.

Q That didn't strike you this was a big fire when you went off to bed? A Well, it didn't strike me as being big then, but I thought it would be afterwards; because I made the remark.

Q Now, how long have you been in bed when the explosion took place? A Well, I had not—I couldn't tell you just exactly how long I had been in there; I had not been very long in there, though.

Mr. Garrison. That is all.

Re-direct examination by Mr. Skinner.

Q Mr. Walmsley— A Yes, sir.

Herbert G. Walmsley, re-direct.

Q —do you know that there was water on three sides of Black Tom? A Three sides? No, sir; I do not; I didn't know it.

Q Well, as you looked over from Bedloe's Island to Black Tom, you saw a pier, did you not? A I seen a pier, yes, sir.

Q Did you see water on more than one side of that pier? A The water was on both sides of it.

Q Both sides? A Yes, sir.

Q Now, as you looked from Bedloe's Island—Liberty Island—over at the pier—you had seen it before this night, hadn't you? A Did I see what?

Q You had seen Black Tom before this night, hadn't you? A Oh, yes, sir.

Q Then you were familiar with the look of Black Tom from Liberty Island? A Yes, sir.

Q And as you looked from Liberty Island and saw the pier, could you also see the rest of Black Tom— A All that same side.

Mr. Garrison. You mean at night?

Mr. Skinner. No, in the day time.

The Witness. In the day time?

Q Yes. A Yes, sir; you could see right smart at day.

Q Now, as you looked over from this Liberty Island at Black Tom, as it stretched from the pier on, you speak of the fire as being so many feet or such a distance from the water's edge? A Yes, sir.

Q Do you mean the water's edge between the edge of the water that was on the side of Black Tom, or do you mean the edge of the water that was at the end of Black Tom? A I mean the edge of the water at the edge of the land where the docks come from the land out, where they extend from the land out in the water.

Q Yes. Well, now, can't you see on this map here the piers sticking out in the water? A Yes, sir.

Q This is water? A Yes, sir, I see that.

Q And here at the top of the map is the northerly side of Black Tom, and water all along there. Do you see? A Yes, sir; I see that; yes, sir.

Q Now, there is water all along that northerly side of the map—northerly side of Black Tom; and then there is water in here on the southerly side of this pier, and around this way, all around to the southerly side of the map? A Yes.

Q Now, Bedloe's Island goes off in the other direction to the right of the pier, and if you look from Bedloe's Island to the right—over at the pier— A Yes, sir.

Q Was this that I show you up there, that east side —was that the water's edge—

Mr. Garrison. I object to that.

Mr. Skinner. Wait till I finish.

Q Was this side that I am pointing to, the northerly side of the pier and the island—the water's edge that you speak of, or was this in around between the piers on the right-hand end of Black Tom Island, the easterly end? Which was it, up there or in here? A Well, the side that the warehouse is on, do you call that the northerly side?

Q Yes—well, wait. No. The side that the warehouse is on is the southerly side of the island. You could see the warehouse, I take it, from either side; but they are actually over on the southerly side of the island. Now, you said that the fire was about half way between the pier and the warehouse? A Yes, sir.

Q That distance is about 800 feet, I think—

Mr. Garrison. Between 750 and 800.

Q Yes, about 800 feet from the end of the warehouse nearest to you to the end of the pier furthest from you, between those two points, and you spoke of the fire as about half way between the piers and the warehouses— A Yes, sir.

Herbert G. Walmsley, re-direct.

Q Now, by the way—

Mr. Garrison. He has also said it was 68 feet from the water's edge.

Mr. Skinner. Yes.

Q And Vice-Chancellor Garrison thinks that you meant 68 feet from the edge—the water's edge; that is, at the end of Black Tom, nearest to the pier; and I thought you meant the water's edge 68 feet from the water's edge that is on the north side of Black Tom.

Mr. Garrison. He can't see the north side of Black Tom.

Mr. Skinner. Certainly could.

Q Can you tell which it was now, by the map? A Well, what I want to know is that warehouse and pier —do you call that the northerly side, that is, facing the Statute of Liberty?

Mr. Skinner. No.

The Witness. That side?

Mr. Skinner. No. The Statue of Liberty is over in this direction.

Mr. Garrison. No, it is not.

Mr. Skinner. The Statue of Liberty is over in this direction, and it is east from the pier.

Q Now, if you look at the end of the pier, Mr. Walmsley, if you look at the end of the pier, you are looking at the easterly side; but if you look at the side of the pier you are looking at the northerly side. Do you get that? A (No answer.)

Q That is the northerly side of the pier and that is the easterly end of the pier. Now, were you looking at the end of the pier or at the side of the pier? A Well, we seen the side of the pier.

Edward Kane, direct.

Q Side of the pier? A Yes, sir.

Mr. Skinner. That is all.

By Mr. Garrison.

Q And it was 68 feet from the west side of that pier? A The length of this room.

Q From the side of the pier? A From the edge of the land—

Q I know, but you have just told Judge Skinner that you looked at the side of this pier here. Now, if you were looking at the side of this pier here, it was 68 feet along here somewhere, wasn't it, across the pier? A Yes; but this was up in the car tracks; it was not out on the pier.

Q Then it is 68 feet from here, isn't it? A From the water's edge.

By Mr. Skinner.

Q And midway between the pier and the storehouses? A Midway, yes, sir.

Mr. Skinner. Yes. That is all.

Mr. Garrison. That is all.

(Witness excused.)

EDWARD KANE, sworn.

Direct examination by Mr. Skinner.

Q Mr. Kane, where do you live? A 38 Orient avenue.

Q Jersey City? A Jersey City.

Q And where do you work? A Standard Oil.

Q In July, 1916, whom did you work for? A Lehigh Valley Railroad.

Q And in what capacity? A Watchman.

Q Where? A Black Tom's.

Q Then were there other watchmen there? A Yes, sir.

Q How many? A Four.

Q Four including yourself, or four besides yourself? A There were three others by myself.

Q And who were the three? A Mr. Sloan, Mr. Kelly, Mr. Groath, and Mr. Gary—four.

Q Four others besides yourself? A Yes, sir.

Q And were you in a position of supervisor over them? A Yes, sir.

Q Now, were these men nothing but watchmen, or did they have other duties? A They had other duties.

Q What were the other duties of each? A Well, Mr. Sloan had to take care of the boiler.

Q Sloan had to take care of a boiler. Where? A Where? Right along—by Store F storehouse.

Q Right along by Store F? A Yes.

Q What did the boiler supply steam for? A Pumps, for our fire pumps.

Q Pump— A Steam heat.

Q Steam heat for the storage house? A For the offices; yes, sir.

Q Now, besides looking after that pump—pardon me. You said he looked after the boiler. Well, who ran the pump? A Well, he did.

Q Did he do anything else in and around that machinery besides look after the boiler and run the pump? A He had to ring buttons.

Q Yes; that was outside, wasn't it? A Outside, yes, sir.

Q But in the way of engineer's or fireman's work, was that what he did, what you just described? A Yes, sir.

Q And was he on duty in the day time or night? A Night time.

Q What do you mean when you say he had to punch a button? A He had to go out and ring his buttons every hour.

Q And where were the buttons that he had to punch? A There were two on the east side of Pier 4.

Edward Kane, direct.

Q Two on the east side of Pier 4? A Yes, right down by Storehouse A.

Q Storehouse A? A Yes, and right up at the other end—south end of Pier 4.

Q South end of Pier 4? A Yes, sir.

Q Then his place was in the pump room alongside of Store F, and from that at intervals he would go out and punch buttons on Pier 4? A Yes, sir.

Q And back to the pump room? A Yes, sir.

Q Now, you mentioned another man? A Mr. Kelly.

Q Kelly. Where was Kelly? A Stationed at the grain elevator.

Q The grain elevator. Is that the new grain elevator or the grain transfer elevator? A Grain transfer.

Q The grain transfer elevator. And what did he have to do there besides watch it? A He had to go—well, look after the boiler there and ring buttons.

Q What boiler? A Boiler in the elevator.

Q Well, was his time for work at night? A Yes, sir.

Q And what buttons did he punch? A He punched buttons on the east side of Pier 4.

Q The east side of Pier 4? A Yes, sir.

Q Now, aren't you mistaken about that? A Or on the west side.

Q West side? A West side of Pier 4.

Q West side as you look here on the map? A Yes, sir.

Q West side? A Yes, sir.

Q So that his place was in the grain transfer elevator boiler room? A Yes, sir.

Q And from there he would go out at intervals—you say every hour—and touch buttons on the west side of Pier 4? A Yes, sir.

Q Then back— A Yes, sir.

Q —to the pump, to the boiler room? Where was Groath? A Groath was in the oil yard.

Q In the oil yard? A Yes, sir.

Q The oil yard was west, was it not, of the transfer elevator? A Yes, sir.

Q How far west? A I couldn't say that.

Q Well, some distance? A Yes, sir.

Q A quarter of a mile, eighth of a mile, or what was it?

Mr. Skinner. Does anybody know?

Mr. Hardin. Half a mile.

Q Was it a quarter of a mile, or half a mile, or less than that, or more? A Oh, it is less than that.

Q Less than which? A Less than a quarter of a mile.

Q About a quarter of a mile? A Less than a quarter of a mile.

Q He didn't have any boiler to take care of? A No, sir.

Q Where were the buttons he was to push? A Around Store AA—around the Storehouse AA.

Q That is not shown on this map? It is off to the left of the map? A No, sir.

Q Was there a gate at the west end of the yard? A Yes, sir.

Q And where was Kelly's or Groath's post with reference to that gate, how near it? A Well, about fifty feet away from it I should judge, fifty or a hundred.

Q Where was Garrity's place of work? A He was from Pier 5 down south—around North Pier and South Pier.

Q Pier 5. Here. Well, did he have anything to do besides watching? A Well, he took care of a steam crane that was down around Store R.

Q Did he do that at night? A Yes, sir.

Q Keep the fires up? A Just only look after the fires so they wouldn't go out.

Q All of these men were night men, weren't they? A Yes, sir.

Q Where would Garrity punch buttons? A Well, he punched the buttons on Store G.

Q Store G, Garrity? A Yes, sir; there was a button there.

Q Oh. Well, that was right up close or next east of the pump house where Sloan was, wasn't it? A Yes, sir.

Q Then Garrity would come up as far to the west as Store G and punch a button? A Yes, sir.

Q Then where did he go? A He would go around the platform, that is the north side of the storehouse, and punch buttons down along the north side there.

Q Along the north side and back to what? A Store R.

Q To Store R and then what else did he punch? A He had buttons around—all around them storehouses, different—

Q All around the storehouse? A Yes.

Q Were any of the buttons that he would punch any further east than Store R? A No, sir.

Q So he had no buttons to punch around North Pier or what you call South Pier or Pier 7? A No, sir.

Q And this punching of buttons was done for what purpose? A Well, I suppose to let the company see that the men did not sleep.

Q Then the buttons were recording the fact that the men had gone on the beat? A Yes.

Q Now, how long would it take Garrity—I will withdraw that. In your oversight of the men did you go around through the night to see whether they were on the job? A Yes, sir.

Q How long would it take Garrity to make his round or how long did he usually take, within your observation? A Well, something I never looked after that. About fifteen minutes anyhow.

Q Fifteen minutes for the entire round? A Yes, sir.

Q That is to come up from the crane here—the crane was near Store R? A Yes.

Q And near the tank, was it? A Well, more out this way on the pier.

Q Well, to come up from there along Storehouses G, H, I, K, L, M, N, N, P, Q and R, and back to the crane you say he would do that in about fifteen minutes? A Around fifteen to twenty minutes.

Q Did he have buttons to punch down on Pier 6? A Yes, he had one button on Pier 6.

Q Where on Pier 6? A At the extreme end, the east end.

Q The extreme—do you mean the end nearest the storehouses or farthest away? A Extreme east—or the south end. South end.

Q Furthest away from the storehouse? A Yes, south end.

Q And to punch that he had to go the entire length of the pier, did he? A Yes, sir.

Q And do all of that, besides going around these other storehouses, in fifteen minutes? A Yes, sir—well, I should judge about fifteen, I didn't exactly.

Q Then he go back—having made that round he would go back to the crane? A Yes, sir.

Q From there would he go anywhere else until his next round—a repetition of this? A Yes, sir; he would walk around through the yards down below.

Q In the meantime ~~you~~ look after the fire under the boiler? A Yes, sir.

Q Well, where were your headquarters? A All over the yard.

Q Were there ammunition cars and cars with explosives coming into the yard in the month of July, 1916? A Yes, sir.

Q How long had you been employed there in that capacity of watching Black Tom? A About seven years.

Q When did the ammunition cars and explosives begin to come in, as you recollect? A I couldn't say.

Q Well, was it a year or more before July, 1916? A I couldn't say. I disremember.

Q Well, it was some considerable time, wasn't it? A Well, I never took any notice of what month they came in or anything.

Mr. Garrison. I couldn't hear that.

(Answer repeated by stenographer.)

Q Did this watching service that you speak of, these four men under you watching and working at other points and other ways, did that service exist before the munition cars began to come in? A Yes, sir.

Q After the munition cars began to come and up to the time of the explosion on Black Tom, July 30, 1916, was there any change in or addition to that watching service? A No, sir.

Q Was this gate up at the western end of the yard kept locked at night? A No, sir.

Q Open, was it? A Yes, sir.

Q Were there barges and other vessels anchored or tied to the piers at the end of Black Tom or on the sides? A Yes, sir.

Q Was that true July 29th and 30th, 1916? A Yes, sir.

Q Were there many of them? A Well, there was, as far as I remember, there was one schooner and one steamship.

Q Well, do you mean to say that was all that there were? A Well, there was other boats; there was lighters and barges.

Q And had that condition of having lighters and barges and steamships and all alongside of Black Tom existed, continued for any length of time before July 30th? A Yes, sir.

Q Months before that? A Yes, sir.

Edward Kane, direct.

Q How did you know that the cars in the yard contained explosives and ammunition? A Well, the signs on them.

Q Placards? A Yes, sir.

Q Now, did these barges and lighters that were tied there have men upon them? A Yes, sir.

Q Captains and workmen? A Yes, sir.

Q And did these men that were on the barges come up through the yard to go to Jersey City in going to the stores or for business? A Yes, sir.

Q And then go out the other end at the westerly gate? A Yes, sir.

Q Was that true only in the day time, or was it true in the day time and night time as well? A Very seldom they go up at night time; they would be coming in in the night time.

Q They would be coming in? A Yes, sir.

By the Court.

Q Were you ever at the gate when they came in? A No, sir.

By Mr. Skinner.

Q Have you seen them coming in and going out? A Yes, sir.

By the Court.

Q Well, what were they required to do when they came in as you saw them coming to identify themselves? A Well, we would ask them where they were going and they state what boat they were on, and we know just exactly where that boat laid.

Q How did you know that they belonged on that boat? A Well, we take their word for it.

Q All right.

Edward Kane, direct.

By Mr. Skinner.

Q Are you speaking of the practices that prevailed shortly before July 30th, 1916? A Yes, sir.

Q And at that time? A Yes, sir.

Q Now, how long had Sloan and Kelly and Garrity and Groath been under your supervision and working there as watchmen? A Well, they were there when I went there.

Q How long had they been working as taking care of engines and boilers and as watchmen? The same job as you have described? A All the time, since I have been there.

Q Now, you spoke of cars being there in the yard and boats being tied and barges tied to Black Tom Island. Was there any increase in the number of cars and the number of boats shortly before 1916? When you first went there and were watching down there were there as many cars and as many boats as there were in July, 1916, or was there an increase? A Well, about the same.

Q Well, did you make any inspection or go around that yard the night of July 29th? A Yes, sir.

Q What time? A I was down around that way, around seven o'clock.

Q And then again were you there later? A Around —well, I—about eleven o'clock.

Q About eleven. Did you go around again between eleven o'clock and the time of the fire? A Where?

Q Did you go again between eleven o'clock and the time of the fire? A No, sir.

Q So eleven o'clock was your last round? A No, sir. Eleven o'clock was my last round, and I just got back.

Q Did you see Garrity on that last round? A Yes, sir.

Q Where was he? A He was down on the south—he was on the south side of the island—at Pier 7.

Q Did you see Sloan? A Yes, sir.

Edward Kane, direct.

Q Where was he? A He was in the boiler—around the boiler room.

Q There near Store F? A Yes, sir.

Q Did you see Kelly? A He wasn't there then.

Q What say? A I didn't see Kelly. He was down at the elevator, I suppose.

Q Did you see Groath? A Not then, no, sir.

Q What was the first that you heard or knew of any fire there? A Well, I was—I heard a man hollering and blowing a police whistle and I run to see what it was.

By the Court.

Q Mr. Kane, was it your duty to watch the yard or watch the watchmen? A Well, watch the yard and watch the watchmen, too.

Q All right.

By Mr. Skinner.

Q In your watching of the yard did you have to make the entire circuit or round of the yard to cover the beats of all the four men under you? A Yes, sir.

Q And did you do that that night? A Yes, sir.

Q The night of July 29th? A Yes, sir.

Q How long would that take you? A Well, I would start from the pump house and go down around the north pier.

Q Yes. The pump house by Store R you mean? A No, sir; by Store F.

Q Then go down towards north pier? A Yes, south side.

Q You would go down on the south side? A Yes.

Q Would you come back on the north side? A Go right down to the very end of the island.

Q To the end of the island. Did you go out on the south pier or to it? A Down as far as the south pier.

Q Then which way would you go? A Cross right over to the north pier.

Edward Kane, direct.

Q Yes; and then which way? A Go down to the—down on the north pier.

Q Down what? A Down on the north pier and then come right up on the north side.

Q And how far up would you go? A I would come up as far as the boiler room again.

Q The boiler room at F? A Yes, sir.

Q And then what? A Then I would come back on the —down around Pier 4 there.

Q Pier 4, that is going still— A Down on the east.

Q To the west—that is where Kelly was—Kelly's beat, wasn't it? A Yes, sir.

Q And then on— A To the grain elevator, yes, sir.

Q Which way? A Right down on the east side of the pier.

Q Yes. A Down to the grain elevator.

Q Yes. A And then right over into the oil yard.

Q Up to Groath's beat? A Yes, sir.

Q And then back? A Then back.

Q The oil yard was up near the gate? A Yes, sir.

By the Court.

Q Did you keep any book, Mr. Kane, that indicated what inspection you made and when you made it? A No, sir.

Q And who was it that had charge of the bells or button systems? A Well, they all registered in the office.

Q Yes, but whose office? A Mr. Dickman's.

Q And did he keep any book, do you know about that? A I could not say.

Q You don't know that? All right.

By Mr. Skinner.

Q Do you know how it registered; was it on a tape? A On a dial.

Q On a dial. Do you know whether there was any tape behind the dial or not? A I don't know.

Q Now, you were going to tell us—you said that you heard a man shouting, was it, or heard a whistle? A Yes, sir.

Mr. Garrison. Heard hollering and blowing of a whistle.

Q Where were you when you heard that? A I was on the dock; I was between Pier 4—or between Pier 5 and Pier 6.

Q Between Piers 5 and 6, and on which side of Black Tom, north or south? A On the south side.

Q Near what storehouse? A Well, I couldn't exactly say—midway.

Q Midway, and from which direction did the sound of the whistle come? A Sounded in front of the storehouses, on the north side of the storehouses.

Q You were in the rear of the storehouses and the sound of the whistle came from the front, that is from the north side? A Yes, sir.

Q What did you do then? A I run back to the pump room to see if I could see who it was.

Q Ran back to the pump room at which—F? A Yes, sir.

Q So you run westerly to the pump room at F, and that took you up towards the north, nearer to the north side of the stores? A Yes, sir.

Q Did you see anybody? A Yes, sir; there was a man running there.

Q And who was the man? A Well, he was one of Dougherty's watchmen.

Q It was not Garrity? A No, sir.

Q Nor Sloan? A No, sir.

Q Well, did you then have your attention drawn by him to anything? A Yes, sir; he said there was a fire at the north pier.

Q Did you look? A Yes, sir.

Q Where did you go to look? A I got on the platform in front of Store G.

Q Platform in front of Store G. On the north of Store G? A Yes.

Q Or south? A North.

Q And then which way did you look? A I looked down towards north pier.

Q That is easterly? A Yes.

Q And what did you see? A Saw a small flame.

Q Where? A Well, down as far to the end of the island as I could see.

Q Well, how far could you see? Was there anything down there that obstructed your view? A Well, I could see cars there.

Q You saw cars where? Where were the cars? A Right down around—down near store—down near the north pier.

Q From north pier in which direction did these cars run—I mean lie; they lay to the west, didn't they, from north pier? A Sir?

Q The cars lay to the west from north pier, didn't they? A Yes.

Q And how far up towards, or near, Store R did they come? A Well, I could not exactly say.

Q Well, just come down here and look at this map. Now, do you understand the map? A Yes.

Q Do you see north pier up to the right and these tracks? And here is the Storehouse R going to the left, to the west, and the other storehouses up to A, and then Store B still further west, and the grain elevator about down here on the south and these Piers 4, 5 and 6 and 7 still further to the east? A Yes, sir.

Q Now, I call your attention to the marking on this map, P. 16; these white oblong rectangles here indicate cars on these tracks; do you see? A Yes, sir.

Q Now, just look at that map and the cars, tracks, as they are shown there—as the map shows these cars; they

are light, and others here that are yellow rectangles, and others that are a sort of dark red and other colors; do you see them all? A Yes, sir.

Q Now, taking that as a picture of the cars on these tracks, what would you say as to whether that was the condition of the tracks about on July 29, 1916? A That looks about the way they were that night.

Q And as you stood up here on the platform in front of G? A Yes, sir.

Q Looking down, could you see some of those cars? A Yes, sir.

Q And where was the little—the fire that you saw with reference to those cars? A Down as far as—well, down about—looking in a direction about here.

Q By the way, do you know where Zeke's shanty is?

Mr. Hardin. Get that indication.

Q Do you know where Zeke's shanty was? A Yes.

Q Where was it with reference to Zeke's shanty? A It looked down almost in front of his place, or further.

Q Here on the map is the point marked pile stockade. A That is where Zeke's shanty used to be.

Q And you say it was almost in front of or further—a little further? A Yes; that is as far as I could see. It might be a little further; I don't know.

Q Just take your seat. Then how big was this blaze that you saw? A Very small.

Q Can you give us some idea of the size? A Well, from where I stood it would not look much bigger than a man's hat.

Q And did it look to be—let's see; just a moment; did it look to you—I will withdraw that. If this map correctly shows the cars as they were that night, then if you would look down to a point nearly opposite Zeke's shanty you would be looking between rows of cars, is that the fact? A No, sir; you could not see between them, not from the platform.

Mr. Garrison. I could not hear that answer. Please read it.

(Answer repeated.)

Q Did you move from the platform to a position where you could see down between the cars? A Not until after I telephoned.

Q Well, did you actually telephone? A Yes, sir.

Q And then did you see the fire—blaze? A Yes.

Q And having that second observation of it, would you still say that it was nearly opposite Zeke's shanty? A Well, it looked down in that direction.

Q Yes. Now, what were your instructions, if you had any, as to what should be done in case of fire in that yard? A In case of fire I was to call up the New York Fire Department for tugboats—fire boats.

Q Was that the first thing you were to do? A The first thing was to call up the Lehigh Valley for locomotives and fire tugs.

Q And when you say Lehigh Valley you mean some particular point? Where? A Jersey City terminal.

Q How far was that from Black Tom—from these storehouses? A Only a few miles.

Q A few miles? So the first thing was to telephone them—for what? A Fire tugs and locomotives.

Q I mean to the Lehigh Valley. Oh, for fire tugs and locomotives; yes. A And then for the New York fire tugs, Standard Oil for their fire tugs, Jersey City Fire Department; then the agents and—

Q What? A For the agents and the—

Q And what? A The officers of the railroad.

Q Well, that would require quite a good deal of telephoning, wouldn't it? A Yes, sir.

Q And did you have any other instructions? A Well, get the fire—get the hose and everything that I could get ready while they were coming.

Q Were you to get the hose ready before telephoning or were you to telephone first? A Telephone first.

Q To all of these people that you have named? A Yes, sir.

Q Did you have any other instructions? A Not that I can remember now.

Q And was this telephoning that you speak of to be done in the order that you have named? A Yes.

Q First to the Lehigh Valley office for the fire tugs and locomotives, and then to the New York Fire Department—

The Court. He did not say it that way.

Mr. Skinner. I may have got the order wrong.

The Court. He said first the New York Fire Department, then the Lehigh Valley, then the Jersey City Fire Department, and then the agents and officers of the railroad.

Q I thought you afterwards put the Lehigh Valley first.

The Court. He may have afterwards.

Q Which were you to telephone first to? A Well, now, I could not say. It is so long ago.

Q Did you have any instructions as to which you were to do first or was that left to you to choose to do as you thought best? A Well, there was an instruction printed on the board. Now, I could not say how it read.

Q And where was it? A It was right alongside the telephone.

Q In the pump room? A No; in the timeclock office.

Q The timeclock office; were those the only instructions you had, the ones that were posted in the timeclock office? A Yes.

Q Well, now, when you saw this blaze—little fire—what did you do? A I went immediately and telephoned up.

Edward Kane, direct.

Q To whom? A I called up the Lehigh Valley Railroad terminal.

Q Yes; what did you call for? A I called for fire tugs and locomotives.

Q Yes? A Then I called up the New York Fire Department.

Q For what? A For fire tugs. Then I called up the—the Standard Oil, Greenpoint, Long Island, for their fire tugs.

Q You are giving the order in which you did it, are you? A Yes, sir.

Q And then? A I called for Mr. Dickman, and Mr. Mulligan, and I could not get them on the telephone at all. Mr. Sloan got them on the telephone.

Q Did you telephone to the Jersey City Department? A No, sir; Mr. Sloan said that the alarm was sent in already for them.

Q The Lehigh Valley terminal where you telephoned to get engines, you say was several miles away; have you any idea how many miles? A No, sir.

Q It would take some time for a locomotive to come from there, wouldn't it? A No, sir.

Q Where is it? A Jersey City.

Q Well, where in Jersey City? A Well, they run within a half a mile or a mile of the place. The locomotive was about a half—a mile away from the place—whether they got orders from there or not.

By the Court.

Q Is the terminal at Communipaw? A Yes.

By Mr. Skinner.

Q And the office which you would telephone to was at Communipaw? A Yes.

Q No matter where the engines were? A Yes.

Q And then somebody at the other end of the telephone in the office would get some orders to men on the engines wherever they were? A Yes, sir.

Q And how far away was the Standard Oil office that you telephoned? A Greenpoint, Long Island.

Q Greenpoint, Long Island. How far away was that in miles? A I do not know.

Q Well, it was quite a few miles, wasn't it? A I suppose so.

Q Five or ten miles? A I do not know.

Q Did you hear any instructions given to the other men that were under you or do you know of any instructions that they had except these that you have mentioned on the board posted up in the time clock office? A I do not know of any.

Q Well, then at the time that you saw this blaze were there any explosions of shells going on at that time or did that come later? A They come a little later.

Q And about how much later, Mr. Kane? A About twenty minutes or so—fifteen or twenty minutes.

Q Were any of these calls that you sent out answered? A Yes.

Q Which got there first, the locomotives or some of the fire tugs? A The locomotives got there—as far as I could see.

Mr. Garrison. Let me hear the last of that answer.

(Entire answer repeated by the stenographer.)

Q About how long do you think it was after you telephoned for them that they got there? A Well, less than half an hour.

Q And when they got there what did they do? A They went right down and pulled the cars.

Q That is right down onto the yard where the freight cars were? A Yes.

Q And began drawing them out? A Yes.

Q Did you see them drawing any of them out? A Yes.

Edward Kane, direct.

Q Did you see them drawing out any cars marked "Explosive"? A I did not take notice.

Q Then what came next to your help, fire tugs or fire department or what? A I did not take notice to the fire tugs at all.

Q Did the Jersey City Fire Department arrive? A Yes; the fire ch—

Q Where was the nearest engine house, how far from this point? A What was that?

(Question repeated.)

A About two mile.

Q Two miles. Do you know about what time it was that the first engine got there? A No, sir.

Q Was there anybody from the fire department that was ahead of an engine, a hook and ladder or anything like that? A I did not take notice.

Q Do you know about what time it was that you heard this man calling and the whistle blowing and were told that there was a fire; have you any way of fixing the time? A Well, yes, about 12:30—I will say it was 12:30; I was in the boiler room at twelve o'clock. The bells on the—there was an Australian schooner down there and that struck eight bells, which signified twelve o'clock.

Q How soon after that did you go out on your run, or out? A Well, about fifteen or twenty minutes after that I walked out.

Q How long had you been out when you heard this blowing of the whistle. A Well, about ten or fifteen minutes.

Q So that you place it around half-past twelve that you heard the alarm given by this man? A Around half-past or twenty-five to thirty—

By the Court.

Q Can you tell us how long those instructions that were posted in the timeclock room had been posted?

A Well, I used to get them—I used to get—once every year I would get one and have it posted up there.

Q Was it the same set of regulations that you always had during the whole while you were employed there that were posted in the timeclock room, or did they differ from time to time? A According to the addresses of the different employees; if they were changed, why—

Q I am not talking about the employees. I am talking about the things you were to do in case of fire. A Yes.

Q You said those were posted near the telephone in the timeclock room? A Yes.

Q I want to know whether those regulations that were posted there were the same regulations that had always been there since you were there? A Yes, sir.

By Mr. Skinner.

Q Now, there was an explosion there that night, wasn't there? A Yes.

Q How long before that explosion would you say it was that the drill engines arrived? A I could not say.

Q Then of course you could not say how long it was before that that the fire department arrived? A No, sir.

Q You spoke of the shells going off or beginning to go off—small explosions—how long did that continue before the first big explosion? A Well, I had no watch and I did not time it at all.

Q Well, was it just a few minutes or quite a long while? A Oh, quite a long while.

Q Well, how long did it take you to telephone, do all the telephoning that you did do? A I could not say.

Q Was it just a few minutes or a long while? A Well, it took me quite a while.

Q Was there any alarm of fire given? Do you know of any alarm of fire given that night—of your own knowledge, I mean? A No, sir.

Q Somebody told you that an alarm had been sent in? A Yes, sir.

Edward Kane, direct.

Q What provision was there for sending alarms? How would you do it? A Well, there was fire boxes.

Q Fire boxes where? A Fire boxes right on the storehouse.

Q Was there more than one? A Well, they had an auxiliary fire department—boxes.

Q Well, what was the nearest fire alarm box to Store R? A There was one right on Store R.

Q In or on? A Outside, on the door.

Q Outside. Now, was there any fire alarm box on Black Tom further east than that one which we have mentioned here, or not? A No, sir.

Q Was there any fire alarm box of any kind at all between that and the North Pier? Was there any hydrant—was there any fire alarm box of any kind at all between that and the North Pier? A No, sir.

Q Was there any hydrant down near Store R? A Yes, sir.

Q Was it near this tank, right off? A Yes.

Q This map, Mr. Kane, shows a hydrant about due —just opposite, north of Store R, and apparently connected with the salt water main? A Yes, sir.

Q Do you recall that hydrant? A Yes, sir.

Q And then there is one shown on the map down just off the northeast corner of Store R, as I point here? A Yes, sir.

Q Were there any hydrants on Black Tom Island further east than these two that I have been showing you? A No, sir.

Q Any at all down between that point and the North Pier? A No, sir.

Q Was there any water main, so far as you know— A No, sir.

Q Going down that way? Was there any hose cart on Black Tom Island anywhere? A Yes, sir.

Q Where? A It was around Store 3.

Q Store— A 3.

Q Store 3, yes. A By Store F, Store M.

Q Yes, go ahead. A I disremember now about store —down around Store R.

Q Well, the map shows one right here at the head of Pier 6? A Yes.

Q Was there one there? A I disremember now; I know there was some there.

Q Was there any hose cart east of Pier 6? A Why, I disremember whether there was one there at Store R or not.

Q Well, there is none shown here on the map, and this is supposed to be a statement by the company of what there was in the way of hose carts? A I would not say for sure, but I disremember, I say.

Q Was there any chemical engine on Black Tom? A Yes, sir.

Q More than one? A One.

Q One. And where was that one? A Pier 5.

Q Pier 5. Yes, it is shown here on the map, chemical engine, right along side of Store M—wasn't it? A Yes.

Q And that was the only chemical engine there was on the Black Tom? A Yes, sir.

Q And what did they have on it? A They had a big tank.

Q Yes, and some hose? A And hose.

Q What was its size, its weight? Give us some idea of it? A Well, it was a large tank.

Q Well, would it take more than one man to run it down to the point where you saw the fire? A Yes, sir.

Q How many people would it take? A It would take two or three men—three men.

Q Now, in case of fire, did Sloan's duty take him at once to the fire pump? A Sir?

Q In case of fire, did Sloan's instruction or his duty take him right to the fire pump? A Yes, sir.

Edward Kane, direct.

Q Would Sloan be available for any fire fighting if there was any to be done, or would he have to stay by his pump? A He would have to stay by his pump.

Q How about Kelly? A Well, Kelly would come right up.

Q Kelly would come right up and leave what he had? A Yes, sir.

Q And Groath, where he was, could he be spared up there also? A Yes, sir.

Q From way up at the left of the yard? A Yes, sir.

Q Well, did Groath have to work the pump? A No, sir.

Q In case of fire would Garrity have any work to do around the boiler or engine or pump? A No, sir.

Q Well, now, Mr. Kane, in case of fire, would you be able with the help that you could get from these men, to run that chemical engine down to a point here to Zeke's shanty? A No, sir.

Q There was a roadway, wasn't there, on the north of the storehouses? A Yes, sir.

Q Where did that stop? It is shown here by this map as stopping about opposite Store O. Is that right? A Some place there.

Q If you wanted to get a stream of water suppose you had men enough and you wanted to get a stream of water on the fire at the point where you saw it that night, where would you go for the hose? A Get it there at Store M.

Q Store M. That is, from one of the hose carts? A Yes, sir.

Q Well, if as this map says, there were two—

Mr. Skinner. Two, wasn't it? It doesn't say, but it says hose carts, plural.

The Witness. Two of them there.

Q Each with 400 feet of hose. Was that hose wound up on the hose cart? A Yes, sir.

Q And coupled together so that it made one complete length of 400 feet? A Yes, sir.

Q Well, would one of those lengths be sufficient to reach down to a fire near Zeke's shanty?

Mr. Garrison. I should say it depended on where he could couple it up.

Mr. Skinner. Well, he could say that, too.

Q Could you reach from the nearest hydrant? Do you know the distance, Mr. Kane, from the nearest hydrant, here by Store R, to down by Zeke's shanty? Do you know that distance? A I could not say that I do.

Q Well, at any rate, if the distance is—whatever the distance is, let me ask you this: Would it be practicable to trail or stretch that hose from the hydrant to the point of the fire in an absolutely straight line, or would you have to allow something for the pliability of the hose in going over tracks, and so on? A You would have to allow something.

Q So it would take more hose than just the distance in feet? A Yes, sir.

Q Mr. Kane, with the facilities that were at your disposal, was there anything on the night of July 29th and 30th, 1916, that you could do to fight that fire as you saw it? A No, sir.

Q And did you do anything that night towards putting out that fire except telephoning and calling for help, that you spoke of? A No, sir.

Q Did you see anybody else do anything? A No, sir.

Q What was Garrity's physical condition the night of the fire? I don't mean that particular night, but that night and prior thereto? A It was all right.

Q Was he old or young? A He was an old man.

Q An old man. How old, about, would you say? A I couldn't say.

Q Well, can you give us—from your observation, could you tell about how old he appeared? A No, sir; I never asked his age.

Edward Kane, cross.

Q What? A I never asked his age.

Q Well, how about—how did he show his age? A Well, he showed pretty good for an old man like him.

Q Well, I mean, did he show in his walk or in his manner in any way? A No, sir; only he had very short steps.

Q Now, you spoke of the drill engines getting down there. Did you see the drill engines working about the time of the first explosion? A Yes, sir.

Q What did you see? A Saw them go down there and pull cars up.

Q Well, was that going on—was that going on; were they doing that at the time when the first explosion took place? A Yes, sir.

Q Going down where? A Down—down around the cars through the fire.

Q And pulling them out? A Yes, sir.

Q And after—that you saw at the time the explosion took place? A Yes, sir.

Q The first big explosion. By the way, Mr.— did you see that explosion? A Well, no, I couldn't say that I did. I was sideways; it was at my side.

Q Then you are not able to tell where the explosion was— A No, sir.

Q —with reference to the place you saw the fire.

Mr. Skinner. That is all. Cross examine.

Cross examination by Mr. Garrison.

Q What did you say your present occupation was, Mr. Kane? A Laboring at the Standard Oil, laboring at the Standard Oil.

Q You spoke about what you did when men came in there to go on these boats. Did you know some of these men? A Yes, sir.

Q Suppose you didn't know them. What would you do then? A I generally asked them what boat they were on.

Q Yes? A And where the boat laid.

Q Yes. Then what did you do? A Well, if they gave me the right satisfactory answer, I knew that boat laid there, why, then, I let them go on ahead.

Q Did you accompany them down to the boat, go with them down to the boat? A If they were intoxicated; yes, sir.

Q Suppose they were not intoxicated? A Well, quite —I might let them pass.

Q Weren't your instructions to accompany every man that you didn't know to the boat he said he belonged to? A No, sir.

Q Now, when had you last been down (indicating)— here is the big tank. Now, what do you call all this part of the yard east of that big tank? Isn't that all Pier 7? A That is all Pier 7; yes, sir.

Q Yes. Now, when had you last been around Pier 7 before the man hollered out that there was a fire? A After 11 o'clock.

Q After 11 o'clock? A Yes, sir.

Q Just tell me how you went around that time? Did you come down here to the south side? A Yes, sir.

Q Walked all the way out to the water's edge? A Yes, sir.

Q Walked north? A Yes, sir.

Q Did you go out on the south pier? A No, sir.

Q Walked up to the North Pier? A Yes, sir.

Q Did you go out on the North Pier? A Yes, sir.

Q And around it? A Yes, sir.

Q And back? A Yes, sir.

Q And then along this one space, this road? A Yes, sir.

Q Back as far as where? A Around Store R there.

Mr. Hardin. I object to the designation of the road.

Q Well, whatever it is; whatever this open space is, you walked along there, did you? A Yes, sir; there was kind of a pathway there.

Edward Kane, cross.

Q Opposite Store R? A Yes, sir.

Q And then what did you do? A Crossed right over to the roadway.

Q Over to this— A Roadway there.

Q —Centre road? A Yes, sir.

Q And came down as far as where? A As far as the pumphouse.

Q And that is what? A Store F and G.

Q F and G, down as far as here. About how long after eleven o'clock on this inspection that you made at eleven o'clock—about how long a time were you down at Pier 7, or around Pier 7 there? A Well, I got back into the pumphouse, started to eat just at twelve o'clock.

Q Then you had been just about an hour walking around there, had you? A Yes, sir.

Q Did you see anybody down there, any stranger? A No, sir.

Q Did you meet anybody at all? A No, sir.

Q There was nobody down there? A No, sir.

Q And at that time was there any fire down there? A No, sir.

Q Then you went into the pump house and began to eat, didn't you? A Yes, sir.

Q How long did you stay in the pump house? A Fifteen or twenty minutes.

Q Yes. Then when you came out, where did you go? A Down between Pier 5 and Pier 6.

Q You came down here, did you? A Yes, sir.

Q Between F and G? A Yes, sir.

Q About on the south side of the storehouses; is that right? A Yes, sir.

Q Walked along here? A Yes, sir.

Q And then where was this man that made the holler and blew the whistle? A He must have been on the north side of the storehouses.

Q Over here? A Yes, sir.

Q And where did you meet him? A I met him between Store F and—F and G.

Q You came back here, then, did you? A Yes, sir.

Q And did you run or did you walk? A I run back.

Q You ran back. Did you run out here in front of the storehouses? A Well, just about near the pump house there I met him.

Q Just near the pump house? A Yes.

Q What was the man's name? A I couldn't say.

Q He was one of the Dougherty's men, detectives, watchmen, around there? A Yes, sir.

Q And whereabouts was that? Where were they stationed? A They were stationed—they were supposed to be by the North Pier.

Q They were supposed to be up here, weren't they? A Yes, sir.

Q And what did this man say? A Said there was a fire at the North Pier.

Q What else did he say? A That is all he said.

Q Did he say whether it was on the car, in the car, or on the ground, or what? A He didn't say.

Q What did you do then? A I got on the platform of Store G to see whether he was telling the truth or not; saw the small blaze.

Q Got on the platform of Store G? A Yes.

Q And looked down toward the North Pier? A Yes.

Q Saw this fire? A Yes.

Q How big did you say it was when you first saw it? A Very small.

Q Could you tell whether it was on the ground or in a car? A You couldn't see.

Q Was there anything between you and the fire? A Well, the cars.

Q You couldn't see it if there were cars? A Right over the top of the car.

Q Eh? A Over the top of the car.

Edward Kane, cross.

Q Then it was higher than the top of the car? A Yes, sir.

Q Then I don't understand. You mean that what you saw was coming up above the top of the car? A Yes, sir.

Q Oh; then that is what was about the size of the man's hat? A Yes.

Q You don't know how deep down it was? A No, sir.

Q All you know is it was about the size of a man's hat above the top of the car? A Yes, sir.

Q Well, weren't there shells going off then, or shots, at that time when you were standing out in front of G? A No, sir.

Q Sure about that, now? A Yes, sir.

By the Court.

Q Who was this Dougherty man, do you know? A I couldn't say.

Q Wasn't any way by which you could identify him; know his first name or anything of that sort? A No, sir.

Q All right.

By Mr. Garrison.

Q Mr. Kane, you recall testifying some time ago in another case, don't you? A Yes, sir.

Q In New Jersey Fidelity & Plate Glass Insurance Company, plaintiff, against Lehigh Valley Railroad Company, defendant. I am going to read from page 90. Do you recall that upon that occasion this question was asked you and this answer was made by you: "Q That is all you know. All right. Now what did you do, if anything to put the fire out that you first saw? A I couldn't do nothing. When I came out here the shells was popping and I wouldn't dare go near it." Do you remember testifying to that? A Yes, sir; that is after I telephoned.

Q That is after you telephoned? A Yes, sir.

Q That was not when you first saw the fire, was it? A Not when I first saw the fire.

Q Well, now, Mr. Kane, this was not the first time there had been a fire down there during the night while you were watching, is it? A No, sir.

Q And some of those fires had occurred while you were watching down there and you men down there had put it out without sending in any alarms? A Yes, sir.

Q Why didn't you start to put this fire out instead of going in and turning in the alarm first? A Well, it was so far away we couldn't get down there in time and I seen it was kind of dangerous, the ammunition.

Q Let us take one thing at a time. It was so far away you couldn't get down there in time. In time to do what? A Well, after telephoning for the—

Q No, no. You don't understand my question. Before this there had been small fires down there and you men down there had put them out without telephoning to anybody; isn't that a fact? A Yes, sir.

Q Well now then, why didn't you try to put this fire out before telephoning to anybody? A Well, I thought it would be better to get help.

Q Well, why? A Because it was kind of dangerous.

Q Why was it dangerous? A Because of ammunition.

Q It was down in the ammunition cars, was it? A Yes.

Q Now there was no trouble, no reason why you could not have hooked the hose on these plugs here at the big tank and have gotten clear down to the north pier, is there? A No, sir.

Q You had plenty of hose to get down to the north pier? A Yes, sir.

Q And a big head of water? A Yes, sir.

Q These pumps were all working, weren't they? A Yes, sir.

Q They were working on that night? A Yes, sir.

Q You saw water come out of the pump that night, didn't you?

Mr. Skinner. I object as not cross examination.

Q Did you see any water come out of the pump that night?

Mr. Skinner. I object to it as not cross examination.

Mr. Garrison. Am I restricted?

The Court. I think I will permit that question. I think you laid evidence enough to permit an inference to be drawn, at least an argument to be made that this man did not do something or anything at least because of certain things. He has a right to show what the reasons were.

(Question repeated by stenographer.)

A No, sir.

Q Well, now then, please tell us why it is then that when this man came around there and blew the whistle and said there was a fire and there was plenty of hose there to reach down to the north pier, why was it that you went and telephoned first instead of going down there and trying to put that fire out? A Well, I thought it would be better to get more help.

Q Well, why? You hadn't tried to get more help on some other occasions; you had gone down and put the fire out. A Well, the other fires, why, the men was working on the pier—one fire was, and they came out and gave us help.

Q Isn't it true that you knew these things that were in the ammunition cars and you were afraid somebody would get killed; isn't that the truth? A Yes, sir.

Q When these locomotive engines got down there—what time did you go on duty at night? A 5.30.

Q And stayed on until what time? A Six o'clock.

Q And after 5.30 were any engines—did any engines come down into that yard? A No, sir.

Q What do you call that in railroad slang; what kind of a yard do you call it? Don't you call it a dead yard? A Yes, sir.

Q Why do you call it a dead yard? A Nothing moving there at night.

Q Yes; and that was true while you were down there for six or seven years that you were watchman there? A Yes, sir.

Q No engines came down there after what time? A Half-past five—or six.

Q Half-past five. On the night of this 29th of July, that is Saturday night, did any engine come down there at all that night? A No, sir.

Q Did any come there until you telephoned for them to come? A No, sir.

Q About how long after you telephoned for the engines to come, I mean the locomotive engines, did they come? A About half an hour.

Q And how long after that did the Jersey City Fire Department get there? A I should judge they came close together.

Q Close together. Did the Jersey City Fire Department try to put this fire out? Did they do anything? A No, sir.

Q Did any fire tugs get there at all, or don't you know? A I don't know.

Q Now, when you came out from telephoning—let me ask you who did you telephone to first? A Lehigh Valley Railroad terminal.

Q That was for the engines? A Yes, sir.

Q Where did they come from, Oak Island? A No, sir; Jersey City terminal.

Q Jersey City terminal. Then who did you telephone to? A Sir?

Q After you telephoned to the Jersey City terminal who did you telephone to next? A New York Fire Department.

Q And then who? A Standard Oil.

Q Then who? A Mr. Dickman.

Q You did not get Dickman? A No, sir.

Q Then you tried to get Mulligan? A Yes.

Q Who was Mulligan? A He was the superintendent.

Q Mr. Dickman was the agent, so called? A Yes, sir.

Q That is all the telephoning you did? A Yes, sir.

Q When you came out from telephoning who else was there besides yourself? A I met Mr. Sloan.

Q Anybody else? A That is all I remember.

Q Yes; and did you and Sloan go somewhere together or did you separate? A He went back to call up Mr. Dickman.

Q He did? A Yes, sir.

Q What did you do then? A I went out in the road to see if there was anybody coming.

Q Yes. Well, did you look at the fire while you were out on the road or did you look at the fire before you went out on the road? A No; I wasn't looking at—

Q Was anything going on then in the way of shells going off? A Yes; it was starting to pop off then.

Q Did they start to pop off while you were in telephoning? A I don—I disremember.

Q But they were going off when you came out in the road? A Yes, sir.

Q And how much had the fire grown by that time? A Quite considerable.

Q Well, what do you mean; was it higher above the cars then? A Yes, sir.

Q Now, I am perfectly right, am I—I am clear that from where you stood you could not see the bottom of the fire at all; is that right? A No, sir.

Q You could only see what was coming up above the tops of the cars that stood between you and whatever was on fire? A Yes, sir.

Q Did you know for certain whether it was a car or a boat or what was on fire? A I could not say.

Q Now,. Mr. Kane, in answer to a question of Judge Skinner's you were asked substantially this: With the facilities that were there could you have done anything to have fought this fire as you saw, and you said no. What do you mean by that? Why couldn't you have done anything to fight that fire when you first saw it? A Well, I had to telephone.

Q Oh, why couldn't you have gone and fought the fire before telephoning? Nothing would stop you from doing it if you wanted to? A No, sir.

Q Why didn't you do it. Why did you tell him you couldn't have done anything? Why couldn't you have done something yourself? A Why I don't know.

Q There is no reason, is there, why you could not have done something yourself? A No, sir.

Q There was hose there, hose carts there? A Yes, sir.

Q You and Sloan could have dragged that hose down to this big tank if you wanted to? A Yes.

Q And you could have coupled it up? A Yes.

Q And gotten the water and thrown it on the fire? A Yes, sir.

Q Why didn't you do it? A Why, I thought it safer to get more men, help.

Q Why? Why did you think you needed more men at this particular fire when you had not used them for some other fires? A Well, seemed to be more dangerous.

Q Dangerous on account of the explosives? A Yes.

Q You saw it was in the vicinity of the explosives? A Yes.

Q That is all.

Edward Kane, re-direct.

Re-direct examination by Mr. Skinner.

Q Mr. Kane, Judge Garrison asked you if you and Sloan could not have pulled the hose out there and you said yes. Now, don't you recall telling me on direct examination that Sloan could not leave his pump? A Well, Sloan couldn't, no, sir, but Garrity could.

Q Garrity. Have you any idea how long it would have taken you and Garrity to get that hose out from or off the hose cart at M down to the hydrant in the Store R and get it coupled and stretched down to that fire? A No, sir, I couldn't.

Q Would it have taken a short time or a long time? A Well, take quite a while.

Q In the meantime the fire would be burning, wouldn't it? A Yes, sir.

Q Well, these other fires that you speak of as having been put out, you said you had other men to help you. Where did they come from? A Well, I put them out myself.

Q Yes. A Sometimes the weeds over in the little place across the way would get on fire and I would bring the hose cart out myself and couple it up to the fire plug, and run the hose cart right across.

Q Well, where was that fire that you are just speaking of with reference to Store M? A Right opposite.

Q Right opposite? A Opposite Store F in the weeds right over on the far north.

Q You did not have to run the hose very far? A Not very far, right across the roadway.

Q Were these fires that you speak of at a time when there were ammunition cars in the yard? A No, sir.

Q How long before were they? A Oh, some months before that.

Q Well, you did speak of men helping you put out fires; who were they? A Well, there was a car of sulphur on fire down there one night—there was men that

was working on the pier loading china clay, and they came out and helped me.

Q How many of them altogether? A Oh, there was a whole gang, thirty or forty men.

Q You were asked why you did not fight the fire instead of telephoning. Were your instructions to fight fire or to telephone? A Well, that was to my own judgment. If I thought I could put it out before—if I thought it was any way dangerous to telephone, and if it was not, why to put it out myself.

Q Those were your instructions? A Yes.

Q That is all.

Re-cross examination by Mr. Garrison.

Q You had instructions to call on the captain of the Lehigh Valley barges that were in there to help you put out fires? A Yes, sir.

Q How many barges as a rule were in there? A They were all instructed that in case that whistle should blow that they would have to come out and help.

Q Yes, that is what they were instructed, and you were instructed to use them, to use them to help put out fire? A Yes, sir.

Q About on an average how many barges were in there during the time, throughout the time—about how many such barges were there in there, Lehigh Valley barges? A About twenty or thirty of them.

Q They were all around here? A No, right east side—the west side of Pier 4.

Q Pier 4. They were all down here at Pier 4? A Yes, sir.

Q West of that? A Yes, sir.

Q Who was to blow this whistle, Mr. Kane, that brought these men there to help you? A Mr. Sloan.

Q He blowed it that night? A Yes, sir.

Samuel J. Sloan, direct.

Q After Sloan had started his pump going there was no reason why he should not leave the pump house if he wanted to? A No, sir.

Q So he could, as a matter of fact have gone down with you to the hose if he wanted to? If you wanted him to walk down to the North Pier with you there is no reason why he should not have done it? A I don't know whether it was safe for him to leave the pump or not.

Q What could happen to the pump? A Well, the pump might lose its suction and bust all to pieces.

Q That is all.

Mr. Skinner. That is all.

SAMUEL J. SLOAN, sworn.

Direct examination by Mr. Skinner.

Q Mr. Sloan, by whom are you employed? A Presently by the Standard Oil.

Q Were you employed by the Lehigh Valley Railroad Company in July, 1916? A Yes, sir.

Q Were you on Black Tom? A Yes, sir.

Q Remember the fire and explosion there? A Yes, sir.

Q What was your employment then? A I was night engineer then.

Q Night engineer, and stationed where? A Black Tom, right at Store F.

Q Store F, and what did you have to take care of? A The boiler, and the fire pump, also steam heating plant in the winter time.

Q How long had you been night engineer? A Well, I have been there for twenty-two years.

Q Had you been night engineer all that? A Well, I was formerly fireman and then I got to be engineer.

Q On Black Tom? A Yes, sir.

Q Well, did you have anything besides your duties as engineer, anything in the way of watching? A Yes, sir; I had to go down every hour and punch buttons.

Q Where? A On the dock side, on Pier 4 on the east side, on the dock side, not on the far end—on the south end.

Q And this punching buttons was done, I suppose, by you as you made a round? A It was a round; go down there and punch buttons and come back.

Q And what did you go around for? A To punch the buttons.

Q Well, punching the buttons, of course, recorded the fact that you had been around? A If I saw any fire or anything that was wrong I would be there to remedy it.

Q And you had a well-defined—you had a certain beat to cover? A That was my beat.

Q Nobody else had anything to do with that portion of the yard but you in the way of watching? A Only Kane.

Q Kane had supervision over you? A Kane was a roundsman to see that we all done our duties.

Q Who was the watchman—was there anybody to the each of you? A To the east—Garrity.

Q Was he a young man or an old man? A I should say Garrity was a man around 55.

Q And where was he stationed? A Garrity's beat consisted of down the platform on the track side, right around that stores to Pier 6, then all around to the farm.

Q Did he have to look after the boiler? A They had a locomotive yard there. He had to look at it once or twice a night just to see that the fire was in. That is all he had to do with it.

Q What do you mean by the farm? A Well, wherever the cars would tie up at night.

Q What do you call the farm? A We call Pier 7 the farm. Originally—years ago—that was only a farm.

Mr. Garrison. Pier 7?

A Yes.

Q In July, 1916, it was not a farm? A It was a railroad yard.

Q Were there many cars in it on the night of July 29th-30, 1916? A I could not tell you that; I hadn't anything to do with that at all.

Q To the west of you, the left of you, was Kelly? A Pier 4, Kelly had the grain elevator.

Q He had boilers to look after? A Only—it was in the summer time—just to see that the fire was kept in. There was no pressure required there—get up steam in the morning for the elevator operation.

Q And over further was Groath? A Over to the extreme west.

Q By the gate? A Not by the gate. From the grain elevator about four hundred feet.

Q Where is the oil yard? A That is the—the oil yard is to the southwest of—what they call the oil yard is the Eagle Oil Works now, and this place was formerly the oil yard, and that is where the National Storage is operated.

Q On this night in question, July 29-30, were Groath and Kelly and Sloan—yourself—and Garrity at your respective posts? A Well, I seen Kelly, I seen Garrity and Kane, but Groath was out of my jurisdiction altogether.

Q You remember the fire and explosion? A Yes, sir.

Q How long before that had you seen Garrity and Kane? A Well, I seen Kane at 12 at night.

Q And Garrity? A I seen Garrity at different times during the night when he made his rounds around there, because he always had to pass the pump room where I was.

Q What was the last you had seen of him before the fire? A It might have been an hour or somewhere around there.

Q Might it have been more or less? A I could not tie myself to the time.

Q You had been there some twenty years I think you said? A Yes, sir.

Q You knew, did you not, that there were cars in this yard with explosives and ammunition? A All I knew about that, that there was ammunition and stuff of that kind coming in, but further than that I did not know what the contents were.

Q You just knew generally that there were cars there with ammunition and explosives? A Exactly so.

Q And that had been during all the time that you worked down there on Black Tom? A No, sir. That would be I should say before the explosion to my memory only a few months.

Q Was there any change in the provision there for watching after the explosives began to come? A Oh, yes.

Q What change? A Well, when the ammunition started to come in there, as far as I understand, the Lehigh Valley or the—

Q Not what you understand. What you saw. A Well, the shippers—the Dougherty Detective Agency had four men down there watching those ammunition cars.

Q Were there any more Lehigh Valley watchmen after the ammunition cars began to come than there were before? A No; just the same amount of men.

Q Just the same. Well, now, what was the first you knew of the fire? A The first I knew of the fire I heard some shouting—it was a common thing to hear down there.

Q In the yards you mean? A Right down there where I worked, Pier 5.

Q What do you mean when you say it was a common thing to hear? A You know, men coming down the road, those men coming down at night off the boats, or off barges, those sailors sometimes off German ships would be a little intoxicated, and so we always go out and see them go down the road and to the ships.

Q Sailors from German ships? A The ships coming in; there was no German ships at that time, but there is quite a lot of sugar steamers come in there and the men after their working hours go up to Lafayette and up to Claremount to have a good time and come back singing.

Q And that was at night? A During them periods when the ships would be coming in, but other times it would be dead quiet there.

Q Well, you heard shouting. Now, tell us about that. A I heard shouting and two men run over to me and I was between the pump room, that is about 20 or 30 feet—and the National Storage office—and they run over to me all excited and hats off, and he said to me all the piers are afire; and I thought it was a steer they were giving me, and I said to hell it is, or something like that, and I run over across the track crossing in line with where they said North Pier was, and I looked down between the cars and I see a blaze there, it looked to be very distant.

Q About how big? A The blaze looked to me to be about the size of a hat.

Q Where was it with reference to the cars? A It looked to me from where I could see to be about the extreme end of the North Pier.

Q Do you know where Zeke's shanty is? A Yes.

Q Where was it from Zeke's shanty? A I could not tell you. That is quite a distance from me, but I should say it was below Zeke Townes' shanty.

Q It looked so to you? A Yes.

Q Well, then, what did you do? A When I ascertained that I says I must go and turn in a fire alarm and this man says I have turned in the fire alarm already. I run in, put the damper on the boiler, opened the suction valve and got my pump a-going, and the telephones commencing ringing. One telephone was right direct to the National District people who had the supervision of the sprinkler system. It rang and a fellow says to me there is a fire down there? I says yes.

Q You mean somebody on the telephone? A Yes. He says there is a fire down there? I says yes, on the North Pier. He says what is Davison's telephone?—he was the superintendent of warehouses—I gave him his telephone; so there was quite a lot of telephoning—

Q Let me ask you just a minute there. In this, what you had to do about connecting your pumps and opening the suction valve and all that—does that take some time? A In the summer months from April to November, we always keep what we call a dry line, charged for 80 to 100 pounds pressure, and all I had to do was open the suction valve and the outside valve and give it just a couple of turns over and the pressure would run from 80 to perhaps 120 or 125.

Q Well, then, the telephone rang and this man talked with you, and after that you did what else? A After that the men hollered to me something about—he says try and get Mr. Dickman, so I called up central and got Mr. Dickman and told him the conditions of things.

Q And then? A I kept up the pump there, and the next thing I see was I guess a locomotive engine come down first.

Q Could you leave that pump to go and fight the fire? A Nearby I could, yes.

Q Where you saw this fire that night could you? A You could in a way. You could regulate your pump as long as the pressure would be released from it. You could open your suction valve sufficiently to take the

excessive pressure from your pump and do it, but as a rule you are not supposed to do that.

Q Did you see any explosions, small explosions, shrapnel or shell? A Not for some time after I see the fire.

Q How long a time? A I should judge somewhere between 15 and 20 minutes.

Q Between the time you first saw the fire and the time you saw the small explosion? A Different small explosions, such as ammunition going off.

Q Did you see Kane or Kelly or Garrity or Groath do anything to try and put out the fire? A I tell you, I was attending all my business. I was busy with the pump and the boiler and the telephones.

Q Then, do I understand that you did not see them? You were there attending to your duties? A I seen them starting off, sure.

Q But did you see them doing anything to put out the fire? A No; I was hundreds of feet away from where they would hook onto a hose.

Q Have you any idea what track this fire was on—which one of these tracks? A Well, now, that track appeared to me on the extreme—it was either on track—I think they are numbered from 18, 17 and over south—lesser number.

Q Numbered from the sea wall? A Yes. It must have been between either the 18 and 17 track—somewhere around there.

Q How many tracks from the sea wall? A I should say one or two—right in line with the North Pier. You see, the North Pier is in line with those two tracks.

Q I see. Now, Mr. Sloan, where was the nearest hydrant to the point of the fire, as you saw it? A The nearest hydrant, on the roadway opposite the structural tank.

Q You mean the tank that lies to the east of Store R? A Yes.

Q And in the roadway, you mean a point here north of Store R? A Yes; there is a Corey three-way hydrant and a salt water hydrant somewhere by there.

Q Yes; the map shows a three-way hydrant just to the northeast of the corner of Store R. A Yes.

Q And shows a— A Dry line over there.

Q So this green line—which I understand is the salt water system— A Yes, sir.

Q No; that is marked here "Fresh Water." A There is a fresh water there, too. There is three lines there.

Q How far would you say it was in feet from that hydrant to the point where you saw the fire—roughly? A Well, I will say, roughly, about six or seven hundred feet.

Q And where was the nearest hose? A The nearest hose, I think, was between the blocks at Store M and the next store down—and the crossing over—there was always two hose carriages there in the house.

Q Right here? A Yes; and there is two in Pier 6, or used to be there.

Q Was there a chemical engine on Black Tom? A Yes, sir; there was two.

Q Where were they? A One was situated or posted right there in Pier 5 and there was one there by the oil yard.

Q Way off to the west? A Yes, sir.

Q Would it be easy to take that chemical engine that was at Pier 5 down easterly to the point where you saw the fire? A You could not take the chemical engine any further than the road run.

Q That roadway— A The roadway stopped opposite Store R.

Q Store O it shows here. A Store O. I know the end of the road.

Q You could not take it any further than that? A No; it was too heavy.

Samuel J. Sloan, cross.

Q And what was the condtion, what would you have to take it over? A Down between tracks.

Q Well, Mr. Sloan, when you saw this blaze—you say about the size of a barrel—did you see it off to one side of the cars, or between cars, or on cars, or how? A Now, the best of my memory is this: When I run across the crossing and went to the extreme north side I looked down between two rows of cars; I guess the gauge in between two tracks is around four feet; something like that; and I looked down right and I could see the fire in the center, as it were, of that space.

Q And did it look to you to be on the ground, or on top of the car, or what? A Well, now, it could not be on the top of the car; because it was only about a barrel high, about.

Q When you said a barrel high, did you mean a barrel height from the ground? A Yes, sir; about that.

Cross examination by Mr. Garrison.

Q Well, Mr. Sloan, from where you saw this fire, could you tell whether it was on the ground, or whether it was in a car, or where it was? A Well, I couldn't tell you whether it was on the ground; I could see it looked to be more on the ground; it might have been on the side of the car.

Q It might have been coming out of the inside of the car, for all you know? A Sure, sure.

Q And it seemed to you to be down below—that is to say, nearer the North Pier than opposite Zeke's shanty; is that right? A Oh, yes; it looked to me that way.

Q You didn't go any nearer to it than that? A No, sir; I kept within my own bounds.

Q It was part of your business to fight fires down there, wasn't it? A Yes, sir.

Q Yes? A When there would be a fire there at night-time down there.

Q That is what I say. It was part of your business? A Why, sure.

Q There would not have been any trouble, so far as distance is concerned, to have hooked hose on to the hose—on to the hydrant under the big tank and to have reached down to the North Pier, would there? A Well, there was Kane and Kelly—

Q Well, just answer my question. It was practical. A Yes, it was practical.

Q That is what I want to know. Well, if this fire was not any bigger than a barrel, why didn't you go down and try to put it out? A I am subject to orders from Kane.

Q Did Kane give you any orders? A No, sir.

Q He did not? A No, sir; he is roundsman in charge of that place at night.

Q He gave you no orders whatever? A None whatever.

Q Judge Skinner has asked you about the chemical engine. There was no occasion to run the chemical engine over these tracks at all, was there? A None whatever.

Q With these pumps going? A The pump was sufficient. The hose carriage would be the most practical thing. You could back the hose carriages down there and unreel the hose.

Q You could back them down there readily? A You could back them down there, and unhook the hose.

Q And you could put a stream of a hundred feet? A Put about a hundred feet or thereabouts.

Q There was ample pressure? A Yes. Always in the summer we had a cold water pressure, say, eighty to a hundred day or night, and you could increase it as you wanted it.

Q You spoke of a steam heating plant. You didn't work that in the summer time, of course? A No.

Q So, all you had to do was look after the pump? A Yes.

Q You didn't see any sailors come shooting in there that night? A No; the only hollering I heard was these two Dougherty men.

Q You didn't see any strangers in there that night at all? A No, sir.

Q When did the engines stop coming in there that night? A That Saturday night everything was quiet after five o'clock—well, we will say about a quarter after five brings all the workmen away, and the yard was practically dead after that.

Q Well, it was a dead yard, anyhow? A Yes, sir. Night time we never operated in there.

Q As a rule, when would the last engine be in there at night? A About a quarter of six weekday nights, the last.

Q And on Saturday? A Saturday, quarter past five.

Q Now, did you see any strangers in there that night at all before the explosion? A No, sir.

Q Or hear any? A None.

Q And who were these men that came over and had this talk with you about the fire? A As I understand it, they were the Dougherty men; these men that were supposed to watch the ammunition cars.

Q Did you have any talk with them? A Just a few words exchanged with them. They said the North Pier was afire, and they were all excited, and the minute they gave me the word they beat it up for Lafayette.

Q And from what you saw, in your judgment, did you reach the conclusion that the fire was down among the ammunition cars? A Well, I knew—I knew there were ammunition cars down at the North Pier, in that vicinity; took it for granted there is where it was; and it looked to me that way.

Q That is what made them so excited; that is what you thought they were so excited about? A Why, sure, because they came right from where the fire was. They ran up the road.

Q And it was their business to watch the ammunition cars? A That is what they were there for.

Q So you jumped to the conclusion right away the ammunition car was on fire? A Why, yes, sir.

Q That is the real reason you didn't go down there? A That is the reason—who, me go down there?

Q Yes. A I would not go down, no.

Q Wouldn't you go down if there was a fire? A If it was a small fire.

Q Wouldn't you go down if there was a fire? A Why, surely.

Q Why didn't you go down that night if there was a fire? A Wasn't told to go down.

Q Wasn't one of the reasons because there was ammunition down there? A Well, if I seen the fire was small I certainly would go down there; but if I seen the fire was bad and dangerous I wouldn't go down for anybody.

Q And the fire was bad and dangerous in the ammunition cars? A At first it didn't look, but after a while it was certainly dangerous.

Q When the Jersey City Fire Department got there what did they do, anything to try to put the fire out? A The Jersey City Fire Department got down there and got off the wagons, and just stood around the road talking.

Q Then, they didn't do any fire fighting? A None whatever.

Q Did any of the people that came there from any of the fire departments try to put out the fire? A No, not until after the big explosion was all over; then they were all busy, and then it was too late.

Q Where were you when the big explosion took place? A I was just after coming out of the office and talking to Superintendent Mulligan, and the explosion took place; everything went black as ink, and I went along with it.

Q Where were you when the explosion took place? A Right there by the pump.

Mr. Garrison. All right; that is all.

Samuel J. Sloan, re-direct.

By Mr. Skinner.

Q Did you see it? A I seen the reflection, you know, and everything then got black.

Q Well, could you tell where the explosion was with reference to the fire that you had seen before? A It was down that way (indicating). That is all I know.

Q When the Jersey City Fire Department got there, was that some time after the fire started? A The Jersey City Fire Department got down there in pretty good time, as I judge; they got down there one o'clock or five minutes to one.

Q At that time had the fire spread from the point that you first saw it? A Yes, sir, it was coming up this way (indicating).

Q Had it extended to more than one car? A Well, it looked to me that perhaps it might have got to two cars.

Q And by that time were there any explosions coming from it, shrapnel and shells? A Yes, shooting out this way, and big rockets going off once in a while.

Q You said a hose could be stretched from the hydrant down to the point where you saw the fire ? A Yes, sir.

Q Would that take a short time or long time? A Well, that all depends on how many men were at it.

Q And with, say, Kane and Garrity, do you think they could do it in a short time? A It would be kind of a tedious job for Kane and Garrity.

The Court. How many men would it require?

The Witness. Four good men ought to be able to run that hose down there.

The Court. And you think it would take that many?

The Witness. Yes; I believe around three or four men.

Q And it would take some time to couple the links together? A That is quick; that is very quick; because

there is about 350 to 400 feet of hose in each carriage and you could reel them and run them right down between the tracks and connect up.

Q You say you didn't go down and put out the fire because you were not told to go down. Didn't you also have your own place and your own duties there by the pump? A Yes, sir; I had my own place. In emergencies, of course, you will do anything.

Q Did you have instructions before the time of this fire as to what to do in case of fire? A Yes, sir.

Q What were your instructions? A There were all kinds of instructions in typewriting hung up in the boiler room and in the office.

Q What were you to do ? A In case of fire immediately get up pressure, blow your whistle in the location where the fire started; that would notify everybody around the boats, and so on, and watchmen, and they would all run to that one particular place with a hose carriage and they would hook on, and I would have the water supply on for them.

Q Did you have any instructions to leave your pump and go out and fight the fire, or try to put it out? A No.

Mr. Skinner. That is all.

By Mr. Garrison.

Q You followed your instructions, whatever they were, didn't you, Mr. Sloan? A Yes, sir.

Q And you blew the whistle? A Yes, sir.

Q And that was supposed to ring up these grain boat captains? A Bring every man. I seen a couple of men responded, that I could say.

Q And they had stations assigned to them? A Yes, sir; every man had stations, different hose carriages to go to.

Q Yes, they had different hose carriages to go to; they were in crews, weren't they? A Yes, sir.

Samuel J. Sloan, re-cross.

Q And all those instructions were posted up there? A Yes, sir.

The Court. Did anybody go to the hose carriage?

The Witness. That night nobody went to the hose carriage, because it was in the middle of the night, and when the men got there I suppose it was too late.

Q Too late on account of what? A Well, I don't know; the men that responded to the call, before they—whether they would go down there is another thing; I don't know.

Q The reason they didn't go down was because of the danger, wasn't it? A That is the idea.

The Court. Well, how long after you blew the whistle did the men that you say might have gone down there respond to the call?

The Witness. They might have gone down there in ten minutes.

The Court. Well, they might have; but did they?

The Witness. They did. I seen two men. One was by the name of Mason, and another fellow by the name of Crockett.

The Court. Well, now, at that time, were the shells exploding?

The Witness. Yes, sir; the shells were exploding, Judge; the small shells were going off.

The Court. All right.

By Mr. Skinner.

Q Were Mason and Crockett Lehigh Valley men? A Yes, sir; they were off the grain boats.

Q Oh, men off the grain boats? A The Lehigh Valley boats.

Mr. Garrison. They are employes of the Lehigh Valley Railroad Company, aren't they? A Yes, sir.

Andrew Baker, direct.

Q All these men? A All these men, yes, sir; they are on the Lehigh Valley.

Q And they were clustered about below Pier 4? A On the west side of Pier 4.

Q Below, I mean, up toward the land, up toward Jersey City from Pier 4? A Yes, sir.

Q Generally, how many of those grain boats were in there? A Well, 15 to 20; thereabouts.

Q And two or three men on each boat? A No, sir; one man on each boat.

Q One man on each boat? A Yes, sir.

By Mr. Skinner.

Q Mr. Sloan, the pressure that you spoke of that you had, was that on the fresh water main or salt water main? A Salt water.

Q The old six inch main? A Six inch line, dry line, marked "D"; that means in the winter time it is dry; and in the summer time it is always up.

Mr. Skinner. That is all.

Mr. Garrison. That is all.

(Witness excused.)

ANDREW BAKER, sworn.

Direct examination by Mr. Skinner.

Q Captain, where do you live, and what is your occupation? A 498 Carroll street, Brooklyn.

Q And what is your occupation? A Lighter captain.

Q In July, 1916, were you a lighter captain? A Yes.

Q What was your boat? A Scow Frank.

Q Frank. Was that at or near Black Tom on the night of July 29th and 30th, 1916? A Yes; I was up at the north pier.

Q Speak up so the jury can hear you. A Yes; my boat laid at the north pier that night.

Q And did you see anything of a fire that night on Black Tom? A Yes, up.

Q When was the first you saw it? A I don't know exactly the time, but I should think it was around 12 o'clock when I got called up.

Q Who called you up? Did somebody call you up? A Yes, sir.

Q Where were you when you were called up? A I laid in my bed.

Q When you were called up then what did you do? A I walked out and put on my shoes and got up quick.

Q And went where? A To the deck.

Q Out on deck. Now, when you got out on deck—by the way, where was the fire? A When I went on the off shore side, so I could look up along the pier, it was a little bit further up than the yard, and the pier.

Q Where was the boat that you were on? Was it at the pier or off from it? A It laid alongside the pier, I should say about 125 feet from the end of it.

Q Alongside of the North Pier? A North of North Pier, about a hundred—

Q North side of the North Pier? A Right.

Q About a hundred feet from the end? A Yes.

Q Now, you got up and went on deck, and tell us what you saw? A I went on the off shore side of my boat; that is, to say, the furthest side away from the dock, and I looked up along there and then I saw a fire.

Q Where was the fire? A The fire was up—really, about a little ways from the inner end of the dock.

Q A little ways from the end of the dock? A Yes.

Q Do you remember a tile stockade there? A Yes.

Q Zeke Townes' shanty; do you know that? A Yes, sir.

Q Where was the fire, as you saw it, with reference to Zeke's shanty? A I should guess just up a little bit further than Zeke's shanty.

Q A little bit further away from you? A Further up the line; yes, sir.

Q And how far—was it in among the tracks there? A It looked to me to be on the tracks leading right down on the north side of the pier.

Mr. Garrison. That is track 18.

Q Well, would that be the track nearest the sea wall or one in from that? A Yes, nearest the sea wall on the north side of the pier.

Q And did it look to you as if it was on the track nearest the sea wall? A Yes, sir.

Q This, then, was not on the North Pier at all, but up in the yard somewhere? A No, it was not on the pier; up further.

Q Well, how much of a fire was it then? A When I first noticed it it was hardly half the size of a box car, I should think.

Q And were any shells going off then, exploding, or did that come later? A No; it come from them small calibre, must have been.

Q Smoke?

The Court. Small calibre.

Q Well, how do you know that the small calibre shells were going off? Was it by the sound or by what you saw? A By the sound.

Q What did it sound like? A Well, it sounded very small shot, like a revolver shot, something like that; little stronger.

Q Well, did you do anything yourself towards sending in an alarm or trying to put the fire out? A There was a captain on the Johnson 17 that woke me up.

Q Yes? A And we, the two of us, went over, and waked up the crew on the Johnson 11, laid alongside the Frank, and then we decided to go to the telephone and let Johnson lighters know there was a fire over there.

Q Yes? A And we walked up to the inner end of the pier and across the bulkhead there, and we tried in a shanty there to get a telephone; but that was dark and locked.

Q The door locked? A Yes.

Q Was there a telephone in that shanty, do you know? A Yes, there was a telephone there.

Q Could you get in? A No, I couldn't get in.

Q Well, then, did you do anything further? A We walked a little bit further to go on the side to call on the telephone, and I came back to look after the boat.

Q Well, now, did you see an explosion—a large explosion after that? A They were getting stronger right along, but not much.

Q What was getting stronger? A The shooting in the—

Q The shooting; well, I know, but did there not come a time when there was a big explosion? A Well, that was a time afterwards when I got down to the dock again.

Q Well, then, now, when there was that big explosion, did you see it? A Yes—that is, to see—I feel more than I seen it.

Q Where was that explosion?

Mr. Garrison. He has not said he knew where it was, yet.

A It must have been just right about where the fire started; very near to it.

Q Yes. And where were you when that explosion came? A I stood then at my boat and looked up the line just at it.

Q Now, up to the time of that explosion had you been anywhere else than right around there? Were you watching the fire all the time? A No; we were around there and letting go lines, and one boat lay alongside, pulled out to try to get adrift and get away from there; and I was out around the dock there helping others, and also letting go of my own lines.

Andrew Baker, cross.

Q Between the time that you first saw the fire and the time of this first big explosion, was there any other fire there on Black Tom or anywhere else there than the one you have described? A Not anywheres around the dock.

Q Was there any fire on the North Pier or on the boats? A No; it was a very quiet night; the lights burning brightly on the boats, and there was not a fire or sound around there.

Q After the first explosion did you see any fire on any of the boats? A Shortly afterwards, yes.

Q Where did you go to after that first explosion? A Well, the explosion took—shot me up in the air and kicked me around and then I walked in the cabin of my boat because there was some debris coming through the air.

Q And then did you stay in the cabin or come out? A I come out shortly afterwards.

Q Did you get away from there? A No; I was around the dock.

Q Now after the first explosion did you see Johnson 17 and Johnson 11, two boats? A Yes.

Q And was there any fire on either of them or on your boat? A No.

Cross examination by Mr. Garrison.

Q Captain, when did the Frank get in there? A I am not sure, but I think it was on Thursday.

Q And she lay, was there about 125 feet from the end of the North Pier in toward the land; is that so? A Yes.

Q Was there any boat between you and the land? A Yes.

Q Further? A Yes, there was another boat.

Q Who was she? A She was a Moran scow.

Q You belonged to the Johnson Lighterage Company? A Yes.

Q You were hired by the Johnson Lighterage Company? A Yes.

Q And your barge was controlled by the Johnson Lighterage Company. And outside of you, nearer Jersey City, this way— A Yes.

Q —north from you lay what? A Laid Johnson 11.

Q And where did Johnson 17 lay? A He laid on the bay end, about 15 feet, I guess, from the end of the dock.

Q And he lay about here and you lay about here and the 11 lay outside of you. Is that right? A That is right.

Q Who did you say woke you up? A The captain on the Johnson 17.

Q What is his name? A I think his name was Harry Johanson.

Q He was a Scandanavian, was he? A Yes.

Q Is he alive or dead, to your knowledge? A He is dead now.

Q What was the name of the captain of the 11? A Christ. Casperson.

Q Well, now, about what time was it when Harry Johanson woke you up? A I did not look at the time.

Q Didn't look at the time at all? A No.

Q And he informed you there was a fire, did he? A Yes, sir.

Q And you get out on the land side, did you say, of your boat? Did you come on the deck? Did you come on the North Pier? A I walked on the inside first and then I walked on the offshore side, or on the Jersey City side.

Q You walked on the offshore side near Jersey City? A Yes.

Q Was it from there that you saw the fire? A Yes.

Q And you were on the far side of your boat from the north pier when you first saw the fire? A Yes.

Q Was there anything between you and the fire? A No, no; I don't think there was. I could clearly see the fire.

Q Clearly see it. Was the fire in a car, in a freight car? A That is what appeared to me, yes.

Q Appeared to be inside of the car? A Well, no—in the box car, must have been.

Q That is what I say, in the box car? A Yes.

Q Inside of the car; the flames were coming out from the car? A Yes.

Q At that time these small calibre shots were going off, were they, and that car, you say, seemed to you to be a little further up than Zeke's shanty, up the land way; is that right? A Yes, sir.

Q And was it on the sea-wall track, or next to the sea-wall track, or next one to that, could you tell? A It appeared to me to be right on the sea-wall track.

Q The nearest one to the sea-wall? A Yes.

Q Did you stand there watching it? A No; I was around getting boats tied together to get them away from there, and around the dock helping getting together lines on the other boats on the other side.

Q What lines, on which boat was it that you were tying together trying to get away from there? A They were all the four lying on the other side, and he let go the lines on the other side of the dock.

Q Those that lay between the North Pier and Bridge Number 2? A Yes.

Q Did you do anything in respect to the Johnson boat, your own boat? A Yes; I pulled my boat off into 17, and laid tug lines on the both corners of those two boats.

Q Laid tow lines on both corners? A Yes.

Q What was the purpose of that? Why did you do that? A So the tug when he got hold of one he had the other one hanging on to him.

Q Where was this shanty that you went into or tried to get into to try to telephone? Was it the shanty where the detectives used to live? A No; I don't really know what they used it for, but she was located just on the bulkhead between the float bridge and North Pier.

Q But it was on this bulkhead, on this bulkhead between the floating bridge and the North Pier? A Yes.

Q I see. Well now, when you could not get in there did you telephone over to your owner or your superintendent or somebody? A I didn't do it. The captain of the 17 went and did that.

Q The captain on the 17 went to do that? A Yes.

Q Do you know where he went to do it? A No; he told me he was going to the warehouse to the booth there.

Q Then you mean up there by the pump house? A Yes.

Q Where there was an office and the telephone? A Yes, sir.

Q It is between that and G. All right. The Frank and the 11 and 17 were all Johnson Lighterage boats, weren't they? A Yes.

Q All belonged to the Johnson Lighterage Company or were operated by them? A Yes.

Q Before the first explosion were either of those three boats cast loose from the North Pier? A Yes; crew on the Johnson 11 had pulled 11 outside the end of the dock, pretty near.

Q Well now, what about the 17? A The 17 laid just about where she was before.

Q She was not cast loose after the first explosion? A Not before the first explosion.

Q I should have said before the first explosion? A No.

Q The Johnson 17 was not and the Frank was not? A Yes.

Q And the Frank was not? Is that right? I am now talking about the first explosion? A Yes.

Q Now, then, before the first explosion was the Frank cast loose from the dock? A Yes sir; I think I cast the Frank loose trying to get her out toward the 17.

Q You had got her loose and got her up to 17. Was the 17 cast loose before the explosion? A No, not at that time.

Q Was she cast loose after the first explosion? A Yes; I cast her loose then.

Q Where did she go? A She stopped pretty near dead when I left her.

Q Where were you at the time of the second explosion? A I was little ways in the water away from there.

Q In the water? A Yes.

Q How did you get in the water? A I jumped into it.

Q You jumped into it? You mean you jumped into it after the first explosion? A No, just before the second. There was quite some time between them explosions, I don't know how long, but I was around the dock.

Q A tugboat came in and towed some of these barges away, didn't it? A Yes; there was a Lehigh Valley tug, they had hold of that heap laying on the outside.

Q In here? A Yes, sir.

Q Between the North Pier and Bridge Number 2? A Yes.

Q And they pulled some of those boats away? A Yes; just got them out, just about out when the first explosion occurred.

Q When the first explosion occurred? A Yes.

Q When the first explosion occured you were still on your boat, you were still on the Frank? A I was forward and back; I was on the dock letting go the other lines, and I was back on my own boat.

Q You were not jumping in the air? A I was forward and back a couple of times.

Q I am not asking you about going back and forth. When the first explosion took place where were you standing, where were your feet? A I was on my own boat.

Q That is what I thought, you were standing on your own boat? A Yes.

Q Which way were you facing when the explosion took place? A I was facing about up the dock looking at the fire.

Q You were facing up the dock looking at the fire? A Yes.

Q What happened to you at the time of the explosion; were you thrown down on the floor, on the deck of your boat? A I was kicked from one side of the boat to the end over on the other.

Q Blown from one side of the boat to the other? A Yes.

Q Did it injure your boat, that first explosion? Did the first explosion injure your boat? A No, no.

Q No. Did the first explosion injure the Johnson-17? A No.

Q You are sure of that? A Not except the windows come out on all of them.

Q Did not do any serious injury? A No, sir.

Q What about the number 11, Johnson 11? A She was at that time got out by the outer end of the dock.

Q Yes, I know, but I asked you about whether she was injured or not? A That I don't know.

Q You don't know; but you know the 17 was not? A Yes.

Q You know the Frank was not. When did the 17 get blown up? A That I don't know.

Q You know she did get blown up? A She was afire and I could see her from the water.

Q Then you do know she got blown up completely, didn't she? A I know she disappeared.

Q Yes; she just disappeared as though she had been blown off the face of the water, didn't she? A Well—

Q That is your knowledge of it, isn't it? A I know that is my knowledge.

Andrew Baker, cross.

Q You never saw the Johnson 17 after that night? A No, sir.

Q And the captain was killed? A Yes.

Q He was killed that night? A Yes.

Q There was an explosion on that boat that night, wasn't there? Yes.

The Stenographer. What did you say?

Mr. Skinner. He shook his head.

A I didn't see no explosion on the Johnson 17.

Q Did you hear it? A No.

Q Where were you at the time of the explosion, when you jumped in the water, what happened to you? A I swim over towards shore.

Q Why did you jump in the water? A Because it was getting too hot.

Q Was the fire anywheres out near the North Pier at that time? A Yes, the fire were getting—it took fire on the Johnson-17 when he was right alongside of me—when I was on the stern, and I walked over the bow and over on my own boat.

The Court. We will adjourn at this time until two o'clock.

RECESS.

Q Captain, where did you say you lived? A 198 Carroll street, Brooklyn.

Q Then you are over here voluntarily today; you were not subpoenaed? That is right, isn't it? A I am subpoenaed.

Q Subpoenaed? In Brooklyn? (No answer.)

Mr. Garrison. What is the answer?

The Stenographer. He has not answered the last question. He said "I am subpoenaed."

Q Were you subpoenaed to come here to Jersey City today? A I am asked by the Johnson Lighterage Company to come today.

Q You came because the Johnson Lighterage Company asked you to come? A Yes.

Q That is what I meant. You did not get any paper from the Court to come? A No.

Q And who are you employed by now? A I am walking the street just during the strike.

Q You are on strike? A Yes.

Q Before you went on strike who were you employed by? A I was employed by the Atlantic Lighterage Company.

Q Now, you say that your boat, the Frank, got down to Black Tom on Thursday; did you say that? A I think it was Thursday; I am not quite sure.

Q What cargo had you on when you got there? A I do not recollect exactly; I think I had two carloads of some kind of scrap metals.

Q Some kind of shells, shrapnel shells? A Yes.

Q And what were you to take on at Black Tom? A I did took on at Black Tom—I think I took on five carloads of T N T high explosive that Saturday.

Q Five carloads of T N T? A Yes.

Q And who was the consignee? Who were you working for? Who did that suff belong to? A That I cannot recollect.

Q Where were you to deliver? A I cannot recollect where I was to deliver that stuff; I think it was British stuff.

Q But you were to deliver it down Gravesend Bay on one of the steamships? A Not that particular car I had that time.

Q Where were you to take it? A I think I was going to take it to a ship for the British Government.

Q Weren't all those boats that were loaded with explosives loaded down in Gravesend Bay? A Loading?

Not loading at Gravesend Bay. We loaded at Black Tom.

Q But you had to get it off of your boat. You were not going to take it to Great Britain in your boat? A No.

Q No; where was your boat going to take it to another boat?

(No answer.)

Q (Question repeated.) A That was my understanding; I was going to take it to a British ship at Gravesend, for some ship.

Q That is what I thought. You were going to take it to a ship down Gravesend Bay? A Yes.

Q All these explosives were loaded on ships down Gravesend Bay? A Yes.

Q Where were you required to anchor when you had explosives on board? A At that time they left us lay at Black Tom.

Q I did not ask you that. I asked you where you were required to anchor when you had explosives on board; where were you required to anchor when you were going to anchor? A I do not quite understand you.

Q There were times when you had to anchor, were there not? A Yes.

Q And you could not load your stuff onto the steamships then? And there were places marked out in the bay here where lighters or scows with ammunition or high explosives on had to anchor, isn't that true? A Yes.

Q Where were those places? A I think there are two moorings outside of the Statue of Liberty on Jersey shore that time.

Q And weren't there some further down? A Not that time, I don't believe.

Q There were afterwards? A Yes.

Q When did Johnson 11 come there and tie up alongside of your boat, the Frank? A About around five or six o'clock that Saturday night.

Q And when did the 17 come in? A I do not recollect. I think it was Friday.

Q Friday the 17; didn't the 11 get there before the 17? A No.

Q Are you sure about that? A Yes; I am sure about that.

Q You are sure the 17 got there before the 11? A Yes, sir.

Q And you think the 11 came in about five or six o'clock on Saturday evening? A Yes, sir.

Q Now, how long a time was it between the time that you came upon the land side of your deck and saw this fire that the first big explosion took place? A I should think that might have been around half an hour.

Q About half an hour; and was anybody else on your boat at the time of the first explosion? A No.

Q And you were standing looking down toward the fire, were you? A Yes.

Q Now, tell us what you saw. A Well, just came a crash of a sudden and I got thrown over to the other side of the boat.

Mr. Garrison. Just read that.

(Answer repeated.)

Q That is what happened to you. I ask what you saw. You did not see the crash and you did not see the fall. You have only told us about something you heard and something that happened to you physically. What did you see with your eyes? A Just at the crash I don't recollect that I saw anything.

Q You do not remember that you saw anything? A No.

Q And you do not know where that explosion was then? A No; not just then.

Q After the explosion was your boat on fire? A No, sir.

Q Was the 17 on fire? A No.

Q Was the 11 on fire? A No.

Q How long after that first explosion was it before you jumped overboard? A That must have been quite some time; I should think about twenty minutes.

Q And during those twenty minutes did your boat get on fire, or the Johnson 17 get on fire, or the Johnson 11 get on fire? A I do not know about the Johnson 11. About that time the ship from amongst the burns come out from the other side of the dock—them burned boats—they commenced to come out from the other side, and Johnson 11 lay up amongst them; I do not know which of them caught fire first.

Q Then the Johnson 11 had gotten loose after the first explosion and drifted around or got in front of the North Pier? A Yes.

Q And off toward Bedloe's Island, the Statue of Liberty? A They were only about forty or forty-five feet away from—

Q Never mind how far. They were out toward the Statue of Liberty? A Yes.

Q And had the 17 gotten loose yet? A I cast her loose, but that was after the first explosion.

Q You cast her loose, and how far did she drift after you— A She was hardly off the dock at all, only about ten or twelve feet, around that.

Q Was that the last time you saw her? A No, I saw her while swimming in the water.

Q That is the last time you saw her before you jumped overboard; is that right? A I stood on the Johnson 11 about twenty minutes after the first explosion.

Q And where was the Johnson 17 during those twenty minutes? A She was laying in about exactly the same place she always lay.

Q Ten or twelve feet from the dock? A I had cut her off. Then I tried to shove her out from the dock to try and get her out of there.

Q I understand that; and she drifted ten feet off, you say? A Yes; about that.

Q There were some cars standing on the North Pier, weren't there? A Yes.

Q What did they have in them, do you know? A I think there was three cars of T N T which I was supposed to get on.

Q Yes; had those cars caught fire? A No.

Q They did not? A No.

Q Were they afire during any of the time that you were down there? A No.

Q What caused you to jump overboard? Why did you jump overboard after you stood there twenty minutes; why didn't you jump overboard before or why didn't you stay longer before you jumped? A I did try to do all possible to see if I could save both boat and property, and I also waited for that tug, and I also ordered him to put the line on these two boats that were not on fire and save them and come and save me.

Q That does not tell me why you jumped overboard? A It were getting hot—they were getting hot, so hot around there.

Q What was getting hot? A The air, with five boats was a big fire just laying outside the end of the dock there.

Q These boats were on fire; is that right? A Them boats which the tug helped pull out. They caught fire before any of them boats I was on caught fire, and they give an awful heat.

Q Did you jump overboard because these other boats were on fire? A Yes, because I saw that there was nothing no more for me to do there.

Q If there was no more for you to do why did you jump overboard; why couldn't you have stayed on your boat? A No—I—

Q I am trying to find out; I am not trying to trip you or anything. I want to understand you. A I saw there was no more for me to do there.

Q You would have been safer on the boat than you were floundering around in the water; what was your purpose in jumping into the river? A To save my life.

New Jersey State Library

Q What were you afraid of? A I was afraid of them taking fire right alongside of me.

Q Oh? Now, what was on 17? A I don't know really what was on it. I think it was a little picric acid.

Q Yes, and some detonating fuses? A That I do not know exactly.

Q Whereabouts was the 11 before the first explosion in respect to the Frank—the Frank was tied up right alongside of the North Pier? A Yes.

Q Now, where was the 11? A The 11 was outside the end of the North Pier at that time.

Q Yes, but at first she was tied up right alongside of you ? A Yes, sir.

Q Tied to you, as a matter of fact? A Tied to me.

Q And the 17 was in front of you, between you and the end of the pier? A Yes.

Q Now, is it your recollection that the 17 came in there and got in ahead of you before the 11 came in and tied up alongside of you?

(No answer.)

Q Haven't you gotten those two mixed? A No, I do not think—my recollection is that 17 come in there some time during Friday.

Q I thought maybe you had gotten the numbers mixed. You do not think you have? You think you have gotten the numbers right, do you? A I don't know, but 11 landed alongside of me that Saturday night around five o'clock.

Q Yes; and your impression is that the 17 was before it? A Yes; before that.

Q All right; I wanted to be sure I got your memory.

Q Now, you say after the first explosion you stayed on your own boat about twenty minutes and then things got very hot and you jumped overboard; is that right? A Not around my own boat; that time I was around the dock—was on the end of the dock and took a look around and so.

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Mr. Garrison. Read me that, please.

(Answer repeated.)

Q Now, let's get it straight. The first explosion threw you across your boat? A Yes.

Q Then you went down into your cabin because you said some debris was flying around? A Yes, sir.

Q Then you came on your own deck again? A Yes.

Q When you said you stayed altogether after the first explosion twenty minutes on your own boat, that is wrong, is it? A If I said that, that is wrong.

Q What did you do during those twenty minutes? A Well, shortly after the first explosion when I came out on deck I took a look up the line where the fire been before, and then I went out on the end of the dock, and I saw one derrick lighter which I thought was the Rockwell.

Q All right. A And there was a particular friend of mine on that boat. They were hollering for help! help! help.

Q You were out on the end of the North Pier? A End of the North Pier, yes.

Q All right; go ahead; and nothing was afire out there, as I understand? A Then that boat lay furthest away just caught fire that time.

Q The Rockwell did? A It must have been the Thompson; I thought at that time it was the lighter Rockwell.

Q That boat caught fire? A Yes.

Q What made that catch fire? Was it from sparks going over that way? A There must have been something went through the air there.

Q You did see it, then? A No, I did not see it, but I see the fire then just after that started.

Q What did you do next? A I hollered to him to jump overboard and save his life.

Q What did you do next then? A I went back to my own boat and poled and dragged and tried to get it out further.

Q Pulled and dragged what?

The Stenographer. Poled; p-o-l-e-d.

Q You put a pole in the bottom of the river and tried to push yourself? A Pushed on the dock to try to get the Johnson 17 and the Frank together.

Q Then what did you do? A I went on the dock again and I hollered to that tug there. Then by that time they caught fire on them boats he was moving with and I hollered to him to let them go and take those two boats out I was on which there was no fire on, to save me anyhow.

Q Then what happened? A He backed up within twenty feet of the cable of the 17 and then he took the Rockwell and left me behind.

Q Did he take the 17? A No.

Q Then what happened? A I walked around a few minutes, I do not know how long, but then they were getting so hot right where I stood and I walked over to 17 from the after end of my own boat and I tried to get my shoes off but they were getting so hot I jumped right overboard the way I was.

Q Then you did jump overboard off your own boat? A Yes, but just—

Q Then what happened to you; how did you get picked out of the river? A Oh, I swim over to the Jersey Central.

Q You swam over to the Jersey Central terminal? A Yes, sir.

Q Where were you when the second explosion took place? A I was a little distance away from my own boat in the water.

Q A little distance away from your own boat, in the water? A Yes.

Q About how far? A I should guess around 150, something like that, 200 feet.

Q From your boat? A Yes.

Q And how far were you from the 17? A That is the same distance; we were quarter and quarter.

Q Did you see that second explosion? A No; I did not see it but I felt it.

Q Tell us your sensations; what happened to you? A Just after, I hear the crash—keeping on swimming, then there come a terrible wave.

Q Terrible wave? A In the water.

Q Yes? A Which I turned around and I headed right through them; there were three of them.

Q You headed right through these waves? A Yes, sir.

Q You turned around, you mean; you turned with your head back to the North Pier? A Towards my boat again.

Q To watch your boat?

The Court. "Towards" his boat.

Q Was your boat still all right or was she blown up? A I think she was all right; I am not quite sure of that.

Q What about the 17; was she all right or had she blown up? A No—I am not quite sure of that, but I think that boat lay there still.

Q You were quite sure some boat blew up, weren't you, from the effect in the water? A Yes, that I am, but which it was I have no idea.

Q Then you swam over to the Jersey Central dock and climbed up there, and then you were all right; you were not hurt, were you? A No; I was not hurt, but I ran right into a fire there again.

Mr. Garrison. Read that answer, please.

The Court. He ran right into a fire there.

Q Was there an explosion over there at the Jersey Central? A Yes.

Mr. Garrison. I did not hear about that.

Q What was the barge that was lying broadside of the Frank before anything happened at all? A That was Johnson 11.

Q Now, how far had you swum before these great waves came that you had to go through? A I guess about 200 feet.

Q So you were then about 200 feet from your barge and the 17? A Yes.

Q Was there anything thrown into the water at that second explosion? Did you feel anything dropping around you? A Yes; through the air; yes.

Q Coming out of the air? A Yes.

Q Dropping around you; and, of course, you couldn't tell what it was? A No.

Q And were they things that were hot? Was it anything that was hot? A No; not what I feel that time.

Q Did you feel anything dropping around you on the deck of your boat at the time of the first explosion? A Yes.

Q Yes. Now, the time of the first explosion, Captain Baker, as I understand you, you were somewhere about—this is the end of the north pier? A Yes.

Q You were somewhere about here; you said about 125 feet from the end? A Yes.

Q And the fire was somewhere down here, about opposite Zeke Townes'? A Yes.

Q Now, if the explosion took place there— A Yes.

Q —the first explosion, then you were the distance from there to there, say, 250 or 300 feet; is that correct? A That is correct, yes; that is something like it, yes.

Q And all that explosion did to your boat was break the windows, as I understand you? A Correct.

Mr. Garrison. Just measure what that is.

Mr. Skinner. About 25.

Mr. Garrison. 25 what?

Mr. Skinner. 25 inches.

Mr. Garrison. That is 25 times 25.

Mr. Skinner. May we have it appear on the record that the distance—

Mr. Garrison. I haven't finished yet. Just a moment.

Mr. Skinner. You get that in there.

Mr. Garrison. What is that?

Mr. Skinner. The distance.

Mr. Campbell. Mr. Kane said it was 25 feet to the inch: "Q What is the scale of the map?" (A "25 feet to the inch" on page 204 of the minutes.)

(It is consented that the distance referred to is 600 feet.)

Q Now, Captain, where were you on your boat just before the first explosion? Just what part of your boat were you on? I know you were on the deck but on what part of the deck? A Aft, what they call it, by the cabin end; aft end.

Q The stern of your boat? A Yes.

Q Stern of your boat? A Yes.

Q And which side were you on, the side towards Jersey City or the side towards New York? A I was on the north side of my boat.

Q That is the side towards Jersey City? A Well, towards this side, yes, towards—Jersey City, and then New York will be on the same line—

Q Well, let me get it straight. Suppose my finger were your boat (placing his finger upon the large map); were you on this side, north, or were you over on that side toward the south? A I was out towards the north.

Q You were towards the north? A Yes.

Q Then is that on the off shore side of your boat, considering the pier as the shore? A That is right.

Q When you picked yourself up where were you? A I was on a line alongside of my boat.

Q Blown right straight across your deck? A Yes.

Q And if you were facing the front of your boat like this, you were blown right from the left side over to the right hand side? A Yes.

Mr. Garrison. That is all.

By Mr. Skinner.

Q Captain Baker, after this fire, did you go and look at the scene of it? A I never went up further towards the fire than the bulkhead between—

Q I mean the next day? A The next day, yes, I was around there.

Q Now, did you see a big hole there? A Yes, I did.

Q Where was that hole with reference to the point where you first saw the fire the night before? A I should think that just in the center, around the center of the hole is about where the fire started, in my estimation.

Mr. Skinner. That is all.

Mr. Garrison. That is all.

(Witness excused.)

FLORENCE ELIZABETH McENENY, sworn.

Direct examination by Mr. Skinner.

Q Miss McEneny, where do you live now? A Why, for the present I work for the Department of Health, Kingston Avenue Hospital, Brooklyn.

Q And are you a trained nurse by profession? A Yes.

Q And in July, 1916, were you engaged in following your profession? A Yes, working as—

Q Where were you stationed? A Ellis Island.

Q And do you remember any fire and explosion at Black Tom's the night of July 29 or the early morning

of the 30th, 1916? A Well, I happened to be on night duty that night of the explosion.

Q Just to make it easier, make your answers short. Just answer the questions and speak right over here to me. Try to make me hear. Now, you were on night duty? A Yes.

Q Did you see any fire that night? A Why, yes, coming back from supper, about 12:30.

Q Well, that comes later. You saw it? A Yes.

Q And where was it? A Why, it was the left-hand side of the warehouses; it was nearer the warehouse.

Q On what? A On Black Tom.

Q On Black Tom, on the left hand side of the warehouses. Do you remember the pier at the end of Black Tom? A I am not so distinct; no; I am not so sure; but I know it was nearer the warehouse.

Q I just asked you—you had seen Black Tom before, hadn't you, and you had seen a pier there on the end? A Yes.

Q Now, was this fire somewheres between the pier and the warehouses?

Mr. Garrison. I think that is leading.

The Court. Yes; I sustain the objection.

Q You say it was to the left of the warehouses. Where was it with reference to the pier? A Why—

Q How far to the left of the warehouses was it? A I would say it was between; it was medium, between the pier and the warehouses.

Q Between the pier and the warehouses. Now, what time was it that you saw it? A The first time I saw the fire was 12.30.

Q How do you fix the time? A Coming back from supper—I had come back from supper—I had come back from supper at 12.30; while coming back from supper, which was 12.30 and looking over opposite Black Tom,

was the ward I was on duty, an open corridor—I saw a bonfire at 12.30.

Q Did you have your supper at regular times over there? A Yes; it was never before 11.30 nor later than 12.30.

Q What is that? A I say it was never later than 12.30.

Q Now, you said that it was a bonfire. Is that the way it appeared to you? A It was a small—we watched it—bonfire, an ordinary bonfire.

Q And where was it with reference to any cars? A I don't know about the cars; it was just towards the warehouse; left hand side.

Q Did you continue to look at that fire? A Yes.

Q Did it stay the same size, or did it get bigger? A It started spreading; it started to spread.

Q At the time you first saw it, did you hear anything in the way of explosions, or did they come later? A No; didn't see any; just watched the bonfire; 15 minutes after I heard the explo—popping.

Q 15 minutes? A 15 minutes after; watched it steadily for about 10 or 15 minutes—15 minutes.

Q Now, later, did you see or hear any big explosion? A No.

Q Didn't either hear or— A No, sir; I watched it for about 15 minutes, until we heard the popping of shells, and when it started to get very loud, why, we went up and woke up the superintendent, and he came down and watched it from then on until two o'clock, up to the explosion.

Q Then do I get it—is it right, then, as I understand you, that it was about 15 minutes between the time you first saw the fire and the time when you first heard the popping of shells? A Yes.

Q And then after that it kept getting louder? A Yes.

Q And then where did you go? A I went up to Mr. Lee, the superintendent's room, and woke him up.

Florence Elizabeth McEneny, cross.

Q Speak a little slower. You went up to the superintendent's room and woke him? A Yes.

Q Then what did you do? A Why, we came down and watched it.

Q And did it continue the same size or did it get larger still? A It started getting larger and the noise was getting louder.

Q Noise was getting louder. Then what happened? What did you do? A Well, of course, then I was going back and forth about my duties, back and forth about the ward, and I didn't watch it very, very intently.

Q Did you go to your patients? A Well, I kept coming back and forth.

Q Well, now, what else happened then? A That is all I remember until the explosion.

Q Then you didn't either see or hear a big explosion? A Well, I was standing there watching it, but, of course, I couldn't say just how it just went up.

Q What do you mean by "just went up"? What went up? A Well, I mean it went up in a sort of—you know, such a rush, sort of volcano, like; it just blew up so hurriedly that I couldn't say exactly how it happened; it stunned us, sort of.

Q What was it that blew up and where was it? A I couldn't say that; I couldn't say that very well; I don't know; it just seemed to come around the fire—from where the fire was.

Q Now, before that time, before the time that it went up like a volcano, had you seen any fire anywhere else then on Black Tom? A No.

Mr. Skinner. Cross examine.

Cross examination by Mr. Garrison.

Q Miss McEneny, I show you a geodetic survey map gotten out by the United States Government, which has been marked "J. V." for identification, and I show you what is marked Black Tom Island, and I show you what

is marked Ellis I. Now, that is where you were, over at Ellis Island, weren't you? A Yes.

Q And that is quite close to the Jersey Central piers, isn't it? A Yes.

Q Now, you said that you had noticed piers at Black Tom. Whereabouts were those piers, can you tell us, using Black Tom there to show where the piers were? A Well, they were on the right and the left; but the pier where the fire was was on the left hand side of the warehouses, more toward this side here.

Q More towards the right? A More towards the right; and the fire was left of the warehouses.

Q Your left, you mean? Say, standing on Ellis Island, did the fire seem to be to your left of the warehouses? A No, the right, standing on Ellis Island, this way.

Q Oh, standing on Ellis Island— A It was to the right.

Q It was to the right of the warehouses; is that right? A No, to the left of the warehouse the fire was.

Mr. Skinner. She says to her right.

Q Standing on Ellis Island was the fire to your right or to your left? A To my right. The fire was on the right, more towards the warehouse.

Q I am afraid I do not understand it. Could you tell us down here on the map, if I showed you where the warehouses were?

(Witness leaves the witness chair and goes to the large map.)

Q Now, Ellis Island is somewheres over here, about where this is. Here is the first warehouse here, see? All these are warehouses. Here are the piers that stick out in the water at the end of Black Tom. Now, give us some idea, that being Ellis Island—some idea where you think the fire was? A This is the warehouse—

Q No, these are the warehouses, all down here. A It was to the left. The fire was to the left of where I was standing, and the warehouses were to the right side—the warehouses were right to the fire, and I was standing to the left of the fire. You see, the fire was on the left and the warehouses were on the right, and the fire was to the left of the warehouses.

Q Unless you were standing with your back to it, I do not see that is possible. However, just resume the stand, please.

(The witness resumes the witness stand.)

Q Could you see whether this fire was on the ground or was above the ground? A I couldn't see that.

Q You couldn't see any cars; you were too far away to see any cars or anything else? A No; it was too dark and too far away to distinguish whether it was low down or whether it was up.

Q What makes you think it was on Black Tom Island at all? A Well, being over there seventeen months, we knew that the ammunition was towed out there and left to dock there at night.

Q How do you know it was among ammunition? A Well, we knew there was ammunition around there; was told it was kept there.

Q How do you know this fire was among the ammunition? A Well, I don't know exactly; I knew there was ammunition towed around there.

Q Well, weren't these little shells going off? Wasn't there something going off when you first saw this fire? A No, there wasn't a sound.

Q How did you know it was Black Tom Island? A Well, I knew ammunition was kept there; I knew it was towed—

Q I know, but how did you know it was among ammunition? I don't understand you? A When I heard the popping.

Florence Elizabeth McEneny, cross.

Q When you heard the popping. Did you hear the popping right as soon as you saw the fire? A No, I saw the fire first, and the popping afterwards.

Q At the time you saw the fire and the time you heard the popping, how did you know it was on Black Tom Island at all? For all you know, it might have been somewhere else? A I knew it was around that, for the ammunition was towed—came in night after night; they used to put a red flag on it.

Q I understand all that, Miss McEneny; but before anything popped off, what reason had you to believe that it was ammunition that was on fire? A Well, the popping—I didn't know—I knew there was a fire there.

Q I mean, before any popping took place, how could you tell that fire wasn't on the shore back of Black Tom Island? A I didn't know anything about the fire.

Q You didn't know anything about the fire until the popping occurred? A Until the popping occurred, and that was what this alarm was.

Q That is what I thought. Now, you say this was about half-past twelve when you first saw the fire? A Yes.

Q Then you inquired for Mr. Lee, did you call him? A Yes.

Q He was your superintendent? A Yes.

Q And then he came down there and stayed, you said, until about two o'clock when the explosion took place? A Yes; he never moved from the time I called him up.

Q It was about two o'clock when that explosion took place? A Yes.

Q Where were you when the explosion took place? A I was standing right there.

Q Right there by him? A I was standing right there, another nurse and myself.

Florence Elizabeth McEneny, cross.

Q How do you fix the time? A Well, I know it was about—two o'clock; it could not have been any later than quarter past two.

Q Between two and quarter after. Was there another explosion that morning? A There was one after that, but I don't remember anything about it.

Q About how long after? A About an hour.

Q What time did you go off duty that morning? A Well, we didn't really go off; none of us; we stayed on there.

Q You stayed on the island all next day? A All next day, and I was on the next night.

Q There was some barges, some burned barges, came over and landed on Ellis Island? A Yes; they got caught in the building.

Q And they were on fire? A Yes, sir.

Q Some shells came and landed on the island? A Lots of them.

Q Shot right on there like out of a cannon? A Yes.

Q I think that is all.

Mr. Skinner. That is all.

Q Just one minute. Was there a physician on duty on the island that night named Ramus? A Yes, he was the head executive officer.

Q He was there, was he? A Well, he wasn't there on night duty. Why, he was called.

Q He was there during this time? A Yes.

Q Were you near him when this explosion, this first explosion went off? A He wasn't there at all when the explosion—just Mr. Lee and myself and Miss Monahan.

Q Wasn't he on the island during the explosion? A Yes, he was in his quarters.

Q Oh, he was not near you? A No.

By Mr. Skinner.

Q What do you mean, "In his quarters"? A Down in the staff house.

James J. Kelly, direct.

Mr. Garrison. He was not up where she was.

JAMES J. KELLY, sworn.

Direct examination by Mr. Skinner.

Q Mr. Kelly, in July, 1916, where did you work? A Lehigh Valley Railroad.

Q Where do you work now? A Lehigh Valley Railroad.

Q In July, 1916, in what capacity did you work? A Stationary fireman.

Q Stationary fireman, and are you still working in that capacity? A Yes, sir.

Q Besides being stationary fireman—I withdraw that—where was your work? A Right around the elevator.

Q That is the grain transfer elevator? A Yes, transfer elevator.

Q Shown on the map to the left of Store 3? A Yes.

Q Were you on day duty or night duty? A Night duty.

Q What did you have to do as stationary fireman? A Well, go around every hour and punch buttons.

Q Well, is that what you did as fireman? A Well, I had to take care of the fires and every hour go around and punch—

Q What fires did you have to take care of? A The grain elevators, the boilers in the grain elevator.

Q The boilers that operate what? A The machinery for transferring grain.

Q Then you go out and punch some buttons; where were they? A One at—one on the elevator on the northeast end.

Q Yes. A One on the west of 4, right at the center of the pier.

Q West of 4? A Yes, and one at Store 3.

Q And one at Store 3? A Yes. And in the course of your duty would you go any farther to the east than Pier 4? A No, sir.

Q How long had you been working in that way? A Well, ever since I have been there.

Q How long was that? A Thirteen years now, but I was in seven years out there nights.

Q Seven years working nights right where you described, and doing the same kind of work? A Yes, sir.

Q Was Groath out to the west of you? A Yes; he was at the oil yard.

Q And Kelly was east? A Sloan to the east.

Q And Sloan to the east, and Garrity to the end of that? A Yes.

Q And Kane in supervision over you ? A Yes, all over.

Q And you four men and Kane had been working in that way for a number of years prior to 1916? A Yes, sir.

Q Do you remember whether or not there were cars with ammunition and explosives on in the yard that night? A There were.

Q And had they been coming there for some time before that? A Well, I wouldn't say how long. Two months maybe.

Q Two months. After they came—were they there in any number? A Well, I never could tell you that, because I never—was always down below me.

Q After they came was there any different instructions given to you that you had had before? A No.

Q Was there any change or additions in the watchmen than there had been before? A Only on the Dougherty men.

Q But you men, as far as the Lehigh Valley men— A No difference.

Q That was all. Now did you see anything of the fire that night, July 29th and the morning of the 30th? A Not until after I heard the whistle blow.

Q What whistle was it? A Sloan from the pump house.

Q Down by Store F? A Yes.

Q Where were you when you heard the whistle blown? A I was on the grain elevator at that time.

Q What did you do then? A Well, they didn't do any work there Sunday, and they were going to wash a boiler, and I was underneath the boiler blowing her down so she could be washed for the morning.

Q Well, did you go out or stay where you were? A Well, I stayed there until I had finished my job, and I said that sounded like the whistle from the pump house, so I walked down.

Q How long did you stay there finshing your job? A Oh, I guess it took me ten or twelve minutes.

Q Then you went out? A Then I went out.

Q Where did you go? A Went down to the pump-room.

Q That is where Sloan was? A Yes.

Q At Store F? A Yes.

Q As you went down to the pump room did you see anything of a fire? A No, sir.

Q When did you see the fire? A The first time I seen the fire was when I went to the pump room and seen Sloan and he told me there was a fire down on the North Pier.

Q After he told you did you look? A Yes.

Q Which direction? A I crossed over from Pier 5, over to the sea wall.

Q You crossed over from Pier 5 to the sea wall, that is on the north side of Black Tom? A Yes.

Q Then which way did you look? A Right straight ahead.

Q Ahead down towards— A Down towards the North Pier.

Q And what did you see? A I saw a fire there.

Q How big a fire? A Well, I wouldn't say—maybe four or five feet, four feet.

Q Where was it? A Well, it seemed—I wouldn't say now whether it was on the ground or on the side of

the car, but it looked more on the ground than on the side of the car.

Q Yes. Was it in between strings of cars? A Yes, it was right in between the cars.

Q And you knew, I suppose, at that time where Zeke Townes lived? A Yes, sir.

Q And could you tell as you looked down where the fire was with reference to Zeke Townes' shanty? A Well, it was down as far as that, even further, as far as I can recollect.

Q Now, when you first saw this fire, this fire that you have described, was there any fireworks coming from it or any explosion of any kind? A No, sir.

Q And later did you see any shells going off? A Well, after I looked at the fire I had to go back to the elevator to secure the boiler, to make sure, and then I came back to the pump room, and I think meantime they started to go off.

Q I see. When you went back to the elevator what did you go for? A I went to secure the boiler. Maybe I had been away—I would have to be, maybe, away an hour or two.

Q And she would need attention? A She would need attention.

Q Did you do anything to it when you got back? A Back where?

Q Back to the boiler? A Yes; I covered her over and I filled her up full of water.

Q And did you hurry about it or take your time? A I did. That took me twelve or fifteen minutes from the pump room to up there and back again.

Q Then when you got back did you look at the fire again? A Yes.

Q Did you see any explosions or any shells popping off? A When I came back from the elevator they was going off.

Q That was twelve or fifteen minutes later? A Twelve or fifteen minutes later.

Q That is, later than the first time you saw it? A Than the first time I saw it.

Q In the meantime, in those twelve or fifteen minutes, had the fire stayed the same size or getting bigger? A No, it was getting bigger right along.

Q Did you yourself do anything to put out that fire? A No, sir.

Q Was there anything in your—had you had any instructions beforehand as to doing anything in case of fire? A Well, if Kane had given us instructions we would have done it. Whatever he said we done.

Q Did you have any instructions that night from anybody? A No; no more that night than any other night.

Q Would your duties around that boiler have required you to stay there or not go any greater distance away? Could you be away— A No; after I had once secured it I could stay away for about an hour and twenty minutes.

Q I see. Was there anything that you could do if Kane had called on you to put that fire out? A Well, I guess the time we got everything down there we would have had to come back again, because it would have been hard work to get the hose and everything down there.

Q Hard work, and would it have taken time? A Yes, sir.

Q In the meantime the fire was getting bigger, was it? A Yes, sir.

Q How long a time do you suppose it would have taken before you could have got—you and Kane, say, have got the hose on and down to the point where you saw the fire? A Nothing less than a half an hour.

Cross examination by Mr. Garrison.

Q What were your general instructions, Mr. Kelly, in case of fire? A Well, general instructions was when the

whistle blowed it blew points where we could go, but this night it was only one long blow.

Q Well, you had a place to go to a hose cart, didn't you? A Oh, there was hose carts all over there.

Q You were supposed to go to a hose cart in case of fire? A Yes; after I once find it, where the fire was.

Q When you first saw this fire how big was it? A Well, might have been four feet high.

Q When you said it was between cars did you mean by that it was on the ground between two sets of cars? A Well, the way it looked from the distance, it might have been on the ground or might have been coming out of the side of a car. I couldn't say, or might have been down further; maybe there wasn't any cars there at all; but it was right in between the cars. Now, how far down I couldn't say.

Q When you say it was in between cars do you mean to say that you could see cars on one side of it and cars on the other—wait until I get through—side of it, and this fire right in between the two sets of cars? A Yes, sir.

Q You could see that that dark night? A Yes.

Q A little bit of a fire? A Yes.

Q Do you mean to say it was not in a car? A I couldn't say whether it was in a car or on the ground, but it was in between the cars.

Q Then, what you mean by between the cars is that as you looked down between two sets of cars you could see this fire coming from somewheres down in that neighborhood? A Yes, sir.

Q You don't mean to say it was not in a car, do you? A No, sir.

Q Now, after you heard this whistle, you say you waited ten or twelve minutes, and then you went down to find out what whistle was blowing? A I wasn't sure whether it was a pump whistle or not, whether it was a tugboat.

James J. Kelly, re-direct.

Q Why were you any surer at the end of ten or twelve minutes? A I finished my work up and I went outside and I happened to look out on the basin, and where the tug comes, and I didn't see any, so I went down where Sloan was at the pump house.

Q And Sloan then told you there was a fire down by the North Pier? A Yes.

Q Then you went over to the sea wall and looked down? A Yes.

Q And you saw this little fire? A Yes, sir.

Q Why didn't you go down there and see what it was? A Well, I had to go back and secure my boilers before I could go down there.

Q Well, after you had gone back and secured your boilers, why didn't you go down? A Well, by the time I got back them shells was shooting.

Q You had helped put out little fires down there before? A Yes.

Q Were you afraid to go down that night? A Well, wasn't afraid—I was afraid when them shells started to go off.

Q When you first saw the fire did you know whether it was down where the ammunition cars were? A I knew it was down that way; I heard there was ammunition cars, but I never saw it.

Q You heard there was ammunition cars down there? A Yes.

Q And you knew a fire among ammunition cars was dangerous? A Yes.

Q Now, wasn't that the real reason you didn't run down there and see where it was? A Yes.

Q That is all.

Re-direct examination by Mr. Skinner.

Q Do you mean that, Kelly? Do you mean to say that the real reason why you did not run down to see where it was was because you were afraid? Do you

mean that with reference to the time when you first saw the fire or the time— A No.

Q Or the time you got back and saw the shrapnel and shells going off? A After I came back from securing the elevator.

Q You were not a watchman, were you? A No; I was a stationary fireman.

Q And your duties were at your fire? A Yes, sir.

Q That is all.

Re-cross examination by Mr. Garrison.

Q Why did you punch these buttons if you are a stationary fireman? A Well, to let them know we were on the job.

Q Wasn't that because you were a watchman, too? A Yes, stationary fireman.

Q You were a watchman? A Yes, stationary fire and watchman.

Q You had duties down there in respect of a fire? A Yes.

Q Part of your business to help put out fires if you could? A Yes.

Q Now, then, when you first saw that fire it was down among what somebody had told you were ammunition cars; isn't that so? A Nobody told me it was down amongst ammunition cars, but I know that the ammunition cars was down that way.

Q That is what I said. The fire was down among what you had been told before that was a place where ammunition cars were? A Yes, sir.

Q And you knew that a fire in ammunition cars was a bad thing to have to go to? A Yes.

Q Isn't it a fact that the reason you did not run down there to see where the fire was was because you knew it was dangerous? A Yes.

Re-direct examination by Mr. Skinner.

Q Are you speaking now of the time when you first saw the fire or the time when you saw it when the shells were going off? A Well, I am speaking from the first and the second.

Q Both times? A Both times.

Q Mr. Kelly, had you been given instructions as to whether in case of fire you were to take care of your boiler or to take care of the fire? Which was to come first? A The boiler was to come first.

Q Those were your instructions? A Yes.

Q And you obeyed instructions that night? A Yes.

Q That is all.

Re-cross examination by Mr. Garrison.

Q Do you mean to say that somebody said to you in writing or by word of mouth and speaking for the Lehigh Valley, if a fire breaks out you are to go and attend your boiler first before you go and do anything about the fire? A No; I was securing the boiler on my own license. I wasn't going to leave it—

Q Judge Skinner asked you whether you had instructions to do it and the substance of your answer was that your instructions were in case of fire to attend to your boiler first. Did you mean that? A No; I meant to save my own license.

Q To do whatever you thought was best? A Yes.

Re-direct examination by Mr. Skinner.

Q Then had you been given any instructions at all, Mr. Kelly, as to which to do in case of fire, look after your boiler or to look after the fire? A Why, have to look after the fire after I fix the boiler up if I can.

Q Had anybody instructed you what to do? A No.

Q That is all.

Re-cross examination by Mr. Garrison.

Q I understood you to say there were some other fires down there before that where you helped to put them out? A Yes.

Q That was under your general instructions, wasn't it? A Yes.

Q That is all.

Re-direct examination by Mr. Skinner.

Q And those times that you did that did Kane call on you to go down there? A Well, I saw a fire once or twice over on the beach, and I happened to be there at the pump room talking to Sloan when we took notice to it, and we hooked a hose up to the pump house and run the hose and put it out.

Q Was that close by? A Right across to Pier 5.

Q Was this fire that you saw close to any hose or hydrants? A Well, it was down below where the last hydrants were.

Re-cross examination by Mr. Garrison.

Q There was ample hose there to reach from the place where the big tank was down to the North Pier? A Oh, plenty.

Q There was no reason why, if you men that were down there, you four men, had wanted, you couldn't have hooked up the hose and squirted water on the North Pier—leaving out danger—there was no physical reason why you could not do it? A No, no, no.

Q Were you there when the Jersey City Fire Department got there? A Yes.

Q Did they try to put the fire out? A No, sir.

Q Were you there at the time of the first explosion? A Yes, sir.

Q Were you there at the time of the second explosion? A No, sir.

Q Where were you at the time of the second explosion? A Took a walk up the avenue.

Q You walked pretty fast, didn't you? A I did.

Q I guess you ran. All right.

Re-direct examination by Mr. Skinner.

Q You said there was no reason why you and the four men could not have put the hose on there. Where was one of the four, Groath? A Why, Groath was over to the cork works, or over to the oil yard—I call it the cork works now.

Q That was some distance off? A Well, it is a good quarter of a mile from the pump room.

Q Was that a reason why Groath could not help you right then and there; he was a quarter of a mile away.

Mr. Garrison. I object. He has not said Groath was a quarter of a mile.

Q Where was he? A He was right there at the gate, what we call the gate coming in.

Q How far is that from where you were? A Oh, five or six minutes walk.

Q And Sloan, was he under any duty, did he have anything to look after? A He had the fire and the fire pump to look after.

Q Do you know where Kane was? A Oh, you could see Kane any hour of the night or any hour of the morning; you never could tell when you could see him.

Q And there was plenty of hose, was there? A Sir?

Q There was plenty of hose to reach? A Yes.

Q Would it take a long time or a short time to get the hose out and hook it on and get down there if all four of the men were there? A Well, take twenty minutes to a half hour.

Q That is all.

Re-cross examination by Mr. Garrison.

Q After this fire was started and after you got down there you saw some Lehigh Valley men, other than Kane and Sloan? A I do now recollect. I didn't see him at

the last—I seen him, but I didn't put it in the last testimony I was up here, but I knew all about they went down there.

Q Mason and Crocker? A Yes.

Q So there were at least five of the Lehigh men right down there at that time? A Yes.

Q Did you see anybody down in that yard that night other than the Lehigh Valley men, any strangers? A Early in the evening?

Q Yes; I mean before the fire? A No, sir; only I seen the six or eight grain boat captains.

Q They are Lehigh Valley employees? A They are all Lehigh Valley men.

Q That is what I asked you. Did you see any one down there that was not a Lehigh Valley man before the fire? A No, sir; because nobody outside of the Lehigh Valley men can go down the road and I can see them.

Q How long did you say you thought it would take four men to have coupled the hose onto the plugs there by the big tank and go down to the North Pier—how long did you say you thought it would take four men to do that? A Twenty minutes to half an hour.

Q How long would it take five men? A They could not do it much quicker.

Q What would take them so long? A Pulling the hose across the tracks and underneath the cars.

Q Were you there when they did that once and put out a mahogany fire? A Yes; I was there.

Q Did that take as long as twenty minutes to half an hour? A That was in the open; there was no tracks there at that time.

Q The only difference was the tracks? A Yes.

Q It was almost down to the North Pier? A It was almost to the end of the pier.

Q And you men hooked up your hose and went down and put it out? A Yes.

Q How long was that before this fire—about May, wasn't it? A Yes, I guess it was—yes.

Q Then the real reason you people did not get any hose on was because you were afraid of those explosions? Now that is the truth, isn't it? A Yes.

Q That is all.

Re-direct examination by Mr. Skinner.

Q And when you saw Mason and Crocker was that at the time when the shrapnel was going off or before that? A When I came off from the elevator I saw them.

Q And that was when the explosions were going off? The shells? A Yes.

Q Were they on the boats? A Yes.

By the Court.

Q When did you start to take a walk? A Right after the first explosion.

Q Was that when you were most frightened? A Yes.

Q When did you get frightened first? A Not till then. Of course everybody was frightened that was down there with these shells going.

Q All right.

Mr. Garrison. I did not hear that.

(Answer repeated.)

By Mr. Garrison.

Q You just said everybody was frightened when the shells were going off. That was long before the first explosion? A Yes.

Q You were all frightened then? A Yes, sir.

Q And you were frightened before the shells went off because you knew the fire was down near the ammunition cars? A Yes.

Re-direct examination by Mr. Skinner.

Q Did you see any drill engines coming down? A Yes.

Q And there were men running them? A Yes.

Q Lehigh Valley men? A Yes.

Q How near did they go to the fire? A They pulled on down until they got hold of cars that were afire, four or five cars or maybe ten ahead of the cars that were on fire.

Q At that time were there shells going off? A Yes.

Q Did they pull out any cars that were on fire? A Yes.

Re-cross examination by Mr. Garrison.

Q Do you know how many of those men were injured? A Railroad men?

Q Yes. A I know the Walsh boys—the Walsh brothers was injured and I think there was one more.

Q Leyden? A Leyden, yes.

Q Leyden was killed? A Yes.

Q One of them was killed and several of them were injured? A Yes.

By Mr. Skinner.

Q They were injured by the first explosion? A I could not say whether he was killed at the first explosion.

Q Up to the time you saw these men coming down they had not been injured; that is true? A Oh, no.

By Mr. Garrison.

Q When you first saw them they had just gotten there; there was nothing to injure them unless they were injured coming through Jersey City? A No.

By Mr. Skinner.

Q Had they just got there? A The crew?

Q These men you saw going down with the drill engines; was that just as they got there? A No, no; they was down there fifteen minutes or twenty minutes I guess before the explosion, maybe longer.

Q And that was the first time you saw them down there? (No answer.)

Q Did they keep on going? A They came up and down for a string of cars at a time and get some more.

By the Court.

Q What injured them, Mr. Kelly, or killed them, if you know? If you do not know, tell us. A I could not say what killed them.

Q You do not know whether it was shrapnel or the big explosion or what it was? A No; I do not.

By Mr. Garrison.

Q Where were you, Mr. Kelly, when you saw these Lehigh Valley engines come down? A I was looking out through—out of my boiler room door.

Q Up here? A Yes.

Q Where were you when you saw them pull any cars out? A When they went down I went down after them; I went down as far as the boiler room, the pump house.

Q Down here between F and G? A Yes.

Q Did they get down as far as Pier 7? A I guess that is about where they hooked onto the first end.

(Mr. Garrison indicates on map.)

A No; I think they went below there, down to that big tank.

Q How do you know that? A It looked to me to be there; it might have been on the other side.

Q How far below the big tank do you think the last of their cars went? They had some cars in back of the engine? A Yes; they came out with fourteen or maybe sixteen cars with the first pull.

Q Did they get them back here at Pier 7? A No; they got them down straight.

Q You mean out of Pier 7? A Yes.

Q You do not know where they got them? A I cannot say what track they got them off of.

Q How far did they pull those up before they backed down again? A The first fellow took a load up, then another one backed in and got a load.

Q Didn't they first come in and get some cars and then back down again so as to have a lot of cars between them and Pier 7? A Yes; the first thing they done was they went and got some cars and backed up.

Q So that they would have a lot of cars between them and the cars that were in Pier 7? A Yes, sir.

Q How many cars did they have back of the engine before they began to run back into Pier 7 again? A That is hard to say.

Q And you do not know what cars down here in Pier 7 they got hooked up to at all? A No, sir.

By the Court.

Q Do you know how they coupled these cars; was it automatically done? A Yes; automatic.

By Mr. Skinner.

Q Mr. Kelly, the time that you spoke of in answer to the Vice-Chancellor, some other fire that was put out by Lehigh Valley men—how many men were there? A There was only just the same four, that is all; that was Kane and Garrity and myself—there was only three of us. Sloan was in the pump house.

Q And was that in May? A I would not say whether it was in April or May. I would not say just what time it was.

Q Either in April or May; and you mean before this one of July? A Yes.

Q The same summer, the same year though? A Yes, sir.

Q Leyden that you spoke of, was he one of the train crew? A He was the chief of the special police.

Q Of the Lehigh Valley? A Yes.

James Groat, direct.

JAMES GROAT, sworn.

Direct examination by Mr. Skinner.

Q Mr. Groat, in July, 1916, were you employed by the Lehigh Valley Railroad Company? A Yes.

Q And where was your post? A Oil yard.

Q What was your work? A Watchman.

Q And were you up near the gate? A Well, I was in that neighborhood.

Q In that neighborhood? A Yes; our yard includes the gate as they call it.

Q Did you have any instructions to stop anybody coming in the yard? A Yes, sir, at all times, such suspicious characters such as fishermen, especially Sundays and holidays.

Q You spoke of suspicious characters; what do you mean by that? A Well, you would have to look 'em over probably.

Mr. Garrison. I did not hear that.

(Answer repeated.)

Q There were a number of boats, weren't there, down along the Black Tom piers? A Over at the grain elevators, yes, sir. There was quite a fleet there.

Q And down at the North Pier and South Pier, too? A Well, I would not know as to those bargemen. I was acquainted though with most of the captains of the grain boats.

Q Were there lighters and barges down at that pier? A There must have been. I was not over there; that was out of my zone.

Q Did men come from those lighters and barges and go up and down through the yard? A Yes, sir; night and day.

Q And was there any provision made for stopping them at all, or did they just come and go? A Well, they was privileged characters. They came and went. They

had business over there; and the Standard Oil men all came through my zone.

Q Did anybody have to show any pass? A No, sir.

Q Or any credentials of any kind? A No, sir.

Q Was there any provision made for identifying them to find out whether they had a right to come and go? A Not while I was on there. I was relieved a short time after the explosion, and then was when the identification business came in.

Q Oh! There was an identification system inaugurated, was there? A Afterwards, I heard; now, I would not swear to that.

Mr. Garrison. I move to strike that out.

The Court. I will strike it out. It appears clearly it is hearsay.

A I merely—

Mr. Garrison. That is all right.

The Court. Don't tell us anything about what you heard.

Q That is all.

Cross examination by Mr. Garrison.

Q Had you any instructions as to what to do in case of a fire down on the pier? A Yes—not on the piers.

Q One moment. How long had you worked for the Lehigh Valley? A Well, I had been on that plant since '85. Now, I do not know when the Lehigh Valley took control.

Q How long had you been a night watchman down there? A Why, about two years.

Q Two years? A Yes.

Q What had you been doing down there before that? A Engineer.

Q Whereabouts? A All over the plant.

Q All over the plant? A Yes, sir.

James Groat, re-direct.

Q At night or day? A Day time.

Q And when did you begin doing night work? A Why, '14—I had to quit railroading.

Q What does 14 mean? A The year 1914. I had to quit railroading and I took a job of watchman.

Q And you had instructions to do what if the fire whistle blew? A Well, we had instructions over there in my zone to give the alarm in case of a fire. Then I had a certain number of men to go and call.

Q Yes; did you hear the fire whistle that night? A Why, I do not think I did. It was too far away. I was about—

Q Don't you know whether you heard it or not? A I know I didn't.

Q You know you did not? A Yes, sir.

Q You did not go down to the yard at all? A No, sir.

Re-direct examination by Mr. Skinner.

Q What men did you have to call? A I could not mention their names now. There was the foreman there. I was to call the foreman, Mr. Smith, he was the captain of the fire squad that I belonged to.

Q Just who were you to call? A Mr. Smith.

Q Who else? A Mr. Smith, he was to do the rest.

Q Were you to call him by telephone? A No; I was to go to him.

Q Where did you have to go to; where was he? A I had to go to Communipaw avenue and Whiton street. That was the instructions.

Mr. Garrison. I did not hear that.

(Answer repeated.)

Q How far was that from your post? A Oh, I guess it was a mile and a quarter I should judge.

Q And were your instructions to do that first? A In case of fire, yes.

James Groat, re-cross.

Q That is all. A After giving the alarm.

By the Court.

Q How do you go there, along Phillips street and then up? A You can go shorter than that by crossing the Central Railroad tracks, and so forth. Phillips street is the proper street, but I can cut that short by going across the tracks.

Re-cross examination by Mr. Garrison.

Q You are only talking about a fire where you were? A Yes—A—A.

Q You were not talking about a fire down at Pier 7? A I don't know about that.

By Mr. Skinner.

Q But in case of a fire that you did know of at Pier 7— A I got my instructions from Mr. Kane.

Q Wait a minute. In case of a fire down around Pier 7 were your instructions to go and call Mr. Smith? A No, sir. I was under Mr. Kane's command in a fire.

Q Did you have any instructions at all to do anything in case of a fire to the east of you unless and until called upon by Mr. Kane? A That is all. I was under his jurisdiction.

By Mr. Garrison.

Q If Mr. Kane had directed you to go down there and fight a fire it would have been your business to go down and help him? A I would have went, yes.

By Mr. Skinner.

Q If Kane wanted to call you how would he have done it? A By phone.

Q Did you get any phone message that night? A Yes.

Q From Kane? A Yes.

Q And did you go down? A No, sir; it was not that kind of a message. I had to pilot the fire department through the oil yard; that was the message I got from Mr. Kane.

Q To pilot them? A Through the oil yard.

Q You mean the city fire department? A Yes; they came from two ways, from Claremount and Communipaw avenue.

CHRISTOPHER CASPERSON, sworn.

Direct examination by Mr. Skinner.

Q Captain Casperson, in July, 1916, were you doing anything at all upon a boat? A Yes; I was captain of No. 11 Johnson.

Q Captain of Johnson 11? And where were you on the night of July 29 and the early morning of the 30th, 1916, the night of the Black Town explosion? A I was on the boat laying alongside of Black Tom pier.

Q By Black Tom pier do you mean the North Pier? A Yes; on the right hand side of the pier.

Q And which boat were you on? A No. 11 Johnson.

Q Well, do you know anything about a fire that night? A Yes; I was waked up about one o'clock that night and there was a fire starting on the dock then and I guess it were seven or eight hundred feet about from the pier.

Q Do you remember the storage warehouses—where they were? A Yes.

Q And the big tank? A Yes.

Q Tell us what you saw, will you? A What I saw, yes; I saw the fire. I stayed back on my boat to save the boat so it went in dock.

Q How far was the fire that you saw from the storage buildings? A Well, that was hard to tell, because it was a line direct to the storage buildings. It is hard to tell just how it lies.

Q Because it was in a direct line? A In a direct line, yes.

Q Which was it nearer to? A Well—

Q Which was it nearer to, the North Pier, westerly end, or the storage warehouses? A That is, tank was about the middle between the pier, Pier N and the storage house.

Q Do you know where Zeke's shanty is? A Yes, I know where Zeke's shanty is.

Q Was it nearer—anywheres near that? A It was near to that shanty, yes.

Q What was it? A The fire was near to that shanty.

Q And how near would you say? About how near? How near was it to the shanty? A Oh, it was close about 50 feet from there.

Q Well, how big a fire was it? A Oh, about some—oh, about five feet in circumference, I guess.

Q Tell us again, will you, Captain? A Yes; it was something like five feet around, five feet in circumference.

Q Can you tell about what time this was? A Something around one o'clock at night.

Q Well, at that time, when you first saw it, were there any shells going off or any popping, explosion? A Yes, the shells was exploding as they went off.

Q That was so at the time when you first saw the fire, wasn't it? A Yes; that was just when the fire started. Keep on right along.

Q How was your attention called to the fire? A A captain on Johnson No. 17, he called us out.

Q Now, was there an explosion there that night? A Not yet.

Q Well, later, was there a big one? A The explosion?

Q Yes? A Well, it is hard to tell how big that was Of course, it is—

Q But there was an explosion, you remember that? A Yes, there was a great explosion afterwards.

Christopher Casperson, cross.

Q Did you see it? A Well, I see something, fire and all these things; that is all I remember of it until I come back again; I had been in the water; I was blown in the water from the boat.

Q Could you tell where that explosion was? A Yes, it was close to that place, where the fire was, as far as I could make it; close to where the fire was.

Q And between the time that your attention was first called to the fire and the time of this big explosion that blew you into the water, did you see any other fire anywhere else than Black Tom? A No, sir.

Mr. Skinner. Cross examine.

Cross examination by Mr. Garrison.

Q Captain, when did the 11 get into Black Tom?

Mr. Skinner. Oh, pardon me.

A It got into Black Tom—

By Mr. Skinner.

Q I asked you if you saw any other fire on Black Tom. Did you see any other fire at all anywheres on the boats or on Black Tom? A No, sir. Nothing except the light was burning in there.

Q In where? A The lights was burning, the ordinary signal lights of the boats, the headlights, lanterns.

Cross examination by Mr. Garrison (resumed).

Q When did the Johnson No. 11 get down to Black Tom pier? A About five o'clock in the afternoon.

Q Five o'clock on the afternoon of Saturday? A Yes.

Q The 29th of July? A Yes, sir.

Q And what did you have aboard when you got there? A I had about 400 kegs of picric acid on deck.

Q 400 kegs of picric acid, was it? A Yes.

Q Where had you gotten that? A I don't know. Of course, I just coming on the boat; it was loaded on the boat, and I took it back again from Gravesend Bay to Black Tom.

Q Were you captain of the 11 on that Saturday? A Yes, I took charge of her just two days before; she was laying over on the Bay then.

Q When you took charge of it, were these kegs of acid on it? A They were on it, yes.

Q Where was it when you took charge of her? A I took charge of her on the Jersey flats.

Q On the Jersey flats? A Yes, sir.

Q Where are they? A That is below Statue of Liberty.

Q Statue of Liberty? A Yes.

Q She was anchored there, wasn't she? A Yes, she was anchored down there.

Q And when you took charge of her, she had these four or five hundred—whatever it is, kegs of picric acid on her? A Yes, and smokeless powder.

Q And smokeless powder? A Yes, sir.

Q Was that loaded there? A No, I went out to Gravesend Bay and we loaded the smokeless powder.

Q You went to Gravesend Bay and loaded the smokeless powder? A To Gravesend Bay, yes.

Q To Gravesend Bay and you loaded the smokeless powder on to the steamship? A Yes.

Q But you still kept the picric acid on? A Yes.

Q And then did you come back to Black Tom? A Yes.

Q Out from Gravesend Bay? A Up to load more.

Q To load more? Do you know to whom the picric acid was consigned? A No.

Q And, of course, you don't know where they got that? A No.

Q You don't know what railroad terminal they picked that up? A No.

Q That was all she had on the night of the explosion, just the picric acid? A Yes, sir; that is all she had.

Q Now, then, when you got there, the Frank was there, was she? A The Frank was laying there.

Q And you lashed your boat on the outside of the Frank? A I lashed my boat on the outside of the Frank, yes.

Q And when did the 17 get there? A The 17 was laying there when I come there; I don't know when it come there.

Q And you came there about what time on Saturday? A Five o'clock in the afternoon.

Q Five o'clock in the afternoon. You are not allowed to come anywheres in the Bay with explosives after five o'clock, are you? A I beg pardon?

Q You are not allowed to be floating around anywhere except down in Gravesend Bay after five o'clock with explosives, are you? A No, I don't think so, not explosives.

Q You don't think so? You know so, don't you? A Yes, sir.

Q You know you are not allowed to be floating around after five o'clock? A They used Gravesend Bay for anchorage there; before that time the Government had it before.

Q Precisely. But the Government wouldn't let you and didn't let you at that time have your boat around the harbor when she had explosives on after five o'clock at night; is that right? A You had to go to anchor.

Q You had to go to anchor? A Yes, you had to go to anchor.

Q And that is one of the reasons why you say you got there about five o'clock, isn't it? A Yes.

Q As a matter of fact, it was a little after five o'clock, wasn't it? A No; it was not after five; it was maybe before five.

Q Now, you think it was about one o'clock in the morning when the captain of the 17 woke you up? A Yes.

Q Why do you say one o'clock? Have you any real idea of the time? A He hollered down the companion-way to us, and said there was fire on the dock.

Q I didn't ask you about fire on the docks. I asked you what made you think it was one o'clock? Did he tell you it was one o'clock? A No.

Q What made you think it was one o'clock? A I asked some one there and he said it was about one o'clock.

Q They said it was about one o'clock? A Yes.

Q When you first looked at the fire? A When I came up on deck, yes.

Q Who else was one deck when you first came up? A I beg pardon?

Q Who else was one deck when you first came up? A My mate was there.

Q What is your mate's name? A Pete Pasterson.

Q Where is he now? A He is right here.

Q He is here in the court room, is he? A Yes, sir.

Q Now, which side of the boat were you on when you first looked at this fire? A I was standing right in the middle of the boat, right out of the cabin there.

Q And was your stern inland, or was your stern toward Liberty Island? A Just in the middle of the stern of the boat I was standing.

Q Which way was your boat? Which way was the stern of your boat? Was the stern of your boat toward the land, or was she pointed—was the stern— A Pointing up, yes, toward the land.

Q The stern of your boat was toward the land? A Yes.

Q The stern of your boat was toward the land. All right. Then you had to look over the stern of your boat to see this fire? A Yes.

Q And were you standing looking over the stern of your boat—were you standing on the right hand side of your cabin or the left hand side of your cabin? A In the middle of it, right in the middle of it, center of it.

Q Center of the cabin? A Yes.

Q Well, you were up on deck, weren't you? A No, outside of the door, of the door of it.

Q You were just about the center of your boat; is that what you mean? A Yes.

Q All right. Now, how big did this fire seem to be in height? How high did this fire seem to be when you saw it? A About five feet.

Q Then you also said it was five feet around? A Five feet around.

Q And could you tell whether it was coming out of a car or not? A Of course, that I couldn't tell; I saw the fire; I didn't went up there to look.

Q Went up where to look— A I didn't went up there.

Q And you couldn't tell from where you were whether it was in a car or not? A I couldn't tell.

Q Was there anything between you and the fire? Were there any cars between you and the fire? A Yes, there was some cars on the track there.

Q Didn't they get between your eyes and the car that was on fire, or whatever it was on fire? A No; there was not car just between my eyes and the fire; I could see the fire right from the deck there; I could see the clean fire; but if it come out of a car or not, I can't say.

Q Well, now, you said it was on the dock. You don't mean the fire was on the dock, do you? A I don't know; of course, I wasn't right there.

Q You don't know whether it was on the North Pier or not? Eh? A No, I couldn't say; I couldn't see that in the night time if it was in the car or outside of the car; I couldn't swear to that.

Q But leaving aside the question of what was the fire, could you tell whether the fire was on the North Pier or not? A The fire, yes, was in line with the car track.

Q But was it on the north pier? You know what the North Pier is, don't you? A Yes, I know the North Pier. Pier they were loading ammunition.

Q Yes, that is the ammunition pier. Now, was the fire on the ammunition pier? A It was not on the pier; that is, opposite the pier.

Q Opposite the pier? A Yes, on the land.

Q Now, how far up in the yard was the fire when you first saw it? A Well, it would be about 700 or 800 feet from the pier.

Q Seven or eight hundred feet from the pier? A From the end of the pier.

Q And it was about opposite Zeke's shanty, wasn't it? A Yes.

Q And about 50 feet in the yard from Zeke's door, or from Zeke's house; is that right? A Yes; yes, sir.

Q But it was so dark you couldn't tell whether it was coming out of a car or whether it was—or where it was coming from, could you? A No.

Q Well, now, what did you do after you saw this fire? How long did you stand there watching it? A We were starting right away to haul the boat down to the end of the pier.

Q How did you try to do that? A Oh, we had a line there, and we lowered right down.

Q You took a line and tied it to something on the pier and then pulled on the line; is that right ? A Yes.

Q And how far did you get your boat? A I got down to the end of the pier.

Q End of the pier? A Yes.

Q Was she laying across the end of the pier this way, parallel? A Just one end into the corner of the pier.

Q How far back were you from the Johnson 17? A Oh, I was—he was just alongside of me—he was not very far inside; I passed him at the time I hollered out.

Q Did you pull around there? A Yes.

Q Were his lines cast loose then? A No; he was tied fast to the pier.

Q He was tied fast to the pier. Were you on the 17 that night? A No, I didn't went on the 17.

Q Were you on the 17 the day before? A No.

Q You were never on the 17 at all? A No.

Q Who was the captain of the 17? A I don't know his name. He died after, the poor fellow.

Q He is the fellow came and waked you up? A Yes.

Q You knew him, though? A No, I didn't know him.

Q Never saw him? A Nothing more than that night, and it was dark.

Q Well, did you see him that night? A I saw him in the dark, yes.

Q Saw him in the dark. Well, you worked your boat around pretty near to the end of the pier, didn't you? A Yes.

Q All right. Were you there when the first explosion went off? A I was right there in the boat.

Q And where were you standing when the first explosion went off? A I was standing forward on my boat, against the bulkhead, in the front of the bulkhead.

Q In the front of the bulkhead of the boat? A Yes, fore part of it.

Q Do you mean way up in the bow of your boat? A Yes.

Q Is she a pug nosed boat, or has she got a point? A No, she had two bulkheads on her at that time.

Q Two bulkheads? A One forward and one aft, yes.

Q What did they do, run across from side to side of the boat? A Yes.

Q What were they for? So you could pile cases inside? A Pile cargoes inside, yes.

Q I see. Now, where were you standing in respect to that bulkhead; were you facing the bow, or were you facing the stern, or were you facing the side? A I was facing the bow.

Q You were facing the bow? A Yes.

Q Then you were looking up towards New York City, weren't you? A Yes, over the Statue of Liberty, or so.

Q What? A Yes, way over to New York.

Q That is, you were looking over to New York? A Yes.

Q Then you didn't see where the explosion came at all, did you? A No.

Q Were you standing to the left or the right of your boat? A Towards the left hand side.

Q The right hand side? A The left.

Q To the left hand side? A Yes.

Q And you were looking out toward the Statue of Liberty? A Yes.

Q And you heard a crash, I suppose? A Yes.

Q And then what is the next thing happened to you? A Well, I was blown off the boat and dumped in the water there.

Q Were you dumped into the water over the left hand side of your boat, or over the right hand side of your boat? A Oh, it was about 50 feet away from the boat I come in the water, or something.

Q Which side of the boat did you fall out, the left hand side or right hand side? A From the left corner of the boat, the bow, from the left corner of the bow of the boat.

Q You were pretty close to the left hand side of your boat, were you? A Yes, I was.

Q And were you blown over or did you topple over? Were you blown clear off your feet, or did you just topple over? A I was lifted in there, I was lifted in the air.

Q Lifted in the air? A Lifted in the air.

Q Was your boat hurt? A The bulkhead fell down.

Q The bulkhead? A Yes.

Q And some of the glass was broken? Yes.

Q And that is all that happened to your boat, wasn't it? A Yes.

Q You were not hurt, were you? A No, I was not hurt.

Q Was the other man hurt—the mate? A No, he was not hurt.

Q Where was he when this explosion went off, do you know? A He was in the aft end of the boat.

Q Well, you couldn't see him because you were looking the other way, weren't you? A Yes.

Q You only knew that because he told you? A Yes.

Q Well, now, what did you do after you got in the water? Did you swim ashore, or did you get back? A I swimmed aboard of another boat; I guess it was one of Moran's scows.

Q Moran's scows. That was one of the boats that was around here between the North Pier and Pier No. 2, wasn't it, on this side? A Yes.

Q Is that over here? A Yes.

Q Looking towards the Statue of Liberty? A Yes.

Q And you got on a boat that was in here somewhere? A Yes, I got aboard of a scow there.

Q What did you do after you got aboard the Moran scow that was in there? A I was walking around; I was looking for a time, and then they started fire on her.

Q Started a fire on the Moran scow? A Yes.

Q All right. Now, did you go back to your own boat? A I jumped over again and swimmed around and a Lehigh Valley picked me up there, Slatington.

Q The Lehigh Valley tug Slatington picked you up? And took you away? A Yes.

Q Where were you at the time of the second explosion? A I was just coming up the Lehigh Valley pier then; they brought us up that way then.

Q Up the river? A Over to Jersey.

Q Well, now, when you left had your boat got afire—

A Yes.

Christopher Casperson, cross.

Q Had the 17 caught fire? A No—no; I didn't ~~say~~ saw my boat caught fire.

Q When did you next see your boat after that— A I see him the next day afterwards again; he was coming into—

Q When did you next see your boat, the No. 11, after that night—that Sunday morning, rather; when did you next look at your boat? A Sunday afternoon he come into Conover street.

Q Your boat came in there? A Yes.

Q Was she damaged? A Yes, she was damaged.

Q By fire or explosion? A By fire.

Q Was she floating? A Oh, yes.

Q Did you ever see the 17 again? A No; I never saw the 17 any more.

Q The 17 was blown up, as you understand it? A Yes.

Q As you understand it, Johansen, or whatever his name was, was killed—the captain? A Yes.

Q Now, then, did I understand you to say that although you had your back to this explosion, you say you thought it came from the place where you first saw the fire? A Yes.

Q Now, how could you draw that conclusion when you had your back to it? How do you know where it came from? A Just in the—just in the second as I got lifted in the air, I turned my head around and I saw the like a smoke cloud coming up right from there, about the same place where the fire was.

Q You saw a big smoke cloud coming up from where the fire was? A Yes.

Q How far were you from that big smoke cloud? A About seven or eight hundred feet; seven or eight hundred feet, something around there.

Q After this first explosion was there anything dropped around you, any shrapnel or shells or iron or pieces of steel, or anything else? A After the explo-

sion? Yes, oh, yes; I saw car wheels and dirt and everything coming in the air at the time I was laying in the water swimming.

Q How far did you have to swim before the Moran took you up or you got on board? A Well, I stepped out for a little while and crawled on board in that Moran boat, and so I jumped overboard again and come aboard of another boat; I don't know the name of her.

Q Nearer the North Pier? A Yes.

Q Until you finally got on the North Pier again and got on your own boat again? A Yes—no; I didn't come my own boat again.

Q You didn't? A No; the Lehigh Valley boat come right in there and took me off.

Q She had some scows attached to her; she pulled some scows out, didn't she? A No; she had no scows on at that time; she just come to save the life, I guess.

(Witness excused.)

PETER PASTERSEN, sworn.

Direct examination by Mr. Skinner.

Q Mr. Pastersen— A Yes, sir.

Q —in July, 1916, what were you doing? Were you on a boat? A Yes, I was on a boat, No. 11, laying over to Black Tom on the North Pier, tied up alongside of a scow by the name of—called Frank.

Q Did you see a fire the night of July 29th, or 30th, 1916? A Yes.

Q Did you see it? Just tell me, did you see it? A Yes.

Q Where was it? A It was up on the pier.

Q Well, what do you mean? A On the pier, on the North Pier.

Q On the North Pier? A Yes, on the North Pier.

Q Well, was it anywheres near Black Tom? A Yes, it was on the Black Tom pier, on the North Pier.

Q Do you mean the fire was on the pier? A Yes, it was on the pier, in the car, standing on the pier; in the box car that was standing on the pier.

Q Where were you? A I was on board the boat.

Q Yes. Where was the boat? A The boat was laying alongside of Frank, alongside of the pier.

Q Alongside of the North Pier? A North Pier, yes.

Q Well, was it on the side toward Bedloe's Island, the Statue of Liberty, or on the other side? A Yes, over at the other side to Jersey City, right over to Jersey City, on the north side.

Q Where was it from the end of the pier—your boat? How near the end? A Oh, it was about 200 feet, I think, on the end of the pier.

Q I mean the end that is furthest out in the water?

Mr. Garrison. He understood that.

The Witness. My boat was lying about 200 feet from the end of the pier.

Q Now, do you remember a lot of piles and a shanty? A Yes; I noticed that.

Q Colored man lived there? A Yes.

Q Where was this fire that you saw from that shanty, how near to that? A The fire was about right abreast of that shanty.

Q How big a fire was it when you first saw it? A Oh, it was not very big; it looked to me like a burning one car.

Q One car; what time was that? A That was about a quarter before one; half past twelve or quarter before one.

Q Did you look at it long? A Yes; I looked at it all the time, from the time I saw it right along.

Q Did you see anybody try to put it out? A No.

Q When you first looked at it was there any noise of explosion or shells going off, or did that came later? A Yes, the shells went off, from both sides of the car.

Peter Pastersen, cross.

Q Well, was that when you first saw it? A Yes; it commenced to go off just when I saw it—a little.

Q Then was there a big explosion later? A Yes; about an hour later.

Q And was there any of the fire that night that you saw except—or before the big explosion, I mean—except this one you described? A No, not before the big explosion.

Q Was there any fire on any of the boats before the big explosion? A No.

Mr. Skinner. Cross examine.

Cross examination by Mr. Garrison.

Q When you said that this car that was on fire was on the North Pier, don't you call the North Pier this part that sticks out in the river, from here (indicating)? A Yes; I call that the North Pier; that is furthest from Jersey City.

Q The part that is further up towards Jersey City is the North Pier, is it? A Yes.

Q And you were tied up here about 200 feet from the end of the North Pier? A Yes.

Q You just said the car was on the north pier; did you mean that? A Yes, sir.

Q You meant it was up there somewhere on this pier? A Yes.

Q That is not abreast of Zeke's shanty? A Well, I was standing on my boat and I couldn't exactly tell; I couldn't exactly tell where the fire was, but it looked to me like it was like about abreast of the shanty or up on the pier somewheres.

Q It was either up abreast of the pier or out on the pier, you couldn't tell which; is that right? A Yes; it seems like to be about abreast the shanty up on the pier there.

Q Well, now, I don't think we understand each other. You understand this what I call the bulkhead is where

the pier joins the solid ground? A Yes; I wasn't ashore on that pier at all, so I didn't know nothing at all about the pier.

Q Only answer the question. That we will call the bulkhead and this we will call the pier, this long tongue of land was the pier? A Yes.

Q You were tied here about two hundred feet from the end of that long tongue? A Yes.

Q Was it your idea, as you looked at this fire, that it was in a car on that North Pier? A It was on that north pier.

Q On this long tongue of land? A Yes.

Q Not up here, not up in the yard? A No, it wasn't up in the yard.

Q Now, could you tell whether it was in a car or what it was? A It looked to me like it would be right in the car.

Q Right in the car? A Yes.

Q And the shells were going out of both sides of the car, was it? A Yes.

Q Now, where was your boat? When did you get in there? A We got in there Saturday night between five and six o'clock.

Q Yes; and when you got there you tied up alongside of the Frank? A Yes, sir.

Q Where was the seventeen? Where was the Johnson 17? A She was laying about half way between the end of the pier and the Frank.

Q Was she there when you got there? A Yes, she was there.

Q Where were you when the explosion went off,—I mean where was you boat? A We hauled the boat—as soon as we saw the fire we hauled the boat right out to the end of the pier, because—

Q Yes. Where were you standing on your boat? A I was standing off on the starboard quarter with the line laid on the cleat on the dock to go—to slip the line.

Peter Pastersen, cross.

Q Your starboard is the right hand side as you look toward the bow, is it? A Yes.

Q You were standing on the right hand side of your boat then? A Yes.

Q With your face toward the bow? A Yes.

Q With your face toward the bow of the boat? A Yes.

Q Would that make you face the Statue of Liberty, about? A Yes, about so, that way.

Q Your back was to the fire, wasn't it? A Yes.

Q So you could not see what was taking place back of you, could you? A Well, I wasn't starting to look ahead all the time, I was looking around me.

Q Did you see the explosion? A It knocked me down on the deck.

Q You didn't see it; you just heard it? A Yes, I heard it, and I was stunned for a few seconds, but then when I came up I seen the smoke and the fire and all of it.

Q It didn't blow you overboard? A No.

Q It blew your captain overboard? A Yes.

Q Did anything fall around you? A Yes, I seen some pieces of woods and things flying around the water.

Q What did you do after the first explosion? A I throw my line loose—

Q Yes. A And then I run forward on the boat and I hollered for the captain if he wasn't there of if he was killed, and he answered he was on another boat. He answered me from another boat.

Q Then what happened, Mr. Casperson? A Why, I jumped down on my boat and went over to the other boat; it was all in a heap laying there on the pier.

Q What was all in a heap lying on the pier? A All the boats there. Some boat came out from the other side and we had drifted all together out there except number 17 and the Frank, he was laying in alongside of the pier.

Q Yes. Were any of those boats afire that you got in among? A They just started to get afire then.

Peter Pastersen. re-direct.

Q Was your boat afire? A No.

Q Was the 17 afire? A I couldn't say if 17 was afire.

Q Then did you go away then? A I went aboard of that boat, yes, and they start a fire on that boat just as I came on board.

Q Did you go away from them then or did you stay there? A Yes, I got away from there and I go on board towboat, the Slatington.

Q That is a Lehigh Valley tug? A Yes.

Re-direct examination by Mr. Skinner.

Q Between you and the fire, Casperton, was there another boat along that pier? A Yes; there was a boat there, a Moran boat laying up that way.

Q How near to the land end of that pier did the Moran boat lie? A He was laying pretty close up to these spiles that stand there, about them piles.

Q Do you mean the bulkhead? A Yes; he was pretty near up abreast where the fire started.

Q Could you see Zeke's shanty from your boat? A Yes, I could see the shanty, yes.

Q Now, would you say that the fire, as you saw it, was nearer to you than Zeke's shanty, or further away, or both about the same distance? A Oh, maybe the fire was a little nearer our boat than that other shanty was; I can't exactly tell that.

Q A little nearer? A Maybe he was a little nearer, wasn't very much, though.

Q Now, when you say a little nearer do you mean a few feet or what do you mean? A Oh, maybe fifteen or twenty feet.

Q That is all? A Something like that.

Mr. Skinner. Will there be any question, Vice-Chancellor, about the use of a copy of the regulations of the Interstate Commerce Commission?

Mr. Garrison. Not the slightest.

Mr. Skinner. This is one from the government printing office.

Mr. Garrison. Just so it is the right edition. I don't know what it is.

(Mr. Skinner hands a book to Mr. Garrison.)

Mr. Garrison. All right, either one of these.

Mr. Skinner. Then, if your Honor please, we have exhausted the supply of witnesses that we had thought would fully take up the day, and there are only a few minutes left, and I thought I would take the time, and utilize the time, by offering the regulations of the Interstate Commerce Commission. There is no question as to the manner of proving this. This is a certified copy of the regulations, edition of 1914, and they are marked as effective October 1, 1914.

(Books marked Exhibit P. 17.)

Mr. Garrison. It seems to me, if your Honor please, that in the event of a writ of error or other method of review it would be quite burdensome for anybody to have to print that entire book. Much of it has nothing whatever to do with this situation.

I do not want to do anything more than to suggest, but you and I can agree probably on the pages that do concern the matter.

Mr. Skinner. Quite so. I can record them for you probably.

The Court. You offer so much as applies to these pages.

Mr. Garrison. That is all. There is a great deal which has nothing to do with this case. What I had in mind was that on page 73 are regulations for the transportation of explosives and other dangerous articles by express. Of course we have nothing to do with that. Yet there are pages devoted to it,

and I think we had better have that matter that concerns the issue that is before your Honor.

Mr. Skinner. Then to answer the Vice-Chancellor's suggestion, we indicate section 1643—

Mr. Garrison. Oh, no, I don't mean that. What I mean is this: Here in the first seventy-three pages are regulations for the transportation of explosives by freight. As I understand it, that is the operative, effective regulations of the Interstate Commerce Commission in reference to this matter, from 1 to 73. After that you get into express, and no one contends any of this was by express, and the next is about shipping containers and explosives.

Mr. Skinner. I do not see myself why the entire seventy-two pages should be offered. Why not carry out the same suggestion and let me indicate the particular sections that I rely on?

Mr. Garrison. I am perfectly willing to that.

Mr. Skinner. And if we find we have overlooked any—

Mr. Garrison. I am perfectly willing he should indicate any sections he relies on, but of course I want the whole document to go in that has to do with the regulations of the transportation of explosives by freight.

Mr. Skinner. Then I might put the whole thing in.

The Court. I can see that it may be very important, because one question may be whether Congress has completely and entirely covered this object, and if it has, they want to know what the regulations are.

Mr. Skinner. Our point of view is, however, that there are certain regulations which we depend upon or which we point to, and it is those we intended to put in.

Discussion.

Mr. Garrison. Rather than to get in trouble, I will ask that the whole document go in, from cover to cover, and then they can do what they please with it, so we will have no trouble or question about it.

The Court. That is what was offered.

Mr. Garrison. Yes. That whole copy goes in.

(Mr. Skinner hands two photographs to Mr. Garrison.)

Mr. Campbell. Photographs of the crater. They were taken two days, I think, after or three days after.

Mr. Garrison (after examining them). No objection.

Mr. Skinner. I offer these two photographs showing the crater a short time after the explosion in question. The first one was the one showing the figure of the Statue of Liberty.

(Photograph marked Exhibit P. 18.)

Mr. Skinner. And the one that shows some spiles in the foreground.

(Photograph marked Exhibit P. 19.)

Mr. Garrison. Judge Skinner, how long do you expect to take tomorrow? All day?

Mr. Skinner. I think so. Don't you?

Mr. Campbell. Yes, I think so.

The Court. It might be a wise plan to revise your judgment of how many you are going to take, and put one more witness in for fear you might fall short the next time, because we will sit up to the time and possibly a bit beyond it some of these days. So I think we will adjourn now until ten o'clock tomorrow morning.

ADJOURNED TO FRIDAY, MARCH 28, 1919, 10 A. M.

FOURTH DAY.

Mr. Campbell. Judge Garrison, while we are waiting for Judge Skinner we might determine on this insurance policy matter. I have here all the policies and all the checks. I do not understand that you wanted all the policies. Mr. Lark looked them over last night and checked them up and we will take your suggestions—I will either put in all the policies or put in one as a sample and you may have the copies or have them all if you like.

Mr. Garrison. They all have standard clauses. We can put in one. Put a schedule in, and where there is any variation in the riders that we think is important—

The Court. Very well.

Mr. Garrison. Just offer one and then allow us to put in the variations.

Mr. Skinner. Any time you want.

(Policy marked P. 10.)

Mr. Skinner. Judge Garrison, may we later have a copy substituted for the original, as the companies want the original back?

Mr. Garrison. Yes.

Mr. Skinner. I would like to submit to the jury—they were not shown these photographs yesterday—I would like to pass them around—P. 18 and P. 19.

The Court. All right.

Mr. Skinner. Now, if the Court please, a matter that we ask the Court to take judicial notice of—the complaint in this case sets out in its second count that for a long time prior to the 29th day of July, 1916, it was a matter of public knowledge and was known to the defendant that evilly disposed persons were abroad in the land seeking through the medium of fire and explosion and in other ways to

occasion damage to property and especially munitions of war which they conceived might be eventually destined for the warring European nations; and we say there was a higher degree of care owing because of it. Now, in the former trial, your Honor, there, as we understood it, took judicial notice of that situation; reading from your Honor's remarks in denying the motion for a non-suit, you said:

"Reasonable care in this case may very well be the duty to use a high degree of care, having in mind the nature of the explosives, having in mind the facts which everybody must have known at the time. Everybody knew, for instance, that war was waging all over the European continent, and the munitions were being hurried for use in that war over practically every artery of commerce that we have in the country. And everybody knew from common knowledge that incendiary fires were of very frequent occurrence, or, at least, the report of them was a very frequent report."

And if there were any doubt at all in your Honor's mind as to the Court's right in the proper exercise of its discretion to take judicial notice of the facts set out in this allegation of the complaint we would be prepared to fortify the Court's idea upon the subject, because we have had a careful examination made of a number of New York papers and a collection of several hundred articles bearing on the occurrences of the night referred to in the complaint and supporting the allegations of the complaint and showing by their number, the character of the publications and all that they were matters of common knowledge. We ask the Court, however, to take judicial notice of the facts set out in that allegation.

Mr. Garrison. My difficulty is to ascertain just what it is Judge Skinner desires you to take judicial

notice of. Certainly you are not going to take judicial notice of the fact that these things were known to any specific people, as I understand it.

Mr. Skinner. What?

Mr. Garrison. You are not asking him to take judicial notice of the fact that these things were known to any specific people. It says here it was a matter of public knowledge and was known to the defendant. I do not assume your Honor will assume it was known to the Lehigh Valley Railroad. However that may be, I do not understand just what the scope is of the public information which he wants you to take judicial notice of. Of course you will take judicial notice of the fact that there was a war in Europe. I suppose he means that there was a German propaganda going on in this country and these people, thinking to help their Fatherland, were endeavoring to blow up munitions which might otherwise go to the enemy of their Fatherland. If he means that, I have no objection. Otherwise I do not think it is relevant or material.

The Court. Do you want it to go any farther than that.

Mr. Skinner. I think not. I think that covers it.

The Court. All right, then. If there is no objection to that, that is what I will judicially notice on the subject.

Mr. Skinner. Will the stenographer repeat what Judge Garrison said?

(Repeated.)

Mr. Skinner. That is sufficient, sir.

The Court. All right; that will be judicially noticed by consent—or at least without objection.

JOHN GATELY, sworn.

Direct examination by Mr. Skinner.

Q You are connected with the Jersey City Fire Department? A Yes, sir.

Q And were on July 29-30, 1916? A Yes.

Q And what was your official position? A Battalion chief.

Q On those dates? A Yes.

Q Did you go to Black Tom Island on the night of July 29 and the morning of July 30th? A Yes.

Q And what was the occasion of your going there? A Fire.

Q Did you get any instructions to go there or any notice of the fire? And if so, when? A Got instructions from fire headquarters.

Q And when? A Around that time.

Q What time was it? A I think it was around 12:45.

Q How did you get them, by messenger or telephone or how? A Telephone message.

Q What did you do on receipt of that message? A We—I went directly to Black Tom.

Q Where were you when you got it? A In 5 truck at Monticello and Communipaw avenue.

Q How long did it take you to get to Black Tom? A Well, I should judge about five or seven minutes.

Q When you got there what did you see? A I saw a fire.

Q Did you go into the yard? A Went into the yard driveway.

Q How far in did you go? A I believe about four hundred feet of the fire.

Q Do you remember the storage warehouses down there? A Well, I see the warehouses afterwards.

Q I see; did you notice as you went in how far down with reference to those warehouses you got? A Well, I should judge about four hundred feet.

Q From what? A From the driveway.

Q From the driveway. Well, did you go down on the driveway or on something else? A On the driveway I went down.

Q You went four hundred feet down the driveway or---

The Court. From the entrance?

A Four hundred feet from the fire and buildings--warehouses, on the driveway down with my automobile.

Q Did you know how far the driveway goes down—did you see any ending of the driveway? A No, sir.

Q Could you see the fire? A Oh, yes.

Q Where was it? A In front of me.

Q Well, I mean what was there at the point of the fire; what was burning, apparently? A Well, there was explosions.

Q From what? A Well, I could not exactly say from what.

Q I do not mean what caused the explosions, but where did the explosions seem to come from? A Towards the pier like from where I was standing there.

Q Did you see any cars? A Yes.

Q Now, were any cars burning? A Yes, sir.

Q Is that the fire you saw—burning cars? A That, and the explosions.

Q Were there many cars down there—I do not mean burning cars, but altogether? A Quite a number.

Q How many do you think were burning when you got there? A Well, I should judge four or five.

Q And what were the explosions that you speak of—what kind of explosions? A Well, there were shells going up.

Q How was that manifested; what did you see? A Well, a sort of blaze and then where we were standing around, why, the shells were coming down on the side of us.

Q And could you hear the explosions from the shells? A I heard one explosion.

Q No; I mean from the shells; as they went off, did they make any noise as they went off? A No; I do not think so.

Q Well, did you see any of the Lehigh Valley Railroad employees or any men whom you knew to be Lehigh Valley Railroad employees? A I saw one man, I think he was the superintendent of the railroad.

Q Do you remember his name? A I do not know his name now. If I heard it I might.

Q Was it Mr. Dickman? A Dyckman.

Q Counsel says that he was the agent of the company.

Mr. Skinner. I do not know whether that is material.

Mr. Garrison. The witness said he was the superintendent. Mr. Dickman was the agent of the company.

Q When you got there were any of your department—any of the Jersey City Department there? A Oh, yes.

Q What ones; what companies? A There was 10 engine, 8 engine, 5 truck, 16 engine.

Q Is that all? A Yes.

Q When you got there? A Well, they were not all there when I arrived.

Q I asked you which ones were there when you got there. A Why 8 engine.

Q And then these others came afterward? A I telephoned to headquarters and the chief sent me some help.

Q Now, when you got there and found 8 engine were any attempts made to extinguish the fire? A Oh, yes; we tried their pumps.

Q Now, what did you do? You say you tried their pumps. What did you do? A They had hose attached to them and we tried to get water there to put on the fire.

John Gately, direct.

Q Did engine company No. 8 put out any hose to try to get any streams of water? A We used their—tried to get their water first, and then when I saw that we could not get that, why, we made connections with one of our engines to the river.

Q When you say you tried to get "their" water first, whose water do you mean? A The railroad people's water; we tried to get that.

Q And where did you try to get it? A Why, on the main thoroughfare.

Q Did that run along the driveway? Is that what you mean by the thoroughfare? A Yes, their pumps—hydrants.

Q A line of hydrants along the driveway? A Yes, sir.

Q What kind of hydrants were they? A Well, ordinary fire hydrants.

Q Were they two-way or three-way hydrants, or have they any name? A Well, I could not answer that; their names.

Q Were they two-way hydrants or three-way hydrants or both? A That I could not say. All I know that they had one line of hose on the hydrants.

Q And do you know whether they got any water? A We did not get any water from them at first.

Q And did you later? A Yes, sir.

Q How long a time was it between the time when you first tried to get it and the time when you got the water? A Well, I think fifteen or twenty minutes afterwards.

Mr. Skinner. Cross examine.

A I met Mr. Dyckman and I asked him—

Q Well, I do not think that would be proper.

Mr. Garrison. You may ask him if you want to.

Q All right. What did you ask Mr. Dickman? A What was the matter he could not give us water.

Q What did he say? A He did not seem to answer me—pay any attention—I guess the man,—like a good many more—was more or less excited, and after a while he got us water.

Mr. Skinner. That is all. Cross examine.

Cross examination by Mr. Garrison.

Q Chief, what is the equipment under you, what equipment have you charge of? A Battalion.

Q Yes; tell us what it is. Tell us what it consists of. A Well, four or five engines and two truck companies.

Q And are the truck companies the companies that have the hose? A No, sir.

Q Haven't you got any hose for your four or five engines? A Oh, yes.

Q Well, you did not mention the hose. A Well, that completes the engine; engine and hose.

Q The hose is not on the engine, it is separate, isn't it? A Yes.

Q All right; how many hose carts have you? A To my battalion?

Q I am asking you. A Five.

Q You have five engines and five hose carts and two trucks? A Yes.

Q And where are your headquarters? A Communipaw avenue, near Monticello.

Q And on this night you were there? A Yes, sir.

Q How much of this equipment is at your headquarters? A Well, at that time there was only the truck company and myself.

Q Where were the engines? A They were in the different houses.

Q Well, you say you got word from the chief about 12:45 to go to Black Tom? A I think that was the time; yes, sir.

Q Yes, and what did you do then? A I went there, directly to Black Tom.

Q Well, how did you get there? A Well—

Q I don't mean the streets you went over. What kind of conveyance did you go in? A An automobile.

Q In your automobile? A Yes, sir.

Q And how many men did you take down there with you? A Well, the truck company.

Q How many men were in the truck company? A Eight.

Q Anybody in your automobile with you besides your driver? A No, sir.

Q Then there were you and your driver and eight men of the truck company? A Yes, sir.

Q Did you send for any of your engines to go down there, any of those five engines you had under your control? A Headquarters did that.

Q What were the numbers of your engines? A Eight engine, 10 engine, 16 engine.

Q That is only three out of five. You have got two more? A Eight, 10 and 16, and a truck.

Q Well, that doesn't make five engines? A No.

Mr. Skinner. He has not said he had five engines.

Q Didn't you say you had five engines under your control? A I said in my battalion.

Q Well, that is what I am asking you. Give us their numbers of the engines you had in your battalion? A Yes, but they don't all come—

Q I didn't ask you anything about coming. I asked you to give us the number of the engines that belonged to your battalion. Now, you have given us three. What are the other two? A You mean at the fire—8, 10, 16 and 5 truck.

Q (Repeated by the stenographer.) Give us the numbers of the engines you had in your battalion? A Eight, 10, 16 and 5 truck.

Q But you said you had five engines in your battalion. Tell me the numbers of the other two? A Why, there was 19, 13.

John Gately, cross.

Q Nineteen and 13. Now, on the night of the fire whereabouts was No. 10 engine before—whereabouts was it housed? A On Holliday street.

Q Whereabouts was No. 8 engine housed? A On Ege avenue.

Q And whereabouts was No. 16 housed? A Belmont avenue.

Q And where were the other two numbers that you gave me? Where were they housed? A The truck on Communipaw avenue near Monticello.

Q Well, now, you got down there, you said, in five or seven minutes; that is about right, is it? A That is right to the best of my knowledge.

Q Yes. And did your truck go right along with you? Did this truck with the eight men go right along with you? A Yes, sir.

Q How many men accompany No. 8 engine? A Well, they have eight men.

Q They have eight men. How many go on the hose cart? A Altogether eight men.

Q No, altogether eight men. That is for the hose cart and the engine? A Yes, sir.

Q Was the hose cart there, too? A Yes, sir.

Q Now, you said you saw one hose cart coupled up. Was that a Jersey City hose or Lehigh Valley hose? A Lehigh Valley hose.

Q Yes. There was only one way to get from Jersey City down into the island of Black Tom, isn't there? A I believe so.

Q Well, you know it, don't you? The rest is all railroad tracks, nothing but that driveway. Now, you came down the driveway and you said you didn't see the end of the driveway? You said you didn't see the end of the driveway? A No; I couldn't see the end of the driveway.

Q No. It was pretty dark that night, was it? Was it pretty dark when you got down there, except where the fire was? A It was pretty dark, yes.

John Gately, cross.

Q Now, you said you didn't see the warehouse until afterwards—now, you don't mean that, of course. Here is the driveway and here are the warehouses. You certainly saw them there? A After a while I saw them, yes.

Q After a while. But what you said was after the explosion, as I understand. But, at any rate, you did see the warehouses. Do you know how far you got from the end of the warehouses, the easterly end? Do you know where the big tank was? How far were you back landwards from the big tank? A Well, the distance from the warehouse to the driveway, I should judge about three or four hundred feet.

Q I do not understand that answer. I want the distance back on the driveway where you were from the big tank? A I should judge about 400 feet.

Q 400 feet back from the big tank. Well, now, the driveway itself is, I should think, fully 1,200 feet back from the big tank. It stops there. Now, did you go 400 feet from the end of the driveway? This driveway does not go, I should think, within 400 feet.

Mr. Garrison. Judge Skinner, would you say that is 400 feet?

Mr. Skinner. Pretty near.

Mr. Garrison. Yes. Well, the Judge thinks 300.

Q The end of the driveway is at least 300 feet from the big tank. Now, were you 400 feet back from the end of the driveway? A I was opposite.

Q Opposite what? A The warehouse.

Q I know, but there are any number of warehouses here; there must be 15; now, which one were you opposite? A I couldn't tell you which one.

Q All right. Now, do you know where the pump was? Do you know where the pump house is up here between F and G? Do you know where that pump house is? A I can't recall seeing the pump house.

Q What physical thing can you recall that will enable us to find out where you were, how far you got down the driveway on the night of the fire before the first explosion? A Well, where the fire was, down where the cars was; I was up this way about 400 feet from it.

Q Well, if you were 400 feet up from where these people had put the fire and opposite Zeke's shanty, you were way down here in the yard surrounded by cars. You couldn't have driven your automobile down there or truck down there to save your life? A We drove it down as far as we could go on the driveway.

Q But you never got off the driveway, did you? A No, sir.

Q Where is the end of the driveway up here? A I couldn't say where the end of the driveway is.

Q Well, you really don't know where you were, Chief, do you? You don't know where you were with reference to these storehouses? A I know I was just about opposite them on the driveway.

Q But opposite from them doesn't mean anything, because there are 15 or 20 of them. Were you opposite A or B? Do you know what you were opposite at all? A The warehouses was by the river.

Q Certainly they were; they were to your right as you drove in? A Yes, sir.

Q Now, I want to know opposite what car, what number, or what one of these storehouses you were. I am trying to find out where you were? A Well, I couldn't tell the number of which storehouse it was.

Q I know you can't, but can't you give me some physical thing? Do you remember the storehouse that had the big tank on? A I saw one of the buildings with a big tank on top.

Q Yes. Well, how near were you to that building that had the big tank on the top? A Well, I was within 400 feet of it.

Q 400 feet near it—or near what, the fire? A No, from the river.

Q I am not interested in the river. I am interested in the fire? A Well, I was about 400 feet from it.

Q From what? A From that building and where the fire was.

Q There was no building on fire when you got down there? A No, there was no building on fire.

Mr. Skinner. He did not say there was a building on fire. He said he was from that building and where the fire was.

Q Was it 400 feet back towards Jersey City or was it down towards the end of the pier? A Towards Jersey City.

Q And back about 400 feet. All right. That is in the block between F and H?

Mr. Garrison. What do you suppose those buildings are, Judge, 50 feet front? Well, about the right-hand side of Pier 4, I should say.

Q Well, now, was pretty near all of the apparatus there gathered about the same place? A Yes, sir.

Q And you had been down there before, hadn't you? Down to Black Tom? A No, sir; I—not down around there.

Q Well, you had been down around Black Tom, hadn't you? A Yes.

Q You had been down on inspection trips? A No, sir.

Q Hadn't you? A No, sir.

Q I thought you had. Well, then, do you know where the city hydrants were? Do you know where the city hydrants were? A Well, I don't know exactly whether they were city hydrants or they belonged to the railroad.

Q Exactly, and you don't know whether the water that didn't come from the hydrant was the city water or the

water that the railroad company tried to provide, do you? A No, sir, I can't answer that.

Q You don't even know whether the plugs were turned on, do you; you didn't turn any of these plugs on? A I had—an engineer did it.

Q But you didn't turn any of them on? A No, I didn't.

Q And you didn't see any of them turned on? A I saw an engine—engineer tried to turn them on.

Q Well, did he know how to turn it on? A Did he know? Yes, sir.

Q Was the implement there to turn it on with? A Yes, sir.

Q What kind of hydrant did it look like? A It looked like a hydrant where you lift off the lid.

Q Well, what kind was it? You know there are all kinds of fire hydrants, don't you? A Yes, sir.

Q What are the fire hydrants in Jersey City? What are they called, your city hydrants? A Well, there are different names; some are called the Ayres; some is called the Corey.

Q Well, now, Corey three-way hydrants work entirely different from the Ayres, doesn't it? A Yes, sir.

Q Now, do you know whether these were Corey three-ways or whether they were Ayres, or what they were? A I couldn't answer.

Q Then, you don't know whether the man did the proper thing to turn it on? A Oh, yes, sir.

Q How do you know that? A Because I saw him trying to turn it on from the top.

Q You saw him trying to, but you don't know whether he did the proper thing or not, do you, of your own knowledge? A Well, I seen—

Q You just assume that he did the proper thing? A Yes, sir.

Q Yes. Well, now, when you got down there you say there were about four or five cars on fire? A Yes, sir.

Q Is that right? Was there any fire on the ground or was it all confined to the cars? A Well, it looked on the ground and on the cars.

Q What was burning on the ground? A Well, I couldn't see what was burning on the ground.

Q Couldn't you see whether it was stuff that had fallen out of the cars? A Well, I suppose it could be.

Q And these shells were going off as soon as you got down there? A They were going off, yes, sir.

Q And you didn't risk your men to send them down into the fire, did you? A Well, I couldn't send them any further down, because we didn't have the water. I suppose if we got the water we would probably have went down there.

Q Well, you did get water in 15 or 20 minutes? A Yes, sir.

Q Why didn't you go down then? A We did.

Q How near did you get to the fire? A Within three or four hundred feet of it.

Q At what time was that? A Well, I should judge a half an hour afterward; we took suction from the river by one of our engines and—

Q Well, now, as a matter of fact, Chief, you never put any water on that fire until after the explosion; isn't that right—until after the second explosion? A Well; I wouldn't say after the second; in between the first and second.

Q Yes, but you didn't get any water on that fire before the first explosion, did you? A No, sir.

Q And aren't you mistaken about in between? Wasn't it after the second explosion that you got any water at all on that fire? A Well, I couldn't say for sure.

Q You saw this big tank down here from where you were, didn't you? A I saw the tank on one of the buildings—

Q And didn't you see this big tank— A Coming on in the morning.

Q Didn't you see this big tank that was down at the end of the warehouses, up on a grade, high steel structure? A I cannot say that I did.

Q Did you do any personal investigation to find out where the nearest hydrant was to the fire? A Why, we saw them there as we—

Q But did you go down to see where the nearest hydrant was to the fire? Did you personally go down there? A Oh, yes; we were there.

Q Where did you find the nearest hydrant to the fire? A Well, I should judge around 400 feet from there.

Q From what? A From the fire.

Q Out in the yard? A Yes, sir.

Q Well, now, when you found that hydrant that was three or four hundred feet from the fire and down in the yard, why didn't you hook some hose up to it to put the fire out? A Why, they had hose on.

Q They had the hose on? A Yes, sir.

Q When you say there was no water coming out of the one hydrant that you tried, or that somebody tried, why didn't you connect up with the bay? There was all the water in the world there? A I did.

Q When, right away? A Well, as soon as I discovered that we couldn't get no water.

Q Well, it didn't take you from 12.50 until after the second explosion to find out that you weren't going to get water and you had to suck up the bay, did it? A Well, when I saw that we didn't get any water I ordered one of the apparatus to the bay for to take suction.

Q Were you there during both explosions, during both of the big explosions? A I was there; yes.

Q During both of them? A The first one—the first one kind of put me out of business.

Q I say, were you there during both of them? A Yes, I was there.

Q Now, then, when was the first one in point of time? How long after you got there was it that the first big

explosion went off? A Well, I should judge about three-quarters of an hour or an hour, maybe.

Q And between that and the second, how long a time was there, between that first big explosion and the second? A I should judge a half an hour.

Q Half an hour. So there was an hour and a half—there was an hour and a half from the time of the first explosion until the time of the second explosion—well, from the time you first got there? Now, if that is true, then you had an hour and a half during which you could have coupled up your hose and could have gotten water by suction out of the bay; isn't that a fact? A Well—

Q And you didn't do it? A Oh, yes.

Q But you didn't put any water on that fire, or try to, until after the second explosion; and, as a matter of fact, not after the second explosion? A We were working at the fire when the second explosion occurred.

Q Now, tell me what you mean by working at the fire? A Well, we had our engine connected through the bay and took suction, and was stretching the hose in with the water when the second explosion took place.

Q Yes; all right. Now, whereabouts was your engine? Where was this engine that was getting this water out of the bay? A Why, it was alongside of the string-piece at the river.

Q Down where you first landed, at that pier down where you first came? A Well, further up from where we was located.

Q You mean further up towards Jersey City? A Yes, sir; we had—

Q And then you got your water out of the bay there, did you? A Yes, sir.

Q And how far was the fire from there? A Well, I should judge a thousand feet easy.

Q A thousand feet easy? A Yes, sir.

Q And did you get any water out of the bay and on to that fire before the second explosion? A Yes, sir.

John Gately, cross.

Q Who had charge of this hose? A Why, captain of the company.

Q Who was he? A I believe it was Hogan.

Q Holden? A Hogan.

The Court. Hogan.

Q Hogan. Is he here? A Yes, sir.

Q Now, you said you saw a man trying to turn on one of these plugs, an engineer. What was his name? A I can't recall his name.

Q Wasn't he one of your firemen? A Oh, one of our firemen, yes.

Q That is what I am asking you. The one you saw trying to turn the plug on? A Captain Hogan.

Q Hogan? A Captain Hogan was trying.

Q The same man that you spoke of was in charge of the hose? A Yes, he had charge of the company.

Q He was captain of what company? A 8 engine.

Q 8 engine? A So I believe at that time.

Q Do you remember being examined here before in the Plate Glass insurance case? Don't you, Chief? A I remember.

Q Never mind the name of the case. You remember being on the stand once before and my asking you questions, don't you? A I remember you asked me.

Q Well, yes. Now, I am going to read you a question and an answer (page 189), and ask you if this question was not asked you by me and whether you did not make the answer that I am going to read you. The question was: "Well, you did not open the city hydrants, did you, while you were there?" Answer: "No, sir." Do you remember that? A Well, I can't recall that.

Q You don't recall whether you said that or not? A No; I cannot remember saying it.

Q Yes, all right. Well, now, Chief, aren't you mistaken in saying that No. 8 engine was there at all until after the explosion? A What is that?

Q (Repeated by the stenographer.) Yes, all right. Well, now, Chief, aren't you mistaken in saying that No. 8 engine was there at all until after the explosion? A I believe she was there.

Q Before the explosion? A Why, yes.

Q That is your best memory? A That is my best memory.

Q All right. Now, were there any other engines there before the first explosion besides No. 8? A Well, I cannot recall now whether they were or not, till I telephoned.

Q When did you telephone in respect to the time that you got there? In other words, how long had you been there before you telephoned? A Why, I believe 20 minutes or a half an hour.

Q How many cars were on fire by that time? A Well, there were cars burning; I couldn't say exactly how many cars was burning.

Q And by that time none of your men had actually gotten down in the yard where the fire was at all; had they? A Oh, yes, we were down there.

Q Down around the fire? A Yes, sir.

Q Who was there down around that fire? A Why, we were.

Q How near were you ever to that fire? A About 400 feet from it.

Q What were you doing 400 feet from it? A Why, we were trying to get water from the plugs.

Q But you weren't down where the fire was; you were not down there with axes or with anything else at the fire, the place where the fire was? A We were down as near as the heat would allow us to go down.

Q You couldn't get any nearer on account of the heat? A No.

Q Shells didn't make any difference to you? A Well, we didn't know that there were any shells at that time.

John Gately, re-direct.

Q Why, you just told us a while ago that it was—that shells were falling around there? A They were afterwards; we discovered they were shells.

Q What did you think they were at first when they kept popping off? A Well, I thought it might be some burnt wood.

Q Burnt wood making a noise like that? A Well, they weren't making any noise where we were, until they would hit the shutters.

Q Until they hit the shutters? A They were hitting shutters in the building.

Q Didn't they make a noise as they went through the air? A Of course, they made noise; certainly they made noise.

Q Well, you knew they were shells? A I didn't know what they were until they told me afterwards.

Q You knew it was not burning wood going through the air making a noise like that; that is a fact, isn't it? A Oh, no; wood wouldn't make any noise like that.

Q And you knew they were shells or some kind of projectiles? A Yes.

Q And you knew shells kill people? A Yes.

Q And you didn't want to risk the life of your men by sending them in there to get killed? A No, sir; I wouldn't send them in there to get killed.

Re-direct examination by Mr. Skinner.

Q Did you see the explosion, the first explosion? A I didn't see it, no, but I felt it.

Q Well, were you able to tell where it was? A Well, down—in front of us—I couldn't tell exactly where it happened.

Q That is all.

Mr. Garrison. That is all.

EBENEZER W. KLOSTERMAN, sworn.

Direct examination by Mr. Skinner.

Q Lieutenant, you are connected with the Jersey City police force? A I am.

Q In what position? A Lieutenant of police.

Q Were you lieutenant of police on July 29th and 30th, 1916? A I was.

Q On the night of the 29th, late, or the early morning of July 30th, did you go to Black Tom? A I did.

Q Was there a fire there? A There was.

Q Did you see it? A I did.

Q When did you first hear of it? A I first seen the illumination of it at about 1.10.

Q Yes. A While I was on Jackson avenue and Orient.

Q Did you go right there? A No, sir, I did not. I thought the fire was in Brooklyn, from the illumination, and I telephoned to the Fifth Precinct from the nearest signal box and was informed they were sending reserves and the wagon there on a still alarm, so I told them it was not a still alarm; it looked like a great big fire to me; you better have the wagon pick me up, and they got me at Claremont avenue and Ocean.

Q What is a still alarm? A Well, they call it telephone—not a bell alarm—it is not sent in from any fire box. That is what we call a still alarm—telephone or personal message.

Q Then what happened? A Then the wagon picked me up at Claremont avenue and Ocean, and I went down there.

Q About what time did you get there? A I arrived there about 1:35 A. M.

Q Did you see any fire then? A I did.

Q What did you see burning? A Well, when I first got there I placed my men across the island before I looked the fire over, and then I looked the fire over to see what the extent of it was. My reason, if you want for

that, was because I had three men there from post and three men from reserve, and if I didn't need the men from post I should have sent them back on post again. So I looked the fire over and I saw about fifty freight cars was on fire. They were on about four or five tracks.

Q Were there any explosions or poppings from the fire at that time—shells going off? A Yes, there was.

Q Well, was there a big explosion later? A There was.

Q You were there at that time? A I was.

Q Where was that big explosion with reference to the freight cars burning that you seen when you got there? A It was just back of the freight cars that I could see burning.

Q Just back of it? You mean nearer to the explosion? A It come up out of the smoke from the freight cars that were burning. I could see a point where the flames come, but, of course, the flames went into black smoke, and you couldn't see through that. But this affair—the ball of fire came up out of the center of the smoke.

Q Just describe that explosion? A Well, that is a hard matter. I was standing three or four hundred feet in front of the fire, at about 2:08; I was with Patrolman Hamill, Battalion Chief Gately and several others; I were watching the two brakemen on the freight train when this—my attention was taken from them to this ball of fire leaving the center of the fire and going up, going up on a pillar of smoke; the smoke appeared to push this ball of fire up about one hundred and fifty feet, when the ball left the fire, or the ball left the smoke, rather, and went up about fifty feet, when it opened up; it didn't bust; it just slowly opened up and then there was a report.

Q Then what happened; was there any effect felt by you and those around you? A Well, when the ball opened up it seemed, I don't know; seemed to grasp things and suck the air and hold everything tight for

about ten seconds, and then we heard the report; then things commenced to move—so did we—or tried to.

Q Do you know of there being warehouses down there? A Yes.

Q Did you see whether or not the explosion had any effect on the warehouses? A When we heard the report the two upper stories of the brick warehouses below the driveway seemed to crumble up and slide away, slide off into the bay, away from us; the air became full of flying cars, shells, dirt, cinders, coal, everything.

Q Well, there were three of those big storage warehouses or blocks of stores, weren't there? A Well, there were two below the driveway.

Q Yes. A One above, and then there were some wooden ones.

Q This effect that you describe, did you see that with reference to all three of the warehouses? A No, sir; the ones below the driveway.

Q Did you see any fires at any time in those warehouses or in the wreckage of them? A No, sir.

Q After the explosion did you see fire there? A No, sir; I did not.

Q Well, what did you do? What did you do? What effect did the explosion have on you? A Well, first, as I say, it seemed to just suck the air out of me, and hold me still; I couldn't move for about ten seconds, and then I undertook to get away.

Q And did you? A Well, no, I didn't exactly get away. I had quite a time. I would go a little ways and go down, and I got about two or three hundred—two hundred feet away from the fire, I guess, when I was pinned in under a fire truck.

Q You were not then in position to see what— A Well, I couldn't get out of there until after everything kind of cleaned up—after the first explosion; then I went back looking for my hat. Before I got out again I met the firemen coming back and the policemen coming back,

and found one of my men were missing, and I went back looking for him. It was, I guess, three o'clock afterwards before I got out of there.

Q Now, Lieutenant, you spoke of seeing some brakemen on freight trains as you were looking at this just before this explosion? A Yes.

Q Where were they? With reference to the fire, I mean; where were they; what were they doing? A I telephoned—after I telephoned to Sergeant Sheen about keeping my men there; I noticed this bulkhead and I went down to investigate that, and before coming back on the driveway where I had left a majority of my men and while standing there I discovered that the Lehigh Valley was running in two trains to take out the loaded cars that were on our side of the fire.

Q You mean you saw it? A Yes, there was a train on each side of the driveway, and on the third or fourth car from the end of that train—of each train—there was a brakeman with his lantern, swinging it.

Q Did you see that for any length of time before the explosion, the first explosion? A That I would judge to be probably five minutes before the explosion, possibly ten.

Q And how far down towards the fire did those brakemen get? A I would judge they were about two hundred feet below us.

Q And how near to the fire—to the cars that were burning? A I would judge they were within probably five or six cars from the fire.

Q From the burning cars? A Yes, sir.

Q Did you see any of the Fire Department there, the Jersey City Fire Department? A When I arrived there Battalion Chief Gately was there, 5 truck was there, and I see the apparatus there from 8 engine, 10 engine and 16 engine.

Q Well, did you see any efforts made by any of the fire departments to get water from any hydrant? A

Well, no; I didn't. You see our position is to keep them from interfering with the firemen. I see there were two line of fire hose running past where I was.

Q Yes. Well, do you know whether they got water? A Well, they did not from the two line of hose that went in by me. I see a fireman go over and lift up the end of the hose two or three times, and the water would go about ten or fifteen feet from the nozzle.

Q Did you see anybody other than the Jersey City Fire Department doing anything at all to extinguish the fire? A No; I can't say that I did.

Q That is all.

Cross examination by Mr. Garrison.

Q What did you see them doing to extinguish the fire? A I can't say I seen them do anything.

Q Yes. Now, where were you when you first saw this light that you thought was in Brooklyn? A At Jackson avenue and Orient.

Q And about 1:35, as I recall your testimony, you got into a patrol wagon, or what did you call it? A No; we arrived at Black Tom Island; arrived at Black Tom at 1:35.

Q Well, then, what was that picked you up? A The patrol wagon; yes, sir.

Q And when you arrived at 1:35, you arrived in a patrol wagon at Black Tom? A Yes, sir.

Q What other officers had you with you? A I had Patrolmen Tiplady, Walsh and Weinhall; they were from post, and Patrolmen Dougherty, Hamill and Tackler, who were from reserve, and there was the chauffeur, Patrolman Schaeffer, was also there.

Q How far down the driveway did your chauffeur drive the patrol wagon before you officers got out? A Down to where the driveway turns and goes between the brick warehouses into Pier 5.

Q Yes; down between Storehouses F and G? A I couldn't tell you the figures.

Q That is what it is. I want to get it in the minutes. A Yes.

Q Then that is where it turns to go into Pier 5? A Yes.

Q Did you ever get any nearer to the fire than opposite Pier 5, opposite that place you have just described? A Yes, I—

Q How much nearer? A I placed my men just east of that driveway, and I went down about a hundred feet nearer the fire to look it over before telephoning to the Fifth Precinct.

Q A hundred feet? A About a hundred feet; yes, sir.

Q About a hundred feet down the driveway? A Yes, sir.

Q From the— A That is, down the tracks.

Q Well— A Down the tracks. We were then on the tracks. I left the driveway after placing my men across the tracks and to the north of the track, and I put one man in the driveway—two men on the driveway there, Dougherty and Kachler in the driveway between the two warehouses, and three men across the railroad tracks, and one north of the railroad tracks on what they call the flats.

Q Where did you walk yourself after you went down this hundred yards? A Went down the tracks.

Q Hundred yards or a hundred feet? A A hundred feet—about a hundred feet.

Q Did you go down the tracks nearest the warehouse or nearest the sea wall? A Well, I couldn't tell you just—there is only four or five tracks across there that I recollect; maybe six tracks.

Q All right; you walked down between these tracks? A Yes.

Q That is the nearest you ever got to the fire? A About a hundred feet east of that driveway.

Q Yes. A Well, I say that is the nearest—no, I wouldn't say that, because when I went down the bulkhead I got within fifty to seventy-five feet of the end of it there; I don't know how near the fire was to that.

Q Fifty or seventy-five feet of what? A From the end of the warehouse on the bulkhead.

Q What bulkhead did you go on ? A Right—south of the warehouses.

Q I know, but there are a lot of bulkheads south of the warehouses. A No, sir; there is only one bulkhead goes down south of the warehouse. There is two piers, Pier 5 and Pier 6, and Pier 4 and Pier 7 runs from the bulkhead.

Q What bulkhead did you go to? They all have bulkheads. A I came—

Q Do you mean you came through 5? A When I arrived at the fire I placed my men across the railroad tracks, two in the driveway, and then went down and looked the fire over. After I see the extent of the fire I go into the Lehigh Valley police shed just at the entrance of Pier 5 there—no, further down—right there, yes—I telephoned to the Fifth Precinct and notified them of the extent of the fire and that I would keep my men there, as it was a large fire, and it was going to take all night, and I came out of that police shed and noticed in going down that bulkhead—I noticed that bulkhead and thought I could get down the bulkhead in a position to see the fire from the front end of the brick warehouses.

Q Do you mean to say you walked down that bulkhead clear to the end of it? A Within fifty or seventy-five feet of the end of it.

Q You couldn't see anything then? A No, sir.

Q Because the building was in your way? A No, sir; I couldn't; the reason I couldn't was because a shell busted on Pier 6 behind me, and I realized it would be foolish and careless for me to go down there, so I stopped.

Q And you went back along the bulkhead again? A Yes, sir.

Q And back here to Pier 5? A That is right.

Q And out to the roadway? A Yes, out to my men.

Q That is where Gately was, opposite Pier 5, where you were? A Later on I found him, and I got talking to Hamill, and he came along and stood alongside of us.

Q You were all standing out here by the railroad tracks opposite Pier 5? A We were east of the driveway, sir.

Q East of the driveway? A Yes.

Q How far east of Pier 5—of the driveway that comes out of Pier 5—how far east of that? A Well, we were possibly—at the time of the explosion we were possibly about fifty feet east of the driveway—that is 2:08.

Q Now, Officer, aren't you entirely mistaken when you guessed that you were three to four hundred feet from the fire? A No, sir.

Q You don't mean to say the fire was within three or four hundred feet of this place, do you? I am pointing here just east of the Pier 5. When you and Gately and Hamill were standing there at the time of the first explosion you were a great deal further than three or four hundred feet from that fire, weren't you? A Not as it looked to me.

Q Oh, as it looked to you; but that is just a wild guess? A No, sir; it is not a wild guess.

Q All right; let's see if it is not. You know that the fire was below this big tank, don't you, at the end of the storehouses? A No, sir; it was not.

Q It was not? A No, sir.

Q The fire that you saw where the explosion took place was west of the big tank, was it? A No; it was west of the big tank, yes.

Q And the explosion took place west of the big tank? A Well, no; I wouldn't say the explosion took place.

Q I thought you just told us the explosion came from where the fire was? A Yes, sir; I did.

Q All right, then; the explosion and the fire both were west of the big tank? A No, sir.

Q Please explain that. If the explosion was where the fire was and the fire was west of the big tank, why wasn't the explosion west of the big tank? A Because in front of the explosion there was probably eight or ten cars; that fire kept spreading up that track towards us; we had to move back several times when the shells fell around us—some of the firemen took the shells as souvenirs that came near hitting them. The fire kept eating up the track towards my cars.

Q Well, were there any cars anywheres near you up here? A Yes.

Q Were there any cars at all west of the big tank? A Yes, sir; the cars that was burning was right in front of the lower warehouse.

Q Right in front of these lower warehouses? A Yes.

Q The cars out here? A Yes, sir.

Q They were burning? A Yes, sir.

Q Were they sending off shells? A Yes.

Q That is where the shells were coming from, the cars right opposite the warehouses? A The cars I could see burning was in front of them two end warehouses; that little warehouse to the end I couldn't see, but the other two warehouses I could see.

Q You mean P and Q? A Yes, sir. It was on front of there where the fire was burning.

Q You couldn't see any fire further down? A No, sir; you couldn't on account of the smoke.

Q Then the only fire you saw was fire in front of P and Q? A Yes, sir.

Q Did the explosion seem to be in that same general neighborhood? A Just in the smoke.

Q In the smoke? A I want to explain myself further. When you speak about fire being below the tank, I could see below that tank from where I was on that bulkhead; there was no fire in the lower yard at all.

Q There? A That is the reason I say there was no fire below that tank.

Q I understand the fire that you saw was in front of P and Q and the fire was about that smoke where that fire was. Now, you said when you left there Gately was there and No. 3 truck, and the apparatus was there for 8 engine. What did you mean by apparatus for 8 engine? A I didn't say 8 engine; I said the apparatus on 8, 10 and 16. The engine was not there.

Q There was no engines at all there? A I didn't see any engines there. That was the hose wagon there.

Q The engines came later, didn't they? A I don't know when the engines came there, sir.

Q Did the engines come up to three o'clock when you left? A Well—

Q Did you see any fire engines down there at all? A No; I say I don't know when they came there. They may have been there when I was there for all I know, but I didn't see them.

Q You would see them if they were anywheres near around where you were? A Yes, sir.

Q You are quite convinced at that time there were no fire engines there? A I didn't see any there.

Q Where do you think they put them when you couldn't see them? A That I couldn't tell you.

Q Just as a matter of common sense there was no place that they could put those engines where you couldn't see them? A If they would describe where they were I could tell you whether I could see them or not.

Q Well, they were not on that driveway? A They wasn't on the driveway, nor they weren't into Pier 5.

Q No. Now you observed some brakemen standing on top of freight cars that were backing in to pull out some of these cars that were near the fire, didn't you? A I did, yes. Two—one on each train.

Q And they were backing in as I understand it to get cars that laid east of P and Q? A Yes, sir.

Q And at the time of the explosion did you see what happened to those men? A No; I did not.

Q You are not the man that saw one of them rise up in the air? A Sir?

Q You are not the witness that saw one of them rise up in the air? A No, sir. I see one of them later, but I do not know what happened to him at the time of the explosion.

Q Was he injured when you saw him? A Well, when I was getting my cap and the other caps he went by me; he was bleeding from the nose here and he directed me to where his brother was; I went for his brother but I could not see him.

Q Was his name Walsh? A I believe Walsh, I believe both their names was Walsh.

Q Were you thrown down by this first explosion? A I went down a number of times, but I was not thrown that time.

Q You were sort of groggy? A No; it did not make me groggy; it just seemed to take the life out of me. Then as I say when the report came everything seemed to move and I made an attempt to get away, as the others was, and I went a little ways and went down. There seemed to be a great weight bearing down on me.

Q You were in the roadway? A Yes.

Q You said after a while you found yourself in contact with a hose cart? A I did not so testify, but I did before.

Q What was it you said you found yourself in contact with? A I was under 5 truck.

The Court. Went down by a truck.

Q Went down by a truck? A Yes. The last time I fell some one hollered, look out for the apparatus, look out for the horses; and in falling—looking back toward the fire you could see things. Everywhere else you couldn't.

Q Perfectly black? A Yes; you could not see what was alongside of you; and I seen the horses almost on top of me. Realizing I could not get up I rolled out of the

way, and in doing so I rolled under the runboard of 5 truck and I could not get under it; I just happened to wedge in there. Five truck was standing still; and some one caught these horses just as they got alongside of me or the hubs would have ripped them.

Q You said you saw the policemen and the firemen coming back; where were they coming back from? A No, sir. When this apparatus was taken from over me I got up and followed it up the road. It seemed to leave all this dirt and stuff drop—you could see it; it got plain just as it does after a thunderstorm; the air seemed to clear. I realized then my cap was gone. I went back looking for my cap. While I was looking for my cap I seen three fellows' caps and a number of firemen's helmets. Then was when Walsh hollered to me to get his brother out.

Q You said after a while you saw the policemen and firemen coming back? A Yes.

Q I want to know where they were coming back from. A I got these hats and took them out toward the gate toward Jersey City; and I had gone probably 100 feet past where I had laid when I met the firemen coming. That was Captain Casper and probably six or eight firemen.

Q Had you seen them before? A No; I did not distinguish them before.

Q Were these police officers your own men? The ones coming back? A About fifteen feet further back I met the police officers, fireman Kachler and Hamill, and I gave Hamill his hat. The other hat patrolman Gidlick came over and took; and there was another one we did not know who it belonged to. That hat I gave to Kachler.

Q You said when you were walking over to Pier 6 a shell exploded on Pier 6 right back of you? A I was about 50 or 75 feet from the end when the shell exploded on Pier 6.

Q That is what I said. And up where you were all standing there were a lot of shells exploding all around?

A Well, they were exploding in the air and flying where we stood in the driveway.

Q And did little pieces of shrapnel come out of them, little pieces of steel and iron come out of them? A They did not come out of them; they came out in the air.

Q They showered down on you like hail? A Yes.

Q They made a great deal of noise? A Yes; when they went off in the air. It appeared as if one car was shooting at the others and all the others were shooting at it.

Q Like a battle? A Exactly.

Q You said there were two lines of fire hose running past where you were. What were they hooked up to? A I could not tell you. I seen them lying on the ground alongside where I was. I could not tell you where they were hooked up at all.

Q Did you stay there up to the time of the second explosion? A I was pulling a man out of the rooms at the second explosion.

Q Then you were there at the second explosion? A Yes.

Q How long was the second explosion after the first explosion? A At the time I did not know, but I found out since it was 22 minutes.

Q And the first explosion was at 2.08 I think you said? A 2.08; and the second at 2.30.

Q How do you come to have such a good knowledge of that first time? A I have no knowledge, only as I told you I found out later.

Q That is both as to the 2.08 and the 2.30? A Yes, sir.

Q After the second explosion you stayed about half an hour and then you went wherever you went—you left about three o'clock in the morning? A No, sir; it was about three o'clock when Chief Monahan got there and ordered me to clear the yard.

Q You left this part of the pier then? A We went to the gate.

Q You said you left there at three o'clock? A Yes.

Q That means you left this part of the yard and went up toward Jersey City? A Well, toward Jersey City. Chief Monahan arrived there about three o'clock.

Q He was chief of the police department? A He was at that time; and he ordered me to have that yard cleared.

Q Were there many people down in the yard at the time of the first explosion? A Do you mean besides the firemen?

Q Yes, besides the firemen and the policemen? A Well, no; I would judge there were less than 100?

Q You of course do not know who they were, I suppose? A Well, no.

Q Do you know whether they were railroad men or not? A We kept them back if they had no business there. There was several there my men told me flashed their shields and were admitted in the lines.

Q They were railroad men? A Yes. Outside of that we kept them out.

Q Up to the time that you left at three o'clock you did not see any water being thrown on that fire by anybody, did you? A Well, I did not leave the fire until pretty near nine o'clock.

Q I am talking about when you went out to the gate; you could not see anything by the gate? A No.

Q I am talking about where you could see things. You could not see anything down there around three o'clock? A Yes, I could.

Q You could see from the gate what was going on in the yard between three o'clock and nine? Now, think about that. A I did not get your question exactly.

Q You said you were about a mile away? A Easily a mile.

Q I am talking about after you got a mile away from this scene, before you made that departure and went a mile back, did you see any fire engines pumping any water on that fire? A No, at no time did I see any fire engines pumping water on the fire.

Q When you were out at the gate were you near the gate when you went out there? A I was at the Caven Point road gate.

Q Is that another connection with Jersey City than the one you first spoke of? You see I did not know there were two gates there. A There is two entrances to this plant, but I did not speak of none previous to that. That is the way I went.

Q That is the way you went down—Caven Point? A Yes.

Q Is that the way these fire engines would naturally go down? A I do not know. 10 engine I think would come down along the shore road.

Q That would not be the one you were on? A No; that was not the one I was on.

Q Where would the others come from, No. 8 and No. 16, what road would they naturally come? A 16 might come the shore road or could come the other way, either one; but 8 would come down that way.

Q Did you see 16 or 10 come down? A No, sir; they were there when I got there.

Q What were there, the engines? A I do not know about the engines; the firemen.

Q I am talking about the engines? A I did not see the engines arrive there at any time, I say.

Q Even after you went out to the gate you did not see them? A No, sir.

Q Now, lieutenant, you remember testifying before in the plate glass case? A Yes.

Q I do not suppose you remember the name of the case, but you remember my examining you once before over here? A Yes.

Q I will read you a question and answer as recorded in that case, and ask you if you remember the question and answer: "Answer my question. As a matter of fact you don't know whether they could get water or whether they could not get water, do you? A No; I cannot say that I do." Do you remember that? A Yes, sir.

Q That was true when you said it, wasn't it? A Well, what is the preceding question he had asked? I do not know just who you mean when you say "they."

Q "Answer my question. As a matter of fact you don't know whether they could get water or whether they could not, do you? A I know— Q Answer my question. As a matter of fact you don't know whether they could get water or whether they could not get water, do you? A No; I cannot say that I do." A May I ask who that question has reference to?

Q That question has reference to the firemen? A Yes; I answered that question that way.

Q And that was true? You did not know whether they could get water or could not? A No.

Q And you do not know now whether they could get water or could not? A I know they could not get water from the two hoses that passed me.

Q You do not know whether there were lots of other hydrants? A No.

Q You do not know how many miles of hose there were down there? A No.

Q So all you are talking about is these two lines of hose that went by you and you do not know where they might have been connected? A No; all I know, the firemen just went over and raised it up two or three times and the water ran out ten or fifteen feet.

Q Just as a garden hose will when you pick it up, some water will ooze out of the end of it? A Not when you pick the nozzle up; the nozzle would have to blow.

Re-direct examination by Mr. Skinner.

Q When you were down on this bulkhead—you spoke of going down the westerly side or southerly side of the storehouses? A Yes.

Q And getting to a point about fifty or sixty feet from the end? A Fifty to seventy-five feet from the end.

Q Yes; the storehouses that you were alongside of, were they solid or made of brick and mortar or were they glass or what? A They were all brick storehouses. From the driveway down they were all brick storehouses.

Re-cross examination by Mr. Garrison.

Q That reminds me; I want to be perfectly sure. You said that when the first explosion took place it seemed as if the roof of the two last storehouses seemed to crumble up and fly off in the bay, or something like that, didn't you? A No; that was when the report went.

Q Yes. A Everything seemed—

Q But as a result of the first explosion? A Yes.

Q Yes; I am only trying to fix the storehouses. When you said the two last did you mean Q and R or P and Q? A No, sir; I meant the two warehouses below the driveway that take in the block, I do not know them as P, Q, R or S or anything of the kind. I mean the building.

Q Yes. Now, come down here so that I can get this plain. It is quite important that I should. This is the driveway; that is where it stops. You draw a line over here and you come by O. A This is where I was. I was standing about fifteen feet below the driveway. This is Pier 5?

Q Yes. A The two warehouses set—I meant this for one and this for the other.

Q The whole block? A Yes; all except this end wall. That was the only thing that was not blown off of the two warehouses.

Mr. Skinner. The witness indicates two blocks, one containing Stores G to M and the other Stores N to R.

JOHN J. HOGAN, sworn.

Direct examination by Mr. Skinner.

Q You are connected with the Jersey City fire department, are you not? A Yes.

Q And in what capacity? A At the present time, captain.

Q July 29-30, 1916, were you in the department? A Yes.

Q And in what capacity there? A Lieutenant of engine company No. 8.

Q Did you go down to Black Tom on the night of the 29th and the early morning of the 30th of July, 1916? A Yes.

Q Do you remember the fire at Black Tom? A July 30, 1916.

Q Were you there that night of the fire? A Yes, sir.

Q When did you first hear of the fire? A About one o'clock, in the morning.

Q How? A We received a telephone message from headquarters to respond to Black Tom Island.

Q Did you go? A Yes, sir.

Q About how long did it take you to get there? A About, I should judge, twelve or fifteen minutes.

Q Then you got there about 1.12 to 1.15? A About that time.

Q Did you go alone or did any others go with you or did you go with any apparatus? A Went with the hose —or the tender—what we call the hose wagon, and four men beside myself.

Q When you got there did you see any fire? A Yes, sir; I saw a number of fires.

Q Where was it? A On the right of the driveway. We went down—to the right of the driveway we seen several freight cars afire there.

Q Keep your voice up. A Several freight cars and ammunition exploding in all directions.

Q How did this ammunition exploding show itself to you, by what you saw or what you heard, or both? A Both.

Q What did you see and what did you hear? A I see the fire, the freight cars burning, and the ammunition exploding and the report from the—

Q Was there much of that or only a little? A Well, I seen quite a bulk of fire there.

Q Now, do you remember the warehouses? A Yes, sir.

Q Had you been down there before, Captain? A Yes, sir.

Q And were you familiar at that time, July, 1916, with the three blocks of warehouses? A Yes, sir.

Q Where was the fire that you saw with reference to the most easterly one of the three warehouses? A At the end of the warehouses, on the road.

Q On the road? A Below the warehouses—the fire were below the warehouses.

Q By below do you mean easterly? A Easterly, yes, sir.

Q Could you tell from where you stood just how far easterly those cars were that were burning—how far east of the easterly end of the warehouses? A Well, the tracks run—the way the tracks run there it did not seem very far from the end of the storehouses.

Q Well, then, where were you standing when you saw them first? A On the roadway.

Q Where, on the roadway? How far away from the fire would you say? A Between the first and second storehouses.

Q Well, between the first and second. When you say first and second, do you mean the first and second after you—that you came to as you went in? A Yes, sir.

Q Or—

Mr. Garrison. "Yes, sir."

Q Then between the two most westerly of the three storehouses? A Yes, sir.

Q That would be—

Mr. Garrison. Is it F and G?

Mr. Skinner. It would be a point somewhere between F and G, opposite Pier 5.

Q Now, did you find anybody of the Jersey City fire department there when you reached there? A I was the first company in there.

Q Did Chief Gately arrive? A After I did; yes, sir.

Q How long after? A I would say about three or four minutes, perhaps; little more.

Q And when you got there what did you do? A I immediately went in to telephone and notify headquarters about the conditions about the fire, believing that I was the only company sent in there, and I knew there was more to do than one company could attend to. I went in through by the pump house there into the office to telephone, and there was a man there at the time telephoning for to send locomotives there.

Q Do you know who that man was? A I don't know; he was a dark complected man; I believe his name was Crane. I heard that afterwards, but I didn't know at the time.

Q Kane—well, have you seen a man named Kane, one of the Lehigh Valley watchmen? A Kane?

Q Yes. A I believe that was his name.

Q Well, did you have to wait for him to get through telephoning? A Just a minute or so when he handed the receiver over to me, and I notified Headquarters then.

Q Then what did you do? A Headquarters notified me that the other—there was other companies on the way down there. I went out and when I came outside, why, Chief Gately had arrived and I told him what I did and—

Q Did you get any orders from him? A I was told to run a line in.

Q Line of hose, that meant, didn't it? A Yes, sir.

Q Yes. Then what did you do? A I started the line in, and tried to get water.

Q From what? A From one of the high pressure hydrants, salt water hydrants, we call them.

Q Well, did you make the attempt to get water from that hydrant yourself, or did some one do it under your direction? A No, sir, I did.

Q Did you succeed in getting it? A No, sir.

Q What was the trouble? A There didn't seem to be any water in the hydrant.

Q Then what did you do? A I reported to the chief that I couldn't get any water; there was no water in the hydrant. I was told to go up and try another one.

Q Did you? A Yes, sir.

Q Just tell us what you did in your attempt to get water? Just describe it? A I tried these hydrants. I found that my regular wrench for the Jersey City hydrant wouldn't fit it. So I borrowed a monkey wrench from Captain Motser, and I opened the hydrant and found no water, and then I tried the valves over in back of them. I looked around. The monkey wrench wouldn't fit there, and I looked around and I found a wrench on the ground, and started to open one of these gates. There was no water, and so I gave up then as far as they were concerned. The chief said, "Well, try the fresh water hydrant." So I tried the fresh water hydrant, and the water just simply fell out of there, no pressure at all.

Q Now, the first hydrant you tried, you said was on the salt water main? A That was the company's hydrant.

Q What? A The company's hydrant, what we call the salt water hydrant.

Q What company do you mean? A Well, the storage company.

Q Well, then, the second piping that you went to after trying the first and failing to get water, was what kind of a hydrant? A Salt water hydrant, high pressure hydrant.

Q And the third one that you went to was what kind of a hydrant? A That was a fresh water hydrant.

Q On a different main then? A It was a city hydrant, city water.

Q Yes, city water. Do you know what kind of a hydrant it was, as to whether it was a two-way hydrant or a three-way hydrant? A Fresh water was only single.

Q Single. Then the next one was what kind of hydrant? A We call them three-way, but they were only two-way; there was no steamer connection.

Q No what? A No steamer connection.

Q But you say you called them three-ways? A Yes, sir.

Q Well, were all these hydrants that you tried so far as you know on the same line of main, or were they on different mains? A That I couldn't say. The city hydrant would have to be boxed—

Q How can you tell that one was salt water hydrant, or hydrant from salt water main, and the other was from a fresh water main? A The city hydrant is boxed in.

Q When you got there did you see anybody else—any Lehigh Valley employees doing anything at all towards putting out the fire? A No, sir.

Q Did you at any time see that? A No, sir.

Q Did you see any Lehigh Valley trainmen on trains in there? A Yes, sir, I—

Q What were they doing? A They were pulling out freight cars there until the locomotives came down.

Q Well, now, did the locomotive come down after you got there? A That is when I saw it, after we got there.

Q Well, do you know whether she came down then or whether she had been down before? A That I couldn't say.

Q She may have come down before and gone out and come back again? A Yes.

Q I see. Now, did you get any nearer to the fire than the point that you described, between F and G? A When we ran the line of hose down, why, we drove down past where the first and second stores are there, to run the hose down, and we got about half way down between the second; we couldn't get the horses any further so I told the driver to turn around and we pulled off the hose.

Q And pulled it in what direction? A Pulled enough off—well, we have to pull it off in a pile to get enough to go down to where the fire is; and we couldn't get any water. I told him to wait until we got the water before they went down; and when we couldn't get the water, why, we packed the hose up on the wagon again. We were ordered to put it on again and drive back in the roadway.

Q Now, how far down did you get that time altogether? You said something about— A Well, between that first roadway and the second row of storehouses.

Q Between the first roadway— A At the pump house there.

Q Oh! You mean the roadway that ran between the storehouses? A Yes, sir.

Q That is what you call the first roadway? A Yes, sir.

Q Between that and the what? A And the second row of storehouses.

Q Well, the second row of storehouses is on the east— A To the east.

Q To the east? A To the east of the roadway.

Mr. Garrison. He means half way.

Q Did you get half way down the length of the second storehouse? A I should judge, yes, sir.

Mr. Skinner. That would be about opposite I or K.

Q When you say you could get no water, do you mean that literally, that no water came, or only a little, or insufficient water, or no pressure? A The only water there was in the fresh water line, in the fresh water hydrant we got; and there was no pressure there at all.

Q But there was water? A There was water there.

Q Did it come out of the nozzle? A Just out of the hydrant, yes, sir.

Q Out of the hydrant. Now did this fire stay the same as it was or did it get bigger? A Oh, it kept spreading.

Q Spreading? A Amongst the freight cars.

Q Was that spread slow or rapid? A Well, it was going pretty well; it don't take long to travel.

Q Were you there when there was a big explosion? A Yes, sir.

Q Can you tell us where that explosion was with reference to the fire? A At the time I stood at that roadway, leading into the pump house, after we got the apparatus back, I was working down the roadway at the locomotive, backing some freight cars down, to connect up to some other ones, and while I was watching there and looking down the road I seen a glare, and it seemed to be quite sharp, and I turned, and after I turned my head away from it, why, the explosion came, and I remember my fire hat going off and throwing me down.

Q Well, when you say that the glare or explosion came, do you mean a noise or report came after the glare? A Yes, sir.

Q Now, where was this glare with reference to the fire that you had been watching? A It seemed to be right in amongst those freight cars.

John J. Hogan, cross.

Q How long did you stay there, Captain? A At the fire?

Q Yes. A I was relieved about somewhere around eight o'clock in the morning.

Q Did this first explosion have any effect on the warehouses? A Oh, yes, indeed.

Q What was it? A After the explosion, why, they were all blew apart, all tumbled down.

Q And was there any fire in them after the explosion? A Yes, sir; they took fire immediately.

Q And then what happened to them as the result of that fire? A There was a pile of ruins in there; whatever was in that was destroyed.

Q Whatever was in them was destroyed. When you were near the pump house, Captain, did you look into the pump house at all? A Yes, sir.

Q I think you said the pump house between Store F and G; that is between the first and second stores? A Yes, sir.

Q Could you see the pump? A Yes, sir.

Q Were they working? A No, sir.

Q And when you got there to the scene of the fire, were there any Lehigh Valley men to direct you at all? A No, sir.

Q Where to go? A No, sir.

Q Could you see where to go? Did you know your way in there? A Oh, yes, yes, sir; yes.

Mr. Skinner. That is all.

Cross examination by Mr. Garrison.

Q When did you look in that pump house, Captain? A When I came out of the office telephoning.

Q Didn't you see Sloan in there? A No, sir.

Q You know Sloan? A No, sir.

Q Weren't you here when he was on the stand? A (No answer.)

Q Weren't you here when Sloan was on the witness stand, either this trial or the last trial? A I don't remember the gentleman.

Q Well, maybe you don't know his name. Didn't you see the engineer that belonged down there, the engineer that had charge of that boiler, of that pump? A No, sir.

Q What other apparatus was there down when you got there, or were you the first to come? A I was the first there.

Q And you took down a tender? A Yes.

Q When did your engine get there? A That I couldn't say.

Q Well, she didn't get there until after the second explosion, did she? A No, sir.

Q You didn't have any engine on the ground until after the second explosion, did you—no fire engine? A I couldn't say.

Q Well, now, you know there wasn't any there, don't you? A I don't know whether any of the others came down or not.

Q Well, you were right there, weren't you? A Yes, sir.

Q And when you were trying to hook this hose onto these hydrants, you were not going to connect it with any engine because there wasn't any engine there? A There wasn't any engine when I went there.

Q And there wasn't any engine there until after the second explosion, was there? A I don't think so.

Q Now, the first thing that you did when you tried to couple up the hose was to put it on to the company's system, the Lehigh Valley Company's system? A Yes, sir.

Q That is the salt water, high pressure system? A Yes, sir.

Q Now, you say you couldn't get any water out of that? A No, sir.

Q Now, then, you tried the city system? A Yes, sir.

Q What was the trouble with the city system? A There was no pressure there.

Q Well, was there any less pressure there than there always was? That is the same system that goes all through Jersey City and protects this whole, great, big city, doesn't it? A We are not supposed to use that for fire purposes.

Q Why not? It is the city system, isn't it? A Yes, it is the city system.

Q Certainly; and if you had a fire engine down there it wouldn't make any difference whether there was any pressure on the pipe? A If you get two or three engines on a small main you get no water at all.

Q I didn't ask you that. I asked you if you had one engine down there and had a line of pipe on the city water, it wouldn't have made any difference whether there was any pressure in the pipe or not; the engine would furnish the pressure, wouldn't it? A If we get enough water.

Q Why couldn't you get enough water? You said there was water there but no pressure. You said there was water but no pressure? A You have got to have a good sized main to supply an engine with water.

Q How big was the city main there, do you know? A I don't know.

Q You don't know anything about it; you don't know whether it was big or small, do you? A They change it.

Q You don't know whether it was big or small, do you? A I don't know; no, sir.

Q No; and you had the whole bay to have sucked up water from if you had an engine there; isn't that true? You could have sucked all the salt water out of the bay that you wanted, couldn't you? A If you get the engine to work.

Q Well, what was the matter with your engines? Were your engines out of order, too? A What did you say?

Q Were your engines out of order, too? A No, sir.

Q Well, they could have worked, couldn't they? Why couldn't your engines work? A Why, we meet with obstacles sometimes, low tide or high tide.

Q Do you remember what the tide was that night? A No, sir.

Q Then that was not the obstacle as far as you were concerned? A No, sir.

Q Now, isn't it a fact that if you had all the engines in Jersey City there and all the firemen in Jersey City there, these shells would have prevented you from getting near enough to that fire to do any good; isn't that the truth? You couldn't really get near that fire, could you, on account of the shells? A Why, we would take a chance.

Q Well, did you take a chance? Were you anywheres near the fire? A Yes, sir.

Q How near were you to the fire? A I was as near as anybody else was.

Q Well, I know that. I am not impugning your bravery, sir; but I am asking you how near you were to the fire? A I should judge about five hundred feet.

Q Five hundred feet. Could you have done any good when you were five hundred feet away from the fire? A If we had water, why, we would have been nearer than that.

Q But you still don't answer my question. If the firemen—I don't care how many of them—were five hundred feet from a fire, you can't do any good; they have got to go nearer than that? A They have got to go nearer than that.

Q Now, as a matter of fact, weren't shells exploding all around in the intervening five hundred feet? Weren't these cars just like companies of infantry fighting each other, these explosions going off? A I don't know how far the shells were going off.

Q You heard them? A Heard them.

Q And you saw them? A I saw them.

Q And some of them hit near you, didn't they? A They were falling around in different directions.

Q And you knew shells kill people, didn't you? A Certainly, if they hit them.

Q Now, would you have felt justified—never mind what you would have done with your own life—would you have felt justified in ordering your four men to go down where these shells were shooting off where they might get hit with these shells? A I would have to go if the Chief told me to.

Q I haven't asked that.

(Question repeated by the stenographer.)

"Now, would you have felt justified—never mind what you would have done with your own life—would you have felt justified in ordering your four men to go down where these shells were shooting off, where they might get hit with these shells?" (No answer.)

Q Do you understand my question, Captain? A Yes, sir.

Q Well, answer it, please? A That is part of our business, to take a chance, and if we had water, why, I would have taken a chance and went down there.

Q You would? A And I will bet I could find men that would have went down with me in the Jersey City Fire Department.

Q Then your whole trouble was, you couldn't get water? A That was the trouble, that we didn't go down there.

Q That is the reason you didn't go down there? A Yes, sir.

Q That is the reason you didn't go down there? A Yes.

Q Because you couldn't get water? A Yes.

Q The whole bay to draw from; the whole bay and Atlantic Ocean to draw from, hadn't you? A At the time I was there I couldn't get no water.

Q Yes. How much pressure was there on the city water at that time that you opened that city hydrant? A I can only make a guess; about fifteen or twenty pounds.

Q What do you usually have in the city hydrants? A Well, it depends on the neighborhood. Some sixty; I have seen as high as sixty pounds.

Q What is the usual, in that neighborhood down there? A Well, it runs all the way from, as I say, from fifteen, twenty pound up to sixty pound, difference—

Q You had fifteen or twenty pound down there? A Yes.

Q The real trouble was you didn't have a fire engine down there, isn't it? If you had had a fire engine you could have gotten water out of your hydrant? Their system wasn't out of order, was it? The Jersey City system wasn't out of order, was it? A It was water there, but there was no pressure.

Q Was there any less pressure than you usually found at fires in city hydrants? Do you know? Are you constantly unable to put out fires in Jersey City because you havn't got enough pressure in your hydrants? A No, sir.

Q Then I don't understand you. Why couldn't you have done here what you did at all other fires? A Well, we hadn't the engines there.

Q You didn't have any engine there? A No, sir.

Q I say, that is the trouble there. The trouble is you didn't have any engines there; isn't that true? A I wouldn't say that.

Q You wouldn't say it? A No, sir.

Q Why wouldn't you say it, Captain? A Well, we depend—we depend in some cases on private fire apparatus.

Q I see. In some cases you depend on private fire apparatus and you don't take your engines; is that right? A Not in all cases.

Q No; I didn't say all cases. I said some cases. Isn't it a fact that if you had had an engine there the city

water system was all right and you could have pumped the city water onto that fire, or you could have pumped it out of the bay; you could have pumped the whole Atlantic Ocean on the fire if you had had suction enough, couldn't you? A If we had an engine down there, yes.

Q Now, Captain, from where you were, which I understand was in the neighborhood of the roadway between F and G, and then you said you thought you got down as far as I, where did this fire appear to be, using the North Pier as another point of the compass? A It was at the end of the storehouses in amongst—

Q At the end of this storehouse here? A Yes.

Q In amongst cars? A Yes.

Q Did you see the big tank over beyond the last storehouse, the one that was up in the big high steel structure? A Yes.

Q Did it seem to be about opposite that? A It was below that.

Q Further in the yard? A Yes.

Q How much further down? A Might have been—I should judge about a hundred feet or—

Q About a hundred feet further down? A Or a hundred and—

Q All right. Just where were you standing when the first explosion took place? A At the first roadway, the pump house.

Q Out in the roadway between F and G? A Yes.

Q Where the pump house is? A Yes.

Q Out in that roadway looking down toward the fire? A Yes, sir.

Q What effect did you say that first explosion had on the warehouses? A After the explosion, why, the warehouses seemed to loom up and take fire.

Q Well, loom up and take fire? Didn't they loom up and fall down? Didn't the roofs go off and didn't they all fall down? A After the explosion I got up and

looked around and I seen everything—everything seemed to be dark.

Q Well? A And in a few minutes, why, it started—it started fire in amongst the storehouses.

Q Yes; but you are not answering my question. I asked you whether those storehouses did not seem to crumble up and fall down? Were they all intact? Did they all stand perfectly solid after the explosion? A No, sir.

Q They all fell down, didn't they? A They were all down after the explosion. They were all up before the explosion. They were all down after the explosion.

Q That is what I say. A I say all; I will correct myself on that. Not all of the—the two and one storehouse on the—

Q The two blocks nearest the North Pier were knocked down, were's they? A The two blocks below the pumphouse.

Q Yes? A Yes.

Q Toward the North Pier? A Yes.

Q All right. They were knocked down? A Yes.

Q Now, do you mean to say there was fire in that after the first explosion? A After the first explosion—yes, sir.

Q There was? A Yes, sir. They loomed right up after the first explosion.

Q They did? A I say the fire started after the first explosion.

Q You were there until eight o'clock in the morning? A Yes.

Q Did anything in the storehouses explode? A I didn't hear it.

Q No. Did you get any fire—what time did you first get water in your fire hose? Read the question, Mr. Kelley.

(Question repeated by stenographer.)

A After the second explosion.

Q Yes, how long after? A Well, I couldn't say. After the explosion, and they commenced working up near the—we put a line on that city hydrant trying to wet down around there, but there wasn't enough pressure there, so we could get near enough to it.

Q What time did you get enough water from any source to enable you to do any good in the way of fighting fire? A We got a line from the New York fireboat.

Q Is that the first thing that did any good? A That is the first that I know of.

Q Well, then, when did the Jersey City fire department first get anything that did any good in the way of putting fire out? A Well, I was only running one company; I was only commander of one company.

Q Yes, but your eyes were all over the place. You could look at other places besides your own place? A Yes, that is a long place.

Q Do you know when the Jersey City fire department ever got anything that did any good in the way of putting out that fire? Do you know? A Well, I heard later that—

Q Did your company ever get any water on that fire? A Yes, sir.

Q When did you get any water? A We took a line from the New York fireboat.

Q When was that? A That was after—I should judge about an hour after the explosions.

Q Did you ever do anything with your own apparatus, your own No. 8 engine, and your own hose? A It was working there after, yes, sir.

Q What say? A It was working there after I found out that the engine was there.

Q Now, when did your engine get there? A I couldn't say what time it was.

Q Haven't you any idea of the right hour, whether it was three o'clock, four o'clock or five o'clock, or six o'clock? A It was after three o'clock.

Q I know that, but how much after three? A That I couldn't say.

Q Was No. 8 the first engine that got there? A I couldn't say that.

Q What can you say about it? Do you think No. 8 was the first or not? A I couldn't tell.

Q Weren't you interested enough in fire apparatus to know whether any engines were coming or not? A I had my company working on that line from the New York fireboat.

Q Did the New York fireboat get there about three o'clock? A There was chiefs and battalion chiefs down there and other captains; I only took care of my own one company.

Q Did the fireboat get there about three o'clock? A Around three o'clock; yes, sir.

Q All right. Now, the second explosion was about half-past two, wasn't it? A I couldn't tell you what time the explosions were or what—

Q How long after the second explosion was it that New York fireboat got there? A Well, it only seemed to be a short while; half an hour or an hour.

Q When you got water out of the hose where did you direct your hose; what were you squirting on? A On the storehouses—the first storehouse, the end storehouse at the pump house, to keep—

Q The one nearest the pump house? A Yes, to keep the fire—wetting down the walls there to keep the fire from going further or taking in the storehouses that were left there.

Q What effect did the second explosion have on the storehouses? A Well, I don't know; I couldn't say that.

Q Where were you at the time of the second explosion? A I was at—I was at the apparatus trying to keep the horses from going up the roadway. They started to run away and I went after them.

Louis Treger, direct.

Q Started to run away before the explosion? A It was the second explosion.

Q I say before the second explosion? A Before the second explosion.

Q Did they start to run away before the second explosion? A No, sir.

Q Where were you, then, at the time of the second explosion? A I was standing right at the apparatus; right at the pump house, the roadway there.

Q Between F and G? A Yes.

Q Were you looking down toward the North Pier? A No, sir.

Q Where did that second explosion seem to come from? A I don't know. I don't know where that came from.

Q What effect did that have on you? A Well, it didn't seem—didn't seem to be anything, the second explosion.

Q I couldn't hear it.

(Answer repeated by stenographer.)

Q What effect did that have on the warehouses; did it shake any of their walls down? A Well, that I couldn't say.

Q Had these horses run away or tried to run away at the time of the first explosion? A Yes, sir.

Q And also at the time of the second explosion? A Yes, sir.

Q That is all.

Mr. Skinner. That is all.

LOUIS TREGER, sworn.

Direct examination by Mr. Skinner.

Q Mr. Treger, you belong to the Jersey City fire department, do you not? A Yes, sir.

Q And did on July 29 and 30, 1916? A Yes, sir.

Q What company did you belong to? A Was a member of 16 engine company then.

Q Where was this engine house? A On Belmont avenue right off of Monticello.

Q Were you the driver of the tender of that company? A Yes, sir.

Q Did you get down to Black Tom that night? A Yes, sir.

Q And see a fire there? A Yes, sir.

Q What time did you hear about that first? A Well, I should judge around 1:05, I think; I was ordered by the captain of the company to proceed with the tender down to Black Tom.

Q Did you go down? A Yes, sir.

Q Driving horses, or— A Driving a tender—horses—horse-drawn apparatus.

Q How far into the Black Tom yard did you get? A Got down as far as, just this side of the driveway, in between the furthest storehouse out, that is, from the north end.

Q There was a driveway there, was there? There were three storehouses, weren't there, that is three blocks? A Three blocks, yes.

Q Was there not a driveway between the most— A Yes, between the last—

Q —just let me finish my question. You mean the driveway between the first storehouse and the second one as you go in? A No, sir.

Q Between then the second and the third? A Yes; right below—right below it.

Q Yes. Now I am asking you as you went in? A Yes, sir.

Q You were going easterly, weren't you? A Yes, sir.

Q Did you get to a point then between the two most easterly warehouses? A Well, I got—the easterly end of the second block.

Q The easterly end of the second block, that would be— A Right below where your hand is; about in there.

Q I will indicate it then by a little east of Storehouse A. A Didn't get beyond the driveway—no, back further; back further than that.

The Court. He didn't get beyond the driveway —back further.

A About in there. Right opposite that storehouse.

Q Indicating a point about opposite the northeast corner of Store M? A In around about in there.

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

Q Where was it? A Right directly ahead and a little off to the right—right off from the end of the storehouse—furtherest one out.

Q Off of the end of the most easterly storehouse? A Yes—right ahead—

Q What was burning? A Seemed to me to be cars.

Q Cars. Did you see anything besides flames? A Well, seen like rockets in the air; I couldn't say what they were.

Q Was that the condition that you saw when you first got there? A Yes.

Q When you got there did you see any other engine company or any members of the Jersey City fire department? A Yes, sir.

Q Who? A Well, as far as—there was a truck and two tenders.

Q Do you know what companies those tenders were from? A 8 and 10.

Q Did you see Captain Hogan there? A No, sir; I don't—I seen him later on—I didn't see him when I went right down there.

Q Did you see Chief Gately? A Yes, sir.

Q Well, did you see any attempt made by the Jersey City fire department or by anybody to get a stream of water on that fire? A Well, we made attempt; I was

ordered to stop at a hydrant, which I did, and they pulled off the hose and told to go ahead and went ahead a little distance, and was ordered to stop.

Q Yes. Then what did you do? Did you see anybody? A I waited there for further orders. Now, what transpired between the captain and the rest of the company I don't know. Then after a while there was—they started to put the hose on the tender again. Told to turn around and go back.

Q Well, then—and you were staying by your horses all the time? A I was by the horses, yes, sir.

Q And you don't know whether or not they were able to get water or not? A No, sir; I do not.

Q Did you see the explosion? A Yes.

Q The first big explosion, I mean? A Well, I had my back kind of turned to the big one.

Q Well, could you with your back turned to it, could you tell from what point or what direction the explosion came? A Yes, sir.

Q How? A It seemed to come from the east.

Q From the east? A Well, it ain't exactly east; right straight down the roadway.

Q Back of you? A Back of me.

Cross examination by Mr. Garrison.

Q Were you there at the time of the second explosion, Mr. Treger? A Yes, sir.

Q Where were you then; about the same place as you were the first? A No; I think a little further down—the horses ran away—

Q They ran toward the fire? A No, they ran away from the fire; turned around and run down the roadway.

Q How close were you to the second explosion? A Well, the second explosion we was driving back again, going to line up again.

Q You were driving toward the fire? A Towards the fire.

Louis Treger, cross.

Q How near were you to the second explosion? A Well, somewheres around about that first gangway in there, or driveway, a little beyond that, might be one storehouse beyond that or so.

Q One storehouse? A Around about that, I wouldn't say for sure.

Q I am not trying to pin you down. One storehouse beyond that F—or between F and G? A Coming this way, driving towards the fire.

Q Where did the second explosion occur? A Right straight ahead of me.

Q Right in the yard? A Right straight ahead, right at the end of the driveway.

Q In the yard, in the railroad yard? A Well, I don't know—yes, the railroad yard there.

Q Now you said that the fire when you got there was right straight ahead of you and to the right. A Well, it spread around that vicinity.

Q I am talking about when you first saw it before it spread. I am not talking about after it spread. You were about here somewhere and the fire was down here and off to your right, was it, as you faced it it was off to your right? A Well, just a little—right ahead, or—what I mean is off in them storehouses—off in the storehouses—the end of the storehouse.

Q There is the end of the storehouse? A Right off of that like, where the roadway is. Is that the roadway?

Q The roadway don't go down to the storehouse? A They run along—there is tracks on each side of the roadway—

Q Where do you want to place the fire? Here is the end of the storehouse. A A little over—to the back there.

Q How far? A A little further out; in around there some place.

Q And did the second explosion seem to come from that same place? A Right from around in there.

Q Both seemed to come from the same place? A About the same; yes, sir.

Q You saw a hose stretched in there with water coming out of it, didn't you? A Yes, sir.

Q Did you know where that hose came from, what it was hooked up to? A I presume it was hooked up to a hydrant.

Q You do not know which one, or where it was? A No.

Q Do you know whether it was a Lehigh Valley hose or Jersey City fire department hose? A I could not say that. I believe it was a Jersey City fire department hose.

Q I could not hear that last answer. A I believe it was a Jersey City fire department hose; members of the fire department had hold of it.

Q And there was water coming out of the nozzle? A Well, a small stream coming out, not enough to do much good.

Q How near was he to the fire? A I could not just say.

Q And these rockets that you speak of, were they shells that were exploding in the air? A I heard afterwards that they were. I could not tell at the time being.

Q You learned afterwards that these things you called rockets were shells? A Yes.

Q Didn't some of the particles fall near you? A No; they did not come close to me. I was further down the roadway. The men were further up the roadway than I was. I was down by the tender.

Q You could hear the pieces of stuff fall on the ground like pieces of coal or some hard substance, couldn't you? A I could not hear nothing fall on the ground. I was too far away from it.

Q Could you hear the shells go off, the pop of them? A Very slight.

Q But you could hear the pop? A Just about hear.

Q You saw some Lehigh Valley trainmen down there, didn't you? A Yes.

Q Saw them running their trains in, trying to pull cars out? A Pulling cars out, yes.

Q How long did it take you to get down there? A Oh, it would take us about fifteen minutes.

Q And you were ordered to go down at 1:05 you say? A I do not know the exact time.

Q You said 1:05. A I said around about 1:05.

Re-direct examination by Mr. Skinner.

Q How late did you stay? A We stayed there till around about eight o'clock in the morning, if not a little bit later.

Q Did you see any effect of the explosions upon the warehouses? A Well, the end one seemed to me to be the end blown out.

Q Did you see any fire in the warehouses? A Yes, sir.

Q What did you see of that? A They were afire; I seen them burning.

Q Yes; for how long? A Oh, they were burning after I left in the morning. That is the whole row of them.

Q And how long before you left were they burning—minutes or hours? A Oh, they were burning hours.

Re-cross examination by Mr. Garrison.

Q Now, just one minute about that. You said the explosion blew out the end of one of the storehouses. Do you mean one block or one storehouse? A Right at the end there, the east corner of one storehouse.

Q That is all the explosion did? A It cracked up further down, but it took the roofs and other part of the buildings down; it cleared it right out.

Q Destroyed those other buildings? A It looked to me it destroyed the first two or three there.

Robert W. Davidson, direct.

Q Then what did it do to the rest? A The rest were afire.

Q They were not afire immediately? A They all did not take afire immediately.

Q I am talking about immediately after the explosion. A After the explosion it looked to me that the end ones were burning.

Q The others were not? A Not the lower ones, no.

Mr. Garrison. May we have a recess for two or three minutes?

The Court. Yes.

ROBERT W. DAVISON, recalled.

Mr. Campbell. With a view to avoiding any possible debate with regard to market value, the plaintiff—

The Court. We would better wait just a minute. I told Judge Garrison he might have a vacation for a moment, and we would better wait until he comes back, unless you agree to go ahead. Now, I think you may proceed.

Mr. Campbell. May it please the Court, with a view to avoiding any possible debate on the question of market value, the plaintiffs will limit their claim to Friday's price of 5⅛ cents or its equivalent and disregard the market price of Monday of 5¼, and I will ask this witness to give us the computations on that basis.

Direct examination by Mr. Campbell.

Q Mr. Davison, have you calculated the value of this sugar on the equivalent of 5⅛ cents per pound—Friday's price? A I have.

Q Take up the sugar, if you please, in each of the warehouses G, H, N and O. In the first place, how many bags were there in Storehouse G? A 3,096.

Q And what was the weight? A 1,000,658.

Q And what would be the value of that on the basis of 5⅛ per pound, c. and f? A $51,329.94.

Q Now, take Warehouse H. How many bags? A 3,210 bags.

Q And the weight? A 1,037,504 pounds.

Q And the value? A $53,220.

Mr. Garrison. That is c. and f. too?

Q This is at the same rate, 5⅛?

Mr. Garrison. But c. and f?

A Yes; c. and f. 5,050 bags in Warehouse N, weighing 1,632,211 pounds.

Q Value? A $83,373.94.

Q Now, take Warehouse O. A 10,152 bags, weighing 3,281,228 pounds. Value $168,230.28.

Q What is the total of the values in Warehouses G, H, N and O? A $356,154.16.

Q Have you calculated the interest on that sum? A I have.

Q Up to when? A From July 30, 1916, to March 24, 1919.

Q That was last Monday? A Yes, sir.

Q At what rate? A At 6%

Q And how much does that amount to? A $56,613.85.

Mr. Garrison. Of course your Honor understands that in not objecting to this computation I am not admitting that the interest should be added.

The Court. Why do you put in interest to March 24th?

Mr. Campbell. I originally told him to calculate it down to March 24th—if we lose by it—

The Court. If you are willing to stand by that computation all right.

Mr. Campbell. I am willing to stand by it.

The Court. All right.

Mr. Campbell. Under our practice we calculate the interest to the time of trial. Perhaps we would better omit the calculation of the interest and let it be calculated later by consent. Would that be agreeable?

Q These figures you have calculated are down to March 24th? A March 24th.

Q Will you tell us how you have calculated the damage to sugar in Storehouse E? A In Storehouse E there were put in 3,870 bags and we took out—that is sound sugar—we took out 819 bags of sound sugar and 3,051 bags of damaged sugar, and at the same base of 5⅛ cents at the different tests, the value of the sugar as in the store—that is sound value—would have been $63,970.14.

Mr. Garrison. That is the sound value of the whole 3,870 bags. You did not give us the weight.

A 1,251,823 pounds. Now, we took out 3,051 bags of damaged sugar, weighing 928,525 pounds, testing 92.47, value $44,979.14. There were 819 bags of sound sugar weighing 259,824 pounds, value $13,288.03.

Mr. Garrison. What was the test of that?

A That was the sound sugar; the original test of 95.7311. The total value taken out of $58,267.17, making a difference of—

Mr. Garrison. That is the value taken out, you say?

Q Now, you deduct that from what? A From what the value ought to have been—that is the value that was put in the store.

Q What was that value? A $63,970.14—making a difference of $5,702.97. And the charge of cooperage on that of $16.33, making a total amount of $5,719.30.

Robert W. Davidson, cross.

Q Now, have you calculated the interest on that? A I calculated the interest on that for the same time at the same rate and it amounts to $909.13.

Q The total of principal and interest is what? A $6,628.43.

Q Did you tell us the total of principal and interest of the other items? A I did.

Q I do not think you gave us the total—principal and interest of the other two items. A $412,768.01.

Mr. Garrison. One cent?

A One cent.

Q If you add to that the $6,628.43— A That would be $419,396.44.

Q And that is the total of value with interest to March 24? A Correct.

Cross examination by Mr. Garrison.

Q At what test did you calculate the sugar that was in G? A At 95.7311.

Q And what does that mean? A It means that it tests 95 per cent. with that decimal of purity.

Q This sugar from cane? A Yes.

Q And 100 of course is the maximum limit? A Yes.

Q And this means it is 95 plus toward 100 of purity? A Yes; what they call suprose content.

Q Yes; I understand that. Now, in respect of these 3,051 bags that were damaged in E, you say the test was 92.47? A Correct.

Q How could an explosion affect the quality of sugar? A It was mixed up with the dirt and—

Q Well, wasn't it still in the bags? A And—

Q Wasn't it still in the bags? A And moisture.

Q Will moisture affect the purity? A Well, there was dirty water from the fire, I presume.

Q Never mind your presumption. I am not asking you about your presumption. I am asking you what you

know about the business. Well, where the net purity of this sugar is 95 and you pour water on it, does it become less pure? If you do not know, say you do not know? A If it were pure water, probably not; that is, clean water.

Q Yes, and if it was not clean water, what would happen then? A Why, that would be different. You add impurity to it.

Q You would also add weight to it, wouldn't you? A Certainly; that is possible.

Q Yes. So perhaps we are paying for some of the dirt in there as well as sugar? A My dear man, that weight there is less than what was put in.

Q I am not asking about that. I am saying, if you took out bags and it only tested 92 and part of that was dirt, wouldn't we be paying for part of the dirt? A There was not much dirt about it.

Q There must have been some dirt to have affected the difference between 92 and 95 on your test? A It must have been—that is, the water that may have been into the bags, and then the heat—

Q Well, would heat affect quality? A It is all affected by it.

Q I can't understand. How can heat make a thing less pure? We are talking about purity now, aren't we? Isn't quality in sugar simply purity? The nearer you get to the essence of the cane is the question, isn't it? A Yes.

Q Now, that is purity? A Yes.

Q When you get the whole essence of the cane with no deleterious or outside matter in it, it is 100? A Yes.

Q Now, where you get dirt or impurities or other foreign substances, then you get it less pure. Now, you have told me that you have only given us an allowance here on the basis of 92? A Yes.

Q For this sugar that you took out? A Yes; that is all; that is right.

Q Now, this must have been because it was at least three degrees less pure than this other sugar that you have taken credit in your own behalf? A Yes.

Q Now, water would not affect purity, would it, clean water? A Will you allow me to make another little explanation?

Q Yes; I will be obliged if you will make it plain to me? A The impurities that are already in the sugar and have heat applied, are liable to make the sugar deteriorate.

Q Well, then, as I understand you, if you had sugar and it was not subjected to heat and it tested for 95, and then you put it under heat, it would test for less, would it? A It is liable to, yes.

Q Well, what would make it "liable to, yes"? A Well, the impurities there.

Q But could heat increase the amount of impurity? A Doesn't it cause fermentation to act more quickly?

Q Well, is fermentation an impurity? A Why not? Certainly.

Q I thought impurity was some outside thing that affected the purity? A Not necessarily.

Q Oh, well, then— A I don't mean a piece of dirt.

Q Then it is not a question of purity; it is something else beside purity? A Well, foreign matter. I will put it that way, then.

Q Well, now, can heat produce foreign matter, if you don't put any foreign matter into the substance, or if you take sugar and subject it to the greatest heat on earth and don't put anything else in the vessel, have you put any impurity in there by reason of the heat? A It would depend on the quality of the sugar that is subjected to that.

Q I am not talking about the quality of the sugar. Put it in there at 100 per cent? A No, because there aren't any impurities.

Q Well, if there are five per cent. impurities, could heat increase the volume of the impurity? A It can, certainly.

Q It can; it can make it ten per cent? Isn't that a mathematical absurdity, that heat can double the volume of anything and make it twice as much? A Well, chemistry is not mathematics.

Q That is an answer, is it? A That is the best I can give you just now.

Q Well, you think up a better one, because I don't think that will go. Now, with respect to this sugar, was it there by consignment, or was it owned by your concern? A It was owned by us.

Q Yes; and how long had it been there? A Been there from— I don't know whether it was the last day of February or first of March; in that neighborhood.

Q It had been— A That is, it was being unloaded the last two days of February and the first few days of March.

Q Then it had been there from March to July? A Correct.

Q You were holding it for speculation, were you? For a high price? A Well, we didn't have any use for it at the time.

Q Well, do you mean to tell me the world was not using any sugar at that time? A That is rather a dull time; we were getting larger quantities then than at any other time of the year.

Q Well, the war in Europe was making sugar of enormous demand, wasn't it? A Yes.

Q Shortly after that we were put on rations; we could only have one lump, or something? A That was not—that was quite a bit later.

Q Exactly; but it was already coming; it was getting toward that, wasn't it? A No, not at that time.

Q It was not? A No.

Robert W. Davidson, cross.

Q Didn't the sugar merchants at that time realize that the European war probably would put up the price of sugar? A Of course they did.

Q And you were holding it for a high price there, weren't you? A Well, perhaps, but—

Q Now, don't say "perhaps." Be frank with me. Don't you know they were? A No, I won't answer it that way.

Mr. Garrison. All right. That is all.

Mr. Skinner. That is all.

(Witness excused.)

(Recess till 2 o'clock.)

(Afternoon session, March 28, 1919.)

The Court. Now, I am ready to hear you if you have anything further to offer.

Mr. Skinner. May we have upon the record—I will ask counsel on the other side—an admission of the incorporation of the various plaintiff companies?

Mr. Garrison. I admit that.

Mr. Skinner. I desire to offer in evidence admissions contained in the original answer filed by the defendant in this case as follows—

Mr. Collins. I do not think that is necessary. They have the answer. As I understood it, your Honor's ruling was—or we stated we would not object to their offering the answer as an admission. They should not offer some particular part of the answer.

Mr. Skinner. It seems to me I may at least indicate the portions of the answer that we want to—

The Court. The great difficulty with the situation is that the original answer is not before me now

and you will have to offer the answer, I suppose, to get it before me—the actual answer that you are trying the case on, and I understand the rule to be clear that you have to offer the original answer, if that is what you rely on, in evidence.

Mr. Skinner. Then I offer in evidence the original answer filed by the defendant in this case; and I may explain the purpose for which I offer it.

Mr. Garrison. Is that the answer?

Mr. Skinner. I thought there would be no question about it.

Mr. Garrison. Is that the original answer?

The Court. Well, you want to offer the original answer; if there is any question about it, I have a certified copy here from the clerk.

Mr. Garrison. I understand he offers that. It ought to be marked.

Mr. Skinner. It will be marked.

The Court. I do not see any necessity to explain it unless there is an objection to it. To explain the purpose would be merely a speech.

Mr. Skinner. All right, sir. May we have the answer marked?

The Court. Of course.

Mr. Skinner. The original?

The Court. If you want it.

(Paper marked P. 11.)

Mr. Skinner. I am using the certified transcript of the pleadings, the answer as therein given, from pages 8 to 11, both inclusive.

Now, I want to read from the answer certain portions that I desire to direct the jury's attention to.

The Court. You may do that.

Mr. Skinner. Reading from the third defense to the first count, paragraph 2: "The explosion mentioned in the complaint was due to a fire caused by incendiarism of which defendant had no knowledge or suspicion."

The first defense to the second count, paragraph 5: "It admits that the fire and explosion described in the complaint was caused by incendiarism and it says that the defendant had no knowledge or suspicion of said incendiarism and that said fire occurred notwithstanding due diligence by defendant to prevent incendiarism."

And I am calling attention of the jury particularly to the portions of what I have read that admit—

The Court. They understand what you are calling attention to. They heard it.

Mr. Collins. Your complaint charged incendiarism.

The Court. Never mind; it is in.

Mr. Skinner. Now, Mr. King. We want to get some distances upon the record.

ARTHUR N. KING, recalled.

Direct examination by Mr. Skinner.

Q Have you, since you were on the stand last, measured certain distances upon the map marked P. 16? A Yes, sir.

Q Will you tell us, please, now, the distance from a point abreast of the pile stockade as shown on this map, otherwise described as the location of Ezekiel Townes' house, to the nearest hydrant—a hydrant just to the north or northwest of the one hundred thousand-gallon tank? A Measuring that along parallel to the track, and thence directly across the tracks to the hydrant, is about six hundred feet.

Q Now, the distance from the same point, abreast of the pile stockade, to the pump house shown on the east of Store F? A I did not get that one. I will measure that for you. Fourteen hundred feet.

Q Then the distance from the same point to the grain transfer elevator—that is from the point opposite the pile stockade? A 2,250 feet.

Q Now, the distance from the hose cart at the middle of Store N to the point opposite the stockade? A 1,100 feet.

Q Now, the distance from the point opposite the stockade to the oil yard? A 4,700 feet—four thousand, seven hundred feet.

Q Then the area of the portion of the premises shown on this map that lies between the bulkhead on the east and a point drawn through the southeasterly corner of Storehouse R? A About eleven acres.

Q And the distance from the easterly bulkhead as shown on this map to the gate at the westerly end? A 4,900 feet.

Q That is all.

Mr. Garrison. No questions.

Mr. Skinner. Plaintiff rests.

Mr. Garrison. We desire to make a motion for a non-suit.

The Court. Very well; I am ready to hear it.

Mr. Garrison. Do you want to keep the jury here?

The Court. It is immaterial.

Mr. Garrison. I felt that probably we could discuss the matter with more freedom if the jury were not here.

The Court. I am perfectly agreeable to have them removed if both sides desire.

Mr. Skinner. It is a matter of indifference to us, sir.

The Court. All right; the jury may be taken out if one side wants it and the other side is indifferent. Take them to the jury room.

Mr. Garrison. Now, if your Honor please, we move to non-suit as to all the plaintiffs upon the following grounds:

First: The plaintiffs have failed to prove facts sufficient to constitute a cause of action.

Second: That Congress, having taken jurisdiction of the subject matter and having enacted statutes therein—

Mr. Collins. Thereon.

Mr. Garrison. —to provide for the safe transportation of explosives in interstate commerce on land, and the Interstate Commerce Commission in accordance with the directions of said statutes having made rules and regulations governing the subject matter, and the explosives in question in this suit having been in the course of transportation on land in interstate commerce, the plaintiffs cannot succeed unless they prove a violation of said statutes or the rules and regulations of the Interstate Commerce Commission above referred to. This they have failed to do.

Third: The plaintiffs, having failed to prove any negligence on the part of the defendant in respect of the starting of the fire, the plaintiffs cannot succeed on any assumption of negligence on the part of the defendant in respect of the starting of the fire.

Fourth: The facts in this case do not permit the Court properly or legally to allow the case to go to the jury upon the doctrine of *res ipsa loquitur.*

Fifth: Assuming that the Court holds that there may have been some other duty to which the defendant was subject which is not covered by the statutes of the United States and the rules and regulations of the Interstate Commerce Commission above referred to, there is no

proof of any violation of any such other duty, if any existed.

Sixth: Since there is no proof from which any proper inference could be drawn of any negligence on behalf of the defendant in respect of the starting of the fire, the plaintiffs may not recover legally upon any assumption of negligence in respect of the starting of the fire; and if it is sought to hold the defendant legally responsible because of the conduct of its employees after the fire started, then the plaintiffs may not succeed in this case on this theory because all of the facts proven show that the fire, when discovered, was in a car, and that such car was either itself an ammunition car, or a car containing explosives, or ammunition, or was in the immediate vicinity of cars containing explosives and ammunition; and, therefore, the only inference which a jury could be permitted to draw is that anyone going near such fire would be in great danger; and therefore the defendant cannot be held responsible because its employees under these circumstances of emergency did not attempt to go near the fire to put it out.

Now, we move to non-suit insurance companies or plaintiffs for the following reasons:

(a) Because the policies in question in the standard clause contain the following (I am reading from line 132 of the printed part in the policy): If this company shall claim that the fire was caused by the act of neglect of any persons or corporation, private or municipal, this company shall on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured upon receiving such payment. And there is no proof of any assignment.

(b) Because the policies put in evidence in this suit each contain in the standard clause the following: (I am

reading from line 31.) This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riots, civil war or commotions, or military or usurped power, or by the order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered from fire in neighboring premises (or) unless fire ensues, and, in that event, for damage by fire only, by explosion of any kind or like; * * *".

There is no proof in this case that the sugar insured was destroyed by fire ensuing from explosion.

The Court. How does that read? I do not quite see your point.

Mr. Garrison. How does this read?

The Court. I do not quite see your point, Judge Garrison.

Mr. Garrison. Why, my point is this: That, of course, if these insurance companies made a voluntary payment to the Howell partnership—

The Court. I understand that point, but what I mean is I do not see the point which you make now that there is no proof that the fire ensued from the explosion.

Mr. Garrison. No, there was no proof that the fire is what destroyed the sugar; there is no proof that the explosion did not destroy the sugar; there is nothing here to show what destroyed the sugar. They said there was an explosion and a fire—

The Court. Well, it seems to be quite clear, that the fire preceded the explosion.

Mr. Garrison. The fire in the warehouses—

The Court. No, no, but the fire in that locality, that neighborhood, in the neighborhood of the warehouses, preceded the explosions, it is said, which is said to have destroyed these plants; and if the fire did precede the explosion, my recollection of the law on the subject is that

the explosion would be considered as an incident of the fire.

Mr. Garrison. Well, at any rate, I do not want it now adjudicated. I just want you to get my point. Now, my point perfectly clearly is this: That the evidence is that there was an explosion; that these warehouses were not harmed in the least until there was an explosion. Now, then, they will say, and I shan't combat it, that a fire ensued from the explosion; but there is no scintilla of evidence before you as to what destroyed the sugar. Therefore, so far as this case is concerned, it may have been entirely destroyed in value by the explosion, and I claim that this clause of the policy—

The Court. Well, your point really is that because the fire didn't start in the warehouse—

Mr. Garrison. No, no, not because it didn't start in the warehouse; but because there is no evidence that the fire is what destroyed the sugar. I do not care where the fire started. My point is that there is no evidence here as to what destroyed their sugar; and if it was destroyed by an explosion the company, if it made a payment, made a voluntary payment, because it was under no obligation to do so.

The Court. All right

Mr. Garrison. Now, to take them up in their order: Of course, I shall not devote any time to the first cause, which your Honor will gather.

My second cause is that the whole matter of interstate commerce is within the jurisdiction of Congress; that when Congress chooses to exercise that jurisdiction, its exercise constitutes the sole, exclusive rule of law to be applied to the subject matter; that when Congress enacts a law, as they did in this case, an act to provide for the safe transportation of explosives in interstate commerce on land—

The Court. Is that what the law says?

Mr. Garrison. Yes, sir, that is the title of the act.

The Court. Title of the act. But I mean, as to the provisions of the act itself. That is the title.

Mr. Garrison. Well, I am talking about the title. I say when Congress enacts a statute which is intended, as its title says, to provide for the safe transportation of explosives in interstate commerce on land, that the presumption is that Congress intended to cover the subject matter embraced in the title.

The Court. Yes, but the title is not the act.

Mr. Garrison. Well, I want to make my argument, if your Honor please.

The Court. Yes.

Mr. Garrison. My argument is that when Congress says by a title: "We are now going to legislate for the safe transportation of explosives in interstate commerce on land," that that to the Court conveys the knowledge—the legal knowledge, that Congress has taken jurisdiction of that subject matter, to wit, the subject matter of the safe transportation of explosives in interstate commerce on land; and that, when as in this case they provide that another government agency, to wit, the Interstate Commerce Commission, shall study this question and get the best expert advice that can be gotten, and lay down the rules and regulations to govern that subject matter, and that they have laid down the rules and regulations to govern that subject matter,—and they are in evidence here,—that the only sole ground on which anybody can be held responsible in respect of the transportation of explosives in interstate commerce on land, is for a violation of the law that Congress has laid down.

The Court. Well, I understand all that, except one point, and that is, that merely because Congress has seen fit to say that the act is for the safe transportation of explosives, does not at all indicate that it has legislated with respect to every phase of the transportation of ex-

plosives, so far as their safety is concerned. Suppose they had said in the title to enact, "An act for the regulation of United States marshals," and they had simply said in the body of the act that the marshal should be required to do a certain thing in one particular line of his work. Would anybody say that that covered, or evinced a design to cover everything a marshal was expected to do?

Mr. Garrison. Well, certainly, I am not going to categorically answer that yes.

The Court. I do not expect you to answer it right away, unless you feel that you ought to.

Mr. Garrison. Whatever my argument is worth, I want to make it clear to your Honor, and this is what my argument is worth—this is the whole point: that unquestionably Congress has entire jurisdiction over this whole matter.

The Court. I admit that; you need not argue that.

Mr. Garrison. I am not going to argue that. Now, then, Congress having entire jurisdiction, having said, "We propose to pass an act to provide for the interstate transportation of explosives, and so on," that the presumption is that Congress is dealing with that whole subject matter, whatever the title is.

The Court. I understand that point. That is where you and I part company.

Mr. Garrison. Next I come to Section 233 of the act: The Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives which shall be binding upon all common carriers engaged in interstate commerce or foreign commerce which transports explosives by land.

Now, I say that when Congress has said, "We are going to provide for the safe transportation," and has told the Interstate Commerce Commission to put out rules and regulations on that subject, it does not lie in the

jurisdiction of any State court or of any other court to say: "You didn't go far enough," or "You didn't provide enough," or "You should have provided more and we are going to superimpose some of our other law, the local law, upon what you did provide." My impression is that it is perfectly sound to say that when Congress has once taken up a subject matter and purported by its title to legislate in respect of it, no court, United States or local, State, has a right to add to or to detract from that act by one jot or tittle; and in this case they have certainly contemplated this entire subject matter and they have said, "We are now going to provide for the safe transportation of these dangerous things," and they do provide for them, to the extent of page upon page upon page; and I say when they did that, if they omitted something your Honor (with all due respect, of course,) has no right to say there were other things which this carrier should have done beside what is prescribed in the rules and regulations of the statute.

Now, the second point is, that the plaintiffs have failed to prove any negligence on the part of the defendant in respect of the starting of the fire, and the plaintiff cannot succeed on any assumption of negligence on the part of the defendant in respect of the starting of the fire. That is too plain, I think, to require any further argument, that if—

The Court. Well, which is plain?

Mr. Garrison. Sir?

The Court. Which is plain, the part where you say they have not proven it, or that it is plain if they have not proven it, there should be a non-suit?

Mr. Garrison. The thing that I meant that was plain was this: That since there is no proof at all as to any negligence on our part in respect of starting the fire, that we may not legally be held responsible upon any assumption of negligence in respect of starting the fire.

The Court. Well, of course, that is a mere truism.

Mr. Garrison. Well, that is why I said it was true.

The Court. Yes.

Mr. Garrison. Now, I recall no scintilla of evidence anywhere that shows any attribution of negligence to us in respect of starting the fire.

The Court. Well, now, let me understand you clearly: I want to know whether you mean that you are confining yourself to the starting of the fire, the fire having started by somebody for whom you are responsible; or whether you mean that the starting of the fire was not negligently committed by you, no matter by whom it was started.

Mr. Garrison. I mean everything of that character.

The Court. All right. Now I understand you.

Mr. Garrison. I mean, there is nothing to show here that we were negligent in any way in respect of starting this fire. So far as this testimony is concerned, that fire was auto-genistic; it bore itself; it was spontaneous combustion, so far as any word of testimony in this case is concerned. There is not a scintilla of testimony that there was a human being down there that night that could have started this fire that had not a right to be there; and there is not a scintilla of evidence that any of those people started this fire, or that there was anything suspicious about the starting of this fire. The evidence is unanimous that there was no engine down there to cast any sparks that night. There is no evidence that in any way any human being even knows how that fire got started; and I say that your Honor will take, if my friend Judge Skinner will permit, judicial notice that many queer things happen to many queer compounds. The other day a cargo of molasses blew up in one of our eastern states and killed a number of people; and here we have chemicals of all kinds and explosives—

The Court. You say it blew up by combustion?

Mr. Garrison. I did not say it blew up by combustion.

The Court. You said it blew up by spontaneous combustion.

Mr. Garrison. Well, I dare say it did; it probably spontaneously exploded, if you prefer that. Explosion is only quick combustion. So that I was not so far misspeaking myself. But, call it what you please, that it was spontaneous combustion, self-generative, generated within its own inherent contents. Now, I say it is not a far-fetched argument when you are dealing, as these gentlemen have proved we were dealing, with all kinds of chemicals—with benzol, with chlor-benzol, and picric acid, and T N T and black powder and smokeless powder,—it is not at all a far-fetched argument; it is not at all straining to say that in the absence of the slightest scintilla of evidence of any human agency, almost the irrevocable presumption would be that that thing must have gone off of its own accord; that the fire must have come from some auto-ignition, something within itself that started it.

However that may be, your Honor, I think, will agree with me, I believe, that there is not a scintilla of proof as to how the fire got started and who started it—not a scintilla; and there is not a scintilla of proof from which the jury can properly infer that we were in any way responsible for the starting of the fire. So that in my view we come to a point when, if we are going to be held liable at all, it must be for what we did after the fire was started.

Now, the next point as formulated is, the facts in this case do not permit the Court properly or legally to allow the case to go to the jury upon the doctrine of *res ipsa loquitur*. It has this limitation: that before the Court can properly let a case go to the jury on that doctrine, the plaintiff must have excluded all other inferences excepting inferences of negligence on behalf of the defendant; and if I am right about that when this point is properly stated, and I do not see here any ground on which this Court can say that this plaintiff has excluded

other causes on this trial than the negligence of the defendant.

5: Assuming that the Court holds that there may have been some other duty to which the defendant was subject which is not covered by the statutes of the United States and the regulations of the Interstate Commerce Commission above referred to, there is no proof of any violation of any such other duty if any existed.

Now, by that we had reference to a variety of duties which are set out in the complaint, which are not, as we can read them, in any way related to the United States law, and which we call the other duties other than those specified by obeying the law of the United States that we say is exclusively applicable to the case in hand. I am not going now to go into these various allegations of duty. At the present time I am going to confine myself to those which the plaintiff selected himself and said that he stood upon.

"We say, first (this is from the opening of Mr. Campbell and I am reading from page 27 of the minutes)—we say first that they failed to guard those explosives against any incendiary fire or to permit—or to prevent and discover accidental fire before it was too late. That is what we say first; that they failed in their duty to take care and watch and guard those explosives to prevent any incendiary fire, or to watch out for and promptly discover any accidental fire. And we say, secondly, that they failed to provide adequate apparatus and means to properly fight such a fire before it was too late, and that those statements cover the grounds of our charge against the Lehigh Valley Railroad Company in connection with its failure of duty under the circumstances as they existed there at that time."

Now, assuming—but believing the law to the contrary—that we were under these duties that these gentlemen allege we were under, we say, in the first place, that it was not our duty to guard those explosives against any incen-

diary fire. That practically means insurance. It does not say a word about our taking any reasonable care; it does not allow any latitude; simply provides that if an incendiary fire occurred, we are *ipso facto* guilty. I do not think they can find any possible decision or authority or principle which would make that the law.

The Court. Oh, I think Mr. Campbell, in opening to the jury, was using language popularly, and as it is popularly used in innumerable cases in this State and in the United States courts, where you speak of guarding the lives of passengers that are being carried by common carriers; you mean to use such care to render the lives safe.

Mr. Garrison. Well, I won't read from his opening, then; I will read from his declaration: The defendant neglected to watch and guard such premises and waters adjacent thereto through employees sufficient in number and competent, and properly instruct same to prevent incendiary and accidental fires. That is what they charge as to our duty to prevent fire.

The Court. To watch or guard, to prevent.

Mr. Garrison. Well, all right.

The Court. Well, that is what that means.

Mr. Garrison. Then, if we did not prevent we are guilty, and that is insurance.

The Court. No, no, not at all. If you didn't watch or guard to prevent in such a way the law casts upon you to do it.

Mr. Garrison. Well, it it not worth while for me to argue, then, and force my point. I will present it and let your Honor dispose of it. It seems to me it is perfectly plain when a man says it is your duty to watch and guard to prevent, if you don't prevent you are guilty and I cannot see any escape from it.

The Court. I do not see how that follows at all.

Mr. Garrison. Then it is useless for us to argue. You evidently do not agree with it.

Well, now, that fifth point means, then, to cover all those allegations in the plaintiff's complaint of other duties, and we say there is no proof of the violation of any such other duties, if it existed; and some of them, of course, we deny absolutely that they existed.

Sixth: Since there is no proof from which any proper inference could be drawn of any negligence on behalf of the defendant in respect of the starting of the fire, the plaintiffs may not recover legally upon any assumption of negligence in respect of the starting of the fire; and if it is sought to hold the defendant legally responsible because of the conduct of its employees after the fire started, then the plaintiff may not succeed in this case on this theory, because all of the facts proven show that the fire when discovered was in a car, and that such car was either itself an ammunition car or a car containing explosives or ammunition, or was in the immediate vicinity of cars containing explosives and ammuntion; and, therefore, the only inference which a jury could be permitted to draw is that any one going near such car would be in great danger; and, therefore, the defendant cannot be held responsible because its employees under these circumstances of emergency did not attempt to go near the fire to put it out.

The Court. Why should I conclude that as a matter of fact?

Mr. Garrison. I am going further. In the first place there is no allegation in the complaint under which it would be proper to leave this question to the jury. I fail to find any allegation in the complaint that we are responsible because of the negligence of our employees after the fire was discovered. But however that may be, the facts are that every witness who was down there at the time of the discovery of the fire states—who pretends

to know anything about it—states that the fire was in a car; I think all say that the reason they did not go down there was because of the danger, because of the location of the fire. Now as I understand the law of New Jersey, if only one proper inference is permissible from a state of facts the Court will not leave anything to the jury, the Court will itself draw the only legal inference that the law permits to be drawn. Now I say that when you have uncontradicted testimony, as we have here, no possible dispute about that testimony, that this fire was in a car and was in either an ammunition car or a car in the vicinity of these ammunition cars, immediate vicinity, right down where the ammunition was, in fact, the most of their witnesses place it in a T N T car right opposite Zeke Townes' house,—however that may be, they all say it was in a car, they say it was right down where the ammunition was, and they all say the reason they didn't go down there was because of the danger.

Now I understand the rule of emergency to be this, that when you once establish that there is an emergency, then the law says the doctrine of reasonable conduct no longer obtains, because the doctrine of reasonable conduct is based upon reason, and in the face of an emergency a man is not supposed to have reason, he is bereft of reason by the emergency.

The Court. Where do you find the doctrine stated in those terms?

Mr. Garrison. Well, I did not pretend to be giving the doctrine; I am stating what I understand the doctrine to be.

The Court. Yes.

Mr. Garrison. The Court, in our case of *Hummer* v. *Lehigh Valley,* 75 New Jersey Law, 703, page 713, has stated it in this way: "The Court of Appeals of New York, in a well rendered opinion said that railroads are not liable for a mistaken exercise of judgment on the part

of their employees in an emergency, or for a failure to act with the utmost promptitude and in the right direction when the circumstances are such as to afford no time for deliberation. When an employee of a railroad company is confronted with a sudden emergency the failure on his part to exercise the best judgment the case renders possible does not establish lack of care or skill upon his part which renders the company liable. It is not responsible in such circumstances even for the error of judgment.

The Court. I agree with that. That is vastly different from saying he is bereft from judgment and is not obliged to exercise any.

Mr. Garrison. I cannot see the difference. They say he is not. We are not to be held liable for error of judgment.

The Court. No, no; that is not what that case says, and that is not what you said. He said he is not responsible if he does not exercise the best judgment, or such judgment as he might have exercised.

Mr. Garrison. But it is not responsible in such circumstances even for his error of judgment. That is the language of the case.

The Court. Yes, under such circumstances.

Mr. Garrison. I say in emergent circumstances then the company is not liable even for the error of judgment of its employees. Now the error of judgment here that could be ascribed to them was that they did not go down and put this fire out.

The Court. Yes, but the error of judgment you are reading about is the error of judgment therein before referred to. That is the language,—not having exercised the best judgment under the circumstances.

Mr. Garrison. Well, I do not know of any law that requires you to use the best judgment. It requires you to exercise reasonable judgment—reasonable care.

The Court. Surely.

Mr. Garrison. I say the language of this case and all cases that have since dealt with the matter of emergency comes down to this, that when you come to the emergency the very presence of the emergency takes away the doctrine of reasonable care.

The Court. Why should you say that? If it takes away the doctrine of reasonable care you don't do anything—you are discharged of liability.

Mr. Garrison. I think that is the doctrine.

The Court. Oh, no.

Mr. Garrison. I can only argue the case as decided. I think if you do not come to the view the whole emergency doctrine means nothing. The only thing you can hold in negligence cases the defendant liable for is his error of judgment if he is the person in default, or the error of judgment of his employee, that they did not use reasonable care, they did not do what a reasonable man should have done under the circumstances. That is the only possible rule.

The Court. That is absolutely the rule. You have just now stated it. He should have exercised reasonable care under the circumstances.

Mr. Garrison. All right. I have stated the courts have said when you come to an emergency the defendant can be held liable if his employee don't exercise reasonable care, otherwise there would not be any distinction. If in each case you refer to the jury you say to the jury, "Gentlemen, you are to determine whether there is an emergency here, and if you find there is you are to hold the defendant liable for the exercise of reasonable care under the circumstances," that is certainly the doctrine that there is no emergency.

The Court. That is exactly what the cases hold, and I think you will find them almost uniform on it.

Mr. Garrison. All right. If that is your Honor's mind. I cannot see that. I think you make no distinction.

The Court. I have not attempted to make any distinction, but I can make a distinction.

Mr. Garrison. I mean whatever you said does not lead to any distinction.

The Court. I have not tried to make it yet. It is very plain to me.

Mr. Garrison. Now then with respect to the other, A and B, against the insurance companies alone,—the policy as I read to you requires an assignment if the circumstances warrant. There is no proof of any assignment. I do not see that these insurance companies have one solitary right to bring this suit.

The Court. Judge Garrison, what is the effect of the payment by the insurance company of the policy, or the amount provided to be paid by the policy, to the assured, in law? What is the effect of it?

Mr. Garrison. The effect of it is to entitle them to an assignment.

The Court. Yes, but the effect in law is that it is an equitable assignment, whether it is assigned or not.

Mr. Garrison. No; the policy says it shall be assigned. I stand upon that thing. Your Honor says it does not mean what it says, and it means an equitable assignment. There is no proof of any assignment except by operation of law, but if your Honor says that is sufficient I will have to rest content with that.

The Court. I only say it because the United States Supreme Court says it.

Mr. Garrison. That is pretty good authority. The second point against the insurance companies is that as far as the proofs are concerned it would appear that the jury here had no right to determine that they were under any obligation to pay these people anything. The proofs here are that there was an explosion and after-

wards a fire, and there is no evidence as to whether the explosion did not destroy all of the sugar, and if it had, then I respectfully contend that the insurance companies were not in any legal position to be required to pay anything.

PLAINTIFFS' REPLY.

Mr. Skinner. If your Honor please, in replying to Vice-Chancellor Garrison, as this case was tried once before before your Honor on very similar facts, it would be almost inevitable that I would have to repeat a good deal that was urged before and perhaps refer to remarks that your Honor then made. It seems as though it was unnecessary for me to repeat and to remind your Honor of what your Honor has already expressed in that case, so I will not reply as fully as I would if it were coming before your Honor *de novo*. If I seem to omit anything that seems to your Honor to need further discussion I will be glad to have your Honor call my attention to it.

I have the further justification for relying upon the past that the disposition made by the jury and by your Honor in that other case has received the approval of the court of last resort of this State, and of course your Honor is familiar with that decision.

I think that the point that is, perhaps—is certainly in this case, raised by the other side, that was not in the Plate Glass case is contained in the objections that go to the right of the plaintiff insurance companies to recover; and to that I will particularly address myself.

Vice-Chancellor Garrison says that there is no proof in this case of any assignment. It seems to me to be so clear as to not require extended argument, that under the policy clause that he read the plaintiff insurance companies would be entitled to subrogation. If there

be in the contract a provision for an assignment, a provision that is put there by the contracting parties for the protection of the one entitled to the assignment, and the person or party entitled to the assignment does not choose to take it, that fact does not in any way affect the substantive rights of the parties as they would be without the assignment. The provision for the assignment is simply a provision by which the insurance companies contract to have a method of establishing or proving, producing evidence that would be conclusive of their right—conclusive I mean, within itself—of their right to recover. If the facts which under the policy are the facts which give the right of subrogation, are proven in the case, then the fact that that particular evidental form or right of assignment is lacking becomes entirely immaterial.

The Court. You need not argue that. The right of an insurance company to sue grows out of the fact that the insurance contract is a contract of indemnity; the insurance company having indemnified the assured, out of that very fact grows the legal relation of equitable assignment and the right of the insurance company to pursue the claim against the person or corporation that was guilty of causing the loss by its negligence. I see no difficulty about that.

Mr. Skinner. I was going to refer your Honor to the provisions of the Practice Act, but probably you are familiar with them.

The Court. Oh, yes.

Mr. Skinner. Giving the party in interest a right to sue.

Then his other point, based upon the insurance company's position in this case, was that the damage that we seek to recover for was by explosion, or, rather, that there was nothing in the case to show whether the sugar was destroyed by fire or by explosion, and that it was

in the case, in the testimony so far that there was no fire in the warehouses before the explosion, or at least an absence of proof on that point.

Now, in the first place, the proof in the case is clear as it stands now that the explosion was caused by the fire that preceded it; and not only is there the proof in the case, but there is the admission of the defendant in its answer, which I read from and offered at the close of our case, saying that the explosion mentioned in the complaint was due to a fire caused by incendiarism. So that it seems to me that there is little need for me to dwell upon that.

Then I add this further suggestion, that it is the settled law that a payment honestly made by insurers, without litigation, in satisfaction of a claim of the insured, entitles the insurers to the remedies available to the insured, and that such remedies cannot be resisted on the ground that payment was not within the terms of the policy. That has been held over and over again, and I could if need be cite many cases to your Honor to support that proposition.

The Court. I do not think that principle goes quite far enough to answer the argument of the other side. I do not myself see very much in the argument of the other side, but I do not think that what you have read answers it; because, as I gather the law is quite clear that the right of the insurance company grows out of, is co-extensive with, and can be no greater than the right of the assured, and if the assured could not recover the insurance company cannot recover.

Mr. Skinner. Certainly, sir.

The Court. The principle that you have just read does not support that proposition at all.

Mr. Skinner. No, sir.

The Court. And does not bear upon it.

Mr. Skinner. Let me just—I think perhaps your Honor does not get what I at least had in mind, and that this point covered.

I understood Judge Garrison to say that the damages that are shown here are not damages that are within the policy that we entered into to the assured—are not damages that the insured—is not a destruction of property that the insured could have recovered from us; are not a loss that we were under any obligation to pay, and that, therefore, because of that character of the loss, we are not entitled to subrogation. And it is to that that I address this answer, that if an honest compromise is made of a claim it does not make any difference whether the claim is one that the insurance company could have been made to pay; it is public policy, and it is because of public policy that the law says that such a compromise shall give the insurance company paying the same right, give it full right, without permitting anybody else to question whether or not they were liable under the policy. The courts say honest attempts made by an insurance company to avoid litigation would provoke it and would be destructive of the interest of the public in that connection. And in that way it seemed to me this did have a bearing.

Now as to the emergency doctrine that the other side has invoked, it seems to me there are several answers to it, some of which have already been indicated by your Honor. May I just—I do not want to repeat—may I just add this further suggestion—or let me say this first:

We contend that there is testimony in the case upon which it should be left to a jury to determine whether any emergency existed such as is described in the cases as establishing a special test for the liability of the defendant. But we also contend that it is settled law that if the emergency that is complained of or the emergency that is said to exist is an emergency that has

been brought about by the prior negligence of the defendant, then the defendant has no right and is not permitted even to invoke the emergency doctrine, if a man is negligent.

The Court. There is no question about that; only the point, as I understand it, taken by Judge Garrison is that there is not any proof of prior negligency, and therefore when called upon to act after the fire was started that there was an emergency within the language of the cases.

Mr. Skinner. Yes.

The Court. And that they were only obliged to use the degree of care, if any, which persons are called upon to use in such emergency.

Mr. Skinner. Yes, sir.

The Court. Of course it follows if his first argument is bad, then there was no negligence, or, indeed, no ascribable cause that we know of for the starting of the fire, then manifestly you cannot infer negligence against the defendant in that particular; you cannot infer there was an emergency in the second case.

Mr. Skinner. That is the argument.

Mr. Garrison. Yes.

Mr. Skinner. I think what I said is correct, it would invoke his emergency doctrine that he speaks of even if there were evidence in the case to go to the jury that there was negligence on the part of the defendant in causing the emergency that is said to exist.

Mr. Garrison. No. Why, certainly, if we were guilty of negligence on one ground, what difference does it make about the second? If you prove the negligence in starting the fire you wouldn't have to prove anything further.

Mr. Skinner. Certainly, and that suggests the further answer if there had been any on the points—if the

answer of the court should be in the negative as to any of them—if on any ground there was testimony that the case could go to the jury, the motion for non-suit should be denied.

Practically it would be necessary for the Vice-Chancellor, if he were to prevail in his motion for non-suit, that he should get the court to give assent to every proposition that he has made.

Now as to the other contentions that there is no negligence—no proof of negligence to go to the jury, those are questions that were presented to your Honor in the Plate Glass case, and I hesitate to discuss them. It seems to me as though it would be taking the time of the court unnecessarily.

We contend that there is proof to take this case to the jury upon any one of several grounds upon which the defendant might be held liable,—proof of a lack of care in the prevention of fire, lack of care in the guarding—in the prevention in its most limited sense—lack of care in the guarding against the occurrence of fire, lack of care in providing the appliances with which to fight the fire, lack of care in instructing the men as to how to fight it when it does come, lack of care in the handling of the apparatus, negligence in the handling of the appliances that were there, poor as they were. We have shown by the proofs in this case that there was the premises of the Lehigh Valley Railroad provided with fire protection, and ten acres of it, and those premises, within which were these cars where this fire took place, without one atom of protection of any kind, not one bit of appliance or apparatus; that all that there was that has been shown in this case was unavailable. There was ample time, as shown by the proofs in this case, for this fire to have been discovered; ample time to have been put out long before it got to the point where the Jersey City fire department found it. There was at least fifteen minutes between the discovery of the fire and

the time when these explosions of the shrapnel and shell began; and had there been the mains and the hydrants and the same provision that there was further up the line—if it had been carried down around this eleven acres of yard here, not through and in between the tracks, but around on the outside, so that hose could have been put on right away, or if hose had been kept on there or fastened or coupled—the time to fight a fire of that kind and under the circumstances was to fight it in the first minutes of its inception.

These men were not anywhere near where this fire was. We have shown that as to several of the employees—all in fact except Garrity and Kane—they are the only ones whose beat could possibly have made them available to discover or prevent this fire under the circumstances we have shown here. It seems to me the pleadings in the case are ample to support the proofs that we have presented and the proofs themselves amply show negligence, such certainly as to go to the jury. The regulations of the Interstate Commerce Commission, which are in evidence in this case, are a part of our case. Our case we have rested, following the Court of Appeals in the case of the plate glass companies, upon the law including the regulations, and we say that Congress has not exercised its function to the exclusion of all else.

The Court. What did you gather the rule of the Court of Appeals to be upon the subject of the regulations?

Mr. Skinner. I gathered that the Court of Appeals was following *Evers* v. *Davis,* treating the cause of action as resting upon the common law of the state and the regulations as something in support of the action, as something to support the proofs as to what standard of care was reasonable under the circumstances.

The Court. I would not follow that at all. I do not think that is what the Court of Appeals decided or

intended to decide or meant to decide. I do not think the Court of Appeals for the slightest fraction of a second endeavored to apply the rule of *Evers* v. *Davis* in the matter of the regulations of the Interstate Commerce Commission. The rule of *Evers* v. *Davis* would simply mean that I would have to charge the jury that the matter of the Interstate Commerce regulations were simply things to be taken into consideration by the jury in determining whether or not there was negligence, and that they might be looked upon as some evidence of negligence. The case of *Chiaparelli* against some one in one of the last volumes of the reports holds that. I do not think that is what the interstate commerce regulations meant at all. I think that as far as they are applicable they are exclusively applicable, but I do not think the rule of *Evers* v. *Davis* has the slightest thing to do with it—not the slightest.

Mr. Garrison. They cite that as the basis of their ruling. This is what he says: He says, though in themselves the regulations cannot be made the foundation for a civil action, nevertheless there may be some basis, in conjunction with the other evidence in the case, to establish the negligence charged in the complaint.—*Evers* v. *Davis.* I thought he was applying the doctrine literally of *Evers* v. *Davis* and saying that the regulations were merely used as a sort of standard for negligence. I thought that was what he meant.

Mr. Skinner. I think your Honor will agree with me that a determination of that would be unnecessary for the determination of this motion.

The Court. I am interested to hear what you have to say, but this motion is not giving me any serious trouble.

Mr. Skinner. I think I may sit down.

Mr. Garrison. I realize that anything further is supererogation, but for the record I will say one or two

things to clear it up. I will not be long. I find now that I was right, that Judge Skinner does still insist that it was our duty to have a watchman to guard against fire and to prevent the occurrence of fire. I say there is no such doctrine in any system of jurisprudence anywhere. He says we did not have sufficient appliances to fight fire. Your Honor never could leave that to the jury. I do not know of any rule in existence that requires a private citizen to furnish any appliances whatever to fight fire. I would be almost willing to stand on the doctrine that a private citizen in any community is entitled to rely upon the community to attend to fire and police duty.

The Court. But this is not a private citizen. This is a concern exercising an employment that is affected by the public interest.

Mr. Garrison. I meant a private entity. I meant to cover a corporation. However that may be, I do not have to say that here it is not necessary. The evidence is all one way here, from their witnesses; we have produced no testimony here, and all their testimony is that we had all kinds of fire fighting apparatus down there. We had chemical engines, fire plugs, hose carts—and every witness they have produced says it was ample, when necessary, to squirt water clear out to the end of the North Pier; and the testimony is they did it; the testimony is they put some mahogany logs out clear out at the end of the North Pier. The jury can surely find that they had fire apparatus there. Besides which he says that our instructions to our men—what better instruction could you give than that when the fire whistle blew each of them was to get to his hose cart and do everything he could to put the fire out? You cannot tell them, with any great degree of philosophy, how to put a fire out. Anyone would know you would connect a hose to water and squirt it on the fire. He certainly does not mean we were to lay down rules and regula-

tions to do this and that, to connect the hose up and squirt it on the fire. Besides that, he says we are responsible for the negligent handling of the apparatus. I find nothing in the complaint to charge us with any such thing. And he has not shown that any of these things were the proximate cause of the injury. He does not know, your Honor does not know, I do not know and the jury does not know. There is nothing to show that if we had had a regiment of soldiers thrown about this place that that fire would not have occurred, not the slightest possible evidence.

The Court. No; but there would be a very reasonable inference if you had a regiment of soldiers around there and the car burned for fifteen minutes before any explosion took place, that with any reasonable care on the part of the soldiers the fire would have been put out.

Mr. Garrison. That is because soldiers are trained to get shot; private citizens are not.

The Court. But there was no shooting during that time.

Mr. Garrison. But can it be possible that if there is a fire in the vicinity of explosives it is the duty of a civilian watchman to go in there at the risk of his life when he knows that the proximity of fire to explosives is the most dangerous thing in the world? Every one of their witnesses says that this fire to their knowledge was either in a munition car or so close to a munition car that there was grave danger.

The Court. To take your own argument: Suppose they had taken this tremendous hose that you say would throw water so far, and fifteen minutes before had squirted it on the fire; they would not have had to go so close to put the fire out.

Mr. Garrison. But isn't that, with all due respect, a very unreasonable theory? Suppose that you know that in a very short time a combination of two chemicals is going to cause an explosion, and you see that combina-

tion at ten o'clock and you run away, and some one says, "Mr. Speer, you should not have run away; that thing did not explode for twenty minutes;" is there any rule of law that supposes I am a prophet, that I am supposed to know that the danger will not occur until 10:20 when it is discovered at 10? I think that when you have a great danger of this kind you cannot say that those men will be held to be responsible because it turned out to be ten or fifteen minutes later. They had no way to know it would be ten or fifteen minutes later. You or I would not have known it. Those men are not as intelligent as we are. We would not stand around and say nothing will happen for ten or fifteen minutes.

The Court. A lot of them did stand around. They were there within a distance within which the hose could throw the water.

Mr. Garrison. No; the hose could not throw the water from down here near Zeke's shanty, six or eight hundred feet from the hydrant.

The Court. I did not say from the hydrant; but however that may be, it seems to me to be perfectly plain I ought not to sit here as a judge and say that the clear thing to do is to hold as a matter of law that a man is in the exercise of reasonable care because by the exercise of some judgment with respect to the combination of chemicals—which he probably did not entertain at all—that his proper duty was to run away.

Mr. Garrison. I cannot categorically state a proposition which immediately confounds me. You put things in there which I cannot answer categorically, but if you will take things I do say, I can put it that way, that your Honor will not leave to this jury any question where only one inference can be drawn. We agree on that?

The Court. Yes.

Mr. Garrison. I say the only inference to be drawn is, where the testimony shows a conjunction of fire and explosives, that that is dangerous. So we have got an emergency. If this jury were to find fifty times over that the conjunction of fire and explosives was not an emergency, the Court would set aside as absolutely contradicting the evidence.

The Court. And if they did, I would still be obliged to submit it to the jury to say whether they would or not, under the case of *Central Union Stockyards* v. *Uvalde Asphalt Company,* which your confrere, Judge Collins, succeeded in having written upon the books.

Mr. Garrison. That is where there is a question to go to the jury, but I say where there is no question to go to the jury, where there is only one legal inference, the Court does not go through the mockery of saying, "Gentlemen, I will leave you to find"—where there is only one way to find.

The Court. Oh! That is when there is only one legal inference.

Mr. Garrison. Now, if you say, "I deny your legal premise; I deny that the conjunction of fire and explosives constitutes great danger"—if you say that, I am done; but I say you cannot say that. It is one of the greatest dangers known almost, except possibly a tornado, but a thing which we spent years of invention on to win the war is just a conjunction of those two things. Now, I say when we have a conjunction of those two things, fire and explosives, we have the most dangerous thing in the world. Now, I say that that being so, your Honor is not going through the farce of leaving that to the jury; and if it was necessary for you to take another step by first deciding that step, you would say, "I will not question there was an emergency here; of course there was an emergency." Now, I say, if there was an emergency—I will not argue this

any more—but I say where there is an emergency, the common sense of it is that the defendant is not to be held responsible, unless they contributed, for the bad judgment of their men, because they did here something where they could have done something else which was better judgment. The common sense conclusion is that there having been an emergency the defendant cannot be held for whatever its men did unless there was something affirmatively wrong.

I only want to say one other thing. He refers to the practice act as sustaining his views.

The Court. Yes.

Mr. Garrison. The whole question is whether they are a party at interest.

The Court. Well, with respect to that thing, I think that the right of the party arises out of the fact of the payment and the subrogation; consequently they have become a party whether an assignment ever took place or not. And if they wanted to compel an assignment under the contract they would have the indubitable right to go into a Court of Chancery and compel it.

Now, I have not any doubt what I should do with this motion, and that is I should deny it. At this stage of the case it is a matter of utter indifference to me whether we rest the conclusion that I have reached upon the violation or neglect to comply with the Interstate Commerce regulations or whether we rest it upon the general common law of the state, which has not been abrogated, because that field has not been occupied by the Interstate Commerce regulations—I say it is a matter of indifference at this stage of the case. I do not need to decide it; I do not decide it, because I think that taking either phase of the case there is evidence here from which the jury may conclude that the defendant company was negligent in the manner in which it looked after these explosives. There are at least two provis-

ions of the regulations of the Interstate Commerce Commission which are found in paragraph 1643. One of them says that "Careful men must be chosen to handle explosives. The platform at the feet of the men must be as free as possible from grit, and all possible precautions must be taken against fire." And the Interstate Commerce Commission itself in the kind of placards which it has required to be placed upon the cars has indicated that its notion was that fire must be kept away from these cars. And then we have "B" under paragraph section 1643, which provides that unauthorized persons must not have access to explosives or other dangerous articles at any time while such articles are in the custody of the carrier. Now, in this case we have at least some evidence from which it may be inferred that fire was not kept away from these explosives, and that the neglect to keep the fire away was the proximate cause of the fire that ensued in these cars and the subsequent explosion. And then we have the admission found in the answer to the effect—the original answer—to the effect that the fire was the result of incendiarism, which would warrant the jury in inferring that unauthorized persons had been permitted to have access to the explosives or other dangerous articles at a time when the articles were in the custody of the carrier.

Now, there are two grounds upon which the jury may infer negligence, if it is the violation of the Interstate Commerce Commission's regulations alone which are to be considered; but the Court of Appeal of this State, by whose decision, of course, I am bound and which I must follow, in this case has held that the degree of care to be used is the degree of care proportioned to the risk of injury to be apprehended if care be not exercised; and there are various things in the case from which the neglect to use that degree of care may be inferred. For instance, we may say that the history of the care exercised by this company before the war started, continu-

ing while the war was in progress, clearly indicates that if the notion of reasonable care is a relative notion, as every case which has been decided has held—and it is relevant because it has relation to the circumstances in which the party is called upon to act—and if we conclude that the number of watchmen, the kind and extent and manner of equipment that was put there before the war started, was not enlarged, enhanced, or given further or more minute instructions after the war started and after the incendiarism became a matter of common notoriety—I say if the same regulations were permitted to remain in existence unaugmented by the railroad company after the necessity of a greater degree of care—or not a greater degree, but a more minute exercise of care upon their part had arisen, the jury might infer from that that they had not used care proportioned to the risk; because they might say the amount of care that was necessary and sufficient to guard their cars in their yard when high explosives were not being transported in such great amount was certainly not the degree of care that was required when explosives were being transported in a much greater amount.

And then another thing that might arise is this: This plant is something over ten acres in extent, as I understand it, and the jury, of course, are to say as reasonable men whether it is possible with the plant practically honeycombed with cars filled with all kinds of explosives and inflammables, the number and kind of watchmen who were employed to see that unauthorized persons did not approach was sufficient to properly discharge the requirements of reasonable care, which in this case was a high degree of care proportioned to the risk which rested upon it.

Now, I think, furthermore, that the regulations of the Interstate Commerce Commission are no more or no less—and I say this just in passing—and not as a firm and settled determination which at some subsequent time

may be imported into the case upon argument in some high court as being the definitive and unchangeable decision to which the Court has arrived; but I say that now and offhand it seems to me that the Interstate Commerce Commission regulations impose no less and no greater degree of care in that domain which they have occupied upon the railroad companies, than the rules of the common law would have imposed if the Interstate Commerce Commission regulations had not been adopted. Indeed, I think now and just for the present, that if the comparison is to be made and it is to be determined which of the two would have imposed the greater burden, I think that we may say quite clearly that the regulations of the Interstate Commerce Commission in the domain that they have occupied have imposed a great burden that the common law has imposed, and that consequently, if the common law rule applied in that particular, the defendant would have nothing to complain of because of the application of that rule.

I do not know of anything further that I desire to say about the matter. I may say this in passing, and that is, with respect to this doctrine of emergency, the first thing to be borne in mind and a thing which nobody disputes and everybody has expressly admitted so far as anybody has spoken on it in this case, is that if the emergency is of the creation of the defendant, defendant has no ground whatever upon which it can rest itself in saying that it had a right to consider the situation an emergency and was thereby excused from the exercise of reasonable care; because the cases are uniform that if the emergency is the result of the defendant's negligence, the defendant cannot complain if it was an emergency, that it was an emergency and then excuse itself upon the ground that it did not act as it should have acted in the emergency which had arisen. But leaving that out of the question—and in this case I think there is clear evidence from which the jury may infer that the emerg-

ency, if there was one, was an emergency that was due to the negligence of the defendant in one or more of the particulars that I have just mentioned in what I have said heretofore. But I understand the rule of emergency to be this: That just as reasonable care is uniformly held to mean a rule of relation and to have reference to the situation and circumstances in which a man finds himself placed at the time he is called upon to act, that you would not expect from a man suddenly confronted by a horrific or terrible situation, a fearsome thing,—you would not expect from one the same calm care and judgment that you would expect from a man who was called upon to act in normal circumstances; and, therefore, you would not expect from one, nor is he called upon, to exercise that degree of reasonable care that a person would exercise in normal conditions; but he is called upon to exercise such care as a reasonably prudent and cautious man would exercise in those conditions, and if he does not do that he is liable. I understand that to be the rule that has been decided everywhere, and I understand that to be the law of this state as it has been settled in the case of *Tuttle,* I think it is, against the *Camden & Seashore Railroad Company.*

So that so far as the emergency question is concerned, the answer in this case and at this time to it is that, first of all, the jury may conclude that the emergency was of the defendant's own making; that, secondly, it must be left to them to say at least if the emergency was not of the defendant's own making, still whether the defendant's men acted as they should have acted, and whether the apparatus which was furnished was sufficient to enable them to act properly, if such an emergency should arise. And, after all, we must bear in mind that negligence is always determined by ascertaining what is reasonably to be anticipated by the person who is called upon to exercise reasonable care; and these men were not dealing with Uneeda biscuits; they

were dealing with explosives; and, therefore, the jury have a question to determine in this case whether such care in advance of the emergent condition that was to be expected had been taken, both with respect to men and measures, as should have been taken to enable them to meet such an emergency when it did arise.

So with respect to that matter I think I have said enough and, therefore, I deny the motion that has been made and you may have an objection to that ruling entered upon the minutes of the court.

Mr. Garrison. Exception.

The Court. Yes.

Mr. Garrison. Thank you.

(Trial Adjourned to Monday, March 31st, 1919, at 10:30 A. M.)

(Trial resumed March 31, 1919.)

FIFTH DAY.

ALBERT M. DICKMAN, sworn.

Direct examination by Mr. Hobart.

Q On the 29th and 30th of July, 1916, were you employed by the Lehigh Valley Railroad? A Yes.

Q What was your position? A Freight agent at National docks.

Q Will you state generally what your duties were at that point? A General supervision over the receiving and delivering of freight of all kinds.

Q When you describe this place as National docks, is that the same premises we have been calling the Black Tom Terminal? A Yes.

Q How long were you employed as such agent prior to July 29, 1916? A Seven months at that point.

Q Prior to that where had you been employed A Freight agent at Oak Island Transfer, Newark.

Q What is the relation between Oak Island Transfer and the Black Tom Terminal? A It is the same method of doing business.

Q The Oak Island is a part of the Lehigh Valley system? A Yes.

Q How far from the Black Tom Terminal? A A distance of about four miles.

Q Are the two terminals operated in conjunction or connection with each other? A They are operated in conjunction with each other, yes, sir; under separate agencies, that is all.

Q And you moved over to the Black Tom Terminal about seven months before the 29th of July? A Yes, December—

Q Do you recall the date when you took charge at Black Tom? A December 15, 1915.

Q And from that time on were you continuously in charge at the Black Tom Terminal up to the time of the fire? A Yes.

Q And since for some time afterwards also, I believe? A Up until October, 1917.

Q Was there any passenger traffic at Black Tom Terminal? A No, sir.

Q It was used exclusively for freight? A Exclusively for freight, yes.

Q Will you describe in a general way the method of operation at the Black Tom Terminal with reference to the freight traffic—where it came from, what was done with it, where it was placed and so on? A Well, the freight arrived from points throughout the entire country, as far west as the Pacific Coast, and other points nearby. It arrived there in carloads. It would be shifted to the various points and piers for handling, where it would be delivered to lighters and other boats.

Q Was there any delivery at that point of freight directly to the consignees? A Yes.

Q And where was that part of the work handled? A Down at what we call the bulkhead yard there, alongside of the North Pier, adjacent to the North Pier.

Q That was some distance from the North Pier, wasn't it? I do not mean transferred to lighters— A Oh, yes.

Q —I mean transferred to consignees direct, by wagon. A The transfer to consignees would be handled at our Communipaw Avenue Freight Station.

Q How far is that from Black Tom itself? A In a straight line I should judge it would be about a mile; around the way we had to go it would be about a mile and a half or a mile and three-quarters, something like that.

Q Reference has been made to a roadway that leads into the yard and runs around the sides of the warehouses for some distance. What was that used for? A For trucks to come down there and deliver and receive freight at the warehouses.

Q That was not used as a delivery yard for delivery of freight to trucks? A No, sir.

Q And you referred to the North Pier as a point where delivery was made of freight direct to consignees; what kind of freight was delivered at the North Pier? A Explosives, such as ammunition for cannon and other high explosives—benzol.

Q Was there any other kind of freight delivered direct to trucks at the North Pier on July 29th and 30th and for some time prior thereto outside of the explosives? A No, sir.

Q Now, will you state generally the method of delivery, how was it done? A The cars would be brought in from the yard, placed down on the bulkhead tracks, and as the ships' boats would arrive the cars would be placed on the North Pier, where they would be opened and the delivery taken by the consignees.

Q When you speak of bulkhead tracks, can you describe them by number or other description? A I can describe them by number so far as they are numbered on the map there.

Q Can you give the numbers of them? A Yes; 13, 14, 15 and 16 were used for storing of the cars; 18 was used for a running track in to the North Pier—in a part of the North Pier.

Q How about 17? A 17 was used for running sometimes grain to our trestles and other times salt to the trestle down there.

Q When you ran grain or salt onto the North Pier was that also delivered direct to boats or lighters? A It was delivered right to boats and lighters, but the handling was done by the Lehigh Valley.

Q That was handled by the railroad company itself? A Yes, sir.

Q How about these other articles, explosives, were they handled by way of transfer by the railroad company or by other people? A They were handled by the representatives of the owners and not by the Lehigh Valley.

Q Did the railroad company have anything to do with the transfer of the explosives from the cars to the boats? A No, sir.

Q You have given us some kinds of freight that were handled at the yard, namely, grain, salt, explosives; was there any other kind of freight handled in the same yard? A Yes.

Q Describe generally what other kind. A Borax, iron pipe, structural iron, agricultural implements.

Q Was the yard limited to any particular kinds of freight or did you handle anything that came along? A We would handle anything at all that came along down there.

Q This other kind of freight that was not transferred at the North Pier, what did you do with that after it got into the yard? A Made deliveries at the south pier, Pier

7. Also the channel tracks, sometimes, along the channel of the waterway leading into Black Tom.

Q Did you have any facilities there for transferring the cars themselves direct to lighters without unloading the freight? A Yes; float bridges we had there.

Q And they would be transferred I presume to the railroad company's own boats? A Yes; to the railroad company's own floats; but they were not used prior to the explosion.

Q They came into use afterwards? A Afterwards.

Q Now, directing your attention particularly to the kind of freight that has been referred to in this case, that is to say the so-called explosives, the ammunition for cannon and other articles that have already been described, will you state now in detail how that was handled? Take from the time a car arrives at Claremount yard up to the time the contents of the car are delivered, and state the various steps by which the railroad company disposed of it. A The cars would arrive at Claremount yard and one of our drill engines would bring them down to the bulkhead yard. At the time of arrival at Claremount the tickets for the cars would be delivered to my office where the notice of arrival would be sent to the various consignees. The cars would be pulled down to the bulkhead yard and the orders for delivery would be received from the consignees who would send their lighters with the orders for the cars that they required in the custody of the barge captain. That applies to those commodities with the exception of ammunition for cannon.

Q How was that handled? A The ammunition for cannon, we would give the pier a drill twice a day, would not cut in particular cars, but just fill up the pier and let the consignees take them.

Q You mean the North Pier? A Yes, sir. With the exception that occasionally they would order a special car of combination fuses which would be placed on there.

Q You spoke about this notice of arrival; what is that? A That is a form used by the company to notify the consignee that their cars are at destination awaiting delivery.

Q When would you send that out, when the cars were at Black Tom terminal or when they arrived at Claremount? A When they arrived at Claremount.

Q How far is that from the terminal? A I judge about a mile and a half. It was a yard adjacent to the rest of the tracks right there.

Q Then how would you receive word that the consignees were ready to accept delivery of these different articles? A Sometimes by phone. We would get the advance information as to what cars they would require by phone and then they would send the actual order for those cars along by the boat captain.

Q An order in writing? A An order in writing, yes, sir.

Q And generally speaking would that order specify, the car number or the material or both? A That would specify the car number and the initial and the commodity.

Q And then what would be done with the car? A The car would be shifted down onto the North Pier.

Q Now, was there any particular time of the day or any particular day of the week when these orders were received or when the cars were placed on the North Pier? A No, sir.

Q Did you place any of them there except as you received orders for placing from the consignees or their representatives? A No, sir.

Q Did the railroad company have anything at all to do by way of either transferring the explosives, ammunition, etc., or by way of lightering them to other points in the harbor? A No, sir.

Q By whom was that handled? A By the consignees or their representatives.

Q And do you recall the names of some of the companies that acted for the consignees for that purpose? A Yes; Healing and Son was one of the stevedores who handled the high explosives, and I believe it was McCabe and Company who handled the ammunition for cannon on the Moran lighters.

Q Did the Johnson Lighterage Company do any of the work, do you remember? A The Johnson Lighterage Company would use—Healing and Company would use the Johnson Lighterage Company boats—or Healing and Son that should be.

Q Now, these various cars containing explosives, ammunition, etc., when they were received by the company did they have on them various kinds of placards? A The cars?

Q Yes; the cars themselves? A Yes, sir.

Q And where were they, outside or inside? A On the outside of the cars.

Q And are those the placards that have already been offered in evidence in this case—showing you Exhibit P. 8—the so-called inflammable placard— A Yes.

Q And P. 7, the so-called explosives placard? A Yes, sir; they were on the cars.

Q Now, when these cars were received by the company, were they sealed? A Yes, sir.

Q Did the company have any means of knowing the contents other than as indicated by the placards or by the papers that accompanied the cars? A No way whatever.

Q And what papers did accompany such cars—any outside of the placards that were on the outside of the cars? A The car manifest would accompany the car in the custody of the conductor of the train.

Q Will you state generally what that indicates—whether it would be a particular description of the material or whatever it might be? A The car card would show the car number and initial, the commodity, point of origin, destination, consignee and consignor, the weight

of the contents of the car, that is the weight of the car gross, tare and net, and signed by the issuing agent.

Q Well, does it show anything in the way of a particular description of the merchandise, for example— A Ammunition for cannon, high explosives, or benzol, or something like that.

Q Would it call for T N T specifically for example? A No, not T N T.

Q How was that marked? A High explosives.

Q And is it the fact that all of the so-called high explosives, whatever they might be, were all given that same general term without any specific description? A To my knowledge they always arrived there as high explosives.

Q Whether it be T N T or some other kind of high explosives? A Yes, sir.

Q And those are the cars that had the so-called explosive placard on, are they not? A Explosive placard, yes, sir.

Q Now, did these cards always reach your office at the same time that the cars themselves, or were they sometimes ahead or sometimes behind? A A train came inside the yard, and the cards would be picked up by one of my yard clerks, and the claim written up; that is, write up the entire train and then the cards would—the car cards would be delivered to my office.

Q How frequently did you have a record made of the cars in the yard? A Daily.

Q And do you remember at about what hour? A The clerks would start at 7:30 to 8 o'clock each morning to write up the entire cards.

Q And in their write-ups would they include these cars that were marked with these different placards? A Yes, sir.

Q Describing them, I suppose, in the same way that the placards themselves described them? A No; the

only thing they would show would be the car number and initial and what track they were on; that is all.

Q Now, with reference to the method of handling these explosives and inflammables, did the railroad company issue any rules of regulations? A Yes, sir.

Q And I show you a red book called Lehigh Valley Railroad Company Regulations for the Transportation of Explosives and Other Dangerous Articles by Freight, and marked at the bottom effective October 1st, 1914. Is this the book that was issued by the company? A Yes, sir.

Q And do you know whether, as a matter of fact, this contains the same regulations as appear in I. C. C. rules? A Yes, sir.

Q And the book that I show you, was this the one that had been issued, and was it effective on July 29th and 30th, 1916? A Yes, sir, that is the one that was in effect on the date mentioned.

Mr. Hobart. Will you mark this, please, D—

Mr. Skinner. Just a minute, please.

Mr. Hardin. Do you offer it?

Mr. Hobart. Yes, I offer it.

Mr. Skinner. I do not see the materiality of it at all. I do not know what the purpose is with which it is offered.

Mr. Hobart. Why, if your Honor please, this is identical with the I. C. C. rules and is issued by the railroad company for the information, guidance and instruction of its employees. We simply desire to show that we pass on to our employees and those who have to do with these explosives the rules and regulations that the Interstate Commerce Commission had promulgated with reference to the handling and storage and operation of the cars which contained such articles.

Mr. Skinner. Supposing that they are regulations issued by the company just as Mr. Hobart states, I do not see what bearing that has upon the defense that is interposed in this case. Therefore, I do not see—

The Court. I cannot possibly see how they can be otherwise than relevant and material. In the first place the railroad company had, in my judgment, an obligation upon it, at least, assuming the contention of the defendant to be correct, that they must follow out the regulations of the Interstate Commerce Commission; they certainly had an obligation upon them to inform their employees of what the employees were to do and the employees are obliged to use, at least, a high degree of care to do that thing, and if it should appear that that is all the duty that rests upon the company and the company has complied with it and has informed its employees, that they have followed out the instructions, manifestly there would be no negligence. Now, that is one theory of it.

Now, to take a theory upon which I for the life of me should object to these regulations: suppose the rule is more stringent than they contend, than that contended for by the defendant; suppose the rule is that other duties apply, and suppose it should appear by the introduction in evidence that these are all the regulations that were notified to the employees, and these are all the employees conformed to; it would follow, it seems to me, as a matter of logic, as well as a matter of law, that the railroad company would be negligent in not giving additional instruction if additional instruction were necessary under the common law of the state; and, therefore, I should think it would be highly objectionable to object to the thing from your standing, assuming that you are right.

Mr. Skinner. May I suggest this: I think your Honor's comment upon it rests upon the assumption that these are regulations issued to the employees. There is nothing at all to indicate that that is a fact.

The Court. Of course; but Mr. Hobart has just announced that he is offering it now for the purpose of showing that these are the regulations issued by the company and informed to their employees by the company.

Mr. Skinner. I did not understand that he said that.

The Court. Of course, he cannot do it all at once; he must do it piecemeal. He first puts in the regulations; that is the orderly, chronological, logical way to do it in, and afterward if he shows this thing was issued and that the employees never got it and didn't comply with it what do you object to it for?

Mr. Skinner. Pardon me, sir. I did not understand Mr. Hobart said there were issued to the employees.

Mr. Garrison. We have said so.

Mr. Skinner. On the examination of the paper itself, it seemed to be regulations issued to shippers.

The Court. And Mr. Hobart said so, too.

Mr. Hobart. If there is any doubt about it I will ask the witness again.

The Court. There is no doubt about your having said it. That is why you have no objection to saying it.

Mr. Skinner. Your Honor is quite right, and I would not have said a word if I had understood him to say that.

Mr. Hobart. I will ask him again so there will be no question about it.

Albert M. Dickman, direct.

Q Were these regulations as they appear in the Red Book issued first to your office? A Yes, sir.

Q And what did you have to do in the way of notifying the employees in regard to same? A I would instruct them in the method of handling them.

Q As specified in the— A As specified in the regulations.

Mr. Hobart. Offered in evidence.

The Court. Is there any objection?

Mr. Hobart. Have you any objection, Judge?

Mr. Skinner. No objection.

(Marked defendant's Exhibit 1 in evidence.)

Mr. Collins. Mr. Dickman, speak a little louder.

The Witness. What is that?

Mr. Collins. Speak a little bit louder.

The Witness. All right, sir.

Q Whereabouts in the terminal was your office located? A On Pier 4.

Q And on what part of Pier 4? A The shore end, right up at the tracks there.

Q At the point marked "office" on the large map? A Yes, sir.

Q And what were your hours of duty at that point? A Well, I have been down there straight twenty-four hours at a time, sometimes; but I usually got there about eight o'clock in the morning and left at 5:30; but it is not unusual to stay there many hours after that time.

Q Now, at the time of this fire and explosion, did you live in Jersey City? A Yes, sir.

Q At what place? A 22 Gautier avenue.

Q And were you at home on the night when the fire occurred? A Yes, sir.

Q What was the first that you heard of it? A The phone call from one of my employees.

Q Have you any way of fixing the time at which the message came? A It was from 12:45 to 12:50 that I received it.

Q And do you recall the substance of the call? A Yes, sir.

Q What was it? A He notified me over the phone that the North Pier was afire.

Q And what did you do? A I asked him if he had notified the fire department, and he said he had; and then I asked him if he had called the fire boats; he said he had; then I asked him if he notified the tug despatcher at Jersey City. He said he had done so.

Mr. Skinner. He said what?

The Witness. He said he had done so. And then I asked him if he had notified every one that he should have notified; that is, to get fire apparatus down there. He said yes, he had.

Q Do you know who this employee was that called you up? A Yes, Mr. Sloan, Sam Sloan. I told him then I would be right down.

Q Did you go there? A Yes; I was undressed; that is, I had just finished undressing preparing for bed, and I called a taxicab and while I was finishing dressing then the taxicab arrived at the door and I got on the seat with the driver and we went down there.

Q And how long had you reached there after you got word of the fire? A I guess at the time I received word of the fire up to the time I got down there didn't take more than twenty-five minutes—for the whole thing to happen.

Q Now, when you arrived at the terminal where did you go? A I arrived—I dismissed the taxicab right in front of my Pier 4 office.

Q What time about was that? A That was about 1:10, to the best of my recollection. I met Kane and asked him if there was any tug boats down at the lower

end. He said he believed there was. So I went down there to the west side of Pier 7, saw two tug boats down there, the Slatington, and the Geneva.

Q Were they Lehigh Valley boats? A Lehigh Valley tug boats. And I told them to go around and get out what barges they could, around the North and South Piers. We have grain boats in there, and we had a salt schooner; that was my instructions to them, to go around there and get out what boats they could. I then came up upon the bulkhead side of the stores, that is, water side of the stores—

Q That would be the southerly side? A Yes, sir, southerly side of the stores; walked through, because the way I came down it was a little worse then than it was; when I was coming back, back—one of those time fuses gave me a glancing blow on the stomach when I was down on Pier 7.

Q What was it that gave you— A One of those time fuses, a piece of iron of some kind; I considered it was a time fuse; I didn't stop to pick it up. I came in by the head of Pier 6 and walked in through there between those tracks; that is, in through the driveway—I guess Stores M and N, isn't it? The open space between the two lines of stores.

Q On Pier 6, yes, M and N. A Yes, and I got through to those tracks on the north side of the stores. I met our fire marshal, Lehigh Valley Fire Marshal Julian.

Mr. Skinner. Who?

The Witness. Lehigh Valley fire marshal.

Q Mr. Julian? A Mr. Julian. And he and I walked down then back to the north side of the stores, all the way down to just about the 100,000-gallon tank. Then we met Con Wagner, chief of police of the Lehigh Valley Railroad there. He told me not to go down any further because it would not do me any good; I could not be much help. So Julian and I crossed the tracks then and

stood over on the bulkhead at the north side of the ground there, and were viewing the fire from that point.

Q Near which pier was that? A That would be—well, directly north of the tank; that 100,000-gallon tank; that would be opposite Pier 7.

Q And near Store R? A Yes, but I was on the other side. Store R—between Store R and the tank; I was directly opposite there on the land track.

Q Now, when you first got there you fixed the time as about 1:10. What did you see in the way of fire as to the location of the fire and the cars? A The entire North Pier, to my mind, was ablaze, along with cars down at this end.

Q When you say cars at this end, end of what? A The east end—well, what would be the west end of the North Pier; those cars in that vicinity were on fire, and also the North Pier.

Q Now, do you know the location of what was found the next day to be a so-called crater? A Yes, sir.

Q You have in mind just where that was, just where that was? A I have in mind just where that was, yes, sir.

Q Was there any fire at that point when you first got there? A No, sir.

Mr. Skinner. Which point?

Mr. Hobart. The crater.

Q How large was the blaze on the North Pier, or near the North Pier, wherever it was? A It was a good big blaze.

Q Could you tell whether any of the cars on the North Pier were themselves on fire or was the fire—or whether the fire was near the North Pier? A The fire at that time seemed to be taking in the North Pier and the cars down the end of the yard.

Q And how big was it? A The fire?

Q Yes. A Well, as far as dimensions are concerned, Mr. Hobart, I could not tell you that; but it was a very large fire.

Q Now, at that time, when you first got there, was there any noise of shells or any similar articles as if they were shooting? A Yes, sir.

Q Did you observe that as soon as you got there? A As soon as I arrived there; in fact, I passed one of my watchmen—this old John Groath, up at the oil yard, and also one of the Dougherty men. The Dougherty man told—yelled to me: "Don't go down there, boss"—

Mr. Skinner. I object.

The Court. Objection sustained.

Q Never mind; do not tell what he said. At any rate, when you passed the watchman at the oil yard did you at that time hear any noise of shells? A No, I didn't hear them up there.

Q When did you first hear them? A When I got off the taxicab at Pier 4.

Q What kind of noise was it? A Just the small reports like guns going off, very rapidly, those small guns.

Q And from which direction did that sound come? A From down at the bulkhead yard.

Q Was there anything in the way of small explosives that you could see, anything in the way of sky rockets, or anything like that? A I saw small explosions; yes, sir.

Q And what did they look like? A Slight breaks of flame, and a report.

Q Where did they seem to come from? A Right down there in that same section.

Q That is the North Pier? A Yes, sir.

Q Now, did any of the employees of the Lehigh Valley come there with engines for the purpose of taking out any of the cars? A Yes, sir.

Q How soon after you arrived did they get there? A I believe they either got there at the same time as me, or just a minute or two before or afterwards. I didn't see them as soon as I got there, but I noticed them within a few minutes.

Q Will you state what you saw them doing while they were there? A They had hold of cars, pulling them up out of the yard, out of the bulkhead yard, this lower yard here, backing in their engines on various tracks.

Q Could you tell from what tracks they were pulling the cars? A Only that one engine was working on this side, the north side of the stores; they were pulling out cars which would be on what I would judge tracks 1, 2 and 3 of the bulkhead yard. Another engine was working on the other track and was getting out cars further up; I should judge around tracks 9, 10 and 11.

Q Well, when you speak of tracks 1, 2 and 3, are you giving the numbers of the tracks or are you giving the order of the tracks from the north side? A I am giving the order of the tracks on the map.

Mr. Skinner. From which side?

Q From which side, the north side? A No, tracks down on the south side; the numbering starts on the south side.

Q Well, when you speak of tracks 1, 2 and 3, I wasn't sure whether you meant the tracks which are numbered 1, 2 and 3 on the map? A Yes, sir.

Q —or whether you meant the tracks up on the north side. Which do you mean? A No. One engine was pulling out cars from these lower tracks.

Q From the lower tracks? A Yes, sir.

Q 1, 2 and 3. And the other was pulling from where? A From in around the explosives.

Q Up near the bulkhead tracks? A Yes, sir.

Q And do you know—

Mr. Garrison. He said the bulkhead; he means the sea wall.

Q And do you know which tracks they were by number? A Well, there was various engines down there; also one engine had hold of a string of cars on the sea wall, or what we call the sea wall track.

Q On the north side? A Yes, sir; she was right alongside of where I was standing there.

Q Did you have charge of these engines or those cars; did you have yourself— A No, sir.

Q Or the yardmaster or somebody else? A Generally our yardmaster nights.

Q Who was there, do you remember? A Mr. Henley.

Q Did you observe whether any of the cars that were being pulled out were themselves on fire when they were being pulled? A I didn't observe it, no, sir.

Q And how long did you stay out—in the yard? Stay all night or did you leave afterwards? A No; I stayed there until two o'clock the following afternoon, Sunday afternoon.

Q Let us get back to the point where you were standing at the time that Chief Leyden told you there was no use of going down into that—or just fix that point, can you? Will you? A Sir?

Q Just fix that point for us again? A On the map?

Q If you will, yes. A I should think that would be right about here (indicating).

Q Indicating the point— A Immediately north.

Q —directly north of the hundred thousand gallon tank? A Yes; right in about here.

Q And about half way to the sea wall above? A Yes, sir. That would be right down the road—walked down over the tracks, and Leyden was standing there and I left him and walked—I walked over to the sea wall.

Q How long did you stay at the sea wall track? A Up until the time of the first explosion.

Q Do you know at about what time that occurred? A Eight minutes past two.

Q Were you at the sea wall track when the first explosion occurred? A Yes, sir.

Q Now, will you look at this map again; please come down again. I call your attention to these dotted lines on the map which are marked "Outside line of crater." You are familiar with the location of that? A Yes, sir.

Q How close were you to the nearest point of that crater when the first explosion occurred? A By actual measurement twenty-five feet.

Q When did you measure it? A Following Monday or Tuesday.

Q How did you fix the point where you were standing at the time of the first explosion? A By the location of a telegraph pole; I was leaning against the telegraph pole.

Q Was there anybody with you or near you at that time? A Yes, sir.

Q Who? A Julian—John Julian, the fire marshal, and Kane, my watchman down there.

Q Well, what happened to you when the first explosion went off? A It blew me down—threw me down on my back and I stood—the distance I know—not very large—but as I came to I was down among—that is as I got up—I was not unconscious at any time, but as I got up I went in the wrong direction and went down among the rocks.

Q You were confused for a moment? A I was confused, yes.

Q Could you tell at the time from which direction apparently this—either the noise or the concussion of the first explosion came from? A Yes, sir. I stood facing Bedloe's Island when it happened; had my hand leaning up against the telegraph pole, and there was just an immense blast—well, I don't know as I ever heard very much of the report, as far as that goes, I was so shocked, it stunned me.

Q Was there anything in the way of fire that you could see just before the explosion occurred? A Yes; I could see that the place, the entire place was afire down there where the explosion came from.

Q Was there any change in its appearance just before the shock came? A Not to my knowledge, no.

Q Now, did you observe when the first explosion came whether anything struck you or fell on you? A No; only that the cinders was—had punctured my face and my body in various places, had gone through my clothes and so forth. Nothing fell on me.

Q How long did it take you to figure out where you were or to get your senses again after the first explosion? A Well, as soon as I went down among the rocks I knew I was at the water's edge, you know, because we have a sea wall of rocks built there.

Q As soon as you got to the water you knew you were going in the wrong direction? A Yes, sir.

Q What did you do then? A I came back and up the little incline, put out my hand and felt the line of cars, and walked right along the line of cars until I came to an opening.

Q Which direction did you go? A West.

Q Do you know when the Jersey City fire department arrived? A No, I do not.

Q Did you see them there at all while— A No, not until after the explosion.

Q Well, how long after the first explosion did you observe any fire department? A Well, when I went up the roadway I come across some of the firemen and the apparatus.

Q Where were they when you first saw them? A I should judge about opposite Pier 4, some perhaps down as far as Pier 5, opposite Pier 5.

Q Have you any way of fixing the length of time after the first explosion when you saw them near Pier 4? A No; I haven't any way of measuring the time only the

time it took me to get from where I was knocked down, which I should judge would be about ten minutes—five minutes.

Q At any rate it was after the first explosion when you saw them? A Yes, sir.

Q And before the second explosion? A Before the second explosion, yes, sir.

Q Well, did you see the members of the Jersey City fire department do anything or attempt to do anything in the way of putting out the fire? A No, sir.

Q What were they doing? A Standing around there.

Q Have any hose connected up that you saw? A Not that I—I didn't see any.

Q What was the furthest point towards the east, that is, towards the North Pier that you saw any of the members of the Jersey City fire department while you were there? A I didn't see any of them—that is before the explosion?

Q No; at any time while you were there? A Well, I saw them working down on the fire after the second explosion.

Q Well, that was some considerable time later, wasn't it? A Yes, sir.

Q Well, at any time between the interval between—at any time during the interval between the first and second explosions? A I didn't see them make any effort to put out the fire at all.

Q How far did they get toward the North Pier during that time? A Well, they didn't come down that way.

Q Did they get any further than Pier 4? A Yes; I say they were down as far as Pier 5.

Q Did they get any further than Pier 5? A Not to my knowledge.

Q Where were you when the second explosion took place? A At the grain elevator.

Q Where is that located? A Well, I wasn't at the grain elevator, that is, I was at the—I suppose between

the grain elevator and Pier 4 or what is known as Store 3 there.

Q Store 3 is just ahead of Pier 4, isn't it? A Yes.

Q And a little to the west of it. Whereabouts were you, were you on the driveway or on the pier? A No. I was right down at the bulkhead there.

Q The bulkhead? A Yes, sir.

Q On the south side of Store 3? A No; between Store 3 and the grain transfer elevator.

Q About half way between or where? A About half way between, yes.

Q What were you doing there? A Well, as I seen the fire blaze up after the first explosion, I had one hundred and eighty-five grain boats up there and all crews and every one of them with a family on board, and I was up there chasing them off.

Q You were trying to get them away? A Yes, and we were getting them away, chasing them across the tracks and sent them up on the hill.

Q You heard the second explosion, of course? A Yes.

Q About how long after the first one did it occur? A I should judge about a half hour.

Q Was there anything you saw in the way of fire or anything unusual just before that occurred? A No; my view was obstructed by—well, I couldn't see down that way at all the second explosion; all I could see was the blast.

Q What was it interfered with your view at that point? A Cars and other obstructions.

Q Where did the second explosion come from, as near as you can tell by the sound? A Well, from the blast going up it looked to me as though it came from the same section as the first explosion.

Q Same general direction? A Same general direction as the first explosion, yes, sir.

Q Did that have any effect upon you? A No, none whatever.

Q Now, after the second explosion occurred, what did you do? A I told the men, that is, the people who had got off the boats, not to go up by way of the new elevator, because it was made of concrete and I thought perhaps it might collapse, and I brought them right through the cars to the roadway and sent them up the roadway and I went down into Pier 4 again.

Q And then you remained there until you said two o'clock the next afternoon? A I remained there in that vicinity until two o'clock the next afternoon, yes.

Q Did you see the Jersey City fire department do anything after the second explosion? A Yes.

Q What did they do then? A They were—they had several hoses playing on the burning storehouses and piers.

Q And do you know where they got the water? A No, sir.

Q Do you know Chief Gately, battalion chief? A I don't know him. That is only through seeing him on the witness stand here.

Q Do you remember whether Chief Gately at any time while you were there asked you something about the water? A He never asked me for water.

Q Did any of the firemen— A No, sir.

Q —ask you for water? A No, sir.

Q Now, when the Jersey City fire department did get the hose working did you notice how many were actually in use? A How many hoses?

Q Yes. A No. There was quite a number of hoses coming from not only the Jersey City fire department, but from the fire boats from New York, and also from our tugs, our own tugs and other tugs around there, I don't know whose hoses was working.

Q How far toward the North Pier, if you observed, did the Jersey City fire department finally get after the sec-

ond explosion? A Well, they get down pretty well and covered all those big stores at various points, that is, at that particular time. The following, that is, the Monday, I had them down all over the ruins playing on hoses.

Q That is the next day? A That is the following Monday.

Q Going back now, for a moment, to the condition of things immediately following the first explosion. Did you notice anything with regard to the warehouses at that time? A No, I did not. I came up on the other side of the cars. I couldn't see the warehouses from the way I come up.

Q Did you at any time before the second explosion notice anything about the condition of the warehouses or their walls? A No, sir.

Q And after the second explosion did you? A Well, everything was blazing when I got back there.

Q Now, do you recall when it was that these so-called explosives and inflammables began to be handled through this yard in the manner you have already described? A They had been handled all during the time that I was agent there, and from records I know that they were handled six months prior to that time.

Q Going back for a moment now to the time when you were standing by the telegraph pole on the occasion of the first explosion. Can you tell us how far from you at that time the nearest train was or the nearest string of cars either? A Two tracks to my left—no, to my right. On my right hand.

Q Were those cars at that time moving or were they apparently in charge of members of the crew? A They were trying to move. I think they would have moved only the explosion happened. There was an engine attached to them.

Q They were hooked up to an engine? A Yes.

Q Do you know who was in charge of that train? A No, sir.

Q And that was which track from you, the second track? A Yes, second track from me? It was either 15 or 16 track.

Q Could you see any of the men who were in charge of that train? A Yes, sir.

Q Where were they? A One man was on top of the car and there was one of them on the ground on the other side of the train, in fact he spoke to me, the fellow on the top of the car.

Q How far was the man on top of the car? A I guess he was a couple of car lengths away at one time, another time he was nearer; he was moving—giving signals.

Q Do you know where Chief Leyden was at that time? Was he with you or had he gone somewhere else? A I had left him.

Q You don't know where he was at the moment of the first explosion? A No—only I had a general idea where he was.

Q Now you spoke of another man who was on the ground. How far was he from you? A The other side of the train, the other side of the car.

Q Well, how far away, just across the two tracks? A Well, I guess, one, two, three—three to four tracks anyhow.

Q These two men that you noticed were on top of cars and the other on the ground, was either of them nearer the point where this crater was afterwards than you, or were they further away from the crater than you were? A There was one just about the same distance away as I was from the crater.

Q How about the other? A The other one was just a little bit further.

Q Were they at that point at the time of this first explosion? A Yes, sir.

Albert M. Dickman, cross.

Cross examination by Mr. Skinner.

Q You got down, I understand you, and viewed the fire first from a point somewheres around the southerly side of the premises shown on this map and near the tank; is that right? Where was it?

Q Where was it? A Coming down the roadway I viewed it first.

Q Well, then, later on you got down to this point somewhere southerly of the tank, didn't you? A I was down by the tank but I did not view the fire from there.

Q Where did you first view the fire? A Coming down the roadway.

Q And what other points of view did you get of the fire than along that roadway? A As I came around past the tank and came down to the west of 7—

Q To the west of 7? A Yes; right down to the extreme end there.

Q Here (indicating on map P. 16)? A Yes, sir—I could see the fire there through cars, and so forth, blazing up.

Q You are indicating now a point right at the elbow formed by these pier lines or whatever they are south of the inscription Pier 7? A Yes.

Q Is that part of Pier 7? A Yes.

Q Then you were at the southwest corner of Pier 7? A Southwest corner of Pier 7.

Q How far down southerly did you get? A All the way down to the channel.

Q What do you mean by the channel? A The last line down there.

Q The very extreme? A The very extreme.

Q You understand, do you not, that this map shows the location of the cars that were on those tracks as of the time of the accident? A Yes, sir.

Q And that is the condition of the cars that were there as you stood looking at the fire from this elbow point? A I did not stand there looking at the fire from

that elbow point. I said I could see the fire from there.

Q If you could see the fire weren't you looking at it? A Yes.

Q And you said you stood there looking at it? A I was giving instructions to tugboat men there and I could see the fire over the cars.

Q You could not see through them, could you? A That is what I said before, I saw over them.

Q It was over those cars that you were looking? A Yes.

Q And it was from that point that you said you saw the cars afire on North Pier? A No, sir.

Q Didn't you say that before? A No, sir.

Q Didn't you describe yourself as cutting down here in this southerly direction, although you did not say just how far down you got, getting below Storehouse R, south of it, and seeing the cars afire on the North Pier? A No, sir; I never said that.

Q Where were you when you saw the cars afire on the North Pier? A After I had come around.

Q Come around where? A After I had come around through here. I came right along here in behind these cars (indicating on map P. 16), through here, in through here and then around over there.

Q I see; leaving the elbow point at the southwest corner of Pier 7 and going up northerly to the bulkhead side of the stores? A Yes.

Q Westerly along there? A Yes.

Q Northerly between M and N stores to the roadway, then easterly again on the roadway to—where? A Down to here.

Q Down to where? A Right about here.

Q Right about the point north of the— A That is where I met Con Leyden and talked to him, and walked over here.

Q You walked over northerly to the sea wall and stood there? A Yes.

Q And at that time you saw cars burning on North Pier? A At that time I say I saw the North Pier and cars burning.

Q And is that the time you meant in your testimony when you said you saw cars burning on North Pier? A As I came down I could see the cars and the North Pier ablaze.

Q As you first came down? A As I came down that roadway, yes, sir.

Q As you first came right down that roadway. Where did you leave it? A Where did I leave it? I left the taxicab at Pier 4 and walked straight down that roadway.

Q To where? A To where I told you about going down to Pier 7.

Q Did you get down to between M and N? A Further than that.

Q Down to east of R? A Yes.

Q And then west southerly along the east side of R? A Yes.

Q Do you mean to say you came down the roadway all the way past all the three storehouses? A Yes.

Q Then it was only when you were on the roadway that you saw cars burning on North Pier? A When I was on the roadway I saw the entire thing burning down there, what appeared to me to be the North Pier, the cars at the pier and some of the cars on the bulkhead.

Q And it was when you were on the roadway that you saw that, and only when you were on the roadway? A No, sir; after I came back and stood up alongside the telegraph pole I saw the same thing.

Q That is beyond the roadway but in line with it? A Yes.

Q And it is only when you were up at the north side of these premises, either on the roadway or standing at the telegraph pole, that you saw the cars burning on North Pier? A I did not quite get that.

Albert M. Dickman, cross.

Q You did not see cars burning on North Pier when you stood anywhere else than on the roadway or down by the telegraph pole? A See cars burning on North Pier at any other time?

Q Yes. A Once, when I had left the roadway and had walked over toward the sea wall, I was all over that place that night, I do not know exactly what movements I made, I never put it down.

Q And it looked to you as if the cars were burning on North Pier? A Yes, sir.

Q And as if the pier was burning? A As if the pier was burning.

Q The pier was a wooden structure? A Wooden structure.

Q And at the same time you say you saw what seemed to you cars in the bulkhead yard burning? A Yes.

Q Is the bulkhead yard a part of Black Tom yard? A Yes.

Q And what part of Black Tom yard do you call the bulkhead yard? A Down where those cars were?

Q That is this tract that perhaps you heard Mr. King say contained eleven acres? A Yes. There are different sections of it.

Q Where were the cars in the bulkhead yard that you saw burning? A They appeared to me to be right down at the extreme end of the yard.

Q Appeared to be? A They were right down at the extreme end of the yard.

Q Do you say that standing where you were and looking eastwardly straight down the track that you could pick out the location of the car that was burning, tell whether that was on the extreme end or where it was? A The car?

Q Yes. A No, not the car, but the cars I could.

Q The cars? A Yes.

Q Did you look down to the left of the cars? A To the left?

Q Yes. A One time when I was across the tracks I looked down there.

Q Did you look at all in any direction other than to the left of the cars; was your vision at any time to the right of the car? A I was all over that place that night.

Q You were talking about a place where you could look down; you could not look down and see where the fire was if you were at any of these points southerly with your view obstructed by these freight cars? A No.

Q Then when you were looking down here from a point on the driveway or up at the telegraph pole did you look down between rows of cars? A No; I had an unobstructed view right down to the North Pier there.

Q And you stood 25 feet from the edge of the crater when the first explosion occurred? A When the explosion occurred, yes, sir, that is where I was standing.

Q Then you were thrown down in the rocks? A No; I was thrown flat down on my back.

Q You spoke of going down in the rocks. A Yes; as I stated, I got up and started in the wrong direction and went down among the rocks.

Q So that the explosion just threw you down and then you picked yourself up? A Yes, that is all.

Q Immediately? A I would not say immediately, perhaps half a minute; I do not know just exactly how long I was laying there; I was not unconscious at any time, but I did seem to be in a daze.

Q And you think that was for half a minute? A A fraction of a minute or perhaps a minute

Q Then you went down in the rocks because you were in a confused state? A Yes.

Q But you quickly recovered from that confusion, from that confused state, didn't you? A I knew as soon as I went down among the rocks—the plant is very familiar to me—I knew just where I was.

Q Then you came up and walked westerly along the sea wall? A Along the sea wall, along this row of cars.

Albert M. Dickman, cross.

Q How soon after this explosion was it in minutes that you observed the Jersey City firemen standing around doing nothing? A Well, they were not doing nothing; they were going up the other end—but—they were not making any effort to put the fire out.

Q How many minutes was that after the explosion? A I thought it was perhaps five, perhaps ten minutes, but my conception of time at that particular time would be apt to be—may be wrong; but it took me the time consumed to get from the point where I was to Pier 5; that was the length of time that it would take—well, I should judge five minutes.

Q Five minutes? A I mean to walk, that would take about five minutes.

Q Your testimony is now, according to your best judgment and recollection, that it was five minutes after this explosion, five, perhaps six minutes after this explosion, that you were out at the point you spoke of where you observed the firemen doing nothing to put out the fire? A No; as I came up, as I say—from the point where I came up by the tank after going down among the rocks—walking from that point up to Pier 5 would take a man about five minutes, I should judge, and when I got there I saw some firemen and I saw others going up the line, up the roadway.

Q Without regard to the processes by which you tell how long it was, I want you to tell me; do you think it was five minutes or six minutes or seven minutes after the explosion that you observed the firemen doing nothing to put out the fire? A I should say anywhere from five to ten minutes.

Q So that this explosion had no effect upon you, standing 25 feet away from the edge of it, that interfered with your ability to observe what the firemen were doing perhaps ten minutes later?

Mr. Garrison. I object. He has not said he was 25 feet from that first explosion. He said he was

25 feet from the crater. He has not attempted to say the explosion was at the crater.

The Court. Let us hear the question.

(Question repeated.)

The Court. (To Mr. Skinner.) Do you contend that he has said he stood 25 feet from the edge of the explosion?

(Former testimony summarized by the stenographer.)

The Court. You may frame your question to include that.

Mr. Garrison. He has not said the first explosion was at the crater.

Mr. Skinner. I will withdraw the question.

Q You measured where you stood? A Yes.

Q The next day? A Two days later.

Q Why did you do that? A So as to make sure of the distance I was away from that crater.

Q What did that have to do with it? A I supposed for some time such as now I might have to tell how far I was away from that crater, so we went down there to measure it.

Q You did not measure or attempt to measure the distance you stood away from the site of the first explosion, did you?

Mr. Garrison. This witness has not attempted to indicate where the first explosion was.

Mr. Skinner. I have not asked him to.

The Court. What was the question?

(Question repeated.)

Mr. Garrison. That assumes the witness has placed the site of the first explosion.

Mr. Skinner. He has said he was knocked down by the first explosion.

The Court. Do you know where the first explosion was?

The Witness. No, sir, only that it was dead ahead of me, that is all.

The Court. I will overrule the question.

Q You say it was dead ahead of you? A Yes.

Q Well, you did not see then where it was, other than that? A Other than that it was in front of me, that is all.

Q Didn't it seem to you to be right in front of you? A No, sir.

Q It didn't? (No answer.)

Q Well, what was it that interested you in the crater or its location or your position with reference to it two days after? A The fact of wanting to know just where I stood, the exact spot.

Q Why? A In the event of it being asked me in testimony.

Q Why did you think it might be asked you; how far you stood from the crater? A It is the most natural thing in the world to find out where a man was.

Q It would be the most natural thing in the world to find out where you were at the time of the first explosion, wouldn't it, where you were with reference to the place of the first explosion, wouldn't it? A I do not know anything at all about that.

Q So that your measurement was not made for the purpose of telling where you stood with reference to the place of the first explosion? A It was made to tell where I stood at the time of the first explosion.

Q As you said, the way you located where you stood was with reference to a telegraph pole? A Yes.

Q That telegraph pole was still standing then two days after the explosion? A Yes.

Q And was it marked in any way? A No, sir.

Q How could you pick it out? A It was the first telegraph pole next to one that had a transformer on, and that was about directly opposite the tank.

Q And you remembered that fact, that it had the transformer on, and observed it? A There was no transformer on this pole I stood at.

Q You observed the transformer on the next one? A Yes.

Q And observed it the night of the fire? A No; I knew it was there.

Q Were there other poles with transformers on? A Not in that vicinity.

Q But up from it? A Yes.

Q These poles were how far apart down there? A I should judge 60 to 70 feet and perhaps 75 feet.

Q Now, you had supervision you say of the receipt and delivery of freight here at Black Tom? A Yes.

Q Then these cars that were there on the night of July 29th and 30th—the morning of the 30th—had been under your observation continuously, hadn't they? A What do you mean by observation? Do you mean I was down there looking them over every minute?

Q You did not think I meant that, did you? I mean that from day to day you saw the condition of bulkhead yard and knew about the cars that were there, didn't you? A Yes, sir.

Q Both by observation with your eyes of the cars themselves and by knowledge of the record of the receipt of the car? A Yes, sir.

Q And you knew that they contained explosives, didn't you? A I knew that.

Q And you knew that explosives would be set off, or made to explode by fire or detonation, didn't you? A Well, I had never studied the subject. I had been told—

Q You knew it, didn't you? A Yes; I knew it.

Albert M. Dickman, cross.

Q When you were knocked down by the first explosion I think you said Julian and Kane were with you? A Yes.

Q That is Kane the roundsman? A Roundsman of watchmen, yes.

Q Were Kane and the men you call watchmen under your supervision? A Yes, sir.

Q And you say Kane stood right by you? A Right by—right next to me.

Q How long did he stand there with you, as long as you were there? A Up until the time of the explosion, yes, sir.

Q When did you first see Kane on reaching the Black Tom yard that night? A On my way down, as I got out of the taxicab.

Q So right as you got out of the taxicab you saw Kane? A No; as I got out of the taxicab and walked down I met Kane.

Q Just a few seconds after you alighted? A That is all.

Q And then he accompanied you all the way down? A No, sir.

Q He left you? A He left me.

Q When did he rejoin you? A After I came through Pier 6 there.

Q Where did he leave you? A Where did he leave me?

Q Yes; where were you when he left you? A You mean the first time?

Q Yes. A I guess at about Pier 5.

Q Then he rejoined you? A As I came out at Pier 6.

Q Coming back from this elbow, southwest corner of Pier 7? A Yes.

Q And then he did stay with you? A He stayed—he stayed then with me until the time of the explosion.

Q And Kane walked with you, you say, from a point

opposite Piers M and N—Stores M and N easterly down to this point where you stood at the time of the first explosion? A Down to where I met Con Leyden.

Q Down to where you met Con Leyden? A Yes, sir; that is the point which you just mentioned, Mr. Skinner.

Q Well, Mr. Dickman, as you got there at 1.10 and left your taxicab I understand you that you walked right down in the way that you have described without stopping, didn't you? A No; oh, no; I stopped—what I mean I was here, there and everywhere; I am not—I am giving my general idea of what I done that night, and where I was; but I don't say that I was walking in a straight line all the time. I was moving in all around there, talking to different people.

Q Well, how long after you got there do you think it was when you got down here to the southwest corner of Pier 7? A I should judge that was about 1.30; perhaps 1.35 or 40; something like that.

Q And from there walking up to the point opposite Pier 6, and so up to the east—to the sea wall, and then easterly, how long did you take? A Well, I should not think that would take me more than 15 minutes if I walked that straight without stopping anywhere, or anything of that sort; I talked to Julian at the head of Pier 6 there; stood talking to him for a while.

Q Do you think it would take you 15 minutes to go from the southwest corner of Pier 7 up to the bulkhead westerly to the point between M and N, northerly to the sea wall and then down to the point where you stood at the time you first— A Would it take 15 minutes to make that walk?

Q Yes. A It would take about—I should judge, to make that walk—it would take about 15 minutes to make that walk, I should judge; perhaps a little less; but I will say 15 minutes.

Q How do you fix the time of the first explosion as 2.08? A Why, by a time clock.

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Q Where? A That was in the former shanty, that we dug up afterwards.

Q Oh, you didn't observe the time at the time of the explosion? A No, sir.

The Court. Who had charge of these Dougherty men down there?

The Witness. They were under other supervision than mine, your Honor.

The Court. Well, I understand that, but I ask you who had charge of them.

The Witness. I have never been told to find as to who had charge of them; I think they made their reports to the Dougherty people; they made no report to the Lehigh Valley officials.

The Court. Well, then, you want us to understand, I gather, from your answer that they were not watching these cars for the Lehigh Valley Railroad Company? In other words, they were not Lehigh Valley watchmen?

The Witness. They were not Lehigh Valley watchmen, sir.

The Court. All right.

Q Are these regulations that you have produced here, D. 1, the complete regulations of the company? A The complete regulations of the company?

Q Yes. A They are to my best understanding.

Q At the time that you talked with Sloan—that was shortly after you reached there, wasn't it? A Sloan?

Q Yes.

Mr. Garrison. He said Sloan telephoned.

The Witness. Sloan telephoned to me.

Q Oh, it was over the telephone? A Yes, sir.

Q Where were you when he telephoned? A I was home when he telephoned to me.

Q And did you get your first word of the fire from Sloan? A Yes, sir.

Q And then it was that he told you that he had notified everybody? A No, I said, "Has everybody been notified?" And he said, "Yes, sir." I didn't ask him if he notified everybody. I asked him if these certain people had been notified; that is, such as the fire department or any one else.

Q Well, you testified here that he said he had notified the fire boat— A I said, "Have the fire boats—New York Fire Department, been notified?" He said, "Yes, sir." I said, "Has the Jersey City Fire Department been notified?" He said, "Yes, sir." I didn't ask him if he done it. But I asked him if it—if they had been notified.

Q Did you ask him anything else besides the notification of these various fire departments, and so forth? A Besides the notification of these various fire departments and so forth?

Q Yes. A No; I said, "I will be right down," then; that is all.

Q Did you see Sloan after you got there? A Yes, sir.

Q Did you get more than one telephone message from Sloan? A No, sir.

Q When you got to this fire did you see any smoke the first time? A Did I see any smoke?

Q Yes. A As I approached I could see the smoke arising out of the flame; yes, sir.

Q Thick cloud of smoke? A Well, I just couldn't say whether it was a thick cloud of smoke.

Q Why not? Why couldn't you say? A Well, I don't know just what you mean by thick cloud of smoke. There was heavy smoke arising.

Q Heavy smoke arising from the burning cars? A Yes, sir, from the burning cars; yes, sir.

Mr. Skinner. That is all.

Albert M. Dickman, by the Court.

The Court. You said that these cars, when they arrived in the Claremont yard, were notified to the consignee, as I understand you.

The Witness. Notice of arrival.

The Court. Would be made to the consignee?

The Witness. Yes.

The Court. And then who gave the order for the moving of the cars from the Claremont yard?

The Witness. That was a regular daily operation, your Honor. One of the—the train crew who had charge of the placing of the cars at the North Pier and those other piers, would go out to the Claremont yard, pick up whatever kind of those cars there were there and run them down to this place, these tracks where we put them.

The Court. That was the railroad initiative?

The Witness. Yes, sir.

The Court. And when they got down near Black Tom yard, where did you put them after having notified the consignee of their arrival at Claremont?

The Witness. We would place them on these various tracks on that bulkhead yard.

The Court. In the bulkhead yard?

The Witness. Yes, sir.

The Court. And you would keep them there how long?

The Witness. Well, the free time would be 48 hours.

The Court. Now, then, after 48 hours you charged demurrage on those cars, didn't you?

The Witness. Yes, sir.

The Court. And you would hold those cars there until the consignee actually removed the contents from the cars, wouldn't you?

The Witness. Yes. sir.

The Court. Well, now, when the consignee wanted to remove the contents from the cars, how did you get the car to the point where the contents were removed?

The Witness. Our drill engine would take hold of the cars that were needed, pull them up and switch over and go down on the North Pier and place them there.

The Court. And how would you know when to do that?

The Witness. Well, so far as the ammunition for cannon was concerned, we had daily notice—the consignees had representatives right down on the ground and they would tell me whether they were going to work the next day; also tell the conductor of that particular train crew; and he would make a drill, place so many cars there at night before he went home; and then if they had used those up before 12 o'clock, noon hour the next day, he would make another drill, take out all the empties, and put in filled—loaded cars.

The Court. So that the place on the North Pier where you put the cars was a place—in the first place, I am talking about—

The Witness. Yes, sir.

The Court. —was, in the first place, a place selected by you?

The Witness. Selected by the Lehigh Valley.

The Court. By the Lehigh Valley?

The Witness. Yes, sir.

The Court. And they were not put to the point where the unloading was done until notice from the consignee where he wanted them placed or where the unloading was to be done?

The Witness. He would notify us that they were going to come over to get the cars, and we would place them there.

The Court. And until he notified you that he was going to come over for the cars they were left where you had placed them?

The Witness. Yes, sir.

The Court. That is, the Lehigh Valley Railroad?

The Witness. Yes, sir.

The Court. All right; that is all.

By Mr. Hobart.

Q On what tracks by number were they placed? You call them the bulkhead tracks. But do you know the numbers? A Yes, sir. As a general rule they were from 12 up to 16. 12, 13, 14, 15 and 16.

Q And those are the tracks nearest to the tracks leading into the North Pier? A Yes, sir.

Q Except track 17? A Well, it was a lead track also, to the trestle of the North Pier.

Q Now, when were these movements, drill movements in the yard made with reference to the hour of the day? A Always in the day time.

Q Were they ever made after dark? A Never to my knowledge; no, sir.

Q Was there any particular hour in the day when you were supposed to be through drilling? A At sundown; that is, the crew, I guess, got through down there at 5.30.

Q Was there any drill in the yard at all that night? A No, sir.

The Court. Just one more question: Did you give directions or cause directions to be given to any of the Lehigh Valley Railroad watchmen to look after those cars on the North Pier?

The Witness. To look after the cars on the North Pier?

The Court. Yes.

The Witness. Not specifying in reference to it

The Court. Well, I don't care whether you specified it or not. Did you give directions to look after the cars on the North Pier?

The Witness. I gave directions to look after all the ammunition and explosive cars.

The Court. Well, those are the ones that were on the North Pier?

The Witness. Yes, sir.

The Court. So that you really did give directions to look after the cars on the North Pier?

The Witness. On the North Pier; yes, sir.

The Court. And the watchmen that you gave them to did that thing, did they, if they did their duty?

The Witness. If they did their duty they done that.

The Court. All right. And that was done until the material was unloaded from the cars?

The Witness. Yes.

The Court. By the consignee?

The Witness. Yes, sir.

The Court. Very well.

By Mr. Hobart.

Q Referring further to the watchmen, you mentioned the Dougherty watchmen who were not employed by the Lehigh Valley. Do you know as a fact that they were such watchmen there? A I knew that there were such watchmen there; yes, sir.

Q How did you know that? A By my seeing them there.

Q And do you know what particular duties they were charged with? A Yes, sir.

Q How do you know that? A From conversation with them.

Q And what were their duties?

Mr. Skinner. I object.

The Court. I think I will sustain it unless it appears that—

Q Well, where did you observe them and what did you observe them doing? A I observed them down around the North Pier; also along the cars of ammunition and explosives, and I asked them what their duties were, what they were doing down there.

Q Well, did they have any particular point for headquarters as far as you observed—not what they told you but what you observed? A Any particular point for headquarters?

Q Yes. A Yes; they had a little shanty.

Q Where was that located? A Well, that was just about opposite this Zeke's shanty that you have heard mentioned here, on the shore.

Q You saw them at that point at different times? A Yes, a little structure they built themselves; they put up themselves.

Q Do you recall when they first went to the yard or went to that part of the yard where you observed them? A Well, it was at least two months prior to the explosion, perhaps longer.

Q Now, referring again to the pole where you were standing at the time of the first explosion, did you afterwards notice whether or not that pole had any marks of the explosion? A I didn't notice any.

Q Was it blown over in any way? A No, sir.

Q Or broken—anything broken about it? A No, sir; standing perfectly straight.

Q Well, now, how did you fix the particular pole? That is what we want to get at? A That is from the—from the point where I met Con Leyden and alongside

of this pole we had a pile of ties; and Julian was leaning against that pile of ties and I was leaning against the pole.

Q Were the ties there the next day? A They were there for several weeks afterwards.

Q Yes. And how far from the pile of ties was the pole? A About three feet; five feet; not more than that.

Q When the Dougherty watchmen first came there, did you know as a fact that they had come? A Yes, sir.

Q And how did you learn that? A By having it reported to me by my men down there.

Q Did you afterwards see them there? A Yes, I saw them there.

Q And did you get any word from any of your superiors as to whether or not they were coming there?

Mr. Skinner. I object.

The Court. Why?

Mr. Skinner. I do not see how, in the first place, it is competent. Did anybody else tell him that they were coming? That is second-handed information of the plainest kind.

The Court. I do not think so. I think if this man is charged with performance of duties on the dock he is obliged to obey the orders of his superiors, and if one of his superiors indicated certain men were there or were to be there, it is part of the *res gestae* of his business on the dock to let that be proven and show what his orders were and what his instructions were, and what part the Lehigh Valley had in the guarding of the dock by these men.

Q (Repeated by the stenographer.) "And did you get any word from any of your superiors as to whether or not they were coming there?" A Not that they were coming there. After they had arrived there I took the

subject up with my superior officer and he informed me that it was all right to let them be there.

(Witness excused.)

JOHN MICHAEL JULIAN, sworn.

Direct examination by Mr. Hobart.

Q What is your position with the Lehigh Valley, Mr. Julian? A Fire marshal.

Q How long have you acted as fire marshal? A About seven years.

Q What territory do you cover? A At the present time?

Q At this time, yes. A The entire system, from Buffalo to New York City.

Q On the 29th or 30th of July, 1916, what did you cover? A New York division, from Newark, New Jersey, into New York.

Q What did that go to? A Between New York City and Newark.

Q That included Black Tom terminal? A Yes, that included the Black Tom terminal.

Q State generally what your duties were? A My duties were to maintain and inspect fire fighting paraphernalia.

Q Did you have anything to do with watchmen? A Very little.

Q Your duties were limited to the apparatus and paraphernalia? A Yes.

Q And at the time of this fire on July 29th, you lived in Jersey City, I believe? A Yes.

Q At what point? A At 2129a Boulevard. That is one door from Grant avenue.

Q When did you first know of the fire? A Shortly after twelve o'clock. I received a telephone message that the North Pier was on fire from Watchman Kane.

Q Did you go to the terminal? A I did.

Q How did you go? A I walked right straight over Claremont avenue.

Q How far? A Oh, it is possibly, I dare say, two and a half miles.

Q How soon after you got the message did you arrive at the terminal? A Why, I probably arrived there around the neighborhood of I will say 1:20, in that neighborhood. I didn't fix the exact time. I did not look at my watch.

Q Where did you go when you arrived, in what part of the terminal? A The first part of the terminal I went to the pump station at the east end of Store F, to ascertain whether those pumps were working and whether they had pressure on the lines.

Q What did you find? A I found the pump working, pressure on the lines.

Q Who was there working? A Mr. Sloan.

Q How could you tell whether they were working or whether the pump was working? A Well, the pump was working and I looked at the gauge and I took the gauge pressure.

Q What pressure did it have? A About seventy pounds at that time.

Q Was that the proper pressure to have for operation? A Seventy is an operating pressure, yes; from seventy to a hundred.

Q Where did you go after that? A I spoke to Mr. Sloan and asked him how his pump was working and he said "Working fine," and everything, the water was on the line, and he said Dickman is outside, and I went outside and met Mr. Dickman and Kane. Dickman left right away and went around the block of stores. Dickman left us and I spoke a few words to them—my attention was with Kane, the man who called me up, and I asked particularly about the fire and what was being done, and Dickman left us and went between the blocks of stores, between F—I think it is F and G, as far as

the store went down there—he said he was going around to notify the tugboat captains. I conversed with Kane and I got data from Kane as to the time of the fire as near as he could place the time.

Mr. Skinner. Don't tell.

Q Never mind what Kane said to you. A And I then walked up, facing this block of stores, to store—middle block of stores, and met Dickman again coming through between the stores, and there we went a little ways further and crossed over near the tank which you referred to—we crossed over to the roadway and up to the gravity or hundred thousand gravity tank that stood up there on stilts.

Q That is the one there, Store R? A That is the one at Store R, yes.

Q Where did you go? A We met Mr. Leyden, chief of police, and crossed over to the seawall side to get a close—to get a better view of the fire. The fire seemed to be down at the North Pier.

Q Where were you when you first observed any fire after you arrived at the terminal? A Why, I was coming up the roadway when I first observed the fire.

Q Where did it seem to be when you first observed it? A Seemed to be away down the east end of the terminal.

Q Could you tell where it appeared to be with reference to the North Pier? A It seemed to be in the vicinity at the time of the North Pier.

Q Was that before you got to the pump house? A That was before we got to the pump house, yes.

Q After you had gone into the pump house and spoken to Sloan and came out again did you again observe the fire? A After I crossed into the roadway.

Q Where was it then? A It seemed to be down in the neighborhood of the North Pier.

Q And when you and Leyden and Dickman were down there by the hundred thousand-gallon tank near Store R

where was the fire then? A Seemed to be further away from us, to be in the neighborhood as I saw it of the North Pier. Of course at the point of the tank our view was somewhat obstructed by cars, but as I crossed to the sea-wall side we had a better view of it.

Q Do you know where the crater was as it was located the next day? A Yes.

Q Or the same day perhaps? A Well, it was Sunday morning.

Q Yes. Now where was the fire with reference to the crater when you first saw it and when you again saw it by the tank? A It was far beyond the crater, east of the crater.

Q Far beyond the crater, east? A Yes, east of the crater.

Q Was there any fire at or near the point where you afterwards located the crater? A Not at that time there wasn't.

Q That is the time I mean, when you first went there? A No, sir.

Q Now can you tell where you were standing when the first explosion occurred? A Yes, sir; I can.

Q Where were you? A I was standing leaning against a pile of ties next to Mr. Dickman.

Q Near to Mr. Dickman? A Near to Mr. Dickman.

Q How far from him? A Well, possibly a couple of feet, two or three feet.

Q How do you fix the point? A There was a pile of ties against that pole, and I think that is the last pole to stand. I know the pile of ties was there the following morning, and that was directly, almost opposite between the gravity tank and Store R, a point opposite those.

Q What were you doing? A Standing there watching the fire. Mr. Leyden advised us not to go down any further. He said you can do no good and it will be dangerous for you.

Q After he had warned you did he go? A He got on a car and went further east.

Q How long did you stand there by the pile of ties before the first explosion occurred? A Well, I wouldn't say positively; may have been ten, may have been twelve minutes, or fifteen.

Q From which direction did the explosion come? A Directly in front of us.

Q Did you see anything in the way of fire or smoke immediately before the fire occurred? A Yes, sir.

Q What did you see? A A fire and a coil of hazy smoke and quite a fire down in front of the North Pier.

Q Was there any change in the fire or smoke? A One instant and there was a flash, an instantaneous flash.

Q Where did it appear to be, this flash? A Why, appeared to be down right off of the North Pier.

Q You have referred to some cars that were standing on the tracks; were they on what is called the seawall tracks? A Well, I am not familiar with the tracks. I should imagine what is called the seawall track, but I am not familiar.

Q They were near where you were standing? A Yes.

Q Were any of the cars on those tracks on fire when you first went there and when you stood by the pile of ties? A Near to where I was standing?

Q Yes. A No, sir.

Q Now, were any cars between you and the North Pier on fire or apparently on fire while you stood by that pile of ties? A Well, there seemed to be apparently on fire at the west end of the North Pier, the cars adjacent to the North Pier seemed to be somewhat afire.

Q You speak of the west end, of what? A The west end of—the end attached to the land.

Q The land side? A The land end.

Q Were there any cars between you and those cars that appeared to be on fire while you stood by the pile of ties? A No, sir, they did not.

John Michael Julian, direct.

Q Now, when this flash came was there any noise that accompanied it? A Well, the flash was—there seemed to be an instant following the flash, there was a terrific blast of wind that didn't seem to me to be as heavy a noise as a person might surmise, but it knocked me down and I turned around and I held my ears that way, because I felt a rain of everything like fine dust going over my head.

Q Could you tell what was hitting you? A No, sir; I could tell it was dust. Right afterwards the air became black, you couldn't see as much as a spark of a match, and I thought it had blown itself out, and, thank God, it is over, the whole North Pier is gone, and that was my thought, and on looking over the brick storehouses I could see the uppermost story seemed to be off, lifted off, kind of ragged.

Q Which storehouses were those? A That is the stores just east of R—M, N, O, P and Q, right opposite, and I stood right opposite and looked over to those.

Q And you mean west of R? A West of R, I mean.

Q That is in the last block? A That is the last block of stores, yes. Then was my first realization that the explosion was somewhat of a heavy explosion.

Q What part of those stores were apparently knocked off. A Seemed to be the topmost of the upper story.

Q Of all of them? A Well, couldn't state all; it looked jagged against the skyline.

Q Did you notice any other stores that were injured apparently by the first explosion? A I did not. As I passed down there I didn't notice the stores any more.

Q Now do you know how far that point was where you stood from the nearest line of the crater? A I do not, I did not measure it.

Q Did you see the crater the same day or the same morning? A I did, the same morning.

Q What is your judgment as to how close you were standing to the edge of it, I mean, without having meas-

ured? A It was only a short distance, maybe thirty feet, thirty-five feet.

Q Was the pile of ties where it had been? A Yes.

Q How about the telegraph pole? A The telegraph pole still stood. It was not a telegraph—an electric light pole.

Q It was an electric light pole? A Yes, Public Service pole.

Q After the first explosion what did you do? A After the first explosion I picked myself up and looked for a flashlight I had in my pocket, which was missing; looked over toward the block of stores, and I thought I was the only thing left living, it was my first impression, kind of got myself together, and the flame lit up again in the center, and I could see which direction I was going, and I stood there somewhat in a dazed condition, and started down toward Pier 4, and a distance down I picked up a brakeman, Walsh, a man somewhat injured about the face and was bleeding and in a dazed condition.

Q Had you seen those brakemen at any time either just before or just after the first explosion? A Saw them just before the explosion.

Q Where were they? A This man Walsh, on top of a box car with a lantern in his hand.

Q Well, how far from you? A Well, possibly four or five—maybe half a box car length ahead of me, east.

Q Was the car part of a string of cars? A Part of a string of cars, yes, sir.

Q Any engine facing them? A That I couldn't—I imagine there was. I didn't look down the direction the engine was facing. The cars had been moving, and he was there with his lantern.

Q What was his name? A John Walsh, I knew him sometimes as Whitey.

Q Did you see anybody else around there besides Walsh and Dickman? A There was Kane there and

other men moving around there, but I didn't pay particular attention to who they were.

Q You started to tell us where you were after the first explosion and you got to the point where you picked up one of these men that had been hurt. A That was Mr. Walsh.

Q Where did you go after that? A I took him by the arm and walked down toward the old grain transfer elevator, where I knew there was a patrol wagon there and there was firemen in that neighborhood, Jersey City firemen, and I figured then they would send an ambulance call from that point, and that would be the best point to get him.

Q Then your idea at that time was to take care of this engine man? A Take care of that engine man.

Q Now on your way down to the grain transfer elevator did you follow along the roadway or bulkhead? A Followed along the seawall side to a place about, between—well, opposite Pier 5, and then cut across to the roadway.

Q From Pier 5 you walked along the roadway? A Yes, sir.

Q On your way down towards the grain transfer elevator did you see any Jersey City firemen? A I did.

Q What were they doing? A Well, they seemed to be in somewhat of an upset condition themselves—in a confused condition, running around.

Q Have a hose at that time? A No, there was no hose. I heard one man say, "Let's go over and get this man out from under a roof or something," and then they made a rush in the direction of Pier 4.

Q Did they get any hose on? A I didn't see any.

Q You finally got your man down to the— A I got him down to the grain transfer elevator, yes.

Q Send in a call? A They had already had a patrol wagon there taking anybody that was injured.

Q What did you do after that? A Turned around and going to start back, and in the meantime there was some shifting of cars in that neighborhood. It seemed to me—whether they paid any attention to me I don't know, but the time seemed to go very rapid, and right after that the second explosion; I was facing it and I was headed right down there toward the North Pier when the second explosion occurred.

Q Where were you? A Right opposite the grain transfer elevator and between that and Store 3.

Q What direction did that come? A It came from the—well, it seemed to come just beyond Store R; took in a greater scope than the other, seemed to fan out like a big fan.

Q It looked bigger or sounded bigger? A It didn't sound any bigger, but it seemed to take in a greater area.

Q Was there something you could see? A Oh, all you could see was these three rolls go out and an immense flame between it. It compared nothing like the first one, didn't seem to be of the same nature.

Q Did it have any effect upon you? A Not at all; only might have agitated my fright a little more.

Q Now, going back to the time when you first arrived at the terminal was there any sound of smaller explosions, as of guns or shells or anything of that sort? A Yes; they were various in strength.

Q What kind of sound was it? A Oh, it was continuous rattle.

Q Where did it come from? A Seemed to come from the neighborhood of the North Pier.

Q Did any of that sound come from the section where you afterwards located the crater? A No, sir.

Q When you first got there were there any of the Jersey City firemen there at that time? A They came right after me, I think. They were not there when I passed the grain transfer elevator, but they followed me right up, they came right in, I heard their apparatus.

Q Did you observe where they went? I am referring to the period before the first explosion? A The only Jersey City firemen I saw there before the first explosion was when I was standing talking to Dickman and I faced around and heard somebody hollering. There was a fireman with a nozzle—he had no hose—it was a nozzle, and his coat and hat—rubber coat and hat, kind of shielding himself here possibly four hundred feet further back from where I stood.

Q Four hundred feet back? A Yes, further west.

Q He was the nearest man, you say? A He was the nearest man I saw. What attracted my attention was by a certain remark he passed.

Q You mean a remark he made when you called out to him? A No; he hollered back to somebody behind him.

Q What did he holler?

Mr. Garrison. I object.

Mr. Hobart. Part of the *res gestae.*

The Court. I think I will permit that.

A Well, the remark was: "To hell with this. If I want to get shot I will go to Mexico."

Q Was there some shooting going on at this time? A Only this small popping of those time fuses flying through the air. We were closer to them.

Q You saw the firemen there afterwards get more hose attached to the different hydrants? A I guess they did.

Q Well, did you actually see it? A Well, I would say whether they had it attached to the hydrant or whether they were pumping from the bay That I couldn't say. Later on in the morning I saw hose attached to hydrants.

Q How long were you there? A I was there all the following day, all Sunday.

Q During that time was hose attached to the hydrants? A Yes; there was hose attached then.

Q Was water coming from the hydrant? A Yes.

Q Do you recall when was the last time before the fire you had observed anything about the hydrants or the pumps or the other fire fighting apparatus? A Why, it might have been in the neighborhood of a week or so before that that I was down there and walked over the premises.

Q And what did you do at that time? A We didn't test any of the—open any of the valves to our sprinkler. Didn't open a hydrant to find out we had water. In fact we knew there was water in all these hydrants.

Q You have gone over, I believe, the answers to the plaintiff's interrogatories in this case describing the fire fighting apparatus in detail? A Yes.

Q That is correctly set forth in those answers, isn't it? A Yes.

Q When the men were working there the next day, I mean the firemen, did they get water from the hydrants at that time? A They did, yes.

Q Did they get it from the city hydrants? A Yes, sir. Well, they were our hydrants. They were called—city water was on the hydrants, and our own pumps were on them.

Q I mean hydrants that were on the city main? Did they get water from the city main? A Well, they got water from the hydrants, yes, sir. They are connected to the city and salt mains—either one.

Q Now then referring to the matter of instructions to employees in regard to fire, I show you a notice headed, "National Storage Company, fire department regulations and fire alarm locations." A Yes.

Q You have seen that before, have you? A Yes.

Q Or a similar card? A Yes.

Q Were there any of those notices in the Black Tom terminal yard at the time of this fire and explosion on July 29th and 30th? A They were posted up in conspicuous places over the buildings and on the platforms.

Q How long had they been there? A Oh, probably eighteen months before—a year before the explosion, anyhow.

Q Now, have you refreshed your recollection as to the various points at which these cards were posted? A Some of them were posted on the hoist engine houses, on both sides of the brick stores; others were posted in offices and in the piers at conspicuous points where they could be seen.

Q These regulations as they appear on this card which is headed National Storage Company, did these regulations also apply to the Lehigh Valley? A They did.

Q Now, I call your attention to a memorandum on a paper which I show you and ask you if you can tell by reference to this memorandum the various points at which this card was placed—a memorandum which I understand you prepared, showing the location of these cards? Just look at the memorandum I show you. A Yes.

Q Was this prepared by you? A Yes; this was prepared by me.

Mr. Skinner. I understand that counsel has a memorandum in his hand containing an answer to this question and he wishes to have the witness read from it. I have no objection to shortening the proceeding.

The Court. All right.

Q Will you kindly refer to this memorandum for the purpose of refreshing your recollection as to the locations of this particular card and tell us where these cards were placed? A One inside the electric pump house a short distance to the east of Store R.

Two. On the north side of the block of stores known as Store N to R inclusive and about the centre of said block about five feet above the level of the platform located in front of said block.

Three. Outside of said block of Stores N to R inclusive, on the westerly side of Store N about five feet above

the level of platform located on the west side of said store.

Four. Outside of said block of Stores N to R inclusive, on the southerly side of said block about in the centre thereof and about five feet above the level of the bulkhead located on the southerly side of said block.

Five. Outside of the wall of covered pier known as Pier 6 and on the northerly side thereof, near the northeast corner about five feet above the bulkhead.

Six. On the side wall of the covered pier known as Pier 6 on the southerly part thereof on the southerly wall thereof and about five feet above the level of the floor.

Seven. Outside of the small house known as the hose cart house located near the easterly end of block of stores known as Stores G to M inclusive, about in the middle of Store M and about five feet above the level of the ground.

Eight. On the outside of the wall of the building containing steam hoist engine located on platform on the northerly side of Stores G to M and in the centre thereof, and about five feet above the level of said platform.

Nine. On the outside of wall of the building containing steam hoist engine located on the bulkhead on the southerly side of Stores G to M about in the centre thereof and about five feet above the level of said bulkhead.

Ten. Outside the wall of covered pier known as Pier 5 on the northerly side thereof about five feet above the level of the bulkhead.

Eleven. Inside the wall of covered pier known as Pier 5 on the southerly side thereof about five feet above the bulkhead.

Twelve. Inside the office of the superintendent of the National Storage Company located near the southwest corner of the block of Stores G to M.

Thirteen. Inside the timekeeper's shanty on the easterly wall thereof located near the easterly side of block of stores known as A to F inclusive, about five feet above the floor.

Fourteen. Inside the building of the National Storage Company located near the easterly wall of the block of Stores A to F and about in the centre of said block about five feet above the floor.

Fifteen. Inside the building known as the boiler house located near the northeast corner of said block of Stores A to F about five feet above the floor.

Sixteen. On the outside of the wall of building containing steam hoist engine located on platform on the northerly side of Stores A to F about in the centre thereof and about five feet above the level of said platform.

Seventeen. Outside of the wall of building containing steam hoist engine located on the bulkhead on southerly side of Stores A to F about in the centre thereof and about five feet above the level of said bulkhead.

Eighteen. Outside the wall of the first building located at the head of covered pier known as Pier No. 4 and about five feet above the level of said floor.

Nineteen. Outside a small building containing a hoist engine located about in the centre of Pier 4 and about five feet above the level of said floor.

Twenty. Outside a small tool house located on the southwest corner of Pier 4 near the head thereof, about five feet above the floor of said pier.

Twenty-one. Outside of small building containing hose cart in the westerly wall of Store 3 and five feet above the level of the ground.

Twenty-two. Outside the south wall of building known as Warehouse AA, about five feet above the ground.

There were also about fifteen other such notices posted in conspicuous points about the above warehouses and other buildings, but none of the defendants is able to give their location.

Q You have given all that you can recall by reference to this memorandum? A Yes.

Mr. Hobart. I offer this card in evidence.

Mr. Skinner. No objection.

(Card marked D. 2.)

Q Reference has already been made, Mr. Julian, in certain answers that were read by the plaintiffs to what is called the American District Fire Alarm System. I show you a red box and ask you if that was a box used in connection with that system? A Yes, sir; it was.

Mr. Garrison. Are you going to put it in evidence?

Mr. Hobart. Yes.

Q And is this one of the very boxes that came from the place? A Yes, sir.

Mr. Hobart. I offer it in evidence.

Mr. Skinner. No objection.

(Designated D. 3.)

Q It is a little inconvenient to print. Will you just read what it says? A Break glass; open door; pull inside lever down.

Q Marked at the top, "For fire?" A "For fire."

Q And when we open it according to directions what do we find? A "Pull down and let go"—in silver letters with an arrow.

Q Do you recall where these pull boxes were located? A Two in Pier 6—

Q Without going into details, will you state generally if they were located at the points shown on this previous Exhibit D. 2? A Yes; they were.

Q That gives the location of them? A Yes; that gives the location of them.

Q I show you a small red card headed "Fifty dollars reward." Was that located anywhere near these different boxes? A Located one at every box.

Mr. Hobart. I offer it in evidence.

Mr. Skinner. No objection.

(Marked D. 4.)

Q I show you another card marked "Lehigh Valley Railroad; location of fire alarm signal boxes at National Storage." Were these cards which I show you located at various points in the yard on the night of July 29? A They were located in every local pull box in the inside, on the outside cover.

Q By pull box do you mean this red box we have just referred to? A No; the Lehigh Valley local system, that is a pull box; something on the order of that. It was enclosed in a waterproof wooden box with a glass door. On the door was one of those cards.

Q The location of the Lehigh Valley boxes is indicated on the card itself? A Yes.

Q And was there a card at each one of those boxes similar to the one I show you? A Yes.

Q This is one of the identical cards? A It was one taken from one of the boxes.

Q It looks as if it had been through something. Were there any of the cards located at any other point, such as telegraph poles or other conspicuous places? A They were in every conspicuous space, in the offices, in the grain elevator, etc.

Q About how many of them were there altogether? A Oh, I do not know. I dare say there must be thirty or forty of them distributed around.

Q This also gives the location of city boxes? A Yes.

Q Number 671 and 672? A Yes.

Q Do you know whether in fact there were city fire alarm boxes at those points as indicated? A Yes; there were.

Mr. Hobart. I offer this card.

(Card Marked D. 5.)

Q I show you another card headed "Rules and Requirements of the New York Board of Fire Underwriters." Were some of these cards also posted in and around the yards? A Yes; they were posted in storehouses and warehouses.

Q Do you recall which warehouses they were posted in? A Well, I could not recall the exact points; I know they were in one of the warehouses; I have seen those cards.

Mr. Hobart. I offer this card.

(Card marked D. 6.)

Q I show you another card headed "Lehigh Valley Railroad, Office of General Superintendent, rules relative to fire protection." Were those signs in the yard on the night of July 29?

Mr. Skinner. Why not ask him where they were?

A They were.

Q State as nearly as you can recall where they were. A There were several of those cards distributed around at various points in conspicuous places.

Q About how many altogether, as near as you can remember? A I can't—there may have been forty or fifty of them distributed around various points.

Q Were they limited to the buildings or were they placed on some of the piers or other points? A No; some were placed on piers; some on the grain elevators.

Mr. Hobart. I offer it.

(Marked D. 7.)

Q Is this one of the identical cards that has been through the explosion? A That is one of the identical cards taken from there.

Q Now, with regard to the tugboats, were there any instructions in the tugboats with regard to what they should do or what the fire call was? A The fire call was printed in red letters in the pilot house of the tug.

Q Do you know what the call was? A Two long and three short whistles.

Q Now, were there any other written or typewritten or printed instructions as to what should be done in the

event of fire? A There were some typewritten instructions at the time in the pumping station regarding the fire boat calls, etc.

Q Where were those notices placed with regard to the telephones in those buildings? A They were placed in—I think there was one in the timekeeper's office near the telephone and one in the pumping station, in various points where telephones were handy, so that they could be utilized.

Q Have you endeavored to procure one of those? A I have been unable to procure anything; they were destroyed.

Q Do you recall the substance of what they contained? A I do not recall it to the word. It is a notification there of the different men and their home addresses and their telephone calls, and the fire boat calls, and the Eagle Oil Works call, I think, for their fire boat—their telephone.

Q Do you remember any of the officers whose telephone numbers were given on this typewritten notice? A I believe Mr. Dickman's number was there, and Mr. Luscomb, of the National Storage; Mr. Davidson's house and probably his 'phone, if he had one.

Q How about the trainmaster? A Trainmaster, superintendent.

Q How about your own? A Fire marshal.

Q Your own telephone call? A My own telephone call was there, too; yes, sir.

Q How about the fire boat? A Fire boat call was on there, too; the telephone call for the fire boat.

Q Now, reference has already been made to the two city fire alarms, No. 671 and 672, as shown on Exhibit D. 5, the oil yard, on the telegraph pole, and Store F, east end. You have seen these fire alarm boxes, have you? A Yes, sir.

Q What kind of boxes were they? A Standard Janewell boxes.

Q Regular city boxes? A Regular city boxes.

Q Any instructions as to what should be done in regard to those boxes in event of fire? I mean, anything on the boxes themselves? A Lettered on the outside of the door, "Janewell Fire Alarm;" inside door it said, "Pull lever down and let go."

Q How long had you had charge of the fire fighting paraphernalia at the Black Tom terminal before the fire? A About three and a half years.

Q Now, will you call to mind for a moment the date when the war started in Europe? Do you remember when it was? A Well, it was possibly in the neighborhood of August 1st, 1914; in that neighborhood.

Q Yes; well, it may have been a day or two before or afterwards, but that is near enough for all practical purposes, I guess. We won't argue as to who started it. Now, state whether or not you were then in charge of the fire fighting apparatus at this point? A Yes, sir; I was.

Q Now, after the war started, on or about the 1st of August, 1914, was there any change or any addition to the apparatus at the terminal, in the fire fighting apparatus, or— A The installation of the 12-inch line took place after the war started.

Q What line is that? A The large line running down the roadway with twenty-four three-way Corey hydrants.

Q Is that connected up with the city fire department? A That is connected with the city water system.

Q Do you recall when that was installed? A I don't recall the exact date; but that was put in service somewhere in the fall of 1915, if my recollection is correct.

Mr. Collins. When?

The Witness. Fall of 1915.

Mr. Collins. Speak a little bit louder.

Q And did that include the so-called Corey hydrant? A That included the twenty-four three-way Corey hydrants; yes, sir.

Q Now, was there anything else put in after the date of August 1st, 1914? A I believe the National District Fire Alarm System was installed after that date.

Q Well, does that include what we sometimes call the automatic sprinkler system? A That is in connection with the automatic sprinkler system.

Q Part of that system? A Part of that system, supervisory system.

Q How about the American District Fire Alarm System; is that the same system? A That is what I had reference to, the American District Fire Alarm System.

Q Were there any other pumps put in after the war started in August, 1914? A Two pumps.

Q How many? A Two.

Q Where were they located? A One located at the oil yard and one located east of Store R; both $1,500 pumps, one electric and one steam.

Q Was there one east of Store R, near the 100,000 gallon tank? A Near the 100,000 gallon tank; yes, sir.

Q Is that an electric pump? A That is an electric pump.

Q Now, you have referred to these hydrants that were put in as a part of the 12-inch main or in connection with it, as three-way hydrants. Will you state what that means? Why do you call them three-way? A Three-way hydrants mean that you can connect one, two or three hose to the hydrants.

Q Three separate and distinct hose? A Three separate and distinct hose; yes, sir.

Mr. Hobart. Cross examine.

Cross examination by Mr. Skinner.

Q Mr. Julian, you verified or swore to the answers to interrogatories that were put to the Lehigh Valley by the plaintiff in this case, did you not? A Yes, sir.

Q And particularly with reference to the fire apparatus and fire protection facilities that were at Black Tom yard? A Yes, sir.

Q You have just been questioned as to the time when some of the fire fighting apparatus was installed. Do you remember? A Yes, sir.

Q And asked when it was with reference to the commencement of the war. Do you recall when the munitions began to be shipped, received at Black Tom yard? A No, sir; I do not.

Q Well, how long before the Black Tom disaster had that been going on? A I would not attempt to say.

Q Why not? You were there? A I don't know.

Q Why, as the marshal and the man in charge of the fire protection, would not the commencement of the shipments of munitions be fixed in your memory? A No, sir, it would not.

Q Would it not present situation for you to consider as fire marshal? A It would; yes, sir.

Q Well, didn't you consider it? A I did.

Q And you cannot tell us when that was? A No, sir; I cannot.

Q Not within six months? A No, sir; I would not attempt to say it.

Q That receipt of munitions there came to your notice as soon as it began, didn't it? A It came to my notice before it began.

Q Before it began? A Yes, sir.

Q And it was a matter of special interest by you from the standpoint of fire protection, wasn't it? A Certain things; yes, sir.

Q Certain things? What things? A I understood there were to be munitions for cannon only; that was my understanding at the time.

Q And you understood, too, that that was going to increase the danger at that point, didn't you? A Well,

it depended on how much was going to be unloaded, whether the danger was increased or not.

Q It did? A Yes, sir.

Q Well, what amount? Did you fix on any amount in your mind as being the amount it depended on? A I did not.

Q Did you reach any conclusion as to any quantity that you could ignore from the standpoint of the danger there? A That was up to the freight department. That was not up to me to make conclusions about munitions or whatever was being shipped in there.

Q And you made none, did you?

Mr. Garrison. Made what?

Q Made no conclusions at all as to what extra danger that situation presented? A No, sir; I didn't think it was being handled through there—I didn't know what was being handled through there.

Q What? A I didn't know the amount that was being handled through there.

Q Why, you saw it, didn't you? A I saw cars labeled munitions for cannon.

Q And you saw many of them, didn't you? A I wouldn't say that I saw many of them; I had seen many of them along the line.

Q In Black Tom yard? A I have seen several in Black Tom yard.

Q Why do you say several, Mr. Julian? What do you mean by that? A Going along the line of cars; I didn't go in and out between tracks. I seen on the face of the cars of the labels—labeled, munitions, upon cars, etc., but I never took it a particular point to go down amongst those cars and count them up.

Q Did you not have the oversight of all the fire apparatus that there was there? A I had the oversight of a certain amount, yes.

Q What amount? A With reference to the upkeep and the maintenance of that fire apparatus.

Q What else was there? A I had no right to make any special recommendations or anything in the line of certain corrections until I consulted my superiors.

Q You had no right to make them? A No, sir.

Q Do you mean to say that if you saw a need of any fire appliance there you could not suggest any— A I could suggest it, yes.

Q Well, you had that right? A Yes, sir.

Q Now, you saw the need, didn't you? A I did not; no, not in the yard.

Q What do you mean by "in the yard"? A We had the additional hydrant on our roadway; we had the—

Q What do you mean when you say "in the yard?" A In the yard, between tracks. There is no yard that I know of where there is any hydrant between tracks.

Q Well, what do you mean by "in the yard?" That is what I am asking you? A Well, in the yard, at the lower end of the island there is the yard.

Q It is the lower end in the yard, isn't it? A The lower end of the yard; yes, sir.

Q And you mean these eleven acres that Kane described? A That eleven acres.

Q In the lower end of the Black Tom Island yard? A Yes, sir.

Q And you saw the cars coming there from day to day with the placards, didn't you? A No; I didn't see them coming from day to day with the placards, because my trip down there was only sometimes once a week or once in two weeks.

Q Well, once in a week or once in two weeks. When you went there from the time munitions began to arrive until the Black Tom explosion you saw many cars placarded explosives, and many placarded inflammable, didn't you? A I don't know what you call many.

Q Well, you use your own? A I might have seen a dozen.

Q And you might have seen two dozen? A (No answer.)

Q Don't say anything rash. You might have seen two dozen— A I am not going to say anything rash.

Q What? A I might have seen a dozen, as I told you before.

Q And would you say you might have seen two dozen? A I might have, but I never counted them.

Q And would you say you might have seen three dozen? A No, I won't say that.

Q Now, do you mean one, two or three dozen altogether in the time that you were there, or at any time in any one day? A In any one day.

Q So it is somewhere between two and three dozen that you stop at as having been under your observation for a day at a time, by days, marked explosives and inflammable? A Yes.

Q Now, this fire protection that you have been describing here and that you verified in the answer to the interrogatories is protection installed in connection with the storage warehouses, isn't it? A Can be used at any point there.

Q It was installed in connection with the storage warehouses, wasn't it? A Not necessarily, no.

Q Well, don't you know that that was so, whether it was necessary or not? That that is the fact? Don't you know that? A No, I do not.

Q Don't you know that it was installed—the sprinkler system— A I knew the sprinkler system was, yes.

Q Wait a minute; let me finish. A I beg your pardon.

Q Don't you know that the fire appliances were installed by the storage company? Don't you know that, by the storage company? A I understood that the Lehigh Valley was joining with the storage company on that.

Q Joining with them? A Yes, sir.

Q Don't you know, too, that it was done in connection with a readjustment for insurance rates on the storage warehouses? A No, I did not.

Q Sprinkler system company— A Sprinkler system, I understand.

Q To get a reduced rate? A Exactly.

Q Now, these hydrants— A Yes.

Q These mains were put in for the sprinkler system, were they? A The hydrants were not put in for the sprinkler system; no, sir.

Q Don't you know that the mains were put in for the sprinkler system? A The mains were put in for the sprinkler system?

Q Yes. A To a point west of Pier 4.

Q All of these mains as far as the 12 inch main ran, don't you know they were put in for the sprinkler system? A There was an independent ten inch main for the sprinkler system.

Q Don't you know that the ten inch main and the twelve inch main both were put in in connection with the sprinkler system? A As I said, the 12 inch main was a part.

Q Which part? A The part below Pier 4.

Mr. Garrison. By "below" you mean what?

The Witness. I mean west of Pier 4.

Q That was put in in connection with the sprinkler system? A That was put in in connection with the sprinkler system, to aid the sprinkler system.

Q The storehouses are all east of Pier 4? A Exactly.

Q How could the 12 inch main west of Pier 4 help out the sprinkler system of the stores east of Pier 4? A The ten inch took water from that twelve inch.

Q Then the twelve inch main supplied the ten inch main? A The 12 inch main supplies the 10 inch main, exactly.

Q One was the parent and the other the child, wasn't it; but all in the same family? Right? A If you want it that way.

Q And you say it was the Lehigh Valley Storage Warehouse Company's family: is that right? A I don't know anything about that.

Q Now, don't you know—you were in the employ of the Lehigh Valley at the time that was done, weren't you? A I was.

Q And don't you know that it was done before the old six inch main was thought to be inadequate? A Well, that may be.

Q You know it to be so, don't you? A It was inadequate to take care of all those sprinklers, yes.

Q Yes. So that as a matter of fact, with the installation of the 12 inch main and the 10 inch main that took care of the sprinkler system and the six inch sprinkler no longer did? A The six inch main never did take care of the sprinkler.

Q The six inch main was used for boiler supply, and what we call house service? A For four inch hydrants.

Q For what? A Four inch hydrants.

Mr. Garrison. Fire hydrants?

The Witness. Yes, sir.

Q And these notices that you have been producing here—take this one, D. 2, headed, "National Storage Company, Fire Department Regulations," that is what it was, wasn't it? A Jointly with the Lehigh Valley.

Q How do you know it was jointly with the Lehigh Valley? A Lehigh Valley men participated in certain companies and the names were added on that list.

Q Well, do you mean that the Lehigh Valley and the Storage Warehouse Company were one and the same? A That I couldn't tell you anything about.

Q You don't know that, eh? A No, sir; I don't.

Q But apparently, then, so far as you saw, the Lehigh Valley was putting this in with the National Warehouse Company? A As far as I understood it to be. I don't kniw anything about their contract or anything else.

Q Now, this gives—this D. 2 gives a list of a private fire department, doesn't it? A Yes, sir.

Q And I notice that it has a chief, Davidson? A Yes.

Q Was he the chief of the fire department at the time of this fire? A Of that particular department at the National Storage Company.

Q What? At the National Storage Company and the Lehigh Valley you mean, don't you? A And the Lehigh Valley.

Q Yes, yes. And was Luscomb, the deputy chief, as shown here? A Yes, sir.

Q And was there a hose carriage No. 5 with a captain and a company? A Yes, sir.

Q As shown here? A Yes, sir.

Q And a hose carriage No. 6 with a captain and a company? A Yes, sir.

Q And a hose carriage No. 10 on the end of Pier 6, with a captain and a company? A Yes, sir.

Q And a hose carriage No. 3 adjacent to this with a captain and a company? A Yes, sir.

Q And a hose carriage No. 4 adjacent to this, and a hose carriage No. 9 at the north end of Warehouse A, each with a captain and a company? A Yes, sir.

Q And in each case the company consisted of four men beside the captain, except hose carriage No. 9, which had two men and a captain? A Yes, sir.

Q And all those men were the department—were the fire department of the Lehigh Valley and the Storage Warehouse Company? A Yes, sir.

Q And none of them was on duty that night? A No, sir.

Q You mean that they were not on duty? A They were not on duty unless called.

Q So that they had a big fire department for the day time—and for the night time what did they have? A They had five watchmen.

Q Five watchmen. And those watchmen were the fire department, were they? A They were instructed in the handling of hose—

Q Were they all that there was of a fire department? A Practically, yes.

Q And they had other things to do besides watch for fire, didn't they? A They had to make their rounds, yes, and ring their clocks.

Q Yes; but besides making their rounds and watching for fire, they had other things to do, didn't they; they had to take care of engines and boilers and pumps? A Cover over a fire once in a while.

Q They had to take care of pumps, didn't they? A Yes, sir.

Q That is more than covering over a fire, isn't it? A Yes, sir.

Q That is, keeping steam up. You know who I mean —Sloan? A Yes, I know.

Q And he had to work a pump, too, in case of fire, didn't he? A Yes, sir.

Q He couldn't very well fight a fire and work his pump, too, could he? A No.

Q And Groath, where was he? Up in the west end, wasn't he? A He was up at the west end.

Q And he had to stay there, too, in case of fire, didn't he? A Well, he didn't have to stay there, no.

Q Well, he didn't have to, but that was his post, his place to stay, wasn't it? A That was his place unless called some place else.

Q I say unless called down to the fire at the east end he would stay right up at the west end; right? A That depends on the situation.

Q Well, what do you mean by that? A If a man saw a fire down at the lower end he certainly wasn't going to stay there if he thought he could be of any assistance.

Q You say he would stay unless he was called; is that right? A Well, that may be his duty; but duty may call him there.

Q He was part of this night fire department, wasn't he? A Apparently, yes.

Q The name given here on this D. 2 is Grate. Is that meant for Groath? A That is a misprint; that is meant for Groath.

Q There is a name there that is new to me—Dawson. Who is that meant for? He wasn't there at all at the time of this fire? A No; that is one of the older cards.

Q That is an old card? A One of us went—Dawson was shifted, or some one else, I couldn't tell you where he was shifted to.

Q That is D. 2 is an old card? A I believe it is one of the first cards we had printed.

Q You had them printed about when? A I couldn't tell you just when.

Q How many months before the Black Tom fire, a year? A Might have been a year before the Black Tom.

Q So that night Dawson was not there? At the time of the Black Tom fire nobody had taken his place there?

Mr. Garrison. Garrity.

Mr. Skinner. I object. I do not think that suggestion should have come from counsel.

Mr. Garrison. I should not have made it.

Mr. Skinner. Possibly the witness did not hear.

The Witness. I did not hear it.

Q I will suggest it. A I couldn't tell you the man's name; I didn't hear it.

Q You couldn't tell? A I couldn't tell you offhand now the other man's name.

Q Do you mean to say— A Oh, Garrity.

Q Garrity was a pretty old man, wasn't he? A Well, he wasn't such an old man.

Q He wasn't such a young man either, was he, without being too— A He was a man pretty spry for his years.

Q But his years were pretty many, too, weren't they? A I don't know the man's exact age. I couldn't tell you.

Q At any rate Garrity is down on this schedule that you say was put up there? A Yes.

Q And he is down as one of the pump men? A Yes.

Q He is not down as being on the fire department, is he? A No.

Q Now if Garrity—so that when this thing was started, you had according to this, Kane, Groath, Sloan, Kelly, Dawson, and Garrity was there too, wasn't he? A Yes, sir.

Q But he was not part of the fire department? A He was the night pump man.

Q He was not part of the fire department, was he? He is not down here, "Night Company," on that list, is he? A No.

Q He had separate duties to perform, didn't he? A Yes, sir.

Q Other than that of being part of the night company, part of the night fire department? A Yes, he did.

Q And so far as you would judge from reading this card he was not any part of the fire department, was he? Garrity? A He was a part of that—

Mr. Garrison. I think counsel ought to get the question—if he means at the time the card was made up or at the time of the fire?

Q At the time the card was made up? A At the time the card was made up he was a night pump man, to take care of the electric pumps and that was part of the fire fighting appliances.

Q But that was what he was at the time the card was made up? A Yes, sir.

Q And that is what he was at the time the Black Tom fire took place there, wasn't he? A Yes.

Q He had not changed his employment or functions in the least, had he? A Well, that I wouldn't say.

Q Well, why is it, because you don't know? A Because I don't know. He may have had other duties to perform down there other than this pump.

Q You had charge of the pumps, didn't you? A Well, not directly, no.

Q Why, weren't you in supervision over the fire fighting apparatus? A You can be in supervision without being right around there at the time.

Q I didn't say you were down there. You had charge of it. Isn't that so? A Well, maybe I did.

Q Well, maybe. Don't you know whether it is maybe or surely? Don't you? Why not say yes? A Well, yes, then.

Q Well, surely if you had charge of the pumps you would know whether one of the men that you had that was working the pumps was told off for some other job, wouldn't you? A I had charge of the pumps from this point. Whether they were property manned and operating, it was up to the agent or whoever had charge then there to supply the men, and he would have instructed the men and say as to who handled that pump.

Q You had nothing to do with that? A I had nothing to do with the other part at all.

Q With that part. With the part you have just described. You had charge of the apparatus, and whether you found the men, you had nothing to do with that? A Not in a general sense—only in a general sense, not

as to go down and make it my special duty to go down there about getting men.

Q But apparently— A That was up to the agent. He had certain supervision over certain upkeep and maintenance.

Q You say in a general sense you did have that much. Just tell us what that general sense was? What it included? A Well, the general sense was this, that if I was going down there and found at any time in my inspection that anything was deficient or men had been negligent about places and any certain duties, it was up to me to make that report and see that they were placed there.

Q If you found a pump was in perfect condition with nobody to work it you wouldn't say anything? That is none of your business; is that right? A Nobody to work it? I don't understand.

Q Suppose you found that the pump was in splendid condition, but the man that usually worked there had been taken away for another job and nobody there in his place; you wouldn't say anything about it? A I would if that pump was necessary, that is, to have a man continually stationed there. If it was a pump such as that electric pump was, to be started up for the first time as a service pump on the tank and the supply. Having started the electric pump there was no need of a man hanging in the electric pump house.

Q Then Garrity was only there as night pump man? A As electric pump man.

Q Would he have anything to do more than to pull the switch? Electricity did the rest, didn't it? A He would have to prime his pump.

Q What do you mean by that? A Open up a water valve and prime his pump and then put in the switch and the pump will do the rest.

Q Open up a water valve and prime his pump? A Exactly.

John Michael Julian, cross.

Q Do you mean put water into it and get the sucker —the way we used to do with the old pump out in the back yard when the sucker got dry, put water in it and get it sucked up and started off? A Don't have a sucker.

Q The main priming you would have to do depended on whether the sucker was dry or how dry it was? A No necessity of the sucker being dry. It is a bronze impeller, centrifugal pump, and had to be primed.

Q The length of time it would take to prime it would depend upon the condition of the pump and how long before it was that it had been used? A It was tried every week.

Q Supposed to be? A Yes, it was; and the amount of water we used to prime came from a tank, and we had a good supply of water to prime any pump.

Q Then at the time this card was made up, as you understand it from the card and as you know it from your memory, Garrity had nothing to do except to operate that night pump? A Electric pump, yes.

Q That was just turn the prime up and turn on the switch and off she went, eh? A Well, open your main gate valve.

Q Ah! Open the main gate valve. If that was overlooked the pump would not be much use, would it? A I don't think it would.

Q No. Now, this water that was in the pipe was fed by the hundred thousand-gallon tank, wasn't it? A Yes.

Q And the hundred thousand-gallon tank supplied the pressure, didn't it? A Supplied a pressure—slightly in excess of the city pressure at the end, to keep the check-valve, to keep the city water back.

Q That is it. That is, here was the city water down at the west end flowing into the Lehigh Valley Storage Company family mains? A Exactly.

Q And with a pressure? A Yes.

Q And then there at the easterly end was the tank, a hundred thousand-gallon tank with the gravity pres-

sure supplied by that water in the tank, wasn't it? A Yes.

Q And the one was opposing the other? A Exactly.

Q And the pressure at the tank was a little greater than the pressure from the Jersey City main? Right? A Yes; that assured us an absolute water supply.

Q So that you were sure of getting a water supply from the tank? A Or from the city.

Q If the tank failed then from the city? A Then from the city.

Q And if the city failed then from the tank? A From the three pumps.

Q Or from the three pumps. By the way, there were post indicator valves all along this main, weren't there? A Yes.

Q If those post indicator valves, any of them, got closed, you wouldn't have any control, you wouldn't get water although you had pressure? A Impossible to close them unless you notified the National district. They were supervised. The entire system was supervised.

Q Anybody could close them? A As soon as they did the National district would call up.

Q Anybody could close them, couldn't they? A Oh, anybody could close them, if you want to go that far.

Q That is, there was a post indicator valve coming right up out of the ground and the closing or opening was done by a common wrench turning the bolt or whatever it was? A Exactly.

Q And opening or closing the valve down below the ground, and the wrench hung alongside of the post? A It did.

Q Open to anybody? A Open to anybody, but it was supervised the same as the—

Q Was there anybody alongside of each post to watch it and see that nobody got at that? A No; there was electric supervision over that post. It could not be turned a half turn.

Q If somebody monkeyed with it it would be reported off somewhere—where? A It would be reported at Montgomery street, 76 Montgomery street, A. D. T., and they in turn would notify us and give us what valve was being tampered with.

Q Yes. The pressure that came from the hundred thousand-gallon tank was the only pressure on a 12-inch main except the Jersey City supply, was it? A At normal times.

Q What do you mean by normal times? A Normal time is any time during the day and night except in time of fire, when the pumps were started, the other pumps were started.

Q Unless the pumps were put on? A Yes.

Q The two fifty thousand-gallon tanks that were on top of two of those storehouses did not supply any pressure to the hydrants? A That supplied the sprinklers.

Q Answer me; they did not supply any pressure to the hydrants? A No, sir.

Q Why did you put them in this description attached to the interrogatories of the fire protection that you had there? A I—

Q You put them in, didn't you? A They supplied the hydrants?

Q You put those two fifty thousand-gallon tanks in as part of the fire protection? A Oh, the fire protection system, yes.

Q You knew at the time that you put them in that they didn't have anything to do with the hydrants, didn't you? A I did.

Q And didn't you read those interrogatories and the answers? A I did.

Q Before swearing to them? A That could be turned into the hydrants if necessary.

Q Didn't you read the statement that all of them were connected with the 12-inch main? A Oh, they are.

Q They are. How are they connected? A Through the ten.

Q Through the ten? A Through the ten-inch main. The ten taps the twelve.

Q Yes. What is it taps the fifty thousand? The ten taps the twelve, but does either the ten or twelve tap the fifty thousand-gallon tanks? A The ten does, yes.

Q Taps it? A Yes.

Q You don't mean by that, do you, that the pressure was in on that ten-inch main normally from the fifty thousand-gallon tanks? A That is what I said.

Q Didn't have to be turned on specially? A No, sir.

Q And the ten-inch main went entirely to the sprinkler system, didn't it? A Yes.

Q So that the tapping of the fifty thousand-gallon tanks by the ten-inch main did not in any way afford any fire protection outside of the stores or away from or other than to the sprinkler system; isn't that so? A Well, that is part of the entire system.

Q By the way, when you made up this list of the fire fighting protection down there did you understand that it had to do with the Black Tom fire? A Yes.

Q And were you given any instructions as to how complete you should make the description of that system? A No, sir.

Q Did you do it on your own idea? A I was simply given instructions to give my detail of everything that was down there and I gave it to the limit of my records and my knowledge of what was down there.

Q You were not told then to give a detailed statement of what there was in the way of fire protection available on the night of the Black Tom fire to put it out? A I was asked for a detail of all the fire protection at Black Tom and what was there that night and just how it operated, and I gave it.

Q So you included in that statement all that there was for protection of the storage warehouses? A Of the entire Black Tom—

Q Listen to me. You included everything that there was of protection for the storage warehouses even though you knew that it had afforded no protection for the portion of the Black Tom yard where the Black Tom fire took place? A And I gave just what I was asked to give.

Q You had the pails of water that were in the storage warehouses? A The entire fire protection of the National Storage, or what was known as National Docks.

Q The entire fire protection of the National Storage?

Mr. Collins. National Docks.

A National Docks.

Q You did not put in the list the protection for the yards down below that of hydrants? A There is none in there.

Q There was none on the night of the fire? A There was none in any yards.

Q What? A It is not customary. It is not a general custom and wasn't at that time.

Mr. Skinner. I ask that that be stricken out.

The Court. The difficulty with the situation was that you asked him the question. You said "What?"

Mr. Skinner. I said what, without hearing what he said.

The Court. Well, I think that was your error and not the witness'.

Q Look out here, Mr. Julian. You spoke about fire protection between the tracks—hydrants, you know, between the tracks—some time ago you said there were not any hydrants down in the yard between the tracks? A Yes, I said there weren't any.

Q Why did you mention between the tracks? Wasn't it because you thought you couldn't put hydrants between

the tracks? A No; it is not a custom to put hydrants in between tracks, both because of injury to employees as well as track space.

Q Danger of interference with the operation of car movements? A Yes.

Q And that is what you had in mind when you mentioned hydrants between the tracks? A I probably did.

Q There was a clear open space around this yard, wasn't there; around the north side here, along the sea wall, where hydrants could go without being between the tracks; wasn't there? A Hardly; there was hardly space enough, unless there had been an additional fill put out there.

Q Why, Mr. Julian, do you see this big white line running down along here, easterly, and then off diagonally, marked "United States Government ten-inch line to City Island"? A Yes.

Q That is a pipe line? A That is a pipe line.

Q Water? A Yes.

Q Then do you know of any reason why hydrants and other pipe lines could not have been run down there alongside of that? And hydrants put on it? A Well, there was hardly sufficient room, if I remember the situation correctly at the time.

Q Well, this map shows the room? A That shows the room being right alongside of the tracks—probably down below the tracks.

Q You say there wasn't room alongside of this other pipe line that is there now? A No; if you stand a hydrant up I do not think there is room enough; the hydrant has to come up out of the ground. A line laid underground—

Q You could have made one; it was filled ground? A How is that?

Q It was all made ground, wasn't it, that eleven acres? A Part of it was made ground.

Q And this northerly side was where the tracks and the pipe line to Liberty Island was made ground, was it? A Yes, I guess that was filled.

Q And you could have made more? A That depends on whether they could have gone out further.

Q You could have gone out to the property line of what is shown here as the line, couldn't you—eh, couldn't you? A I suppose they could.

Q You could even have taken up a track, couldn't you? A Surely, if you want to eliminate track space.

Q That is, if you cared more for fire protection than you did for track space you could have gotten it.

Mr. Garrison. I object to it as argument.

Mr. Skinner. I will withdraw the question.

Q Down here on the easterly side at the bulkhead end of this yard the map shows an open space between the tracks and the end of the pier, of the bridges? A Yes.

Q I think, judging by the scale, I would say that is about twenty-five to forty feet, somewheres around that, is that right? A I don't think it is over twenty-five feet, if it is that.

Q Plenty of room to put a line of pipe? A You have the whole ocean there.

Q Plenty of room to put a line of hydrants in that open space—that is not ocean, is it; you know what I mean, I think. I say the distance between the end of the tracks as shown here and the line of the bridges or bulkhead line? A There may have been line for and space for hydrants, but it was not the custom or was not at that time to install hydrants in railroad yards.

Q It could have been done? A It probably could have been done.

Q On Pier 7 there was a line of open space, wasn't there? A That wouldn't have been any use down there; the hydrants were just as good as they were.

John Michael Julian, cross.

Q Take this open space between the main lot of tracks and the six other tracks that are shown south of the bulkhead? A That happened to be used as storage space.

Q Called the Bowery tracks. Storage for what? A Steel tracks and everything else in there.

Q You didn't have to? A Where else you going to put it?

Q You could have used it for fire protection, couldn't you? Put hydrants right in there? Do not smile about it? A I am not smiling.

Q Couldn't you? All you had to do was to take some of the space that you piled iron and steel; isn't that so? A The space is like that, and as I said before it is not the practice to put fire hydrants in a railroad yard.

Q Well, Mr. Julian, was there anything in that yard with which to fight a fire; I mean in these eleven acres— with which to fight a fire in case it took place? A Nothing except your hydrants at the lower end of that yard.

Q And they were not in the yard? A They were on the edge of the yard.

Q Was there anything else? A There was barrels of water at the float bridges with pails in it.

Q Is it customary for railroad companies to run their fire protection along through part of the yard to the point where the congestion comes and where the cars are piled, or accumulated, rather, on an eleven-acre tract, and stop their fire protection at that point? Is that railroad practice? A That was the practice at this time. Cars were not considered as being a dangerous fire hazard.

Q Well, why is it the Lehigh Valley Railroad could join with the Storage Warehouse Company in this fire protection and things that you have been describing? Isn't it for their cars? A Well, it was for their cars jointly, but what I mean as a fire starting, the possibility of a fire starting in and about tracks where a cinder fill is maintained and all rubbish kept clean and grass away—

that the mere fact that it takes a man—if he intended to build a fire or set a car on fire he would have to carry quite a bit of material there, and he would be noticed at any time walking between the cars.

Q Do you think it was harder for a man to set a fire on a cinder-filled yard than it would be on a dry way? A Not unless he got on the inside of the car.

Q Do you think the condition of the ground he would have to travel on would make any difference? A Would make a difference to that extent; he would have to carry a greater amount of material if he wanted to build a fire of sufficient heat.

Q Do you think it was railroad practice to make no provision for the protection of their yards if they have that cinder fill? A No yards that I know of have any protection through them.

Q If they are cinder-filled and filled with valuable cars and high explosives no protection, you say, is given because it is cinder-fill? A We followed the general custom of railroads. There is no protection there.

The Court. We will adjourn until quarter-past two following, the custom of the court.

RECESS.

Q Mr. Julian, you said in your direct examination that you were notified by telephone of the fire shortly after twelve o'clock? A Yes.

Q And how shortly after twelve do you think that was; how near twelve? A Well, it may have been twenty minutes after twelve to my knowledge.

Q You spoke of the fire that you saw as being in the neighborhood of North Pier? A Yes.

Q How near to the North Pier? A Well, from my judgment at that time it seemed to be right at either the

shore end of the North Pier or on the North Pier; I could not say positively.

Q The shore end of it? A Yes, sir; that is, the west end of the North Pier.

Q But not on it? A Well, I could not see beyond it; that is where the smoke seemed to hang, right in that section.

Q Was it on the pier or off of it? A That I could not positively say; I could not state.

Q It might have been for all that you could say, all that you could see then, somewhere up here to the west of the end of the North Pier? A That may be possible.

Q It might have been near Zeke's shanty on the pile stockade, as far as you can tell? A It may have been in that section.

Q Did not the munitions begin to come to the Black Tom yard about August, 1915? A It may be around that time; it seems to me it was warm weather yet, when the munitions started to come in there; the exact month I would not attempt to say.

Q The answers to the interrogatories, speaking of the American District Telegraph Company's fire protection system—by the way, was that put in in connection with the sprinkler system or in connection with the installation of the sprinkler system? A It was put in about the same time.

Q The sprinkler system and the alarm system all about the same time? A About the same time, I should say.

Q Now, the answers to the interrogatories say—the answer to the interrogatory says that that American District Telegraph Company's fire protection system was installed in March, 1915; is that right? A That may be.

Q Well, you verified these answers with reference to this very subject matter, the fire protection system? A Yes, sir.

Q And you made that statement, didn't you? A I did not say they were installed in March. I said they were installed some time in 1915.

Q You swore to a statement they were installed in March, 1915. A From their records. If I said anything about the installation it was from their records. I do not know just what date they were turned over.

Q Have you any doubt you said it? I am showing you a copy of these answers—"This system was installed March, 1915." That is right; isn't it? A That is right.

Q Now, after the munitions came was there any change in or addition to the fire protection appliances? A No; I do not know of any unless it was the completion of that 12-inch line.

Q Well, wasn't that put in in connection with the other changes—that is this sprinkler system—installation? A They were probably all started about the same time, but I do not know about the finishing up of them—turning over.

Q You said that when that explosion came you turned away from it—do you remember? A I did.

Q What did you mean by that? Did you mean that you saw it? And turned around? A The instant of the flash, the instant the flash caught my gaze, instinct seemed to turn me away from it.

Q You saw the flash and understood at once that there was an explosion, didn't you? A An explosion had taken place.

Q And it came from where you saw the fire, didn't it? A It came from the section where I saw the fire, yes.

Q Now, the second explosion you said did not sound bigger—I thought you meant—did not sound bigger than the first explosion? A No; it did not.

Q It did not sound as big, did it? A Well, I don't know; the first one seemed very sharp and quick to me; the second one seemed more of a roar.

Q Did the second one seem to come from the same place as the first? A It seemed to be nearer and more to the right as I faced it.

Q More to the right? A A little more to the right than the first one.

Q When you got there did you see any Lehigh Valley employees doing anything to put out the fire? A When I arrived I proceeded to the pumping station.

Mr. Skinner. Repeat the question.

(Question repeated.)

A I did not go down that section right away.

Q At any time when you were there did you see any Lehigh Valley employees doing anything to put out the fire? A No, sir.

Q When you heard the fireman say, "To hell with this; if I want to get shot I'll go to Mexico," where were you standing? A Standing right opposite the pile of ties that I spoke of where I was when the explosion took place.

Q And he was four hundred feet away? A About three or four hundred feet back.

Q And you heard him? A I heard him yell that.

Q And shells were going off all the time? A They were popping and banging; I said about three or four hundred feet off I heard him yell that to someone on the dock.

Q He yelled it so that above the noise of the exploding shells, or the roar of the flames, or the crackling of the wood, you could hear him four hundred feet away? A I did not say exactly four hundred feet. I said I should judge three or four hundred feet; I judged it to be that, but I heard him distinctly make that remark.

Q These notices that you spoke of as having been posted in conspicuous places—I forget the number of the exhibits—I think you said they had been posted about a year before? A That was the original date of the posting of these notices, and from time to time, as they became weather-beaten or torn off, they were replaced.

Q When you say these notices, do you refer only to

D. 2 that is before you, or do you refer to the other ones that you have been testifying about? A The others were occasionally replaced; the others were replaced before that time, some of the others.

Q All of them were in place, then, before the munitions began to arrive at Black Tom, weren't they? A I think they were.

Q And were these that you have produced all of the notices that there were around? A There were several other typewritten notices of which I have not been able to procure a copy.

Q But of the printed ones, you have produced all that you could— A The printed ones, we have produced all that we could get hold of.

Q Did you have anything to do with the making up of these answers to interrogatories so far as they related to the placards on the cars? A No, sir.

Q Do you know who did? A I believe that was Mr. Dickman, the agent, if I am not mistaken.

Q That is all.

Re-direct examination by Mr. Hobart.

Q You were asked with regard to what appliances, if any, there were in this tract of land we have called the yard, east of Storehouse R. Was there any hose that would reach into that yard? A Two carriages between Stores M and N—four hundred feet on each. It had been previously used some time before that to a small fire amongst the log work.

Q It had actually been used to put out fires? A Actually used and reached to lower end of that section; yes.

Q How long before that had it actually been used for that purpose? A Possibly a month or six weeks before that.

Q And it had worked satisfactorily? A It had worked satisfactorily; yes.

Q Reference has been made to the men who may have been available at night; was it the custom to have grain boats or Lehigh Valley tugboats or barges tied up in the vicinity of the yard? A The grain boats were tied up at the grain elevator and the grain transfer elevator, and those men could be utilized if necessary. There was also a tug stationed there and several other tugs subject to call in that vicinity.

Q When you say a tug stationed there do you mean one was there regularly? A If I am not mistaken, I think there was one stationed there continually somewhere around Pier 7, if my recollection is correct.

Q Do you know if those men had any instructions to assist in case of fire? A Always had those instructions.

Mr. Hobart. There is one matter I omitted on the direct. I wanted to refer to a photograph which I did not have before me at the time. With the Court's permission I would like to show this to the witness.

Q I show witness a photograph—I will see if it has a number—it looks like "12 Harrison—Har—"

Mr. Skinner. It has not been offered yet?

Mr. Hobart. No; it has not been offered yet.

Q Do you recognize the situation, as you see it there, within a day or two after the fire? A Yes; that is looking from the North Pier west.

Q Is there anything on that to enable you to identify the location of the crater? A Here is the crater.

Q Where we see this pond of water? A This pond of water, yes, sir. On Sunday I went over the bigger section of this all through here, so I know it.

Q Examine that closely and see if you can tell, having in mind the location of the crater—see if you can tell the location of the telegraph pole to which you refer in

your testimony. A Here is the pole right here, and there is a pile of ties right behind it.

Q Can you mark that pole in some way so that we can identify it? A There is the pile of ties right behind that pole.

Q How have you marked the pole? A I have put an arrow there.

Q Pointing directly at the pole? A Yes.

Q And right near the foot of it is the pile of ties? A Seven or eight railroad ties piled to a height of about three feet.

Mr. Hobart. I offer the photograph.

(Marked D. 8.)

Re-cross examination by Mr. Skinner.

Q Let us make it clear, please, Mr. Julian, from what point this photograph is taken and in what direction we are looking. This— A This is taken, evidently, from the North Pier, looking west.

Q From the North Pier, looking west? A Looking west, yes, sir.

Q And these ruins that are shown here in the back of the crater are ruins of the storehouses, aren't they? A Those are mostly cars. Those further back are the ruins of the storehouses, yes, sir.

Q And this pole that is shown here is farther west some distance, isn't it, than the first portion of the ruins of the stores? A No; it is directly opposite—it is the end of Store R and the tank, if my judgment is correct; the tank stood about in there, and it is directly opposite the tracks; that pole stands in a line almost directly north of it.

Q You would say, then, looking at that picture, that the telegraph pole pointed out is not west of Store R? A I do not think so, no. If anything, it is probably a little east of it.

John Michael Julian, re-direct.

Re-direct examination by Mr. Hobart.

Q Is there anything on the photo which you can identify as being the ruins of the tank to which you have just referred? A Not now; some of this structure here looks very much like some of the structural work of the tank. It may not be.

Mr. Skinner. Just mark it. Take your pencil and mark it.

(Witness marks it.)

Mr. Skinner. Now, you have marked another arrow to the left of the first one?

The Witness. Yes.

Q You think, as near as you can tell, that that is some ruins of the gravity tank? A It looks like some of the structure of the gravity tank, although it may be a steel frame of a car.

Q You are not sure about that? A Not positive of that, no, sir.

Q Now, entirely aside from the picture, what is your recollection as to whether this telegraph pole which you observed there when you were there the next day was east or west of Store R? A One of the poles had two transformers that set into the—I don't know which store it was—set into, I think it was a six-story building next to Store R—Store Q, it seems to me; and those two transformers came down on the ground and we had to pass—I had to pass those that night in going back from the explosion.

Q Now, then, having in mind again the pole where you were, and the pole that you saw the next day, can you say whether that was east or west of Store R or east or west of a line drawn north and south through Store R? A If my recollection is correct, it seemed to be just north of a line drawn through Store R.

Q Just north? A Yes; directly opposite Store R; that is, the east corner of Store R, directly opposite.

Albert M. Dickman, direct.

Mr. Hobart. All right.

By Mr. Skinner.

Q But you went down there the next day or a day afterwards and you saw it? A I was down there.

Q And it was where it is shown on the picture, where you marked? A That is it, if that is the pole.

Q "If that is the pole." Well, haven't you testified that is the pole? A That is the pole; it looks like it to me on that photograph as being the pole.

Q Well, when you went down did you go with a photographer? A No, I did not.

Q Were you with the photographer when he took the picture? A No, sir, I was not, at no time.

Q Now, will you just be good enough to write the word "tank" over that arrow, so we will know which arrow indicates which? A (Marking.) That may be the tank.

Q You say "That may be the tank." Well, that is what you think from this picture is the ruins of the tank? A Yes; that is what I think.

Q And that arrow mark is where you think that you stood? A Yes.

(Witness excused.)

MR. DICKMAN, recalled.

Direct examination by Mr. Hobart.

Q I would like to show you the same picture that Mr. Julian was looking at, marked Exhibit D. 8. Have you seen it before? A Yes.

Q Do you recognize the telegraph pole alongside of which you were standing? A Yes.

Q Do you notice the arrow which Mr. Julian placed on the pole? A Yes, sir.

Q Or at least on what he said was the pole? A Yes, sir.

Q Do you recognize that as being the place? A I recognize it as being the place where I stood that night, yes, sir.

Q And is that the place that you measured as being 25 feet from the crater? A Yes, sir, that is from the extreme edge of the crater.

Q Yes. Well, that is what I mean. The line of the crater nearest to it? A Yes, sir; the line of the crater nearest to it.

Q It is marked here with the word "tank," what Mr. Julian thought was the ruins of the gravity tank. Do you know whether that represents the ruins, or can't you tell? A No, I cannot tell.

Q All right. Have you seen these various cards that have been offered in evidence containing a list of fire companies and various instructions, and so on, that Mr. Julian has referred to? A Yes, I have seen them.

Q And some of them are marked "National Storage" and some of them are marked "Lehigh Valley?" A Yes, sir.

Q Were they used together as part of one general system of protection? A One general system of protection; yes, sir.

Q I call your attention to a large card marked Exhibit D. 2. Reference has been made to an employee by the name of Dawson. Do you know whether he was working for the company at the time of the fire—do you know whether he was? A I don't believe he was working for the Lehigh; I am not sure of that, though.

Q At any rate, he was not on duty that night at that time? A No, sir; no, sir.

Q Did anybody take his place? A Not that I know of. It was up to Kane to place his men, and if he had one leave, why, he was to get another one to put in his place.

Q How about Garrity; was his work limited to the electric pump? A No; Garrity's duty was to watch

down around Pier 7, south of it, and all the way over there, including all those tracks.

Q Now, reference has already been made to the date when the European war started, about August 1st, 1914. Of course, you were not in charge there at that time, were you? A No.

Q Well, having in mind that the European war was going on, and also having in mind that ammunition began to come in—was coming in when you took charge there, and had been coming for some time—did you make any change with regard to the number of watchmen that you had after you had taken charge? A No, sir.

Q Why not? A Well, I considered the yard down there absolutely a dead yard.

Mr. Skinner. What?

A (Repeated by stenographer.) Well, I considered the yard down there absolutely a dead yard. (Witness continuing.) And I had five good, reliable men that I could absolutely depend on; that is, men that I knew were honest. That particular time it was a pretty hard matter to get labor, and a good part we were getting through agents who would supply it to us; they would supply anything; and as I had taken this subject up on several occasions, I decided that it would be better to have men there that I could place absolute dependence on, rather than bring in a lot of strangers that I knew nothing about. That was my reason for not putting any extra men down there.

Mr. Hobart. Cross examine.

Cross examination by Mr. Skinner.

Q Do you mean that you thought that you would not be able to trust the extra men? A I would—yes, I would not be able to trust the extra men—new men coming in there.

Q That rather than have an extra man that you were not sure of you would not have any extra men at all? A I am taking into consideration all conditions as they were at that time.

Q I assume that. But you were afraid to take extra men because you might not be able to trust them? A I was afraid to take extra men because I would not be able to trust them; I was not sure whether I could or not.

Q Well, didn't you think of making—of having inquiry made about extra men who might present themselves for employment? A Yes.

Q Having them looked up? You could do that, couldn't you? A Oh, yes, sir.

Q You could inquire of their former employment, couldn't you? A Yes, sir.

Q And you could inquire there and find out what their reputation was, couldn't you? A Yes, sir.

Q In other words, it was entirely within your power to find out whether the proposed extra men were trustworthy or not, wasn't it? A Yes. I do not say that they were not honest men, though, or trustworthy.

Q But you, as a matter of fact, made no attempt to get extra men, did you, for the reasons that you have stated? A As a matter of fact I made no attempt to get extra men. I was satisfied with conditions as they were with these men I had—old employees of the company, and so on; men that could be relied upon.

Q And you said Garrity's duty was to watch around Pier 7? A North, yes.

Q And with the exception of Kane, who had general supervision over the watchmen, Garrity was the only one whose duty was to watch around Pier 7? Isn't that so, Mr. Dickman? A Yes, sir.

Q So that you had one watchman for the eleven acres of cars and ordinary freight and explosives, and Kane occasionally coming on his round? A Yes.

Q And that is all you had? A Yes; I took into consideration these Dougherty men, too.

Q You did, did you? A Yes, sir.

Q They were not employed by the Lehigh Valley? A No, sir, they were employed by a responsible firm that I understood had good, reliable men.

Q The Dougherty Agency? A The Dougherty Agency, yes, sir.

Q And you just thought that they might do some of the watching; is that it? A From what I understood, they were to watch the ammunition.

Q And you thought that they were going to watch? A I thought that they were going to watch, naturally, certainly.

Q You had no control over them, did you? A None.

Q You couldn't make certain that they would watch, could you? A No.

Q They might not watch for all that you knew; isn't that so? A That is true; yes, sir.

Q And for that possibility you made no provision, did you? A Made no provision.

Q You depended, then, partly upon men over whose movements you had no control and as to whose watching you had no assurance? A As to whose watching I had no assurance.

Q They were men you didn't know whether they were trustworthy, did you? A No, I didn't know they were trustworthy.

Q You had not even inquired whether they were trustworthy, had you? A No.

Q You didn't engage extra men for fear they might not be trustworthy, but you depended upon men that were sent there by somebody else without inquiry as to whether they were trustworthy; is that right? A Well, I had received word from my superior officer that those men could stay down there; that they had a right to be there; I naturally took it for granted when I got word from my superior officer that they were trustworthy men.

Q Because you were told that they had a right to be there? A Because they had permission to be there.

Q And the barge men had permission to be there, too, didn't they? A Yes, sir

Q And did you take for granted that they were trustworthy men? A They were all employees.

Q Oh! A That is, the men of our own barges.

Q But the other barges? A No.

Q Hundreds of men were there in the course of the summer of 1916 that you didn't know, as to whom you didn't know whether they were trustworthy or not; isn't that so? A Hundreds of men were there.

Q Yes? A At night?

Q Night and day. A In the day time very likely, yes.

Q As to whom you made no inquiry as to whether they were trustworthy men? A What do you mean, employees, or what?

Mr. Garrison. I object to this.

The Witness. What do you mean?

Mr. Skinner. I will make my meaning clear. The witness asks, What do I mean?

Q I mean men who could be trusted at least to be safe to allow around explosives?

Mr. Garrison. Now, if your Honor please, I object. The only time this witness is using the word "trustworthy" is in respect to hired men to be watchmen. He has not talked about men who were trustworthy as to sailing boats, who were down there in the day time, or in any other capacity. And it is not cross examination as to his characterization except as to watchmen—to be hired by him to be watchmen.

The Court. Well, he undoubtedly has the right to cross examine this witness to ascertain whether what

he has said is true as far as cross examination can bring that out.

Mr. Garrison. I can see that, of course.

The Court. Now, then, if he wants to find out about his desire to have no more watchmen there because he could not be sure that the other watchmen to be gotten would be trustworthy, it may throw some light upon that question. If it is ascertained whether or not he permitted other persons who were not watchmen and who were not known to be trustworthy to be on the premises, because of the untruthworthiness it might result in dangers, it would not make any difference whether the untrustworthiness was in the watchmen or not; therefore, I think the question is cross examination. I will permit it. You may have your objection, of course, on the record.

Q (Last question repeated by the stenographer.) A Well, speaking of the day time, my employees—I had a responsible foreman there all the time. Each gang of men—that is, each gang would consist, perhaps, of eight to ten men. Every man was in charge of a leader, and a foreman and assistant foreman, who were absolutely reliable, to keep tabs on those men at all times.

Q Is that your answer? A That is my answer, yes.

Q Well, how is it that that satisfies you as to the day time and you didn't think that similar precautions were necessary in the night time? A I had my reliable men down there at night, so far as watchmen went.

Q Fewer in number, a good deal? A Fewer in number, these watchmen.

Q Yes. Did you have in mind the possibility that someone might try to set fire to those cars? A That thought had occurred to me.

Q And did you think that the danger of anybody's attempting that was greater in the day time than it

was in the night time? A What do you mean? Whether it would be more danger of it going off in the day time than night time?

Q No. I mean just what I said—more danger of somebody trying to set fire to them. Did you think that the danger was greater in the night time than it was in the day time? A I thought it would be greater in the night time.

Q But you had more men in the day time than you had in the night time? A They were not watchmen; they were employees.

Q But they were not watchmen? A Sir?

Q They were not watchmen? A They were not watchmen in the day time, no.

Q Well, why did you mention it? A I understood you to mean the general employees that I had down there in the day time. You said hundreds of men I had down there. They were employees; they were not watchmen.

Mr. Skinner. That is all.

By Mr. Hobart.

Q What did those men do who were there in the day time? A They handled freight.

Q Freight-handlers and train crews? A Freight-handlers, train crews, yard checkers, and so forth.

Q And at night there was no work of that kind done? A No, sir.

Q No unloading? A No unloading whatever.

Q No loading of barges and lighters? A No, sir.

Mr. Hobart. That is all.

By Mr. Skinner.

Q Well, who were these men you had there at night? A Kane, Garrity, Sloan, Groath.

Q Is that all? A That is all.

Q Sure? A That is all I had as watchmen.

Q The answer to—that is all.

By Mr. Hobart.

Q You did say something about barges, or men on barges, Mr. Dickman. Were they the Lehigh Valley barges to which you referred? A Lehigh Valley grain boats.

Q That is all. A And Lehigh Valley barges, too.

Mr. Skinner. And what?

Mr. Hobart. And Lehigh Valley barges.

The Witness. And Lehigh Valley barges.

By Mr. Skinner.

Q And there were other barges there, too? A Yes.

By Mr. Hobart.

Q What do you mean by other barges? A Why, they had barges—there would be barges come in to discharge from the National Storage Company and take things out of there.

Q Well, where did the Lehigh Valley grain barges and the other Lehigh Valley barges go to carry out their work? A Where would they go from there?

Q No, where did they land or dock for the purpose of doing their work around the terminal? A They would run up at the grain elevators in that basin alongside of the grain elevators.

Mr. Skinner. I see.

Mr. Hobart. That is all.

By Mr. Skinner.

Q Just one question for location. Store AA was west of everything shown on this map, wasn't it? A Yes, sir, AA was.

Mr. Skinner. That is all.

Albert M. Dickman, re-direct—re-cross.

By Mr. Hobart.

Q Reference has been made to this Mr. Garrity. Do you know where he is? A He is in an incurable hospital here in Jersey City; I don't know; I understand.

The Court. You do not mean an incurable hospital. You mean a hospital for incurables.

The Witness. Hospital for incurables; yes, sir; hospital for incurables.

Q Well, he received some injuries in this explosion, didn't he?

Mr. Skinner. What is that, sir?

Mr. Hobart. He received some injuries in this explosion?

The Witness. Yes, sir.

By Mr. Skinner.

Q Well, now, you understand he is in a hospital? A I understand he is.

Q You know just where he is, don't you? A No; I don't know just where he is.

Q You don't? A No, sir; I really don't know; I never found out.

Q When was the last you saw him? A The last time I saw him is about three months ago.

Q At the hospital? A No, sir.

Q At his home? A Down at Black Tom, before he went to this hospital.

Q So that he was there working until about three months ago—was it? A Yes, sir.

Q Well, he was not incurable between July, 1916, and three months ago, was he?

Mr. Garrison. I object. This witness has not said he was incurable at all; he has not diagnosed

his case. He has not said there was anything the matter with him at all. He has not diagnosed his case.

Mr. Skinner. I withdraw it.

The Court. Of course, if it is withdrawn I do not have to rule.

Mr. Garrison. I mean he has not said he is incurable.

The Court. No.

Mr. Garrison. He is talking about his incurability. He is asking whether he was incurable within the last three months. How does he know?

Q You testified in a former trial, the trial of the Plate Glass case? A No, sir.

Q Well, didn't you see Garrity then? A Yes, sir.

Q He testified then, didn't he? A Yes, sir.

Mr. Skinner. That is all.

Mr. Hobart. That is all.

(Witness excused.)

FRANK DECKENBACK, sworn.

Direct examination by Mr. Hobart.

Q On the 29th and 30th of July, 1916, were you in the employ of either the National Storage or the Lehigh Valley? A I was employed in the National Storage Company.

Q How long have you been working for that company? A From December 9, 1915.

Q Did you have anything to do with supervising or installing or inspecting the fire protection at the warehouses? A We maintained a sprinkler equipment and outside hydrant systems.

Q You are familiar with the general method of operation of that system there? A I make the daily inspections, make necessary repairs, if there are any needed.

Frank Deckenback, direct.

Q Now, then, were you at the Black Tom terminal on the afternoon of Saturday, July 29th, 1916? A Yes, sir.

Q What occasion did you have to be there? A The regular routine of work which I did every day while on duty—making inspection of the system, pumping up the air of the dry valves, if there were any needed, and replenish the water in the pump house, if there was any needed, and also take a look at the outside gate valves to see that they were all open that ought to be open.

Q Did you make any tests in connection with the water supply? A Yes. I climbed to the top of each of the gravity tanks and pumped up two of the tanks to the overflow pipe. I found one of them full; two of them were a little bit below.

Q What did you do with those two? A Pumped them up to the overflow pipe.

Q Was there anybody with you? A Yes.

Q Who was it? A A man by the name of O'Loughlin, a man who was an inspector from the American District Telegraph Company.

Q Did you observe the gauges to see whether or not the tanks were filled? A Why, the overflow pipe was within about three inches of the top of the tanks, and I pumped these tanks till the water came out of that pipe, so surely it had to be full to come out of this pipe.

Q Did you test or observe any other portions of the water supply outside of the tanks themselves, I mean on this particular occasion? A That afternoon? I made an inspection of all the dry valves. There are three water gauges at each dry valve. Each dry valve house was normal. Every dry house throughout the property—of course, they were normal.

Q Did you find anything out of order at all? A Nothing was out of order, no, sir.

Q How long did that take you to make your inspection? A Why, would take on an average of about two

or three hours; that is, to go throughout the entire property.

Q Now, did you do that every day, or on certain regular periods? A Every day; usually the first thing in the morning; sometimes in the afternoon I would make a second inspection.

Q How did you happen to make your inspection on this occasion in the afternoon? A On this occasion I wanted to be sure the tanks was full, because I would be out of town—of course, I was always sure they are full, but I wanted to be particularly sure, for an inch or so will cause an alarm to come into the National district.

Q What hour of the day were you there in the afternoon? A I left there between three and four o'clock. I had been in there all that day up to that time.

Q You are familiar, are you, with the operation of the electric pump near Store R? A Yes, sir.

Q And reference has been made that Mr. Garrity had something to do with that? A Mr. Garrity knew how to start the pump. I saw him start it.

Q Did you give him any instructions with regard to it? A I did. I told him how to start the pump, and he started the pump.

Q When did you do that? A Why, prior to the explosion; it may have been three weeks to a month before that time.

Q Now, were you at the terminal on an occasion about two weeks prior to the explosion, in the night time? A I was.

Q What was the occasion of your being there? A To instruct the men whose duty it was to be watchmen there at night to—should a fire occur, or should a break occur in the sprinkler system, what valves to shut down to stop water damage.

Q What men did you find there that night when you were there? A Kane, Kelly, Garrity, Sloan were there,

but Sloan knew about the system; his duties were in the pump house; that is, to keep up the steam, and he couldn't very well go away from the boiler for any length of time, although I was sure he knew about the system. These men we started out—

Q Anybody else besides those you have mentioned? A Not that I know of. There may have been others, but I don't recall that just now.

Q Do you remember a man by the name of Crockett? A Crockett was there.

Q Did he go around with you? A He did. He used to act as watchman occasionally in case another man was off, I understood, to take his place.

Q And some others besides him?

Mr. Skinner. I object to it as leading.

Q Were there any others besides those you mentioned? A I don't recall just now.

Q What did you do in the way of instructing these men? A The first thing we did was, we started out at the gate valves in that neighborhood of Store 3, that is, the upper cross-over, where the ten-inch and twelve-inch branch off, one, of course, taking care of the sprinkler system, and the other one the hydrant lines. I started there and I instructed them what these valves meant. The valves are all marked, the post indicators having marked on what piers or warehouses they go to. I showed them what to shut off in case of break in a house where water would have to be shut off, so they could shut them off on the outside, and we went down the entire line to the electric pump, finished up at the electric pump house.

Q How long did that take you altogether to go over the system with these men? A In the neighborhood of two hours, as near as I can recall.

Cross examination by Mr. Skinner.

Q Mr. Deckenback, your inspection was always to the efficiency of the sprinkler system, wasn't it? A Sprinkler system, hose carriages, water pumps, keep my tanks filled, and other matters pertaining to the fire protection of the sprinkler system.

Q Everything that had to do with the inspection of the facilities for fire protection of the storage warehouses? A The sprinkler equipment was my job—to take care of the sprinkler equipment.

Q But all with reference to the storage warehouses? A Well, anything that would affect the storage warehouses?

Q Yes. A Near the outside or on the inside?

Q Whether it was inside or outside, your inspection was from the point of view of seeing that everything was right and as it should be— A Surely.

Q —for the protection of the storage warehouses? A The sprinklers were only in the storage warehouses.

Q Yes; and the outside things that you inspected had to do with or were in some way connected with the sprinkler system inside? A The hydrants on the outside, yes, and had to take care of those, too, and tested them to see they were in condition.

Q You made these inspections daily? A Daily, except Sundays.

Q You realized, then, did you not, that after you had made an inspection, there might something get out of order? A Well, there might something get out of order, but it would soon be detected by the American District Telegraph system.

Q But you made your inspections every day because you realized that from day to day something might get out of order, didn't you? A The dry pipe systems, the sprinkler, you cannot make them perfectly air-tight to hold from day to day without replenishing the air, so

therefore you would have to replace that air, otherwise you would have a lot of false alarms coming in.

Q It was about three weeks before the explosion you instructed Garrity? A Somewheres around three weeks to a month.

Q And how long a time did you take in giving him that instruction? A Why, I was with him—he had been instructed before I took him under—

Q I didn't ask you that. I asked you how long a time you took? A Well, I can't tell you just how many minutes. I was in there until I was sure that the man knew what he was doing, until he could show me he could start the pump.

Q You say he had been instructed before? A To my—I understood—

Q You were so informed, you mean? A Yes.

Q Then, why did you instruct him again? A I wanted to be sure that he knew. Perhaps I could tell him something that would bring it out clearer to him.

Q And you were in doubt, were you? A No, sir, not in doubt, but it is part of my business as inspector to be sure that these men knew.

Q Did you on that same occasion instruct the other men? A On this particular occasion he was the only man with me.

Q Why did you pick out Garrity? A He was there earlier and I happened to be there in the afternoon, and I forget just when it was, so I instructed him this time, and the other men went down there and we started the pump, although each man did not start it single-handed.

Q But this time, three weeks before the explosion, you took Garrity in hand and instructed him. You did not then instruct anybody else, did you? A I had Garrity in hand twice.

Q You did not then instruct anybody else, did you? A At this particular time?

Q Yes. A I had Garrity in hand once before the three weeks.

Q You know— A And this other time we finished up with this pump house and started the pump.

Q Mr. Deckenback, you don't answer my question. I say, on this occasion, three weeks before, you did not instruct anybody but Garrity, did you? A No, not this particular time.

Q Why didn't you tell me that before? A Well, I was a little bit confused with the two times I had him down there.

Q You had him down twice, did you? A Yes.

Q Why twice? Wasn't once enough? A He was in the party the second time.

Q Did you think he needed any extra instruction? A Well, it would be necessary—

Q Did you think then that he needed any extra instruction? A Well, if I did, he showed me that he didn't, because he could start the pump.

Q I didn't ask you what he showed. Did you then think that he needed extra instruction? Yes or no to that, please. A No.

Q Had you seen him before around the pumps? A Yes, sir.

Q Did you feel doubtful whether he understood how to work them? A No, I did not.

Q He had been on that post before you instructed him, hadn't he? A Yes, sir; he was on that—

Q What? A He was on that card as the pump man.

Q And he had been the pump man? A He had been pump man prior to my employment with the National storage.

Q Doing the very things about which you instructed him, or there to do the very things? A Well, this pump, he didn't have to run this pump every night; he simply

had to know how to run this pump in case it was necessary to run it.

Q And that is what he was there for before you instructed him? A That is in connection with his duties as watchman, or in case of fire, to start this pump.

Q Well, did it occur to you that it might be well to make sure that Garrity knew how to start it? A I thought I would take him up to be sure that he knew it.

Q And other than these two times that you have spoken of, once Garrity alone and again with the other men, did you ever give him any instruction other than those two? A Garrity? Give him any instructions?

Q Did you give Garrity any instructions on any other occasions than those two? A Two times is all I remember of. Of course—

Q Did you instruct the other men on any other occasions than the one you have told us of? A No.

Q That is all. How long had you been there in that position of inspector? A With the Storage company?

Q Yes. A I started in their employ on December 9, 1915.

Q In that capacity? A No, with the Storage company.

Q I say how long had you been there in that capacity, position of inspector of the sprinkler system? A With the National Storage Company from December 9, 1915.

Q As inspector? A As inspector with them.

Q Doing the same thing that you had been doing at the time you are telling of, the same kind of inspection? A My employment with the National Storage started on December 15—on December 9, 1915. Prior to that time the people making the installation had their man on the job of taking care of the system.

Q That is, for sometime after your system was installed the people who had put it in had certain tests with it? A Well, in case of any defects coming up at all, why, they are there to correct them, should there be any.

Re-direct examination by Mr. Hobart.

Q Do you make any distinction between checking up and instructing? You speak of checking up .Garrity? A Well, this is the one particular time I had reference to. I checked him up. He came down one day a little earlier, and because he used to come there a little earlier at times, and I had occasion to go down to this pump house and I had him go down with me, and we started the pump. I started the pump and then had him start the pump, and he started it without any difficulty.

Q And did he get along all right? A Surely did.

Q Now, referring to this occasion a couple of weeks prior to the fire, when you went over the line with all the men, including Garrity— A Yes.

Q —did you cover any of the hydrants outside of those that were particularly— A We went into everything with detail, right straight through; started at Store 3 and worked down the line, and showed them all the valves and where they went to.

Q I want to know particularly whether you included all the hydrants? A I made the distinction between a three-way Corey hydrant, the salt water hydrant and the fresh water hydrant.

Q You covered everything? A We covered everything.

Re-cross examination by Mr. Skinner.

Q Well, before the time you took Garrity in hand, as you say you showed him, you started the pump and he started the pump, Garrity had been there as the pump man for weeks and months, hadn't he? A I don't know how long he had been there.

Q Well, weeks? A I don't know how long the men had been there. My time dates from December 9th. I knew nothing about previous.

Q He had been there from December 9th, 1915, hadn't he? A Yes, to my knowledge, he had.

Q The pump man? A Yes.

Q To do just what it was that you instructed him in doing? A Yes, sir.

Q Now, didn't you go down there to instruct him because somebody suggested to you or you had yourself thought that perhaps he was incompetent? A That thought did not occur to me. The thought that did occur to me, that if the man had been working on one thing continuously, why, bringing things clear to his mind from time to time, why, keeps him more on the alert.

Q Yes. That is all.

A Juror. Do I have the opportunity of asking questions?

The Court. Oh, yes, indeed.

Mr. Hobart. Of this witness?

The Juror. I ask through counsel.

Mr. Skinner. No.

By the Juror (No. 6).

Q In your direct examination you said this Saturday night previous to the explosion you took—you were very particular to see that everything was all right, also said that it was a regular—a customary—thing to make these examinations of the place to see that everything was in order. Why more particularly that night than any other? A I was to be out of town over Sunday. I had got permission to go out of town that Sunday and I didn't want anything to happen because of false alarms.

By Mr. Hobart.

Q It was on Saturday afternoon, I think you said, not night? A Saturday afternoon, and I went there between three and four, and I was to be out of town over Sunday.

MARTIN T. HENLEY, sworn.

Direct examination by Mr. Hobart.

Q I believe you are employed by the Lehigh Valley? A I am.

Q What is your position now? A Yardmaster.

Q At what point? A Jersey avenue.

Q In Jersey City? A Jersey City.

Q And how long have you worked for the Lehigh Valley? A October, 1915.

Q And before that had you had any other railroad experience? A Twenty years.

Q With what companies? A Erie Railroad.

Q And in what capacity? A Twelve years as yardmaster, eight years as trainman and conductor.

Q Freight conductor or passenger? A Freight conductor.

Q On the night of July 29th, 1916, what was your position with the Lehigh Valley? A I was night yardmaster.

Q At what point? A Well, I was located at the foot of Washington street, Jersey City.

Q Is that just south of what we call the Gap? A Yes; just south of the Gap.

Mr. Garrison. Is that Communipaw?

Mr. Hobart. Yes.

Q Now, how far is that office located from the Black Tom terminal? A About three miles.

Q Is that three miles by railroad track or three miles by airline? A By railroad track.

Q Were you on duty that night? A I was.

Q What was the first that you heard of any trouble at Black Tom? A Well, I was notified by our terminal dispatcher about one o'clock.

Q How did you get the notice? A By phone.

Q And what was the notice? A That there was a fire at Black Tom.

Q And when you received that notice, what did you do? A Well, I took three engines and went down there.

Q Where did you get the engines? A I got one engine at Washington street, one engine at a point about a quarter mile west of there, and two engines at Jersey avenue; that is about a mile west.

Q Did you have three engines or four engines? A Four.

Q Four engines. When you say you got four engines I do not suppose that you mean you personally ran those four, did you? Did you get engine crews to run them also? A I took one engine from Washington street and the crew and stopped at this point a quarter mile west; in the meantime I notified Jersey avenue to get the two engines he had located at that point and meet me on my way up.

Q So that you had four engines altogether? A Yes; and I got a tank of water in each engine; that consumed about five or six minutes, I guess.

Q What engine did you ride on? A I went down on engine 3428.

Q Do you remember who else were on that engine with you? A Yes; Conductor Gafney and train crew; Engineer Mulford was the engineer.

Q Was that the first of the four engines to reach the terminal? A Yes; the three engines were only a matter of five feet apart reaching there.

Q What? A About five feet. That is, three; the fourth engine was probably five minutes behind.

Q The first three engines all got there within a very few seconds of each other? A A very few seconds, yes.

Q Do you remember what track you came in on when you got to the terminal with your first engine? A I went down through what is known there as the seawall track.

Q Is that the one on the northerly side, the one that leads over to the North Pier? A To the lead of North Pier.

Q Have you given us the engine number? A 3426 was the engine I took over.

Q What was the one you went on? A 3428; I sent him to the other side.

Q Whereabouts were you when you first noticed anything of the fire? A When I first noticed the fire?

Q Yes. A Well, I could see it leaving Jersey avenue.

Q How far is that away from the terminal? A Two miles.

Q Where did it appear to be when you first saw it? A Well, in the vicinity of Black Tom. I could tell it was at Black Tom.

Q Could you tell at that distance in what part of the terminal it apparently was? A Oh, no.

Q When you got down to the terminal, did you then see the fire? A Yes; I saw it then.

Q Where did it then appear to be? A Out to the North Pier, towards the shore end of the North Pier.

Q How far in the direction of the North Pier did you go on the engine? A I went down to what is known as the bulkhead tracks; they did run from 1 to 16. The fire seemed to be on the rear of 14 and 15 and 16—along there—and the cars—

Q When you speak of the rear, can you tell us— A That is the pier end of the tracks; that would be the rear end.

Q About what time was it that you arrived at the terminal? A About 1:30.

Q Could you tell whether or not any of the cars themselves were actually burning? A That is what I saw burning.

Q How many were burning when you got there? A Well, I could not say. They were afire on two tracks,

I know of; how many of those cars were burning, I could not say.

Q Do you know which two they were? A I would say 15 and 16—or 14 and 15.

Q You mean one car on track 14 and the other on track 15? A It looked to be two or three cars on track 14 and the same number on 15.

Q Were all of the cars that were burning on the same track? A Yes; they were burning on both tracks.

Q What did you do in the way of taking the cars out? A Well, we came in on 13—on 12, rather—picked the cars up on 12, what would come, what was coupled.

Q Now, limit yourself for the moment to what was done with the— A Well, I am a little ahead of my story. We picked cars off the seawall; those were the first twelve cars we removed that were standing on that seawall track.

Q Now, just tell, as nearly as you can recall, what was done with the engine that you had come in on—limit yourself to that for a minute. A Well, the engine I came in on was 3428; he took a string of cars on either two or three bulkhead—off either two or three bulkhead, back the other side 3426 took these cars off the seawall.

Q Were those the cars you have already described as burning? A No; we are not to those cars yet.

Q Haven't got to the burning cars yet. All right; go on. A Now, engine 3143, that is, Conductor Walsh—we come down on either 12 or 13 bulkhead and we coupled up that track—pulled up and throwed the switches for 13—backed in on 13 and pulled that track up; there was cars burning on that; and cut—I stopped, and cut the two rear cars off, just kicked them, shunted them back in. They were afire.

Q Was there any shooting going on at that time? A Yes; there were shells. That is, the brass tops of shells.

Q Where were they coming from? A They were coming from these cars. I could not say just what track, but I think it was 14.

Q You do not mean the two cars you cut off? A Oh, no, sir.

Q All right. A I am sure they were coming from those cars on 14. We pulled 13 off, but some cars remained on that; how many, I cannot say, but I imagine it was only one or two.

Q How far did you pull those cars? A Just up over the switch and then throwed the switch for 14.

Q Then what did you do? A We backed in on 14, and pulled 14 out—started to pull it out.

Q How many did you get on 14? A Well, I would not say; there was three or four left on the track. I know they were burning. You could not see back of the fire any too good.

Q Do you remember how many you took out from 13? A From 15?

Q I thought you took some out from 13. A From 13? About eight cars, I imagine—seven or eight.

Q Then you got some on 14? A 14.

Q Did you get any on either 15 or 16? A We were on 15 when the—when we let go.

Q What do you mean "when we let go"? A When the explosion took place; we had hold of 23 cars when she went up.

Q Were some of the cars that you had at that time—could you tell whether or not they were cars with explosives or ammunition? A Well, I do not think so, any more than shells, and they were only flying about as fast as a man would throw a baseball, because when I first went down just one struck me here; it was just like a good blow—enough to knock me down.

Q Did you keep on working in the midst of the shells? A Oh, you could dodge them; they wasn't going fast; they just whistled through.

Q You just dodged them? A It wasn't hard to duck them.

Q You must have played baseball. A Yes, that is about all, just about like a fellow would throw a baseball.

Q Well, did you dodge them? A I didn't dodge that one.

Q You dodged all but the one that hit you? A All but one, yes, sir.

Q How far did you go with the cars? A About five feet. We moved about five feet, when she went up.

Q You had only gone about five feet when the explosion came? A That is all.

Q Now, at the time of the explosion were you on the train or on the ground? A I was on the ground by the rear cars.

Q Near the rear of the train? A Near the rear of the train.

Q Do you remember on which side of the train, on the north side or the south? A Yes; I was on the shore side, the side towards the warehouses.

Q And about where were you at that time, as nearly as you can fix it? A I judge about—about 100 feet east of the water tank; that is towards the North Pier, understand.

Q When you speak of the water tank which tank do you mean? A That tank that blew up.

Q Do you know where Store R is? A Yes.

Q That is the last warehouse towards the east? A Yes.

Q And the water tank is just east of that? Is that the one you mean? A Yes; if you cut over those switches 12, 13 and 14 are east of the water tank.

Q And you were about how far east of the tank? A 100 feet, I imagine, may be more.

Q Can you tell on which track you were? A On what track?

Q Yes. A I was between 14 and 15.

Q Now, do you think you could point out to us on the map where you stood? A Pretty close to it, I think.

Q Are you familiar with this map or a similar map? A No. I am rather familiar with the ground.

Q Suppose you step down and see if you can locate it; first locate Store R. Here is the North Pier; here are the numbers of the tracks. A Here is where the leads are; here is where the switches are.

Mr. Garrison. Pointing to a line a little to the right from the water tank.

A We came in on either 12 or 13; I pulled them out 13, got them onto 14 and then 15. We had 23 cars.

Q Now, fix the point where you stood when the first explosion occurred. A About over along in here.

Q Indicating between tracks 14 and 15? A Yes, between tracks 14 and 15 along in here.

Q And about opposite the car marked on the map OMA 32452? A That is about it.

Q And on the southerly side of that car? A I fix myself by the switches—throwing the switches.

Q Now, at about the time that explosion occurred what happened to you? A Well, I was thrown up against a car.

Q Were you thrown down into a hole or a crater or anything of that kind? A No.

Q Did you afterwards see a crater in the yard? A That was two weeks, I think. I saw where it was; that was about all. That is the first I was down there after that date.

Q Was the crater there right after the first explosion when you got there? A No; I did not see it.

Q Did you feel it? A No; I did not feel it. I do not know where the hell I would be if that crater was there then. No, sir.

Martin T. Henley, direct.

Q Was there any warning of the first explosion? A No; all that struck me is—the air coming very dead you know and like one big flare, as quick as that; no warning to me at all—the flare and then everything seemed dead, the air.

Q Did you see a flare? A I saw one flare just for a second—one big flare, and—(witness slaps his leg).

Q Where did that appear to be? A Well, I tell you; I thought it was from the river end as I told the superintendent when he came down; he asked me where I thought it was; I said it looked to me as though it was from the river. I did not know at that time there was any barges on the river—anything was on the river, but I told him as I saw it.

Q You say you were knocked against a car by the explosion? A Yes.

Q Were you knocked unconscious or what happened to you? A I think I was stunned for three or four minutes, but not long.

Q Did you come to finally? A I came to.

Q Did you have to climb out of the crater to get to your feet? A No; but I stumbled over parts of cars that was there.

Q Where did you go? A Well, I went out to the end of the string of cars. Everything was dark; you could not see anything.

Q Which end? A The shore end, the west end.

Q As you walked along towards the west end was the ground level at that point? A Yes; with the exception of those parts of cars, car wheels and everything else in the path; I stumbled two or three times over those.

Q Was there any hole or any crater there at that time? A No hole, no; not that I saw.

Mr. Skinner. Not that you saw?

A Not that I saw, no.

Q Did you see anything at that time of any hole or crater? A No; I saw no hole at all.

Q Now, when you saw the place a couple of weeks later could you tell when you looked at it where you had been at the time of the first explosion? A Oh, yes; I located myself by the switches as I told you—the switches were still there.

Q Where was that point with reference to the crater? A Oh, that point was east of the crater.

Q How far east? A About 100—I imagine 100 feet.

Q Do you mean outside the line of the crater? A Outside of the line and east of the crater.

Q How big was the crater when you saw it? A Oh, I imagine about 75 feet.

Q About what? A About 75 feet.

Q You mean across or lengthwise? A Lengthwise.

Q Could you tell whether or not the point where you were when you were knocked down—whether that was— A It was pretty much in line with the crater.

Q What do you mean by in line with it? A Where I was standing there the crater would be, I would imagine.

Q Oh, you mean you would be right in the crater itself? A I would imagine I would be in the crater.

Q You fixed that point by reference to the switches? A Yes.

Q After the first explosion did you continue to do any work in the way of removing cars? A Yes, we pulled some cars up on the other side, way on over there.

Q Did you keep on working or were you stunned? A No, I stayed. I wasn't injured very badly, only just shook up.

Q And how long did you continue working there pulling out cars? A Oh, I stayed there until half-past four in the morning, five o'clock.

Q Were you there when the second exposion went off? A I was.

Q What is that? A I was. I was—

Q Where were you then? A Well, I was near the grain elevator then, looking for some men.

Q You mean what is called the new grain elevator? A The new elevator, yes, sir.

Q And where did the second explosion seem to come from, which direction? A Well, down in the direction in which the cars were, I thought.

Q Well, which cars? A On those tracks where we were pulling.

Q Was there any warning of the second explosion or any indication of it? A No, it didn't seem to shake the ground; while there was an awful sound, it didn't seem to shake the ground from where I was. Of course, I was a good deal from the second.

Q Did that knock you down? A Oh, no; it didn't even shake the ground. It was a very loud report. Of course, I was up near that new grain elevator.

Q While you were working around there, half-past one, when you got there, up till half-past four, were these shells going off at different times? A Yes, the shells were going off when I got there.

Q Were they all like these baseballs, or were some of them a little smaller than that? A No, they all seemed to strike me about the same—the noise, rather. I didn't notice that in particular. Of course, you are working pretty fast there; you ain't paying much attention to noise.

Q You didn't stop to think about it, did you? A If you had brains you wouldn't be there.

Q Were they like the shells, caps, whatever they were? A That is, whistling, like; the noise of whistling through the air; not fast.

Q Did you see whether any of them struck the piers? A No; I didn't see.

Q Or struck the cars, or anything of that kind? A No, I didn't notice where any of them struck as long as they didn't strike me.

Q There was only the one that struck you? A Yes.

Mr. Hobart. Cross examine.

Cross examination by Mr. Skinner.

Q After the first explosion, when you said the air seemed to be kind of—what did you say, empty?

The Court. Dead.

A Dead; your breath kind of left you.

Q Was there darkness then? A There was a flare; everything got so dark for five or six minutes; then after I come to you couldn't see anything; then after it did clear up I saw the fire.

Q Did anybody indicate the warehouses? A Everything seemed to me to be afire around that place.

Q Including the warehouses? A Before that there was no building afire, only confined to these cars, you know.

Q Right after the explosion the warehouses were afire? A Yes, after the air cleared up.

Q And when the explosion happened, were you on the ground or on top of a car? A I was on the ground.

Q Did you get yourself out of there or did anybody lead you out? A Oh, I got out myself.

Q Which way did you go? A I went to the west.

Q To the west. And you went as soon as you could, did you? A Well (laughing), I didn't linger any; I couldn't go any faster.

Q You didn't linger at all to make any observation of that crater, did you? A No, no, no.

Q You didn't observe that at all until about two weeks after? A No; that was the first I was down there.

Q And it was dark when you left, wasn't it? A It was dark, yes.

Q And so you couldn't see anything, could you? You couldn't see whether the crater was—you couldn't see

where the crater was, could you, then? A No, I didn't see any crater.

Q Well, you couldn't see in the dark, could you, and not lingering, but going west?

The Court. Entirely west.

A Where I saw that crater two weeks afterwards, I judge I would have walked into that crater if—

Q I understand that, but I want to get— A No, I didn't see it.

Q I want to get this— A I understand.

Q What you are telling us with reference to the crater is the inference you made two weeks after when you were there; but when you were there the night of the explosion you didn't see and couldn't see where the crater was; couldn't see whether there was any at all? A No signs of a crater; I didn't see.

Q You didn't see it. How do you know there were not signs? It was dark? A I say I saw no crater— no signs of a crater.

Q But you didn't stop to look for a crater, did you? A No.

Q You made for the west? A I certainly did.

Q And it was dark when you started and stayed dark for five or six minutes? A Yes.

Q And the traveling and going was rough, wasn't it? A Rather.

Q And car wheels and cars littered the ground, right? A Yes.

Q For all you know, they might have filled the crater; isn't that so? A Oh, yes.

Q And two weeks later they might have all been taken away; isn't that so? A Yes.

Q Now, these shells that were coming out, you said they just made a whistling sound? A Just the tops of the shells they were; the brass tops; that is what hit me, just the brass tops.

Q The brass tops? A The timers, I guess; the timers; no shell, no steel; just—

Q And no steel? A Just the brass top.

Q And these brass tops were flying through the air making like a little whistling noise? A Like a whistling noise; a noise just like you throw a baseball.

Q And didn't travel far when they traveled, did they? A No; I don't suppose they did. They weren't beyond us, anyhow.

Q And when you got there that was the condition shells were whistling and flying around—all these brass tops, and that went—and you went right in among them and towed the cars out? A Yes.

Q And got within how far of the fire; how near to it? A Well, we were to the fire, because I got two cars off—one car off, rather, that was burning.

Q Now, that was some time around 1:30? A Yes; when we got there that was around 1:30; that was between 1:30 and the explosion.

Q And you don't know how long the fire had been going? A No, I have no idea.

Q When you first saw it at one o'clock it looked to you like a pretty good sized fire? A Yes, sir; it looked —you could see the flare from the time when I left Jersey avenue.

Q And it was, as near as you could locate the fire— it was on the rear of cars that were on 14, 15 and 16 tracks? A In that neighborhood.

Q There weren't any cars afire on the sea wall track? A Oh, no; not a car.

Q Is that the one called No. 18 from this map? A 18 would be the North Pier.

Q On the sea wall track? A No; the sea wall track— the sea wall was beyond that. See?

Mr. Skinner. Well, that is not shown here.

Mr. Garrison. He is talking about the sea wall. You are talking about a track.

Q You are talking about the sea wall? A Well, that is leading to 18 Pier, the North Pier. We call it the sea wall.

Q Well, it is 18? A That is true.

Q And 17 leads to the North Pier? A Yes, that is on the south side.

Q There were no cars afire on 17? A No. These tracks on 18 stood way up, you see.

Q West? A West, yes, shore end.

Q Well, as far up as the tank? A Yes, as far up as the tank.

Q And how many of them were there? A Twelve cars on that track.

Q On 18? A Yes.

Q Now, you have got it placed. You see, Pier 18 is here (indicating)? A Yes, but we call it the sea wall.

Q I want to be sure you are not twisted about it. A It is the most northerly track.

(Witness leaves the witness stand to go to the map.)

Mr. Skinner. Let me show you these cars here.

Q Now, you see track 18? A Yes.

Q Now, you mean they were on that track? A Way up here.

Q Way up little west of it? A Here is the sea wall track.

Q Then you were up to the opposite of Stores M to R? A Yes.

Q And the 12 cars extended how far to the east? A To the easterly end.

Q To the easterly end? A Yes.

Q Then all these 12 were west of a point about opposite Stores Q or P? A Store Q.

Q Now, were there other cars down below by— A No, I didn't see any; I didn't notice any.

Q No cars? A I didn't notice any.

Q Were there any on 17? A No, I didn't see a car on 17. We went right near—right where—

Q Now, this— A There might have been cars on that pier, but I didn't get down on that pier. Track 17 would be the North Pier, the south side of the North Pier; 18 would be the North Pier itself.

Q This map is supposed to show the location of cars on the night of the fire as furnished by the Lehigh Valley Company, and it shows four cars on track 17 together opposite the car stockade, and then a fifth further back near the track? A That may be, but I didn't look at that track at all.

Q That may be there? A That may be there; but I didn't look.

Q You didn't see any fire? A No; I didn't see any fire. The fire seemed to be in the rear of these three tracks, 13, 14 and 15.

Q Somewhere between those three? A Yes.

Q But somewhere between those three tracks, between the bridge and Zeke's shanty? A By the shore.

Q And Zeke's shanty? A Yes.

Q Now, you were, I suppose, pretty active and interested at the time trying to get these other cars out? A I only paid attention to the cars we were dragging out, because we didn't have—

Q You didn't locate the cars that were burning? A No.

Q Or the place where the cars were with absolute accuracy, did you? A No.

Q You spoke, I think, of going down to get the stuff out. What did you mean, including these explosive cars? A That were in on the tracks.

Q I want to call your attention to the fact that there are switches running into tracks 12 and 13, 7 and 8, 9 and 10, and switches that I mention are all back here alongside of the switches that you pointed out? A Yes.

Q Now, can you be sure which ones of those switches you took? A Yes.

Q Absolutely sure of it? A Absolutely sure of it.

Q And did you see them there when you next—was it two weeks or later, or when, that you first visited these premises? A Just two weeks.

Q After the fire? A Might have been a couple days more than two weeks.

Q Were you laid up for a while? A Laid up for two weeks.

Q Well, laid off? A Well, I was laid off for two weeks. You see, it was my time for my vacation. It come in a handy time.

Q Well, if it hadn't it would have been a very good time for it? A Monday my vacation started. This happened on Sunday.

Q Were the switches there when you looked at it two weeks later? A Yes, they were there.

Q Just as they were when you left? A Oh, they were torn up some.

Q Torn up pretty badly, weren't they? A I say they were torn up, but they had been working on them, repairing them in the meantime.

Q They were being replaced? A The tracks were all being replaced.

Q Well, were they through the replacing? A Oh, no.

Q And the replacing consisted of taking them from where the explosion had blown them and putting them back, didn't it? A I don't think the explosion blowed those tracks much.

Q What? A It didn't blow the tracks away that the string of cars we had was on, because I walked out along the string of cars.

Q Two weeks later? A Oh, no, that morning, see? That is how I located my way out. I had the cars to guide me.

Q Didn't the explosion blow the switches at all? A Oh, I didn't examine them; but it didn't blow the cars, because I located myself out.

Q It—but didn't it blow the switches? A No, I didn't see it; I don't think it did.

Q Did you see it as you looked at this map, that the switches are at least partly in the crater? A Yes, partly in the crater.

Q Well, now, seeing that, don't you think that the explosion did blow those switches?

Mr. Garrison. Now, if your Honor please, I object to the form of that question. According to this witness, the explosion he is talking about did not blow the switches. Now, whether some other explosion later blew them, I don't think this witness is competent to comment on at all.

The Court. Well, if the objection is that the question is a mere argumentative question, I will sustain it.

Mr. Garrison. Well, I will add that to my other objection.

The Court. I supposed that you would, and I will sustain it.

Q The first tracks that you went on when you came down there were which? A 13.

Q And from 13 did you draw some cars? A Drawed some cars.

Q How far back did you take them? A Oh, about the rear, two or three cars; I don't know just what was burning on those tracks; you couldn't see what was back. We probably got four or five cars off that track.

Q And how many—or how far back did you take them to the west? A As far—oh, to the west?

Q Yes. A From the head end of the track—from the west end of the track.

Q Well, did you take them any further west than the storage houses? A No.

Q Left them standing on—well, did you push them in again? A We had not taken anything out at all; we doubled from one track to another, and when we had—

Q That is, you took from 13 and then pushed what you had— A Held right on, doubled over on 14.

Q Held on? A Held right on to the cars we had hold of.

Q When you went in with your engine didn't you go in? You went to the end of the— A Yes.

Q And didn't you go in with your engine going cow-catcher facing your rear? A Rear end forward.

Q The engine was reversed, so that you could couple the rear end of the engine— A Yes, sir.

Q —on the front end of the train, of the cars, and pulled them out, and then backed the whole—your engine and all—down on what track? A The next track to it, 14.

Q 14; got some more the same way? A Got some more the same way.

Q Did they cut off any of them? A Oh, yes, sir.

Q And then took that added load that you had, pulled it out of track 14, up on to the what? A Next, 15.

Q 15. That is, you pulled it clear past the switches? A Yes.

Q You took the whole train past the switch so that the rear end of it was west of the switch? A M-M.

Q And then you pushed it in again on what? A 15.

Q 15. Took some more cars out the same way? A Yes—started to take them out.

Q Started. Now, when you started to take them out you had behind you—behind the engine and hooked on to it how many cars? A Oh, in the neighborhood of twenty.

Q Did you have any difficulty in moving them? A Yes, we did have difficulty in moving out.

Q What? A We had a little difficulty in moving.

Q Well, who was the engineer? A Engineer was James McLaughlin.

Q And did he have a fireman with him? A Yes, he had a fireman.

Q This map shows the sea wall track, east of that what is called here middle float track, and east of that, eastbound float track. Which one of those were you pulling them out on? A Well, we headed out to make what we call the middle float; see?

Q Middle float track? A Yes.

Q Now, Mr. Henley, just come here and look. By the time you were completed, this whole train of cars was how long? A Not very long.

Q Well, how long would that be, about? A Well, we will average 36 foot to a car.

Q It would be about 700 to 750 feet, then, in length? A Yes.

Q And before you went in on 15 and took the cars from there how many did you have on? How many did you get from 15? A Oh, we probably got about five from 15.

Q So that you must have had about fifteen or more before you went into 15? A Yes.

Q And that would be about five or six hundred—550 feet about? A About that.

Q Then, didn't you have to pull your train from— A The engine, by the way, is outside.

Q Well, you would have to get the— A There ought to be no trouble with the class of engine we had to pull twenty cars on those tracks.

Q Well, some of that train would be about upon these switches that are immediately opposite R, wouldn't they? A Yes.

The Witness. What is that map?

Mr. Skinner. Twenty-five feet to the inch.

Q Now, were you at any time opposite those switches that are opposite R? A Myself?

Martin T. Henley, re-direct—re-cross.

Q Yes. A No; I was at the rear end all the time; I didn't come out there only when I walked out.

Q How far were you from the engine when the explosion came? A I was the rear car.

Q Extreme rear? A Extreme rear.

Q Why were you at the rear? A Why, that was the business end of it. No use being up near the engine when you want to get the cars out.

By Mr. Hobart.

Q Why were you at the rear end? A Well, this was the business end of it; that is where we usually operate the engine on these cars.

Q Were you supposed to throw switches or release the rear cars, or what? A I was there to get the cars out of the track if I could. I didn't want to linger any longer than we had to, and the more help you had down there the better we were. It wasn't a very nice place to work.

Q You threw the switches yourself? A I threw a switch from 13 to 14.

Q That is all.

Re-cross examination by Mr. Skinner.

Q When you went in there first, Mr. Henley, did you go just with an engine or did you have some cars behind you? A Just an engine. The only cars was there I took out with another engine—he went on out to the Fairmount yard with those twelve cars.

Q By the way, when you were in there working away getting the cars out, as you have described it, did you see any Lehigh Valley employees trying to put the fire out ? A No.

Q That is all.

Re-direct examination by Mr. Hobart.

Q Did you see any Jersey City firemen trying to put the fire out? A No, I did not. I saw a truck as I came

in the yard, a city hose cart there; I didn't notice whether —I did see one man, one fireman, down where—in our vicinity; he was there when the shell hit me. He went to pick the shell up, and he dropped it; it was red hot. That is the only fireman, I think.

By Mr. Skinner.

Q Do you remember his name? A No; I wouldn't remember the man; in fact, he had his shirt on.

By Mr. Hobart.

Q Did that man have a hose? A No; he had nothing; he just looked as though he was sightseeing. He was all alone; there was nobody with him.

Q How far was he away from you? A He came down, as I dropped down he came there then, right by me then, but I wasn't down to the rear of this track then.

Q Was that before the first explosion? A Oh, yes; it was just before I got down to the rear of these tracks. That was at the head end of those tracks.

Q One other question. You have described these base-balls, as you call them. Were all of the explosions of that kind, or were there some of them shells and large size— A That is the only explosion. The only explosions I heard or saw was those. Towards daylight they seemed to get a little stronger. Maybe that was imagination. That was after the explosion, you know.

Q What was the fireman trying to pick up which he dropped because it was red hot? A That was that timer —brass top.

Q Brass top, one of the shells? A Yes.

Q And did you see any of the larger shells, the casing or the cases? A No, I didn't see any.

Q That is all.

Thomas Walsh, direct.

By Mr. Skinner.

Q While you were there did the fire extend westerly and keep getting more and more— A Kept coming toward us, just jumped from car to car, you know.

THOMAS WALSH, sworn.

Direct examination by Mr. Hobart.

Q You are employed by the Lehigh Valley, Mr. Walsh? A Yes, sir.

Q What is your position? A Freight conductor.

Q How long have you been a freight conductor? A About five years.

Q Were you working for the company on the night of this explosion? A Yes, sir.

Q Were you on night duty? A Yes, sir.

Q Where were you working on that evening before the fire? A Scale house, Washington street.

Q How far was that from the Black Tom terminal? A Oh, about a mile, a mile and a half.

Q What was the first you knew of any fire at the Black Tom? A I went up to Jersey avenue to get some water on the engine and the yardmaster told me to go over to the Storage; there was a fire over there.

Q That is Mr. Henley, that has just testified? A Yes, sir.

Q What engine did you have? A I forget the number now; I think it is 3456.

Q Do you remember about what time Mr. Henley told you to go over to the Black Tom terminal? A About 1:30.

Q And who were in your crew? A John Walsh, brakeman; a brakeman named Oakes—Mr. Oakes—

Q And your engineer and fireman, who were they? A The fireman's name was Campbell, the engineer's name was McLaughlin; there was a switch tender sent over with us also, named McQuire.

Q Did Henley go with you or on another engine? A I couldn't say for sure; there was three or four engines going over. He might have went over with me. I don't know though.

Q Where were you when you first saw any sign of a fire? A Well, of course, when we got there to the storage, the way the tracks lay there, as soon as we pulled on there I seen the engines there. That is quite a way from the—where the fire seemed to be, so we backed on down. I believe it was then I met Mr. Henley and he told me to go down and render whatever assistance I could in regards to getting cars out.

Q At that time when you first pulled into the Black Tom yard where did the fire appear to be? A Well, as I worked my way down the fire did seem to be on the back end of the island, over toward the North Pier. The place was all lit up.

Q Now, can you recall what you did in the way of clearing the tracks and of pulling out the cars? A Yes, sir; we crossed over and backed down the middle float.

Q Middle float track, is that? A Yes, sir.

Q That is right next to the sea wall track? A That is between the sea wall and the east bound float.

Q All right. A I thought it was clear but when we got down there was about ten cars on there, seemed to me about ten; might have been eight. So we coupled up to them, and we shoved on down further towards the fire, and when we got down there of course these shrapnel and bullets, well, in fact, everything was flying all around there and made it disagreeable, and you couldn't do much business.

Q What were these things that seemed to you to be flying around? A The big ones would whistle past, make a big noise like these propellers do. Of course, the little ones was just like rain hitting a tin roof. This brakeman was a brother of mine, and the position we was in, we could have coupled up by working on the

ground, we could have made these couplings, for to get the cars out, but the shrapnel and shells was coming from the side where the show was on, so that made me get on the opposite side to where the engineer was on, so I asked this hind brakeman, which was—he was my own brother, of course—I asked him would he get up on top so we will get the signals, because I had to get on the other side for to protect myself from this small stuff, that I figured was flying around, and he got up—I didn't tell him to get up, but he got up himself, because I wouldn't get up there myself, and I felt afterwards that I shouldn't have asked him, but he got up any way, and we started to couple up and get out whatever cars we could.

Q What track did you back into? A Well, I wasn't positive sure at the time, but it must have been in around 14. We backed in there first with these cars that we had hold of.

Q Which way was your engine headed? A Our engine was headed toward the main line of the Central.

Q Towards the shore? A No; our engine was headed towards the Jersey Central tracks, of course.

Q All right. A We was backing up, of course, to get the train; we had hold of about eight or ten cars that we coupled up to on the middle floats, backing down; we backed in on 14, and I guess we opened the knuckles, and took a chance, because you couldn't go in there, and when we coupled up we pulled ahead and we had about six, and then we pulled out again and we backed in 15 with what we still had.

Q How far did you pull out? A Well, we had to pull out about six or seven car lengths, we backed up, you understand.

Q So as to clear the switch for fifteen? A So we could back up again. We back in on 15, I think it was and we got about five or six, and the hind car was blazing.

Q Where were you while that was being done? A I was standing alongside of the switches leading into 15.

Q What were you doing, giving signals or coupling the cars, or what? A Well, I was giving signals to my brother and he was passing them to the head man, or I was watching—I was making out with the couplings or something like that, because you couldn't go down with the cars, so I was just standing there, there was nothing else to do, only taking the sights, as the man says.

Q Then you started backing into 15, is that it? A We went into 15 and we made the couple again—what I mean we opened the knuckle and took a chance—when you do a thing like that you are only taking a chance, and sometimes try to adjust the knuckle.

Q You mean sometimes they would not couple? A But in this case it did couple, so we pulled ahead. When we hit them we pulled ahead, and we made the coupling, and when we got the hind end out there was one car blazing; I don't know whether it was Mr. Dickman or Mr. Henley was there then or Mr. Leyden, but there was some one of them around there then, and I proposed to him to kick it back; I didn't want to pull it out in the yard, because it was blazing.

Q That is, you mean the rear car? A Yes, sir; so we did; somebody cut it off, I don't know just who it was, and we kicked the car down the track again; and I know Mr. Leyden was there at the time. So then there was another track, I guess it must have been 16, looked pretty full, and I think Col. Leyden, because I knew him pretty well, he said to me that don't look a good track, why don't you hook on to them, and I said I think we will, so we coupled on to them, and we made a coupling again, and Mr. Henley was there, and we gave the engineer a sign to go ahead, and he had about all he could handle.

Q How many cars did you have at that time? A I don't know, must have had about thirty or thirty-five.

Thomas Walsh, direct.

Q Whereabouts were you then with reference to the train? What part of the train were you? A I was standing—while this was going on I was standing around the switches, because you couldn't go no other place. My place was not on the head of the train, and where my place was was on the hind end, because I couldn't get there, because it was around the North Pier where the fire was. I guess the reason we couldn't pull the cars there was a brake on the hind end of the cars and nobody could go down there to knock it off; we gave the engineer the signal to go ahead and he couldn't pull it, and Sloan said he would go up and get another engine, and about that time the thing let go.

Q Where were you when it let go? A I must have been around switch 14 or 15, or somewhere in that vicinity.

Q On which side of the train were you? A I was on the side near the storehouses.

Q Do you think you could show us on the map where you stood? A Yes, sir.

Q Please do so? A This is number 4? Yes, sir; I was in around here.

Q Indicating what switch—the switch on what track? A I was in around here, where the switches are.

Mr. Skinner. Indicating a point right opposite the track.

Mr. Hardin. That point leads on to the sea wall.

A I was on the transfer, so I was down in here, down here.

Q Name the track? A I came down on the float and I went in on 15 and 16.

Q You are indicating now— A Yes, now, down here. Came in here. Well, of course, there is where I must have been. I couldn't have been no other place.

Q Just name it; what is the name of the track you were on at the time of the explosion? A What is the name of the track?

Q 14 or 15 or 16? A Yes; the point of the switch around 14, 15.

Mr. Hardin. Middle float track.

A That is right out here, because these switches we were using. Here is one. We made three or four doubles. I couldn't watch over here.

Mr. Garrison. Better indicate it.

Q Describe a little better, first by reference to the track and then by reference to the big tank? A Yes, I remember the tank being across here.

Q You could see the tank? A Yes.

Q Was that about opposite you or what? A Well, I couldn't say, the big stone, the big pier was across from me, Pier 7, of course, at that time I didn't notice it, but I came down this track, here is where I got the seven cars, on this float. There was a man named Voorhis pulled up the sea wall track with a number of cars about the same time, went in on 14 and doubled out, and then on 15 and doubled out and then I gave the signal, and got hold, and I thought the engineer got it, and the explosion happened, so there was no other place to be only there, because that man was up on here and my brother was in that same place.

Q When you went in there, indicate on the map, will you, please, by describing it, by the track number or some other number so we will know just what you mean? A Well, if I took the middle float—does that indicate switches?

Q Yes.

Mr. Campbell. He indicates the lever.

A The handle. Well, if this is 14 or 15 there must be only a difference of a few feet in the switch going to 14 and the switch going to 15 and the switch going to 13, so I must have been, say, at 14 switch or 15 switch or 13

switch; it is only a matter of a few feet, I don't know just whether—I was on this side of the car—that is our cars, that was blocked here, because the stuff was coming that way and I couldn't work on that side; if I had to work in that stuff there would have been no reason to get on the lines and get the cars out, there would have been no necessity of that at all. We couldn't work on that side, there, I had to come over here, and he had to get up on the top, because the engine to be working—

Q When you said on that side you mean on the northerly side? You have indicated the top of the map. A This is New York side, isn't it? This is the water side, this is the pier side and this is the brick side. This is the side we were working on, the left hand side from the engine.

Q These shells or these shrapnel— A They were coming from here, so it seemed to me. You couldn't stand over there at all. When I got these cars on 15 it screened me. The bullets were rattling like that (rattling the map). Just like rain on a tin roof.

Q Now, you have said you were on the switch, either 13, 14 or 15? A Or 15, I done whatever work I done there.

Q But you have not yet told us so we can get it on the record, just where you were? Take the tank here. Do you know where the tank was? Could you tell where you were with reference to that tank? A Well, I was in the vicinity of the tank. I seen the tank, but—

Q Well, take the cars on track 16? A 16? This is 15?

Q Yes. A Well, yes. Yes, I must have been right here.

Mr. Hardin. You remember this middle float track all the time.

A I understand. I came down on the float. See, if I came down the middle track I couldn't get on the middle

float, so it positively proves I must have gone on that track, come down the middle.

By Mr. Garrison.

Q There are switches, and there are switches, and there are switches. A Yes, but that is a switch would not lead you on to 15. Well, I was at switch on 14, see, opposite the tank.

By Mr. Hobart.

Q Tell us as near as you can recall it? A Yes.

Mr. Garrison. Won't you please measure from the dotted line where he says he was.

Mr. Hardin. Two inches.

Mr. Garrison. Little over two inches on the map from the edge of the crater as shown by the dotted line.

Mr. Hardin. Two inches and two tenths.

The Court. Adjourned until ten o'clock tomorrow morning.

(Adjourned till Tuesday, April 1, 1919, at 10 A. M.)

(Trial resumed April 1, 1919.)

THOMAS F. WALSH, resumes.

Direct examination by Mr. Hobart continued.

Q When the first explosion occurred what happened to you, Mr. Walsh? A When the first explosion—well, I was blew down I guess, that's all I know about it—knocked down.

Q And how long was it before you got up again? A Well, I do not know; I believe—I was not unconscious but I—I might have been unconscious; it was—but there was a conductor that picked me up afterwards some time,

found me sitting there, I don't know how long—five minutes, or it might not have been a minute.

Q Do you remember what conductor that was? A Yes, sir; Voorhis.

Q And where did you go after that? A I do not know. They took me up to the ambulance I believe.

Q You were taken home or taken to the hospital? A No; I went to the City Hospital.

Q Then you were not there when the second explosion occurred? A No, sir.

Q And of course you did not do anything further after that, after you were knocked down? A No, sir.

Q Except you were removed to the ambulance? A That was all I done, yes, sir.

Q Now, you referred to your brother as being on top of the car? A Yes.

Q You asked him to go on top of the car? A Yes; I asked him.

Q Did he go? A Yes.

Q Do you know where he was when the first explosion occurred? A Yes; I was backing that car at the time.

Q How far was he away from you? A He was directly on top of the car. I was underneath him.

Q You were on the ground alongside of the car on which he was standing? A Yes.

Q You stood on the ground and he was on the car? A Yes, sir; he was on the car.

Q When the explosion occurred did you observe what happened to your brother? A No, sir, not then; but when I woke up I was sitting down; something had hit me on the small of the back. When I got my senses a little bit together I tried to get up and I could not get up and I knew that something had happened but I could not quite—I did not really know what happened after that had gone off. I remember that my brother was there and I looked up and I—I looked up on the car and I

shouted to him to save me. I remember that very much; and then I thought—

Q Did you see your brother? A No, sir; there was nobody there. After the explosion everything seemed to go away; there was no one around there. Right a minute or two before that there was different people around there, Mr. Dickman and Mr. Henley and Mr. Leyden and—

Q Do you remember how you got to the ambulance; did anybody carry you there or did you walk there? A No; after I got on my feet with the help of Voorhis and I think there was the city fireman or somebody, or I believe Marty Henley was there helping me—I was only hurt across the back. I could walk after I was on my feet.

Q You walked to the ambulance? A Yes.

Q Do you remember how far you walked? A Yes; while I was sitting there maybe I waited ten or fifteen minutes in the ambulance and the ambulance was as near as I can judge around the grain elevator, that is where the whole crowd was, everything was there.

Q On your way to the ambulance did you have any difficulty in walking; did you have to climb over anything or climb out of anything? A No, sir; we walked along the train that we had hold of.

Q Alongside of the same train which was still standing there? A I believe so, yes.

Q And after you got to the engine then where did you go? A When we got to the engine then of course we had to keep walking I should judge ten or fifteen car lengths before we came to the ambulances.

Q Did you walk along the roadway after that? A Along the track, the middle float I suppose. The reason I say I might have been unconscious five minutes, when I got up there the ambulances was there.

Thomas Walsh, cross.

Cross examination by Mr. Skinner.

Q You were familiar with the Black Tom yard of course before this night; you had been working around there? A Yes, sir.

Q And you know where Zeke's shanty is, don't you, the shanty— A No, sir; I did not exactly know—I know just about where it was.

Q Do you remember the bunch of piles or stockade of piles there? A No, sir, I did not. I was not thoroughly acquainted with it. I just—in fact I did not work there; I worked a mile or a mile and a half from there, but I have worked there at different times, but there was some of them moved three or four or five months previous to this.

Q In any of those times don't you remember seeing a shanty off on the north side of the sea wall on some piles? A No, sir; I did not; but I have seen it since the explosion.

Q Oh! You have seen it since? A Yes, sir.

Q You mean you have seen what is left of the piles? A Yes, sir.

Q And you spoke of the fire that you saw as being over towards the North Pier? A Yes, sir.

Q Did it seem to you to be in the neighborhood of that bunch of spiles? A I could not say truthfully. When I looked down there of course there was more or less excitement that night and there was smoke and the glare of the blaze and this stuff lying around. To tell the truth I did not bother much at all making an observance—an observation of anything.

Q So that you could not locate the fire with any exactness or certainty? A No, sir; only that it seemed to be in the back.

Q You spoke of kicking a car back down the track; that was more than one car, wasn't it? You said you kicked down a portion of what you already had hooked on? A No, sir; there was one car I think.

Q And which track was that kicked on? A I think it was 14.

Q Was that right before the explosion? A Yes; that was a few minutes before the explosion.

Q And was anybody on that car? A No, sir. We did not kick it exactly. I put it in the clear so that it would go to 15.

Q That means you sent it back under momentum and without anybody on it to control the car? A Yes, sir; but we had hold of that car and I would say twenty other cars so we could not go on at any speed. We just started back to make the coupling to get the car in the clear. I do not know how far she rode, may be a car length or two.

Q You did not see how far it went? A Well, I watched the car stop.

Q You did watch it stop? A Yes; she stopped about two or three car lengths in the track.

Q And that was on track 14? A Yes.

Q And why did you kick it back on track 14? A Because if I had pushed it back nobody would have gone in there to cut the car back, uncouple to cut it back we call it. I wouldn't go in and I wouldn't ask you to go in.

Q That is why you kicked it back instead of pushing it back? A Yes, sir—for safety.

Q Why did you send it back at all? A Because the car was on fire and I did not want to leave it with the cars that were not on fire.

Q This was a car that was on fire? A Yes; the end of it was burning.

Q And it was one of those you had gone in onto track 14 and hooked up to? A Yes.

Q How many cars altogether were there on track 14? A I couldn't—

Q Well, did you get them all? A I could not say that.

Thomas Walsh, cross.

Q Did you get them all? A I could not say; we took what come.

Q You spoke something about the knuckles, you took a chance that the knuckles worked; what was that? A Well, a coupling will couple up itself, understand, if it is adjusted properly. There is ofttimes though when the knuckles gets a little bit out of place and they don't work; some one has to be there to make them straight.

Q You mean you took a chance as to whether that would work? A Yes; it did work.

Q And when the explosion took place I think you said that the rear end of your train was down near the North Pier where the fire was and that you did not go down there where all the fire was; do you remember? A Previous to the explosion taking place I coupled up on 15.

Q Yes? A And we had a hold of that—we had as many as we could pull anyway.

Q Well, at that time you could not go down to the extreme rear of your train? A No, sir.

Q Because it was too near to the fire; isn't that so? A Yes; and stuff flying around; we just backed in and coupled up to it.

Q How far away from the rear end of the train were you? A Right at the coupling; I had the switch; the cars just lay in the clear.

Q I mean how many cars were there back of you, east of you towards North Pier? A I could not say.

Q A good many? A I could not say; I do not know whether the track was full.

Q I mean on your train. Did you have six or eight or ten cars back of you towards the North Pier? A Towards North River—that is what I say; I cannot tell if I had knew that we could have gone down and coupled up or counted the cars.

Q Was that where you were standing when the explosion happened? A No, sir; I was on the switches that would lead me onto 15. I dare say I was on 14 switch.

Q At the time the explosion happened were you at the rear end of the train or not? A No; no.

Q You were a good ways up on the train, weren't you? A At the time it happened I was in the vicinity with the exception of the difference of the switch that would lead onto 15. Of course I walked down the cars and I told the man helping me to walk ahead so we could keep out of the shot. That would throw him in the same place, so I was still around the switches.

Q I am only asking you where you were with reference to the rear end of your train—how far from the rear end were you? A I do not know how far the rear end lay; I do not know the number of cars.

Q To the best of your judgment at least how many—six or eight? A I cannot say. I could only see a certain distance in the track.

Q Well, isn't it your recollection, however, without being able to tell the exact number of cars that east of you at the point where you stood there was a considerable portion of your train, including— A The cars that I coupled up to?

Q Yes. A Do you mean the cars that I went in on 15 with?

Q The cars you went in with and the cars that you got there. I just want to know if you can tell me how many of those cars there were that laid to your east towards North Pier. A I cannot say.

Q Can you say four with safety or six or eight? At least how many? A I went in with my train off 14. I backed in on 15. I can count four or five, but whether there was more than that, whether it was fifteen—

Q You can say there were at least four or five and might have been more? A There might have been more;

there might have been fifty if the track would hold that many.

Q At the time of the explosion was Henley standing near you? A I do not know just where Henley was at the time of the explosion, but he was there a minute before the explosion because when we made the coupling it was him that suggested to get me a pusher, to get some one to help me out. I spoke to him and told him we could not pull them.

Q Did the explosion seem to you to come from the place where you had seen the fire? A Well, it came so quick that I never gave it a thought. The only thing I thought, I felt afterwards that I thought there was something going to happen; everything got still, a smothering stillness, and then the thing happened; I could not tell where it came from or what direction; in fact I knew nothing about it.

JOHN WALSH, sworn.

Direct examination by Mr. Hobart.

Q You are employed as a brakeman by the Lehigh Valley? A Yes.

Q And were working in that capacity on the night of the explosion at Black Tom? A Yes, sir.

Q Are you the brother of the witness who has just testified? A Yes, sir.

Q You were on duty that night, were you? A Yes.

Q Where were you working? A Why, I was working at the scale house.

Q How far is that from Black Tom? A About a mile and a half.

Q Did you get any orders to go to Black Tom? A Yes, sir.

Q And about what time did you get the orders? A Well, between half-past one and—about, between one and half-past one—between one and half-past one.

Q And where did you get the orders from? A From Mr. Henley.

Q And what did you do? A Why, I told the engineer and he said he wanted a tank of water. We went in and got water and went over to Black Tom. When we got down there we followed a fellow named Voorhis down there. He went in on the sea wall track and we got down there and seen we could not do anything there and my brother told me to cut the engine off and go down the track called the middle float. Well, we went in the middle float and there was about eight or ten cars there.

Q At that time where were you; were you still on the engine or did you get on the car or what did you do? A When we backed down the sea wall track I had to walk down—there was a couple of couplings to make. I coupled the cars and walked down to the hind end and the engineer was on the opposite side, and, of course, the way we was working around the curve there we could not very well work there; my brother asked me if I would get up on top.

Q Which way was your engine headed at that time? A Headed west.

Q Headed in a westerly direction. Which way was it with reference to the North Pier? A Sir?

Q Which way was it headed with reference to the North Pier; was it headed toward the North Pier or away from the North Pier? A No, sir; the head end of the engine was facing the other way.

Q The other way from the North Pier? A Yes, sir.

Q Then your engine was backing in? A Yes, sir.

Q Now, when your brother asked you if you would get on top of the car was there any disturbance going on—any noise? A Well, at that time I could not see. I could hear the noise, but I did not know really what it was.

Q What kind of a noise was it? A I found out afterwards it was something like shells and stuff bursting.

Q Well, did you get on top of one of the cars? A Well, the cars I got on was all right; there was nothing the matter with those cars.

Q Well, you got on top of them, did you? A Yes.

Q Where was your train or the car on which you climbed at the time you got on top of it? A The cars I was on was on what they call the middle float.

Q How far from the engine? A About eight car lengths—eight or ten car lengths; I could not say for sure.

Q On which track was the train at the time you first got on top of the cars? A On the middle float.

Q And do you know where your car was—I mean the car you got on top of—do you know where it was with reference to the storehouses or with reference to the tank? A Do you mean the water tank?

Q The big water tank, yes. A The cars we had hold of first was above the side of the water tank, and then we backed out with the cars and got off the float down towards I think it was 14, we got some cars off there and pulled up above the switch and backed down another track; that is the track my brother had reference to.

Q What track was that? A That was in towards—I ain't quite sure whether it was 14 or 15. One car we had already off; we kicked that car off after the car was on fire.

Q Now, wait a minute. Were you on top of the car all the time during that movement? A Yes, sir.

Q All right. Proceed. Now, you kicked the car back, kicked it off or did something to it? A Sir?

Q You did something with the car at the rear? You said you kicked it? A Yes; I kicked it back into the fire; the fire was all burning; afraid to pull it off; if we had to pull it up we would have to go up in the yard where the car was on fire, and we were afraid to do some damage, as the car was on fire. We kicked that back. We come up above the switch and we backed in towards another track. My brother said to me: "How does that

track down there look?'' I said, ''It looks all right.'' What I meant by that, those cars didn't seem to be on fire.

Q Now, do you remember what track that was? A Well, I think it was in towards something around 15; I was not very well acquainted with the yard at that time.

Q Well, did you back in on that track? A Yes, sir.

Q Hooked on to some other cars? A Yes, sir; we coupled on some more cars. The engineer started—

Q Did you still remain on top of the train? A Yes, sir. The engineer started ahead. He couldn't pull out, and Mr. Leyden was standing—

Q How many cars— A Sir?

Q How many cars did you have on the train at that time? A Well, I couldn't say. Mr. Leyden stood there, and I seen the way the thing was. I was going to walk back; I thought there was brakes on; I was going to knock the brakes off, and he was on the ground then and he hollered up: ''Hey, Walsh!'' I said, ''What do you want?'' He said, ''Don't you go back there any further.'' I said, ''All right, sir.'' So then I walked up a little ways, maybe a car length. I stood there and a little while afterward Mr. Henley came up, and walked up a way and he stood there talking to my brother.

Q You still remained on top of the train, did you? A Yes, sir; that is, right after that that the explosion came.

Q You were on top of the train at the time of the explosion? A Yes, sir.

Q Can you tell us which car you were on at the time the explosion came? A Well, yes, I was on the—some of the cars we got off 14; I was practically right near the hind end.

Q Near the hind end of the engine? A Yes, sir; that is what we got off about 14 before we backed into 15.

Q How many cars were there behind you towards the rear of the car? A When we back into 15?

Q Yes. A Well—

Q Just before the explosion? A Before the explosion?

Q Just before the explosion? A Well, I was back about maybe 13 car lengths.

Q You mean you were back— A That is, from the engine.

Q Back 13 cars from the engine? A Yes, sir.

Q Well, now, do you know how many cars there were still behind you towards the rear of the train? A Well, I couldn't say how many cars were down there, but there were quite a few, because I could see—I could see from where I was— I could see all the way back, and what I seen it didn't seem to be on fire at all.

Q Now, you know where the big water tank is, do you not? A Yes, sir.

Q Can you tell us from where you were just before the explosion with reference to the big water tank? A No, I was this side of the water tank.

Q What do you mean by "this side?" A Why, more towards—like—well, the water tank would be like here; I was more like over this way, more like towards the west.

Q Well, were you nearer the North Pier or away from the North Pier? A I was right opposite Pier 7; that is when the explosion was.

Q Well, Pier 7 takes in quite a lot of— A Sir?

Q Pier 7 takes in quite a lot? A Well, I moved up near the end of the Pier 7. 7 is like here and the water tank stands over in this direction. I could show you better over there.

Q You know the map, do you? A Yes, sir.

Q Well, just come and show us just where you were when the explosion came. Now, speak up.

(Witness leaves the witness stand and goes to the map.) (T. 16.)

Q Let me remind you that way off to the right of the map is the North Pier. Here are the stores; here is the

last store on your pier, called Store R; and a short distance to the right of Store R on the map is the big water tank? A Here is the water—water tank here; this is the middle float here. I was about down here at Pier 7. Pier 7. The stores in here. See? Well, there is the water tank here. Here is where Pier 7 starts. I was between the water tank and Pier 7. This is what they call the middle float here. We came down here and we backed in toward 14 and 15. Well, here is the water tank here, and here is the head of Pier 7. Well, I was in around here, sir.

Mr. Skinner. Indicating a point immediately north of Storehouse R, northeast corner of Storehouse R.

Q Now, did you have any warning or notice of the explosion? A No, sir.

Q Anything to indicate to you that it was going to occur? A No, sir.

Q What happened to you when the explosion came? A Well, I really don't know what did happen for a minute, or maybe a little more than a minute. The only thing I knew after the explosion—after the explosion did happen, why, I was sitting on the ground and I got up—

Q You remembered you had been on top of the car? A Yes, sir.

Q Well, how did you get on the ground? Did you climb down? A Oh, no, sir; I got knocked down.

Q Fall down or—what? A I got knocked down, and I was sitting on the ground when I come to my senses. I looked—I didn't really know where I was, and I got up—I tried to get up and I couldn't figure out where I was. So I sat there for a few seconds and I remembered—my memory started to come to me, I could see the light in front of me, but the lights were all out; so I got up and I tried to walk but I couldn't. So then I got up again. There was some cars there; that is, right near the roadway. I got hold of the cars and I seen a form passing

me, and I hollered, and it was Mr. Julian there. He came down and helped me out.

Q Well, were you injured by the explosion? A Why, yes, sir; all me nose here, and up here (indicating).

Q Your nose was broken, was it? A Yes, sir.

Q Where did you go after that? A Well, they took me up the roadway, and the patrol was there, and some one says that I ought to have medical attendance right away. One of the officers there, a cop, he said something about we would have to wait a minute, and some man came along in an automobile, and he took me up to the doctor's office on Ocean avenue, and from there they took me to the City Hospital.

Q You were not there when the second explosion occurred? A No, sir.

Q Now, I would like to have you go back for a moment to the time when your engine first came into the Black Tom yard. I want to ask you if when you got into the yard you saw anything of the fire—when you first got there? A Before—did I see anything of the fire?

Q Yes? A Well, yes I did. When I got up on top, why, we couldn't work any too fast down there—I could see like the fire from the top of the cars, you know.

Q Well, where did the fire appear to be at that time? A Why, it seemed to be like almost in the back of the yard; it was from the front of the yard—that it, where we were getting the cars from the fire seemed to be all in the back of the yard.

Q What do you mean by the back of the yard? A Why, down towards the water front more; that is—you know, like the river, more.

Q You know where the North Pier is? A Yes, sir.

Q Where did the fire appear to be with reference to the North Pier? A Well, it was right this side of the North Pier.

Mr. Hobart. Cross examine.

John Walsh, cross.

Cross examination by Mr. Skinner.

Q You say it was right this side of the North Pier, Walsh. You mean to the west of the North Pier, don't you? A Well, that would be in towards the—

Q Towards the gate, the land side? A Yes, sir.

Q And I suppose there was quite a little smoke coming from these burning cars, wasn't there? A Well, yes; there was smoke.

Q Kind of a haze of smoke, flame behind the smoke, and all that, was what you saw, wasn't it? A Well, there was smoke, but there was more flame than smoke.

Q And I don't suppose you could locate with exactness just the very spot where the fire was, could you? A No, I didn't say—but it seemed to be down more towards —down towards the river.

Q Somewhere a little to the west of the land end of North Pier? A That would be on the right hand side facing the North Pier.

Q The right hand side facing— A That would be facing the North Pier.

Q Well, as you went in you went in—as shown on this map it would be from that end going in this way? A Yes, sir.

Q And here is your middle float track, and the switch is down here, and then there is a tank and you go on towards North Pier. Now, where you were over here somewheres you saw the fire down near North Pier, you say? A No; I said this side of North Pier.

Q Well, to the land, to the left—nearer you? A Yes, sir.

Q Between you and North Pier? A Yes, sir.

Q Do you remember that shanty down there, Zeke's house; or haven't you seen that? A No, sir; I don't remember; I don't believe I ever seen that.

Q You had only worked there a few days? A Well, I never worked down there, not in the night time.

Q So you were not familiar with the yard? A Sir?

Q You were not familiar then with the yard? A Not with that part of the yard; no, sir.

Q And you speak of Ju—isn't it a fact—had you been there before at all? A Down that part of the yard?

Q Yes. A No, sir.

Q Now, you are telling about tracks 14 and 15. This being the first time that you had been down there you didn't know 14 and 15, did you? A No, sir.

Q You have learned that since, haven't you? A Sir?

Q You have learned the track number since? A Oh, I have worked down there since, yes, sir.

Q And you have learned the track numbers? A Sir?

Q Learned which tracks had certain numbers? A Yes, sir.

Q And have you been over this map before? A No, sir.

Q Well, another map like it, I mean? A No, sir.

Q Haven't you been over any map to locate the tracks that you were switching to and from? A No, sir.

Q Why, you told Mr. Hobart that you were familiar with this map. He asked you that? A No; I heard him speaking about the map. My brother told me about the map.

Q Oh, yes. And did your brother tell you that it was 14 and 15? A No, sir. I asked him last night what was that over there, and he told me a map, after he come out.

Q Yes, now, Julian—you speak of Julian running by you? A Yes, sir.

Q Julian was then near you at the point where you stood when the explosion occurred? A Sir?

Q Was Julian near you at the time when the explosion took place? A I don't know where he was.

Q Well, you had not seen him before that? A Before the explosion?

Q Yes. A Well, no, I have—I had seen him walking in around there, but I don't know really where he was.

Q Well, when he ran by you which direction was he going, towards the gate, away from North Pier or towards North Pier? A He was like crossing the roadway; that is—

Q Crossing the roadway. I see. Running from the sea wall towards the tank, or from the sea wall toward the storehouses, or from the storehouses toward the sea wall? A No; between the eastbound and the roadway there, opposite the piers.

Q Between what? A There is the roadway, and there is the roadway between the eastbound track and the storehouses, a roadway where wagons passed.

Q Well, do you mean—oh, I see. The track that is marked here "eastbound float track"; is that what you mean? A Yes, sir.

Q Now, there is a roadway there which seems here to end opposite Store O? A Yes, sir.

Q Was he on that roadway? A No, sir; he was like crossing, see? Like if he was going back up above, and I didn't know who he was, and I seen the form passing me and I hollered. I thought maybe first it was the fireman.

Q And were you standing or lying down? A I was standing; I was trying to get up the roadway, but I guess I was kind of dazed, and I couldn't get up.

Q Had you gone far from the point where you were when the explosion took place, or just moved a few feet? A No; I just got up first and I fell down.

Q At this point, then, on the roadway where Julian ran across was where you were thrown down by the explosion? A Well, no, I got up first and walked a little way, and I got up again and I stopped, and that was when I seen the form—seen the passing form.

Q When you say walked a little way, do you mean a block or do you mean a few feet? A Well, maybe a few

feet. I was trying to grapple my way along the cars, you know; I couldn't see.

Q For instance, from you to me? Would it be about that distance? A Well, no; maybe I didn't walk that far.

Q Not that far. Now, then, where was your brother then? A I don't know where he was.

Q How long had you been there when the explosion took place? A Well, I guess I was working there around the cars three quarters of an hour.

Q Now, Walsh, during the time that you were there didn't the fire spread, go from car to car? A Well, it might have.

Q Well, didn't you see that the shells were going off? A Yes, sir; we seen what we thought was shells breaking.

Q Looked like sky rockets? A Yes, sir.

Q And they were landing in all directions, weren't they? A Yes, sir.

Q They were not shooting in any one direction, but in all sorts of directions? A Well, it seemed to me there were more shooting up in the air, you know.

Q Well, they would come down one way, and another shell would come down in another place, and all around, wouldn't they? A Well, you could see like little—what was inside of it, like shrapnel.

Q Well, did you see the fire—could you tell whether the fire was creeping down towards the North Pier? A Well, no, sir; I couldn't say that.

Q You didn't see it. You mean you couldn't tell? A No, I couldn't say whether it was creeping down there or not. The only fire I seen seemed to be down more towards the river than any place else.

Q But you could not tell whether it was starting in one direction or more than one direction? A No; we were not down there for that purpose.

Charles Voorhis, direct.

Q Now, just one more question: You speak about kicking the car back. That was just before the explosion, wasn't it? A Yes.

Q Just before the explosion? A A little while before the explosion.

Q And was it a long time—you say a little while; much longer than the time it took you to tell us about it? A Oh, it might have been—no. We kicked the car back into the fire. We pulled it over the switch. Well, that might take about four or five minutes; and back down over this other track, and that was the track we could not pull; it may have been ten minutes, maybe more.

Q Ten minutes, eh? As much as that? A Yes, sir.

Mr. Skinner. That is all.

(Witness excused.)

CHARLES VOORHIS, sworn.

Direct examination by Mr. Hobart.

Q You were employed as conductor? A Yes, sir.

Q Are you the Conductor Voorhis that Mr. Walsh referred to when Walsh was knocked down by the explosion? He spoke of a Conductor Voorhis who helped him out? A Yes, sir.

Q You are the man who did that, are you? A Yes, sir.

Q All right. Now, speak out so we can hear you. Whereabouts were you when the first explosion came, as far as you can tell? A When the first explosion took place I was way up near the road part, near the yardmaster's office.

Q Now, what did you do after the first explosion? A Well, just at the time of the first explosion we were pulling a string of cars off the sea wall track, and when the explosion took place I missed my rear man, and I

told my man to go on out into the yard with the cars we had hold of and I would go back and look for him; and while going back over the track that we pulled out of, I got back down near the tank and I heard some talking over on the other side, and I crawled through Conductor Walsh's train and that is where I found John was.

Q Now you speak of the tank; what tank do you refer to? A The large tank.

Q That big water tank? A Yes, sir.

Q Do you know where the warehouse is? A Yes.

Q Do you mean the tank near the— A Yes, why down near that; just the exact spot I can't tell you that, but down near that.

Q That is where you found Walsh? A Yes, sir.

Q What did you do? Did you help him out or what? A I picked him up and set him up and then some other gentleman, whoever he was, I don't know who it was, came along and I went on in search of my own man.

Q And did you find your own man? A No, sir.

Q Well, did you see him again that morning? A I found him in the morning, yes.

Q Do you know where he was? A I know where he told me he was.

Q Well, I don't suppose you can tell us that. At any rate, you did not find him that time? A No, sir.

Q All right. Cross examine.

Mr. Skinner. No questions.

No cross examination.

MICHAEL A. MULLIGAN, sworn.

Direct examination by Mr. Hobart.

Q Mr. Mulligan, on the occasion of this fire and explosion, July 29th and 30th, 1916, you were employed by the Lehigh Valley as superintendent? A Superintendent, yes, sir.

Q What is your occupation at this time? A Superintendent of the Lehigh, the New Jersey division of the Lehigh Valley.

Q What does that cover, what part of the road? A That covers between Plainfield and Pennhaven Junction —Plainfield, New Jersey, and Pennhaven Junction, Pennsylvania, a distance of one hundred and two miles.

Q On July 29th and 30th, 1916, what part of the road did your jurisdiction cover? A Took in the Lehigh Valley property between West Elizabeth, New York and Brooklyn, including Black Tom territory.

Q You are familiar, I suppose, with the general situation of Black Tom? A Yes, sir.

Q The connecting tracks and so on? A Yes, sir.

Q Now we have been referring to Black Tom as a terminal, or the terminal. Just where are the terminals of the Lehigh Valley in New York Harbor or Jersey City —where were they at this time? A Why, Black Tom was a portion of the terminals, and we had a portion of them in the Johnson avenue and Washington street territory, taking in between Johnson avenue and what is known as the Gap.

Q Are you familiar also with the location of the other railroad terminals in Jersey City, Bayonne, Hudson County generally? A The majority of them, yes.

Q How does the Black Tom terminal compare with these other terminals with reference to its distance from the inhabited section of the city? A Black Tom territory is the most isolated, so far as Jersey City, New York, or the inhabitants is concerned, of any terminal we have in the city.

Q You refer to it as being the most isolated of any that—did you say we had? A Well, that any road has that I know of.

Q You did not mean to limit it to the Lehigh Valley? A No, sir; I meant to limit it to all railroads, terminals, in Jersey City.

Michael A. Mulligan, direct.

Q Just for the purpose of the record will you tell us what other railroads did have terminals in Jersey City? A Central Railroad of New Jersey, Pennsylvania, Erie Railroad, might say the Lackawanna is in Jersey City, they are in Hoboken.

Q Well, part of it is in Jersey City? A Part of it is in Jersey City, yes.

Q Now, as superintendent, were you aware of the fact, through records or otherwise, that various kinds of explosives were being transported over the line of the railroad? A Yes, sir.

Q And do you recall how long prior to July 29th and 30th that had been done? A That had been done for several months. I couldn't tell you the exact date. It had been done several months prior to that time.

Q Now do you recall the occasion when certain men who have been described in this case as the Dougherty men went on duty at the Black Tom terminal? A Yes, sir; I have a memory that Sup—the vice-president in charge of transportation office called me up and advised that the Dougherty agent was to protect the explosives in the Black Tom territory. And they had four such men that they were going to send over for to work then, and they would put on four nights.

Q Have you any way of fixing or can you now recall the time when you received this message? A No. As it was a verbal—and over the telephone—I made no note of it; but they were sent over to my office for to be accompanied down on the grounds, and our agent notified accordingly that they would take charge of this explosives. At that time, why, our agent was notified also, and our captain of police accompanied them down there and made them acquainted with the grounds, as well as our watchman down there; that they had authority to take care of this explosives.

Q Well, it was prior to the explosion that this was? A Oh, yes; several months prior to the explosion.

Q Was there any particular part of the terminal which was assigned to these Dougherty men as headquarters or as a resting place, or anything of that kind? A Yes, the North Pier, at which point we transfer this explosives to boats, and tracks adjacent to this North Pier, which is known as tracks 16, 15 and 14, which would make it very convenient for them to be assembled and look after it from all directions, that is, from east, north, south and west, and for that purpose, why, as I figured it, those four men were placed there.

Mr. Skinner. As you figured it, you say?

A As I thought at the time, yes, sir. So then they put up a cabin.

Q Who put it up? A The Dougherty men.

Q You knew of it, did you? A Yes, sir.

Q And it was with your permission? A Yes, sir; and they rigged that up and it was just about half way between those tracks, so that they could in making their tours drop in there and warm up or eat their lunches, if they saw fit.

Q Do you know where that cabin was located with reference to what has been called Zeke's shanty? A Why, it was just directly across, except it was on the outer shore or the outer edge of the lead to North Pier, which would be known as track 18.

Q And do you know as a fact whether these men from the Dougherty agency did go on duty? A Oh, yes. Yes, I have been down there and saw them on duty myself, in fact, there was a new man down there who was not acquainted with me, and he asked me to identify myself as to my business on the grounds.

Q Well, were there some on duty during the day? A Yes.

Q And some at night? How many during the day? A Well, there was supposed to be four men on days, and I would never find four men when I was down there,

of course that would be occasionally, but say once a week I would have occasion to be down there, but I have seen as many as three at a time.

Q How many at night? A Four. Four all nights, and of course the Lehigh Valley had a patrolman, whose duty it was to visit the yard, because we had other cars on adjacent tracks known as 11, and that on over to track 1, where we had all kinds of merchandise.

Q And that is, you mean the Lehigh Valley has such? A Yes.

Q Were there any particular tracks where it was the practice to place the cars containing explosives? A Yes, sir.

Q Or munitions? A Yes; those tracks right alongside of the North Pier was laid out for that purpose, and it was the duty of our conductor working down in there during the day to pick up all such cars and place them on those tracks before he left there, regardless of the time it consumed.

Q Was there any particular reason why those tracks were assigned to that special work? A For the purpose of bringing it close together to permit the detectives to take proper care of them, not have it strewed all over the yard.

Q Would that also be a convenient point by which the cars could be shifted to the North Pier? A Yes, sir. Just right alongside of the North Pier—pull out and shot in there as they were wanted for the boats.

Cross examination by Mr. Skinner.

Q Well, Mr. Mulligan, did you have Black Tom yard under pretty close observation personally? A Yes, sir; I would say—

Q In the summer of 1916? A Yes—through my agency down there, Mr.—

Q I said personally? A Well, personally, I would get down there once a week, but that is not a close observation.

Q Well, once a week then you saw the condition of things in the yard? A Yes.

Q The number of the cars? A Number of the cars—

Q Yes, I don't mean— A Car number or the amount of cars there?

Q The quantity? A Eh?

Q The quantity. A Why, yes, I would actually get a report of that every morning, and then I would go down there, and once a week I would see it, but I know each morning what I had there.

Q And you as—you were the superintendent of freight, weren't you? A Superintendent of everything—of all property—passenger, freight—

Q Oh, superintendent then in care of the property without anything to do with the— A Operation?

Q Moving. Moving of it? A No, no; I operated it and had the care of it, and so forth.

Q Yes. Then you knew, generally speaking, pretty well where these cars came from, didn't you? A Oh, yes.

Q Some of them came from the far West, did they? A Yes; came to us at our connections on the frontier at Buffalo.

Q And some of them came from other points in New Jersey? A And other points in New Jersey, and was transferred to us by the Pennsylvania, yes, sir.

Q Did you have any inspection of the way bills from time to time? A No; my agent would take care of the inspection of the way bills, and he would transfer them to the lighterage office.

Q You spoke of some of these cars as being transferred to you from the Pennsylvania? A Yes, sir.

Q Was not the yard used sometimes for cars that had—whose journey had begun in some other point in New Jersey and ended at Black Tom? A Well, that I

couldn't say at the present time. I never saw any bills that would indicate that, but—

Q The yard was not limited to cars that had come from outside the state, was it? A Oh, no. No, the yard was limited to the business that we formerly handled there by lighterage, and prior to the Lehigh Valley taking it over the Pennsylvania had entered into a contract with the National Dock Company which had it at the time for handling a portion of their business through that territory.

Q And that business formerly handled by lighterage included business that had come to you from the points within the state and as well from points without the state?

Mr. Garrison. I object. I cannot see that this is relevant to any issues which have been raised in this suit. There is no dispute that these goods that were exploded were in interstate commerce.

The Court. Well, I suppose, however, that he may want to get some evidence in with respect to intrastate transportation, that the regulations of the state were applicable to that yard. I do not know whether that is the object.

Mr. Garrison. If he does—

Mr. Skinner. I want to show that the yard was not limited to interstate commerce, but was a yard for both interstate and intrastate commerce.

Mr. Garrison. I object to that, because I say as far as we are concerned the matters they are charging us in respect of here were all in interstate commerce, uncontradictedly so, in the pleadings, and that being so, I do not see why we should in this case try some other responsibility under some other intrastate commerce rules. I respectfully object.

The Court. Well, what is the point you take on it, Judge Skinner?

Mr. Skinner. I will withdraw the question.

The Court. Very well.

Q Now, Mr. Mulligan—was the question answered, Mr. Stenographer?

The Stenographer. No, sir.

Q Tracks 14, 15 and 16, you say, were the tracks on which these cars that contained explosives were usually placed at night? A Yes, sir—they were placed in fact as they arrived, to make that fair.

Q When did that begin? A Oh, that began for several—at the time that we started to handle the explosives in large quantities—of course while—

Q That was when?

The Court. Just a minute.

A After it was necessary to store them outside of the pier tracks immediately—

The Court. Had you finished your answer?

The Witness. Yes.

The Court. I thought you had not.

Q Well, the shipment of munitions, the receipt of munitions, at Black Tom began back in August, 1915, didn't it? A Yes, sir; about that time, I would say.

Q And had pretty soon took very large proportions, hadn't it? A Well, toward the latter part of the year and beginning of 1916, why, there was more cars coming in than the pier would accommodate, yes, sir.

Q And these assignments of explosives to tracks 14, 15 and 16 were made with reference to the convenience of handling the cars the next day, wasn't it? A It was made to assemble that class of business together so as to be properly protected, also with a view of having the least movement in order to place them where they were wanted.

Q The next day they were to go, or shortly afterwards they were to go on North Pier, weren't they? A They were to go as soon as ordered—that day probably—if some of the business arrived in the early morning hours that would be required in the afternoon, and we make several switches during the day from those tracks on to the piers.

Q So they were placed at night on these tracks 14, 15 and 16, because those were the nearest to the tracks 17 and 18 that ran down on North Pier? A Yes, sir.

Q Isn't that so? A Yes. That is the business that arrived during the day, but anything that arrived during the night we would hold out and take it in.

Q Yes, when you heard from somebody, I think a vice-president, that some detectives were coming down there weren't you told that it was all right to let them on, to let them on— A To let them on the property?

Q Yes. A Why, he explained to me—

Q Weren't you told that? A Yes, sir.

Q Yes. Did you get any writing at all? A No, sir; I—

Q Did you ever have any written statement of the province of these Dougherty detectives? A No.

Q From any superior officer? A No, not prior to the explosion.

Q Yes. A After—afterwards I did.

Q And when you got this word from the vice-president—by the way, who was he? A Why, it was this chief clerk, Mr.—Blenderigd was vice-president, but Mr. Healy was chief clerk at the time, who also done business for Mr. Healy through me.

Q Didn't he tell you that somebody, some people interested in those explosives, was going to have them watched? A He told me—

Q Did he not tell you that? A Why—

Q Or substantially that? A Well, I can't answer the question no or yes on that. I would have to be

fair with everybody—that he advised me that the Dougherty agency was taking over the watching and caring for the explosives on the Black Tom territory.

Q He told you that they were taking it over? A Yes, sir.

Q Yes, sir? A Yes.

Q What did you do? A Why, they went to my office—

Q What did you do? A Why, I advised our captain of police to take them down to the grounds and show them where the territory was and explain to them the nature of it.

Q And what territory did you tell him to show to them? A I told him to show them the territory of the North Pier.

Q Yes; and did you— A And the tracks.

Mr. Garrison. You are interrupting him.

A And the tracks adjacent thereto that would be stored awaiting placement on the pier.

Q And did you then give any instructions or notify anybody that the Lehigh Valley watchmen were relieved, that the duty of watching had been taken over by the Dougherty Detective Agency? A I told this man in charge of our police department to make the necessary arrangements with his forces.

Q You told the Court and jury a little while ago in your direct examination that Kane, the head watchman— A I did? I did not say anything about Kane.

Q You did not mention his name; the head watchman? A Yes.

Q Still went down around there and supervised? A On the other section of the yard where we had merchandise and other business; and I still say it.

Q You still say now that you gave no instructions to anybody to have Lehigh Valley watchmen cease the watching down there? A No, sir; I did not; I just

simply advised our captain of police to take care of that business for us; those were his duties and he did it.

Q To take care of what business? A The proper protection of our business around that yard.

Q When was that; months before, wasn't it? A Yes; but—

Q But I am asking you at the time you got this word about the Dougherty agency taking over the guarding, you did not tell anybody under you that the Dougherty agency had taken over the guarding and the Lehigh Valley was no longer to guard, did you? A I simply told our captain of police that the Dougherty agency was taking over the protection of those explosives at Black Tom and for him to go on the ground and show him where it was and what territory it would be in. That was as far as was necessary.

Q Who was the captain of police? A C. J. Leyden.

Q He is dead, isn't he? A Yes, sir; he was a victim of the explosion.

Q Did you tell anybody else? A No, sir; I generally done by business through him and he through his own employees, the men under him.

Q After that did you go down there? A Oh, yes.

Q And did you see Lehigh Valley watchmen down there? A Not exactly on those grounds; no, it was not necessary because it was taken over by those Dougherty men.

Q Please answer my questions and no more. A I do.

Q Did you see Lehigh Valley watchmen down there? A On the other section of the yard, yes.

Q Did you see them down there in the neighborhood of this portion of the yard that lies east of the tank? A No; not in that particular place.

Q Did you ever see Kane making his rounds? A No; Kane was a night man.

Q Oh, you were not there at night, eh? A No; except—

Q You do not know then what was done at night in the way of watching? A Yes; I do so far as the reports I received were concerned, yes.

Q Of your own knowledge? A No; I was not on the ground nights; no, not down in that particular spot.

Q Then the Lehigh Valley did not have any watchmen down here (indicating on map P. 16)? (No answer.)

Q Yes or no to that. A This side of that, yes, they had a patrolman taking care of that freight. There is a series of tracks there where the men patrolled our property with that exception.

Q Which tracks? A I would say anywhere from over the head of the yard and over there to the waterfront alongside of that series of tracks that you see there.

Q Then you say that the Lehigh Valley Company still had watchmen in the portion of the yard east of the big tank you mean, don't you? A Oh, yes.

Q And they had a certain defined territory. Now, won't you just tell us exactly what that territory was? A Below that yellow line there, from that all on down from there; they took in all that.

Q The line I am pointing to? A Yes. Down in—

Q Wait a minute. That I am pointing to? A Yes.

Q That is the yellow line of cars on track 13? A Yes.

Q Below that? A Yes.

Q Did they have track 13 or not? A When there was—

Q Did they have track 13 or not in their territory? A In case it was occupied by other things than explosives I would say yes.

Q And if it was occupied by explosives you would say no? A They would protect that in this way; if there was any Dougherty men around, why, the Dougherty men was there and frequently would tell them that that part of the territory was all right.

Q Yes; and you know all this, do you, what the Dougherty men would frequently tell them; do you know that? A Yes; I know it through my—

Mr. Garrison. I object. First he gets this witness to say he was not down there at night and all he knows is by reports. Then when the witness tells him what was told him he quarrels with the witness.

Mr. Skinner. I am not quarreling with the witness.

Mr. Garrison. The witness first told you he did not know this of his own knowledge and then you went on after he had warned you of that and got all this hearsay testimony out of him.

The Court. I do not see that that is hearsay testimony.

Mr. Garrison. I do not care what we call it; call it what you please.

The Court. I care what it is because if it is hearsay I will not let it in.

Mr. Garrison. He first told him that he was not there nights and it must be second hand information; then counsel says "Yes; and you know all this, do you, what the Dougherty men would frequently tell your men?"

The Court. If you object to his manner, that is past now.

Mr. Garrison. I do not object to his manner, whether it is a sneer or not, but I object to the frame of that question. Having gotten it from the witness that he does not know it from his own first hand knowledge—

The Court. (To the stenographer.) Won't you tell me whether the objection came before the answer or not?

(Question and interrupted answer repeated, followed by the objection.)

The Court. I think I will permit that to be answered. It will not do any harm to anybody because he will undoubtedly say he knows it through his reports from his agents. I think the question is a mere matter of supererogation; it is a matter of non-necessity because we all understood it.

The Witness. That is the answer. The reports received from people in charge of that class of work.

Q Now, Mr. Mulligan, I was asking you to define the territory that you say the Lehigh Valley watchmen had and calling your attention particularly to track 13 and you said in your answer to my question that their territory laid below track 13. A Yes. I wish to be very broad on that reply because you are very technical now on that and I would like everybody to know prior to the explosives coming down there and the Dougherty men our watchmen were in charge of it all. When they received word the Dougherty men were taking charge of the explosives they took care of everything else.

Q Everything else than what? A Than the explosives and the tracks that contained them.

Q Do you want to change your former testimony that the Dougherty detectives were assigned to look after the cars on tracks 14, 15 and 16? A No; I do not wish to change it at all. I simply said they were sent down there for to take charge of the explosives in that territory.

Q But before you did not content yourself with that general statement; you said— A It might be a technical point on your view, but I think it would be felt by everybody that I just meant wherever they would happen to be.

Q But I am only taking what you said. You said that certain tracks were definitely assigned—listen now, please— A Yes.

Q —for the explosives, certain tracks were definitely assigned for these Dougherty detectives.

Mr. Garrison. I object. The witness has not said that.

The Court. I will sustain the objection. I do not think he said that thing. If you desire to have the testimony on that point read you may have it.

Mr. Skinner. I do not want to take the time unnecessarily, but I thought that was what he said.

(Portions of the testimony on cross examination repeated by the stenographer.)

Mr. Skinner. It seems it is in the notes of the stenographer that is not here.

The Court. If you would like to have him sent for I will have him sent for.

Mr. Skinner. I would like him sent for. In the meantime I will continue my examination.

Q Do you know who the night watchman was? A Yes; we had a fellow down there by the name of Kane. He had an assistant.

Q Who? A I just cannot remember his name, now.

Q Was it Groath or Sloan or Garrity?

Mr. Garrison. I object. This is not cross examination. Nothing was asked this witness on direct examination about the Lehigh Valley men that were down there.

Mr. Skinner. It is preliminary to asking about the movements of these men after the time when he says Dougherty men were assigned.

Mr. Garrison. I am only making the objection that it is not cross examination.

The Court. I do not think anything was asked of this witness in chief on this subject.

Mr. Skinner. There was nothing, sir; but when he said in chief that Dougherty men were assigned and the watching was turned over to them, it would seem to me I have the right—

Mr. Garrison. He has not said that. He said the man told him that the Dougherty men were going to take over something and he told Con Leyden that; that is all he said. He has not said Leyden carried it out or what Leyden did or what somebody on the ground did.

The Court. I understood him to say that he gave certain directions to Leyden which were tantamount or the jury might conclude that it was tantamount to a direction to Leyden to lay off the job of watching munition cars when the Dougherty men were on the job.

Mr. Garrison. What he is now asking is what men were down there, Kane, Groath, Garrity and others. This man has not pretended to have any knowledge about that. We have not elicited anything from him about the physical goings on on that ground. What we have elicited is that he got orders from the chief and he conveyed them to the chief of police. Now he is examining about the detail of this matter, about what men there were on the ground, physically there, and what those men did. We have not elicited that. If he wants to make him his own witness, all right, but it is not cross examination.

Mr. Skinner. He testified at the beginning of his direct testimony as to guarding the land.

Mr. Garrison. If you can find we asked him about who was guarding that land I will withdraw my objection.

Mr. Skinner. The man was put on the witness stand as the superintendent and asked in very general fashion about the methods that were pursued, and then told in general fashion of the duty of watching being taken over, or he said that he heard or was told that it had been taken over or was to be taken over, and that he passed that word along, and I ask

him now on cross examination of his personal knowledge as a man who supervised and visited there whether he saw it taken over or whether it is not the fact that the Lehigh Valley watchmen went on watching just the same.

The Court. I do not think that that has the remotest thing to do with this particular point, what you have just said, because he has already said on innumerable occasions that he was not there at night and knows nothing about it. I do think there is some ground for admitting this question, and I think that ground is this: That this witness has said that he is the man in charge as superintendent of this terminal, and he has indicated that he had directions with respect to what should be done with respect to watching this yard, and that he communicated those directions to Con Leyden, the chief of police or whatever it was in that yard. Now, I would assume that if reports were coming in from his men, which is a part of the *res gestae* of the running of the yard under the superintendence of this witness, that if the reports were coming in indicating to him that these men were still watching the munitions when he had directed that they should not watch them, that it would impugn the value of his evidence that he had called them off. So I will admit it. You may have an objection entered on the record.

(Objection noted by defendant.)

(Stenographer reads testimony on direct examination.)

The Court. I think under the circumstances I will sustain the objection because the question was whether the tracks 14, 15 and 16 were definitely assigned to these detectives to watch. I do not think there is any evidence that warrants that question, so I will sustain the objection.

Mr. Skinner. I still think that there was something, but I do not want to take the time. I will trust to my examination of the minutes later.

Q I was asking you about the assistant watchman that you said Kane had, and I asked you whether it was Groath or Sloan or Garrity? A Why, I couldn't say rightly the watchman he would select. He was the roundsman and he was in charge down there nights, and, of course, his duties would be handed out to him by his chief of police.

Q And you don't know what they were then? A Oh, yes, I know that he had his men stationed around there; in fact, he had four men under him who took care of this property, known as our piers, and had them divided along, and he would make tours during the night and see that they were on their job, and in that way, why, he may have assigned any of them down in that territory in his absence; so I would not—

Q You don't know whether he did? A No; I trusted in the captain of police to keep that thing straight for me.

Q Was the captain of police on duty day and night, or only in the day time? A Why, he was supposed to be on duty whenever the occasion called for, and would make a trip down there as often as necessary during the night.

Q He had then no specified time? A No, sir.

Q Day or night? A No, sir. He worked 24 hours and 365 days.

The Court. Let me understand, Mr. Mulligan. Is it your desire to have us understand that the Lehigh Valley watchmen were not watching the munition-laden tracks and were not looking after them at all, either by day of night?

The Witness. Why, only in a general way. Those roundsmen and our police department would visit them occasionally to see that the Dougherty men was taking care of the place. In that way. And if they found a man down there that was not complying with

the instructions or doing his work, they would probably take the matter up.

The Court. Well, then, what you want us to understand, as I gather from it, is that your men watched the Dougherty men and the Dougherty men watched the munitions.

The Witness. Not that.

The Court. Well, that is what you said just now.

The Witness. Yes. I said they had supervision over them to see that they complied with our orders.

The Court. Then what you want us to understand is that the Dougherty men, while employed by somebody else were subject to your direction, and directed by you or your men.

The Witness. No, sir; only so far as behaving themselves and seeing that they didn't get in any mixup with our employees, and so on; that is about all. We wished them to feel—

The Court. Well, you simply watched their etiquette?

The Witness. Yes.

The Court. And not the performance of their duties?

The Witness. Right.

Q Well, again, then, do you want us to understand that after the Dougherty men were put there, the Lehigh Valley watchmen discontinued watching the munition cars?

Mr. Garrison. Now, if your Honor please, I object to that. He has not said what they did. Your Honor did not examine him as to what they did, but as to what he understood these instructions were. Mr. Skinner insists on having him go down there and testify to the facts when the man does not know the facts.

The Court. Yes.

Mr. Skinner. I withdraw the question.

The Court. In order to get the matter clearly, let me ask you a question: Did you understand from the reports that your men gave you that your men were not watching anything except the etiquette of the Dougherty men?

The Witness. Yes, sir; that is the way I understood it after they went down there.

The Court. And that your men were not watching the munition cars at all?

The Witness. Not after we had placed them on those designated tracks; but prior to that we took care of them.

The Court. All right.

Q Upon those designated tracks. Then you mean 14, 15 and 16? A Yes, that section of the yard.

Q That section of the yard? Well, now, would you call that designation? What section do you mean? A That you were just pointing to on that blue print.

Q Well, but before you named 14, 15 and 16. Weren't those the designated tracks? A Well, if we had more business than those tracks would hold, of course, we would continue to use more tracks; and if we had less we would use less. It is just according to the amount of business you had. Now, I don't want to say they were used altogether for that business. There were times when the pier would not accommodate all that we had, and again, we had to use as many as three tracks.

Q And sometimes more? A Well, sometimes to my knowledge, I believe we did use probably the fourth and fifth tracks, but we kept them adjacent to each other.

Q Did you understand from the report that you got that the Lehigh Valley watchmen had in any way discontinued watching the munition cars to see that there was

no fire on them that would endanger these other cars of the Lehigh Valley or the storage warehouses? A My report received prior to the handling of munitions down there and the reports after were identically the same thing so far as the property was concerned in which we had watchmen engaged.

Q Yes? A In that particular territory it was not necessary to have a watchman engaged, only to patrol around there, and see occasionally so far as fire was concerned; but after we handled these munitions, why, then it was necessary to protect it. And it was taken over by those agencies as an extra protection. Now, then—

Q Extra protection? A Yes. Now, then—

Q What do you mean by that, Mr. Mulligan? A I mean the concerns that were handling that business; they put those men down there for to take care of their explosives.

Q As extra protection? A They did, yes.

Q That is, additional protection, you mean, don't you? A Why, yes.

Q Additional to the protection that the Lehigh Valley Railroad Company was already given to them; don't you mean that? A Why, additional to what we had; that is natural, certainly; because the nature of the goods required it.

Mr. Skinner. That is all.

(Witness excused.)

WILLIAM A. GRAHAM, sworn.

Direct examination by Mr. Hobart.

Q Mr. Graham, by whom are you employed? A American District Telegraph Company.

Q Were you in their employ on the 29th and 30th of July, 1916? A Yes, sir.

Q What department? A Construction and maintenance.

Q And where is your office located? A At 75 Montgomery street, in Jersey.

Q Jersey City? A I have duties in both New York and Jersey City.

Q And did you have charge of the A. D. T. system that was connected up with the National Storage and Lehigh Valley terminal at Black Tom? A Yes, sir.

Q On July 29th and 30th, 1916. Is there any way by which you can determine at your office whether the system is in proper working order? A Yes, sir.

Q Will you tell us what that is? A We have records kept by the operating department.

Q Well, will you tell us how it is possible to ascertain whether the system is working all right? A Why, it is under electrical supervision.

Q Well, is there any record or any note made at your office if anything is wrong, if anybody tampers with it? A Yes, sir; we have a log book.

Mr. Skinner. A what?

The Witness. A log book.

Q Well, is that an automatic record? A No, sir.

Q Does any signal of any kind come in? A There are automatic signals, and they are recorded on this log book.

Q That is what I mean. There is a signal that comes in? A Yes.

Q Can you describe generally what kind of a signal it is? In other words, how do you tell at your headquarters whether there is anything wrong with the system, or whether anybody has been monkeying with it? A Well, they have devices attached to the different tanks, valves, gates, in the equipment so that if they are tampered with, opened or closed, or if any alarm is received, that actuates the instrument in the plant which operates through

relays in the central office and gives a signal—a distinct signal, showing where this trouble came from.

Q Now, what kind of signal is it that is given? A It comes in on a register and it is marked on tape.

Mr. Skinner. Marked on what?

Mr. Hobart. Marked on tape.

The Witness. With ink.

Q Indicating whether anything has happened? A Indicating where there is trouble on the line, and there is a distinct signal coming in showing that the device was in operation.

Q Well, suppose there was low water pressure on any point; would that also be indicated? A That would be indicated.

Q Did you examine the record of the A. D. T. system for the night of July 29th and 30th shortly after that date? A Not personally.

Q Well, did one of your men examine it? A Yes, sir.

Q Do you know what he did with it? A I do not.

Q Well, do you know whether he turned it over to the railroad company? A That would not come through me.

Q And you personally have not seen it yourself? A No, sir.

Mr. Hobart. All right. That is all. Cross examine.

Mr. Skinner. No questions.

By Mr. Hobart.

Q You would know that tape if you saw it, wouldn't you? A This tape?

Q Yes. A I couldn't say.

Q Well, do you know what it looks like? A I know what the tape looks like, but I mean the particular tape that was used on that night, I would not positively say I would recognize it.

Mr. Hobart. All right.

(Witness excused.)

ALEXANDER DAVIDSON, sworn.

Direct examination by Mr. Hobart.

Q You were employed by the National Storage Company? A Yes, sir.

Q And in what capacity? A Superintendent of the warehouses.

Q Were you on duty on the night of this explosion? A No, sir.

Q Where were you when it occurred? A I was in Fulton avenue, somewhere near Ocean, when the first explosion occurred.

Q How did you happen to be there? A I was notified by the A. D. T. that there had been a fire—or, I mean, that one of the boxes on Pier 6 had been turned in.

Q Meaning the alarm had been turned in? A The fire alarm.

Q How did you get the word, by telephone? A By telephone.

Q All right. And what did you do when you got the word? Did you get up and dress? A No. When I got the word first they told me that it was nothing. See? Didn't amount to anything.

Mr. Collins. Speak a little louder.

The Witness. And I called up the watchman and he said he would let me know in a little while, and I waited until I got the word from him. Then I started out.

Q Now, where were you when you first saw the fire? A That was where I first saw the fire, on Fulton avenue, somewhere near Ocean; that was the explosion; that was the first I saw of it.

Q Well, did you see any fire before you saw any explosion? A No, sir.

Q How long did you stay at that point before you noticed the explosion? A Oh, I was coming; I was walking towards it.

Q Walking towards the terminal? A Yes, sir.

Q And how far away from it? A Why, it must be a mile and a half; a mile; between a mile and a mile and a half.

Q Now, what did you notice in the way of an explosion? Tell anything that you saw or anything that you heard? A A tremendous burst of light, three globes, just the same as that. (Indicating the electric light globes on the Court's desk.)

Q Big electric light globe? A One big central and two on the side, not so high; just as if there were three explosions in one.

Q Now, where did that appear to you to come from? A Well, it just seemed to be back in the bay, you know; I was too far away from it to locate it.

Q Well, you knew where the terminal was, of course? A Oh, yes, I knew where it was because I had been notified, you see.

Q Well, you knew where it was before that; that is, you had worked there every day; you worked at the terminal every day? A Oh, yes.

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

Q Could you see the North Pier from where you were? A Oh, no.

Q But you knew the direction of it, did you? A Yes, sir.

Q Now, had you any way of telling where these globes came from with reference to the North Pier or with reference to any other part of the terminal? A No, sir.

Q Well, could you tell whether they came from land or from water? A No; I thought they came from water at the time, because afterwards, thinking of it, because it was so clear, see there was no dirt in the flame.

Q And is that the way it appeared to you, as though it came from the water? A Yes—no dirt—no rubbish.

Q Was there any sound with it, any noise? A Oh, tremendous shock.

Q Now, did you hear the second explosion? A Yes.

Q Where were you when that occurred? A I was outside—I was outside that bridge that leads into the yard, in what they call the grain yard.

Q Do you mean that is part of the terminal itself? A Part of the terminal itself. See, I came down that way and I was a little to the right of the straight runway, you know; I couldn't see yet straight down; I was a little to the right of it, see?

Q Where did it appear to come from? A Oh, well, you could see it come from straight down below; you just see the rays of the dirt and the rubbish.

Q Where do you mean by straight down below? Can you fix the apparent place by any reference to any object? A No—when you come in the yard there is two bridges lead into the yard from that yard.

Q Yes. A And there is a hill that these bridges go over. Well, if I had been in a straight line with that I could see right down, but I wasn't; I was off to the right and couldn't see straight down. I could see the explosion, but I couldn't see where it came from, you see.

Q Was there anything to indicate the explosion in the way of fire or skyrockets, or anything of that sort, just before it occurred? A Before this second explosion?

Q Before the second one? A Oh, I could hear a noise, that it was coming, you know. I could hear that noise continually.

Q Well, what kind of a noise did you hear? A Well, there was shells going off all around there; I could hear them going.

Q Was the noise of the second explosion different from the noise of the shells? A Yes, entirely.

Q Now, where did that appear to come from? A Well, at the time I couldn't tell, but I thought afterwards it came out of the yard, because there was so much dirt thrown up.

Q Could you see the dirt? A Oh, you could see the dirt up in the air; it seemed to me as if there was a thousand tons of it up in the air.

Q Was there any such dirt or any similar objects at the time you saw the first explosion? A I couldn't see anything but clear light.

Cross examination by Mr. Skinner.

Q When you saw the first explosion you were a good deal further away? A Yes, sir.

Q Than you were when you saw the second explosion, weren't you, Mr. Davidson? A Yes.

Q Too far away to see what was in the air, weren't you? If it was fine dirt you wouldn't be able to see it at the distance you were, would you? A Well, the light would show it, the shadow of the light, that is what I thought.

Q How far away were you when the first explosion came? A I should say between a mile and a mile and a half, roughly.

Q And you were rather fearing explosions, weren't you? As you looked at the fire you were fearing explosions? A I did not see the fire.

Q No; didn't you see the fire—you knew there was a fire there? A I had been notified there was a fire, but I couldn't see it from where I was.

Q Because of that notification were you not rather fearful of an explosion, fearing that an explosion might come? A Well, no, I wasn't fearful of an explosion.

Q Well, you knew that there were explosives down there, didn't you? A I knew there were shells down there.

Q Well, shells—munition cars? A Yes.

Q What? A Oh, I didn't know anything about it outside I had seen the shells handled; I didn't know anything about what was there. It was none of my business.

Q I don't ask you about the details of your knowledge, but you knew generally that there were cars filled with ammunition of some kind or explosives of some kind that were going down there into Black Tom yard, and you have seen the placards on the cars, too, haven't you? A Yes, yes.

Q And the placards said, "Explosives" on some cars, and "Inflammable" on others? A Yes, sir.

Q And it had been going on under your observation for a number of months, hadn't it, before this explosion? A Oh, yes.

Q How long a time? A Really, I couldn't tell you.

Q A year, six months? A I couldn't tell you.

Q Several months, anyway? A Well, it was none of my business and I wasn't interested in it. That is all.

Q Well, the cars went right past the storage warehouses that were under your supervision, didn't they? A Yes; they went past the back of the warehouses, that is right.

Q And you saw them going past? A Once in a while, but the most of our work would be in the front, so we had business in the front and not in the back.

Q Now, as you went down to the fire at Black Tom, having heard about the fire, having known of these explosives for months back or some time past, weren't you full of apprehension that there might be an explosion down there?

Mr. Hobart. I object to it as not cross examination.

A Not—

Mr. Skinner. I want to show that his direction was directed to the very thing.

The Court. I think I will permit it.

A I forgot the question.

(Question repeated by stenographer.)

A No, I wasn't until the explosion went off.

Q That is all.

Re-direct examination by Mr. Hobart.

Q Did you see any of the effects of the explosion afterwards? A Yes, sir.

Q Did you observe particularly with regard to the warehouses? A I did.

Q Were some of them knocked down? A Not knocked down, but great sections of the walls torn out.

Q Did you observe whether the walls were torn outward or inward, or which way? A No—they must be outwards, because the freight that was in was standing intact inside and the walls gone out.

Q The walls gone out? A Yes, sir.

Q Could you tell which warehouses you observed? A I saw H and I with the wall out, and I got a glance of O with the wall out.

Q Did you observe— A Sections of it.

Q Did you observe anything about the big water tank, whether anything happened to it? A I couldn't see that at the time.

Q Did you afterwards? A The tank was down when I got down there; I couldn't give the time when I got down there.

Q Did you notice the tank afterwards, either the same day or the next day? A Yes, sir.

Q Where was that with reference to the walls? A The tank was—the tank structure—the tank had gone straight down, the structure was laying on top of the wall of Store Q; Store Q wall had come this way and the tank had gone on top of it.

Q By tank structure what do you mean? A The supports.

Q Steel beams that supported it? A Supporting the tank on top.

Re-cross examination by Mr. Skinner.

Q You say the walls were drawn out; is that right? A Yes.

Q Instead of being blown in the explosion had apparently sucked the walls right out? A I couldn't tell what happened to them, but the walls, you know, the freight that was right inside the wall—

Q You could see the freight there? A Standing straight up and the walls gone.

Q The goods which were stored in the warehouses, you could see it? A Yes.

Q And when was that? A That would be about—

Q After the first explosion? A After the second explosion.

Q So of course it was after the first, too. Did you see fire in those warehouses? A Yes, sir.

Q Everything in them was burned up, wasn't it, practically? A No, no. The fire was only started in every warehouse when I got down—every warehouse was burning.

Q The fire went on and practically destroyed everything, didn't it? A Yes, sir.

Q That is all.

Re-direct examination by Mr. Hobart.

Q You referred to the tank or the structure of the tank, rather, as resting on the top of one of the warehouses, or on top of the walls that had fallen down or been knocked down, and you spoke of it as Warehouse Q? A Yes.

Q Are you sure about that? Which is the warehouse nearest to the tank? A R is the warehouse nearest to the tank. R is one-story high. The big wall of Q was pulled straight over the top of R.

Q Then when you speak of the structure resting on top of the walls of Q, Warehouse Q, you mean that the

walls of Warehouse Q themselves had fallen over on Warehouse R? A Yes, sir.

Q And that in turn the tank or the structure of the tank had toppled down on top of those walls; is that what you mean? A It had been lifted and carried on top of the wall.

Q Pardon me? A Been lifted out clear from under the tank and laid on top of the wall.

Q Laid on top of the walls that were resting on Warehouse R? A Yes.

Q What I want to find out is where the structures of the tank was with reference to Warehouse R? A It was right on Store R.

Q Right on Store R? A That is across—

Q Right on top of the walls that had tumbled on to Store R? A Yes.

Q All right.

Mr. Skinner. That is all.

THOMAS J. JOHNSON, sworn.

Direct examination by Mr. Hobart.

Q Mr. Johnson, were you at one time employed by the Johnson Lighterage Company? A I was.

Q Are you in their employ now? A I am not.

Q What is your position now or your occupation? A My last position was with the war department—chief of the lighterage in the war department, dollar a year man.

Q Were you in the employ of the Johnson Company on the 29th and 30th of July, 1916? A I was.

Q And for some time prior to that date? A Probably a year and a half prior.

Q In what capacity were you employed? A Why, I had charge of operating the boats.

Q And did that company operate a number of tugs in New York harbor? A They did.

Q A number of barges and a number of lighters? A They did.

Q Were records kept of the cargoes or lading of the different boats? A They were.

Q I call your particular attention to certain barges or lighters that have been called Johnson number 11, Johnson number 17, and the barge Frank; were they operated by that company at that time when you worked for them? A They were.

Q Did any of these boats go under their own power or were they all towed by tugs? A They were all towed by tugs, they were scows.

Q Was there any record kept of the movement of those different boats and of their lading on various dates? A There was.

Q I show you certain papers that have been handed to me, headed, "The Johnson Lighterage Company, position of boats." Is that part of the record of your company? A Yes.

Q Kept by whom? A It is—well, part of that is kept by myself; some of this is in my handwriting.

Q Now can you state by reference to these records what the contents of the different barges were on the dates that are indicated on the records themselves? A No, absolutely not. That ain't a record of what the boats had on; that is a record of where they lay.

Q Well, take that first then, the position of the boats? A That is it.

Q Now take the one that is headed, "July 27, 1916." Is there any record on that one with regard to number 11 or number 17, or the Frank? A Well, I can tell you in a minute. Yes, on July 27th, the 17 was at Pier 8, West Shore, Weehawken; and the Frank was at Jersey Central Railroad, and from there went down to Gravesend Bay to the steamship Kursk; and the number 11 was at Jersey flats in the morning; from there she moved to steamship Garitza, Gravesend Bay, and came back

again at night, evidently delivered her cargo to the Garitza and came back again at night to the Jersey flats and anchored.

Q Was Gravesend Bay the landing point for explosives at that time? A Gravesend Bay was the loading point into the foreign steamers, but it was not the mooring point where you laid awaiting the arrival of foreign steamers.

Q It was the point where different barges were transferred to steamers for export? A Where goods were actually put aboard the foreign steamers.

Q Take the record of July 28, 1916, and do you find any record there as to the Johnson 11 or the Johnson 17 or the Frank? A Yes. The Johnson 17 on that day in the morning, was at West Shore Railroad at Weehawken, and she went to Erie Railroad, Weehawken, and then later on went to Black Tom.

Q Is there anything to indicate the hour of the day? A Well, they have a sheet, a towing sheet, a log, kept by the captain of the tug, which indicates that, but this—

Q That does not appear on this? A No; that is a separate sheet.

Q That is kept at your office? A That is kept at our office.

Q Now you have given us the movement of Johnson 17 as far as indicated by this sheet; now give us Johnson 11? A Johnson 11, Jersey flats in the morning, and steamship Garitza at Gravesend Bay, during the rest of the day.

Q And the barge Frank? A Frank, Gravesend Bay, steamship Kursk in the morning, and came up to Black Tom—whether at what hour I don't know, that don't show the hour, but sometime during the day.

Q Take the record of July 29th as to the position, and do you find anything there as to either of these barges? A Yes; the 17 was at Black Tom.

Q Nothing to show the hour? A Nothing to show—well, that don't show the hour, no.

Q All right? A And the Frank was at Black Tom, and the number 11, Gravesend Bay, steamship Garitza, and then back to Black Tom. That don't show whether those boats at the time were loaded or light or anything else.

Q These papers that you have referred to do not give any indication as to the lading? A Oh, don't show; they may be light, maybe they are down and made trips and delivered their cargo and come back again light.

Q Now I show you another document, partly typewritten and partly in handwriting, and ask you if you can tell us what that is? A "Cargo loaded on barge Isabelle, cargo loaded on barge Frank." Well, that is evidently a record of what was on various boats at the time of the explosion over there at Black Tom.

Q How do you identify that as being such a record? A Well, the only way I can identify it is by the statement on the bottom of it, that is the only way. I presume that that it what it is. It says a statement of cases received by Johnson Lighterage Company on board lighters at the time of the explosion, and I take it for granted that this is correct. I do not know what it is.

Q Well, was it kept in your office? A Well, that I couldn't say. I know they kept records there.

Mr. Hobart. You do not object to it, I guess.

Mr. Skinner. Let me see it. (Examines paper.)

Mr. Skinner. Mr. Hobart, we would not require strict formality of proof; as long as you could show by anybody who knows that that is a correct statement we would not object that it was not formally proved.

Mr. Hobart. We have another witness to clear up any possible objection. Cross examine.

Thomas J. Johnson, cross.

Cross examination by Mr. Skinner.

Q You said, Mr. Johnson, that the Johnson 17 and these others were at Black Tom on the 29th of July. Did you have personal knowledge of that besides what you get from the records? A I would not have personal knowledge. That information came to me in the regular ordinary course of business.

Q Were you in charge of the operation of these boats? A I was.

Q For what purpose were the barges at Black Tom? A They were at Black Tom to load. They were loading on Saturday and were going to finish loading on Sunday. It was all arranged for them to finish loading on Sunday.

Q Was any arrangement for that loading made with the Lehigh Valley Railroad Company? A There was.

Q To continue the loading on Sunday? A Yes.

Q Did you have anything to do personally with the making of that arrangement? A I did.

Q With whom did you make it? A They had a man over there at the National Docks—whether he was a National Dock man or a Lehigh Valley man—I presume he was a Lehigh Valley man; he was known as the powder clerk; he handled all that stuff. It is over three years since that time and I do not remember his name, but I would know it if I heard it.

Q What arrangement did you have with him? A I gave him a list of cars that we had at the time and told him to order them in because their facilities are very limited there; they could put only so many cars in at a time; and my orders to him were that the steamer was in for the stuff and we had to work on Sunday—we are not allowed to move that stuff after sundown.

Q What arrangement did you have with him? A To put the cars in, and we would finish the cars up on Sunday, what we did not finish on Saturday.

Raymond Carinne, direct.

Re-direct examination by Mr. Hobart.

Q Was his name Higgins? A I do not think so; that does not strike me as his name.

Q Was it Dickman? A Dickman was the agent. I spoke to him only in cases where there was delays of cars, but—

Q I show you another book. Do you know who kept this book? A Yes.

Q Who was it? A A young man by the name of Raymond. He is sitting out there.

Q This was kept in the office in the regular course of business? A It was.

Q Called a powder entry book? A Yes.

RAYMOND CARINNE, sworn.

Direct examination by Mr. Hobart.

Q Are you the young man referred to by the last witness as the one who kept the powder book? A I am.

Q You kept this at the office of the Johnson Lighterage Company? A Yes.

Q Made entries in it from day to day? A Yes.

Q State generally what it shows? A It shows my record of just what is on the boat for future reference.

Q A record of the loading of the boats? A Yes.

Q And how do you get the record? A I got them from the railroad company—reports of the Lehigh.

Q You kept a record of it in the regular course of business, did you? A Yes.

Q I observe certain pages have been turned down here with notes at the top marked No. 17 and Frank—Frank—there may be some others—now, does that show the lading? A Yes, sir.

Q Of the different barges? A Yes, sir.

Q I show you this typewritten sheet to which I have already called the attention of Mr. Johnson. Have you seen that before? A Yes, sir.

Q Who made it up? A I did.

Q Made it up from that? A Made it up from the records in the book.

Q Now, will you show us the records in the book from which you prepared this typewritten memorandum? A I will.

Q Where are they—any pages in the book? A Yes; that is why I did not have them—

Mr. Garrison. Have him read the items from the book.

Q Can you refer to the book and pick out the item?

Mr. Skinner. Tell us what it is; perhaps we can agree on it.

Q Was it made from the book? This memorandum? A Yes.

Mr. Skinner. Mr. Johnson says that the book this was taken from is a record of the contents of the barges kept by this young man, and if the young man says the paper you have is a copy, that is all right; use it.

Mr. Hobart. That is all we want.

Q Now, refer to the memorandum and tell us by reference to the memoramdum what cargo was on the barge Frank.

Mr. Skinner. On—

Q On July 29 and 30—I mean to include—1916. If you have taken this memorandum from the books it will save time if you just look at the memorandum and then if Judge Skinner or anybody wants to look at the book later they can.

Mr. Skinner. Can't you use the memorandum now?

Mr. Hobart. Yes; I am willing to if you agree to it.

Mr. Skinner. I am willing to shorten it up.

Q Look at the memorandum and tell us what was on the barge Frank. A There was three cars of explosive projectiles and five cars of T N T.

Q How do you determine from your records or from your memorandum based on the records that that cargo was there on the evening of July 29? That is what I want to know. A I have no idea. I was just keeping that record, that is all.

Q Does the record show that? A The records show the exact date the boat was loaded.

Q You give so many cars? A Yes.

Q How do you tell the number of cars? A By the car numbers.

Mr. Garrison. Does he know where he got them?

Q Is there anything to show where they came from? Does your book show? A Yes.

Mr. Garrison. Tell us from your book what railroad the car came from.

Q Take the barge Frank, the first car number is, according to this memorandum, 562724. Is there anything to show where that came from? A Jersey Central.

Q And that had what? A 378 boxes of explosive projectiles.

Q The next car is 24788. Where did that come from? A From Jersey Central.

Q What did that have? A 520 boxes of explosive projectiles.

Q Now 6964. Where did that come from? A Jersey Central.

Q And what did that have? A 227 boxes of explosive projectiles.

Q That makes three cars. You spoke of five. A I said three cars of explosive projectiles and five cars of T N T.

Q Five cars of T N T? A Yes.

Q I do not see any car number for T N T. Is there anything to show the car number or where those cars came from? A Yes.

Q Where did they come from? A Lehigh Valley.

Q On what date? A On July 29 they were loaded.

Q July 29th. Anything to show the hour or the time or anything of that sort? A No, sir.

Q Where is the record of that, please, in the book? A There is a part of it right there, and, of course, we did not have room enough there so I put it on this page.

Q On these two separate pages? A Yes.

Q You have got this marked "Czaritza." What does that indicate? A That is the steamer it was intended for.

Q This barge Frank you are speaking of now all the time? A Yes.

Q Now, turn to the barge known as Johnson 11. What have you got as to Johnson 11? A Three hundred barrels of wet picric acid.

Q Where did that come from? A New Haven Railroad, Harlem River.

Q That is all that was on that one? A Yes.

Q Now, we come to—

Mr. Garrison. Where was that to go?

Q Indicate where that was to go. A Yes; that was intended for the Steamship Novgorod.

Q Is that a Russian boat, do you know? A Yes.

Q Now, come to Johnson 17; what is the record that you have as to that? What is the record of that? A 1005 cases of T N T.

Q Now, where did that come from according to your memorandum? A West Shore Railroad, Weehawken.

Q Is there anything there to show the consignee of that? A Why, no—it was the orders from the Russian Government, that is all.

Mr. Garrison. Where was that to be delivered?

A For Gravesend Bay, intended for the steamship Novgorod.

Q Before you leave the T N T, is there anything to show the car number or numbers? A Yes, sir.

Q How many cars were there? A Two cars.

Q Both of them according to your record loaded at what point? A At West Shore Railroad, Weehawken.

Mr. Garrison. Give the numbers of those cars.

Q Have you the numbers of them? A Yes.

Q Read them, please. A C. R. I., 37511; C. & N. W., 109022.

Q I notice opposite those cars in your memorandum some name that looks like C. J. Med. A That is the shipper. His name is C. J. Medjakowski. I could not put it in there.

Q It was too long to write in? A Yes.

Q Do you know what his position was? A Why, he was attached to the Russian Embassy.

Mr. Garrison. Is he the person to whom it was shipped.

A No; that is the person that ordered it shipped.

Q Ordered it— A Ordered us to deliver alongside steamers in Gravesend Bay.

Q Was there anything else on Johnson 17 according to your memorandum? A 417 cases of detonators.

Q You marked them exploders on your typewritten memorandum? A Yes, sir.

Q Is that the same as detonators? A Yes, sir.

Q Where did you get those? A From the Erie— Erie Railroad Company, Weehawken.

Q Have you the car number? A I have C. P. 201681.

Q Is there anything to show who gave you the order for those? A It was received from the Newcastle Construction Company.

Q Where were they going according to your record? A Overseas to Russia—intended for the steamship Czaritza.

Q There was only one car in regard to those? A That is all—417 cases.

Q And you have given us the car number? A I have.

Q Was there anything else on Johnson 17 according to your records? A That is all.

Q Now, according to this memorandum you have got here at the bottom of it—you say this was written by you—"Statement of cases, etc., received by Johnson Company and on board at the time of the explosion." How do you determine or how do you know whether they were on board as far as your records show? A According to the records.

Mr. Hobart. Cross examine.

Mr. Skinner. I understand from counsel—I would like it to appear on the record—that none of the cars that have been enumerated here are any of the cars enumerated in the answer to the interrogatories as being at Black Tom at the time of this explosion. Is that true?

Mr. Garrison. Is that true? There may some of them have been there.

Mr. Hobart. Some of those on the Frank, I am not sure about them.

Mr. Garrison. Some of these cars were on the Frank; they may not have been pulled out of the yard. We do not want to commit ourselves that they were not at the yard.

Mr. Hobart. I will ask him.

Mr. Garrison. He cannot tell whether they were out of the yard. Judge Skinner wants to know that.

By Mr. Hobart.

Q Can you tell by your records now—you spoke of some cars containing T N T that had been loaded on the

barge Frank—does your record give the numbers of those cars? A Yes.

Q Refer to them and give us those car numbers.

Mr. Garrison. He said Lehigh Valley cars. That is how I knew they were loaded at Black Tom.

Q Look at that so that we will not have any question. A C. & N. W., 141052; C. & N. W., 139326; C. & N. W., 121346; Omaha, 29468; Omaha, 30764.

Q Those are the five cars you have already mentioned?

Mr. Garrison. I do not want to consent that they were out of the yard. They are not; they are still in the yard.

Q Now, does your record show that those five cars whose numbers you have just given us, were loaded from the cars on to the barge on July 29th? A Yes, sir.

By Mr. Skinner.

Q Just one question. Can you tell whether these memoranda show the barges that are mentioned to have been completely loaded, was there a cargo still incomplete, something more to be added to it? A There was, the next day.

Q You mean that there was more to go into these barges the next day? A Yes, sir.

Mr. Skinner. That is all.

By Mr. Hobart.

Q Do you know which of the barges were to have more the next day? A I do not; I was only keeping the record. I had no charge of the supervision of the lighters.

Q The records show that the barges were to have something more put on the next day. Does that apply to all three of these barges that you have mentioned, or to some of them or two of them or all of them—according to your records, of course; that is all you know about it, I

suppose? A Well, as far as I know about how much a boat would carry, I know she didn't have a full load.

Q Well, do you know that any of them had a full load? A I don't know all of them.

Q Well, which is the one that didn't have a full load?

Mr. Skinner. He doesn't say it was one.

Q Well, which were the two or which were the three? A You see; I only kept the records; I don't know.

Q You really don't know about that, do you? A No, I don't know; I just kept records; that is all.

Mr. Hobart. That is all.

(Witness excused.)

MR. JOHNSON, recalled.

By Mr. Hobart.

Q You referred to a man you had a telephone talk with? A I did.

Q Was his name Kirk? A No—oh, you mean the—the Black Tom man?

Mr. Garrison. Yes.

Q The one at Black Tom, yes?

Mr. Garrison. You said it was not Collins and it was not Leyden. Now, was it Kirk?

The Witness. Now, I am not positive that that was Kirk. That don't seem to be the name there. That is three years ago since this thing has happened, and it is pretty hard from three years back to remember a man's name. I know he was the man that handled all the explosives over there and we gave all those orders to him on the explosives. We very seldom talked to the agent.

Q Well, he was one of your men? A No, he was a Lehigh Valley man.

Thomas J. Johnson, cross.

Q He was a Lehigh Valley man? A Lehigh Valley man, yes.

Q And you can't recall his name? A Well, I can't recall it. Now, I may think it over; it may come to me perhaps if I am talking to that young man who was here on the stand. I have often—or even the operator in the business—I often have asked him to connect me with a certain man there, and he is the man handled all that part of it.

Q Do you know what time they stopped loading on July 29th, 1916? A Well, I should think between four and five o'clock. I did know at the time, but I would have to look at the record to refresh my memory. It was perhaps about four to five o'clock. They don't usually work after four on Saturday in the summer months. It is a hard thing to get them to work until that time.

Cross examination by Mr. Skinner.

Q Perhaps you can tell us, Mr. Johnson, about these barges Frank, 11 and 17. Were they fully loaded? A They were not fully loaded, they were only partly loaded.

Q Is that all true of all three barges? A That is true of all three; yes, sir.

Q What you have said of arranging to take additional cargo on Sunday, does that apply to all three of these? A That applies to all three boats; yes, sir.

Mr. Skinner. That is all.

By Mr. Hobart.

Q Well, up to the closing hour of work on Saturday, neither Johnson 11 nor Johnson 17 had taken on any explosives at the Lehigh Valley terminal, had they? A No, because they could only put in cars enough at a time to work one boat at a time there; their facilities were limited; they had a single track on that upper side of 7,

and they couldn't put the cars in as fast as the three boats could handle them.

Q But the fact is that up to the closing hour of Saturday those two boats had not received anything from the Lehigh? A That may possibly be true; I would have to look it up to refresh my memory to be positive; it may be true.

(Witness excused.)

Mr. Garrison. If your Honor please, by agreement between counsel it has been agreed that we need not call a photographer who will testify that he took these pictures that I hold in my hand in the places where he said he took them; but that he would if he were on the stand testify to what appears on the back and the front of each of these exhibits; in other words, on the front is a picture and on the back is a legend, showing where it was taken and when it was taken by Mr. Harrison, a photographer. I, therefore, put in evidence a picture on the face of which is "14 Harrison." Now, I think they might just as well continue to hold these numbers instead of exhibit numbers, don't you think so? What difference does it make?

The Court. If you agree upon it.

Mr. Garrison. Why not agree that instead of having separate exhibit numbers we will let them retain these numbers that are on them?

Mr. Collins. With the word "Harrison" added.

Mr. Garrison. That they continue to be marked "14 Harrison," etc.

Mr. Skinner. Yes.

Mr. Garrison. "3a, Harrison"—

The Court. Of course, it might be wise to have the stenographer put his initial on so that you will

know what was the "14 Harrison" you were talking about.

(Initialed, "J. V." by the stenographer.)

Mr. Garrison. Next is 3 Harrison

(Initialed by the stenographer.)

Mr. Garrison. Next is 2 Harrison.

(Initialed by the stenographer.)

Mr. Garrison. Next is 1a Harrison.

(Initialed by the stenographer.)

Mr. Garrison. Next is 1 Harrison.

(Initialed by the stenographer.)

Mr. Skinner. I notice, Vice-Chancellor, that there are some portions of the legend that appear on this that plainly could not be within the knowledge of the photographer. It must be something other than a statement by him of what he did. I am showing you the one marked 6 Harrison. I cannot agree that that go in.

Mr. Garrison. Oh, no. I will scratch my pen right through that. This is what you want out.

Now, that is 6 Harrison.

(Initialed by the stenographer.)

7 Harrison

(Initialed by the stenographer.)

And 5 Harrison.

(Initialed by the stenographer.)

9 Harrison.

(Initialed by the stenographer.)

8 Harrison.

(Initialed by the stenographer.)

10 Harrison.

(Initialed by the stenographer.)

11 Harrison.

(Initialed by the stenographer.)

12 Harrison—this is in as D. 8. Harrison, 12c.
(Initialed by the stenographer.)

Harrison 12a.
(Initialed by the stenographer.)

Harrison 4.
(Initialed by the stenographer.)

The reason I read some of them one way and some another is because that is the way they have them on the photograph. This one is marked "Underwood—8."

(Initialed by the stenographer.)

Gentlemen, you might as well be looking at these. You will find on the back where the picture is taken from, and what it is a picture of.

(Hands them to the jury.)

This is Underwood 4 with the legend amended.
(Initialed by the stenographer.)

Mr. Garrison. Underwood, and Underwood 1.
(Initialed by stenographer.)

Mr. Garrison. If you want the points of the compass that map will give it to you.

(Hands photograph to the jury.)

Mr. Garrison. "Harrison 17." You gentlemen understand what they call the float bridges—these are called float bridges in between North and South Pier.

"Underwood, No. 2."
(Initialed by stenographer.)

"Underwood 6."
(Initialed by stenographer.)

"Underwood 3."
(Initialed by stenographer.)

"18 Harrison."
(Initialed by stenographer.)

"19 Harrison."
(Initialed by stenographer.)

"Underwood and Underwood 7," and "Barth 3." (Initialed by stenographer.)

Mr. Garrison. Those are sort of companions; one shows one side of the cars and the other shows the other.

Mr. Garrison. Now, Judge, I desire to offer in evidence, and I understand that the other side consented yesterday not to object to the competency, by which I mean of course the method of proof—a United States Government map, with a legend: "Hudson and East Rivers from West 67th street to Blackwell's Island, New York. Lights, beacons, buoys and dangers corrected for information to date of issue, January 2, 1917."

Mr. Hardin. I never saw this before.

Mr. Skinner. As showing what, Vice-Chancellor?

Mr. Garrison. Well, whatever it shows. It shows the soundings mainly, that is what we are interested in—United States Government soundings, corrected to 1915.

Mr. Skinner. This is a map, if your Honor please, showing the condition in 1915.

Mr. Garrison. No, no.

Mr. Skinner. I object to it.

Mr. Garrison. Corrected to January, 1917

Mr. Skinner. Is it?

Mr. Garrison. Look at it.

Mr. Skinner. What date does it show?

Mr. Garrison. That is corrections from surveys with a corps of engineers, U. S. survey, 1915, and then with certain things—what does it read?

Mr. Skinner. And corrected for information received to date of issue in January, 1917, lights, beacons, buoys and dangers.

Mr. Garrison. But I am not interested in any of those things. I am interested in soundings. Take all the buoys and lights and things off it if you want to. I am interested in soundings. These are United States Government soundings for 1915. This is the latest one they have. The casualty was in 1916. This is not later.

Mr. Skinner. This was published in 1916, corrected in 1917.

Mr. Garrison. But as to buoys, lights, and so forth.

Mr. Skinner. May we have it understood that this is a map published in April, 1916, corrected as to certain things indicated on the map to January, 1917?

Mr. Garrison. I have read it.

Mr. Skinner. That the soundings are not among the things corrected in 1917. In other words, the map is supposed to show the condition as to soundings prior to this publication in 1916.

Mr. Garrison. That is what we want exactly.

Mr. Skinner. I only want what the fact is.

The Court. You want to have it understood, Judge Skinner, that—

Mr. Skinner. The map says, sir, upon it, it is corrected to 1917.

The Court. You want to have what you just now stated understood by the jury as being the situation under which the map was to be received?

Mr. Skinner. Yes, sir; I want it to be received as it reads.

The Court. All right, and that is what the other side wants.

Mr. Garrison. Could not be received any other way. (Map marked Exhibit D. 9.)

Mr. Garrison. I now desire to offer in evidence first a sheet signed with the printed name of E. F.

Sweet, assistant secretary, headed "New York anchorage regulations, Department of Commerce, office of the secretary, dated May 18, 1914." Any objection to that?

Mr. Skinner. We object to the materiality.

Mr. Garrison. They do not object to its competency, but they do to its relevancy and materiality. I wish to offer first—let me offer this first. The one I just offered is a mere amendment bringing down to 1914 the previous rules of 1911, rules for anchorage in this harbor. I will debate the relevancy after I offer the both papers. The main body of the rules was the paper I just offered, and a mere statement headed, "Department of Commerce and Labor, Bureau of Navigation, Rules and Regulations relating to the anchorage of vessels in the Port of New York, June 15, 1911." Of course I offer both of these papers and these supplements. We want to offer both of these papers and then do you admit that these were in effect in July, 1916? If you admit that then we do not have to have the Government officer.

Mr. Skinner. All right.

Mr. Garrison. There is no objection to the competency of these, but they do want to object to the relevancy and materiality. If they do—and they also admit that they were in effect down to the 29th and 30th of July, 1916.

Mr. Skinner. Just put it this way. They shall be taken in effect as down to July, 1916, subject to correction; but as to their admission we still urge that they are immaterial and therefore should not be admitted.

Mr. Garrison. Their materiality, if your Honor desires me to state it, is this. This is the regulation of the government as to where vessels laden with certain sorts of things should anchor, and if there is

any contention on behalf of these gentlemen that vessels laden with these things anchored at Black Tom, we wish to show they were violating the law in that respect, for whatever effect it may have upon this case. It may have a great deal of effect—I don't have to argue that.

Mr. Skinner. Well, it is already evident in this case, by the evidence that has been introduced on the part of the defendant, that they were there with the consent of the Lehigh Valley Railroad Company.

Mr. Garrison. If you please, we have not been heard upon that subject yet.

Mr. Skinner. And they were there for the purpose of receiving freight.

Mr. Garrison. We haven't been heard on that subject yet.

Mr. Skinner. That is the evidence made by the defendant himself. He says he has not been heard. It is part of the defendant's case.

Mr. Garrison. You were permitted through the various witnesses to the various versions of the same fact, so we may be.

The Court. I think that if there is going to be any question raised in the case about the legality of the presence of these boats there thus laden, or to be thus laden, that it cannot possibly be irrelevant to show what the real regulations were with respect to what makes the presence of such a vessel there liable or legal, in fact it seems to me that to say the least it is material and relevant, and therefore if that follows, as I think it does, I think these things should be admitted. If there is going to be any question about it. I don't know whether there is or not. Of course I can't tell myself what is in the mind of counsel on either side until he comes to argue it.

Mr. Skinner. Of course, your Honor understands I am making the objection in the light of what the situation is now in the case.

The Court. No; you are making it in the light of what you contend is the situation in the case. It may very well be that the other side may contend it to be different, and what the real situation is would eventually depend on what the jury decide. So of course I must take the respective contentions of the counsel and then let the jury determine which of the situations is the correct one in the light of the evidence.

Mr. Skinner. You will admit them?

The Court. Yes.

Mr. Skinner. The objection may be noted?

The Court. Yes, it will be noted.

(Papers marked Exhibits D. 10 and D. 11.)

The Court. I was so interested I didn't notice it was one o'clock, so we will adjourn until quarter-past two.

RECESS.

(Afternoon session, April 1, 1919.)

KENNETH OWEN, sworn.

Direct examination by Mr. Garrison.

Q What is your occupation? A Civil engineer.

Q Employed by whom? A At present I am employed by the Springfield Asphalt—formerly with the Lehigh Valley.

Q When were you last with the Lehigh Valley? A Up to October, 1917.

Q And from what time? A From April, 1914.

Q Did you make some soundings in the vicinity of the North Pier at the National Dock terminal? A Yes.

Q Do you remember when you made them? A In October, 1916.

Q Is this a blueprint of this (indicating)? A Yes.

Q What is this paper that I now hand you? A It is a map platted from the notes which I made at the time of taking the soundings.

Q Does the map show just where the soundings were taken? A Yes; the figures on the map give the locations of the soundings.

Q That is of course true; but does it show whereabouts you took the soundings—whereabouts you were when you took the soundings? A I don't quite—

Q For instance, I will put my finger anywhere; there is one, 5.9. Now, how would anybody know where it was that it was 5.9 deep? A You will notice a small mark in front of each figure; that gives the point at which those soundings were taken.

Q Point on what? A Point on this area covered by the map.

Q The map shows a long projection marked "North Pier"; that is the North Pier of what? A North Pier at Black Tom.

Q And on the left-hand side of the map there is a straight line marked "Bulkhead." What is that the bulkhead of? A That is the bulkhead line established by the U. S. Government.

Q There are some finger-like looking things which are marked "Transfer Bridge." Are those what we have called the float bridges between the North and South Pier? A Yes.

Q Then all this that you did was taken north of the North Pier? A Yes.

Q What is your scale? A Fifty feet to the inch.

Q And anybody by measuring fifty feet to the inch from any point here can find out how far it was north of the North Pier? A Yes.

Q Does this correctly show what you found the soundings to be? A Yes.

Q As delineated on this map throughout everything shown on this map? A Throughout that area, yes.

Q Is this a blueprint taken from that? A Yes, sir.

Mr. Skinner. Can you spare one of these?

Mr. Garrison. Yes.

Q Now, Mr. Owen, these figures that appear all over the face of the map indicate what? A Indicate the depth of the water.

Q In feet or inches? A In feet.

Q For instance, where it is 5.4 that is five feet and— A And four-tenths.

Q And four-tenths? A Yes.

Q And of course the little point in front does not mean a decimal point? A No; that is simply to indicate the point where the sounding was taken.

Q So when you want to find out where the sounding was taken you measured your point? A Yes.

Q And the figure there shows what the depth was at that point? A That is the depth below mesne low water.

Q When the U. S. Government Bureau takes soundings and puts them on its map what is their datum line —mesne low water, too? A It varies, but the datum which they use is generally given on the maps.

Q Will you please look at Exhibit D. 9 and tell me what the datum line was as shown by that map? A Yes; it shows—there is a note on this map saying the soundings are expressed in feet and show the depth at mesne low water.

Q Then that is the same as on your map? A Yes.

Q Which you measured at the same time? A Yes—not exactly at the same time, but during the same—

Q I mean the same period of the tide. Of course I do not mean the same day; but the same period of the tide. If you took it at mesne low water and they took it

at mesne low water they did take them at the same period of the tide? A They are not taken that way. They are taken at any time, but the stage of the tide is noted at the time they are taken and the variation is given.

Q Then the two, what we will call the assumed heights, are identical? A Yes.

Q Between yours and the government? A Yes.

Q And if there is a variation between yours and the government map it would show an actual variation in the water? A Yes.

Q As disclosed by the soundings? A Yes.

Mr. Garrison. I offer this blueprint in evidence.

Mr. Skinner. No objection.

Marked D. 12.

By the Court.

Q How do you arrive at mesne low water? What is the tide that you deem to be the regular tide? A The mesne low water has been established by the government through observations on the tide covering a number of years and they have established monuments. When soundings are taken we refer to those monuments to get an elevation from a government monument and refer all the soundings from the surface of the water to that monument ,taking the relation of the surface to the monument at the time you take the sounding.

Q Then it is a monumental figuring and not a figuring on the exact state of the tide? A It is not taken from the tide itself, no.

Cross examination by Mr. Skinner.

Q This map, Exhibit D. 12, shows a line called "Bulkhead Line." That is an imaginary line? A Yes, all imaginary except at the end of the Pier 7 at Black Tom, which is this point, this line, along here, what is generally know as the end of Pier 7—in that case it is an actual fixed line of the bulkhead.

Q You mean that so much of this line as shows solid running southerly, or at least to the bottom of the map, with the inscription "Bulkhead Line," is the real end of Pier 7? A Yes.

Q But from that point on towards the top of the map it is imaginary? A Imaginary, yes.

Q And of course you do not know how long the depths that you found on this day had been there do you? A No; we can only take them as being of that time.

CHARLES A. GAMBLE, sworn.

Direct examination by Mr. Garrison.

Q Where do you reside? A In Brooklyn.

Q And where were you employed on the 29th and 30th of July, 1916? A New York Sugar Trade Laboratory, 80 South street, New York.

Q Was there some sort of an instrument used there in connection with a thermometer? A Yes.

Q And just describe generally what that instrument was. A It is just a recording thermometer that works by clockwork, and we keep it there to keep a temperature record.

Q Yes; and what made the record? A Why, it is a pen that works by an expansion of metal. As the temperature rises and falls the metal contracts or expands and moves this pen, recording it.

Q And is that pen open to the air or is it enclosed? A It is enclosed in a clock—just like the face of a clock.

Q Practically airtight? A Yes.

Q Have you got the sheet that was in this recording clock, or whatever you call it, on the night of July 29 and the morning of July 30, 1916? A Yes. (Witness produces it.)

Q I call your attention to a line, a thick red line running parallel to the irregular circular line that runs around this disc and ask you to tell me about what time that mark was made as indicated by the things on the

face of that piece of paper. A I would say that this was made—the first mark was made about a quarter after two.

Q When would you say the second right angle line was made? A The second line I would say would be about a quarter of three, according to this.

Q Are those marks such as would be occasioned in the normal operation of this machine by temperature? A No, sir.

Q What, among other things, would cause such irregular right angle lines to appear? A A very severe shock or a jar.

Q Such as an explosion might make? A An explosion would cause it, might shake the building and might jar the clock.

Q You removed that from the disc when? A I removed it from the disc I think it was on the morning of August 5. It will show there. The dates I have written on it; I show it there.

Q And those two marks made at the time indicated and given in your testimony appear to have been made on what date? A Why, it was made on the night of the—

Q You would better look at your paper here. A That was made on the morning of July 30.

Q Now, I notice in the part of this disc that is marked "Wednesday noon," and then a "2," some more similar right angle marks. Can you tell us what caused those? A Yes; these are caused by jarring the table. This clock frame sets on a table between our two polariscopes and we are working there continually through the day, and during this hot weather we operate an ammonia compressor which also causes vibrations during the day.

Q Is there anything working there at night? A No, sir.

Q Is there anything to cause a jar there at night? A No, sir; that room is locked up.

Q Nothing in there at all? A No, sir; nothing in there. This room is insulated. It is padlocked so that no one can get in there.

Q What do you mean by insulated? A Insulated so that there is no radiation of heat. We keep the room at a constant temperature.

Mr. Garrison. I want to offer that disc in evidence.

Mr. Skinner. May I just ask the witness a question or two before this is marked so that I may be sure that I understand what he has already told us?

Q Mr. Gamble, turning to the sector of this circle that is marked in pen and ink July 29th, I notice irregularities in the red line? A Yes.

Q Does that indicate to you some disturbance of this recording instrument? Yes or no? A Well, yes.

Q Now, then, again turning—going to the next, the next sector to that one that has the inscription July 29th, it is colored green? A Yes.

Q What period of time is that supposed to represent? A That is from 6 P. M. to 6 A. M.

Q On the 29th? A Yes.

Mr. Garrison. Well, no; it is 29th and 30th.

The Witness. 6 P. M., July 29th, to 6 A. M., July 30th.

Q And the line that is—and then the next sector which is a black and white, and not colored, has the figure 30 in it? A That is July 30th.

Q That is July 30th, from 6 A. M.? A To 6 P. M.

Q So that the entire period of time between 6 P. M. on July 29th and 6 A. M. on the morning of the 30th is supposed to be represented here covered by this green sector? A Yes, sir.

Q And in that green sector and on the red line I notice a mark at right angles almost to the red line? A Yes, sir.

Charles A. Gamble, cross.

Q Do I understand you that that indicates some disturbance? A Yes, sir.

Mr. Garrison. He said "yes, sir."

The Witness. Yes, sir.

Q And there is nothing else in the red line within that green sector to indicate any other disturbance, is there? A No, sir.

Q So that this red line apparently—this record that you produce here shows one disturbance by explosion or shock of some kind in the period of time here mentioned? A Well, it really shows a slight one annexed to that; there is really two there, if you notice it.

Q Where is it? A Right next to this one; you can see it if you look at it closely. It is very slight, but it is there.

Q In red, is it? A Yes, sir.

Q You mean that other—that slight thickening of the line? A That slight thickening. There was a slight jarring of the instrument there that caused that.

The Court. Where was that, before or after the big one?

The Witness. After.

Mr. Garrison. He gave the time.

The Court. Yes, I know the time.

Q Now, this sectors have on the margin under the different points in them various hours, 6 P. M., 9 P. M., 12 o'clock at night and 3 A. M. Apparently this red line that marks disturbance—that is the large one—is somewheres between 12 and 3, isn't it? A Yes, sir.

Q Midnight and 3 A. M.? A Yes, sir.

Q Does this record with any exactness as to when it was? A I would not say exactness; but I say approximate.

Q Yes. And each one of these lines then read an hour, don't they? A Supposed to represent an hour; yes, sir.

Q And according to this there was a severe shock by explosion, very, very close to 2 o'clock and a little after it; isn't that right? A I would say that; yes, sir.

Q Not—

The Court. Why do you say it represents a severe shock by explosion?

The Witness. I did not say that. I say it represents a severe shock.

The Court. You just did answer it. He asked you if it represented a severe shock by explosion and you said yes.

Mr. Skinner. Well, I think he has already said that.

Mr. Garrison. I think he said it was a shock that might be caused by explosion. He didn't say it was.

Q Now, this mark that is here—where was the other one you found, Mr. Gamble? A Down there (indicating).

Q The mark that shows in the sector marked 2, do you know what caused that? A Yes, sir.

Q You think that was caused by some person jarring the table? A Yes, sir; we were working around there at that time; or caused by a jar of the ammonia compressor, which causes vibration.

By Mr. Garrison.

Q Judge Skinner asked you about some irregularities that appeared during the day time of July 29th in the day time record? A Yes, sir.

Q What causes those? A Why, this was caused where I changed the chart.

Q This irregularity? A Yes, that is caused—

Q Now, you are going too fast. That is, this irregularity between 9 A. M. and after noon, as indicated here,

on July 29th, was caused by what? A No; that is caused by us working around that instrument, jarring it. This break in the line is caused where I changed the chart.

By Mr. Skinner.

Q Well, then, if these are caused by—these in the sector marked July 29th—are caused by your working around the instrument, is it not a fact, Mr. Gamble, that just walking around the room will disturb that instrument? A No, sir; I don't think it is delicate enough for that.

Q Well what did you mean when you said "we were working around"? A We were working on that bench and we were handling our sets of tubes there and jarring the table, perhaps.

Q Now, that indicates, does it not, to you a jarring condition of that table from 9 A. M. on the 29th to 3 P. M.? A Well, that line is not broken there; that is a steady line from there on.

Q Well, from 9 A. M. to some time around half-past one. Do you mean then that you were—that men working there were continuously jarring that table all that time? A No; I don't say they were continuously jarring it. We were working around there and we were very apt to jar it.

Q Working around it might disturb it, then? A Yes.

Q It is quite susceptible? A It is, to a jar on the table, yes.

Q Well, wouldn't it be to anything on the table; if there were a jar on the floor? A That would perhaps do it, yes.

Q So that this second marking that you point out there may have been caused by just some slight jar of the room or the building? A Well, it would take quite a jar to jar the pen that much.

Q Well, it didn't take much of a jar to jar it on the 29th, did it, between 9 A. M. and half-past one? A Well,

New Jersey State Library

as that jar there is not anything like that; that extends to at least a quarter of an inch there.

Q But the jar on July 29th between 9 and half-past 1, as indicated here, was a good deal more severe than the one on the 30th, wasn't it? A Well, for this particular time; this particular time was perhaps just one great big jar.

Q No. I mean the little one? A The little one, yes.

Q Yes. These on the 29th indicate a very much more severe jar, don't they? A Well, that is a jar probably jarring the clock. We were right there. We may have hit the clock.

Q But the indication is on a very much more severe jar? A Yes.

Q Given to the instrument between the hours of 9 to half-past 1? A Yes, sir.

Q And that was just due to the men working around? A Yes, sir; that is all these jars were.

By Mr. Garrison.

Q Now, when you speak of these jars, I notice that the line coming up to 9 A. M. of the gray part, which means day time— A Yes.

Q July 29th—comes up a little below 80? A Yes.

Q And then there is a drop below 70? A Yes.

Q Was that drop caused by some artificial physical means, or was there a drop in temperature? A That was a drop in temperature.

By Mr. Skinner.

Q Well, what portion of that on the 29th was due to your changing a pen? A Just this point here; this break in the line.

Q Indicating a point where it begins to drop downward? A Drop downward; yes, sir.

By Mr. Garrison. I offer it in evidence.

(Marked D. 13 in evidence.)

William Crockett, direct.

By Mr. Skinner.

Q Where was this clock or recording instrument located in the building? A On the fifth floor.

Q And where with reference to the front of the building? A Well, it was toward the rear of the building.

Q Rear of the building. And what direction or point of the compass would that rear of the building face? A Well, let's see. That faces away from the East River; it faces across Manhattan; that would probably be west.

Q Faces west. Where was this building, the Trade Laboratory Building? A 80 South street, New York.

Mr. Skinner. That is all.

Mr. Garrison. That is all.

(Witness excused.)

WILLIAM CROCKETT, sworn.

Direct examination by Mr. Garrison.

Q Where do you live, Mr. Crockett? A 104½ Lafayette street, Lafayette.

Q Where did you live on the night of July 29th, 1916? A Black Tom.

Q What part of Black Tom did you live on? A North side.

Q And whereabouts? Whereabouts on the north side? A I had a bungalow down there.

Q Well, now, can you tell us what it was opposite, or some way or other that we can locate it? A Right across from the elevators.

Q Right across from the elevators? A North; yes, sir.

Q Whom were you employed by at that time? A Lehigh Valley.

Q In what capacity? A Engineer.

Q You mean locomotive engineer or stationary engineer? A Stationary, crane operator.

Q Eh? A Crane operator, engineer.

Q Did you work in the day time or night time? A Day time.

Q Now, did you hear anything of a fire down in the Black Tom neighborhood on that night? A Yes, sir.

Q What time was it when you first heard anything about a fire? A Midnight; some time around midnight, I should say.

Q Some time around midnight? A Yes, sir.

Q And how were you notified about it? Never mind what anybody said, but how were you notified about it? Did somebody tell you about it? A Oh, no; we were waked up. There were three of us together that night.

Q What woke you up? A Young fellow that was with me.

Q What woke you up? A Well, the young man woke me up.

Q That is what I want to know. Now, when you got up did you get dressed? A Certainly; yes, sir.

Q And did you go out of your house? A Yes, sir.

Q Did you see the fire before you went out of your bungalow? A Yes, sir.

Q What did you see it from? A Saw it out of the door; saw the fire.

Q Before you left the bungalow? A Yes, sir.

Q Where did the fire seem to be when you first saw it? A Well, on Pier 7.

Q Did you hear anything? A I heard a whistle blowing. I said, "What is that?"

Q I mean, anything from the fire? A Oh, certainly; yes, sir.

Q What did you hear? A Oh, explosions; small ones.

Q Like shells going off? A Like Fourth of July; something like that.

Q Now, then, where did you go after you left your bungalow? A Toward the fire.

Q And who went with you? A Mr. Mason.

Q Was he another employee of the Lehigh Valley? A I think he was at that time; he is now; I think he was at that time, too.

Q You are not sure? A No.

Q Well, where did you first go after you left your bungalow? A Oh, went right over toward the fire; we went all around the island and all over.

Q Well, how far down—how far down toward the North Pier did you go? A Pier 6.

Q Now, whereabouts did you go with reference to Pier 6? Wait till I show you Pier 6. Here is Pier 6. Just before you come to the last block of stores. Is that what you mean? A Yes, sir.

Q Where did you go in respect to this driveway that comes out of Pier 6? A Right to that crossing, Pier 6 crossing, leading to Pier 6.

Q Do you mean the crossing between the roadway? A From the roadway; yes, sir; on the roadway.

Q Were you out there on the roadway, or were you in here in front of the stores? A Well, right at the crossing there, right at the roadway, leading to Pier 6.

Q Yes, right at this roadway leading to Pier 6? A Yes, sir.

Q Where did the fire appear to be then? A Down Pier 7, away down below that; still further down.

Q Down here? A Yes, sir.

Q Well, did it appear to be as far as the North Pier, or this side of the North Pier? You know where the North Pier is? A Certainly; yes, sir.

Q Well, now, did it appear to be on the North Pier or this side of the North Pier, or where did it appear to be? A It appeared to be just to the right end of the North Pier, on the right-hand side of the North Pier going down.

Q Right-hand side going down. In here somewhere? A Yes, sir.

Q Now, what did you do? What did you do? A Well, I went back as far as the pump room, talked to Sam Sloan in there.

Q Well, then what did you do? A And one thing and another; went around, walked around to see if there was anything to do, or tried to see what was doing.

Q Well, what did you do yourself? You did something after a while, didn't you, besides walking around? A Well, I couldn't tell you that, what I really did do. In a case of that kind you do lots of things you never remember.

Q When you first got down there was the Jersey City Fire Department there? A I don't know. That's a question.

Q (Repeated by the stenographer.) A I think they was; I wouldn't be positive, but I think so; yes, sir; I think they was either there or coming there at that time.

Q Did you handle any hose at that time yourself? A Yes, sir.

Q Where did you get the hose that you handled? A Pier 6.

Q What hose carriage was that? A No. 10.

Q Who went with you to get the hose from No. 10 hose carriage? A Nobody.

Q And what did you do after you got No. 10 hose carriage? A Took those hose carriage to Pier 6 crossing.

Mr. Garrison. Repeat that question.

(Question repeated by the stenographer.)

The Witness. Yes, sir.

Q And that is in here? A Right on that crossing.

Q What did you do after you got your hose carriage there? A There was nothing to do; you had no help with you; there was nothing to do.

Q Did you connect the hose up? A One link; yes, sir.

Q What did you do? Was there any water? A There was water, but there was nobody to handle it.

Q Never mind. There was water? A Yes, sir.

Q And you connected one link with it? A Yes, sir.

Q Then what did you do? A Walked away.

Q Well, did you let the water run through the hose? A No, sir.

Q Do you know anything about the pump about Store F? A Well, I know; yes, sir.

Q Between F and G? A Yes, sir.

Q What do you personally know about it? Were you at the pump house? A I have been there several different—

Q No, that night were you there? A Oh, no.

Q Weren't you talking to Sloan? A Yes, sir; I was in there.

Q You were in the pump house talking to Sloan? A Yes, sir.

Q Was the pump going? A Yes, sir.

Q How big a stream of water was coming from this hose that you hooked up? A No water coming from it at all.

Q I thought you just said there was? A I didn't turn it on. I told you I didn't turn it on.

Q Did you turn on the hydrant to which the hose was attached? A No, sir.

Q Where were you when the first explosion took place? A Pier 6; Pier 6 crossing.

Q Were the shells going off all the time from the time you first saw this fire up until the first explosion? A Yes, sir.

Q Were they going off between the first and second explosions? A Yes, sir.

Q Were you there until after the second explosion? A Yes, sir.

Q Were you injured? A I was.

Q Which explosion injured you? A The first one.

Q How long did you stay there? A Till they took me away in the morning.

Q Down where the fire was. How near did you get from where you were there at Pier 6, if it is the nearest you ever got to the fire? A That is the nearest I got, yes.

Q Why didn't you go any nearer? A No, that was near enough.

Q On account of what? A Well, because I didn't want to go no nearer.

Q Well, but why? Wasn't there some reason why you didn't want to go any nearer? Tell it to us. What was going on down there that made you afraid of going down there? A Too many—too many shells going off down there to suit me.

Q Precisely? A It was pretty warm.

Q That is right. I understood it. That is the reason you didn't do anything with this hose, wasn't it? A One reason, yes; and the other reason was because I couldn't get no help.

Q Wasn't Mason with you? A Mason had went—Mason left me and went toward the dock.

Q When did Mason leave you and go toward the dock? A Before the explosion.

Q Toward what dock? A Pier 6.

Q Did you see him again? A No, sir; not after—not until I saw him in his house, saw him home.

Q Did you see Mr. Leyden down there that night? A Yes, sir.

Q Did you see Mr. Dickman? A Yes.

Q See Kane? A Yes, sir.

Q Now, I don't understand yet clearly; did you turn on the hydrant at all after you hooked up this hose? A No, sir.

Q Was the hydrant that you hitched this hose up to connected in any way with the system where the pump was that Sloan was running? A This hydrant was from this new system they had put in there.

Q And that pump pumped that new system, didn't it? A That pump could pump in all the ways; it was two different lines in there; that pump could pump the water anywheres.

Q Why didn't you turn on the hydrant? A Pretty hard for a man to turn on—have to run the hose and turn the hydrant on and hold the hose himself, pretty hard matter.

Q Well, you could lay the hose down while you turned the hydrant on. Why couldn't you lay the hose on the ground and take and turn the hydrant on? A I could have done that, certainly.

Q Well, why didn't you? If you took the trouble to go and get the hose and hook it on the hydrant, why didn't you turn the hydrant on? You knew there was water, didn't you? A Certainly.

Q Why didn't you turn on the water into the hose? A There was no use of turning it on there, because you wouldn't know which way—suppose that hose had been turned on and come back, that is liable to twist any way; it was as liable to hit me as it was the fire.

Q The only reason that is dangerous was because there was so much water pressure? If it was just a little bit of water pressure it wouldn't hurt you. It was because the water pressure was so high you were afraid to turn it on? A I wasn't afraid to turn.

Q Why didn't you? A I just explained it.

Q That is not a very good explanation, because you thought the water would hit you you wouldn't turn it on. You were not afraid of a little water, were you? A No.

Q The main reason was the shells that were down near those cars? A No; the shells wasn't bothering me. I wasn't thinking of no shells at all.

Q Why didn't you go on down there where the cars were? A I didn't want to go down there alone. There was one man that went down there alone and never came back.

Albert M. Dickman, direct.

Q The reason he didn't come back was because of shells hitting him? A That is the reason.

Q Then you knew better?

Mr. Skinner. I object.

Mr. Garrison. You can take the witness and examine him. I withdraw the question.

Cross examination by Mr. Skinner.

Q Mr. Crockett, you said that the fire was Pier 7? A It was in the lower yard just below the—as near as I could see.

Q Somewheres— A Down below—below that tank, Store R tank.

Q Do you know where Zeke's shanty was? A Yes, I do.

Q Was that anywheres near that? A It was to the right of Zeke's shanty, as near as I can remember now.

Q And near it? A Well, it wasn't very far from it.

Q And the explosion came from the same place as the fire? A Well, it came from that neighborhood; yes.

Q That is all.

Mr. Garrison. That is all.

ALBERT M. DICKMAN, recalled.

Direct examination by Mr. Garrison.

Q Mr. Dickman, who had authority down there—you said you were the agent—at Black Tom? A Yes, sir.

Q And as part of your duty had you anything to do with the movement of the cars? A No, sir.

Q Had you anything to do with the unloading of the cars, where they should be unloaded? A Are you speaking of ammunition?

Q Yes, ammunition? A No, sir.

Q Had you anything to do with placing of the cars? A Only by getting orders to the yard department.

Q That is what I mean? A Yes, sir.

Q Who handled that business for you, besides yourself? A What, the ordering of the cars?

Q Yes, sir. A Well, my chief clerk would do it at times.

Q What is his name? A W. F. Kirk.

Q Who else? A And his assistant, a young man named George Higgins.

Q What I want to know is this: Suppose a consignee wished to take some freight from there, some ammunition away from there, say on Thursday, what would be the routine he would follow, if his car was on the North Pier ready to be loaded on his barge on Thursday? A He would telephone my office the night before.

Q You had charge of that, your office? A Yes.

Q Who were the people there that had any duties in respect of that? A He would—

Q No, who are the people in your office, besides yourself, that had any duties in respect of the matter that I have just spoken of? A My chief clerk.

Q Mr. Kirk? A Higgins.

Q And Mr. Higgins? A And they would hand the order—telephone over to our order clerk.

Q Did you have any conversation with anybody in respect of the unloading of the ammunition cars at the North Pier on Sunday, I mean the cars to be ready on Sunday, July 30, 1916? A No, sir.

Q Did you have any such conversation at any time? A No, sir.

Q On Saturday or Sunday? A No, sir.

Q Or Friday? A No, sir.

Q Friday or Saturday before that Sunday? A No, not for the unloading on Saturday or not for the unloading on Friday.

Q But for the unloading on Sunday? A That is what I meant, for the unloading on Sunday.

Q That is what I asked you. Where was Kirk on Saturday, July 29, 1916, in respect of his being at Black Tom? A He was not at Black Tom.

Q Do you know whether his health was good or bad; was he away on account of health? A He was sick.

Q He was sick and not at work at all that day? A Yes.

Q That is Saturday, July 29th? A He was not there at all on account of illness.

(No cross examination.)

HARRY A. CAMPBELL, sworn.

Direct examination by Mr. Garrison.

Q Where do you live, Mr. Campbell? A Woodhaven, Long Island.

Q Where are you employed? A Bureau of Explosives, Underwood Building, New York.

Q Is that a government bureau, or what kind of bureau is it? A It is a railroad organization enforcing government regulations.

Q In respect of explosives? A Yes, sir.

Q And who is your immediate superior? A Col. B. W. Dunn.

Q Of the United States Army? A Yes.

Q Were you in that employ in July of 1916? A I was.

Q Did you go to the scene of the Black Tom explosion? A I did.

Q When was the first time you went there after the explosion? A Sunday morning, about five o'clock.

Q July 30th, the morning the explosion took place? A Yes, sir, the same morning.

Q Did you see the cars—oh, one minute, how did you get there? A By automobile.

Q Did you go out on the North Pier? A I did not. I went around the North Pier on a lighter—tug.

Q That is what I was going to ask you; after you got down there in an automobile did you get into some kind of a water vehicle? A I did.

Q What was it? A It was a tug belonging to the Johnson Lighterage Company.

Q Where did you go, generally speaking, in that tug? A Why, we laid off the North Pier for I presume half to three-quarters of an hour.

Q And you laid off there in which direction of the compass? A About easterly.

Q Do you mean toward Liberty Island? I mean off that way or off this way? Pointing first north and then east? A Northeast, off the corner.

Q Off here? A Yes, sir.

Q Could you see the cars that were on the tracks on the North Pier? A Could not see any cars. The smoke was very heavy.

Q Did you see any lighters or barges out there? A Why, after the wind moved the smoke away we saw a portion of a lighter laying adrift.

Q Did you see the name or number of her? A I don't recall that I saw the name, but I afterwards identified it as the Frank.

Q Could you see what her cargo was? A What remained on board of her deck was trinitrotoluol in hundred-pound boxes.

Q What kind of boxes? A Hundred-pound boxes.

Q Wooden boxes? A Yes, sir.

Q Hundred pounds in each box? A Net; yes, sir.

Q About how many such boxes or cases did you see? A Well, to make a round guess at about a hundred.

Q Trinitrotoluol is ordinarily spoken of as T N T, the same thing? A Yes.

Q Just another name? A Yes.

Q Tell me everything that you saw on the North Pier while you were there to the northeast of it? A Well, on the following day I crawled over the North Pier.

Q Oh, well, now, don't come to the following day yet. I was going to ask you about that next. But on this first day? A It was not possible to discern much on that day.

Q When did you go there next? A Following morning.

Q On— A On Monday.

Q The reason you couldn't see anything on Sunday was because of the fire? A The smoke, yes, sir.

Q The smoke? A Heat.

Q Where did you go on Monday? A On Monday I took a launch, I don't know who owned the launch; it was a small launch, and I asked them to take me over to the North Pier.

Q Where did you take it from? A I think it was from the immigrant dock in Jersey City.

Q All right. Did you get over to the North Pier? A Yes, sir; I climbed on the extreme end of the North Pier, that is the bay end, the outside end, and crawled up over the debris down to the dock itself, down to the fire.

Q That is you got on the extreme eastern end and walked the whole length of the pier back to the bulkhead? A We didn't walk it, we crawled it.

Q You got there somehow? A Yes.

Q What did you find the condition to be out on the North Pier? A There were two carloads of 3.3 shrapnel on the extreme end, the bay end.

Q That is out here? A Yes, sir.

Q Then what did you find? A They were not entirely consumed by fire, just showed the effects of shattering, and they were leaning—

Q You mean the cars, you are talking about now? A Yes, sir.

Q Go ahead.

Mr. Skinner. He didn't say that.

A They were leaning toward the south.

Q They were leaning down toward the bottom of the map? A Yes; they were covered with mud which had—I don't suppose you want that.

Q That is all right; covered with mud? A Yes.

Q You said their sides were shattered? A Yes.

Q What about the contents? Were the contents exploded or not, or burned? A No, sir, that was not exploded.

Q What happened next? What did you see next after those cars of three-inch shells? A Well, from that time on all I discovered was the steel skeletons of cars; the wood had been entirely consumed.

Q Yes. What about the contents? A That had likewise been consumed by fire.

Q Could you tell from the appearance of those cars whether or not the destruction had taken place from explosion or from fire? A Oh, positively.

Q Well, which was it? A It was by fire.

Q Concerning how many cars did that fact obtain? A Of the balance of the cars on that pier. I don't know how many there was.

Q All the way down to the bulkhead line? A Yes, sir.

Q Did you see any larger sized shells than 3.3 shells? A I recall having seen two larger diameter shells than 3.3.

Q When you speak of 3.3 shells, where is that measurement? A Across the base of the shell.

Q The cap, right in the middle—right straight through that cap? A No; across the base.

Q That is the diameter? A Diameter of the shell.

Q Well, that would be right through the cap, wouldn't it? A No; the cap points up. I said across the base.

Q I guess we mean the same thing, but we are talking different. These 3.3-inch shells would be three inches and three-tenths in diameter? A Correct.

Q What larger diameter shell did you see then than that? A I saw two shells approximately five inches in diameter.

Q Where were those two? A They were not together; one shell was found at the land end of the float bridge, the float bridge nearest the pier, that North Pier, I think it is called.

Q That is this float bridge here? A Yes; found on the land right there; and the other one we located some time later was in the stringpiece.

Q Yes, whereabouts—stringpiece of what? A Well, they call the borax dock; I don't know what it is on that map.

Q The borax pier? A Yes, it was imbedded in a piece of lumber there.

Mr. Garrison. It is conceded that the borax pier and the South Pier are synonymous.

The Court. All right.

Q That means this pier here, the borax pier. Did you see any of those on any car or any barge or canal boat or any other place? A No, sir; I did not.

Q What size shell is that (indicating)? A 3.3.

Q Just to see if you and I understand the same thing, my notion is that if you measure it from there right straight through that cap over here you would make 3.3; is that right? A From here to here.

Q That is right through the cap, isn't it? A No, that is the base; this is the cap.

Q Oh, well, I call this the cap. Then you and I mean the same thing, except I was calling this cap that you call base. It means right through that cap, from one side to the other? A Yes.

Q That is 3.3? A Yes, that is a British 3.3.

Q That is a British 3.3? What is this thing I am unscrewing here, Mr. Campbell, or trying to unscrew? A It is a combination fuse.

Q When that shell explodes this comes separate. Does that go off separate? A That functions first, and falls away from the projectile.

Q This part that I hold in my hand is called the nose or the cap, isn't it? A Well, you could call it that.

Q Well, we will call it that; and this little clock-like thing is where you set it? A Yes; that is the time ring.

Q As to how long it was to go off after you shot it? A Yes.

Q And when the time arrives, if that mechanism works perfectly, this sets off something that is in the shell? A Yes.

Q Fulminate of mercury? A Yes, black powder.

Q And that sets off the contents of the shell? A Yes.

Q Put that back just a minute. Now, this has nothing whatever to do with shooting the projectile out of a gun? A You mean propelling it?

Q I call shooting and propelling pretty much the same thing. Call it what you please. These three parts go in together? A Yes.

Q Then how does that and this get out of here? A The brass shell case which I hold in my left hand contains smokeless powder; that is crimped on to the projectile.

Q That is this? A On the face of what we call the primer, known as cannon primer.

Q That is this little thing I am putting my finger on in the center of the base of the shell? A Yes, sir.

Q That is hit with something? A That is hit with the plunger in the gun and the charge now ignites the smokeless powder, the smokeless powder pushes the projectile out of the gun and the time fuse is on that projectile.

Q This brass part here is the container, isn't it? A Smokeless powder.

Q That contains smokeless powder. That is the propelling force that shoots, that is under the piece of

metal that shoots off the contents, the shrapnel or high explosive out of the gun? A Yes, sir.

Q And then travels whatever distance the distance of the gun is elevated or aimed at; and then what is in there goes off by reason of what happens to this nose? A Yes.

Q Is that intended to shatter this container or only to throw the shrapnel out? A It is intended to propel the shrapnel from that projectile.

Q And this remains intact? A Yes; it has to in order to give the projectiles their direction.

Q If this were an explosive shell this would be shattered? A That would be fragmented.

Q There would be high explosives in there? A Yes.

Q And this nose would set it off? A If that was a high explosive projectile that would be set off by a detonating fuse, which is entirely different from that.

Q What is the difference in explosive nomenclature between a high explosive and low explosive? A A high explosive is detonated by intense shock. A low explosive is an explosive usually set off by ignition.

Q You said by an intense shock? A Yes; by detonation. That is the correct term.

Q By a small explosion? A Yes; one explosion sympathetically setting off another.

Q Yes; a little explosion sets off a big explosion? (No answer.)

Q These 3.3 shells, were any of those going off when you were down there on Sunday morning? A They were not.

Q I may have neglected to ask you, but I do want to ask you whether you saw any of these larger size shells other than 3.3 anywhere else than at the foot of the float bridge and there imbedded in the stringpiece of the borax pier? A I saw some large calibre shells at the dock known as Dock 19, Jersey Central Railroad.

Q What were they on? A On a boat called Isabel which had sunk and was then being raised when I was there.

Q Isabel? A Yes. I do not remember the exact diameter of these shells, but they were larger than the 3.3 shells.

Q Did you see any of these 3.3 shells in the yard when you were in there on Monday? A Yes; I saw fragments.

Q Many of them? A Yes; large quantities of them.

Q They had been exploded, had they; they had gone off? A Yes.

Q Shrapnel is just little pieces of steel? A Lead balls.

Q Yes; they put them in this second thing, this container? A Yes.

Q Do you know anything about a concern called the Solway concern, or company? A I know where they are located.

Q Do you know what they make? A They make T N T and picric acid.

Q Do you know how they pack their T N T? A Yes.

Q I mean in what size cases? A One hundred-pound packages.

Q Have you any first-hand knowledge as to what was loaded on Johnson barge 17—first-hand knowledge? A I investigated the loading from delivery records.

Q No; first-hand knowledge. A No; I did not see the barge.

Q And you have no first-hand knowledge as to what was on the Frank? A I saw the reports of what had been destroyed.

Q What about the Johnson Barge 11; did you see her? A I did not.

Mr. Garrison. You may cross examine.

Mr. Skinner. No cross examination.

Richard W. Barrett, direct.

Mr. Garrison. I think I will offer this shell in evidence because it has been used by the witness.

(Shell marked D. 14.)

RICHARD W. BARRETT, affirmed.

Direct examination by Mr. Hobart.

Q You are the general solicitor of the United States Railroad Administration in the Lehigh Valley Railroad department? A Lehigh Valley Railroad, yes.

Q And prior to that were you the assistant general solicitor of the Lehigh Valley Railroad Company? A Yes.

Q And were you acting as such on the 28th of August, 1916, and on the 11th of September, 1916? A That is correct.

Q I call your attention to Exhibit P. 6, being a letter signed by you and addressed to Mr. Campbell, dated August 28, 1916; that was written by you, wasn't it? A It was.

Q It refers to two blueprints; do you recall the blueprints that were sent? They have been offered in evidence and are on the boards before us. A If those are the blueprints, yes.

Q Will you please state where you got the information which appears on the blueprints with regard particularly to the number and the location of the various cars indicated thereon? A The information came to me from the operating department.

Q And do the blueprints correctly show the information that you had up to that time? A The blueprints gave the information, exact information I had on those dates and were sent to me as correct.

Q And did you afterwards get further information on that subject? A Yes; we continued to get information on that subject, that varied those prints slightly, for some weeks after that. I do not know what the difference is

between those blueprints and the larger print that we have. I understand it is four cars.

Q Now, how did you get the information as to the cars that were there, the numbers of them and the location of them and the contents of them? A The information came, as I stated, from the operating department or from representatives of the operating department. The sources of that information were from Mr. King, the engineer, from car inspectors and specialists who examined the remains to tell what cars were still remaining on those tracks after the explosion, and from Mr. Dickman and his employees and other employees I assume at the National Docks.

Q Did you yourself send men there to examine the cars and examine the records? A I sent these two car inspectors, Everett and Warren, to examine the cars that had been left there after the explosion. When I say I sent them, I mean I asked that they be sent.

Q You eventually ordered prepared and we now have placed before us what we call the large map, P. 16. Does that map represent the final result of your inquiries and investigations. A Yes, it does. Now, P. 16 is the big map?

Q Yes. A Yes, it does. You see, I was not here when those maps were put in.

Q So far as you were able to get any information, does that correctly show the location of the cars and the other items that purport to appear thereon? A That map shows the very best and last information that I could get in reference to the cars and everything else that is shown on it.

Q Calling your attention to the letter that has been marked P. 9, dated September 15, 1916, addressed to Mr. Connelly, inspector of combustibles, this is a typewritten copy of such letter, the original not being available for some reason—I think the absence of the original was explained—do you recall writing that letter—it is dated September 15, 1916? A Yes; that is a copy of the letter I wrote Mr. Connelly.

Q In response to a request from him? A Yes.

Q On part of the Exhibit P. 9 is a sheet headed "Cars, explosives, on hand July 26 to 29 inclusive." Do you recall sending that, either this particular paper or one similar to it, with the letter? A Well, I sent him a statement, of course. I do not know that that is the statement that I sent him or that that is a copy of the statement.

Q Well, at any rate, whatever statement you did send him, was that based upon such information as you had at the time you sent it? A That statement was based upon information taken by the stenographers from the bills—billing of the cars. He asked for the cars on hand between July 26th and 29th, apparently—yes—inclusive; and as the records at Black Tom had been partially destroyed and disarranged, it was with great difficulty that I could get those records, or any records, and Mr. Connolly or some one from his office called me up two or three times insisting that this list be furnished, and I likewise called up the operating department and insisted that I had it to furnish. The operating department sent me the billing covering these three or four days—26th to 29th—four days; and I had the information copied from the billing and forwarded to Mr. Connolly, and if this is that information it is correct in so far as that billing was concerned.

Q What do you mean by the billing? A The waybills for the cars.

Q And are they sometimes turned in before the cars themselves actually arrive? A Yes, so I am informed. That turned out to be the case in connection with a number of these cars.

Q And was this list limited to those cars that had actually arrived at the Black Tom terminal, or did it cover other cars as well? A Well, I assume that the bills, when I received them, covered exactly what Mr. Connolly asked for. We later found that a large number of these cars had not arrived at Black Tom or any place else. The billing had preceded the cars, and the cars were ultimately

delivered some place else; I don't know where. But this was—the list was later corrected. I don't know that Mr. Connolly was ever sent a correct list, but the District Attorney—what is his name?

Mr. Collins. Hudspeth.

Q Hudspeth? A Hudspeth was furnished with a correct list.

Q Now, it has been shown in the case that some cars were pulled out of the Black Tom terminal either during the fire or almost immediately thereafter; and, calling your attention again to P. 16, does that represent the sum of your information as the cars were just before the fire, without regard to any that may have been pulled out during the fire or immediately thereafter? A Yes.

(Witness excused.)

Trial adjourned to 10 o'clock A. M. Wednesday, April 2d, 1919.

SEVENTH DAY.

(Trial resumed April 2, 1919.)

GEORGE A. HIGGINS, sworn.

Direct examination by Mr. Garrison.

Q Where do you live? A 560 Newark avenue.

Q Jersey City? A Yes, sir.

Q By whom are you employed? A I am not employed at the present time.

Q Were you ever employed by the Lehigh Valley Railroad? A Yes.

Q Were you employed by the Lehigh Valley Railroad in July of 1916? A Yes.

Q In what capacity? A I had charge of the grain department.

Q The grain department? A Yes, sir.

Q Whereabouts? A At National Docks.

Q Who was your chief? A There was not any chief. I was acting chief clerk.

Q I do not mean that. Who was next over you? A Mr. A. M. Dickman.

Q Were you down there on Saturday the 29th day of July, 1916? A Yes, sir.

Q Did you have any conversation with anybody connected with the Johnson Lighterage Company at all over the telephone that day? A No, sir.

Q Did you make any arrangements that day for the continuation of the loading of ammunition or explosives on Johnson lighters on the next day, Sunday? A No, sir.

Q How late did you work there on that Saturday? A 5:30.

Q How late was Mr. Dickman there that day? Do you remember? A No; I do not remember how late Mr. Dickman was there.

Q When Mr. Dickman was not there who attended to the telephone in respect to the requests for the movement of cars? A In the absence of the chief clerk I did.

Q And who was the chief clerk? A His name was Kirk.

Q Was he there that day? A No, sir.

Q He was away all day, was he? A He was away all day; yes, sir.

Q If Mr. Kirk did not answer the telephone and arrange for the movement of cars then it was your duty? A Yes, sir.

Q Was there anybody else there who had that duty beside you and Kirk? A No, sir.

Q To your knowledge was any arrangement made with anybody for the continuation of loading of ammunition on Johnson barges on Sunday, July 30, 1916? A To my knowledge, no, sir.

Q And you would have had knowledge, would you? A I would have, yes, sir.

Q Because Kirk was away? A Yes.

Q And you were the only other person? A Yes.

Mr. Garrison. You may take the witness.

Cross examination by Mr. Skinner.

Q Is your recollection distinct, Mr. Higgins, as to what took place on July 29 and July 30 and July 28? A Is it distinct?

Q Yes; do you remember what happened and just what was done from day to day in the routine of your office there? You cannot do that, can you? A Well, the ordinary routine of work, that is all.

Q Yes; and the ordinary routine of work included arrangements for the storage or the anchoring and mooring of barges at North Pier, didn't it? A As the orders were placed, yes.

Q That was routine, wasn't it? It happened from day to day? A Yes, sir.

Q And you would not have a distinct recollection of what happened in the course of that routine for any particular day last summer—three years ago, would you? A Why, yes.

Q You would? A I have that recollection of that day.

Q Where was the office located with reference to Black Tom? A The office?

Q Yes; where you were. A On July 29 it was on Pier Four.

Q Right there on Black Tom? A Yes; Pier Four.

Q Yes; and you were there on July 29? A Yes.

Q And how late did you stay? A 5:30.

Q And did you see the barges or lighters that were at North Pier or in that vicinity? A No, sir.

Q Mr. Kirk you say was not there? A No, sir.

George A. Higgins, cross.

Q What day of the week was that? A The 29th was a Saturday.

Q Was he there on Friday? A No, sir.

Q He was not? (No answer.)

Mr. Garrison. Speak. The stenographer cannot get the shake of your head.

Q Was he there Thursday? A No; I think he was off about ten days.

Q You mean he was on a vacation? A Yes.

Q And you mean you know just when his vacation began and ended? A No, I do not mean that. He was off eight or ten days at the time.

Q And when did his vacation of eight or ten days begin? A Well, that I cannot answer.

Q When did it end? A Why, it ended on the 30th.

Q It ended on a Sunday, did it? A Yes.

Q This calling you up or calling your office up there and making arrangements for the placing of barges or lighters at North Pier happened almost every day, didn't it?

Mr. Garrison. I object; there is not the slightest evidence this man had anything to do with placing lighters or barges at North Pier or that anybody called him up about it.

Mr. Skinner. I do not mean their location.

The Court. I believe he has only testified to the location of cars.

Mr. Garrison. He has said he was the one that was called up when they wanted cars put at the North Pier for unloading.

Mr. Skinner. I accept the correction.

Q Now, this matter of being called up to have cars placed so that they could be unloaded to lighters or barges was happening almost every day, wasn't it? A Why, yes.

Q And could you tell us now whether there was any telephone call of that kind on July 28? A If there was I did not receive it.

Q Could you tell us if there was? A It would be either taken up with the agent or the chief clerk.

Q What? A I say it would be either taken up with the agent or the chief clerk.

Q The agent, meaning Mr. Dickman? A Mr. Dickman.

Q And it might be with Mr. Dickman without your knowing about it? A Why—I don't know. Mr. Dickman was not there that day I don't think.

Q On the 28th— A Oh! The 28th?

Q The 29th, rather. A No; Mr. Dickman went to the bank in the morning and I am not clear whether he came back that day or not.

Q Where did Mr. Dickman go on the 28th, if anywhere? A He was at the office all day.

Q He did not go out at all? A He was around the plant all day long; he was very seldom in.

Q And the 27th where was he? A He covered the regular routine every day, taking care of the elevators and all over.

Q And going to the bank was a regular routine? A Only on Saturday.

Q Do you say he went to the bank on Saturday because that was the regular routine or because you remember he went? A I remember he went.

Q You were the grain clerk? A I was head of the grain department; yes, sir.

Q Who else was in your office? A There were several clerks.

Q Several? How many? A Just a second. About fifteen.

Q About fifteen. And did you always answer the phone yourself? A No; we had a telephone operator and she would switch the party onto whoever they wanted.

George A. Higgins, cross.

Q Then I suppose you had extension phones on different desks? A Yes.

Q Can you tell us anything that happened on the 27th —27th now? A Why, no.

Q You have not the slightest recollection, have you, of what took place on the 27th in that office—I mean memory of it? A Nothing, outside of the regular routine.

Q And if you were to try to tell what took place on the 27th wouldn't you have to answer only of your knowledge of the routine? A Yes, sir.

Q And by your belief that what was usual and routine took place on that day? A Yes.

Q But without any memory of it at all? A Yes.

Q When Kirk was away you were the one, were you, that looked after the location of cars on request for unloading? A Yes; I acted as chief clerk, yes.

Q Chief clerk? A Yes.

Q Was that Mr. Kirk's title? A Yes.

Q Who was under you? A Well, we had as I say an office force, I guess, of 14 or 15.

Q What were your duties? A I had charge of the grain department.

Q Well, as in charge of the grain department what did you do, keep records or what? A I kept records of all grain going in and out of the elevators.

Q Anybody helping you at that? A I had one helper, one assistant, yes.

Q What was his name? A Why, I think it—I just forget his name now.

Q Were you in the office all day the 28th—or the 29th? A Yes, sir.

Q Every minute of the day? A Well, outside of lunch hour.

Q If anybody called while you were out would they have to wait or have to hold the phone until you came back? A Why, they would not have to wait because if I was out at lunch hour—went out to my lunch and took a

walk around and came back again, the operator would tell me who called and I would call them back.

Q Didn't people ever call and talk to some one else in your absence about the location of the cars for unloading? A Not that I know of. There was nobody authorized to handle that.

By the Court.

Q Did you have a vacation in that year too, Mr. Higgins? A No, I did not have no vacation that year.

Q Did you have one last year? A Last year, yes, sir.

Q What date was that? A The date of my vacation?

Q Yes. A Why, I went on July 15. I had two weeks' vacation.

Q And what date did it end? A I was back on a Monday, the 30th.

By Mr. Skinner.

Q Kirk was back on the 30th of July, was he? A No, sir.

Q No? A No, sir; Kirk did not come back to the National Docks.

Re-direct examination by Mr. Garrison.

Q You say you are not working now? A I am not working.

Q In answer to a question of Judge Skinner you said it was part of your regular routine to attend to the mooring of barges as the orders were placed. What had you to do with the mooring of the barges? A If the orders were placed I would put it up to the agent, Mr. Dickman, but they only—

Q What had you to do with the mooring of the barges? A But only in a telephone conversation.

Q What had you to do with the mooring of the barges? A Nothing whatever.

Q And what you meant was, if you got orders— A Over the phone.

Mr. Skinner. I object to leading.

Q What you meant was when you got an order from a consignee as to the fact that he wanted to get his goods you did something? A Yes.

Mr. Skinner. I object to the question.

The Court. I will strike the question and answer out because the objection came before the completed question was answered.

Q You said you did something when orders were placed? A Yes.

Q Tell us what you mean when you say orders were placed. A I would put the matter up to the agent, Mr. Dickman.

Q What do you mean when you say an order was placed? A If the consignee ordered a certain car placed I would take care of the placing—take the order over the phone and take care of the placing of it.

Q By placing you mean what? A Issue orders to the conductor to have the car placed.

Q By placing you mean what? A To have it where they wanted to handle the car.

Q Place it where? A Whatever point.

Q Whatever point for what? A For the handling of it.

Q What do you mean by the handling? A For unloading the car.

Q You would put the car where it would be unloaded? A Yes.

Q If it was ammunition where would it be put? A Put down at the North Pier.

Q Was working there—was having consignees unload their cars on Sunday a usual or unusual thing at Black

Tom when you were there? A Why, it was unusual while I was there.

Q Were you down there on Sunday? A No, sir.

Re-cross examination by Mr. Skinner.

Q Did you continue in the employ of the—what was it; the Storage Company or the Lehigh Valley Railroad? A Lehigh Valley Railroad.

Q After July 30, 1916? A Yes; I was there until October 1, 1917.

HUDSON MAXIM, sworn.

Direct examination by Mr. Garrison.

Q Where do you reside, Mr. Maxim? A Landing, N. J.

Q And what is your occupation? A I am an inventor —developer of inventions.

Q In what line? A Mainly explosives.

Q How long have you devoted your attention to explosives? A Since 1888.

Q And in general what has been your experience in the matter of explosives, scientific study, and so forth, of explosives—

Mr. Garrison. Will you agree to his qualifications?

Mr. Skinner. Certainly.

Mr. Garrison. All right; you need not qualify.

Mr. Skinner. We admit Mr. Maxim's qualifications.

Q You have invented high explosives? A Yes, sir.

Q And have dealt with them extensively, have you? A Yes, sir.

Q From a scientific standpoint? A Yes, sir.

Q Does the United States Government use any of your explosive inventions? A The multi-perforated smokeless powder was made by my invention—smokeless cannon powder.

Q What about Maximite? A Maximite is not in use any more.

Q Was it ever used by the United States Government? A Yes; it was bought in 1901.

Q And in respect to time, chronologically, where did Maximite come in so far as high explosives are concerned? A Maximite was the first high explosive to be fired through heavy armor plate and exploded behind the plate with a detonating delay action fuse.

Q In the world? A In the world, I think; that is, to the best of my knowledge and belief.

Q Now, what makes anything explode? I do not mean what sets it off but what in the constituent mass itself makes one thing explode and another thing not explode under similar conditions? A It is because an explosive compound has within itself the elements of its own decomposition. It does not depend on atmospheric oxygen.

Q And, therefore, some things have the characteristics of explosives and others have not? A Yes, sir.

Q What is the scientific difference between what is called a high explosive and other kinds of explosives? A A high explosive is one that is capable of being detonated; that is to say, of being caused to decompose by what is called an explosive wave which travels at a velocity of from 17,000, I should say, to 20,000 feet per second.

Q Then, as I understand it, detonation means a small explosion which sets off a big explosion? A Yes, sir; a detonator is a small explosion which sets off a big explosion.

Q And the distinction, as I understand it, between a high explosive and other kinds of explosives, is that a high explosive is one that is set off by a small explosive? A Yes, sir.

Q Whereas other explosives— A And the explosive which is not a high explosive as, for example, gunpowder, is decomposed or burned from surface combustion.

Q And does not require a small explosion to set it off? A Only requires to be ignited.

Q Ignited. After the impulse has been given, either by emission or small explosion, detonation, is there any other distinctive characteristic between a high explosive and other explosives? Or is the scientific action the same in each thereafter? A The action is different. An explosive like gunpowder is burned quite relatively slowly from surface combustion; and as an illustration, smokeless cannon powder in a gun burns at the rate of about four inches a second up to 35,000 pounds pressure per square inch; that is pure nitrocellulose smokeless powder; nitroglycerine compounds burns more rapidly; and the rate of combustion of a gunpowder like smokeless gunpowder is to the rate of combustion of a high explosive as four inches is to four miles.

Q As—I didn't get that? A As four inches is to four miles.

Q Yes? A About that.

Q In other words, the high explosive, when it is detonated— A Bursts—

Q —bursts with very much greater speed than another explosive? A Yes.

Q A low explosive? A Yes.

Q What is the cause of spontaneous combustion? A Spontaneous combustion—it depends somewhat, of course, upon the kind of thing that combusts. Take—

Q Well, I mean in general? A Take smokeless powder when it is impure as, for instance, when it contains acid, and not all of the nitric acid is gotten out of it; it will gradually decompose from the reaction of the acid with the nitrocellulose.

Q Then it will go up without any exterior cause, will it? A Yes. Pulverized coal, for instance, goes off—is ignited by spontaneous combustion from the absorption of oxygen in its pores; and take paint oil mixture. A cotton rag saturated with paint oil will absorb oxygen

from the air and heat and set fire to itself. That is called spontaneous combustion.

Q Now, at times in the history of the making of powder quantities of powder have been found so defectively made that they would go off of their own accord? A Yes.

Q That happened one time with the French, didn't it? A Yes. The Renard blew up from impure nitrocellulose powder.

Q Smokeless powder? A Smokeless powder.

Q What is the composition of the substance known as trinitrotoluol and commonly called T N T? A Well, it is a nitrated product of toluol.

Q What is toluol? A Toluol is a by-product made from—manufacturing of gas—coke, mainly.

Q Coking? A Coking, and manufacture of gas.

Q And you take this by-product of coking and treat it with nitric acid? A A little nitric acid.

Q And put in a little sulphuric? A Sulphuric, too, to take out the water.

Q And you get the T N T? A T N T.

Q And trinitro means— A Three molecules of nitric acid.

Q Of nitric acid? A Yes.

Q Now, what are the characteristics of T N T? A It is a very stable explosive compound. It is—oh, a little more than half, I should say, as powerful as nitrogelatine; not quite so powerful as picric acid, but it is one of the most stable—chemically stable of all explosive compounds.

Q And what do you mean by chemically stable? A That is to say, it does not tend to decompose. It stands a good deal of handling and time without decomposing chemically.

Q Now, what will cause the explosion of T N T? A It requires a strong detonator—a comparatively strong detonator, I should say; and can be detonated with a

No. 6 dynamite cap; but for a large mass it is better to use a No. 8 cap.

Q Yes. And by a small detonator or slightly largely detonator, you mean something to cause the initial explosion? A Yes.

Q You speak of the T N T? A Yes. It takes a bigger detonator to set it off when it has been cast into a shell and is solid than it does when it is in a powder form.

Q How do you get the T N T into a shell? Do they put it in solid or do they heat it? A They generally melt it and pour it into a shell.

Q It is in a jelly form? A Yes.

Q They heat it over the fire and pour it into the shell? A Yes.

Q And then it crystallizes? A Yes.

Q What was the state of scientific knowledge with respect to the explosibility of T N T by combustion, by ignition, by fire in July of 1916? A I don't know what the extent of the knowledge was, but there had been fires of T N T before that time, immediately after that—

Q Now, just one minute. Now, listen carefully to the question.

(Question repeated by the stenographer.)

Q "What was the state of scientific knowledge with respect to the explosibility of T N T by combustion by ignition, by fire, in July of 1916?"

Mr. Garrison. Now, can you answer that?

A It was known that T N T would burn up in large quantities without exploding.

Q And what is your scientific judgment today in respect to the explosibility of T N T by deficient, by combustion, by fire? A It is that it will burn in practically unlimited quantities without detonation.

Q Without explosion, you mean? A That is to say, without exploding.

Q Have you any instances that you can cite to the jury in respect to that matter? A Yes. In August—I don't remember—of last year—I don't remember the day—206,000 pounds of T N T caught fire in a magazine and burned up without detonation or explosion at Kenvil, in New Jersey, at the works of the Hercules Powder Company.

Q Do you know of any other instance?

Mr. Skinner. Well, I think it is obvious that the knowledge cannot be the doctor's personal knowledge. I object to the question unless it is made to appear that he speaks from personal knowledge. Hearsay statements of incidents of this kind—

The Court. I think that objection is pretty well taken.

Mr. Garrison. I won't press it.

The Court. Of course, the last answer stands because that is quite another thing.

Mr. Garrison. It's not a matter of any interest. But I do not understand the doctor as an expert of any character is limited to matters which are within the personal knowledge of the person. I always understood, for instance, that a physician could be asked about a Caesarian operation, whether it was reported successful, and how long it was performed. I understand he can state from his medical book or others' medical book, and say from a reading of this book that it was discovered in 1886. He may have been born in 1886, or 1896, and so forth. I always understood that an expert could give you a statement of the facts, not because he personally knew the thing, not because he was part of the thing, but because it is part of his cyclopaedic knowledge of the thing.

The Court. I do not think there is any doubt about your statement of the law. But the difficulty

is the state of the law does not cover the particular thing you are asking about now. What you are asking for now the statement of the particular facts and particular place, and those things will not be admissible, as I understand it, even from a scientific witness. Those are matters of fact which must be established outside of that.

Mr. Garrison. I do not care to press the matter.

Q Have you made any personal experiments with T N T with respect to its explosibility by ignition? A Yes, sir.

Q And what has been the result of your personal experiments? A That it will burn up without exploding.

Q In respect to the likelihood of explosion, what would you say in a case where upon a barge there was 100,000 pounds of T N T and 417 cases of detonators—to be exact, it is 1,005 cases of 100 pounds each and 417 cases of detonators? A I should say that there were present all of the conditions necessary to insure a high order of detonation of the T N T in case the barge should get on fire.

Q What would you say was the likelihood of explosion in a case where there were eight cars of T N T and 50 pounds each of T N T in boxes containing 100 pounds each, and a fire communicating itself to those cars, eliminating the question of any detonation?

Mr. Garrison. Confining himself entirely to the effect of ignition by fire.

Mr. Skinner. I think, Vice-Chancellor Garrison, that we perhaps both have the understanding that there is evidence in the case that there were eight cars of T N T, and possibly that is not yet so. We may be going a little bit on our understanding of the facts. The answers to the interrogatories speak of eleven

cars of high explosives without indicating what was in them. By your question do you refer to the cars marked H here on the map marked P. 16?

Mr. Garrison. I do.

Mr. Skinner. And shall it be understood that these cars contained T N T?

Mr. Garrison. I so understood. I so understood our answers to the interrogatories.

Mr. Skinner. I think it did not.

Q Proceed, please. A In the absence of external detonating means, it is my opinion that the T N T in the eight cars would burn up without exploding.

Q As a matter of scientific expertism in this line, if in respect of the 417 cases of detonators of which I have spoken, which I have assumed were on a barge within 300 feet or 400 feet—between three and four hundred feet, say, of the eight cars containing the T N T, or some of such eight cars, and a fire communicated itself was on the barge and set off some of the detonators, would it be possible for some of those other detonators to be thrown as far as the cars that are within three or four hundred feet of them? A I should think it would.

Q Well, is it more or less likely that they would? A I should think it would be very likely.

Q And what would be the effect of T N T of a detonator thus thrown at it or heating it? A Explode it, detonate it.

Q I want you to assume, Mr. Maxim, that there were eight cars of T N T as shown on Exhibit P. 16, and that at that place, after a given time, there was a crater some two hundred and seventy-five feet one way and one hundred and seventy-five another—let's get the exact measurements—

Mr. Skinner. It is in the interrogatories.

Mr. Garrison. What are the dimensions of that crater, Mr. Barrett?

Q —three hundred and seventy-five feet long, one hundred and seventy-five wide, and at the deepest point ten feet, and the cars, after the time mentioned are destroyed, and visible evidence of an overturn in the immediate neighborhood; what would you assume had happened to those cars or the contents? A They had exploded.

Q Assume that a man was standing within twenty-five feet of the exterior line of this crater at the time of such explosion, what would you say would be the condition of that man after the explosion and as a result of the explosion? A Well, he certainly would be killed.

Q Assume the presence of a man within the area of the crater at the time of the assumed explosion, what would you say had been the physical effect upon such a man? A He would have been blown to minute fragments without any question.

Q Assume a man on the ground at a point not nearer than fifty and not further away than seventy-five feet from the exterior of the crater at the time of the explosion, at the site of the crater, what effect would you say the explosion would have had upon him? A He certainly would be killed.

Q Assume another man on top of a freight car anywhere within one hundred and fifty feet at the edge of the crater at the time of the assumed explosion at the side of the crater, what would have happened to that man? A He would have been certainly killed.

Q Assume a man leaning against some pile of railroad ties, within say fifty feet of the edge of the crater at the time of this explosion, at the site of the explosion, what would have happened to that man? A He certainly would have been killed.

Q Is there any differences in effect in respect of an explosion of T N T in a railroad car elevated above the ground by the height of the truck of the car and an explosion on the ground or on water? A Yes, sir.

Q Explain the difference? A When a high explosive is detonated at an elevation above the surface of the earth it exerts very much greater action in a horizontal plane than when placed on the surface of the earth.

Q What about water? A And the same is true with respect to water, for water acts as a solid when it is affected by an explosive blast or when it is in the proximity of an explosive blast.

Q That acts as a solid? A Yes.

Q It gets so compressed that it is just as though it were a solid thing? A Yes, it acts as a solid.

Q Then if I understand you, the lateral effect of the explosion of T N T elevated above the ground—by lateral, I mean by that out each side—is greater than if it was actually on the ground itself? A Very much greater. If I may be permitted to add something illustrative of that? In the war they found that the projectiles exploding in contact with the earth or penetrating the earth deflected their blast up very greatly, and so an attempt was made, and successfully, to put a long detonating rod on the end of the shell, and I was engaged on that work, in the Naval Consulting Board, so that the shell would explode above the earth.

Q The Germans dropped some bombs of that kind on London, on poles, so the pole would hit the street and the bomb would go off and injure the houses? A I understand they did.

Q Explain for the benefit of the jury and my benefit and the Court's benefit, the mortar-like effect of an explosion? A When an explosive is detonated in contact with the earth's surface it forms a crater in the earth under it and the body of incandescent gases from the explosives are propelled by their own force upward into the atmosphere, expanding as they go up largely in the shape of an inverted cone.

Q Like a funnel? A Yes, sir, like a funnel. If I may proceed—

Mr. Skinner. Have you an answer to your question?

Mr. Garrison. Yes, that is all for the moment.

Q Then in layman's language, as I understand it, when the explosion goes off it bumps into the earth and then shoots up just as though it was coming out of a cannon? A Exactly.

Q Would such a mortar-like effect be greater in an explosion of four hundred thousand pounds of T N T in boxes of one hundred pounds each, in eight separate freight cars, or one hundred thousand pounds in one hundred pound boxes gathered together on the deck or in the hold, or wherever it was, of a barge, the latter being situated on the water? A It would be greater in the barge.

Q Which of the two assumed explosions that I have embodied in the previous question would exert the greater effect upon the ground, the earth? A The barge.

Q Why? A Because the quantity is larger in contact with the area of the crater to be formed.

Q You will have to translate that into layman's language. You are not assuming that the greater quantity is on the barge, are you? A From the greater concentration of the explosive.

Q The one hundred thousand pounds being together on the barge? A Yes. From the greater concentration of the explosive.

Q Now go on, please, Mr. Maxim. A You will have to repeat the question.

(The last three or four questions and answers repeated by the stenographer.)

A Yes. Greater concentration of the explosives. For that reason there would be a wave of greater amplitude set up in the earth or water, that is, the shock wave would be greater and more intense.

Q Assume two explosions at the site of Black Tom, one of whatever amount of T N T was in the eight cars creating the crater which is shown in this case on land at or near the place where the cars appeared on P. 16, and another, the other explosion of one thousand and five cases of T N T in one hundred pounds each on a barge, two or three hundred feet north of the North Pier, the former explosion causing a crater of three hundred and seventy-five feet long, one hundred and seventy-five feet wide, and ten feet deep, and the latter, the barge explosion, causing a crater in the bottom of the river of about one hundred and twenty-five feet one way and seventy feet at its widest point and narrower at other points, and about fifteen and a half feet deep below the previous floor of the bay or river; which of those two explosions in your judgment would cause the most sizeable disturbance of the earth on Manhattan Island? A Explosion of the barge.

Q Why? A Because of the greater intensity and duration of the action of the gases and of the explosion upon the surrounding media; also from the fact that a part of the media was water, which transmits shock much better than does the earth underneath.

Q Assume that a barge loaded with a thousand and five cases of T N T, one hundred pounds each case, and the detonators which are going to explode that material, about three hundred feet north of the North Pier of P. 16, and rows of storehouses running from R back to and including F, the roofs of which are lifted off as a result of the explosion, the upper part of the building; would you say that the effect on those buildings was likely to be caused by the explosion of the T N T in the barge and at the point indicated in the question?

Mr. Skinner. I object to that question as containing an assumption which I think is not warranted by the evidence. The evidence does not contain that the roofs of all of the warehouses named by the Vice-

Chancellor were taken off, but only of one or two of them, and as question turns a great deal upon the size of the effect I object to his putting into it an assumption as to the size of it that is not warranted by the evidence.

Mr. Garrison. What do you say the evidence shows?

Mr. Skinner. The evidence shows the taking off of the roofs of Storehouses P and Q.

Mr. Garrison. All right; and you deny that the shock had any effect on the other storehouses?

Mr. Skinner. We don't deny anything of the kind. We object to your putting it into the question.

Mr. Garrison. I will put into the question whatever you say was the effect of the explosion on the warehouses.

Mr. Skinner. I shall not undertake to frame the question for you, sir.

Mr. Garrison. I was not asking you to frame the question for me. I asked you what the fact is in the case with respect to the destructive effect on the warehouses. Now you state the fact and I will adopt your definition of the effect of it.

Mr. Skinner. If the assumption is contrary to the fact the jury will understand it, and I will call their attention to it, and I will let it go at that.

Mr. Garrison. Will you read the question?

The Court. You say you renew the objection?

Mr. Skinner. I withdraw it.

(Question repeated by stenographer.)

A It is my opinion that the explosion of a barge so loaded in such close proximity to the warehouses, would have very serious effect upon them, producing extensive structural damage.

Q What would you say the effect on the warehouses would be of the explosion at the site of the crater on land of the T N T amounting in the aggregate to 400,000 pounds in the 8 cars at the places indicated on the map? A If the walls of the warehouses were standing at the time of the explosion the effect of the T N T from that distance would be much more severe than the effect from the barge.

Q Assume there only had been one explosion and that was the barge explosion, where would that most likely affect those structures, those warehouses to which I have called your attention; where would the effect of that explosion appear most on those buildings? A It would unroof them.

Q Why would it tend to go toward the roof? A Because it would act like a very strong wind might act, and it would produce first an outside pressure on the wall of the building and then the reaction of the wave, lessening the pressure on the outside of the wall of the building with respect to the atmospheric pressure inside of the building, would tend to throw the walls of the building out in the direction of the explosion and throw them down bodily and carry the roof off at the same time.

Q Would the explosion on water as assumed in these questions have a more mortar-like effect than the explosion on the land? A Yes; it would have.

Q In other words, it would be like a funnel, go out like this? A Yes.

Q Would that have anything to do with striking the roofs of the buildings? A Yes; it would be likely to strike the buildings higher up; that is the maximum pressure would strike the buildings higher up.

Q Than an explosion at the cars? A Yes; the cars would strike the buildings lower down. Of course the cars, on account of their close proximity, would have a very disastrous effect on buildings near too.

Mr. Skinner. What?

A I say that buildings so near—that the explosion of such quantity of dynamite in the cars would have a disastrous effect on buildings so near.

Q You assume it is dynamite. It is T N T. A I mean T N T. It is the same thing.

Q I was just going to ask you that same question. What would have been the effect in your judgment on those buildings of the explosion at the site of the crater on land? A It would have shattered the walls very much and they would come down as a mass of brick instead of the whole wall coming down.

Q It would have sort of pulverized them? A Yes; knocked them brick from brick.

Q I show you a photograph admitted in evidence here, Underwood 2, and the legend on the back of which is "Extreme end of North Pier where man is standing showing effect of explosion upon box car standing on the track on the end of the pier; picture taken from north looking south and showing car thrown southward by explosion." Now that car as shown in that photograph is the extreme end car here, P. & R. 12275 on Exhibit P. 16? A Yes.

Q And the evidence is that that was taken from the north? A Yes.

Q So that you are looking at the north side of that car? A Yes.

Q Assume an explosion at the site of these cars here where my hand is on this map, at the site of the crater on land, would it be scientifically possible for that effect on the north side of that car out here to have been produced by the explosion at the site of this crater on land? A It would be utterly impossible.

Q Where would an explosion have to come from to produce the effect shown in that photograph on this car on the end of the North Pier? A It would come from a direction at right angles to the end of the pier, which I understand is a northeasterly direction.

Q Up here? A Yes.

Q North of the pier? A Yes.

Q Such an explosion to produce that effect on the car would have to come from the north of the pier? A Yes.

Q It could not have come parallel with the pier? A Yes.

Q You mean no, don't you? A I did not catch it.

(Question repeated.)

A I mean no. No.

Q It could not have come parallel? A No; of course not.

Q I show you Exhibit A. 1, Harrison, taken August 1, 1916, from land end of North Pier to the south of the same, looking northeast before fire had destroyed pier. This shows the south side of the North Pier. Now, let me get that on the map. That was taken from here somewhere and shows the south side of this pier. Does that show any effect whatever of an explosion at the site of the crater on land? A It does not.

Q I now show you Underwood 8. This photograph shows a 5.11-inch shell imbedded in the superstructure on the north side of South Pier. The photograph is taken almost directly north and in an almost straight line from North Pier toward the South Pier, the camera being over here somewhere. This shell is imbedded in the superstructure of this South Pier. Would that be possible, considering the angle at which the shell entered the wood, as a result of an explosion at the site of the crater on land? A It could not have been a possibility even, projected by the explosion of the cars.

Q A shell to have entered that piece of wood at that angle must have come from what angle? A Come from the north.

Q Up here somewhere? A Yes.

Q I show you Underwood 4, car P & R 12275. This photograph is taken from the extreme east end of the

North Pier. I want you to look at that a minute. Now, this is this end car again. It is taken from the extreme end of the pier and shows the north side of that car. Where would you say the explosion came from which destroyed that car? A From a northerly direction.

Q In respect of the explosive effect of T N T in boxes in these eight cars that we have been talking about, what would the number of the cars have to do with the resultant effect of the explosion? A The fact that the explosive was carried in eight cars standing end to end would greatly increase the extent of the immediate lateral blast in the direction transverse to the axis of the train.

Q At right angles do you mean? A Yes; at right angles to the train, but at a considerable distance the action would be very much less for the reason—

Q Very much less than what? A Less than if the mass of the explosive were in a single pile, because there would be at the start much more air set in motion and more energy consumed in displacing air by the cars strung out in a long line like that than there would be if the explosive were all in one pile; but at a distance the intensity of the action of the atmospheric wave would be very much greater because there would be less air set in motion with respect to volume at the start and the velocity of the air would be greater if the mass of the explosive was more concentrated.

Q Which would be the greater in intensity say in respect of near objects and far objects of the explosion 1005 cases of T N T on a barge situated say three hundred feet north of the North Pier? A The intensity of the effect through the earth by the explosion of the barge, both at near distances and at long distances, would be greater than the effect of the explosion of the cars on the land. I would like to continue a little.

Q All right, sir; go on. A The location of the explosive in the cars being four feet about above the ground,

and the surface of the ground being in the neighborhood of eight feet from average high water, as near as I could get to it by measurement—and I went over there and measured it—the effect of the explosion of the cars would have to be transmitted—that is to say I mean the shock or wave of transmission through the earth, which is in a sense a sound wave, because it travels at the same speed as sound both in air and in the earth—the explosive would have to transmit this shock downward to the underlying earth and then horizontally or in a lateral direction through the earth to distant objects; and sand and gravel and cinder, which were the substances underlying the seat of the explosion, would not very readily transmit a shock in a lateral direction or horizontal direction.

Q Assume that the fire communicated to the T N T cars consumed no T N T whatever so that it was all there at the time of the explosion, how much greater in effect was the explosion of the T N T in the eight cars than if there had been only say one car there? A The depth of the crater would have been substantially the same and the earth shock substantially the same—that is to say the intensity of the earth shock would have been substantially the same with one car as with eight cars—would not be quite so much but it would be approximately as much.

Q What about its effect on surrounding objects? A Its distant effect would be not much greater than one car.

Q What about objects near to it? A The atmospheric effect near to it would be very much more intense.

Q In the eight cars than in the one? A In the eight cars than in the—Oh! I beg your pardon. I will correct that answer. The effect in a lateral direction or horizontal plane from the explosion of one car upon nearby objects would not be much greater than the explosion of eight cars—not much less than the explosion of eight cars—excuse me.

Q Is there some scientific rule about the relative distance between quantities of explosives and objects that may be injured by them? A Yes, sir.

Q What is it? A The distance between a point upon which the transmission of the effect is to be considered from the exploding mass with double the quantity of explosive would have to be eight times as great to produce an equal intensity upon the object. It has been found that when exploded on the earth, the atmospheric effect is even less than that. This effect that I have referred to is when an explosive were to be suspended so it could extend equally in all directions. When exploded on the surface of the earth the quantity would have to be considerably larger in order to maintain the same intensity of effect; that is to say, it would have to be more than eight times the quantity.

Q My attention, Mr. Maxim, is called to the effect that the weight in pounds in each of the cars that I have been mentioning was 57,500 pounds. If each time I mention the contents of the cars I had said 57,500 pounds instead of 50,000 pounds, would it have altered your answers? A No, sir.

Q T N T is a high explosive? A Yes, sir.

Mr. Garrison. Take the witness.

Cross examination by Mr. Skinner.

Q Doctor, T N T is a very powerful explosive, is it not? A Yes, sir, it is a very powerful explosive.

Q And your experience with all kinds of explosives has been great, has it not? A I have had considerable experience.

Q Your investigation of them? A Yes, sir.

Q Have you not found in that experience that they play strange freaks sometimes? A They do things often which are unexpected of them, owing to the lack of understanding of the persons operating with them or handling them. I cannot say that the explosive itself is freaky.

Q Well, the effect of the explosive— A It is often unexpected.

Q —varies a good deal according to the surrounding conditions and circumstances, does it not? A In what respect?

Q Well, in any respect. Is it not true that the effect of any explosive being exploded will be determined a good deal by the conditions that surround it, the position it is in, the physical things that are near it, the condition of the atmosphere—all sorts of things? A When it explodes or when you cause it to explode?

Q Well, when it explodes? A It acts differently when it is in proximity to resisting bodies than it does when there are no resisting bodies in proximity, by being deflected away from the resisting bodies.

Q And is it not true sometimes that one man is badly hurt or killed where another man within the same distance from the explosion is practically uninjured? A That does occur; that does occur when there is sufficient—resisting by deflecting bodies of sufficient mass intervening between the man that is not injured and the explosive blast.

Q Well, T N T burns, doesn't it? A Yes, sir; it burns.

Q And melts? A Yes, sir.

Q And when melted or in this molten condition from heat, is it not especially susceptible to explosion by detonation? A It is more susceptible the higher the temperature.

Q Yes. A And the heat of the consuming flames is absorbed by melting the T N T; also again by volatilizing the liquid T N T; and the greater the rapidity of combustion is occasioned by the presence of a greater mass of flame causes a greater volatilization of the liquid T N T which carries the zone of flame further away; so that it is equalized—the temperature is equalized in that way and prevented from heating the T N T to a detonating point; and in that way—

Q What is the detonating point? A Of T N T? A little over 300, I think, centigrade.

Q 300 degrees? A Yes, I don't know the—the melting point is about 80 and the ignition point is about 300.

Q And that is also the detonating point, isn't it? A If it is confined it would be the detonating point. If it is heated up to 300 degrees of heat in a closed state I should say it would be likely to detonate.

Q That is, detonate itself? A Yes, be self-detonating.

Q In other words, given a sufficient temperature? A It will detonate itself, yes, sir.

Q Given a certain temperature ignition becomes detonation, doesn't it? A No, sir; ignition cannot raise the T N T to a sufficiently high point to detonate it on account of the heat absorbed in melting the T N T, volatilizing it, and the displacement of the zone of flame by the volatilized T N T.

Q But the temperature finally gets to the point where ignition causes self-detonation, or the T N T detonates itself, as you express it? A No, sir, not unless the T N T is confined.

Q Confined, yes. A In a shell, for example.

Q Well, in a chamber? A No, it would not be confinement enough. It depends—if there were a big steel chamber, where the pressure could be greater, it would be all right.

Q Are you speaking of a temperature of 300 degrees?

Mr. Garrison. Centigrade.

A 300, yes.

Q Centigrade? A Yes, sir.

Q Are you? A Yes, sir.

Q Now, this condition that we are speaking of, of ignition by burning T N T, leading to self-detonation, which you say is true if T N T was confined—that condition is increased, that likelihood of self-detonation is increased if the temperature is increased, isn't it? A

Yes; but the temperature is a portion of the confinement.

Q Well, it may also be a portion of the heat applied to it, may it not, from outside? A Yes. If a shell containing the T N T should fall into the liquid T N T, melting the thing flowing out from the cars, then the confined T N T in the shell would detonate and detonate the whole mass.

Q Yes, and if T N T, no matter in what contained—I mean laying aside for the present the character of the container—if T N T reached a temperature of two or three times 300 degrees, then it would be more likely to self-detonate, would it not? A Yes; I think it would be already detonated before it would arrive to three times the detonating temperature.

Q And when we speak of the term white heat—of course, you are familiar with it? A Yes, sir.

Q That is several thousand degrees temperature, isn't it? A Well, several thousand—it depends, of course, on what is heated.

Q Fahrenheit? A It is over 2000.

Q Centigrade? A No, Fahrenheit in that case.

Q Yes. Now, when T N T is molten, though, it may not yet have reached the point of self-detonation because not confined, it is certainly much more perceptible to self-detonation—or to explosion by a detonator from without, is it not? A As the temperature is raised of all explosives the ease of detonation or the size of the detonator required to set off the explosive is less.

Q Now, if the T N T is in eight cars end to end— A Yes, sir.

Q And there comes to it in a heated condition a jar or blow, on any part of that heated mass, you would expect an explosion of the whole mass, or at least a large part of it, wouldn't you? A No, sir; it would depend upon the size of the blow.

Q Yes; well— A Upon the intensity of the action of the blow.

Q Well, a shell striking it would be sufficient, wouldn't it? A It depends upon whether the T N T were confined when the shell entered it and what lies in the shell. A projectile thrown from guns can be shot through a box of melting T N T without exploding it.

Q Well, Doctor, when you were asked on your direct examination about the explosion assumed to have taken place on a barge, did you not say that that might have been caused by a shell striking it?

Mr. Garrison. No.

The Witness. No, no.

Mr. Garrison. He did not say that. He said the detonators would set it off. He said if a fire set off the detonators you had an ideal condition for explosion. He didn't say a word about the shell.

Mr. Skinner. I think I am right.

Q In your direct examination you at least said that T N T might be set off by being struck by a shell? A No.

Q Well, do you say so now? A I say that if the shell was passing at sufficient velocity and the liquid T N T were sufficient to confine the shell passing through it, it would detonate it; but it would take a very high velocity and strong confinement such as could not have been obtained under the conditions over there.

Q Suppose— A To illustrate that, if you will allow me. I have fired a rifle ball at high velocity through T N T and the impact of the rifle ball does not explode the T N T whether melted or in a solid state.

Q Then, if you had a mass of molten T N T would you, without fear at all, give it a blow—a light blow with a hammer? A Yes, sir.

Q Would you expect that T N T to explode by friction if friction were applied to it? A No. The tem-

perature melted of T N T is only about 80 degrees centigrade.

Q And what is that Fahrenheit? A Well, 174, I think it is. You multiply it and divide it—multiply it by 9 and divide it by 9 and add 32; something like that.

Q Suppose a shell should explode in the T N T instead of going through it; what would happen? A It depends upon what the shell is loaded with.

Q Depends on what? A It depends on what the shell is loaded with. If it is loaded with black gunpowder, it would not detonate it. I tried it the other day. It would not do it.

Q You tried it with a rifle bullet, you mean? A I tried it by using a detonator of black gunpowder and melted T N T—

Q Small quantities in each case? A Exploded the detonator with black powder and it didn't explode the T N T.

Q Suppose it were something else? A If the shell was loaded with T N T, and the T N T in the shell detonated as it entered the other T N T, the whole thing would go.

Q If the shell was loaded with the T N T and it exploded in another mass of T N T it would certainly detonate and explode that mass, wouldn't it? A Yes.

Q If a shell was loaded with any other high explosive, other than T N T, your answer would be the same, wouldn't it? A If it was—if it contained picric acid, and picric acid detonated, or guncotton and the guncotton detonated, the result would be the same.

Q Eh? A Or, if it contained a mixture of nitrate of ammonia and T N T.

Q Well, you are familiar with the explosives that are put in shells, aren't you? A Well, somewhat.

Q And would not a shell loaded with any of the highest explosives that you are acquainted with? A Any of the high explosives that are used in modern warfare, ex-

ploding in a mass of melted T N T would detonate the entire mass of T N T.

Q Yes. Now you were shown a number of photographs, showing the effect on North Pier and on the north side of the North Pier? A Yes, sir.

Q Do you remember? A I do, yes, sir.

Q Three of them here before you now? A Yes, sir.

Q An explosion on a barge out on the water north or northeast of the North Pier would have produced that effect, would it not? I think you said so. A This effect, yes (indicating photograph). Yes, sir.

Q You spoke of T N T as one of the most stable explosives. That expression stable was used by you in a comparative sense, wasn't it? A In a chemical sense, chemical stability. It is not so insensitive to shock as some other explosives; it will not stand to be fired through as heavy armor-plate as certain other high explosives.

Q Relatively stable then? A It is chemically very stable; very, very stable indeed.

Q Oh, do you mean by that that it is very hard to set off? A No, I mean that it is not so hard to set off on account of that—of its chemical stability, but on account of its resistance to the influence of detonation.

Q The distance that you were asked to assume that the barge was at was, I think, sometimes stated at one hundred and fifty and sometimes two hundred feet away from the North Pier.

Mr. Garrison. No; I didn't state anything about a hundred and fifty; I said about three hundred feet.

Mr. Skinner. I am wrong, sir, then. Two or three hundred.

Mr. Garrison. I said three hundred feet. I never attempted to place it nearer than three hundred feet.

Q Would you expect the explosion of a hundred thousand pounds of T N T on a barge to have as much effect

upon structures within say six hundred feet? A Yes, sir.

Q Would not distance make a considerable difference? A The intensity would decrease as the square of the distance.

Q Yes; and if the distance was twelve hundred feet? A It would decrease inversely to the distance.

Q Please translate or work it out for us? Instead of three hundred feet from—let us assume that the object affected is fifteen hundred feet away from the barge exploding; how would you express that in comparison with the effect upon an object three hundred feet away? A It has been found that an unbarricaded magazine, sir, is dangerous to structural buildings—it is likely to produce great structural damage to buildings if it be nearer than three thousand six hundred and seventy feet; if those buildings had been three thousand six hundred and seventy feet away they would have not been so likely to have suffered very great structural damage, but any distance inside of that they are likely to suffer great structural damage.

Q You do not mean any distance within that three thousand, that it would suffer the same damage? A No, they would suffer more and more as they were nearer the explosive.

Q Yes. A Yes.

Q And when it was twenty-five hundred feet it would not suffer much, would it? A I would think it would suffer considerably. Twenty-five hundred feet, yes, being elevated as they were, the barge being low in the water and projecting its gases in great velocity, that the buildings being high above the ground, it would have very serious effect upon them at that distance—two thousand feet, you say.

Q Were you acquainted with the explosion on Ellis Island?

Mr. Garrison. Ellis Island?

Q I beg your pardon, I withdraw the question. Now, if this T N T that was in cars—the explosion of it would have a greater effect than if T N T was rested on the ground, I understood you to say; is that right? A It would have a greater effect in one way and less in another, depending on the effect you are looking for.

Q Would the greater effect be a horizontal effect—its effect horizontally? A The effect of a hundred thousand pounds exploding in one mass would be to project the surrounding air outward with a given velocity. Now if we only had half that quantity it would—if we had, I mean to say, double that quantity, or two hundred thousand pounds, it would increase the velocity of the surrounding air projected outward, about, I should say, thirty odd per cent., and that would give it about fifty per cent. more striking energy. The same law holds good in the projection of air or the transmission of air outward as a projectile from an exploding body that obtains in a gun; if you double your velocity of your projectile you have to have four times the propelling energy on your shell, and if you have only half the quantity of the explosive behind that projectile, your projectile being of a given weight, you would only get about sixty per cent. increase in velocity—or we would get—wait a minute—you would get—let me re-state that. If you used twice the powder charge you would get I should say about—using twice the propelling energy, not necessarily the powder charge—twice the amount of pressure during the travel of the projectile, you would get increase of velocity of about twenty-five per cent.

Q Twenty-five? A I should think so. You would get about quarter greater velocity. It takes four times the energy to get double the velocity. You must apply four times the energy to get double velocity.

Q Then instead of a hundred thousand pounds if you had four hundred thousand pounds the explosion would have double the velocity? A No; it would have less

velocity than a hundred thousand pounds of T N T in one pile, because of the greater concentration of the mass of T N T in the single pile.

Q Will you be good enough just for the minute to leave out the assumption that a hundred thousand pounds is in one pile? Just for the minute. A Yes, sir.

Q Now just tell me, a hundred thousand pounds of T N T exploded and four hundred thousand pounds exploded, assuming the same conditions for both, which would have the greater explosive force, and how much greater would one be than the other? A The greater quantity would have a proportionately greater explosive force.

Q If the greater quantity is four times the greater explosive force, it would be in what proportion? A The explosive force liberated by the mass would be four times greater, but the effect upon the surrounding air, to transmit explosive shock through the air or water, would depend upon the distribution of the mass.

Q What do you mean by the distribution of the mass? A Whether it is strung out in a string of eight cars or in one pile.

Q I was asking you to give your answer on the assumption that both masses were in the same—relatively the same distribution of arrangement? A Then you would get—you would have four times as much energy generated by the four times as much explosive.

Q You were asked about the seismic effect of the explosions, the two explosions that were described. Does that mean the effect upon the earth as conveyed by vibrations through the earth? A The effect of the sound-wave passing through the earth, the wave of compression passing through the earth, which travels at the same speed as sound through the earth.

Q That is a sound-wave? A Yes; it is a large sound-wave.

Hudson Maxim, cross.

Q Well, besides producing a sound-wave the explosion produces an air-wave? A That is a sound-wave, too. It is a wave of the same character.

Q But it is a different wave? A No, the same in the air-wave, only degree.

Q It is a different wave though of the same kind? A Not necessarily. You could beat a drum with T N T if you wanted to and get the same wave.

Q When the T N T is exploded the wave goes through the earth? A Yes, sir.

Q And when T N T is exploded the explosion sends a wave through the air? A Yes, sir; in the air the amplitude or travel back and forth of the wave is much greater than it is in the earth.

Q And the wave going through the air will blow out panes of glass within a certain distance? A Yes; within a certain distance.

Q And when those panes of glass are blown out you ascribe them to the air-wave and not to the earth-wave? A The glass it blown out by the air-wave.

By the Court.

Q What is the certain distance within which the air-wave would blow out the glass? A If you will allow me to explain the action of an air-wave on glass—

Q If you will just tell us—what I want to know is— A Well, it depends upon the character of the country over which the sound-wave passes, and the height of the buildings—and the height of the buildings. I have no personal experience in the matter beyond what I have seen and read, but I understand that glass has been broken by some of the large explosions to a distance of forty miles.

By Mr. Skinner.

Q The effect produced by the air-wave would be greater from the explosion of four hundred thousand

pounds, and would be experienced at a greater distance, than by the explosion of a hundred thousand pounds, assuming them both to have been exploded under the same conditions and circumstances? A Yes, sir.

Q And if the T N T was exploded at an elevation above the ground—I mean the same quantity of T N T now—would not the effect of such an explosion of any given quantity through the air, this air-wave, be greater than if it was exploded on a barge on the water? A If you will repeat the question?

Q Not elevated, but lying on the barge?

(Question repeated by the stenographer.)

A And under the same circumstances, did I understand you?

Q No; I am giving the circumstances different now. In that one case the quantity—while the quantity is the same the T N T is elevated above the ground in cars, and in the other case it is lying on barges? A Yes; it would have a very much greater lateral effect, the quantity and distribution of the explosives being the same.

Q Exactly. A Atmospheric effect, I refer to.

Q Yes. By the way, does not the explosion of any considerable amount of high explosives send a wave out and is there not then a return air? A The wave of compression moves outward and then there is a reaction, of course, to fill the void behind that—that is the law of acoustics, the travel of sound-waves through the air. There is no reaction of the length of the wave.

Q So that objects that are within the range of the effects of that explosion may be blown out and sucked back? A That is what I was going to explain—

Q Beg pardon? A That is what I was going to explain. The wave of compression on glass presses it in and puts the glass under tension, and then as the partial vacuum of the wave follows immediately behind the wave of maximum compression, the glass springs

outward to fill the void and push—accelerated by the atmospheric pressure inside of the building in connection with the outside pressure, throws the glass out in the street.

Q But what I asked you and what you have been describing is true of objects generally and not especially of glass with air behind it; is that not so? A It is to a certain extent true, of course, with all masses.

Mr. Garrison. Let me hear that.

(Answer repeated by the stenographer.)

A Yes, but the—

Mr. Garrison. Masses.

Q Did you want to finish it? A I was going to say, but the effect on the light body like glass, which has but little mass, is much more pronounced than upon a heavier body, that is, for a given amount of force exerted upon it by the atmospheric wave.

Q Doctor, if there was a recording instrument in a building five stories high, recording any disturbance, even the jar of the table on which it stood, any pressure applied to that table, such an instrument you would expect to record the explosion of a large mass of T N T if it was within sufficient distance? A Yes.

Q And you would expect it to record that in proportion to the size of the mass exploded, would you not? A No; in proportion to the intensity of the action.

Q Assuming that there are two explosions both in the same place, both of the same substance, would not this instrument that records a jar record, show, the greater jar from the explosion of the greater mass? A Not unless the medium through which the shock were conveyed would be identical and the condition under which the explosives were to be detonated would be identical.

Q Well, the medium would be the air, wouldn't it, the same air wave that would blow out the glass from the windows would also jar the table, wouldn't it? A The wave which would actuate a recording instrument of the character to which you have referred unquestionably would be by the earth's shock and not by the air shock; that is to say the instrument would be actuated by the earth shock rather than by the air wave.

Q It would? A Yes, sir.

Q Well, when the glass is blown out is there not from that air wave something like a blow? A The glass at that distance would be blown outward into the street. It would not be blown into the building and there would not be much transmission of shock through the walls of the building and through the windows to the instrument, but the whole building would vibrate by the earth shock.

Q But wouldn't anybody standing within sufficient distance of the explosion feel a blow or something like a blow? A They would feel in the drums of their ears the atmospheric pressure as it passed by.

Q They might be actually pushed right over? A If they were near enough to the explosion, yes, sir.

Q And they might be blown a number of feet if they were near enough? A Yes.

Q And if they were farther away although not on their feet they would still feel an impact? A Yes.

Q And so the table might feel the impact? A Yes.

Q And then record it by this instrument? A Yes.

Q And if the impact came from an explosion of 400,000 pounds you would expect the recording instrument to record that as greater than if the explosion came from a hundred thousand pounds in the same place the same time, isn't that so? A If the hundred thousand pounds were exploded in the same place under the same conditions and at the same distance it would have a greater atmospheric effect.

Q Which would? A The larger quantity.

Q Certainly. And record a greater degree of jar upon this instrument? A I do not think that either of them would be responsible for the action upon the instrument. It would be the earth wave in my opinion. That is, it is my opinion that it is the earth wave which would affect an instrument of that kind.

Q And if this instrument were jarred then by somebody pressing on the table or pushing it or leaning against it and you saw something recorded on the instrument you would not think that that was caused by the person pressing against it; you would say it was done by some earth shock, would you? You would not say that, would you? A I do not get your—

Q If you saw that the instrument registered something of shock— A Yes.

Q —and you knew that somebody had pushed the table or jarred it in some way— A Yes.

Q You would assume, would you not, that the instrument had recorded that jar or shock of the table and not something that had come through the earth, would you not? A If the instrument were setting on the table it would represent shock coming through the earth.

Q Well, then, would a jar by anybody pushing against the table—would you call that a shock coming through the earth? A No; coming through the person who gave the shock.

Q Yes; through the party? A Yes.

Q And you would expect the instrument to record it? A It would depend on the character of the shock and the character of the instrument. To what extent a man can produce the same effect on a seismograph that an earthquake could I think is open to some question.

Q If you knew the instrument recorded a slight shock such as a slight jar upon the table, and you found that instrument recording in a way that showed that it had received a shock, would you say that was a shock that

had come through the earth and not a shock that had come from somebody jarring the table? A I do not get your meaning at all.

(Question repeated.)

Q You would not exclude the jar given to the table by the person as the cause of that registration, would you? A I do not get your meaning. I may be dense, but I cannot get the meaning of the question.

Q Perhaps it is my fault. Let me state it again. If you know that the instrument records a jar given to the table by somebody touching the table— A Yes.

Q You know that fact? A Yes.

Q And then you are told that the instrument has recorded a jar— A Yes.

Q You would not exclude the possibility of somebody having touched or jarred that table as the cause of that registration, would you? You would not say that it must be something coming through the earth, that it could not have come from somebody jarring the table? Now, isn't that plain?

The Court. What he means is—

A I get your meaning. A shock traveling through the earth travels at very great velocity, much greater than sound—more than twice as fast as sound—and the shock that would vibrate a needle of a recording instrument would have to be very quick on account of the smallness of the mass of the needle, and a shock like a person would give to a table would not actuate a needle in the same way that a vibration through the earth would actuate it, transmitted by an explosion, would not give the same deflection to the needle.

Q Not as much? A No; not as much.

By the Court.

Q I suppose that would depend on how heavy the person hit the table, wouldn't it? They might knock

the table over. A It would depend upon whether the person hit the table with a hammer—but depending on the character of the instrument. I do not know what character of instrument you are talking about at all, but there are kinds of instruments which would be affected more by the earth shock than by a person being thrown against it and there are other instruments that would be affected in a reverse manner.

By Mr. Skinner.

Q Exactly. A Of course I cannot tell without knowing the character of the instrument.

Q In answering the hypothetical questions that were put to you by Judge Garrison, questions involving the effect of explosion upon the warehouses, how far away from the warehouses were you assuming the explosions to be?

Mr. Garrison. Which explosion?

Q You remember that you were asked about the possible effect of an explosion upon the warehouse; do you remember that? A Yes.

Q And the barge was spoken of? A Yes.

Q As the site of the explosion. How far away from the warehouse were you assuming the barge to be? A I think you stated two thousand feet.

Q No; in Judge Garrison's question. A I do not know the exact distance of the warehouses from the barge, but if the warehouses were nearer than say 3,670 feet they would be likely to be—to suffer structural damage in proportion to their greater nearness than that.

Q In direct proportion? A No; not in direct proportion, but as the square of the nearness.

Q And did you have in mind any distance in feet as the distance of the barge from the warehouses? A I had in mind that it was assuredly less than 3,600 feet.

Q And that is all that you had in your mind in definition of the distance of the barge from the warehouses, that it was less than three thousand plus feet? A I do not get your meaning.

(Question repeated.)

A Yes.

Re-direct examination by Mr. Garrison.

Q In answer to Judge Skinner's questions, Mr. Maxim, you spoke of the effect of a heat of 300 degrees centigrade on T N T provided that T N T was in a molten condition and confined. Is that correct? A Yes.

Q Would it be possible to secure an amount of heat to detonate T N T if T N T were in a freight car? A No, sir.

Q Or on the ground? A No, sir.

Q Then by confined you meant in some steel thing, like a shell or a steel chamber? A Yes.

Q Some place where the gases and the heat could be intensified? A Yes; when the gases would not expand and free themselves and keep down the temperature.

Q Now, Judge Skinner also elicited from you some information with respect to the effect of compression and suction; is it a fact that an explosion with respect to any stable object having magnitude, having weight, that it—well, in the first place, the effect is by the compression of the air?—I am not talking about vibratory shock through the earth— A Yes.

Q That is just as though somebody hit you with a steel bar? A Through the earth, yes.

Q No; through the air entirely; through the air; the effect of compressing the air is to hit it just as though it were hit with a solid, isn't it? A Not just as though it were hit by a solid. It is not so sharply thrust as if hit by a solid.

Q What would you compare it to; as though hit by what? I have not the scientific terms. But you are hit

with something, aren't you? When the air, compressed by an explosion, hits a wall, something hits that wall? A Yes.

Q What is it? A It is like the shock from a projectile hitting a man and killing him, passing near to him without striking him. Although it is an elastic shock it is comparable to a heavy blow struck by a solid object.

Q That is just exactly what I was trying to say, although I was not very scientific. Now, supposing that we have an instance of a man located on a barge on the North Pier here, facing east, so that he has his back to the site of the explosion of T N T on land, and he is standing on the left-hand side of his barge, to wit: the north, and as a result of the explosion, wherever it came from, he was blown from the left-hand side, north, to the right-hand side, to the south of his barge; would you say that that was a part of the effect of an explosion at the site of this crater on land? A It would be impossible.

Q Where would an explosion come from that would blow a man from the north of his boat to the south of his boat? A From a northerly direction.

Q And this idea of suction that Judge Skinner spoke about would have nothing to do with that, would it? A No, sir.

Q Have you been on the premises at Black Tom? A Yes, sir.

Q Spent some time down there investigating? A Yes.

Q You saw where the north pier was? A Yes.

Q You saw the site of these storehouses? A Yes.

Q So that when you answered my questions you answered in view of your personal knowledge from having been on the premises? A Yes.

Q And you had those distances in mind that you had seen? A Yes.

Mr. Garrison. Judge Skinner, is there any dispute that those eight cars were loaded with T N T?

Mr. Skinner. No, sir.

Mr. Garrison. All right; it may be admitted on the record that those cars were loaded with T N T.

By Mr. Garrison.

Q I show you Exhibit "12-Harrison," and call your attention to a telegraph pole shown on this photograph above which there is an arrow made by pen and ink, and I call your attention to a bit of water in the foreground of the picture between the view and the telegraph pole, and I tell you that that does indicate where the crater was on the land, and I want you to explain why, if an explosion took place at that crater, that telegraph pole still stood after the explosion? A The telegraph pole is a very tough and resistant body, and it is also round, and that gives it a facility of gliding past it a wave of compression through the air; its shaft—the half section, the half vertical section of the pole is substantially half round, and that is the shape given to the nose of a torpedo. It is a good shape for gliding off a large part of the blast upon it.

By Mr. Skinner.

Q Is that the reason—

Mr. Skinner. Is that all, Mr. Garrison?

Mr. Garrison. No.

By Mr. Garrison.

Q Now, assume that the wall of Storehouse Q, as shown on P. 16, fell on top of R, the smaller, lower warehouse to the right of it as you look at this exhibit, and then assume that the steel structure of the tank which stood at the right fell on top of that, what would you say that those effects indicated with respect to which explosion was first in point of time, that at the crater on land or that at the crater in the water about 300 feet to the north of the North Pier? A That is to say, it would be proof

that the first explosion was in the barge and that the structure here under the tank was thrown over by the second explosion—on the question of proof that the building wall was knocked down by the first one and the structure thrown over by the second.

Q In answer to some questions previously asked you, you said that the limit of safety for structural damage was 3.760— A 3.670, I think.

Q 3.670 feet. Just explain that, please? A When a building, a magazine is not barricaded—

Q Tell us what you mean by barricaded? A I mean protected by a structure built outside of it.

Q All right. Now when a magazine is built without an outside protecting structure then what? A It has about four times the lateral or horizontal action—intensity of action as it has when it is barricaded.

Q Well, now, what about the 3,670 feet? How is that arrived at? A There have been a very large number of investigations made and determinations—over 500 cases I believe have been examined of explosions that have happened in different parts of the world and it has been found that when a structure, a magazine is not barricaded it must be placed twice as far away for the same effect and that if not barricaded the distance for 100,000 pounds is 3.670 feet and when barricaded it would be about half that distance.

By Mr. Skinner.

Q You say that the magazine not barricaded must be placed how far away to have— A Twice as far to offer the same amount of protection to surrounding buildings.

Q Twice as far. That is, without the barricade it is more dangerous to the surrounding buildings than with it? A Yes, sir.

Q And this distance that you name, three thousand and some feet—

Mr. Garrison. 3,670.

Q 3,670, is the distance calculated as the place of safety to structures for 100,000 pounds? A For 100,000 pounds, yes; when not barricaded, other things being equal, of course, the barge was very low in that case and the buildings were very high, so they would get more effect than they would if the barge had exploded above ground, or had exploded on an equal plane—in the water on an equal plane. I would like to make one correction of one of my answers that I made.

Mr. Garrison. Yes.

The Witness. Where I think that I said that if the energy behind a projectile were doubled, the increased velocity would be about 25 per cent. I think it would be in the neighborhood of 60 per cent.; that is my impression at the present time.

By Mr. Garrison.

Q 60 per cent.? A About 60 per cent.

Q If you doubled the amount of the energy back of the projectile the doubling of the amount would increase the velocity about 60 per cent.? A I should think about that; if it increases four times the velocity is double.

Q Put four times as much energy back of the projectile and you will increase the velocity twice? A Double the velocity.

Q And if you put twice as much you think it would increase it about 60 per cent.? A Yes.

By Mr. Skinner.

Q Well, can you give us, Doctor, just a little idea on this point: Suppose that the object affected by the explosion—the objects affected by the explosion are buildings, and they are, say, 36 odd hundred feet away, that is one case; now, suppose the buildings to be thirteen or fourteen hundred feet away. Having in mind now what you say about your three thousand and some odd structural safety distance, how would you expect the

effect of the explosion upon the buildings 1,300 feet away to compare with the effect upon buildings three or four thousand feet away? A The effect would be directly as the square of the distance at which the buildings were placed nearer the seat of the explosion.

Q And if the effect upon buildings, say, thirty-six or thirty-seven hundred feet away was nothing—no effect at all, probably a few panes of glass—would you think that the explosion that did that was strong enough, big enough to blow down heavy structures, storage warehouses 1,300 feet away? A I certainly should.

Q You would? A Yes.

Q Although the effect was nothing—practically noth— A Yes, sir.

Q —to the distance named? A Well, "practically nothing" means a good deal. There would be no—that distance is given for serious structural damage. That means serious injury to the foundation, breaking of main supports in the building, like that, but not like knocking down plaster, breaking glass, and that sort of thing. If a building would be—if, say, you were to bring the building appreciably nearer to the explosive blast from that line you would greatly increase the effect upon the building, very greatly; in fact, the rate of increase is, as I have said, as the square of the distance with which you approach the seat of the explosion.

Q Yes. Then if the building was— A That may be easily understood in this way: Take an object in the bay a thousand feet from the barge, or if those buildings were 1,400 feet, say—1,400 feet—well, let us take, for instance, a thousand feet as a better example, a thousand feet from the barge toward New York—

Q Yes? A Now, then, you could put about 800 pounds —certainly 500 pounds of T N T at a thousand feet further away; that is doubling the distance from the first point—well, according to actual calculation if exploded above, from the earth, you could put eight times or eight

hundred thousand pounds a thousand feet further away and it would not produce any greater effect on the first point named; and if in an unbarricaded magazine, you could put in ten to twelve times as much explosive, ten to twelve times 100,000 pounds of explosives a thousand feet further away without producing any more effect on the point a thousand miles to the east of the barge.

Mr. Garrison. A thousand miles?

The Witness. A thousand feet to the east of the barge.

Mr. Skinner. That is all.

(Witness excused.)

Mr. Garrison. We close.

PLAINTIFFS' TESTIMONY IN REBUTTAL.

DR. CHARLES F. McKENNA, sworn.

Direct examination by Mr. Skinner.

Q Doctor, what is your profession? A I am a chemist and chemical engineer.

Q Where do you practice? A In New York City.

Q Have you had any experience with explosive materials? A Yes; I have studied explosive materials; I have studied the subject of explosive materials and many of the explosives.

Q And over what period of time? A Over—

Q To what extent? A Over twenty years or more.

Q Have you been on any commissions to study the subject of explosives and their effects? A Yes, sir; I have been acting for New York City for several years as chemist member of the Municipal Explosive Commission for the regulation of the trade in explosives; I have acted for the American Railway Association as an adviser with

two other chemists on the subject of the care of explosives on railway properties.

Q Have you appeared in court as an expert testifying as to the characteristics of explosives? A Yes, sir.

Q Have you acted as adviser to manufacturers of explosives? A Yes, sir.

Q This covers a period of about how many years, roughly? A Twenty to twenty-five years.

Q Are you familiar with the properties of trinitrotoluol, commonly called T N T? A Yes, sir.

Q What is the effect of heat upon trinitrotoluol?

Mr. Garrison. I object. This is not rebuttal of anything had in this case. These gentlemen desire to show anything about the properties of these things which we had in our possession or what their probable or possible effect might be or what not, it is part of their main case. They did not choose to do it, and I do not see how they can prove their main case on rebuttal.

The Court. I think this is rebuttal. It tends to refute that portion of the defense which is directed to showing that the first explosion which took place was the explosion on the barge, and also that portion of the evidence with respect to that first explosion which shows the difference in effect between its destruction and that alleged to have been wrought by the second explosion.

Mr. Garrison. May I be heard again before your Honor rules?

The Court. Yes.

Mr. Garrison. If I may be pardoned, it seems to me the basis of your Honor's ruling vindicates the strength of my objection. If these gentlemen to succeed must establish that the effect upon their sugar was from the explosion on land, and that that was the explosion which did the damage to them, unques-

tionably that was their case. Now, if they failed to make that out in their main case how can they now be permitted to make it out in their rebuttal case? If that was not their point, then of course it is all immaterial and irrelevant. Your Honor has said it tends to show where these explosions were, and which explosion was first. That was their business, to establish the explosion that injured them was on our land. We have introduced evidence with respect to another explosion. If it was part of their busines to exclude that first explosion they should have done it by Dr. McKenna, or by what witnesses they had; they had no right to reserve witnesses upon their main point and wait after we have rebutted their testimony and then come in by way of rebuttal and produce what testimony they might have.

The Court. I do not see it the way you do. The way I see it is they established or sought to establish the fact of the explosion on the land having been the first explosion, by showing what the actual physical facts were by those persons who witnessed those facts. Now you come and show that those physical facts are at least allied facts under their apparent interpretation, and therefore you say, "We are going to show that the explosion occurred on the water first by certain other facts," and then you bring facts in. Now what they are rebutting is the facts that you have brought in. If you had not put any case in at all there would have been sufficient in my judgment to have gone to the jury. Now you bring in some new facts, and it is to rebut facts that rebuttal is allowed, and therefore I am allowing it. You may have your objection noted on the record.

Mr. Garrison. All right. Exception.

The Court. Of course.

(Question repeated by stenographer.)

A The effect of heat upon trinitrotoluol is to melt it and to render its particles more sensitive to decomposition.

Q And when more sensitive to decomposition does that have any relation to its sensitiveness to explosion? A Yes, sir.

Q Describe that? A The sensitiveness to explosion is that property which the explosives have of decomposing in the molecule and having the explosive detonating wave transmitted to the entire mass of explosives.

Q And is that detonating wave transmitted with any degree of progession or instantaneously? A It is as far as we know instantaneous.

Q Now when— A Although there are progressive steps in the chemical decomposition.

Q Are those progressive steps visible or observable by the eye, or— A No, sir.

Mr. Garrison. Put your eye out.

Q —measurable in any ordinary measurement of time? A They are measurable by the proper instruments.

Q Well, then, when the T N T is subjected to heat and you say thereby more susceptible to detonation, explosion by detonation, does it make a difference—does that susceptibility increase with increased temperature? A I believe so.

Q Assuming, Doctor, that eight cars of trinitrotoluol were subjected to the heat coming from the burning of a number of other cars in close proximity, within a few feet, the cars being box cars and containing ammunition for cannon, cars burning around this T N T, would that be sufficient heat ordinarily to melt the T N T? A Yes, sir.

Q At what temperature does it melt? A At about 80 degrees centigrade; about 170, more or less, Fahrenheit.

Q If it reached what we call a white heat, what temperature would that be? A It would probably 2500 degrees more or less Fahrenheit.

Q Now if in that condition T N T was struck by the impact of a shell coming from one of the ammunition cars in close proximity to the T N T, would that in your judgment be—what would be the effect of that in your judgment?

Mr. Garrison. I object to that. There is not the slightest evidence in this case of any white heat.

Mr. Skinner. I will withdraw the assumption of white heat.

Q Assuming the T N T to have been subjected to the heat of the conflagration that I have described and the cars in the vicinity, what in your judgment would be the effect of the impact of a shell from one of those cars upon the T N T? A If the conflagration that you speak of refers not only to the surrounding objects but to the flaming of the stocks of T N T itself I know positively that the temperature would have reached what we call a white heat, and that under those conditions a shell falling into the mass would almost undoubtedly detonate the mass.

Q And suppose that the T N T had just reached the condition of melting and had run down in its molten condition from the cars in which it was contained and over the tracks and that then a train of cars or a car attached to a train of cars was to be run over the tracks that had the molten T N T on it, what in your judgment would be the effect of that? A The effect of the iron—contact of the iron wheel and the steel rail with melted T N T between would be extraordinarily dangerous.

Q What do you mean by dangerous? A Extraordinarily likely to decompose, to detonate.

Q And explode? A Yes, sir.

Q Well, then, if one hundred thousand pounds of T N T were to be exploded upon a barge floating on the water and one hundred thousand pounds of T N T were to be exploded in cars on the land would there be any difference in the effect of the explosion by reason of the fact that one was on the land and the other was on the water? A There would be a difference in the effect.

Q Yes; and what would the difference be? A The effect upon the land would be for a—a more ready reflection of the blow back to the air. On the water the first effect would be to displace a mass of water in the form of a wave and then to send the remaining gases into the air.

Q Well, would the resistance of the water be the same as the resistance of the land? A No, sir.

Q I mean the resistance to the explosion wave? A No, sir.

Q Which would be the greater? A The displacement of the water would be easier for the gases, and the greater earth effect would come from the explosion upon the earth of that mass.

Q Suppose the explosion on the land is four times the quantity that explodes on the water, what difference would the difference in quantity make?

Mr. Garrison. I object, if your Honor please. I want the question corrected in this respect. The explosion on the land had no four times gathered together—there was gathered together on the barge a thousand and five cases; there was gathered in these cars not more than half of that quantity.

Mr. Skinner. That is the question that we put to Dr. Maxim and his answers seemed to be all predicated upon the assumption that the—

The Court. They were predicated on the dispersion of the mass in the cars and the condensation of it on the barge.

Mr. Skinner. It was collected, and the other was not; and there is nothing in the case to show that there was any more concentration of the explosives on the barge than there was upon the cars.

Mr. Garrison. Except the mathematics; excepting twice one is two. We had one barge with a thousand pounds in cases, and we had no car with more than half that number of cases.

The Court. I do not see any objection to admitting this question that is asked. When cross examination comes they can ascertain whether the manner in which it was placed makes any difference.

(Question repeated by stenographer.)

A I could only estimate it. I have no criteria for judgment except to believe that since the water would be displaced in the form of a large wave it would respond more readily than the earth; that the destruction of four times as much explosive in the case of the land as on water would have a nearly fourfold effect, diminished—it would have a fourfold effect, diminished, of course, by the reaction that comes after every explosion, the neutralization of some of the waves. It would be nearly four times as great, but of course by reason of the dispersion and neutralization, would have a diminishing factor. Just what that factor is I cannot say.

Q Does any explosion, whether upon land or water, send out a wave through the air? A The explosion of any mass of explosives sends out a vibration in all directions equally. The fact that it seems to manifest itself on the earth is simply because the earth is there to register it.

Q Is that effect through the air like that of an extremely violent wind? A It is certainly like that, like a cyclone.

Q Would the effect of an explosion on land sending out such a wave like a very violent wind have an effect upon water? A Yes, sir.

Q Make a wave there? A Yes, sir.

Mr. Garrison. Read me that question.

(Question repeated by stenographer.)

Q Did you go down to Black Tom Island? A Yes, sir.

Q Was that shortly after the explosion? A It was about a week afterwards.

Q Then did you make any personal inspection and observation of the wreck on the site of the explosion? A Yes, sir.

Q Did you see the condition of the buildings? A Yes, sir.

Q The effect upon the buildings? A Yes, sir.

Q And did you see the crater? A Yes, sir.

Q Was that about three hundred and seventy-five long and one hundred and seventy-five feet wide, ten feet deep? A That is a good approximation to what I estimated it.

Q I estimated it an acre in area, and that would be about the same. Is the effect of explosions an invariable effect or is it subject to variations? A It is subject to extraordinary variations as we find it.

Mr. Garrison. I don't understand what you mean by effect of explosions. Do you mean on the objects?

Mr. Skinner. Yes, on the objects.

Q Will you tell us what you mean by that? A Oh, I mean that study of cases of explosions give us a great number of situations where the action of the waves and the reaction backwards produce apparently contrary effects. There is a zone of extraordinary power which seems to pass by the spot, within a few feet, almost a few inches of it, when there are evidences of the power having been very, very much less, just as—

Q Are you speaking now of the evidences of the same explosion? A Yes.

Mr. Garrison. I object, because your Honor ruled that these experts could not give anything except their own personal knowledge, and it does not appear that these explosions that he is talking of he was present at or had any personal knowledge of.

(Question repeated by stenographer.)

Mr. Garrison. Your Honor said I could not examine Mr. Maxim.

The Court. You are asking him the evidences of the particular explosion where he was present?

Mr. Garrison. Oh, no. The difference is the explosion, the effect of it—he says sometimes there are extraordinary results, and he is now putting in the evidences of those explosions, and I say it does not appear this gentleman was present.

Mr. Skinner. He has been testifying, sir, for several questions preceding about the effect of explotions, that it may have the effect of one kind upon one person standing in one place, and just a few feet away may have a different effect, and I want—

Mr. Garrison. He has not said that yet.

Mr. Skinner. He has.

Mr. Garrison. I have not heard it.

The Court. Well, he said it, I think, and at any rate he may state as an expert what effect explosions will have. The thing I ruled out when the objection was made, when Judge Garrison was examining the witness, was the specific instances in which the witness had observed those effects to have taken place. I will rule the same out with respect to this witness, and I understand that to be the point of your objection now.

Mr. Garrison. My objection is now he is asking about evidences of undisclosed explosions.

The Court. Yes.

Mr. Garrison. As unless it appears he was present at those explosions he cannot give the evidence, under your ruling.

The Court. Just what he may testify and what I have ruled he could testify about, and what I presumed the question involves is what as an expert he has found out the results of explosions will be when certain explosives are set off, or—

Mr. Garrison. I cannot object until he asks his question. It is just the opposite of it. He asks the evidences of explosions, and unless this gentleman was present that comes under your ruling.

The Court. It undoubtedly does if he is asking specific instances.

Mr. Garrison. I object to it in its present form.

(Question and answer repeated by stenographer.)

The Court. Why, undoubtedly I will permit the question. "Same explosion" means the kind of explosion and its effects that you are talking about in a previous answer, and not the place of one or any specific explosion.

Mr. Skinner. The answer was given, yes.

Mr. Garrison. I want an exception.

The Court. You may have it, of course.

Q And, Doctor, if there were a barge lying three or four hundred feet, say three hundred feet from North Pier, northeast of North Pier, and there was an explosion on that barge and that explosion demolished portions of the storehouses on Black Tom, took the roofs off of some of them, would you expect that explosion to have any effect at all upon the buildings on a point say on Ellis Island? A Yes, sir.

Q And if you saw such an effect upon the buildings on Black Tom what effect would you expect it to have on buildings on Ellis Island, if from a barge lying between

Black Tom and Ellis Island? A If the structural damage were as great as I saw at the site of Storehouse R—

Mr. Garrison. I object. What he saw was after both explosions.

Q Well, if the structural damage was as I have described it to you, taking off the roofs of some of them, having some effect on some of the buildings but particularly taking the roofs off? A If the effect of the explosion of the material on the barge was as great as you have described to me, in the raising of the roof and the collapse of those structures at that point, I would certainly believe—

Mr. Garrison. He talks about the collapse of those buildings; there is no evidence of that.

Q Without putting in the element of the collapse, confine yourself to the effect of taking off roofs and portions of the upper stories of some of the warehouses. A If the contents of the barge Johnson 11, lying off where it is supposed, or stated to have been, was sufficiently great to, as you describe, produce the damage at the point R—Warehouse R—it certainly would have produced structural damage on Ellis Island.

Q What do you mean by structural damage? A Displacement of walls.

Q Something more than the glass breaking? A Something more than the glass breaking.

Q When you said Johnson 11 did you have anything else in mind than this barge I was assuming—did you mean by that the barge that I have assumed was several hundred feet away? A I had nothing else in mind except the barge that has been spoken of as having a load—

Q You have no personal knowledge as to what that barge was called? A No personal knowledge.

Cross examination by Mr. Garrison.

Q How far have you estimated that Black Tom is from a point three hundred feet northeast of North Pier

—the warehouses on Black Tom? How far have you estimated that the Warehouse R is from a point three hundred feet northeast of North Pier? A I believe it to be about fourteen hundred feet.

Q And how far are any buildings on Ellis Island from the same point where you have located the barge? A About 3,700 feet.

Q More than twice as far? A Yes.

Q And how high are the buildings on Ellis Island? A From my general knowledge there I should estimate them to be at their highest seventy-five feet.

Q Thirty-five feet? A Seventy-five feet.

Q How high would you estimate— A Seventy-five feet.

The Court. Seventy-five feet.

Q Seventy-five feet. How high do you estimate that Storehouse Q was? A About sixty feet.

Q The building of Storehouse Q was lower than the buildings on Ellis Island? A I think so.

Q Do you know anything about it? Did you ever see Storehouse Q when it was standing? A I have estimated it.

Q Did you ever see Storehouse Q when it was standing? A Yes.

Q And estimated its height? A No.

Q When did you see it standing? A On many occasions for many years.

Q As you went by in boats? A I have been on Black Tom before this.

Q When were you on Black Tom before August, 1916? A I cannot recollect the date.

Q Years before? A Probably four years before.

Q And you carried in your mind from that visit the height of Storehouse Q? A Well, I carried it in my mind and have refreshed my recollection now.

Dr. Charles F. McKenna, cross.

Q What do you really know about the height of Storehouse Q? A Only refreshing my recollection now and making an estimate.

Q Refreshing your recollection from what? A From the buildings I have seen there.

Q And your recollection is it was about sixty feet high? A Yes; that is my recollection, my recollection and my estimate.

By the Court.

Q Did you know where the explosion was said to have taken place on the barge—that is where in the water the barge was located? A I simply read a report so stating.

Q Well, now, from that point to the buildings on Ellis Island how far did you estimate it? A That is the figure we used, the two points we used.

Q That is your 3,700 feet? A Yes.

Mr. Garrison. Yes; that is what he estimated.

By Mr. Garrison.

Q I show you Exhibit 18, Harrison, taken from the land end looking east after the pier had been partially destroyed by fire, and call your attention to the Statue of Liberty. A Yes.

Q What are those buildings immediately to the left of the Statue of Liberty? A I do not know, sir.

Q Don't you know enough about the locality to know that that is Ellis Island? A No.

Q You do not know that locality down there very well?

Mr. Skinner. He does not know the picture.

A Ellis Island looked very much closer than that to me when I stood on the shore after the date of the explosion.

Q I now show you Barth 3, and ask you to look at the Statue of Liberty and the buildings that appear there

to the left of it. Can you identify those? A Yes; that looks more like it.

Q As you look at those buildings do you see any of them that are more than three stories high? A No, sir.

Q Do you think there were twenty-five-foot ceilings, then; do you think they had seventy-five feet in three stories? A The first floor may have had a twenty-five-foot ceiling.

Q Rather unusual, isn't it, to have a twenty-five-foot ceiling? A Not in structures of that character.

Q All right; now what about the—

Mr. Skinner. Doctor, we cannot hear you out here at all. You are talking to the Vice-Chancellor.

Q What about the other stories above the first one? A They, together with the chimneys, would give probably just the height I maintained.

Q I see. I call your attention to Underwood 4, which shows a car on the extreme end of the North Pier, and you are looking from the north at the north side of the car. Would you say that that effect could have been produced by an explosion at the point of the crater on land as shown on Exhibit P. 16? A I do not believe that it was.

Q I now show you Underwood 8 in which a large shell has been propelled into the stringpiece of the South Pier, and the photograph was taken from either the North Pier or north of the North Pier, and I ask you whether from the angle of the shell and the other physical indicia in your opinion it was possible for that shell to have been projected from the vicinity of the crater on land as shown on P. 16? A I do not believe that it was.

Q That shell must have come from the north? A It probably came from the direction we see it pointing at now.

Q And that is north. Not the direction it is pointing in but the direction that its butt is from. A Yes; from the north to the south.

Q Yes; from the north to the south. Have you ever done any personal experimentation with T N T? A Yes.

Q Have you ever exploded it by heat? A No, sir.

Q Have you ever seen T N T exploded by heat? A I have seen the effects of it.

Mr. Garrison. I ask that that answer be stricken out.

Mr. Skinner. Let us have it in.

The Court. I will strike out the answer as not responsive. He was asked if he had ever seen it explode. He says he has seen the effects of it, which involved the notion it did explode from heat.

Q Have you ever seen T N T explode from heat? A No, sir.

Q Have you ever seen T N T explode from the friction of a car wheel over T N T? A No, sir.

Q Where do you get the idea you can explode T N T under a car wheel? A You can explode T N T by means of a drop hammer.

Q How do you know that? A Because that is well known by all the authorities.

Q You have something in some book? A Yes.

Q But you do not know anything about it personally? A I know that is the property of the material.

Q I ask you: You do not know anything about it from personal experimentation? A I know that is the property of the material.

Q You do not know anything about it from personal experimentation? A I have not made that experiment.

Q No; now, isn't it a fact that when T N T was first utilized the British authorities put it on their explosive list, didn't they? A Yes.

Q And after a while they took it off their explosive list? A Yes.

Q So that it was free to be transported like flour or anything of that kind? A It was at that time.

Dr. Charles F. McKenna, cross.

Q And down until recently no one, authority or otherwise, believed it could be set off by anything but explosion—detonation? A I do not agree with that.

Q Wasn't that a fact? A No, sir.

Q Wasn't there a long period of time during which no one conceived that T N T could be set off by anything but a small explosion—a detonation? A No, sir.

Q The authorities do not bear you out on that, do they? A Yes, sir; they do.

Q Have you got any authority in court? A I have an authority which shows the effect—

Q No; have you any authority at all in court of any sort? A Yes.

Q What have you got here? A I have got Monroe. (Or Munro.)

Q Doctor Monroe of the United States service? A Yes.

Q What else? A Nothing else bearing on that.

Q Is that one of those government pamphlets or a book on explosives? A A book on explosives. Brunswick, translated by Monroe.

Q German book? A Yes; the author was originally German, yes.

By the Court.

Q What do you mean, he was originally German—he changed? A I mean to say that the author was German.

Q All right. A The original author—it is called Monroe's—

Q He has re-written it? A Yes.

By Mr. Garrison.

Q Do you know the law which controls the relation between the distance of explosives and the objects to be affected thereby? A No, sir; I know of no such law.

Q You mean there is no such law? A No, sir.

Q You do not mean that? A I do mean it. I do not know of any such law.

Q You do not know that the scientific men have worked out that it would take eight times the amount of the explosives to affect an object twice the distance from a given point? A No, sir; I do not know it.

Q Do you deny it? A I express my strong doubt of it.

Q Do you deny it? A I express my strong doubt.

Q Do you deny it? A I do not know of it.

Q Then you do not know? A I do not know.

Q Then why do you deny it? A It is my opinion that there is no such law.

Q I want to know if you know that there is any such law that, if worked out, would show it would take eight times the amount of an explosive to affect an object twice the distance from a given point? A I am led to deny it because I do not believe it.

Q Then, as I understand, you are not prepared to say that there is any relationship whatever between the distance from the explosives to the objects to be affected thereby, is that so? A Yes.

Q You say that? A Yes.

Q Then why does not an explosion on Black Tom affect China? A Well, you cannot reduce it to an absurdity.

Q You have produced the absurdity. A I have not.

Q You have said there is no difference at all, measured by distance— A No, I did not.

Q In the effect of—did you misunderstand the question? A I said there was no law on the subject, no law of nature.

Q There is a difference; you refuse to call it a law, but there is a difference? A Yes.

Q But you refuse to call it a law? A I refuse to believe there is a law giving the definite relations.

Q Now, this thing you refuse to call a law, doesn't the result of that thing mean if you have an object twice as far away from an explosive as a given object, it would take eight times the amount of the explosive to affect the second object? A I do not believe that.

Q Now, I do not care whether you call it a law or call it something else. You don't believe it? A I don't believe there is such an exact law known.

Q How near exact is that—you said it was inexact—how near exact is the statement I made? A I don't know, sir.

Q Well, you really don't know anything about it, do you? A Yes, sir.

Q Well, tell us what you do know about it? A I know that explosives manifest their possibilities with considerable difference of effect on every experiment, and—

Q Now, you do not seriously mean that, do you? A Yes, sir.

Mr. Skinner. Let him finish.

Q Go ahead? A And that it is impossible to determine a law which exactly computes the effect to be given by a certain weight of explosives.

Q Are you through? A Yes.

Q I am not talking, of course, down to feet or inches, if that is what you mean by exactness. But isn't it known in all the history of this subject and from all of the thought that has been given to it by the governments of the world and scientists that there is a limit beyond which the explosion of a given amount of explosives will have no real deleterious, serious effect? A I know there is such a limit.

Q You know there is such a limit? A Yes, sir.

Q What is that limit? A It cannot be stated in the form of a law of nature.

Q Don't bother about law. You refused to call it law. Call it something else? A Well, you gave me the law.

Q What is that? A You asked me about a law.

Q I asked you what that distance was. I asked you the distance, and you said there was no law. I did not ask you for the law. I asked you for the distance. Supposing—

The Court. What do you mean by a law? Let us find that out. Let us find out what you mean when you talk about it.

The Witness. A definite statement of the facts, or the energy in a given condition of explosives.

The Court. Well, in this kind of a thing, isn't it merely the statement of a relationship between an event and its consequences? Isn't that what you mean by a law? (To Mr. Garrison): And that is what you mean by a law?

Mr. Garrison. That is what I mean by a law. I mean that a given amount of gunpowder will shoot if it is confined in a certain kind of chamber, like a revolver bullet; it will produce certain results in certain distances around. Now, then, I call that a law. I call it a law when these military experts can, with their compasses and periscopes, locate a ship four miles out at sea and do some figuring and put a certain amount of powder back of some projectile and land it on the deck of a ship. I say that is some kind of law. I do not care what you call it. It has some relation between power, propulsion and distance, and these other factors, with given results. Do you mean the same thing?

The Witness. I do. I mean under those conditions the exactitude of the law is according to the exactitude of the instruments of observation that they use.

Q Well, what has the gun got to do with observation? That is the thing that propels the projectile, and that acts under a law, doesn't it? A I do not understand your law.

Q Well, let us see if you cannot understand me. Suppose you take a projectile that weighs X pounds and have X amount of powder back of it to propel it— A Yes.

Q Isn't there a law which tells you how far that powder will propel that projectile at a certain angle? Don't you call that a law? A There is a form by which artillerists can produce it.

Q Don't you call that a law? A As far as they have any exactitude in that, it is.

Q It is a law, then, isn't it? A Yes.

Q Then they know if they put twice as much powder back of the same weight of projectiles it will have a certain other effect? A Yes.

Q And that you call a law, don't you? A Yes.

Q Now, please keep that in mind as what I call the law. Now, don't you men who know about explosives—and I assume you do—don't you know that a certain amount of explosives exploded under certain conditions acts on given lines? A No, sir; I don't know that.

Q You do not know that? A No, sir.

By Mr. Skinner.

Q Doctor, when you say in answer to the Vice-Chancellor that the difference in the effect of explosives according to the distance of the explosives from the object is not reduced to a law, just what do you mean? A I mean that unlike the art of gunnery, the use of explosives in large masses for quarrying and mining and large scale operations, and the effect produced by large masses of explosives when stored and exploded under those conditions give no definite conditions under which we can derive laws.

Q Then you mean that it has not been reduced to such certainty as you would call a law? A Certainly; that is what I mean.

By Mr. Garrison.

Q Has it been reduced to such certainty that you call it something else? Now, you see, we have gotten away from that last answer. Has it been reduced to something that you call something? Would you call it a formula? A No, sir.

Q What do you call it? A Simply our experiences, not codified or systematized.

Q I didn't ask you about codification. Now, you said you acted for New York City in some of these explosive matters? A Yes, sir.

Q And you acted in regard to the American Railway Association, advising them about explosions? A Yes, sir.

Q Well, if there is no law and no formula known and no one knows anything about it, what is the use of any advice on the subject? A That is just what we need to do—to get as much information as we can and be guided by the experience.

Q Well, if each case acts different, what good does experience do you? A That is our trouble.

Q That is your trouble? A Yes, sir.

Q Then you cannot tell anything about safeguarding explosives? A Yes, we can.

Q I thought you said there were no formulaes, no laws? A I said there was nothing which should be called a law of nature which determines for us beforehand what would be the effect of large masses of explosives exploding.

Q Then, as I said, experience would not do you any good? A Experience is good so far as it tells us the history of given cases, from which we can make deduc-

tions; but we have nothing yet in the nature of a law of explosives, scientific positiveness.

Q Then each case stands on its own bottom? A Yes, sir, precisely so.

Mr. Garrison. All right; that is all I want.

By Mr. Skinner.

Q The pictures I show you, 1-a-Harrison, Underwood-4 and Underwood-8—Doctor, if there were an explosion upon land followed some minutes later by an explosion from a barge on the water, would there by anything in these pictures or any other condition shown by them that in your judgment would be inconsistent with those facts—the facts of the two explosions, first on land and second on the water? A Repeat the question.

(Question repeated by the stenographer.)

A I don't think there would be anything inconsistent.

Q And these pictures that you were shown, you said indicated to you that there had been an explosion from the south—

Mr. Garrison. No.

Q From the north to the south? A Yes, sir.

Q Is there anything in the picture that would indicate to you whether that had been preceded by any other explosion from the north—the other direction? In other words, can you tell from the picture whether there had been any prior explosion from the opposite direction? A There is nothing which would give that determination.

Mr. Skinner. That is all.

(Witness excused.)

Trial adjourned to 10 o'clock A. M., Thursday, April 3rd, 1919.

EIGHTH DAY.

(Trial resumed April 3, 1919.)

Mr. Garrison. The defendant moves the Court to give binding instructions to the jury in favor of the defendant, and to give directions to the jury to find a verdict in favor of the defendant upon the respective grounds urged upon the motion for non-suit and the reasons as developed in the argument thereon, calling particular attention in respect of the Sixth Ground alleged, to the fact that, as stated in the said argument and as the fact is, there is no allegation in the complaint under which it would be proper to leave to the jury any question respecting the negligent conduct of the employees of the defendant after the discovery of the fire. This motion is intended to embrace all of the reasons urged on the motion of the non-suit, both those given for non-suiting all the plaintiffs and those given for non-suiting only the insurance companies, plaintiffs; and also in respect of directing a verdict in favor of the defendant against the insurance companies, plaintiffs, upon the additional ground that there is no evidence from which the Court and jury can determine what, if any, damage was caused to the sugar covered by the policies by fire, and what was caused by explosion, and therefore, there is no basis to find any damages accruing to the insurance companies under the policies and the proof; also on the following ground, as against the insurance companies, plaintiffs, that under the pleadings and proofs, there is nothing to show that the insurance companies, plaintiffs, were under any legal duty to make payments under the terms of their several policies and by doing so, obtain any right of subrogation thereunder; and upon the further ground as to all plaintiffs, that there is no proof that the omission of any of the alleged duties which it is alleged in the complaint the defendant omitted, was the proximate cause of injury complained of to the plaintiffs, or any of them; and upon

the additional ground as respects all of the plaintiffs, that there is no proof that the performance of any of the alleged duties set forth in the complaint would have prevented the injury of which the plaintiffs, or any of them, complain.

I have been over these matters so frequently with the Court I do not think it is worth while to take further time to argue them.

The Court. I will deny the motion and you may have the objection to that ruling entered on the record.

Mr. Garrison. Exception.

We would like to have an opening. I do not know if it is necessary to put in the form of an instruction, but we would like to have the Court indicate to the plaintiff the propriety in his opening of indicating the duties we were under, the omission of which they allege caused the actionable damage; and also with respect to the regulations of the Interstate Commerce Commission, that they point out those of them that they allege we have violated.

The Court. That being so, how much time do you think you will desire for summing up?

Mr. Garrison. Of course a great deal will depend as far as we are concerned on what these gentlemen think they have proven, what cause of action they think they have got against us. I am really in the dark. I will take as little time as possible.

(After discussion, ten or fifteen minutes was allowed for the opening and an hour and a half or less for the summing up of each side.)

Mr. Garrison. Is there any objection to two counsel speaking on each side?

The Court. No.

Charge to Jury.

Gentlemen of the Jury:

The suit, or suits, that we are trying are brought by Frederick H. Howell, Thomas A. Howell and James H. Post, co-partners doing business under the firm name of B. H. Howell, Son and Company, as one plaintiff, and a group of insurance companies whose names you have heard mentioned before you, and which it is not now necessary to rehearse, because the counsel in this case have agreed in order to facilitate your labors that if there shall be a verdict for the plaintiffs you shall find how much Mr. Howell should have and how much the insurance companies as a group should have, and if the whole claim of the plaintiffs has been made out by the greater weight of the evidence, as it is required to be under the law, I shall give to you in a few moments the figures, which some one of you who has paper and pencil may take down so that you will know what that whole loss will be in case the plaintiff has established it. And I think probably, in order to get it out of the way, I might say to you now what it is.

If the plaintiffs have made out their whole claim the plaintiff Howell partnership is entitled to recover $36,854.09 by way of principal. That you have down?

A Juror. Yes, sir.

The Court. And $5,811.78 by way of interest, making an entire sum—which I think you need not find as an entire sum. Just simply return the amount of principal and the amount of interest.

Now, the insurance companies, if they are entitled to recover under the conditions which I have indicated to you, would be entitled to recover $325,019.37 by way of principal and $52,306.06 by way of interest.

Now, in order to make it plain to you how that verdict should be returned if you find for the plaintiffs for the

full sum under the rules which I will give you later, you would simply say when you come in, "We find in favor of the plaintiffs and we assess the damages of the Howell firm at $36,854.09 principal and $5,811.78 interest; and we assess the damages of the insurance companies at the sum of $325,019.37 principal and $52,306.06 interest.

Now, that is the shape of the verdict if you find for the plaintiff for the full amount as I have indicated to you, and that is the way the matter will be returned if that kind of verdict should be found.

Now, the claim, gentlemen, upon which any recovery is rested by the plaintiff is a claim which grew out of what the counsel have either inaccurately or accurately, speaking from a verbal standpoint, termed a catastrophe which is said to have occurred on Black Tom Island, or near Black Tom Island, on the night of July 29-30, 1916, some time in or near the middle of that night; and the claim made by the plaintiff is that that catastrophe, which took the form of fire and explosion, or explosion and fire, as you may find from the facts in the case, is charged by the plaintiff to have arisen out of the negligence of the defendant company, the Lehigh Valley Railroad Company; and the negligence which they say gave rise to that catastrophe and the consequent loss which they claim has been sustained by these two groups of plaintiffs is stated by them in their written complaint as follows:

The plaintiffs charge that under the law applicable to said railroad common carrier and the regulations of the Interstate Commerce Commission for the transportation of explosives and other dangerous articles, as prescribed under the act of Congress of March 4, 1909, and acts supplemental thereto or amendatory thereof, it became and was the duty of the defendant, in connection with such explosives, explosive projectiles, ammunitions and munitions of war, to exercise all reasonable care to prevent fire or explosion upon the said premises and to control and extinguish the same, the extent of such duty

being commensurate with the nature and risk of the situation hereinbefore set forth; to take all reasonably possible precautions against fire, and to keep fire away; to make all reasonable and suitable provision for the safe storage thereof outside of station; to prevent unauthorized persons from having access thereto on said premises; and to take all reasonable and necessary precautions for quick isolation in case of fire.

That is the charge that they make of the duties which they say were violated.

The plaintiffs allege that they neglected to perform such duty in the following respects:

It neglected to watch or guard said premises and waters adjacent thereto through employees sufficient in number and competence, and to properly instruct the same, to prevent incendiary or accidental fires;

It permitted unauthorized persons upon said premises and especially upon or in the vicinity of said explosives, ammunition or munitions of war;

It permitted vessels not connected with the transshipment of said explosives, ammunitions and munitions of war to lie moored at said North Pier;

It permitted or neglected to prevent barges or lighters having no business at said North Pier, and wholly or partially laden with such explosives and munitions of war, to lie moored to said North Pier or moored to similar barges moored thereto, or to lie in the vicinity thereof;

It neglected to isolate or separate the railroad cars containing such explosives and munitions of war, and improperly accumulated or bunched the same in the same locality on said premises, and take precautions for quick isolation in case of fire;

It neglected to provide employees sufficient in number and competence and to properly instruct the same for the purpose of discovering and extinguishing any incendiary or accidental fire. Such insufficient, incompetent and uninstructed employee or employees as the defendant had,

were negligent in guarding, discovering and reporting the fire hereinbefore alleged;

It neglected to provide sufficient apparatus and employees for the purpose of fighting and extinguishing fire upon said premises, in said railroad terminal; and

It neglected to provide sufficient means of communication or alarm of fire.

And then the plaintiff charges that

The loss of the merchandise of the said plaintiff was caused by the defendant's neglect of duty aforesaid.

Now, first of all, the law says that the burden rests upon the plaintiff to make out by the greater weight of the evidence that the negligence which he has charged in his written complaint against the defendant existed and was the proximate cause of the loss of which the plaintiffs complain and for which in this suit they seek to have a recovery in damages. That does not mean that they are obliged to make out all of those specifications of negligence which I have read to you, for if they make out any one of those specifications of negligence, or two or more of them, by the greater weight of the evidence and show by the greater weight of the evidence that that one specification, or two or more specifications of negligence were the proximate cause of the loss and that they existed on the part of the defendant company, that would give them a right to have a recovery and to have you assess their damages at such sum as they shall have proven by the greater weight of the evidence.

Now you will have observed from what I read that the charge is made that there was a neglect to comply with the statutes and regulations made in pursuance thereof by the Interstate Commerce Commission; and it might be well to look for a moment first at the statute and then at some pertinent portions of the regulation. Section 233 of the act provides that the Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives, which shall be binding

upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. Said commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations made desirable by new information or altered conditions. Such regulations shall be in accord with the best known practicable means for securing safety in transit, covering the packing, marking, loading, handling, while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport. Such regulations as well as all changes or modifications thereof, shall take effect ninety days after their formulation and publication by said commission and shall be in effect until reversed, set aside, or modified.

Now, in pursuance of that power, regulations were adopted and published, and were in force. Section 1401 of those regulations provides that

As the use of explosives is essential to various business activities throughout the country, it is the duty of interstate railroad carriers to accept and transport such explosives under these regulations.

And I charge you, therefore, that the law imposed upon the defendant the duty of transporting the explosives in the cars as testified about in this case. At the time of the explosion they were still in course of such transportation in interstate or foreign commerce by land. I charge you further that the sole duty of the defendant to the plaintiffs in regard to the explosives received by it for interstate transportation by land and still in course thereof in respect to all matters within the scope of the statutes of the United States and the regulations of the Interstate Commerce Commission concerning the same, was to comply with such statutes and regulations, and the plaintiffs are not entitled to recover in respect of any such subject matter unless they prove a failure on the part of the defendant to so comply and that such

failure was the proximate cause of the injury complained of by the plaintiffs.

Now, then, we find that section 1643 of the regulations provides as follows:

Careful men must be chosen to handle explosives, the platform and the feet of the men must be as free as possible from grit, and all possible precautions must be taken against fire. Suitable provision must be made, outside of the station when practicable, for the safe storage of explosives, and every effort possible must be made to reduce the time of this storage.

And we find in section 1666 the following:

A certified car for the dangerous explosives specified in paragraph 1661 must be protected by attaching to each outside end, and side door, the lower edge not less than four and one-half feet above the car floor, a standard placard twelve by fourteen inches, on which appears in conspicuous red and black printing on strong tag board the following notice: EXPLOSIVES (to be printed in red). HANDLE CAREFULLY. KEEP FIRE AWAY (to be printed in red). And then follows a statement of what is declared on the placard to be condensed rules for handling the car:

This car must not be placed in a passenger train, nor in a mixed train if avoidable.

Cars containing explosives must be near center of train and may be together if desired; must be at least 15 cars from the engine and 10 cars from caboose when length of train will permit.

This car must not be placed next to cars bearing the inflammable or the acid placard or cars containing lighted heaters. Whenever it is possible to avoid so doing it must not be placed next to tank cars or flat cars or next to carloads of lumber, poles, iron, pipe, or other articles liable to break through end of car from rough handling.

The air and hand brakes on this car must be in service.

In shifting have a car between this car and engine whenever possible, and do not cut this car off while in motion.

Avoid all shocks to this car and couple carefully.

Avoid placing it near a possible source of fire.

Engines on parallel track must not be allowed to stand opposite or near this car when it can be avoided.

This placard must be removed from car when the explosives are unloaded.

Now, under that section 1643 which I was reading a moment ago appears this:

That if a shipment of explosives is not removed within 48 hours after notice of arrival at destination, it must be disposed of by return to the shipper, or by storage at the expense of the owner, or by sale, or when necessary to safety by destruction under supervision of a competent person.

And further, that

Unauthorized persons must not have access to explosives or other dangerous articles at any time while such articles are in the custody of the carrier.

And then section 1689 provides, speaking of cars containing explosives:

They must be coupled carefully and all unnecessary shocks must be avoided. Other cars must not be cut off and allowed to strike a car containing explosives. They must be so placed in yards or on sidings that they will be subject to as little handling as possible, and be removed from all danger of fire.

Now, then, I charge you, gentlemen, that the rule of law that is to be extracted from these regulations and the statute in pursuance of which they are passed is that the defendant railroad company was under a duty in the transportation and custody of the cars of explosives, ammunition and inflammable substances in the particulars indicated, to exercise a degree of care commensurate with the risk of danger reasonably to be anticipated, and the defendant railroad company is liable for damages to

the plaintiffs for any failure to exercise such care if the failure to exercise such care was the proximate cause of the injury and loss to the plaintiffs.

I charge you that the standard of care imposed upon the defendant railroad under the regulations of the Interstate Commerce Commission in so far as such regulations cover the field of the measure of the defendant's duty is the same as the defendant railroad company was under without them, namely a degree of care commensurate with the risk of danger reasonably to be anticipated.

Now, then, gentlemen, that brings you to this interesting inquiry: What is the degree of care commensurate with the risk of danger reasonably to be anticipated which it was the duty of the defendant in this case to exercise with respect to these explosives in regard to the particulars in which the plaintiff has complained the defendant was negligent? How do you ascertain such care? Well, the law says that a high degree of care—which is only another way of saying reasonable care—is the duty of every person when he is handling something which is apt to be dangerous and which he has reason to anticipate will be dangerous to others if he does not handle it carefully. Now, then, you can readily see that such a rule is a rule of relation; it has regard to all of the circumstances in which a man finds himself placed at the time he is called upon to act. To take an ordinary illustration:

If a man were crossing a country road with an automobile he would be under the duty to exercise much less care than he would be if he were crossing the corner of 42nd street and 5th avenue, in New York, with an automobile. And why? Because the risk of committing some injury or causing some injury to somebody other than himself, or to himself if you please, is infinitely greater, and therefore a man is simply called upon to view the environment in which he finds himself placed at the time he acts and then in the light of what he knows, or should know in the exercise of reasonable care under

the circumstances, he must conduct himself accordingly. Take, for instance, Robinson Crusoe on the island. When he first got there and supposed himself not to be in community to any other living human being, he could take his fowling piece and shoot; he could do as he pleased on the island with the perfect assurance, apparently, that nobody would be injured by what he did; but after he had gone out one morning and had seen in the sand on the shore the mark of a human footprint, then a fact loomed into his mental horizon that indicated to him that he must be more careful in shooting off firearms and in conducting himself in that locality, because if he were not he might injure some one. So you see there is, reduced to its most primitive condition, the origin of the requirement that reasonable care shall be used. It has regard to the situation in which a man finds himself placed. Now, here, this railroad company found itself placed with explosives on its hands, and those were required to be transported and for a while stored in process of transportation, within the limits of a city, and therefore the law said that they must use care which would be commensurate with the risk of injury to persons in the neighborhood that would ensue if such care were not used. Now that is the rule of common sense as it is the rule of the common law and as it is the rule that is to be extracted from the regulations of the Interstate Commerce Commission, and it is the rule that must govern in the decision of this case by you; and therefore, to go back to the proposition that I enunciated at the start, it is this: that the plaintiff must make out by the greater weight of the evidence that this defendant company in one or more of the particulars charged by it neglected to use a degree of care commensurate with the risk of injury to be anticipated from neglecting to use such degree of care, and that such neglect on its part was the proximate cause of the injury complained of by these plaintiffs, before they are entitled to have a verdict. If

they do make that out by the greater weight of the evidence, then they are entitled to have a verdict and to have you assess their damages.

Now, then, there are some other things that have to be dealt with in this case. It is contended, as you have heard it very eloquently contended in argument before you by the counsel for the defendant, that the defendant is not responsible for the fire on that Black Tom peninsula, and that they are not responsible for the loss that occurred. They say, outside of the fact that they say they are not guilty of negligence at all with respect to the particulars that are charged against them, as having been negligence—they say that this fire did not originate through any negligence of theirs, but that it originated in a place over which they had no control, and that the conflagration that subsequently ensued and the explosion which first occurred was not an explosion for which they were at all responsible. They say that the first explosion occurred in a scow, or barge, called the Johnson-17, that that was something that was loaded with stuff that they had not put there, that it was loaded in violation of the anchorage laws of the United States, and that the explosion occurred there and was the cause of all the subsequent destructive results. Now, of course, if that catastrophe, as it is called, down there was brought about by any other cause, it makes no difference what it was, than the defendant's negligence, the defendant is not responsible for it and cannot be made to pay. The whole imposition of liability upon the defendant rests upon the notion that it was at fault, because without fault, and fault is charged in the written complaint of the plaintiff, there can be no recovery whatever, and the verdict would have to be for the defendant. I want to make that perfectly plain to you, that the only ground upon which liability can be rested against the defendant is fault, legal fault, such fault as I have indicated here, and that fault, of course, arises out of the notion that they have

been shown by the greater weight of the evidence not to have exercised the degree of care which the law under the circumstances exacted of them and which I have defined to you. Unless that is shown there can be no negligence and there can be no recovery.

Another claim made by the defendant, as I understand it, is that even if the loss occasioned, if any was occasioned, by the Johnson-17, was not the original or the sole cause of the destructive effects or results on plaintiffs' property, of which complaint is made here, that still if it was an independent cause and it did cause some loss to the plaintiff, and you cannot say, because the evidence does not make it clear, how much of the loss was due to the explosion on the Johnson-17 for which the defendant was not responsible, if it was not responsible, and how much was due to the other explosion or to the fire that ensued from either of them, why, manifestly, you could not say how much the plaintiff ought to have, and therefore you would have to say that the best that could be said for them in that particular would be that they would be entitled to six cents' damages; because the law makes it incumbent upon the plaintiff to make out by the greater weight of the evidence not only what was the cause of his loss, but the extent of it, how much it was.

Now, in response to that, of course, the plaintiff says that the explosion on Johnson-17 was simply one link in a chain of consequences which flowed from an original act of negligence on the part of the defendant. They say that the first explosion was the explosion that took place on the land, and that everything that occurred after that was an unbroken concatenation, a complete series of links, all of which were traceable as to their original legal source to the negligence on the part of the defendant company, the Lehigh Valley Railroad Company; and if they have made that out by the greater weight of the evidence, then, of course, it follows as a legal consequence that the plaintiff is entitled to recover all the

loss that has been shown by it to have resulted from both explosions. You can readily see that this proposition that I am trying to elucidate to you is merely a matter of cause and effect. If the defendant has been shown by the greater weight of the evidence to have caused all the loss, why, then, of course, the defendant must necessarily pay all the damage. If it has not been shown to have occasioned all the loss, but has been shown to have occasioned some of the loss by its legal fault, then, of course, it ought to pay so much damage as it has been shown to have caused, and if the jury cannot say how much that damage was, because that has not been made clear in the evidence, but they are satisfied that it did cause some loss, why, then, manifestly, the jury could only say, under the circumstances that the defendant would be obligated to pay nominal damages.

Now, gentlemen, so much for that contention.

I am requested to charge, and do charge, that if the jury find that the fire which was subsequently discovered upon the premises of the defendant on the night of July 29-30, 1916, was started by spontaneous combusion the defendant cannot he held legally responsible in respect of the starting of said fire.

I have already charged, I think, and fully covered all those that I intend to charge, so far as the requests of the defendant are concerned.

Now, in determining, gentlemen, whether or not care proportioned to the risk has been exercised, you must bear in mind that the criterion is, What would a reasonably prudent and cautious man have done under the circumstances? The law erects a sort of fictitious man, we call him the man of ordinary care, a sort of fictitious creature who is supposed to possess the average caution, judgment, skill and understanding, and the law says, You ask yourselves the question in determining whether the care that is cast upon the defendant has been used or not, what would a reasonably prudent and cautious

man have done under the circumstances? and in determining that question you ask yourselves whether or not a reasonably prudent and cautious man would have had watchmen and guards upon the premises to watch these inflammable and explosive substances, and whether or not he would have had as great or greater a number of guards and watchmen than the defendant had in this case, and whether or not he would have had guards of more competence, and then you ask yourselves whether or not such a reasonably prudent and cautious man would have depended, and to what extent he would have depended, upon the activities of the so-called Dougherty detectives, who, counsel in summing up have seemed to assume were employed by the consignees, or at least by some outside party. You ask yourselves how far, to what extent, would a reasonably prudent and cautious man have relied upon their activities, and to what extent would he have relaxed his own activities in the light of his knowledge of their presence there and their business there; and then you would ask yourselves, furthermore, to what extent a reasonably prudent and cautious man would have permitted persons to come upon that property at night, what challenge would he have used to ascertain whether they were authorized or not, what inspection, if any, would he have adopted to determine their safety if they were on there—that is, their safety so far as the adjoining property was concerned. You ask yourselves all those questions, and say to yourselves, Now, if this reasonably prudent and cautious man were there and were charged with the duty that is charged upon the defendant in this case, the duty of using this care proportioned to the risk of injury to be anticipated, or danger to be anticipated—you ask yourselves, Has it been shown in this case that the defendant company did not exercise that degree of care in any one or more of the particulars indicated in the plaintiffs' written complaint? If that has been shown, and its neglect to exercise it was a proximate

cause of the plaintiffs' injury, then you will say to yourselves, naturally, that it follows that there should be a recovery and an assessment of damages. If it has not, why, manifestly, there should not be a recovery, and the verdict would have to be for the defendant.

Now, I have been, I think, over this matter as fully as it is necessary to go over it to acquaint you gentlemen with the rules of law which I think should govern you in your determination of it, and you will take the case under these rules and determine it.

If there is any question as to a matter of law which any of the jury desires to ask to elucidate in his mind anything that seems obscure before he retires I should be very glad to have the juror ask it, and if it be a pertinent and proper question, of course, I shall be very glad to answer it. If not, why, the jury may take the case and consider it.

JURY RETIRES.

Mr. Skinner. No exceptions.

Mr. Garrison. The first exception that I want is right after your Honor had read the complaint and said something to the effect that if they found the defendant was guilty of any neglect of any of the duties which the other people had set forth in their complaint and had failed to fulfil that duty—

The Court. I see your point. Your point is that some of these are outside of the regulations.

Mr. Garrison. Some of these are outside of our duties in any respect.

The Court. Yes. You may have that exception.

Mr. Garrison. Now, why not find the exact place in the charge? You said it two or three times.

The Court. If the point is as you have stated and not as I have indicated it, I should be very glad to have you

indicate the particular point which was outside of your duty, because I might want to change that.

Mr. Garrison. Do you want me to indicate that?

The Court. Yes.

I can tell you what I said. I said if the jury find that the plaintiff has established by the greater weight of the evidence that the defendant neglected any one or more of the duties indicated and that that was the proximate cause of the injury and loss, that the plaintiff would be entitled to have a verdict.

Mr. Garrison. Well, that is what I want an exception to.

The Court. Yes.

Mr. Garrison. There and wherever else you said it.

The Court. And you said the reason you wanted the exception was because there were some duties there which you did not think you were under any obligation to observe, and I want to know what they are so in case I might want to retract them—

Mr. Garrison. I want to say three things at least. I want to say that I wish an exception to that language because any of these alleged duties as charged in the written complaint which are outside of our duties under the regulations of the Interstate Commerce Commission I think was improper for you to have left to the jury.

The Court. So do I. But what are they?

Mr. Garrison. I haven't come to that.

Secondly, I think that some of the alleged duties are not our duties under any aspect of the law, whether you disregard the Interstate Commerce regulations as having a part in the case or not; and some of them I think there is absolutely no evidence to sustain, whether they are duties or not; and in respect to many of them I think—never mind whether they are there or not—there is no evidence under which they could be found to have been the proximate cause of the injury even if negligent.

The Court. I am very glad to hear all that, but what I want to know is—I want you to put your finger on the particular things which you say are faulty. The object of this exception is so that I may correct it. Now, if you will tell me what they are I may correct them.

Mr. Garrison. Now, do you want me to specify as to each one?

The Court. Yes, of course.

Mr. Garrison. All right. The first one is that we neglected to watch or guard said premises and waters adjacent thereto through employees sufficient in number and competence and to properly instruct the same to prevent incediary or accidental fires.

First, I contend that that is not within the regulations; second, I contend that it is not a proper statement of our common law duty; and, third, I contend that there is no evidence to show that we did not have employees sufficient in number and competent, and did not properly instruct the same to prevent incendiary or accidental fires.

The Court. All right. I will let that stand.

Mr. Garrison. The second one is: "It permitted unauthorized persons upon said premises and especially upon or in the vicinity of said explosives, ammunitions, or munitions of war." First, I contend that that is not required by the regulations; second, I contend that there is no evidence that we permitted unauthorized persons upon the premises upon the night in question which is the only night in question here, which is the night of the fire.

The Court. What do you mean is not required by the regulations?

Mr. Garrison. They did not say anything about unauthorized persons upon the premises.

The Court. Well, of course, if you draw a distinction between on the premises and on having access—

Mr. Garrison. I think there is a very great difference between them.

The Court. It may be, but I do not see it. I will let it stand.

Mr. Garrison. I want an exception thereto.

The Court. I want you to have it.

Mr. Garrison. Because ability to get on the premises where the things are and going beyond are very different things.

The Court. Of course; but where they get the permission and you have not watchmen there to see that they do not wander around at will it seems to me they have access—

Mr. Garrison. There is no use my debating it. In the first place, it is not a regulation requirement; secondly, there is no evidence that any such thing was permitted or happened, or was there that night; or, in fact, that if such a thing did happen or was there that night that it was the proximate cause.

The Court. I understand you.

Mr. Garrison. Third. "It permitted vessels not connected with the transshipment of said explosives, ammunition or munitions of war to lie moored to said North Pier." I say that that does not charge any duty. There is no reason why we should not do so if we want to, and there is no evidence that I know of that would permit any such thing; and there is no evidence that by permitting any such thing we had any duty cast upon us, or that a thing happened to charge us with any damage that resulted from the fact that such vessels were there.

The Court. Well, I see no objection to stating to the jury what was charged by the plaintiff in his complaint, and telling them it had to be made out if there was anything in it.

Mr. Garrison. Well, my objection is that it was no duty.

The Court. Well, assuming it was not, and there is no evidence to support it, there is no harm done anyway.

Mr. Garrison. It permitted, or neglected to prevent, barges or lighters having no business at said North Pier, and wholly or partially laden with such explosives and munitions of war, to lie moored to said North Pier or to lie moored to similar barges moored thereto, or to lie in the vicinity thereof.

First, I say that that does not charge any—they charged we "neglected to perform said duty in the following respects:" I say the converse of that. It was not our duty. There is no reason why we should not do all those things that they say, and there is no evidence that we did any of the things they say; and there is no evidence to show we were responsible because, having done it, anything happened by which any liability can be attributed to us as the proximate cause of any injury.

The Court. Well, there is some evidence in your own requests to charge, but, however, we will let that pass. It does not make any difference.

Mr. Garrison. Five. "It neglected to isolate or separate the railroad cars containing such explosives and munitions of war and improperly accumulated or bunched the same in the same locality on said premises, and take precautions for quick isolation in case of fire."

I contend, first, that this was not within the regulations. (Of course, I contend that No. 4 was not within the regulations. I say that No. 4 was not within any of the regulations.)

It is not within the regulations, in the first place. It is not a common-law duty in the second place. It is not shown that we did not isolate or separate them in any manner that the law would say was improper, and it is not shown that the lack of doing so was the proximate cause of any injury in the case.

Sixth. "It neglected to provide employees sufficient in number and competence, and to properly instruct the

same for the purpose of discovering and extinguishing any incendiary or accidental fire, such insufficient, incompetent and uninstructed employee or employees as the defendant had were negligent in guarding, discovering and reporting the fire hereinbefore alleged."

After the first sentence of that paragraph—it is not within the regulations; it is not a proper statement of our common-law duty, at least outside of the regulations if it were proper to apply the rule outside of the regulations; and there is no evidence to show that we did not follow the custom in this respect, or that we were neglectful in this respect; and there is no evidence to show that the neglect of the alleged duty was the proximate cause of the damage suffered by the plaintiffs and complained of.

And in regard to the second sentence—I do not know whether I care anything about that. If it was our duty, then I suppose it is proper that they should charge negligence. But I do deny so much of the second sentence of this paragraph as charges us with the duty of guarding, discovering and reporting the fire. There is no evidence that we were negligent in guarding, discovering or reporting the fire. In our theory of the case there is no evidence to show that the lack of more guards, or greater guard, or what not, would in any way have prevented the occurrence of the disaster.

Seventh. "It neglected to provide sufficient apparatus and employees for the purpose of fighting and extinguishing fire on said premises and said railroad terminal."

This is not within the regulations. There is no proof that we did not provide sufficient apparatus and employees for the purpose of fighting and extinguishing the fire; and it is not a duty enjoined upon us by law outside of the regulations, even if it were proper to apply some law to us outside of the regulations.

And, last. "It neglected to provide sufficient means of communication or alarm of fire."

We claim, in the first place, there is no duty under the regulations in that respect; there is no duty outside of the regulation in that respect of the character charged here, and there is no evidence to show that we neglected to provide sufficient means of communication or alarm of fire; or that the failure of these, or any of the previous ones, was the proximate cause of the injury suffered by the plaintiff.

The Court. That concludes your enumeration of the grounds, does it?

Mr. Garrison. That concludes my enumeration under my first exception.

The Court. Now, then, with respect to the first exception, in order that there may be no question about the situation and that it was clearly brought to my attention, we will write right down here that I do not desire to call the jury back to say a solitary word to them about that situation, because all that I did was to tell the jury what the claim of the plaintiff was, assuming that they were intelligent men, and to direct their attention to the fact that only those elements of that claim, those specific allegations of negligence which were made out by the greater weight of the evidence could be by any possible conception of the case a ground of recovery. So there is no need to call them back to tell them that.

Mr. Garrison. I desire to except to so much of your Honor's charge as that where you said: "Now, then, I charge you, gentlemen, that the rule of law that is to be extracted from these regulations and the statute in pursuance of which they are passed is that the defendant railroad company was under a duty in the transportation and custody of the cars of explosives, ammunition and inflammable substances in the particulars indicated to exercise a degree of care commensurate with the risk of danger reasonably to be anticipated, and the defendant railroad company is liable for damages to the plaintiffs

for any failure to exercise such care, if the failure to exercise such care was the proximate cause of the injury and loss to the plaintiffs."

Give me an exception to that.

The Court. Yes.

Mr. Garrison. I desire to except to that part of your Honor's charge wherein you say: "Now, then, gentlemen, that brings you to this interesting inquiry: 'What is the degree of care commensurate with the risk of danger reasonably to be anticipated which it was the duty of the defendant in this case to exercise with respect to these explosives in regard to the particulars in which the plaintiff has complained the defendant was negligent'?"

The Court. You may have it.

Mr. Garrison. I next desire to except to that part of your Honor's charge in which you said as follows:—

The Court. Well, there cannot be any doubt about that. You may have an exception to what I said about the rule of reasonable care being a rule of relation.

Mr. Garrison. Have you got it there?

Mr. Kelley. Yes. (Reading.) "Now, then, you can readily see that such a rule is a rule of relation. It has regard to all the circumstances in which a man finds himself placed at the time he is called upon to act." "Well, the law says that a high degree of care, which is only another way of saying reasonable care, is the duty of every person when he is handling something which is apt to be dangerous and which he has reason to anticipate will be dangerous to others if he does not handle it carefully."

Mr. Garrison. Now, then, I want to object to such part your Honor's charge as made the doctrine of reasonable care in this case a rule of relation, my point being that where the legislature has laid down the rule it makes no difference whether it is a proper relation to the subject matter or is not. To make it perfectly clear, if the

legislature says the only audible signal you have to give is a bell, it does not make any difference whether a bell was the only thing on earth; if the legislature prescribes it, it does not make any difference.

The Court. Under the circumstances do you want me to call the jury back and tell them that it is the duty of the defendant company to remove these cars from all danger of fire, and that it is not a duty of relation at all, but it is an absolute, unquestioned, unqualified duty?

Mr. Garrison. Oh, no; I don't want you to do that. I do not want you to tell the jury what I do not think the law is; and I think the law is what the legislature has said. If you say that is what they said, I would say yes, you ought to tell them that.

The Court. That is what they have said.

Mr. Garrison. Well, whatever the law is you should charge them, but I do not think you should charge them they are free to determine what the degree of care is, in a case where the legislature has defined what the degree of care is, by a rule of relation.

The Court. I think you may have your exception to that, because I am perfectly satisfied, if your contention is correct, that I have charged a large mile from anything you are contending for.

Mr. Garrison. That may be. I desire to except to so much of your Honor's charge wherein you said: "And, therefore, the law said that they must use care which would be commensurate with the risk of injury to persons in the neighborhood that would ensue if such care were not used."

The Court. Yes.

Mr. Garrison. It explains the common law, and it is not a question of kind of care; it is a question of the kind of care prescribed. Now, then, I desire to except to your Honor's charge wherein you spoke in this wise: "And in determining that question you ask yourselves whether

or not a reasonably prudent and cautious man would have had watchmen and guards upon the premises to watch these inflammable and explosive substances, and whether or not he would have had as great or greater a number of guards and watchmen than the defendant had in this case, and whether or not he would have had guards of more competence; and then you ask yourselves whether or not such a reasonably prudent and cautious man would have depended, and to what extent he would have depended, upon the activities of the so-called Dougherty detectives." My point is that there was no evidence in this case under the law which could properly make the defendant responsible for anything that happened on Johnson-17 in the way of explosion, and you left it to them with an "if."

The Court. Now, let me ask you this: Suppose that the cars where this first explosion took place caught fire, and a spark from that fire flew over and landed on Johnson-17 and set that afire. Would the defendant have been responsible for the fire on Johnson-17?

Mr. Garrison. To a stranger?

The Court. Yes, to a stranger.

Mr. Garrison. I say no. I say in the first place it would not, in this case absolutely, for this reason: that under the undisputed facts in this case the Johnson-17, in defiance of law, was at that place that night, without our knowledge, and certainly without our consent; because we didn't know what she was loaded with—things which should have caused her to go elsewhere and anchor and not to come there and tie up. So that she was unlawfully there. I say even if that were not so, even if she did not have under the law to go somewhere else and anchor instead of coming there and mooring, there is no evidence, and the fact is, we did not know what she was loaded with, and as she was an independent intervening cause as between us and the damage caused by the explosion on her we are not responsible for the

occurrence of the explosion that took place on the Johnson—never mind if it did take place by reason of a spark from our fire.

Now, my next one is where you go on and say that that was merely a matter of cause and effect, a concatenation of circumstances. Do you remember?

The Court. Surely.

Mr. Garrison. I object to that because I say that even if under your Honor's theory the fire on our premises communicating itself to the Johnson barge and the Johnson barge went off and caused the damage to the plaintiff, or some of it, you have no right in law to let this jury find any damages against us by reason of anything that was caused by the explosion on the Johnson barge.

The Court. Well, then, it would not be a legal concatenation; because the law says if there is an intervening culpable cause the concatenation is broken.

Mr. Garrison. But you said it was an unbroken concatenation.

The Court. I said if it was. I left it to them to say so.

Mr. Garrison. I beg your pardon. You could not have left it to them to say. What you evidently meant to say was, if we had a fire on our premises and that communicated itself to the barge and the barge went off, that that was an unbroken concatenation.

The Court. You may have an exception to it.

Mr. Garrison. I say that was the law, because you should have charged them that to the extent that any damage was caused to this plaintiff by what happened on the Johnson-17 explosion we were not responsible in law.

The Court. All right.

Mr. Garrison. I desire to except to that part of your Honor's charge in which you asked the jury in searching their minds as to what verdict to find as to the degree of care—you said to them: "Now, would you have had

guards or would you have had a greater number of guards—"

The Court. No.

Mr. Garrison. Well, this ideal man: "Now, in determining, gentlemen, whether or not care proportionate to the risk has been exercised you must bear in mind that the criterion is, What would a reasonably prudent and cautious man have done under the circumstances?"

The Court. Your point here, as I understand it, is that this now permits them to apply the doctrine of care proportionate to the risk, or reasonable care, instead of the regulations?

Mr. Garrison. Yes, in so far as that is true.

The Court. All right.

Mr. Garrison. And also because even if that is true and you are applying some other rule, there is no evidence to support a finding, and, therefore, you should not have left it to the jury as to whether lack of guards, or of more guards, or of sufficient guards, was the proximate cause of this trouble, or was a duty that we left unfulfilled, and as a result of which we caused this injury.

The Court. Well, what becomes of your non-fictitious but splendidly real witness, Crockett?

Mr. Garrison. Splendidly drunk witness, Crockett, you mean.

The Court. Crockett said, "If I had had help, things would have occurred down there."

Mr. Garrison. This is about guards and watchmen.

The Court. Whatever it was.

Mr. Garrison. Of course, as to that, I think that comes under the emergency doctrine.

The Court. I do not think the emergency doctrine has the remotest possible connection with this case. The case you cited was a clear authority against you; that was *Hummel* v. *The Lehigh Valley.*

Defendant's Exceptions to Charge.

Mr. Garrison. I except to that part of your Honor's charge wherein you said: "And then you would ask yourselves, furthermore, to what extent a reasonably prudent and caution man would have permitted persons to come upon that property at night; what challenge would he have used to ascertain whether they were authorized or not." I except to that because it seems to me there is not a scintilla of proof that any people came there upon that night in question, and that is the only night we are concerned with. We are not concerned with what happened a week before, or a week after.

The Court. I think the jury might possibly have a right to infer that if they came in there without challenge and they were in the habit of coming there and this fellow was in the habit of seeing them, that the jury would have a right to assume they came there that night.

Mr. Garrison. I say they have no right to assume in the face of the positive evidence of our witness; that they didn't come there that night.

The Court. They might not have believed the witness. They have a right to disbelieve him.

Mr. Garrison. You would not call it a preponderance of evidence, then, would you?

The Court. I was not debating that.

Mr. Garrison. I desire to except to your Honor's having charged the first request to charge of the plaintiff.

The Court. I charged all the language of No. 2, and then added something to it, because the first request to charge was defective and I added to it.

Mr. Garrison. Well, I want this—

The Court. I can tell you what I said in so many words. I said the defendant railroad company was under a duty in the transportation and custody of the cars of explosives, ammunition and inflammable substances in the particulars indicated to exercise a degree

of care commensurate with the risk of danger reasonably to be anticipated, and that the defendant railroad company was liable for damages to the plaintiffs for any failure to exercise such care, if the failure to exercise such care was the proximate cause of the injury and loss to the plaintiffs.

Mr. Garrison. I want an exception to whatever your Honor charged in that part of the charge which you now tried to remember, and of which we will get the exact words from the charge. Now, your Honor says you did charge No. 2?

The Court. I did; in the exact language of the request.

Mr. Garrison. I desire to except to your Honor's charge of the No. 2 request of the plaintiffs in the language as I have it before me: "The standard of care imposed upon the defendant railroad under the regulations of the Interstate Commerce Commission so far as such regulations cover the field of the measure of the defendant's duty is the same as the defendant railroad company was under without them, namely, a degree of care commensurate with the risk of danger reasonably to be anticipated."

The Court. Correct. I charged that, and you may have an exception to it.

Mr. Garrison. I desire to except to so much of your Honor's charge as construed and applied to this defendant in this case the language of sections 1643-a and b, of the regulations of the Interstate Commerce Commission. I want a separate exception to each because you charged separately as to each. As to section 1643-a, I think it is entirely clear that that relates entirely to the handling of explosives at stations and in transferring them to and from cars, and that is no duty of the railroad company, and it has nothing whatever to do with it; and there is no evidence in this case that they were engaged in handling such explosives at all.

The Court. You may have the exception to that.

Mr. Garrison. Therefore, I consider it a duty of the shippers, consignees, or somebody else, but not of the railroad company; and there is no evidence that they handled the explosives at all, and under our conception there is no evidence that they did not take all of the precautions against fire excepting what would amount to insurance; and we understand that no such rule as that is applicable.

As respects B, there is no evidence that any unauthorized persons had access to the explosives or other dangerous articles at any time while they were in the custody of this carrier.

The Court. Without arguing it, but just pointing it out to you, it might not be something that is useless, a matter of supererogation, to point out the act itself which determines that kind of regulations that should be adopted, and the manner in which they shall be applicable, and says that such regulations shall be in accord, etc., etc., "For handling while in transit."

Mr. Garrison. Yes. They are two different things—handling the cars while in transit and handling explosives. We handle the cars; we do not handle the explosives. This, we contend, is strictly limited to handling explosives by its language, which we do not do at all in any part of the entire history of the transportation.

We except to so much of your Honor's charge as in interpreting section 1666 commented upon and dilated upon the explosive placards.

The Court. I did not comment or dilate. I read it.

Mr. Garrison. Because we contend that has no relevance to any facts in this case; that it is not a regulation; that there is no evidence that we took fire to this thing or brought it to it; that the words, "Keep Fire Away," do not mean that if a fire breaks out in the neighborhood there is any regulation or anything re-

quiring us to put it out; that the proper construction of "Keep Fire Away" is a warning not to bring fire to, and the condensed rules for handling the car on the placard were immaterial and irrelevant to anything in this case; because there is no evidence that we in any way did any of the things, or left undone any of the things, that are mentioned in such condensed rules.

Now, I desire to except to your Honor's refusal to charge the defendant's requests to charge. I think your Honor charged No. 1 and No. 3, and I do not think you charged any other.

The Court. Yes, I did.

Mr. Garrison. Excepting Nos. 1, 3 and 23.

The Court. I give you an exception to my refusal to charge individual requests other than Nos. 1, 3 and 23. I want you to have it.

Mr. Hobart. We except to your Honor's leaving to the jury as one of the regulations applicable to the circumstances of this case, the one that was read or known as No. 1689.

The Court. All right; you may have it.

Defendant's Requests to Charge.

1. The law imposed upon the defendant the duty of transporting the explosives in the cars as testified about in this case, and at the time of the explosion they were still in course of such transportation in interstate or foreign commerce by land.

2. The sole duty of the defendant to the plaintiffs in respect to the explosives received by it for interstate transportation by land and still in the course thereof was to comply with the statutes of the United States and the regulations of the Interstate Commerce Commission respecting the same; and the plaintiffs are not entitled to recover unless the jury shall find that the defendant failed to so comply and that such failure was the proximate cause of the injury complained of by the plaintiffs.

If the Court refuses to charge No. 2, then we respectfully request the Court to charge No. 3, as follows:

3. The sole duty of the defendant to the plaintiffs in regard to the explosives received by it for interstate transportation by land and still in the course thereof, in respect of all matters within the scope of the statutes of the United States and the regulations of the Interstate Commerce Commission concerning the same, was to comply with such statutes and regulations; and the plaintiffs are not entitled to recover in respect of any such subject matter unless they prove a failure on the part of the defendant to so comply and that such failure was the proximate cause of the injury complained of by the plaintiffs.

4. The "explosive" placard in evidence is not a regulation of the Interstate Commerce Commission.

5. The words "Keep Fire Away" on the "explosive" placard in evidence do not constitute a requirement that fire should be extinguished.

6. There is no evidence in this case but that the explosives in defendant's cars were in all respects carried, conveyed, transported, handled and held by the defendant in compliance with the statutes of the United States and the regulations of the Interstate Commerce Commission respecting the safe transportation of explosives in interstate commerce by land.

7. That there is no evidence from which the jury can legally infer that the defendant did not furnish sufficient watchmen or guards on its premises on the night of July 29 and morning of July 30, 1916.

8. There is no evidence from which the jury can legally infer that the defendant did not provide sufficient fire-fighting apparatus on its premises on July 29-30, 1916.

9. There is no evidence from which the jury can legally infer that the defendant did not observe the usual custom of railroads in respect to the fire protection afforded at Black Tom on July 29-30, 1916.

10. There was no legal duty resting upon the defendant in respect of its terminal at Black Tom to furnish fire hydrants in addition to those furnished by the city of Jersey City, the said terminal being within the limits of that municipality.

11. There was no legal duty resting upon the defendant in respect of its terminal at Black Tom to furnish its own fire protection, in addition to that furnished by the city of Jersey City, the said terminal being within the limits of that municipality.

12. There was no legal duty resting upon the defendant in respect of its terminal at Black Tom to furnish men and equipment to extinguish fires, in addition to the men and equipment of the municipality of Jersey City, within the limits of which the said Black Tom terminal is.

13. The Court has taken judicial notice of the fact that by reason of the war in Europe there was common knowledge of German propaganda, as a result of which persons favorable to Germany, either at the instigation of the German government or on their own initiative, sought to destroy munitions which otherwise would go to the enemies of their fatherland. If it is assumed that this knowledge reached the attention of the officials of the defendant, it should also be assumed that such knowledge likewise reached the municipal authorities of Jersey City, and that any necessary police protection to take precautions against incendiarism or other criminal acts within the limits of Jersey City would be furnished by such municipality, and the defendant cannot be held legally responsible for failure, if any, to furnish its own police protection for such purpose.

14. There is no evidence in this case of the presence of any unauthorized persons on the premises at Black Tom on the night of July 29-30, 1916.

15. There is no evidence in this case that any unauthorized persons had access to the explosives or other dangerous articles in the custody of or on the premises of the defendant on the night of July 29-30, 1916.

16. There is no testimony of any witness from which the jury can draw any legal inference as to what caused the starting of the fire which was discovered on the premises of the defendant on the night of July 29-30, 1916.

17. If the jury believes the testimony of Dr. McKenna, the expert produced by the plaintiffs, that "There was nothing which could be called a law of nature which determines for us beforehand what would be the effect of large masses of explosives exploding * * * and that each case stands on its own bottom," then the jury may not find a verdict against the defendant based upon its failure to take precautions other than it did take.

18. The defendant can only be held legally responsible for the results of its conduct reasonably to be

expected, and under the proofs in this case it was not reasonably required to expect explosion of T N T in the cars on its premises as a result of fire.

19. The plaintiffs in this case cannot upon their complaint herein recover any damages against the defendant by reason of any alleged negligent conduct of defendant's employees after the discovery of the fire on its premises.

If the Court refuses to charge No. 19, then we respectfully request the Court to charge No. 20, as follows:

20. If the jury finds that the defendant was not negligent in respect of the starting of the fire and that the said fire was either in a car of explosives or ammunition or was immediately adjacent to cars containing explosives or ammunition, then a condition of emergency existed by reason of which the defendant cannot be held responsible for errors of judgment on the part of its employees, or any of them, in respect of what they did or failed to do concerning the putting out of the fire.

If the Court refuses to charge No. 20, then we respectfully request the Court to charge No. 21, as follows:

21. If the jury finds that the defendant was not negligent in respect of the starting of the fire and that the said fire was either in a car of explosives or ammunition or was immediately adjacent to cars containing explosives or ammunition, then the jury should consider whether the situation thus disclosed was not an emergency, and if the jury finds that the situation was that of emergency, then it may not find the defendant legally responsible for the errors of judgment of its employees in respect to what they did or failed to do concerning the putting out of the fire.

22. The defendant can only be held responsible in damages for the failure to exercise reasonable care under the circumstances, and the jury in considering the circumstances and the degree of care exercised may con-

sider the fact that there were four watchmen on the premises in the immediate vicinity of the cars containing the explosives on the night of the explosion in question, in addition to the watchmen employed by the defendant.

23. If the jury finds that the fire which was subsequently discovered upon the premises of the defendant on the night of July 29-30, 1916, was started by spontaneous combustion, the defendant cannot be held legally responsible in respect of the starting of said fire.

24. The undisputed evidence is that Johnson barge No. 17, with 1,005 cases of T N T and 417 cases of detonators (all obtained elsewhere) moored at North Pier at Black Tom some time on Friday, July 28, 1916, and there is no evidence that the defendant had any knowledge whatever of the materials thus laden on said Johnson-17 at that time; and the jury must find, under the law, as contained in the Anchorage Regulations of the United States Government, that a boat thus laden should not have been moored at Black Tom Pier, but should have proceeded to the anchorage ground as designated in the said United States regulations, and that the act of mooring her thus laden at the North Pier at Black Tom was an unlawful act.

25. If the jury find that the Johnson-17, containing 1,005 cases of T N T and 417 cases of detonators (all obtained elsewhere), was unlawfully moored at Black Tom Pier, and that the T N T subsequently exploded on the night of July 29-30, 1916, and caused the injury complained of by the plaintiff, the jury cannot legally find the defendant responsible for such injury.

26. There is no evidence in this case from which the jury can legally hold the defendant responsible in respect of the materials on Johnson barge No. 17, or for the results of any explosion of such materials.

27. If the jury find that the T N T on the Johnson barge No. 17 exploded and caused the injury of which

the plaintiffs complain the jury cannot legally find the defendant responsible.

28. The plaintiffs in this case having complained that the injury which they suffered was occasioned by the first of the two explosions, which the proofs show occurred at or near Black Tom on the night of July 29-30, 1916, the jury cannot legally hold the defendant responsible for such injury unless it finds that the explosion of the T N T cars on land on the premises of the defendant was the first of the two explosions.

29. In view of the fact that the regulations concerning the transportation of explosives and other dangerous articles on land in article 1647 contain a prohibition against the loading of such materials as detonators and high explosives in the same car or storage place, and of the evidence in this case in respect to the danger of thus loading such articles on the same carrier, the jury may legally find that the presence on Johnson barge No. 17 of the detonators and T N T constituted negligence on behalf of the proprietor of such barge.

30. It is the undisputed fact that there were two explosions at or near Black Tom on the night of July 29-30, 1916, one thereof upon the land at the place indicated by the crater as shown in Exhibit P. 16, and the other on a barge at the site of the crater in the bed of the river as shown by Exhibit D. 12, and that the defendant, if held responsible at all, can only be held responsible for the effects of the explosion on land, and it is the undisputed fact that each of such explosions, directly or indirectly, damaged the warehouses containing the sugar, for the loss of which damages are claimed in this suit, and there is no evidence from which the jury can determine how much of the damage to the said sugar was caused by the effects, direct or indirect, of the first explosion and how much was caused by the effects, direct or indirect, of the second explosion; and in default of

such proof the jury can legally find a verdict against the defendant, if at all, only for nominal damages.

31. The jury is not at liberty to allow the plaintiffs, or any of them, any interest in respect of any sum found to be due them, or any of them.

In respect solely to the insurance company, plaintiffs, the defendant respectfully requests the Court to charge as follows:

32. The insurance company, plaintiffs, cannot legally recover against the defendant except in respect of a sum of money legally required to be paid by them to the co-partnership plaintiffs in pursuance of the respective policies of insurance on the sugar in question.

33. There is no proof in this case by which the jury can determine how much injury was occasioned to the sugar of the co-partnership plaintiffs in the warehouses by reason of the explosion or explosions, and how much was occasioned by fire ensuing, and therefore the jury can, in respect of the amount of insurance paid by the said insurance companies to the plaintiffs and claimed in this suit, allow only nominal damages, if any.

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Exhibit P. 1.

EXHIBITS.

EXHIBIT P. 1.

THIS AGREEMENT, made in duplicate the 24th day of June in the year One Thousand nine hundred and thirteen (1913) between the NATIONAL STORAGE COMPANY, a corporation of the State of New Jersey, (hereinafter called the Storage Company) of the first part, and the LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, (hereinafter called the Railroad Company), of the second part:

WITNESSETH;

THAT the Storage Company has let and demised and by these presents does let and demise unto the Railroad Company ALL the lands belonging to the National Storage Company, situate at the National Docks, Jersey City, Hudson County, New Jersey, being a tract of land containing about one hundred and eleven acres, more or less, together with all the tracks, wharves, piers, docks, bulkheads, stores, warehouses, elevators and power houses, and all other buildings and structures of every kind whatsoever erected thereon; excepting and reserving therefrom about one hundred and forty-nine thousand and five hundred (149,500) square feet, together with the following structures erected thereon: Stores "A," "E," "F," "G," "H," "I," "K," "L," "M," "N," "O," "P," "Q" and "R" and Pier 6 and Shed No. 2 ~~and~~ on Pier 7 and the office building (40′ x 25), located between stores "F" and "G," together with the right of access thereto and wharfage rights in connection therewith as herein provided.

PROVIDED, however, that the Railroad Company may use, for its own purposes, during the continuance of this lease or any extension or renewal thereof, the entire first or ground floors of stores "N" and "O," hereinbefore excepted from the property herein demised, in accordance with all the terms and conditions of this lease.

Exhibit P. 1.

The land herein demised with the tracks, buildings and structures of all kinds erected thereon are shown colored in red on the map attached hereto and made a part hereof and the property excepted herein and to be retained by the Storage Company is shown colored in yellow on the aforesaid map, which is entitled:

"Lehigh Valley Railroad, New York Division, Map showing the National Storage property to be leased to L. V. R. R. Co. of N. J. National Stores, Jersey City, N. J. Office Division Engineer, Jersey City, N. J., June 10, 1913, Plan No. 224-G."

for a term of ten years from the first day of July, Nineteen hundred and thirteen, at an annual rental of Two Hundred and six thousand one hundred and three dollars ($206,103.00), payable monthly in advance.

The parties hereto covenant and agree each with the other as follows;

First:—The Railroad Company agrees to pay in the first instance all taxes and assessments which may be levied and assessed against all of the said property whether leased to the Railroad Company or retained by the Storage Company, except taxes levied upon the franchises and business of the Storage Company. The Railroad Company will carry insurance on all the buildings and property of the Storage Company, including the contents of its warehouses and stores in such amounts as may from time to time be required by the Storage Company, and the Railroad Company will in the first instance pay all the premiums on the said insurance. The Railroad Company will, however, charge the Storage Company and the Storage Company will repay to the Railroad Company, within thirty (30) days after the rendition of bills therefor, such equitable proportions of such taxes, assessments and insurance as are applicable to the property herein excepted from the terms of this lease and retained by the Storage Company and to the contents of its warehouses and stores. The Railroad Com-

Exhibit P. 1.

pany will pay for such electric light, electric power, steam heat, steam power, water and fire protection as may be used by it and by the Storage Company and will keep an accurate account of the cost thereof and will charge to the Storage Company its pro rata share of the cost thereof, together with expenses incurred in connection therewith, and the Storage Company will repay the same to the Railroad Company within thirty (30) days after the rendition of bills therefor.

SECOND:—The Railroad Company agrees to keep the premises herein demised in good order and repair and all improvements erected thereon in good condition during the continuance of this lease and any extension or renewal thereof and to deliver up *peacable* possession of the demised premises to the Lessor in as good order as the same now are, reasonable wear and tear excepted, upon the termination of this lease in the manner hereinafter set forth.

PROVIDED, however, that expenditures for repairs to warehouses or structures to be used jointly by the Storage Company and the Railroad Company, as herein provided for, shall be borne and paid for pro rata as the interests of the parties hereto may appear, the same to be determined either by agreement or by arbitration.

THIRD:—The Storage Company hereby grants to the Railroad Company the right to use the property herein demised for all purposes incident to its transportation business; to operate an elevator or elevators and make any other use of the lands, buildings, railroad tracks, and other property herein leased not inconsistent with such use as the Railroad Company could make of the said property if owned by it in fee. The Storage Company further grants to the Railroad Company the right to sublet any portion or portions of the lands, buildings and other property herein leased to it without further permission from the Storage Company than that herein

Exhibit P. 1.

contained, provided, however, that if the Storage Company at any time shall be temporarily in need of additional storage space or additional pier facilities it reserves the right to call upon, the Railroad Company therefor when such space or pier facility is not in use by the Railroad Company and the Storage Company agrees to pay and the Railroad Company agrees to charge for such temporary accommodations a reasonable monthly rental therefor, the same to be determined by agreement between the parties hereto or by arbitration in the manner hereinafter provided.

FOURTH:—The Storage Company reserves to itself the right to collect and receive any wharfage which may arise, accrue or become due for the use and occupation of any of the wharves and docks on the said property for the dockage of vessels, boats or lighters, other than those belonging to the Railroad Company, or for the wharfage of which the Railroad Company is or may be chargeable.

FIFTH:—The Storage Company hereby grants to the Railroad Company the right to erect or construct upon the property herein leased, any buildings, docks, elevators, storehouses, tracks or any other structures necessary for railroad purposes, or for the purposes of persons or corporations to whom the Railroad Company may sub-let any of the said property provided that the cost of the same shall be paid for by the Railroad Company, and that upon the termination of this lease or upon the termination of any extension or renewal thereof, the Railroad Company agrees to remove from the said property all such tracks, structures, buildings, piers, docks or wharves as may have been constructed by it during the said term or any extension or renewal thereof, or to sell the same to the Storage Company, at a valuation to be placed thereon at the time of the termination of this lease, the said valuation to be made by the parties hereto or by arbitration in the manner hereinafter provided.

Exhibit P. 1.

SIXTH:—The Storage Company hereby agrees to complete at its own expense all additions and improvements to the property herein demised in course of construction and uncompleted at the beginning of the term of this lease, viz. on July 1, 1913, and after the completion thereof the said additions and improvements shall be turned over to the Railroad Company as a part of the property herein demised and covered by the terms and conditions of this lease.

SEVENTH:—The Storage Company hereby grants to the Railroad Company the right to re-arrange or relocate any existing buildings, docks, elevators, storehouses, tracks, or other structures herein leased to the Railroad Company, provided that, at the expiration of this lease or any renewals thereof, the Railroad Company will, if required by the Storage Company, replace such buildings, docks, elevators, storehouses and tracks or other structures, upon their present existing locations. The Storage Company further grants to the Railroad Company the right to remove wholly or in part from the said lands the present existing buildings, docks, elevators, storehouses, tracks and other structures herein leased to the Railroad Company; Provided, however, that before the Railroad Company shall effect such removal the value of such structure or structures at the time of such removal shall be either agreed upon between the parties or fixed by arbitration as hereinafter provided and upon the termination of this lease or any renewal thereof, the Railroad Company, at the option of the Storage Company, shall either replace such structure or structures or shall pay to the Storage Company the agreed or arbitrated value thereof as so fixed.

EIGHTH:—Any difference that may arise between the parties hereto in connection with this lease and which cannot be adjusted by the parties themselves, shall be referred to three arbitrators, one to be chosen by the party of the first part and one by the party of the second

Exhibit P. 1.

part and the third by the two arbitrators thus chosen. The decision of the said arbitrators or a majority thereof shall be final.

NINTH:—The Storage Company hereby reserves the free and unrestricted access at all times to any and all property excepted by it from the within lease, over any property hereby leased to the Railroad Company, for the wagons, railroad cars, motor cars and any other transportation facilities that the Storage Company may at any time desire to use, together with the right of access to the said property for all persons desiring to enter the Storage Company property for business or other reasons, and the Railroad Company hereby grants the said free and unrestricted access to the said property of the Storage Company.

TENTH:—The Lessor and Lessee herein expressly reserve the right to terminate this lease upon written notice of not less than ninety (90) days with or without assigning any reason therefor and the said Lessee agrees to and does hereby waive all notice to quit now or hereafter required by any law or laws previous to proceedings to recover possession of the demised premises. Any notice of termination by the Lessor shall be good if served personally upon the Lessee.

ELEVENTH:—All rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the successors and assigns of such parties.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed the day and year first above written.

NATIONAL STORAGE COMPANY,

By:

E. L. MACKENZIE,
President.

(SEAL)

Attest:

G. J. BANKER,
Secretary.

Exhibit P-2

EXHIBIT P. 2.

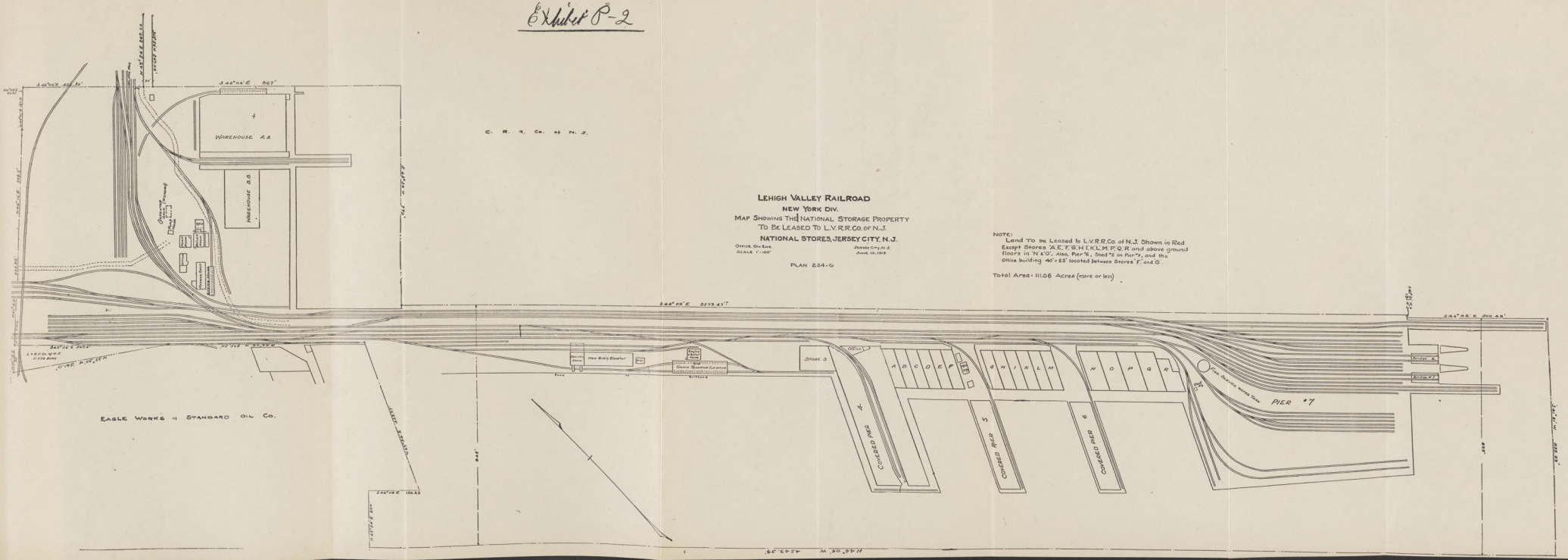
C. R. R. Co. of N. J.
WAREHOUSE A.A.
WAREHOUSE B.B.
Office
Pump House
Scale House
Oil House
Oil House
Oil

EXHIBIT P. 2 A.

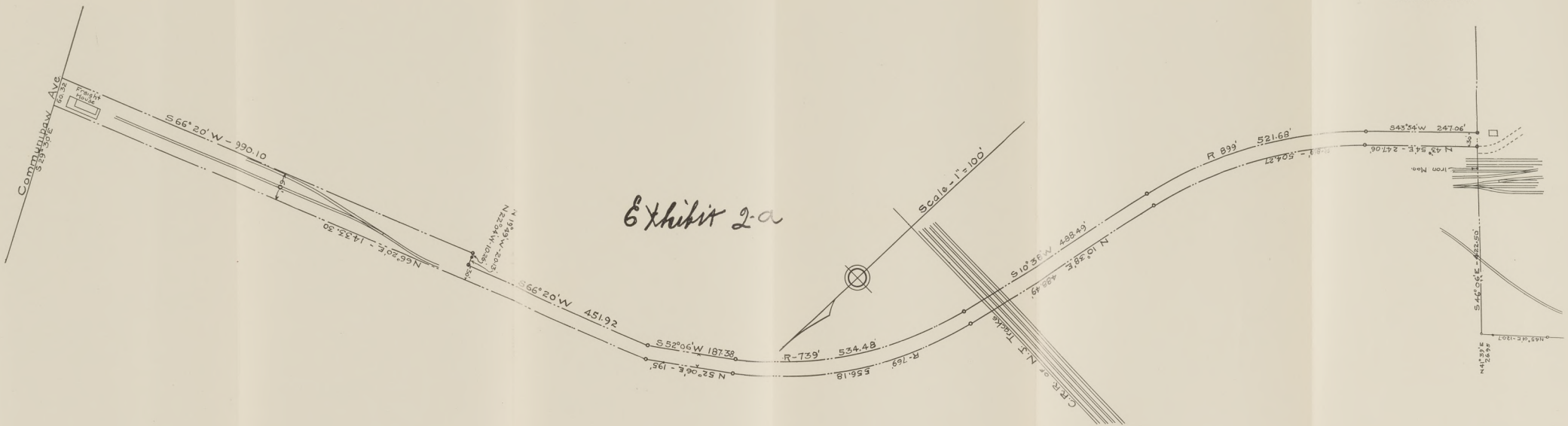

Exhibit 2-a

Exhibit P. 1.

LEHIGH VALLEY RAILROAD COMPANY
OF NEW JERSEY,
By:

E. B. THOMAS,
President.

(SEAL)
Lehigh Valley.

Form approved } E. H. B.

Attest:
J. WM. ROBBINS,
Assistant Secretary.

Description Approved }

Terms and Conditions Approved { J. I. M. / H. C. D. / C. A. B. / E. L. M. / J. A. M.

(Note) Map No. 224-G, June 10, 1913,
Div. Eng. Jersey City, attached to original.

Exhibit P. 3.

EXHIBIT P. 3.

L 28008 No. 515

All releases against this Receipt appear on the back hereof

Direct Railroad Connections

Pennsylvania R. R. and Lehigh Valley Railroad Fast Freight Lines Erie Railroad West Shore R. R. & Connections. Central Railroad of N. J. Baltimore & Ohio R. R. Phil'a & Reading R. R. & connections.

NATIONAL STORAGE COMPANY
NATIONAL DOCK STORES.

No. 24323 Jersey City, N. J., Mar. 13 1916

RECEIVED IN STORE as per back at NATIONAL DOCKS:

From S. S. "Guildhall" Ex .....

Twenty-five Thousand Three Hundred and seventy-eight (25378) bags Sugar and Fifty-one (51) bags Sweepings (as per back) on Storage subject to the order of B. H. Howell Son & Co. on payment of the charges accrued thereon and in accordance with the marginal note hereto annexed. Condition, quality and quantity of contents unknown.

NATIONAL STORAGE COMPANY.

In Store Feby. 24/16
Storage 35c per ton per Month
Labor 50c per ton
Other Charges

By E. L. Mackenzie
President.

New York Office
108 Produce Exchange.

THIS RECEIPT MUST BE SURRENDERED FOR DELIVERY OF GOODS COVERED HEREIN.

The annexed Receipt may be Transferred by Endorsement (unless the words "NOT NEGOTIABLE" shall be written or stamped on the face thereof) and any person to whom the same may be so transferred will be deemed and taken to be the owner of the property stored, which will be delivered on the surrender and cancellation of this Receipt properly Endorsed.

Exhibit P. 3.

(Endorsements on Back)

STEWART SUGAR CO.

Ciege de Avila

Store	Bags Sugar	Sweepings
E	3870	
G	3096	5
H	3210	1
N	5050	15
O	10152	30
Total	25378	51

Of which some bags torn and mended

some stained and 622 damaged of which (120 Store "O" (502 " "N"

RELEASED 9/8 1916 Store E
(3870) bags Sugar

NATIONAL STORAGE CO. G. J. Banker

B. H. Howell Son & Co.
S. S. Guildhall

Exhibit P. 4.

EXHIBIT P. 4.

Treasury Department No. 515
Customs Cat. No. 6180B. 128262
C. F. C., Feb. 9-14.

UNITED STATES CUSTOMS SERVICE
PORT OF NEW YORK

Apr 15, 1916 Store
Surveyor's Office, Apr 16 1916, 191

CERTIFICATE of weight of Merchandise imported in s/s Guildhall from Havana 2/23/16
by B. H. Howell Son & Co.

Marks and Numbers.	Articles.	Gross.	Tare.	Net.
Stewart Sugar Co.	25400 Bags sugar.....		sch	
Ciege De Frila	24756 " " 8050602		61890	7988712
	2 " not found.			
Wet	622 " Sugar.....	200292	1555	198737
			A. T.	
Govt	5 cans Samples...	101	26	75
Govt	80 " " ...	1596	410	1186
Mcht	75 " ...	79	18	61
Dock	7 Bags sweepings.	1916	36	1880
Govt	1 can samples....	9	5	4
Ship	31 Bags Sugar	8536	81	8455
Govt	1 can samples....	10	5	5
		8263141	64026	8199115

Certified from the Weigher's Dock Book on file in this office E. G.
Certification fee of 20 cents paid.
Additional charge for certificate 9 cents.

E. G. F. W. Cole
A. D.
Surveyor.

Exhibit P. 5.

EXHIBIT P. 5.

THIS INDENTURE, made in duplicate this Seventeenth day of June, A. D. nineteen hundred and fourteen, between the LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY, a corporation of the State of New Jersey (hereinafter called the lessor), of the first part, and the LEHIGH VALLEY RAILROAD COMPANY, a corporation of the State of Pennsylvania (hereinafter called the lessee) of the second part, WITNESSETH:

THAT the Lessor, for and in consideration of the covenants of the Lessee to be by it kept and performed as hereinafter contained, both hereby let and demise to the Lessee, its successors and assigns, for the term of ninety-nine years from July 1st, 1914, all of its railroad in the State of New Jersey, extending from Phillipsburg to Perth Amboy and to Jersey City, with all branches, laterals, sidings and appurtenances whatsoever, together with the right to maintain and operate the same and to receive all lawful tolls and revenue therefrom arising.

AND the said parties hereto do hereby covenant and agree, each for itself, its successors and assigns, with the other, its successors and assigns, as follows, to wit:

First: The Lessee shall assume and hereby agrees to pay during the continuance of this lease the entire cost of maintaining and operating the said railroad and appurtenances, together with interest on any bonds or other obligations of the lessor now outstanding or that may, subsequent to the date hereof, be lawfully issued or entered into.

Second: The Lessee shall and will at its own proper cost and charge well and (within ninety days after they shall respectively become payable) faithfully bear, pay and discharge all taxes, charges and assessments of every kind and nature whatsoever, ordinary and extraordinary, which, during the term hereby demised, shall

Exhibit P. 5.

be lawfully assessed or imposed upon the said premises or any part thereof, or upon the business there carried on, or the receipts derived therefrom.

THIRD: It is covenanted and agreed by the parties hereto that the said Lessee may make such additions and betterments to the demised premises as it may deem advantageous, and that the Lessor shall and will when and as requested by the Lessee reimburse the Lessee for the cost of such additions and betterments, but in case of such reimbursements the Lessor shall be chargeable with lawful interest semi-annually upon the amount received. Such reimbursement may, at the option of the Lessor, be made by means of its debenture or other obligations, provided the same shall be authorized and approved in accordance with the laws of the State of New Jersey by the Board of Public Utility Commissioners of the State of New Jersey. Such debentures or other obligations shall, if required by the Lessee, be secured by mortgage on the property and franchises of the Lessor, provided said Board of Public Utility Commissioners shall, in accordance with the laws of the State of New Jersey, authorize and approve the giving of any mortgage so required.

FOURTH: The Lessor shall and will during the term hereby demised maintain its corporate existence and at all times and from time to time during the said term when requested by the Lessee, its successors or assigns shall and will put in force and exercise every corporate power and do each and every corporate act which the Lessor might now or may at any time hereafter lawfully put in force and exercise, to enable the Lessee to use and operate, manage and maintain the demised premises, and to make any extension, addition or betterment thereto that the Lessee may desire, the Lessee hereby agreeing to indemnify and save harmless the Lessor against any loss, damage or liability for such exercise

Exhibit P. 5.

of corporate powers or performance of corporate acts, when exercised or done at the request of and for the benefit of the Lessee.

IN WITNESS WHEREOF, said parties have caused their common seals to be hereto affixed, and these presents to be duly executed the day and year first above written.

LEHIGH VALLEY RAILROAD COMPANY
OF NEW JERSEY,
By:

E. B. THOMAS,
President.

(SEAL)

Attest:

D. G. BAIRD,
Secretary.

LEHIGH VALLEY RAILROAD COMPANY,
By:

E. B. THOMAS,
President.

Approved as to
form,
E. H. Boles,
Gen'l Solicitor.
(SEAL)

Attest:

D. G. BAIRD,
Secretary.

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

BE IT REMEMBERED, That on this 17th day of June, A. D. 1914, before me, the subscriber, a Foreign Commissioner of Deeds for New Jersey in Pennsylvania, personally appeared D. G. Baird who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the Secretary of Lehigh Valley Railroad Company of New Jersey party to the foregoing Indenture; that he well knows the corporate seal of the said Company, that the seal thereto affixed is the proper corporate seal of the said Company; that the same was so affixed

Exhibit P. 5.

thereto, and the said Indenture signed and delivered by E. B. Thomas who was, at the date and execution thereof, the President of the said Company, in the presence of deponent, as the voluntary act and deed of the said Company, and that deponent thereupon signed the same as subscribing and attesting witness.

D. G. BAIRD.

Subscribed and sworn to before me, the day and year last above written.

J. Wm. Robbins,
A Foreign Commissioner of Deeds
for New Jersey in Pennsylvania.
(SEAL)

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

On the 17th day of June, A. D. 1914, before me, the subscriber, a Foreign Commissioner of Deeds for New Jersey in Pennsylvania, and residing in Philadelphia, Pennsylvania, personally came D. G. Baird, Secretary of the within-named corporation, Lehigh Valley Railroad Company, who, being duly sworn according to law, deposes and says, that he was personally present at the execution of the above-written Indenture and saw the common or corporate seal of the said Company duly affixed thereto, and that the seal so affixed thereto is the common or corporate seal of the said corporation, and that the foregoing Indenture was duly signed, sealed and delivered by and as and for the act and deed of the said corporation for the uses and purposes therein mentioned, and by order and authority of the said corporation, and that the names of E. B. Thomas, President of said corporation, and of this deponent, subscribed to said Indenture in attestation of the due execution and delivery thereof, are in the proper and respective handwritings of said E. B. Thomas and of this deponent.

D. G. BAIRD.

Exhibit P. 5.

Sworn and subscribed before me, the day and year last above written.

WITNESS my hand and seal.

J. WM. ROBBINS,
A Foreign Commissioner of Deeds
for New Jersey in Pennsylvania.
(SEAL)

STATE OF PENNSYLVANIA }
CITY OF PHILADELPHIA } *ss.*

DAVID G. BAIRD, being duly sworn says that he is the Secretary of the LEHIGH VALLEY RAILROAD COMPANY OF NEW JERSEY; that he has compared the preceding copy with the original thereof, and he does hereby certify the same to be a correct transcript therefrom and of the whole thereof.

D. G. BAIRD.

Sworn and subscribed
before me this 17th
day of June A. D. 1914

(SEAL) J. WM. ROBBINS,
a foreign commissioner of deeds
for New Jersey in Pennsylvania.

Exhibit P. 6.

EXHIBIT P. 6.

LEHIGH VALLEY RAILROAD COMPANY
LEGAL DEPARTMENT

E. H. Boles — 143 Liberty Street
General Solicitor
R. W. Barrett
B. F. LaRue — NEW YORK August 28th, 1916.
Stewart C. Pratt
Asst. General Solicitors

F. B. Campbell, Esq.,
c/o Butler, Wyckoff & Campbell, Esqs.,
54 Wall Street,
New York City.

Dear Sir:—

Pursuant to our 'phone conversation on Friday, August the 25th, I am sending herewith two blueprints showing tracks, buildings and car locations at our National Docks Terminal, Jersey City, on July 29th, 1916 and August 1st, 1916. I beg to call your special attention to the fact that the car locations outlined on both of these maps are only approximately correct. The number of cars shown on each siding, pier and track is correct, but neither the exact location nor the order in which the cars had been placed could be accurately determined.

Very truly yours,

R. W. Barrett,
Assistant General Solicitor.

bR

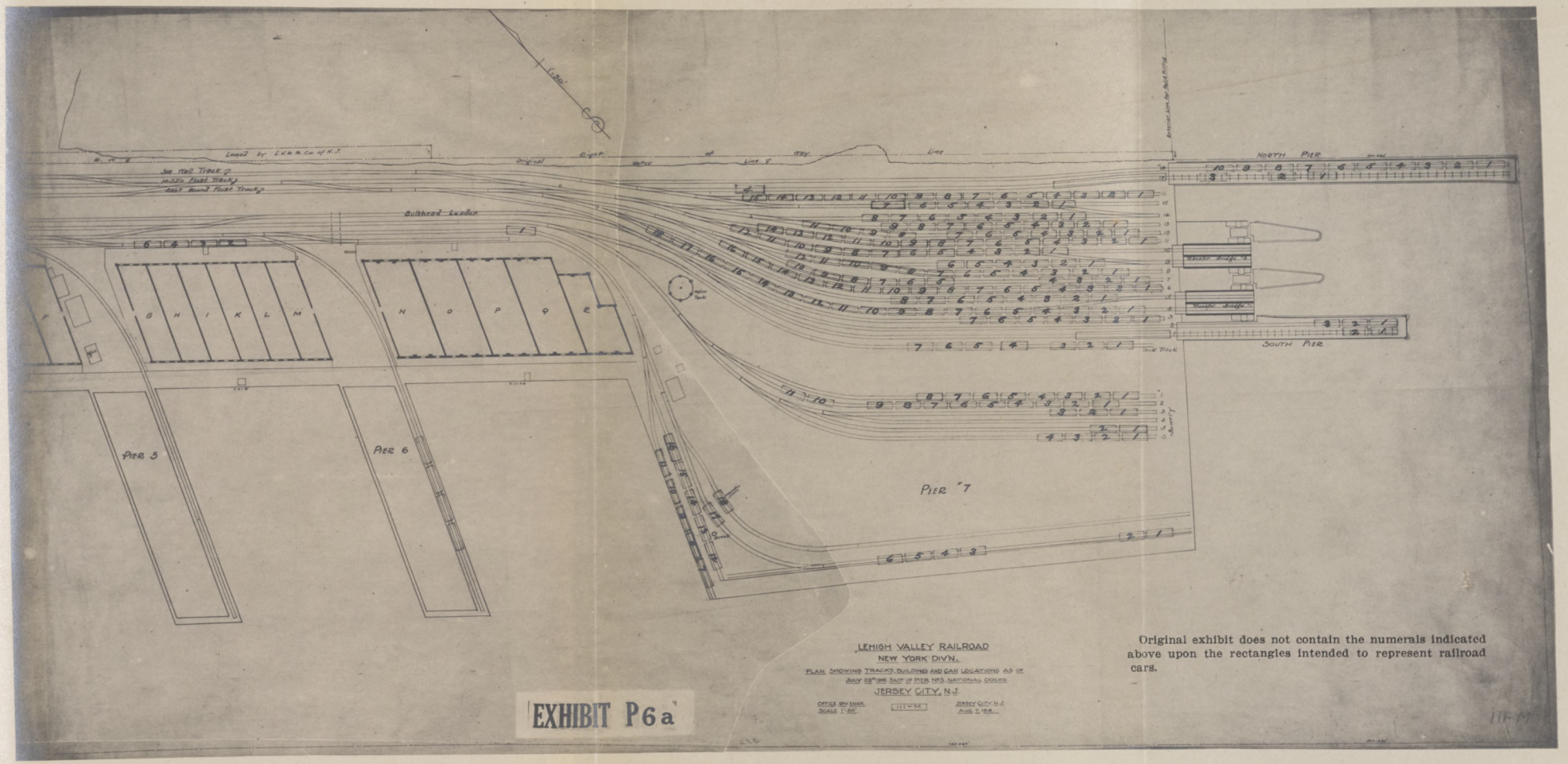

EXHIBIT P6a

Original exhibit does not contain the numerals indicated above upon the rectangles intended to represent railroad cars.

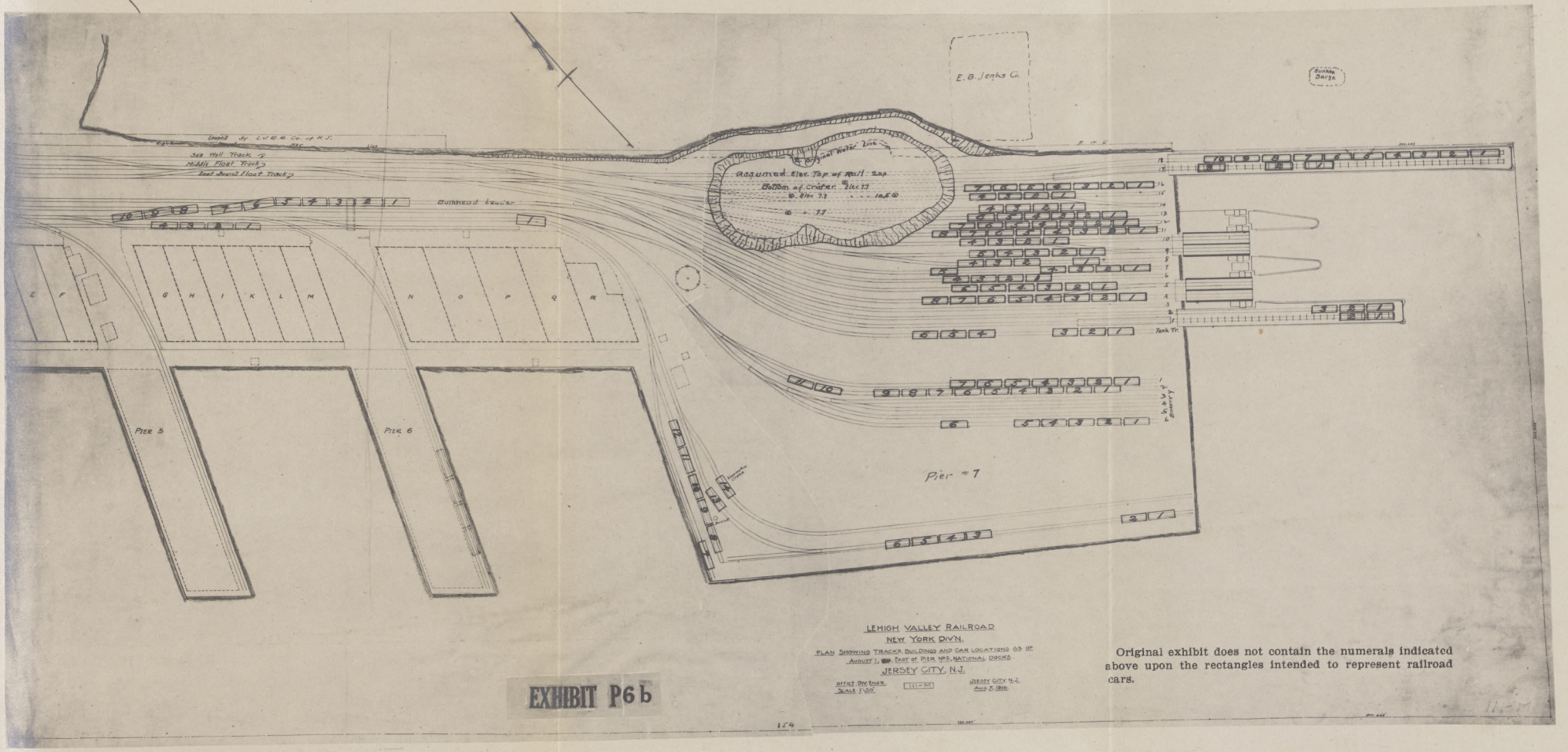

EXHIBIT P6b

Original exhibit does not contain the numerals indicated above upon the rectangles intended to represent railroad cars.

EXHIBIT P. 7.

Form T—546 Revised 10-17-9M*

Lehigh Valley Railroad Company

EXPLOSIVES

HANDLE CAREFULLY

KEEP FIRE AWAY

STATION ..... 191 .....

CONDENSED RULES FOR HANDLING THIS CAR

1. This car must not be placed in a passenger train nor in a mixed train if avoidable.

2. Cars containing explosives must be near center of train and may be together if desired; must be at least 15 cars from engine and 10 cars from caboose when length of train will permit.

3. This car must not be placed next to cars bearing the inflammable or the acid placard or cars containing lighted heaters. Whenever it is possible to avoid so doing it must not be placed next to tank cars or flat cars or next to carloads of lumber, poles, iron, pipe, or other articles liable to break through end of car from rough handling.

4. The air and hand brakes on this car must be in service.

5. In shifting, have a car between this car and engine whenever possible, and do not cut this car off while in motion.

6. Avoid all shocks to this car and couple carefully.

7. Avoid placing it near a possible source of fire.

8. Engines on parallel track must not be allowed to stand opposite or near this car when it can be avoided.

9. This placard must be removed from car when the explosives are unloaded.

Exhibit P. 8.

EXHIBIT P. 8.

Form T547-A-1-16-55M*

Lehigh Valley Railroad Company

INFLAMMABLE

KEEP LIGHTS AND FIRES AWAY

HANDLE CAREFULLY

.....STATION.....191

1—This car must not be next to a car containing Explosives.
2—Do not enter with exposed flame, nor with lighted lantern, until car has been ventilated and vapors allowed to escape.
3—When lading requiring this placard is unloaded from box or stock cars, Agents, Yardmasters and Conductors MUST REMOVE THE PLACARDS. Tank cars must retain placards until cleaned.
(Par. 1903)

ENCLOSURE IN EXHIBIT P. 9

CARS EXPLOSIVES ON HAND JULY 26th TO 29th INCLUSIVE

Car No.		Billed Contents	Billed Weight	Way-Bill Ref.		Consignor	Consignee	Time Arrd on Term'l Divn.	Time Del'd	Barge Taking Delivery	Name of Man Receipting
E	111334	725 bx ammn	86366#	Redington	150–7–21	Beth. S. Co.	Beth. S. Co.	7–22	7–26–11AM	No. 20	C. Carney
LS	89763	" " "	"	"	" "	" " "	" " "	"	" –12 N	"	" "
St P	503894	600 " "	71745	"	" "	" " "	" " "	"	" – 2PM	"	" "
P	34644	823 " "	93400	"	151–7– "	" " "	" " "	"	" – 3PM	"	" "
P	42135	500 " "	57878	"	162–7–22	" " "	" " "	"	" – 3PM	"	" "
P	34395	850 " "	101256	"	130–7–19	" " "	" " "	7–20	" – 4PM	"	" "
P	48523	" " "	"	"	" "	" " "	" " "	"	" – 5PM	"	" "
CNW	121674	725 " "	86366	"	150–7–21	" " "	" " "	7–22	" –10AM	8	" "
PLE	33109	675 " "	80409	"	161–7–22	" " "	" " "	7–23	" – 3PM	"	" "
NH	8420	2–525 " "	62541	"	150–7–21	" " "	" " "	7–22	" –10AM	"	" "
E	105020	725 " "	86366	"	176–7–24	" " "	" " "	7–25	7–27–12 M	64	" "
NYC	238407	600 " "	71745	"	145–7–20	" " "	" " "	7–21	" – 4PM	"	" "
CP	123132	650 " "	78704	"	" "	" " "	" " "	"	" – 5PM	"	" "
B&A	39526	600 " "	71745	"	144– "	" " "	" " "	7–21	" –11AM	"	" "
P&R	21801			PRR Service Car—No bill				"	" –1:40PM	16	H. Hansen
B&A	39517	433		" " "	" "			"	" –2:30PM	"	" "
CNW	112444	Cs Explo		JC—Natl Dks	184–7–19	Dupont	Hartfield-Solan Co.	7–14	" –4·45PM	"	" "
RI	45033	750 bx ammn	84000	Reddington	177–7–24	Beth. S. Co.	Beth. S. Co.	"	" – 8AM	20	C. Carney
NH	74214	525 " "	62541	"	150–7–21	" " "	" " "	7–22	" – 9AM	"	" "
SP	21499	600 " "	71745	"	144–7–20	" " "	" " "	7–22	7–28–11AM	64	" "
UP	123964	850 " "	101256	"	" "	" " "	" " "	7–21	" –12 N	"	" "
LS	85754	725 " "	86366	"	" "	" " "	" " "	7–21	" – 8AM	"	" "
L&N	101543	" " "	"	"	144–7–20	" " "	" " "	7–21	" – 9AM	"	" "
FWD	6369	750 " "	84000	"	145–7–20	" " "	" " "	7–21	" –10AM	"	" "
P&R	12275	725 " "	86366	"	112–7–17	" " "	" " "	7–20	Damaged 7–30		
P&R	14537	457 " "	48156	"	130–7–19	" " "	" " "	7–20	" "		
P	517981	850 " "	101256	"	176–7–24	" " "	" " "	7–25	Destroyed 7–30		
P	11832	" " "	"	"	" "	" " "	" " "	7–25	" "		
P	536124	" " "	"	"	" "	" " "	" " "	7–25	" "		
E	102070	725 " "	86366	"	" "	" " "	" " "	7–25	" "		
B–4	54578	750 " "	84000	"	177–7–24	" " "	" " "	7–25	" "		
CEI	61659	725 " "	85369	"	178–7–24	" " "	" " "	7–25	" "		
CP	128766	186 cs celluose	54682	Aetna	5043–7–19	Aetna E. Co.	G. W. Sheldon	7–23	" "		
Wab	67166	184 " "	53641	"	2047–7–18	" " "	" " "	7–23	" "		
P	517708	212 " "	61553	"	5044–7–19	" " "	" " "	7–23	" "		
P	84422	900 bx ammn	100800	Reddington	184–7–25	Beth. S. Co.	Beth. S. Co.	7–26	" "		
NYC&STL	10194	550 " "	61600	"	" "	" " "	" " "	7–26	" "		
P	517930	925 " "	103600	"	" "	" " "	" " "	7–26	" "		
GT	26343	525 " "	62541	"	185–7–25	" " "	" " "	7–26	" "		
HV	32020	525 " "	62541#	"	185–7–25	" " "	" " "	7–26	Destroyed by fire		
B&A	37330	725 " "	86366	"	185–7–25	" " "	" " "	7–25	"		
B&M	52932	725 " "	85369	"	186–7–25	" " "	" " "	7–26	"		
CNW	137046	500 Cs Expl.	57675	Tolleston, Ind.	599–7–23	Dupont	C. J. Medzikowski	7–26	"		
VSP	25671	200 Cs Celluose	59087	Aetna	5049–7–21	Aetna E. Co.	G. W. Sheldon	7–26	Diverted to Perth Amboy 7–30		
CNW	128278	500 Cs Expl.	57724	Tolleston, Ind.	600–7–23	Dupont	Hartfield-Solan Co.	7–26	7–27 3:50PM	Barge 16	H. Hansen
CNW	141052	500 "	57675	"	578–7–23	"	C. J. Medzikowski	7–27	7–29 1:30PM	" "Frank"	No signature
StPMO	30764	500 Cs Exp..	57675	"	5797–23	"	"	7–27	7–29 2:30 " "	" " "	" "
"	29468	500 "	57675	"	5777–23	"	"	7–27	7–29 3:30 " "	" " "	" "
CNW	121346	500 "	57675	"	575 7–23	"	"	7–27	7–29 4:30 " "	" " "	" "
"	139326	500 "	57675	"	572 7–23	"	"	7–27	7–29 5:30 " "	" " "	" "
M&O	33602	500 Cs Exp	57675	Tolleston, Ind.	570–7–23	"	"	7–27	Destroyed 7–30		
"	32452	500 "	57675	"	571 7–23	"	"	7–27	Destroyed 7–30		
CNW	131112	500 "	57675	"	582 7–23	"	"	7–27	" "		
"	135762	500 "	57675	"	576 7–23	"	"	7–27	" "		
"	129112	500 "	57675	"	573 7–23	"	"	7–27	" "		
M&O	30832	500 "	57675	"	580 7–23	"	"	7–27	" "		
"	32194	500 "	57675	"	581 7–23	"	"	7–27	" "		
"	30484	500 "	57675	"	569 7–23	"	"	7–27	" "		
CNW	139900	500 "	57675	"	574 7–23	"	"	7–27	" "		
"	126960	500 "	57675	"	568 7–23	"	"	7–27	" "		
Rut	7312	750 BX Ammn	84000	Reddington	191 7–26	Beth. S. Co.	Beth. S. Co.	7–27	Diverted to Perth Amboy 7–30		
CN	3268	675 "	80409	"	189 7–26	" " "	" " "	7–27	" " " "		
P&R	54073	725 "	86366	"	189 7–26	" " "	" " "	7–27	" " " "		
B 4	43033	700 "	83388	"	189 7–26	" " "	" " "	7–27	" " " "		
PRR	18875	850 "	101256	"	189 7–26	" " "	" " "	7–27	" " " "		
PM	52420	725 "	86366	"	189 7–26	" " "	" " "	7–27	" " " "		
PRR	22499	850 "	101256	"	189 7–26	" " "	" " "	7–27	" " " "		
GT	23913	550 "	64763	"	190 7–26	" " "	" " "	7–27	" " " "		
QMS	5025	550 "	64763	"	190 7–26	" " "	" " "	7–27	" " " "		
Erie	103278	725 "	85369	"	190 7–26	" " "	" " "	7–27	" " " "		
LEW	43792	186 Cs Celluose	54683	Aetna	5052 7–21	Aetna E. Co.	G. W. Sheldon Co.	7–27	" " " "		
NYC	105833	186 "	55182	"	5050 7–21	" " "	"	7–27	" " " "		
M&O	40424	186 "	55182	"	5051 7–21	" " "	"	7–27	" " " "		
LV	85282	725 Bx Ammn.	86366	Reddington	196 7–27	Beth. S. Co.	Beth. S. Co.	7–28	Destroyed 7–30		
PRR	94146	925 "	103600	"	197 7–27	" " "	" " "	7–28	"		
P&R	11332	800 "	89600	"	184 7–25	" " "	" " "	7–28	Tnsfd to LV 8813 7–30 a/c dam. to car		
NYC	239272	184 Cs Celluose		Aetna	5045 7–19	Aetna W. Co.	G. W. Sheldon Co.	7–28	" LV 87997 7–30 " " " "		
LV	3443	850 Bx Ammn.	101256	Reddington	196 7–27	Beth. S. Co.	Beth. S. Co.	7–28	Diverted to Perth Amboy 7–30		
PRR	5023	850 "	101256	"	196 7–27	" " "	"	7–28	" "		
CIL	61797	725 Bx Amm	86366	Reddington	196 7–27	Beth. S. Co.	Beth. S. Co.	7–28	" "		
P&R	15478	525 "	62541	"	196 7–27	" " "	"	7–28	" "		
PRR	534111	925 "	103600	"	197 7–27	" " "	"	7–28	" "		
NYC	84139	575 "	84139	"	197 7–27	" " "	"	7–28	" "		
E	110548	725 "	85369	"	198 7–27	" " "	"	7–28	" "		
PRR	48247	725 "	85369	"	198 7–27	" " "	"	7–28	" "		
LV	83742	750 "	84000	"	208 7–28	" " "	"	7–29	" "		
NH	72073	575 "	64400	"	208 7–28	" " "	"	7–29	" "		
E	103013	750 "	84000	"	208 7–28	" " "	"	7–29	" "		
Wab	75665	750 "	84000	"	208 7–28	" " "	"	7–29	" "		
PRR	83927	925 "	103600	"	208 7–28	" " "	"	7–29	" "		
PRR	21907	925 "	103600	"	208 7–28	" " "	"	7–29	" "		
B 4	47675	600 "	71745	"	209–7–28	" " "	"	7–29	" "		
MKT	17475	500 "	59663	"	209 7–28	" " "	"	7–29	" "		
DLW	39517	525 "	62541	"	209 7–28	" " "	"	7–29	" "		
P&R	2927	525 "	62541	"	209 7–28	" " "	"	7–29	" "		
MKT	100017	525 "	62541	"	209 7–28	" " "	"	7–29	" "		
Wab	64109	525 "	50563	"	209 7–28	" " "	"	7–29	" "		
CNW	133464	500 Cs Exp.	57675	Tolleston, Ind.	617 7–25	Dupont	Dunham & Moore	7–29	" "		
"	121774	500 "	57675	"	615 7–25	"	"	7–29	" 8/1		
"	139422	500 "	57675	"	613 7–25	"	"	7–29	" "		
"	135024	500 "	57675	"	614 7–25	"	"	7–29	" "		
M&O	33718	500 "	57675	"	612 7–25	"	"	7–29	" "		

The first 35 cars arrived up to the 26th, following which are shown the cars arrived in the erminal on 26th, 27th, 28th and 29th. Statement shows 102 cars handled as follows:

Delivered	30
Destroyed	29
Damaged	4
Delivered after fire	39
TOTAL	102

Exhibit P. 9.

EXHIBIT P. 9.

September 11th, 1916.

In re—Fire and explosion at National Docks.

James W. Connolly, Esq.,
Inspector of Combustibles,
244 Bay Street,
Jersey City, N. J.

Dear Sir:—

In accordance with your favor of the 28th ulto., I am sending herewith, a list of all cars of explosives on hand at National Docks, from July 26th to 29th, 1916, inclusive, together with the disposition thereof.

I call your attention to the fact that we are not allowed to furnish, except upon demand of the proper legal authorities of a state or municipality, some of the facts requested in your communication. I have, however, secured all of the information you desired and assume that, in accordance with the terms of the Interstate Commerce Act, the same will be used solely by yourself or the proper legal officers of the County or Municipality.

I call your attention to the column entitled "Billed Contents." I have given you, in this column, the information contained on the billing of all the cars referred to, which is the lawful tariff designation for the contents of the various cars and the only information we have in respect thereto.

Will you kindly let me know if I can of of any further assistance to you.

Very truly yours,

R. W. BARRETT,
Assistant General Solicitor.

bS

Exhibit P. 10.

EXHIBIT P. 10.

No. 4427967

UNITED STATES BRANCH OF
THE LONDON ASSURANCE
CORPORATION
of London, England
Incorporated by Royal Charter 1720.

Amount $1600. Rate .27601 Premium $4.42

In Consideration of the Stipulations herein named and of Four and 42/100 Dollars, Premium Does Insure B. H. Howell Son & Company, as the firm is now or may be hereafter constituted, for the term of One Year from the Nineteenth day of April, 1916, at noon to the Nineteenth day of April, 1917, at noon against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Sixteen Hundred Dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

New Jersey Standard 80% Coinsurance Clause.

On Sugar, the property of the assured or held by said assured in trust or on commission, or sold but not delivered while contained in brick building known as National Storage Store "G"
Communipaw, Jersey City, New Jersey.

Automatic Sprinkler Clause A and Supervisory F-1 attached.

Other insurance permitted without notice until required.

Attached to and forming part of policy No. 4427967, London Assurance Corporation.

(F 1) Automatic Sprinkler Supervisory System Clause. (For Tenants) Filed with the Commissioner of Banking and Insurance at Trenton, N. J., under Chapter No. 85, Laws of 1913, State of New Jersey.

Exhibit P. 10.

It is understood that the premises herein described are protected by Central Station Valve Alarm and Automatic Sprinkler Supervisory System, and in consideration thereof, this policy is issued at a reduced rate.

Attached to and forming a part of Policy No. 4427967 of London Assurance Corporation, London, England.

Signed Meyer & Klein Co Agents

(A) Automatic Sprinkler Clause

Filed with the Commissioner of Banking and Insurance at Trenton, N. J., under Chapter No. 85, Laws of 1913, State of New Jersey.

In consideration of the reduced rate at which this policy is issued, it is hereby made a condition of this policy that, in so far as the sprinkler system and attachments and the water supplies therefor are under the control of the assured, due diligence shall be used by the assured to maintain them in complete working order during the full term of this insurance, and that no change shall be made in the said sprinkler system and attachments, or in the water supply thereof, without the consent of this company in writing.

Attached to and forming a part of Policy No. 4427967 of London Assurance Corporation, London, England.

Signed Meyer & Klein Co Agents

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent, or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and condi-

New Jersey State Library

Exhibit P. 10.

tions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions Required by Law to be Stated in this Policy.—This Policy is in a stock corporation.

In Witness Whereof, this Corporation has executed and attested these presents, this 16th day of May, 1916.

This Policy shall not be valid until countersigned by the duly authorized Agent of the Corporation at Jersey City, N. J.

Countersigned by Meyer & Klein Co., Agent.

CHARLES L. CASE, (Signed) Frank A. Byrnes.
Manager.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascer-

Exhibit P. 10.

tained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or

Exhibit P. 10.

notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-gylcerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by speci-

Exhibit P. 10.

fic agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property, held on storage or for repairs; nor beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actu-

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ally paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make

Exhibit P. 10.

a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this com-

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pany or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended

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hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

ASSIGNMENT OF INTEREST BY INSURED.

The interest of.....as owner of property covered by this Policy is hereby assigned to..... subject to the consent of The London Assurance Corporation.

.....

Dated,.....

Note.—To secure Mortgage, if desired, the Policy should be made payable on its face to such Mortgagee, as follows: Loss, if any, payable to *John Doe,* Mortgagee.

Exhibit P. 10.

CONSENT BY COMPANY TO ASSIGNMENT OF INTEREST.

The London Assurance Corporation *hereby consents that the interest of.....as owner of the property covered by this Policy be assigned to..... Dated,.....*

FORM FOR REMOVAL

Permission is hereby granted to remove the property insured by this Policy to the..... ..... situate .... and this Policy is hereby made to cover the same property in new locality, all liability in former locality to cease from this date.

Rate increased to .....% Additional Premium $.....

Rate reduced to .....% Return Premium $.....

.....Agent.

Dated,.....19

SHEET.....BLOCK.....No.....

UNITED STATES TRUSTEES

CHARLES D. DICKEY, Esq., Brown Brothers & Co.
JAMES N. JARVIE, Esq.,
JAMES H. POST, Esq., B. H. Howell, Son & Co.
JUSTUS RUPERTI, Esq., G. Amsinck & Co.

CHARLES L. CASE,
Manager.

$1600. sugar Nat'l Dock Store "G".

Standard Fire Insurance Policy of the States of New Jersey, Connecticut and Rhode Island

Expires April 19th, 1917.

Property Nat'l Storage Store "G".

Amount, $1600.

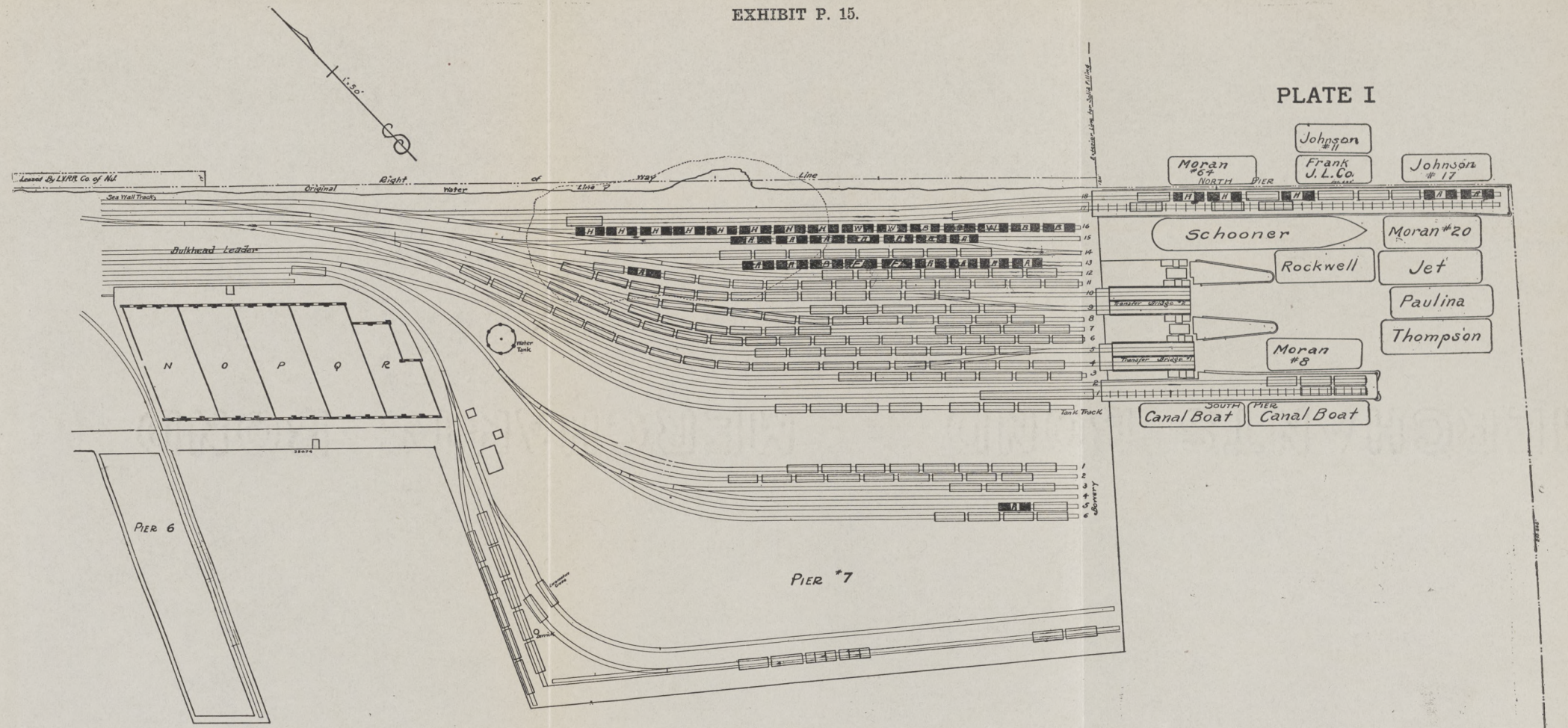
Premium, $4.42.

B. H. Howell, Son & Co. etc.

No. 4427967

EXHIBIT P. 15.

PLATE I



LEHIGH VALLEY RAILROAD
NEW YORK DIV'N.

PLAN SHOWING TRACKS, BUILDINGS AND CAR LOCATIONS AS OF AUGUST 1, 1916, EAST OF PIER Nº6, NATIONAL DOCKS
JERSEY CITY, N.J.

OFFICE, DIV. ENG'R. SCALE 1"=50' | III-M | JERSEY CITY, N.J. JAN. 17, 1917

Key:-
H = High Explosives (T.N.T.)
A = Ammunition for Cannon — Exp. projectiles
F = Fuzes (Combination)
B = Benzol
W = Wet Nitro Cellulose
▭ = Merchandise Cars

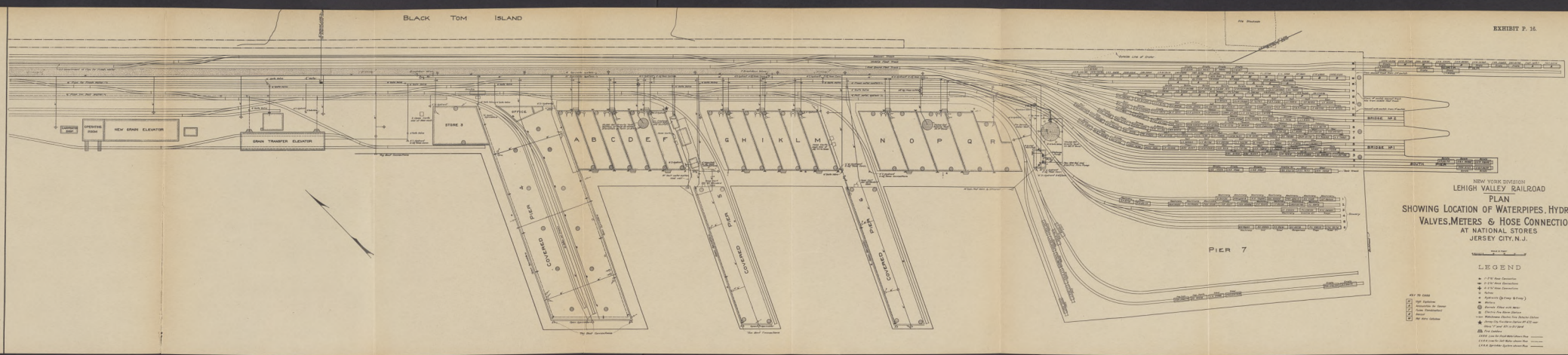


EXHIBIT P. 16.

NEW YORK DIVISION

LEHIGH VALLEY RAILROAD

PLAN SHOWING LOCATION OF WATERPIPES, HYDRANTS, VALVES, METERS & HOSE CONNECTIONS AT NATIONAL STORES JERSEY CITY, N.J.

LEGEND

UNION VALLEY RAILROAD

PLAN

SHOWING LOCATION OF WATERPIPES, HYDRANTS,
VALVES, METERS & HOSE CONNECTIONS

AT NATIONAL CITY, CAL.

JERSEY CITY, N.J.

Exhibit P. 11.

UNITED STATES BRANCH
THE LONDON ASSURANCE
CORPORATION
Incorporated by Royal Charter, 1720.
No. 84 William Street
New York
Montgomery & Fountain
Insurance
56-58 Pine Street, New York.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

If this Policy is cancelled the following receipt is to be filled up and signed by the insured.

.....19

IN CONSIDERATION of .....Dollars Return Premium, the Receipt of which is hereby acknowledged, this Policy is cancelled and surrendered to The London Assurance Corporation.

.....*Assured.*

EXHIBIT P. 11.

This is the same as the Answer heretofore printed as part of the pleadings.

(See pages 37 to 41.)

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EXHIBIT P. 17.

REGULATIONS
for the
TRANSPORTATION OF EXPLOSIVES BY FREIGHT.

Prescribed under act of March 4, 1909. Originally formulated and published January 15, 1910, effective 90 days thereafter. Revision formulated and published July 2, 1914, effective October 1, 1914, and superseding the regulations published January 1, 1912.

Paragraphs are numbered to correspond to the rules and regulations of the American Railway Association.

GENERAL NOTICE.

1401. (*a*) As the use of explosives is essential to various business activities throughout the country, it is the duty of interstate railroad carriers to accept and transport such explosives under these regulations. When local conditions make the acceptance, transportation, or delivery unusually hazardous, local restrictions, as provided by paragraph 1429 herein, may be imposed.

(*b*) It is also the duty of carriers and shippers to make these regulations effective and to thoroughly instruct their employees in relation thereto.

1402. The Bureau for the Safe Transportation of Explosives and other Dangerous Articles, hereinafter called Bureau of Explosives, organized by the railways under the auspices of the American Railway Association, is an efficient bureau in charge of an expert chief inspector. This bureau will make inspections and conduct investigations, and will confer with manufacturers and shippers with a view to determining what specifications and regulations will within reasonable limits afford the highest degree of safety in packing and preparing these dangerous articles for shipment and in transporting the same. The Commission will seek to avail itself of the expert knowledge thus developed, and in formulating amendments to these regulation or specifications supplemental

thereto, while not bound thereby, will give due weight to such expert opinions.

1403. The Commission will make further provision as occasion may require for new explosives not included in or covered by the following regulations.

1404. These regulations apply to all shipments of explosives as defined herein, including carrier's material and supplies.

GENERAL RULES.

1421. Unless specifically authorized by these regulations, explosives must not be packed in the same outside packages with each other or with other articles.

1422. Explosives, when offered for shipment by rail, must be in proper condition for transportation and must be packed, marked, loaded, stayed, and handled while in transit in accordance with these regulations. All packages of less-than-carload shipments must also be plainly marked on the outer covering or boxing (outside package) with the name and address of the consignee.

1423. Except on through bills of lading to a foreign destination, shipments of dangerous explosives as named in paragraph 1661 must not be accepted when consigned "order notify."

1424. **Empty boxes or kegs** previously used for high explosives are dangerous and must not be again used for shipments of any character. Empty boxes which have been used for the shipment of other explosives than high explosives must have the old marks thoroughly removed before being used for the shipment of other articles. **Empty metal kegs** which have been used for the shipment of black powder which was not contained in an interior package must not be again used for shipment of any explosive, and if used for the shipment of other articles must have the old marks thoroughly removed or obliterated.

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1425. (*a*) Explosives except such as are forbidden (see par. 1501) may be offered for transportation to railroads engaged in interstate commerce, provided the following regulations are complied with, and provided their method of manufacture, packing, and storage, so far as it affects safe transportation, is open to inspection by a duly authorized representative of the initial carrier or of the Bureau of Explosives. Shipments of explosives that do not comply with these regulations must not be received.

(*b*) Shipments offered by the War and Navy Departments of the United States Government may be packed, including limitations of weight, as required by their regulations.

1426. When practicable at any point, **regular and separate days** should be assigned for receiving from shippers less-than-carload lots of dangerous explosives named in paragraph 1661.

1427. To enable the carrier to provide proper cars at stations where less-than-carload shipments of the dangerous explosives named in paragraph 1661 are accepted for loading by the carrier, the shipper must give to the carrier not less than **24 hours' notice** of his intention to offer such shipments, and state their destinations. When a regular day to receive all explosive shipments offered at such a station has been appointed, this notice may be waived by the carrier, but the explosive shipments must be delivered on such days in time to permit proper inspection, billing, and loading, on that day.

1428. Before any shipment of dangerous explosives as named in paragraph 1661 destined to a point beyond the lines of the initial carrier is accepted from a shipper, the initial carrier must ascertain that the shipment can go forward via the route designated.

1429. All carriers must report to the chief inspector of the Bureau of Explosives for compilation and publication, full information as to **restrictions** which may be

imposed as provided in paragraph 1401 (a) against the acceptance, delivery, or transportation of explosives over any portion of their lines.

1430. (*a*) **Forbidden explosives**, as defined in paragraph 1501, and explosives condemned by the Bureau of Explosives (except properly repacked samples for laboratory examination), must not be offered for shipment.

(*b*) Samples of any **new explosive must be examined** and approved as safe for transportation by the Bureau of Explosives before shipments (except samples for this examination not exceeding 5 pounds net in weight) can be accepted. For this purpose a **new explosive** is defined to be the product of a new factory or an explosive of an essentially new composition made by any factory.

1431. **Leaking or damaged packages** of explosives must not be offered for shipment. Should any package of high explosives when offered for shipment show excessive dampness or be mouldy or show outward signs of any oily stain or other indication that absorption of the liquid part of the explosive is not perfect, or that the amount of the liquid part is greater than the absorbent can carry, it must be refused in every instance. The shipper must substantiate any claim that a stain is due to accidental contact with grease, oil, or similar substance. In case of doubt, the package must be rejected.

1432. **Condemned or leaking dynamite** must not be repacked and offered for shipment unless the repacking is done by a competent person in the presence of, or with the written consent of an inspector, or with the written authority of the chief inspector of the Bureau of Explosives.

1433. Carriers must forward shipments of explosives promptly and within 48 hours after acceptance at originating point or receipt at transfer station or at interchange point, and consignees must remove such shipments from the carrier's property within 48 hours after notice of arrival at destination, Sundays and holidays not included.

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1434. (a) Serious **violations** of these regulations (such as defective packing, improper staying, rough treatment of car, broken packages, etc.) and **accidents** or **explosions** occuring in connection with the transportation or storage on carrier's property of explosives must be reported by the carrier to the chief inspector, Bureau of Explosives, 30 Vesey Street, New York City.

All violations must be corrected before forwarding the explosives.

(*b*) Consignees should report promptly to the chief inspector, Bureau of Explosives, all instances of improper staying and broken or defective packages of explosives in shipments received by them.

SECTION 1.

INFORMATION AND DEFINITIONS, GROUPING.

1500. For transportation purposes, explosives are divided into the following groups:

1. **Forbidden explosives.**
2. **Acceptable explosives.**

GROUP 1.—FORBIDDEN EXPLOSIVES.

1501. The following are forbidden explosives:

(*a*) **Liquid nitroglycerin.**

(*b*) **Dynamite** containing over 60 per cent of nitroglycerin (except gelatin dynamite).

(*c*) **Dynamite** having an unsatisfactory absorbent, or one that permits leakage of nitroglycerin under any conditions liable to exist during transportation or storage.

(*d*) **Nitrocellulose** in a dry and uncompressed condition, in quantity greater than 10 pounds, net weight in one exterior package.

(*e*) **Fulminate of mercury in bulk** in a dry condition, and fulminates of all other metals in any condition except as a component of manufactured articles whose transportation is not forbidden herein.

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(*f*) **Fireworks** that combine an explosive and a detonator or blasting cap.

(*g*) **Explosive compositions** including **fireworks** that ignite spontaneously or undergo marked decomposition when subjected for 48 consecutive hours to a temperature of 75° c. (167° F.)

(*h*) **Firecrackers** whose dimensions exceed 5 inches in length or three-quarters of an inch in diameter or whose explosive charges exceed 45 grains each in weight.

(*i*) **Toy torpedoes** exceeding 1½ inches in diameter, or toy caps containing more than an average of thirty-five hundredths of a grain of explosive composition per cap.

(*j*) **Fireworks** that can be exploded en masse by a blasting cap placed in one of the units or by the impact of a rifle bullet or otherwise.

Such articles may be shipped when packed, marked, and certified in accordance with these regulations and offered for shipment as high explosives.

(*k*) **Fireworks** containing a match tip or head, or similar igniting point or surface, unless each individual tip, head, or similar igniting point or surface is entirely covered and securely protected from accidental contact or friction with any other surface.

(*l*) **Fireworks or explosives** containing an ammonium salt and a chlorate.

(*m*) **New explosives** (except samples for laboratory examinations) until approved for transportation by the Bureau of Explosives.

(*n*) **Explosives properly condemned** by the Bureau of Explosives (except properly repacked samples for laboratory examinations.) Parties who are dissatisfied with the decision of the Bureau may appeal to the Commission and if it is a question of chemical composition the Commission will arrange to have a test made by a disinterested government laboratory.

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GROUP 2.—ACCEPTABLE EXPLOSIVES.

1502. **Low explosives and black powder** are general names that may be used to describe all explosives having a composition similar to that of ordinary black powder, such as carbonaceous material, sulphur, and a nitrate of sodium or potassium, and that cannot be detonated by a commercial blasting cap. Examples are, rifle, sporting, cannon, and blasting powders.

1503. **High explosives** are all explosives more powerful than ordinary black powder, except smokeless powders and fulminates. Their distinguishing characteristic is their susceptibility to detonation by a blasting cap. Examples of high explosives are the dynamites, picric acid,[1] picrates, chlorate powders, nitrate of ammonia powders, dry trinitrotoluol, dry nitrocellulose (gun cotton), and fireworks that can be exploded en masse.

1504. **Smokeless powders** are those explosives from which there is little or no smoke when fired. They include smokeless powder for cannon and smokeless powder for small arms. **Smokeless powder for cannon** used in the United States at the present time consists of a nitrocellulose colloid, and is comparatively safe to handle and transport. **Smokeless powders for small arms** may consist of nitrocellulose or nitrocellulose combined with nitroglycerin. Detonable picrate or chlorate mixtures are classed as high explosives.

1505. **Fulminates** are fulminates of mercury or of other metals in bulk form, that is, not made up into percussion caps, detonators, blasting caps, toy torpedoes, or exploders.

1506. **Small-arms ammunition** (such as is used in sporting or following pieces, or in rifle or pistol practice, etc.), consists usually of a paper or metallic shell, the

[1] Picric acid for medicinal purposes, and not exceeding 4 ounces in one outside package, may be shipped without other restrictions when in securely closed glass bottles, properly cushioned to prevent breakage.

primer, and the powder charge, with or without shot or bullet, the materials necessary for one firing being all in one piece.

1507. **Ammunition for cannon** embraces all fixed or separate-loading ammunition too heavy for use in small arms. When the component parts are packed in separate outside packages such packages may be shipped as smokeless powder for cannon, explosive projectiles, empty (including solid and sand loaded) projectiles, primers, or fuzes. Igniters composed of black powder may be attached to packages in shipments of smokeless powder for cannon.

1508. **Explosive projectiles** are loaded shells for use in cannon. They are not liable to be exploded except by fire of considerable intensity, and the flying fragments would then be very dangerous.

1509. **Blasting caps** contain from 5 to 50 grains of dry fulminate of mercury, or other substance similar to or in combination with fulminate of mercury, packed in a thin copper shell and fired by a slow-burning safety fuse. When a small "bridge" or fine wire is imbedded in a suitable priming material and arranged to fire the fulminate by heating the bridge by means of an electric current, the cap is called an "electric blasting cap." They cause explosions of a high order, or "detonations." This means the instantaneous conversion of the entire explosive into gas instead of the gradual conversion known as "combustion." Dynamite "detonates" and smokeless powder for cannon "burns."

1510. **Detonating fuzes** are used in the military service to detonate the high explosive bursting charges of projectiles or torpedoes. In addition to a powerful detonator they may contain several ounces of a high explosive, such as picric acid or dry nitrocellulose, all assembled in a heavy steel envelope.

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1511. **Primers, percussion and time fuzes** are devices used to ignite the black powder bursting charges of projectiles, or the powder charges of ammunition. For small-arms ammunition the primers are usually called "small-arms primers" or "percussion caps." **Tracer fuzes** consist of a device which is attached to a projectile and contains a slow-burning composition to show the flight of projectiles at night.

1512. **Safety fuse** consists ordinarily of a core of granular black powder, which is surrounded by yarn, tape, pitch, rubber, etc.

Cordeau detonant is a fuse containing trinitrotoluol, assembled in a drawn lead tube.

Safety squibs are small paper tubes containing a small quantity of black powder, one end of each tube being twisted and generally tipped with sulphur.

1513. **Fireworks** include everything that is designed and manufactured primarily for the purpose of producing a visible or an audible pyrotechnic effect by combustion or by explosion. They consist of common fireworks and special fireworks. (See par. 1501 (*j*).)

1514. **Common fireworks** include all that depend principally upon nitrates to support combustion and not upon chlorates; that contain no phosphorus and no high explosive sensitive to shock and friction; that produce their effect through color display rather than by loud noises. If noise is the principal object, the units must be small and of such nature and manufacture that they will explode separately and harmlessly, if at all, when one unit is ignited in a packing case. They must not be designed for ignition by shock or friction. Examples are Chinese firecrackers, Roman candles, pinwheels, colored fires, rockets, serpents, railway fuses, flash powders, etc.

1515. **Special fireworks** include all that contain any quantity of phosphorus, a fulminate, or other high explosive sensitive to shock or friction, or that contains

units of such size that the explosion of one while being handled would produce a serious injury, or that require a special appliance or tool, mortar, holder, etc., for their safe use, or that are designed for ignition by shock or friction. Examples are giant firecrackers, bombs, and salutes (not high explosives), toy torpedoes and caps, ammunition pellets fired in a special holder, railway torpedoes, etc.

SECTION 2.

PACKING, MARKING, AND CERTIFYING ACCEPTABLE EXPLOSIVES.

1531. (*a*) The construction of **shipping containers** purchased hereafter and used in shipping explosives must conform to specifications approved by the Interstate Commerce Commission that apply, and excepting shipments offered by the United States Government, each container must be stamped, labeled, or marked "Complies with I. C. C. Spec'n. No.———" or equivalent marking, as stated in the specification.

(*b*) In addition to standing the tests prescribed, the design and construction of packages must be such as to prevent the occurrence in individual packages of defects that permit leakage of their contents under the ordinary conditions incident to transportation. The results of experience, gained by an examination of broken or leaking packages on arrival at destination, must be reported to and recorded by the Bureau of Explosives, to the end that further use of any particular kind of package shown by experience to be inefficient may be prohibited by the Commission.

(*c*) Pending approval and promulgation by the Commission of specifications for types of shipping containers other than those for which specifications are published herein, containers may be used which after investigation made by the Bureau of Explosives or by other competent testing laboratory in the presence of a representative of

the Bureau of Explosives, are shown to possess the general efficiency and the protection against leakage of contents afforded by the standard types of corresponding capacity described in the specifications published herein, provided they are labeled or marked to show compliance with this requirement.

SAMPLES OF EXPLOSIVES TOGETHER.

1532. **Samples of explosives** (except blasting caps) in separate interior containers may be packed in the same outside package of gross weight not exceeding 50 pounds, provided the weight of any one sample does not exceed eight ounces, and provided the interior packages are so cushioned and protected as to insure their transportation without rupture or leakage of contents. The package must be marked and described with the name of the most dangerous explosive included among the samples, such as "HIGH EXPLOSIVE," "BLACK POWDER," etc.

LOW EXPLOSIVES AND BLACK POWDER.

1533. **Packing.**—Packages containing less than 12½ pounds of black powder or low explosives must be inclosed in a tight wooden box complying with specification No. 16. Each inside package containing less than 12½ pounds and more than 1½ pounds must be so placed in the outside box that the filling hole will be up. The boxes must be marked on top "THIS SIDE UP" and also as prescribed by paragraph 1536.

1534. Twelve and a half pounds or over of black powder or low explosives must be packed in packages that comply with specification No. 11 or 13. Kegs less than 8 inches long must be boxed as prescribed by paragraph 1533.

1535. **Weight.**—Packages must not weigh over 200 pounds gross.

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1536. **Marking.**—Each outside package must be plainly marked, stamped, or stenciled "BLACK POWDER" or "LOW EXPLOSIVES," and may also show "BLASTING," "RIFLE," etc., as "BLACK BLASTING POWDER," "BLACK RIFLE POWDER," "LOW BLASTING EXPLOSIVE," etc. Additional marks, trade names, etc., may appear if desired by shipper, but such additional marking must not be more conspicuous nor must it obscure the marking prescribed herein.

HIGH EXPLOSIVES.

1551. **High explosives** consisting of a liquid mixed with an absorbent material must have the absorbent (wood plup or similar material) in sufficient quantity and of satisfactory quality, properly dried at the time of mixing; nitrate of soda must be dried at the time of mixing to less than 1 per cent of moisture; and the ingredients must be uniformly mixed so that the liquid will remain thoroughly absorbed under the most unfavorable conditions incident to transportation.

1552. Explosives containing nitroglycerin must have uniformly mixed with the absorbent material a satisfactory antacid which must be in quantity sufficient to have the acid neutralizing power of an amount of magnesium carbonate equal to 1 per cent of the nitroglycerin.

1553. (*a*) **Packing.**—High explosives containing more than 10 per cent of nitroglycerin must be made into cartridges not exceeding 4 inches in diameter or 8 inches in length, and must not be packed in bags or sacks. This does not apply to gelatin dynamite.

(*b*) High explosives containing not more than 10 per cent of nitroglycerin may be shipped in bags or sacks. Each bag or sack must not contain more than 12½ pounds of explosive, and must be packed in a box with filling end up. These bags and sacks and the coverings of all cartridges must be strong and so treated that they will not absorb the liquid constituent of the explosive.

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1554. (*a*) All boxes in which high explosives in cartridges, bags, sacks, or in bulk are packed must be lined with strong paraffined paper or other suitable material. The lining must be without joints or other openings at the bottom or on the sides of the box, and must be impervious to water and to any liquid ingredient of the explosive.

(*b*) In packing cartridges of nitroglycerin explosives at least one-quarer of an inch thickness of dry, fine wood pulp or saw-dust must be spread over the bottom of the lined box before inserting the cartridges, and all the vacant space in the top must be filled with this material.

(*c*) All cartridges exceeding 4 inches in length, except explosive gelatin or gelatin dynamite, must be placed horizontally in boxes.

1555. Inside packages containing not more than 1 pound each of dry uncompressed nitrocellulose, wrapped in strong paraffined paper or other suitable spark-proof material, will be accepted for shipment if securely packed in an outside package that complies with Specification No. 14 and is marked as prescribed in paragraph 1559. Outside packages must not contain more than 10 pounds of dry nitrocellulose.

1556. (*a*) High explosives containing no explosive liquid ingredient and not having, with their normal percentage of moisture, a sensitiveness to percussion greater than measured by the blow delivered by an 8-pound weight dropping from a height of 7 inches on a compressed pellet of the explosive three-hundredths of an inch in thickness and two-tenths of an inch in diameter confined rigidly between hard steel surfaces, as in the standard impact-testing apparatus of the Bureau of Explosives, may be shipped in bulk when securely packed in authorized containers. These explosives may also be packed in cartridges, and must be so packed when their sensitiveness is greater than the above limit. Wooden boxes or wooden kegs provided

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with suitable linings to prevent leakage must be used for chlorate powders.

(*b*) When the addition of water to any such explosive will make it nonexplosive according to tests made by the Bureau of Explosives, the wet material may be shipped and handled in transit as prescribed by the Regulations for the Transportation of Dangerous Articles other than Explosives by Freight and by Express.

1557. **Containers** for high explosives must comply with Specifications Nos. 11, 14, 20, 21, and 22 as specified therein.

1558. (*a*) **Weights.**—Packages of high explosives containing an explosive liquid ingredient must not exceed 75 pounds gross weight.

(*b*) Packages of high explosives containing no liquid explosive ingredient whose shipment in bulk is authorized by paragraph 1556 must not exceed 125 pounds gross weight.

(*c*) The gross weight of an outside package containing not exceeding 10 pounds net of dry nitrocellulose, not compressed, packed as prescribed in paragraph 1555, must not exceed 35 pounds. Compressed sticks or blocks of dry nitrocellulose (gun cotton) wrapped in strong paraffined paper may be shipped in outside packages complying with Specification No. 14, with a gross weight not exceeding 75 pounds.

1559. **Marking.**—Boxes must be plainly marked on top and on one side or end and kegs must be marked on one end "HIGH EXPLOSIVE—DANGEROUS," in letters not less than $\frac{7}{16}$ inch in height. The tops of boxes must be marked "THIS SIDE UP."

SMOKELESS POWDER FOR CANNON.

1571. **Packing.**—Smokeless powder for cannon must be packed in tight wooden boxes free from loose knots and cracks, or in wooden barrels that comply with Specification No. 11, or in metal barrels or kegs that comply

with Specification No. 13. Smokeless powder for cannon may be packed in water in metal barrels or in strong wooden barrels of the type used for alcohol.

1572. **Weight.**—Packages must not weigh over 180 pounds gross unless the powder is packed in water.

1573. **Marking.**—Each package must be plainly marked "SMOKELESS POWDER FOR CANNON," or "SMOKELESS POWDER FOR CANNON IN WATER."

SMOKELESS POWDER FOR SMALL ARMS.

1575. **Packing.**—Packages containing less than 9 pounds of smokeless powder for small arms must be inclosed in a tight wooden box complying with Specification No. 16. Each inside package containing less than 9 pounds and more than 1½ pounds must be so placed in the outside box that the filling hole will be up. The box must be marked on top "THIS SIDE UP" and also as prescribed by paragraph 1578.

1576. Quantities of 9 pounds or over of smokeless powder for small arms must be packed in tight wooden boxes free from loose knots or cracks, or in wooden barrels that comply with Specification No. 11, or in metal barrels or kegs that comply with Specification No. 13. Kegs less than 8 inches long must be boxed as prescribed by paragraph 1575. Smokeless powder for small arms may be packed in water in metal barrels or in strong wooden barrels of the type used for alcohol.

1577. **Weight.**—Packages must not weigh over 150 pounds gross.

1578. **Marking.**—Each outside package must be plainly marked "SMOKELESS POWDER FOR SMALL ARMS," or "SMOKELESS POWDER FOR SMALL ARMS, IN WATER."

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FULMINATES.

1591. **Packing.**—Fulminate of mercury in bulk must contain when packed not less than 25 per cent of water, and must in this wet condition be placed in a bag made of heavy cotton cloth of close mesh, equal in quality and weight to the cotton twill used for pockets in high-grade clothing. There must be placed inside the bag and over the fulminate a cap of the same cloth and of the diameter of the bag, and the bag must be tied securely and placed in a strong grain bag, which must, in turn, be tied securely and packed in the center of a cask or barrel in good condition and of the kind used for shipment of alcohol. The grain bag must not contain more than 150 pounds dry weight of fulminate and it must be surrounded on all sides by tightly packed sawdust not less than 6 inches thick. The cask or barrel must be lined with a heavy, close-fitting jute bag, closed by secure sewing to prevent escape of sawdust After the barrel is properly coopered it must be filled with water and the bung sealed. The barrel must be inspected carefully and all leaks stopped.

1592. **Marking.**—Each cask or barrel must be plainly marked "WET FULMINATE OF MERCURY —DANGEROUS."

SMALL-ARMS AMMUNITION.

1601. **Packing.**—Small-arms ammunition must be packed in pasteboard or other boxes, and these boxes must be packed in strong outside wooden or metal containers.

Small-arms ammunition in pasteboard or other boxes, and in quantity not exceeding a gross weight of 75 pounds, may be packed with nonexplosive and noninflammable articles and with small-arms primers or percussion caps (see par. 1619), provided the outside wooden or metal container is marked as prescribed in paragraph 1602.

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1602. **Marking.**—Each outside package or case must be plainly marked "SMALL-ARMS AMMUNITION."

1603. No restrictions, other than proper packing and marking, are necessary for the shipment of small-arms ammunition.

AMMUNITION FOR CANNON.

1604. **Packing.**—Ammunition for cannon must be well packed and properly secured in strong wooden or metal containers.

1605. **Marking.**—Each outside package must be plainly marked "AMMUNITION FOR CANNON WITH EXPLOSIVE PROJECTILES," or "AMMUNITION FOR CANNON WITH EMPTY PROJECTILES," or "AMMUNITION FOR CANNON WITH SAND-LOADED PROJECTILES," or "AMMUNITION FOR CANNON WITH SOLID PROJECTILES," according as the projectiles do or do not contain a bursting charge, or "AMMUNITION FOR CANNON WITHOUT PROJECTILES."

Empty cartridge bags having attached black powder igniters must be marked "EMPTY CARTRIDGE BAGS —BLACK POWDER IGNITERS."

1606. No restrictions other than proper marking are prescribed for shipments of material relating to ammunition for cannon, but containing no explosive or other dangerous article, such as cartridge cases, "dummy" or "drill" cartridges, etc.

EXPLOSIVE PROJECTILES.

1607. **Packing.**—Explosive projectiles must be packed in strong wooden or metal boxes and each projectile must be properly secured. Projectiles exceeding 100 pounds in weight may be shipped without being boxed, if desired. When necessary, detonating fuzes of an approved type may be assembled in explosive projectiles.

1608. **Weight.**—The gross weight of a box containing more than one explosive projectile must not exceed 160 pounds.

1609. **Marking.**—Each exterior package or projectile must be plainly marked "EXPLOSIVE PROJECTILE," "SAND-LOADED PROJECTILE," "SOLID PROJECTILE," "EMPTY PROJECTILE," "EXPLOSIVE TORPEDO," or "EMPTY TORPEDO."

No restrictions other than proper marking, are prescribed for the shipment of sand-loaded projectiles, empty projectiles, solid projectiles, or empty torpedoes, and tracer fuzes of an approved type may be assembled in projectiles.

BLASTING CAPS.

1611. **Packing.**—Blasting caps contain such a sensitive and dangerous explosive that very efficient packing is necessary, and the outside of all caps must be free from fulminate.

(*a*) Blasting caps must be packed in strong interior packages or containers, in which they must fit snugly, and the caps must be closed securely by teats projecting from a plate of suitable elastic material placed over the caps. Not more than 100 blasting caps may be packed in a single inside container. All inside containers must then be packed snugly in cartons or wrappings made of paper or pasteboard.

(*b*) For not more than 5,000 caps the inside containers in cartons or wrappings must be packed in an outside box which must comply with Specification No. 15, and they must be separated from the outside box by at least 1 inch of tightly packed sawdust, excelsior or equivalent cushioning material.

(*c*) For more than 5,000 caps the inside containers, in cartons or wrappings, must be packed in an inside box made of sound lumber or in a hermetically sealed metal box made of not less than 30 gauge United States

standard, and this inside wooden or metal box must then be packed in an outside box made of sound lumber; both of these boxes must comply with Specification No. 15. Tightly packed sawdust, excelsior, or equivalent cushioning material at least 1 inch thick at all points must separate the inside box from the outside wooden box.

(*d*) More than 20,000 blasting caps must not be placed in one outside package.

(*e*) Not more than five tin boxes, containing not more than 100 blasting caps in each box, may be packed with safety fuse, each box to be placed in the center of a coil of fuse, and in this case the outside box must be made of sound lumber, complying with Specification No. 15.

(*f*) Electric blasting caps must be packed in pasteboard cartons containing not more than 50 caps each. These cartons must be packed in a wooden box, complying with Specification No. 15.

1612. **Weight.**—The gross weight of an outside package containing blasting caps or electric blasting caps must not exceed 150 pounds.

1613. **Marking.**—Each outside package must be plainly marked "(number) BLASTING CAPS—HANDLE CAREFULLY," or "(number) ELECTRIC BLASTING CAPS—HANDLE CAREFULLY." In addition, each box must bear the marking "DO NOT STORE OR LOAD WITH ANY HIGH EXPLOSIVE."

DETONATING FUZES.

1615. **Packing.**—Detonating fuzes must be packed in strong, tight wooden boxes, and each fuze must be well secured.

1616. **Weight.**—The gross weight of one outside package must not exceed 165 pounds.

1617. **Marking.**—Each outside package must be plainly marked "DETONATING FUZES—HANDLE CAREFULLY."

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PRIMERS, PERCUSSION AND TIME FUZES.

1619. (*a*) **Packing.**—Primers, percussion and time fuzes must be packed in strong, tight wooden outside boxes, with special provision for securing individual packages or primers and fuzes against movement in the box.

(*b*) Small-arms primers containing anvils must be packed in cellular inside packages, with partitions separating the layers and columns of primers, so that the explosion of a portion of the primers in the completed shipping package will not cause the explosion of all of the primers.

(*c*) Percussion caps may be packed in metal or other inside boxes containing not more than 500 caps, but the construction of the cap and the kind and quantity of explosives in each must be such that the explosion of a part of the caps in the completed shipping package will not cause the explosion of all of the caps.

(*d*) Small-arms primers and percussion caps may form a part of the gross weight of 75 pounds of small-arms ammunition that may be packed with other articles as authorized by paragraph 1601.

1620. **Weight.**—The gross weight on one outside package must not exceed 150 pounds.

1621. **Marking.**—Each outside box must be plainly marked "SMALL-ARMS PRIMERS—HANDLE CAREFULLY," or "PERCUSSION CAPS—HANDLE CAREFULLY," or "CANNON PRIMERS—HANDLE CAREFULLY," or "COMBINATION PRIMERS—HANDLE CAREFULLY," or "PERCUSSION FUZES—HANDLE CAREFULLY," or "COMBINATION FUZES—HANDLE CAREFULLY," or "TRACER FUZES—HANDLE CAREFULLY," etc.

1622. No restrictions other than proper packing and marking are necessary for the shipment of primers, percussion and time fuzes. No restrictions other than

proper marking are prescribed for the shipment of "Empty cartridge shells, primed."

COMMON FIREWORKS.

1631. **Packing.**—Common fireworks must be in a finished state, exclusive of mere ornamentation, as supplied to the retail trade, and must be securely packed in strong, tight, spark-proof wooden barrels that comply with Specification No. 11, or in boxes complying with Specification No. 12A.

1632. **Weight.**—The gross weight of one outside package containing common fireworks must not exceed 325 pounds, except that exhibition set pieces when specially packed may have weight not exceeding 400 pounds.

1633. **Marking.**—Each outside package must be plainly marked in letters not less than $\frac{7}{16}$ inch in height "COMMON FIREWORKS—KEEP FIRE AWAY."

SPECIAL FIREWORKS.

1634. **Packing.**—Special fireworks must be in a finished state, exclusive of mere ornamentation, as supplied to the retail trade, and must not contain forbidden fireworks. (See par. 1501 (*f*) to (*l*), inclusive.)

Special fireworks must be securely packed in strong, spark-proof wooden barrels that comply with Specification No. 11, or in boxes complying with Specification No. 12.

1635. **Weight.**—The gross weight of one outside package containing special fireworks must not exceed 200 pounds, and the gross weight of a package containing toy torpedoes must not exceed 65 pounds.

1636. **Marking.**—Each outside package containing special fireworks or a mixture of common and special fireworks must be plainly marked in letters not less than $\frac{7}{16}$ inch in height "SPECIAL FIREWORKS—HANDLE CAREFULLY—KEEP FIRE AWAY."

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SAFETY FUSE, CORDEAU DETONANT, AND SAFETY SQUIBS.

1638. **Safety fuse, cordeau detonant, and safety squibs** must be packed in strong wooden boxes or barrels properly marked, and may be loaded in any car with any other kind of an explosive or inflammable substance or with other freight. Cordeau detonant must not be packed in the same package as blasting caps, or with any high explosive.

SHIPPING ORDER.

1641. (*a*) **Shipper's certificate.**—The shipping order for any package containing an explosive named below must show each article under its proper name as specified in this paragraph, and must show the following certificate in the lower left-hand corner, over the written or stamped facsimile signature of the shipper or of his duly authorized agent:

This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

LIST OF SHIPPING NAMES.

Low explosives.
Black powder.
High explosives.
Smokeless powder for cannon.
Smokeless powder for small arms.
Wet fulminate of mercury.
Ammunition for cannon with explosive projectiles.
Ammunition for cannon with empty projectiles.
Ammunition for cannon with sand-loaded projectiles.
Ammunition for cannon with solid projectiles.
Ammunition for cannon without projectiles.
Explosive projectiles.
Explosive torpedoes.

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Detonating fuzes.
(Number) blasting caps.
(Number) electric blasting caps.
Common fireworks.
Special fireworks.

(*b*) The following acceptable explosives must be described under their proper names as given below, but shipper's certificate is not required:

Small-arms ammunition.
Small-arms primers.
Cannon primers.
Empty cartridge shells, primed.
Empty cartridge bags—black powder igniters.
Combination primers.
Percussion caps.
Percussion fuzes.
Time fuzes.
Tracer fuzes.
Combination fuzes.
Safety fuse.
Cordeau detonant.
Safety squibs.
Empty projectiles.
Sand loaded projectiles.
Solid projectiles.
Empty torpedoes.

(*c*) Whenever orders are placed in foreign countries for the importation of explosives, to be forwarded from port of entry by carriers subject to these regulations, the importer must furnish with the order to the foreign shipper, and also to the forwarding agent at the port of entry, full and complete information as to the necessary packing and marking required by these regulations. The forwarding agent must file with the originating carrier a properly prepared and certified shipping order as prescribed herein.

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SECTION 3.
RULES FOR HANDLING.

1642. In handling packages of explosives at stations and in transferring them to and from cars the greatest care must be taken, and shocks or fall liable to injure the containing package must be avoided. Where an inclined chute is employed such chute shall be constructed of 1-inch planed boards, with side guards 4 inches high extending 3 inches above top face of bottom of chute and throughout its length, fastened with brass screws. D-shaped strips or runners, not more than 6 inches apart and running lengthwise of chute, must be fastened to the upper surface of the bottom board by means of glue and wooden pegs extending through the bottom board and runners. Chutes must be occasionally wiped down with waste moistened with machine oil when dynamite packages are being handled.

A stuffed mattress, 4 feet wide by 6 feet long and not less than 4 inches thick, or a heavy jute or hemp mat or like diameter, must be placed under the discharging end of the chute.

1643. (*a*) Careful men must be chosen to handle explosives, the platform and the feet of the men must be as free as possible from grit, and all possible precautions must be taken against fire. Suitable provision must be made, outside of the station when practicable, for the safe storage of explosives, and every effort possible must be made to reduce the time of this storage. If a shipment of explosives is not removed within 48 hours after notice of arrival at destination, it must be disposed of by return to the shipper, or by storage at the expense of the owner, or by sale, or when necessary to safety by destruction under supervision of a competent person.

(*b*) Unauthorized persons must not have access to explosives or other dangerous articles at any time while such articles are in the custody of the carrier.

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LOADING IN CAR.

1644. (*a*) Packages receive their greatest stresses in a direction parallel to the length of the car and must be loaded so as to offer their greatest resistance in this direction. Boxes of dangerous explosives named in paragraph 1661 when loaded in the car must rest on their bottoms and with their long dimensions parallel to the length of the car.

(*b*) A car must not contain more than 70,000 pounds gross weight of explosives. This limit does not apply to shipments of small-arms ammunition or ammunition for cannon.

(*c*) When the lading of a car includes explosives and exceeds 5,000 pounds, the weight of the lading must be distributed in approximately equal parts in both ends of the car.

1645. Explosives packed in kegs, except when boxed, must be loaded on their sides with ends toward ends of the car; and packages of explosives must not be placed in the space opposite the doors unless the doorways are boarded on the inside as high as the lading. Large casks, barrels or drums may be loaded on their sides or ends as will best suit the conditions.

1646. (*a*) Packages containing any of the explosives for the transportation of which a certified and placarded car is prescribed (see par. 1661), must be stayed (blocked and braced) by the one who loads the car, by methods not less efficient than those described in Bureau of Explosives Pamphlet No. 6, to prevent change of position by the ordinary shocks incident to transportation. Special care must be used to prevent them from falling to the floor or from having anything fall on them or slide against them during transit.

(*b*) To prevent delays to local freight trains, when there are shipments of explosives for different destinations loaded in a "peddle car" or "way car," the shipments for each destination must be stayed separately.

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(*c*) Forwarding and transfer stations for explosives must be provided with the necessary materials for staying.

(*d*) Shippers must furnish the material for staying packages loaded by them.

1647. Detonating fuzes or blasting caps, or electric blasting caps, must not be loaded in a car or stored with high explosives of any kind, including explosive projectiles, nor with wet nitrocellulose.

1648. Wet fulminate of mercury must not be loaded with any explosive or inflammable article.

1649. Fireworks must not be loaded in the same car nor stored on carriers' property with any explosive named in paragraph 1661.

1650. Explosives named in paragraph 1661 that require a certified car, placarded "EXPLOSIVE," must not be transported in the same car with nor stored on railway property near any of the dangerous articles for which labels are prescribed by the Regulations for the Transportation of Dangerous Articles other than explosives by freight.

1651. In a car containing explosives all packages of other freight must be loaded, and when necessary must be stayed to prevent injury to packages of explosives during transit. When practicable explosives should be loaded so as to avoid transfer at station.[1]

WAYBILLING.

1652. (a) The carrier must see that each shipment of explosives is properly described on the shipping order and on the revenue waybill under one of the names in the "List of shipping names," paragraph 1641, and that the correct gross weight is given.

(*b*) The revenue waybill or astray waybill for a shipment, and the card waybill and envelope containing rev-

[1] At stations where it is necessary to handle explosives at night it is recommended that incandescent electric lights be provided.

enue waybill when used as a card waybill for a car containing any of the following explosives:

Low explosives,
Black powder,
High explosives,
Wet fulminate of mercury,
Ammunition for cannon with explosive projectiles,
Explosive projectiles,
Explosive torpedoes,
Detonating fuzes,
Blasting caps, Electric blasting caps, } In quantity exceeding 1,000 blasting caps or 1,000 electric blasting caps.

must have plainly stamped or plainly written across the top, in letters not less than three-eighths of an inch high, the word "EXPLOSIVES."

(*c*) The revenue waybill and astray waybill for a shipment, and the card waybill and envelope containing revenue waybill when used as a card waybill for a car containing:

Ammunition for cannon with empty projectiles,
Ammunition for cannon with sand-loaded projectiles,
Ammunition for cannon without projectiles,
Ammunition for cannon with solid projectiles,
Smokeless powder for small arms,
Smokeless powder for cannon,
Common fireworks, or
Special fireworks,

must have plainly stamped or plainly written across the top, in letters not less than ⅜ of an inch high, the word "INFLAMMABLE."

(*d*) No indorsements are required on revenue waybills, card waybills, or other billing for shipments or for cars of the following explosives:

Small-arms ammunition.
Small-arms primers.
Cannon primers.

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Empty cartridge shells, primed.
Empty cartridge bags—black powder igniters.
Combination primers.
Percussion caps.
Percussion fuzes.
Time fuzes.
Tracer fuzes.
Combination fuzes.
Safety fuse.
Cordeau detonant.
Safety squibs.
Empty projectiles.
Sand-loaded projectiles.
Solid projectiles.
Empty torpedoes.
Blasting caps. } In quantity not exceeding
Electric blasting caps. } 1,000 caps.

SHIPMENTS FROM CONNECTING LINES.

1654. (*a*) Cars containing explosives named in paragraph 1661 which are offered by connecting lines must be carefully inspected by the receiving line on the outside, including the roof, and if practicable the lading must also be inspected. These cars must not be forwarded until all discovered violations have been corrected.

(*b*) If the car shows evidence of, or if there is any reason to suspect that it has received rough treatment, the lading must be inspected and placed in proper condition before the car is permitted to proceed. When interchange occurs and inspection is necessary after daylight hours, electric flash lights or other suitable covered lights should be provided. Naked lights must not be used.

(*c*) Shipments of explosives offered by connecting lines must comply with these regulations, and the revenue waybill, freight bill, manifest of lading, card waybill, switching order, or other billing must bear the indorsement "EXPLOSIVE" or "INFLAMMABLE" prescribed by paragraph 1652 (*b*) and (*c*).

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DISPOSITION OF INJURED, CONDEMNED, AND ASTRAY PACKAGES.

1655. **Packages found injured or broken** in transit may be recoopered when this is evidently practicable and not dangerous. A broken box of high explosives that can not be recoopered should be reinforced by stout wrapping paper and twine, placed in another strong box, and surrounded by dry, fine sawdust, or dry and clean cotton waste, or elastic wads made from dry newspaper. A ruptured can or keg should be inclosed in a grain bag of good quality and boxed or crated. Injured packages thus protected and properly marked may be forwarded.

1656. **Condemned packages** of leaking explosives should (1) be returned immediately to shipper if at point of shipment; or (2) disposed of to a person who is competent and willing to remove them from railway property, if leakage is discovered while in transit; or (3) removed immediately by consignee if shipment is at destination.

When disposition cannot be made as above, the leaking boxes must be packed in other boxes large enough to permit, and the leaking box must be surrounded by at least 2 inches of dry, fine sawdust, or dry and clean cotton waste, and be stored in station magazine or other safe place until arrival of an inspector of the Bureau of Explosives or other authorized person to superintend the destruction or disposition of the condemned material.

1657. When name and address of consignee or shipper are known, an **astray shipment** must be forwarded to its destination or returned to the shipper by the most practicable route, provided a careful inspection shows the packages to be in proper condition for safe transportation.

When a package in an astray shipment is not in proper condition for safe transportation (see par. 1655), or when name and address of consignee and shipper are unknown, disposition will be made as prescribed by paragraph 1656.

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SELECTION AND PREPARATION OF CARS.

DANGEROUS EXPLOSIVES.

1661. For the transportation of carloads or less-than-carload lots of—

Low explosives,
Black powder,
High explosives,
Wet fulminate of mercury,
Blasting caps,
Electric blasting caps, } In quantity exceeding 1,000 blasting caps or 1,000 electric blasting caps.
Ammunition for cannon with explosive projectiles,
Explosive projectiles,
Explosive torpedoes, or
Detonating fuzes,

only certified and placarded cars may be used.

CERTIFIED CAR PLACARDED "EXPLOSIVES."

1662. Certified cars must be inspected inside and outside and must conform to the following specifications:

(*a*) Box car not less than 60,000 pounds capacity with friction draft gear. Steel underframe cars should be used when available. On narrow-gauge and other railroads, all of whose freight cars are of less than 60,000 pounds capacity, explosives may be transported in car of less than that capacity, provided the available cars of greatest capacity and strength are used for this purpose.

(*b*) Must be equipped with air brakes and hand brakes in condition for service.

(*c*) Must have no loose boards or cracks in the roof, side, or ends, through which sparks may enter.

(*d*) The doors must shut so closely that no sparks can get in at the joints, and, when necessary, they must be stripped. The stripping for doors should be on the inside and be fastened to the door frame where it will form a shoulder against which the closed door is pressed

by means of wedges or cleats in door shoes or keepers. The openings under the doors should be similarly closed. The hasp fastenings must be examined with doors closed and fastened and must be cleated when necessary to prevent door shifting.

(*e*) The journal boxes and trucks must be carefully examined and put in such condition as to reduce to a minimum the danger of hot boxes or other failure necessitating the setting out of the car before reaching destination. The lids or covers of journal boxes must be in place.

(*f*) The car must be carefully swept out before it is loaded. For less-than-carload shipments the space in which the packages are to be loaded must be carefully swept.

Holes in the floor or lining must be repaired and special care taken to have no projecting nails or bolts or exposed pieces of metal which may work loose or produce holes in packages of explosives during transit.

(*g*) When packages of explosives are to be loaded over exposed draft bolts or kingbolts, these bolts must have short pieces of solid, sound wood with beveled ends (2-inch plank) spiked to the floor over them (or empty packages of the same character may be used for this purpose) to prevent possibility of their wearing into the packages of explosives.

(*h*) The roof of the car must be carefully inspected from the outside for decayed spots or broken boards, especially under or near the running board, and such spots must be covered or repaired to prevent their holding fire from sparks. A car with a roof generally decayed, even if tight, must not be used.

(*i*) The carrier must have the car examined by a competent employee to see that it is properly prepared, and must have a "Certificate" signed in triplicate upon the prescribed form (see par. 1665) before permitting the car to be loaded.

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(*j*) Cars not in proper condition, as above specified, must not be furnished to the shipper or used for the transportation of explosives.

LESS DANGEROUS EXPLOSIVES IN CAR PLACARDED "INFLAMMABLE."

1663. (*a*) Carloads or less-than-carload lots of—
Ammunition for cannon with empty projectiles,
Ammunition for cannon with sand-loaded projectiles,
Ammunition for cannon with solid projectiles,
Ammunition for cannon without projectiles,
Smokeless powder for small arms,
Smokeless powder for cannon, or
Fireworks,
may be loaded in any box car which is in good condition into which sparks can not enter and whose roof is not in danger of taking fire through unprotected decayed wood. These cars do not require the car certificate but must have attached to both side doors and both ends the "INFLAMMABLE" placard prescribed by paragraph 1667, and the doors if not tight must be stripped to prevent the entrance of sparks.

RELATIVELY SAFE EXPLOSIVES IN CAR WITHOUT PLACARDS.

(b) Carloads or less-than-carload lots of—
Small-arms ammunition,
Small-arms primers,
Cannon primers,
Empty cartridge shells, primed,
Empty cartridge bags—black powder igniters,
Combination primers,
Percussion caps,
Percussion fuzes,
Time fuzes,
Tracer fuzes,
Combination fuzes,
Safety fuse,
Cordeau detonant,

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Safety squibs,
Empty projectiles,
Sand-loaded projectiles,
Solid projectiles,
Empty torpedoes, and not exceeding 1,000 blasting caps, or 1,000 electric blasting caps,

may be loaded in any box car which is in good condition, without car certificate or placards,

(*c*) When specially authorized by the carrier, explosives in quantity not exceeding 150 pounds may be carried in construction or repair cars when the packages of explosives are placed in a "magazine" box made of sound lumber not less than 1 inch thick, covered on the exterior with metal, and provided with strong handles. This box must be plainly stenciled on the top, sides, and ends, in letters not less than 2 inches high "EXPLOSIVES—DANGEROUS—HANDLE CAREFULLY." The box must be provided with strong hinges and with a lock for keeping it securely closed. Vacant space in the box must be filled with a cushioning material such as sawdust or excelsior, and the box must be properly stayed in the car to prevent movement. The car, when not occupied by a responsible employee, must be placarded "EXPLOSIVES."

PLACARDING OF CARS AND CERTIFICATION OF CONTENTS.

1664. Uniform practice is important and the prescribed form of car certificates and placards must be used.

1665. (*a*) **Car certificate.**—The following certificate (prescribed by par 1662 (*i*), printed on strong tagboard measuring 7 by 7 inches, must be duly executed in triplicate by the carrier, and by the shipper if he loads the shipment. The original must be filed by the carrier at the forwarding station on a separate file, and the other two must be attached to the outside of the car doors, one on each side, the lower edge of the certificate not less than 4½ feet above the floor level.

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(*b*) At stations where explosives are loaded into a properly certified and placarded car received with other shipments of explosives, or carload shipments are reconsigned, a record must be kept of the car, originating point, carrier's name and date of car certificate.

CAR CERTIFICATE.

No. 1 ——— Station, ———, 19——.

I hereby certify that I have this day personally examined——————— car No. ————————, and that the roof and sides have no loose boards, holes, or cracks, or unprotected decayed spots liable to hold sparks and start a fire; that the kingbolts or draft bolts are properly protected and that there are no uncovered irons or nails projecting from the floor or sides of the car which might injure packages of explosives; also that the floor is in good condition and has this day been cleanly swept before the car was loaded; that I have examined all the axle boxes and that they are properly covered, packed, and oiled, and that the air brakes and hand brakes are in condition for service.

———————————

Railway employee inspecting car.

———————

No. 2. ——— Station, ———, 19——.

I hereby certify that I have this day personally examined the above car; that the floor is in good condition and has been cleanly swept and that the roof and sides have no loose boards, holes, cracks, or unprotected decayed spots liable to hold sparks and start a fire; that the kingbolts and draft bolts are protected, and that there are no uncovered irons or nails projecting from the floor or sides of the car which might injure packages of explosives; that the explosives in this car have been loaded and stayed and that the car has been placarded according to paragraphs 1644 to 1651, inclusive, 1661, and 1666, of the Regulations for the Transportation of Explosives prescribed by the Interstate Commerce Commission; that the doors fit or have been stripped so that sparks can not get in at the joints or bottom.

———————————

Shipper.

———————————

Railway employee inspecting loading and staying.

NOTE.—Both certificates must be signed. Certificate No. 1 by the representative of the carrier. For all shipments loaded by the shipper he or his authorized agent must sign certificate No. 2, and the representative of the carrier must certify as to the loading and staying and general condition. When the car is not loaded by the shipper, certificate No. 2 must be signed only by the representative of the carrier. A shipper should decline to use a car not in proper condition.

Exhibit P. 17.

"EXPLOSIVE" PLACARD.

1666. **Placard.**—A certified car for the dangerous explosives specified in paragraph 1661, must be protected by attaching to each outside end, and said door, the lower edge not less than 4½ feet above the car floor, a standard placard 12 by 14 inches, on which appears in conspicuous red and black printing on strong tag board the following notice:

14 Inches

.....R.....Company . . .

EXPLOSIVES

(To be printed in red)

HANDLE CAREFULLY

KEEP FIRE AWAY

(To be printed in red)

.....STATION.....19....

12 Inches

CONDENSED RULES FOR HANDLING THIS CAR

1. This car must not be placed in a passenger train, nor in a mixed train if avoidable.

2. Cars containing explosives must be near center of train and may be together if desired; must be at least 15 cars from engine and 10 cars from caboose when length of train will permit.

3. This car must not be placed next to cars bearing the inflammable or the acid placard or cars containing lighted heaters. Whenever it is possible to avoid so doing it must not be placed next to tank cars or flat cars or next to carloads of lumber, poles, iron, pipe, or other articles liable to break through end of car from rough handling.

4. The air and hand brakes on this car must be in service.

5. In shifting have a car between this car and engine whenever possible, and do not cut this car off while in motion.

6. Avoid all shocks to this car and couple carefully.

7. Avoid placing it near a possible source of fire.

8. Engines on parallel track must not be allowed to stand opposite or near this car when it can be avoided.

9. This placard must be removed from car when the explosives are unloaded.

NOTE. Carriers will be permitted to use their present supply of placards, but all new supplies must conform to the amended form.

Exhibit P. 17.

"INFLAMMABLE" PLACARD.

1667. A placard of diamond shape printed on strong tag board measuring 10¾ inches on each side and bearing in red and black letters the inscription prescribed by paragraph 1913 must be placed on each outside end and side door of a car containing any quantity of smokeless powder for cannon, or smokeless powder for small arms, or ammunition for cannon with empty projectiles, or ammunition for cannon with sand-loaded projectiles, or ammunition for cannon with solid projectiles, or ammunition for cannon without projectiles, or fireworks.

HANDLING CARS CONTAINING EXPLOSIVES.

1680. The phrase "cars containing explosives" as used in this and subsequent paragraphs, excepting paragraph 1697, refers to the dangerous explosives specified in paragraph 1661, which require a certified car placarded "EXPLOSIVES."

1681. Under no circumstances must a car known to require the "EXPLOSIVE" placard be taken from a station, including transfer stations or interchange points, a siding, or yard, unless it is property placarded as per paragraphs 1665 and 1666, nor unless the car is in proper condition. The carrier must see that its representative in charge of a freight train makes a thorough check of the cars bearing "INFLAMMABLE", "ACID," and "EXPLOSIVE" placards with the billing to see that all placards required are attached and that those not required are removed.

1682. Every possible effort must be made to expedite the movement of cars containing explosives, and no unnecessary delay must occur at initial, interchange, or transfer stations.

1683. When a car containing explosives is in a train, the carrier must make proper provision for notifying its train and engine employees of the presence and location of such car in the train before leaving the initial station.

Exhibit P. 17.

1684. Such cars must be frequently inspected to see that the placards and car certificates are intact. Whenever any of these become detached or lost in transit, they must be replaced on arrival at the next division terminal yard, if in through freight train, or at first station stop if in local freight train.

1685. On lines where regular trains are operated for freight service only, cars containing explosives must not be hauled in a train that carries passengers. Where only a mixed train service is operated or where passengers are carried in the caboose car of a freight train, a car containing a freight shipment of explosives may be hauled, but it must not be placed next to a car carrying passengers, and whenever it is practicable to do so, such a car or cars must be placed between freight cars not bearing "ACID" or "INFLAMMABLE" placards. Cars containing explosives must have air and hand brakes in service.

1686. (*a*) In through freight trains they must be placed near the middle of the train, and two or more such cars may be placed together if desired. They must be at least 15 cars from the engine and 10 cars from the caboose when length of the train will permit. They must not be placed next to cars bearing the "INFLAMMABLE" or the "ACID" placard, or cars containing lighted heaters. Whenever it is possible to avoid so doing they must not be placed next to tank cars or wooden-frame flat cars or next to carloads of lumber, poles, iron, pipe, or other articles liable to break through end of car from rough handling.

(*b*) These requirements apply also to local freight trains except that to avoid the danger of otherwise unnecessary switching at way station, cars containing explosives may be placed not closer than the second car from caboose or the second car from engine. They must be placed between cars that do not bear the "INFLAMMABLE" or "ACID" placards, if such cars are in the train.

Exhibit P. 17.

1687. (*a*) If shipments of explosives are accepted at nonagency stations, provision must be made for the proper certification and placarding of cars, examination of shipments, and loading and staying of packages in cars.

(*b*) Shipments of explosives must not be unloaded at nonagency stations unless the consignee is there to receive them, or unless proper storage facilities are provided at that point for their protection.

1688. When handling cars containing explosives in yards or on sidings, they must, if it is practically possible, be coupled to the engine protected by a car between, and they must never be cut off while in motion.

Cars containing explosives must not be handled in switching or in trains, with doors open.

1689. They must be coupled carefully and all unnecessary shocks must be avoided. Other cars must not be cut off and allowed to strike a car containing explosives. They must be so placed in yards or on sidings that they will be subject to as little handling as possible, and be removed from all danger of fire. They must not be placed on tracks under bridges, and when avoidable, engines on parallel tracks must not be allowed to stand opposite or near them.

1690. At points where trains stop and time permits, cars containing explosives and adjacent cars must be examined to see that they are in good condition and free from hot boxes or other defects liable to cause damage. If cars containing explosives are set out short of destination for any cause the carrier must arrange that proper notice be given to prevent accident.

1691. Whenever a car containing explosives is opened for any purpose and in every instance after such a car has received rough treatement, inspection must be made of the packages of explosives as soon as practicable without unnecessary disturbance of lading to see that they are

properly loaded and stayed and in good condition. Upon the discovery of leaking or broken packages, they must be carefully removed to a safe place. Loose powder or other explosives must be swept up and carefully removed. If the floor is wet with nitroglycerin, the car is unsafe to use and a representative of the Bureau of Explosives should be immediately called to superintend the thorough mopping and washing of the floor with a warm, saturated solution of concentrated lye or sodium carbonate. If necessary, the car must be placed on an isolated siding and proper notice given.

1692. **Removal of placards.**—The certificates and placards prescribed in paragraphs 1665, 1666 and 1667 must be removed from the car as soon as the explosives are unloaded.

IN CASE OF A WRECK.

1697. In case of a wreck involving a car containing explosives, the first and most important precaution is to prevent fire. Before beginning to clear a wreck in which a car containing explosives is involved all unbroken packages should be removed to a place of safety and as much of the broken packages as possible gathered up and likewise removed, and the rest saturated with water. Many explosives are readily fired by a blow or by the spark produced when two pieces of metal or a piece of metal and stone come violently together. In clearing a wreck, therefore, care must be taken not to strike fire with tools, and in using the crane or locomotive to tear the wreckage in pieces the possibility of producing sparks must be considered. With most explosives thorough wetting with water practically removes all danger of explosion by spark or blow; but with the dynamites wetting does not make them safe from blows. With all explosives mixing with wet earth renders them safer from either fire, spark, or blow. In case fulminate has been scattered by wreck, after the wreck has been cleared the wet sur-

face of the ground should be removed, and, after saturating the area with oil, be replaced by fresh earth. If this is not done, when the ground and fulminate become dry small explosions may occur when the mixed material is trodden on or struck.

REGULATIONS FOR THE TRANSPORTATION OF DANGEROUS ARTICLES OTHER THAN EXPLOSIVES BY FREIGHT.

Prescribed under act of March 4, 1909, and section 15 of the act to regulate commerce, as amended June 18, 1910. Revision formulated and published July 2, 1914, effective October 1, 1914, and superseding regulations published January 1, 1912.

GENERAL NOTICE.

1701. Special precautions are necessary in preparing for shipment packages of dangerous articles other than explosives, and in handling these packages during transit. Any failure of a shipper, or of a carrier, to perform the duties imposed upon him in this respect may be the actual or a contributory cause not only of destructive fires but of disastrous explosions, since large quantities of explosives are transported frequently through thickly populated districts and in trains containing cars loaded with other dangerous articles.

1702. Sections 235 and 236 of the act of March 4, 1909, require the shipper of dangerous articles to describe and mark his packages properly and to inform the agent of the carrier of the true character of their contents. Heavy penalties are provided for the shipper who knowingly solicits the transportation of dangerous articles without complying with these requirements, as well as for the carrier that knowingly transports them.

1703. To promote the uniform enforcement of law and to minimize the dangers to life and property incident to the transportation by land in interstate commerce of dangerous articles other than explosives, the following

Exhibit P. 17.

regulations are prescribed to define these articles for freight transportation purposes, to state the precautions that must be observed by the shipper in preparing them for shipment, and by the carrier in handling them while in transit. It is the duty of each such carrier and shipper to make the prescribed regulations effective and to thoroughly instruct their employees in relation thereto.

1704. These regulations apply to all shipments of dangerous articles other than explosives, including carriers' material and supplies.

1705. Specifications as to containers, methods of packing for shipment, etc., will be considered and prescribed from time to time. Orders prescribing such specifications will be given effective dates as conditions and investigations may appear to warrant.

1706. The Bureau for the Safe Transportation of Explosives and other Dangerous Articles, hereinafter called Bureau of Explosives, organized by the railways under the auspices of the American Railway Association, is an efficient bureau in charge of an expert chief inspector. This bureau will make inspections and conduct investigations and will confer with manufacturers and shippers with a view to determining what specifications and regulations will within reasonable limits afford the highest degree of safety in packing and preparing these dangerous articles for shipment and in transporting the same. The Commission will seek to avail itself of the expert knowledge thus developed and, in formulating amendments to these regulations or specifications supplemental thereto, while not bound thereby, will give due weight to such expert opinions.

GENERAL RULES.

1711. Carriers that are subject to the act to regulate commerce must not receive shipments of articles defined as dangerous by these regulations when the shipments

are not packed, marked, labeled, described, and certified as prescribed herein. The method of manufacture and packing of articles defined as dangerous by these regulations, so far as it affects safe transportation, must be open to inspection by a duly authorized representative of the initial carrier or of the Bureau of Explosives.

1712. All shipments of articles subject to these regulations offered for transportation in interstate commerce must be properly described by the shipper in his shipping order and bill of lading under the specific or general name provided for the description of such freight by the carrier's classification and tariff governing.

The same description of contents must be marked plainly on the outside of each package.

In less-than-carload shipments each package must be marked also to show plainly the name and address of the consignee. This address, the name of contents, and the required label or "no label required" marking, should be as near together as practicable.

1713. All shipments of articles defined as dangerous by these regulations, and for which detailed instructions for packing are not given herein, must be securely packed in containers strong enough to stand without rupture or leakage of contents all ordinary shocks incident to reasonably careful handling during transit. It is the duty of shippers, where leakage from their shipping containers is known to be a probable source of fire or material damage to other freight, to exercise special care in constructing shipping containers for such articles, even though their names do not appear in the list of dangerous articles, paragraph 1807.

1714. Carriers must forward shipments of dangerous articles other than explosives promptly and within 48 hours after acceptance at originating point or receipt at transfer station or at interchange point, and consignees must remove such shipments from the carrier's property

Exhibit P. 17.

within 48 hours after notice of arrival at destination, Sundays and holidays not included.

1715. (*a*) **Serious violations of these regulations** such as the discovery of leaking or broken packages of dangerous articles, **and accidents or fires** in connection with the transportation or storage on carrier's property of dangerous articles must be reported by the carrier to the chief inspector of the Bureau of Explosives, 30 Vesey Street, New York City.

(*b*) Consignees should report promptly to the chief inspector, Bureau of Explosives, all instances of broken or defective containers in shipments of dangerous articles received by them.

Placards and Handling Cars.

* * * * * *

1905. (*a*) Tank cars placarded "INFLAMMABLE" must be placed in trains, if possible, at least 5 cars from the engine and 5 cars from the caboose, but must not be placed next to a car placarded "EXPLOSIVES." When length of train does not permit this, they must be placed as near the middle of the train as practicable, and in all cases carriers must see that their train crews are informed of the presence and location of such cars in the train.

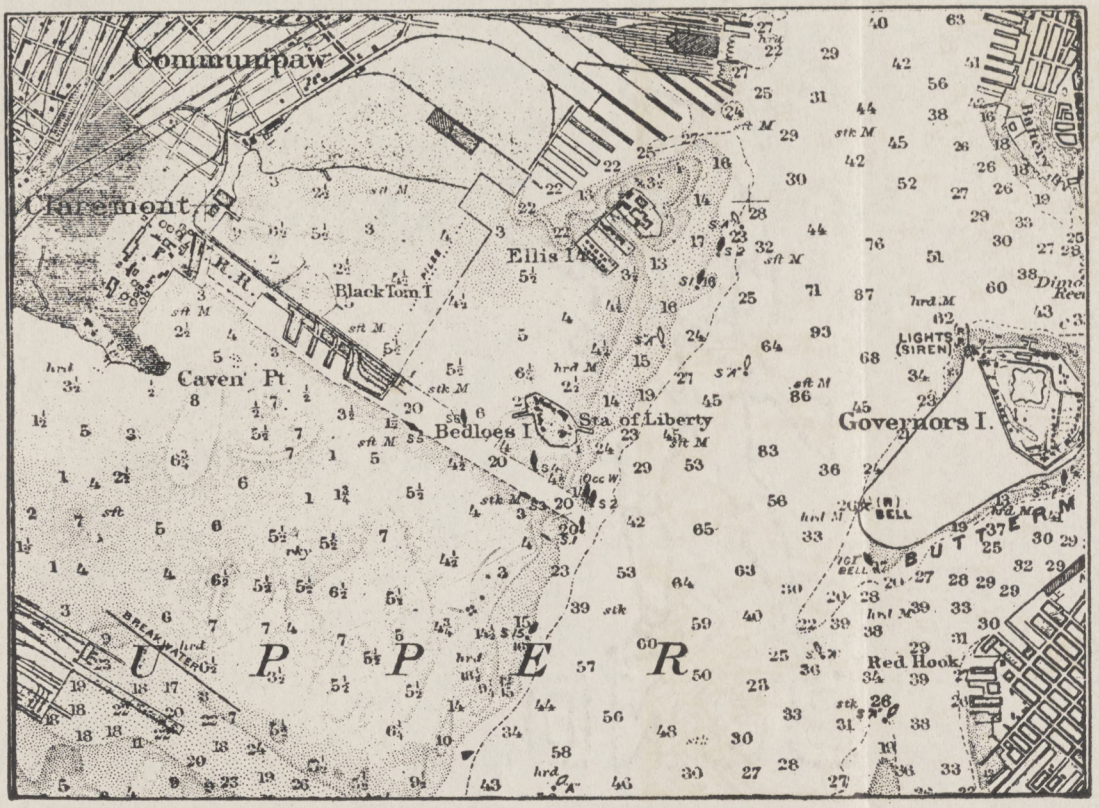
Special care must be taken to avoid rough treatment and unnecessary switching of placarded tank cars.

(*b*) The carrier must see that its representative in charge of a freight train makes a thorough check of the cars bearing inflammable, acid, or explosive placards, with the billing, to see that all placards required are attached and those not required are removed.

1906. When cars protected by "INFLAMMABLE" placards are received or held in yards, particularly at night, the carrier must see that all necessary precautions are taken to prevent accidents. These precautions must

PLAINTIFFS' EXHIBIT (No Number).

Geodetic Survey.





Exhibits D. 1 and D. 2.

include provision for quickly isolating them in case of fire.

EXHIBITS P. 18 & P. 19.

Photographs.
Copies furnished.

EXHIBIT D. 1.

D. 1—Red Book of I. C. C. Regulations issued by defendant. These Regulations are the same as Exhibit P. 17.

EXHIBIT D. 2.

NATIONAL STORAGE COMPANY
FIRE DEPARTMENT REGULATIONS AND FIRE ALARM LOCATIONS.

Private Fire Alarm Boxes.

East End of Property

No. 2—Grain Elevator
No. 3—Pier 4, South End
" 4—East Side, Pier 4
" 5—North End " 4
" 6—West Side " 4
" 13—Store—dock end
" 14—Pier 5, East Side
No. 15—Pier 5, West Side
" 16— " 6, West "
" 17— " 6, East "
"—21—Store P, dock end
" 23— " Q, Platform end
" 25—National Docks Pump room

Exhibit D. 2.

West End of Property.

No. 26—Old C de Docks (Cork Insulation Company premises)
" 34—Warehouse A. A. North End
" 35—Cork Insulation Warehouse "B B"

Jersey City Fire Alarm Boxes.

No. 671—Telegraph Pole near Cork Insulation Company's Office
" 672—Store F—East End National Docks

Auxiliary Alarm Boxes
Calling Jersey City Fire Department

No. 1—Center Warehouse AA.
" Rear
" North Wall near center Warehouse AA.
" South " " " " "
" Section 2 Office, Pier 4
" " 19 East Side, Pier 4
" " 30 " " 4
" " 15 West Side " 4
" " 15 c deck West Side Pier 4
" North end Pier 5
" South " " 5
" North " " 6
" South " " 6

Back ups or Fire Out.
Seven short blasts on Fire Whistle.

Private Fire Department.
Chief, A. DAVIDSON Deputy Chief, H. LUSCOMB.

Exhibit D. 2.

Hose Carriage No. 5 in Gangway between Warehouse M and N

ROBERT COSTELLO, Captain

DILLON	PASIECEZNIK
PIEDES	SANATIOA

Hose Carriage No. 6 in Gangway between Warehouse M & N

JOHN DEVINE, Captain

O'Connor	Cunningham
Burgess	Sturken

Hose Carriage No. 10 on land end of Pier No. 6

WILLIAM CROCKETT, Captain

MASON	JOULES
PRINDIVILLE	STEVENSON

Hose Carriage No. 3 adjacent to Office

JOHN PIERCE, Captain

DUFFY	STYLES
HUMULAH	CALLAHAN

Hose Carriage No. 4 adjacent to Office

OTTO KRAEL, Captain

HOMADEL	LATZ
GILLIGAN	M. SMITH

Hose Carriage No. 9 at north end of Warehouse "AA"

FRANK SMITH, Captain

FEDYK	MATICOKA

B Night Company

KANE, Captain

GRATE	SLOANE	KELLY
		DAWSON

Exhibit D. 2.

Electric Pump Men

Day	Night
TANNER	GARRETY

1st—Upon discovery of fire pull the nearest Private Alarm Box—and stay near said Box to direct Fire Department to the fire.

The City Alarm Box may be pulled at the discretion of the Chief or Deputy Chief of Department.

2nd—When signal is received the Electric Pump man on duty must immediately prime and start Electric Pump, permitting same to churn. He shall then station himself outside of pump house and await instructions before opening valve to discharge into main.

3rd—When signal is received the Steam Pump Engineer on duty at the West End of property shall take his station in steam pump house and prime pump; but shall not start pump until a signal of one long blast on the fire whistle has been given. The pump must then be started and run at 80 lbs. water pressure at the pump until back taps are sounded.

4th—1st—Alarm consists of location signal being repeated three times on steam whistle near office.

5th—2nd—Alarm is a repetition of first alarm location signal.

6th—On first alarm all Companies located in the end of yard signal is received from, must respond; all Companies not responding must hold themselves in readiness for second alarm signal.

7th—On 2nd alarm entire Department must respond.

Exhibits D. 3 and D. 4.

EXHIBIT D. 3.

Red Box of A. D. T. System.
On outside of box appears the following:
"FOR FIRE
B R E A K
G L A S S O P E N
D O O R
P U L L L E V E R
D O W N"
On inside appears an arrow pointing to the words:
"P U L L
D O W N
A N D
L E T G O."

EXHIBIT D. 4.

$50.00 R E W A R D
Will be paid for information leading to the arrest and conviction of any person maliciously turning in a fire alarm from this box.

AMERICAN DISTRICT TELEGRAPH
& MESSENGER CO.

Exhibit D. 5.

EXHIBIT D. 5.

Form T. 496

8-7-100

LEHIGH VALLEY RAILROAD

General Agent Division.

Location of Fire Alarm Signal Boxes at National Stores.

CITY BOXES.

City Box No. 671—Oil Yard—Telegraph pole at office.
" " " 672—Store "F"—East End.

LEHIGH VALLEY BOXES.

L. V. Box No. 2—Grain Elevator.
" " " " 3—Pier No. 4—South End.
" " " " 4— " " 4—East Side.
" " " " 5— " " 4—North End.
" " " " 6— " " 4—West Side.
" " " " 25—Pump Room—National Docks.
" " " " 13—Store "K"—Dock End.
" " " " 14—Pier No. 5—East Side.
" " " " 15— " " 5—West "
" " " " 16— " " 6— " "
" " " " 17— " " 6—East "
" " " " 21—Store "P"—Dock End.
" " " " 23— " "Q"—Platform End.
" " " " 26—Crude Dock—Midway.
" " " " 34—Oil Warehouse AA—North End.
" " " " 35—Cooper Shop BB.

Exhibit D. 6.

EXHIBIT D. 6.

RULES AND REGULATIONS OF THE NEW YORK BOARD OF FIRE UNDERWRITERS. FOR LISTED STORAGE STORES.

Approved storage stores must be occupied and be under the exclusive control of the warehouseman.

Electric lights may be permitted subject to the following conditions:

All wires to be protected by approved metal conduits or approved metal armored cables. These conduits or cables to terminate in all cases in outlet boxes or condulets throughout building. Switches, cut-outs and panel boards to be enclosed in approved metal cabinets. Lights to be used only for the general illumination of the principal aisles or passageways and not to be placed over tiered goods or where they are liable to injury when goods are being tiered. Incandescent electric lights only to be used.

All lamps must be connected to rigid receptacles or clusters, each lamp or cluster to be protected by a 3/16 inch glass globe and a No. 5 B. & S. wire guard or their equivalent. In no case will pendants or portable lights be permitted except in the office or in motor rooms.

The entire equipment to be disconnected when the building is closed; the switch for this purpose to be located either directly at point where wires enter building or at a convenient location on first floor directly above the service connection. A pilot lamp to burn near entrance whenever this main switch is closed.

The rules of the national electrical code regarding the use of conduits, wires, fittings, etc., must be rigidly enforced.

No electric light to be permitted in any fibre storage store.

Exhibit D. 6.

No fires or lights other than incandescent electric to be permitted in storage stores or in storage sheds, unless said lights are contained in enclosed locked lanterns, containing lamps filled with whale, sperm or lard oil, or containing approved candles. Lanterns to be unlocked, lighted and extinguished only in the office or other approved room. Open lights and fire heat permitted in office only.

Cotton, rags or any vegetable fibre that is not in compact bags or bales, will not be permitted in any store. No cotton or other fibre waste, or cotton or other fibre damaged by fire shall be stored; cotton or other fibre damaged other than by fire shall be stored separately and only in fireproof warehouses or vaults. Cotton or other fibre sweepings shall be stored only as damaged. No loose cotton, rags, or fibre shall be dried on the roofs or premises of said warehouses.

Cotton picking is not permitted in any store. Cotton samplers to conform to all rules prescribed by the Underwriters for the safety of the stores.

When cotton is picked, it must be done outside of the building, and under proper supervision so as not to constitute an exposure thereto.

No smoking shall be permitted in the stores, or on the premises, or wharves, or piers under the control of the warehousemen. Conspicuous signs bearing the words "No Smoking" shall be posted throughout the premises.

If workmen's clothing is allowed to be hung in stores or sheds, a suitable room or closet shall be provided for the same, constructed entirely of incombustible material.

In fibre stores all employees shall be required before going to work to deliver up to the guardian of this room any matches, pipes, cigarettes or cigars in their possession and the same shall be deposited in a fireproof receptacle until returned to the owners.

Exhibit D. 6.

Well-holes, hatches, elevators and stairways to be closed at night, and the warehouse so secured that no access can be had thereto without the knowledge of those having charge of the premises.

The proprietors shall examine carefully, or cause to be examined, their premises each morning and evening.

In every store there shall be kept exclusively for fire purposes, at least one approved fire pail for each 500 square feet or portion thereof of floor area, but in no case less than five pails or buckets on each floor, at all times filled with water and ready for use; setting, location and disposition of pails to be in accordance with standard requirements of the board. A 50-gallon cask of water and 3 fire pails will be accepted as the equivalent of 6 fire pails.

All goods stored in the cellars shall be placed on skids not less than four inches from the floor, or six inches from the ground.

The use of stationary engines for hoisting purposes located in some suitable place will be permitted, provided the same have been approved by the survey bureau of the board.

Electric power will be permitted for hoisting, only when the wires and motor are fully protected from contact with goods on storage, placed as may be previously agreed upon with this board, and a certificate issued that all is in full compliance with the rules and requirements of the board. Elevator motors to be enclosed in a room of incombustible material; height and area to be sufficient to afford free access to the motor or engine for cleaning and repairing.

No ashes, waste, or sweepings shall be kept in wooden receptacles in the building, or on the wharves or covered piers.

Good and sufficient passageway must be preserved on each floor. All windows—front, rear and sides—and stairways must be kept free from obstruction of any kind.

Exhibit D. 7.

At fibre storage stores a competent watchman shall be maintained during nights, Sundays and holidays with approved watchman's time detectors.

Any violation of the foregoing rules and requirements will be promptly reported by the inspector.

As amended December 21, 1910.

EXHIBIT D. 7.

Form T. 61.

LEHIGH VALLEY RAILROAD COMPANY.

Office of the General Superintendent.

RULES RELATIVE TO FIRE PROTECTION

Which the Employes of this Company, Having the Custody of Property, are Instructed to Observe:

No. 1. Rubbish, sweepings and inflammable material must not accumulate on the premises of the Company.

No. 2. Greasy and oily waste, or old rags, must be kept in covered metal cans, and must be removed from buildings every night.

No. 3. Sawdust must not be used on floors, nor in spittoons, as it is easily ignited.

No. 4. Smoking is prohibited in all buildings, with the exception of those where we have regular smoking rooms.

No. 5. Safety matches only may be used, and care should be taken to see that they are extinguished after being used. All matches must be kept in metal boxes.

No. 6. Oil for use in shops, freight houses, stations and towers should be kept outside of buildings, when possible. If not feasible, the oil cans must be kept in a metal-lined box.

No. 7. Stoves should be securely set on stone, cemented brick or metal. Woodwork near stoves and stove pipe

must be protected with metal screens or mats, and air spaces provided where stove pipes pass through woodwork.

No. 8. Ashes must be kept in metal cans and not against woodwork, and must be removed each day.

No. 9. Steam pipes must be free from woodwork, and kept free from waste and other inflammable material. Steam coils and steam pipes should be clear of woodwork, and inflammable material kept away from them. Where belts pass through partitions, sufficient space should be allowed to avoid friction from edge of belt.

No. 10. The use of coal oil lamps with glass fonts is prohibited; lamps with metal fonts must be used. They must not be filled after dark nor near a fire, as the oil, when low, generates an explosive gas. Paper shades must not be used. The use of gasolene or oil stoves, and the use of kerosene or gasolene to start fires, must not be permitted. When gasolene is used as a fuel at power plants, the supply must be stored at a safe distance from the fire.

No. 11. Supplies of benzine, gasolene or naptha must be kept in buildings especially intended for same. Switch lamps and oil must not be stored in station buildings where it is possible to avoid it . Lamps must not be filled in or near cars, stations or buildings, at night, when artificial light is in use. Special provisions should be made for the storage of explosives, and in no case shall such storage be permitted in depots or other buildings.

No. 12. Electric light, telegraph and telephone wires in buildings must be properly insulated and equipped with safety devices. All telephone and telegraph wires, before entering buildings, must be protected by lightning arrestors, and where they are liable to come in contact with high tension wires excessive current protectors must be provided. Lights should not be permitted near wood or paper. Where gas or lamp brackets are used, they

should be so constructed as to make it impossible for the flame to come in contact with the woodwork. Torches must not be used near inflammable material or where they will come in contact with wooden structures.

No. 13. Where locked city fire alarm boxes are near by, keys must be procured and hung up in a well-known and accessible place. Employes should have a knowledge of the location and the use of fire alarm boxes, extinguishers and other appliances. The latter, when provided, must be conveniently located, and used without delay when necessity arises.

No. 14. Fire buckets, casks, etc., must be kept filled and salt added to the water in them where it is likely to freeze. At least once each month fire hose should be tested under full pressure; extinguishers, plugs and other fire appliances carefully examined and tested, and fire brigades drilled.

No. 15. Requisition must be made promptly for supplies necessary for the observance of these rules. All defects which tend to increase the risk of fire must be attended to or reported at once.

No. 16. Rolling equipment must not be allowed to stand near elevators, mills or other buildings longer than is absolutely necessary. Special attention must be given to localities where valuable property is concentrated in buildings, rolling stock, etc. Buildings used for kitchens, eating houses and laundries require particular attention. Cinders must not be loaded on cars until they are cool enough to prevent ignition. No lumber should be piled within 100 feet of building.

No. 17. All windows, fire doors and shutters must be closed at night when the buildings are not occupied by employes. Broken glass in skylights, windows, transoms or manhole covers, and defects in fire shutters or fire doors, should be repaired at once.

Exhibit D. 8.

No. 18. The heating and lighting appliances in all cars and buildings should be frequently inspected and defects promptly repaired.

No. 19. Communicate with your superior officer when any suggestion occurs to you which will tend to lessen the fire risk in your vicinity.

No. 20. It is the duty of all officers, agents and other employes to exercise the greatest care in protecting the Company's property from fire. Their attention and interest will not only be directed to the property under the immediate jurisdiction of their respective departments, but to all property of the Company, wherever located. Where the instructions herein given are disregarded, it will be the duty of employes to immediately report the facts in writing to their superior officers. Constant vigilance is necessary to avoid fires, and employes failing to display the required interest in the protection of the Company's property will be considered negligent of their duties.

M. B. CUTTER,
General Superintendent.

South Bethlehem, Pa., October 1, 1904.

EXHIBIT D. 8 AND 27 OTHERS.

Photographs.
Copies furnished.

Exhibit D. 10.

EXHIBIT D. 10.

NEW YORK ANCHORAGE REGULATIONS
DEPARTMENT OF COMMERCE

OFFICE OF THE SECRETARY.
Washington

Department Circular No. 254
BUREAU OF NAVIGATION.

May 18, 1914.

TO WHOM IT MAY CONCERN:

The Rules and Regulations Governing the Anchorage of Vessels in the Bay and Harbor of New York, issued June 15, 1911, pursuant to the act approved May 16, 1888, as amended by the act approved February 14, 1903, and the act approved March 4, 1913, are hereby amended as follows:

WESTERN ANCHORAGE, UPPER BAY.

(See Plate V.)

20. At the end of the first paragraph insert:

"No vessel shall anchor between Ellis Island and the piers of the Central Railroad of New Jersey, or in the dredged channel approaches to this space."

E. F. SWEET,
Assistant Secretary.

EXHIBIT D. 9.

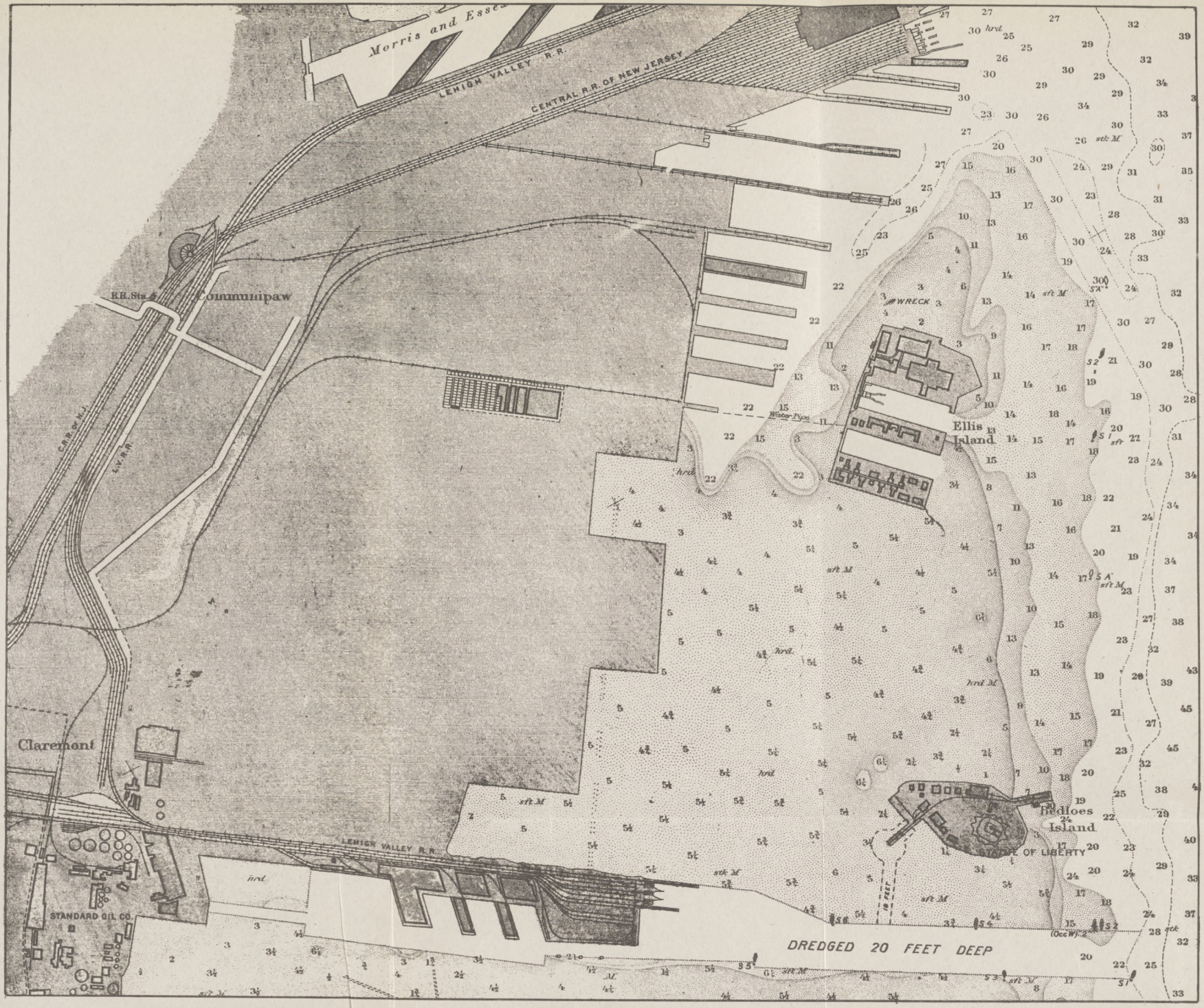

Morris and Esse
LEHIGH VALLEY R.R.
CENTRAL R.R. OF NEW JERSEY
R.R. Sta.
Communipaw
C.R.R. of N.J.
L.V.R.R.
WRECK
Water Pipe
Ellis Island
Claremont
LEHIGH VALLEY R.R.
STANDARD OIL CO.
Bedloes Island
STATUE OF LIBERTY
DREDGED 20 FEET DEEP

Exhibit D. 11.

EXHIBIT D. 11.

(Cover)

DEPARTMENT OF COMMERCE AND LABOR
BUREAU OF NAVIGATION.
RULES AND REGULATIONS
RELATING TO THE
ANCHORAGE OF VESSELS IN THE
PORT OF NEW YORK
June 15, 1911

Washington
Government Printing Office
1911

AN ACT RELATING TO THE ANCHORAGE OF VESSELS IN THE PORT OF NEW YORK.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Secretary of the Treasury (Commerce and Labor) is authorized, empowered, and directed to define and establish an anchorage ground for vessels in the bay and harbor of New York and in the Hudson and East Rivers, to adopt suitable rules and regulations in relation thereto, and to take all necessary measures for the proper enforcement of such rules and regulations.

Sec. 2. That in the event of the violation of any such rules and regulations by the owner, master or person in charge of any vessel, such owner, master or person in charge of such vessel shall be liable to a penalty of one hundred dollars; and the said vessel may be holden for the payment of such penalty and may be seized and proceeded against summarily by libel for the recovery of the same in any United States district court for the district within which such vessel may be, and in the name of the

officer designated by the Secretary of the Treasury (Commerce and Labor).

Sec. 3. That this act shall take effect immediately.

Approved May 16, 1888.

RULES AND REGULATIONS GOVERNING THE ANCHORAGE OF VESSELS IN THE PORT OF NEW YORK.

Department of Commerce and Labor,
Office of the Secretary,

Washington, June 15, 1911.

The following described anchorage grounds for vessels in the bay and harbor of New York, and in the Hudson and East Rivers, respectively, are hereby defined and established, and the following revised rules and regulations governing the same are published for the government of the owner, master, pilot, or other persons having charge of a steam vessel towing or otherwise conducting a vessel to an anchorage in the port of New York, pursuant to the act of Congress approved May 16, 1888:

(a) Vessels shall anchor only within the following specified limits, and a vessel anchoring within any of the below described boundaries must anchor entirely within said boundaries, so that no portion of the hull shall extend beyond said boundary after veering chain or when riding to a tideway.

(b) No vessel shall anchor in any of the channels except in cases of great emergency, and then as near the edge of the channel as possible, so as not to impede or interfere with the free navigation of the same, and only until such time as they can procure assistance; and no vessel shall anchor so as to obstruct the approach to any pier or impede the movement of any ferryboat.

(c) All stake boats used for assembling barges, canal boats, and other vessels preparatory to being made up in tows, and vessels used for storing explosives and moored

Exhibit D. 11.

only in the anchorage for explosives, as described in paragraph 2, No. 27, page 7, may be moored under permits granted by the supervisor of anchorages and moored only in such places as he may designate.

(d) A vessel upon being notified to move into the anchorage limits must at once get under way or make a signal for a tug.

(e) Permits may be granted by the supervisor of anchorages to wrecking plants to anchor in the channel for the purpose of recovering sunken property, subject to his supervision. Such wrecking plants must comply with all the navigation laws in regard to lights, fog signals, etc., and in granting such permit the Government assumes no responsibility.

(f) Points where cables and pipes cross the anchorage grounds are marked in red on the accompanying maps, and all vessels are cautioned not to anchor so as to interfere with them.

(g) All ash scows the property of the municipalities bordering on the waters of the port may be anchored in such places as the supervisor of anchorages may designate.

(h) The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction is hereby prohibited.

(i) No vessels shall occupy permanent berths in the anchorages except as provided for in these anchorage rules and regulations.

(j) The supervisor of anchorages shall assign berths in the respective anchorages to all vessels applying for them.

(k) All officers of revenue vessels at the port of New York are charged with the enforcement of these rules and regulations, and are empowered to remove from her anchorage any vessel not anchoring within the prescribed limits.

Exhibit D. 11.

EAST RIVER ANCHORAGES.

(See Plate No. 1)

1. To the northward of a line from the south point of Hart Island to Wrights Point.
2. To the westward of a line from Wrights Point to Throgs Neck.
3. To the southward of a line from buoy off Sands Point to buoy off Gangway Rock.
4. To the southward of a line from buoy off Gangway Rock to center of Stepping Stones Lighthouse.
5. To the eastward of a line from the center of Stepping Stones Lighthouse to Willets Point.
6. On Hammond Flats to the northward of a line from Old Ferry Point to the head of Engineers Wharf, Throgs Neck, the said line running about magnetic east and west between said points.
7. To the southward of a line from Willets Point to Whitestone Point.
8. On the north side of the channel, north of a line between Old Ferry Point and Hunts Point.
9. On the south side of the channel, south of a line between Whitestone Point and buoy (No. 1) off College Point, and to the eastward of a line running from said buoy to College Point.
10. In Flushing Bay, to the southward of a line from College Point to the north end of Rikers Island.
11. To the southward of a line from the north end of Rikers Island to the north end of South Brother Island, thence to Lawrences Point.
12. To the westward of a line from Stony Point to northeast end of Wards Island; and between Wards Island and Randalls Island, and between Randalls Island and Port Morris.
13. To the westward of a line from the foot of One Hundred and Sixteenth Street, New York, to the north end of Avenue B, New York, but no vessels shall

anchor on this anchorage within 150 feet of any wharf or pier, or so as to impede the movements of a ferry, or so as to prevent ready access to or from the piers.

14. To the eastward of a line from Hatters Dock to Gibbs Point (Hallets Cove, Astoria).

(See Plate No. 2.)

15. To the southward of Thirty-second Street Pier and the northward of Twenty-fourth Street Pier, and to the westward of a line passing through the horizontal-striped buoy off Nineteenth Street, running thence N. by E. ⅛ E. (cor. mag.). Vessels may anchor anywhere within these limits, provided they do not obstruct the approach to any pier or impede the movements of any ferryboat; and the officer in charge of anchorage grounds may, whenever he deems it advisable, move or cause to move any vessel not, in his opinion, complying with this proviso.

Range for outer boundary of this anchorage: When steering on this range (N. by E. ⅛ E., cor. mag.) you should look squarely into the new Forty-second Street Ferry Slip, on the center of the axis of which is a prominent dark chimney.

SOUTH ANCHORAGE, HUDSON RIVER

(See Plate No. 3.)

16. Vessels may anchor in the Hudson River to the westward of a line 100 yards west of the center line of said river; that the northeast boundary of this anchorage shall be a line drawn from the southeast corner of Gokey's dry dock just below the Weehawken terminal of the West Shore ferries to the end of the Thirty-fourth Street Pier, New York; that the southern limit of this anchorage be a line from the end of the Erie Railroad Co.'s Coal Pier, Hoboken, to the end of the Twenty-fifth Street Pier, New York, about SE. ⅜ E.

Exhibit D. 11.

MIDDLE ANCHORAGE, HUDSON RIVER

(See Plate No. 4)

17. Vessels may anchor in the Hudson River within the limits of the port of New York to the westward of the center line of said river running about NE. ½ N. (cor. mag.) from Castle Point, Hoboken, through the white anchorage buoy off Sixtieth Street to the northward of a line running from the southeast corner of West Shore Pier No. 3, Weehawken, to the center of the Fifty-fourth Street Pier, New York, about SE. ½ E. (cor. mag.) and to the southward of a line running from the outer end of the Guttenburg Pier to the outer end of the West Seventieth Street Pier, New York.

In no case shall a vessel anchor within 200 yards of the shore in either of these Hudson River anchorages.

UPPER ANCHORAGE, HUDSON RIVER

(See Plate No. 4)

18. To the northward of a line drawn from the pier on the Guttenburg side directly across the river to Eightieth Street, New York (cor. mag.), to the westward of a line parallel to and 125 yards to the westward of the center line of the river.

Note.—Small vessels may anchor inside the pier head lines as established by the Board of Engineers, United States Army, along the east bank of the Hudson River between Eighty-first Street and One hundred and twenty-first Street, and between One hundred and thirty-second Street and One hundred and fifty-eighth Street, in the discretion of the supervisor of anchorages, but the officer in charge of anchorage grounds may, whenever he deems it advisable, move or cause to move any vessel not, in his opinion, complying with this proviso.

Exhibit D. 11.

NAVAL ANCHORAGE, HUDSON RIVER

(See Plate No. 4.)

19. An anchorage is set aside for naval vessels to moor in a single line on the east side of Hudson River north of Seventy-ninth Street, and thence to Fort Washington Point, and above that point if necessary. Its southernmost limit shall be north of the northernmost cable crossing the river at Seventy-ninth Street, and extending northeastwardly on the east side of the river. Anchors shall be let go to the eastward of a line drawn 250 yards from the end of the pier at Seventy-ninth Street to 250 yards from the end of the pier at the foot of One hundred and twenty-ninth Street, thence to a point 330 yards from the pier at the foot of One hundred and fifty-eighth Street; and thence northeasterly, following the general line of the 24-foot curve on the east side of the river and 250 yards distant from the salient point of this curve. No ships shall anchor within a limit of 300 yards of the prolongation of One hundred and thirtieth Street, in order to give free passage for the Fort Lee ferryboats. The destroyers and other light-draft naval vessels may anchor on the west side of the river west of the 18-foot curve as shown on Coast Survey chart No. 369.

WESTERN ANCHORAGE, UPPER BAY.

(See Plate No. 5.)

20. To the southward of a range passing through Wall Street ferry, Brooklyn, and the white buoy to the north and east of Ellis Island; to the westward of a line running SW. by S. (nearly) from the said white buoy to a point one-third of a mile ESE. ⅞ E. from the red bell buoy at the entrance of Greenville Channel. In order to prevent vessels fouling the Ellis Island cable, the buoy marking

Exhibit D. 11.

the northern limit of the channel to Ellis Island and the buoy marking the southern entrance to said channel have been moved so as to leave a space of 800 yards clear water between the anchorage grounds north of the Ellis Island Channel and the anchorage grounds south of said channel, but the ranges otherwise retain their same magnetic bearings.

No vessels shall anchor in the Black Tom or Greenville dredged channels nor near the entrances to said channels so as to obstruct the approaches or interfere in any way with the free navigation of the same.

Note.—Vessels are especially cautioned not to anchor in Ellis Island Channel, thereby endangering the cable in said channel. In addition to the penality for illegal anchorage, the owners of vessels which foul the above-mentioned cable will be liable for the damage resulting therefrom, including the cost of clearing, which should be done, in order to reduce the injury to a minimum, by signaling for the Western Union Co.'s tug.

½ To the northward of a line from Constables Point to Robbins Reef bell buoy; to the westward of a line from Robbins Reef bell buoy to the bell buoy at entrance to Greenville Channel, and south of said channel.

EASTERN ANCHORAGE, UPPER BAY.

(See Plate No. 6.)

21. To the southward of a line passing through the Statue of Liberty on Bedloes Island, the two white buoys marking the north limit of anchorage ground and the southern point of the north entrance to the Erie Basin; to the eastward of a range passing through Produce Exchange tower and buoy No. 14 and bell buoy off Owls Head, and thence marked on

the eastern and southeastern limits by four white anchorage buoys along the western edge of the widened Bay Ridge and Red Hook Channels. These buoys will eventually be replaced by proper channel buoys marking the edge of the dredged channel. On and after July 1, 1901, vessels will not be allowed to anchor to the eastward and southward of said line of buoys. Small vessels may, in the discretion of the supervisor of anchorages, anchor to the southward and eastward of the Bay Ridge Channel, provided they are inside of the pierhead lines as established by the Board of Engineers, United States Army. Small vessels may, in the discretion of the supervisor of anchorages, anchor at the mouth of Gowanus Bay, to the eastward of a line tangent to the southwestern edge of Erie Basin Bulkhead, and running thence S. by E. (cor. mag.), but so as to leave a clear channel of 150 yards along the northern shore. The supervisor of anchorages may, in his discretion, remove any vessel not complying with the provisions hereof.

EASTERN ANCHORAGE, LOWER BAY.

(See Plate No. 7.)

22. To the eastward of a line drawn through Fort Lafayette in a S. by E. (mag.) direction, and to the northward of a line drawn from Coney Island Lighthouse, on Norton Point, to Hoffman Island, approximately WNW. ¾ W. (mag.).

STATEN ISLAND ANCHORAGE.

(See Plates Nos. 7 and 8.)

23. To the southward of a line from St. George Ferry Flagstaff to the white buoy off St. George Landing, and to the westward of a line running S. ⅝ W. (nearly) from the white buoy off St. George Landing, through the white buoy off Tompkinsville, and

as far south as a point off Clifton, Staten Island. (See Plate No. 8.) To the westward of a line running SSE. ¼ E. (nearly) from Fort Tompkins to the buoy on Craven Shoal; thence to buoys Nos. 11, 9, and 7; thence to Conovers Beacon.

The part of anchorage 23 lying between the northern boundary and the white buoy 800 yards south of said boundary is reserved for ships of war of all nations and vessels of the United States Government.

QUARANTINE ANCHORAGE.

(See Plate No. 8.)

24. To the southward of a line passing through Clifton, Staten Island, and a point off same, and to the westward of a line from the point off Clifton, Staten Island, to the bell at Fort Wadsworth.

Vessels arriving at quarantine and awaiting inspection may anchor temporarily to the westward of a range passing through Craven Shoal Buoy and Robbins Reef Lighthouse, but as soon as cleared by the quarantine officer must vacate this temporary anchorage, and if detained in quarantine, must at once move into the quarantine anchorage.

SANDY HOOK ANCHORAGE.

(See Plate No. 7.)

25. To the southward of a line extending from North Hook Beacon Lighthouse to Point Comfort Beacon Lighthouse.

(See Plate No. 7.)

26. Vessels may anchor on Dry Romer Shoal and Flynns Knoll. Care must be observed not to foul the United States Signal Corps cable (shown in red on the chart), which crosses Flynns Knoll.

Exhibit D. 11.

ANCHORAGE FOR EXPLOSIVES.

(See Plates Nos. 1 and 5.)

27. Vessels carrying gunpowder or other explosives may anchor only as follows:

First. On the shoal ground to the eastward of Rikers Island, East River, from one-fourth to five-eighths of a mile from this island.

Second. On the New Jersey Flats between a line drawn parallel to and 1,500 feet to the south of the Black Tom dredged channel and a line drawn parallel to and 1,500 feet north of the Greenville dredged channel, and to the westward of a line from Bedloes Island to Robbins Reef, provided that they do not anchor within 1,000 yards of Bedloes Island, or within 500 yards of any pier.

Third. Vessels (carrying explosives) of too great draft to use the above anchorages may anchor only in Gravesend Bay, on a line drawn from Fort Hamilton to the western tip of Nortons Point, Coney Island, but not within 1,000 yards of the shore. All vessels laden with explosives while within the port will display at all times a red flag of at least 16 square feet surface at the masthead. Vessels so laden and without masts will display the flag at least 10 feet above the uppermost deck. All such vessels must be at all times in charge of competent persons and must comply with the navigation laws in regard to lights and fog signals.

SHEEPSHEAD BAY.

28. No vessel shall anchor or moor so that under any conditions of wind and tide it will be within 100 feet of the wharves or floats along the north shore of Sheepshead Bay, or within 100 feet of the bulkhead or beach at low tide along the south shore of the bay, or within 200 feet east of the footbridge crossing the bay from the foot of Ocean Avenue

Exhibit D. 11.

to the Manhattan Beach property. This shall not prevent small vessels from mooring, not more than two abreast, to the outside of floats and wharves along the north shore, or the mooring of such vessels, as may have the consent of the property owners, to the bulkhead on the south side of the bay, but in no case shall vessels so moored extend more than 30 feet from said bulkhead, if moored thereto, or from the beach line at low tide if not moored to bulkhead.

BENJ. S. CABLE, Acting Secretary.

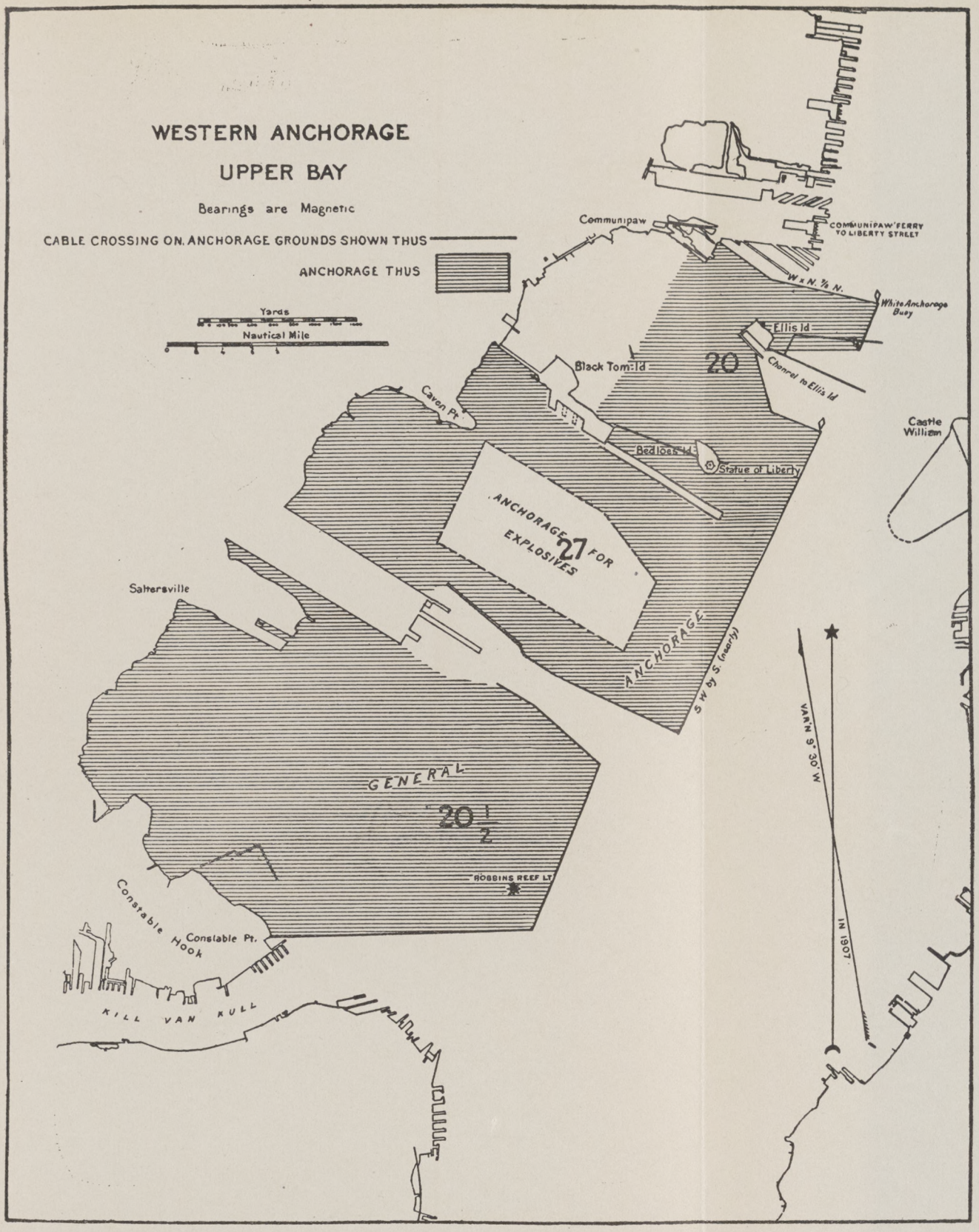
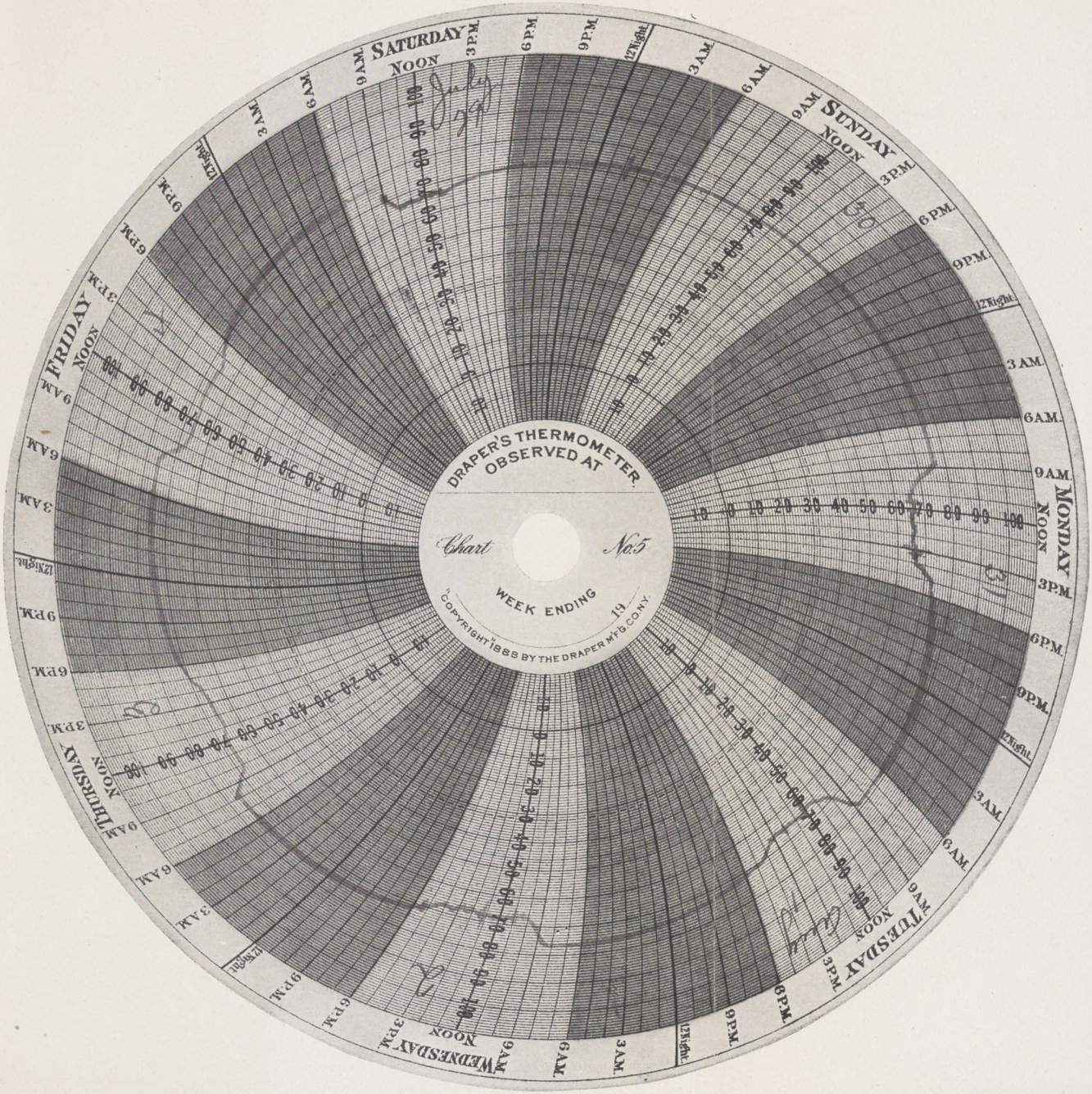

WESTERN ANCHORAGE
UPPER BAY
Bearings are Magnetic
CABLE CROSSING ON ANCHORAGE GROUNDS SHOWN THUS
ANCHORAGE THUS
Yards
Nautical Mile
Communipaw
COMMUNIPAW FERRY TO LIBERTY STREET
W x N. 7/8 N.
White Anchorage Buoy
Ellis Id
Black Tom Id
20
Channel to Ellis Id
Caven Pt.
Castle William
Bedloes Id
Statue of Liberty
ANCHORAGE FOR EXPLOSIVES
27
Saltersville
ANCHORAGE
S W by S. (nearly)
VARN 9° 30' W
IN 1907
GENERAL
20 1/2
ROBBINS REEF LT
Constable Hook
Constable Pt.
KILL VAN KULL

EXHIBIT D. 13.



Record of Automatic Thermometer.

MEMORANDUM RE PHOTOGRAPHS OFFERED IN EVIDENCE IN THE CASES OF HOWELL v. LEHIGH VALLEY R. R.

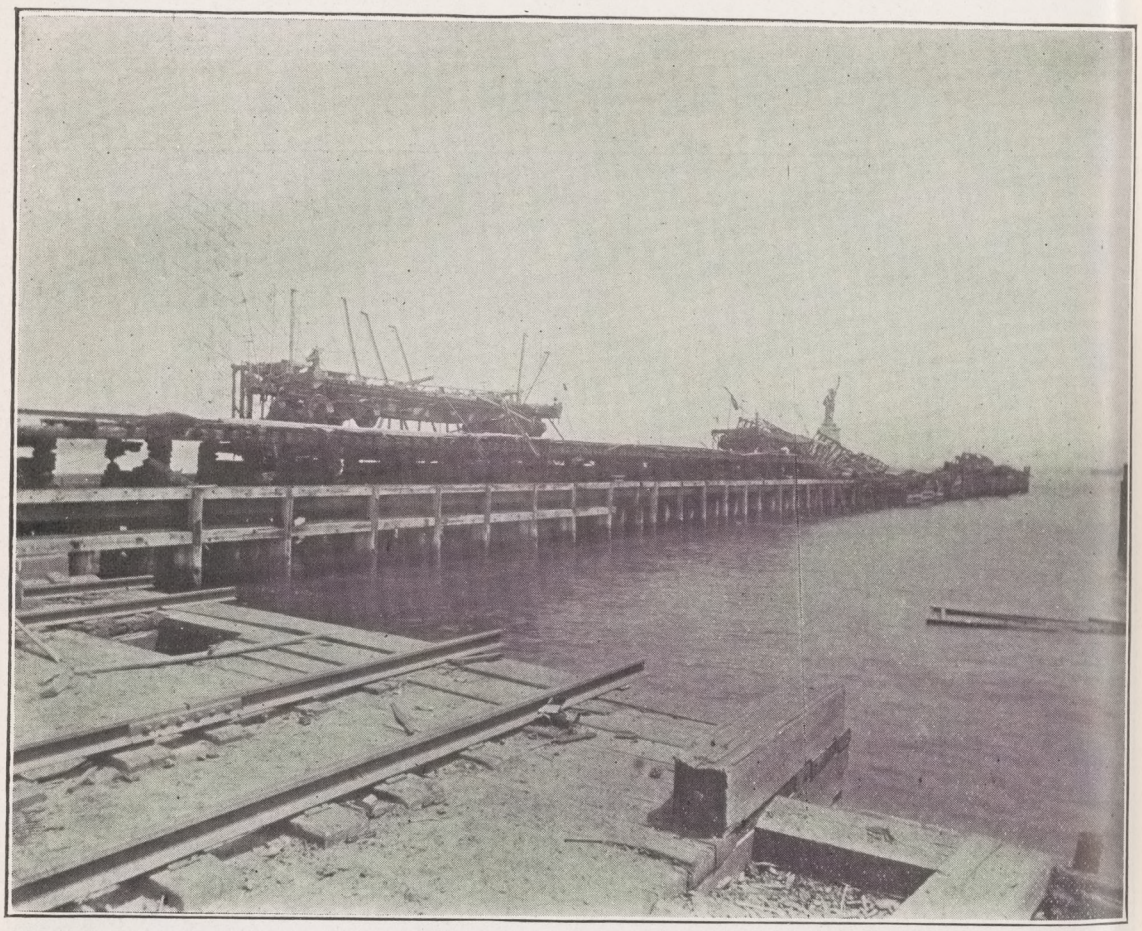
Photos are arranged in numerical order, with "Harrison" first, "Underwood" second and "Barth" third. Numbers in blue pencil on back of each photo are merely arbitrary, for purpose of reference.

1. 1. **HARRISON.**



Taken August 4, 1916, from land end of North Pier looking east after fire had destroyed pier.

2. 1 A. HARRISON.



Taken August 1, 1916, from land end of North Pier to the south of the same looking northeast before fire had destroyed pier. This shows the south side of the pier.

3. 2. **HARRISON.**



Taken August 4, 1916, from land end of North Pier looking west, showing track 18.

4. 3. **HARRISON.**



Taken August 4, 1916, from land end of North Pier looking west, showing track 17 to the right of picture.

5. ~~P. 19.~~ 3 A. HARRISON.



Taken August 1, 1916, from near land end of North Pier, showing tracks 17 and 18, looking west.

6. 4. **HARRISON.**



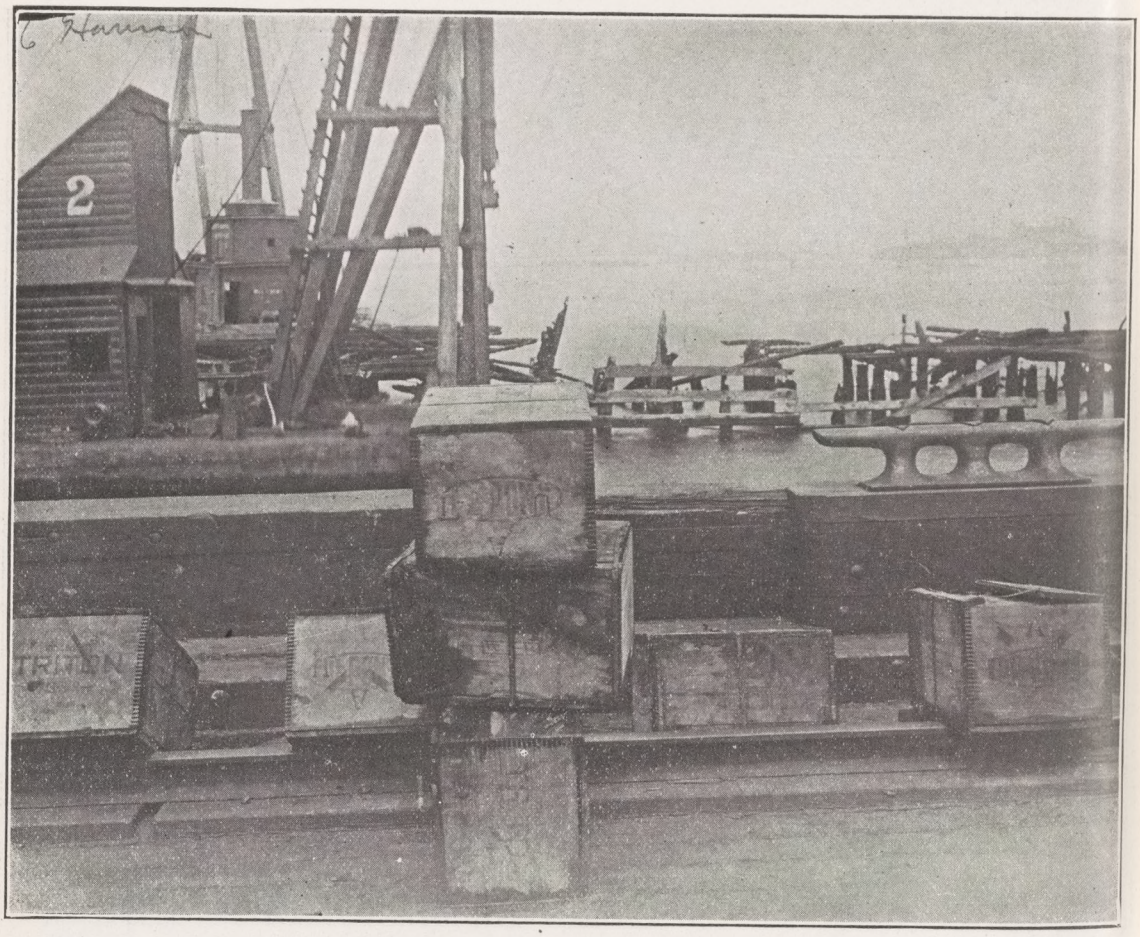
Taken August 4, 1916, from track 17 near land end of North Pier looking south. The steel car showing through the frame is T. & O. C. 23787, the first car on the east end of track 7.

7. 5. **HARRISON.**



Taken August 4, 1916, from near the float bridges looking toward the ~~northeast~~ west. The track at the left of this picture is track 10. Track 11 is next to the right. Track 12 can be seen still further to the right. The car shown with the brake wheel and frame intact is Erie 88702, loaded with salt. The car next west of this car is L. V. 97001, a non-revenue box car. The car in the distance on track 10 is L. V. 8759.

8. 6. **HARRISON.**



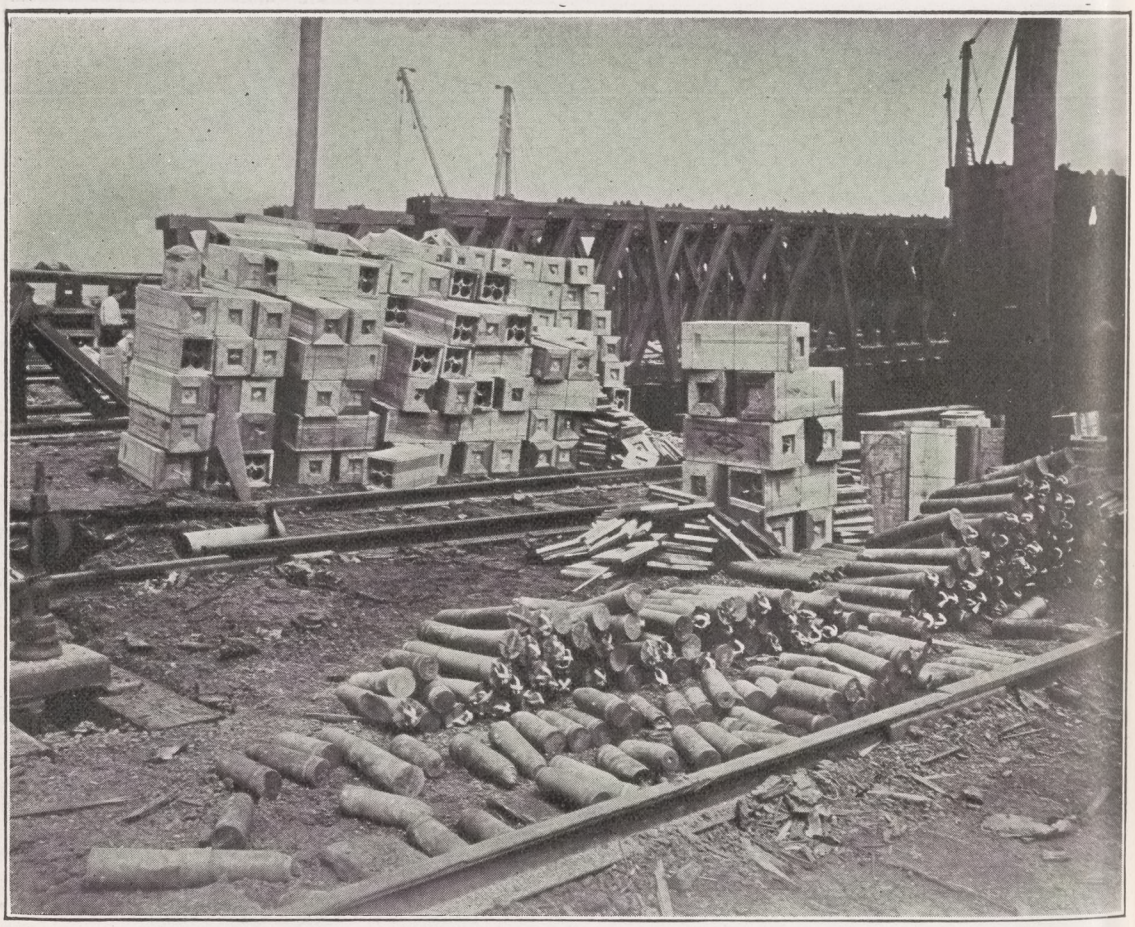
Taken August 4, 1916, from the float bridge at the south side of the burned portion of the North Pier looking northeast toward Ellis Island. Taken after the pier had been destroyed by fire.

9. 7. **HARRISON.**



August 4, 1916. This picture shows some additional packages of T. N. T.

10. 8. **HARRISON.**



Taken August 4, 1916, showing shells and shell boxes salvaged from cars and barges.

11. 9. **HARRISON.**



Taken August 4, 1916, from the south side of the east end of the crater near tracks 14 and 15 looking east. Shows the extreme east end of the crater. Shows condition of cars wrecked at the southeast side of the crater.

12. 10. HARRISON.



Taken August 4, 1916, from near the east end of the crater looking east, showing the wreckage of cars near the southeast side of the crater, and looking across the yard toward the bulkhead. The mast of the schooner at the right-hand side of the picture was located at the South Pier.

13. **11. HARRISON.**



Taken August 4, 1916, from the south side of the crater a little east of the middle and looking almost north. The boxes in the foreground were brought in empty from Bethlehem for the purpose of carrying salvaged shells.

14. D. 8. 12. HARRISON.



Taken August 1, 1916, from the east end of the crater looking west toward the storage warehouses.

15. ~~P. 18.~~ 12 A. HARRISON.



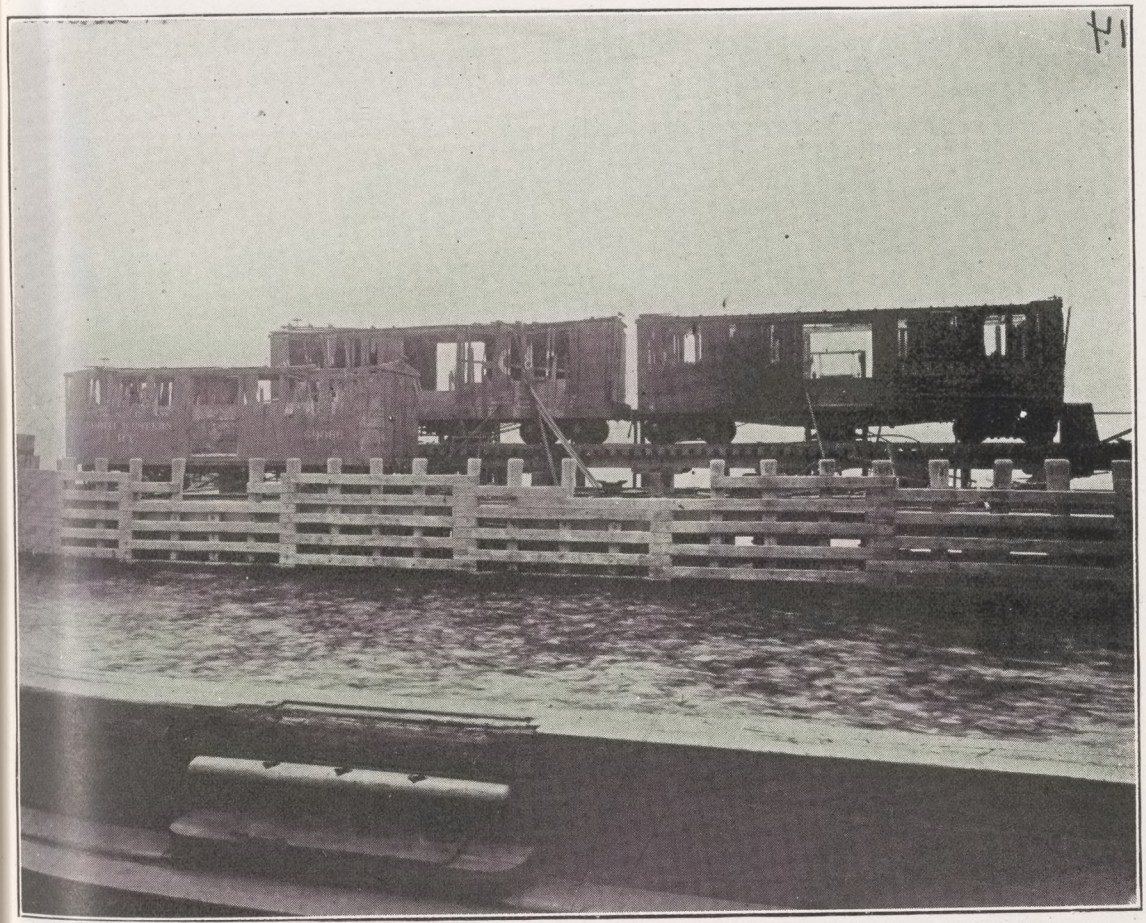
Taken August 1, 1916, from the west end of the crater looking east toward the North Pier.

16. 12 C. HARRISON.



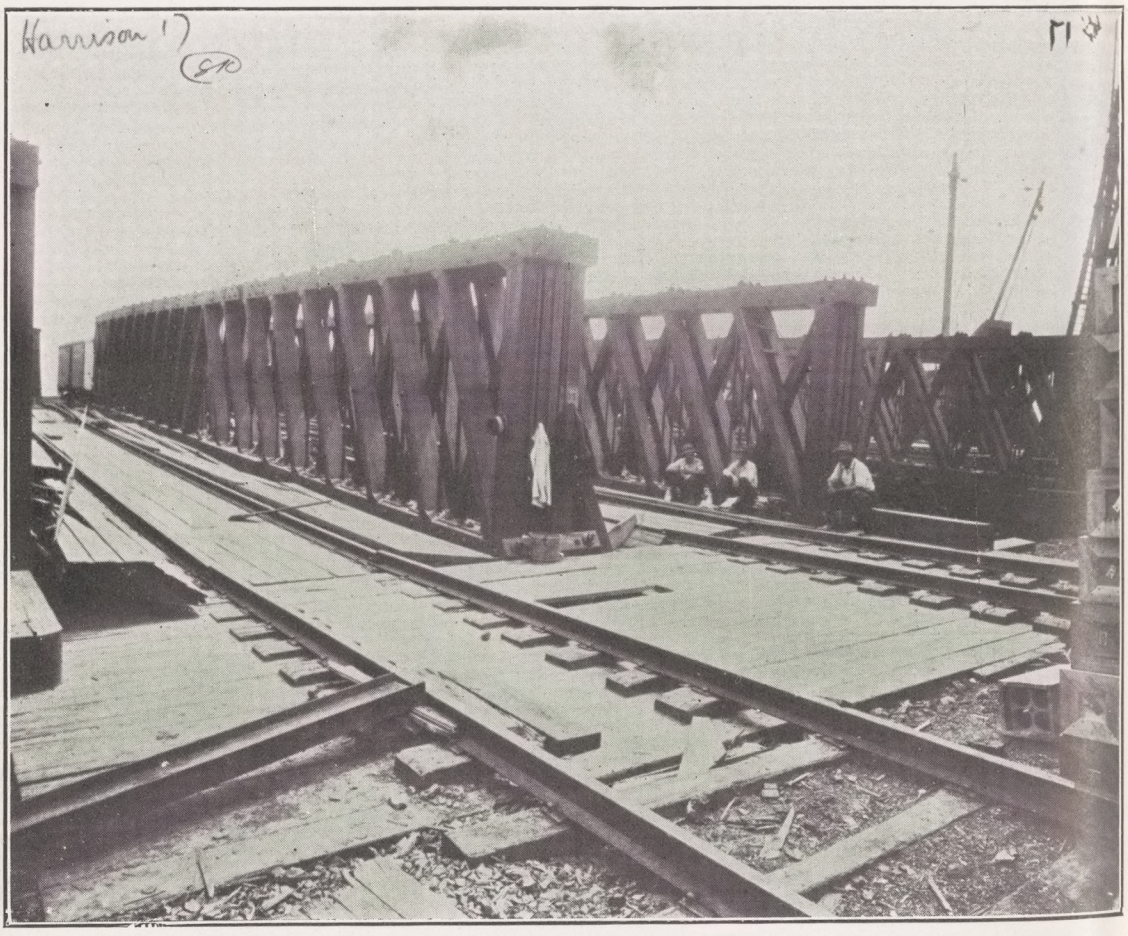
Taken August 1, 1916, showing the wreck of the east end of the storage warehouse; also the wreck of the water tank.

17. **14. HARRISON.**



Taken August 4, 1916, from the float bridges looking toward the south. It shows the north side of the South Pier and the car standing thereon.

18. 17. **HARRISON.**



Taken August 4, 1916, showing float bridges.

19. 18. **HARRISON.**



Taken August 1, 1916, from the land end of the North Pier looking east after the pier had been partially destroyed.

20. 19. **HARRISON.**



Taken August 1, 1916, from the north side of the east end of the crater looking toward the southeast.

21. 1. **UNDERWOOD.**



North Pier looking from ~~north~~ east toward ~~south~~ west, showing trucks and under-frames of cars, which had been burned. Cars on South Pier can be seen in the distance.

22. 2. **UNDERWOOD.**



Extreme end of North Pier where man is standing, showing effect of explosion upon box car standing on the track on the end of the pier. Picture taken from the north looking south, showing car thrown southward by explosion. This was car P. & R. 12275.

23. 3. **UNDERWOOD.**



This picture shows the North Pier looking from the north toward the south from the land end to about two car lengths from the water end of the pier.

24. 4. **UNDERWOOD.**



Car P. & R. 12275, shown on No. 2. This photograph is taken from the extreme east end of the North Pier before they had been destroyed by fire. Taken July 31, 1916.

25. 6. **UNDERWOOD.**



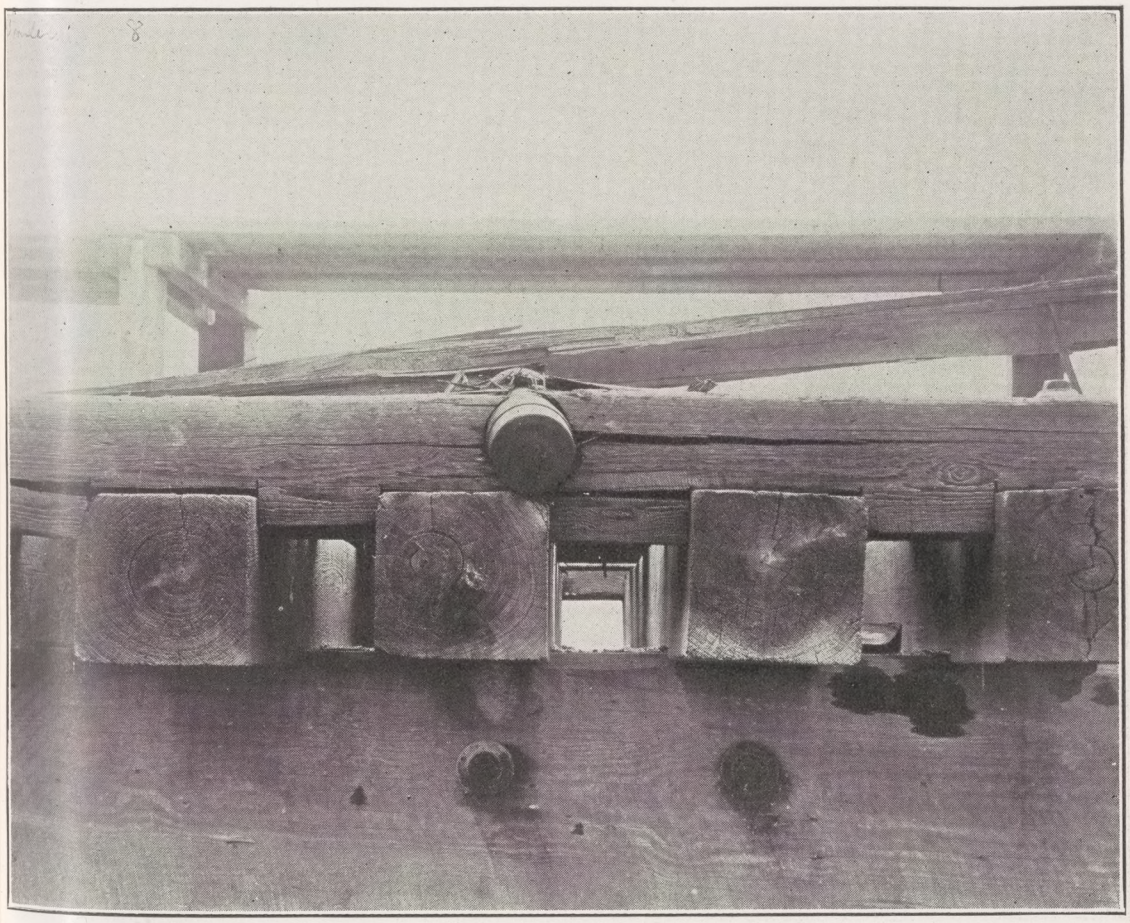
Photograph taken from almost the same point as No. 5 21 with the camera turned toward the southwest, showing the racks projecting the float bridges.

26. 7. UNDERWOOD.



Cars on extreme end of South Pier directly opposite the North Pier. These cars were loaded with borax in sacks. The north side of the cars is shown. The south side of these cars is shown in Barth's picture No. 3.

27. 8. UNDERWOOD.



This photograph shows a 5.11-inch shell imbedded in the superstructure on the north side of the South Pier. The photograph is taken almost directly north and in an almost straight line from the North Pier toward the South Pier.

28. 3. **BARTH.**



Taken , 1916. This picture shows the south side of the cars shown in Harrison No. 14.

29. P. 18. 1. LEVICK.



30. P. 19. 2. **LEVICK.**



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New Jersey Court of Errors and Appeals

FREDERICK H. HOWELL, *et als.*, *Plaintiffs-Respondents,* *vs.* LEHIGH VALLEY RAILROAD COMPANY, a corporation, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF FOR FREDERICK H. HOWELL AND OTHERS, PLAINTIFFS-RESPONDENTS.

The defendant-appellant appeals from a judgment in favor of the plaintiffs-respondents for $420,049.98, including costs, entered upon the verdict of a jury after a two weeks' trial in an action sounding in tort for damages occasioned by negligence in connection with its premises resulting in the so-called Black Tom Island casualty of fire and explosion of July 30th, 1916. The subject matter already has been before this court (*New Jersey Fidelity & Plate Glass Insurance Co.* v. *Lehigh Valley Railroad Co.*, 92 N. J. Law 467).

Summary Statement.

The plaintiffs, parties interested in the ownership of a great quantity of raw sugar of the value, on July 30th, the night of the casualty, of $361,873.46 (appellant's brief, p. 176), lost their goods in the great casualty of fire and explosion which occurred in that portion of Communipaw, Jersey City, known as Black Tom Island in the early hours of July 30th, 1916. The sugar was stored in the warehouses of a subsidiary concern of the defendant situate immediately adjacent to the part of the premises occupied by the defendant and, as the result of the fire, the explosion and the ensuing conflagration, the warehouses containing the

bulk of the sugar were totally destroyed. This sugar had belonged to the plaintiffs, Howell & Company, had been insured with plaintiff insurance companies under the usual standard fire insurance policy and subsequent to the fire these companies paid to the owners the sum of $325,-019.37 by reason of such liability, and all parties, owners and subrogated insurers, joined as plaintiffs in bringing this action, which is based upon the negligence of the defendant in connection with its said premises.

The plaintiffs claimed that the defendant failed in its duty to exercise reasonable care under the circumstances in the prevention, extinguishing or minimizing of fire upon its premises; that by reason of such failure fire started upon such premises, causing the explosion of explosives in the defendant's custody which occasioned the destruction, as the joint result of the explosion so caused and the ensuing fire, of the warehouses and the goods they contained.

The defendant claims generally that the plaintiffs showed no negligence upon its part under any law to which it was amenable and that the motion for a non-suit or the direction of a verdict in its favor should have been granted; that its substantial rights were injuriously affected by misdirection in the charge of the Trial Judge and by failure to properly charge; and, with particular reference to the plaintiff insurance companies, that the motion for non-suit should have been granted as to them.

The issue of fact toward which the defendant eventually directed its evidence was as to the place of the first and great explosion, the question being whether such explosion occurred in the railroad yard in the cars of explosives there, as claimed by the plaintiffs, or whether it occurred on the barge known as Johnson No. 17 in the river from explosives with which such barge was laden, any responsibility for which was denied by the defendant. A minor issue was as to the part played in the watching and guarding of the railroad yard by certain persons called Dougherty detectives, acting for the consignees. It is not con-

ceived that it is possible to suggest that there was any issue as to the fact that the place of the fire which caused the entire casualty was in the railroad yards among railroad cars there standing, as claimed by the plaintiffs, and this fact is for the first time now admitted in appellant's brief (pp. 2, 106, 143).

PART I. THE FACTS.

Statement of Facts.

THE SITUATION.

Black Tom Island is not an island, but a peninsula about one and one-half miles long, surrounded on three sides by water, and was one of the Hudson River freight terminals of the defendant. The easterly end portion, a tract of about eleven acres (376) abutting upon the navigation channel of the river, contained rows of railroad tracks and was used for the purposes of a railroad yard (411, 412). To the west of the railroad yard at the southerly side of the peninsula stood three large brick buildings (341) of a subsidiary of the defendant known as the National Storage Company, each of these three buildings being separated from the adjoining buildings by an open passageway some fifty feet wide, through which access by railroad track and passageway was had to the piers projecting from the southerly side of this part of the peninsula. Each building was subdivided into separate warehouses designated by letters of the alphabet, the most easterly building, that nearest to the railroad yard, comprising warehouses known as warehouses R to N; that building immediately to the west comprised warehouses M to G; and that building still farther to the west comprised warehouses F to A. Immediately north of the warehouse buildings were rows of parallel railroad tracks used in connection with freight for these warehouses; then came a horse-truck driveway, its easterly end being at a point opposite to the westerly end of warehouse building N to R; and

north of this driveway ran three parallel railroad tracks leading to the railroad yard. Considerably further to the west of the warehouse buildings were, to the south, grain elevator buildings; to the north, the railroad tracks and the driveway, and very considerably further to the west, where the peninsula joined the main shore line of the city, were various structures at the entrance to the Black Tom peninsula and an independent oil manufacturing plant (Ex. P 2, opposite p. 752, Vol. II).

From the extreme easterly side or bulkhead of the railroad yard at the end of the peninsula, two piers and other pier structures projected still further to the east, the most northerly of which, a pier 475 feet long (p. 164) known as the North Pier, adjoined the bulkhead at its extreme northeasterly corner, upon which pier ran two parallel railroad tracks, the prolongation of the two most northerly tracks of the railroad yard.

All of the railroad property mentioned, including the railroad yard, North Pier, other piers and docks and all wharfage rights were used and controlled by the defendant (Ans. 37, l. 20; complaint 31, l. 20; Ex. P. 1, Vol. II, p. 747, l. 30).

This 11-acre section covered with railroad tracks seems to have been variously designated as the railroad yard, bulkhead yard, Pier 7 and the "farm" (221).

To the north of the railroad yard, a little to the east of the middle of its northern boundary there is shown on the Interrogatory Map (Ex. P. 16) what is designated as "Pile Stockade," a landmark frequently referred to in the testimony. This was a structure built upon piles driven into the flats or land under water, upon which was the house or shanty occupied by Ezekiel (or Zeke) Townes, colored, his wife and children, Zeke being a watchman over the pile-driving boats of the Jenkins (Jenks) Company (140, 141).

The Trans-shipment of Explosives.

The traffic in explosives and munitions of war had existed for over a year prior to the time of the casualty of July 30th, 1916 (433, l. 24; 410, l. 40). These explosives and munitions passed through the Black Tom terminal en route to Europe, being transferred on Black Tom to river barges or lighters which conveyed them to ocean-going vessels in Gravesend Bay. The continuity of flow of this traffic depended upon the presence or readiness of the ocean-going vessels to receive their cargo (defendant's opening, p. 57-l), and when not so ready the traffic was blocked.

The defendant had set apart the North Pier as the exclusive place for unloading explosives, for their transfer from the railroad cars to the lighterage barges (defendant's opening, p. 57k).

When the railroad cars arrived at Black Tom terminal they would not be placed on the North Pier, but would be placed in the first instance on the tracks in the railroad yard (448, 414) at places selected by the defendant (449) and would be held there until the consignee wanted to remove the contents (448-449, 450, 415, 412).

Upon notice from the consignee the defendant would shift the cars from the railroad yard to the North Pier (415) by its switch engine (449). Advance notice of the particular cars required for transshipment would be given to the defendant by the consignees by telephone, and the consignees would send their lighters to the North Pier, the captains of which would bring the actual delivery orders (414, 415). The actual transfer of the contents of the cars when so placed on the North Pier ready for unloading would be done by the consignees (defendant's opening, 57-l, 448-449).

In the railroad yard, tracks numbered (see maps) "13, 14, 15 and 16 were used for the storing of the cars" (413) prior to their subsequent delivery on the North Pier when ordered by the consignees.

Defendant's Watchmen Arrangements for the Protection of the Railroad Yard Against the Outbreak of Fire.

The defendant entrusted the watching at night of the whole of this Black Tom peninsula to four or five men who had other duties besides watching (184). The defendant's agent, Dickman, with general supervision over the whole terminal (410), said that all the watchmen he had there at night were four men, Kane, Garrity, Sloan and Groath (509-510). One Kelly, whose main duty was that of stationary fireman at the grain elevator, appears to have also had some slight watching duties in that immediate vicinity (271, 264).

One Kane was the roundsman in charge of the others (220, 184), whose duties included the entire circuit of the yard, including the North Pier (193, 192, 208). To begin at the extreme westerly or mainland end of the peninsula, up by the oil yard (185), so far away that he did not hear the fire whistle that night (282), where there is said to have been a gate which was not locked at night (189), one Groat (also referred to as Groath and Grate, 280, 819), "old John Groat(h)" (425) appears to have been the night watchman in that neighborhood (280), though not stationed by the gate, but nearer to the grain elevator (221) or at least 50 to 100 feet away from the gate (186), when he was not engaged in punching watchmen's buttons (the watchmen's buttons were punched hourly, defendant's opening, 57-o, 184, 185, 220) as far away as warehouses AA (186). To the east of Groat, Kelly, the stationary fireman, kept up the fires under the boiler in the grain elevator and incidentally punched certain buttons to the westward of Pier 4 (264, 185, 271). The next man to the east was Sloan, night engineer (219), whose duties were to take care of the boiler and the fire pump (219, 224-225) in the pump house situated in the passageway between Store F and Store G (184). In addition to his duties as night engineer Sloan acted as watchman, to be evidenced by punching buttons on the east side of Pier 4 and back to the pump house by Store F (220, 185).

A single watchman, one Garrity, was defendant's only guardian of the entire remainder of the Black Tom peninsula, everything to the east of the passageway between Stores F and G, including both large warehouse buildings, Stores G to H and N to R, the railroad yard of 11 acres area, Pier 6 to the south 445 feet long, the North Pier 475 feet in length and the South Pier, somewhat shorter. Garrity was an old man (206) (~~he admitted to sixty-nine, according to his evidence in the Plate Glass case, page 266, in December, 1917, but did not know his birthday because "they didn't keep any records in the old country"~~) and "showed pretty good for an old man like him" (207); and, while "he was a man pretty spry for his years" (483), his spryness seems to have been limited by the "very short steps" which he had to take (207). Garrity's duties (apparently increased in direct proportion to his years and spryness) included the looking after fires under boilers connected with a steam crane near Store R (186). In addition to punching buttons around the warehouses (G to M and N to R) (187, 188) and as far south as the extreme south end of Pier 6 (188) (there were no actual watchmen's clocks or buttons east of Store R), his duty was to watch all around the railroad yard, including all the tracks (503-504, 505) and embracing the North Pier (451). It took Kane, his roundsman, an hour (209) to walk the same beat the night of the casualty, including going out on and around the North Pier (208).

No change in or addition to the defendant's watching service or regulations or instructions to its watchmen was made upon the coming of the munitions traffic and that service was precisely the same up to the happening of the casualty (189, 191, 202, 222, 504). No attempt was made to get additional men (505), because of the difficulty of getting trustworthy men (504) and because, as defendant's agent claimed, he relied upon certain outside parties referred to as "Dougherty men" (505), notwithstanding that the thought had occurred to him that someone might try to set fire to the cars (508).

No system of identification of parties claiming access to the Black Tom peninsula was provided or enforced by defendant. The word of any stranger, to the effect that he belonged on a vessel, would be taken (190, 208). Men employed in an entirely different business (Standard Oil) all came unhindered through the entrance to Black Tom (281). Instructions as to stopping anybody apparently applied only to "suspicious characters such as fishermen, especially Sundays and holidays" (208), but others had practically the freedom of the peninsula if they said they belonged there. Sea and river faring men came and went as they chose, night and day (280); after working hours they would go up to Lafayette or Claremont to have a good time and would be coming back singing (223, 190); and it was a common thing to hear shouting at night there (222).

The So-Called "Dougherty" Men.

The defendant produced certain testimony with reference to these so-called "Dougherty men" with a view of excusing or mitigating what may unhesitatingly be designated as its reckless lack of care in connection with the guarding of these munitions as shown by the record as herein outlined. This testimony was furnished by the defendant's two officials primarily responsible for the condition of affairs at Black Tom, Dickman, the defendant's actual agent at the terminal, and Mulligan, the superintendent of that division of the railroad. And upon the only point that in any way concerned the questions of fact before the jury, these two witnesses are absolutely at variance; and in this court the matter is determined by the verdict for the plaintiffs under the proper instruction of the Trial Judge (736).

The testimony concerned the presence at Black Tom of men from the so-called Dougherty Agency, four of whom are said to have been there at night (571, 573, 506). Upon certain points there is no dispute. These Dougherty men were employed on behalf of the con-

signees (appellant's brief, p. 81; charge, 736, l. 17), and "were not Lehigh Valley watchmen" (446). The defendant had no control over them (506) and made no provision for the possibility that they might not watch at all (506), the defendant merely looking after their "etiquette"—"only so far as behaving themselves and seeing that they didn't get in any mix-up with our (its) employees" (587, 588). The defendant had nothing to do with the performance of their duties (587), whatever those duties were. These Dougherty men had been permitted to build a little shanty on the edge of the lead or track to the North Pier (572), where they warmed their coffee or lunches (152, 572), as fire on the explosives-discharging North Pier would obviously have been impossible.

The defendant's witness Mulligan wished it to be understood that ("as I figured it," 572) the defendant had turned over to the Dougherty men the duty of watching the cars of explosives and munitions, not only on the North Pier but on the yard tracks in that neighborhood wherever the cars were placed, and that the defendant was not watching such cars at all (588, 584, 585, 580-584, 572, 573, 578, 579). Mulligan was the division superintendent (570) who only went to Black Tom about once a week in the day time (574), was not there at night at all (579, 580), and his knowledge of what was done at night was based upon reports made to him (582), although such reports were identically the same before and after the coming of the munitions traffic (589). Appellant's brief (p. 81) now disavows this testimony of its witness and superintendent, appellant now saying that the Dougherty men were there "on behalf of the shippers or owners of some of the explosives." "This was merely an added precaution which was no part of the defendant's duty."

The testimony of Dickman, defendant's agent actually at Black Tom (410) who gave the directions to the Lehigh Valley watchmen (451)—who testified the day previous to Mulligan's testimony—had painted a different picture. He had testified, in answer to the Court, that the cars

of explosives and munitions remained in the charge and custody of the defendant while on the North Pier and until their contents were unloaded by the consignees, and that defendant's instructions to its own watchmen were to look after the cars up to that moment, and "if they did their duty, they done that" (451). A little further along, in referring to these Dougherty men, his testimony indicated that his attitude, as the defendant's agent in actual charge there, towards these men, was merely *permissive:* "I had received word from my superior officer that these men could stay down there, that they had a right to be there" (506); "they had permission to be there" (507); the witness did not get any word from his superiors that these men were coming there, but "After they had arrived there I took the matter up with my superior officer and he informed me that it was all right to let them be there" (454). Dickman's testimony on this point is corroborated by Kane, the roundsman, who, in making his rounds on the night of the casualty did actually go out on the North Pier: *"Q Did you go out on the North Pier? A Yes, sir.* Q And around it? A Yes, sir" (page 208 of the record as corrected, see also p. 193); which is the kind of evidence the Trial Court has in mind when, in referring to Mulligan's version, the Court said that if "these men (the Lehigh Valley watchmen) were still watching the munitions when he had directed that they should not watch them, that it would impugn the value of his evidence that he had called them off" (583).

As hereinafter recited (p. 14) there were moored to the North Pier at the time of the casualty a number of lighters or barges laden with explosives and munitions (see Ex. P. 15, opp. p. 776, Vol. II). It is fairly inferable from the evidence that this condition or practice had existed for a considerable time before (262, 261, 189, 190, 280).

Upon all of this evidence the jury were properly allowed to take into account the suggested activities of these Dougherty men as a watching factor in the guarding of

the yard (charge, 736), irrespective of the principle of law that the defendant could not lawfully delegate its duty to guard property in its custody; and that issue is concluded by the verdict. So the way Mulligan "figured it out" the day following Dickman's testimony is only of passing interest now, especially in view of the appellant's disavowal of its superintendent.

These explosivees and munitions were admittedly in the defendant's custody up to the moment that they were removed by the consignees from the cars at the side of the lighterage barges on the North Pier (451) and it was the defendant's duty to guard them up to that moment, a duty which the defendant actually purported and attempted to carry out (208)—most inadequately, as plaintiffs claim. The shippers or consignees' duty to guard their own goods did not arise until they had taken them from the cars and placed them upon the lighters, and then it did arise. These Dougherty men were employed by the shippers or consignees, as defendant admits, and the reasonable inference is that their duty was simply co-extensive with their employers' duty, namely, *to watch the cargoes of the lighters at Black Tom.*

And finally, ~~while it does not appear in this case that these Dougherty men may have construed the performance of their duty night after night *to permit of the practice of three of them sleeping while one remained awake*~~, it does appear that the defendant made no provision to ascertain whether they even did this or any watching at all (506).

Explosives in Railroad Yard.

According to defendant's own admission there were in the railroad yard at the time of the casualty 228 cars in all (138-139), of which the following were loaded with explosives or inflammable materials:

Eleven carloads "high explosives," each car containing 57,500 pounds, a total of 632,500 pounds (record, pages 109, 111), of which at least 8 carloads containing 460,000

pounds were in the railroad yard and 3 carloads are said to have been on the North Pier (Interrogatory Map, Ex. P. 16, opposite p. 776, Vol. II);

Seventeen carloads waybilled as "ammunition for cannon" (111), containing a total weight of 1,452,764 pounds, of which at least 15 cars containing a weight of 1,312,286 pounds were in the railroad yard and 2 carloads are said to have been on the North Pier (Interrogatory Map, Ex. P. 16, opposite p. 776);

Three carloads waybilled as "wet nitrocellulose" (guncotton) (p. 57r, l. 22, Dfts. opening) containing a total weight of 169,876 pounds (109-110, 111);

Five carloads benzol (monochlorbenzol) containing a total weight of 296,960 pounds (111, 110);

One car containing 8,663 pounds of toluol (111); and also 2 carloads of combination fuses (111).

There is thus admitted by defendant to have been in the railroad yard (exclusive of the fuses) 32 carloads of explosives and inflammable material, containing a total of 2,500,000 pounds, and on the North Pier 5 cars containing 300,000 pounds.

The cars of high explosives and those of ammunition for cannon bore upon their sides and ends the placard containing the warning "Explosives — Handle Carefully — Keep Fire Away" and other matter (Ex. P. 7, Vol. II, 763; 125, 113-115, 190, 812). The cars of wet nitrocellulose, benzol and toluol bore a placard with the inscription "Inflammable—Keep Lights and Fires Away—Handle Carefully" and other matter (Ex. P. 8, Vol. II, 764, 125, 114-115).

Defendant had knowledge of the "high explosive" material by its waybilled description only and did not know which of the several high explosives it was, whether TNT (trinitrotoluol) or any of the other high explosives (Defendants opening, 57q, l. 30 *et seq.;* 416, 417; Vol. II, 784; Section 1503, I. C. C. Regulations). Such high explosive was in fact TNT (666), but that it was TNT was not known to defendant (57q., l. 30).

While the great quantity of extra hazardous material which defendant admits to have been there is much more than ample for plaintiffs' grievance against the defendant, plaintiffs introduced evidence (defendant's own detailed statement or schedule) tending to show some 29 additional cars in the railroad terminal (Ex. P. 9 with enclosure, Vol. II, 765, and opposite, admitted p. 137), the statement showing cars admittedly in the railroad yard and destroyed by the casualty, arriving in the terminal *after* cars claimed by defendant not to have been at Black Tom at all. The defendant claimed that the statement should be modified by subsequent information (Barrett, 648).

There were railroad cars upon the tracks north of the warehouses (227, 333) which the Interrogatory Map (Ex. P. 16) does not purport to show.

As to Location of Cars.

So far as any issue here is concerned, it is not necessary to inquire into the absolute accuracy of the plan furnished by the defendant (Ex. P. 16) with reference to the position of the cars in the railroad yard there shown. The information as to the cars embodied in the several plans prepared by defendant was necessarily derivative, obtained from Dickman and his employees and others (Barrett, 649, 161). In the letter of August 28, 1916, the defendant, referring to another plan (Ex. P. 6a) says that "the number of cars shown on each siding, pier and track is correct, but neither the exact location nor the order in which the cars had been placed could be accurately determined" (762, Ex. P. 6).

The several plans prepared by defendant differ in certain particulars. (1) Mr. and Mrs. Ezekiel Townes, colored, whose residence adjoined the railroad yard on the north, have from the beginning thrown considerable light on the origin of the fire, testifying that the fire originated on a railroad car of munitions in the railroad yard which car was situated on the third track from the northern

side, in a direction from their home on the pile structure, "catecornered" or slanting on a southwesterly line with the easterly end of the warehouses, without any intervening cars (142, 143, 145, 146, 150, 151, 153, 154). The Interrogatory Map (Ex. P. 16) now shows four empty cars interposed to this line of vision, which cars are not shown on the earlier plans prepared in defendants' own office (Ex. P. 6a, Ex. P. 15) and if it were material it would be interesting to know from what information was determined the precise spot that those cars are said to have occupied upon an otherwise apparently vacant track. (2) While two of the early plans (Ex. P. 6a and Ex. P. 15) show 15 cars on track numbered 16, completely filling the track to the switches, the last plan (Interrogatory Map P. 16) shows one more or 16 cars, and we find a car of wire rods represented as being between cars of high explosives and wet nitrocellulose, and we recall that Interstate Commerce Commission Regulation which provides that cars of explosives and inflammables shall not be placed together (Ex. P. 7 and Ex. P. 8). (3) The two isolated cars of ammunition shown in Exhibit P. 15 have, on the Interrogatory Map (Ex. P. 16) apparently been added to the other ammunition cars on Track 13, making the number of cars 11, as shown on that track in that map, as against 9 cars similarly shown on Exhibit P. 15 and Exhibit P. 6a. In the index to the record, defendant designates Exhibit P. 16 (the interrogatory map) as "showing location of cars." Upon this point the jury had before it the considerations just mentioned.

Munitions-Laden Lighters at North Pier.

At the time of the casualty there were crowded around the North Pier a number of munitions-carrying lighters or barges. Exhibit P. 15 purports to show their general position. Five of them were crowded together at the south side of the pier and four were moored at the north side (120-121, Ex. P. 15). The five barges at the south side of the pier had received from the defendant in the

few days preceding the casualty a total of 24 carloads or over 1,500,000 pounds of explosives, munitions and inflammables (122-124). While the defendant in its answers to interrogatories (124)alleges no knowledge as to whether such cargoes were in fact upon the barges at the time of the casualty, such was a fair inference, especially in the absence of any evidence by defendant to the contrary; and the record shows that eruptive barges were in evidence on the river that night (263).

The four barges on the north side of the North Pier were the Moran No. 64, Johnson Frank, Johnson No. 11 and Johnson No. 17. The barge Moran 64, moored furthest to the west, had on board a cargo of nearly 1,000,000 pounds of ammunition for cannon and combination fuses, loaded on the Thursday previous, the 27th (121-122, 301). The Frank, which lay to the east of No. 64, had arrived at the pier on Friday, the 28th (599), with two or three carloads of shrapnel shells (245, 604), a partial cargo only, and on Saturday, the 29th, took on board 5 carloads or nearly 300,000 pounds of the high explosive TNT (245, l. 25; 123); the date given on p. 123 of record would seem to be error in printing, according to one copy of the defendant's answer to interrogatories served upon plaintiffs' attorneys, and the correct date of the 29th corresponds to the testimony of the Frank's captain as given on p. 245, l. 25; see also the exact hour in the afternoon of the 29th at which each car was loaded on the Frank, as given in the enclosure to Ex. P. 9, opposite p. 765), the loading of the last of these 5 cars concluding the day's work at 5:30 P. M. (enclosure to Ex. P. 9, opposite p. 765). Outside of the Frank (239, 288) lay the Johnson 11, which arrived there about 5 o'clock Saturday afternoon, rather before than after (288, 286, 246, 247, 602), carrying a partial cargo of 300 kegs of picric acid (607, 286) obtained elsewhere (287). Towards the easterly end of the North Pier, at the north side, lay the Johnson 17, which had come there *on Friday, the 28th* (601, 246-247, 250), *not as stated in appellant's brief* (p. 86) *that it was ad-*

mitted that the Johnson 17 got there on Saturday the 29th after the close of business, laden with 2 carloads or 1,005 cases of TNT (608, 607) and 1 carload of 417 cases of detonators, obtained elsewhere (608). The evidence is to the effect that the Johnson 17 reached and moored to the North Pier *on Friday the 28th* (601, l. 20; 246, l. 40; 247, ll. 1-4; 250, ll. 20-30).

Each of the three Johnson barges were, at the close of business on Saturday, the 29th, only partially loaded (612), and an arrangement had been made between the Johnson people and the defendant that the uncompleted loading of all three barges would be continued on Sunday, the 30th, the defendant putting the cars on the pier for the Sunday's work (603); and the three cars of TNT on the North Pier were apparently in furtherance of this arrangement (249).

Other Vessels at North Pier.

While for some months before the casualty the North Pier only was used for the delivery of explosives (Defendant's opening, 57k; 412) and no other kind of freight was delivered there direct to consignees (412; the word "trucks" in l. 32 should obviously be "consignees"), yet nevertheless the trestle on the southerly side of that pier was used to discharge cars of salt or grain to vessels, strangers to the munitions traffic (413), and there was in fact on the night of the casualty a schooner, the "George W. Elzey," at the south side of the pier near the land end, which had been partly loaded with salt by the defendant itself the day before (423, 121, 123, 159; see Ex. P. 15 opp. p. 776; photos pp. 844, 861), whose crew manifestly must have had the freedom of that explosive neighborhood.

Fire-Fighting Protection of Railroad Yard.

There was no immediately available fire-fighting protection, either of men or means, for the 11-acre railroad yard, which, in the case of cars laden with explosives, meant absolutely no protection at all.

The defendant's answer to plaintiff's interrogatory as to fire-fighting protection of the railroad premises fills 17 pages of the printed record (92-109), all of the minute and elaborate detail (489) of which, with slight exception, relates to the protection *of the warehouses belonging to the National Storage Company* (490). Defendant seems, however, in its recital, to have overlooked the four barrels of water and pails said to have been on the easterly bulkhead of the peninsula (493; Ex. P. 16).

Even if any of such fire-fighting facilities could be said to be available for the yard, such facilities were in no way increased at the coming of the munitions traffic (496, ll. 11-19; 472, 473, 478, 479).

The defendant's allegations of fire-fighting protection applicable to the cars in the railroad yards are as follows:

(1) That "there were eight watchmen on duty at said yard," which assertion has hereinbefore been demonstrated to be either equivocal or inaccurate (p. *supra*).

(2) The possible efforts of the defendant's drill engines (103) which upon notification had to fill their tanks with water (523), capable at most of squirting a small stream of water for a brief time, or of attempting to remove cars in the yard not yet attacked by fire, which drill engines, even if summoned and available as promptly as defendant contends they were, did not arrive on the scene until one hour after the discovery of fire (524, 277). Also the possible efforts of tugboats (102), whose availability for the purpose of fire fighting among the railroad cars is not clear and which likewise did not arrive there until even after the drill engines (200). All of which

can hardly be said to be effective first aid in the case of a fire amongst explosives.

(3) The alleged possibility of the application of water to the burning car or cars of explosives through the hose equipment provided by defendant, the suggestion being that by the use of the two 400 feet lengths of 2½-inch hose kept near warehouse M (498), an effective stream of water could have been promptly brought to bear upon the fire if the exploding shells or the fear of a greater explosion had not reasonably deterred men from using such apparatus; the pressure being supplied from the 100,000-gallon stand-pipe. To this suggestion it may be replied that to take that 800 feet of 2½-inch hose and pull it across the tracks and under or over intervening freight cars (275) on a dark night (314), to the side of the fire in the distant part of the yard, would take four or five men twenty minutes to half an hour to accomplish (275, 274); that three (Kane, Sloan, Kelly) of the defendant's four men in that neighborhood had to attend to prior duties of telephoning, engineering and boiler work (199, 205, 219, 224-225, 232, 268, 272) with another ("old Groat") so far to the west that he did not hear the fire whistle (282) with telephone instructions to pilot the city fire department through the oil yard (284), leaving but Gerrity ("old man Gerrity," him of the very short steps), whose fire-fighting capacity is not told in the record, it being testified that attempting to pull the hose down "would be kind of a tedious job for Kane and Gerrity" (231); that there was no help to handle such apparatus as there was (Crockett, 634, l. 36; 635, ll. 1-2; 636, l. 20); that although it is alleged that the 100,000 gallon stand-pipe at the westerly end of the yard supplied the 12-inch main with a pressure of 45 pounds to the inch (104), the evidence of the Jersey City Fire Department is that when hydrants on this main were opened, no appreciable water came out (329, 345, 346, 347, 350, 353, 311). And if all this imaginary hose-equipment-application-of-water to the cars in the yard, could have been reality, then the

first movement of the switching engines over the tracks leading into the "neck of the bottle" entrance to the railroad yard would have ripped the hose to pieces.

While there were hydrants in that part of the yard north of the warehouses in the driveway, but none even around the outside edge of the yard (493); while the government water pipe to Liberty Island runs along the north side of the yard (492; Ex. P. 16) in the vicinity of the tracks where the cars of explosives were kept; and while it would have been entirely practical to have run a line of water pipes along the north boundary of that yard outside the tracks (492, 491), except for the loss of track space (492, 491) and expense; there was no water at all east of the distant standpipe except the four barrels "with pails" on the easterly bulkhead (493).

All of which boils down to the statement above made at the beginning of this topic, that the defendant's railroad yard had no fire-fighting protection whatever (490).

The suggestion is made by defendant's own fire marshal that it was not a general custom at that time in other railroad yards to install hydrants even around the outside edge of railroad yards (490, 492, 493, 494), cars "not considered as being a dangerous hazard" (493), but it was not necessary to inject into this case independent collateral issues involving the comparative situation of those alleged other yards, *prior to the munitions traffic,* or whether the cars in those other yards, if contained therein for days at a time, carried boxes of soap or of the high explosive TNT. It requires no expert opinion to support the inference that the entirely practicable line of water pipes on the northern edge of the yard with hose attached to hydrants ready for immediate use, with an actual pressure from the standpipe which defendant claims it had and with a few men familiar with such work and carefully instructed, if combined with reasonable fire prevention, at least would have been some attempt to keep on the map that portion of the port of New York.

Public Knowledge of Munitions Depredations

Plaintiffs asked the Trial Judge to take judicial notice as fact of that allegation in the complaint that for a long time prior to the casualty "It was a matter of public knowledge and was known to the defendant that evilly disposed persons were abroad in the land, seeking through the medium of fire and explosion and in other ways, to occasion damage to property, and especially to munitions of war which conceivably might eventually be destined for the warring European nations" (305-306, 36).

The defendant's counsel, who subsequently intimated that it might be a matter of doubt and argument as to who started the European war (472), preferred, possibly out of consideration for any German sympathizer on the jury, to frame it in this fashion: "That there was a German propaganda going on in this country and that these people, thinking to help their Fatherland, were endeavoring to blow up munitions which might otherwise go to the enemies of their Fatherland" (307). This form being acceptable to the plaintiffs, "German propaganda" desirous of "helping the Fatherland" took the place of "evilly disposed persons," and it becomes matter of record in this case that these explosives were destined for its enemies as well as that *it was matter of public knowledge that there were people around who "were endeavoring to blow up munitions."*

THE CASUALTY

At the trial the plaintiffs adduced evidence tending to prove the following facts:

1. **The fire started in the railroad yard among the cars of explosives there.**

This fact is now admitted for the first time by appellant in its brief here (p. 106).

Mr. and Mrs. Ezekiel Townes, colored, the nearest witnesses to the place of the fire, whose home was within seventy-five feet or so of it, actually saw the blazing car, the location of which was in the railroad yard on the third track from the northern side, in a southwesterly direction from the witnesses' home, on a line with the easterly end of the warehouses (142, 143, 145, 146, 150, 151, 153, 154). There was also the testimony of the barge captains whose boats were at the North Pier, all three of which witnesses said that, prior to the first explosion there was no fire at all on the boats around the North Pier (Baker, 238; C. Casperson, 286; P. Casperson, 298); and all of whom placed the fire in a railroad car near the colored man's home (Baker, 235, 236, 239, 240, 256; C. Casperson, 284, 285, 290, 291; P. Casperson, 297, 298, 301), two distinctly placing the car in the railroad yard (Baker *supra;* C. Casperson *supra*); one, while placing it nearly abreast of Zeke's shanty, mistakenly thinks that spot was on the North Pier, which would be a physical impossibility (P. Casperson, 296, 299).

Then there was the evidence of Nurse McEneny on Ellis Island to the north (257, 260, 261) and Marine Engineer Walmsley on Liberty Island to the east (166, 170, 183), substantially to the same effect.

The witnesses (defendant's employees and later, firemen and policemen) who saw the fire from a long distance away to the west—from a position about opposite the pump-house between Stores F and G—and who, of course, could not give the location with any exact accuracy, place the fire generally straight down the north side

of the island or a trifle to the right (looking east) towards or near the North Pier, in the vicinity of the explosives.

2. The fire was of incendiary origin.

Plaintiffs in their complaint had alleged that the fire was caused by incendiarism (36). Defendant's answer not only expressly admitted that the fire was caused by incendiarism, but affirmatively pleaded that the explosion was due to a fire caused by incendiarism (41). A few days before the beginning of the trial defendant obtained permission to withdraw such part of its answer, but on condition that "if at the trial of the action the plaintiffs shall offer in evidence the original answer, no objection shall be made on the part of the defendant to its admissibility as an admission by the defendant" (44), and at the trial the original answer was so offered by the plaintiffs and admitted in evidence (373-375).

The defendant offered no evidence whatever in explanation or mitigation of this admission, although upon other matters it introduced evidence to explain away the effect of certain of the plaintiff's evidence (Witness Barrett, 648), and there was, therefore, the best of evidence of the incendiary origin of the fire.

The time of the discovery of the fire was apparently shortly before and not later than 12:30 A. M. of Sunday morning, July 30 (258, 209, 201).

The fire, when first seen, appeared small, as of the size of a hat or a barrel, whether from the ground or over the top of the car is not clear, depending upon the point of view of the witness (227, 267, 269, 211, 258).

3. **An appreciable interval of time occurred between the time when plaintiffs' witnesses first saw the fire and the beginning of the popping or small explosions of the shells.**

This is admitted in appellant's brief (p. 106).

Kane, defendant's head watchman, thought such interval was fifteen or twenty minutes (200), which was also the estimate of Sloan, the engineer (225), the two men of the defendant who, according to the testimony, received the alarm first; Kelly, another watchman, is to the same effect (226-270). Miss McEneny, the Ellis Island nurse, saw the fire about the same time before the popping began (258).

Upon the alarm of fire Kane says that he occupied himself in accordance with his instructions with considerable telephoning, and then went out to see if anybody was coming (197-200, 214-215), and a city fireman states that he got there at about 1:12 or 1:15 (342) and then heard Kane telephoning for switching locomotives (344); Sloan, following his orders, worked at his engine and did a lot of telephoning on another instrument (224, 232); Kelly went to attend to his boiler (267 *et seq.*); the record is silent as to Garrity's activities; while Groat, away up at the entrance, was instructed to pilot the fire department through the oil yard (284).

After the lapse of such appreciable interval of time the ammunition shells began to explode or pop "like Fourth of July" (632); the fire increased, becoming a conflagration, involving many other cars and working its way westerly towards the warehouses (333) and easterly towards the North Pier; switching engines gathered from different places elsewhere, after getting their crews and stopping to fill their tanks with water (523, 558) arrived at about 1:30 A. M. (524, 277), or one hour after the fire was first discovered, and proceeded to pull out such cars as they could reach; the police and fire departments had arrived, the latter not being able to get water (329, 340, 345, 346, 347, 350, 311). A resident of Black Tom, em-

ployed there, had meanwhile himself connected up a single length of hose, but could do nothing because of lack of help (634, 635, 636).

On the North Pier some of the barge captains, upon the alarm of fire, had gone to a little shanty situated on the bulkhead near the pier where there was a telephone, found the door locked and were unable to open it (237, 240, 241). The barge men proceeded to move the ammunition-laden lighters, which were absolutely free from fire, out towards the extreme easterly end of the pier (237, 240, 291, 299).

At 2:08 A. M. (445, 326, 337, 428), over an hour and a half after the discovery of the fire, at the moment when a switching locomotive and crew were vainly endeavoring to move cars or the then unburned portion of the burning mass which they constituted, from the tracks upon which the cars of explosives are said to have been placed (526, 527, 539, 546, 547, 555, 560, 326, 328, 334, 278, 207), the first great explosion occurred, or as one witness describes it, "she let go" and "she went up" (527).

4. The location of the first and great explosion was in the defendant's railroad yard.

As this was the main issue of fact raised by the defendant, the evidence upon it will be discussed at length in plaintiff's First Point (*infra*).

5. The first explosion wrecked the warehouses in which plaintiffs' sugar was contained and caused fire which completed the destruction.

Appellant's brief (p. 143), in substantially admitting the wrecking of the warehouses, apparently overlooks its contention that the effect of the first explosion was confined to the roofs and upper portions of the buildings, which assumption was made the basis of the opinion of its expert, Mr. Maxim (p. 670, l. 32; 672, ll. 16, 35; 698, l. 8).

This was admitted by defendant's counsel in his opening: "We agree with him that it was the first explosion

that did the damage to the plaintiffs in this action'' (57m).

The most easterly warehouse building (stores N to R) received the full force of the explosion. Notwithstanding that the next easterly building (stores G to M) was protected by the first mentioned building, they were both practically demolished; and even the easterly end of the third (Store F) blown out (365). As a captain in the Jersey City fire department described it, referring to the two easterly warehouse buildings: ''They were all down after the explosion; they were all up before the explosion'' (356); and again, ''after the explosion why they were all blew apart, all tumbled down'' (349; see also 327, 365).

And immediately fire broke out in the wreckage, as defendant practically admits: ''Now they will say, and I shan't combat it, that a fire ensued from the explosion'' (defendant's counsel, 380); and as the city firemen said ''they took fire immediately'' (349), ''after the explosion why the warehouses seemed to loom up and take fire'' (355, 356), and, according to defendant's yardmaster, ''everything seemed to be afire'' (532); the result of the fire being ''a pile of ruins'' (349).

Excavation Effect of Explosion in Railroad Yard.

When daylight broke on Sunday morning, in the northern part of that railroad yard, where the night before had been land, filled or made land, covered with tracks upon which were the cars, there was seen through the smoke of the burning debris, a great pond of water, filling an excavated area or areas stated by defendant to have been approximately 375 feet long, 175 feet wide and from 7.7 to 10.5 feet deep (125; see Ex. P. 6b following p. 762, Vol. II; see also photographs 871, 856, 857).

The interrogatory map of the defendant (Ex. P. 16) fails to disclose an interesting feature shown on another plan (Ex. P. 6b following p. 762). The interrogatory map (Ex. P. 16) shows what is called the ''Outside Line

of Crater." The other plan (Ex. P. 6b) shows in addition what purports to be the *inside* outline of the excavation. It will be noted for subsequent reference that this inside line shows the outline of substantially *two* circumferences instead of one, a larger and to the west a smaller, and that these two circumferences intersect one another, forming the one entire excavated area.

Value of Plaintiff's Sugar.

The plaintiffs Howell & Company had, previous to the casualty, deposited in Stores G, H, N and O raw sugar to the amount of nearly 7,000,000 pounds (65) of the value at the time of the casualty of $356,154.16 (p. 367, l. 22), which was totally destroyed, while sugar in Store E was partially damaged in the sum of $5,719.30 (p. 368, l. 40), a total damage of $361,873.46, the sugar being insured with the plaintiff insurance companies (70-71), under standard fire insurance policies aggregating upwards of $450,000 (71), upon which the companies paid to Howell & Company a total of $325,019.37 (73). The Trial Judge separated the respective parts of the claim due to Howell & Company and its insurers and the amounts of stipulated interest upon such sums respectively (charge 724-725), and the postea and judgment run in such form (45, 47) in the total amount of $420,-049.98, including costs (47).

With the exception of the item of $5,719.30 for damage to sugar in Warehouse E (368, l. 40), plaintiffs' claim was for the total destruction of sugar in the other warehouses which were burned to the ground.

There is a daily reported market for sugar in New York (75, 76, 82, 83). The price of raw sugars of varying degrees of purity are quoted upon a basis of what is known as "96 test, centrifugal sugar" (77, l. 34), and values quoted refer to sugar of this standard. Standardized deductions or additions of definite figures are made from such price, according as the particular sugar is of a lower or higher quality according to the test. The

standard market price indicated above means "c. and f." (cost and freight) (77, l. 37), to which by custom is added a definite percentage for marine insurance, if that has been paid by the seller (78). The daily quotations of market price are definite, determinable figures applicable to that particular business.

The evidence was distinct and it is admitted by defendant (p. 176) that the market price for sugar upon the above indicated basis was 5⅛ cents per pound on Friday, the 28th. There was no market for sugar on Saturday, the 29th (77, l. 23), and of course none on Sunday. Monday's market price was 5¼ cents (77, l. 34).

There being a debatable question of law whether the market price of 5⅛ of Friday or 5¼ of Monday was applicable in the case at bar of a destruction of the property upon the intervening Sunday, plaintiffs finally expressly limited their claim to the lower price of 5⅛ cents (366, l. 26). Upon this basis counsel for both sides agreed upon figures, and such figures were given to the jury by consent in the Judge's charge (724-725).

The item of $5,719.30 included in the loss was for partial damage to sugar in Store E (368).

FIRST POINT.

The evidence amply sustained the plaintiffs' contention that the first and great explosion was in the defendant's railroad yard at the site of at least a large part of the excavated area, and that issue is concluded by the verdict of the jury.

Appellant's brief (p. 124) admits that this was a question for the jury.

Both plaintiffs and defendant agree that it was the first and great explosion that wrecked the warehouses and was the causation of the plaintiffs' damage (57m). The plaintiffs asserted that the place of that explosion was in the defendant's railroad yard; that what exploded was at least a substantial portion of the 8 carloads of 460,000

pounds of the high explosive TNT, in the cars there; and that a large portion at least of the excavated area resulted therefrom. The defendant contended that such explosion occurred on a barge or lighter called the Johnson 17 (733), upon the river at a point about 300 feet north of the extreme easterly end of the North Pier (683, l. 32), and that the exploding substance was 2 carloads or 1,005 cases (100,000 pounds) of TNT with which it was loaded (608, 607).

In opening the case to the jury it was stated on behalf of the plaintiffs that they expected to show that this first explosion took place in the railroad yard in the neighborhood of where the fire started, and the request was made that if the defendant intended to take issue on this point, that its counsel with equal frankness state where they contended it occurred (57g). The defendant's counsel, in his opening refrained from doing this, merely challenging plaintiffs to prove their assertion and saying that defendant would not be liable for any explosion on the water, without specifying any particular barge (57m-57n), although defendant must then have planned its proof directed toward the Johnson 17.

PLAINTIFFS' PROOF.

The plaintiffs adduced evidence to prove their contention by witnesses from what, under the circumstances, is every conceivable point of view.

1. *From the west.*

Captain Hogan of the Jersey City fire department got there at 1:15 (342), and from a point about opposite to the opening or roadway between Stores F and G (355) he looked down and saw several freight cars on fire in the yard at a point, as it seemed to him, beyond the end of the storehouses and below (to the east of) the tank or standpipe in the yard, to the right of the driveway (355, 342), meaning to the right of the line of the driveway running parallel with the northern boundary of the

peninsula and parallel to the way he was looking (see map Ex. P. 16; the driveway itself ended opposite Store O). At the moment of the first explosion he was standing at the same place (355) and as he says, "I was working (looking) down the roadway (driveway above mentioned) at the locomotive backing some freight cars down, to connect up to some other ones, and while I was watching there and looking down the road I seen a glare, and it seemed to be quite sharp, and I turned, and after I turned my head away from it, why the explosion came, and I remember my fire hat going off and throwing me down" (348). The location of the glare with reference to the place of the fire "seemed to be right in amongst those freight cars" (348).

Treger, another member of the Fire Department (359) went down to a point about opposite Store M and says the fire was "right directly ahead and a little off to the right—right off from the end of the storehouse—furthest one out" and was burning cars (361). At the time of the first explosion, he could tell from what direction it came although his back was turned, and it came from "right straight down the roadway" (362). Lieutenant Klosterman of the Jersey City police force (325), standing about fifty feet further to the east than Hogan was (50 feet east of the roadway between Stores F and G, 332), who was also looking down watching the brakeman on the freight train, states that the explosion "was just back of the freight cars that I could see burning." "It come up out of the smoke from the freight cars that were burning. I could see a point where the flames came, but, of course, the flames went into black smoke, and you couldn't see through that. But this affair—the ball of fire—came up out of the center of that smoke" (326). This witness places the fire, when he got there, somewhat nearer the warehouses than the others, and when he says there was no fire "below the tank" or "in the lower yard at all" (333) he means to the *south* of the tank or in the *southern* part of the yard; and as he had, when he first

arrived, gone along the southern bulkhead, to the south of the warehouses, to a point east of the head of Pier 6 (331), he had had a clear view of this part of the yard.

2. *From the north.*

Nurse McEneny on Ellis Island, who had placed the location of the fire as midway between the North Pier and the warehouses (257, 260, 261), says the explosion "seemed to come around the fire—from where the fire was" (259).

3. *From the east, from the North Pier.*

The barge Johnson 11 lay lashed to the outside of the barge Frank on the north side of the North Pier (288; Ex. P. 15, opposite p. 776). Her captain who, when awakened at about one o'clock saw the fire in the railroad yard about 700 or 800 feet from the North Pier (284), as he thinks, and near the shanty in the piles of the colored man Zeke Townes (385), places the explosion close to where the fire was (286). "Just in the—just in the second as I got lifted in the air, I turned my head around and I saw the like a smoke cloud coming right up from there, about the same place where the fire was" (295). His boat was at this time off the end of the pier and he was blown overboard directly away from the direction where he had located the explosion (293) and "saw car wheels and dirt and everything coming in the air at the time I was laying in the water swimming" (296).

Up to the time of this first explosion there was no fire at all upon any of the barges or lighters (238, 286, 298).

4. *Finally and conclusively that the barge Johnson 17 was afloat undamaged (except for broken glass) for some time after the first explosion.*

That the barge Johnson 17 was not the cause of nor the location of the first explosion is the convincing result of reading—or better, to have heard—the testimony of

Captain Baker of the barge Frank (234-256). This matter-of-fact river-faring bargeman gives a clear description of what occurred on that North Pier from the time he first saw the burning car in the defendant's railroad yard to a period some time subsequeut to the first explosion—clear in spite of his limited power of description as, for example, when he attempts to put into words the effect upon him of the first explosion: "Well, the explosion took—shot me up in the air and kicked me around and then I walked in the cabin of my boat because there was some debris coming through the air" (238). He tells us that upon being aroused he came out of the cabin and went to the off-shore side of his boat, where he had an uninterrupted view of the burning car in the railroad yard (235, 239); that then he proceeded to let go his own lines (237, 241) and worked his own boat easterly down to where the Johnson 17 lay, fastening tugboat lines or hawsers on the corners of both boats (240, 241-242); the Johnson 17 remaining where she had lain from the beginning, about fifteen feet west of the extreme easterly end of the North Pier (239, 241, 248; see Ex. P. 15), not only up to the moment of the first explosion but for a considerable time *thereafter,* except that after the explosion she had been pushed 10 or 12 feet away from the pier (248, 242).

For some time after the first explosion—about 20 minutes (248, 251, 242)—and up to the moment when the awful heat from the burning barges which had been at the south side of the pier compelled him to jump into the river (249), he had the Johnson 17 under his eye and even under his feet (244), absolutely demonstating that the first explosion—the one which defendant admitted in its opening (57m, l. 37) caused the plaintiffs' damage—could not have come from her (238, ll. 22-25; 241, ll. 27-34; 242, ll. 1-3; 243, ll. 20-23, 30; 244, ll. 20 *et seq.;* 247, l. 39; 248, ll. 23 *et seq.;* 252, ll. 12, 22 *et seq.;* 253, l. 4; also witness P. Casperson, 300, 301). Subjected to a long, gruelling cross examination, of which he did not seem aware,

not only calculated to test the truth and as well the accuracy of his recollection, but to confuse and trip him, the only effect was to bring out more distinctly what occurred; the net result to the defendant of the cross examination being an apparent ambiguity in his description of the direction in which the first explosion threw him.

Captain Baker's "Ascension."

The defendant points with satisfaction to what it claims is Captain Baker's admission that the first explosion threw him in a direction (alleged by defendant to have been from north to south, 695) which the alleged explosion of the Johnson 17 might have thrown him, if that barge had exploded at the point defendant contends it did at the time defendant would like it to have exploded, and uses it as the basis of an opinion of its expert witness (695), in spite of the fact that Baker himself was on board of and about the Johnson 17 for a long time after the first explosion had taken place. Such alleged direction is diametrically opposite to the direction in which Captain Casperson on the barge Johnson 11, a short distance away (243, 250, 291), was thrown by the same first explosion (293). While the matter is not of great moment, it is questionable if the evidence warrants any such assumption.

The testimony on this point is found at pages 254-256 of the record. Baker is first made to say (254) that at the time of the first explosion he (on his boat) was 125 feet from the end of the pier. The witness' mind must have become confused and thrown back to the time when he first saw the fire from the off-shore side of his boat (235, 239) because he had previously testified that before the first explosion he had brought his boat down to the Johnson 17 near the end of the pier and had tug boat lines on the corners of both (240, 241-242; 239, 248). The line of direction in which his boat lay does not appear at all, nor with certainty the relative positions of stern and bow. Then he says (255-256) that he was at the

stern of his boat, on the north or off-shore side (regarding the pier as the shore), was blown straight across the deck (256) to a point "on a line alongside of my boat" (255, l. 40) and "Q If you were facing the front of your boat like this, you were blown right from the left side over to the right-hand side? A Yes" (256, l. 2). He had previously testified (237, l. 32; 243, l. 9; 247, l. 18) that he was *facing* the fire in the railroad yard (to the west) *and not as erroneously assumed by defendant's counsel in his hypothetical question to his expert (695) that he had his back to the fire in the railroad yard and was facing east.*

Whether the witness' description of being shot up in the air and kicked around meant a curve in a straight line of flight, or being involved in cross-currents of force, cannot be known from this record. His line of flight upon this record may be argued pro and con. If he was facing the "front" (bow) of his boat (as defendant's counsel assumes) while looking *towards* the fire from the north or off-shore side of his boat, then it would be physically impossible under either plaintiffs' or defendant's respective contentions as to the location of the explosion, for him to be thrown from the "left side over to the right-hand side" of his boat. If, on the other hand, his boat was pointed easterly or northeasterly and he stood upon the northerly or off-shore side of the stern of his boat, then a direct current from the explosion in the railroad yard would have tossed him in a direction from the left side (port side) to the right side (starboard) of his vessel (consult Ex. D. 9), but upon this hypothesis, looking as he was toward the railroad yard, he would not be facing his interrogator's idea of the *front* of his boat. The comparatively unimportant question of the direction of Baker's flight must be regarded as unsolved by the record.

DEFENDANT'S EVIDENCE.

To support its contention that the first explosion occurred on the Johnson 17, the defendant introduced evidence along the following lines:

1. That the extreme westerly portion of the excavated area in the railroad yard could not have been caused by the first explosion, because of the presence in or near such portion of the yard of present living persons who must inevitably have been killed;

2. Of the existence subsequent to the occurrences of the night of July 29-30 at the extreme easterly end of the North Pier and of the South Pier of physical evidences of an explosive force coming from a direction to the north of that point;

3. Of the existence some months after the casualty of a depth of water or excavation in the river bed at a point north of the easterly end of the North Pier in excess of the depth it was before;

4. That the barge Johnson 17, having on board two carloads of TNT and one of detonating fuses, exploded that night;

5. By the opinion of an expert witness to the effect that, upon certain specified assumptions given to him, the first explosion was more liable to have occurred from two carloads of TNT upon a barge at the point indicated in Paragraph 3, *supra,* a distance of 1,375 feet from the nearest warehouse (as calculated from the plan furnished by defendant Ex. P. 16), than by eight carloads (or inferentially of any less quantity) of the same explosive on the tracks in the railroad yard distant only 387 feet (as similarly calculated) from the same nearest warehouse.

PLAINTIFFS' RESPONSE TO DEFENDANT'S CONTENTION.

1. *As to the presence of persons near what was subsequently the western edge of the excavated area.*

Dickman, one of the defendant's officials responsible for conditions down there at Black Tom, tells us that at the time of the first explosion he was standing on the sea-wall track at a point immediately north of the stand-pipe, beside a telegraph pole close to a pile of railroad ties, which place was 25 feet from the nearest point on what witness calls the *outside* line of the excavated area, as that area appeared on the following Monday or Tuesday (428); that the first explosion blew him down, he never lost consciousness and walked away (428-429); that after the entire casualty was over the pole was unharmed and the ties unmoved (452-453). Defendant's fire marshal, Julian, is to the same effect, except that he does not seem to have been familiar with the location of tracks down there (458).

Defendant introduced the testimony of three other employees, the yard master and two trainmen, for the purpose of showing that the place at which they were working—alleged to be the westerly part of the excavated area—was not involved in the first explosion. It is doubtful whether the testimony shows this. The direct examination of these witnesses would place the point at which they were, at the particular switches leading to tracks 14 and 15, at the extreme westerly part of the excavated area. The two Walsh boys, trainmen, were not familiar with the yard and learned the track numbers since (553, 565). Testing their testimony by other objects and facts would put them further west than where Dickman and Julian say they were and the others think they were. John Walsh, the brakeman who was blown to the ground from the top of the car, when he tried to get up found himself lying on the ground somewhere north of the warehouses, not further east than in front of Store O (566) and possibly about opposite the roadway between Stores

M and N leading to Pier 6 (566) and Fire Marshal Julian had come across him after the explosion (460). Just before the explosion this John Walsh was on the top of a car "maybe half a box car ahead of" (to the east of) where Julian was standing (460), and Thomas Walsh, the other trainman, was on the ground immediately underneath his brother, John Walsh (551), while the yard master, Henley, was at the same place talking to Thomas Walsh (560). If John Walsh's idea of where he was on the ground is approximately correct, then these witnesses of the defendant were all further west than the spot Dickman specifies; were not further east than Store O where the driveway ends) and were possibly west of that and about opposite to the roadway between Stores M and N. Henley, the yard master, also states that when he saw the place a couple of weeks later "the switches were still there" (530), meaning presumably the switches by which he stood at the time of the explosion; if so, these switches were certainly not where the excavation was.

Aside from these indications as to where these witnesses were, the jury could have had in mind two other lines of reflection upon this particular fact.

First: It is self-evident, even according to defendant's view of the evidence, that the cyclonic force which dug out the westerly part of the excavated area—whenever it occurred—left unharmed a pile of logs and the telegraph pole, which according to Dickman was within 25 feet of the outside line of the excavation; simply demonstrating that that particular spot, for some reason unknown, was an island of safety in the tremendous forces which obviously swerved around it, thus supporting the opinion of plaintiffs' expert, Dr. McKenna, that large masess of explosives produce apparently contrary and illogical effects (707, 719, 720). Defendant's attempted explanation, through its expert witness, of the reason of the survival of the pole by reason of its roundness and alleged toughness (696), leaves without even attempted explana-

tion the continuance, unharmed, of the pile of loose railroad ties (453).

Secondly: *It is not impossible that the first explosion may only have created the larger and easterly of the two apparent "craters" constituting the excavated area and shown upon the plan* (Ex. P. 6b opp. p. 762), *and may not have involved the extreme westerly end at all. The* first explosion was admittedly at 2:08 A. M. The witnesses refer to a second explosion, substantially less in effect, some twenty minutes later, or at about 2:30 (337). The site of this second or lesser explosion is placed by witnesses from the west for plaintiffs and for defendant, about the same place as the first, "right at the end of the driveway" (363, 364) or from "just beyond Store R" (462), and perhaps this is what was in the mind of defendant's counsel when he says (538), "Now whether some other explosion later blew them, I don't think this witness is competent to comment on at all." It is also possible that the second explosion indicated by Captain Baker when he was swimming in the water and which created the great waves (253, 248, 242, 244, 252) was not the same second explosion referred to by the witnesses from the west, notwithstanding the apparent approximate identity of time. Baker even thinks, but is not quite sure, that Johnson 17 was afloat after the second explosion of which he speaks (253). Fortunately for Court, jury and counsel, it is not necessary that there be shown the exact location of every explosion of that night on land and water.

2. *Indications on easterly end North Pier of an explosion from the north.*

3. *As to the alleged excavation in the river bed.*

4. *As to an explosion at some time of the Johnson 17.*

Plaintiffs may regard with equanimity any evidence as to these contentions, irrespective of the conclusiveness of the proof. The overwhelming weight of the evidence

is that the first explosion occurred on the land and did not occur on the Johnson 17. There is really no more evidence to show that the second explosion testified to by the boatmen was upon the Johnson 17 than upon any one of the other barges. That the Johnson 17 may have exploded that night and that an explosion from some one of the barges on the river to the north of the North Pier may account for certain physical indications at the extreme easterly end of that pier, are matters not affecting plaintiffs' case.

THE EXPERT TESTIMONY.

5. *Mr. Maxim's opinions.*

Upon certain assumptions hereinafter referred to, Mr. Maxim, upon being asked whether the supposed effect upon the buildings was likely to have been caused by an explosion upon the barge (670, l. 27 *et seq.*), answered simply that such an assumed explosion "would have very serious effect upon them, producing extensive structural damage" (671, l. 35); but that upon the hypothesis of an explosion of the TNT in the cars in the railroad yard at the site of the excavated area, "if the walls of the warehouses were standing at the time of the explosion, the effect of the TNT from that distance would be much more severe than the effect from the barge" (672, l. 1 *et seq.*).

The defendant had previously introduced in evidence the paper disc upon which are commonly recorded temperature variations in a form of recording thermometer (630; Ex. D. 13 opp. p. 842), which on the night of the casualty was said to have been located on the fifth floor of a building on the eastern side of the lower portion of Manhattan. This recording disc apparently shows a mark at right angles with the normal course of the indicator, estimated to have occurred, according to that instrument, at 2:15 A. M. of July 30th, and a second mark, so slight as to be barely perceptible, made at a time esti-

mated to have been a half hour later (625, 627). The inference sought to be had from this evidence is that such marks record and measure two explosions of that night at Black Tom, the first explosion and a later one, and that the first was of much greater intensity than the other. Mr. Maxim is then called upon to state his opinion that the more sizable disturbance of the earth on Manhattan Island would have been caused by the explosion of two carloads of TNT on the barge in the river rather than by the explosion of 8 carloads on the land, "because of the greater intensity and duration of the gases and of the explosion upon the surrounding media; also from the fact that a part of the media was water, which transmits shock much better than does the earth underneath" (670, l. 1 *et seq.*).

These opinions were based upon the following assumptions:

(a) Witness was asked to assume that the damage to the warehouse buildings by the first explosion was limited to the roofs and upper part of the buildings, "the roofs of which are lifted off as a result of the explosion, the upper part of the building" (p. 670, ll. 32-33); and the witness, in giving his opinion, based it expressly upon the hypothesis that the effect upon the buildings of an explosion taking place upon the barge "would unroof them" and that the explosion's "maximum pressure would strike the buildings higher up" (p. 672, ll. 16, 35), he assuming that such buildings were "very high" (p. 698, l. 8).

(b) The witness himself, in stating his opinion, assumed that two carloads of TNT loaded on a barge, were more concentrated, more compact, more in one pile, than a much greater quantity in railroad cars placed end to end, as defendant alleges was the position of the cars on the tracks in the yard (669, l. 25 *et seq.;* 675, l. 20; 685, l. 10; 686, l. 24). "The Court. They (Dr. Maxim's answers) were predicated on the dispersion of the mass in the cars and the condensation of it on the barge. Mr. Skinner (for plaintiffs) * * * there is nothing in the case

to show that there was any more concentration of the explosives on the barge than there was upon the cars" (705, l. 38; 706, l. 1).

(c) The witness finally assumed that, while the 8 cars of TNT in the railroad yard were four feet above the ground (675, l. 40), the explosives (2 carloads) laden upon the barge were practically upon and level with the *surface* of the water (668, l. 1 *et seq.*).

PLAINTIFFS' RESPONSE.

When Mr. Maxim's opinions are analyzed as above outlined, it is seen that plaintiffs could view them with entire unconcern, except as to the suggestion that an explosion of two carloads of TNT on the water would jostle Manhattan to a greater extent than the explosion on the land of a substantial part of eight carloads. Even in the absence of the opinion to the contrary of Dr. McKenna, plaintiffs' expert, to the effect that "the greater earth effect would come from the explosion upon the earth" of the explosives in the railroad yard (705, l. 22), it would hardly seem supposable that a jury would be likely to adopt Mr. Maxim's view. But Mr. Maxim's assumptions had either no evidence in their support or were directly contradicted by evidence in support of plaintiffs' contentions.

There is no evidence in the case to support the hypothesis that the 100,500 pounds of TNT on the barge was any more concentrated than that in eight railroad cars placed end to end (as defendant in its answers to interrogatories, a self-serving declaration, says they were, which is the only evidence there is upon the subject), each car containing 57,500 pounds of the same high explosive. The Maxim testimony came in at the end of the case, and it was hardly necessary for plaintiffs to occasion the delay requisite to obtain the reappearance of the boatmen to show specifically what is perhaps general knowledge, that the area of a barge is much greater than

the area of a freight car and that the loading of any vessel commonly proceeds by an even distribution of cargo to prevent listing; especially in the absence of any evidence to the contrary. Then the assumption that the barge cargo was practically upon and level with the earth's surface (the river water), which Maxim's theory of explosives makes important, is entirely unsupported by the evidence. The jury may well have recognized that the deck of a barge is as far, if not further, removed from the water line than the floor of a railroad car is removed from the ground; and whether or not they knew that all explosives are deck-loads, they had evidence that the explosives on other barges were "on deck" (286, l. 38). And finally the assumption that the damage to the buildings caused by the first explosion was substantially confined to their roofs and upper parts, was directly contrary to other evidence in the case. The evidence of the Jersey City fire department is as stated *supra*, that the two easterly buildings were all blown apart, all tumbled down (356, 349).

The expert testimony upon the question of the location of the first explosion as between the barge on the water and some part of the excavated area on the land, comes down to this: On the one hand there was the thought of Mr. Maxim that an explosion on the barge on the river of two carloads of TNT would exercise the greater quaking force on Manhattan, an opinion based upon assumptions for which there either was no evidence at all or was contradicted by plaintiffs' evidence; while on the other hand, not only was Mr. Maxim's expression on this point denied by Dr. McKenna (*supra;* 705, l. 22), not only did the jury have evidence directly contrary to Maxim's basic assumptions, but the jury had before it, with other overwhelming evidence, a real live human witness (Captain Baker) who, if they believed him, for some time *after* the first explosion, had the barge Johnson 17 not only under his eyes but under his *feet.* And it is possible that the jury wondered at the defendant's reliance upon the opinions

of its expert instead of the production of the crews of its two tug boats, the Slatington and the Geneva, which were off the North Pier at the time of the explosions (242, 423, 252, l. 14; 249, l. 18).

No jury that was ever empanelled could have reached any other result as to the location of the first explosion than that it occurred in the railroad yard.

PART II. THE LAW.

SECOND POINT.

The charge of the Trial Judge that the measure of the defendant's duty under the circumstances was the exercise of a degree of care commensurate with the risk of danger reasonably to be anticipated, was entirely sound; and it is immaterial whether the source of that duty is the regulations of the Interstate Commerce Commission, as charged by the Judge and claimed by the defendant-appellant, or is the common law of the State of New Jersey.

THE CHARGE.

The learned Trial Judge charged the jury substantially as follows:

1. The measure of duty which the jury were directed to apply to the facts as they found them was that the defendant was under a duty to exercise a degree of care commensurate with the risk of danger reasonably to be anticipated (730, l. 33; 731, l. 3; 731, ll. 14-20; 732, ll. 20-27; 735, l. 30; 736, ll. 30-37).

2. "That the sole duty of the defendant * * * in respect to all matters within the scope of the statutes of the United States and the regulations of the Interstate Commerce Commission concerning the same, was to comply with such statutes and regulations" (728, l. 31 *et seq.*)

The Judge referred to such regulations concerning the transportation of explosives which provide that "all possible precautions must be taken against fire" (729, l. 10; section 1643 (a), Vol. II, p. 801, l. 26), and that "unauthorized persons must not have access to explosives or other dangerous articles at any time while such articles are in the custody of the carrier" (730, l. 22; section 1643 (b), Vol. II, p. 801, l. 37); that cars containing explosives shall be placarded with notices containing the warning, among other legends, "Explosives. Handle Carefully. Keep Fire Away" (729, l. 20; section 1666, Vol. II, p. 812); and that such cars "be so placed in yards" that they will "be removed from all danger of fire" (730, l. 30; section 1689, Vol. II, p. 815, l. 22).

3. That the *meaning of these regulations* was the "exercise of a degree of care commensurate with the risk of danger reasonably to be anticipated" (730, l. 38; see 745, ll. 5 *et seq.*).

4. "That the standard of care imposed upon the defendant railroad under the regulations of the Interstate Commerce Commission in so far as such regulations cover the field of the measure of the defendant's duty, is the same as the defendant railroad company was under without them, namely, a degree of care commensurate with the risk of danger reasonably to be anticipated" (731, ll. 4-13).

5. The Judge finally defined in the usual way the meaning of "degree of care commensurate with the risk of danger reasonably to be anticipated" (731, l. 14 *et seq.*; 735, l. 30 *et seq.*).

DEFENDANT'S CONTENTION.

The defendant contends that the only law to which it is amenable in the transportation of explosives is that contained in the regulations of the Interstate Commerce Commission; that unless each and every duty is particularly specified in such regulations, it is subject to no law whatever and that no state court can supplement such

regulations by "one jot or tittle" (383, l. 13; 377, 380-383, 738, l. 24); and that there is nothing in the regulations to require of it any of the duties and particulars of violation specified in the complaint (34-36).

Plaintiffs claimed that the measure of the defendant's duty was expressed in the same legal formula, whether the source of that formula was found in federal law represented by the I. C. C. regulations or in the state common law, and that the jury was only interested in the practical formula and not in its source or history. The learned Trial Judge saw fit to follow the defendant's view as to the source of the law, that the regulations were exclusive within their scope, but made it clear that the measure of the defendant's duty in the premises was the same, whether imposed by the regulations or by the common law of the state.

The defendant therefore is only in a position to raise here the questions (a) whether the defendant's duty so measured is imposed by the I. C. C. regulations and (b) if not, and the regulations are silent upon such duties, whether the regulations may be supplemented by the common law of the State of New Jersey.

PLAINTIFFS' POSITION.

The following is a digest of plaintiffs' views as to the law upon this point, the argument being set forth at length in a memorandum handed to the Trial Judge, a copy of which is submitted to this Court.

The federal statutes under which the I. C. C. regulations are made are expressions as to criminal acts and liabilities and are not intended as a measure of civil duty.

Lysaght v. *Lehigh Valley R. Co.*, 254 Fed. 351.

In the Lysaght case the plaintiff was suing to recover damages to certain of his goods destroyed, while in transit, as a result of this Black Tom explosion. The Court (Hand, *J.*) said at p. 355:

> "Sections 232-235 of the Criminal Code do not concern the regulation of the carrier's civil liability.

> They are intended to provide against the carriage of explosives generally on passenger vehicles or vessels, and otherwise to impose conditions upon such carriage as the Interstate Commerce Commission shall prescribe. It may be that their violation might entail a civil liability in addition to that imposed at common law, but upon that I need express no opinion. That they serve as a limitation upon the common law liability is not suggested in the text of the statute, and is not to be inferred from its purpose. It in no sense follows because shipments are lawful, when they conform to the rules, that there is no responsibility *inter partes,* which arises from their possession."

Even assuming that the statute and the regulations made under it may affect civil liability in some respect, the fact that Congress constitutionally *enters* a proper field of jurisdiction--exclusive to the extent actually *occupied*—is not equivalent to an *occupation* of such entire field.

To this suggestion, the defendant argued to the court below that the intention of Congress to occupy the entire field of the transportation of explosives was indicated by the title of the federal statutory enactment under which the regulations of the Interstate Commerce Commission are made, which title was stated by defendant's counsel to be as follows (380, l. 37; 381, l. 1) "An act for the safe transportation of explosives in interstate commerce on land." This was not the title of the statute in 1916, the time of this casualty. The earlier act of 1908, to which defendant referred was expressly repealed by the codifying act of March 4, 1909, the title of which is "Be it enacted, etc., that the *penal laws* of the United States be, and they hereby are codified," etc. (Chap. 321, 35 U. S. Statutes at large 1088), of which the provision in question is Section 233 of Chapter 9, entitled "Offenses against foreign and interstate commerce." But the obvious reply to the argument below of defendant's counsel is that of the learned Trial Judge, that the intent of Congress is to be gathered from the act itself,

not simply from general expressions in its title; and that, for example, if Congress enacts a statute providing for a single phase of the duty of a federal marshal and entitles the statute "An Act for the regulation of United States Marshals," this would not evince a design to cover everything in marshal was expected to do (382, l. 1; 381, l. 1).

APPELLANT'S CASES.

The cases cited by defendant in its argument contending that Congress had fully occupied the field are roughly divided into two classes: (1) Conflict of federal and state statutes affecting civil rights and (2) conflict of state and federal criminal statutes.

None of the cases—not even the Ingrid cases (discussed *infra*)—are on the point at issue in this case, viz.: *the effect of a purely federal criminal statute on the civil common law of the state.*

Cases interpreting the "Safety Appliance Act" are not in point as that Act specifically provides that employees working on cars, etc., not equipped with the specified safety devices are not to be held to have assumed the risk. The act shows that it is designed to affect civil rights and take a paramount position over the common law. The same answer applies to cases arising under the Federal "Employer's Liability Act."

The case of *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, relied upon to a great extent by defendant, reveals a situation unmistakably taken over by Congress in the "Hours of Service Act." Two statutes—state and federal—were in direct conflict, and as pointed out in the decision, the postponing provision was enacted to free the railroads from all interference by state statutes on the subject of hours of service prior to the taking effect of the federal statute.

At pages 379 and 380, the Court says:

> "In the first place, no conceivable reason has been, or we think can be, suggested for the postponing provision if it was contemplated that the prohibitions of State laws should apply in the meantime. This is true because if it be that it was contemplated that the subject dealt with should be controlled during the year by State laws, the postponement of the prohibitions of the act could accomplish no possible purpose. This is well illustrated by this case, where, by the ruling below, a State regulation substantially similar to that contained in the act of Congress is made applicable. In the second place, the obvious suggestion is that the purpose of Congress in giving time was to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act, a purpose which would of course be frustrated by giving to the provision as to postponement a significance which would destroy the very reason which caused it to be enacted. Finally, the convictions which arise from the fact of the postponement are made plain by a report on the bill made to the House of Representatives by the Committee on Interstate and Foreign Commerce, wherein it was said (Report No. 7641, dated February 16, 1907, p. 6):
>
> " 'Owing to the probable necessity of changing in some instances division points, entailing the removal of employes, and to permit ample time to readjust themselves to the requirements of the law, it is not to become operative for one year after its approval.' "

The defendant also relies upon the case of *Savage* v. *Jones*, 225 U. S. 501. An Indiana statute required the manufacturer of stock feed to attach in a conspicuous place on the outside of each package destined for sale in Indiana, a printed statement certifying the name of the manufacturer and of the shipper, and the chemical analysis, etc. The purpose of the statute was to prevent fraud and imposition, and it was sought to enforce it in a case involving goods in the original package (*i. e.*, goods in the original package being a part of interstate commerce). It was

held that the statute was not in conflict with the "Federal Food and Drugs Act," which provided that no manufacturer should label his goods falsely. Hhere was a case of a Federal statute and a State statute on the same subject, and yet the State statute was held effective. Both were designed to prevent fraud and they did not conflict. Surely it cannot be said that the rule of reasonable care of the common law is inconsistent with a criminal statute providing that (Sction 233):

> "Such regulations shall be in accord with the best known practicable means for securing safety in transit, etc."

If the goods were not in transit then they were not in interstate commerce and there is no question of conflict.

The defendant *could not have been injured by the application of the rule of reasonable care.* It would be ridiculous to say that the act in question designed through its administration by the Interstate Commerce Commission to secure safe transportation of explosives by the promulgation of strict rules, the violation of which was a criminal offence, allowed the carrier to conduct itself with less regard to the dangers arising from the shipment than the common law allowed.

"The Ingrid Cases," 195 Fed. 596, 216 Fed. 72.

It appears from both opinions that there was no evidence of negligence on the part of the defendant (195 Fed. 596, at pages 603 and 604, and 216 Fed., 72, at pages 76 and 80). At the latter page the Court says:

> "According to the libelant's own theory as presented upon the argument, the accident might have been caused by the negligence of either the railroad company, the powder company or Healing. It is also true that the explosion may have been caused by the act of outsiders entirely unconnected with any of the respondents. If the explosion itself is evidence of negligence, such negligence may have been that of the powder company in the manufacture of the dynamite or the packing of it in the boxes; or it may have been the negligence of the railroad company in improperly handling the

> car; or it may have been the negligence of Healing in carelessly transferring the boxes from the car into the lighter; or it may have been the negligence of unauthorized persons who may have interfered with some of these operations. And any one of these theories is almost as probable as another. The cause of the explosion is a mystery and cannot be accounted for."

No negligence had been proved. This is very important to bear in mind. *If an action could be supported, it must be upon some other grounds.* These were the questions decided below and brought up for review to the Court of Appeals. Counsel urged the doctrine of *Fletcher* v. *Rylands,* because they could show no negligence; for the same reason they pressed the doctrines of *res ipsa loquitur,* and nuisance, and finally they attempted to show a violation of the statutes and ordinances of New Jersey, in order that they might establish a nuisance *per se* or make out a *prima facie* case of negligence under the doctrines discussed above. A reading of the briefs filed in the Circuit Court will substantiate this, we believe.

The holding of the Circuit Court then comes to this: When it is attempted to make out a nuisance *per se,* or a *prima facie* case of negligence by showing a violation of State and City penal statutes, ordinances or police regulations, the Federal Court says the Congress has provided penal regulations, and by so doing has completely occupied the field. *If a case of nuisance per se or prima facie negligence is to be established by showing the violation of penal statutes or police regulations, it must be established by showing a violation of the Federal regulations.*

Inconsistent state and federal penal statutes and police regulations cannot exist in matters of interstate commerce, and the former must go. This is not saying that a federal criminal statute supplants the common-law of torts. *If so, why did the Court discuss negligence, Fletcher* v. *Rylands, res ipsa loquitur, and common-law nuisance? If their holding was as sweeping as is here con-*

tended for, why was there not but one answer to those questions; that the regulations are the sole measure of civil duty? Why did the District Court use the following language in 195 Fed., at page 600:

> "The question, therefore, whether the railroad company is responsible for the dynamite which exploded depends, in the first place, upon whether the locality where it was kept and all the existing circumstances made it a nuisance *per se,* and, if not, whether there was negligence in leaving it, or in the manner of handling and keeping it on the pier."

Does such language lead one to believe that the Court would have turned a deaf ear to a common-law cause of action if it had been established? Does it repudiate the common-law? Is it not perfectly consistent to say that Congress has occupied the field of criminal conduct and affirmative police regulation to the extent that precludes further interference by the state, and still to say that complete provision has not been made for civil liability? To say, that as the state regulations are invalid, violations thereof cannot support a legal presumption of negligence or nuisance, is not to say that negligence cannot be shown at common-law.

It is submitted that the Ingrid cases went no further than to deny validity to the statutes and ordinances of New Jersey, which were in conflict with the regulations of the Interstate Commerce Commission made in pursuance and by direction of a criminal statute of the United States.

For further argument on this point and refutation of defendant's authorities, the Court is respectfully referred to the supplementary printed memorandum.

THE I. C. C. REGULATIONS.

The plaintiffs claimed first that the provisions of the regulations were at the least sufficient to cover the measure of ordinary duty and care sought to be imposed upon the defendant. The plaintiffs claimed secondly, that even

if the regulations were construed to be silent upon such care in the particulars alleged, thereupon the common law of the state came into play, to supplement that which the regulations failed to cover, and so to negative the defendant's contention that in such event it was subject to no law whatever as regards such uncovered duties.

a. The regulations do cover the duties applicable to the facts shown in the case at bar.

In addition to the particular regulations specified by the Trial Judge in his charge, there is the provision in section 1906 of the regulations that "When cars protected by 'Inflammable' placards are received or held in yards, particularly at night, *the carrier must see that all necessary precautions are taken to prevent accidents.* These precautions must include provision for quickly isolating them in case of fire" (section 1906, Vol. II, p. 817c, l. 37). The cars in the railroad yard that night of wet nitrocellulose, benzol and toluol all bore this "Inflammable" placard (125, 114, 115). This regulation is under that subdivision of the regulations concerning inflammables relating to placards and "handling cars" (817c, Vol. II). Of the sections referred to by the Trial Judge in his charge, all come under section 3 of the regulations for the transportation of explosives by freight concerning the handling of the explosives and the cars in which they are contained (813, 801, Vol. II).

The express language of these regulations would impose a formula of duty much more strict than that of the common law as charged by the Judge and this horn of its dilemma was recognized by the defendant's counsel (745). Plaintiffs were entirely willing and urged upon the Trial Judge that the strict language of the regulations should of course be construed in the light of the general common law which is the law of New Jersey (*Kowalski* v. *Newark Passenger Ry. Co.*, 15 N. J. L. J. 50, 51), according to the standard of the reasonable and ordinary prudent man, and the Trial Judge so charged.

b. If the law of the regulations did not cover the facts, then the common law of New Jersey would apply.

From the language of the statute in pursuance of which the regulations are made, it does not follow that if the Interstate Commerce Commission did not act or only partially covered the ground "in accord with the best-known means for securing safety in transit," there should be a void and no law. Suppose that the Commission made but one regulation and that concerned the packing of explosives? Obviously the ground would then not have been covered. In such case the language of the U. S. Supreme Court, through Justice Matthews, applies (*Smith* v. *Alabama,* 124 U. S. 465, at 477-478):

> "The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law, which until displaced, covers the subject."

With these words in view it cannot be said that any inaction on the part of Congress gives rise to anarchy and that the defendant is under no standard of care as to the numerous details of transportation of a car of explosives which it would be under where a car of pig iron or of biscuits was concerned.

CONCLUSION.

The measure of duty charged by the learned Trial Judge, namely, that the defendant was under a duty to exercise a degree of care commensurate with the risk of danger reasonably to be anticipated, was the correct legal yardstick heretofore laid down by this Court in the same matter (*New Jersey Fidelity & Plate Glass Insurance Co.* v. *Lehigh Valley Railroad Co.,* 92 N. J. Law 467) and is open to no complaint upon defendant's part on any theory of the effect of the I. C. C. regulations.

THIRD POINT.

Even upon defendant's hypothesis that the first explosion occurred upon the Johnson 17 (the evidence being overwhelmingly to the contrary), there was evidence from which the jury could infer the defendant's knowledge of and consent to the presence at the North Pier of the Johnson 17, and from which the jury could find the defendant guilty of negligence in this respect.

It has been hereinbefore shown (p. 14, title "Munitions-Laden Lighters at North Pier," *supra*) that upon the night of the casualty there was clustered around the North Pier a small fleet of ammunition-laden barges, each a floating arsenal; and that most of these barges had, in the few days preceding the casualty, received their highly dangerous cargoes from the defendant. It appears further that, recognizing the danger of the trans-shipment of these explosives, and "in order to increase the safety and the method of handling these goods" (defendant's opening, 57j, l. 38) the defendant set apart the North Pier (defendant's opening, 57k, l. 1) for such dangerous business. It also appears that all this dock property, including wharfage rights, was used and controlled by the defendant (Ans. p. 37, l. 20; complaint, p. 31, l. 20; Exhibit P. 1, Vol. II, p. 747, l. 30). The testimony showed that the defendant, through its employees, was in the active control and possession of the North Pier (451, 208).

The Johnson 17 arrived at and moored to the North Pier on *Friday, the 28th* (250, ll. 25-26; 246, l. 40; 601, ll. 34-37), not as appellant's brief states as admitted, that this barge came there on Saturday, the 29th, after the close of business; so that Johnson 17 lay there, moored to defendant's property over thirty hours before the casualty, including one whole business day. The recollection of Captain Baker to that effect (250, ll. 25-26) is corroborated by the records of the Johnson Lighterage Company offered in evidence by defendant (601, ll. 34-37). Defendant's answer to interrogatory No. 8 (120, l. 23) unresponsively

volunteered the self-serving declaration that Johnson 17 had arrived at Black Tom after the close of business on the 29th (121, l. 10) which appellant now makes the basis of the assertion in its brief that this fact is admitted.

The Johnson 17 and the other Johnson barges came to the North Pier at Black Tom on business for the purpose of obtaining cargoes of explosives (603, ll. 14 *et seq.*) and not as trespassers.

Defendant's agent and witness, Dickman, testified in connection with the practice of handling the explosives, that "the orders for delivery would be received from the consignees, who would send their lighters with the orders for the cars that they required in the custody of the barge captain" (414, ll. 27-32) and that "we would get the advance information as to what cars they would require by phone and then they would send the actual order for those cars along by the boat captain" (415, ll. 16-20).

Another Johnson boat, the Frank, had, during Saturday, the 29th, taken on board 5 carloads of TNT (245, l. 25; enclosure to Exhibit P. 9 opposite p. 765, Vol. II), and the reason Johnson 17 did not take any cargo on that Saturday was because the defendant's facilities were limited, "they could only put in cars enough at a time to work one boat" (612, ll. 38-40; 613, ll. 1-2; 603, l. 33). Appellant's statement in its brief that its records show that the loading of the 5 carloads of TNT on the Frank was on the 20th instead of the 29th, is contradicted by its own detailed records (see enclosure to Exhibit P. 9, opposite p. 765, Vol. II), and, of the two copies of the answers to interrogatories served on plaintiffs' attorneys, one gives the date as the 29th and the other as the 20th; the printed record (123, l. 2), containing the last-mentioned date. Reference to the interrogatory map (Ex. P. 16, opposite p. 777) will show, still remaining on the North Pier at the time of the casualty, the five empty cars themselves by initials and numbers identical with the initials and numbers of the cars specified in the enclosure to Exhibit P. 9, *supra* (opposite p. 765, Vol. II) and as

specified in the aforesaid answer to interrogatories (123, ll. 4-12).

There was also evidence that an arrangement had been made between the Johnson people and the defendant that further transfer of explosives from the defendant's cars to the Johnson barges would proceed on Sunday, the 30th, the defendant putting the cars on the pier for the Sunday's work (603, ll. 37-40, 30-37). There were in fact three cars loaded with high explosives on the North Pier at the time of the casualty (see Interrogatory Map Ex. P. 16, opposite p. 777, Vol. II). The Johnson 17 came there only partially loaded and was to take additional cargo on Sunday (612, ll. 24 *et seq.*).

It has been heretofore pointed out that the jury had before it evidence that the explosives cargo of another Johnson barge was "on deck" (286, l. 39), even if they did not know that all explosives are deck loads.

Contrary to appellant's assertion in its brief (p. 158) that "it appears without dispute that the Johnson barge No. 17 was moored at the North Pier without the defendant's knowledge or consent," there was before the jury evidence that defendant knew of the presence there of the Johnson 17 for a full 24 hours before the casualty and that she remained there during that night with defendant's express or at least implied consent; and also evidence that defendant knew, or was put upon inquiry to know, what she was loaded with—a cargo of the same general character as the cargoes of the other barges there, of which the defendant had express notice.

And upon all of this evidence the jury could have reached the conclusion that there had been a failure on defendant's part to use due care commensurate with the risk of danger reasonably to be anticipated in permitting Johnson 17 (as it did the other munitions-laden barges) to remain moored to the North Pier.

Just how the federal anchorage regulations (Ex. D. 11, pp. 831, 841, 620), so much relied upon by the defendant, come to its aid, it is difficult to see. If these

anchorage regulations have any effect other than mere navigation rules; have, as defendant contends they have, the force of public law; then such law is binding upon the defendant, and increases rather than lessens the measure of defendant's duty under the circumstances.

FOURTH POINT.

The Trial Court was not in error in not charging the language of defendant's 24th, 25th, 26th, 27th, 28th, 29th, 30th and 33rd (p. 746k, l. 13, to p. 746m, l. 2, and p. 746m, ll. 17-24) requests with reference to proximate cause, as part of that language did not express the proper rule of law, and that part which did express the proper rule of law was fully covered by the Trial Judge in his charge to the jury.

The contention in defendant's written argument (pp. 118) that the refusal of the Trial Judge to charge the language of requests 24 to 30 inclusive and the language of request 33 was error, and the exceptions to the charge of the Trial Judge (p. 733, l. 29, to p. 734, l. 39) may be summed up in the language of its counsel at page 746a, lines 11 to 17, and page 746a, lines 31 to 34:

> "*Mr. Garrison.* I object to that because I say that even if under your Honor's theory the fire on our premises communicating itself to the Johnson barge and the Johnson barge went off and caused the damage to the plaintiff, or some of it, you have no right in law to let this jury find any damages against us by reason of anything that was caused by the explosion on the Johnson barge. * * *
>
> *Mr. Garrison.* I say that was the law, because you should have charged them to the extent that any damage was caused to this plaintiff by what happened on the Johnson 17 explosion we were not responsible in law."

The Judge charged as follows (p. 733, l. 4, to p. 736, l. 16):

> "Now, then, there are some other things that have to be dealt with in this case. It is contended,

as you have heard it very eloquently contended in argument before you by the counsel for the defendant, that the defendant is not responsible for the fire on that Black Tom peninsula, and that they are not responsible for the loss that occurred. They say, outside of the fact that they say they are not guilty of negligence at all with respect to the particulars that are charged against them, as having been negligent—they say that this fire did not originate through any negligence of theirs, but that it originated in a place over which they had no control, and that the conflagration that subsequently ensued and the explosion which first occurred was not an explosion for which they were at all responsible. They say that the first explosion occurred in a scow, or barge, called the Johnson 17, that that was something that was loaded with stuff that they had not put there, that it was loaded in violation of the anchorage laws of the United States, and that the explosion occurred there and was the cause of all the subsequent destructive results. Now, of course, if that catastrophe, as it is called, down there was brought about by any other cause, it makes no difference what it was, than the defendant's negligence, the defendant is not responsible for it and cannot be made to pay. The whole imposition of liability upon the defendant rests upon the notion that it was at fault, because without fault, and fault as charged in the written complaint of the plaintiff, there can be no recovery whatever, and the verdict would have to be for the defendant. I want to make that perfectly plain to you, that the only ground upon which liability can be rested against the defendant is fault, legal fault, such fault as I have indicated here, and that fault, of course, arises out of the notion that they have been shown by the greater weight of the evidence not to have exercised the degree of care which the law under the circumstances exacted of them and which I have defined to you. Unless that is shown there can be no negligence and there can be no recovery.

Another claim made by the defendant, as I understant it, is that even if the loss occasioned if any was occasioned, by the Johnson 17, it was not the original or the sole cause of the destructive effects

or results on plaintiffs' property, of which complainant is made here, that still if it was an independent cause and it did cause some loss to the plaintiff, and you cannot say, because the evidence does not make it clear, how much of the loss was due to the explosion on the Johnson-17 for which the defendant was not responsible, if it was not responsible, and how much was due to the other explosion or to the fire that ensued from either of them, why, manifestly, you could not say how much the plaintiff ought to have, and therefore you would have to say that the best that could be said for them in that particular would be that they would be entitled to six cents' damages; because the law makes it incumbent upon the plaintiff to make out by the greater weight of the evidence not only what was the cause of his loss, but the extent of it, how much it was.

Now, in response to that, of course, the plaintiff says that the explosion on Johnson-17 was simply one link in a chain of consequences which flowed from an original act of negligence on the part of the defendant. They say that the first explosion was the explosion that took place on the land, and that everything that occurred after that was an unbroken concatenation, a complete series of links, all of which were traceable as to their original legal source to the negligence on the part of the defendant company, the Lehigh Valley Railroad Company; and if they have made that out by the greater weight of the evidence, then, of course, it follows as a legal consequence that the plaintiff is entitled to recover all the loss that has been shown by it to have resulted from both explosions. You can readily see that this proposition that I am trying to elucidate to you is merely a matter of cause and effect. If the defendant has been shown by the greater weight of the evidence to have caused all the loss, why, then of course, the defendant must necessarily pay all the damage. If it has not been shown to have occasioned all the loss, but has been shown to have occasioned some of the loss by its legal fault, then, of course it ought to pay so much damage as it has been shown to have caused, and if the jury cannot say how much that damage was, because that has not been made

> clear in the evidence, but they are satisfied that it did cause some loss, why, then, manifestly, the jury could only say, under the circumstances that the defendant would be obligated to pay nominal damages."

It is submitted that the charge of the Court correctly stated the law.

In its statement of the case in its written argument on page 106, and again on page 7, in the grounds of appeal the defendant admits that the fire started on its premises. The fire was first discovered shortly before and not later than 12.30 A. M. (253, 203, 201), and the first explosion occurred about 2.08 A. M. (445, 326, 337, 299), and the secondary explosions about one-half hour later (431, l. 26; 625, l. 9). This is the chronological history of the casualty, and it is well to remember that it, admittedly, begins with a fire in the defendant's yards. The sequence itself is sufficient evidence to go to the jury that there was a casual relation between the fire and the first and secondary explosions. That the whole casualty germinated in the fire on defendant's premises was unquestionably a proper question for the jury to pass upon. It is respectfully submitted that, *in view of the evidence,* the question of whether the explosion, if any, on Johnson 17 (whether that explosion was the first or subsequent) was such an efficient and independent intervening cause as to break the chain of causation, was a jury question also.

> *Coxe* v. *Penn. R. R. Co.*, 76 N. J. L. 786; *Hammill* v. *Penn. R. R. Co.*, 56 N. J. L. 371.

Assuming for the sake of argument that the first explosion was on Johnson 17.

The presence of vast quantities of combustibles and ammunition in defendant's yards would tend to aggravate and render dangerous any fire in the yards. In transmitting the fire and causing detonations and hurling shells into surrounding space they would act as a fuse to other

combustibles, munitions of war and high explosives in the vicinity. *All of this was foreseeable to any prudent man.*

Under these circumstances if defendant had no knowledge, that about the North Pier many munition laden barges were clustered, it was a very sad commentary on the prudence of its agent on the premises, and on the vigilance of its guards. Certainly the jury should pass upon the question of whether this was reasonable care. But there is evidence that defendant had such actual knowledge (p. 603, l. 19; see Third Point, *supra*). That a fire starting in the yards would be transmitted to some of these barges and end in casualty was foreseeable to a high degree, and the resulting casualty was a proximate cause of the fire.

Coxe v. *Penn. R. R. Co.*, 76 N. J. L., p. 786. The defendant's right of way extended along the northerly side of the property of the plaintiff and one X, on which latter property a hay press was located distant about 33 feet from the center of defendant's main track. Defendant also maintained a siding connecting with a freight station and a platform contiguous to the X building. The testimony showed that the weather had been dry, and that dead grass and other combustible material had collected between the rails of the siding, and between the siding and the main track in the immediate vicinity of the X building. In the language of one witness the condition of the track was weedy and dirty. At 3.38 P. M. defendant's train passed. Shortly thereafter a fire started in the dead grass between the main and side tracks at a point near the hay press. From there it spread to the X building, and from thence to the plaintiff's building.

The defendant met this with testimony that the right of way was kept in good order, and was free and clear of combustible material. At pages 787 and 788, the Court said:

> "That verdict, not being reviewable here upon this writ, the defendant urges, as matter of law, that the plaintiff's loss was attributable, not to

the fire, originating, as we must assume in view of the verdict, by defendant's negligence on its right of way, but to the spreading of the fire from the Pitman & Stackhouse building, which intervened in point of time between the negligent act of defendant and the destruction of plaintiff's buildings."

* * * * * *

"It were a task of supererogation to again review the cases and apply the distinctions, as was done in the Salmon case. It should suffice to say that the questions here raised by the learned counsel for the defendant were there fully considered in the light of the authorities, and the rule enunciated was, 'in actions for injuries resulting from fire originating through the defendant's negligence and communicated to the plaintiff's property, where distance, intervening objects or the manner in which the fire was communicated presents the question, whether the plaintiff's loss is attributed to the defendant's negligent act; and there being no intervening agency apparent which may stand in law as the immediate cause of the injury, the question is one for the jury, whether, under all the conditions under which the loss happened, the destruction of the plaintiff's property was a result which might reasonably have been expected (though not in fact anticipated) from the defendant's negligent act.' See, also, Whart. Neg., Sec. 85.

Under this rule the questions of causal connection and intervening cause, if any existed, were properly left by the court to the determination of the jury, and their verdict under the circumstances upon this writ cannot be disturbed."

Delaware, Lackawanna & West. R. R. Co. v. *Salmon,* 39 N. J. Law, 299. This was a case of fire spreading from sparks from a railroad train. At pages 309-312, the Court says:

"The cases in which the responsibility is laid on the original wrong-doer, though intervening agencies without his fault have interposed, are quite numerous. Indeed, cases of this class are only instances of the application of the principle adjudicated in the well-known Squib case, as ex-

pressed in the opinion of Chief Justice De Grey. Scott *v.* Shepherd, 2 W. Bl. 892.

* * * * * * *

In actions for injuries resulting from fire originating through the defendant's negligence, and communicated to the plaintiff's property, where distance, intervening objects, or the manner in which the fire was communicated, present the question whether the plaintiff's loss is attributable to the defendant's negligent act, and there be no intervening agency apparent which may stand in law as the immediate cause of the injury, the question is one for the jury, whether, under all the conditions under which the loss happened, the destruction of the plaintiff's property was a result that might reasonably have been expected (though not in fact anticipated), from the defendant's negligent act. Whart on Neg. Sec. 154."

Sutphen v. *Hedden*, 67 N. J. L. 324. Defendant contractors were making an excavation bordering on the sidewalk. To guard this they had constructed a fence. A sudden gust of wind caused a few sections of the fence to collapse and fall into the excavation. The plaintiff was found lying in the excavation opposite that part of the fence which had fallen. He brought action for unskilfulness in the erection of the fence and for failure to maintain it in a safe condition. At pages 329 and 330 the Court said:

"* * * Assuming as we must under this request, that the falling of the fence was at least one of the efficient causes of the accident, it is none the less proximate in character, because the wind was a concurring cause in producing that result. It is true that without this concurring force the accident could not have happened, but it is equally true that if the fence had not given way under the violence of the wind the accident could not have occurred. Such a concurrence of causes does not necessarily render either a remote cause. They may both be proximate."

Even if the defendant was unaware of the fact that the particular barge—Johnson 17—was moored to the

North Pier, the result would not be different. A careful watching of the premises would have disclosed the fact.

Jeremiah Smith in an able article on Proximate Cause in 25 Harvard Law Review, says at page 238:

> "If there is a substantial likelihood that certain conduct when pursued by the defendant, will result in some appreciable harm to the plaintiff's person, then the defendant if he so conducts, cannot escape liability on the ground that he could not forsee the precise manner in which the harm would occur, nor the exact nature of the harm, nor the full extent of such harm. What must be foreseen in order to establish negligence, is 'harm in the abstract not harm in the concrete'." (1 Street, Foundations of Legal Liability, 104.) "The defendant need not foresee 'that an injury should occur in the exact way or to the same extent as that which did occur.'" (Houston, etc., R. R. Co. *v.* McHale, 47 Tex. Civ. App. 360, 367.) "He need only foresee that some injury of a like general character is not unlikely to result from failure to use care."

It is submitted that the same rule applies to injuries to property.

See, also, *Christianson* v. *Chicago, etc., R. Co.,* 67 Minn. 94; *Hill* v. *Winsor,* 118 Mass. 251.

Even if the action of Johnson 17 in tying up at the North Pier was illegal and hence negligent, this would not break the chain of causation as a matter of law.

Hammill v. *The Pennsylvania R. R. Co.,* 56 N. J. L., 371. The plaintiff contended that the proximate cause of the accident and consequent injuries to him was the neglect of the defendant railroad company to give the statutory signal of the approach of its train. The plaintiff at the time of the accident was standing on a much-used path on the property of the defendant, running parallel and close to the tracks, and connecting with a foot walk at the railroad bridge. It was alleged in the evidence and disputed that no signal was given of the approach of the train to the crossing at First street, and

that another man by the name of Barry, carrying a box of tools on his shoulder, negligently and carelessly went upon the crossing at First street and was struck by the locomotive and killed, and some of the tools by the force of the collision were thrown with much violence against the plaintiff, injurying him severely. The Court said at pages 377 and 378:

> "But it is contended that this negligent conduct of the defendant, conceding it to exist, was not the proximate cause of the injury. The contention is that the negligence of Barry, in placing himself carelessly in front of the locomotive, with the box of tools on his shoulder, was the independent and proximate cause of the injury. It is true that Barry's negligence contributed to his own death, and the trial judge instructed the jury that his negligence tended to the production of the injury received by the plaintiff, and that if Barry's negligence stood alone as an independent cause of the injury, there could exist no right of recovery on the part of the plaintiff, but it was submitted to the jury whether the statutory signal was given or not, and if not given, that was negligence on the part of the defendant, and if it co-operated with the negligence of Barry in producing the injury of the plaintiff, a right of recovery existed, but if it did not co-operate with the negligence of Barry in producing the injury to the plaintiff, then no right of recovery in the plaintiff existed; if the injury was the result of the joint negligence of the defendant and Barry, a liability on the part of the defendant ensued.
>
> It is premised that this was a proper submission to the jury upon the evidence in the cause, and that the law as applicable was properly stated to the jury. It was not within the province of the Court to assume that statutory signals were given, nor upon the assumption that there were not given to say that this negligence did not co-operate with the negligence of Barry and thus produce the injury to the plaintiff. The result might have been, if the signal had been given, that the accident might not have happened to the plaintiff."

At page 378:

> "We look for the primal negligence contributing to the injury, and then follow it up to its natural consequence and ascertain whether any independent efficient cause intervened to produce the injury, and it must be generally left to the jury to determine according to the circumstances of each particular case whether the facts fit the standard of naturalness."

Again at page 380:

> "The question whether the negligence of the defendant was the proximate cause of the plaintiff's injury was, in this case, one for the jury to determine, and an investigation of the evidence leads to the conclusion that it was not determined wrongfully by them."

The charge of the Trial Judge was consistent throughout with the law of these decisions. The jury on page 733, lines 20 to 40, was very carefully instructed that if the injury to the plaintiff was caused by any other cause than the negligence of the defendant—that is the negligence of the master and owner of Johnson 17—"the defendant is not responsible for it." The Court could not have granted the language of defendant's requests unmodified without committing error, and the charge that was made fully covered those portions of defendant's request that were consistent with the law.

We may add that the language on page 735, ll. 10-18, was very favorable to the defendant in that it allowed a "six-cent" verdict if it was uncertain just what portion of the loss was attributable to the alleged negligence of the defendant and what portion was attributable, if any, to Johnson 17.

Compare this with the language in the Hammil case, quoted, *supra:*

> "If the injury was the result of the joint negligence of the defendant and Barry (a third party), a liability on the part of the defendant ensued."

On the assumption that the second explosion occurred on Johnson 17, there need be no argument, as defendant's

counsel admitted in his opening that the first explosion caused the damage to the plaintiff. "We agree with him that it was the first explosion that did the damage to the plaintiffs in this action" (57 m).

Throughout its written argument defendant contends that there was no casual connection between each of the plaintiffs' specifications of negligence and the casualty and damage, and that the question should not have been left to the jury. It would be a waste of time to review all of these contentions in detail.

It is said that there is no casual connection between lack of guards and the casualty. Lack of guards means easy access for incendiaries, and defendant admits incendiarism caused the fire (p. 41). It would be hard to imagine a more direct casual relation.

Under the defendant's theory of the law of causation, the jury would cease to function as a finder of facts.

FIFTH POINT.

The Court did not err in repeating to the jury the plaintiffs' specifications of defendant's negligence or in charging the burden of proof resting upon the plaintiffs with reference thereto.

The Court in his charge to the jury first stated what the plaintiffs alleged to have been the duties of the defendant in connection with the explosives in the railroad yard and in what respects the plaintiffs alleged the defendant had failed to perform such duties and then charged that the burden was upon the plaintiffs to make out by the greater weight of the evidence that one or more of such specifications of negligence existed on the part of the defendant and were the proximate cause of the loss.

The charge of the Court in this respect is found at page 725, l. 30, page 727, l. 30, and is as follows:

> "The plaintiffs charge that under the law applicable to said railroad common carrier and the

regulations of the Interstate Commerce Commission for the transportation of explosives and other dangerous articles, as prescribed under the act of Congress of March 4, 1909, and acts supplemental thereto or amendatory thereof, it became and was the duty of the defendant, in connection with such explosives, explosive projectiles, ammunitions and munitions of war, to exercise all reasonable care to prevent fire or explosion upon the said premises and to control and extinguish the same, the extent of such duty being commensurate with the nature and risk of the situation hereinbefore set forth; to take all reasonably possible precautions against fire, and to keep fire away; to make all reasonable and suitable provision for the safe storage thereof outside of station; to prevent unauthorized persons from having access thereto on said premises; and to take all reasonable and necessary precautions for quick isolation in case of fire.

That is the charge that they make of the duties which they say were violated.

The plaintiffs allege that they neglected to perform such duty in the following respects:

It neglected to watch or guard said premises and waters adjacent thereto through employees sufficient in number and competence, and to properly instruct the same, to prevent incendiary or accidental fires.

It permitted unauthorized persons upon said premises and especially upon or in the vicinity of said explosives, ammunition or munitions of war.

It permitted vessels not connected with the transshipment of said explosives, ammunitions and munitions of war to lie moored to said North Pier.

It permitted or neglected to prevent barges or lighters having no business at said North Pier, and wholly or partially laden with such explosives and munitions of war, to lie moored to said North Pier or moored to similar barges moored thereto, or to lie in the vicinity thereof.

It neglected to isolate or separate the railroad cars containing such explosives and munitions of war, and improperly accumulated or bunched the same in the same locality on said premises, and take precautions for quick isolation in case of fire.

It neglected to provide employees sufficient in number and competence and to properly instruct the same for the purpose of discovering and extinguishing any incendiary or accidental fire. Such insufficient, incompetent and uninstructed employee or employees as the defendant had, were negligent in guarding, discovering and reporting the fire hereinbefore alleged.

It neglected to provide sufficient apparatus and employees for the purpose of fighting and extinguishing fire upon said premises in said railroad terminal; and

It neglected to provide sufficient means of communication or alarm of fire.

And then the plaintiff charges that

The loss of the merchandise of the said plaintiff was caused by the defendant's neglect of duty aforesaid.

Now, first of all, the law says that the burden rests upon the plaintiff to make out by the greater weight of the evidence that the negligence which he has charged in his written complaint against the defendant existed and was the proximate cause of the loss of which the plaintiffs complain and for which in this suit they seek to have a recovery in damages. That does not mean that they are obliged to make out all of those specifications of negligence which I have read to you, for if they make out any one of those specifications of negligence, or two or more of them, by the greater weight of the evidence and show by the greater weight of the evidence that that one specification, or two or more specifications of negligence were the proximate cause of the loss and that they existed on the part of the defendant company; that would give them a right to have a recovery and to have you assess their damages at such sum as they shall have proven by the greater weight of the evidence."

The defendant excepted to this part of the charge and argues in its brief that the charge was erroneous in the following respects:

(1) That it incorrectly states the measure of defendant's duty to the plaintiffs.

(2) That there was no evidence to justify the Trial Judge in leaving to the jury the question of defendant's negligence in the particulars indicated.

(3) That the evidence failed to show that such negligence was the proximate cause of the loss.

As preliminary to plaintiffs' answers to the defendant's above contentions, it may be said that the charge of the plaintiffs in general is that the defendant failed to exercise reasonable care in connection with the explosives in its custody and that such failure was the proximate cause of the loss. The specifications of negligence contained in paragraph 12 of the complaint are merely in the nature of a bill of particulars. In no event could it be error to state to the jury what is charged by the plaintiffs in the complaint with the further statement that the charge must be made out to justify recovery as in contemplation of law the pleadings are always before the jury (see discussion, p. 740, l. 30; 743, l. 20).

McCann v. *Ullman,* 109 Wis. 574, 577;

Blair-Baker Horse Co. v. *First National Bank,* 164 Ind. 77, 84;

Macon Cons. Street R. R. Co. v. *Barnes,* 113 Ga. 212, 219;

Central Railway Co. v. *Bannister,* 195 Ill. 48, 49-50;

Chicago & Alton R. R. Co. v. *Harrington,* 192 Ill. 9, 25-26;

Graybill v. *C. M. & St. P. Ry. Co.,* 112 Ia. 738, 744;

Hartpence v. *Rogers,* 143 Mo. 623, 632-633;

Ballzer v. *Madison & Northern R. R. Co.,* 89 Wis. 257, 263.

(1) The charge correctly states the measure of defendant's duty.

With particular reference to the first of the defendant's above contentions the defendant argues that the measure of its duty is incorrectly stated in that the charge places upon it the burden of insuring against

damage. The first answer to this contention is that the defendant has overlooked or ignored the allegations of paragraph 11 of the complaint, which equally with the allegations of paragraph 12 were incorporated in the charge and has argued entirely from the recitals of paragraph 12. Paragraph 11, as repeated to the jury, very clearly alleges, not the duty of an insurer, but the duty "to exercise all reasonable care" to prevent fire or explosion, etc., the duty "to take all reasonably possible precautions against fire," "to make all reasonable and suitable provision" for safe storage, "to take all reasonable and necessary precautions" for quick isolation, etc. The allegations of paragraph 12 are that the defendant neglected to perform "such" duties, such duties referring to the allegations of paragraph 11.

Even paragraph 12, standing alone, reasonably and fairly construed, has no such meaning as contended for by the defendant. There is no allegation that by any fair construction, legal, popular or otherwise can be said to be an allegation that defendant failed to prevent fire or damage. The allegations are that defendant "neglected to watch or guard" and "to properly instruct their employees" (note the comma before the next words "to prevent incendiary or accidential fires" making these words merely the aim of watching and guarding). The other allegations are that the defendant "permitted" or "neglected" certain things which caused plaintiffs' loss, these words in themselves implying acquiescence in the things complained of or lack of reasonable care to prevent them.

But whatever the complaint may or may not mean when properly construed and as repeated to the jury, the charge unequivocally stated the rule to be that defendant's liability must be based upon lack of reasonable care under the circumstances. The material portions of the charge in this respect are as follows:

> "Now, then, I charge you, gentlemen, that the rule of law that is to be extracted from these regulations and the statute in pursuance of which they

were passed is that the defendant railroad company was under a duty in the transportation and custody of the cars of explosives, ammunition and inflammable substances in the particulars indicated, *to exercise a degree of care commensurate with the risk of danger reasonably to be anticipated, and the defendant railroad company is liable for damages to the plaintiffs for any failure to exercise such care if the failure to exercise such care was the proximate cause of the injury and loss to the plaintiffs.*''

''I charge you that the standard of care imposed upon the defendant railroad under the regulations of the Interstate Commerce Commission in so far as such regulations cover the field of the measure of the defendant's duty is the same as the defendant railroad company was under without them, *namely a degree of care commensurate with the risk of danger reasonably to be anticipated.*''

''* * * *that the plaintiff must make out by the greater weight of the evidence that this defendant company in one or more of the particulars charged by it neglected to use a degree of care commensurate with the risk of injury to be anticipated from neglecting to use such degree of care, and that such neglect on its part was the proximate cause of the injury complained of by these plaintiffs, before they are entitled to have a verdict.* If they do make that out by the greater weight of the evidence, then they are entitled to have a verdict and to have you assess their damages'' (730-733).

''Now, in determining, gentlemen, whether or not care porportioned to the risk has been exercised, you must bear in mind that the criterion is: What would a reasonably prudent and cautious man have done under the circumstances? The law erects a sort of fictitious man, we call him the man of ordinary care, a sort of fictitious creature who is supposed to possess the average caution, judgment, skill and understanding, and the law says: You ask yourselves the question in determining whether the care that is cast upon the defendant has been used or not, what would a reasonably prudent and cautious man have done under the circumstances? and in determining that question you ask yourselves whether or not a reasonably

prudent and cautious man would have had watchmen and guards upon the premises to watch these inflammable and explosive substances, and whether or not he would have had as great or greater a number of guards and watchmen than the defendant had in this case, and whether or not he would have had guards of more competence, and then you ask yourselves whether or not such a reasonably prudent and cautious man would have depended, and to what extent he would have depended, upon the activities of the so-called Dougherty detectives, who, counsel in summing up have seemed to assume were employed by the consignees, or at least by some outside party. You ask yourselves how far, to what extent, would a reasonably prudent and cautious man have relied upon their activities, and to what extent would he have relaxed his own activities in the light of his knowledge of their presence there and their business there; and then you would ask yourselves, furthermore, to what extent a reasonably prudent and cautious man would have permitted persons to come upon that property at night, what challenge would he have used to ascertain whether they were authorized or not, what inspection, if any, would he have adopted to determine their safety if they were on there—that is, their safety so far as the adjoining property was concerned. You ask yourselves all those questions and say to yourselves, Now, if this reasonably prudent and cautious man were there and were charged with the duty that is charged upon the defendant in this case, the duty of using this care proportioned to the risk of injury to be anticipated, or danger to be anticipated—you ask yourselves, Has it been shown in this case that the defendant company did not exercise that degree of care in any one or more of the particulars indicated in the plaintiffs' written complaint? If that has been shown, and its neglect to exercise it was a proximate cause of the plaintiffs' injury, then you will say to yourselves, naturally, that it follows that there should be a recovery and an assessment of damages. If it has not, why, manifestly, there should not be a recovery, and the verdict would have to be for the defendant'' 735-737).

Under the charge as above quoted it is not open to defendant to say that the measure of its duty was incorrectly stated. The defendant cannot pick out a part of the charge and say that that part standing alone is erroneous. The charge must be construed as a whole and if as a whole it is correct that is sufficient.

Brown v. *Spence,* 79 N. J. L. 452;
Crosby v. *Wells,* 73 N. J. L. 790, 811;
Redling v. *Central R. R. Co.,* 68 N. J. L. 641, 646;
Sullivan v. *North Hudson R. R. Co.,* 51 N. J. L. 518, 542-3.

This is not under any view such a case as *State* v. *Erie R. R.,* 84 N. J. L. 661, cited by defendant where two statements of law were made to the jury, one of which was erroneous. The latter portion of the charge does not contradict the former, but merely amplifies it and rounds it out as a completed whole.

(2) There was ample evidence to justify the Trial Judge in leaving to the jury the question of defendant's negligence in the particulars specified in the complaint.

With reference to the contention that there was no evidence to justify the Trial Judge in leaving the question of defendant's negligence in the particulars indicated to the jury, the first thing to be said is that with reference to some of the particulars indicated there was no request to withdraw the issues from the jury. The defendant did not request the withdrawal of the following specifications of negligence from the consideration of the jury:

> "It permitted vessels not connected with the trans-shipment of said explosives, ammunition and munitions of war to lie moored at said North Pier.
>
> It permitted or neglected to prevent barges or lighters having no business at said North Pier and wholly or partially laden with such explosives and munitions of war, to lie moored to said North Pier or moored to similar barges moored thereto, or to lie in the vicinity thereof.

It neglected to isolate or separate the railroad cars containing such explosives and munitions of war, and improperly accumulated or bunched the same in the same locality on said premises, and to take precautions for quick isolation in case of fire."

It is well settled that error cannot be predicated on the failure of the Court to give an instruction that was not asked for. It cannot now be contended therefore that the Court should have instructed that there was no evidence to sustain the above quoted specifications.

Chess v. *Vockroth,* 75 N. J. L. 665, 672;
Daggett v. *North Jersey Street Ry. Co.,* 75 N. J. L. 630, 638;
Farrell v. *Colwell,* 30 N. J. L. 123;
Cole v. *Taylor,* 22 N. J. L. 59.

In the last case cited the contention was that the Trial Court should have charged that there was no evidence of fraud. This Court held that as no request for such a charge had been made, the omission afforded no ground for reversal.

In any event there was sufficient evidence to go to the jury on all the plaintiffs' specifications. With reference to the specification of failure to watch or guard, the evidence has been hereinbefore analyzed (p. 6) and need not be here repeated. Suffice it to say that there was ample evidence to sustain the verdict on this issue.

But defendant now seems to contend that the limit of its duty was to use reasonable care to employ sufficient and competent men and properly instruct the same to guard the premises and that it is not liable for actual failure to guard. This contention is manifestly unsound. The defendant is clearly liable for all negligence of its servants and agents. Being a corporation it can act only through servants and agents. *The cases which defendant cites at such length are all cases under the fellow-servant rule, having no application to the case on appeal.*

With reference to the specification that defendant permitted unauthorized persons upon the premises, it must be kept in mind that the defendant's original answer admitted in evidence (374, 41), admitted that the fire was due to incendiarism. This is an admission in effect that unauthorized persons were on the premises during the night in question. In addition it appears that no system of identification of parties claiming access to Black Tom was provided or enforced. The word of any stranger that he belonged to a vessel moored to the premises would be taken (Kane, 190, 208). Men claiming to be Standard Oil men came unhindered through the entrance to the peninsula (Groat, 281). Instructions as to stopping anybody applied only to suspicious characters (Groat, 280). Men claiming to be sea- and river-faring men came and went day and night (Groat, 280). After working hours they would go up to Claremont to have a good time and would come back singing (Sloan, 223; Kane, 190). It was a common thing to hear shouting there at night (Sloan, 222).

With reference to the presence of vessels laden with explosives and vessels not connected with the shipment of explosives, defendant admits that such vessels were present on the night in question. The evidence on this point is hereinbefore covered (pages 14-16), and need not be here repeated. It will be recalled, moreover, that no instruction was requested upon this point.

With reference to the non-isolation of the cars of explosives and ammunition, it is admitted that eight carloads of high explosives containing 460,000 pounds were standing together on one track in the railroad yard, having been there for two days (109-10; Ex. P. 16). There were also 16 cars of ammunition for cannon which had been there from four to eleven days. There were five cars of benzol which had been there from two days to thirty days and one car of tuluol which had been there eighty-four days (110). The only way to isolate these cars in case of fire was by drill engines which admittedly

did not arrive until an hour after the discovery of the fire (524, 277). In fact it took a half hour to collect these engines and supply them with water and crews (Henley, 522-523). It should be kept in mind, moreover, that there was no request that this specification be withdrawn from the consideration of the jury.

With reference to the fire-fighting appliances available for use in the yard as distinguished from those available for the protection of the warehouses, there were clearly none. The facts with reference to this point have been hereinbefore fully stated (p. 17).

With reference to the specification that there was no sufficient means of communication of alarm of fire, and that there was delay in reporting the fire, it is undisputed that there was no available means to report the fire from the yard. While there was a telephone in a shanty on the bulkhead near the pier, the door was locked on the night in question and witnesses were unable to open it (Baker, 237, 240, 241). It is admitted that none of the employees of the defendant knew anything about the fire until it was reported to them by the Dougherty detectives. No alarm could therefore have been sent until the detectives had traversed the considerable distance from the lower part of the yard. Even then no alarm was sent in until Kane and Sloan had vertified the presence of the fire by personal observation (Kane, 194; Sloan, 223).

On all the plaintiffs' specifications of defendant's negligence there is thus some evidence at least and in this situation the law is clearly settled that the verdict should be sustained. This Court will not review the weight of evidence on which a verdict is found.

Savino v. *Goldberg,* 92 N. J. L. 617;
Davis v. *Fallon,* 91 N. J. L. 618;
Spargo v. *C. R. R. of N. J.,* 84 N. J. L. 251.

A verdict is conclusive where there is any evidence to sustain it.

Mahoney v. *Metropolitan Life Insurance Co.*, 80 N. J. L. 136.

The plaintiffs are not obliged, however, contrary to the contention of the defendant, to uphold the verdict on every one of their specifications of negligence. As it has been hereinbefore shown, if the defendant desired to remove from the consideration of the jury its negligence in any particular, it was necessary for it to make an appropriate request. This was done only with reference to a part of the specifications. Furthermore, reading to the jury what the claims of a plaintiff are is not equivalent to a submission of all such claims to the jury.

Bryce v. *Cayce*, 62 S. C. 546, 11th exception, pages 558 and 563.

Moreover, these specifications are not separate and distinct wholes, but merely correlative parts of the whole ultimate fact to be proved, that is the defendant's lack of reasonable care. The defendant was not entitled to pick out some one or more of these specifications and request a charge that such one or more specifications apart from the others should be withdrawn from consideration by the jury. It is well settled that a judge is not required to charge whether part of a group of incidents adduced to prove a fact is or is not alone sufficient to establish the fact.

Runyan v. *Central R. R. Co.*, 65 N. J. L. 228, 231;
Bliss v. *Schaeffer Brewing Co.*, 67 N. J. L. 29, 30;
Blackmore v. *Ellis*, 70 N. J. L. 264, 266.
Christensen v. *Lambert*, 67 N. J. L. 341, 345.

If the verdict can be sustained on any of the alleged grounds of negligence, the judgment should not be disturbed. A judgment will be affirmed if correct on any legal ground.

Meisel v. *National Bank*, 85 N. J. L. 253;
Karnuff v. *Kelch*, 69 N. J. L. 499;

Railroad v. *Salmon,* 39 N. J. L. 301;
Sec. 161 N. J. Practice Act 1903.

On an appeal every intendment is in favor of the correctness of the judgment and doubt will not lead to a reversal.

Kern v. *Katz,* 92 N. J. L. 406;
Phillips v. *Long,* 90 N. J. L. 212.

Finally with reference to this point, Section 27 of the Practice Act of 1912 provides that:

> "No judgment shall be reversed or new trial granted on the ground of misdirection or improper admission or exclusion of evidence or for error as to matter of pleading or procedure unless after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party."

(3) The question of proximate cause is concluded by the verdict of the jury.

The question of proximate cause in general is discussed in another part of this brief. It is sufficient to say here that as to the plaintiffs' specifications of the defendant's negligence there is no question of remoteness or of intervening cause. There is no doubt that the fire and the resulting explosion caused the loss complained of. The only question is whether the fire and explosion were due to the defendant's lack of reasonable care under the circumstances. This issue under the principles above stated is concluded by the verdict of the jury.

SIXTH POINT.

There was no error on the part of the Trial Court in its refusal to charge the language of defendant's 8th request that: "There is no evidence from which the jury can legally infer that the defendant did not provide sufficient fire fighting apparatus on its premises on July 29-30, 1916," and hence there was no error in the Trial Court's refusal to charge the language of defendant's 9th request that: ."There is no evidence from which the jury can legally infer that defendant did not observe the usual custom of railroads in respect to the fire protection afforded at Black Tom on July 29-30, 1916."

In its brief (p. 116) the defendant takes the position that because the plaintiff failed to produce any evidence of better fire fighting apparatus and appliances in other railroad yards, and as defendant's fire marshal testified (p. 490, ll. 30-40, to p. 491, l. 40; p. 492, ll. 30-35) that it was not the custom to put hydrants between the tracks there was no evidence to go to the jury that the defendant had not acted with reasonable care in its failure to have *any fire fighting apparatus* in the eleven-acre yard in which the cars of ammuntion and high explosives were placed.

As sustaining this contention, defendant cites some five New Jersey cases, four of which deal with car and other railroad equipment devices, and the other with technical bridge construction.

It is submitted that these cases have no application to the facts presented in the present case. They all deal with equipment, the practicability and value of which, depends upon the usage and experience of a given trade or business. Whether or not a *total lack of fire equipment* in this eleven-acre yard was due care is an elemental question of negligence for the jury. The defendant's witness Julian admits that it was feasible to place hydrants around the edge of the yard (p. 492, ll. 10-28).

That a question of lack of protection may be so elemental as to be independent of custom is brought out in *Cullen* v. *West Jersey & S. R. Co.*, 90 Atl. 283. Plaintiff was injured in falling on the defendant's platform, which was shown to have had a "saucer-like" depression. The plaintiff, thinking she was upon a level platform, slipped and sprained her ankle. The lower court refused a nonsuit. The upper court affirmed this ruling. At page 284 the Court differentiated this case from that of *Feil* v. *West Jersey & S. R. Co.*, 77 N. J. L. 502. After quoting at length from this cause, the Court observes:

> "This element of general use by well regulated railroad companies is entirely lacking in the present case, but quite apart from that, a step in a station platform so constructed as to be perfectly obvious to anyone walking along the platform in broad daylight, as in the *Feil* case, is a very different proposition" (from the facts in the case at bar).

In the present case there was no question as to whether the fire protection in the yards was sufficient, suitable and efficient. The question was: Was it due care to have *no fire protection whatever in this eleven-acre yard?* (See *supra,* page 17 of this argument.) *This was an elemental question of negligence for the jury to pass upon.* It takes neither expert testimony nor show of custom to determine whether it would have been more consistent with due care to place a few hydrants around the boundary of the yard (not between the tracks) in the vicinity of the cars of explosives, with hose connections for immediate use.

Again, it must be remembered that the situation in the Black Tom yards immediately prior to and at the time of the explosion was a very *extraordinary situation,* not to be governed by analogies to normal railroad yards (p. 576, ll. 25-30). At p. 576, ll. 28-35, defendant's superintendent, Mulligan, says:

> "Q Well, the shipment of munitions, the receipt of munitions at Black Tom began back in

> August, 1915, didn't it? A Yes, sir; about that time, I would say.
>
> Q And had pretty soon took very large proportions, hadn't it? A Well, toward the latter part of the year and beginning of 1916, why there was more cars coming in than the pier would accommodate, yes, sir."

In the four or five months prior to the casualty the Black Tom yard had become a veritable ammunition dump, and no safeguards in equipment in the eleven-acre yard had been added. It is submitted that the custom in other railroad yards, far from being conclusive, has little if any probative force in a situation such as that at Black Tom in July, 1916.

Appellant in its brief (pp. 100) offers the Court the suggestion that it was not bound reasonably to anticipate that the combustion of a large quantity of TNT would result in the explosion thereof, based upon the testimony of its expert that up to the time of the catastrophe the best scientific judgment was that TNT would not explode merely by combustion.

We may let the defendant itself answer its own present suggestion. In its opening defendant's counsel below said "We know nothing whatever about those explosives, except what appears in the way-bills, or what appears on the placard. They do not tell us what it is, they do not say just what material it is, nothing of the kind" (57 q., ll. 30 *et seq.*), and in its answers to interrogatories the defendant states that as to the contents of the cars way-billed as containing "high-explosives" (111) "the only information of the defendant as to said contents being that given on the face of the way-bills or bills of lading" (113, ll. 16-18; see, also, testimony of defendant's agent Dickman, 416, 417). And then we also recall the assertion of defendant's counsel to the Court below that "when we have a conjunction of these two things, fire and explosives, we have the most dangerous thing in the world" (404, l. 32; 402, l. 27). The term "high explosives," according to the I. C. C. regulations,

includes the dynamites and gun cotton (vol. II., 784; ll. 12-20).

Such alleged scientific judgment was denied by plaintiffs' expert Dr. McKenna (703-715), and there was evidence that the immediate cause of the explosion of the TNT in the cars in the yard may well have been caused by the explosion of a shell (704, ll. 21 *et seq.;* 682, ll. 22 *et seq.;* 683, l. 1), or some movement in connection with the attempted removal of cars of the defendant's drill engines (526, 527, 539, 546, 547, 555, 560, 326, 328, 334, 278, 207).

SEVENTH POINT.

The Trial Court did not err in declining to charge that the plaintiffs could not upon their complaint herein recover any damages against the defendant by reason of any alleged negligent conduct of defendant's employees after the discovery of the fire on its premises.

By its 19th request, the defendant raised the objection that there is no allegation in the complaint under which the plaintiffs could recover damages based upon the negligence of defendant's employees after the discovery of the fire. That the defendant had in mind a question of pleading rather than a question of evidence is shown by the following reason urged by the defendant in support of its motion for a non-suit and in support of its motion for direction of a verdict. "There being no proof of negligence on the part of the defendant with respect to the starting of the fire, if it is sought to hold the defendant responsible because of the alleged negligence of its employees after the fire started, the defendant cannot be held liable on such ground because there is no allegation in the complaint under which such alleged negligence might properly be left to the jury" (Seventh ground of appeal, page 3; eighteenth ground of appeal, page 6). In its brief, Point III, Subdivision e, the defendant apparently

abandons this point with the statement that the charge did not leave to the jury the question of the negligence of its employees after the fire. The following observations however, may not be out of place.

To answer the objection so raised it is only necessary to refer to the allegations of the complaint. Paragraph 11 alleges that it was the duty of the defendant "to exercise all reasonable care to prevent fire or explosion upon the said premises, and to control and extinguish the same * * * " (page 34). Paragraph 12 alleges that the defendant failed to perform *such* duty in the following, among other respects: "It neglected to provide employees sufficient in number and competence and to properly instruct the same, for the purpose of discovering and extinguishing any incendiary or accidental fire. Such insufficient, incompetent and uninstructed employee or employees as the defendant had, were negligent in *guarding,* discovering and *reporting* the fire hereinbefore alleged" (page 35).

Aside from the general allegations of the incompetency of the defendant's employees, which are not limited to a time prior to the discovery of the fire, there are two distinct respects in which the defendant's employees are alleged to have been negligent subsequent to the discovery of the fire, that is to say in "guarding" and in "reporting" the fire. The word "guarding" as here used is not perhaps altogether a happy one, but in the light of the prior allegations in Paragraph 11 of defendant's duty to take reasonable care to control and extinguish fire upon its premises and the allegation of Paragraph 12 that defendant failed to perform such duty in the particulars indicated, it is manifestly used in the sense of controlling or extinguishing. In any event there can be no ambiguity in the allegation that defendant's employees were negligent in "reporting" the fire. The defendant's 19th request was therefore too broad under any construction of the complaint and the Court would not have been justified in so charging.

Whatever construction be placed upon the complaint, however, and however correct the language of the defendant's 19th request may have been, the defendant was fully protected and its rights safeguarded in every respect by the charge to the jury in language of the Court's own choosing. It was clearly pointed out that the plaintiff could recover, if at all, only in respect of the particulars in which negligence was charged. The Court first told the jury in the language of the complaint what the plaintiffs charged were the duties of the defendant and in what respect the plaintiffs alleged these duties were violated (pages 725-727). The Court then said:

> "Now, first of all, the law says that the burden rests upon the plaintiff to make out by the greater weight of the evidence *that the negligence which he has charged in his written complaint against the defendant* existed and was the proximate cause of the loss of which the plaintiffs complain and for which in this suit they seek to have a recovery in damages. That does not mean that they are obliged to make out all of those specifications of negligence which I have read to you; for if they make out any one of those specifications of negligence or two or more of them, by the greater weight of the evidence and show by the greater weight of the evidenec that that one specification or two or more specifications of negligence were the proximate cause of the loss and that they existed on the part of the defendant company, that would give them a right to have a recovery and to have you assess their damages at such sum as they shall have proven by the greater weight of the evidence" page 727).

The Court said further:

> "That the plaintiff must make out by the greater weight of the evidence that this defendant company *in one or more of the particulars charged by it* neglected to use a degree of care commensurate with the risk of injury to be anticipated from neglecting to use such degree of care and that such neglect on its part was the proximate cause of the injury complained of by these plaintiffs before they are entitled to have a verdict" (page 732).

The Court said still further:

> "The whole imposition of liability upon the defendant rests upon the notion that it was at fault, because without fault, *and fault as charged in the written complaint of the plaintiff,* there can be no recovery whatever, and the verdict would have to be for the defendant" (page 733).

The Court said still further:

> "Has it been shown in this case that the defendant company did not exercise the degree of care *in any one or more of the particulars indicated in the plaintiff's written complaint?* If that has been shown, and its neglect to exercise it was a proximate cause of the plaintiff's injury, then you will say to yourselves, naturally, that it follows that there should be a recovery and an assessment of damages. If it has not, why manifestly there should not be a recovery and the verdict would have to be for the defendant" (page 736).

Even though the language of the defendant's 19th request had constituted a correct statement, the Court was not required to charge the defendant's language in preference to his own language correctly covering the point.

State v. *Rombolo,* 91 N. J. L. 560.

If the real issue is pointed out, as was done in this case, the judgment will not be disturbed because of the refusal to adopt some particular mode of presenting the issue.

Fath v. *Thompson,* 58 N. J. L. 180.

There is nowhere in the record any objection or exception to the admission of evidence as not being within the issues presented by the pleadings. If it could be said that the complaint does not when fairly construed allege perfectly any negligence of defendant's employees after the discovery of the fire, and further that there is evidence of such negligence in the record which may have influenced the minds of the jury, and still further that the defendant was not fully protected by the charge as rendered, nevertheless the case having been fully tried and the defendant

not having been surprised or suffered any injury, this Court has the power to amend the pleading if necessary to conform to the proof and should in the interest of justice exercise such power.

Van Houten v. *Van Houten,* 89 N. J. L. 301;
American Life Insurance Co. v. *Day,* 39 N. J. L. 89.

Finally, with reference to this point, Section 27 of the Practice Act of 1912 provides that:

> "No judgment shall be reversed or new trial granted on the ground of misdirection or improper admission or exclusion of evidence *or for error as to matter of pleading or procedure unless after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party.*"

EIGHTH POINT.

The refusal of the Trial Court to charge the language of defendant's 20th and 21st requests relating to an alleged emergency considered in the light of the Trial Judge's own language used in his charge was not error.

In its brief (Point III, Subdivision (e)) defendant refers to the emergency doctrine, but does not pursue the argument. The following observations, however, may not be out of place.

The evidence conclusively shows that a comparatively long period of time elapsed from the time of the first discovery of fire until the first efforts of defendant's servants towards fighting the fire were made. The so-called emergency doctrine is only applicable when the action has been called for and performed in a few seconds.

The train crews arrived at about 1:30 A. M., or one hour after the fire was discovered (pp. 524, 227). This

was the first effective effort of the defendant to fight the fire, although Crockett had a short time before connected a length of hose, but could find no one to assist him in the handling of it (p. 634, l. 35). It is impossible to place a numerical time limit on the applicability of the so-called emergency doctrine, but the most cursory perusal of the authorities is convincing that it is predicated upon almost instantaneous action—not action extending over several minutes or an hour.

Todd v. *Daniels,* 153 Ill. App. 223. A crane car overturned, injuring the plaintiff. The evidence showed that the plaintiff was in charge of the operating machinery of the car and that, at the time, the crane was lifting a large girder; that a sudden gust of wind swung one end of the girder around, causing the crane car to tip. Seeing this the foreman ordered the derrick cable lowered. This was done, but when the cable was fully let out the girder did not touch the ground and therefore pulled the crane car over, injuring the plaintiff. The question, as to negligence, narrowed down to whether or not the foreman had given the wrong order.

The Court said at page 228:

> "The gust of wind was not anticipated by any one engaged at the work with plaintiff. The peril of all on the car was suddenly made imminent. There was no time for anything but *instant* action. Instinct and not deliberation was the only faculty the exercise of which might save the situation. * * * The order to lower the girder was an emergency order, necessarily given on the spur of the moment in an effort to avert an accident which was momentarily threatening the crane car and those working upon it. Even if the judgment thus exercised was not the most judicious, the lack of time in which to form a more correct judgment relieves the act from an imputation of negligence."

The foreman here was meeting a situation that would have excited any reasonable man, and added to this he had but an "instant" to act in. The time element was so

infinitesimal that he could not rationalize, and there was no time to correct a false move. "Instinct and not deliberation was the only faculty the exercise of which might save the situation." It is probable that only two or three seconds intervened between the arising of the emergency and the injury sustained by the plaintiff.

Lewis v. *Long Island R. R. Co.*, 162 N. Y. 52, at page 62, the Court says:

> "Railways are not liable for a mistaken exercise of judgment upon the part of their servants * * * to act with the utmost possible promptitude when the circumstances are such as to afford no time for deliberation."

An analysis of the facts in this case show the defendant's servant had to make his decision in a few seconds. At page 61 the Court says:

> "At the rate of speed which the train was running only about eight seconds elapsed after he first saw the horses when the collision occurred. Thus, he was suddenly confronted with an emergency, having but a few seconds in which to take such precautions as were possible to prevent the accident or mitigate the injury."

Hestonville R. R. Co. v. *Kelley,* at page 120, the Court said:

> "Where the sole basis of liability is the omission to perform a certain duty suddenly and unexpectedly arising, we think there ought to be at least a consciousness of the facts which raise the duty on the part of the person who is charged with its performance, and a reasonable opportunity to discharge it."

This Court quotes this language with approval in the Hummer case (cited *infra*) at page 712. From the stated facts the time element in this case appears to be about thirty seconds.

Hummer v. *Lehigh Valley R. R. Co.*, 75 N. J. L. 703. The Court said at pages 712 and 713:

> "It is manifest that, owing to conditions over which the engineer had no control, he could not

ascertain, except by inference, that the wagon was caught on the crossing and was the real danger until the train was so close to the wagon that it was impossible to stop in time to avoid a collision.

The rule is well settled that 'where the sole basis of liability is the omission to perform a certain duty suddenly and unexpectedly arising, there ought to be at least a consciousness of the facts which raise the duty on the part of the person who is charged with its performance, and a reasonable opportunity to discharge it.' H. M. & F. Pass. Ry. Co. *v.* Kelley, 102 Pa. St. 115 (at p. 120).

The whole transaction, as the plaintiff says, from the time he saw the headlight, picked up his lantern and started up the track to signal the oncoming train, until the engine struck the wagon, occupied less than a minute.

The train, travelling at the rate of twenty-five miles per hour, which is about thirty-six and one-half feet per second, was, at that rate of speed, only about *sixteen seconds away from the crossing.* The engineer was confronted with a sudden emergency which necessitated his acting upon his judgment rather than upon a knowledge of the actual facts.

The fact that in sudden emergencies human judgment does not always arrive at a correct conclusion, and in an instant, is not evidence of negligence." Cites 162 N. Y. 152.

In view of the fact that the case so strongly approves of the rule in the Kelley case cited *supra,* it is well to note that the Court speaks frequently of the fact that the engineer was ignorant of the real danger (page 713). That the quotation from the Kelley case immediately follows such an observation is quite significant that this fact, in the Court's mind, was a very important part of the defendant's case.

It can hardly be argued, with good grace, that the defendant's watchmen and employees were ignorant of the danger in the Black Tom yards.

The Court in the Kelley case points out with particular care at page 713 that the entire incident occupied but

sixteen seconds. Again the time element was most important.

In applying the rule to the facts in the case at bar it should be remembered that both in the Hummer case, and in all of the other cases cited, the time element was well under a minute. It should also be noticed that both the Hummer case and the Kelley case laid very great stress on the fact that the one sought to be charged with a duty was ignorant of the danger until it was too late to act to prevent the damage being done.

From the reasoning of these cases it would seem to follow, of necessity, that the doctrine should not apply if it is shown that the defendant, at some subsequent time, had an opportunity to mend his mistake and to adopt a proper course of action before the damage complained of had occurred.

The language of the defendant's 20th and 21st requests that: "in the event of an emergency the defendant cannot be held responsible for "errors of judgment" on the part of their servants "in respect to what they did or failed to do concerning the putting out of the fire," with no other limitations, if submitted by the Trial Judge would have been an erroneous statement of the law. There was then no error in his refusal to so charge. Under such charge the jury could have disregarded any and all errors of judgment and the rule of due care would have been abrogated.

Workman v. *Mayor, etc., of the City of New York,* 63 Fed. 298, at page 298:

> "In the afternoon of July 11, 1893, a fire broke out on the westerly side of South street, about opposite Pier 48, East River. For the purpose of assisting in putting out the fire, the fire boat New Yorker, belonging to the mayor, aldermen, etc., made her way into the adjoining slip, and in the haste of the occasion she was run into the bow of the barkentine Linda Park, causing the latter considerable damage, for which the above libel was filed.

> For the respondent it is contended that a less rigid rule of care is applicable in the urgencies of such an occasion, and that considering the circumstances, the collision should not be held to have proceeded from negligence. I have no doubt that some acts which might properly be deemed negligent under ordinary circumstances ought not to be held negligent under the stress of fires. But the same general rule is, I think, nevertheless to be applied as the test of what is due care, viz., the care that a man of ordinary prudence would be reasonably supposed to exercise under like circumstances, if the burning property, and the property damaged, had been his own."

Lemay v. *Springfield Street Railway Company,* 110 Mass. 63. The plaintiff was a passenger upon the defendant's street car. By reason of the excessive speed of the car in going around a sharp curve, she alleged that she was thrown from the car. The motorman testified that when the car was approaching the curve the air brakes failed to work. There was evidence that the motorman did not use his hand brakes, but tried unsuccessfully to stop the car by reversing the power. There was a verdict for the plaintiff. The Court ordered certain exceptions overruled if the Superior Court would allow an amendment of the complaint. Otherwise they were to be sustained.

At page 67 the Court said:

> "It is true that allowance must be made for one compelled to act immediately, without the opportunity for deliberation, upon a sudden emergency. But this does not mean that he is necessarily excused for any error of judgment, but simply that his conduct is to be judged in view of the exigency and the need of immediate action. He is still bound to use the same degree of care to which he is ordinarily held; but due allowance must be made for the situation in which he is placed, and he is not to be held to a coolness of judgment for which there is not time."

NINTH POINT.

The joinder of the insurance companies as parties plaintiff, their identity with the assured, and their right to subrogation are not open to attack.

(a) The right of the Insurance Companies to be subrogated to the rights and remedies of the assured to the extent of payment of the loss is not dependent upon assignment by the assured.

The 8th and 21st grounds of appeal raised the contention that the insurance companies should have been nonsuited or that a verdict should have been directed against them, because there is no proof of assignment by the assured of an interest in the recovery (pages 3 and 6). This contention, which however is not argued in the brief and may be assumed to be abandoned, is based upon an erroneous idea of the foundation of the right of subrogation.

The contract of insurance is a contract of indemnity and the insurer upon paying to the insured the amount of a loss, total or partial, of the goods insured, becomes from that fact alone subrogated in a corresponding amount to the assured's right of action against the carrier or other person primarily responsible for the loss.

Hall & Long v. *Railroad Companies,* 13 Wall. 367, 370.

Phoenix Insurance Co. v. *Erie Transportation Co.,* 117 U. S. 312, 320-321.

Liverpool & Great Western Steam Company v. *Phoenix Insurance Company,* 129 U. S. 397, 462.

Chicago, St. Louis & New Orleans Railroad Co., v. *Pullman Southern Car Co.,* 139 U. S. 79, 87.

St. Louis, Iron Mountain & Southern Railway Co. v. *Commercial Union Insurance Co.,* 139 U. S. 223, 235.

Wager v. *Providence Insurance Co.,* 150 U. S. 99, 108.

Fidelity Title & Trust Co. for use v. *Peoples Natural Gas Co.*, 160 Pa. St. 8, 15.

In *Liverpool, etc., Steam Co.* v. *Phoenix Insurance Co., supra,* the Court said at page 462:

> "From the very nature of the contract of insurance as a contract of indemnity, the insurer upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, *without any formal assignment* or any express stipulation to the effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss" (Italics ours).

In *Phoenix Insurance Co.* v. *Erie Transportation Co., supra,* the Court said at page 321:

> "From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured, the amount of the indemnity agreed upon between them, is entitled, by way of salvage, to the benefit of anything that may be received either from the remnants of the goods, or from damages paid by third persons, for the same loss."

In *Fidelity Title & Trust Co.* v. *Peoples Natural Gas Co., supra,* the Court said at page 15:

> "An assignment of the claim by the Fidelity Title & Trust Co. or a formal order of subrogation to its rights is not necessary to the maintenance of the suit in its present form. The facts which entitle the appellee to such subrogation appear in evidence and are undisputed and the Fidelity Co. makes no objection to the use of its name in the enforcement of the claim."

In respect to the ownership of property insured and risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from a person primarily responsible for the loss.

Weber v. *Morris & Essex Railroad Co.*, 35 N. J. L. 409, 413;

Fire Assn. v. *Wells,* 84 N. J. E. 484, 487;

Hall & Long v. *Railroad Companies,* 13 Wall. 367, 370;

Chicago, etc., Railroad Co. v. *Pullman Southern Car Co.,* 139 U. S. 79, 88;

Wager v. *Providence Insurance Co.,* 150 U. S. 99, 108;

Moore v. *Taylor,* 175 N. Y. App. Div. 37.

The legal title to the claim against the person primarily responsible for the loss remains in the insured or his assignee after the receipt of the whole or a part of the insurance.

Chicago, etc., R. R. Co. v. *Pullman Car Co.,* 150 U. S. 79, 87.

Mobile & Montgomery Railroad Co. v. *Jurey,* 111 U. S. 584, 593.

Over v. *Railroad Co.,* 63 Fed. 34.

The interest of the insurer in the claim against the person primarily responsible for the loss, after payment of the insurance, is beneficial only and in the right of the assured.

St. Louis, etc., Railroad Co. v. *Commercial Union Insurance Co.,* 139 U. S. 223, 235.

Phoenix Insurance Company v. *Erie Transportation Company,* 117 U. S. 312, 321.

Palmer v. *Oregon-Washington Ry. & Navigation Co.,* 208 Fed. 666.

Gaugler v. *Chicago, etc., Ry. Co.,* 197 Fed. 79, 82.

Platt v. *Richmond, etc., R. R. Co.,* 108 N. Y. 358, 364.

At common law the claim against the wrongdoer must be asserted in the name of the assured and the person or persons primarily liable for the loss cannot defend either in whole or in part by showing the payment of insurance money. The fact of the payment of insurance is not

admissible in evidence either in bar or in mitigation of damages.

Chicago, St. L. & New Orleans Railroad Co. v. *Pullman Southern Car Co.,* 139 U. S. 79;

Turk v. *Illinois Central R. R. Co.,* 193 Fed. 252, 255;

M., K. & T. Ry. Co. v. *Fuller,* 72 Fed. 467;

Weber v. *Morris & Essex R. R. Co.,* 35 N. J. Laws 409;

Drinkwater v. *Dinsmore,* 81 N. Y. 390;

Briggs v. *N. Y. Central, etc., R. R. Co.,* 72 N. Y. 26, 32;

Carpenter v. *Eastern Transportation Co.,* 71 N. Y. 574;

Merrick v. *Brainard,* 38 Barb. 574; affirmed 34 N. Y. 208;

Collins v. *N. Y. Central, etc., R. R. Co.,* 5 Hun. 503;

Brewster v. *Silverstein,* 133 N. Y. Supp. 473;

Regan v. *R. R. Co.,* 60 Conn. 124;

Texas & Pacific R. R. Co. v. *Levi,* 59 Texas 676.

Under code provisions directing or permitting the prosecution of suits in the name of the real party in interest, all the insurance companies entitled to subrogation should unite in one suit and, if the assured also has an interest, he too should be joined as a party plaintiff.

Palmer v. *Oregon-Washington Railway & Navigation Company,* 208 Fed. 666;

Gaugler v. *Chicago, etc., Railway Company,* 197 Fed. 79;

Moore v. *Taylor,* 175 N. Y. App. Div. 37;

Jacobs v. *N. Y. C. R. R. Co.,* 107 N. Y. App. Div. 134, 137;

Brett v. *First Universalist Society,* 5 Hun. 149, affirmed 64 N. Y. 651;

Munson v. *N. Y. C., etc., R. R. Co.,* 32 N. Y. Misc. 282;

Allen & Arnink, etc., Co. v. *United Traction Co.,* 154 N. Y. S. 934;

Insurance Company v. *Railway Company,* 45 Oregon 53;

Fairbanks, et al. v. *Railway Company,* 115 Cal. 579;

Wunderlich v. *Railway Company,* 93 Wisc. 132;

Railway Company v. *Insurance Company,* 53 Neb. 514;

Railway Company v. *Miller,* 27 Tex. Civ. App. 344;

Insurance Co. v. *Railway Company,* 41 S. Car. 418;

Continental Insurance Co. v. *Loud Lumber Co.,* 93 Mich. 139;

Cunningham v. *Seaboard Air Line,* 139 N. Car. 427;

Pontiac Mutual County, etc., Insurance Co. v. *Sheebley,* 203 Ill. App. 527; affirmed 279 Ill. 118;

Farmers Mercantile Co. v. *Seaboard Air Line Ry. Co.,* 86 S. E. Rep. 678;

Pittsburgh, etc., Ry. Co. v. *Childs,* 108 N. E. Rep. 583.

Section 4 of the New Jersey Practice Act of 1912 provides:

> "Subject to rules all persons claiming an interest in the subject of the action and in obtaining the judgment demanded either jointly, severally or in the alternative, may join as plaintiffs except as otherwise herein provided."

Under the above cited authorities it was clearly proper to join both the assured and the insurers as parties plaintiff, both having an interest in the subject of the action and in obtaining the judgment demanded, without assignment from the assured. The insurers and the assured being in contemplation of law identical, how the recovery is divided between them is a question which interests them alone and in which the defendant is not concerned.

Mobile & Montgomery R. R. Co. v. *Jurey,* 111 U. S. 584, 594.

(b) The contention that the insurance companies are not entitled to subrogation for the alleged reason that it does not appear that claim was made by them at or before payment of the loss that the fire was caused by some third person is not before this Court. In any event such contention is without foundation in a case such as this where insurers and assured unite in an action against such third person.

All of defendant's motions and requests with reference to the right of subrogation under the terms of the policy were limited to the question of assignment.

The defendant now in its brief on appeal for the first time raises the contention that it does not appear in proof that the insurance companies at or before payment of the loss claimed that the fire was due to the act or neglect of some third person, and that in the absence of such proof they are not entitled to subrogation.

This contention cannot be raised for the first time on appeal.

Thornton v. *Fay,* 81 N. J. L. 427;
Hubatka v. *Maierhoffer,* 81 N. J. L. 410;
McCloud v. *Ill. Surety Co.,* 83 N. J. L. 572;
Coccia v. *Giuliano,* 85 N. J. L. 369.

With reference to the merits of such contention in this case, the insurer and the assured as one entity have united against an alleged tort feasor. Assuming that the defendant is legally responsible for the loss, its liability is neither increased nor diminished by the fact of payment of a part of the damages to the insurance companies. If the defendant is not liable to the insurance companies for any part of the loss, then it is liable to the insured for the whole of the loss. It is merely a question of the division of damages recovered in the right of the assured, and it is not open to defendant in any way to question such division. As said by the Supreme Court of the United States the question of division is one in which the defendant is not concerned.

Mobile, etc., R. R. Co. v. *Jurey, supra,* p. 594.

It is indeed an extraordinary contention to say that the defendant can raise for its own purposes the provisions of a contract for subrogation between an insurer and an insured which was not made for defendant's benefit and in which defendant has no interest of any kind.

If it is necessary to be technical, the very fact that this suit was brought is a claim by the insurance companies as well as by the insurer that the loss was caused by the act or neglect of a third person, the defendant, and whether such claim was made soon enough by the insurers if a material question at all is one that the insured can waive. It does not concern the defendant. Paragraph 10 of the complaint, being the complaint both of the insurer and the insured, refers to the policy provisions for subrogation, and shows that the insured does not dispute the insurers' right in this respect.

The case of *Fire Association of Philadelphia* v. *Schellinger,* 84 N. J. E. 464, relied on by the defendant, is an entirely different case from the case now on appeal. There the question was between the insurer and the insured; here it is between the insurer and the insured suing in harmony as one against the alleged wrongdoer; there the right of subrogation had been waived by the insurer and the insured claimed the benefit of the waiver; here the insured does not even claim there has been a waiver.

If the plaintiff insured is satisfied there is no reason why the defendant should not be. To argue as plaintiff contends that the insured might be able to recover again the amount of the judgment apportioned in favor of the insurance companies is ridiculous. The insured is a party to this action and is bound by the judgment. *It is fundamental that a tort chose in action is indivisible and cannot be sued upon piece-meal.*

Moreover, as shown by the charge (p. 724, ll. 10-40), counsel in the case agreed that in the event of a verdict favorable to the plaintiffs, the judgment should be apportioned between insured and insurers, and further agreed how much each group should have in the event of a deci-

sion for the plaintiffs in full. There was no exception to this charge, and it stands as binding upon all the litigants, including the defendant, subject only, as to the defendant, to the particular exceptions made in the trial court.

(c) The sugar insured was destroyed by fire within the meaning of the policies.

The defendant contends in the 9th, 11th, 22d and 24th grounds of appeal that the plaintiff insurance companies should have been non-suited or that a verdict should have been directed against them, for the alleged reason that there is no proof that the sugar in question was destroyed by fire and not by explosion (pp. 3-4; 6-7).

This contention finds no support in the evidence. The origin of the whole disaster at Black Tom was a fire in the railroad yards (Townes, 141; Mrs. Townes, 153; Walmsley, 166; Kane, 195; Sloan, 223; Baker, 235; McEneny, 257; Kelly, 266; Casperson, 284; Casperson, 296; Gately, 308; Klosterman, 325; Hogan, 342; Treger, 361; Dickman, 424; Julian, 456; Henley, 524; Walsh, 544; Crockett, 632).

The two explosions occurred in the course of the fire and were incidental thereto. As a result of the first explosion the warehouses were badly damaged (Klosterman, 327, 341 Hogan, 349, 355; Treger, 365), but the goods in the warehouses remained intact (Davidson, 597-598).

Immediately after the explosion the warehouses took fire and their contents were destroyed (Hogan, 349, 355-356; Treger, 365-366; Davidson, 598).

The policies insured the plaintiff co-partnership against all direct loss or damage by fire except as thereinafter provided (Exhibit P. 10, 766). The only material exception is that it was provided that the companies should not be liable for loss by explosion, "unless fire ensues and in that event for the damage by fire only" (770, l. 91). In this case fire did ensue and it was the fire and not the explosion that caused the loss of the sugar.

The following testimony of defendant's witness, Superintendent Davidson of the Warehouse Company, upon this point is clear and undisputed:

> "Q Did you observe whether the walls were torn outward or inward, or which way? A No—they must be outwards because the freight that was in was standing intact inside and the walls gone out (597, ll. 10-20).
>
> Q You could see the freight there? A Standing straight up and the walls gone.
>
> Q The goods which were stored in the warehouse, you could see it? A Yes.
>
> Q And when was that? A That would be about—
>
> Q After the first explosion? A After the second explosion.
>
> Q So, of course, it was after the first, too. Did you see fire in those warehouses? A Yes, sir.
>
> Q Everything in them was burned up, wasn't it, practically? A No, no. The fire only started in every warehouse when I got down—every warehouse was burning.
>
> Q The fire went on and practically destroyed everything, didn't it? A Yes, sir" (598, ll. 10-20).

There are two reasons therefore why the loss in question is a loss by fire:

(1) Because the sugar did actually burn following the explosion and was not destroyed by the explosion itself. The fact that some of the sugar may possibly have been damaged by dirt and debris from the damaged warehouses before the ensuing fire actually consumed it could be material only upon the question how much the companies should pay. This phase of the matter will be further discussed hereinafter.

(2) Because even damage, if any, occasioned by the explosion to the sugar in question before the ensuing fire, was under the circumstances, a loss by fire, the origin of the whole disaster being a hostile fire upon premises adjacent to the warehouses and the explosion being merely incidental to such fire. The explosion clause of the

policy has never been held effective to relieve the insurer from liability for loss by explosion occurring in the course of and incidental to a hostile fire upon the premises containing insured merchandise.

Wheeler v. *Phoenix Ins. Co.*, 203 N. Y. 283;
Washburn v. *Farmers Ins. Co.*, 2 Fed. 304;
Washburn v. *Miami Valley Ins. Co.*, 2 Fed. 633;
Transatlantic Fire Ins. Co. v. *Dorsey*, 56 Md. 70.

This case is not such a case as *Ross* v. *L. L. & G. Ins. Co.*, 83 N. J. L. 340, where the explosion was caused by a lighted match and was not incidental to a hostile fire. A lighted match is not a fire (*Mitchell* v. *Potomac Ins. Co.*, 183 U. S. 42, 52).

The plaintiffs are not unmindful of the cases which hold that where a fire produces an explosion and the explosion causes concussion damages only on distant premises, such concussion damage is not a loss by fire. The question is an open one in this State, however, and considering the fact of the proximity of the warehouses to the railroad yard and the fact that the warehouse company was a subsidiary of the defendant and that for many purposes at least the whole of Black Tom constituted premises under one management it could easily be said that the fire in the yard was the cause even of the explosion damage, if any, to the insured merchandise.

The defendant in its brief, for the first time, has raised the question of the construction of the following clause of the policy: "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." While the question of the construction of this clause is of course not before this court, not having been raised in the trial court, every insurance lawyer knows that the falling walls clause and the explosion clause are always construed together so that even where the walls do fall, if they fall as the result of explosion, the policy does not

cease and the insurer remains liable for any damage by ensuing fire.

Dows v. *Faneuil Hall Insurance Co.*, 127 Mass. 346;

Davis v. *Insurance Co. of North America*, 115 Mich. 382;

Leonard v. *Orient Insurance Co.*, 109 Fed. 286.

(d) Insofar as the defendant is concerned the settlement between the insurers and the assured is conclusive upon the question of the liability of the insurers upon the policies and the right of the insurers to be subrogated to the rights and remedies of the assured to the extent of the amounts paid.

In the 10th and 23rd grounds of appeal the defendant raises the contention that the payment by the insurance companies were voluntary payments which did not give rise to any right of subrogation (pages 3 and 7). The same point is raised in the 32nd and 33rd requests to charge (pages 14 and 15).

It is believed that it has hereinbefore been shown that the loss in question was a loss by fire for which the companies were liable. There can be no doubt that it has been shown that the probabilities of the legal liability of the insurance companies were so great that the companies were justified in settling with the insured. The companies were not obliged upon penalty of losing the right of subrogation to require the insured to establish beyond all doubt that the loss was a loss by fire within the policy and not a loss by explosion, or to require the assured to show how much was due to the explosion, if any, and how much to ensuring fire. It is of no advantage for the defendant to object to the settlement. If the defendant is not liable to the insurance companies for the amounts paid by them it is liable to the assured for such amounts.

The law is well settled that payment honestly made by insurers without litigation in satisfaction of a claim by the insured, entitles the insurers to the remedies avail-

able to the insured; and such remedies cannot be resisted on the ground that the payments were not within the terms of the policy.

King v. *Victoria Ins. Co.,* L. R. App. Cas. (1896) 250;

United States v. *American Tobacco Co.,* 166 U. S. 468, 478;

Nord-Deutscher Lloyd v. *Ins. Co. of North America,* 110 Fed. 420, 429;

Maryland Casualty Co. v. *Cherryvale Gas, Light & Power Co.,* 152 Pac. Rep. 313 (Kansas);

Fidelity Title & Trust Co., for use against Peoples Natural Gas Co., 150 Pa. St. 8;

Railway Co. v. *Fire Association,* 60 Ark. 325;

Sun Mutual Ins. Co. v. *Miss. Valley Transp. Co.,* 17 Fed. 919, 923;

Insurance Co. v. *C. D. Jr.,* 1 Woods 72; Fed. Cas. No. 7051;

May on Insurance, Section 454;

MacGillivray on Insurance, p. 735.

The English case above cited was a case of loss and damage to wool by collision between certain punts. The insurers paid the loss and brought suit against the alleged *tort feasor.* One of the defenses was that the wool at the time of the damage was not covered by the policy. The Court declined to go into the alleged defense, and said:

> "To their Lordships it seems a very startling proposition to say that where insurers and insured have settled a claim of loss between themselves a third party, who caused the loss, may insist on ripping up the settlement and on putting in a plea for the insurers which they did not think it right to put in for themselves; and all for the purpose of availing himself of a highly technical rule of law which has no bearing on his own wrongful act. * * * But it is claimed as a matter of positive law that in order to sue for damage done to insured goods insurers must show that if they had disputed their liability, the claim of the insured must have

> been made good against them. If that be good law the consequence would be that insurers could never admit a claim on which dispute might be raised except at the risk of finding themselves involved in the very dispute that they have tried to avoid by persons who have no interest in that dispute, but who are sued as being the authors of the loss. The proposition is, as their Lordships believe, as novel as it is startling * * *''

In *United States* v. *American Tobacco Co., supra,* the Court said, page 478:

> "Whether or not the insurance companies could have made a successful defense (to the extent of the value of the stamps in question) is beside the question. They were not bound to make such defense."

In *Nord-Deutscher Lloyd* v. *Ins. Co. of N. A., supra,* the Court said:

> "The case does not require us to go into possible defenses that the insurance companies might have made. It cannot be material to the carrier with whom it litigates the question of negligence."

In *Maryland Casualty Co.* v. *Cherryvale Gas, Light & Power Co., supra,* the plaintiff had insured against the breakage of plate glass. Having paid a loss it brought action under an alleged right of subrogation. The defense was that the glass was destroyed by fire for which loss the plaintiff was not legally liable. The Court held this defense insufficient, and said:

> "Moreover, the insurance company was not required to quibble with the assured as to whether its policy fairly covered the breaking of the glass by the gas explosion or whether the remoter cause, the lighting of a match, was a fire and that the fire was the cause of the breaking of the glass. The insurance company had the right to pay and it is subrogated to all the rights of its policyholder against the wrongdoer who released the gas which did the mischief."

In *Fidelity Title & Trust Co. for use against Peoples Natural Gas Co., supra,* the Court said, pages 15 and 16:

"There is no evidence in the case which warrants an inference of collusion between the Fidelity Company and the appellee (the insurer) in the suit on the insurance policy, or that the appellee had any defense to the action which it neglected to make. It did not allege that the policy was void by reason of a violation of its conditions, and it is not apparent now that there was any ground for such a defense. *Besides it is not clear that the appellee owed any duty to the appellant to make its defense if it existed. The liability of the appellant for the loss in question is grounded on its own negligence and is primarily to the owner of the property damaged thereby*" (italics ours).

TENTH POINT.

The Trial Court correctly declined to charge the language of the defendant's 31st request, reading as follows: "The jury is not at liberty to allow the plaintiffs, or any of them, any interest in respect of any sum found to be due them, or any of them."

The allowance of this request would have even prevented the jury *in its discretion* from including interest in its finding of damages. We believe that the cases clearly demonstrate that this is not the law. There is conflict in the decisions whether the allowance of interest is a matter of right in law or matter of discretion for the jury, but whichever rule prevails in New Jersey the Trial Judge was right in his refusal to charge as requested by the defendant.

Kendrick v. *Towle,* 60 Mich. 363. The defendant operated a logging railroad which passed by a mill belonging to the plaintiff. An engine operated over the right of way set fire by its sparks to the plaintiff's mill. The Court said at page 368:

"The defendant insists, as his fourth reason for reversal, that the jury allowed interest to be recovered on the amount awarded as damages from the time of the fire, and that the charge of the court

> permitted it. It does not appear that anything more than actual compensation was given by the jury for the property burned; and in such cases unless the addition of interest would increase the damages to so great an extent as to be clearly unjust when the value of the property is taken into consideration, no reasonable objection can be made to the allowance of interest; and the objection in this case cannot be allowed to prevail."

Varco v. *C. M. & St. P. Ry. Co.*, 30 Minn. 18. The plaintiff sued to recover for the value of two colts injured by alleged negligence of a locomotive belonging to the defendant. At page 22 the Court said:

> "The jury were also instructed in case they found for the plaintiff to allow interest on the value of the property from the time of the injury. This was proper. It is not a case in which exemplary damages were claimed or allowed, and the basis of plaintiff's claim for compensation is the value of the property destroyed. In such cases interest is necessarily allowed for the indemnity of the party. The same rule applies as in the case of conversion of property."

Wilson v. *City of Troy*, 135 N. Y. 96. An excavation had been made in the city street. A valuable horse of the plaintiff fell into the excavation, injuring himself badly. The plaintiff asked as a measure of damages the value of the horse at the time of the accident plus interest to the time of judgment. At page 104 the Court said:

> "The principle that the right to interest in such case was in the discretion of the jury was, however, gradually abandoned, and now the rule is that the plaintiff is entitled to interest on the value of property converted or lost to the owner by a trespass as matter of law."

Among other authorities in accord with the above are:

Deems v. *Alb. &c. Line*, 7 Fed. Cas. No. 3736;

J. S. R. R. v. *McAlpine*, 75 Ala. 113;

Geo. Pac. Ry. v. *Fullerton*, 79 Ala. 298;

Jacksonville R. R. v. *Peninsular Land &c. Co.*, 27 Fla. 1;

Wabash Railroad v. *Williamson,* 3 Ind. App. 190;
Rippey v. *Miller,* 46 No. Caro. 479;
Texas & Pac. Ry. Co. v. *Tankersley,* 63 Texas 57.

In his 8th edition of this work on Damages, Sedgwick says, at Volume I, pp. 463, 464:

> "Sec. 317. *Property destroyed by negligence.* There seems to be no reason why any difference should exist in the rules governing the allowance of interest, on the value of property destroyed, whether the destruction was caused by the misfeasance or by the negligence of the defendant; that is, whether the suit is such that at common law an action would have lain, on the one hand of trover, trespass, replevin, or detinue; on the other, of trespass on the case. In some jurisdictions interest is in fact allowed in cases of negligence; but in others interest in such cases is held to be in the discretion of the jury."

Finally, that interest is allowable on actions in tort based upon the deprivation of property, in New Jersey, is established by the case of

Hopple v. *Higbee,* 23 N. J. L. 342.

The defendant was a constable. He had seized certain liquor belonging to the plaintiff under an attachment issued against one M. The plaintiff claimed the liquor as his own and asked recovery against the constable for his disturbance of possession. This was a case of conversion, but not a wilful conversion. The mental attitude of the plaintiff in committing the tort was perhaps less culpable than the mental action of a defendant committing a tort through negligence. At page 347, the Chief Justice said:

> "In the action of trespass *de bonis asportatis* damages are allowed upon two grounds, viz: 1. By way of compensation for the loss of the goods. 2. As vindictive or exemplary damages for a wanton or malicious injury to the rights or feelings of the plaintiff, as a public example to prevent a repetition of the act. Where the trespass is accompanied by no circumstances of aggravation, the value of the property to the plaintiff at the time of the

injury, *with interest,* furnishes ordinarily the measure of damages.

Pacific Ins. Co. *v.* Conrad, Bald. 138.

Sedgwick on Damages, 549."

The case was cited with approval in *Outcal* v. *Durling,* 25 N. J. L. 448.

In connection with this, the case of *Parrott* v. *Knickerbocker Ice Co.,* 46 N. Y. 361, is most illuminating. The action arose out of a claim for damages caused through a collision of vessels in a river. In allowing interest in the computation of damages, the Court said, at p. 369:

> " * * * we think that interest on the value of the property lost was properly allowed. In cases of trover, replevin and trespass, interest on the value of property unlawfully taken, or converted, is allowed by way of damages, for the purpose of complete indemnity of the party injured, and it is difficult to see why, on the same principle, interest on the value of property lost or destroyed, by the wrongful or negligent act of another, may not be included in the damages. (Propeller Mary Vaughan *v.* Steamboat Telegraph, 2 Benedict 47; Sedgwick on Damages, p. 385, and cases cited; Walrath *v.* Redfield, 18 N. Y. 457)."

It would seem that the reasoning of the New York court was sound. There would seem to be no inherent difference in a property loss occasioned by conversion or negligence—especially is this so when the conversion is not wilful or malicious.

Against this weight of authority, which it is submitted is correct on principle, tort cases may be cited in which the court refused to allow the recovery of interest. The cases are mostly personal injury, libel and slander, and cases involving the loss or destruction of property *which has no readily ascertainable value.* The reason given for the disallowance of interest in these cases ("interest is not allowed on unliquidated damages"), is that the person liable does not know what sum he owed, and, therefore, cannot be in default for not paying until the damages are assessed by a jury's verdict. This reason very evi-

dently deals with value, as even in contract cases where interest is generally allowable the breach of contract or the extent of the breach is not finally determinable short of trial and verdict. Such cases are those cited by defendant in its brief.

Philbrick v. *Mundy,* 106 Atl. 361. This was an appeal from the Circuit Court of Essex County to the Supreme Court. At p. 106, the Court said:

> "The only ground of appeal argued is that 'the court erred in charging the jury to allow interest on an unliquidated claim for damages.' We are of the opinion that the point is well taken.
>
> At the trial it appeared that the reasonable value of the repairs to the automobile necessitated by the accident was $879.19. The learned trial judge instructed the jury that, if they found for the plaintiff, it should be for that amount with interest from the date of the accident. Accordingly, the jury added interest on $879.19 and rendered a verdict for $1,002.43.
>
> We think that was wrong. Interest is not allowed on unliquidated damages. Speer *v.* Van Orden, 3 N. J. L. 232, 653. The reason is that the person liable does not know what sum he owed, and therefor cannot be in default for not paying. That principle is applicable to an action of tort, *such as the present,* where the damages are an uncertain quantity, depending on no fixed standard, and cannot be made certain except by verdict."

There is no fair market value of the charges that an automobile mechanic will make for repairs to a machine injured through accident. As the case stands, it is simply an authority against the proposition that as a rule of law the Court must instruct the jury to find interest along with its damages in such a tort case. The case does not hold that the jury cannot in its discretion assess interest. It will be noted that the case is not a court of last resort case, and hence is not of the highest authority in the State.

Speer v. *Van Orden,* 3 N. J. L. 232. The case arose on certiorari. The plaintiff demended $12.75 damages with

interest for two years as compensation for the killing of its heifer by the defendant's dog, which at the time was in charge of a negro boy. The insufficiency of this state of demand was alleged as a cause of reversal.

> "*By the Court.* Without deciding how far the master of a negro is liable for his tortious acts, interest on uncertain and unascertained damages cannot be recovered."

The report of this case is so meagre that we cannot tell whether the interest was demanded as a matter of right, or whether it was simply asked that the jury be allowed to assess damages if they saw fit. If the former is the case, it simply means that this case is committed to the proposition that interest is not allowable in a tort action where the damages are not ascertainable and uncertain as a matter of law. Furthermore, in the language of the Court the damages were were "uncertain and unascertainable." The case differs from the situation in the case at bar, in that the damages in the present case are as accurately determinable as the amount of a debt or the price of goods as fixed in a contract.

Richards v. *The Citizens M. Gas Co.*, 130 Pa. 37. This was an action for the negligent destruction of property. At p. 39, the Court said:

> "Interest as such is recoverable where there is a failure to pay a liquidated sum due at a fixed day, and the debtor is in absolute default. It cannot, therefore, be recovered in actions of tort, or in actions of any kind where the damages are not in their nature capable of exact computation, both as to time and amount. In such cases the party chargeable cannot pay or make tender until both the time and the amount have been ascertained, and his default is not, therefore, of that absolute nature that necessarily involves interest for the delay. But there are cases sounding in tort, and cases of unliquidated damages, where not only the principle on which the recovery is to be had is compensation, but where also the compensation can be measured by market value, or other definite standards. Such are cases of the unintentional

conversion or *destruction of property,* etc. Into these cases the element of time may enter as an important factor, and the plaintiff will not be fully compensated unless he receive, not only the value of his property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages, in the nature of interest, for the lapse of time. It is never interest as such, nor as a matter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure. * * * Interest is recoverable of right, but *compensation for deferred payment in torts* depends on the circumstances of each case. The plaintiff may have set his damages so inordinately high as to have justified the defendant in refusing to pay, or in other ways the delay may be plaintiff's fault; or, the liability of defendant may have arisen without default."

Regan v. *N. Y. & N. E. R. R. Co.,* 60 Ct. 124. The defendant's railroad damaged plaintiff's stock in storehouse by fire along right of way. At pp. 142 and 143, the Court said:

"One other point made on the trial has been assigned for error, although it was not noticed in the argument for the defendant. The defendant claimed that the rule of damages was the value of the goods at the time of their destruction, without interest, but the court allowed interest from the date of the injury to the date of judgment. It has been sometimes said that interest is not to be allowed on unliquidated demands. There are actions, such for instance as assault and battery or slander, to which the rule is applicable. But where the demand is for property that has a market value susceptible of easy proof, there is no propriety in such a rule. A loss of property having a definite money value is practically the same as the loss of the use (or interest) of so much money. We think, therefore, a just indemnity to the plaintiff required the addition to the value of the goods at the time of their destruction, of the interest from that time to the date of judgment. This court has already applied such a rule to actions of trover, for the conversion of goods, as in Clark *v.* Whitaker, 19 Conn. 319, and Cook *v.* Loomis, 25 Conn. 483, and

> to the action of trespass for taking personal property, as in the case of Oviatt *v.* Pond, 24 Conn. 47d."

In the case at bar it is the uncontradicted testimony of the witnesses Herbert S. Connell and Earle Knoblock that there was a daily reported market value for sugar in New York (p. 75, l. 4; p. 82, l. 39; p. 83). The facts in the present case then show that the value of the goods destroyed was ascertainable in a most accurate and conclusive way.

The defendant in its brief attempts to show that there was no certain market value for the sugar. Its position is summed up in the next to the large paragraph in defendant's argument under this point, where it is said:

> "Later in the trial, plaintiff's counsel recognized the uncertainty as to the exact market value, and stated in open court that the plaintiffs' claim would be limited to Friday's price of 5 cents." (This appears to be an error for 5⅛. See paragraph immediately above in defendant's argument and also the record (p. 79, ll. 1-10; p. 84, ll. 1-10)), "and would disregard Monday's price of 5¼" (p. 366, ll. 20-30).

The legal fallacy of this contention is patent.

The plaintiff's concession in accepting the market price of Friday's market, the quotations of which are not questioned in defendant's brief, was made with a view of eliminating a possible *legal* question of what market value—that of Friday or Monday—was the proper *legal* test of damage. As a matter of *law,* the authorities are in discord as to whether the market last before the casualty or the first market after the casualty supplies the proper legal test. We must assume, however, that one or the other is the proper and certain test in the courts of this State. The plaintiff by adopting Friday's market price took the lowest quotation and hence the defendant cannot be heard to complain.

Appellant suggests that doubt in counsel's mind as to the proper market value to be applied under the law

makes the damages unliquidated. *It was a question of law for the Court and not a question of fact for the jury, that counsel had under consideration.* If a question of law makes the damages unliquidated, then a *legal* question as to whether interest was collectible on a promissory note would make the damages unliquidated and no damages could be allowed in an action of assumpsit on the total amount due. In legal theory, the law is certain. Uncertainty as to the facts makes the damages unliquidated and defendant admits the certainty of the facts in its brief (p. 176), "The defendant does not dispute the market value of the sugar, nor the method by which it was determined." The damages were not, in the language of the cases of *Speer* v. *Van Orden* (*supra*), and *Philbrick* v. *Mundy* (*supra*), uncertain and unascertainable.

It is submitted that the authorities *supra* clearly establish that the plaintiff was entitled in this case either to (1) damages as of right in law, or (2) in the discretion of the jury. The allowance of the defendant's request would have precluded the plaintiffs from interest in all events.

The learned Trial Court told the jury:

> "Now, in order to make it plain to you how that verdict should be returned if you find for the plaintiffs for the full sum under the rules which I will give you later, you would simply say when you come in, 'We find in favor of the plaintiffs and we assess the damages of the Howell firm at $36,854.09 principal and $5,811.78 interest; and we assess the damages of the insurance companies at the sum of $325,019.37 principal and $52,306.06 interest."

This language would seem to leave the question of allowance of interest to the discretion of the jury, and the defendant in any event cannot be heard to complain, *as it failed to take an exception to this portion of the charge.*

CONCLUSION.

Stripped of all technicalities, the case comes down to this:

Prior to the beginning of the traffic in explosives and of the munitions depredations in this country the appellant instituted certain measures of care with respect to fire, measures the most favorable view of which for the appellant is that such measures were then commensurate with the risk of danger at that time to be anticipated.

Then the situation radically changed in two respects: (a) for over a year before the casualty the appellant continuously had in its custody, moving through the Black Tom yard, enormous quantities of highly dangerous explosives, and (b) it was matter of public knowledge that there were persons around who were endeavoring to blow up munitions.

To this altered situation, of the greatest danger, the appellant applied precisely the same measures of care instituted before the perilous condition arose, in no respect whatever increasing its vigilance.

And, as the result of incendiarism, the very danger reasonably to be anticipated, the enormous quantity of such explosives at Black Tom on July 30, 1916, exploded with results highly disastrous to these plaintiffs.

Appellant through its counsel asserted to the Court below that "when we have a conjunction of these two things, fire and explosives, we have the most dangerous thing in the world" (404, l. 32; 402, l. 27).

Against a publicly known peril calculated to cause the most dangerous thing in the world, the appellant by its own standards of care stands convicted, irrespective of any contentions of the plaintiffs, of failing to exercise

that degree of care which the people through the law put upon it for their own self-preservation.

The judgment should be affirmed with costs.

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New Jersey Supreme Court

HUDSON COUNTY.

FREDERICK H. HOWELL, *et al.*, Plaintiffs, *v.* LEHIGH VALLEY RAILROAD COMPANY, Defendant.	Action at Law. Before Mr. Justice Speer.

PLAINTIFF'S MEMORANDUM AS TO THE SOURCE OF THE LAW GOVERNING THE MEASURE OF DUTY OWED BY THE DEFENDANT.

This memorandum is prepared on the hypothesis that evidence will be adduced at the trial of this cause, tending to show a lack of reasonable care within the State of New Jersey on the part of the defendant common carrier in the prevention of incendiary or accidental fires, and in the taking of precautions for extinguishing or minimizing fire, once started, among explosives, munitions of war and highly inflammable substances in course of transportation in interstate and foreign commerce. The question has been raised whether the measure of duty owed by the defendant is to be determined by the common law of the State of New Jersey or by alleged Federal law as represented by certain regulations of the Interstate Commerce Commission made under a provision of an act of Congress.

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It is the purpose of this memorandum to demonstrate that the measure of duty or standard of care owed by the defendant is exactly the same whichever rule of action is to be applied—that of of the State of New Jersey or that which is alleged to be the Federal rule, and that there would seem to be no occasion for any ruling upon the source of that duty or care; but that if a decision is to be made as to which law applies, the law so to be applied is the common law of the State of New Jersey.

SYNOPSIS OF THE ARGUMENT.

FIRST POINT.

The common law of the State of New Jersey determines the measure of duty owed by the defendant.

(a) The Federal statute and regulations made thereunder are expressions of criminal acts and liabilities and not intended as a complete measure of civil duty.

(b) The regulations of the Interstate Commerce Commission have not covered the field to the complete exclusion of the common law of the State of New Jersey.

(c) There is no Federal common law which can be invoked.

SECOND POINT.

Assuming the applicability of the regulations of the Interstate Commerce Commission, which we deny, the measure of duty of the defendant under the hypothesis stated at the beginning of this memorandum would be the same as if predicated upon the State common law.

(a) Federal statutes and regulations made thereunder are to be read in the light of the common law.

(b) The common law measure of duty in New Jersey is the same as that of the so-called English or general common law.

(c) The regulations of the Interstate Commerce Commission.

FIRST POINT.

The common law of the State of New Jersey determines the measure of duty owed by the defendant.

(a) *The Federal statutes and regulations made thereunder are expressions of criminal acts and liabilities and not intended as a complete measure of civil duty.*

The Act of Congress, authorizing the Interstate Commerce Commission to formulate rules and regulations for the safe transportation of explosives, is found in the *Criminal Code*. The enacting clause is as follows:

> "Be it enacted, etc., that the *penal laws* of the United States be, and they hereby are, codified, and revised and amended, with title, chapters, head-notes, and sections, entitled, numbered and to read as follows."
>
> Chap. 321, 35 U. S. Stat. at Large, 1088.

The Code is divided into chapters and sections. That portion of it with which we are concerned appears in Chapter Nine, which is headed: *"Offenses** against Foreign and Interstate Commerce."

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*Italics ours throughout.

The section dealing with the transportation of explosives are 232 to 236 inclusive—they are an integral part of the Criminal Code.

These considerations are sufficient, in themselves, to show that it was the intent of Congress to pass a statute defining *Criminal Acts.* "Crimes" and "*Offenses* against Foreign and Interstate Commerce"—surely such titles and headings are not ambiguous. It would be hard to imagine more lucid words and phrases.

The language in the body of the act itself is even more compelling.

Section 232 makes, with certain exceptions, the carriage of explosives by vessels or vehicles carrying passengers an offense. The offense is defined by Congress and is not left to further elaboration by the Commission.

Section 233 reads as follows:

> "The Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. Said Commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions. Such regulations shall be in accord with the best known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport. Such regulations, as well as all changes or modifications thereof, shall take effect ninety days after formulation and publication by said Commission and shall be in effect until reversed, set aside, or modified."

Here Congress is dealing with the transportation of explosives by land, and it authorizes and requires the Interstate Commerce Commission to formulate rules for the safe transportation of explosives which shall be binding upon all common carriers.

Section 234 makes it unlawful to transport "liquid nitroglycerin, fulminate in bulk in dry condition," etc. In this section no supplementary regulation by the Commission is called for.

Section 235 provides for the marking of packages of explosives, and concludes with the following paragraph:

> "Whoever shall knowingly violate, or cause to be violated, any provision of this section, or of the three sections last preceding, or any regulation made by the Interstate Commerce Commission in pursuance thereof, shall be fined not more than two thousand dollars, or imprisoned not more than eighteen months, or both."

Section 236 reads as follows:

> "When the death or bodily injury of any person is caused by the explosion of any article named in the four sections last preceding, while the same is being placed upon any vessel or vehicle to be transported in violation thereof, or while the same is being so transported, or while the same is being removed from such vessel or vehicle, the person knowingly placing, or aiding or permitting the placing, of such article upon any such vessel or vehicle, to be so transported, shall be imprisoned not more than ten years."

Sections 235 and 236 provide the penalties for a violation of the Act. It is very significant that they are not directed against the carriers or their agents specifically. The inclusion of a prison term is decisive that the penalty is not directed solely

against the carriers. The punishment under Section 236 is a maximum imprisonment of ten years; no fine is provided. Perhaps this section would not apply to all violations of the regulations of the Commission. It nevertheless shows the intent and purpose of the Act.

The language of Section 233 is that the regulations shall be *"binding upon the carriers."* The meaning is, that the carriers as well as all other legal entities are subject to the provisions of the criminal code. These words would seem to support a fine against the carriers under Section 235.

The language of Section 235 is that:

> "Whoever shall knowingly, etc. * * * shall be fined not more than two thousand dollars, or imprisoned not more than eighteen months or both."

It would be hard to imagine words which could more completely and absolutely define violations of the regulations as criminal offenses. By the use of the word "knowingly" the Congress has provided that the crime is not complete until a *mens rea* is shown, thus indicating that the offense is more than a public tort—that it is a crime. The particular offense is not denominated a misdemeanor or felony. Throughout the Criminal Code, however, such classification does not appear to be the practice.

What does a violation of the regulations lead to? A fine of not more than two thousand dollars or imprisonment for not more than eighteen months or both. *No provisions for civil liability are made. Indeed, there is no provision made for the recovery of a penalty by a party injured through a violation of the Act. Civil rights are not touched upon in any way.*

Section 10 of the Interstate Commerce Act declared discrimination between shippers to be a criminal offense. The section concluded with the following language:

> "and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of Competent Jurisdiction for all damages caused by or resulting therefrom."

Act Feb. 4th, 1887, c. 104, Sec. 10, as amended;
Act March 2, 1889, c. 382, Sec. 2, and
Act June 18, 1910, c. 309, Sec. 10.

The act had declared certain practices to be unlawful. Penalties were provided in Section 10 for violations of the act. In order that the parties injured by such practices might have civil redress, the Congress added the clause above. In this way the provisions of the act were given a civil significance and the intention of the Congress was made apparent.

The fact that no such clause appears in the sections of the Criminal Code under discussion is at least significant. The Congress has expressed no intent that the violation of these regulations resulting in injury, shall, *per se*, give rise to a civil action. We submit, therefore, that no rule of construction would justify the conclusion that the Congress had intended to occupy the field of civil rights, upon this subject, to the complete exclusion of the existing common law of the State.

As has been said, no intention on the part of the Congress to lay down a complete measure of civil liability can be traced in the title of the act, the enacting clause, or in the words of the sec-

itons in question. If, in consequence of such action by the Congress, such a measure of civil duty has been established, it must be by operation of law, and not by expressed intent.

Upon this precise question there is very little in the books. As a general proposition it would seem too obvious for argument that a criminal statute does not displace all common law as to civil liability, and make one's duty to the community at large commensurate with one's duty to the State. *If such were the case, upon the enactment of a criminal code, the common law of torts would vanish as to the subjects touched.*

Undoubtedly criminal statutes *do affect* the standards of civil duty. We believe that courts which have so ruled, have acted upon sound principle. It does not follow, however, that criminal statutes fix exclusively such standards of duty.

Suppose a statute makes it a crime to drive an automobile more than twenty miles an hour through a city. A drives his automobile at a greater speed and, therefore, is not able to stop his car in time to avert a collision with B, who is in the exercise of due care. B is injured. It is fair to say that A should not set up his opinion as to what is a safe speed against that of the Legislature. No reasonable man should do that. If nothing further is shown we would, at least, be able to say that such conduct is evidence of negligence, which A must overcome. Whether such conduct on the part of A is *prima facie* or conclusive evidence of negligence, differs in the various jurisdictions.

Whichever view we take, we can say that the criminal statute has affected A's case when sued by B in an action of tort. We cannot say, however, that the criminal statute has prescribed the

full duty of care which motorists owe the public generally.

Suppose A drives through crowded streets, without sounding his horn, and engaged in conversation with some one on the rear seat. Suppose that he collides with B, who is in the exercise of due care, and injures him. Can A move for a nonsuit upon showing that at no time was his car running faster than nineteen miles an hour? To press the point: Suppose the only negligence alleged was excessive speed and it was shown that when the accident occurred, A was driving through a very crowded thoroughfare at nineteen miles an hour. Has A acted as a reasonable man would under the circumstances? *Does that question become unimportant when A cites the criminal statute?*

In *Evers* v. *Davis*, 86 N. J. Law, 196, the plaintiff's intestate died as a result of a fire in a nonfireproof tenement. In violation of a public penal statute, the house was not equipped with a fire-escape. It was held that an action for negligence and not an action on the statute was the remedy. It was also held that a charge to the effect that the sole question was whether the violation of the imposed duty was the proximate cause of the injury was not correct in law. The Court in commenting upon the truism that a reasonable man should not set his own judgment against that of the Legislature as expressed in the statute, said at page 203:

> "But whether the overt act be one of omission or of commission, and whether the conduct of the defendant be stated in terms of 'duty,' or of 'fault,' the one common denominator, so to speak of the action of negligence is the element of what we may call discoverable danger; that is to say, a danger that is

> susceptible of being discovered in advance of action or inaction, by the exercise of that degree of care which if a man fails to exercise he becomes civilly liable for the consequences of his conduct."

This Court then, in effect, refused to commit itself to the proposition that the violation of a penal statute is conclusive evidence of negligence. *A fortiori it is not the only evidence of negligence.*

Again on pages 200 and 201, the Court says:

> "In each of these respects we think that the Trial Court was in error and that. to the contrary, no civil action could be brought directly upon the statute, and that whatever benefit the plaintiff in a civil action derives from the *statute must be through the common law action of negligence.*
>
> "The reason why no civil action can be based upon the statute is because no such action or right of action is given by the statute. The language of the statute is entirely free from ambiguity; it seeks to eliminate a source of danger by the imposition of a penalty. The Legislature could, if such were its intention, have provided also that anyone injured by a breach of the statute should have a remedy by civil action."

Again at page 202:

> "The familiar expressions that the breach of such a statute is 'negligence *per se*' or is '*prima facie* evidence of negligence' seem to me to postpone elucidation rather than to contribute to it, while the *implication that proof of a breach of a public statute will support a private recovery is positively misleading.*"

The Court quotes with approval the language and principles of the late Dean Thayer in an article in the Harvard Law Review for February, 1914. Dean Thayer showed that the sole influence

of a criminal or penal statute upon civil rights was its effect upon the common law criterion of an "ordinary prudent man." In other words the common-law was still the law of the case, and whether or not a criminal statute had been violated, was simply one test of action approaching that of an "ordinary prudent man."

The Court says at page 203:

> "Now, it is precisely upon this element of discoverable danger that public statutes or ordinances act, and they do this *not by giving to the plaintiff a right of action he did not have before,* but by their operation upon what we may call the common-law conscience of the defendant, better known to us in its personified form of 'the ordinary prudent man,' the familiar fiction designed by the common-law to aid juries, when deciding what was the proper thing for a man to do, to lose sight of the personal point of view of that particular man and to base their judgment upon a general standard which in the final assize is what the jury itself thinks was the proper thing to do."

Again at page 204:

> "The point to be observed, and it is the only matter with which we are now concerned, is that whatever benefit the plaintiff in a civil action derives from such penal statutes, is through the medium of the action of negligence."

From the excerpts quoted above, it is clear that the New Jersey Court is committed to the proposition that a penal statute does not create new civil duties.

With this reasoning in view, which, it is submitted, is correct on principle, it would seem to follow in course, that the regulations of the Com-

mission, which can have no greater scope than that of the act authorizing them, were not intended to, and did not create new civil duties.

If this be true, how can it be said that the Congress has occupied the field of civil duties to the exclusion of the State common-law?

The most that the Congress, through the medium of the Interstate Commerce Commission, has done, is to affect the "common-law conscience" of "the ordinary prudent man."

Caldwell v. *New Jersey Steamboat Co.*, 47 N. Y., 282.

The facts of the case were as follows: The plaintiff was a passenger on the steamboat "St. John." When the vessel was off Twenty-fifth Street, New York, an explosion of one of the boilers took place, injuring the plaintiff. He sued for damages, and the defendant requested an instruction that if it be shown that the defendant had complied with the Act of Congress concerning boiler regulations and inspections, there was no liability on its part for injuries received from the explosion of a boiler. The charge was refused, and the upper Court affirmed the ruling at pages 292 and 293 in the following language:

> "An exception was taken to the refusal of the Court to charge the jury that if the defendant had in all respects complied with the Act of Congress, they were not liable; and also that, in that event, there was no further presumption of neglect against them, by virtue of that act. (Brightley's Dig., 850). This is untenable. The Act of Congress provides additional safeguards for the protection of passengers on steamboats to those before imposed by law. The liability of owners is not in any manner restricted or limited by that statute, and is not, therefore, confined to the

> acts of omission or commission therein declared to be negligent. A failure to comply with its provisions would subject the party to its penalties, and also to a charge of negligence; but it does not operate to take away any common-law liability or remedy, and does not profess to do so. The presumption of negligence, arising from the bursting of the boiler, did not depend upon this statute, but arose from a rule of the common-law, that where an act takes place which usually, and according to the ordinary course of things, would not happen, if proper care was exercised, it is presumed that such care was not observed. The provisions of this statute are not in conflict with the common-law; but if they were, rules of evidence prescribed by Congress, are not binding upon State Courts."

This case is interesting, in that it holds that compliance with the statute does not even overcome the doctrine of *res ipsa loquitur*; that even though it be shown that the federal regulations have been complied with, a presumption of negligence on the part of the defendant still persists.

In *Heiserman* v. *B. C. R. & N. Y. Ry. Co.*, 63 Iowa, 732, a statute had fixed and declared a rate applicable to the carriage of grain. The statute, it appears, further provided a penalty recoverable by any one injured, because of a violation of the statute. The plaintiff had allowed too long a period to elapse, since the overcharge he complained of, to permit a recovery *under the statute.*

It was held that the existing right to recover for an overcharge at common-law was not taken away by the statute, and that he might, therefore, have his action at common-law.

The statute before the Court in the Heiserman case included a penalty recoverable by the party aggrieved. In other words civil rights were con-

sidered and provided for. The provision was in the *form of a penalty,* and the Court refused to hold that the Legislature had intended to abrogate the common law.

In *Knox County* v. *Hunolt,* 110 Mo., 67, the Court, in holding that a criminal statute did not preclude the common-law action, said at page 73:

> "This statute undoubtedly prescribes the punishment and the only punishment that can be imposed for the offense therein mentioned; but it does not undertake to furnish a civil remedy. * * * The civil remedy, if any there is, is a common-law action."

In *Cumberland & Oxford Corp.* v. *Hitchings,* 59 Me., 206, a statute made it criminal for one to commit certain trespasses "wilfully, maliciously, or contrary to law." From the context of the report it appears that the injured person was allowed, under the statute, to recover a penalty against the trespasser. It was held that the common law action for trespasses not wilful still remained.

The following language is to be found at page 209:

> "Statutes are not to be construed as taking away a common-law right, *unless the intention is manifest.* Nothing here indicates such an intention. The seventh section was for the increased protection of the plaintiff's rights for their diminution or destruction. Nothing indicates that the Legislature intended to deprive the plaintiffs of all remedy for trespasses committed on their premises, except for those which are wilful and malicious and contrary to law, and that all right of action should be barred by a limitation of one year."

It is very obvious from the context that the reporter has omitted the word "not" in the second sentence between the words "rights" and "for."

In this case the statute provided for some relief for the injured party—it took cognizance of the wrong done to the individual and attempted to expiate it, yet the Court held that the common-law action still survived. The criminal code makes no provision for the civil redress of parties injured through a violation of its provisions or the regulations of the Interstate Commerce Commission made thereunder. How strained the construction of a criminal statute that would create civil rights commensurate with its provisions when there is not even a provision in it for the recovery of a penalty by a person aggrieved and injured by reason of its breach.

Lysaght *v.* Lehigh Valley R. Co., 254 Fed., 351.

In this case the plaintiff was suing to recover damages to certain of his goods destroyed, while in transit, as a result of the Black Tom explosion. The plaintiff interposed a demurrer to three pleas. The second plea, in part, alleged (p. 352):

> "That the defendant, in the course of its handling and transportation, and while holding the aforesaid explosives and munitions of war, had fully complied with all the requirements of the Act of Congress and the rules of the Interstate Commerce Commission applicable, as well as with its own tariffs, classifications, and bill of lading provisions for the transporting of such explosives and munitions of war."

The Court, at page 355, said:

> "Sections 232-235 of the Criminal Code do not concern the regulation of the carrier's civil liability. They are intended to provide against the carriage of explosives generally on passenger vehicles or vessels, and other-

> wise to impose conditions upon such carriage as the Interstate Commerce Commission shall prescribe. It may be that their violation might entail a civil liability in addition to that imposed at common law, but upon that I need express no opinion. That they serve as a limitation upon the common law liability is not suggested in the text of the statute, and is not to be inferred from its purpose. It in no sense follows because shipments are lawful, when they conform to the rules, that there is no responsibility *inter partes*, which arises from their possession."

The Interstate Commerce Commission primarily functions in disputes between a carrier and a shipper. The Court holds that the regulations do not limit the common law rights of a shipper against a carrier. *A fortiori* they do not limit the common law rights of a third person affected by no legal relational duties or rights to the carrier.

> *New Jersey Fidelity & Plate Glass Ins. Co.*, v. *Lehigh Valley R. R. Co.*, 105 Atlantic, 206.

This case arose as a result of the same explosion now under consideration in the case at bar. There was a judgment below for the plaintiff which the upper Court affirmed.

> "The plaintiff, in its complaint, did not make the regulations of the Interstate Commission a basis for its right of recovery against the defendant, but made use of such regulations, in the same manner as is done in cases of negligence, where penal ordinances or statutes are introduced in evidence, which, though in themselves cannot be made the foundation of a civil action, nevertheless may be used as tending, in conjunction with the other evidence in the cause, to establish the negligence charged in the complaint. Evers *v.* Davis, 86

N. J. L., 196; 90 Atl., 677. Although the learned judge adverted to the regulations and their effect, he did not instruct the jury that the defendant could be convicted of negligence and must respond in damages, if any of the regulations had been violated by it, but, on the contrary, expressly instructed the jury that the defendant's liability to respond in damages to the plaintiff, arose, if, in the transportation of explosives, it failed to exercise care commensurate with the risk of danger" (p. 208).

In stating the rule of law, which it is submitted is none other than that embodied in the common-law, the Court said at page 207:

"Whether the defendant had exercised that degree of care commensurate with the risk of danger arising from the accumulation of the vast quantity of high explosives upon its premises, in cars which stood in close proximity to each other, was clearly a jury question.

"Under the pleadings and proof in the cause the jury was warranted in taking into consideration the exposed condition of the premises where the cars containing the explosives stood, the possibility of their being tampered with, or set on fire by intruders, or through the carelessness of workmen employed by the defendant, in and about the premises; and might properly have found that the number of watchmen employed by the defendant to guard this great quantity of high explosives against such happenings was inadequate; or that the watchmen had been negligent in the performance of their duties in failing to discover the fire before it was too late to prevent the disaster which followed; or that the defendant was negligent in failing to provide adequate apparatus to fight the fire, or in failing to give notice of the fire as soon as discovered to the Fire Department."

These words clearly demonstrate that the Court of Errors and Appeals has again affirmed the doctrine in the Evers case. It is, therefore, submitted that these two cases have settled the law in this state, and that the defendant's duty in this case is measured by the common-law of the State of New Jersey.

The Ingrid Cases.

Two cases in the Federal Reporter will be strongly urged against the view set out above. They are *"The Ingrid,"* 195 Fed., 596, and *Ingrid* v. *C. R. R. Co. of N. J.*, 216 Fed., 72, the same case on appeal.

From these cases sweeping generalities may be drawn which require a nice analysis to rebut. They should be carefully read in the light of the evidence and of the arguments urged by counsel.

It appears from both opinions that there was no evidence of negligence on the part of the defendant. 195 Fed., 596, at pages 603 and 604, and 216 Fed., 72, at pages 76 and 80. At the latter page the Court says:

> "According to the libelant's own theory as presented upon the argument, the accident might have been caused by the negligence of either the railroad company, the powder company, or Healing. It is also true that the explosion may have been caused by the act of outsiders entirely unconnected with any of the respondents. If the explosion itself is evidence of negligence, such negligence may have been that of the powder company in the manufacture of the dynamite or the packing of it in the boxes; or it may have been the negligence of the railroad company in improperly handling the car; or it may have been the negligence of Healing in carelessly transferring the boxes from the car into the lighter; or it

> may have been the negligence of unauthorized persons who may have interfered with some of these operations. And any one of these theories is almost as probable as another. The cause of the explosion is a mystery and cannot be accounted for."

No negligence had been proved. This is very important to bear in mind. *If an action could be supported, it must be upon some other grounds.* These were the questions decided below and brought up for review to the Court of Appeals. Counsel urged the doctrine of Fletcher *v.* Rylands, because they could show no negligence; for the same reason they pressed the doctrines of *res ipsa loquitur*, and nuisance, and finally they attempted to show a violation of the statutes and ordinances of New Jersey, in order that they might establish a nuisance *per se* or make out a *prima facie* case of negligence under the doctrines discussed above. A reading of the briefs filed in the Circuit Court will substantiate this, we believe.

The holding of the Circuit Court then comes to this: When it is attempted to make out a nuisance *per se*, or a *prima facie* case of negligence by showing a violation of State and City penal statutes, ordinances or police regulations, the Federal Court says the Congress has provided penal regulations, and by so doing has completely occupied the field. *If a case of nuisance per se or prima facie negligence is to be established by showing the violation of penal statutes or police regulations, it must be established by showing a violation of the Federal regulations.*

Inconsistent State and Federal penal statutes and police regulations cannot exist in matters of interstate commerce, and the former must go. This is not saying that a Federal criminal statute supplants the common-law of torts.

If so why did the Court discuss negligence, Fletcher v. *Rylands, res ipsa loquitur, and common-law nuisance? If their holding was as sweeping as is sometimes contended for, why was there not but one answer to those questions; that the regulations are the sole measure of civil duty?* Why did the District Court use the following language in 195 Fed., at page 600:

> "The question, therefore, whether the railroad company is responsible for the dynamite which exploded depends, in the first place, upon whether the locality where it was kept and all the existing circumstances made it a nuisance *per se,* and, if not, whether there was negligence in leaving it, or in the manner of handling and keeping it on the pier."

Does such language lead one to believe that the Court would have turned a deaf ear to a common-law cause of action if it had been established? Does it repudiate the common-law? Is it not perfectly consistent to say that Congress has occupied the field of criminal conduct and affirmative police regulation to the extent that precludes further interference by the State, and still to say that complete provision has not been made for civil liability? To say, that as the State regulations are invalid, violations thereof cannot support a legal presumption of negligence or nuisance, is not to say that negligence cannot be shown at common-law.

It is submitted that the Ingrid case went no further than to deny validity to the statutes and ordinances of New Jersey which were in conflict with the regulations of the Interstate Commerce Commission made in pursuance and by direction of a criminal statute of the United States.

(b) *The regulations of the Interstate Commerce Commission have not covered the field to*

the complete exclusion of the common-law of the State of New Jersey.

There are four possible situations which may lead to a collision between Federal and State law operating on interstate commerce. They are cases where: (1) the Congress has not acted and the State Legislaure has (attempted State interference with interstate commerce may be so drastic as to invalidate it even in a case where the Congress has not legislated).

(2) The collision, if any, is between Federal legislation and the State common-law;

(3) The collision, if any, is between Federal legislation and prior State legislation;

(4) The collision, if any, is between Federal legislation and subsequent State legislation.

Every case should be read with this classification in view, for it is very evident, for example, that a different standard should prevail in case (4) than in case (2). The Congress may have legislated with the common law in view, but with the intent that the State should not subsequently interfere by legislation on the subject. With the former the Congress was acquainted, but no prophet could foretell what the latter might bring forth.

The situations in cases (2) and (3) may also be differentiated. The common law of all States has a common source; it is generically the same. It is fairly probable, therefore, that the common law rule in a given instance will approach a standard in all States. It is reasonable to suppose that the violent contrasts will be few. This would not be true of State statutes. Therefore it is plausible that Congress would accept the former as a background for its legislation, which affects all States, where it would not accept the latter. The principles of uniformity are strongly in favor of case (2).

The following language recurs frequently in the books: "the power to regulate commerce is exclusively vested in Congress." Commerce existed prior to the Constitution. Commerce among the States germinated in the common law. It existed by virtue of the common law and the statutes of parliament and the acts of the Colonial Assemblies. This law was inherent in commerce—it was a vital and integral part of commerce. Then the Constitution was adopted, and on that date power to regulate commerce vested in the Congress, and the States could no longer regulate and mould its growth.

So there is a very real distinction between abrogating affirmative State action since the adoption of the Constitution and abrogating the common law. Especially is this so where the congressional action does not specifically voice such an intent.

The decisions are conflicting. A careful examination of the authorities will show that the instances under case (4) of State laws held invalid or not to apply are very numerous, while instances under case (2) of the common law held abrogated are few if any.

That there is a common law applying to interstate commerce is neatly brought out in the case of *Brown* v. *Memphis*, 5 Fed., 499. The facts of the case were that: employees of a railroad excluded a woman from one of its coaches. She sued the company and was met with a defense under an act of the Tennessee legislature abrogating the common law right of one to sue for wrongful exclusion. Hammond, D. J., charged the jury in part at page 501 as follows:

> " * * * that this act of the legislature, so far as it abrogated the common-law right of action for wrongful exclusion from railroad cars on roads running between two or more States, was unconstitutional, because it was a

> regulation of commerce between the states, which the legislature had no right to make, the exclusive right to make it being by the Constitution of the United States in Congress."

A motion for a new trial was overruled in 7 Fed., 51.

This is a very striking authority justifying the classifications suggested, and showing that the Court will, in some cases, declare affirmative State action void and yet apply the common law.

Cases similar to that of Northern Pacific Ry. Co. *v. Washington,* 222 U. S., 370, will be strongly urged as authorities establishing the rule that mere action by Congress completely ousts the States from the field. The railroad company was being proceeded against under a State statute prohibiting a train crew from remaining on duty more than sixteen consecutive hours. The train was engaged in interstate commerce, and the Court held that an act of Congress regulating the hours of service, though it was provided that such act was not to go into effect until one year, was such an entering of the field by Congress as to prevent the application of the State statute. Congress passed the act on March 4th, 1907; on June 12th the State law became effective.

These facts present a case arising under classes (3) or (4) of the suggested classification. It is not in point with the situation before us, and yet counsel for the plaintiff at pages 371 and 372, and *the Court at pages 379 and 380, felt called upon to justify their opinions, to some extent, upon the particular circumstances of the case.* At pages 379 and 380 the Court says:

> "In the first place, no conceivable reason has been, or we think can be, suggested for the postponing provision if it was contemplated that the prohibitions of State laws should apply in the meantime. This is true because if

> it be that it was contemplated that the subject dealt with should be controlled during the year by State laws, the postponement of the prohibitions of the act could accomplish no possible purpose. This is well illustrated by this case, where, by the ruling below, a State regulation substantially similar to that contained in the act of Congress is made applicable. In the second place, the obvious suggestion is that the purpose of Congress in giving time was to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act, a purpose which would of course be frustrated by giving to the provision as to postponement a significance which would destroy the very reason which caused it to be enacted. Finally, the convictions which arise from the fact of the postponement are made plain by a report on the bill made to the House of Representatives by the Committee on Interstate and Foreign Commerce, wherein it was said (Report No. 7641, dated February 16, 1907, p. 6):
>
> " 'Owing to the probable necessity of changing in some instances division points, entailing the removal of employes, and to permit ample time to readjust themselves to the requirements of the law, it is not to become operative for one year after its approval.' "

It is clearly evident that the Congress did not wish interstate commerce to be burdened with an "hours of service act" until the carriers had had time to adjust themselves to its peculiar difficulties.

It does not follow, however, from this decision (waiving questions under the fourteenth amendment) that the employees would be precluded from contracting with the railroad company that they should not be kept on duty more than sixteen hours; and that for the breach of such contract no civil remedy should be available. *That would be a case with facts parallel to those which we are discussing.*

There are many authorities holding, on the particular facts, that when the Congress has acted State laws are abrogated. There are many authorities holding, on the particular facts, that even though the Congress has acted the State law applies. Most all of these decisions, however, will fall under the third and fourth classifications made at the outset of this heading.

There must be an underlying reason for the decisions, and it is submitted that the cases can be explained and reconciled by the application of a very homely rule.

If the State law interferes with the functioning of the Federal statute, or impedes that which it it is intended to accomplish, the State law must be treated as having been superseded. Of course, as in all general propositions, questions of policy and police powers in many cases have swung the balance one way or another.

On the whole, however, if we examine those cases affirming the general proposition we will generally find an evident collision between the State and Federal law. Perhaps we should go further and say that the Federal law or the objects which it sought to effect would be embarrassed by countenancing the State law.

It is plainly evident that this line of reasoning quickly resolves itself into the fundamental question: "has the Congress *occupied* the field to the extent that the enforcement of the State common law would lead to a collision in letter or in spirit with the Federal act?" We should not treat this as coincident with the question: "has the Congress *entered* the field?"

It would perhaps be profitable to quote here the words of Chief Justice Marshall in the great case of *Gibbons* v. *Ogden,* 6 Curtis, 1, at page 16:

> "Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, *the validity of which depends on their interfering with, and being contrary to,* an act of Congress passed in pursuance of the Constitution, the Court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, *come into collision with an act of Congress,* and deprived a citizen of a right to which that act entitles him. *Should this collision exist,* it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous."

It would seem that our test would harmonize with these words of the greatest exponent of federalism.

In this connection it will be profitable to consider some of the cases which have applied the State law.

In *Hebe Co. et al.* v. *Calvert et al.*, 246 Fed., 711, an Iowa statute provided, *inter alia* (p. 715):

> "No person within the State shall manufacture, offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, any article of food which is adulterated or misbranded within the meaning of such chapter. Section 5774. A compound article is a food, if used by man as such. Section 5775. A food is adulterated, if a valuable or necessary constituent or ingredient has been wholly or in part abstracted from it. Section 5778.

> It is misbranded, if it is labeled so as to deceive or mislead the purchaser, or if the label on the package containing the food bears a statement regarding such food which is false or misleading in any particular (Section 5785), provided, however:
>
> " 'That this section shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food or drink, if each package sold or offered for sale is distinctly labeled in words of the English language as mixtures or compounds, with the name and percentage, in terms of one hundred per cent of each ingredient therein. The word "compound" or "mixture" shall be printed in letters and figures not smaller in height or width than one-half of the largest letter upon any label on the package, and the formula shall be printed in letters and figures not smaller in height or width than one-fourth the largest upon any label on the package, and such compound or mixture must not contain an ingredient that is poisonous or injurious to health.' "

The Federal Pure Food and Drugs Act, provides for the labeling of foods stating the nature of article, percentage of ingredients, etc. The Iowa act also required a label. Accepting the doctrine that goods in the original package are still in interstate commerce, the State was clearly allowed to supplement congressional action by affirmative statutory action on its part. Police power is not a sufficient ground of differentiation; the regulation of explosives would plainly fall into that category too.

It is submitted that the real explanation of the case is the simple fact that the Federal statute and the objects which it sought to accomplish, were not embarrassed by this particular State statute.

The United States Supreme Court has passed

upon a similar situation in *Sligh* v. *Kirkwood,* 237 U. S., 52.

Sligh was charged by information in the Criminal Court of Record in Orange County, Florida, with the violation of a statute making it unlawful "to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which are immature or otherwise unfit for consumption." One of the counts charges that Sligh delivered to a railroad agent for shipment to Alabama, one car of oranges immature and unfit for consumption.

It was held that the provisions in the Federal Food and Drugs Act, relating to shipment in interstate commerce of vegetable substances in filthy, decomposed, or putrid condition do not apply to fruit unfit for consumption, because green or immature. "Green or immature fruit equally deleterious to health, does not seem to be within the Federal Act. Therefore until Congress does legislate upon the subject the State is free to enter the field."

Here, again, we see the Federal law being supplemented by a State statute. In this case public policy does not weigh so heavily as in the case immediately preceding. No harm would come to the health of the citizen of Florida by its violation. The goods were consigned to parties in Alabama. The most that Florida was protecting was the business integrity of the people of the State.

In the Sligh case the State action was affirmative, the public policy slight, and still the State law was given force and effect.

In *Crossman* v. *Lurman,* 192 U. S., 189, a New York statute prohibited the sale or keeping of *adulterated* food and drugs. A federal statute prohibited the importation of food and drugs *adulterated so as to be injurious to health.* A contract

was made in New York for the sale of goods then situate in a foreign country. The seller was resident in New York, but the buyers were not.

It was held that the New York law applied, and that the buyer was not obligated to accept and pay for goods, even in the original packages, not meeting the requirements of the New York statute.

In *Savage* v. *Jones*, 225 U. S., 501, an Indiana statute required the manufacture of stock feed to attach in a conspicuous place on the outside of each package destined for sale in Indiana, a printed statement certifying the name of the manufacturer and of the shipper, and the chemical analysis, etc., etc. The purpose of the statute was to prevent fraud and imposition, and it was sought to enforce it in a case involving goods in the original package (*i. e.*, goods in the original package being a part of interstate commerce).

It was held that the statute was not in conflict with the Federal Food and Drugs Act, which provided that no manufacturer should label his goods falsely.

The Court said at page 533:

> "Is, then, a denial to the State of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a State law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. *If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field, else must be frustrated and its provisions be refused their natural effect—the State law must yield to the regulation of Congress within the sphere of its delegated power. Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426; *Northern Pacific*

Ry. Co. v. *Washington, supra; Southern Ry. Co.* v. *Reid, supra.*

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation, is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. *In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.* This principle has had abundant illustration. *Chicago &c. Ry. Co.* v. *Solam,* 169 U. S., 133; *Missouri, Kansas & Texas Ry. Co.* v. *Haber,* 169 U. S., 613; *Reid* v. *Colorado,* 187 U. S., 137; *Pennsylvania R. R. Co.* v. *Hughes,* 191 U. S., 477; *Crossman* v. *Lurman,* 192 U. S., 189; *Asbell* v. *Kansas,* 209 U. S., 251; *Northern Pacific Ry. Co.* v. *Washington,* 222 U. S., 370, 379; *Southern Ry. Co.* v. *Reid,* 222 U. S., 424, 442."

In the same tenor is *Standard Stock Food Co.* v. *Wright,* 225 U. S., 540.

In *Michigan Central R. R. Co.* v. *Michigan R. R. Commission* (236 U. S., 615), it was held: (1) that a State, in a proper case, could require two railroad companies to connect up their tracks; (2) that a State, acting within its jurisdiction and not in "*hostility*" to any Federal regulation of interstate commerce, may compel a carrier to accept loaded cars from another line and transport them over its own. One of the roads was the Michigan Central R. R. Company, a large interstate carrier.

The word "*hostility*" in this decision, appearing at page 629, is very forceful.

It may be remarked in criticism of the foregoing cases, that the State was exercising its police power—an exception promulgated in the early cases where inspection laws were concerned. There are two answers to any such criticism.

The first would seem to turn the point against one offering the criticism. A police regulation is affirmative action and, as pointed out, *supra*, more likely to collide with the intentions of the Congress as expressed in its legislation than an application of the common-law existing at the time of the Federal enactment. Secondly, it cannot be doubted that the existence within a State of high explosives is of grave concern to the public safety. Perhaps the sufficiency of the common-law lulled the State Legislature. If a State may make penal regulations protecting the safety of its inhabitants, which also carry with them alterations of civil liability (such is the situation in a case to be cited and discussed immediately following), it would seem to us that a common-law requirement of reasonable precaution to guard against explosions, can fairly be regarded as a rule, the existence of which lulled the State Legislature into not affirming it by positive statutory enactment. Such legislation would be merely declaratory of the common-law.

Missouri, Kansas & Texas Ry. Co. v. *Haber* (169 U. S., 613). The Kansas Legislature passed a statute relative to the bringing of cattle, capable of communicating Texas fever, into the State, and making it a misdemeanor. Among the provisions were clauses making the fact that *such cattle came from a point south of a stated line and during a stated period, prima facie evidence that they were capable of communicating the said disease,* and allowing a civil action. A Federal statute was also passed providing, among other things, that rules be laid down by the Secretary of the Treasury for the exportation and transportation of live stock. The act also provided that no railroad company, etc., should receive for interstate transportation,

livestock affected with any contagious disease. It was further provided that the Commissioner of Agriculture should notify the proper officials of the railroad company in writing and by publication in newspapers of the existence of such contagion; *and that anyone knowingly violating the provision of the act (as to prohibitions upon carrying infected cattle)*, would be guilty of a misdemeanor and liable to a fine not less than $100.00, or more than $5,000.00. The State statute declared that the mere fact that cattle came from a given district was *prima facie* evidence that the cattle were capable of communicating the disease —a fact which, in itself, gave rise to liability. In contradistinction the Federal offence was not complete unless the cattle were *actually* diseased, and the offender had *knowledge* of such fact.

The railroad company brought cattle into Kansas from the district designated in the State statute, and the plaintiff's cattle were infected. The plaintiff sued the railroad under the Kansas statute.

It was held that the Kansas statute was not overridden by the act of Congress, because the Federal act did not deal with civil liability, and therefore the Kansas act imposing civil liability was not in conflict with the act of Congress.

The Court said at pages 623 and 624:

> "The act of Congress did not assume to give any corporation, company or person the affirmative right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communicable diseases. On the contrary, it was made a misdemeanor to deliver for transportation or to transport or drive from one State to another, cattle known to be affected with contagious, infectious or commu-

nicable diseases. Whether a corporation transporting, or the person causing to be transported from one State to another cattle of the class specified in the Kansas statute, should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their State of such diseased cattle is a subject about which the Animal Industry Act did not make any provision. *That act does not declare that the regulations established by the Department of Agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law or under some State enactment for damages arising out of the introduction into that State of cattle so affected.* And, as will be seen from the regulations prescribed by the Secretary of Agriculture, that officer did not assume to give protection to anyone against such liability."

And again, at pages 627 and 628:

"It is, therefore, a mistake to say that the Kansas statute so far as it gives a right of action for injuries arising from disease communicated to domestic cattle by cattle of a particular kind brought into the State *comes into conflict* with any regulation established under the authority of Congress, to prevent the spread of contagious or infectious diseases from one State to another. That statute, we repeat, only embodies a rule of civil conduct prescribed by a State whose government is competent to regulate—in subordination always to the supreme law of the land and its own fundamental law—the relative rights and obligations of all within its jurisdiction. Neither corporations nor individuals are entitled, by force alone of the Constitution of the United States and without liability for injuries resulting therefrom to others, to bring into one State from another State cattle liable to impart or capable of communicating disease

> to domestic cattle. The contrary cannot be affirmed under any sound interpretation of the Constitution. This Court while sustaining the power of Congress to regulate commerce among the States has steadily adhered to the principle that the States possess, because they have never surrendered, the power to protect the public health, the public morals, and the public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the National Constitution, nor come in conflict with acts of Congress passed in pursuance of that instrument."

While State compliance with some of the regulations of the Secretary of Agriculture was not mandatory, it would seem that compliance with the regulations of the Secretary of the Treasury was. Further, Congress had, by its own words, quite definitely covered the subject in the Federal Act, Section 6 of which is set out on pages 620 and 621:

> "Sec. 6. That no railroad company within the United States, or the owners or masters of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious or communicable disease; nor shall any person, company or corporation drive on foot or transport in private conveyance from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to

be affected with any contagious, infectious or communicable disease, and especially the disease known as pleuro-pneumonia; *Provided*, that the so-called splenetic or Texas fever shall not be considered a contagious, infectious or communicable disease within the meaning of sections four, five, six or seven of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto."

In *Reid* v. *Colorado*, 187 U. S., 137, the same question was presented to the Court on a conviction for the violation of a State statute. While not involving civil liability, the same question as to exclusiveness of Federal action was before the Court. In upholding the constitutionality of the State statute, Justice Harlan said, at pages 149 and 150:

"Still another subject covered by the act is the driving on foot or transporting from one State or Territory into another State or Territory, or from any State into the District of Columbia, or from the District into any State, of any live stock *known* to be affected with any contagious, infectious or communicable disease. But this provision does not cover the entire subject of the transporting or shipping of diseased live stock from one State to another. The owner of such stock, when bringing them into another State, may not know them to be diseased; but they may, in fact, be diseased, or the circumstances may be such as fairly to authorize the State into which they are about to be brought to take such precautionary measures as will reasonably guard its own domestic animals against danger from contagious, infectious or communicable diseases. The act of Congress left the State free to cover that field by such regulations as it deemed appropriate, and which only incidentally affected the freedom of interstate com-

merce. Congress went no further than to make it an offence against the United States for anyone *knowingly* to take or send from one State or Territory to another State or Territory, or into the District of Columbia, or from the District into any State, live stock affected with infectious or communicable disease. The Animal Industry Act did not make it an offence against the United States to send from one State to another live stock which the shipper did not know were diseased. The offence charged upon the defendant in the State court was not the introduction into Colorado of cattle that he knew to be diseased. He was charged with having brought his cattle into Colorado from certain counties in Texas, south of the 36th parallel of north latitude, without said cattle having been held at some place north of said parallel of latitude for at least the time required prior to their being brought into Colorado, and without having procured from the State Veterinary Sanitary Board a certificate or bill of health to the effect that his cattle—in fact—were free from all infectious or contagious diseases, and had not been exposed at any time within ninety days prior thereto to any such diseases, but had declined to procure such certificate or have the inspection required by the statute. His knowledge as to the actual condition of the cattle was of no consequence under the State enactment or under the charge made." (Italics are those of the Court.)

These last two cases present a situation where both the Federal and the State legislatures have acted—instances of affirmative State action. The Court, however, sustained the validity of the State legislation because there was no collision between the two—they could be harmonized.

In Missouri, Kansas & Texas Ry. Co. *v.* Haber (*supra*) the Court was undoubtedly governed by the fact that the Federal statute dealt solely with

criminal liability. For this reason the case might have been cited under the first heading in this argument, had it not been the intent to confine that heading to the effect of criminal statutes upon the common law.

With the cases before us, it now becomes necessary to attempt to ascertain whether or not the Act of the Congress and the regulations of the Interstate Commerce Commission made pursuant thereto have completely occupied the field so as to collide with the common law of New Jersey.

The positive enactments of the Congress have been summarized under the first subdivision of this argument. From the language of the act it would not seem to follow of course that the regulations of the Commission were to govern exclusively, or that if the Commission did not act, or only partly covered the ground "in accord with the best known practicable means for securing safety in transit," there should be a void and no law. Suppose that the Commission made but one regulation and that concerned the packing of explosives? Obviously, the ground has not been covered. Obviously, the language of Justice Matthews in *Smith* v. *Alabama*, 124 U. S., 465, at pages 477 and 478, applies:

> "The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law, which until displaced covers the subject."

With these words in view it cannot be said that inaction or partial inaction on the part of the Congress gives rise to anarchy.

An examination of the statute and the regulations made thereunder clearly shows that the rules are not antagonistic to the common law—there is no collision.

In approaching the question, we must first determine the rule of construction to be applied.

As has been shown *supra,* the liabilities fixed by the regulations are criminal liabilities. We must, therefore, adopt a construction of them consistent with the principle that criminal statutes must be strictly interpreted.

It would probably not be questioned that the negligence of an engineer, in pulling a train at such high speed around a curve as to cause derailment, or in colliding with another train through disregard of signals, causing an explosion, would make the railroad company liable to respond in damages. Could this liability be based upon the regulations? Could it be said that they were broad enough to cover such a case? Would a court allow a conviction under the act? Could it point to any regulation and, interpreting it strictly, impose a prison sentence on the engineer, or a fine on the carrier? If not it would be strange to say that the company was civilly liable—to set up two standards of conduct flowing from the same act.

It is interesting to note that approximately one-half of the "Regulations for the Transportation of Explosives by Freight," deal with the problem of packing and staying, a very large proportion of the remainder with placards and certificates, a very few with the handling of the cars in switching and their position in the train. None deal directly with the proper running of the train itself —its speed, the duties of its engineer and crew, and the caution of switch operators and signalmen. That the omission to cover the latter ground means that no law shall govern is inconceivable. It cannot rationally be supposed, for example, that the Congress intended no standard of care for signalmen where a train of explos-

ives was concerned, but held the carrier to his reasonable action where a train of pig iron was concerned.

The application of the common-law rule of the duty of due care could not conceivably hinder the carrying out of the regulations. The common law does not require that the explosives be packed in a different way or handled in a different manner than that prescribed by the Commission. The using of due care would, in no way, interfere with a full and complete compliance with the regulations of the Interstate Commerce Commission, and would certainly be in accord with the spirit of an act which directed that "such regulations shall be in accord with the best known practicable means for securing safety in transit, etc." Chap. 321, U. S. Stat. at Large. 1135 (Section 233).

There is no collision between the common law and the regulations.

(c) *There is no Federal common law which can be invoked.*

As the Federal Government has no territorial jurisdiction, as such, save in the case of the District of Columbia, the territories, and the colonies, it would be an anomalous doctrine to attempt to establish a Federal common law enforced by the Federal Courts in the different states.

In *Smith* v. *Alabama,* 124 U. S., 465, at pages 475, 476, Mr. Justice Mathews says:

> "The statute of Indiana held to be valid in that case* was an addition to and an amendment of the general body of the law previously existing and in force regulating the relative rights and duties of persons within the jurisdiction of the State, and operating upon them, even when engaged in the business of inter-

*Sherlock *v.* Alling, 193 U. S., 33.

state commerce. This general system of law, subject to be modified by state legislation, whether consisting in that customary law which prevails as the common law of the land in each State, or as a code of positive provisions expressly enacted, is nevertheless the law of the State in which it is administered, and derives all its force and effect from the actual or presumed exercise of its legislative power. It does not emanate from the authority of the national government, nor flow from the exercise of any legislative powers conferred upon Congress by the Constitution of the United States, nor can it be implied as existing by force of any other legislative authority than that of the several states in which it is enforced. It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the State, without regard to their pursuits, is subject to change at the will of the Legislature of each State, except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs committed upon them. It is the source of all those relative obligations and duties enforceable by law, the observance of which the State undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each State that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implication."

And again on pages 477, 478:

"* * * In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that

does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law, which until displaced covers the subject.

"There is no common-law of the United States, in the sense of a national customary law, distinct from the common-law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. W*heaton* v. *Peters,* 8 Pet., 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent, though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *Railroad Co.* v. *Lockwood,* 17 Wall., 357, where the common-law prevailing in the State of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied was none the less the law of that State."

In *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S., 92, at page 101, the Court says:

"There is no body of Federal common-law separate and distinct from the common-law existing in the several States in the sense that

> there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules, and burdened by no restrictions other than those expressed in the statutes of Congress."

That the Federal Court in a given district does not always follow the decisions of the State courts is no argument for the existence of a Federal common-law. The State law is the law enforced, but the United States Court is not bound to say that what the State courts have said is the State law, is the State law. In other words, two separate and distinct judicial systems are enforcing the same law, but their ideas as to what that law is need not, of necessity, coincide.

To conclude: If the regulations of the Interstate Commerce Commission have not fully displaced the common law, and if there is no Federal common law, it follows that the common law of the State of New Jersey determines the measure of duty owed by the defendant.

SECOND POINT.

Assuming the applicability of the regulations of the Interstate Commerce Commission, which we deny, the measure of duty of the defendant under the hypothesis stated at the beginning of this memorandum would be the same as if predicated upon the State law.

To justify this assumption it is necessary to hold that the Congress intended the criminal statute and regulations to fix civil duties, and that such regulations completely cover the field to the exclusion of the common-law of the State. The converse of this is intended to be demonstrated by the preceding point. If the assumption be true, the following observations are pertinent as to the construction and meaning of the regulations.

(a) *Federal Statutes and regulations made thereunder are to be read in the light of the common-law.*

Assuming the regulations of the Interstate Commerce Commission to fix civil duties as well as criminal acts, which we say is not the case, *they must be interpreted with the common-law as a background.*

In *Smith* v. *Alabama,* 124 U. S., 465, Justice Matthews after holding that there was no Federal common-law separate from and independent of the Constitution and statutes of the United States (see *supra,* pp. 36 and 38), says at page 478:

> "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of

> its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution, and the laws and treaties made in pursuance thereof, has for its basis so much of the common-law as may be implied in the subject, and constitutes a common-law resting on national authority."

And in *Moore* v. *U. S.*, 91 U. S., 270, the Court says at page 274:

> "The language of the constitution and the many acts of Congress could not be understood without reference to the common-law."

(b) *The Common Law Measure of Duty in New Jersey is the Same as That of the So-called English or General Common Law.*

The fiction of the ordinary prudent man is well established in the general or English common law. The measure of duty is what he would do under similar circumstances.

Alderson, B., in *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch., 781, says at page 784:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

These words were quoted with approval by Mr. Justice Field in the *Nitroglycerine Case*, 15 Wall, 524, at page 536.

In *Heanen* v. *Pender* (trading as West India Groving Dock Company), 11 Q. B. D., 503, at page 507, Brett, M. R., says:

> "Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes

> the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property."

These two excerpts are classic as definitions of negligence. The United States Supreme Court has quoted one with approval. The common law has spoken through them, with a strong voice.

To turn to the New Jersey definitions:

In *Kowalski* v. *Newark Passenger Ry. Co.*, 15 N. J. L. J., 50, Dixon, J., said, in charging the jury, at page 51:

> "Now what is meant by reasonable care? That means not extraordinary care, but such care as a reasonable man would exercise in view of all of the circumstances presented to him. That is what is meant by reasonable care. Such care as an *ordinary prudent person* would exercise under the conditions existing at the time he is called upon to act. And when you are speaking of a corporation exercising reasonable care, you have to apply this rule, not to the invisible corporation, but to the persons operating and managing the affairs of the corporation."

In *Evers* v. *Davs*, 86 N. J. Law, 196, the following words were cited at page 11 of this argument:

> "Now it is precisely upon this element of discoverable danger that public statutes or ordinances act, and they do this *not by giving to the plaintiff a right of action he did not have before*, but by their operation upon what we may call the common law conscience of the defendant, better known to us in its personified form of 'the ordinary prudent man,' the familiar fiction designed by the common law to aid juries, when deciding what was the proper thing for a man to do, to lose sight of the personal point of view of that particular

> man and to base their judgment upon a general standard which in the final assize is what the jury itself thinks was the proper thing to do."

The same concept is to be seen in these words. We may say that the word negligence has the same significance when used by the courts of New Jersey as given to it by the so-called general or English common law.

(c) *The Regulations of the Interstate Commerce Commission.*

It will now be profitable to review some of the regulations of the Commission concerning the handling of explosives.

Paragraph 1643 is as follows:

> "(a) Careful men must be chosen to handle explosives, the platform and the feet of the men must be as free as possible from grit, *and all possible precautions must be taken against fire.* Suitable provision must be made, outside of the station when practicable, for the safe storage of explosives, and every effort possible must be made to reduce the time of this storage. If a shipment of explosives is not removed within 48 hours after notice of arrival at destination, it must be disposed of by return to the shipper, or by storage at the expense of the owner, or by sale, or when necessary to safety by destruction under supervision of a competent person.
>
> "(b) *Unauthorized persons must not have access to explosives or other dangeraus articles at any time while such articles are in the custody of the carrier.*"

There are two very salient provisions here. The first is: " * * * and all possible precautions must be taken against fire." Literally this standard is higher than that laid down by the common

law. The second is subsection (b), which is very strong in its language. "Must not have access to"—What is the meaning of the words "access to explosives"? Do they merely denote a prohibition from actual contact with the explosives? The Standard Dictionary defines access as follows: "The act or opportunity of approaching; a coming to or near; admittance as to an interview. * * * (2) A way of approach or entrance; passage; path." It can certainly be said that under these definitions failure to exercise reasonable care to prevent unauthorized persons from approaching the cars near enough to set them afire would be a violation of the regulations.

In paragraph 1689 it is provided that the cars "must be placed in yards or on sidings that they will be subject to as little handling as possible, and be removed from all danger of fire."

Paragraph 1906 reads (see page 64 of Regulations):

> "When cars protected by *'inflammable'* placards are received or held in yards, particularly at night, the carrier must see that all necessary precautions are taken to prevent accidents. These precautions must include a provision for quickly isolating them in case of fire."

In the light of the common law this language would at least be an injunction to use reasonable care in the handling of explosives, and reasonable precaution to prevent fire from spreading to the cars. It may be said that in so far as the field has been covered, the regulations have laid down as strict a measure of civil duty as that embodied in the common law.

When these considerations are coupled with the language quoted in the two cases of Smith *v.* Alabama and Moore *v.* U. S. (*supra*), it would seem

that the standard of care derivable from the regulations of the Commission must be *at least* as high as that imposed by the common law.

If it be held that the regulations contain the whole law of the case, it must be because their scope is very broad. If it be held that the regulations contain the whole law of the case they must be broadly interpreted, for it is not reasonable to suppose that the Congress intended anarchy in any phase of the transportation of explosives.

In *New Jersey Fidelity and Plate Glass Insurance Co.* v. *Lehigh Valley Railroad Company* (*supra*) the Court in affirming the judgment below said at pages 208 and 209:

> "The regulation to 'keep fire away' cast no greater burden upon the defendant than that imposed upon an individual or carrier who in the midst of a densely populated community stores vast quantities of highly explosive materials. But even if the regulation could be construed in the sense that it imposed a higher degree of care than was required, at common law, the trial judge did not adopt any such construction, but, on the contrary, instructed the jury that the care required was care commensurate with the danger of the risk; and this was no more than stating the common law rule pertaining to the circumstances of the case.
>
> "It is plain, from the judge's charge, that, with the regulations considered, no greater burden was imposed upon the defendant, in respect to the measure of care to be exercised

> **by it, in the handling and care of the high explosives, than if the regulations were entirely out of the case."**

A standard of care less stringent than that of the common law is not even considered by the court.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

FREDERICK H. HOWELL, *et als.*,
Plaintiffs-Respondents,

vs.

LEHIGH VALLEY RAILROAD COMPANY,
Defendant-Appellant.

SYNOPSIS OF BRIEF FOR DEFENDANT-APPELLANT.

In view of the length of the record herein, and the numerous witnesses and exhibits, and the length of the brief made necessary thereby, we present the following synopsis of defendant's brief, covering the main points discussed therein.

(I)

The plaintiffs, in their complaint, and the Trial Judge in his charge, took the ground, with respect to the Federal statutes and the regulations adopted thereunder by the Interstate Commerce Commission, for the transportation of explosives, that the defendant might be found guilty of negligence under such regulations, as well as under the common law rule announced by the Trial Judge—that it was the defendant's duty to use a degree of care commensurate with the risk.

The defendant asserts that where Congress has acted in respect of a subject matter under Federal jurisdiction, such action supplants the common law and is exclusive of all other laws, whether common or statute, on said subject. Under this principle, the jury were left to speculate as to the required degree of care, without being limited to the question of whether or not there was a violation of the Federal laws, for example, the jury might

have speculated that a degree of care commensurate with the risk might require the defendant to carry T N T or shrapnel shells in steel cars, instead of wooden cars, or in steel containers, instead of wooden containers, or might require the defendant to have fire extinguishers in or near every car. But the defendant claims that as Congress has prescribed rules for the packing, handling, storage and transportation of explosives, there can be no charge of negligence against it except for a failure to comply with such regulations, in other words, that the sole test is—whether the defendant obeyed the regulations.

(II)

The Trial Judge permitted the jury to take certain of the regulations of the commission into consideration as the basis of a charge of negligence. The defendant urges that none of the regulations which he specified applied to the circumstances of the case, and further urges that if they did apply, there was no proof of a violation thereof, or that such violation was the proximate cause of the damage to the plaintiffs.

(III)

If it was proper to permit the jury to consider grounds of negligence other than violations of the interstate regulations, nevertheless, the defendant urges that there was no proof of negligence in the particulars specified by the Trial Judge in the charge. The complaint and the charge of the Trial Judge did not assert liability on the part of the defendant by reason of the conduct of any of its employees *after* the outbreak of the fire. The plaintiffs, in the complaint, alleged certain theories of negligence, and the Trial Judge, in his charge (following in substance the allegations of the complaint) permitted the jury to hold the defendant responsible on such theories. They related solely to the starting of the fire, the discovery and report thereof, and the care exercised by the defendant in guarding its premises, and in furnishing fire fighting

devices. All of these points relate, primarily, to the outbreak of the fire. There was no direct evidence as to what started the fire, but there was evidence from which the jury might reasonably infer that it was started by spontaneous combustion; but, as the Trial Judge permitted the jury to find the defendant responsible in respect to the starting of the fire, it was, in practical effect, an attempted application of the doctrine of *res ipsa loquitor*. The defendant claims that this was error, as, when there are various theories of negligence—some of which are consistent with innocence, the plaintiffs' proofs must be such as to eliminate all theories that are consistent with innocence—in other words, the jury had no right to speculate that the defendant may have been guilty, when the evidence upon which the speculation was based is clearly consistent with innocence.

In his charge, the Trial Judge permitted the jury to find the defendant negligent on any one of a number of different specifications. As to at least some thereof, the defendant urges that they afford no proper basis for a verdict against it, because there was no proof in support thereof. The verdict being a general one, there was nothing to show on what theory the jury found the defendant guilty, and, hence, if the record shows that one or more of the theories of negligence thus submitted to the jury, were without foundation in the proofs, the judgment must be reversed.

(IV)

There was error in the charge, and in the refusal to charge on the subject of the legal effect to be given to an explosion which occurred on Johnson Barge No. 17. There was no proof that the defendant had any knowledge of the presence of Johnson 17 at its pier, nor of the contents thereof, and the defendant urges that the Trial Judge should not have left to the jury the question of whether the defendant was in any way responsible for the explosion on the Johnson 17, where the same was the first or the second, in point of time, of the two explosions which, admittedly, occurred.

(V)

There was no evidence of any claim made by the insurance companies to the insured at the time of the payment of policies, that the fire was caused by the act or neglect of some third person.

(VI)

The jury were erroneously permitted to include interest in the verdict for the plaintiffs.

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III.

ASSUMING THAT THE JURY HAD THE RIGHT TO BASE A VERDICT UPON ANY GROUND OF NEGLIGENCE OTHER THAN A VIOLATION OF THE INTERSTATE REGULATIONS, THERE WAS NO PROOF OF ANY SUCH NEGLIGENCE, OR THAT THE SAME, IF PROVED, WAS THE PROXIMATE CAUSE OF DAMAGE TO THE PLAINTIFFS. EVEN IF THERE WAS PROOF OF NEGLIGENCE IN SOME ONE OR MORE OF THE RESPECTS SUBMITTED TO THE JURY (OTHER THAN A VIOLATION OF THE INTERSTATE REGULATIONS), THE PROOF FAILED TO SHOW NEGLIGENCE IN ALL OF SUCH RESPECTS, AND IT WAS ERROR TO PERMIT THE JURY TO BASE A VERDICT UPON A FINDING OF NEGLIGENCE IN SOME OF THE RESPECTS THUS SUBMITTED 62

(a)

It was error to permit the jury to find negligence on the part of the defendant, on the ground that the defendant neglected to watch or guard the premises and the waters adjacent thereto through employees sufficient in number and competence, and to properly instruct the same, to prevent incendiary or accidental fires, or to discover and extinguish the same 66

(b)

It was error to permit the jury to find negligence on the part of the defendant, on the ground that the defendant permitted unauthorized persons upon the premises in the vicinity of the explosives 83

(c)

It was error to permit the jury to find negligence on the part of the defendant, on the ground that it permitted, or neglected to prevent, vessels not connected with the transhipment of explosives and having no business at the North Pier, and wholly or partially laden with explosives, to lie moored to said pier or in the vicinity thereof 85

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(d)

It was error to permit the jury to find negligence on the part of the defendant, on the ground that it neglected to isolate or separate the railroad cars containing explosives, and improperly accumulated or bunched the same, and neglected to take precautions for quick isolation in case of fire 94

(e)

It was error to permit the jury to find negligence on the part of the defendant, on the ground that its employees were negligent in guarding, discovering and reporting the fire on July 30, 1916 100

(f)

It was error to permit the jury to find negligence on the part of the defendant, on the ground that it neglected to provide sufficient apparatus and employees sufficient for the purpose of fighting and extinguishing fire 109

(g)

It was error to permit the jury to find negligence on the part of the defendant, on the ground that it neglected to provide sufficient means of communication or alarm of fire 117

IV.

THERE WAS ERROR IN THE CHARGE TO THE JURY AND IN THE REFUSAL TO CHARGE CERTAIN REQUESTS SUBMITTED BY THE DEFENDANT RELATING TO THE SUBJECT OF THE DEFENDANT'S ALLEGED RESPONSIBILITY FOR THE EXPLOSION ON THE JOHNSON BARGE NUMBER SEVENTEEN 118

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(a)

The evidence shows that there were two explosions on July 30, 1916, one on land in the Black Tom yard, and the other on water in Johnson Barge No. 17. There was evidence from which the jury might infer that the first explosion was on the water in Johnson Barge No. 17, and the jury should have been charged, as requested, that if this explosion caused damage to the plaintiffs, the jury could not find the defendant responsible therefor.. 124

(b)

Regardless of whether the first explosion was on land or on water, the jury should have been charged as requested, that the verdict, if any, against the defendant, should be limited to nominal damages, as there was no evidence from which the jury might determine how much of the damage to the plaintiffs was caused by the explosion on land and how much was caused by the explosion on water 140

(c)

So far as relates to the plaintiff insurance companies, the jury should have been charged as requested, that the verdict, if any, in their favor, should be limited to nominal damages, as there was no evidence from which the jury might determine how much of the damage to said plaintiffs was caused by explosion and how much was caused by fire 142

(d)

It was error to leave to the jury the question of whether the defendant was responsible for the explosion on water (even though said explosion was not the first in point of time) as such explosion was the result of an independent, intervening, illegal cause 158

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(e)

It was error to leave to the jury the question of whether there was any duty on the part of the defendant to guard or watch explosives on Johnson Barge No. 17, and to refuse to charge the jury, as requested, that the mooring of said barge at the North Pier in Black Tom Yard, partly laden with explosives, was in violation of the Anchorage regulations of the United States Government 164

V.

The law is settled that under a fire insurance policy such as those involved in this case an insurer is not entitled to subrogation unless at or before the payment of the loss he claims to the insured that the fire was caused by the act or neglect of some third person. There was no evidence of any such claim having been made in the present case 165

VI.

It was error to direct the Jury to include interest in any verdict that might be returned in favor of the plaintiffs 172

VII.

For these reasons, the judgment entered in favor of the plaintiffs, and each of them, should be reversed and a new trial ordered 177

New Jersey Court of Errors and Appeals

FREDERICK H. HOWELL, *et als.*,
Plaintiffs-Respondents,

vs.

LEHIGH VALLEY RAILROAD COMPANY, a corporation,
Defendant-Appellant.

BRIEF IN FAVOR OF THE LEHIGH VALLEY RAILROAD COMPANY, DEFENDANT-APPELLANT.

(1)

Statement of the Case.

The appeal in this case is taken from a judgment entered in the New Jersey Supreme Court, in favor of the respondents (hereinafter called the plaintiffs) and against the appellant (hereinafter called the defendant) for the sum of $42,665.87 (made up of an item of $36,854.09 as the principal sum and an item of $5,811.78 for interest), in favor of the plaintiffs, Frederick H. Howell, Thomas A. Howell and James H. Post, co-partners, doing business under the firm name of B. H. Howell Son & Company; and for the sum of $377,325.43 (made up of an item of $325,019.37 as the principal sum, and an item of $52,306.06 for interest) in favor of the plaintiffs, Home Insurance Company and seven other insurance companies, making a total judgment for the sum of $419,991.30, besides costs.

These amounts were allowed as damages alleged to have been sustained by the several plaintiffs by reason of the destruction by fire and explosion of a quantity of raw sugar, alleged in the complaint to have been of the fair market value of $429,038.61.

The plaintiffs, Frederick H. Howell, *et als.*, were the owners of said sugar and the plaintiff insurance companies paid certain amounts to the first named plaintiffs, under the terms of certain insurance policies, whereby the said sugar was insured; and it was claimed that the plaintiff insurance companies were entitled, under the terms of the several policies, to be subrogated to the rights of the individual plaintiffs, and by reason thereof, were entitled to join with said plaintiffs in a suit to recover damages to the extent of the payments so made on said policies.

The fire and explosion by which the said sugar was destroyed, occurred at one of the Jersey City Terminals of the defendant, located on the west shore of the Hudson River, on the early morning of July 30th, 1916, and is commonly referred to as the Black Tom Explosion.

The judgment was entered on the verdict of a jury, after trial in the Hudson County Circuit Court on March 24th to April 3rd, 1919.

The questions on this appeal are:

Whether there should have been a non-suit, or a direction of a verdict in favor of the defendant, and whether there was legal error in the charge of the Trial Judge and in the refusals to charge as requested.

Grounds of Appeal.

The Grounds of Appeal upon which the defendant relies, are as follows:

I.

Defendant's Motion for a Non-suit, or a Direction of Verdict in its favor should have been granted for one or more of the Reasons set forth in the Grounds of Appeal. (See Grounds, Nos. 1 to 24, pp. 4 to 7.)

II.

There was error on the part of the Trial Judge in refusing to charge one or more of the requests submitted in behalf of the defendant, as set forth in the Grounds of Appeal. (See Grounds Nos. 25 to 54, pp. 7 to 15.)

III.

The Trial Judge erroneously charged the jury in one or more of the respects set forth in the Grounds of Appeal. (See Grounds, Nos. 55 to 76, pp. 15 to 28.)

The following is a statement of each Ground of Appeal which is intended to be urged.

(I. *Motion for Non-suit.*)

Defendant's motion for a non-suit should have been granted for one or more of the following reasons:

1. The plaintiffs have failed to prove facts sufficient to constitute a cause of action:

2. That Congress, having taken jurisdiction of the subject matter and having enacted statutes thereon to provide for the safe transportation of explosives in interstate commerce on land, and the Interstate Commerce Commission, in accordance with the directions of said statutes, having made rules and regulations covering the subject matter, and the explosives in question in this suit having been in the course of transportation on land in interstate commerce, the plaintiffs cannot succeed unless they prove a violation of said statutes or the rules and regulations of the Interstate Commerce Commission above referred to. This they have failed to do.

3. The plaintiffs, having failed to prove any negligence on the part of the defendant in respect of the starting of the fire, the plaintiffs cannot succeed on any assumption of negligence on the

part of the defendant in respect of the starting of the fire.

4. The facts in this case do not permit the Court properly or legally to allow the case to go to the jury upon the doctrine of *res ipsa loquitur*.

5. Assuming that the Court holds that there may have been some other duty to which the defendant was subject which is not covered by the statutes of the United States and the rules and regulations of the Interstate Commerce Commission above referred to, there is no proof of any violation of any such other duty, if any existed.

6. Since there is no proof from which any proper inference could be drawn of any negligence on behalf of the defendant in respect of the starting of the fire, the plaintiffs may not recover legally upon any assumption of negligence in respect of the starting of the fire; and if it is sought to hold the defendant legally responsible because of the conduct of its employees after the fire started, then the plaintiffs may not succeed in this case on this theory, because all of the facts proven show that the fire, when discovered, was in a car, and that such car was either itself an ammunition car or a car containing explosives, or ammunition, or was in immediate vicinity of cars containing explosives and ammunition; and, therefore, the only inference which a jury could be permitted to draw is that any one going near such fire would be in great danger; and, therefore, the defendant cannot be held responsible, because its employees under these circumstances of emergency did not attempt to go near the fire to put it out.

7. There being no proof of negligence on the part of the defendant with respect to the starting of the fire, if it is sought to hold the defendant responsible because of the alleged negligence of its employees after the fire started, the defendant

cannot be held liable on such ground because there is no allegation in the complaint under which such alleged negligence might properly be left to the jury.

As to the plaintiffs, insurance companies, for one or more of the following additional reasons:

8. Because the policies in question in the standard clause contain the following: "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured upon receiving such payment." And there is no proof of any assignment.

9. Because the policies put in evidence in this suit each contain in the standard clause the following: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riots, civil war or commotions, or military or usurped power, or by the order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered from fire in neighboring premises (or) unless fire ensues, and, in that event, for damage by fire only, by explosion of any kind or lightning; * * *"

There is no proof in this case that the sugar insured was destroyed by fire ensuing from explosion.

10. Because whatever payments were made by the plaintiffs, insurance companies, to the plaintiffs, Frederick H. Howell, *et als.*, were voluntary payments, and there is nothing to show that the plaintiffs, insurance companies, were under any legal duty to make such payments under the terms

of their several policies, and by doing so to obtain any right of subrogation thereunder.

11. Because there is no proof that the sugar for the value of which payments were made by the plaintiffs, insurance companies, to the plaintiffs, Frederick H. Howell, *et als.*, was destroyed by fire, and for all that appears, the destruction of said sugar may have been caused entirely by explosion, and there is no evidence from which the Court and jury can determine what, if any, damage, was caused to the sugar by fire and what was caused by explosion, and therefore there is no basis to find any damage accruing to the plaintiffs, insurance companies, under the policies and the proof (pages 376-410).

(II. *Motion to Direct Verdict.*)

Defendant's motion for a direction of verdict should have been granted for one or more of the following reasons:

12. The plaintiffs have failed to prove facts sufficient to constitute a cause of action.

13. That Congress, having taken jurisdiction of the subject matter and having enacted statutes thereon to provide for the safe transportation of explosives in interstate commerce on land, and the Interstate Commerce Commission, in accordance with the directions of said statutes, having made rules and regulations governing the subject matter, and the explosives in question in this suit having been in the course of transportation on land in interstate commerce, the plaintiffs cannot succeed unless they prove a violation of said statutes or the rules and regulations of the Interstate Commerce Commission above referred to. This they have failed to do.

14. The plaintiffs, having failed to prove any negligence on the part of the defendant in respect

of the starting of the fire, the plaintiffs cannot succeed on any assumption of negligence on the part of the defendant in respect of the starting of the fire.

15. The facts in this case do not permit the Court properly or legally to allow the case to go to the jury upon the doctrine of *res ipsa loquitur*.

16. Assuming that the Court holds that there may have been some other duty to which the defendant was subject which is not covered by the statutes of the United States and the rules and regulations of the Interstate Commerce Commission above referred to, there is no proof of any violation of any such duty, if any existed.

17. Since there is no uroof from which any proper inference could be drawn of any negligence on behalf of the defendant in respect of the starting of the fire, the plaintiffs may not recover legally upon any assumption of negligence in respect of the starting of the fire; and if it is sought to hold the defendant legally responsible because of the conduct of its employees after the fire started, then the plaintiffs may not succeed in this case on this theory, because all of the facts proven show that the fire, when discovered, was in a car, and that such car was either itself an ammunition car, or a car containing explosives or ammunition, or was in immediate vicinity of cars containing explosives and ammunition; and, therefore, the only inference which a jury could be permitted to draw is that any one going near such fire would be in great danger; and, therefore, the defendant cannot be held responsible, because its employees under these circumstances of emergency did not attempt to go near the fire to put it out.

18. There being no proof of negligence on the part of the defendant with respect to the starting of the fire, if it is sought to hold the defendant

responsible because of the alleged negligence of its employees after the fire started, the defendant cannot be held liable on such ground because there is no allegation in the complaint under which such alleged negligence might properly be left to the jury.

19. There is no proof that the omission of any of the alleged duties which it is alleged in the complaint the defendant omitted was the proximate cause of the injury complained of to the plaintiffs, or any of them.

20. There is no proof that the performance of any of the alleged duties set forth in the complaint would have prevented the injury of which the plaintiffs, or any of them, complain.

As to the plaintiffs, insurance companies, for one or more of the following additional reasons:

21. Because the policies in question in the standard clause contain the following: "If this company shall claim that the fire was caused by the act of neglect of any person or corporation, private or municipal, this company shall on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured upon receiving such payment." And there is no proof of any assignment.

22. Because the policies put in evidence in this suit each contain in the standard clause the following: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riots, civil war or commotions, or military or usurped power, or by the order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered from fire in neighboring prem-

ises (or) unless fire ensues, and, in that event, for damage by fire only, by explosion of any kind or lightning; * * *'' There is no proof in this case that the sugar insured was destroyed by fire ensuing from explosion.

23. Because whatever payments were made by the plaintiffs, insurance companies, to the plaintiffs, Frederick H. Howell, *et als.*, were voluntary payments, and there is nothing to show that the plaintiffs, insurance companies, were under any legal duty to make such payments under the terms of their several policies, and by doing so, to obtain any right of subrogation thereunder.

24. Because there is no proof that the sugar for the value of which payments were made by the plaintiffs, insurance companies, to the plaintiffs, Frederick H. Howell, *et als.*, was destroyed by fire, and for all that appears, the destruction of said sugar may have been caused entirely by explosion, and there is no evidence from which the Court and jury can determine what, if any, damage was caused to the sugar by fire and what was caused by explosion, and therefore there is no basis to find any damage accruing to the plaintiffs, insurance companies, under the policies and the proof (pages 722, 723).

(III. *Requests to Charge.*)

The Trial Judge refused to charge one or more of the following requests submitted in behalf of the defendant. (The numbers in brackets correspond to the numbers of the requests, as submitted.)

25. (2)

The sole duty of the defendant to the plaintiffs, in respect to the explosives received by it for interstate transportation by land and still in the course thereof was to comply with the statutes of

the United States and the regulations of the Interstate Commerce Commission respecting the same; and the plaintiffs are not entitled to recover unless the jury shall find that the defendant failed to so comply and that such failure was the proximate cause of the injury complained of by the plaintiffs.

26. (4)

The "explosive" placard in evidence is not a regulation of the Interstate Commerce Commission.

27. (5)

The words "Keep Fire Away" on the "explosive" placard in evidence do not constitute a requirement that fire should be extinguished.

28. (6)

There is no evidence in this case but that the explosives in defendant's cars were in all respects carried, conveyed, transported, handled and held by the defendant in compliance with the statutes of the United States and the regulations of the Interstate Commerce Commission respecting the safe transportation of explosives in interstate commerce by land.

29. (7)

There is no evidence from which the jury can legally infer that the defendant did not furnish sufficient watchmen or guards on its premises on the night of July 29 and the morning of July 30, 1916.

30. (8)

There is no evidence from which the jury can legally infer that the defendant did not provide sufficient fire-fighting apparatus on its premises on July 29-30, 1916.

31. (9)

There is no evidence from which the jury can legally infer that the defendant did not observe the usual custom of railroads in respect to the fire protection afforded at Black Tom on July 29-30, 1916.

32. (10)

There was no legal duty resting on the defendant in respect of its terminal at Black Tom, to furnish fire hydrants in addition to those furnished by the City of Jersey City, the said terminal being within the limits of that municipality.

33. (11)

There was no legal duty resting upon the defendant in respect of its terminal at Black Tom, to furnish its own fire protection, in addition to that furnished by the City of Jersey City, the said terminal being within the limits of that municipality.

34. (12)

There was no legal duty resting upon the defendant in respect of its terminal at Black Tom, to furnish men and equipment to extinguish fires, in addition to the men and equipment of the municipality of Jersey City, within the limits of which the said Black Tom terminal is.

35. (13)

The Court has taken judicial notice of the fact that by reason of the war in Europe, there was common knowledge of German propaganda, as a result of which persons favorable to Germany, either at the instigation of the German Government or on their own initiative, sought to destroy munitions which otherwise would go to the enemies of their Fatherland. If it is assumed that this knowledge reached the attention of the officials of the

defendant, it should also be assumed that such knowledge likewise reached the municipal authorities of Jersey City, and that any necessary police protection to take precautions against incendiarism or other criminal acts within the limits of Jersey City would be furnished by such municipality, and the defendant cannot be held legally responsible for failure, if any, to furnish its own police protection for such purpose.

36. (14)

There is no evidence in this case of the presence of any unauthorized persons on the premises at Black Tom on the night of July 29-30, 1916.

37. (15)

There is no evidence in this case that any unauthorized person had access to the explosives or other dangerous articles in the custody of or on the premises of the defendant on the night of July 29-30, 1916.

38. (16)

There is no testimony of any witness from which the jury can draw any legal inference as to what caused the starting of the fire which was discovered on the premises of the defendant on the night of July 29-30, 1916.

39. (17)

If the jury believes the testimony of Dr. McKenna, the expert produced by the plaintiffs, that "There was nothing which could be called a law of nature which determines for us beforehand what would be the effect of large masses of explosives exploding * * *, and that each case stands on its own bottom," then the jury may not find a verdict against the defendant based upon its failure to take precautions other than it did take.

40. (18)

The defendant can only be held legally responsible for the results of its conduct reasonably to be expected, and under the proofs in this case it was not reasonably required to expect explosion of T N T in the cars on its premises as a result of fire.

41. (19)

The plaintiffs in this case cannot upon their complaint herein recover any damages against the defendant by reason of any alleged negligent conduct of defendant's employees after the discovery of the fire on its premises.

If the Court refuses to charge No. 19, then we respectfully request the Court to charge No. 20 as follows:

42. (20)

If the jury finds that the defendant was not negligent in respect of the starting of the fire and that the said fire was either in a car of explosives or ammunition or was immediately adjacent to cars containing explosives or ammunition, then a condition of emergency existed by reason of which the defendant cannot be held responsible for errors of judgment on the part of its employees or any of them in respect of what they did or failed to do concerning the putting out of the fire.

If the Court refuses to charge No. 20, then we respectfully request the Court to charge No. 21 as follows:

43. (21)

If the jury finds that the defendant was not negligent in respect of the starting of the fire and that the said fire was either in a car of explosives or ammunition or was immediately adjacent to cars containing explosives or ammunition, then the

jury should consider whether the situation thus disclosed was not an emergency, and if the jury finds that the situation was that of emergency, then it may not find the defendant legally responsible for the errors of judgment of its employees in respect of what they did or failed to do concerning the putting out of the fire.

44. (22)

The defendant can only be held responsible in damages for the failure to exercise reasonable care under the circumstances, and the jury in considering the circumstances and the degree of care exercised may consider the fact that there were four watchmen on the premises in the immediate vicinity of the cars containing the explosives on the night of the explosion in question, in addition to the watchmen employed by the defendant.

45. (24)

The undisputed evidence is that Johnson barge No. 17, with 1,005 cases of T N T and 417 cases of detonators (all obtained elsewhere), moored at North Pier at Black Tom some time on Friday, July 28, 1916, and there is no evidence that the defendant had any knowledge whatever of the materials thus laden on said Johnson 17 at that time; and the jury must find under the law as contained in the anchorage regulations of the United States Government that a boat thus laden should not have been moored at Black Tom pier, but should have proceeded to the anchorage ground as designated in the said United States regulations, and that the act of mooring her thus laden at the North Pier at Black Tom was an unlawful act.

46. (25)

If the jury find that the Johnson 17 contained 1,005 cases of T N T and 417 cases of detonators (all obtained elsewhere) was unlawfully moored at

Black Tom Pier, and that the T N T subsequently exploded on the night of July 29-30, 1916, and caused the injury complained of by the plaintiff, the jury cannot legally find the defendant responsible for such injury.

47. (26)

There is no evidence in this case from which the jury can legally hold the defendant responsible in respect of the materials on Johnson barge No. 17, or for the results of any explosion of such materials.

48. (27)

If the jury find that the T N T on the Johnson barge 17 exploded and caused the injury of which the plaintiffs complain, the jury cannot legally find the defendant responsible.

49. (28)

The plaintiffs in this case having complained that the injury which they suffered was occasioned by the first of the two explosions, which the proofs show occurred at or near Black Tom on the night of July 29-30, 1916, the jury cannot legally hold the defendant responsible for such injury unless it finds that the explosion of the T N T cars on land on the premises of the defendant was the first of the two explosions.

50. (29)

In view of the fact that the regulations concerning the transportation of explosives and other dangerous articles on land in Article 1647 contain a prohibition against the loading of such materials as detonators and high explosives in the same car or storage place, and of the evidence in this case in respect to the danger of thus loading such articles on the same carrier, the jury may legally find that the presence on Johnson barge 17 of the

detonators and T N T constituted negligence on behalf of the proprietor of such barge.

51. (30)

It is the undisputed fact that there were two explosions at or near Black Tom on the night of July 29-30, 1916, one thereof upon the land at the place indicated by the crater as shown in the Exhibit P. 16, and the other on a barge at the site of the crater in the bed of the river, as shown by the Exhibit D 12, and that the defendant, if held responsible at all, can only be held responsible for the effects of the explosion on land, and it is the undisputed fact that each of such explosions, directly or indirectly, damaged the warehouses containing the sugar, for the loss of which damages are claimed in this suit, and there is no evidence from which the jury can determine how much of the damage to the said sugar was caused by the effects, direct or indirect, of the first explosion and how much was caused by the effects, direct or indirect, of the second explosion; and in default of such proof, the jury can legally find a verdict against the defendant, if at all, only for nominal damages.

52. (31)

The jury is not at liberty to allow the plaintiffs, or any of them, any interest in respect of any sum found to be due them, or any of them.

In respect solely to the insurance company plaintiffs, the defendant respectfully requests the Court to charge as follows:

53. (32)

The insurance complany plaintiffs cannot legally recover against the defendant except in respect of a sum of money legally required to be paid by them to the copartnership plaintiffs in pursuance of the respective policies of insurance on the sugar in question.

54. (33)

There is no proof in this case by which the jury can determine how much injury was occasioned to the sugar of the copartnership plaintiffs in the warehouses by reason of the explosion or explosions and how much was occasioned by fire ensuing, and therefore the jury can, in respect of the amount of insurance paid by the said insurance companies to the plaintiffs and claimed in this suit, allow only nominal damages, if any (pages 746-f. to 746-m).

(IV. *Exceptions to Charge.*)

The Trial Judge erroneously charged the jury in one or more of the following respects:

55. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

(a) It neglected to watch or guard said premises and waters adjacent thereto through employees sufficient in number and competence, and to properly instruct the same, to prevent incendiary or accidental fires; * * *"

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the following language:

(b) "Now, first of all, the law says that the burden rests upon the plaintiff to make out by the greater weight of the evidence that the negligence which he has charged in his written complaint against the defendant existed and was the proximate cause of the loss of which the plaintiffs complain and for which in this suit they seek to have a recovery in damages. That does not mean that they are obliged to make out all of those specifications of negligence which I have read to you, for

if they make out any one of those specifications of negligence, or two or more of them, by the greater weight of the evidence and show by the greater weight of the evidence that that one specification, or two or more specifications of negligence were the proximate cause of the loss and that they existed on the part of the defendant company, that would give them a right to have a recovery and to have you assess their damages at such sum as they shall have proven by the greater weight of the evidence."

56. "The plaintiffs allege that they (the defendants) neglected to perform such duty in the following respects:

It permitted unauthorized persons upon said premises and especially upon or in the vicinity of said explosives, ammunition or munitions of war; * * *"

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

57. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It permitted vessels not connected with the transhipment of said explosives, ammunition and munitions of war to lie moored at said North Pier; * * *"

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

58. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It permitted or neglected to prevent barges or lighters having no business at said north pier, and wholly or partially laden with such explosives and munitions of war, to lie moored to said north pier or moored to similar barges moored thereto, or to lie in the vicinity thereof; * * *"

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

59. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It neglected to isolate or separate the railroad cars containing such explosives and munitions of war, and improperly accumulated or bunched the same in the same locality on said premises, and to take precautions for quick isolation in case of fire; * * *"

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

60. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It neglected to provide employees sufficient in number and competence and to properly instruct the same for the purpose of discovering and extinguishing any incendiary or accidental fire. Such insufficient, incompetent and uninstructed employee or employees as the defendant had, were negligent in guarding, discovering and reporting the fire hereinbefore alleged; * * *"

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence

on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

61. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It neglected to provide sufficient apparatus and employees for the purpose of fighting and extinguishing fire upon said premises, in said railroad terminal; * * *"

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

62. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It neglected to provide sufficient means or communication or alarm of fire."

And after so charging, the Trial Judge then erroneously permitted the jury to find negligence on the part of the defendant by reason of failure to perform such alleged duty, using the language set forth in Ground of Appeal No. 55 (b).

63. "The plaintiffs allege that they (the defendant) neglected to perform such duty in the following respects:

It neglected to watch or guard said premises and waters adjacent thereto through employees sufficient in number and competence, and to properly instruct the same, to prevent incendiary or accidental fires;

It permitted unauthorized persons upon said premises and especially upon or in the vicinity of said explosives, ammunition or munitions or war;

It permitted vessels not connected with the tran-

shipment of said explosives, ammunition and munitions of war to lie moored at said north pier;

It permitted or neglected to prevent barges or lighters having no business at said north pier, and wholly or partially laden with such explosives and munitions of war, to lie moored to said north pier or moored to similar barges moored thereto, or to lie in the vicinity thereof;

It neglected to isolate or separate the railroad cars containing such explosives and munitions of war, and improperly accumulated or bunched the same in the same locality on said premises, and to take precautions for quick isolation in case of fire;

It neglected to provide employees sufficient in number and competence and to properly instruct the same for the purpose of discovering and extinguishing any incendiary or accidental fire. Such insufficient, incompetent and uninstructed employee or employees as the defendant had were negligent in guarding, discovering and reporting the fire hereinbefore alleged:

It neglected to provide sufficient apparatus and employees for the purpose of fighting and extinguishing fire upon said premises, in said railroad terminal; and

It neglected to provide sufficient means of communication or alarm of fire.

And then the plaintiff charges that,

The loss of the merchandise of the said plaintiff was caused by the defendant's neglect of duty aforesaid.

Now, first of all, the law says that the burden rests upon the plaintiff to make out by the greater weight of the evidence that the negligence which he has charged in his written complaint against the defendant existed and was the proximate cause of the loss of which the plaintiffs complain

and for which in this suit they seek to have a recovery in damages. That does not mean that they are obliged to make out all of those specifications of negligence which I have read to you, for if they make out any one of those specifications of negligence, or two or more of them, by the greater weight of the evidence and show by the greater weight of the evidence that that one specification, or two or more specifications of negligence, were the proximate cause of the loss and that they existed on the part of the defendant company, that would give them a right to have a recovery and to have you assess their damages at such sum as they shall have proven by the greater weight of the evidence."

64. (a) "Now, then, we find that Section 1643 of the regulations provides as follows:

Careful men must be chosen to handle explosives, the platform and the feet of the men must be as free as possible from grit, and all possible precautions must be taken against fire. Suitable provision must be made, outside of the station when practicable, for the safe storage of explosives, and every effort possible must be made to reduce the time of this storage. * * *"

And after so charging, the Trial Judge then erroneously permitted the jury to consider said regulations as applicable to the circumstances of the case and erroneously permitted the jury to impose upon the defendant a duty other than that specified in said regulation, using the following language:

(b) "Now, then, I charge you, gentlemen, that the rule of law that is to be extracted from these regulations and the statute in pursuance of which they are passed is that the defendant railroad company was under a duty in the transportation and custody of the cars of explosives, ammunition and inflammable substances in the particulars indi-

cated, to exercise a degree of care commensurate with the risk of danger reasonably to be anticipated, and the defendant railroad company is liable for damages to the plaintiffs for any failure to exercise such care if the failure to exercise such care was the proximate cause of the injury and loss to the plaintiffs.

I charge you that the standard of care imposed upon the defendant railroad company under the regulations of the Interstate Commerce Commission in so far as such regulations cover the field of the measure of the defendant's duty is the same as the defendant railroad company was under without them, namely, a degree of care commensurate with the risk of danger reasonably to be anticipated."

65. "And we find in Section 1666 the following:

A certified car for the dangerous explosives specified in paragraph 1661 must be protected by attaching to each outside end, and side door, the lower edge, not less than four and one-half feet above the car floor, a standard placard twelve by fourteen inches, on which appears in conspicuous red and black printing on strong tag board the following notice: EXPLOSIVES (to be printed in red); HANDLE CAREFULLY. KEEP FIRE AWAY (to be printed in red). And then follows a statement of what is declared on the placard to be condensed rules for handling the car. * * *

This car must not be placed in a passenger train, nor in a mixed train if avoidable.

Cars containing explosives must be near center of train and may be together if desired; must be at least 15 cars from engine and 10 cars from caboose when length of train will permit.

This car must not be placed next to cars bearing the inflammable or the said acid placard or cars

containing lighted heaters. Whenever it is possible to avoid so doing, it must not be placed next to tank cars or flat cars or next to carloads of lumber, poles, iron, pipe, or other articles liable to break through end of car from rough handling.

The air and hand brakes on this car must be in service.

In shifting have a car between this car and engine whenever possible, and do not cut this car off while in motion.

Avoid all shocks to this car and couple carefully.

Avoid placing it near a possible source of fire.

Engines on parallel track must not be allowed to stand opposite or near this car when it can be avoided.

This placard must be removed from car when the explosives are unloaded."

And after so charging, the Trial Judge then erroneously permitted the jury to consider said regulation as applicable to the circumstances of the case and erroneously permitted the jury to impose upon the defendant a duty other than that specified in said regulation, using the language set forth in Ground of Appeal No. 64 (b).

66. "Now, under that Section 1643 which I was reading a moment ago, appears this:

That if a shipment of explosives is not removed within 48 hours after notice of arrival at destination, it must be disposed of by return to the shipper, or by storage at the expense of the owner, or by sale, or when necessary to safety by destruction under supervision of a competent person."

And after so charging, the Trial Judge then erroneously permitted the jury to consider said regulation as applicable to the circumstances of the case and erroneously permitted the jury to impose upon the defendant a duty other than that

specified in said regulation, using the language set forth in Ground of Appeal No. 64 (b).

67. "Now, under that Section 1643 which I was reading a moment ago appears this: * * * And further, that

Unauthorized persons must not have access to explosives or other dangerous articles at any time while such articles are in the custody of the carrier."

And after so charging, the Trial Judge then erroneously permitted the jury to consider said regulation as applicable to the circumstances of the case and erroneously permitted the jury to impose upon the defendant a duty other than that specified in said regulation, using the language set forth in Ground of Appeal No. 64 (b).

68. "And then Section 1689 provides, speaking of cars containing explosives:

They must be coupled carefully and all unnecessary shocks must be avoided. Other cars must not be cut off and allowed to strike a car containing explosives. They must be so placed in yards or on sidings that they will be subject to as little handling as possible, and be removed from all danger of fire."

And after so charging, the Trial Judge then erroneously permitted the jury to consider said regulation as applicable to the circumstances of the case and erroneously permitted the jury to impose upon the defendant a duty other than that specified in said regulation, using the language set forth in Ground of Appeal No. 64 (b).

69. "Now, then, we find that Section 1643 of the regulations provides as follows:

Careful men must be chosen to handle explosives, the platform and the feet of the men must be as free as possible from grit, and all possible precau-

tions must be taken against fire. Suitable provision must be made, outside of the station when practicable, for the safe storage of explosives, and every effort possible must be made to reduce the time of this storage.

And we find in Section 1666 the following:

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This car must not be placed in a passenger train, nor in a mixed train if avoidable.

Cars containing explosives must be near center of train and may be together if desired; must be at least 15 cars from engine and 10 cars from caboose when length of train will permit.

This car must not be placed next to cars bearing the inflammable or the acid placard or cars containing lighted heaters. Whenever it is possible to avoid so doing, it must not be placed next to tank cars or flat cars or next to carloads of lumber, poles, iron, pipe, or other articles liable to break through end of car from rough handling.

The air and hand brakes on this car must be in service.

In shifting have a car between this car and engine whenever possible, and do not cut this car off while in motion.

Avoid all shocks to this car and couple carefully.

Avoid placing it near a possible source of fire.

Engines on parallel track must not be allowed

to stand opposite or near this car when it can be avoided.

This placard must be removed from car when the explosives are unloaded.

Now, under that Section 1643 which I was reading a moment ago appears this:

That if a shipment of explosives is not removed within 48 hours after notice of arrival at destination, it must be disposed of by return to the shipper, or by storage at the expense of the owner, or by sale, or when necessary to safety by destruction under supervision of a competent person.

And further, that

Unauthorized persons must not have access to explosives or other dangerous articles at any time while such articles are in the custody of the carrier.

And then Section 1689 provides, speaking of cars containing explosives:

They must be coupled carefully and all unnecessary shocks must be avoided. Other cars must not be cut off and allowed to strike a car containing explosives. They must be so placed in yards or on sidings that they will be subjected to as little handling as possible, and be removed from all danger of fire.

Now, then, I charge you, gentlemen, that the rule of law that is to be extracted from these regulations and the statute in pursuance of which they are passed is that the defendant railroad company was under a duty in the transportation and custody of the cars of explosives, ammunition and inflammable substances in the particulars indicated, to exercise a degree of care commensurate with the risk of danger reasonably to be anticipated, and the defendant railroad company is liable for damages to the plaintiffs for any failure to exercise such care if the failure to exercise such care was the proximite cause of the injury and loss to the plaintiffs.

I charge you that the standard of care imposed upon the defendant railroad under the regulations of the Interstate Commerce Commission in so far as such regulations cover the field of the measure of the defendant's duty is the same as the defendant railroad company was under without them, namely, a degree of care commensurate with the risk of danger reasonably to be anticipated."

70. "I charge you that the standard of care imposed upon the defendant railroad under the regulations of the Interstate Commerce Commission in so far as such regulations cover the field of the measure of the defendant's duty is the same as the defendant railroad company was under without them, namely, a degree of care commensurate with the risk of danger reasonably to be anticipated."

71. "Now, then, gentlemen, that brings you to this interesting inquiry: What is the degree of care commensurate with the risk of danger reasonably to be anticipated which it was the duty of the defendant in this case to exercise with respect to these explosives in regard to the particulars in which the plaintiff has complained the defendant was negligent?"

72. "How do you ascertain such care? Well, the law says that a high degree of care—which is only another way of saying reasonable care—is the duty of every person when he is handling something which is apt to be dangerous and which he has reason to anticipate will be dangerous to others if he does not handle it carefully. Now, then, you can readily see that such a rule is a rule of relation; it has regard to all of the circumstances in which a man finds himself placed at the time he is called upon to act."

73. "And therefore, the law said that they must use care which would be commensurate with the risk of injury to persons in the neighborhood that would ensue if such care were not used."

74. "Another claim made by the defendant, as I understand it, is that even if the loss occasioned, if any was occasioned, by the Johnson 17, was not the original or the sole cause of the destructive effects or results on plaintiff's property of which complaint is made here, that still if it was an independent cause and it did cause some loss to the plaintiff and you cannot say, because the evidence does not make it clear, how much of the loss was due to the explosion on Johnson 17 for which the defendant was not responsible, if it was not responsible, and how much was due to the other explosion or to the fire that ensued from either of them why, manifestly, you could not say how much the defendant ought to have, and, therefore, you would have to say that the best that could be said for them in that particular would be that they would be entitled to six cents damages; because the law makes it incumbent upon the plaintiff to make out by the greater weight of the evidence not only what was the cause of his loss, but the extent of it, how much it was.

Now, in response to that, of course, the plaintiff says that the explosion on Johnson 17 was simply one link in a chain of consequences which flowed from an original act of negligence on the part of the defendant. They say that the first explosion was the explosion that took place on the land, and that everything that occurred after that was an unbroken concatenation, a complete series of links, all of which were traceable as to their original legal source to the negligence on the part of the defendant company, the Lehigh Valley Railroad Company; and if they have made that out by the

greater weight of the evidence, then, of course, it follows as a legal consequence, that the plaintiff is entitled to recover all the loss that has been shown by it to have resulted from both explosions. You can readily see that this proposition that I am trying to elucidate to you is merely a matter of cause and effect. If the defendant has been shown by the greater weight of the evidence to have caused all the loss, why, then, of course, the defendant must necessarily pay all the damage. If it has not been shown to have occasioned all the loss, but has been shown to have occasioned some of the loss by its legal fault, then, of course, it ought to pay so much damage as it has been shown to have caused, and if the jury cannot say how much that damage was, because that has not been made clear in the evidence, but they are satisfied that it did cause some loss, why then, manifestly, the jury could only say under the circumstances that the defendant would be obligated to pay nominal damages."

75. "Now, in determining, gentlemen, whether or not care proportioned to the risk has been exercised, you must bear in mind that the criterion is, what would a reasonably prudent and cautious man have done under the circumstances? * * * And in determining that question you ask yourselves whether or not a reasonably prudent and cautious man would have had watchmen and guards upon the premises to watch these inflammable and explosive substances and whether or not he would have had as great or greater a number of guards and watchmen than the defendant had in this case, and whether or not he would have had guards of more competence, and then you ask yourselves whether or not such a reasonably prudent and cautious man would have depended, and to what extent he would have depended, upon the activities of the so-called Dougherty detectives."

76. "And then you would ask yourselves furthermore, to what extent a reasonably prudent and cautious man would have permitted persons to come upon that property at night, what challenge would he have used to ascertain whether they were authorized or not" (pages 737 to 746-f).

Brief of the Argument.

I.

It appearing that Congress had enacted legislation relative to the transportation of explosives in Interstate Commerce and that regulations had been made pursuant to such legislation, the duty of the defendant in the premises must be determined solely by reference to such legislation and regulations.

The complaint charged that under the law applicable to the defendant, and the regulations of the Interstate Commerce Commission for the transportation of explosives and other dangerous articles, as prescribed in the Act of Congress of March 4th, 1909, "it was the duty of the defendant to exercise all reasonable care to prevent fire or explosion upon the said premises, and to control and extinguish the same, the extent of such duty being commensurate with the nature and risk of the situation hereinbefore set forth, to take all reasonably possible precautions against fire, and to keep fire away; to make all reasonable and suitable provision for the safe storage thereof outside of station; to prevent unauthorized persons from having access thereto on said premises, and to take all reasonable and necessary precautions for quick isolation in case of fire" (p. 34, l. 35, to p. 35, l. 5).

In its answer to these allegations, the defendant admitted that certain regulations were in full force and effect, and that the same were applicable to it in respect of its care, custody and control of the said explosives, while the same were in the course of transportation in

interstate commerce; and it further said that the defendant was subject exclusively to said acts and regulations (p. 39, ll. 15-35). The defendant also set up, by way of a second defense, that, as a common carrier engaged in interstate commerce, it was compelled by law to receive, carry, convey and transport the said explosives, providing the same were packed, marked, loaded and handled in accordance with such statutes and regulations, and it then alleged that the said explosives were packed, etc., and, when offered for transportation were, and until and at the time of the explosion continued to be, in proper condition to transport, in accordance with said statutes and regulations, and were carried, conveyed and transported and held by it lawfully, and strictly in accordance therewith (p. 39, l. 40, to p. 40, l. 35).

Motions for non-suit and for direction of verdict in favor of the defendant were made on the ground, among others, that as the explosives were in the course of transportation on land, in interstate commerce, the plaintiffs could not succeed unless they proved a violation of the interstate statutes or regulations, and this, the plaintiffs had failed to do. (Motion for non-suit, p. 377, ll. 10-30; motion for direction, pp. 722-723.)

The same point was raised by appropriate requests to charge. Requests Nos. 2 and 3 read as follows:

> "2. The sole duty of the defendant to the plaintiffs in respect to the explosives received by it for interstate transportation by land and still in the course thereof, was to comply with the statutes of the United States and the regulations of the Interstate Commerce Commission respecting the same; and the plaintiffs are not entitled to recover unless the jury shall find that the defendant failed to so comply and that such failure was the proximate cause of the injury complained of by the plaintiffs.
>
> If the Court refuses to charge No. 2, then we respectfuly request the Court to charge No. 3 as follows:

> 3. The sole duty of the defendant to the plaintiffs in regard to the explosives received by it for interstate transportation by land and still in the course thereof, in respect of all matters within the scope of the statutes of the United States and the regulations of the Interstate Commerce Commission concerning the same, was to comply with such statutes and regulations; and the plaintiffs are not entitled to recover in respect of any such subject matter unless they prove a failure on the part of the defendant to so comply and that such failure was the proximate cause of the injury complained of by plaintiffs'' (p. 746-g, ll. 10-35).

The Trial Judge refused to charge Request No. 2, but did charge Request No. 3 (p. 728, l. 31, to p. 729, l. 1). As this request was in the alternative, the defendant is entitled to raise the point that it was error to refuse to charge Request No. 2. *Kosher Dairy Co.* v. *N. Y. S. & W. R. R.*, 86 N. J. L. 161.

The same point is raised by certain exceptions to the charge. In the course of his charge, the Trial Judge, after including therein said Request No. 3 and quoting certain of the interstate regulations, then permitted the jury to impose upon the defendant a duty other than as specified in those regulations, using the following language:

> ''Now, then, I charge you, gentlemen, that the rule of law that is to be extracted from these regulations and the statute in pursuance of which they are passed is that the defendant railroad company was under a duty in the transportation and custody of the cars of explosives, ammunition and inflammable substances in the particulars indicated, to exercise a degree of care commensurate with the risk of danger reasonably to be anticipated, and the defendant railroad company is liable for damages to the plaintiffs for any failure to exercise such care if the failure to exercise such care was the proximate cause of the injury and loss to the plaintiffs.
>
> I charge you that the standard of care imposed upon the defendant railroad company under the regulations of the Interstate Commerce Commis-

sion in so far as such regulations cover the field of the measure of the defendant's duty is the same as the defendant railroad company was under without them, namely, a degree of care commensurate with the risk of danger reasonably to be anticipated."

(Ground of Appeal No. 64-b; pp. 20-21.)

* * * * * * *

"I charge you that the standard of care imposed upon the defendant railroad under the regulations of the Interstate Commerce Commission in so far as such regulations cover the field of the measure of the defendant's duty, is the same as the defendant railroad company was under without them, namely, a degree of care commensurate with the risk of danger reasonably to be anticipated."

(Ground of Appeal No. 70, p. 26.)

* * * * * * *

"Now, then, gentlemen, that brings you to this interesting inquiry: What is the degree of care commensurate with the risk of danger reasonably to be anticipated which it was the duty of the defendant in this case to exercise with respect to these explosives in regard to the particulars in which the plaintiff has complained the defendant was negligent?"

(Ground of Appeal No. 71, p. 26.)

* * * * * * *

"How do you ascertain such care? Well, the law says that a high degree of care—which is only another way of saying reasonable care—is the duty of every person when he is handling something which is apt to be dangerous and which he has reason to anticipate will be dangerous to others if he does not handle it carefully. Now, then, you can readily see that such a rule is a rule of relation; it has regard to all of the circumstances in which a man finds himself placed at the time he is called upon to act."

(Ground of Appeal No. 72, p. 26.)

* * * * * * *

"And, therefore, the law said that they must use care which would be commensurate with the risk of injury to persons in the neighborhood that would ensue if such care were not used."

(Ground of Appeal No. 73, p. 26.)

* * * * * * *

"Now, in determining, gentlemen, whether or not care proportioned to the risk has been exercised, you must bear in mind that the criterion is, what would a reasonably prudent and cautious man have done under the circumstances? * * * And in determining that question you ask yourselves whether or not a reasonably prudent and cautious man would have had watchmen and guards upon the premises to watch these inflammable and explosive substances and whether or not he would have had as great or greater a number of guards and watchmen than the defendant had in this case, and whether or not he would have had guards of more competence, and then you ask yourselves whether or not such a reasonably cautious and prudent man would have depended, and to what extent he would have depended, upon the activities of the so-called Dougherty detectives."

(Ground of Appeal No. 75, p. 28.)

* * * * * * *

"And then you would ask yourselves furthermore, to what extent a reasonably prudent and cautious man would have permitted persons to come upon that property at night, what challenge would he have used to ascertain whether they were authorized or not."

(Ground of Appeal No. 76, p. 28.)

(For charge on this subject, see p. 730, l. 33, to p. 733, l. 3; p. 735, l. 30, to p. 737, l. 5; and for exceptions to charge see p. 743, l. 30, to p. 746, l. 20; p. 746-c, l. 1, to 746-d, l. 25.)

It appears without dispute that the explosives which were in the defendant's yard at Black Tom were all in the course of interstate commerce at the time of the explosion, and the Trial Judge expressly so charged (p. 728, l. 30). The explosives were in thirty-three cars, which had come from various points outside the state of New Jersey, and had been taken to the Black Tom yard for the purpose of having their contents transferred to lighters, which in turn would carry them to steamers for export. The defendant urges that under these circumstances the Interstate Commerce Commis-

sion Regulations were exclusively controlling, and that the question for the consideration of the jury was—not whether the defendant had exercised care commensurate with the risk or had performed certain other duties not specified in said regulations, *but whether it had complied with the regulations,* and whether any alleged failure so to do was the proximate cause of the damage to the plaintiffs.

The Court will remember that in the case of *New Jersey Fidelity & Plate Glass Company* v. *Lehigh Valley R. R.,* 92 N. J. L. 467, this Court ruled adversely to our present contention. We are not, however, barred from reasserting the point then made, and it is proper to say that this case differs from the one cited, in that in the former case the regulations were not pleaded or relied on by the plaintiffs, whereas, in the present case, they were pleaded and relied on. Furthermore, in said case, the defendant offered no evidence, whereas, in the trial of the present case, all the facts that applied to the regulations were fully developed.

If it be urged by counsel for plaintiffs that the case of New Jersey Fidelity & Plate Glass Company, *supra,* is controlling on the point that, as stated in the opinion therein, "no greater burden was imposed upon the defendant, in respect to the measure of care to be exercised by it, in the handling and care of the high explosives than if the regulations were entirely out of the case" (92 N. J. L., p. 474), the answer is, that in the present case, as will be hereinafter shown, the Trial Judge, in his charge, permitted the jury to impose upon the defendant certain "burdens," by way of alleged duties, which were entirely different from the duties fixed by the interstate regulations, and in no way related to them; and, therefore, so far as relates to the "measure of care to be exercised," a greater burden was imposed upon the defendant than would have been the case if the jury had been limited to the consideration of the regulations alone.

The regulations must be considered to have the force and effect of a statutory provision, and the defendant, therefore, claims that when the regulations prescribed that certain precautions be taken in the transportation and handling of explosives, the question of the defendant's liability depended upon whether or not it complied with the regulations; and if it appears that the defendant has obeyed said regulations, that fact is sufficient to meet a charge of negligence. As the explosives in question were all in the course of interstate transportation, the duty of the defendant, we submit, must be determined solely by reference to the regulations prescribed by the Commission pursuant to the direction and authority of the Federal Congress; and all local ordinances or laws are immaterial.

> *Actiesselskabet Ingrid* v. *Central R. Co. of N. J.*, 216 Fed. 72 (affirming 195 Fed. 596, rehearing denied, 216 Fed. 991, petition for writ of certiorari to U. S. Supreme Court denied, 238 U. S. 615; 59 L. Ed. 149); also reported in L. R. A. 1916 (B), 716.

It is settled that a compliance with statutory regulations is sufficient to meet a charge of negligence, when the statute has undertaken to prescribe a specific duty.

An example of this principle is *Hackett* v. *N. Y. &c., R. Co.*, 58 N. J. L. 4, where the court held that all that could be required of a railroad company with respect to giving signals of the approach of its trains to the public highway was a compliance with the statute with respect to the giving of signals by bell or whistle, following the decision of the Court of Errors and Appeals in the case of *New York, etc., R. Co.* v. *Leaman*, 54 N. J. L. 202, where the Court said:

> "When the prescribed audible signals are given in conformity with the statute, whether they are heard or heeded by a traveller crossing the track or not, the company is absolved from negligence so far as concerns this kind of audible warning of the approach of its trains."

Another analogy is found in the statutes relative to liability on the part of railroad companies for damages resulting from fire escaping from locomotive smokestacks. The leading example of such cases in New Jersey is *West Jersey, &c., R. Co.* v. *Abbott,* 60 N. J. L. 150, from which we quote:

> "When the Legislature enacts regulations in respect to any precaution to be taken in the use of a dangerous instrumentality by those whom it has authorized to use it, those regulations define and limit the measure of duty in respect to that particular sort of precaution. The statute which we have had under consideration also enacts that railroad companies shall give certain specified audible signals of the approach of its trains to the crossing of a public highway. It was settled in this court that the regulations in respect to audible signals were exclusive, and if obeyed, would exonerate a railroad company from liability for a collision at a crossing arising from a failure to hear such signals, and that it was erroneous to permit a jury to determine whether or not, on account of the prevalence of a dense fog or other impediment to sign and sound, other audible signals ought not to have been given. * * *
>
> "In the case before us the Legislature has prescribed what duty a railroad company must perform in respect to the escape of sparks from the smokestacks of its engines. The prescribed duty does not require the company, at any time, to absolutely prevent the escape of such sparks, but only to take and use all practicable means to that end. Proof that they have taken and used such means furnishes a defense in that respect. It is obvious that to permit a jury to find that a railroad company was, at any time, under a duty to take sufficient care to prevent the escape of any fire at all, is incongruous with the regulations of the Legislature and at variance with the doctrine of the case last cited."

Other cases in this State in which this principle has been applied to railroad fire cases are:

Hoff v. *West Jersey R. Co.,* 45 N. J. L. 201.
Vallaster v. *Atlantic City R. Co.,* 72 N. J. L. 334.

Goodman v. *Lehigh Valley R. Co.*, 75 N. J. L. 277.

Other classes of cases in which this principle has been applied are actions brought to recover for personal injuries under the "Federal Safety Appliance Act" or under the "Federal Employers Liability Act." In such cases it has been decided that the injured employees of common carriers engaged in interstate commerce must seek their remedy exclusively in accordance with the provisions of those statutes.

Texas & Pac. Ry. Co. v. *Rigsby,* 241 U. S. 33, 60 L. Ed. 874;

N. Y. Central R. Co. v. *White,* 243 U. S. 188, 60 L. Ed. 667;

N. Y. Central R. Co. v. *Winfield,* 244 U. S. 147, 61 L. Ed. 1045;

Erie R. R. Co. v. *Winfield,* 244 U. S. 170, 61 L. Ed. 1057.

The general rule as to the supremacy of Federal law over any local or State statutes has been declared in a number of cases by the United States Supreme Court. The following are illustrations:

In *Gulf, etc., Ry. Co.* v. *Hefley,* 158 U. S. 98; 39 L. Ed., 910, it was held that a statute of Texas imposing a penalty for failure to deliver goods on tender of the rate named in the bill of lading did not apply to interstate shipments, for the reason that Congress had legislated upon the same "subject matter" in the Interstate Commission Act, whereby the published tariff rate was prescribed as the rule of compensation in such cases.

In *Northern Pacific Ry. Co.* v. *Washington,* 222 U. S. 370; 56 L. Ed. 237, it was held that legislation by Congress as to hours of service of railroad employees occupied the field to such an extent as to prevent state legis-

lation on that subject. It was said by Chief Justice White:

> "In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, *the Act of Congress was exclusively controlling.*" (Citing *Southern Railway Co.* v. *United States,* 222 U. S., 20.)

This case was peculiar in its facts, in that the Act of Congress, which was thus held to be exclusively controlling, contained a provision (p. 376) "That this Act shall take effect and be in force one year after its passage," and the year had not expired. Meanwhile the state of Washington had passed a law regulating the hours of service of railway employees which resembled the Act of Congress, and the suit was brought by the Attorney General of the state to recover penalties for the violation of the state law. The railroad admitted the acts complained of, but denied any liability for the penalties imposed by the state law. The trial court granted a motion for judgment on the pleadings and imposed the penalty. The Supreme Court of Washington affirmed, but the Supreme Court of the United States reversed. The affirmance in the State Supreme Court was based upon the ground that the Act of Congress provided that it should not take effect until one year after its passage, and, secondly, that the Act was to be treated as not existing until the expiration of a year from its passage. The opinion of the Supreme Court of the United States, White, *C. J.,* contains the following:

> "But we are of opinion that this view is not compatible with the paramount authority of Congress over interstate commerce. It is elementary, and such is the doctrine announced by the cases to which the court below referred, *that the right of a state to apply its police power* for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or *manifests its purpose* to call into play its exclusive power. This being the conceded

> premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation *that subject was at once removed from the sphere of the operation of the authority of the state*'' (p. 378 of 222 U. S.).

In *Southern Ry. Co.* v. *Reid,* 222 U. S. 424, 56 L. Ed. 257, a statute of North Carolina requiring common carriers to transport freight as soon as received to interstate points under certain penalty for failing to do so, was held to be invalid because in conflict with the requirement of the Hepburn Act forbidding such transportation until rates had been fixed and published.

In *Chicago, etc., R. Co.* v. *Hardwick Elevator Co.,* 226 U. S. 426, 57 L. Ed. 284, a reciprocal demurrage law of Minnesota was held invalid because Congress, by the passage of the Hepburn Act had "exerted its paramount and all-embracing authority over the subject."

In *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 57 L. Ed. 314, it was held that the Carmack amendment to the Hepburn Act superceded all state laws upon the subject of the limitation of the carrier's liability for loss of and damage to interstate shipments.

In the cases of *St. Louis, etc., Ry. Co.* v. *Edwards,* 227 U. S. 265, 57 L. Ed. 506, and *Hampton* v. *St. Louis, etc., R. Co.,* 227 U. S. 456, 57 L. Ed. 596, a statute of Arkansas, imposing a penalty for delay in delivering cars to the consignee was held invalid on the ground that it had been superseded by the provisions of the Hepburn Act.

In *Adams Express Co.* v. *City of New York,* 232 U. S. 14, 58 L. Ed. 483, held that the provision of a municipal ordinance requiring every owner of a public express to give a bond for each vehicle licensed under the ordinance, to be conditioned for the safe and prompt delivery of all baggage and packages entrusted to the

owner or driver of such "express" was invalid for the reason, among others, that Congress, by the Act of June 29, 1916 (U. S. Comp. Stat. Supp. 1911, p. 1288), had exercised its authority and had provided its own scheme of regulation in order to secure the discharge of the public obligations that the business involved.

In *Erie R. R. Co.* v. *New York,* 233 U. S. 671, 58 L. Ed. 1149, 52 L. R. A. (N. S.), 266, the provisions in the labor law of the state of New York relating to the hours of service of telegraph operators engaged in interstate commerce were held to be void, as Congress had covered the same "field" by the Hours of Service Act of 1907.

In *Southern Ry. Co.* v. *R. R. Commissioners of Indiana,* 236 U. S. 439, 59 L. Ed. 661, held that the state law of Indiana was superseded by the Federal Safety Appliance Act, although the requirements of the latter differed in certain details from those of the state law.

In *Charleston & W. C. Ry. Co.* v. *Varnville Furniture Co.,* 237 U. S. 597, 59 L. Ed. 1137, a state statute providing for a penalty against the carrier for failure to pay, within forty days, a claim for damages to an interstate shipment, was held to be superseded by the Carmack Amendment.

In *Atchison, etc., Ry. Co.* v. *Harold,* 241 U. S. 371, 60 L. Ed. 1050, held that the Carmack Amendment excluded state action in regard to the duty of carriers in interstate shipments to issue bills of lading and the responsibilities thereunder, and that therefore all questions in regard thereto must be determined by reference to said statute rather than by reference to the local law of the state if such local law is in conflict with the said statute.

In determining the question of whether or not the legislation of Congress has covered the entire field of any particular subject, it is not necessary that the statute shall expressly declare its intention to occupy the

whole field; neither is it necessary for Congress to expressly prohibit any state action on the same subject.

In the case of *Savage* v. *Jones,* 225 U. S. 501, at p. 533, 56 L. Ed. 1182, the Court said (italics ours):

> "When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that *which needs must be implied is of no less force than that which is expressed.* If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulations of Congress within the sphere of its delegated power (citing cases).
>
> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the Act of Congress fairly interpreted is in actual conflict with the law of the state" (citing cases).

In the case of *McDermott* v. *Wisconsin,* 228 U. S. 115, 57 L. Ed. 754, it was held that certain provisions of a statute of Wisconsin, requiring syrup and certain similar articles to be labeled, was void in so far as it interfered with the Federal Pure Food and Drugs Act.

In *Houston & Texas Ry.* v. *United States,* 234 U. S. 342, 58 L. Ed. 1341 (Shreveport Rate Case), the Court said:

> "The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress,

> and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the state, and not the nation, would be supreme within the national field. * * * We are not unmindful of the gravity of the question that is presented when state and Federal views conflict. But it was recognized at the beginning that the nation could not prosper if the interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress, and of the agencies it lawfully establishes must control."

In *Illinois Central R. Co.* v. *De Fuentes,* 236 U. S. 157, 59 L. Ed. 517, an order of a state railroad commission requiring empty cars to be switched to side tracks was held to be invalid as an unlawful regulation of interstate commerce, on the ground that such a switching movement was a part of interstate commerce, the regulation of which Congress had undertaken.

In *Southern Ry.* v. *Railroad Commission of Indiana,* 236 U. S. 439, 59 L. Ed. 661, held that the provisions of the state law, as applied to interstate traffic, requiring railroads to place certain equipment on the sides or ends of cars, was invalid because Congress had occupied the field of legislation relating to the equipment with safety appliances of cars moving in interstate traffic. The Court said:

> "The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control."

In *Atchison, etc., Ry. Co.* v. *Harold,* 241 U. S. 371, 60 L. Ed. 1050, it was held that Congress, by the Carmack Amendment of June 29, 1906, had so asserted its power over the subject matter of interstate shipments, including the duty to issue bills of lading and the responsibilities thereunder, as to preclude the application

of a local rule of law of a state which invested the innocent holder of a bill of lading with certain rights which were not available to the shipper.

In *Spokane, etc., R. Co.* v. *Campbell,* 241 U. S. 497, 60 L. Ed. 1125, held that a state law which rendered a wilful violation or omission of duty on the part of a railroad employee whereby human life or safety is in danger and punishable as a misdemeanor, had no bearing on the right of an employee of an interstate railway to recover damages for injuries sustained in a collision because of defective brakes, since the right to recover depended exclusively upon the Federal Employers' Liability Act of April 22, 1908.

In *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147, 61 L. Ed. 1045, and *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170, 61 L. Ed. 1057, held that the right of employees who were engaged in interstate commerce at the time of an accident to receive compensation for injuries sustained therein depended solely upon the Federal statute of 1908 so as to exclude any right of compensation under state law, even though the injuries were caused by an accident which arose without negligence on the part of the employer or any of the fellow-employees.

In *Northern Pacific R. Co.* v. *North Dakota,* U. S. , 63 L. Ed. (advance opinions, p. 533), it was held that under the recent statute, by virtue of which the President was authorized to take over and operate the railroad systems, as a war measure, the Director General had authority to make and enforce intrastate rates without regard to state action. In the course of the opinion the Court said:

> "The elementary principle that, under the constitution, the authority of the Government of the United States is paramount when exerted as to subjects concerning which it has the power to control, is indisputable. This being true, it results that although authority to regulate within a given

> sphere may exist in both the United States and in the states, when the former calls into play constitutional authority within such general sphere, the necessary effect of doing so is, that to the extent that any conflict arises, the state power is limited, since, in case of conflict that which is paramount necessarily controls that which is subordinate."

The principles laid down in the foregoing cases have not yet been applied by the U. S. Supreme Court to a case arising under the Transportation of Explosives Act, but they have been applied by the Circuit Court of Appeals for the Second Circuit in the case of *The Ingrid, supra,* which arose out of an explosion of dynamite on February 1, 1911, at the terminal of the Central Railroad of New Jersey known as Communipaw, in the City of Jersey City, New Jersey. We quote from the opinion of Judge Holt, in the District Court, as follows (italics ours):

> "The libellant claims that the railroad company violated the law of New Jersey, and the ordinances of Jersey City, in respect to the storage of explosives. In the first place, in my opinion, the liability of the railroad company, while transporting this dynamite, was governed *exclusively* by the Act of Congress of March 4, 1909, which provides that the Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives which shall be *binding* on all common carriers engaged in interstate or foreign commerce which transport explosives by land. Under this act the Interstate Commerce Commission has formulated and issued regulations for the transportation of explosives, and it is not claimed that those regulations have not been complied with by the defendants. Congress having passed such a law, it clearly governs in my opinion all common carriers who come within its provisions, *and takes the place of all local laws and ordinance on the subject."* (Citing *Southern Ry. Co.* v. *U. S.,* 222 U. S., 20; *Northern Pacific Ry. Co.* v. *State of Washington,* 222 U. S., 370; *Southern Ry. Co.* v *Reid,* 222 U. S., 424.) "If it did not, a railway company transporting dynamite over a long railroad system,

passing in the trip through various villages, cities and states, would be subject at every stage of the journey to varying local regulations which probably it could not observe. It is pre-eminently just that in such cases there should be a central authority, prescribing what the railroad company, in the transportation of such explosives, should do" (195 Fed. at p. 602).

The decision was affirmed in 216 Fed. 72. We quote from the opinion of Judge Rogers as follows:

"It is claimed that the respondent failed to comply with the requirements of the laws of the state of New Jersey and with the municipal regulations of Jersey City in respect to the storage of explosives. It is sufficient to say that the dynamite which exploded was addressed to Carlisle, Crocker & Co., Montevideo. It was a foreign shipment and as such was subject exclusively to the Act of Congress approved March 4, 1909 (35 Stat., 1135, c. 321; U. S. Comp. St. Supp. 1911, p. 1660). That Act (Section 233) authorized the Interstate Commerce Commission to formulate regulations for the safe transportation of explosives which should be binding upon all common carriers engaged in interstate and foreign commerce which transport explosives by land. The Interstate Commerce Commission accordingly formulated and issued regulations governing the transportation of explosives in interstate and foreign commerce. We have no doubt that the dynamite in question was subject exclusively to the regulations of the Interstate Commerce Commission. When Congress has legislated upon a subject within its constitutional control and has manifested its intention to deal therewith in full, the authority of local jurisdiction is necessarily excluded. See *Northern Pacific Railway Co.* v. *State of Washington,* 222 U. S., 370" (216 Fed., 82).

An application was made to the U. S. Supreme Court to review this case by certiorari, but the same was denied (238 U. S. 615, 59 L. Ed. 149), and hence the question of the construction or application of the Explosives Act was not directly under consideration by that Court.

II.

The evidence failed to show a violation of the Interstate Regulations or that any such alleged violation was the proximate cause of damage to the plaintiffs.

The Trial Judge in his charge to the jury referred specifically to certain of the interstate regulations and then stated that the duty of the defendant, in respect to all matters within the scope of the statutes and the regulations, was to comply therewith and that the plaintiffs were not entitled to recover in respect to any such subject matter, unless they proved a failure on the part of the defendant to so comply, and that such failure was the proximate cause of the damage (p. 728, l. 30, to p. 729, l.). The regulations to which he referred are known as Section 1643-a, Section 1643-b, Section 1666 and Section 1689 (pp. 729-730). As to each of these regulations, the defendant claims that there was no proof of any violation thereof, or, if there was, that such violation was not the proximate cause of the damage to the plaintiffs; and in some cases, that these regulations clearly did not apply to the circumstances, as shown by the undisputed facts.

Each of the regulations to which the Trial Judge referred will be discussed from these angles:

(a)

Section 1643-a.

This reads as follows:

> "Careful men must be chosen to handle explosives, the platform and the feet of the men must be as free as possible from grit, and all possible precautions must be taken against fire. Suitable provision must be made, outside of the station when practicable, for the safe storage of explosives, and every effort possible must be made to reduce the time of this storage. If a shipment of explosives is not removed within 48 hours after notice of ar-

> rival at destination, it must be disposed of by return to the shipper, or by storage at the expense of the owner, or by sale, or when necessary to safety by destruction under supervision of a competent person."

The complaint alleged as one of the grounds of liability that under the law and the interstate regulations it was the duty of the defendant to take "all reasonably possible precautions against fire" (paragraph 11 of complaint, p. 34, l. 38), and in the next paragraph the complaint alleged certain specific respects wherein it was stated that the defendant had neglected to perform its duty (pp. 35 and 36).

The defendant asked for a non-suit and for a direction of verdict on the ground, among others, that the plaintiffs had failed to prove a violation of the interstate regulations. (See grounds of Appeal Nos. 1 and 13, pages 1 and 4; motion for non-suit, page 377, and motion to direct verdict, page 722.)

The Trial Judge quoted Section 1643-a as one of the regulations from which the duty of the defendant in the premises was to be "extracted" (p. 729, ll. 1-15; p. 730, ll. 15-20; ll. 35-40).

After quoting Section 1643 and certain other of the regulations, the Trial Judge instructed the jury as follows:

> "Now, then, I charge you, gentlemen, that the rule of law that is to be extracted from these regulations and the statute in pursuance of which they are passed is that the defendant railroad company was under a duty in the transportation and custody of the cars of explosives, ammunition and inflammable substances *in the particulars indicated,* to exercise a degree of care commensurate with the risk of danger reasonably to be anticipated, and the defendant railroad company is liable for damages to the plaintiffs for any failure to exercise such care if the failure to exercise such care was the proximate cause of the injury and loss to the plaintiffs.

> I charge you that the standard of care imposed upon the defendant railroad company under the regulations of the Interstate Commerce Commission in so far as such regulations cover the field of the measure of the defendant's duty is the same as the defendant railroad company was under without them, namely a degree of care commensurate with the risk of danger reasonably to be anticipated" (p. 730, ll. 30-40).

Defendant submits that it was error to permit the jury to take this regulation into consideration in determining whether the defendant had performed its legal duty, for the reasons that it had no application to the circumstances of the case, and that there was no proof of any violation thereof, or that any alleged violation was the proximate cause of the explosion.

This regulation appears in the pamphlet issued by the Interstate Commerce Commission, under the general title of "Rules for Handling." The first subdivision under this title is Number 1642, and refers to the handling of packages of explosives at stations and the transferring thereof to and from cars, and directs that certain specific apparatus be employed for such handling and transferring; then follows the direction in Section 1643-a that careful men must be chosen to handle explosives, etc. The section in question obviously refers to the loading and unloading of explosives at stations and the transfer thereof to and from cars, and, hence, the direction that all "possible precautions must be taken against fire" relates to a like situation, and has nothing to do with the duty of the carrier on an occasion when the explosives are not actually being handled or transferred. It is admitted that in this case the explosion did not occur while the explosives were being handled or transferred. All of them were on cars or barges and no one was handling or even touching them at the time of the explosion.

Furthermore, the directions in Section 1643-a (in the same way as the directions in Section 1642) refer to the duty of the persons who are, in fact, handling or

transferring the explosives. In the present case, this duty was performed by the shippers or the consignees, and the defendant had nothing whatever to do with it, as the evidence shows without dispute that the shippers or the consignees had sole charge of all the handling of the explosives, both the loading and unloading; the carrier had nothing whatever to do with the handling of the explosives nor with the selection of men for that purpose; all it did was to transport them from one point to another and on the arrival of the cars at the terminal, to place them at a convenient point for unloading by the consignees.

It probably will not be seriously claimed that the provision in this section for the storage or removal of explosives has any application to the present case. No one can possibly tell whether the original fire or the first explosion was in a shipment that had not been removed within forty-eight hours after notice of arrival. Of course, it may be stated that if the explosives had been returned or sold or destroyed, the explosion would never have happened; but it might equally be said that if the explosives had never been transported, or had never been shipped at all, the explosion would never have happened. Indeed, we may go a step further back and say that if certain chemical compounds had never been combined to make these explosives, or if the chemicals had never been created, that then the explosion would never have happened—in other words, there is no possible causal connection between the explosion and the fact that some of the explosives were on hand forty-eight hours after notice of arrival, or the fact that they were not stored at the expense of the owner, or the fact that they were not sold, or the fact that they were not destroyed before the explosion. But, even if this regulation should be considered to ~~comply~~ apply to a carrier while explosives are in its possession, in the course of transportation, although not being actually handled or transferred at the moment of an explosion, still, the fact remains that there is no proof

that the defendant had failed to select careful men to "handle explosives"; neither was there any proof that the platform and feet of the men were not free from grit. If it be said that the defendant violated the direction that all possible precautions must be taken against fire, the answer is—that such an injunction does not make the carrier an insurer against fire; indeed, even the plaintiffs did not made such a claim in their complaint, as all that was alleged therein was that it was the defendant's duty to take all "reasonably" possible precautions. The more important point with regard to this regulation is—that it does not apply at all to a situation such as existed in the present case, and, hence, it was error to permit the jury to take it into consideration in determining whether or not the defendant had exercised the degree of care which was legally chargeable upon it.

(b)

Section 1643-b.

This reads as follows:

> "Unauthorized persons must not have access to explosives or other dangerous articles at any time while such articles are in the custody of the carrier."

The complaint alleged as one of the grounds of liability that it was the duty of the defendant to prevent unauthorized persons from having access to the explosives on defendant's premises, and that the defendant permitted unauthorized persons upon the premises, and especially upon, or in the vicinity of said explosives (p. 35, ll. 1-20).

The defendant asked for a non-suit and for a direction of verdict on the ground, among others, that the plaintiffs had failed to prove any violation of the interstate regulations. (See Grounds of Appeal Nos. 1 and 13, pp. 1 and 4; motion for non-suit, page 377, and motion to direct verdict, page 722.)

The defendant also submitted certain specific requests on this subject (Nos. 14 and 15, p. 746-i), as follows:

> "There is no evidence in this case of the presence of any unauthorized persons on the premises at Black Tom on the night of July 29-30, 1916."
> (Ground of Appeal No. 36, p. 10.)
> "There is no evidence in this case that any unauthorized person had access to the explosives or other dangerous articles in the custody of or on the premises of the defendant on the night of July 29-30, 1916."
> (Ground of Appeal No. 37, p. 10.)

These were denied, and exception was taken thereto (p. 746-f, l. 18).

The Trial Judge, in the charge, quoted this regulation as one of the several duties which the plaintiffs alleged the defendant had failed to perform. It was first included in the general statement of the plaintiffs' allegations (p. 726, l. 8) and thereafter it was quoted in full as one of the interstate regulations (p. 730, ll. 20-25).

He then permitted the jury to take into consideration this alleged duty in determining the question of whether there was negligence on the part of the defendant. He told the jury that if the plaintiffs had made out *any one* of these specifications of negligence, and had shown that that one specification was the proximate cause of the loss, that that would give the plaintiffs the right to recover damages. (See charge, p. 727, l. 25; Grounds of Appeal Nos. 55 (b), 56 and 63, pp. 15, 16 and 18.)

Again, after quoting this section of the regulations, together with certain other sections, the Trial Judge charged that the rule of law to be extracted from these regulations and the statute was that the defendant was under a duty *in the particulars indicated* to exercise a degree of care commensurate with the risk reasonably to be anticipated. (See charge, p. 730, l. 38, and Grounds of Appeal No. 64 (b) and No. 67, p. 23.) He further charged on this subject:

> "And then you would ask yourselves furthermore, to what extent a reasonably prudent and cautious man would have permitted persons to come upon that property at night, what challenge would he have used to ascertain whether they were authorized or not."
>
> (See charge, p. 736, ll. 25-30; Ground of Appeal No. 75, p. 28.)

Watchman Kane said that on the night of the explosion there were four watchmen in the employ of the defendant who were assigned to duty in the so-called Black Tom yard. One was Garriety; his round started at the place known as "Store" (or warehouse) G; thence to and along the northerly side of the platform in front of Store G, and thence in an easterly direction as far as Store R, he indicated the fact that he had covered the round by punching the buttons attached to a recording instrument; he also covered the southerly end of the covered pier known as No. 6, and also walked around the yards "down below" (pp. 187-188). On the night of the explosion, Garrity was seen by Kane, who was the supervisor, at eleven o'clock, and at that time Garriety was at Pier No. 7 (page 191, ll. 35-40). Kane also made his rounds on two occasions prior to the starting of the fire; the first time was at about seven o'clock in the evening, and the other at about eleven o'clock (p. 191, ll. 20-40). At eleven o'clock, or after, Kane was at the south side of Pier 7, at the water's edge, and he then walked up to the North Pier (which was the name given to a pier extending in an easterly direction from Pier 7), and at the northerly side thereof, and went out on the pier and around it and back, and thence by the road or open space to Store R, and crossed over to the pump house between Stores F and G, arriving at the pump house at midnight (p. 208, l. 20; p. 209, l. 20). It thus took him about an hour to make this trip. While Kane was doing this there was no fire in the yard and he saw no one there (p. 209, ll. 20-30).

There were times when the men employed on the barges and lighters that had put up at the piers would return to their boats at night, and it was the practice for the watchmen to ask what boat they were on, and where that particular boat was (p. 207, ll. 30-40; p. 208, ll. 1-10).

Sloan, another watchman, who was stationed at store F, said that at times some of these boatmen would be intoxicated and would make a disturbance by shouting (p. 223, ll. 10-20), but *on the occasion of the explosion there were no sailors who had come into the yard that night and no strangers at all were either seen or heard* (p. 229, ll. 1-20).

Captain Baker of the Scow "Frank" was at the North Pier when somebody called him and he got out of bed and went on deck and saw the fire (p. 235). The night had been very quiet; lights were burning brightly on the boats and there was not a fire or sound around there (p. 238, l. 10).

Kelly, one of the watchmen posted at or near the grain transfer elevator, located some distance to the west of Pier 4, was also on duty that night. He had charge of the fires and his duty also required him to make a round by the grain elevator at Pier 4, and at Store 3 (p. 264). He knew nothing of the fire until he heard the whistle blow from the pump house. He saw no strangers in the yard that night, the only persons he observed being six or eight of the captains of the Lehigh Valley grain boats.

> "Q Did you see any one down there that was not a Lehigh Valley man, before the fire?
>
> A No, sir; because nobody outside of the Lehigh Valley men can go down the road and I can see them" (p. 275, ll. 18-20).

Groat was another watchman who was posted at what is commonly known as the oil yard, near the gate leading into the Black Tom yard. His instructions were to watch for suspicious characters, including fishermen. He knew most of the captains on the grain boats (p. 280, ll. 10-40).

The foregoing is a summary of the evidence on this point. While it is true that it was the practice to permit captains of the grain boats and other employees to come into the yard at night without any rigorous identification, that fact had nothing whatever to do with the fire and explosion. There is nothing to show that any unauthorized person was in the yard on the night of the explosion, and still less is there anything to show that any unauthorized person had "access" to the explosives; on the contrary, the testimony of the watchmen indicates that there were no strangers at all in the yard on the night of the fire and explosion; and there is no direct evidence of any kind as to the cause of the fire; a *fortiori,* is there not evidence to show that any authorized person started the fire. Hence, even if Section 1643-b was applicable to the circumstances, still the proofs fails to show either any violation thereof, or that any alleged violation was the proximate cause of the fire and explosion, and, therefore, the jury were erroneously permitted to take into consideration the question of whether the defendant had violated its duty in the particular indicated by Section 1643-b. While, of course, the defendant would not be entitled to a non-suit or direction of verdict unless the plaintiffs failed on *all* of the alleged grounds of negligence, nevertheless, so far as this point is concerned, the defendant was clearly entitled to have the jury instructed in acordance with its requests to charge Nos. 14 and 15 as set forth above. The refusal to so charge was especially prejudicial, in view of the further direction of the Trial Judge, as set forth in Ground of Appeal No. 76; the statement in the charge that the jury might ask themselves to what extent a reasonably prudent and cautious man would have permitted persons to come upon that property at night, and what challenge they would have used to ascertain whether they were authorized or not, was peculiarly obnoxious in the light of the undisputed evidence that there was no unauthorized person seen or heard on the premises on the night of the

fire and explosion, and in the light of the failure of any direct proof as to the starting of the fire.

The defendant submits that it was error to permit the jury to find negligence on the part of the defendant by reason of any supposed violation of this regulation, and further submits that even if the defendant was under a common law duty to keep unauthorized persons away from the premises, there was no proof of any violation of any such duty; and in either event, there was no proof that the failure to keep unauthorized persons away from the premises was the proximate cause of the accident. Plaintiff's own evidence demonstrated that on the night of the explosion there was not a single person seen anywhere in the vicinity of the scene of the explosion who did not have a lawful right to be there.

(c)

Section 1666.

This section is headed "Explosive Placard," and reads as follows:

> "A certified car for the dangerous explosives specified in paragraph 1661, must be protected by attaching to each outside end, and side door, the lower edge not less than 4½ feet above the car floor, a standard placard 12 by 14 inches, in conspicuous red and black printing on strong tag board the following notice:

14 inches

14 inches

.....R..... Company

EXPLOSIVES
(To be printed in Red)

HANDLE CAREFULLY

KEEP FIRE AWAY
(To be printed in Red)

.....Station.....19

CONDENSED RULES FOR HANDLING THIS CAR

1. This car must not be placed in a passenger train, nor in a mixed train if avoidable.

2. Cars containing explosives must be near center of train and may be together if desired; must be at least 15 cars from engine and 10 cars from caboose when length of train will permit.

3. This car must not be placed next to cars bearing the inflammable or the acid placard or cars containing lighted heaters. Whenever it is possible to avoid so doing it must not be placed next to tank cars or flat cars or next to carloads of lumber, poles, iron pipe, or other articles liable to break through end of car from rough handling.

4. The air and hand brakes on this car must be in service.

5. In shifting have a car between this car and engine whenever possible, and do not cut this car off while in motion.

6. Avoid all shocks to this car and couple carefully.

7. Avoid placing it near a possible source of fire.

8. Engines on parallel track must not be allowed to stand opposite or near this car when it can be avoided.

9. This placard must be removed from car when the explosives are unloaded.

This was quoted at length in the charge as if it were to be construed as a regulation. (See page 729, l. 15; p. 730, l. 10). We submit, in the first place, that it is not to be considered as a regulation at all, and, hence, it was improper to permit the jury to consider it as such. This was nothing more or less than a warning to employees that the car on which the placard was placed contained explosives. To say that this warning amounted to a statutory rule, by force of which a carrier would be bound "to keep fire away" at all hazards, under a penalty of damages, in the event that it did not keep fire away, is to transform a warning into a prohibition. The obvious purpose of the warning was that all persons who had anything to do with the handling of explosives, whether they were employed by the car-

rier, or by the shipper, or by the consignee, should, as far as practicable, keep fire away from cars on which said signs were placed; for example, it amounts to a warning to keep lighted lanterns or cigarettes away from such cars, but it clearly does not place upon the carrier the burden of insuring against fire; neither does it apply to a case where a fire has been started by some third party and continues to burn in the vicinity of the car or cars containing explosives.

That this legend on the placard was never intended by the Commission to be a regulation is further shown by the fact that on this very same placard there appear what are called "Condensed rules for handling this car" (p. 342); then follow nine paragraphs of directions as to the placing and handling of cars containing explosives; but the direction "Keep fire away" does not appear on the placard as one of these *rules*. It is printed in red and the letters are of a size corresponding to the word "Explosives" (see Sec. 1666, at p. 27 of Regulations).

If it be said that this statement on the placard was practically equivalent to that part of Section 1689 of the Regulations which directed that cars containing explosives should be removed from all danger of fire, and that therefore the remarks of the Trial Judge in his charge wherein the placard is referred to did not prejudice the defendant, the answer is that this placard was offered in evidence and was before the jury at the time they were considering their verdict; it is a large card and the words under consideration are printed in large capitals of a fiery red color. With such a card before them the jury might well be impressed with the idea that the defendant was liable, merely because it failed to "keep fire away" from the explosives.

Under the charge, the Trial Judge included the warnings and rules which were printed on this placard, under the classification of regulations from which the "rule of law" was to be "extracted," and then stated that the defendant was under a duty "in the particulars indicated" to exercise a degree of care commensurate

with the risk (p. 730, ll. 30-40). This, of course, was equivalent to a direction to the jury that the warning "keep fire away" was a regulation with which the defendant was bound to comply. The fundamental error in this part of the charge was in recognizing the warning placard as a regulation, when, in fact, it was not a regulation at all. All that this regulation requires is that placards of a certain size be attached to certain parts of every car containing certain kinds of explosives. Of course, if there was any evidence from which the jury might find that the defendant had failed to exercise reasonable care with respect to fire or any other dangers, and that such failure was the proximate cause of the resulting damage, then a verdict might be justified against the defendant, by reason of its failure to exercise such care under the circumstances of any particular case, but that is entirely different from holding a defendant liable for a violation of a regulation when, in fact, the supposed regulation in question is merely a warning of the danger of fire, and is not a statement of the duty imposed upon the defendant, with respect to the care of such explosives.

In the present case, there is no dispute about the fact that these warning placards were attached to all the cars, as required by the regulation; and even if they had not been so attached, it would be difficult to discover any theory by which the failure to so attach them might be held to be the proximate cause of the fire and explosion—particularly in the absence of any direct evidence as to the cause of the fire.

(d)

Section 1689.

This reads as follows:

> "They must be coupled carefuly and all unnecessary shocks must be avoided. Other cars must not be cut off and allowed to strike a car containing explosives. They must be so placed in yards or on sidings that they will be subject to as little

> handling as possible and be removed from all danger of fire. They must not be placed on tracks under bridges, and when avoidable, engines on parallel tracks must not be allowed to stand opposite or near them."

This clearly applies to the locating or placing of cars in yards or sidings, and does not impose upon the carrier the duty of insuring against fire. For example, it might be construed as requiring a carrier to place cars a reasonably safe distance from shops or buildings whence sparks might escape from fires. It amounts to nothing more or less than a direction that the cars should be put in as safe a place as possible under the circumstances. In the present case, the cars containing explosives were placed at the extreme easterly end of the yard, where there was no shifting of cars; and, indeed, at night, there was no shifting of cars at any point in the yard. It was, of course, necessary to move the cars to a convenient point for unloading; and when that had been done, the practice was to leave them on the North Pier until they had been unloaded by the consignees, and they were certainly removed as far as possible from all danger of fire.

Moreover, there is no proof that any violation of this regulation was the cause of the fire or of the explosion. The accident happened late at night when none of the cars were being shifted. They were all standing in the yard, there were no "shocks"; no car was cut off and no car was allowed to strike another car; none of the cars were placed on tracks under bridges, and no engines were standing beside or near them. In other words, there is not a scintilla of proof of any violation of this regulation, unless the expression that the cars must "be removed from all danger of fire," be construed as equivalent to a positive statement that the duty rests upon the defendant to eliminate entirely the danger of fire.

III.

Assuming that the jury had the right to base a verdict upon any ground of negligence other than a violation of the Interstate Regulations, there was no proof of any such negligence, or that the same, if proven, was the proximate cause of damage to the plaintiffs. Even if there was proof of negligence in some one or more of the respects submitted to the jury (other than a violation of the Interstate Regulations), the proof failed to show negligence in all of such respects, and it was error to permit the jury to base a verdict upon a finding of negligence in some of the respects thus submitted.

If the Court concludes that the defendant was chargeable with some duty other than such as were specifically named in the regulations, then the question arises as to what these duties were and whether there was any evidence from which the jury would be justified in finding that there had been a violation of such duties.

The verdict on the part of the jury was a general one, as there was a general finding of negligence without any specific statement as to the particular ground or grounds of negligence. Hence, if it was error on the part of the Trial Judge to leave any one of several alleged grounds of negligence to the jury, the verdict must be set aside—as it is not possible to determine upon which one of the several grounds the verdict was based.

The rule is well settled that a verdict which cannot be supported upon the theory of law on which the case was submitted to the jury, must be set aside.

Fritz v. *Sayre & Fisher Co.*, 77 N. J. L. 236.

The same rule should apply when a case is submitted to the jury on several theories of law and there is a general verdict, but the record shows that as to some one or more of the theories either the theory itself is erroneous or that there is no evidence in support thereof.

Spencer v. *Haines*, 73 N. J. L. 325;

Carroll v. *Stark*, 85 N. J. L. 438;

Thompson on Trials, Vol. 2, Sec. 2640, p. 1922 (Second Edition).

The vital importance of this point in the present case is shown by the fact that the Trial Judge permitted the jury to base their verdict upon any one of several grounds. We quote from the charge as follows:

"The plaintiffs allege that they neglected to perform such duty in the following respects:

"It neglected to watch or guard said premises and waters adjacent thereto through employees sufficient in number and competence, and to properly instruct the same, to prevent incendiary or accidental fires.

It permitted unauthorized persons upon said premises and especially upon or in the vicinity of said explosives, ammunition or munitions of war.

It permitted vessels not connected with the transshipment of said explosives, munitions and munitions of war to lie moored at said North Pier.

It permitted or neglected to prevent barges or lighters having no business at said North Pier, and wholly or partially laden with such explosives and munitions of war to lie moored to said North Pier or moored to similar barges moored thereto, or to lie in the vicinity thereof.

It neglected to isolate or separate the railroad cars containing such explosives and munitions of war, and improperly accumulated or bunched the same in the same locality on said premises, and take precautions for quick isolation in case of fire.

It neglected to provide employees sufficient in number and competence and to properly instruct the same for the purpose of discovering and extinguishing any incendiary or accidental fire. Such insufficient, incompetent and uninstructed employee or employees as the defendant had, were negligent in guarding, discovering and reporting the fire hereinbefore alleged.

It neglected to provide sufficient apparatus and employees for the purpose of fighting and extinguishing fire upon said premises, in said railroad terminal; and

It neglected to provide sufficient means of communication or alarm of fire.

> And then the plaintiff charges that
> The loss of the merchandise of the said plaintiff was caused by the defendant's neglect of duty aforesaid.
> Now, first of all, the law says that the burden rests upon the plaintiff to make out by the greater weight of the evidence that the negligence which he has charged in his written complaint against the defendant existed and was the proximate cause of the loss of which the plaintiffs complain and for which in this suit they seek to have a recovery in damages. *That does not mean that they are obliged to make out all of those specifications of negligence which I have read to you, for if they make out any one of those specifications of negligence, or two or more of them by the greater weight of the evidence and show by the greater weight of the evidence that that one specification, or two or more specifications of negligence were the proximate cause of the loss and that they existed on the part of the defendant company, that would give them a right to have a recovery, and to have you assess their damages at such sum as they shall have proven by the greater weight of the evidence''* (pp. 726, 727).

The foregoing quotation from the charge, so far as it states the allegation of the several duties, was taken from paragraph 12 of the complaint. Later in the charge the Trial Judge reiterated that the plaintiffs were entitled to recover if the plaintiff had made out by the greater weight of the evidence that the defendant ''*in one or more of the particulars charged* * * * neglected to use a degree of care commensurate with the risk of injury'' (p. 732, ll. 30-35; and again at the end of the charge he told the jury that the question they should ask themselves was ''Has it been shown in this case that the defendant company did not exercise that degree of care in any *one* or more of the *particulars* indicated in the plaintiffs' written complaint? If that has been shown, and its neglect to exercise it was a proximate cause of the plaintiffs' injury, then you will say to yourselves, naturally, that it follows that there

should be a recovery and an assessment of damages. If it is not, why, manifestly, there should not be a recovery, and the verdict would have to be for the defendant'' (p. 736, l. 30 to p. 737, l. 10).

The defendant now urges that the legal rule as alleged in the complaint and quoted therefrom in the charge did not correctly state the measure of its duty to the plaintiffs; and that whether it did or not there were several of the particular specifications of negligence submitted to the jury concerning which the evidence was insufficient to justify the Trial Judge in leaving that specification to the jury at all, and that in any event even though the defendant may have been negligent in each of the specifications set forth in the charge, the evidence failed to show that such negligence was the proximate cause of the accident.

In discussing these questions, it should be noted that under the authorities above cited, if the defendant can show either that the measure of its duty was incorrectly stated or that under the undisputed evidence there was a failure of proof of negligence, or a failure to show such negligence was the proximate cause of the damage to the plaintiffs, with respect to *any one* of the particular specifications which the Trial Judge permitted the jury to consider, the defendant is entitled to a reversal of the present judgment, as the verdict was general and for all that appears, the jury may have based their verdict on one of the erroneous principles which, under the charge, they were permitted to consider.

Before discussing in detail the specifications of negligence as set forth in the complaint, and in the charge, we may anticipate the claim that may be made by the plaintiffs that even if the charge incorrectly stated the measure of the defendant's duty in one part thereof by saying in effect that the defendant was under the duty of insuring against damage rather than under the duty of taking reasonable care to prevent same, nevertheless the latter part of the charge cured the error by stating

that the criterion was "What would a reasonably prudent and cautious man have done under the circumstances?" (p. 735, ll. 30-35); and that therefore in substance the jury were told that the measure of the defendant's duty was to exercise reasonable care. The answer to this is that if one part of the charge incorrectly states the legal rule and another part states it correctly, the defendant is, nevertheless, entitled to a reversal for the reason that the jury cannot be expected to select a correct rule when they are given their choice of two, one of which is correct. In the case of *State* v. *Erie R. R.*, 84 N. J. L. 661, this Court said:

> "If a judge makes a mistake in charging the jury, he may undoubtedly cure it by calling attention to it as a mistake and directing the jury to disregard it or to substitute for it a later statement of the law. Nothing of that sort was done in the present case, where the most that can be said is that two statements of the law were made to the jury, one of which was erroneous. Unless we conceive of our trial system as one in which the jury is clothed with the capacity to decide between two judicial statements of the law and unerringly to select the correct statement and to disregard the incorrect, the error of the charge in the present case was not cured or rendered noninjurious to the defendant who excepted to it."

(a)

It was error to permit the jury to find negligence on the part of the defendant, on the ground that the defendant neglected to watch or guard the premises and the waters adjacent thereto through employees sufficient in number and competence, and to properly instruct the same, to prevent incendiary or accidental fires, or to discover and extinguish the same.

The Trial Judge recited certain parts of paragraph 12 of the complaint with respect to the defendant's alleged duty to employ sufficient employees and to properly instruct the same. It will be convenient to consider two

parts of the complaint which deal with the same subject. The allegations as found in the complaint and as quoted in the charge of the Trial Judge are as follows:

> "It (defendant) neglected to watch or guard said premises and waters adjacent thereto through employees sufficient in number and competence, and to properly instruct the same, to prevent incendiary or accidental fires."
>
> * * * * * * *
>
> "It neglected to provide employees sufficient in number and competence and to properly instruct the same for the purpose of discovering and extinguishing any incendiary or accidental fire" (p. 35, ll. 10-35; p. 726, ll. 15-20 and ll. 35-38).

The question of the defendant's negligence in this respect was left to the jury together with certain other specifications. (See p. 726, ll. 15-20; p. 727, ll. 20-30.) Exceptions were duly taken to this part of the charge (p. 738, ll. 20-40; p. 739, ll. 1-20). The same point was raised by motions for non-suit and for direction of verdict (see grounds for non-suit Nos. 1, 3, 4 and 5, p. 377, l. 10, to p. 378, l. 1; p. 722, ll. 1-20).

Of course, the defendant would not have been entitled to a non-suit or a direction of verdict unless the plaintiff had failed to prove *any* of the allegations of negligence as specified in the complaint; and in order to raise the present point directly, the defendant submitted certain requests to charge, as follows:

> "No. 7. That there is no evidence from which the jury can legally infer that the defendant did not furnish sufficient watchmen or guards on its premises on the night of July 29 and morning of July 30, 1916" (p. 746-h, ll. 10-13).
>
> "No. 16. There is no testimony of any witness from which the jury can draw any legal inference as to what caused the starting of the fire which was discovered on the premises of the defendant on the night of July 29, 30, 1916" (p. 746-i, ll. 25-30).

The defendant submits that this part of the charge was erroneous for the following reasons:

1. The charge incorrectly states the measure of the defendant's duty to the plaintiffs.
2. There was no evidence to justify the Trial Judge in leaving to the jury the question of defendant's negligence in this particular respect.
3. There was no evidence that the negligence, if there was any in this respect, was the proximate cause of damage to the plaintiffs.

In the first place, we submit that this part of the charge incorrectly states the legal rule which was applicable to the circumstances. The Trial Judge told the jury that if the plaintiffs made out any one of these specifications of negligence, and found that that one was the proximate cause of the loss, then the plaintiffs would have a right to recover damages. The specification of negligence to which this part of the charge refers, alleges that the defendant neglected to watch or guard the premises through employees sufficient in number and competence, and to properly instruct the same, to prevent incendiary or accidental fires or to discover and extinguish same (p. 726, l. 15).

The legal objection to the language used by the Trial Judge in this part of the charge is that it makes the defendant an insurer against liability.

Counsel for the plaintiffs seemed to have been obsessed with the idea that the defendant owed to the plaintiffs the duty of an insurer. In the opening to the jury (which is printed in the record) counsel for plaintiffs stated that the defendant "failed to guard these explosives against any incendiary fire or to prevent and discover accidental fire before it was too late (p. 57f, l. 40 to p. 57g l. 1). In the argument for non-suit, this point was specifically called to the attention of the Trial Judge (p. 386, l. 35, p. 387, l. 40). The Trial Judge seemed to be of the view that the language of the complaint and in the opening to the jury was used in the "popular" sense (p. 387, l. 15). But the difficulty

is—that in determining the measure of the defendant's legal duty in the premises, language must be used in the legal sense. The cases in this state show conclusively that a defendant is not an insurer against negligence, but is merely required to take reasonable care under the circumstances. The measure of care may vary according to the circumstances, but, whatever the measure may be, it is always never more nor less than "reasonable" care.

Gellaty v. *Central R. R. Co.*, 86 N. J. L. 16
Blumenfeld v. *Hudson & Manhattan R. R.*, 89 N. J. L. 581.

Thus, we find that in the case of *Mason* v. *Erie R. R.*, 75 N. J. L. 531, the Trial Judge, in an action brought by a passenger to recover damages for injuries sustained while alighting from a train, instructed the jury as follows:

> "It is undoubtedly the duty, under the law, of this defendant, as well as all railroads, to provide a reasonably safe place for its passengers to alight from its train. There is no question about that. * * * It must provide a reasonably safe place for its passengers to alight from its train."

This Court reversed a judgment for plaintiff on the ground that the charge incorrectly stated the legal duty of the Company. We quote from the opinion as follows:

> "The instruction exhibited by the first of the foregoing exceptions was erroneous in that it incorrectly stated that the duty of the plaintiff in error was to provide a reasonably safe place for its passengers to alight from its trains, whereby the jury was permitted to determine whether reasonable care had been exercised by the plaintiff in error not from the qualities of its conduct in that respect, but solely by the jury's opinion as to the results of that conduct. The duty of the railroad company was, it is perhaps needless to say, merely to exercise reasonable care to provide a safe place for its passengers to alight. Dotson *v.* Erie Railroad Co., 39 Vroom 679.

'This distinction is fundamental,' as was said in the opinion of this Court in Foley *v.* Brunswich Traction Co., 37 Vroom 637, 'since it marks the difference between a carrier's liability for negligence and its guaranty of safe carriage. The former inheres in the implied duty owed by the defendant to the plaintiff. The latter does not so arise, and was not within the undertaking of the defendant.' In the same opinion this further language is used touching an instruction that is not distinguishable in principle from the one now before us:

'This instruction was, we think, erroneous. Its error lay in this viz.: That it guaged the liability of the defendant not by the quality of its conduct, but by the results of that conduct, thereby covering indiscriminately injuries resulting to the plaintiff from causes preventable by the exercise of due care on the part of the defendant, and injuries that might have happened notwithstanding the exercise by the defendant of the degree of care legally imposed upon it as a carrier of passengers. * * * The gravamen of the plaintiff's action was the failure of the defendant to use reasonable care for her safety as a passenger, hence the correct instruction would have been that the defendant was liable for the plaintiff's injuries if it failed to take reasonable precautions to see that the place provided by it for her discharge was a safe one for that purpose * * * It was the defendant's right to have that question submitted to the jury. The question that was submitted to the jury did not give the defendant its right in this respect, for while the occurence of the accident demonstrated the unsafe character of the place at which the plaintiff was invited to alight, it could not lawfully be permitted to establish also the negligence of the defendant, which upon this writ of error was the effect given to it by the verdict.'

Upon the authority, therefore, of the case cited, and of the reasoning on which it rests, the charge in the respect indicated was reversible error.''

In the next place, the defendant claims that it was error to submit this particular question to the jury for the reason that there was no evidence to show that the

defendant was negligent in this respect; or that its negligence was the proximate cause of the accident.

It is well settled that it is error to leave the jury a question upon which there is no substantial supporting evidence.

In *Gilmore* v. *Kane,* 72 N. J. L. 167, it was held erroneous to permit the jury to make an allowance to a plaintiff for expense and loss in the absence of any evidence showing what the same was. The same rule was followed in *Bartow* v. *Erie R. R. Co.,* 73 N. J. L. 12, where it was held error to permit the jury to include in the verdict an allowance for the loss of profits alleged to have been sustained by a plaintiff in his business when the proof failed to furnish any data from which the amount of such profits might be determined with reasonable certainty.

In *Mason* v. *Erie R. R.,* 75 N. J. L. 521, this Court referring to the Bartow case, said:

> "The authorities cited in the last mentioned case fully sustained the position that damages that do not rest upon proof cannot be awarded by a jury, if any authority for so self evident a proposition be needed."

In order to determine whether there was any substantial evidence on which to justify the Trial Judge in submitting this questin to the jury, it will be necessary to discuss the evidence on this subject, always bearing in mind that the measure of duty is not to insure the plaintiffs against damage, but merely to exercise reasonable care to prevent damage.

There is no dispute as to the methods adopted by the defendant for the purpose of guarding the premises in question. The testimony on this point was given by the watchmen who were on duty on the night of the fire and explosion, and their testimony may be summarized as follows:

Kane said there were five watchmen employed by the defendant, to wit, the witness, Kane, Sloan, Kelly,

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Groat and Garrity, and that he, Kane, was the "supervisor" over the other four (p. 183).

Besides their duties as watchmen, each of these men also had certain other duties. Sloan had charge of the boiler in the pump house near Store F (p. 184, ll. 10-20). As a watchman, it was his duty to make his rounds every hour and to punch buttons which were connected with a recording instrument. Two of these buttons were on the east side of Pier 4, one at the south end and the other near Store A (p. 184, l. 30; p. 184, l. 10). The post of Kelly was at the grain transfer elevator. He was also in charge of the boiler at that point. His buttons were on the west side of Pier 4 and he was required to punch them every hour (p. 184, ll. 30-40). He also covered Store 3 and the elevator at the northeast end of the elevator. Groat was located at the oil yard about one-quarter of a mile or less west of the grain elevator. His buttons were at Store AA, about 50 or 100 feet from the gate leading into the yard.

The tour of Garrity covered what were known as the North Pier and the South Pier, on Pier 7. It was also his duty to keep up the fire in a steam crane near Store R (p. 186, ll. 30-40). His buttons were at Store G, near the pump house; on the north side of Store G, and thence to Store R (p. 187, ll. 1-30). He also had a button at the south end of Pier 6. It was also part of Kane's duty in his oversight of the men to go around the yard during the night and see if they were on duty (p. 187, l. 35; p. 188, l. 35). He had been employed as a watchman in the yard for about seven years (p. 188, l. 40).

Kane testified in detail as to the instructions that were given to the employees in the event of fire. He said that his orders were to telephone the company at its Jersey City terminal for fire tugs and locomotives; also the New York Fire Department for fire boats; the Standard Oil Co. for fire tugs; the Jersey City Fire Department and the agents and officers of the

railroad, and in the meantime to get out the hose and have everything ready (p. 197, l. 15; p. 198 l. 20). These instructions were in writing and were posted at the telephone in the office where the time clock was located (p. 198, l. 35; p. 202, ll. 1-20).

These instructions were qualified, however, by the direction that he was to use his own judgment, and if the fire was in any way dangerous, then he was to telephone, and if not, to try to put it out himself. He also had instructions to call on the captains of the barges that might be at the piers and to use them to help put out the fire. They were usually about twenty or thirty of these barges tied up at the west side of Pier 4 (p. 218, ll. 20-30; p. 234, ll. 1-15). The order also required that the whistle be blown to warn these men of the fire and to call them to help (p. 218, ll. 30-40).

Sloan (p. 219).

Was employed as watchman and night engineer and was stationed in the pump house near Store F and had been so employed for 22 years (p. 219, ll. 20-40). Made his round every hour and punched buttons on the "dock side" of Pier 4. The watchman who was to the east was Garrity. His beat covered the platform on the track side as far as Pier 6 and then "all around to the farm." He also had to look at the boiler once or twice during the night to see about the fire (p. 220, ll. 20-40). The farm is that part of the yard which is now known as Pier 7 (p. 221, ll. 1-10). Kelly was located to the west of this witness at the grain elevator, and still further to the west was Groat—a distance of about 400 feet from the elevator (p. 221, ll. 10-30). When the ammunition cars started to come into the yard four men from the Dougherty Detective Agency were sent to the yard to watch these cars; there was no change in the Lehigh Valley watchmen (p. 222, ll. 20-30). Part of the duty of the witness was to fight fires (p. 227, l. 35); and this would be done under the orders

of Kane (p. 228, l. 15). Witness had written instructions as to what should be done in case of fire, namely, to get up pressure, blow the whistle to indicate the location of the fire, to notify the men on the boats and the watchmen, to hook on to the hose carriage and turn on the water supply (p. 232, ll. 10-30).

Kelly (p. 264).

Located at grain transfer elevator near Store 3. Was watchman and stationary fireman. Made his rounds every hour. Punched buttons on the elevator on the northeast end, another on the west side of Pier 4 and at the center and another at Store 3. Had worked in the yard for 13 years and 7 years at night (p. 264, l. 10, to p. 265, l. 10). The instructions in case of fire were to go to the point where the whistle indicated (p. 268, l. 40, to p. 269, l. 10). Part of his duties were to help put out fires (p. 271, l. 25). The first duty was to take care of the boiler, if he thought it best to do so (p. 272, ll. 1-40).

Groat (p. 280).

Was watchman at the oil yard. Had been so employed about two years and before that had been an engineer in the "plant" (p. 281, ll. 30-40). Had instructions to give the alarm in case of fire and to call certain men (p. 282, ll. 1-40); but in the event of a fire at Pier 7 was under the command of Kane and if he had directed him to fight fire he would have gone (p. 283, ll. 30-40).

The written instructions which the defendant gave to its employees for the purpose of guarding against fire and the directions as to what should be done in the event of fire were offered in evidence and are as follows:

Exhibit D. 2 (p. 817d).

This gave the location of the private fire alarm boxes. There were sixteen of these scattered at convenient points throughout the yard. It also gave the location of the Jersey City fire alarm boxes. There were two

of these, one located near the office of the Cork Insulation Company and the other located at Store F. In addition there were 13 auxiliary alarm boxes from which the Jersey City Fire Department might be called. (See pages 817d and 818.) This notice also gave instructions as to the organization of the employees who were to take charge of the different hose carriages and contained specific directions as to what should be done on discovery of fire as follows:

> 1st. Upon discovery of fire, pull the nearest Private Alarm Box—and stay near said box to direct Fire Department to the fire.
>
> The City Alarm Box may be pulled at the discretion of the Chief or Deputy Chief of Department.
>
> 2nd. When signal is received the Electric Pump man on duty must immediately prime and start Electric Pump, permitting same to churn. He shall then station himself outside of pump house and await instructions before opening valve to discharge into main.
>
> 3rd. When signal is received the Steam Pump Engineer on duty at the West End of property shall take his station in steam pump house and prime pump; but shall not start until a signal of one loud blast on the fire whistle has been given. The pump must then be started and run at 80-lbs. water pressure at the pump until back taps are sounded.
>
> 4th. 1st Alarm consists of location signal being repeated three times on steam whistle near office.
>
> 5th. 2nd Alarm is a repetition of first alarm location signal.
>
> 6th. On first alarm all companies located in the end of yard signal is received from, must respond; all companies not responding must hold themselves in readiness for second alarm signal.
>
> 7th. On 2nd alarm entire department must respond.

Exhibit D. 3.

This was the usual red fire alarm box and was a part of the American District Telegraph system, with the

usual directions as to breaking the glass and pulling down the lever in the event of fire (p. 821).

Exhibit D. 4.

This was a notice offering a reward for a malicious fire alarm (p. 821).

Exhibit D. 5.

This was a notice giving the location of the fire alarm boxes and is substantially the same as the first part of Exhibit D. 2 (p. 822).

Exhibit D. 6.

This was a poster giving the rules and regulations of the New York Board of Fire Underwriters requiring certain protection as to goods and storage and forbidding smoking, etc. (pp. 823 to 826).

Exhibit D. 7.

This was a poster issued by the Railroad Company giving directions as to oil and waste, etc. (pp. 826-829).

Exhibit D. 2 was posted at 37 conspicuous places on the walls of warehouses and other buildings (p. 465, l. 30, to p. 467, l. 40).

The red fire alarm boxes of the A. D. T. system were placed at the points indicated in Exhibit D. 2, and alongside of each of them was posted the reward card (p. 468, ll. 1-40).

Exhibit D. 5 was posted at the several locations named on the card. It was also posted at other points in the offices, etc. (p. 469, ll. 1-30).

Exhibit D. 6 was posted in the warehouses (p. 469, l. 35, to p. 470, l. 10); and about 40 or 50 copies of Exhibit D. 7 were placed at various points in the yard (p. 470, ll. 10-30).

Under the foregoing evidence we urge that there was nothing upon which the Trial Judge was justified in submitting to the jury the question of whether there was negligence on the part of the *defendant* with respect to the sufficiency or competence of its employees, or with

respect to the instructions to them. All of the watchmen had been in the employ of the company for many years and there is no pretense that they were not efficient and competent. It may be that they did not exercise the best possible judgment when the emergency arose at the time the fire started, but we are not now dealing with the question of whether the employees themselves were negligent in what they did *after* the fire was discovered. The particular ground of negligence which is now under consideration is whether the *defendant* was negligent, and that is an entirely separate and distinct question from the question of whether the employees themselves were or were not negligent in their efforts to give warning of the fire or to extinguish the same. So far as this point is concerned, the duty of the defendant was nothing more nor less than to *use reasonable care to employ competent men.* The distinction between negligence on the part of the master in the employment of his servants and negligence on the part of the servants in carrying out the instructions of the master is well stated in the case of *Wing* v. *Bradstreet & Sons,* 99 Atl. (Maine) 36, wherein it was held (headnote):

> "Even if a servant is incompetent, before the master can be held liable for injuries due to such incompetence, it must be shown that he knew, or by the exercise of due care, should have known, that the servant was incompetent, and knowledge after the injury is not sufficient."

The Court said:

> "The only other evidence of the incompetency or negligence of Pearl Bradstreet, as claimed by the plaintiff, is the inference that is sought to be drawn from the occurrence of the accident complained of. 'Incompetency cannot be inferred from a single act of negligence.' Even if the accident, as the plaintiff claims, showed Pearl Bradstreet a negligent and incompetent servant, before the master could be held responsible the evidence must show that the defendant knew, or by the exercise of due care should have known, that he was an incompetent and negligent servant. This must be known, or by

> the exercise of due care should have known, before the accident. Knowledge after the accident is not sufficient."

In the case of *Igoe* v. *Boston Elevated Ry. Co.*, 204 Mass. 202, 90 N. E. 574, the Court said:

> "Incompetence cannot be inferred from a single act of negligence. Ettore *v.* Swingle, 183 Mass. 194, 66 N. E. 705. But if we treat the general statement in the plaintiff's offer of proof that Lynch was incompetent as sufficient, there was yet nothing to show that the defendant knew or ought to have known of this incompetence and so was negligent in employing him as a superintendent, or that the injury to the plaintiff was due to such incompetence. Cooney *v.* Commonwealth Ave. St. Ry., 196 Mass. 11, 14, 15, 81 N. E. 905; Gilman *v.* Eastern R. R., 10 Allen, 233, 238, 87 Am. Dec. 635; Id., 13 Allen, 433, 440, 90 Am. Dec. 210."

In the case of *Baulec* v. *New York & Harlem R. R. Co.*, 59 N. Y. 356, it was claimed that the defendant was responsible for the negligence of a switchman who had changed the signal without changing the switch. There was evidence that some time before the accident another train had met with a similar accident at the same switch. The claim was that the defendant was negligent by reason of failure to take reasonable care to employ a competent switchman. Judgment of non-suit was affirmed, the Court saying:

> "The duty of a railroad corporation is to exercise due, that is ordinary care, in the selection and employment of its servants and agents, having respect to their particular duties and responsibilities and the consequences that may result from the want of competence, skill or care in the performance of their duties. If without exercising such care and caution, employees and agents are selected who are incompetent, or in any respect unfitted for the position, and harm and loss come to others by reason of such incompetency or unfitness, the corporation must answer for their neglect and want of care in employing a servant incompetent or untrustworthy.

"There is no impeachment or attempt to impeach the qualifications and fitness of McGerty as a switchman, except by the proof of a single occurrence, several months before the occurrence in question. It is not contended that the defendant was wanting in the exercise of due care in his original employment, and it must be assumed that he was competent when employed and reasonably intelligent, and was during all the time he was in the service of the defendant, sober, temperate, attentive to his duties, carefully, intelligently and successfully performing the service required of him with the single exception referred to. At the time of the accident, he had been in the service of the defendant in different capacities for eight or nine years, had served as a switchman over a year and a half, at or near the point at which the plaintiff's intestate was injured. Six or seven months before the time last referred to, a train had been thrown from the track by a misplaced switch while McGerty was in charge, which the plaintiff claims was caused by his carelessness, want of attention, or mistake. If it be conceded that the negligence of McGerty upon the prior occasion is established, it by no means follows that the defendant was bound to discharge him upon peril of being charged with neglect and a want of due care in retaining him in its service. An individual who by years of faithful service has shown himself trustworthy, vigilant and competent, is not disqualified for further employment, and proved either incompetent or careless and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. The fact would only show what must be true of every human being, that the individual was capable of an act of negligence forgetfulness or error of judgment. This must be the case as to all employees of corporations until a race of servants can be found free from the defects and infirmities of humanity. A single act may under some circumstances show an individual to be an improper and unfit person for a position of trust, or any particular service, as when such act is intentional and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act

> is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular service. But a single act of casual neglect does not, *per se*, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act."

In the case of *First National Bank of Montgomery* v. *Chandler,* 141 Ala. 286, 39 Southern 822, the Court in discussing the question of the liability of the master by reason of failure to exercise reasonable care to select a servant, said:

> "The presumption is that the master has exercised proper care in the selection of the servant. It is incumbent on the party charging negligence in this respect to show it by proper evidence. This may be done by showing specific acts of incompetency and bringing them home to the knowledge of the master or company, or by showing them to be of such nature, character, and frequency that the master, in the exercise of due care, must have had them brought to his notice. But such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of. So it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of the servant, to leave it to the jury whether they did come to the knowledge of the master, or would have come to his knowledge if he had exercised ordinary case * * * It is understood, of course, that the incompetency of the servant in all cases, in order to charge the master, was the proximate cause of the injury. The mere fact that the servant was incompetent and the master had knowledge thereof is of no importance, unless therein is found the cause of the injury, or a cause contributory thereto, without which it might have been avoided or not have happened. Bailey on Master's Liability for Injuries to Servants, 47, 54, 70; Laning *v.* R. R. Co. of New York, 49 N. Y. 521, 10 Am. Rep. 417; Chicago & G. E. R. R. *v.* Harney, 28 Ind. 28, 92 Am. Dec. 282; Michigan Central R. R. *v.* Gilbert, 46 Mich. 179, 9 N. W.

243; Kersey *v.* Kansas City R. R., 79 Mo. 362; Hayes *v.* Western R. R., 3 Cush. 270; Johnston *v.* Pittsburgh W. R. R. Co., 114 Pa. 443, 7 Atl. 184.

"It seems to be the rule at law that, in order for the plaintiff to recover against the defendant, he is bound to show by affirmative testimony: (1) that the injury was the result of the act or omission of some fellow servant; (2) that said fellow servant was incompetent for the duty he had to perform; (3) that the fact of his incompetency was known to the defendant, or that it or its manager or superintendents, acquired a knowledge of it during his employment and before the accident, or by due diligence could have learned of his incompetency. Snodgrass *v.* Carnegie Steel Co., 173 Pa. 228, 33 Atl. 1104. Negligence such as unfits a person for service, or such as renders it negligent in a master to retain him in the employment, must be habitual, rather than occasional, or of such a character as to render it imprudent to retain him in service. A single exceptional act will not prove a person incapable or negligent. Conrad *v.* Gray, 109 Atl. 130, 19 South. 398; Baltimore Elevator Co. *v.* Neal, 65 Md. 438, 5 Atl. 338; Harvey *v.* Railway Co., 88 N. Y. 481; Couch *v.* Coal Co., 46 Iowa 17; Huffman *v.* Ry. Co., 78 Mo. 50."

But it may be urged that the defendant did not have a sufficient number of employees to guard the yard, even though the employees who were on duty were competent —or at least were not incompetent to the knowledge of the defendant. To this it may be answered that these same men had been on duty in the yard for at least six months prior to the fire, during which time many hundreds of cars containing explosives had passed through the yard and many thousands of pounds of explosives had been unloaded from the cars and placed on boats and at no time had there been any suggestion of danger, unless such might be inferred from the so-called "propaganda." Moreover, there were four additional watchmen who went on duty in the yard on behalf of the shippers or owners of some of the explosives. This was merely an added precaution which was no part of the defendant's duty.

Moreover, the proof fails to show any ~~casual~~ causal relation between the alleged insufficiency of a number of watchmen and the fire and the explosion. There is no proof as to the cause of the fire and there is nothing whatever to show that the fire might have been prevented if the defendant had had a score or a hundred or a regiment of guards in and around the yard; and hence, even if it should be said that it was a question for the jury as to whether there was a sufficient number of watchmen, that fact, even if found against the defendant, would not affect its liability in the absence of evidence to show that the insufficiency was the proximate cause of the damage to the plaintiffs.

Finally, it must be remembered in dealing with this point, that the claim in the complaint and the question submitted to the jury was not merely whether there was a sufficient number of watchmen, but also whether the watchmen were competent and whether they had been properly instructed. Three possible grounds of negligence are combined in the one statement in the complaint and in the charge, and the jury were permitted to find the defendant responsible if they believed that it had failed in its duty in any one of these particulars. Hence, even if the watchmen were insufficient in number, there is still nothing for the jury to consider on the point as to whether the watchmen were competent or were not. There is nothing for them to consider as to whether or not the defendant had exercised reasonable care (and that was the extent of its duty) to employ competent watchmen; on the contrary, the evidence shows that they were competent, or to put it in another way, there is no evidence to bring home to the defendant knowledge of the fact that any of the watchmen were *incompetent* unless that fact might be inferred *after* the event.

Again with respect to instructions, it is difficult to see how any additional instructions could possibly have been given to the watchmen. They were told orally and in writing as to what they should do in the event of fire. The case cannot turn upon any narrow question of

whether they should have been instructed to telephone first, or to get out the hose first, or to turn on the water first, or to send in the fire alarm first; in the very nature of things the circumstances must control. The instructions were specific and complete; if the watchmen failed to carry them out it is possible that the defendant might be held responsible for such failure, *provided,* that failure might be found to be negligence on the part of the watchmen, and, *provided further* that this special point was properly alleged in the complaint and submitted to the jury as a basis for the finding against the defendant. But that is an entirely different question from the one which we are now considering. So far as this point is concerned, the only question is whether the defendant had taken *reasonable care* to properly instruct its watchmen. There was no pretense made by the plaintiffs that it was the custom in other yards to give other or different instructions than what were actually given in the present case and there was no evidence to show that these instructions were improper or insufficient or unreasonable and hence there was no question for the jury on the point as to whether or not defendant had failed in its duty in this particular respect.

(b)

It was error to permit the jury to find negligence on the part of the defendant, on the ground that the defendant permitted unauthorized persons upon the premises in the vicinity of the explosives.

It is impossible to tell from the language of the complaint whether the plaintiffs claim that the defendant was negligent because it violated one of the Interstate Commerce regulations with regard to unauthorized persons, or whether they claim that there was a duty (aside from the regulations) on the part of the defendant to prevent unauthorized persons from going on to the premises. (See paragraphs 11 and 12 of the complaint, pp. 34 and 35.) The question of the defendant's negligence

in this respect was left to the jury, together with certain other charges (p. 726, l. 20; p. 727, ll. 20-30). The defendant submitted specific requests to the effect that there was no evidence of the presence of any unauthorized persons on the premises on the night of the fire and that there was no evidence that any unauthorized person had access to the explosives. (See Requests 14 and 15, p. 746i.)

Here again, as under subhead (a) of this point, the defendant urges that the charge incorrectly states the measure of the defendant's duty to the plaintiffs—that duty being merely to exercise reasonable care in this respect rather than to act as an insurer; and for the same reasons which were urged under subdivision (a), we urge that there was error in the charge on this subject also.

We further submit, that it was error to leave this question to the jury because there was no evidence to show that there were any unauthorized persons on the premises, or that if they were there that that fact had anything to do with the starting of the fire. This subject is closely associated with the discussion of the question of whether there was any proof of the violation of the section of the Interstate Commerce regulations known as Section 1643-b, and we refer to Point II (b) for a discussion of the evidence on that subject; and so far as the present point is concerned, we submit that under the undisputed evidence, as it was summarized, there is nothing whatever to show that there were any persons on the premises who did not have a lawful right to be there, and still less is there anything to show that the presence of any such person was the cause of the fire.

(c)

It was error to permit the jury to find negligence on the part of the defendant on the ground that it permitted or neglected to prevent vessels not connected with the transshipment of explosives and having no business at the North Pier, and wholly or partially laden with explosives, to lie moored to said pier or in the vicinity thereof.

Just as in the case of subdivisions (a) and (b) of this point, so again the Trial Judge recited certain paragraphs of the complaint and then told the jury that if the plaintiffs had made out any one of these specifications and that the same was the proximate cause of the loss, plaintiffs would have a right of recovery. The point which we are now considering is recited in the charge to the jury as follows (p. 726, ll. 22-30):

> "It permitted vessels not connected with the transhipment of said explosives, ammunitions and munitions of war to lie moored at said North Pier.
>
> "It permitted or neglected to prevent barges or lighters having no business at said North Pier, and wholly or partially laden with such explosives and munitions of war, to lie moored to said North Pier or moored to similar barges moored thereto, or to lie in the vicinity thereof."

The part of the charge which permitted the jury to find defendant responsible because of its negligence in this particular is at page 727, ll. 20-30.

Here again the defendant makes the same claim as in the previous discussion of this part of the charge; namely, that the complaint and the charge incorrectly state its legal duty in the premises by placing upon it the duty of insuring rather than of exercising reasonable care; it further claims there was no evidence to show that the defendant *permitted,* or neglected to prevent, vessels to lie moored at the North Pier. There is, however, the additional argument on this phase of the case, that even if there were any such vessels at or near the defendant's

premises, they were there without the knowledge of the defendant and without any lawful right to be in that location.

It was admitted that at the close of business on July 29, 1916, certain vessels were moored to the North Pier or were lying alongside of vessels moored to said pier. The following are the names thereof:

Moran Barge No. 64.
Moran Barge No. 20.
Johnson Barge Frank.
Ackerman Barge Paulina.
Ackerman Barge Jet.
Ackerman Barge Thompson.
Ackerman Barge Rockwell.
Schooner George W. Elsey.

It was also admitted that *after* the close of business on July 29th, and prior to the fire and explosion, two barges of the Johnson Lighterage Company were moored at or near the North Pier, Johnson barge No. 11 was moored alongside of Johnson barge "Frank," and Johnson barge No. 17 was moored alongside of the North Pier, both of them being moored without the knowledge or consent of the defendant. The only one of the vessels whose mooring was allowed by the defendant, was the schooner Elsey. It was partly loaded with salt during the business hours of July 29th. The mooring of the other vessels was on various dates prior to July 29th, as follows:

Moran Barge No. 64 on July 27th.
Moran Barge No. 20 on July 26th and 27th.
Johnson Barge "Frank" on July 20th.
Ackerman Barge "Paulina," date of loading not shown.
Ackerman Barge "Jet" on July 21st.
Ackerman Barge "Thompson" on July 24th.
Ackerman Barge "Rockwell" on July 20th.

(pp. 121-124.)

It should further be observed that there was no proof that the cargoes of these several barges were, in fact, still thereon at the close of business on July 29th, and prior to the fire and explosion. The evidence as to the dates of loading thereof was given in the form of defendant's answers to interrogatories, and the defendant expressly disclaimed any knowledge or information as to whether the said cargoes or any of them, or any part thereof had been delivered after the loading thereof; its answers being based on the records showing the dates of loading, and the contents of the cars as indicated on the billing (p. 124, ll. 20-30).

The location of these several vessels at the time of the fire, so far as the same was disclosed by subsequent investigation, is indicated on the map marked Exhibit P. 15. (For testimony as to the circumstances under which this map was prepared, see pp. 158 to 161; and for copy of the map see Vol. 2, opposite page 776.) By reference to this map, it will be seen that the several barges above mentioned were located as follows:

Moran Barge No. 64 on north side of North Pier, near the Bulkhead.

Moran Barge No. 20 on south side of North Pier, near the easterly end thereof.

Johnson Barge "Frank" on north side of North Pier, about in the centre thereof.

Ackerman Barge "Paulina" on south side of North Pier, alongside and to the south of Barge "Jet."

Ackerman Barge "Jet" on south side of North Pier, alongside and to the south of Barge No. 20.

Ackerman Barge "Thompson," on south side of North Pier, alongside and to the south of Barge "Paulina,"

Ackerman Barge "Rockwell," on the south side of the North Pier, alongside and to the south of the Schooner "Elsey."

Johnson Barge No. 11, on the north side of the North Pier, about in the centre thereof, and alongside and to the north of the Barge "Frank."

Johnson Barge No. 17, on the north side of the North Pier and near the easterly end thereof.

Plaintiffs' witness Kane said that for some months prior to the fire, barges, lighters and other vessels were anchored or moored at or near the various piers (p. 189, ll. 20-40). His testimony, however, proves nothing with respect to the allegations of the complaint and the statement in the charge that the defendant had permitted vessels not connected with the transhipment of explosives, or vessels that had no business at the North Pier to lie moored thereat. The record shows without dispute that the explosives were unloaded from the cars on to barges or lighters, and, of course, while the process of unloading was going on, it was necessary for the vessels to be moored at or near the North Pier, as that was the place where the cars containing the explosives were taken for the purpose of unloading their contents on to barges.

Some of the captains of the barges were called as witnesses. Captain Baker of the "Frank" said that his boat was on the north side of the North Pier and about 100 feet from the end (p. 235, ll. 20-30). It had arrived thereon on a Thursday, but he did not fix the date (p. 238, l. 29). He also described the location of certain other barges which were moored at or near the North Pier (p. 238, l. 30, to p. 239, l. 10). This was substantially the same as shown on the map marked Exhibit P. 15. His barge had been loaded on July 20th (p. 123, ll. 1-10). No effort was made by the plaintiffs to show where it had been during the interval between July 20th and July 29th, or whether any permission had been given by any representative of the defendant to allow it to remain at the North Pier, neither was any effort made to show that at the time of the explosion the cargo that had been loaded on the "Frank" on July 20th was still on board; and there was no proof whatever that any part of the cargo on this barge exploded or caused any damage to the plaintiffs. By the time the barge arrived at Black Tom on Thursday, it already had on board two carloads of shrapnel shells; and, according to the captain, he took on five carloads of T N T on that Saturday for delivery to the British Government (p. 245, ll. 20-40).

But he is probably mistaken as to the date of the loading of the T N T, as the company's records show that five carloads were placed on his barge on July 20th (p. 123, ll. 1-10).

In order to deliver the explosives to the British Government, it was necessary to take the barge to a ship at Gravesend Bay, where it was the custom to load all explosives (p. 246, ll. 1-15). Captain Baker knew that there was a place marked out in the bay where lighters or scows, loaded with ammunition or explosives were required to anchor. He fixed these moorings as opposite Statue of Liberty, on the Jersey shore (p. 246, ll. 20-30).

The Johnson No. 11, tied up alongside of Captain Baker's boat at about five or six o'clock on the Saturday night when the explosion occurred; and he thought that the 17 had come in the day before (p. 246, ll. 30-40; p. 250, ll. 20-30). The Johnson barge "Frank" was not set on fire and it did not explode; all that happened to it was the breaking of some windows (p. 254, l. 38).

Captain Casperson was in charge of Johnson barge No. 11. This reached Black Tom about five o'clock on the afternoon of Saturday, July 29th. At that time it had on board 400 kegs of picric acid (p. 286, ll. 20-40). It had come to Black Tom for more (p. 287, l. 35). On arriving at the pier, the 11 was fastened on the outside of the "Frank." The captain knew that at that time Gravesend Bay was used for a Government anchorage ground and that it was necessary for him to go to anchor there after five o'clock, rather than float around the harbor with a load of explosives (p. 288, ll. 20-40). The captain was lifted into the air and blown into the water by the explosion, and the bulkhead of his boat and some of the glass was damaged (p. 293, ll. 20-40). The next afternoon he again saw his boat and noticed at that time that it had been damaged by fire (p. 295, ll. 1-10). There is no proof that any part of the contents of the Johnson 11 exploded, or caused any damage to the plaintiffs.

Of the various other barges that were moored at or near the North Pier, in addition to the "Frank" and the Johnson 11, there is no proof that the contents of any of them exploded or caused any damage to the plaintiffs, except the barge known as Johnson No. 17. This barge was set on fire and completely disappeared (p. 243, ll. 30-40); and the captain was killed (p. 244, ll. 1-10).

There is no doubt that the Johnson 17 exploded—in fact, the defendant claims that this was the explosion that damaged the plaintiffs. The evidence as to when the Johnson 17 arrived at the North Pier is not very clear. Captain Baker of the "Frank" said he thinks it came on a Friday (p. 246, l. 40). The defendant's answers to interrogatories (which were offered by the plaintiffs as a part of their case) stated that this barge, together with No. 11, was moored at the North Pier after the close of business on July 29th, *without the knowledge or consent of the defendant.*

The Johnson 17 had been at Pier 8 of the West Shore Railroad at Weehawken on July 27th, and the next day it went from there to the station of the Erie Railroad at Weehawken and thence to the Black Tom Pier (p. 600, l. 35; p. 601, ll. 15-20). It was still at Black Tom on July 29th (p. 601, l. 40). It had gone there for the purpose of loading and some arrangement was alleged to have been made to finish the loading on the following Sunday (p. 603, ll. 10-20). This arrangement was made by the superintendent of the Johnson Company with a man known as the "powder clerk" (p. 603, ll. 20-30). It will be noted that nothing was proven as to any arrangement whereby the Johnson 17 was to *remain* at the Black Tom Pier after the close of business on Saturday, July 29th. Even if there had been any such arrangement made with a clerk of the defendent, that would, of course, not be binding upon the defendant—especially in the face of a direct provision in the Government regulations, fixing the anchorage ground for boats carrying explosives.

When the Johnson 17 arrived at the Black Tom Pier, it had on board two carloads, or 1,005 cases of T N T

which had been loaded at the West Shore Railroad, on an order from the Russian Government, which was to be delivered to the S. S. "Novgorod," at Gravesend Bay (p. 607, l. 30, to p. 608, l. 10). It also had on board 1 carload, or 417 cases of detonators, which had been loaded at the Erie Railroad docks at Weehawken. These were also for the Russian Government (p. 608, l. 30, to p. 609, l. 10). Up to the closing hour on Saturday, the 29th, this barge had not taken on any more explosives at Black Tom (p. 612, l. 20, to p. 613, l. 10).

The clerk of the railroad company who had charge of the arrangements for loading, was Mr. Higgins. He said that he was on duly until 5:30 P. M. on Saturday, July 29th, and that no arrangements had been made to load explosives on any Johnson lighters the next day. All such arrangements were made either with this witness or with a clerk by the name of Kirk, who was not on duty on July 29th (p. 652, l. 1, to p. 653, l. 10). This clerk had charge of the placing of cars for unloading, including the ammunition cars (p. 655, ll. 20-40).

The freight agent of the defendant, who was in charge of the Black Tom yard on July 29th, was Mr. Dickman. He had general supervision over the receipt and delivery of freight (p. 410, ll. 30-40). The delivery of all explosives was made direct to the consignees at the North Pier (p. 412, ll. 35-40). For that purpose, cars would be run out on the track leading on to the North Pier, and in order to facilitate these movements, four tracks—known as 13, 14, 15 and 16, at the northerly part of the yard, were used for the temporary storing of cars containing explosives. The transfer of the explosives from the cars to the barges was not handled by the railroad, but by the owners or their representatives (p. 415, ll. 30-40).

Even if we assume that, under the testimony of Mr. Johnson, some arrangement had been made whereby the Johnson 17 was to be loaded on the Sunday following the arrival of the barge at the Black Tom Pier (not-

withstanding the evidence of the defendant's clerk to the contrary), that fact would not give the Johnson 17 any *legal right* to remain moored at the North Pier, or anywhere else on the defendant's property. In the first place, the defendant's clerk would have no authority to give permission to the Johnson 17, or any other barge not owned or operated by the defendant, to take advantage of its docking facilities by mooring at its docks during the night; and, in the second place, even if this clerk did have such authority, it would be the allowance of an illegal preference—in violation of the Interstate Commerce Act, and, therefore, could not be binding upon the defendant; and, finally, it would be in direct contravention of the rules and regulations issued by the Bureau of Navigation of the United States Department of Commerce and Labor, relating to the anchorage of vessels in the port of New York. By the act of Congress of May 16th, 1888, authority was given to the Department of Commerce and Labor to define and establish an anchorage ground for vessels in the bay and harbor of New York and the Hudson and East Rivers and to adopt suitable rules and regulations in relation thereto. The regulations that were in effect on July 29th and 30th, 1916, were issued under date of June 15th, 1911, and defined and described the anchorage ground in the port of New York. Section 27 relates to the anchorage for explosives, and provides as follows:

> "Vessels carrying gunpowder or other explosives may anchor only as follows:
>
> First. On the shoal ground to the eastward of Rikers Island, East River, from one-fourth to five-eighths of a mile from this island.
>
> Second. On the New Jersey Flats between a line drawn parallel to and 15,000 feet to the south of Black Tom dredged channel and a line drawn parallel to and 15,000 feet north of the Greenville dredged channel, and to the westward of a line from Bedloes Island to Robbins Reef, provided that they do not anchor within 1,000 yards of Bedloes Island, or within 500 yards of any pier.

> Third. Vessels (carrying explosives) of two great draft to use the above anchorages may anchor only in Gravesend Bay, on a line drawn from Fort Hamilton to the western tip of Nortons Point, Coney Island, but not within 1,000 yards of the shore. All vessels laden with explosives while within the port will display at all times a red flag of at least 16 square feet surface at the masthead. Vessels so laden and without masts will display the flag at least 10 feet above the uppermost deck. All such vessels must be at all times in charge of competent persons and must comply with the navigation laws in regard to lights and fog signals."

The anchorage in the Hudson River as described in the second paragraph of Section 27, is indicated on the map known as Plate V, and entitled "Western Anchorage, Upper Bay"—the particular place where vessels carrying explosives were to be anchored being indicated on the map under the legend called "Anchorage for Explosives" (for copy thereof see reproduction of map as printed in Vol. II, opposite page 842).

We, therefore, submit that it was error for the Trial Judge to permit the jury to find the defendant liable by reason of alleged negligence in permitting vessels that were wholly or partially loaded with explosives to lie moored to or near the North Pier, because:

1. The complaint and charge imposed the dedefendant the duty of insuring against the mooring of said vessels, rather than the duty of taking reasonable care to prevent same.
2. There is no evidence to show that the defendant did, in fact, permit such vessels to lie moored at the pier—the only evidence on this subject being that of the superintendent of one of the lighterage companies to the effect that he had an arrangement with one of the defendant's clerks to have a certain barge loaded on Sunday, after it had arrived on the previous Saturday.
3. The mooring of vessels containing explosives at or near the defendant's premises was done without the knowledge of the defendant and in violation of the anchorage rules.

This is an entirely separate and distinct point from the further question of whether the explosion of the Johnson 17 was the cause of the damage to the plaintiffs. If it was, then the defendant will argue hereafter that it cannot be held responsible therefor, because such damage was the result of an intervening, illegal cause which was in no way chargeable to it.

(d)

It was error to permit the jury to find negligence on the part of the defendant, on the ground that it neglected to isolate or separate the railroad cars containing explosives, and improperly accumulated or bunched the same, and neglected to take precautions for quick isolation in case of fire.

The Trial Judge, after quoting that part of the allegation of negligence as given in the complaint, substantially in the above language told the jury (just as he had done with respect to the other allegations) that if the plaintiffs had made out any one of these specifications and that the same was the proximate cause of the loss, the plaintiffs would have a right to recover damages (p. 726, ll. 30-35; p. 727, ll. 20-30).

Here, again, the defendant claims that the complaint and the charge incorrectly state its legal duty, and further claims that there was no evidence of negligence to go to the jury on this point; neither was there any evidence to show that the negligence, if any, in this respect, was the proximate cause of the damage to plaintiffs.

At the time of the fire and explosion, there were in the Black Tom yard the following:

11 cars which were billed as containing "high explosives" (afterwards found to be T N T).
3 cars containing wet nitrocellulose.
17 cars containing ammunition for cannon.
2 cars containing combination fuzes.
5 cars containing benzol, and
1 car containing toluol.

The location of each of these cars is shown in detail on Exhibit P. 16, opposite page 776. Of the 11 cars of T N T (marked on Exhibit P. 16 with the letter "H") three were on the North Pier near the shore end thereof and the other 8 were on the track in the northerly part of the yard known as track 16.

The three cars of wet nitrocellulose (marked "W" on the map) were on track 16 and to the east of the eight cars of T N T, with a car containing wire rods separating them.

Of the 17 cars containing ammunition for cannon (marked "A" on the map) two were located at the extreme easterly end of the North Pier; seven were located on track 15 in the northerly part of the yard, and eight were on track 13.

The two cars containing combination fuzes (marked "F" on the map) were on track 13.

The five cars of benzol (marked "B" on the map) were located—four on track 16 and one on track 13; and the one car of toluol was on track 6 of what was known as the "Bowery" subdivision of the Black Tom yard.

The testimony of Superintendent Mulligan shows that the Black Tom terminal was the most isolated of any terminal in the New York harbor (p. 570, l. 30; p. 571, l. 10). His testimony also shows that it was the practice to place the cars containing explosives on the tracks near the North Pier. The reasons for this were, to bring the cars close together so that the detectives might take proper care of them, and to have the cars at a convenient point near the North Pier where they could be shifted to the boats when wanted (p. 573, ll. 20-35; p. 576, ll. 30-40; p. 577, ll. 10-15).

The testimony of Freight Agent Dickman shows that the North Pier was used for the purpose of placing cars, in order that the explosives might be unloaded therefrom to the barges or lighters.

Tracks 13, 14, 15 and 16 were used for storing, and track 18 was used as a running track to the North Pier

(pp. 412, 413). Other kinds of freight were handled in the same yard, deliveries thereof being made at the South Pier or by the transfer of the cars themselves direct to the lighters by means of floating bridges.

On the arrival of the cars containing explosives at the yard known as "Claremont," about a mile and a half from Black Tom, tickets for the cars would be delivered at the agent's office, and notices of arrival sent to the consignees. The cars would then be pulled to the bulkhead yard, and on the receipt of orders for delivery, would be placed on the North Pier, and transferred by the consignees to the barges or lighters (pp. 414-415).

We challenge counsel for plaintiffs to point out on what theory there was any negligence on the part of the defendant in this system of shifting and unloading cars containing explosives. There is nothing in the regulations which requires the isolation of one car of explosives from another car and there was no proof that it was either customary or proper to separate the cars. On the contrary, the common sense view would seem to be that the cars should be placed (just as Superintendent Mulligan stated) in a part of the yard where they could be reached most conveniently, and where they could be moved most quickly when the orders for such movement were given by the consignee. So far as concerns isolation in case of fire, we do not know whether counsel will take the position that there was some duty to have an engine with steam up attached to every car or to every string of cars in the yard. That would render the situation more dangerous on account of sparks flying from the engine; and, in the case of this particular yard, the defendant took an extra precaution in that regard by forbidding the use of the yard at night, so as to reduce the danger that might be caused by the escape of sparks.

If it be claimed that it was dangerous to have eight cars of T N T on the same track, the answer is that on the plaintiffs' own evidence, the defendant was not under obligation to reasonably anticipate the explosion of T N T merely by reason of the combustion of a large quantity

thereof. Up to the time of this catastrophe, the best scientific judgment was that T N T would not explode merely by combustion. Mr. Hudson Maxim, who is probably the leading expert in the world on the general subject, said that T N T was a very stable explosive compound, as it did not tend to decompose, and that to cause an explosion a strong detonator was required (p. 662, ll. 30-40). Prior to July, 1916, he said that it was known that T N T would burn in large quantities without exploding, and that it was still his scientific judgment today that it would burn in practically unlimited quantities without exploding (p. 663, ll. 30-40). He based this conclusion upon his experience, including a case where 206,000 pounds of T N T were burned in a magazine at Kenville, N. J., without explosion (p. 664, ll. 1-10; p. 665, ll. 10-20).

He also expressed the view that in the absence of an external detonator the T N T in the eight cars would burn without exploding (p. 666, l. 15). The ignition point of T N T is about 300 degrees centigrade, but it would be difficult to detonate it at that point unless it were confined in a shell or steel chamber where the gases could not expand. It would not be possible to secure sufficient heat to detonate, if it were in a freight car (p. 679, ll. 1-40; p. 694, ll. 10-20).

The testimony of the plaintiff's own expert, Dr. McKenna, was—that he had never seen T N T explode from heat (p. 714, ll. 1-10). He insisted that there was no "law or formula by which the effect of explosives might be determined, which could be called a law of nature which determines for us before the hand what would be the effect of a large mass of explosives exploding; we have nothing yet in the nature of a law of explosives, scientific positiveness."

> Q Then each case stands on its own bottom?
> A Yes, sir; precisely so" (pp. 720-721).

We, therefore, have a situation where one expert says that experience has shown that T N T will not explode by reason of ignition merely because it is accumulated

in large quantities, and another expert says that there is no way by which it is possible to determine beforehand what would be the effect of such an explosion, and that each case stands on its own bottom. Under these circumstances, we cannot see how it can be claimed that there was any lack of reasonable care on the part of the defendant, simply by reason of the fact that eight cars of T N T were standing alongside of each other on one track, and several cars of shells were standing alongside of each other on an adjacent track. The defendant's conduct must be determined in the light of scientific knowledge as it existed at the time of the explosion. It is possible that since this tremendous explosion, the scientific views may have changed, but that does not affect the rsponsibility of the defendant. The defendant's conduct must be judged in accordance with the then existing state of scientific knowledge on the subject.

It must also be remembered that for nearly a year prior to July 29th, 1916, the defendant had been handling explosives of the same kind in the same way, without fire or explosion. The following table shows the total number of cars containing ammunition for cannons, etc., handled each month for a year prior to the fire:

1915.	August, 57.
	Sept., 104.
	Oct., 186.
	Nov., 96.
	Dec., 233.
1916.	Jan., 269.
	Feb., 259.
	Mar., 334.
	Apr., 281.
	May, 301.
	June, 265.

In the month of July, prior to the explosion, cars were handled at the rate of 5, 6, 10, 12 and 17 per day. There certainly was nothing either in the defendant's past experience or observation, or in the knowledge of scientists up to the time of this explosion, which would tend to show that there was any danger in handling cars con-

taining these kinds of explosives in exactly the same way as they were, in fact, handled on July 29th and 30th, 1916.

The defendant's duty must be measured with reference to the scientific knowledge on the subject at the time of the fire and explosion. The test is—what it should have known of the danger at that time, not what it might have learned as the result of the catastrophe. The situation is analogous to actions against physicians and surgeons for malpractice, wherein the liability depends upon the state of the science at the time the damages were sustained. *Coleman* v. *Wilson,* 85 N. J. L. 203, citing 30 Cyc. 1571. In such a case, the question of whether the defendant is negligent depends, in the first instance, upon the state of scientific knowledge. 5 Thompson on Negligence, Section 6714.

The same principle was applied in the recent case of *Mayor and Aldermen of Jersey City* v. *Jersey City Water Supply Co.,* 105 Atl. 494 (affirmed by this court on the opinion below, 106 Atl. 892). In that case, application was made to file a bill of review, on the ground that since the original decree had been made in the case, the advance of science showed that certain opinions of experts, relating to the purity of the water supply, were erroneous. The application was denied. The Court pointed out that it was not pretended that "any witness, speaking only with reference to the *then* scientific knowledge on the subject, could have testified in such a way as to have changed the result."

An interesting discussion of this rule is found in *Water Supply & Storage Company* v. *Larimer & Weld Irrigation Company,* 24 Colo. 322, 46 L. R. A. 322, holding that the use of an inaccurate formula in computing the capacity of an irrigation ditch is not ground for a review of the decree after the discovery of a more accurate formula, which was not known at the time of the decision.

The test of care is—whether what the defendant did was in accordance with the usual custom and has been approved by experience.

Hoff v. *West Jersey R. R. Co.*, 45 N. J. L. 201.
Vallaster v. *Atlantic City R. R. Co.*, 72 N. J. L. 334.
Traphagan v. *Erie R. R. Co.*, 73 N. J. L. 759.
Whilt v. *P. S. Ry. Co.*, 74 N. J. L. 141.
Bobbink v. *Erie R. R. Co.*, 75 N. J. L. 913.
Feil v. *West Jersey & Seashore R. R. Co.*, 77 N. J. L. 502.

Under this evidence, the defendant was not bound to anticipate that the combustion of a large quantity of T N T would result in the explosion thereof. Its duty must depend upon what might reasonably be expected. The defendant sought to raise this point by request No. 18, which reads as follows:

> "The defendant can only be held legally responsible for the results of its conduct reasonably to be expected, and under the proofs in this case it was not reasonably required to expect explosion of T N T in the cars on its premises as a result of fire" (p. 746-i, l. 40).

This request was denied and exception taken (p. 746-f). See ground of appeal No. 40 (p. 11). This request correctly stated the defendant's duty under the circumstances, and it was error to refuse to charge it.

Sutphen v. *Hedden*, 67 N. J. L. 324;
Quinn v. *Delaware, etc. Telephone Co.*, 72 N. J. L. 276;
Meyer v. *Benton*, 74 N. J. L. 533.

(e)

It was error to permit the jury to find negligence on the part of the defendant on the ground that its employees were negligent in guarding, discovering and reporting the fire on July 30, 1916.

After charging that the defendant neglected to provide employees who were sufficient in number and competence and that it neglected to properly instruct the same for the purpose of discovering and extinguishing

incendiary or accidental fire, the complaint then alleged that "such insufficient, incompetent and uninstructed employee or employees as the defendant had, were negligent in guarding, discovering and reporting the fire" (p. 34, ll. 30-38). This part of the complaint was read to the jury by the Trial Judge and the question of the defendant's negligence in said respect was left to the jury (p. 727, ll. 20-30).

It is to be noted that this charge did not leave to the jury the question of whether its employees were negligent *after* the fire was discovered in respect of their efforts to extinguish the fire. If the latter question had been left to the jury a complete answer thereto would be found in the condition of emergency that arose almost immediately on the discovery of the fire—a condition so dangerous and so extraodinary that the employees might well be excused for an error of judgment if there was any such error, in the methods adopted by them to extinguish the fire. But as this point was not left to the jury it is unnecessary to discuss it as a verdict cannot be sustained on a theory different from that on which the case was submitted to the jury.

Fritz v. *Sayre & Fisher Co.*, 77 N. J. L. 236.

Hence, in discussing this point the only evidence to be considered is that which bears upon the question of whether the employees were negligent in "guarding, discovering and reporting the fire." It is not clear just what the pleader intended by the expression "guarding the fire"; and the discussion may therefore be limited to the questions of discovery and report of the fire.

No one actually saw the fire when it first started, but considerable evidence was introduced as to the location and appearance of the fire when it was first observed by various witnesses. The evidence thereon may be summarized as follows:

Ezekiel Townes (p. 139).

Was living on Black Tom Island in a shanty on the north side (p. 140, ll. 10-20). His house was near the

middle of the place marked "Pile Stockade" (p. 141, l. 25). Was asleep on the night of July 29th; at about midnight was waked by his wife. "When I went to the door I see probably a fire alongside the cars, crawling up" (p. 141, l. 40). The fire appeared to be southwest of the shanty in the direction of the storehouses (p. 142, ll. 10-30). The fire appeared to be on the third track, on a corner of the car and alongside the door (p. 143, l. 30, to p. 144, l. 10). At that time "It seemed as tall as a man over the car" (p. 144, l. 22). The fire seemed to be "crawling" alongside the car. Did not see whether there was fire on the ground; saw nothing but the burning wood of the car (p. 145, ll. 30-40). At that time the shells were going off and making a lot of noise and he hurried away with his family (p. 146, ll. 1-10). These shells seemed to be coming from the car that was on fire (p. 151, ll. 1-15).

Lottie Townes (p. 151).

Wife of Ezekiel. Smelled smoke and shook Ezekiel; then heard shooting and shook him again; then heard a loud report which shook the building; went to the door after waking up her husband and saw a car "all ablaze" and large red balls of fire going up in the air (p. 152, l. 1, to p. 153, l. 2). There was no spark on the ground (p. 153, l. 5). The car was on the third track, "slanting" from the house (p. 153, l. 20). Fire was on the top of the car; there was no fire on the ground at all (p. 154, ll. 1-10).

Walmsley (p. 165).

Marine engineer employed on a United States cable steamer. The boat was lying on the west side of Bedloe's Island (p. 165, ll. 30-40). About one o'clock in the morning saw a fire at Black Tom midway between the dock and the warehouse, about the length of the room from the water's edge (p. 166, ll. 20-30). It was in the railroad tracks (p. 170, l. 18). Watched the fire about 15 minutes and then went to bed, but before doing so saw

another fire about two or three hundred yards further away (p. 171, ll. 10-20; p. 177, ll. 10-40). The fire seemed to be four or five feet high; could not tell whether it came from the ground but it looked to be a box car (p. 173, ll. 10-20). The second fire seemed to be on the railroad track, on the ground (p. 174, l. 20). This was about the size of a table (p. 177, l. 40) and was about eight feet high (p. 178, l. 20).

Kane, watchman (p. 183).

First that he knew of fire was when he heard a man hollering and blowing a police whistle (p. 192, ll. 10-15). At that time he was on the south side of the dock between Piers 5 and 6 (p. 194, ll. 10-15). The whistle sounded in front of the north side of the storehouses; he then ran back to the pump room near store F to see who it was. Saw one of Dougherty's watchmen running and he said there was a fire at North Pier (p. 194, ll. 20-40). Witness then got on the platform on the north side of store G and looked in an easterly direction toward the North Pier and saw a "small flame" (p. 195, l. 12). The fire seemed to be almost in front of Zeke's shanty or further (p. 196, ll. 20-30; p. 197, l. 15). At that time the blaze was very small—it did not look "much bigger than a man's hat" (p. 196, l. 30).

The Dougherty man said the fire was at the North Pier. The fire was "over" the top of the car (p. 210, l. 30, to p. 211, l. 10). As soon as witness saw the fire he immediately telephoned to the railroad terminal for fire tugs and locomotives, then he called the New York Fire Department for fire boats and then called the Standard Oil for their fire tugs, then he tried to reach Agent Dickman and Superintendent Mulligan, but could not get them. The other watchman, Sloan, reached them. Did not telephone the Jersey City Fire Department as Sloan said the alarm had been sent in already (pp. 198, 199). The shells began to explode about fifteen or twenty minutes after the blaze was first seen (p. 200, l. 20). The engines came in less than half an hour and pulled out

the cars (p. 200, ll. 20-40). The first alarm was given by the calling of the Dougherty man and the blowing of his whistle about 12:30 A. M. (p. 201, ll. 20-30). The reason he did not start to put the fire out instead of telephoning was because it was so far and he could not get there in time and the ammunition seemed dangerous; he thought it would be better to get help (p. 212, ll. 1-30).

Could not see the bottom of the fire when he first observed it and could not say whether it was a car or boat (p. 216, ll. 1-10).

Sloan, watchman (p. 219).

Was near the pump room and heard shouting and two men ran over and said the piers are afire. He then ran across the track, looked down between the cars in the direction of the North Pier and saw a blaze that looked to be very distant. It was about the size of a hat and seemed at the extreme end of the North Pier below Zeke's shanty (p. 223, ll. 20-40). Was about to turn in a fire alarm when one of the men said that he had already turned it in. He then immediately started his pump and the telephone began to ring (p. 224, ll. 1-15). He then called up Dickman and told him of the fire and kept working at his pump (p. 224, ll. 20-30). Saw small explosions about fifteen or twenty minutes after the fire (p. 225, l. 10). The fire seemed to be in the center of the space between two tracks and was about the height of a barrel above the ground; could not tell whether it was in a car or on the ground, might have been on the side of a car (p. 227, ll. 10-30). The Jersey City Fire Department arrived in good time, about one o'clock or five minutes of (p. 231, l. 15). At that time the fire had spread and big rockets were going off once in a while (p. 231, l. 20).

Baker, captain of barge "Frank" (p. 234).

Barge was lying alongside the north side of North Pier about 125 feet from the end (p. 235, ll. 20-30). The captain of Johnson 17 woke me up about 12 o'clock; not

sure of the time (p. 235, l. 10; p. 239, l. 22). Saw the fire a little way further in shore than Zeke's shanty (p. 235, l. 40). Seemed to be on the tracks leading on to the north side of the pier, nearest the sea wall (p. 236, l. 12). When he first noticed the fire it was hardly half the size of a box car (p. 236, l. 20); it seemed to be inside of the car and the flames were coming out from it (p. 240, ll. 1-10). These small calibre shells were going off at that time like revolver shots (p. 236, ll. 20-30; p. 240, ll. 1-10).

Miss McEneny, nurse on Ellis Island (p. 257).

Saw a fire about 12:30 (p. 257, ll. 10-40). It appeared like an ordinary bonfire and was toward the warehouses and then started to spread. About fifteen minutes later the explosions began (p. 258, ll. 1-30).

Kelly, watchman (p. 264).

Was at the grain transfer elevator near Store 3. Did not know of a fire until he heard Sloan blow the whistle in the pump house (p. 265, ll. 10-40). At that time was working at the boiler and continued to work for ten or twelve minutes until the job was finished, then went to the pump house where Sloan was. The latter told him there was a fire on the North Pier and he then crossed from Pier 5 to the sea wall; saw a fire four or five feet high; could not say whether it was on the ground or on the side of the car, but it looked more on the ground than on the car. The fire seemed to be further than Zeke's shanty (pp. 266, 267). Went back to the elevator and did some more work on the boiler which took twelve or fifteen minutes and then saw the shells popping off (p. 267, ll. 30-40). The fire seemed to be from between two sets of cars, but cannot say it was not in a car (p. 269, ll. 30-40).

Christopher Casperson, captain of Johnson barge No. 11 (p. 284).

Was waked up at about one o'clock and there was a fire starting on the dock about seven or eight

hundred feet from the pier (p. 284, ll. 20-30; p. 289, ll. 1-10). The fire was about fifty feet from Zeke's shanty and was about five feet in circumference. When he first saw it, shells were exploding; "that was just when the fire started" (p. 285, ll. 10-30). The fire seemed to be about five feet high and five feet around; could not tell if it was in a car or not (p. 290, ll. 10-30). It was about seven or eight hundred feet from the end of the pier (p. 291, l. 15).

Peter Casperson (also on Johnson barge No. 11) (p. 296), saw the fire "right abreast" of the shanty. It was about 12:30, or a quarter of one; the fire was not very big, it looked like a burning car. Shells were going off from both sides of the car (p. 297, ll. 20-40). It looked as if the fire was "right in the car" (p. 299, l. 20).

The foregoing evidence shows that the fire was first observed at some time which the various witnesses fix as between 12:30 and one A. M. When it was first observed, it was apparently coming out of the sides and the top of a car on the third track, a short distance to the west of Zeke's shanty. At the time it was first observed by some of the witnesses, and within fifteen or twenty minutes after it was first observed by other witnesses, the shells exploded, and kept up a continuous popping. So far as the discovery of the fire is concerned, there is nothing in the evidence which proves a lack of reasonable care on the part of the defendant's employees. While it was true that the fire was first observed by one of the Dougherty's detectives, it is also true that it was observed by some of the defendant's employees almost immediately after its first discovery, and it would be absurd to charge the defendant's employees with negligence, simply because they did not discover it a few minutes before one of the detectives did so, and particularly in view of the fact that the alarm was promptly sent in.

The evidence as to the time of the alarm is as follows:

Gately, battalion chief of the Jersey City Fire Department (p. 308), received instructions from fire headquarters by telephone, around 12:45 P. M. (p. 308, l. 20; p. 312, l. 35). He went directly to Black Tom by auto and arrived in five to seven minutes; went into the driveway to a point about four hundred feet from the fire. The fire was in front of him and there seemed to be four or five cars burning and shells were exploding (pp. 308, 309). When he arrived, No. 8 fire engine company was already there (p. 310, l. 30). About twenty or thirty minutes later the witness telephoned for more engines (p. 310, ll. 30-35; p. 323, l. 15).

Klosterman, lieutenant of police of Jersey City (p. 325). He first noticed the fire at about 1:10 A. M. At that time it looked like a great big fire. The patrol wagon picked him up and he arrived at the yard at about 1:35 A. M. (p. 325, ll. 15-35; p. 329, ll. 20-30). The first big explosion was at 2:08 A. M. and the second at 2:30 (p. 336, l. 35; p. 337, ll. 25-35).

Hogan, lieutenant of fire engine company No. 8 (p. 342), heard of the fire at about one o'clock from headquarters and got there in 12 or 15 minutes (p. 342, ll. 20-30). At that time several freight cars were burning and the ammunition was exploding in all directions (p. 342, l. 40). His was the first company in the yard, arriving three or four minutes before Chief Gately (p. 344, ll. 10-20). As soon as witness arrived, he telephoned headquarters for help (p. 344, ll. 10-40). The nearest he went to the fire was about five hundred feet (p. 353, ll. 20-30).

Treger, fireman of No. 16 engine company, received orders around 1:05, and drove a tender to Black Tom as far as the corner of Store M (p. 360, l. 15; p. 361, l. 15). When he arrived cars seemed to be burning and rockets were in the air (p. 361, ll. 20-25; p. 364, ll. 20-40).

Dickman, freight agent. Was at his home in Jersey City on the night of the fire. He received a telephone

call from Sloan that the North Pier was on fire. He said the message came to him about 12:45 to 12:50 A. M. He immediately took a taxicab and reached the yard at about 1:10 A. M. (p. 421, l. 35, to p. 422, l. 30).

Julian, fire marshall, was at his home in Jersey City and received a telephone message from Kane that the North Pier was on fire (p. 454, ll. 35-40). This was about 12:20 A. M. He walked to the yard, a distance of about two and a half miles and arrived there at about 1:20 A. M. (p. 455, ll. 1-10).

It is apparent from this testimony that some one (whether it was an employee of the defendant, was immaterial) must have sent in the fire alarm to the Jersey City Fire Department within a very few minutes after the fire was first discovered. The earliest time fixed by any witness for the discovery of the fire is about "12:30 A. M." when Kane stated he heard one of the Dougherty men call and blow his whistle (p. 201, ll. 20-30). The nurse on Ellis Island also saw the fire about 12:30.

Other witnesses fixed different times, varying from 12:45 to one A. M. Chief Gately received the alarm about 12:45 A. M., and reached the scene of the fire in about five minutes, and when he arrived, No. 8 company was already there, so that it was quite evident that the alarm must have been sent in at least as early as 12:45 A. M. Kane stated that the reason he did not telephone the fire department of Jersey City, was because the alarm had already been given (p. 199, l. 20). This was corroborated by Sloan. He was about to turn in the fire alarm when a man—presumably one of the Dougherty detectives, stated he had already turned in the alarm (p. 224, ll. 1-5).

It was, therefore, impossible to charge negligence against the defendant's employees by reason of failing to make a prompt report of the fire. It was obvious that if the alarm had already been sent in, it would have been a waste of time to send in another one, hence there was no question for the jury as to whether or not the de-

fendant's employees failed in the exercise of reasonable care in reporting the fire.

(f)

It was error to permit the jury to find negligence on the part of the defendant, on the ground that it neglected to provide sufficient apparatus and employees for the purpose of fighting and extinguishing fire.

The complaint alleged, among other things, in paragraph 12, that the defendant "neglected to provide sufficient apparatus and employees for the purpose of fighting and extinguishing fire upon said premises, in said railroad terminal" (p. 35, ll. 38-40). This allegation was read to the jury (p. 727, ll. 3-10); and then, as in the case of the other allegations of the complaint, the Trial Judge permitted the jury to find the defendant liable if the plaintiffs had made out this specification of negligence (p. 727, ll. 20-30).

We, therefore, again have the same situation as we have previously discussed, and the defendant makes the same criticism of this part of the charge, namely, that it incorrectly states the defendant's legal duty, by placing upon it the burden of insuring, rather than of exercising reasonable care; and further claims that there was no evidence to show that it had failed to exercise reasonable care in the particulars specified, and that even if there was negligence in that regard, such negligence was not the proximate cause of the damage to the plaintiffs.

It will be noted that this specification of negligence refers to both apparatus and employees, and alleges in substance that both were insufficient. So far as concerns the sufficiency of the employees, this has already been discussed under subhead "a" of this point, and it is unnecessary to repeat such argument. The present discussion will, therefore, be limited to the sufficiency of the fire apparatus. This point was raised by specific requests to charge thereon, as follows:

> "8. There is no evidence from which the jury can legally infer that the defendant did not pro-

vide sufficient fire-fighting apparatus on its premises on July 29-30, 1916.

9. There is no evidence from which the jury can legally infer that the defendant did not observe the usual custom of railroads in respect to the fire protection afforded at Black Tom on July 29, 30, 1916.

10. There was no legal duty resting upon the defendant in respect of its terminal at Black Tom, to furnish fire hydrants in addition to those furnished by the city of Jersey City, the said terminal being within the limits of that municipality.

11. There was no legal duty resting upon the defendant in respect of its terminal at Black Tom to furnish its own fire protection, in addition to that furnished by the city of Jersey City, the said terminal being within the limits of that municipality.

12. There was no legal duty resting upon the defendant in respect of its terminal at Black Tom to furnish men and equipment to extinguish fires, in addition to the men and equipment of the municipality of Jersey City, within the limits of which the said Black Tom Terminal is."

It should first be noted that the railroad terminal at Black Tom was within the limits of the municipality of Jersey City. This defendant pays taxes, like other citizens, and, like them, is entitled to fire protection from the municipality. The defendant's requests Nos. 10, 11 and 12 are intended to raise the point that the defendant was under no legal duty to provide fire protection in addition to that which it would ordinarily receive from the municipal authorities. There is no reason why a railroad company—any more than any other citizen, should be required to furnish fire apparatus, or be required to equip its property with fire extinguishers. If, as a matter of extra precaution, a citizen undertakes to furnish some protection in addition to that which is provided by the municipality, that fact cannot impose upon him a legal duty greater than that which rests upon his neighbor who fails to furnish fire extinguishers. If a house begins to burn, the owner is not required, at his

peril, to have on hand fire extinguishers by which it can be put out, but he has the right to rely upon the protection of the municipal fire department, and, hence, we submit that if a railroad company, or any other citizen, voluntarily undertakes to furnish fire fighting apparatus in addition to that which is provided by the municipality, such fact does not impose upon them any greater duty with respect to third persons than if the additional apparatus had not been furnished at all. If we are right in this contention, then it is immaterial what the apparatus was on the defendant's premises, or whether there was any there at all, or whether it was in proper condition, or whether it was properly used by its employees.

But, in view of the allegation in the complaint, the defendant deemed it proper to submit to the court all the facts respecting the additional fire protection which it did, in fact, furnish. The details of this are shown on the large map known as Exhibit P. 16. In addition to the apparatus described thereon, the warehouses were equipped with an automatic sprinkling system, connected with the American District Telegraph Co. Part of the water supply was furnished by the municipality and, in addition thereto, the defendant had its own independent system, besides two large tanks and numerous hydrants stationed at various points along the railroad tracks. The location of the water mains, tanks, hydrants, hose connections, fire alarm stations, pumps, hose, hose carts, etc., are all indicated on Exhibit P. 16.

A complete description of the fire apparatus, together with the means for communicating the discovery or alarm of fires, was given in defendant's answer to plaintiff's first interrogatory. The statement thereof covers sixteen pages of the record (p. 92 to p. 108). This elaborate description may be condensed as follows:

1. *Pumps.*

There were three pumps. One, an electric pump, at the east end of store R, with a capacity of 1,500 gals. per minute.

Two, a steam pump at store F, with a capacity of 1,200 gals. per minute.

Three, a steam pump at the oil yard, at the west end, with a capacity of 1,500 gals. per minute.

All of the pumps were connected with a 12-in. fresh water main. Said pumps were also equipped so that they could pump salt water into the 12-in. main. The two first named pumps were connected with the A. D. T. system, by means of which an alarm would be given in the event that the electric current was shut off, or if the steam pressure dropped below a certain point. All the pumps were also equipped with outlets to which hose could be attached.

2. *Hydrants.*

There were 24 standard Corey hydrants, with an outlet of 2½ in.—so constructed as to throw one or two or three streams of water at the same time. They were all connected with the 12-in. water main —which was in turn connected with the municipal water supply. They were also connected with the salt water supply, by means of the pumps. These hydrants were located at various points, beginning near the northeast corner of Store R and extending westerly, at regular intervals, to storehouse AA. There were also 19 two-way 2-in. hydrants which were connected with a 6-in. fresh water main—which in turn was connected with the city water supply, or with a 6-in. salt water main. These hydrants were placed at various points, beginning at the pump house and extending westerly to warehouse AA.

3. *Fire Hose and Hose Carts.*

There were 3,000 feet of 2½-in. standard fire hose. This was kept on ten hose carts, which were located at the points described in the answer (p. 98, ll. 30-40); beginning at the easterly end of Store M and extending to the steam pump near the warehouse BB, each hose cart having about 300 feet of hose. The hose carts were also equipped with nozzles, wrenches, &c. Standard hose was also placed on the roofs of the warehouses; likewise, there were 200 feet on pier 6, 200 ft. on pier 5, 1,100 feet on pier 4, 100 ft. in store 3, 550 ft. in the grain elevator, and 400 ft. in storehouse AA.

4. *Chemical Engine.*

There was a one-hundred gallon chemical engine at the northerly end of Pier 5—with 100 ft. of hose.

5. *Fire Extinguishers.*

These were located on the ground floor of each storehouse, with several on Pier 5 and on the two grain elevators; also in storehouses AA and BB.

6. *Water Barrels.*

50-gallon water barrels, with pails, ladders, poles, etc., were placed on each pier and in the warehouses.

7. *Fire Alarms.*

The company had its own fire alarm system, with eighteen stations, and there were also two fire alarms, Nos. 671 and 672, which were connected with the Jersey City Fire Department.

8. *Fire Boats.*

There were fifteen tug boats of the defendant which were equipped with steam pumps and hose; 5 lighters similarly equipped; and there was also an arrangement with the Standard Oil Company and the Central Railroad of New Jersey, by which the fire tugs of those companies were subject to call by telephone or whistle.

9. *Water Mains and Water Supply.*

A 12-inch main was connected with the Jersey City water supply at the pump house at the westerly end of the premises. The said 12-inch main extended from the point mentioned along the southerly line of the driveway north of the said stores to the 100,000 gallon water tank located east of Store R. A 10-inch main connected with the said 12-inch main at a point northwest of Store No. 3, about seventy feet therefrom. The said 10-inch main parallels the 12-inch main to a point about 50 feet from the said 100,000-gallon steel tank, whence it takes a southerly direction and is connected directly with electric pump located east of Store R, as hereinbefore described.

A 6-inch main connected with a 6-inch main of the Jersey City water supply at a point northwest

of store AA, and about 175 feet therefrom. The said main extends in a southerly direction to the southerly side of the said premises, and extends from thence in an easterly direction, paralleling the said 10 and 12-inch mains, to a point directly north to the electric pump located east of store E; thence in a northerly direction to the said pump. The said main is connected with the said pump and with the 100,000 gallon tank hereinbefore described.

A 6-inch salt water main began at the pump house at the westerly end of the said premises, running south therefrom to a point near the southerly line of the premises; thence in an easterly direction paralleling the 6-inch, 10-inch and 12-inch mains to a point directly north of the pump house east of store R. The said 6-inch salt water main connected with the steam pump located east of store F.

The 12-inch main hereinbefore described supplied all of the three-way standard Corey hydrants and the 10-inch main, the hose connections on piers, and the open sprinklers on Piers 4, 5 and 6, the 10-inch main supplied the sprinkler system hereinbefore described protecting all of the piers and warehouses. The two 6-inch mains supplied all of the standard two-way hydrants.

10. *Gravity Tanks.*

In addition to the water supply furnished by the water mains and pumps hereinbefore described, a primary water supply was furnished by three steel gravity tanks, located as follows:

(1) A 100,000 gallon tank was located on an 80-foot steel tower east of the easterly end of store R and about seventy-five feet therefrom. This tank was filled with water. This tank furnished a primary water supply to the 12-inch main, with a pressure of about 45 pounds to the square inch.

(2) A 50,000 gallon steel gravity tank was located on the top of store P. This tank furnished a part of the primary supply for the automatic sprinkler system in stores and piers hereinafter described. This tank was filled with water.

(3) A 50,000 gallon gravity tank was located on top of store F. This tank furnished a part of the primary water supply for the automatic sprinkler

system hereinafter described. This tank was filled with water.

11. *American District Telegraph Co.'s Fire Protection System.*

All the storehouses and piers were connected with the central office of the A. D. T. Co. by wire, and an automatic sprinkler system, together with numerous signals, had been installed in March, 1915, and was in operation at the time of the fire. A full description of the same and the location of each of the signals is given in the answers to interrogatories (pp. 105-108).

It would be difficult to conceive a more elaborate system of protection against fire. The yard itself was as far removed as practicable from the inhabited section of Jersey City; ample water pipes, including some of the defendant's, were located throughout the yard, except in the easterly end thereof, and that part of the yard could readily be reached by the hose which the company had placed at convenient points. The defendant had constructed its own water pipes in addition to the city pipes, and it also provided three water tanks and supplied the necessary power, by way of pumps, to make use of the water. Even assuming that there was any duty resting upon the defendant to furnish its own apparatus and water supply, instead of relying upon the protection of the municipality, the proof does not show that there was any lack of reasonable care in the furnishing of fire apparatus.

It will, no doubt, be urged by counsel for the plaintiffs (as it was at the trial) that there were no hydrants and no water mains east of store house R, but, so far as concerns any claim of negligence in that respect, the answer is that the evidence shows *without dispute* that it was not the custom to place hydrants or mains in a railroad yard. The defendant sought to have this point presented to the jury by the above request No. 9, but this was denied.

The evidence of defendant's fire marshal, Julian, is that it was not the custom to put hydrants between tracks

because of the danger of interference with the operation of car movements (p. 490, ll. 30-40, to p. 491, l. 40; p. 492, ll. 30-35). The plaintiffs did not attempt to contradict or qualify his testimony on this subject, and, hence, we have the undisputed fact that at the time of this fire it was not the practice to place hydrants in railroad yards. The test of whether the defendants had exercised reasonable care, in this particular respect, is whether it violated the usual practice. The question is not whether the defendant adopted the best practice, or whether some better practice may have been developed after the fire, but whether it conformed to the existing practice.

As was stated by this Court in the case of *Traphagen* v. *Erie R. R.*, 73 N. J. L. 759:

> "When there is failure to prove any departure from the usage of other railroads, we think there is no proof which would justify a jury in finding the defendant negligent."

Other similar cases are:

Feil v. *West Jersey R. R.*, 77 N. J. L. 502.
Halm v. *Hudson County*, 78 N. J. L. 712.
Kingsley v. *Delaware, &c., R. R.*, 81 N. J. L. 536.
Raub v. *Lehigh Valley R. R.*, 87 N. J. L. 603.

In the last cited case the Court said:

> "The test in cases of this class is not whether a particular safeguard would have been better, but whether similar safeguards were practicable and useful and according to the ordinary usage of railroads."

It was, therefore, error for the Trial Judge to permit the jury to find any negligence on the part of the defendant by reason of any alleged insufficiency in the fire apparatus. The defendant was, at least, entitled to have the jury charged in accordance with the request that there was no evidence from which the jury could legally infer that the defendant did not observe the usual custom of railroads in respect to the fire protection afforded at Black Tom on July 29-30, 1916.

(g)

It was error to permit the jury to find negligence on the part of the defendant, on the ground that the defendant neglected to provide sufficient means of communication or alarm of fire.

This part of the complaint was read in the charge to the jury, and, as in the case of the points which have already been discussed, the Trial Judge left this question also to the jury, saying that if the plaintiffs had made out any *one* of the specifications of negligence, and had shown that it was the proximate cause of the loss, then the plaintiffs would have a right to recovery (p. 727, ll. 10-30).

As in the case of the previous points, this part of the charge was primarily erroneous because it did not correctly state the defendant's legal duty. If there was any question for the jury on this point, the charge should have stated that it was the duty of the defendant to use reasonable care to provide sufficient means of communication or alarm of fire; but there is not the slightest evidence to show that the defendant failed in its duty in this regard.

It will be noted that the question is not whether the defendant's employees turned in the alarm, or whether it was turned in promptly, or whether the employees were negligent after the fire was discovered, but the inquiry is limited entirely to the question as to whether the defendant had furnished sufficient means of communication or alarm of fire.

There is really no room for argument on this feature of the case. There were eighteen stations on the defendant's private system, besides two stations which were connected with the Jersey City fire department (p. 102, ll. 10-25). The particular locations of the fire alarm boxes are shown on Ex. D. 2, p. 817-d; p. 818 and on Ex. D. 5, p. 822.

No one pretends that the fire alarm system was not in accordance with the best recognized practice. And, in addition to providing this system, the defendant also

posted notices containing explicit directions to its employees and requiring them to pull the nearest alarm box in case of fire. (See Ex. D. 2, p. 820.) Each box contained on the face thereof directions as to what to do in case of fire. (See Ex. D. 3, p. 821.) The card known as Ex. D. 2, containing the directions, was posted at every available point in the yard, as shown in detail by the testimony of Fire Marshal Julian (p. 465 to p. 467). Fire alarm boxes (Ex. D. 3) were also placed at the same points (p. 465, ll. 20-40). What more could be done?

IV.

There was error in the Charge to the Jury, and in the Refusal to Charge certain requests submitted by the defendant relating to the subject of the defendant's alleged responsibility for the explosion of the Johnson Barge Number Seventeen.

On the early morning of July 30th, there were two heavy explosions at or near the Black Tom yard, the first being at about 2:08 o'clock and the second at about 2:30 o'clock. One of these explosions, admittedly, was on the land, at and near the point where eight cars loaded with T N T had been standing in the yard, on track 16. This was demonstrated by the existence of a crater which was found in this vicinity on the morning following the explosion. The location and size thereof is indicated by the dotted line on the map known as Exhibit P. 16, said line being indicated as "outside line of crater." This crater was about 375 feet long, 175 feet wide, and from 7.7 to 10.5 deep.

The other of the heavy explosions was, admittedly, on the water, as was demonstrated by the existence of a crater on the bottom of the Bay, at a point about 250 feet north of the east end of the North Pier. This crater was pear-shaped, with a width of about 75 feet and length of about 125 feet. (See map, Exhibit D. 12, opposite page 842.) The testimony of Mr. Owen is that he prepared

this map from notes which he made at the time of taking soundings at that point (p. 621, ll. 1-10). The figures on the map indicate the depth of the water—the dot in front of each figure indicating the point where the depth was measured (p. 622, ll. 10-30). The same datum line, that is mesne low water, was taken for these measurements as was taken for the measurements indicated on the Government map (Exhibit D. 9, opposite p. 830). The variation in the depth of the water at the point where this crater was discovered, at the bottom of the Bay, is clearly shown by the two maps, Ex. D. 9 indicating that at or near the point in question the depth was five and a half feet at the time the U. S. Government soundings were taken in 1915 (p. 617); and the map Ex. D. 12 showing that the depth at the time the soundings were taken after the explosion was twenty-one or twenty-two feet.

The plaintiffs proved, without contradiction, that on the night of the explosion a barge of the Johnson Lighterage Company, known as Johnson No. 17, was tied at the north side of the North Pier, near the easterly end thereof, and that at some time during the night of July 29-30, after the fire had been burning in the Black Tom yard for some time, this barge was seen to be on fire, and thereafter completely disappeared off the face of the water, together with her captain (p. 243, l. 30, to p. 244, l. 10).

It was shown that this barge had on board 1,005 cases of T N T and 417 cases of detonators, which had been loaded from railroads other than the defendant (pp. 607, 608). The cases of T N T contained 100 pounds each (p. 641, l. 30), hence there were over 100,000 pounds of T N T on board this barge.

The defendant claimed that the damage to the plaintiffs was caused by the explosion of the contents of this barge, or, at least, that the evidence was insufficient to enable the jury to determine how much of the damage to the plaintiffs was caused by such explosion, and how much was caused by the explosion of the T N T in the railroad

cars on land, and further claimed that it could not be held responsible for the damage caused by the explosion of the contents of the barge, for the reason that it was lying at the pier partly loaded with explosives, in violation of the anchorage rules of the United States Department of Commerce and Labor, and that its presence at the pier was not known to the defendant—and, even if it had been known, said barge was at such pier in violation of the law and, therefore, the damage to the plaintiffs was the result of an illegal, intervening cause which was in no way chargeable to the defendant.

On this subject the defendant requested the Trial Judge to charge the jury as follows:

> "24. The undisputed evidence is that Johnson barge No. 17, with 1,005 cases of T N T and 417 cases of detonators (all obtained elsewhere) moored at North Pier at Black Tom some time on Friday, July 28, 1916, and there is no evidence that the defendant had any knowledge whatever of the materials thus laden on said Johnson 17 at that time; and the jury must find, under the law, as contained in the Anchorage Regulations of the United States Government, that a boat thus laden should not have been moored at Black Tom Pier, but should have proceeded to the anchorage ground as designated in the said United States regulations, and that the act of mooring her thus laden at the North Pier at Black Tom was an unlawful act.
>
> 25. If the jury find that the Johnson 17, containing 1,005 cases of T N T and 417 cases of detonators (all obtained elsewhere) was unlawfully moored at Black Tom Pier, and that the T N T subsequently exploded on the night of July 29-30, 1916, and caused the injury complained of by the plaintiff, the jury cannot legally find the defendant responsible for such injury.
>
> 26. There is no evidence in this case from which the jury can legally hold the defendant responsible in respect of the materials on Johnson barge No. 17, or for the results of any explosion of such materials.
>
> 27. If the jury find that the T N T on the Johnson barge No. 17 exploded and caused the injury of

which the plaintiffs complain, the jury cannot legally find the defendant responsible.

28. The plaintiffs in this case having complained that the injury which they suffered was occasioned by the first of the two explosions, which the proofs show occurred at or near Black Tom on the night of July 29-30, 1916, the jury cannot legally hold the defendant responsible for such injury unless it finds that the explosion of the T N T cars on land on the premises of the defendant was the first of the two explosions.

29. In view of the fact that the regulations concerning the transportation of explosives and other dangerous articles on land in Article 1647 contain a prohibition against the loading of such materials as detonators and high explosives in the same car or storage place, and of the evidence in this case in respect to the danger of thus loading such articles on the same carrier, the jury may legally find that the presence on Johnson barge No. 17 of the detonators and T N T constituted negligence on behalf of the proprietor of such barge.

30. It is the undisputed fact that there were two explosions at or near Black Tom on the night of July 29-30, 1916, one thereof upon the land at the place indicated by the crater as shown in Exhibit P. 16, and the other on a barge at the site of the crater in the bed of the river as shown by Exhibit D 12, and that the defendant, if held responsible at all, can only be held responsible for the effects of the explosion on land, and it is the undisputed fact that each of such explosions, directly or indirectly, damaged the warehouses containing the sugar, for the loss of which damages are claimed in this suit, and there is no evidence from which the jury can determine how much of the damage to the said sugar was caused by the effects, direct or indirect of the first explosion, and how much was caused by the effects, direct or indirect, of the second explosion; and in default of such proof, the jury can legally find a verdict against the defendant, if at all, only for nominal damages."

A further request to charge was submitted by the defendant, based upon the language in the insurance poli-

cies, under which the plaintiff insurance companies claimed the right to recover damages in their own name. This reads as follows:

> "33. There is no proof in this case by which the jury can determine how much injury was occasioned to the sugar of the co-partnership plaintiffs in the warehouses by reason of the explosion or explosions, and how much was occasioned by fire ensuing, and, therefore, the jury can, in respect of the amount of insurance paid by the said insurance companies to the plaintiffs and claimed in this suit, allow only nominal damages, if any."

All of these requests were denied and the Trial Judge charged the jury on the subject as follows:

> "Another claim made by the defendant, as I understand it, is that even if the loss occasioned, if any was occasioned, by the Johnson 17, was not the original or the sole cause of the destructive effects or results on plaintiffs' property, of which complaint is made here, that still if it was an independent cause and it did cause some loss to the plaintiff, and you cannot say, because the evidence does not make it clear, how much of the loss was due to the explosion of the Johnson 17 for which the defendant was not responsible, if it was not responsible, and how much was due to the other explosion or to the fire that ensued from either of them, why, manifestly, you could not say how much the plaintiff ought to have, and therefore you would have to say that the best that could be said for them in that particular would be that they would be entitled to six cents' damages; because the law makes it incumbent upon the plaintiff to make out by the greater weight of the evidence not only what was the cause of his loss, but the extent of it, how much it was.
>
> Now, in response to that, of course, the plaintiff says that the explosion on Johnson 17 was simply one link in a chain of consequences which flowed from an original act of negligence on the part of the defendant. They say that the first explosion was the explosion that took place on the land, and that everything that occurred after that was an unbroken concatenation, a complete series of links,

all of which were traceable as to their original legal source to the negligence on the part of the defendant company, the Lehigh Valley Railroad Company; and if they have made that out by the greater weight of the evidence, then, of course, it follows as a legal consequence that the plaintiff is entitled to recover all the loss that has been shown by it to have resulted from both explosions. You can readily see that this proposition that I am trying to elucidate to you is merely a matter of cause and effect. If the defendant has been shown by the greater weight of the evidence to have caused all the loss, why, then, of course, the defendant must necessarily pay all the damage. If it has not been shown to have occasioned all the loss, but has been shown to have occasioned some of the loss by its legal fault, then, of course, it ought to pay so much damage as it has been shown to have caused, and if the jury cannot say how much that damage was, because that has not been made clear in the evidence, but they are satisfied that it did cause some loss, why, then, manifestly, the jury could only say, under the circumstances, that the defendant would be obligated to pay nominal damages. (pp. 734, 735)"

In referring to the subject of the duty of guarding the explosives, the Trial Judge made no distinction between those that were in the railroad cars on land and those that were loaded on vessels, and charged the jury as follows:

"Now, in determining, gentlemen, whether or not care proportioned to the risk has been exercised, you must bear in mind that the criterion is, what would a reasonably prudent and cautious man have done under the circumstances? * * * And in determining that question you ask yourselves whether or not a reasonably prudent and cautious man would have watchmen and guards upon the premises to watch these inflammable and explosive substances and whether or not he would have had as great or greater number of guards and watchmen than the defendant had in this case, and whether or not he would have had guards of more competence, and then you ask yourselves whether or not such a reasonbly prudent and cautious man

would have depended upon the activities of the so-called Dougherty detectives'' (p. 736).

The defendant now urges that there was error in this charge and in the refusal to charge the above requests.

(a)

The evidence shows that there were two explosions on July 30, 1916, one on land in the Black Tom yard, and the other on water in Johnson Barge No. 17. There was evidence from which the jury might infer that the first explosion was on the water in Johnson Barge No. 17, and the jury should have been charged as requested, that if this explosion caused damage to the plaintiffs, the jury could not find the defendant responsible therefor.

Under the evidence there can be no doubt that there were two explosions, one of them being on land and the other on water. The evidence leaves it uncertain as to which of the two explosions was first in point of time, but there was evidence from which the jury might infer that the first explosion was on the water. The various witnesses described these explosions as follows:

Ezekiel Townes (p. 139).

Was waked up by his wife; saw the shells going off, making a lot of noise, and took his wife and two children away in a boat. The explosion came about an hour after he left, and when it took place he was at Pacific avenue, Jersey City.

Lottie Townes (p. 151).

Saw balls of fire going straight up in the air (p. 153, l. 1) and at the time of the explosion was in Jersey City, some distance behind her husband (p. 156, ll. 10-30).

Walmsley (p. 165).

Was on the deck of a vessel near Bedloes Island, watched the fire about fifteen minutes and heard sounds like guns, then went to bed and after he got in bed heard an explosion but did not see it (p. 171, ll. 1-25).

Kane (p. 183).

One of Dougherty's watchmen called his attention to what he said was a fire at the North Pier. He then got on the platform in front of store "G" and looked in the direction of that pier and saw a small flame (p. 195, ll. 1-10). Sent several telephone messages; about fifteen or twenty minutes after he saw the blaze, the shells began to explode (p. 200, ll. 10-20). Drill engines came and started to pull out cars and a few minutes after the first explosion occurred. Witness could not say that he saw this explosion, as it was at his side and could not tell where it was with reference to the place where he had seen the fire (p. 207, ll. 10-30).

Sloan (p. 219).

Was near the pump room at store "F" when some man told him the piers were afire and he ran across the track and looked in the direction of the North Pier and saw a blaze which looked to be "very distant"; it seemed to be at the extreme end of the North Pier below Zeke's shanty (p. 223, ll. 20-40). At the time of the "big" explosion he was just coming out of the office by the pump and was talking to the superintendent. "Everything went black as ink, and I went along with it" (p. 230, ll. 30-40). Saw a reflection and everything got black. "Q Well, could you tell where the explosion was with reference to the fire that you had seen before? A It was down that way (indicating). That is all I know" (p. 231, ll. 1-10).

Captain Baker of Barge "Frank" (p. 234).

Was in his barge on the north side of the North Pier about 125 feet from the end (p. 235, ll. 20-30). Saw a fire on the tracks nearest the sea wall "a little bit further than Zeke's shanty" (p. 235, l. 35, to p. 236, l. 20). Shells were shooting. The big explosion came some time afterward when he was on the dock. Witness said that he felt it more than saw it. "Q Where was that explosion? A It must have been just right about where the fire started; very near it" (p. 237, ll. 20-30). "The

explosion shot me up in the air and kicked me around and then I walked in the cabin of my boat because there was some debris coming through the air (p. 238, ll. 15-20). After the first explosion saw a fire on some of the boats, but did not see any on Johnson 17 or Johnson 11 (p. 238, ll. 20-25). The captain of Johnson 17 was Harry Johnson, who is now dead (p. 239, ll. 10-20). Just before the second explosion witness jumped into the water (p. 242, ll. 10-20). When the first explosion occurred was standing on his boat facing "about up the dock looking at the fire" and was "kicked" from one side of the boat to the end over on the other. That is, was blown from one side of the boat to the other (p. 243, ll. 1-20). Was facing the front of his boat at that time and was blown from the left side over to the right side (p. 256, ll. 1-10).

The first explosion did not injure the Johnson 17 except that the windows came out (p. 243, ll. 20-30). The Johnson 17 "disappeared" (p. 243, l. 35). After jumping in the water he swam towards the shore (p. 244, l. 15) and at the time of the second explosion was still in the water about 150 to 200 feet from his boat. Did not see the second explosion; heard a crash, kept on swimming, "then there came a terrible wave," turned and "headed through" three waves (p. 252, l. 30, to p. 254, l. 15).

At the time of the first explosion there was a crash, but does not recollect that he saw anything and does not know where that explosion was (p. 247, ll. 20-40). Saw the Johnson 17 while he was swimming in the water (p. 248, l. 30). This vessel had been cut off and had drifted out ten or twelve feet from the dock (p. 248, ll. 30-40). It will be observed that if this witness was standing on his boat and facing up the dock, the force of the explosion must have come from his left, as he was blown from the left to the right of his boat. The Johnson 17 at that time was east of the "Frank," and hence to the left of the witness as he faced the dock from the deck of his own boat. If the first explosion had come from the land that would have been from the witnesses' right and would

have blown him from right to left, in exactly the opposite direction from which he says he was blown.

Although this witness said that he saw the Johnson 17 after the first explosion, it is difficult to reconcile this statement with the fact that the force of the explosion by which he was kicked from one side of the boat to the other came from the direction of the Johnson 17.

Miss McEneny (p. 256).

Saw a fire on the left-hand side of the warehouses; was "watching" the explosion but could not say just how it went up, sort of volcano; "it blew up so hurriedly I could not say exactly how it happened"; it seemed to come from round where the fire was (p. 259, ll. 1-30).

Christopher Casperson, captain of Johnson 11 (p. 284).

Saw a fire from his boat; it was near Zeke's shanty (p. 284, l. 30, to p. 285, l. 10). There was a "great" explosion; "I see something, fire and all these things; that is all I remember of it until I come back again; I had been in the water; I was blown in the water from the boat. It was close to that place where the fire was as far as I could make it; close to where the fire was" (p. 285, ll. 1-10). When the first explosion took place was standing in the bow of his boat in front of the bulkhead and was facing the bow, that is in the direction of New York City (p. 292, l. 30, to p. 293, l. 10). "Q Then you did not see where the explosion came at all, did you? A No" (p. 293, l. 12). Heard a crash and the next thing he was blown off the boat and "dumped" in the water from the left corner of the bow (p. 293, ll. 20-30). It was undisputed that the Johnson 17 was to the east of Johnson 11 and hence the force of the explosion by which this witness was blown into the water came from the direction of the 17, as it blew him from the left corner of his boat. Never saw the 17 again. The captain was killed (p. 295, ll. 10-20).

Just at the moment of being lifted in the air by the explosion, turned his head around and saw a smoke cloud

coming from the place where the fire was, at a distance of about seven or eight hundred feet (p. 295, ll. 30-40).

Peter Casperson, sailor on Johnson 11 (p. 296).

There was a big explosion about an hour after the shells started to go off (p. 298, ll. 1-10). At that time was standing on his boat with his face toward the bow. That is, in the direction of the Statue of Liberty, with his back to the fire; did not see the explosion but heard it and was stunned for a few seconds (p. 300, ll. 1-20); could not tell the 17 was afire at that time (p. 301, l. 5).

Gately (p. 307). Arrived at Black Tom about one o'clock, saw the fire and went within four hundred feet of it. There were four or five burning cars and there were explosions from shells (p. 30, ll. 1-40). Did not see the first explosion but felt it, "it was down in front of us, I couldn't tell exactly where it happened" (p. 324, ll. 30-33).

Klosterman (p. 326). Arrived at the yard about 1:35 A. M.; saw the fire; shells were going off and there was a big explosion later; "it was just back of the freight cars that I could see burning" (p. 326, ll. 10-15). Was standing three or four hundred feet from the fire at about 2:08, watching the brakemen on a freight train; saw a ball of fire go up on a pillar of smoke; the smoke appeared to push the ball up about 150 feet, and then the ball left the smoke and went up 50 feet more and opened up slowly, and then there was a report. It seemed to suck the air and hold everything tight for about ten seconds (p. 326, ll. 20-40). The explosion seemed "to be in the smoke" (p. 333, l. 33). The brakemen that he was watching were about two hundred and ten feet "below" and were within five or six cars from the cars that were burning (p. 328, ll. 30-35). Did not see what happened to them (p. 334, l. 40), but afterwards found out that they were two brothers by the name of Walsh (p. 335, ll. 10-15). The second explosion happened twenty-two minutes later, at 2:30 (p. 337, ll. 20-35).

Hogan, fireman (p. 342). Was in the roadway near the pump house; saw a glare and turned his head away and the explosion came. The glare seemed to be in among the freight cars (p. 348, ll. 30-40). At the time of the first explosion he was in the roadway between storehouses F and G (p. 355, l. 32). At the time of the second explosion was standing near the fire engine, trying to keep the horses from running away. This was halfway between storehouses F and G. At that time was not looking toward the North Pier. Does not know where the second explosion came from.

Treger, fireman (p. 359). Had his back turned at the time of the first explosion. It seemed to come from the east—from behind him, straight down the roadway (p. 362, ll. 1-30). The horses ran away; he turned them and was driving his team back again when the second explosion occurred; was driving towards the fire (p. 362, ll. 30; p. 363, l. 10).

Q Where did the second explosion occur?
A Right straight ahead of me.
Q Right in the yard?
A Right straight ahead, right at the end of the driveway.
Q In the yard, in the railroad yard?
A Well, I don't know—yes, the railroad yard there (p. 363, ll. 10-20).

Other witnesses who were called for the plaintiffs gave no testimony on this particular subject.

The plaintiffs' testimony left it somewhat uncertain as to whether the first explosion was on the land or on the water. The evidence of the defendant practically amounted to a demonstration that the first explosion was on the water. It may be summarized as follows:

Dickman (p. 410).

In response to a telephone call, went to the yard, arriving about 1:10. Went with Fire Marshal Julian along the north side of the warehouses as far as the gravity tank located to the east of store E (p. 423, l. 30, to p.

424, l. 10). The North Pier seemed to be ablaze with cars at "this" end (p. 424, l. 15). Saw some of the train crews pulling cars out of the yard; one engine was pulling from the lower or south side of the yard, and another was pulling the explosive cars, and another was on the sea wall track, on the north side (p. 426, l. 20, to p. 427, l. 10). At that time he was standing directly north of the gravity tank and on the sea wall track and remained there up to the time of the first explosion (p. 427, ll. 30-40). *He was twenty-five feet from the nearest point of the crater.* He fixed the distance by actual measurement the following Monday or Tuesday, and he fixed the location by reference to a telegraph pole against which he was leaning at the time (p. 428, ll. 1-20). The explosion threw him down on his back so that he was confused and when he got up he went in the wrong direction "down among the rocks" (p. 428, l. 30). He was facing Bedloes Island at that time, with his hand leaning against the telegraph pole; there was an "immense blast" (p. 428, l. 38). As soon as he found himself among the rocks, near the water, he turned back, put out his hand and felt a line of cars and walked west until he came to an opening (p. 429, ll. 10-25). This line of cars was two tracks over and had an engine attached which was moving them (p. 433, l. 30). Saw a man standing on top of a car giving signals, and another was on the ground on the other side of the train. Both of these men were about the same distance from the crater and they were at that point at the time of the first explosion (p. 434, ll. 10-40).

At the time of the second explosion he was at the bulkhead between store 3 and the grain transfer elevator, trying to remove the grain boats and their crews, that were located at that point (p. 431, ll. 1-20). The second explosion came from the same general direction as the first. On cross examination he frther identified the point where he was standing by reference to the fact that the telegraph pole was still in its position, and was next to a pole on which there was a transformer (p. 422, l. 30, to p. 443, l. 10). He also fixed the point by reference to a

pile of railroad ties which stood near the pole, and which were still there after the explosion (p. 354, ll. 1-10).

Julian (p. 454). Arrived at the yard about 1:20 A. M. Went first to the pump house near store F and found it was working and then went outside and met Dickman. The latter went over to Pier 5 to notify the tug boat captains and the witness went to the middle block of warehouses, met Dickman again and they crossed to the roadway and walked up to the gravity tank to the east of store R. The fire at that time seemed to be in the vicinity of the North Pier (p. 456, ll. 1-30). Observed the location of the crater on the same morning and the fire at that time was far beyond the crater and to the east of it. There was no fire at the crater at that time (p. 457, ll. 10-20). At the time of the first explosion was leaning against a pile of ties, about two or three feet from Dickman. He saw the pile of ties the next morning against the telegraph pole—which was the last one to stand. The pole was almost opposite a point between the tank and store R (p. 457, ll. 20-40). Was there ten or fifteen minutes when the explosion came, from a direction "directly in front." There was an "instantaneous flash" which appeared to be right off the North Pier (p. 458, ll. 1-20). Some cars appeared to be on fire at the west or land end of the North Pier, but there were no cars burning at that time between those cars and the point where the witness stood (p. 458, ll. 30-40). After the flash there was a terrific blast of wind * * * "it knocked me down and I turned around and I held my ears that way, because I felt a rain of everything like fine dust going over my head." * * * "The air became black; you could not see as much as a spark of a match, and I thought it had blown itself out." * * * "And the whole North Pier was gone" (p. 459, ll. 1-20). Saw the crater the next morning, which was a distance of thirty or thirty-five feet from the pile of ties. The pile was still standing (p. 460, ll. 1-10). After the first explosion he was somewhat dazed and then started towards Pier 4,

and on the way back he picked up brakeman Walsh, who had been injured about the face. He had seen Walsh on the top of a box car just before the explosion. At that time Walsh was about a half a car length to the east (p. 460, ll. 20-40). He took Walsh to the grain transfer elevator, where there was a patrol wagon (p. 461, ll. 10-20); turned around and started to go back and then came the second explosion. At that time he was standing between the grain elevator and store 3. This explosion seemed to come "just beyond store R." It did not sound any bigger than the first, but seemed to take in a greater area. It was like a "big fan" (p. 462, ll. 10-20).

By reference to a photograph known as "Harrison 12" and afterwards offered in evidence as Exhibit D. 8 (see page 856), the witness identified the telegraph pole and the pile of ties right behind it (p. 499, l. 30, to p. 501, l. 20). This pole was directly opposite the east corner of store R (p. 60, l. 40).

The same photograph was then shown to Mr. Dickman and he also identified the pole and said he recognized it as the place where he stood, twenty-five feet from the edge of the crater (p. 502, l. 30, to p. 503, l. 10).

Henley, yardmaster (p. 522). Went to the yard on engine 3428, arriving at about 1:30 A. M. (p. 524, l. 35). Several cars were burning on two tracks. Engine 3143 also went to the yard, with Conductor Walsh in charge of the crew. That engine backed in on track 13, on which cars were burning. The two rear cars were afire and were cut off (p. 525, l. 35). He then backed in on track 14 and starting pulling the cars off it (p. 525, l. 20). The train had moved about five feet when the first explosion occurred. At that time he was on the ground, near the rear of the train, and on the side toward the warehouses, at a point about one hundred feet or more east of the water tank, in the direction of the North Pier. He was standing between tracks fourteen and fifteen (p. 526, ll. 20-40). He indicated the place on the map as about opposite the car marked OMA 32452 (p. 528, l. 25).

The map shows that this car was on track 16 and was the third car from the westerly end of the string of cars that were standing on that track. The witness fixed his position by reference to the switches. When the explosion occurred, he was thrown against a car but was not knocked down into a hole or a crater. He afterwards saw where the crater was located and was very sure that he was not in the crater at the time of the explosion (p. 528, ll. 20-40). There was no warning of the explosion; the air was dead and there was a big "flare"; he thought it was from the river (p. 529, ll. 10-20). He was stunned for three or four minutes; he did not have to climb out of a crater to get to his feet, but he stumbled over parts of cars. There was no hole or crater there at that time (p. 529, ll. 20-40). When he saw the place two weeks later he located himself by the switches which were still there, and found that the point where he had been standing was about one hundred feet to the east of the outside line of the crater, and in line with it. "I was standing where the crater would be. * * * "I would imagine I would be in the crater (p. 530, ll. 10-30).

He was also in the yard at the time of the second explosion. He was then near the grain elevator looking for a man. The second explosion seemed to come from the direction of the cars on the tracks where he had been pulling them (p. 531, ll. 1-20). After the first explosion he found his way out by guiding himself by the cars (p. 537, l. 35, to p. 528, l. 10).

Thomas Walsh, conductor (p. 543). Was in charge of engine 3456, which reached the yard about 1:30; the fire seemed to be at the "back end" of the island, toward the North Pier (p. 544, l. 20). He backed in on track 14 with eight or ten cars, so as to couple on to more cars. "Everything was flying around there and made it disagreeable" (p. 544, l. 35). The brakeman on the car was his brother and he asked him if he would go on top of the car to pass the signals as the conductor wanted to get on the other side of the train to protect himself

from the "small stuff that was flying around" (p. 545, ll. 1-20). He backed into track 15 and coupled on to more cars and started the pull ahead. The car at the rear end was then blazing. Somebody cut it off and the car was kicked down the track; then he coupled on to cars that were on track 16 and gave the engineer the signal to go ahead. At that time there were thirty or thirty-five cars coupled on (p. 540, ll. 1-40). There was a brake on on one of the rear cars and nobody could get there to knock it off. The engineer could not pull the train and Sloan said he would get another engine, and about that time the "thing" let go (p. 547, l. 15). When it let go he was around switch 14 or 15 on the side of the train nearest the storehouses. He indicated the place where he was located as the switch in the "middle float track" (p. 548, l. 5), in the vicinity of the big tank (p. 548, l. 15, to p. 549, l. 30). He was knocked down by the first explosion and was picked up in a few minutes by Conductor Voorhis, and was taken to the hospital. He was not in the yard when the second explosion occurred (p. 550, l. 30, to p. 551, l. 20). At the time of the first explosion his brother was on top of the car where witness was standing. The other people around were Dickman, Henley and Mr. Leyden (p. 551, ll. 30-40). He walked out around the train to which his engine was fastened and then some distance beyond that, until he reached the ambulance (p. 552, ll. 20-40).

John Walsh, brakeman (p. 557). Went on top of the train—about eight car lengths from the engine. Train, at that time, was in the middle float track. The rear car was kicked back into the fire, then they backed in on track 15 and coupled on to other cars. The witness remained on top of the train while these movements were being made. The engineer could not pull out and the witness started to walk back to see if some brakes were on, when Leyden ordered him not to go back any further. He remained on top of the train and was there at the time of the first explosion (p. 560, ll. 1-30). At the time

of the explosion he was between the water tank and Pier 7, at a point north of the northeast corner of storehouse R. After the explosion he found himself on the ground and stayed there a few seconds and then tried to walk out. He caught hold of the cars, saw a man passing and called for help, and Julian took him out (p. 562, l. 20, to p. 563, l. 10). Afterwards he was moved to the hospital and was not in the yard when the second explosion occurred (p. 563, ll. 15-20). While they were working with the cars, the fire seemed to be at the back of the yard, towards the water front and right "this side" of the North Pier (p. 563, ll. 20-40).

Voorhis, conductor (p. 568). At the time of the explosion was near the yardmaster's office. His engine was then pulling a string of cars. He missed his rear man and went back to look for him and found Walsh near the water tank; picked him up and sent him away, but did not find his own man until the morning (p. 568, l. 30, to p. 509, l. 30).

Davidson, superintendent of the National Storage Co. (p. 592). Was on Fulton avenue near Ocean avenue when the first explosion occurred. Was walking towards the yard and about a mile and a half distant therefrom. There was a "tremendous burst of light, three globes," this seemed to be "back in the bay" (p. 593, ll. 1-20). The globes were clear, with no dirt in the flame (p. 593, ll. 30-40). At the time of the second explosion he was at the grain yard; could not see where it came from, but noticed dirt and rubbish in the air. It seemed as if "there was a thousand tons of it in the air." There was no such appearance at the time of the first explosion. There was nothing but "clear light" (p. 595, ll. 1-10).

The foregoing evidence shows that the first explosion could not possibly have been on the land, as otherwise the several men, to wit: Dickman, Julian, Henley and Thomas and John Walsh would have been blown to pieces, as they were all very close to the point where the crater was

afterwards found—Henley, indeed, was practically in the centre of it.

In addition to this testimony there was evidence of an expert character which likewise tended to show that the first explosion was on the water.

Gamble (p. 624), employed at the New York Sugar Trade Laboratory, 80 South street, New York City, where a recording thermometer was kept for the purpose of a temperature record. The record is made by a pen which is enclosed on a sheet of paper on which the pen indicates the temperature from hour to hour. This sheet was offered in evidence (p. 630) and a photographic copy has been included in the record as Exhibit D. 13 (see Vol. 2, opposite page 842). This sheet shows two thick lines crossing the irregular circular line at right angles. The first mark was made at about 2:15 and the second about 2:45. These would not be caused by the normal operation of the machine, but would be caused by a very severe shock or jar which might shake the building (p. 625, ll. 1-20). These marks were made on the morning of July 30th (p. 625, l. 28). The room was locked at night and there was nothing to cause a jar (p. 625, l. 40, to p. 626, l. 10). The two lines indicating the disturbances are close together. They do not show the time of the disturbance exactly, but approximately (p. 627, ll. 20-40).

Hudson Maxim (p. 659). Assuming that there were eight cars of T N T as shown on Exhibit P. 16, and that afterward there was a crater 375 feet long and 175 feet wide and 10 feet at the deepest point, and that the cars had exploded, any man standing within twenty-five feet of the external line of the crater would have certainly been killed, and any man who was in the area of the explosion would have been blown to "minute fragments"; any man from fifty to seventy-five feet away and any man on top of a freight car within fifty feet of the crater would certainly have been killed.

The witness then explained that there was a difference between an explosion of T N T in a railroad car elevated above the ground by the height of the truck of the car and an explosion on the ground or on water; saying that the lateral effect when the T N T was above the ground would be very much greater than if it were on the ground or on the water (p. 668, ll. 1-20). The water acts as a solid when it is affected by a blast. The effect of an explosion of 100,000 lbs. of T N T on a barge, on the water, would be greater than an explosion of 400,000 lbs. in eight freight cars standing in a yard. This is due to the greater concentration of the explosives. There would be a greater wave set up in the earth or water, that is, the shock wave would be more intense. In answer to a question which assumed that there were two explosions—one in eight cars on land and the other in a barge on the water, the witness said that the explosion on the barge would cause a greater disturbance of the earth on Manhattan Island because of the greater intensity and duration of the action of the gases upon the surrounding media; and also because that part of the media was water, which transmits shock much better than the earth (p. 670, ll. 1-25). He further explained that the location of the explosives in the cars—four feet above the ground, and the ground itself being eight feet above high water, as shown by measurement, the wave of transmission through the earth, which is similar to a sound wave, would have to go downward to the earth and thence in a lateral direction (p. 675, l. 30, to p. 676, l. 18; p. 688, ll. 10-20).

He further stated that an explosion at the site of the crater on land would have shattered the walls of the warehouses and knocked them brick from brick, instead of having the whole wall come down (p. 673, ll. 1-15). His attention was then called to the evidence showing that the wall of Storehouse Q had fallen on top of Storehouse R, and that the steel structure of the tank fell on top of both, and was asked what that would indicate with respect to which explosion was first, to which he replied

that it would prove that the first explosion was on the barge and that structure under the tank was thrown over by the second explosion, that is, that the building wall was knocked down by the first explosion and the structure thrown over it by the second explosion (pp. 696-697).

His attention was also called to photograph known as "Underwood 2" (see Vol. 2, p. 864), which shows the extreme end of the North Pier with a shattered car thereon, taken from the north—looking south, and he stated that it would be utterly impossible for that condition to be caused by the explosion at the site of the crater on land, and that it would have to come from a direction at right angles to the end of the pier (p. 673, ll. 20-40). The same opinion was expressed with regard to the conditions as shown in the photographs known as "Harrison 1" (p. 843), "Underwood 4" (p. 866) and "Underwood 8" (p. 869), (p. 674, l. 15, to p. 675, l. 10).

Dr. McKenna, plaintiffs' expert (p. 700). The only substantial dispute between his testimony and that of Mr. Maxim was on the question of whether T N T might be exploded by ignition, if the quantity were enough. So far as concerns the effect of an explosion of T N T on a barge upon the water, he said the first effect would be to displace a mass of water in the form of a wave. The experience of Captain Baker, who said that while in the water a "terrible wave" came, shows that that is exactly what happened when the Johnson 17 blew up.

We do not claim that under this evidence the defendant was entitled to a charge that, as a matter of law, the jury must find that the first explosion was on the Johnson 17, for there is sufficient dispute in the evidence to make that a question of fact for the jury. The purpose of summarizing the evidence on this subject is to show that the jury might well have found that the first explosion was on the water in Johnson 17, and, under that state of the record, we submit that the jury should have been charged as requested in Requests Nos. 25, 26, 27

and 28 above quoted. The substance of these requests was that the defendant was not responsible for the explosion on Johnson 17, and that if the jury found that the damage to the plaintiffs was caused by such explosion, then the defendant was not liable. But, instead of charging these requests, the Trial Judge, in discussing the effect of the explosion on Johnson 17 and the plaintiffs' right of recovery, limited the jury's consideration to the single point of whether or not the explosion on Johnson 17 was simply one link in a chain of consequences which flowed from an original act of negligence on the part of the defendant, and stated that if the plaintiffs had made out that everything that occurred after the first explosion was an unbroken concatenation, then the plaintiffs would be entitled to recover all the loss that had resulted from both explosions. His charge overlooked entirely the claim which the defendant had urged, to wit: that the Johnson 17 was unlawfully moored at the pier and that if an explosion thereon caused the damage to the plaintiffs, the jury could not find the defendant responsible therefor. These requests to charge, and the charge as given, also raised the further question as to whether the explosion on the Johnson 17 was an independent, intervening cause. This is separate and distinct from the present point and will be discussed hereafter. Our present claim is that the Trial Judge instead of leaving to the jury the question of whether there was an unbroken concatenation, should have charged that by reason of the illegal act of the Johnson 17 the concatenation *was* broken, and the result, therefore, would be that on this phase of the case the only proper question for the jury to consider was whether the damage to the plaintiffs was caused by the explosion on land or by the explosion on the water. In the former event, the defendant might be liable (provided the explosion on land was due to its negligence), but in the latter event the defendant would not be liable; and this question, in turn, *might* depend upon which explosion was first in point of time. If the explosion on the Johnson 17 was first, the

defendant, we claim, would not be liable, but even if the explosion on the Johnson 17 was second, in point of time, the defendant would not be liable for the effect of *that* explosion, because that was the result of an intervening cause beyond the original negligence of the defendant.

But the defendant's liability did not depend upon the question of which explosion was first, and which was second; under the charge, the jury were told, in effect, that the sole question on this phase of the case was—which explosion was first in point of time; this was error, because the defendant would not be liable, even though the explosion on the Johnson 17 was second in point of time, as such explosion was the result of an independent, intervening cause.

(b)

Regardless of whether the first explosion was on land or on water, the jury should have been charged as requested, that the verdict, if any, against the defendant, should be limited to nominal damages, as there was no evidence from which the jury might determine how much of the damage to the plaintiffs was caused by the explosion on land and how much was caused by the explosion on water.

Under the evidence heretofore cited, there can be no doubt that there were two explosions—one on land and one on water. There was no effort made by the plaintiffs to show how much of the damage was caused by the land explosion as distinguished from the water explosion. It follows, that in the absence of proof to show how much damage was chargeable to one explosion and how much to the other, the plaintiffs would only be entitled to nominal damages, unless the defendant is legally responsible for both explosions. For the reasons elsewhere discussed under this point, the defendant claims that it is not responsible for the explosion on the water whether it was first or second in point of time. Of course, if it should be decided that the defendant is

responsible for both explosions, then the present point could not be considered; but, if the defendant is responsible only for the explosion on the land, then it was vital to the plaintiffs case to prove how much of its damage was caused by the land explosion and how much was caused by the water explosion.

This point was raised by request No. 30 above quoted. Instead of charging this request, the Trial Judge left to the jury to determine the question of whether or not the evidence showed how much of the damage was due to the land explosion (p. 735, ll. 10-20). The defendant insisted that Request No. 30 should have been charged in the form in which it was submitted, but if it be said that this request was too broad, by reason of the fact that it meant a direction to the jury that the defendant could be held responsible only for the effects of the land explosion, nevertheless, the charge itself as given was erroneous, because it left to the jury the question of deciding how much damage may have been caused by the land explosion and how much by the water explosion, instead of directing them that if the defendant was not responsible for the water explosion, then, as a matter of law, the verdict must be limited to nominal damages. In other words, this part of the charge assumes that there was evidence from which the jury could determine how much of the damage was due to the land explosion and how much was due to the water explosion, whereas, the plaintiffs did not make the slightest effort to distinguish between the effects of the two explosions, upon their property. The Trial Judge stated: "If the jury cannot say how much that damage was," etc., whereas he should have stated that if the jury found that the defendant was responsible only for the land explosion and not for the water explosion, then the verdict must be limited to nominal damages, as there was no proof to show how much of the damage was due to the land explosion.

(c)

So far as relates to the plaintiff insurance companies, the jury should have been charged as requested, that the verdict, if any, in their favor, should be limited to nominal damages, as there was no evidence from which the jury might determine how much of the damage to said plaintiffs was caused by explosion and how much was caused by fire.

Not only did the plaintiff fail to prove how much of the damage to them was caused by the explosion on land as distinguished from the explosion on water, but they also failed to prove how much of the damage was caused by fire as distinguished from explosion. The defendant claims that under the terms of the policies, the plaintiff insurance companies are not entitled to recover unless the damage to the plaintiffs Howell came within the terms of the policies and that therefore Request No. 33, *supra*, should have been charged. The policies were in the standard form and one of them was printed in full (Exhibit P. 10, p. 756 to p. 776). The clause of the policy under which this question arises, reads as follows:

> "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and in that event, for the damage by fire only) by explosion of any kind, or lighting; but liability for direct damage by lighting may be assumed by specific agreement thereon."

If the insurance companies have made voluntary payments to the plaintiffs, that does not give them any right to recover against the defendant. This is not a question of whether or not an insurance company can recover from a third party for the amount of a payment made in good faith to its assured. If the terms of the

policy are clear, and if the proof fails to establish that payments can legally be made to the assured under the policy, how can it be urged that a third party can be compelled to make good such payments? Supposing the damage to the plaintiffs Howell was caused by a riot and the insurance companies proceeded to make payments under a policy of fire insurance which, as in this particular case, expressly provides that the company cannot be held liable for such loss, then, clearly, the rioters would not be obliged to make good to the insurance companies what the latter might have paid to their assured; so, here, the policy expressly provides that the company shall not be liable for loss caused directly or indirectly by explosion of any kind, unless fire ensues, and, in that event, for the damage by fire only. There can be no doubt that some of the damage to the plaintiffs Howell was caused by explosion, as the walls of the warehouses were blown down by one or the other of the two explosions, but the plaintiffs made no effort to show how much was caused by explosion as distinguished from fire, and hence there is no basis on which to determine the amount of the verdict for the insurance company plaintiffs, even assuming that they are entitled to any verdict.

The sugar was stored in warehouses E, G, H, N and O, of the National Storage Company (p. 61, ll. 10-40; Ex. P. 3, p. 754). This property was not included in the lease made by the Storage Company to the defendant (Ex. P. 1, p. 747).

There is nothing to show that the fire *started* in any of these warehouses or elsewhere on the property of the National Storage Company, in fact, the evidence is practically undisputed that the fire started somewhere in the yard on the property of the defendant. It is evident that the warehouses were set on fire by one or the other, or both, of the heavy explosions, as, when the Jersey City firemen arrived (which was before the first explosion) there were no buildings on fire (p. 317, l. 10).

Klosterman said that when the first explosion occurred, the two upper stories of the brick warehouse "below the driveway" crumbled up and slid off (p. 327, ll. 10-20). He afterwards explained that by this he meant two blocks of warehouses, one of them containing stores G to N, and the other containing stores N to R, and said that the only thing that was not blown off was the "end" wall (p. 341, ll. 20-40).

Lieut. Hogan of the Fire Department, stated that after the first explosion the warehouses all tumbled down and took fire immediately (p. 349, ll. 10-20). He afterwards explained that he meant the two blocks which were below the pump house, indicating the same blocks of warehouses to which Klosterman had referred (p. 355, l. 35 to p. 356, l. 30).

Fireman Treger said that the end seemed to be blown out and that the warehouses were on fire. The explosion also knocked off the roofs and destroyed the first two or three, and afterwards they were burning (p. 365, l. 15 to p. 366, l. 15).

Julian said that after the first explosion he looked over toward the brick storehouses and saw that the uppermost stories were lifted off. These were M, N, O, P, and Q (p. 459, ll. 10-30).

Henley said that right after the explosion the warehouses were on fire (p. 532, ll. 20-30).

Davidson (superintendent of the Storage Company) said that sections of the walls of the storehouses H, I and O were torn outward; the wall of storehouse Q had fallen over onto storehouse R, and the steel beams that supported the big tank near storehouse R had fallen down on top of the ruins (p. 593-9).

It is clear, from this evidence, that none of the storehouses caught fire until after the first explosion. If this explosion was on the land, near the point where some of the witnesses said the fire started, that is, near Zeke's

shanty, it will be seen that the distance from that point to the nearest storehouse (known as R) was at least six hundred feet, and the distance to the pump house, which was located between storehouses F and G, was at least fourteen hundred feet (see map, Ex., p. 16, and testimony of Arthur N. King, p. 375-6).

We therefore have a case where the damage to the contents of the warehouses where the plaintiffs' sugar was stored, was not caused directly by the spreading of the original fire, but by the explosion resulting from fire on the property of another company. The force of this explosion destroyed the walls of some of the warehouses, and no doubt, destroyed some of the contents thereof, and this explosion in turn, carried the fire to the warehouses and their contents, and destroyed the same in large part.

The question, therefore, is whether such loss comes within the terms of the policy—which does not require an insurance company to pay the assured for loss caused directly or indirectly by explosion, "unless fire ensues, and in that event, for the damage by fire only." There was no proof as to how much damage was caused by fire and how much by explosion.

Even if the defendant was responsible to the insurance companies for the damage caused by fire, it would not be liable for the damage caused by explosion; and, in the absence of proof as to how much was caused by one and how much by the other, the defendant was entitled to have its request charged—that the verdict for the insurance companies should be limited to nominal damages.

Nearly all fire policies contain provisions that either except from the general risk of "fire," fires originating in certain ways, or provide that the company shall not be liable for loss caused, either directly or indirectly, in a certain manner.

Under the so-called New York Standard fire insurance policy, which has been substantially adopted in Connec-

ticut, Louisiana, Michigan, Missouri, New Jersey, New York, North Carolina, North Dakota, Rhode Island, South Dakota and Wisconsin (see 4 Cooley 3020 "Briefs on Insurance"), the standard provision with regard to "excepted risks," is as follows:

> "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues and in that event, for the damage by fire only) by explosion of any kind or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon."

The provision in the policy in the case at bar with regard to "excepted risks" is identical with the provision quoted (p. 770, l. 30 to p. 771, l. 1).

The reason why we named the states that have adopted the New York Standard form is because the decisions throughout the United States and England dealing with the question of "excepted risks" in fire policies will be found to be in hopeless conflict and irreconcilable. This is due to the fact that these decisions deal with fire policies having different kinds of provisions of this nature, and also to the fact that some of the fire policies have no such provisions, but merely say that the company shall be liable for all direct loss or damage by fire without stating any exceptions. By way of example, in Maine, Massachusetts, Minnesota and New Hampshire, the standard policy insures against "all loss or damage by fire originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever" (see 4 Cooley 3020 "Briefs on Insurance").

It is therefore necessary in examining the great number of cases that deal with this question, to ascertain what the policy provision was in each case in order to

determine whether any one of those cases can be regarded as having any weight in construing the policy provision in the case at bar.

The Trial Judge in the case at bar held that because there was a fire which caused an explosion or explosions, which explosions caused the buildings where the sugar was stored to fall, thereby causing damage to the sugar, that therefore the original fire, which caused the explosion or explosions which caused the buildings to fall and consequent damage to the sugar was the proximate or efficient cause of the loss of the sugar in that respect, and therefore the sugar was destroyed "by fire" without regard to whether the original fire occurred within the warehouses or without regard to whether the original fire and explosion was a considerable distance from the insured property. In other words, the Trial Judge in effect held that space was not a factor, no matter how great the distance. On the motion for non-suit considering this question the Trial Judge said (p. 379, l. 35 to p. 380, l. 5):

> "The Court—No, no, but the fire in that locality, that neighborhood, in the neighborhood of the warehouses, preceded the explosions, it is said, which is said to have destroyed these plants; and if the fire did precede the explosion, my recollection of the law on the subject is that the explosion would be considered as an incident of the fire."

This ruling of the Trial Judge that because there was a fire somewhere and an explosion at that place, which caused buildings a considerable distance away, as hereinbefore shown, to fall, thereby damaging the sugar stored in those buildings, that therefore it could be said that this original fire was the proximate cause of the loss of the sugar and the subsequent explosions a mere incident of the original fire, which ruling was carried by him into his charge to the jury, we contend is erroneous. We are not now dealing with the fire, which occurred in the warehouses, after they had been destroyed by the explosion. As to recovery by the insured, for the damage,

if any, to the sugar, by that subsequent fire, it is necessary in order to determine the right to recovery, under the policy to take into consideration the provision in the insurance policy which says: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease (p. 771, ll. 1-10).

A case directly in point is *Hustace* v. *Phenix Insurance Company of Brooklyn,* 175 N. Y. 292, 62 L. R. A. 651. In this well-considered case by the New York Court of Appeals, it was proven that a fire occurred in a building known as The Tarrant Building. Within thirty minutes after the fire started a terrific explosion took place, in that building, caused by the ignition of chemicals and drugs stored in that building by the occupant, which explosion wrecked, not only the Tarrant Building, but other buildings, including that of the plaintiff. The latter was separated from the Tarrant Building by an alleyway eight feet wide, and two buildings, the total distance between the Tarrant Building and that of the plaintiff being 56 feet 11 inches. As the effect of the concussion, the plaintiff's building fell and became a total loss. Prior to such destruction of the plaintiff's building, there was no fire there and no damage thereto had been caused by the fire.

The policy provision with regard to "excepted risks" was identical with that in the case at bar. The Court speaking through Parker, *C. J.,* said:

> "Reading this provision of the contract according to the rule laid down by this court in Schoonmaker *v.* Hoyt, 148 N. Y. 425, 42 N. E. 1059, Judge Martin writing: 'Contracts or statutes are to be read and understood according to the natural and obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. Courts cannot correct suspected errors, omissions, or defects, or by construction vary the contract of the parties'—the conclusion would be reached that an explosion on other premises, which produced such a violent concussion as to destroy a building 57 feet

distant, would be plainly within the terms of such provision, 'excepting risks' of the policy. Plaintiffs contend that the language employed indicates that the exemption was not intended to apply to an explosion caused by a preceding fire, whether in distant premises or not, and argues that if the legislature had intended to exempt from explosion, whether caused by fire or not, it would have omitted the words 'unless fire ensues,' etc., and merely said that the company 'shall not be liable for loss sustained directly or indirectly by explosion of any kind.' Thus according to their view, the clause should be construed as if it read: 'Or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind, excepting explosion caused by fire.' Such a clause should not, of course, be read into a contract that is plain and unambiguous, particularly when it has been framed pursuant to a direction of the legislature, and when, necessarily, care has been observed to select language which should aptly express the scope of the contract, as well as the limitations upon the liability of the insurer. The occasion for the insertion of this exemption clause in the standard policy is found in the decisions of the courts holding the insurer liable for loss caused indirectly by invasion, insurrection, riot, etc., for loss by order of civil authority directing that a building be blown up to stop the spread of a fire, for loss by theft, by lightning, and in some jurisdictions for loss by explosion. In view of these authorities the insertion of this exemption provision must have been for the purpose of overcoming the decisions. And fire insurance companies had the right to limit their risks to loss or damage by fire direct, if they so chose, rather than against damage by riot, theft, explosion, lightning, and all other causes by which property could be accidentally destroyed."

In conclusion the Court said:

"It seems to me that, approaching an examination of such features of this policy as are applicable to the facts of this case in the spirit of the opinion in Peabody *vs.* Saterlee, 166 N. Y. 179, 52 R. L. A. 956, 59 N. E. 818, in which it is said: 'It is important, alike, to the insurer and insured that the

> standard policy should be fairly construed, in order that an instrument which came from the hands of its creators presenting many questions for construction can be rendered clear and easily understood,'— we must reach the conclusion that the language of the policy, so far as it operates upon the facts in this case, is free from doubt. It insures plaintiff against all direct loss or damage by fire, and relieves the insurer from liability for all loss caused directly or indirectly by explosions of any kind and necessarily, therefore, from a loss by concussion caused by an explosion in a neighboring building, whether the explosion be brought about by a lighted match, a fire, or other cause. If this conclusion is correct, it is unnecessary to consider the other questions discussed by counsel."

An earlier New York case with identical provisions as to "excepted risks," namely, *Briggs* v. *North American, etc., Ins. Co.,* 53 N. Y. 446, wherein a building insured was used in rectifying spirits, was greatly damaged by an explosion, resulting from a person repairing machinery bringing in a lighted lamp which, when it came in contact with the vapor in the building caused an explosion. Fire resulted from the explosion, but damage by fire was slight, as compared with that caused by the explosion. Under direction of the Court, the jury found separately the damages caused by the explosion and the fire. The Supreme Court granted a new trial, unless the plaintiff deducted the damage caused by the explosion. The Court of Appeals of New York affirmed that ruling holding that the plaintiff was not entitled to recover for the explosion, and said:

> "If it was in fact an explosion, then the policy provides that the defendant shall not be liable for damages caused thereby. The plaintiffs insist, however, that an explosion caused by fire is a fire, and therefore the defendant is liable for the explosion as for a fire. But that reasoning gives no force to the exception. It allows a recovery for the explosion when the policy expressly stipulates that the defendant will not be liable for that. It may be conceded that, in the absence of this exception, a

> recovery could have been had for the whole damage as for a loss by fire. The authorities referred to by the plaintiffs' counsel tend to that result. I do not think that position will aid the plaintiffs. An explosion without this exception, if it come under the general head of fire, might have afforded ground for recovery; but the defendant guarded against that result by this express stipulation. The exception, too, is general, including explosions by fire as well as others."

These two cases are still the law in New York; in the late case of *Bird* v. *St. Paul Fire, etc., Co.*, 224 N. Y. 47, 120 N. E. 86, the Court of Appeals of New York held (headnote):

> "Where a plaintiff's vessel was insured against fire, and a fire broke out beneath freight cars loaded with explosives, which exploded, causing another fire, which in turn caused a greater explosion, damaging, by concussion, the vessel, about one thousand feet away, plaintiff could not recover on the policy, since the fire was not the proximate cause of the damage, viewed within the reasonable expectation and purposes of the ordinary business man in making such a contract, especially in view of the distance of the explosion from the vessel."

The policy in the Bird case was a Marine Policy, issued to the plaintiff covering the body, tackle, apparel and other furniture of the canal boat, the Henry Bird, Jr. There was no express exception of damage from explosion. The explosion at Black Tom, for which the suit at bar is brought, by reason of the concussion of the air caused damage to the plaintiff's vessel, which was about 1,000 feet distance from the scene of the explosion. No fire reached the vessel, the damage being solely from the concussion caused by the explosion, as shown by the quotation, *supra*. The Court held there could be no recovery. The Court of Appeals, speaking through Cardozo, *J.*, held:

> "This view of the problem of causation shows how impossible it is to set aside as immaterial the element of proximity in space. The law solves these

problems pragmatically. There is no use in arguing that distance ought not to count, if life and experience tells us that it does. The question is not what men ought to think of as a cause. The question is what they do think of as a cause. We must put ourselves in the place of the average owner whose boat or building is damaged by the concussion of a distant explosion, let us say a mile away. Some glassware in his pantry is thrown down and broken. It would probably never occur to him that, within the meaning of his policy of insurance, he had suffered loss by fire. A philosopher or a lawyer might persuade him that he had, but he would not believe it until they told him."

Also the Court said:

"Precedents are not lacking for the recognition of the space element as a factor in causation. This is true even in the law of torts, where there is a tendency to go farther back in the search for causes than there is in the law of contracts. Smith, Legal Cause in Action of Tort, 25 Harvard Law Review, pp. 126, 127, 326. Especially in the law of insurance, the rule is that 'You are not to trouble yourself with distant causes.' Willes, *J.*, in Ionides *v.* Univ. Mar. Ins., 14 C. B. N. S. 289, Leyland S. Co. *v.* Nor. Fire Insurance Society, 1917, 1 K. B. 873, 883, 893. 'In an action on a policy, the *causa proxima* is alone considered in ascertaining the cause of loss; but in cases of other contracts and in questions of tort the *causa causans* is by no means disregarded.' Fenton *v.* Thorley & Co., 1903, A. C. 443, 454; Smith *supra,* p. 326. The rule 'is based,' it is said, 'on the intention of the parties.' Reischer *v.* Borwich, 1892, 2 Q. B. 550."

In *Miller* v. *London, etc., Ins. Co.,* 41 Ill. App. 395, the exemption clause in the policy contained the same language as in the policy in the case at bar. A fire preceded the explosion. The plaintiff's premises adjourned a mill, which took fire and shortly after exploded, blowing the plaintiff's house off its foundation and almost ruining it. It was held that the plaintiff could not recover.

In *German Fire Ins. Co.* v. *Roost,* 55 Ohio St. 581, 36 L. R. A. 236, 45 N. E. 1097, a powder house, situated across the street from plaintiff's house was struck by lightning and an explosion occurred. Plaintiff's house was totally destroyed. The policy provision was the same as in the case at bar. The policy also had a provision providing against any loss or damage caused by lightning. It was held that plaintiff could not recover and Court said:

> "That destruction by explosion of a house 71 feet away from one struck by lightning should be deemed a natural result of the lightning is at least a doubtful proposition. But, be that as it may, when there follows in a policy, after a lightning clause, a provision which distinctly excludes liability for loss by explosion, it appears plain that within the contemplation of the parties at the time of the making of the contract, a loss by explosion could not have been understood to be embraced within the protection of the policy. * * * In no case which has come within our observation—and we have examined a great many—has a liability been found to attach where there was a provision excluding liability for loss by explosion, and the loss was caused by fire, or, as here, by lightning, taking effect in a distant building, and the damage being wrought to the insured property by an explosion produced by the fire or the lightning, without either of the latter agencies coming in contact with the insured property."

In *Heuer* v. *North Western Natl., etc., Company,* 144 Ill. 393, 19 L. R. A. 594, 33 N. E. 411, an explosion was produced by the lighting of a match in a basement filled with illuminating gas. Goods insured were damaged, but not by burning. The policy contained an explosion clause similar to that contained in the policy in the case at bar, and it was held that the plaintiff could not recover, the Court saying:

> "Here the goods insured were not brought in contact with the fire produced by the lighting of a match, but situated with the explosive powder of a fireless concussion, which caused the floor of the

> store in which they were situated to fall, and thereby occasioned the injury."

In *Vorse* v. *N. J. Plate Glass Insurance Company,* 60 L. R. A. 838 (Iowa). It was held that "Fire is not the cause of the breaking of a window, within the meaning of an insurance policy exempting the insurer from liability for loss which happened or was in consequence of any fire, where the loss was caused by the explosion of gas, ignited by a match or light." This case gives the converse problem to that we are considering. The reasoning of the Court shows its applicability. The Supreme Court of Iowa said:

> "Of course, but for the lighted match, or other light in the room, the explosion would not have happened, and the explosion itself was due to rapid combustion. But in ordinary parlance the damage was due to the explosion, or to the concussions produced thereby, or, as said in the agreed statement of facts, the explosion and breakage occurred prior to the fire in the building. The lighted match or other light in the building was not contemplated by the parties as the fire which was excepted by the terms of the policy. It was not a destructive fire, against the immediate effects of which the condition in the policy was intended as a protection. It was, it is true, the possible means of putting the destructive force in motion, but was not the excepted peril. Had there been no fire after the explosion, it seems to us it could not fairly be claimed that the damage done the glass was due to, or in consequence of, any fire. The immediate cause of the breakage was concussion produced by the ignition of gas, it is true; but that such an effect was due to or in consequence of fire, as that term is ordinarily used, or as the parties intended it in this case, is hardly supposable."

In *Mitchell* v. *Patomac Ins. Co.,* 183 U. S. 42, the policy provision was that the insurance company "shall not be liable for loss caused by lightning or explosions of any kind, unless fire ensues and then for the loss or damage by fire only." The defendant had a verdict and the

plaintiff appealed. A clerk of the insured went into the cellar of the building where gasoline was kept and lighted a match, which caused an explosion, which destroyed plaintiff's stock in trade.

The U. S. Supreme Court, speaking through Mr. Justice Peckham on p. 51, said:

> "The plaintiff also claims that error was committed by the court in charging the jury, at the request of the defendant, in substance:
>
> (1) If the loss was caused solely by an explosion or ignition of explosive matter, not caused by a precedent fire, the plaintiff cannot recover.
>
> (2) If an explosion occurred from contact of escaping vapor with a match lighted and held by an employee of the plaintiff, and the loss resulted solely from such explosion, the verdict must be for the defendant.
>
> (3) A match lighted and held by an employee of the plaintiff coming in contact with the vapor and causing an explosion is not to be considered as 'fire' within the meaning of the policy.
>
> *Opinion of the Court.*
>
> We think each instruction was correct. A loss occurring solely from an explosion not resulting from a preceding fire is covered by the exception in the policy. And an explosion which occurred from contact of escaping vapor with a lighted match, under the facts stated, would also plainly come within the exception of the policy. Also a lighted match is not a 'fire' when used as stated in the above third clause of the charge."

An examination of the case given, *supra*, and of many other cases, will demonstrate that the explosion which destroyed the warehouses where the sugar was stored and the sugar in the case at bar cannot be said to be an incident of the fire which was burning at a great distance from the warehouses, so as to make that fire the proximate cause of the damage to the sugar. As stated by the Court in *German Fire Insurance* v. *Roost*, 55 Ohio St. 581, *supra*, "in no case which has come within our observation—and we have examined a great many—had a liability

been found to attach where there was a provision excluding liability for loss by explosion, when the loss for which recovery was sought was due, not to the fire, which caused the explosion coming in contact with the insured property, but from the concussion, caused by the explosion. Other cases to the same effect are given in Joyce "Law of Insurance" (Second Edition, Vol. IV, pp. 4298-4300; Secs. 2586-7), and in the Editor's note in 38 L. R. A. (N. S.), p. 476.

It is therefore clear that the Trial Judge erred in ruling that the original fire which was at least 600 feet from the warehouses was the proximate and efficient cause of the destruction of the warehouses and the sugar, and that the explosion was a mere incident thereto. The fire at that distance from the warehouses did not destroy the warehouses and the sugar, but the explosion did. It follows that the plaintiff insurance companies were under no obligation to pay for the loss of the insured, which resulted from the explosion.

It also appears that under an express provision of the policy, the insurance companies were not even liable for the damage to the sugar by fire, which occurred after the warehouses and the sugar had already been destroyed by the explosion, for the testimony shows that the buildings fell as a result of the explosion, and the policy specifically provides (p. 771, ll. 1-10): "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." In other words, when the buildings fell and were destroyed as a result of the explosion, at that very moment the insurance under the policies of the plaintiff insurance companies immediately ceased and came to an end, and therefore those policies did not cover the subsequent fire.

Counsel for the insurance companies probably realized that the policies did not cover the loss resulting either from the explosion or the subsequent fire in the ware-

houses, for he advanced the following argument (p. 396, ll. 1-25):

> "Mr. Skinner—Let me just—I think perhaps your Honor does not get what I at least had in mind, and what this point covered.
>
> I understood Judge Garrison to say that the damages that are shown here are not damages that are within the policy that we entered into to the assured—are not damages that the insured—is not a destruction of property that the insured could have recovered from us; are not a loss that we were under any obligation to pay, and that, therefore, because of that character of the loss, we are not entitled to subrogation. And it is to that that I address this answer, that if an honest compromise be made of a claim it does not make any difference whether the claim is one that the insurance company could have been made to pay; it is public policy, and it is because of public policy that the law says that such a compromise shall give the insurance company paying the same right, give it full right, without permitting anybody else to question whether or not they were liable under the policy. The courts say honest attempts made by an insurance company to avoid litigation would provoke it and would be destructive of the interests of the public in that connection. And in that way it seemed to me this did have a bearing."

It is needless to say that this cannot be so, because, if it was, then although insurance companies were under no legal obligation to make any payment under the settled law (and they are presumed to know the law), they, nevertheless, as a result of making such payment, which payment would of course be a voluntary payment or a gift, be entitled to collect such voluntary payment or gift from a third person. Such a payment could not be said to be one that was made in good faith.

We are familiar with the cases that hold that where an insurance company makes a payment in good faith, where there is doubt as to its liability, that then the insurance company is entitled, after it is subrogated to the insured's claim, to press that claim against a third per-

son. We have been unable, however, to find any case which permits an insurance company to say that it had made a payment in good faith, where it clearly appears that there was no liability upon the part of the insurance company to make it. On the contrary, the presumption is, as against a third person, that a payment so made—when there is no liability to make it, is not a payment made in good faith. The situation is the same as though the insurance company had said:

> "We are not liable, under the terms of our policy, but we will, nevertheless, make a gift to you of an amount that will be equal to the amount that you could recover on your policy, if we were liable."

None one will contend that in such a case the insurance company would be entitled to sue a third person on the theory that it had made a payment in good faith under the terms of its policy.

We, therefore, respectfully submit that so far as relates to the plaintiff insurance companies, the Trial Judge erred in refusing to charge the jury as requested, viz., that the verdict, if any in their favor, should be limited to nominal damages, as there was no evidence from which the jury might determine how much of the damage to said plaintiffs was caused by explosion and how much was caused by fire.

(d)

It was error to leave to the jury the question of whether the defendant was responsible for the explosion on water (even though said explosion was not the first in point of time) as such explosion was the result of an independent, intervening, illegal cause.

It appears without dispute that the Johnson Barge No. 17 was moored at the North Pier without the defendant's knowledge or consent (p. 121, ll. 10-20). This was shown by the defendant's answers to the plaintiffs' interrogatories, which were offered in evidence by the plaintiffs as a part of their case.

The testimony of Mr. Johnson does not contradict this, as all he said was that he had an arrangement with some clerk at the Black Tom yard whereby the Johnson barge No. 17 (which already had a quantity of explosives on board obtained from other companies) was to complete its loading on the next day—which was Sunday. The only clerk with whom any such arrangement might have been made was Higgins, who was in charge of the office on Saturday, July 29th. He denied that any such arrangement had been made, but even if it had been so made it did not amount to a permission by the defendant that the Johnson 17 *should remain at the North Pier, partly loaded with explosives overnight.* It cannot be presumed that either Mr. Johnson or Mr. Higgins would make an arrangement to violate the law relating to anchorage regulations, and even if one of the defendant's clerks did undertake to make any such arrangement, it certainly could not bind the defendant, as it cannot be presumed that the clerk would have authority to agree that his employer should violate the law. Hence, whatever arrangements may have been made with regard to the Johnson 17, must have contemplated that during the night of July 29-30 (when no part of the work of loading was to be done) the persons in charge of the barge would comply with the law by mooring it at the point fixed by the government. From any point of view, the mooring of this barge at the North Pier during the night of July 29-30, was a violation of law, and it was in no way chargeable to the defendant. If, therefore, the damage to the plaintiffs was caused by the explosion on the Johnson 17, such damage was the result of an independent, intervening cause.

So far as this point is concerned, it makes no difference whether the explosion on the Johnson 17 was first or second in point of time. If it was first, then the defendant might well claim that most of the damage to the plaintiffs was caused by such explosion, and that, therefore, it should not be responsible at all. But, even if it was

second in point of time, still the defendant would not be responsible for the result thereof.

The Trial Judge left to the jury the question of whether the defendant was responsible for the explosion on the Johnson 17, saying that if the plaintiffs had made out by the greater weight of evidence that this explosion was one of a complete series of links, all of which were traceable as to their original legal source, to the defendant, it followed as a legal consequence that the plaintiffs were entitled to recover all the loss that has been shown (p. 734, l. 30, to p. 735, l. 1). We submit that this was error and that the jury should have been charged as a matter of law that the defendant was not responsible for the explosion on the Johnson 17, in accordance with Requests Nos. 25, 26 and 27, above quoted.

This is not a case where the defendant might be held responsible for *all* damages on the theory that it is impossible to distinguish between the damage arising from actionable injury and damage from non-actionable injury. The jury should be permitted to make the distinction, assuming they can, as to which part of the damages is chargeable to the actionable injury. Here there is no doubt that some, at least of the damage to the plaintiffs was caused by the explosion on the water, and that such damage was the *direct result of an illegal and independent act on the part of a third party,* with whose negligence the defendant was not in any way chargeable. The rule is clear that the damages which are chargeable to a wrongdoer must be the natural and proximate result of the tort. The term "natural" imports such damages as might reasonably have been foreseen or such as would accrue in the ordinary state of things. The term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's wrong and the resulting loss. The New Jersey Supreme Court recently had occasion to declare the rule as above stated in the

case of *Justesen* v. *Pennsylvania R. Co.*, 106 Atl. 137, citing:

> *Cuff* v. *Newark & N. Y. R. R. Co.*, 35 N. J. L. 17.
> *Wiley* v. *West Jersey R. R.*, 44 N. J. L. 247.

In the case of *Bird* v. *St. Paul Fire & Marine Insurance Company*, 224 N. Y. 47, 120 N. E. 86, the New York Court of Appeals refused to allow a recovery against an insurance company in a suit brought on a policy of marine insurance covering one of the canal boats that was injured by the very explosion which we have under consideration in this case. The Court came to its conclusion on the ground that a catastrophe of this kind was not within the contemplation of the parties at the time of the execution of the contract of insurance. The Court also had occasion to discuss the question of proximate causes, and with reference to same said:

> "General definitions of proximate causes give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract."

The Court further said:

> "The wrongdoer who negligently sets fire to a building is not liable, without limit for the spreading of the flames. In our state there is a fixed and somewhat arbitrary restriction. (Citing Hoffman *v.* Kind, 116 N. Y. 618, 55 N. E. 481.) But even in jurisdictions where the liability is broader, *its bounds are the reasonable and the probable. The wrongdoer may be charged with those consequences and those only within the range of prudent foresight.*"

Substantially the same rule is given in 29 Cyc. 499, as follows:

> "The test is not to be found in the number of intervening events or agencies, but in their character and in the natural connection between the wrong done and the injurious consequence, and if such result is attributable to the original negligence as a result *which might reasonably have been foreseen as probable,* the liability continues. But an intervening cause will be regarded as the proximate

> cause, and the first cause as too remote where the chain of events is so broken that they become independent and the result cannot be said to be the natural and probable consequence of the primary cause."

The author cites numerous cases which illustrate the point.

A recent case in Massachusetts is *Horan* v. *Watertown*, 217 Mass. 185, 104 N. E. 464. In that case the defendant was constructing a sewer, and its workmen had left several sticks of dynamite in an old tool box in the street. Some boys, of whom the plaintiff was not one, took several sticks out of the box and threw them upon a fire in an adjacent field, and the plaintiff was burned by an explosion of one of the sticks. In sustaining the directed verdict for the defendant, the Supreme Court of Massachusetts held that although there was evidence of negligence on the part of the defendant in leaving the dynamite within the limits of a public street, such negligence was not the proximate cause of the accident. The Court said:

> "The rule applicable to such cases is well settled by our decisions. Where as here the original negligence of the defendant is followed by the independent act of third persons which directly results in injurious consequences to the plaintiff, the defendant's earlier negligence may be found to be the direct and proximate cause of those injurious consequences, if according to human experience and in the natural and ordinary course of events the defendant ought to have seen that the intervening act was likely to happen. But if this is not the case, if the intervening act which was the immediate cause of the injury complained of was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, even though a high degree of caution would have shown him that it was possible, when he owed no duty to the plaintiff to anticipate such further acts, the chain of causation is broken and the original negligence cannot be said to have been the proximate cause of the final injury. (Citing cases.) * * *

> Tested by this rule, the plaintiff's case fails. While the dynamite and the other contents of the box were let in such a way that a thief might not find it very difficult to steal them, it cannot be said that the defendant was bound to anticipate that this might be done and to guard against the consequences that might follow if a thief should steal the dynamite and so use it as to do injury to others. The general presumption of innocence would be inconsistent with this. Still less was there reason to anticipate a series of thefts under the circumstances shown here, or to believe that such thefts would be committed in daylight, upon what seems to have been a pleasant Saturday afternoon, in so public a place. There is nothing to indicate that anything of the kind had ever been done before. We see no reason why the defendant should be held bound to have anticipated that at such a place and at such a time a gathering of boys, after some of them had stolen the dynamite, should engage in the dangerous sport which is shown by the testimony."

So, in the present case, even if there may have been evidence for the jury as to whether or not the defendant was negligent, there was no reason what "in the natural and ordinary course of events" the defendant should have anticipated that a barge loaded with 100,000 lbs. of T N T and 417 cases of detonators (all procured from other companies) should anchor at one of its piers without its knowledge or consent, and still less was it bound to anticipate that such barge would be so anchored in direct violation of the law.

Thus in the Horan case, *supra,* the defendant was not required to anticipate that somebody would violate the law by stealing dynamite, so here, the defendant had no reason to anticipate that the Johnson 17 would violate the law by anchoring at the docks of the defendant, when, under the regulations of the United States Government, it should have been taken to the anchorage ground in the Lower Bay.

(e)

It was error to leave to the jury the question of whether there was any duty on the part of the defendant to guard or watch explosives on Johnson Barge No. 17 and to refuse to charge the jury, as requested, that the mooring of said barge at the North Pier in the Black Tom yard, partly laden with explosives, was in violation of the Anchorage regulations of the United States Government.

The defendant submitted a request that the jury be charged as a matter of law that it must find that the Johnson 17 should not have been moored at the Black Tom pier, but should have proceeded to the United States Anchorage ground, and that the act of mooring at the North Pier was unlawful (see request No. 24 above quoted). This request was refused.

There was no dispute as to the terms of the regulations, neither was there any dispute that when the Johnson 17 came to the North Pier it was partly laden with explosives. Hence, this mooring was clearly in violation of the Federal rules, and the jury should have been charged to that effect.

Under this point we also call attention to the fact that the Trial Judge erroneously permitted the jury to consider whether there was any duty on the part of the defendant to watch or guard the explosives that were on the Johnson Barge No. 17, saying that the question was whether a reasonably prudent man would have had guards and watchmen upon the premises to watch these inflammable and explosive substances (p. 736, ll. 1-10). As there was no dispute about the fact that the Johnson 17 was at the North Pier, and that it was partly loaded with explosives, the necessary inference to be drawn by the jury from this part of the charge was that there may have been some duty on the part of the defendant to watch the explosives on the Johnson 17 as well as those that were in the railroad cars on the land.

V.

The law is settled that under a fire insurance policy such as those involved in this case an insurer is not entitled to subrogation unless at or before the payment of the loss he claims to the insured that the fire was caused by the act or neglect of some third person. There was no evidence of any such claim having been made in the present case.

The defendant asked for a non-suit and for a direction of verdict on this ground as against the insurance companies who are plaintiffs, and the matter was fully discussed by the Court and counsel on each side as shown by the following references: P. 378, ll. 25-40; p. 392, ll. 10-40; p. 393, l. 30, to p. 394, l. 30; p. 405, ll. 15-35; p. 722, l. 10; p. 723, l. 15.

The solution of the question depends entirely upon the meaning of the provision of the policy which deals with the matter of subrogation. Only one policy was offered in evidence because they were all alike, containing the standard clauses required by this State in fire insurance policies (p. 72, ll. 10-30; p. 305, ll. 1-30). Referring to the policy and to the provision therein contained with regard to subrogation, we find it is as follows (p. 775, ll. 1-10):

> "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

Whatever may be the extent of the right of subrogation residing in an indemnitor, in the absence of any agreement upon the subject between the idemnitor and the indemnitee, the law has been settled in this state by the case of *Fire Ass'n of Philadelphia* v. *Schellenger*, 84 N. J. Eq. 464, 94 Atl. 615, decided by this Court, that there is "no

"reason for denying the power of the parties to curtail, or "even to destroy it, by mutual consent if they see fit to do "so. An agreement to that end runs counter to no provi- "sion of the written law, and is not opposed to any public "policy of the state. The right to subrogation is a mere "personal one conferred solely for the benefit of individ- "uals, and a right of this character may always be waived "by the party in whom it resides. *Quick* v. *Corlies,* 39 "N. J. L. 11."

We therefore say that the rights of the parties to this litigation must depend upon the meaning of the provision of the policy which deals with the matter of subrogation, which has been quoted *supra.* This question was also settled by this Court in the case of *Fire Ass'n of Philadelphia* v. *Schellenger,* 84 N. J. Eq. 464, 94 Atl. 615, cited *supra.* In that case Leaming, *V. C.,* speaking for the Court of Chancery (see 83 N. J. Eq. 144) had held (headnote):

> "1. An insurance against loss by fire is an indemnity which the assured holds, and, when the insurance company pays the insured the amount for which it was liable, the insurer becomes subrogated to any rights of the insured as against a third person to the amount of the payment.
>
> "2. An insured sustained a loss by fire which was only partially covered by insurance. He collected the amount of the policy, and sued a railroad and recovered a judgment for $6,000, which was compromised for $3,000. Held, that the insured held the $3,000 in trust for the insurance company, to the extent of the amount of the policy paid, as the insurance company became the equitable assignee of the right of action against the railroad, the legal title remaining in the insured, and the insured could not compromise without the consent of the company.
>
> "3. An insurance company after paying a fire loss has a right of subrogation, regardless of whether there is a subrogation clause in the policy, because the insurance is an indemnity, and the primary liability is upon the one who wrongfully occasions the loss."

This decision was reversed by this Court.

The reasoning of Leaming, *V. C.*, in reaching the conclusion that he did, is more clearly and concisely stated by him in his opinion in the case of *Fire Ass'n of Philadelphia* v. *Wells,* 83 N. J. Eq. 140, 141 (which was also reversed by this Court in 84 N. J. Eq. 484), as follows (italics ours):

> "It was complainant's right and privilege to pay to defendant the amount of the insurance, and by that payment to become subrogated to defendant's claim against the railroad company to the extent of the amount paid. No 'subrogation receipt' or other receipt or agreement was necessary; *subrogation arose from the act of payment and not from the convention.* Monmouth County Fire Insurance Co. *v.* Hutchinson, 21 N. J. Eq. 107; Weber *v.* Morris and Essex Railroad Co., 35 N. J. Law, 409, 413; Sheld. Subr., par. 6. But a writing was executed. That writing was signed by defendant and formally acknowledged by him before a notary public. It sets forth the payment of the insurance money and assigns to complainant defendant's claim against the railroad company to the amount of the payment. *The receipt does no more than state the exact conditions which would have existed by operation of law without a receipt.*"

In other words, he held that the mere payment of the insurance money and nothing more, by operation of law, gave the insurance company the right to sue a third person in the same way that the insured would have had the right to sue, had he not been insured and had the loss been caused by the negligence of the third person. To state the proposition another way, the mere payment of the money worked an equitable assignment of any claim that the assured might have against the third person, which equitable assignment gave the insurance company the right to sue in the same way that the insured could have sued had there been no insurance.

The learned Vice-Chancellor lost sight entirely of the fact that the policy of insurance contained a specific provision with regard to the circumstances under which the

insurance company would be entitled to subrogation. *That provision in the policy in the Schellenger case is identical with the provision in the policy in the case at bar.* It is given in full in the opinion of this Court in 84 N. J. Eq. 464, beginning at the bottom of the page, and since it is identical with the provision in this case quoted *supra,* we shall not again set it forth.

After the fire and loss in the Schellenger case, the company, under its policy, paid to Schellenger $2,855, that being the amount agreed upon as the extent of its liability. Subsequently he brought suit against the railroad company, claiming that the fire was caused by the latter's negligence. He recovered a verdict of $6,000, which he settled for $3,000 and executed a general release to the latter company of all liability for loss or damage occasioned by the fire. The case which the insurance company sought to establish in the Court of Chancery was that, having paid to Schellenger the amount due to the policy issued by it, a right of subrogation immediately sprung into existence by operation of law whereby it was entitled to receive and to press any cause of action against a third person or was entitled to receive the proceeds of any litigation that might be brought by the insured against a third person responsible for the loss. The Court of Chancery sustained that contention and a decree was entered in favor of the insurance company, the complainant, whereby it was adjudged that Schellenger should return to the insurance company the amount he had received from the company, viz., $2,855. It was from this decree that Schellenger appealed, and this Court, reversing the Court of Chancery, held, that the rig of the parties to the litigation must depend upon the meaning of the provision of the policy which deals with the matter of subrogation and that *the meaning of the provision in question was that unless at or before payment of the loss, the insurance company claimed that the fire was the result of the act or neglect of a third person, the right to subrogation was waived and the insurer could not thereafter claim subrogation.*

The decision of this Court as worded in Headnote 2 of the case, based on the facts as we have given them *supra,* was as follows:

> "Held that the insurer could not claim subrogation; the policy waiving that right, unless at or before payment of the loss, it made claim that the fire was the result of the act or neglect of the third person."

The Court, speaking through Gummere, *C. J.,* at p. 466, based its decision upon the following reasoning, which we adopt, first, because it clearly and concisely states the argument which we desire to advance under this head, and secondly, because we will thereby avoid reiteration (italics ours):

> "It is plain from a reading of this part of the contract that the parties to it intended that the right of the insurer, in case it paid the loss, should not be an absolute, but a conditional one; the condition being that the insurer should 'claim that the fire was caused by the act or neglect' of some third person. We think it equally clear that the agreement contemplates that such claim should be made by the insurer to the insured at or before the time when it paid the loss. This appears from the fact that by its terms the right to subrogation, if it comes into existence a all, becomes complete when the payment is made. The language used is, 'this company shall *on payment of the loss* be subrogated,' etc.; 'and such right shall be assigned to this company by the insured *on receiving such payment.*'
>
> "There is no suggestion, either in complainant's bill or in the proofs submitted by it at the hearing, that it made any claim to the defendant that the fire against which it had indemnified him had been caused by the act or neglect either of the Atlantic City Railroad Company, or of any other person, until many months after it had paid the moneys due under its policy. On the contrary, the fact appears that it made no such claim prior to the filing of its bill in this clause. *Its failure to assert such claim at or before the time when the payments was made, was a failure to comply with the conditions upon*

which its right to subrogation depended, and terminated the existence of that right, leaving the defendant free to so deal with the person responsible for the fire with relation to a settlement of any claim against such person, as he might see fit, without any liability to be called to account by the complainant for any of the proceeds of such settlement.''

In the case at bar there is no evidence that at or before the time when the insurance companies paid their respective losses, they made any claim that the fire against which they insured, was caused by the act or neglect of some third person. The only evidence on this subject was given by the witness Davidson (p. 70, l, 35 et seq.). An examination of his testimony will show that payments were made by the various insurance companies who are plaintiffs, under their respective policies, but the time when, or whether at or before the time, the payments were made the insurance companies or any one of them claimed that the fire in question was caused by the act or neglect of some third person does not appear. In the absence of any evidence that the insurance companies before or at the time when they paid their respective losses, made claim that the fire was caused by the act or neglect of some third person, the conclusion necessarily follows that no such claim was made. If no such claim was made then the conditional right which the insurance companies had to subrogation never came into being, but, on the contrary, such conditional right was thereby waived and thereafter could never be brought into life. That right expired when the loss was paid without the making of any claim.

It would have been a very easy matter for the plaintiffs who are insurance companies, to prove that such a claim was made before or at the time they made payments of their respective losses, and the fact that they failed to make proof of this very material element of their case, is a strong indication, to say the least, of the fact that no such claim was ever made, as required by the very terms of the provision with regard to subrogation.

Paraphrasing the language used by Gummere, *C. J.*, at the end of the last paragraph in the opinion in the Schellenger case, the failure of the insurane companies to assert such claim at or before the time when the respective payments were made, was a failure to comply with the condition upon which their right to subrogation depended and terminated the existenec of that right, leaving the defendant free to so deal with the person responsible for the fire with relation to a settlement of any claim against such person as he might see fit, without any liability to be called to account by the insurance companies for any of the proceeds of such settlement. In other words, under the decision of this Court in the Schellenger case, the right to subrogation terminates and is at an end if no claim is made by the insurance company at or before the time when payment of the loss is made and then the insured is free and has the absolute right, without any liabilty over to the insurer, to pursue his remedy or remedies against third persons for occasioning the loss that has been suffered by their fault or neglect. This being so, if in a case of this kind the insurance company is allowed to sustain a judgment in its favor, then we have a situation where a third person, such as the defendant in this action, might very well have two judgments entered against it for the one loss, one in favor of the insured and the other in favor of the insurer. In the present case, the action is brought by the insurer and there is no reason, therefore, in the law, why the insured might not bring an action for the same loss and recover, assuming that it is proven that there was negligence.

The trial judge was clearly wrong in the conclusion that he reached on this question; and, if so, he erred in denying the defendant's motions for nonsuit and direction of verdict, with respect to the insurance companies.

It was suggested by counsel for the plaintiff insurance companies on the argument of the motion for nonsuit, that the section of the Practice Act of this State, wherein it permitted "a party in interest" to sue, in some way

changed the substantive rights of the insurer and insured, and this defendant under the provision with regard to subrogation (p. 394, ll. 30-35). The section to which he probably refers is Sestion 28 of the Practice Act of 1903 (3 Comp. Stat. 4059, p. 28; P. L. 1903, p. 541). However, such a claim cannot be sustained, as the substantive rights of the parties cannot be interfered with. Moreover, Section 28 is only for the purpose of permitting someone to sue on a contract made for his benefit. In the case at bar, the insurance companies are not attempting to sue on any contract made for their benefit, but are attempting to enforce a tort action against the third person merely because of an alleged claim made by them that they were subrogated to the rights of their insured. The question of a contract made for their benefit is not involved. The defendant had not failed to perform any contract that it had with the person insured by the insurance companies and, therefore, the insured has made no contract which can be enforced by the insurance companies.

We, therefore, respectfully submit that the Trial Court should have nonsuited the plaintiff insurance companies, or have directed a verdict in favor of the defendant as against the insurance companies when thereunto moved, because there was no evidence that the plaintiff insurance companies claimed before or at the time of payment of the loss, that the alleged loss was the result of the act or neglect of the third person and the failure of the Trial Judge to grant said motions, or one of them, was error.

VI.

It was error to direct the jury to include interest in any verdict that might be returned in favor of the plaintiffs.

The defendant submitted a request to charge on the subject of interest, as follows:

> "31. The jury is not at liberty to allow the plaintiffs, or any of them, any interest in respect of any sum found to be due them, or any of them" (p. 746-m, ll. 5-10).

The Trial Judge refused this request, and directed the jury that if the plaintiffs had made out their claim, they would, as a matter of law, be entitled to interest thereon (p. 724, ll. 20-40). The amount of interest for the plaintiff Howell was $5,811.78, and the amount of interest for the defendant insurance companies was $52,306.06. The defendant insists that it was error to permit any allowance to be made for interest, for the reason that the damages were unliquidated. This rule was established in this state in the early case of *Speer* v. *Van Orden,* 3 N. J. L. 232, over a hundred years ago. In that case the plaintiff sought to recover for damages to its heifer caused by the beating of same by the defendant's slave and dog, together with two years' interest. The Supreme Court reversed a judgment for the plaintiff, saying:

> "Without deciding how far the master of a negro is liable for his tortious acts, interest on uncertain and unascertained damages cannot be recovered."

This case has recently been cited with approval by the Supreme Court in *Philbrick* v. *Mundy,* 106 Atl. 361. This was an appeal from a judgment in favor of the plaintiff in an action to recover damages for injuries to the plaintiff's automobile. The Trial Judge directed the jury to allow interest. The value of the repairs to the automobile was a certain amount, and the Trial Judge instructed the jury that if it found for the plaintiff, it should be for that amount with interest from the date of the accident. In reversing the judgment, insofar as it included an allowance for interest, the Court said:

> "We think that was wrong. Interest is not allowed on unliquidated damages. Speer *v.* Van Orden, 3 N. J. L. 232-653. The reason is that the person liable does not know what sum he owes, and, therefore, cannot be in default for not paying. That principle is applicable to an action of tort, such as the present, where the damages are an uncertain quantity, depending on no fixed standard and cannot be made certain except by verdict."

The principle thus announced by the New Jersey Supreme Court, is in accord with that adopted in other jurisdictions. It is stated as follows, in 22 Cyc., p. 1512:

> "As a general rule, interest is not recoverable upon unliquidated demands. Where, however, although a demand is unliquidated, the amount thereof can be readily ascertained by mere computation, interest thereon will be allowed."

Numerous cases from nearly every state are cited in support of the statement of the text, but it is not necessary to refer to them in detail.

If these principles are applied in the present case, it will be obvious that interest should not be allowed, as in the first place, the damages were unliquidated, and, in the second place, the amount thereof could not be readily ascertained by computation; indeed, the testimony shows that the plaintiffs themselves were uncertain as to the amount of the damages and as to the proper method of computing same.

The measure of the damages was the market value of the sugar. In the complaint, the plaintiffs alleged that the total value of the sugar that was destroyed was $370,045.05, and damages were demanded in that sum with interest from July 30, 1916.

In the opening to the jury, counsel for plaintiffs claimed that the entire value was $370,000 (p. 57-b, l. 23). The cashier of the firm of B. H. Howell Son & Co. claimed that the market value of the sugar was five and one-fourth cents per pound, to which it was the custom to add a small fraction for marine insurance, making the total value 5.26575 cents per pound (p. 67, ll. 10-40). He also said it was the practice to make a small deduction upon the test of the sugar and that in this case the deduction would be .010756, thus making the net value 5.254994 cents per pound (p. 68, ll. 1-10). He further said that a credit should be given for a certain number of bags of damaged sugar amounting to the sum of $352.27 (p. 68, l. 20). The

witness then gave the value of the sugar in each warehouse, as follows:

Storehouse	E.....	$5,758.34
"	G.....	52,584.52
"	H.....	54,520.77
"	N.....	85,430.32
"	O.....	172,344.12
		$370,638.07

(p. 69, ll. 30-40; p. 70, l. 20).

In estimating the value of the sugar in warehouse E, an allowance was made at the rate of 5.17674 (p. 73, l. 22). No explanation was given as to the difference between this figure and the preceding figure for the allowance on the other sugar, other than the mere fact that one was estimated on the day following the fire and the other in September (p. 73, ll. 20-40).

It will be observed that the plaintiffs themselves and their counsel seemed to have had considerable difficulty in determining the exact amount of the loss. The complaint claimed $370,045.05, but the witness showed the amount to be $370,638.07. But even if there was a certain and definite market price for the sugar at the time of its destruction, it would have been impossible for the defendant to determine exactly what the loss was, as not even the plaintiffs' own counsel were certain of the exact figures, after having had nearly three years in which to prepare them. Hence, on this showing, the damages were clearly unliquidated, even if there had not been any further proof, but the plaintiffs undertook to show by sugar brokers what the market price of sugar was on the morning of Monday, July 21st, following the fire and explosion. Mr. Connell stated that at that time the market was 5¼ cents for 96 test (p. 77, l. 35); to this should be added an allowance for marine insurance (p. 78, ll. 1-20). The last sale made on Friday, July 28th, had been at a price of 5⅛ cents (p. 79, ll. 1-10).

Mr. Knoblock stated there was no market for sugar on either Saturday or Sunday, July 29th and July 30th, and that on Monday, July 31st, the quotation was on the basis of 5⅛ cents for "prompt" sugar and 5¼ cents for August shipment (p. 83, ll. 30-40). On Friday, the 28th, there was a sale at 5⅛ (p. 84, ll. 1-10).

Later in the trial, plaintiffs' counsel recognized the uncertainty as to the exact market value, and stated in open court that the plaintiffs' claim would be limited to Friday's price of 5⅛ cents and would disregard Monday's price of 5¼ (p. 366, ll. 20-30).

On the basis of that price, the value is figured as follows:

Storehouse	E.....	$5,719,30
"	G.....	51,329.94
"	H.....	53,220.00
"	N.....	83,373.94
"	O.....	168,230.28
		$361,873.46

The defendant does not dispute the market value of the sugar, nor the method by which it was determined. The figures are given merely for the purpose of showing that even the plaintiffs themselves were uncertain as to the exact amount of their damage, and this testimony is conclusive in favor of the claim made by the defendant that the damages were unliquidated, and, therefore, it urges that the defendant cannot be compelled to pay interest on the actual damages.

VII.

For these reasons, the judgment entered in favor of the plaintiffs, and each of them, should be reversed and a new trial ordered.

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