

Court of Errors and Appeals

STEPHEN DEMATO

v.

HUDSON COUNTY GAS COM-
PANY.

In Error.

Points of Plaintiff
in Error.

FACTS.

The suit was for damages sustained by plaintiff caused by a chip from a steel chisel head flying, upon the chisel being struck by a hammer, into the eye of the plaintiff, (p. 6, l. 10-40)

The plaintiff was a laborer on the day of the accident working for the defendant. (p. 6, l. 10-15)

He had been working for the defendant about three months. (p. 6, l. 10-15)

His employment was as a common laborer at \$1.50 a day. On the day of the accident until eleven o'clock he had been digging in a trench (p. 6). At eleven o'clock he was called by the foreman and put striking a chisel which was held against an iron pipe by another servant of the defendant. (p. 6, l. 19-23)

His complete instructions were to get a hammer and strike the chisel (p. 8, l. 1-3)

When he had been working about five minutes a steel splinter flew from the chisel head and struck him in the eye. (p. 6, l. 31-36)

This was caused by the defective condition of the head of the chisel (p. 13, l. 30-40) This condition was the result of much use of the chisel and frequent hammering thereon causing the head to become scaly, the solid metal disintegrating and forming scales. (p. 14, l. 1-20) The chisel when this condition occurred ought to have been taken to the blacksmith shop and dressed in which operation, the scales would be rubbed off, and solid metal uncovered for a new head. (p. 14, l. 15)

The men who did the work plaintiff was doing when he was injured was called "mechanics" and received \$1.75 per day. (p. 8, l. 27-30)

Negligence of Defendant.

Proof that the head of the tool was scaly was evidence to go to the jury on the question of the Master's negligence. *Maher v. Throop*, 30 Vr, 187; *Steamship Co., v. Ingelgeten* 28 Vr. 400.

In the case of *Campbell v. Gillespie Iron Co.*, the Court of Appeals held that where there was evidence that the head of a metal pin ought to have been dressed by a blacksmith there was a case to a jury, 40 Vr. p. 281 where court says "there was further evidence that pin was not fit to work with, unless it was dressed by blacksmith."

In addition to the bad tool there was the proof that the servant was a laborer and un-

familiar with the condition of tools, it therefore became the Master's duty to instruct the plaintiff of the danger of the flying chips of steel, *Tompkins v. Machine Co.*, 41 Vr. 330. This plaintiff was a laborer getting one dollar and a half a day, he was suddenly without instruction of any kind put doing work of a skilled man for which the defendant paid the men it employed for this work one dollar and seventy five cents.

Acceptance of Risk.

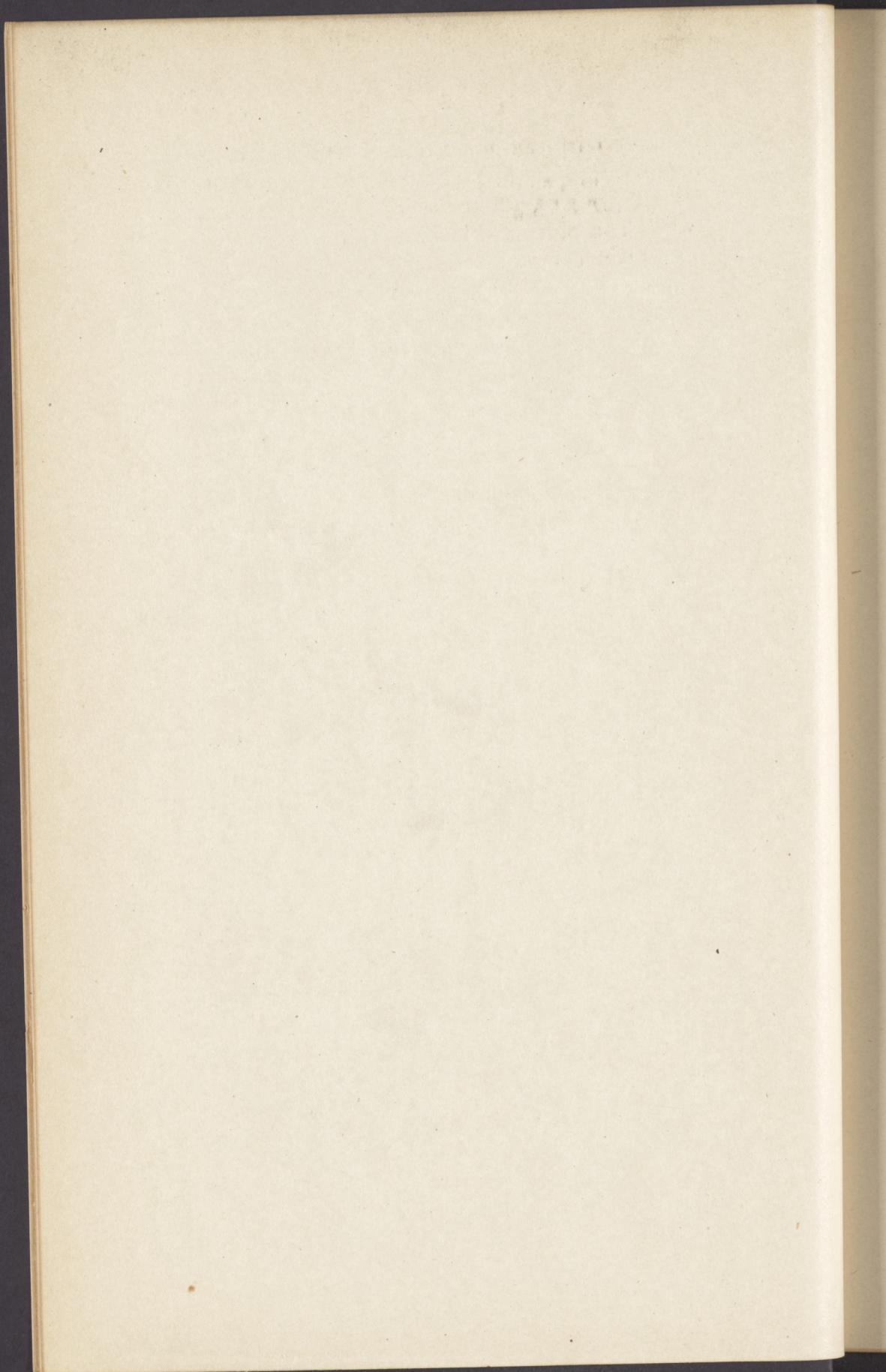
The risk of the happening of this accident was not obvious to a common laborer. In *McDonald v. Standard Oil* 40 Vr. 449 the court said "the injury" (the flying of a chip of metal)" did not occur in the first hours of the employment (if it had there might have been a question for the jury under the ruling in *Pierce Admr. v. Camden and Gloucester Railway* 29 Vr. 400)

To constitute an acceptance of risk it is not only the physical condition which must be obvious but the danger, *Burns v. Telegraph Co.*, 41 Vr. 745

Respectfully submitted

ALEX. SIMPSON,

Attorney for Plaintiff in Error



NEW JERSEY COURT OF ERRORS AND
APPEALS.

STEPHEN DE MATO,

Plaintiff,

Plaintiff in Error,

vs.

HUDSON COUNTY GAS

COMPANY,

Defendant,

Defendant in Error.

In Tort.

On Error.

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BRIEF FOR DEFENDANT IN ERROR.

The above entitled action was tried before the Hon. Jonathan Dixon and a jury. It resulted in a non-suit. The plaintiff now assigns error upon the non suit.

The plaintiff was employed by the defendant, digging in the streets, with a pick and shovel. He had been working in such a capacity for about three months. The company was opening up a trench and laying an iron pipe therein. The plaintiff had seen other men working on the pipe with chisels, and hammers, cutting the same. The manner in which this work was done was as follows: One man would hold the chisel against the pipe at the point where it was desired to cut the same, the two men would strike alternating blows upon the steel with hammers, thus cutting the pipe.

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The plaintiff testified that on September 14, 1901 he was working, digging with a pick and shovel, and that he had been so working for about three months prior to that date. That on such date, the foreman in charge of the men at work, told him to "get hold of a hammer and strike a chisel" which was held by another workman; that he did as directed by the foreman and began striking with the hammer. That
 10 after he had been thus striking for about five minutes a chip flew up and went into his eye.

I.

NO NEGLIGENCE OF DEFENDANT
PROVEN.

The plaintiff was the only witness to the accident. He does not know of what material the chip which
 20 he alleges went into his eye was composed of. He never saw it, according to his own testimony. He endeavored, however, to prove by expert testimony that chips may sometimes fly from a steel that is out of shape or that has been used until the top has been beaten and turned over, and that such a chip could not fly from a chisel that is in proper or dressed condition. The testimony of the plaintiff upon direct and cross examination is set out very fully, as follows:—

30 Direct Examination (page 6).

I live in Jersey City; have lived in Jersey City 14 years; I remember the 14th of September 1901; on that day I was working for the Hudson County Gas Company corner of Pacific Avenue and Grand Street; I was laboring, digging until half past eleven I had been working for that Company three months at labor digging with pick and shovel.

Q. Doing anything else? A. No, sir.

Q. On the morning of September 14th, was your
 40 work changed? A. Yes, at half past eleven I was

changed to striking with a hammer by foreman John Duffy, he told me to get hold of that hammer and strike on the chisel; a fellow had hold of it outside the pipe, he was holding the chisel by the handle.

Q. Was it a chisel like any of these four that I show you? A. Yes, like that short one.

Q. How did the man hold the chisel? A. There was a handle on it, and he was holding the handle, he held the chisel on an iron pipe and I was striking 10 the chisel with the hammer, that made a little mark on the pipe and it cut the pipe.

Q. What happened to you? A. A chip flew up and hit me in the eye; I had been working about five minutes.

Q. What kind of a chip? A. A chip of steel.

Q. What did you do? A. I quit then and went home and Monday morning I went to New York.

Q. Did you see any doctor? A. I went and saw Dr. Chambers, and he operated on me in the City 20 Hospital with an electric business, a magnet; he took out of my eye a piece of steel.

Q. At the time this happened did you know anything about steel chisels? A. No, sir.

Q. Had you ever used any before? A. No, sir, I never used any, never worked with any.

Cross Examination (page 9).

Q. What happened? A. Chip of steel flew up. 30

Q. You had another trial before? A. Yes.

Q. That time you said it flew from the iron pipe?
A. No, sir; I didn't.

Q. How do you know it came from the chisel? A.
It must come from the chisel.

Q. How do you know it came from the chisel?
A. It could not come from a cast iron pipe, splinters never fly from a cast iron pipe.

Q. How do you know, haven't you seen or heard of men being injured by the flakes coming up from the pipe? A. No, sir. 40

Q. You never saw this splinter that hit you? A. No, sir.

Q. So you don't know whether it was steel? A. I got it in the eye anyhow.

Q. But where it came from you didn't know, did you? A. No, sir.

Q. Didn't you keep on working that day? A. Yes

Q. Finished the day out? A. Yes.

10 Q. When did you get through work that day? A. Half past five.

Q. What time did the splinter fly in your eye? A. Half past eleven.

Q. You went on with work after this happened—did you keep on striking? A. No, sir.

Q. Somebody else came there? A. Yes.

Q. They used that same chisel? A. Yes, sir.

Q. And finished the work? A. Yes.

Q. You saw them doing it? A. Yes.

20

From the evidence of the plaintiff there is nothing to charge the defendant with negligence in any manner. There is no evidence that any tool or implement furnished to the workmen by the defendant was defective or improper for the work being done, or that the defendant had not provided for the plaintiff a reasonably safe place within which to work. His evidence simply shows that he was set to work striking with a hammer upon a chisel held by another man against an iron pipe, and that in some way he was struck in the eye by something. He states that Dr. Chambers took a piece of STEEL out of his eye, but he testifies that he (plaintiff) never saw the chip or the article taken from his eye, and does not produce nor is there anything in his evidence to show that it was a steel chip that hit him. It will be further noticed that Dr. Chambers, who it is alleged took the chip from the plaintiff's eye, is not produced as a witness by the plaintiff, nor is his testimony taken and read in Court; Dr. Chambers
30 resides in Jersey City and has his office here. The
40

Doctor, according to the plaintiff's story, removed the steel chip or other article from the plaintiff's eye, and his testimony is extremely essential to the plaintiff's case, in order to prove the material of any object removed by the physician. He should have been produced in Court or his testimony read.

It thus appears that the plaintiff's testimony shows that he was hit in the eye by something as he was working for the defendant; there is not a word in his evidence to show what that object was (except an assumption on his part that it was a steel chip). There is nothing to show WHAT it was. Again, the plaintiff endeavors to set up that the chisel with which he was working was defective, yet there is not a word in his evidence to show what kind of a chisel he was using, except that it was of steel; whether it was old or new, whether it had ever been used before that day, or what was its condition, when the plaintiff was using it; nor is the chisel produced by the plaintiff or called for by him if he desired it in Court and believed it to be in the defendant's possession.

It therefore appears from the evidence produced by the plaintiff in the clearest manner that the defendant has fulfilled all its duties as a master and was not guilty of any negligence or failure of duty.

There was therefore nothing to submit to the jury and the Court rightfully nonsuited the plaintiff.

Ency. of P. & P. Vol. 6, page 938 and case cited.

Central R. R. v. Moore 4 Zab. 824.

Aycrigges Exrs. v. N. Y. & Erie R. R. Co.,
1 Vr. 460.

McCormack v. Standard Oil Co., 31 Vr.
245. 40

II.

CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.

Assuming, however, that the object which struck the plaintiff was a piece of steel and that it came from the chisel which the plaintiff was using, there is nothing in the plaintiff's evidence to show that the
 10 defendant had been guilty of any neglect of its duties. The defendant furnished to the plaintiff and his fellow workmen a chisel and a hammer and placed them to work upon this iron pipe.

As above remarked there is no evidence of any defect in either of the tools or implements being used by the plaintiff. The testimony of the plaintiff shows that the chisel was immediately afterwards used by the other workmen in the same way until
 20 they had finished the work and that plaintiff saw them doing it. (page 8-9). The claim of the plaintiff is that a steel chip MIGHT come from a tool which is defective, and this he seeks to establish by the use of expert testimony. There is nothing in the evidence to show that the tool, to wit, the chisel, supplied by the master was defective at the time it was supplied. The only evidence is that chips of steel might come from the head of a chisel which had been
 30 used so long that the top had become beaten over or out of shape. The evidence shows that such condition comes from the use of the tool or implement by the persons who are working with the same, and that its condition is a result of this use, and best discoverable by the person using the tool.

(Page 18).

Q. When this instrument is out of order, the men that had the best of knowledge of that are the men that are using it? A. Yes.

40 Q. The strikers and cutters? A. Yes.

Q. And sometimes the head, will wear the edge down twice? A. Yes, may be a dozen times.

Q. What kind of steel is the top of the chisel made of, and what kind is the cutting end made of? A. Generally both the same nature, they put soft steel on the head purposely, and the cutting end is tempered.

Q. Isn't it necessary there should be soft steel on the head? A. Yes, so as to keep it from fracturing 10 and flying.

Q. If it would not bend on the top there would be danger of fracturing? A. Yes.

Q. So the fact that this steel falls over on the side is not a defect in the steel? A. No, sir.

Q. That is necessary to the use of the implement? A. It has got to go.

Q. And the only question is whether they keep it going too long? A. When they get unfit for use they should be fixed up. 20

Q. There is a point when that should be discovered? A. Yes.

It was the plaintiff's duty to exercise a proper watchfulness to see that the tool furnished did not become during use, so defective as to be more dangerous than it would otherwise be.

"The duty of self protection requires an employee to make such inspection of appliances furnished to him for his work by his employer as will disclose to 30 him any obvious defect therein, and to exercise a proper watchfulness to see that during use they do not become so defective as to be more dangerous than they otherwise would be; and failure to do this is negligence on his part, which will prevent him from recovering for the injury received by him through a defective appliance, the condition of which was or should have been known to the employer."

McGrath v. D. L. & W. R. R. Co., 39 Vr. 426.

Coyle v. Griffin Iron Co., 63 N. J. Law 611.

Western Union Telegraph Co. v. McMullen, 58 N. J. Law 159.

“Drift pins are obviously subject to deterioration in their use and thereby to become to some extent dangerous, and if the pin used in this case was when furnished to William Campbell, reasonable safe for
 10 the work of rivetting, the duty of inspection fell upon him to see whether it became imperfect during his use of it and for his neglect to make such inspection, the master will not be liable.”

Campbell v. Gillespie Company, 69 N. J. Law 279.

III.

NO INSTRUCTIONS NEEDED.

20 It requires no peculiar skill or instructions to hold a chisel or strike with a hammer in this kind of work. The plaintiff's expert testifies that any ordinary laboring man could hold the chisel, nor is it necessary to have any special skill or instruction to hold a hammer. The plaintiff was not set to work at a dangerous or complicated machine. He was simply to strike with a hammer a chisel held by another man. He needed no special instruction, it is an ordinary job which any ordinarily intelligent laboring
 30 man could do. All that is required is a steady hand so that the hammer strikes the chisel squarely upon the head. The plaintiff admits that during his three months on the work, he had seen the men striking with the hammer. While there is no proof as to what chisel was furnished to the plaintiff, let us, for the purpose of argument, assume that it was the small chisel exhibited in the Court Room. The negligence claimed is that in the course of use the chisel became slightly beaten over on the head. The expert of the plaintiff (Mr. Downs) states that soft steel
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is placed on the head of the chisel for the very purpose of allowing the same to bend over so that it will not fracture and fly around, and that a chisel becoming beaten or battered over is not a defect in the same, but that the chisel is so constructed for that very purpose. (See page 19 of the printed book hereinabove set forth.

IV.

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FELLOW SERVANT.

It will be remembered that there are three men working together, one holding the chisel and two hammering, striking alternating blows. The chips from the pipe fly according to the manner in which the men do the work. If the men holding the hammer lets it fall to one side a little the chips will fly up. If the man holding the chisel flinches when the blow comes the chips may fly up; it all depends upon the men themselves. (See testimony of plaintiff's expert Down page 17). 20

It therefore follows that if there was anyone responsible for the injury to the plaintiff it was the plaintiff himself, or one of his fellow employees.

Such being the case there could be no recovery and the court properly non-suited the plaintiff. 30

V.

THE DANGER WAS OBVIOUS.

If the plaintiff was injured in the manner described by him he assumed the risk and cannot hold the defendant liable.

The Court of Errors and Appeals has dealt with this subject in terms explicitly holding that such risk is assume by the employe. 40

In the case of *Tompkins v. Machine Co.*, 41 Vr. 335 the Court said:—

That the result of striking a steel tool with a hammer of steel would cause chips to fly seems essentially an obvious danger, and to ~~“That the result of striking a steel tool with~~ be one of those risks which, in the language of *Dillenberger v. Weingarten*, 35 Vr. 292
10 “was apparent in the exercise of ordinary observation and which are disclosed by the eyes and other senses.”

The decision of the Court should be affirmed.

Respectfully submitted,

WILLIAM D. EDWARDS.

EDWIN F. SMITH.

Of Counsel.

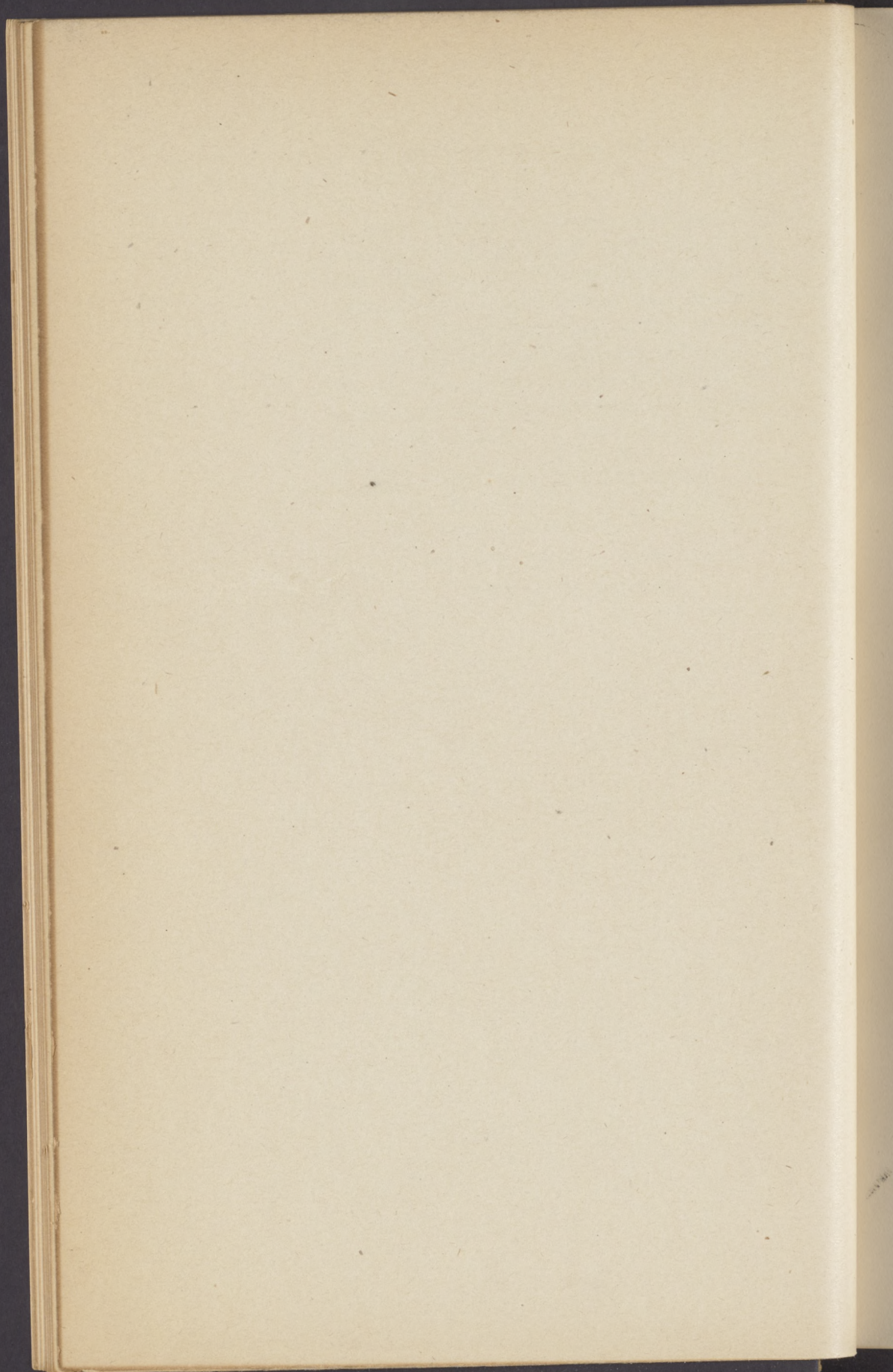
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In the case of *Tupia* & *Alcedo* the
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Court of Errors and Appeals

NEW JERSEY, ss.
[L. S.]

10

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

Because in the record and proceedings and also in the giving of judgment in a certain cause, which was in our Supreme Court before you, wherein STEPHEN DEMATO was Plaintiff, and the Hudson County Gas Company was defendant, in an action-of-tort, manifest error hath intervened to the great damage of the said Stephen Demato, as by his complaint we are informed: 20

We being willing that such error, if any there be, should, in due manner be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, that if judgment thereon be given, then you distinctly and openly send under your seal, the record and proceedings aforesaid, with all things touching and concerning the same, to our Judges of our Court of Errors and Appeals, in the last resort in all causes, at Trenton, on the tenth day of February, next, together with this writ so that the record and proceedings aforesaid being inspected, we may cause to be done, what of right and according to the law and custom of the State of New Jersey ought to be done. 30

Witness, his Honor, WILLIAM J. MAGIE, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, aforesaid, the twenty-sixth day of January, one thousand nine hundred and six
CLERK.

ALEX. SIMPSON,

40

Attorney.

The answer of the Justices of the Supreme Court within named.

The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of the State of New Jersey, in a certain schedule to this writ annexed, as within we are commanded.

WILLIAM J. GUMMERE,
C. J.

NEW JERSEY SUPREME COURT.

STEPHEN DEMATO	}	In Tort. On Postea.
vs.		
HUDSON COUNTY GAS COMPANY.		

JUDGMENT FOR DEFENDANT.

BEDLE, EDWARDS & LAWRENCE, Attys.

As yet the seventh day of November, A. D. nineteen hundred and one.

Witness, DAVID A. DEPUE, Esquire,
Chief Justice.

WILLIAM RIKER, JR.,
Clerk.

HUDSON COUNTY, ss.

The defendant herein, the HUDSON COUNTY GAS COMPANY, having been duly summoned to answer unto the plaintiff herein, STEPHEN DEMATO, in an action of tort, and thereupon the said plaintiff as and for an amended declaration by Simpson & Lillie, his attorneys, complains:

For that the plaintiff was on the fourteenth day of

September in the year nineteen hundred and one, in the employ of the defendant as a servant of the defendant at the City of Jersey City in the County of Hudson and State of New Jersey, and the said defendant placed and put the said plaintiff to work in cutting iron pipes in which said work it was necessary to use and the said defendant did furnish to the said plaintiff a certain tool known as a chisel, and the said defendant did not at the time it furnished the said tool or use reasonable care to inspect the same or have the same inspected to ascertain if the said tool was in a good condition and fit to be used, and at the time the said defendant furnished the said tool was not in proper condition, especially in and about the top of the said tool, which was not dressed and prepared as the same should have been for use in the work for which it was given to the plaintiff, thereupon the said plaintiff began to use the said tool, ignorant, without fault on his part, that the same was not in a proper and fit condition to be used and thereupon while the said plaintiff was in the use of the said tool, because the same was not in a proper condition, certain pieces of steel flew from the top of the said tool into the eye of the said plaintiff by reason of the negligence of the defendant as aforesaid, which said pieces of steel would not have so flew from the said tool if the same had been in a fit and proper condition, and thereupon by reason of the negligence of the defendant aforesaid, the eye of the plaintiff was permanently and seriously injured and the said plaintiff was thereupon forced to pay out and expend large sums of money endeavoring to be cured of the said injury, to wit, the sum of two hundred dollars to his damage two hundred dollars, and the said plaintiff was otherwise greatly injured in and about his said eye.

Wherefore, the said plaintiff says that he is injured to his damage, ten thousand dollars. Therefore he brings his suit.

And the said defendant, Hudson County Gas Company, by Bedle, Edwards & Lawrence, its attorneys, comes and defends the wrong and injury, when, etc., and saith that it is not guilty of the said supposed

grievances above laid to its charge or any or either of them, or any part thereof in matter and in form as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country, etc.

And the plaintiff doth the like.

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

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

Afterwards, to wit, on the tenth day of April, nineteen hundred and three, at a Circuit Court held at Jersey City in and for the County of Hudson, before his Honor, Jonathan Dixon, one of the Judges of the Supreme Court of the State of New Jersey, according to the form of the statute in such case made and provided, comes as well the within named plaintiff as the within named defendant, and the jurors of that jury being
 30 summoned also come, who to speak the truth of the matters within contained, were tried and sworn; evidence was given to them thereupon by the above named plaintiff, which being insufficient to maintain the said issue on his part, and the said plaintiff being thereupon solemnly called to produce further evidence to support and maintain said action, the said plaintiff comes not, but makes default, nor doth he further prosecute his suit against the said defendant.

Therefore it is considered that the said Stephen Demato take nothing by his said writ and that the said
 40 Hudson County Gas Company do go thereof without day, etc.

And it is further considered by the Court here that the said Hudson County Gas Company do recover against the said Stephen Demato the sum of thirty-one dollars and twenty-five cents for its costs and charges by it—about its defence in this behalf laid out and expended by the Court now here adjudged to the said Hudson County Gas Company and with its assent according to the form of the statute in such case made and provided, and that the said Hudson County Gas Company have execution thereof, etc. Judgment signed this second day of June, A. D. nineteen hundred and three. 10

WM. S. GUMMERE,
C. J.

NEW JERSEY SUPREME COURT.

STEPHEN DEMATO

vs.

HUDSON COUNTY GAS COMPANY.

20

In Tort.
Bill of Exceptions

Be it remembered that on this twentieth day of April, A. D., nineteen hundred and three, at a Circuit Court of the Supreme Court holden at Jersey City, in and for the County of Hudson before the Honorable Jonathan Dixon, one of the Justices of the Supreme Court, the issue joined in the above stated cause coming on to be tried (pro ut the pleadings) by the jury for that purpose duly empanelled and thereupon the attorney of the plaintiff, to maintain the said issue on his part called diverse witnesses who being duly sworn testified as follows: 30

MR. SIMPSON for plaintiff.

MR. EDWARDS for defendant.

This cause was tried at the Hudson Circuit, April 9th, 1903, before Mr. Justice Dixon, with a jury. 40

Plaintiff Opens.

STEPHEN DEMATO, sworn for plaintiff, testifies as follows:

Direct Examination by Mr. Simpson:

I live in Jersey City; have lived in Jersey City 14
 10 years; I remember the 14th, of September, 1901; on that
 day I was working for the Hudson County Gas Com-
 pany corner of Pacific Avenue and Grand Street; I was
 laboring, digging until half past eleven; I had been
 working for that Company three months at labor dig-
 ging with pick and shovel.

Q. Doing anything else?

A. No, sir.

Q. On the morning of September 14th, was your
 work changed?

A. Yes, at half past eleven I was changed to strik-
 20 ing with a hammer by Foreman John Duffy, he told
 me to get hold of that hammer and strike on the chisel;
 a fellow had hold of it outside the pipe, he was holding
 the chisel by the handle.

Q. Was it a chisel like any of these four that I show
 you?

A. Yes, like that short one.

Q. How did the man hold the chisel?

A. There was a handle on it, and he was holding
 hold of the handle, he held the chisel on an iron pipe and
 I was striking the chisel with the hammer, that made a
 30 little mark on the pipe and it cut the pipe.

Q. What happened to you?

A. A chip flew up and hit me in the eye; I had
 been working about five minutes.

Q. What kind of a chip?

A. A chip of steel.

Q. What did you do?

A. I quit then and went home and Monday morn-
 ing I went to New York.

Q. Did you see any doctor?

A. I went and saw Dr. Chambers, and he operated
 40 on me in the City Hospital with an electric business, a
 magnet; he took out of my eye a piece of steel.

Q. After that?

A. I stayed home, had to go three times a week.

Q. Immediately after, what effect did it have on your eye?

A. I could not see at all for about three or four weeks.

Q. Before you were struck with the steel splinter what was the condition of your eye?

A. Good, clear, never had anything the matter with it. 10

Q. Did the splinter leave any mark in your eye?

A. Yes.

Q. How long after you were struck did you go to see Dr. Chambers?

A. On Monday afternoon. I was hit on Saturday.

Q. Did you have any other physician attend your eye?

A. No, sir; only Dr. Chambers; he operated on my eye twice. 20

Q. Have you noticed any change in the condition of your eye since the accident?

A. Yes.

Q. Can you see just as well with it?

A. No, sir.

Q. What is the condition?

A. I cannot see out of my right eye.

Q. Do you notice anything else besides your being unable to see?

A. Yes, it hurts me.

Q. Do you see anything particular? 30

A. No.

Q. See any colors?

A. No, sir.

Q. How long after you were struck before you were able to go to work?

A. About six weeks.

Q. At the time this happened did you know anything about steel chisels?

A. No, sir.

Q. Had you ever used any before?

A. No, sir, I never used any, never worked with any. 40

Q. Was anything said to you by the foreman when he put you to work beside what you have told us?

A. No, sir.

Cross-Examination by Mr. Edwards:

Q. How old are you?

A. Twenty-three.

Q. What work have you been doing this morning?

10 A. Labor, pick and shovel, digging the trench for the pipe.

Q. How many men were working with you?

A. About sixteen men.

Q. Who was the foreman?

A. John Duffy.

Q. He hired you?

A. Yes.

Q. When did he hire you?

A. I worked three months until September when I got hurt.

20 Q. Where did he hire you?

A. On West Side Avenue.

Q. What pay?

A. \$1.50.

Q. Why did he ask you to do something else?

A. They were striking at a pipe. I had seen them doing it at a distance.

Q. And the laboring men did that work?

A. No, they had a mechanic to do that work, they was getting \$1.75 and I was getting \$1.50 the pipe cutter did that work.

30 Q. They always had laborers to do the striking?

A. No.

Q. What kind of a hammer did you have?

A. Eight pound hammer.

Q. You always used hammers before?

A. No, sir.

Q. Never did any striking work before?

A. No, sir.

Q. Never hit a chisel?

A. No, sir.

40 Q. How long had you been hammering?

A. Five minutes.

Q. What happened?

A. Chip of steel flew up.

Q. You had another trial before?

A. Yes.

Q. That time you said it flew from the iron pipe?

A. No, sir, I didn't.

Q. How do you know it came from the chisel?

A. It must come from the chisel.

Q. How do you know it came from the chisel? 10

A. It could not come from a cast iron pipe, splinters never fly from a cast iron pipe; splinters never fly from a cast iron pipe.

Q. How do you know, haven't you seen or heard of men being injured by the flakes coming up from the pipe?

A. No, sir.

Q. You never saw this splinter that hit you?

A. No, sir.

Q. So you don't know whether it was steel?

A. No. 20

Q. You don't know where it came from?

A. I got it in the eye any how.

Q. But where it came from you didn't know, did you?

A. No, sir.

Q. Didn't you keep on working that day?

A. Yes.

Q. Finished the day out?

A. Yes.

Q. When did you get through work that day?

A. Half past five. 30

Q. What time did the splinter fly in your eye?

A. Half past eleven.

Q. You went on with work after this happened— did you keep on striking?

A. No, sir.

Q. Somebody else came there?

A. Yes.

Q. They used that same chisel?

A. Yes.

Q. And finished the work? 40

- A. Yes.
- Q. You saw them doing it?
- A. Yes.
- Q. What did you do on Monday?
- A. I didn't go to work on Monday.
- Q. Which eye was it?
- A. Right eye.
- 10 Q. Is there any mark of the splinter there now?
- A. Yes, you can see it.
- Q. You went and saw Dr. Chambers?
- A. Yes.
- Q. Where is Dr. Chambers' office?
- A. Jersey Avenue.
- Q. How long did you go to Dr. Chambers?
- A. About three weeks to his house.
- Q. What did he do the first time?
- A. Operated. Laid me on a table in the hospital, I don't know what they done, they took the chip out.
- 20 Q. They didn't cut?
- A. No.
- Q. They simply put a magnet in and drew the chip out?
- A. Yes.
- Q. How long did Dr. Chambers serve you.
- A. Three weeks at his house, three times a week.
- Q. After that did you go back to work?
- A. Yes, as watchman nights.
- Q. How long did you stay with the Gas Company?
- A. About two weeks, then they laid me off.
- Q. What work have you been doing since?
- 30 A. Railroading on the track at \$1.30 a day, steady work.
- Q. You can do as much work as you ever could?
- A. No, sir, I haven't done a full month since because me eye hurts me.
- Q. How?
- A. The same as if you stick it with a needle; cold weather and hot weather, a day like today it hurts me.
- Q. Did you have any other doctor than Dr. Chambers.
- A. Only Dr. Chambers.
- 40 Q. Can't you see the light out of that eye?

- A. A foggy light.
- Q. You can see my hand?
- A. Yes, it seems to be as big as a house.
- Q. Can you read with it?
- A. No, sir.
- Q. Can you read or write?
- A. No, I can't read or write.
- Q. Who are you working for now?
- A. The D. L. & W. Railroad. 10
- Q. How long have you been working for them?
- A. Last month.
- Q. Before that?
- A. For the Gas Company, digging.
- Q. How much have you worked for the Gas Company?
- A. Two years off and on.
- Q. How much have you worked for the Gas Company since this accident?
- A. Two weeks. 20
- Q. Who did you work for next?
- A. For some contractor, digging cellars.
- Q. You worked all around town?
- A. Yes.
- Q. Been working all the time?
- A. Not all the time, a couple of days a week, or three; I could not work my eye hurt me and it hurts me yet.
- Q. Can you tell in the morning whether you can work or not.
- A. I can tell. If my eye hurts me I stop and go home. 30
- Q. Were you sworn at a former trial?
- A. Yes.
- Q. Didn't you swear you were hit in the eye from a chip from the pipe?
- A. No, sir.
- Q. Sure about that?
- A. Yes.
- Q. Did you on the former trial when you were sworn say anything about a splinter from the chisel?
- A. I don't believe we got that far. 40
- Q. Were you on the stand?

A. Yes.

Q. You said nothing about a splinter from the chisel?

(No answer).

Q. (Mr. Simpson). How soon after you hit the chisel with the hammer did this thing fly in your eye?

A. I stopped right then. The steel came into my
10 eye with the last blow, immediately.

Adjourned for the Day.

SECOND DAY'S PROCEEDINGS.

MR. EDWARDS: In this case I am somewhat surprised. The transcript I see contains but one plea, the general issue. There was first the declaration, then a
20 plea of the general issue and a plea of release, and replication was filed. Then an amended declaration was filed and the only plea filed, through mistake, was the general issue.

MR. SIMPSON: I will consent to the filing of the special plea if I may file a replication setting out fraud in the obtaining of the release.

30 MICHAEL T. DOWNS, sworn for the plaintiff, testifies as follows:

Direct Examination by Mr. Simpson:

I live in Jersey City; have lived in Jersey City 32 years, all my life.

Q. What is your occupation?

A. General mechanical engineer.

Q. Have you had any experience with steel chisels for the purpose of cutting iron pipes by means of blows from a hammer on a chisel?

A. I have on feed and water pipes during the time
40 I have been working at the business, that is 19 years.

Q. During that 19 years you have continuously had experience with the use of steel chisels?

A. Yes.

Q. What kind of work?

A. Beside iron pipes I have experience with castings, boilers, shafting, steel work.

Q. I show you a steel chisel, the same one that was showed yesterday to the plaintiff, and ask you if you have had any experience with that kind of a chisel? 10

A. Yes, I have.

Q. I show you a second chisel which is a trifle larger than that, and ask you if you have had any experience with that kind of a chisel?

A. I have had. It is similar to the other, only for larger work.

Q. Are they both steel chisels?

A. Of the same nature.

Q. In the use of a steel chisel to cut a cast iron pipe by means of blows delivered on the same by a hammer do you know whether it is not possible to prevent splinters of steel flying from the head of the chisel? 20

A. I call that a scale, I don't call it a chip.

Q. Steel scale?

A. Yes.

Q. Under what conditions would a scale fly from a steel chisel?

A. The cutter not being in ordinary and proper shape, by that I mean the chisel could be dressed, and it would be new, and there would be nothing like that to fly. And the chisel could be in ordinary condition and it would not fly until it got beaten altogether out of proper ordinary way of working it. 30

Q. Is it physically possible for a splinter or scale of steel to fly from the chisel which you refer to as being not in a proper or dressed condition?

A. It cannot fly from a chisel that is in a proper or dressed condition.

Q. What kind of chisel is it from which a scale will fly?

A. A chisel something similar to this one. 40

Q. What is there in that condition?

A. It is not fit to be used.

Q. Why not?

A. On account of it being scaly and battered over like it is.

Q. What produces the scaly condition?

A. Continual beating of a hammer in use.

10 Q. How long a time would it require in use to put a steel chisel which was in good condition into a scaly condition?

A. It all depends on who is striking it.

Q. Supposing an experienced man was striking it how long would it take?

A. Ordinarily about two or three months.

Q. Is there any way after it gets out of order and unfit for use to put it in a condition in which it may be fit to be used?

A. Yes, give it to the blacksmith or the tool dresser and they dress the head off, put it in the fire and dress
20 it up.

Q. In cutting iron pipe with a steel chisel what is the effect upon the pipe?

A. Cast iron pipe—it is an integral break you try to form, you don't hit as hard as you do a steel pipe because if you hit cast iron pipe too hard you don't know where it will break; you must lead your cutter around and not strike too hard and the blow makes a slight indentation, according to the blow.

Q. Does it affect the texture of the pipe?

A. Cast iron goes into a powder or small frag-
30 ments.

Q. When a steel splinter flies from the head of a chisel by striking with a hammer what direction does the scale take?

A. It all depends upon how the tool is hit with the hammer. This first chisel has been hit by an inefficient laborer, it is struck to one side instead of being struck fairly on the top. If it was struck fairly on the top the scale would go off either way; if it was struck one side it might come back and hit him on the wrist, if it is struck on the side the scale has got to go off on

40 the upper side because the weight of the blow is underneath. Sometimes the scale will go six to eight feet.

Q. Is there any way of ascertaining whether or not the chisel is in a scaly condition?

A. It is perceptible to the practical eye of a man that is handling these tools.

Q. An experienced man can see by looking at a tool that it is in a scaly condition?

A. Yes.

Q. That large chisel is that in good order?

10

A. It is in fair ordinary good shape.

Q. That small chisel?

A. It is in very bad shape.

Q. Would it be physically possible for a splinter of steel to fly from the top of that large chisel in use?

A. No, sir, not until it gets in bad shape.

Q. Would it be possible for a scale to fly from the chisel as it is now?

A. No, sir.

Q. What is the size of the face of an eight pound hammer?

20

A. Two inches and a half.

Q. Bigger than the head of this?

A. Yes.

Q. (Mr. Edwards showing witness a hammer). Is that the size of an eight pound hammer?

A. Yes.

Cross-Examination by Mr. Edwards:

Q. Where are you working now?

A. Hudson County Electric Light plant at Snake Hill for County.

30

Q. Do you make a business also of testifying as an expert in cases of this kind?

A. No, sir.

Q. Haven't you testified in a great many cases in this Court?

A. No, sir, none at all.

Q. Where did you get your experience in working on cast iron pipe?

A. I have been with the Jersey City Electric Light Company in Bay and Grove Street, started with them; they have had the cutting of cast iron pipes of differ-

40

ent kinds, and of feed water pipe, and cutting of foundations of engines, shafting, pulleys, key-ways.

Q. Tell us how these chisels are held?

A. This small chisel is held with a handle in it, generally about 18 inches long.

Q. Look at this (showing witness a handle).

A. Yes, like that.

10 Q. What is the object of that?

A. So it will be easier for the man that is holding it, so there will not be so much strain on the wrist, so also that in case the blow misses it will not hit him.

Q. That is held by any ordinary man?

A. An ordinary experienced man; not an ordinary laboring man.

Q. An ordinary laboring man of ordinary intelligence?

A. Any ordinary laboring man can hold it, yes.

20 Q. How long would it take a man to learn to hold it properly?

A. Some longer than others.

Q. A day or two?

A. Yes.

Q. A man that had been working at that kind of work a day or two would soon learn to do it?

A. He would continue to learn.

Q. How about the striking by a laboring man, take the ordinary job—a laboring man doing the striking?

A. Yes, we have regular men for that work, that is men what they call pipe men, fitters or cutters.

30 Q. The men that hold the hammer?

A. They are a better grade of men than ordinary laborers.

Q. The men soon get used to that kind of work?

A. Yes, if they are kept at it.

Q. It does not take very long to learn to strike?

A. It does take time, it may take a week or two, after that he ought to understand something about it. It all depends upon who is breaking them in.

Q. Were you a witness in this case before?

A. Yes.

40 Q. You started as a witness in this case?

A. Yes.

Q. When the blow hits the cast iron pipe what happens then—does any scale fly from that?

A. Not from cast iron.

Q. What becomes of the substance that is cut, does it fall off into splinters or powder?

A. Goes into powder, into small fragments.

Q. Wouldn't it fly off in fragments as large as a scale?

A. It would not fly like steel. 10

Q. It would fly off in the same sized fragments?

A. The fragments could be bigger or smaller.

Q. There are fragments constantly flying from cutting cast iron?

A. They fly down.

Q. They are flying somewhere—whether down or up—they fly off?

A. Yes, the way the cutter is—cast iron won't fly up.

Q. Suppose the man holding the hammer lets it fall to one side a little, or if the man flinches when the blow comes? 20

A. It don't go up to any distance.

Q. Does it not depend upon the steadiness with which the man holds the chisel as to where the blow strikes it?

A. Yes.

Q. The man holding it may not hold it steadily and that would give a cause for a glancing blow?

A. Yes.

Q. Just as liable a cause as the man hitting it on the side? 30

A. A man not hitting it is an inferior man.

Q. The man that does not hold it perfectly steady is an inferior man too?

A. Yes.

Q. How many men do they have striking the blows?

A. Two men.

Q. They are alternating blows?

A. Yes.

Q. And repeated quite quickly?

A. It all depends on the way the men are working. 40

Q. If you saw a chisel in the condition this larger chisel is would you say that is in perfect proper shape?

A. Not perfect, it is in good shape.

Q. You would find no fault with the use of that chisel?

A. No, but you would have to catch it.

Q. When this instrument is out of order the men that had the best knowledge of that are the men that
10 are using it?

A. Yes.

Q. The strikers and the cutters?

A. Yes.

Q. And in the business where they are using these they are constantly being sent to the blacksmith?

A. Yes, when it is necessary.

Q. Don't they have to send them to the blacksmith for another reason besides the top?

A. They have to have them sharpened.

Q. And they won't do their work unless they are
20 sharpened up?

A. No.

Q. How long will they continue to work before they need sharpening?

A. It all depends upon the temper.

Q. Will the sharpening wear out quicker than the top?

A. It all depends upon the temper; sometimes the edge will wear the head down twice.

Q. And sometimes the head will wear the edge
30 down twice?

A. Yes, may be a dozen times.

Q. Which required the most attention so far as keeping it in order—the head or the cutting end?

A. That depends upon who you have dressing the tools.

Q. Don't they use different styles of chisels on different sized pipes?

A. Yes, they do.

Q. Can you tell the style of chisel that is ordinarily used on a 20-inch pipe?

40 A. On a 20-inch pipe either one of these would do —this small one is kind of light—it is rather small.

Q. What kind of steel is the top of the chisel made and what kind is the cutting end made of?

A. Generally both the same nature; they put soft steel on the head purposely and the cutting end is tempered.

Q. Isn't it necessary there should be soft steel on the head?

A. Yes, so as to keep it from fracturing and flying. 10

Q. If it would not bend on the top there would be danger of fracturing?

A. Yes.

Q. So the fact that this steel falls over on the side is not a defect in the steel?

A. No, sir.

Q. That is necessary to the use of the implement?

A. It has got to go.

Q. And the only question is whether they keep it going too long?

A. When they get unfit for use they should be fixed up. 20

Q. There is a point when that should be discovered?

A. Yes.

Q. This dressing up of the chisels—where does that take place?

A. In the blacksmith shop.

Re-Direct Examination:

Q. What direction does the cast iron fragments fly from the pipe? 30

A. They fly off to the side—not any distance.

Q. Do they fly up or down?

A. They fly sideways.

Q. They don't fly up?

A. No, they don't fly up.

A. It depends upon the way it is struck with the hammer.

Q. Which direction will steel splinters fly?

A. It all depends upon how they are struck with the hammer, the angle with the face of the hammer; if they are struck fair they will fly off on the side; they fly up when the cutter its not hit right by the hammer. 40

- Q. What is the right way to strike it?
 A. Strike it fair.
 Q. How about striking it on the side?
 A. That is anything but fair if it is struck on the side.
 Q. Then which direction will the splinter fly?
 A. The way the hammer is facing; if it is hit too
 10 far over it will fly from the highest side of the hammer.
 Q. You have said it depends upon the position the chisel was held. If the chisel is in good condition no matter which way it is held will a steel splinter fly from it?
 A. No, it is impossible.
 Q. In what position does the man take in holding the chisel in cutting a twenty-inch pipe?
 A. You mean how he stands—it depends upon where the pipe is. If it is lying on the floor he will stand so the cutter is held on the edge. The cutter is
 20 held so that the man has to strike up sometimes. It all depends upon the room you have to work in.

EDWIN M. WEILD, sworn for plaintiff, testifies as follows:

Direct Examination by Mr. Simpson.

I live at 516 Grove Street, Jersey City; am a practicing physician in Jersey City. I am graduate of the
 30 College of Physicians and Surgeons, Baltimore.

Q. Have you seen this plaintiff recently?

A. I have. I have examined his right eye; I first examined it during last week I believe; I have examined it two or three times.

Q. In what condition did you find it?

A. I found a scar in the inner lower quarter of the cornea, and the iris torn.

Q. Has that any effect on the sight of the eye?

A. Yes, it spoils the refractive effect of the cornea; it interferes with the light entering the eye in a proper
 40 way.

Q. (By the Court). When he looks at an object what diminution does it cause, if any?

A. It causes diminution. The cornea is the lens, it fails to produce any image on the retina; whatever he sees he sees with a blur and indistinct. This is a permanent effect.

Q. As to distances, can he see as well with that eye now as if it were in a normal condition?

A. He can make out at 18 feet what should be seen at 160—not even so plainly—he can just make out what it is. 10

Q. Can he recognize a man three or four feet away?

A. He can recognize an object that far away, but not even a friend so as to know his face.

Q. Does that condition of the eye produce any pain?

A. The effort on the part of the other muscles of the eye in trying to overcome this defect will cause pain, a pain or spasm of the muscles.

Q. What muscles?

A. The ciliary muscles; they are in the eye. 20

Q. That effect on his vision is it permanent?

A. Permanent.

Q. When you examined his eye could you tell from that examination what was the cause of that condition of the eye?

A. There is a linear scar which could only be caused by something with a cutting edge.

Cross-Examination by Mr. Edwards:

Q. Are you a specialist in this line?

A. I have examined quite a number of eyes; I am not a specialist in anything, I follow the general practice of medicine. 30

Q. If you have a case of this kind do you call in some oculist?

A. I never have, and never will if I can help it.

Q. You have no particular practice in this line?

A. I have had quite considerable experience with eye trouble.

Q. How many cases?

A. I have examined and had say two thousand cases. 40

Q. For glasses or for injuries to the eye?

A. Not for injuries.

Q. Would you say 50?

A. Yes, 50, I never kept a record of each case.

Q. Isn't it amongst doctors and surgeons considered that the eye is a special branch requiring men of special skill?

A. It is to those who do not pay attention to it.

Q. Even more so than any other branch?

A. No, sir.

10 Q. How did you examine him?

A. With an ophthalmoscope and a retinascop.

Q. You have to rely upon what the man tells you?

A. What the man tells you has nothing to do with the examination, it is what I find.

Q. What you told us does not depend at all on what he told you?

A. I know the light cannot refract perfectly through a scar of that kind.

Q. What percentage of his eyesight has he lost in that eye?

20 A. He retains sixteen one-hundred-and-sixtieths, that is one-tenth per cent.

Q. How do you figure that?

A. We have cards, test types, and certain distance with a normal eye; you can see the type at a given distance.

Q. When did you first see this man?

A. About a week ago.

Q. You never prescribed for him or did anything for him?

A. No, sir.

30 Q. You simply examined him for the purpose of testifying?

A. Yes.

Q. Which muscles of the eye are strained?

A. The ciliary muscles in the first place, but where there is a strain of one muscle it affects the others.

Q. How does that cause him pain?

A. Any strain or spasm on any muscle causes pain.

Q. It is a severe pain?

A. You can judge by holding your arm in one position and seeing what pain that causes.

40 Q. When a man gets accustomed to that strain of the muscle the pain will disappear after a while?

A. With the loss of the eye,—as long as there is energy in the eye.

Q. Suppose he retains the ten per cent of the energy of the eye?

A. He will have the pain that long.

Q. Will that eye grow worse?

A. Yes, eventually atrophy from unuse.

Q. Does this prevent him from doing physical work? 10

A. It does not affect his arms at all.

Q. It does not affect his capacity to do manual work?

A. It does not affect any other part except the eye.

Re-Direct Examination:

Q. You have said that eventually from atrophy the pain will disappear. Do you mean the loss of the entire sight of that eye?

A. Yes. 20

Q. Is that a probable result?

A. Yes, I think it is.

STEPHEN DEMATO, recalled by plaintiff, testifies as follows:

Q. When you were struck were you standing or kneeling?

A. Standing.

Plaintiff Rests. 30

Defendant asks for a nonsuit on the grounds,

First.—That no negligence on the part of the defendant has been shown, and

Second.—That this was one of the risks of the employment that the plaintiff assumed.

Third.—There is no evidence that the tools were not proper, and that if there was any negligence at all it was the negligence of a fellow servant; if the tool was defective it was the negligence of a fellow servant in 40

not detecting it, in not discovering it, and having it remedied.

The Court hears argument of counsel on both sides on the motion to nonsuit.

Nonsuit will be ordered.

10 Plaintiff prays exception, which exception is allowed and the same is signed and sealed accordingly.

JONATHAN DIXON,
J. S. C.

[L. S.]

COURT OF ERRORS AND APPEALS IN THE
LAST RESORT IN ALL CAUSES.

STEPHEN DEMATO

vs.

HUDSON COUNTY GAS COMPANY.

On Error.
Assignments.

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And now on this tenth day of February, in the year one thousand nine hundred and six, comes the above named plaintiff, by Alexander Simpson, his attorney, and assigns as error and reasons for the reversal of the judgment of the Supreme Court, the following matters and things:

30 First: That the said Court directed a judgment of non-suit to be entered against the plaintiff in error, whereas, it should have submitted the cause to the jury empanelled to try the same, for the reason, that there was evidence produced in the said cause from which the said jury might have found that the defendant was guilty of negligence and of a failure to fulfill its duties as the master of the said plaintiff.

40 And because, there was evidence from which the jury might find that the plaintiff did not assume the risk of the happening of the accident, which caused the injury upon which the said cause was based.

And, because upon the evidence submitted at the trial, of the said cause, it was a question for the jury, as to whether the plaintiff was guilty of contributory negligence in the premises.

Wherefore, the plaintiff in error prays that the judgment of the Supreme Court may be reversed and set aside and that the plaintiff in error may be restored to all things which he had in the premises before 10 the judgment of the said Court.

ALEX. SIMPSON,
Attorney of Plaintiff in Error.

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