

New Jersey Court of Errors and Appeals.

PIERCE,	}	10
28		
CAMDEN, GLOUCESTER & WOODBURY RAILWAY CO.)		Brief for plaintiff in error.

I.

To my mind this is an important case. 20

II.

The plaintiff's intestate was killed September 15th 1894 under these circumstances: He was a conductor for the defendant, a trolley company. He went to work for the defendant August 13th 1894 as an extra hand and remained in their employment until he was killed, a period of about one month. He actually worked for the defendant about two weeks. During these two weeks he worked some of the time along the route on which he was killed; and some of the time on another route of the same Company. So that it is clear he worked on the route where he was killed a very short time. 30

The defendant had double tracks. The route ran between Camden and Woodbury, a distance of about seven miles. Just

outside of Woodbury, in the country, the defendant had six large poles, similar to telegraph poles, between the two sets of tracks, to support wires. One of these poles was six inches and one half of an inch distant from the step running longitudinally along the side of the car for the use of passengers and the conductor in collecting fares. Soon after 10 o'clock in the evening, a very dark evening, of September fifteenth, the plaintiff's intestate, while collecting fares and while in the act of recording a fare by pulling a cord used for that purpose and while standing on this step, was struck by the pole just mentioned and killed. The car was going at a high rate of speed. There was a fraudulent effort made by the defendant, after the accident, to get the plaintiff to sign a release. The poles in question were removed soon after the accident.

- 20 It must be noticed (1) that the intestate had been over the route in question a few times, only one time being definitely proved; (2) that the pole in question was dangerously near and so near as to strike the intestate, not while he was leaning out, but while he was registering a fare; (3) that there were only six poles between the tracks; (4) that the intestate was a conductor whose business it was to collect fares, register the same and look after the safe conduct of the passengers; (5) that the performance of his duties in no sense involved his inspection of the road and the poles; (6) that it nowhere appears affirmatively that he had any knowledge whatever of the poles or their proximity, nor was there any evidence justifying the inference of such knowledge; (7) that the car had a longitudinal foot platform on each side for the use of passengers and the conductor and a registering cord

on each side of the car ; (8) that it was a very dark night ; (9) and that the intestate may have passed the pole in question many times without either having seen it or without having to be on that side of the car to perform his duties. On this showing a non-suit was ordered.

III.

The motion to non-suit rested on two grounds: (1) that the intestate was an experienced railroader and had personal knowledge of the dangerous instrument that killed him; (2) because the intestate was unnecessarily on the side of the car where the danger was. The latter proposition is involved in the former. As to the first proposition in point (1) it is enough to say that experience upon a properly constructed road would tend to throw the intestate off his guard in working upon an improperly constructed road. If the intestate had actually been trained to perform the functions of a conductor upon a road free from such contrivances as killed him, he would be much less likely to expect such murderous arrangements upon another road where his duties were similar. Further the evidence is that he was along the route in question a few times only. He may have travelled it for months and not have noticed the proximity of the pole. There was nothing to bring it necessarily to his attention.

As to the second proposition in point (1) it is sufficient to observe that there is no evidence to show, nor from which it may be fairly inferred, that the intestate knew of the danger or should have known it. There is no presumption of negligence. Negligence must be proved whether on the part of the defendant or plaintiff. On the contrary there is some presumption from the

situation itself that the intestate did not know of the danger. First, nature prevents any man from knowingly subjecting himself to certain injury. Had the intestate known of the dangerous proximity of the pole, he would naturally have avoided it. Next, his business in no way required him to observe the proximity of the pole. His duty was in the car with passengers, the collection of their fares, the registration of the same and the passengers' safe conduct, and not in any sense with the construction of the road or the proximity of the poles to the car. Again, this pole was out in the country where the intestate would seldom be called to the side of the car where he could or would likely notice it. Besides, when his duty did call him to the side of the car, it was very dark. In addition, the fact that there were no such poles at other points along the road where his duty called him to the side of the car would naturally lead him to suppose that the entire route was free of such danger and would not lead him to anticipate the unsafe proximity of poles at the place where he was killed. Further, there were recording ropes on each side of the car, and, with his attention limited to his duties, he might have passed this pole several times without seeing or noticing it. Lastly, he had a legal right to assume that the poles were not dangerously near and that he could safely perform the duties assigned to him by the defendant without jeopardy of his life. If his duty in any respect required him, during the rapid flight of the car to deal with these poles, to observe their proximity and the danger involved, it would have been another matter. The defendant legally assured the intestate that his duties could be performed with a reasonable measure of safety. There-

fore he was not called upon to depart from the performance of his duties and couple with them an inspection of the defendant's road in order to see if he could pursue his work in safety. The proposition in the motion to non-suit was not alone untenable but monstrous. It permitted the intestate to accept the defendant's assurance that the instrumentalities furnished him by it for the performance of his duty were reasonably safe and at the same time required him to depart from his duties to inspect such instrumentalities to see if they were reasonably safe. It would therefore seem clear that the grounds of the motion to non-suit were unsound. 10

IV

It seems to me that the trial court was in palpable error in stating the reasons for allowing the motion. "If negligence could be assumed and if it could be assumed that the pole which struck the deceased was the only one within six and one half inches there might be some ground of argument as to the latency of the danger". The learned court then proceeds to say that the poles were very dangerous and that the defendant was in no wise negligent but the plaintiff was negligent. In the recent case of *Simons vs Fruit Growers Union* the same Judge said "Wherever there is a contract of hiring the law puts in, as a part of the contract, that the tools or implements that the master furnishes to the servant to work with, shall be reasonably safe, and also that the master will exercise reasonable care to keep them in that condition. If a servant is injured while in the employ of a master because of the failure of the master to do either of those things, he is entitled in law to recover." 20 30

This is a correct statement of law. But, if the poles in question were dangerous, if the contract was one of hiring, if the car, tracks, poles &c., were tools given by the master to the intestate to work with, it would seem to be clear enough that the court was wrong in holding that the defendant had not violated its duty. And the court was equally wrong in saying that negligence could not be assumed and at the same time assuming it on the part of the intestate.

V

The above statement of the law embodies the rule that should have been applied to the case at bar. But the court proceeded to solve the case on an assumption of fact which the case will not warrant. And that view is subject to the following criticism.

The law unquestionably is this: "A servant does not assume the risk of any danger arising from unsafe and defective methods, surroundings, machinery, or other instrumentalities, unless he has, or may be presumed to have, knowledge or notice thereof."

A. & E. Ency. of Law, Vol. 14, p. 843 and cases cited. "And it may be observed, in this connection, that it is one thing to be aware of defects in the instrumentalities or plan furnished by the master for the performance of his services, and another thing to know or appreciate the risks resulting or which may follow from such defect. The mere fact that the servant knows the defects may not charge him with contributory negligence or the assumption of the risk growing out of them. The question is did he know, or ought he to have known, in the exercise of common sense and prudence, that the risk, and not merely the defects, existed."

Id. and authorities cited.

The intestate might have known that the six poles were along the route, although there is no evidence that he did, nor is there proof from which it may fairly be inferred that he had such knowledge, but the question is did he know, that, in the ordinary performance of his duty, the pole was so close as to endanger his life? He might have seen the pole or poles, but how can it be conceived that he would know that the pole was close enough to kill him while in the proper performance of his duty? He might have seen that the poles would be dangerous to one leaning out of the car, but how can he be supposed to know that the pole would hit him when not leaning out? He might have seen that the poles were close, but how can he be expected to have learned, in the rapid flight of the car past them and while he was engaged in his duties, that the pole would kill him while on the step furnished by defendant for the performance of his duties and while he was performing them? 10 20

Again "Although an employee assumes all the hazards reasonably incident to the service in which he engages, he has a right to rely on the fact, when placed in a situation of danger, where engrossing duties are required of him, that the employer will not, without proper warning, subject him to other perils unknown to the employee, and from which the work exacted necessarily distracts his attention." 30

Id. p. 855 and cases cited. No doubt the inference of fact would be justifiable that the intestate, while performing his duties of conductor, would be quite as unlikely as a passenger to observe the danger which resulted in the loss of his life.

"A company is likewise liable if it fails to keep its track free from obstructions and structures dangerously near the same."

Id. pp. 881 and 882 and cases cited.

"Railroad Companies have been held to be negligent in permitting an awning of a station house to overhang the track."

Id., note 4, and cases cited.

10 "Or a telegraph pole to stand within eighteen inches of the track," id. and cases cited; also for erecting a cattle chute so close as to endanger employees, id. and cases cited; also for having a stump, unknown to the employee, too close to the track, id. and cases cited; also for having a post too near, Id. and cases cited, or beam, id. and cases cited.

But where such structures, including overhanging bridges, are known by the employees to exist he assumes the risk, id. p. 850 and cases cited. It must, however, appear that he had such knowledge.

20 In the case of *Baylor vs. The Del., Lack., & W. R. R. Co.*, 11 Vr. 23, the Chief-Justice said it did not appear "that it was customary for railroad Companies to build bridges spanning the public road with an elevation sufficient to admit of a man to pass under who was standing upright on the top of a car." Had such been the custom the case would have been different. While there is no proof, on the point of custom, in the case at bar, it is
30 common knowledge that it is customary to put poles where they will not kill employees while in the strict performance of their usual duties. The brakeman's usual duties are to be outside of the cars, on top of them, and anywhere in relation to them that his duty may call. His duty necessarily informs him of the proximity of structures along the road. Not so with the conductor of a trolley car. His duty would never call upon him to

accurately observe the structure of the road and its surroundings. It cannot be regarded in any sense in the course of his duty, his ordinary duty, to make such observation.

In the more recent case of the New York, S. & W. R. Co., vs. Marion, 30 At. Rep., 316, while the main proposition of Eaylor vs. Del. Lack. & W. R. R. Co., 11 Vr. 23, was assented to, it was well said "upon the evidence, it might well be deemed difficult, if not impossible, for a brakeman to calculate the distance of the bar from the roof of a car, and to determine whether or not it was a danger to his safety." The fact is this statement of the law, to be full and correct, would apply to any structure, under the circumstances given, where it would "be difficult for a brakeman to calculate the distance &c." Mere size will not lessen the difficulty of making such calculation and it is absurd to measure such difficulty by the size of the object. The true rule is stated above and consists of the difference in seeing the object and appreciating properly the risk under given circumstances, and this, where the circumstances do not show knowledge on the part of the plaintiff, must certainly send the case to a jury to ascertain whether a plaintiff did have or must have knowledge. The law itself justifies the inference on the part of an employe that the surroundings furnished him by his master are reasonably safe, that structures, bridges, and other obstacles are at a reasonably safe distance, or will be. The servant can legally rely upon this rule. Hence, if he is injured by objects which he may see, but sees them under such circumstances as to make it difficult to apprehend the danger, the question must go to a jury. Much more would this be so in the case of a conductor whose duty will

not, in the course of its performance, lead him either to see such object or properly appreciate the danger of their proximity.

10 Again the court said "upon the evidence in this case, questions arose as to whether such notice had been given to Marion, and whether he had otherwise acquired knowledge of the danger to which he was exposed by this risk. These were questions for the jury." In the case at bar there was no proof that the intestate knew of the poles, nor was there proof that he should have known them, much less that he knew or should have known how close they were and much less that he knew or should have known that, while in the usual performance of his duties, the pole would hit him. Nothing in the nature of his employment, as is the case with the brakeman, required him to deal with or observe the poles; but, on the contrary, the brevity of his employment and
 20 its character may not have permitted the intestate to see the poles nor have the least knowledge of their existence and proximity. When he passed them, on other occasions, he may have been in the car or on the other side of it, so engrossed in his duties, as to not notice the poles at all. Indeed the fact of getting struck would suggest strongly that the intestate had no knowledge of the poles, or he would have avoided them. The trial court erred
 30 in assuming to be true that which the evidence did not even suggest, or, if it did, it was a question for the determination of the jury.

Wherefore it is respectfully urged that the judgement of nonsuit should be reversed and the case remanded for trial.

Respectfully,

JOHN W. WESCOTT,

Attorney for plaintiff in error.

New Jersey Court of Errors and Appeals.

REBECCA C. PIERCE,

Plaintiff in Error,

VS.

CAMDEN, GLOUCESTER AND
WOODBURY RAILROAD COM-
PANY,

Defendant in Error.

10

IN TORT.
ON ERROR.

20

DEFENDANT'S POINTS.

(I.)

30

The plaintiff knew of the proximity of the poles to the track and cars, having been a conductor on the road for some time, and assumed the risk they presented to him as a conductor on that route, pp. 33,37. Therefore the present action cannot be sustained.

Bailor vs. The Del., Lach & W. R. R. Co., 11 V. page 23.

Smith vs. Irwin Co., 22 V., 507.

Toley vs. Jersey Electric Light Co., 25 V., 411.
Lovejoy vs. B. & L. R. R. Co., 125 Mass., 82.
Williamson vs. Newport News & Miss. Valley R.
R. Co., 34 West Va., 657.
Jennings vs. Tacoma Ry. & Motor Co., Sup. Ct.
of Washington, 34 Pacific Reporter, 937.

*Haley vs. Jump River Lumber Co. 81
421, 426. X (II.)*

The Action will not lie for the further reason, that
to the deceased was negligent. The night being dark,
and the rate of speed of the car being very great, he
was careless in unnecessarily being present on that side
of the car, at the time his car was approaching the line
of poles between the tracks, page 39.

J. WILLARD MORGAN,

Attorney.

D. J. PANCOAST,

Counsel for Defendant Co.

*x Nells vs. The B.C. Rte 56 Iowa 524
Clark vs. Ry. Co. 28 Minn 129, 130, 131
Brossman vs. Ry. Co. 113 Pa. St. 490, 491
Missouri Pac. Ry. Co. vs. Jones 71 Texas
Reynolds vs. Maddox 16 D. B. 332
Barley Martin Haber 5 Ark 145, 162, 163*

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NEW JERSEY COURT OF ERRORS AND APPEALS.

REBECCA C. PIERCE,

plaintiff in error,

vs.

CAMDEN, GLOUCESTER AND WOODBURY

RAILROAD COMPANY,

defendant in error.

In Tort

on error.

STATE OF THE CASE.

JOHN W. WESCOTT,
HENRY S. SCOVEL,

for plaintiff in error.

J. WILLARD MORGAN,

for defendant in error.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

REBECCA C. PIERCE,

plaintiff in error

and

CAMDEN, GLOUCESTER AND

WOODBURY RAILROAD COMPANY,

defendant in error.

On error

State of the case.

10

Writ of error.

NEW JERSEY, ss.

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

20

L. S.

For as much as in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you, between Rebecca C. Pierce, plaintiff, and the Cam-

den Gloucester and Woodbury Railroad Company, defendant, in a plea of tort, manifest error hath intervened to the great damage of the said Rebecca C. Pierce, as it is said:

30

We being willing that the error, if any there should be, should in due manner, be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceeding 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 third day of June, next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right and according to the law and custom of the state of New Jersey ought to be done.

10 Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the fourteenth day of May, A. D., eighteen hundred and ninety five.

HENRY C. KELSEY,
Clerk.

JOHN W. WESCOTT,
HENRY S. SCOVEL,
Attorneys.

RETURN.

20

The answer of Mercer Beasley, Chief Justice within named:

30 The records and proceedings of the plea where-of mention is within made, with all things concerning the same. to the Court of Errors and Appeals in the last resort in all causes, within specified, at the day and place within contained, I certify in a certain schedule to this writ annexed, as I am within commanded

MERCER BEASLEY,
Chief Justice.

NEW JERSEY SUPREME COURT.

THE CAMDEN, GLOUCESTER	}	In Tort.	10
AND WOODBURY RAILWAY			
COMPANY		On Postea &c.	
ads		J. WILLARD MORGAN,	
REBECCA C. PIERCE,		<i>Attorney.</i>	
Administratrix of the estate			
of John H. Pierce, deceased.			

As yet of the eight day	Witness Mercer Beasley, Esquire,	
of November, A. D.,	Chief Justice.	
eighteen hundred and	Benj. F. Lee,	
ninety-four.	Clerk.	20

CAMDEN COUNTY, ss.

The Camden, Gloucester and Woodbury Railway Company, a corporation under the laws of New Jersey, the defendant named in this suit was summoned to answer unto Rebecca C. Pierce, administratrix of the estate of John H. Pierce, deceased, the plaintiff therein, in an action of tort, and thereupon the plaintiff by Henry S. Scovel, her attorney, complains for that whereas the said defendant Company, on the fifteenth day of September, eighteen hundred and ninety four, was the owner and proprietor of a certain railway from Camden through Gloucester to Woodbury, over which cars of the said Company were propelled by electricity; and the said John H. Pierce was employed by said Company to collect the fares of the passengers of a certain car of the defendants, while the cars were being moved and propelled as aforesaid, and it became and was necessary for the said

John H. Pierce in collecting fares as aforesaid to walk along a certain platform on the side of said car; that on the day and year aforesaid, at North Woodbury, to wit, at Camden County and said Company had constructed certain poles along said railway and along which its said cars passed; and it then and there became and was the duty of the said defendant company to place such poles at such a distance from the railway and from the cars which were propelled thereon, as to securely and safely protect its employees on its said cars from danger thereby; but the said Company negligently and carelessly failed to perform the said duty and place a pole dangerously close to the track; that the said John H. Pierce did not then or prior thereto know of said pole and had no reason to anticipate the same and was free from negligence and was collecting fares from the passengers of said Company on the platform as aforementioned, while the car was being propelled by electricity as aforesaid, when he was struck by the pole so dangerously placed as aforesaid and thrown to the ground with great force and violence and by reason of the bruises, hurts and wounds thereby caused to him, he, the said John H. Pierce, was so injured that he died, to wit, on the day and year aforesaid.

And the plaintiff avers that she, as the widow and next of kin and administratrix of the effects and chattels of John H. Pierce by means of the premises, was forced to lay out, pay and expend divers large sums of money, to wit, the sum of two hundred dollars in and about the proper, decent and appropriate burial of the said John H. Pierce, and that as the widow and next of kin of the said John H. Pierce, she has by reason of the premises, sustained and suffered great loss, injury and damage, to wit, the sum of twenty five thousand dollars.

Whereby and by force of the statute in such case, made

and provided, an action hath accrued to the plaintiff as administratrix of the said John H. Pierce, for the benefit of the plaintiff, who is the widow and next of kin to the said John H. Pierce deceased, to demand and have of and from the said defendant the said several sums of money above demanded and therefore she brings this suit &c.

And the said plaintiff brings into Court, here, the letters of administration granted to the plaintiff of the goods, chattels and effects of the said John H. Pierce, deceased, by George S. West, the Surrogate of the said County of Camden which is sufficient evidence to the said Court here of the grant of administration to the said plaintiff aforesaid, the date whereof is a certain day and year therein named, to wit, the twenty seventh day of October, in the year of our Lord, eighteen hundred and ninety four. 10

And the said *plaintiff* by J. Willard Morgan, its Attorney, comes and defends the wrong and injury, when &c., and says 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 manner and form as the plaintiff hath above thereof complained against it, the said defendant, and of this the said defendant puts itself upon the country &c. And the plaintiff doth the like. 20

Therefore let a jury thereupon come before the Chief Justice or some other Justice of the Supreme Court of the State of New Jersey at a Circuit Court holden at Camden in and for the County of Camden on the Tuesday of _____ in the year of our Lord, one thousand eight hundred and ninety five by whom &c. 30

And now, at this day, to wit, the nineteenth day of February A. D., eighteen hundred and ninety five before the Supreme Court of New Jersey comes the said plaintiff by his attorney and the Justice before whom &c having sent hither his record had before him in these words, to wit.

Afterwards, to wit, on the seventh day of January, in the year of our Lord one thousand eight hundred and ninety five at a Circuit Court held at Camden in and for the County of Camden, before his Honor, Charles G. Garrison, one of the Justices of the Supreme Court of Judicature 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 the jury being summoned, also come who to speak the truth of the matters within contained were tried and sworn and after evidence being given to them upon the part of the plaintiff he rested his case; whereupon the defendant moved the justice to direct a non-suit by reason that the matters aforesaid by the plaintiff do not support the case set forth in the declaration and the arguments of Counsel being thereupon heard and due consideration had, it is deemed that the plaintiff be non-suited, wherupon, the jury are discharged from further consideration of the premises.

Therefore it is considered that the said Rebecca C. Pierce, administratrix &c take nothing by her said writ and that the said, The Camden, Gloucester and Woodbury Railway Company, do go thereof without day &c.

Judgment signed this nineteenth day of February, A. D., eighteen hundred and ninety five.

M. BEASLEY,

C. J.

I, Benjamin F. Lee, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

{ L. S. }

In Testimony Whereof I have hereto set my hand and the seal of said Court at Trenton this eighth day of May, A. D., eighteen hundred and ninety five.

BENJ. F. LEE,
Clerk.

EDWARD C. AIKEN, SWORN.

By MR. WESCOTT.

Q. Where do you live?

A. 324 Penn Street, this city.

Q. What is your business?

A. Civil engineer and surveyor.

Q. Did you make these maps (referring to two maps on 10
 case)?

A. I made those maps.

Q. When did you make them?

A. At the office of the West Jersey Title and Guaranty
 Company.

Q. Where did you get your data for making the maps?

A. I made the survey at North Woodbury, the scene
 of the accident.

Q. When you speak of the survey, which map do you 20
 refer to?

A. I mean the large plan, the ground plan of the scene
 of the accident.

Q. Just step here, will you? What do the parallel
 lines marked "West Jersey Railroad" mean?

A. The West Jersey Railroad. The parallel lines
 on the plans represent the two railroads running parallel
 with each other, the Camden, Gloucester & Woodbury, and 30
 the West Jersey Railroads, the West Jersey Railroad on
 the lower part of the plan. It also shows (Map No. 1, I
 am speaking about) the turnpike as it crosses these railroads
 at North Woodbury. Measurements were obtained to
 locate on this plan at the proper places the different poles
 surrounding the accident, and also the platform as located
 by a witness who went down on the ground with me at the
 time.

Q. When did you make these surveys?

A. The survey was made October 26th, 1894. That was Friday.

Q. At the time you made the survey did you find a platform there?

A. No, sir: the platform was not there, it was laying on the side of the track as though it was thrown from the centre or some other part of the track?

10 Q. Were you enabled to tell how near the platform was to the track?

A. No, sir: there was nothing there to definitely locate it.

Q. Then you are not able to state the distance of the platform from the track?

A. No, sir; I was not.

Q. Does this black quadrangular figure represent the platform?

20 A. Represents the platform; yes, sir.

Q. And the pole nearest to it, or the black mark nearest to the platform, represents what?

A. The pole at which the accident occurred.

Q. And the red mark, the mark in ink, running across the tracks to that pole?

A. That is the locating distance from that sharp corner made by the turn-pike with the right of way Company's line, or very close to it.

30 Q. Was the pole there?

A. The pole was standing when I made the survey.

Q. Who told you the spot where the plaintiff's intestate was killed?

A. A witness that was sent down with me, Miss Sadie Smith.

Q. Did you make any measurements with reference to that pole?

A. Yes, sir; I ran a plumb line up and down the pole.

I found that the pole was not perfectly plumb; and also my dimensions that I made from the outside rails of either track on the inside, show that the pole was not placed exactly in the centre between the tracks.

Q. Does plan No. 2 represent the pole?

A. Plan No. 2 shows the vertical sections of the pole and car, a car running on the north-bound track.

Q. The north-bound track, on Map No. 2, is which track?

10

A. The lower track.

Q. How near was this pole to the place you were informed the platform was?

A. The pole was within about three feet, south of the platform, or about south.

Q. Towards Woodbury?

A. Towards Woodbury.

Q. How far was the pole from the track, the nearest track or the north track?

20

A. The pole was 2 feet 2 inches from the nearest track or the north-bound track.

Q. Indicated on the map here?

A. It is indicated on both plans.

Q. On Map No. 2?

A. Map No. 2,—the outside perimeter of the pole to the gauge line of the track, 2 feet 2 inches—the north bound track.

30

Q. Two feet 2 inches from the track itself?

A. Yes, sir; from the north-bound track.

Q. Did you make any measurements of the car.

A. On the following Saturday afternoon, October 27th, I made several dimensions of the car relating to the running board and standards and measured everything from the gauge line.

Q. Where did you make these measurements?

A. Those measurements were made down at Gloucester, at the lower part of South Gloucester, I believe, right outside of the race track, where trailing car No. 8 was at the time lying.

Q. Who showed you the car?

A. The car was not shown to me; I merely recognized it from its number, No. 8.

10 BY THE COURT.

Q. What do you mean by the gauge line?

A. The gauge line of the rail is that part on which the flange sets in and abuts against in keeping the wheels of the car on the rails.

BY MR. WESCOTT.

Q. How were these rails fastened?

20 A. Those rails were spiked down and cross tied.

Q. Wooden ties?

A. Wooden ties; yes, sir.

BY THE COURT.

Q. Is this flange on the inside of the track or on the outside?

A. Inside of the rail.

Q. It is on the inner side of the rail?

30 A. The inner side of the rail.

Q. Then, plainly, you made these measurements from the inner side of the top of the rail; is that right?

A. Yes, sir.

BY MR. WESCOTT

Q. You did not make the measurements from the outside of the rail?

A. Oh, no, from the gauge line of the rail.

BY THE COURT.

Q. Then in order to get the distance from the outer side of this rail it would be necessary to subtract the width of the rail from your measurements?

A. From my measurements; yes, sir. They are already subtracted on the plans. The measurements were made that way.

By MR. WESCOTT.

Q. What would the difference be then? 10

A. The difference from the inside edge of the gauge line to the outside edge of the rail itself would be 22 inches.

Q. That would make the difference then between the outer edge of the track and the pole just 2 feet?

A. Yes, sir.

Q. Now this car that you measured, describe in a general way what sort of a car it was.

A. It was an open trailer car, with upright standards, 20 all the compartments opening on the sides, and had cross seats, or seats placed directly across the car at various widths.

Q. Then what was there running longitudinally with the car on the sides?

A. At the lower part?

Q. At the lower part.

A. There was a running board placed there for the accomodation of passengers in getting on and off the car. 30

Q. What do you mean by running board?

A. A board fastened to the car for facilitating getting on and off—a stepping board.

Q. A step that people used when they got in the car and out of the car?

A. Yes, sir.

Q. And that runs lengthwise of the car?

A. Longitudinally of the car; yes, sir.

- Q. One on each side of the car ?
- A. One on each side of the car.
- Q. Now, what was the width of that step on either side ?
- A. The width of the step on either side was $7\frac{3}{4}$ inches.
- Q. And it is indicated on the plan there ?
- A. It is indicated on the plan.
- 10 Q. What was the distance of that platform from the pole ?
- A. The distance of the outside edge of the platform from the pole ?
- Q. Yes, sir.
- A. At its base it was $6\frac{1}{2}$ inches.
- Q. And on plan No. 2 what do these black marks indicate around which I am running the pencil there and which have the appearance of the frame of a seat ?
- 20 A. That sectional drawing represents the seat of the car. The plan of the car itself is a vertical cross section of the car; the car is sliced in half at the centre, vertically.
- Q. These panels just above this black mark represent the back of the seat ?
- A. The back of the seat; yes, sir.
- Q. And the black framework there represents the framework to the seat ?
- A. The framework of the seat.
- 30 Q. What is the distance between the framework of the seat and the pole ?
- A. Eleven inches from the outside edge of the standard.
- Q. And what was the distance between the pole and the standard ?
- A. Between the pole and the standard was eleven inches.
- Q. What do these two lines running up and down, next to the pole, and parrallel with the pole indicate ?

A. Represent the upright of the car for supporting the roof.

Q. Were there handles or grips for the people to take hold of along the sides of the car?

A. There was a handle running from the seat of the cars to the upright or standard for grasping to get on the car.

Q. Did you notice the distance of the seat or the platform of the car from the ground—the distance of the platform from the ground, did you notice that? 10

A. Yes, sir.

Q. How much was that?

A. One foot 5 inches.

Q. That is indicated on plan No. 2?

A. It is indicated on the plan.

Q. These four representations on map No. 2 standing upon the black line running across the map indicate what? 20

A. They indicate the rails, a cross section of the rails.

Q. Then underneath the car, a section of which you have represented on map No. 2, coming in contract with these representations of the rails, are the wheels?

A. The wheels of the car.

Q. Now, Map No. 3 represents what?

A. The first figure on Map No. 3 represents the ground plan of the track and also of the car, a part of the floor of the car; and the upper part shows a ground plan of the rails, the wheels and so forth of the car. 30

Q. And the measurements and representations upon Map No. 3 are the same as those on Map No. 2, as far as they go?

A. Yes, sir.

CROSS EXAMINATION.

By MR. PANCOAST.

Q. Maps Nos. 2 and 3 represent this pole and car from

the North, looking South?

A. From the North looking South; yes, sir.

Q. Did you measure any other poles in that vicinity—like poles?

A. The dimensions of them?

Q. Did you measure the dimensions of the other like poles in that vicinity from the track?

10 A. Yes, sir; I located one or two on either side.

Q. Was this pole the first pole between the trolley tracks going North after leaving Broad Street?

A. Yes, sir.

Q. How many poles are similarly situated, running North, that you took notice of?

A. There was five or six poles.

Q. In the same relative position between these two sets of trolley tracks?

20 A. Yes, sir.

Q. And beyond that the poles were at a much greater distance from the track?

A. They were set outside of the tracks on either side.

BY MR. WESCOTT.

Q. Going further towards Camden?

A. Yes, sir.

BY MR. PANCOAST.

30 Q. About how far apart are those five or six trolley poles situated similarly to the first one you speak of?

A. They range between a distance of probably ninety feet to one hundred and twenty.

Q. 90 feet to 120?

A. 90 feet to 120.

Q. So all these poles similarly situated cover a distance of only a few hundred feet?

A. Yes, sir.

Q. And they are all on the line which makes an angle

from Broad Street to the turn down towards Shivers', weren't they ?

A. No, sir; they were further above; they were beyond the curve where it leaves running parallel with the West Jersey Railroad. There was a few beyond that curve.

Q. A few beyond that curve ?

A. Yes, sir.

Q. About how many—half the number, or only one or two? 10

A. I think there was three or four. They were taking them up at the time.

Q. That is at the time you were making the survey ?

A. Yes, sir.

Q. In October last ?

A. In October last.

Q. Did you measure the dimensions of this pole in question represented on the map ? 20

A. Yes, sir.

Q. What was its diameter at the base ?

A. The diameter at the base was 11 inches.

Q. And what was its height ?

A. Twenty two feet.

Q. What was the diameter at the top ?

A. About $6\frac{1}{2}$ inches.

Q. Had it at the top that triangular arrangement which appears on the map ? 30

A. Yes, sir—supports for the trolley hangers, for supporting the wires of the railroad.

Q. Did you measure that work ?

A. No, sir; I did not. That is approximated as the vertical line running above and directly plumb over the centre between the rails of the railroad.

Q. Approximating it as best you can, what was the size of that triangle at the top of the pole ?

A. Do you mean the upper base line or length? About 5 ½ feet. And the vertical distance from the lower support arm to that horizontal base line was about 4 feet.

Q. What was it constructed of, wood or iron?

A. Iron.

Q. What connection had this pole with the operation of the road, if any, from your knowledge, from what you saw?

10 A. It was erected for supporting the trolley wires relating to the operation of the road.

Q. That was an electric road, wasn't it.

A. Yes, sir.

Q. Did it, at the time you saw it, support the trolley wire?

A. Yes, sir.

Q. Was the road then in operation?

A. The road was then in operation.

20 Q. What was the material of this pole?

A. The pole was of wood. It was painted green. I could not tell without chipping what kind of wood it was.

Q. Were all these five or six poles similarly placed, further north, similar in size and construction throughout?

A. Yes, sir; but not exactly in placing. They were nearer the centre between tracks.

30 Q. Did you measure any other pole there to see how far it was from the body of the car?

A. No, sir. I beg your pardon, I measured the first one north of that. That was very close, within half an inch or so, to the centre between tracks.

Q. That was nearly as close as this one represented on the map.

A. No, sir; it was further away from the car than this pole.

Q. How much further away?

A. Probably two or three inches more.

Q. And did you measure any other one?

A. No, sir.

Q. I understood you to say these poles were between the double set of trolley tracks?

A. In the centre between them; yes, sir.

Q. Exactly in the centre, do you mean to say?

A. No, sir.

Q. Approximately in the centre?

A. Approximately in the centre.

10

Q. Were these poles all the same size, or about the same size?

A. About the same size.

Q. About what was the angle made by the centre line between these two tracks where it first deviated from Broad Street going north?

A. About twelve degrees.

Q. So that from Broad Street going north you could see all these poles in that line, could you?

A. All the poles on the trolley line?

Q. Yes, these poles.

A. No, sir; there was an obstruction.

Q. What was it?

A. An obstruction in the form of a fence at the angle of the railroad and the new street on the north side of the railroad.

Q. What was the height of that fence?

30

A. The height of the fence was about 4 feet.

Q. What was there to obstruct the view of the poles above the 4 feet?

A. There was a tree and also a pole placed there—a tree on the inside of the line whose overhanging branches prevented seeing up the track very far.

Q. Did you make an observation to see whether or not you could see those poles?

- A. Yes, sir. It was also cut off by a part of a house, a corner of a house, at a certain distance down Broad Street from their entering into their private right of way along the railroad.
- Q. Was there anything to obstruct the view, going south on the trolley line?
- A. Before you enter Broad Street?
- 10 Q. Yes, sir.
- A. No, sir, after you pass the bend above there.
- Q. How far does this angle of 12 degrees, turning to the left from Broad Street, extend—the line at that angle?
- A. Quite a distance up the turnpike.
- Q. About how far, as nearly as you can tell?
- A. I have no conception of the distance at all.
- Q. Cannot you give a reasonable approximation of it?
- A. No, sir.
- 20 Q. Then another thing occurs at that point, does it?
- A. Sir?
- Q. Another angle occurs at that point?
- A. Yes, sir.
- Q. To the right or left?
- A. I think it runs to the left.
- Q. Whereabouts does this angle commence, this second one, as nearly as you can tell?
- 30 A. Well, I should judge about a mile and a half or so above the railroad.
- Q. Near what point, if you can recall,—what house or building?
- A. I cannot recall the location of the angle.
- BY MR. WESCOTT.
- Q. You said—I did not quite understand you—that they were taking something up; what were they taking up?
- A. They were removing the poles just above the bend

from this accident at that time.

Q. Removing what poles?

A. Removing the poles from the centre between the tracks, taking them out.

Q. Do you mean the poles that you have indicated by these black marks?

A. Not those poles, the poles above those, several hundred feet north.

Q. Putting them entirely on the outside of the track? 10

A. Putting them on the outside; yes, sir.

Q. You said that the angle on the top, supporting the wires was constructed of iron; did you have occasion to notice whether there was much iron there, enough to make a somewhat great weight, weight enough to sway the pole?

A. No, sir.

Q. You did not notice that?

A. They are very light arrangement, with the exception 20
of a very heavy feed wire and support on top of the pole.

Q. Is that on the inside?

A. That was on both sides of the pole at the top.

By MR. PANCOAST.

Q. Were these poles that were being taken up these big centre poles or guy poles?

A. These were regular trolley poles for supporting the feed wires; &c., the trolley wires. 30

Q. Were there any of these poles in question, these five or six poles in question, being taken up; is that what you mean to say?

A. Those poles around the scene of the accident?

Q. Yes.

A. No, sir.

By THE COURT.

Q. The question I want to ask I think was asked but I

am not quite certain about the answer. How many of these poles that were in the centre between the double track did you test by measurements?

A. Two; two in locating the dimensions and one—

Q. No, but I am speaking about the poles which you have shown on map No. 1; you have shown a line of poles running up between the two tracks.

10 A. They were all located by actual measurements.

Q. And they were all located substantially alike as shown on the map?

A. Yes, sir.

Q. And the distance of this particular pole bears the same relation to the tracks that the other poles do that are in line with it?

A. Yes, sir.

By MR. WESCOTT.

20 Q. Well, are they exactly the same distance from the track?

A. No, sir.

Q. Is there any one of them as near the track as the pole which—

MR. PANCOAST. Well, he said he only measured the second one.

30 THE COURT. I understood him to say he actually measured them all.

THE WITNESS. I had located them.

MR. PANCOAST. I asked him how many he measured and he said he measured the first and measured the second, and then I asked him whether the others were in relatively the same position. He said they were, that the first was closer to the car than the second or the others, but that he did not measure the others. That is what he said, but he said approximately they were all in the centre between the double trolley tracks.

MISS SADIE VAN NOTE, SWORN.

By MR. WESCOTT.

Q. Where do you live?

A. I am living in Merchantville just now.

Q. Do you know this gentleman that just went off the witness stand, Mr. Aiken?

A. No, sir: never met him before until I went with him to have the place surveyed. 10

Q. You have seen him before?

A. I have saw him before, but never spoke to him.

Q. Did you show him the place where John Pierce was killed?

A. Yes, sir.

Q. And you went and pointed it out to him.

A. Yes, sir.

Q. Did you know Mr. Pierce? 20

A. Yes, sir; knew him for four years last December.

Q. About how large a man was he?

A. About five feet two. I do not know the exact height, but judge he was about five feet two.

Q. Was he a man in good health so far as you could judge?

A. As far as I know of, yes, sir.

Q. Now, did you see the accident yourself? 30

A. Yes, sir; I did.

Q. Do you remember when it occurred?

A. It occurred on Saturday evening. I think it was September 15th. We were going to Almonessen—

Q. Pardon me for interrupting—you say what?

A. I say it was on September 15th. We were going to Almonesson, We got a late car going down, so we had to come right away back, and coming back we came up on No. 8 trailer that Mr. Pierce was conductor on.

Q. It was No. 8 trailer?

A. Yes, sir.

Q. Did you get on at Woodbury?

A. Yes, sir; I got on at Woodbury. I didn't go no further than what they call West End, and then I walked up as far as Broad Street and got on, and he was killed right at the beginning of North Woodbury.

Q. Now which track were you on going north

10 A. Going down or going up, do you mean?

Q. When the accident occurred.

A. Up, on the left hand side. No, it was the right hand side. I beg your pardon. It was the right hand side going up, and the left hand side going down.

Q. Were there other people in the car?

A. Yes, sir; there was.

Q. How many, have you any idea?

20 A. Well, I should judge there was about 12 or 13 people in the car.

Q. What time in the day did this accident occur?

A. It occurred at night, close on to 10 o'clock.

Q. Do you remember whether it was dark?

A. Very dark.

Q. What kind of a car was it?

A. An open car.

Q. Do you know whether it had seats crosswise?

30 A. It had seats crosswise. When you get in the cars you sit down.

Q. And was there anything running lengthwise of the cars to enable people to get on and off?

A. No, sir; there was nothing at all except the handles on the side of the car to get on.

Q. You do not understand me, I guess. Was there a platform running alongside the car?

A. A platform alongside the car; yes, sir; on which

Mr. Pierce was standing.

Q. Now, what was Mr. Pierce doing at the time he was killed?

A. When he first collected my fares he said to me, "Sadie, are you living down to Woodbury now?" I said, "No, sir." He collected my fares then, had them in his hand; then he goes back and collects two fares in the back part of the car, and the car stops and two ladies gets on and sits in the seat ahead of me, and while he has his hand on the bell rope he says, "Are you living here, Sadie?" and he no more than got that out of his mouth than the pole struck him. He had his hand on the bell rope pulling the fares, and he did not get the fares pulled when he was struck. 10

Q. Was he knocked off the car?

A. Yes, str; knocked off. The pole struck him in the side of the head and threw him and he whirled around six or seven times and struck a platform. 20

Q. Where was that platform?

A. Why, it was on the side toward South Gloucester, or South Woodbury.

Q. Do you know whether that platform is there now or not?

A. No, sir; it is not there, it is on the embankment.

Q. It has been taken away then?

A. Been taken away; yes, sir. 30

Q. Do you recollect anything about the speed of the car?

A. It was going very rapidly and it ran about 200 yards above where he was struck.

Q. Before it stopped?

A. Yes, sir; before it stopped.

Q. Did you go back?

A. Yes, sir; I was the only woman on the car that went back, and I ran right back to see if he was hurt, be-

cause I had known them for quite so long and always thought well of them all.

Q. Did the accident kill him?

A. He lived about twenty minutes. That was about all. He never spoke another word.

Q. Do you know which side the bell rope was on?

A. To collect fares? There is a bell rope on both sides, for when I go anywheres, or go down to South Woodbury, I always sit on the left hand side and they always collect my fares from the left hand side.

Q. That was the side Mr. Pierce was collecting from when he was killed?

A. Yes, sir.

CROSS EXAMINATION.

BY MR. PANCOAST.

20 Q. Did you say you were going to Almonesson that day?

A. Yes, sir; I was going that night.

Q. Where from?

A. From Camden.

Q. Do you travel that road often?

A. Yes, sir; I do.

Q. How often have you seen Mr. Pierce on that road as a conductor?

A. I never saw him but that once.

Q. You were going north toward Gloucester when this accident occurred?

A. Yes, sir; going towards Gloucester.

Q. And it occurred just as the car turned from Broad Street, Woodbury, to the left?

A. Yes, sir; just above the railroad track.

Q. Where the first pole is between the double tracks?

A. Yes, sir; the first pole.

Q. Now, which side of the car were you sitting on?

A. I was sitting on the left hand side.

Q. Which side of the car did he collect your fare from?

A. The left hand side.

Q. You are sure of that now, are you?

A. Yes, sir; I am sure of it.

Q. And he collected two other fares on the same side?

A. Yes, sir; two other fares, two young ladies. 10

Q. Before or after he collected your fares?

A. He collected them after my fares. He was collecting their fares when he was struck, or had been, and he had his hand on the rope.

Q. Where did you get into the car first that evening?

A. Broad Street and Cooper Street. There is two streets there. One side of Broad is Cooper and the other side is Delaware Avenue. 20

Q. In Woodbury?

A. Yes, sir; South Woodbury.

Q. Is that adjacent to the Court House there?

A. Yes, sir; right across the street from the Court House I got on.

Q. Do you remember how many passengers were in that car at the time you got on?

A. About twelve or fifteen passengers was on the car. 30

Q. Twelve or fifteen?

A. Yes, sir.

Q. How many did you see him collect before he was hurt, how many fares?

A. He collected my two fares, collected two fares back of me and collected two fares ahead of me, and had his hand on the bell rope when he was struck.

Q. Those were the only fares then he had collected up to the time he was hurt?

A. That was all I seen him collect. Of course there was people in the car when I got in there.

Q. Do you recollect where he commenced to collect these fares?

A. No, sir; I do not.

Q. You cannot tell?

A. No, sir; I cannot.

10 Q. Was Broad Street in Woodbury lit by electric lights?

A. Yes, sir.

Q. Was it at the time?

A. Right up to very near the cars it is, but above the cars it is not.

Q. What?

A. Where the cars cross Broad Street in North Woodbury I think that it is.

20 Q. It is lit up to the point where the cars turn off at Broad Street?

A. Yes, sir; but they were out that night.

Q. That is, the electric lights in Woodbury were out that night, you mean?

A. Yes, sir; up in North Woodbury it was.

Q. And it was a very dark night.

A. Very dark.

Q. It was about ten o'clock?

30 A. Close on to ten o'clock; I won't say just how much but it was close on to ten o'clock.

Q. Where was he when he came up to you to collect your fare and you had this conversation with him?

A. He was on the platform on the outside of the car when he spoke them words to me, collecting my fares, when he said the words, and then when he said the words the second time, he had his hands on the bell rope looking up towards the top of the car attending to his duty.

Q. Then after that what did he do on the same side?

A. He didn't say anything only he collected two fares in front of me; he was struck then. He collected my two fares first. Then he goes on the back part of the car on the right hand side and collects two more fares.

Q. On the right hand side?

A. On the right hand side; yes, sir.

Q. Well?

A. And then two young ladies got on and then he goes around on the left hand side, crosses the back of the car, goes to the left hand side and collects these two fares, and after he gets the money in his hand he puts it in his pocket and has his hand on the bell rope, and says, "Are you living here now, Sadie?" and he no more than got the "Sadie" out of his mouth and was looking up at the top of the car when the pole struck him. 10

Q. So then there was a platform on either side of this car? 20

A. No, there was only a platform on one side; there is only a platform on one side.

Q. On one side?

A. Yes, sir; only one platform, and he was on the side toward Woodbury. There was only one platform there, that is all.

Q. Well, you are telling of one thing and I am speaking of another. I mean the running board for the conductor to walk on and for people to step into the car. 30

A. Oh, there is a board on both sides.

Q. There was a step for the people to step on and for the conductor to use in collecting fares on each side of the car?

A. Yes, sir; there was.

Q. And the car was an open car?

A. Open trailer, No. 8.

Q. With seats from side to side?

A. Yes, sir; running right straight across the car.

Q. So that people could get either on or off on either side?

A. Either side, yes, sir. There was no rope or bar across to hinder anybody from getting on at either side.

Q. And he had collected some fares from both sides before he was hurt?

A. Yes, sir; from both sides.

10 Q. And the night was very dark?

A. Very dark; yes, sir.

Q. And the car was running very rapidly?

A. Very rapidly, as if it was behind time.

Q. And there was a bell rope for the conductor's use on both sides of the car?

A. On both sides of the car; yes, sir.

Q. Well, you did not see the pole before it struck him, I suppose?

20 A. No, sir; I did not see it.

Q. Then you don't know what struck him except from what you saw after the accident?

A. That's all. I heard the crash and I looked up and I saw Mr. Pierce fall, but I did not know right at first what struck him, but I heard it so well I will always remember it though.

30 Q. Was it dark enough for you to see him where he had fallen with the electric light in the car, from that light in front of the car, when they brought the car back?

A. There is an electric light in front of the car, that is all.

Q. There was an electric light in front of the car?

A. Yes, sir.

Q. And when the car was backed from that electric light you could see around and see him where he fell?

A. Well, it threw the light out on either side of the

track, yes, sir; and then you could see him from the light in the cars.

Q. You saw him then after he had fallen, from the light given out at the front of the car?

A. No, when we came back to him it was dark, and then they towed the car back and the men jumped out of the car before the car stopped.

Q. I asked you how you saw him through the darkness?

A. I didn't see him at all until the car came back. 10

Q. I understand that perfectly well, but didn't you see him when the car came back by the light in front of the car?

A. Between the light in front of the car and the light in the cars that threw the light out, of course it made the place light so you could see whether he was hurt or not.

Q. So the front of the car threw out sufficient light to see around?

A. Between that and the light in the cars. You could 20 not see nothing until the car was brought back again.

Q. In your journeying up and down that road have you ever noticed that pole where the accident occurred?

A. No, sir; never have noticed it.

MRS. REBECCA C. PIERCE, SWORN.

By MR. WESCOTT.

Q. Where do you live?

A. 1740 Broadway, Camden. 30

Q. What was your husband's name?

A. John H. Pierce.

Q. Do you know whether he worked for this Company, the Camden, Gloucester and Woodbury Railroad Company?

Did your husband work for the Camden, Gloucester and Woodbury Railroad Company?

A. Yes, sir.

Q. What did he do for them?

A. He was a conductor.

Q. How long had he been in their employment before he was killed?

A. Oh, a short time. He went on about the 13th of August and he was killed in September; he was there about a month.

Q. Went on about the 13th of August?

10 A. Yes, sir; somewheres thereabout.

Q. And when was he killed?

A. 15th of September.

Q. Had he any children?

A. One.

Q. Now, before your husband was killed, or before your husband worked for this company, do you remember whether he worked for any other?

A. He worked for the Camden.

20 Q. How much did he make?

A. Well, he made about from ten to twelve dollars a week—from 11 to 12; his regular wages was \$10.80, but he always made over-time. They get paid by the hour.

Q. How much did he make by the week, now?

A. He made about twelve dollars.

Q. What did he do with his money?

A. He gave it to me.

30 Q. Do you know how much he made when he worked for this other company?

A. Yes, sir; he got two pays while he was there. One was \$10.08, one was \$12.92, that I received after his death.

Q. \$12.92?

A. Yes, sir.

Q. You got the \$12.92 after he was killed?

A. Yes, sir; a month all but two days. I got it the 13th of October.

Q. Now, do you know whether he was a regular hand?

A. No, sir; he was an extra.

Q. An extra hand?

A. Yes, sir.

Q. What do you mean by that?

A. Why, an extra hand. They don't have a steady car and they don't have work all the time; they have to go down there and report and if they want an extra man of course they get work; if they don't they don't get work.

Q. Now, during the month that your husband was under contract with this company did he work every day? 10

A. No, sir; he did not.

Q. Can you give us an idea how much of the time he worked?

A. I cannot. I cannot tell you just how much he worked.

Q. Did he make about the same wages with this company that he did with the former?

A. Well, I guess he would if he had had a regular car. 20

Q. Now, do you know what his route was, what course he travelled over when he was working?

A. Well, he was on this end some of the time and he was on the Almonesson end a good bit of the time.

Q. Well, when he was on the Almonesson end did he travel over this spot where he was finally killed?

A. No, sir; he did not; he only came as far Broad Street, Woodbury.

Q. How much of the time—have you any idea—was he on the Almonesson end? 30

A. I could not say.

Q. Do you know how long he was running from Woodbury to Camden?

A. He was running that Saturday, and he worked on the 11th, from Woodbury to Camden, and that is the only time that I could say positively.

Q. Two days?

A. Two days that I know he was there; I could not say positively.

Q. Did he work in the night or day time?

A. Well, he used to work at day time and he has worked some at night, but he was not working Tuesday night.

10 Q. Well, the two times you have known him to have travelled from Woodbury to Camden, was it in the day or night-time?

A. In the day time. Of course, when he was killed it was at night—Saturday night.

Q. When this second payment was made to you by the company was that paper handed to you (Showing witness a paper)?

A. Yes, sir; for me to sign.

Q. Handed to you?

20 A. Yes, sir.

Q. Were you requested to sign it?

A. Yes, sir; I was told to sign it right along there (indicating).

Q. Did you sign it?

A. No, sir; I did not. My attention was directed to that under the "26th of September,"

MR. WESCOTT. I wish to offer this paper in evidence.

30 MR. PANCOAST. I object to it. Let the court see it as to whether it is material. I do not know what it is.

THE WITNESS I would rather you would keep it. I desire it.

MR. WESCOTT. Oh it will not be destroyed.

THE COURT. Does counsel wish to be heard about this paper?

MR. WESCOTT. Well, I offer it in evidence,

THE COURT. Just wait until the adjournment and I will hear anything counsel has to say about it. It is a matter for the

Court. Just go on with this examination of this witness now.

Q. Was your husband in good health at the time he was killed?

A. Yes, sir.

Q. Had he been before?

A. Yes, sir.

Q. About how large a man was he?

A. He was two inches taller than I am. 10

Q. About how much did he weigh?

A. I could not say.

Q. A man of medium size?

A. Yes, sir.

Q. You have taken letters of administration upon your husband's estate?

A. Yes, sir.

Q. What was his age? 20

A. He was forty-seven the 12th of last April—forty-seven, five months and two days.

Q. Was he a man of good or bad habits?

A. Good habits.

CROSS EXAMINATION.

BY MR. PANCOAST.

Q. You said he was formerly employed by the Camden Company; what Company is that? 30

A. As a conductor for the Camden Horse Railroad Company.

Q. Up to what time was he employed as a conductor by the Camden Horse Railroad Company?

A. Eleven months before he went to the Woodbury Company.

Q. Where did you reside at the time of his death?

A. 1740 Broadway, Camden.

- Q. Do you reside there now?
 A. Yes, sir.
- Q. Where did you reside at the time he was employed
 by this defendant Company?
 A. By the Camden Company?
 Q. No.
 A. By this Company?
 Q. Yes.
- 10 A. Where I am now, 1740 Broadway.
 Q. Did you ever travel with him on the cars?
 A. I never was on but once.
 Q. Never went over this route but once?
 A. No, sir, and then I went down with him but didn't
 come back with him.
- Q. And when was that once?
 A. The 11th of September.
- 20 Q. And then you went with him from what place?
 A. From my home to Woodbury.
 Q. Was he conductor that day?
 A. Yes, sir.
 Q. On that road?
 A. Yes, sir.
 Q. Did you come back with him that day?
 A. No, sir; I did not.
- 30 Q. So that the only time you ever travelled with him
 was on the 11th of September, and then he was conductor
 between Camden and Woodbury?
 A. Yes, sir; he was on through the day and I took his
 dinner.
 Q. He was on that route through the day?
 A. Yes, sir.
 Q. And how much of the time he was on that route,
 how much on the Almonesson route you don't know?
 A. No, sir; I do not.

Q. The Almonesson route is a continuation of the route from Camden to Woodbury, is it not?

A. Yes, sir.

Q. And he has always lived in Camden with you ever since last August when he went into the employment of this company.

A. Oh, yes.

Q. So that while he was on the Almonesson route he had to go down to Woodbury every day and come back every day? 10

A. Certainly. He went to Gloucester, and of course when he got to Gloucester he would know where he had to go.

Q. He came back every day when he was on the Almonesson route?

A. Certainly.

20

EDWARD F. CHESTER, SWORN.

By MR. WESCOTT.

Q. Where do you live?

A. I live 2018 Broadway, Camden, New Jersey.

Q. Did you know Mr. Pierce?

A. I was slightly acquainted with him.

Q. Did you see him killed?

A. Yes, sir.

30

Q. Were you on the car?

A. I was.

Q. State, if you will, to these gentlemen, what you saw.

A. I will state as far as I remember.

Q. Yes, sir.

A. In returning from Woodbury upon that evening—I don't just remember the date—we was coming up, shortly after 10 o'clock, and I got on; I don't know the names of

the streets where we got on at. We rode but a short ways before there was two more got on. I think they seated themselves back of us, and when we got a little further there was a couple more got on and seated ahead of us. So they collected the fares from the right of the car, those passengers in back, if I remember right, and then he came to get ours.

Q. Came on the left hand and got yours?

10 A. Yes, sir. So he left us to get the fares ahead of us. I cannot swear whether he got the fares or not, but I guess he had them, for he had his hand on the bell rope when he was hit. The car was going very rapidly. I saw him struck by the rope and whirled around some six or seven times. I jumped up out of the car, never thinking of the bell rope. I hollered, "Stop the car" to the conductor on the motor car. The car had run I guess about 150 or
20 200 yards before the car was brought to a stop. So when we got back to Mr. Pierce his feet was under his body. His head had struck the platform, which I saw. As I saw him fall I jumped up out of the car. The light of the car shone upon him. And so I got off the car as soon as I could. There was some three or four standing around him and none of them seemed to offer to give a hand to lift him up, so I got hold of his arm and tried to help him up and had to ask some one to aid me to help him up. I thought prob-
30 ably he was unconscious. So a suggestion was made to run the trailer car back and take him right back to Woodbury to Dr. Clark's. We took him back there, but I believe before we got to Woodbury he was dead, and there was blood coming from his nostrils and from one or two wounds on the back of his head, one on the back and one on the side, I think.

Q. Do you know what part of his body was struck by the pole?

A. I think there was a wound on the back and one on the side, if I am not mistaken.

Q. Of his head?

A. Yes, sir. His watch was smashed to pieces.

CROSS EXAMINATION

By MR. PANCOAST.

Q. Had you ever ridden with him before over that route? 10

A. No, sir.

Q. Where did you get in the car?

A. I don't know the name of the street. It was in Woodbury.

Q. Do you know whether it was opposite the Court House?

A. It was this side of the Court House—away beyond this side of the Court House. 20

Q. Was it some time before you turned to the left to go off of Broad Street; was it some time before the accident that you got on the car?

A. Yes, sir; before the accident we got on the car.

Q. About what time in the evening was it?

A. About quarter after ten.

Q. Was that night dark or otherwise?

A. Very dark night.

Q. Did you notice whether the electric lights in Woodbury were lit or not? 30

A. They wasn't at this end; no sir.

Q. That is at the north end?

A. Yes, sir; north.

Q. The car was running very fast at this point of the accident?

A. Very rapidly; yes, sir.

Q. How many people, if you can recall, were in the car

before the accident occurred ?

A. I guess some eight or nine probably.

Q. He had been collecting fares, had he ?

A. Yes, sir.

Q. From both sides of the car ?

A. I believe he was ; yes, sir ; to the right and to the left.

Q. Which side of the car were you sitting on ?

10 A. On the left hand side coming up.

Q. He had collected the fares first from the right hand side of the car then ?

A. Collected the fares from the right and came to us, got our fare and went from us for the fares ahead of us. I would not say whether he got it or not, but I believe he did, for he had his hand on the register rope before he rung the fares up.

20 Q. Did you notice him talking to Miss Van Note ?

A. No, sir ; not at that time.

Q. Did you see the pole strike him, or did you judge it struck him by what had occurred ?

A. I saw it strike him. I was looking at him when it hit him.

Q. There was no trouble about seeing the pole then ?

30 A. Yes, sir ; it was a very dark night. I don't know how many poles there is along there. It was the first pole, coming along.

Q. How long did you see it before it struck him ?

A. I just saw it when it struck him. I was looking right at him when the pole hit him.

Q. Where did it strike him ?

A. Struck him right along side of the head.

Q. This was an open car, was it ?

A. Yes, sir ; a trailer.

Q. Were the seats running from side to side ?

A. Yes, sir.

Q. And a step for passengers on each side of the car?

A. Yes, sir.

Q. And you saw the pole plainly when it struck him?

A. Yes, sir.

MISS MARY R. PIERCE, SWORN.

10

By MR. WESCOTT.

Q. This was your mother that was on the witness stand a moment ago?

A. Yes, sir.

Q. Was your father, at the time of his death and for years before, in good health?

A. Yes, sir.

Q. Do you know what he did with his money?

A. Brought it home and gave it to my mother.

20

Q. Was that his habit always?

A. Always.

Q. Was he a man of good or bad habits?

A. Good.

NO CROSS EXAMINATION.

MRS. REBECCA C. PIERCE, RECALLED.

30

By MR. WESCOTT.

Q. (Two papers shown witness) Did you find these in your husband's pocket?

A. These were in his pocket when he died. These papers were in his pocket. They were sent to me in the things that was taken out of my husband's pocket when he was found dead. They are the rules of the company.

MR. WESCOTT. I offer these papers in evidence.

CROSS EXAMINATION.

BY MR. PANCOAST.

Q. Do you know anything about these papers excepting merely that you found them in your husband's pocket?

A. Well, they are the rules.

Q. Do you know anything more about them than that?

A. That is all I know.

10 Q. All you know about the papers is simply you found them in your husband's pockets?

A. They were sent to me.

Q. Is that all?

A. Yes, sir.

Q. You never saw them before?

A. I seen them when he brought them home, and they was given to him by the company.

20 Q. How do you know the company gave them to him?

A. Because he came home and said they was the new rules that the company had got out.

(Objected to).

THE COURT. That is not legal proof and may be stricken out.

J. WILLARD MORGAN, ESQ., SWORN.

30 BY MR. WESCOTT.

Q. What office do you hold in relation to this company?

A. President.

Q. Look at these papers and say whether or not those are the rules of the company in force at this time Pierce was killed?

A. Those are some of the rules and instructions to conductors.

Q. In force at the time Pierce was killed.

A. Yes; there are other rules, of course, in addition to these.

A. I am not asking you about other rules, I am asking about whether these are the rules?

A. They are a portion of the rules.

Q. Are they the rules of the company, so far as they go?

A. Yes, taken in connection with the other rules.

Q. Are they the rules of the company, as far as they go?

A. You have my answer, Judge (To the court) Have I not properly answered the question?

THE COURT. The witness may rely upon his own counsel to bring out anything that is necessary.

Q. Are these the rules of the Company as far as they go?

A. They are a portion of the rules of the Company.

Q. So far as they go they are the rules of the company, are they?

A. You have got my answer. 20

Q. And that is the only answer you make?

A. Yes, sir.

MR. WESCOTT. I offer them in evidence.

THE COURT. If there is no objection they will be admitted.

(The papers in question are marked respectively, Exhibits 1 and 2 Plaintiff).

30

EDWARD C. AIKEN, RECALLED.

By THE COURT.

Q. You only actually measured the distance of one other pole?

A. One other pole.

Q. Beside the pole in question?

A. Yes, sir.

Q. And what distance was the second pole that you measured, not the one that the accident occurred with?

A. From the rails?

Q. From what you call the gauge line?

A. That was within half an inch of the centre between rails or tracks.

Q. Well, what distance was it from the gauge line of the nearest rail on the side where the accident happened.

10 A. Two feet $5\frac{1}{2}$ inches, as near as I can remember it.

Q. You have not it delineated on your map, have you?

A. No, sir; I have not. That pole did not refer to the accident. I just made very accurate dimensions of the pole relating to the accident.

CROSS EXAMINATION.

BY MR. PANCOAST.

20 Q. You said in your former examination, I think, that the distance between the outer edge of the step and the pole, that is, the second pole, was about two or three inches greater than the distance as you found it by measurement between the same point on the car and the second pole?

A. Yes, sir.

. PLAINTIFF RESTS.

Recess until 1 P. M.

TRIAL OF THE CAUSE RESUMED AT 1 P. M.

30 MR. PANCOAST. I move to non-suit the plaintiff. I base this motion on three points, entirely from the testimony of the plaintiff. The deceased was an old hand at railroad-ing, knew the danger and risk that his position as conductor involved on that particular route from the pole in question. He was an old hand at the business, had been in it before, and according to the plaintiff's own testimony, had been on that route for a considerable time. He went into the employment of this Company in August and his

wife says part of the time he was on the road from Almonesson to Woodbury and part of the time on the road from Woodbury to Philadelphia. On the only occasion on which she went over the road with him it was on the 11th of September when he was operating on the route from Camden to Woodbury. Therefore I say it is proved that he was an experienced railroader and that he knew of this situation on that road from actual knowledge and experience and he was just as well calculated to judge of the danger or safety of the place as the company or anybody else. He had been accustomed to pass and repass the pole which caused his death and the danger and risk which it caused was open and visible to him at all times. 10

Second. He was negligent in being unnecessarily on that side of the car while passing the pole which caused his death. He was not obliged to be there, according to the testimony. This was a very dark night, both of the witnesses say, and the car was running very rapidly. He could collect fares from the other side and had been doing it up to this point properly and successfully without any danger. There was nothing to require him to be there on that side of the car at that time. His own thoughtlessness perhaps placed him there. But if he thought about it at all he judged there was no danger. Now, he either did think about it or he did not, and either way it makes no difference. He knew the pole was nigh the track there and he knew there was perfect safety on the right hand side and that he could collect the fares on the right hand side, and if he was negligent and did not think about the danger that was there it was his own fault. If he did think about it, he made a mistake in judgement. His proper place was on the other side, manifestly so. There was no danger there. He had been using that side. I rely upon the doctrine as laid down in 11 Vr., 23; 22 Vr., 507; 25 Vr., 411; 34 Pa- 20 30

cific Reporter, 937, to the effect that where an employe enters the service of a master and encounters risks or dangers that are as obvious to him as to anybody else and he suffers injury there is no remedy. I ask that the plaintiff be called on the ground that the undisputed facts show that his administratrix is not entitled to recover.

THE COURT.

10

The way I look at this case is this:

The plaintiff's case proceeds upon the ground that the plaintiff's intestate was killed by the dangerous construction of the defendant's road, and that dangerous construction consisted in having the poles which maintained the trolley system between the double tracks of the defendant's road and so near to the rails on either hand that one of the poles struck the plaintiff's intestate on the head while he was on the platform of an open car collecting fares. Now, this particular pole that struck him was only six inches and a half from the outer edge of the step on which he was operating. The next pole to it was three inches and a half further from the step, and they are the only two poles with respect to which we are told what was the measurement from the step.

Now, if negligence can be assumed—if it could be assumed that the only pole which was within three and a half inches nearer the step was the one that struck the plaintiff, there might be some ground of argument as to latency of the danger. But nothing can be assumed that will presume negligence as against the proof in the case. Therefore, all that can be assumed is that the poles between these tracks were not all of the same distance—that they varied in distance. So far as we know the furthest was ten inches and the nearest six and a half and all of them so near as to be obvious sources of danger.

Now, it is admitted by both sides that those poles in that

condition were a source of danger to anyone who projected his head over the side of the moving platform of an open car. Not only was it a danger, but the danger arose from these poles which stood there in open sight, from any and all of them, and no one, even without the experience of a car-man, could see a moving car pass along the line of this double track without noticing that the slightest inclination of the shoulders or head of a person over the edge of that platform would bring him into imminent danger of striking one or the other of these poles. 10

Now, that was dangerous, and the company maintained it in that position, and as to a servant it was a danger which was obvious. The contract of service, undoubtedly, in legal effect, was, "If you do not want to engage service where we operate our road in this manner, dangerous as it is, why you must not accept service." And I think that, in law, when the plaintiff's intestate accepted this service he did so charged in law with whatever knowledge would come to him as an experienced car-man of these obvious and apparent conditions, viz: a line of poles maintained in close proximity to the inner edge of the track. Now, that being so, nothing that the company could have told him, no notice they could have given him, would have told him anything more than his own senses advised him of. The poles were there. The cars were there. The relative distance between the two was a matter of such slight difference that any experimenting would of itself been contributory negligence. So, upon the question of the negligence of the Company, I do not think it has been proved, because it cannot be negligence if it was part of the contract. 20 30

Negligence is a departure from a legal duty—it is doing something which is a departure from a legal duty; and if these parties, in law, contracted that this danger did exist,

then, of course, neither party can be charged with what may arise out of the existance of that which is considered in the contract.

Further than that—I am inclined to think from this testimony that the plaintiff's intestate was guilty of contributory negligence, because the proximity of these poles upon one side of the car only, when the other side was entirely free from any such danger, would make it the duty of a reasonable man, upon a dark night, the car going at considerable speed, not to select for the purpose of collecting fares in an open car, where the seats ran through, that side of the car which alone was dangerous. Even though the danger was not perfectly imminent, he could have done it from the other side without the slightest inconvenience. It is a matter of common experience that a conductor suits his own convenience as to whether he will lean across the seat and collect the fares from one side, or go all the way around the car.

If he did not know the danger, then he was negligent in not knowing it. If he did know it, it seems to me he contributed by selecting, without any necessity for it, that side of the car, which, from all circumstances, was the most jeopardous side of the track.

So, upon both sides, I think, as matter of law, there has been no failure of duty on the part of the company, of which this administratrix can legally complain. The demurrer to the evidence will be sustained and a non-suit will be ordered.

Whereupon the plaintiff' by her counsel, prays a bill of exceptions to the ruling of the court, non-suiting the plaintiff, and a bill is allowed and sealed accordingly.

C. G. GARRISON, J. S. C.

NEW JERSEY COURT OF ERRORS AND APPEAL.

REBECCA C. PIERCE,
 PLAINTIFF IN ERROR,
 And
 THE CAMDEN, GLOUCESTER AND
 WOODBURY RAILROAD COM-
 PANY, DEFENDENT IN ERROR.

In Tort.

Assignment of Errors.

10

The plaintiff assigns the following causes of error :

First :- Because the trial court non-suited the plaintiff.

Second :- Because the trial court admitted incompetent
 and rejected competent evidence.

JOHN W. WESCOTT,
 HENRY S. SCOVEL,

ATTORNEYS FOR PLAINTIFF IN ERROR.

20

30

JOINDER IN ERROR.

And hereupon afterwards to wit: on the day of
 June, in the year of our Lord, one thousand eight hundred
 and ninety five, the said Camden, Gloucester and Woodbury
 Railroad Company, by J. Willard Morgan, its attorney,
 comes into court, and says that as to the said several errors
 10 assigned by the said Rebecca C. Pierce, there is no error in
 the record or proceedings aforesaid, or in the giving of judg-
 ment aforesaid, and it prays that the Court here may proceed
 to examine as well the record and proceedings aforesaid,
 as the matters aforesaid, for error assigned, and that the
 judgement aforesaid in the manner and form aforesaid given,
 may in all things, be affirmed.

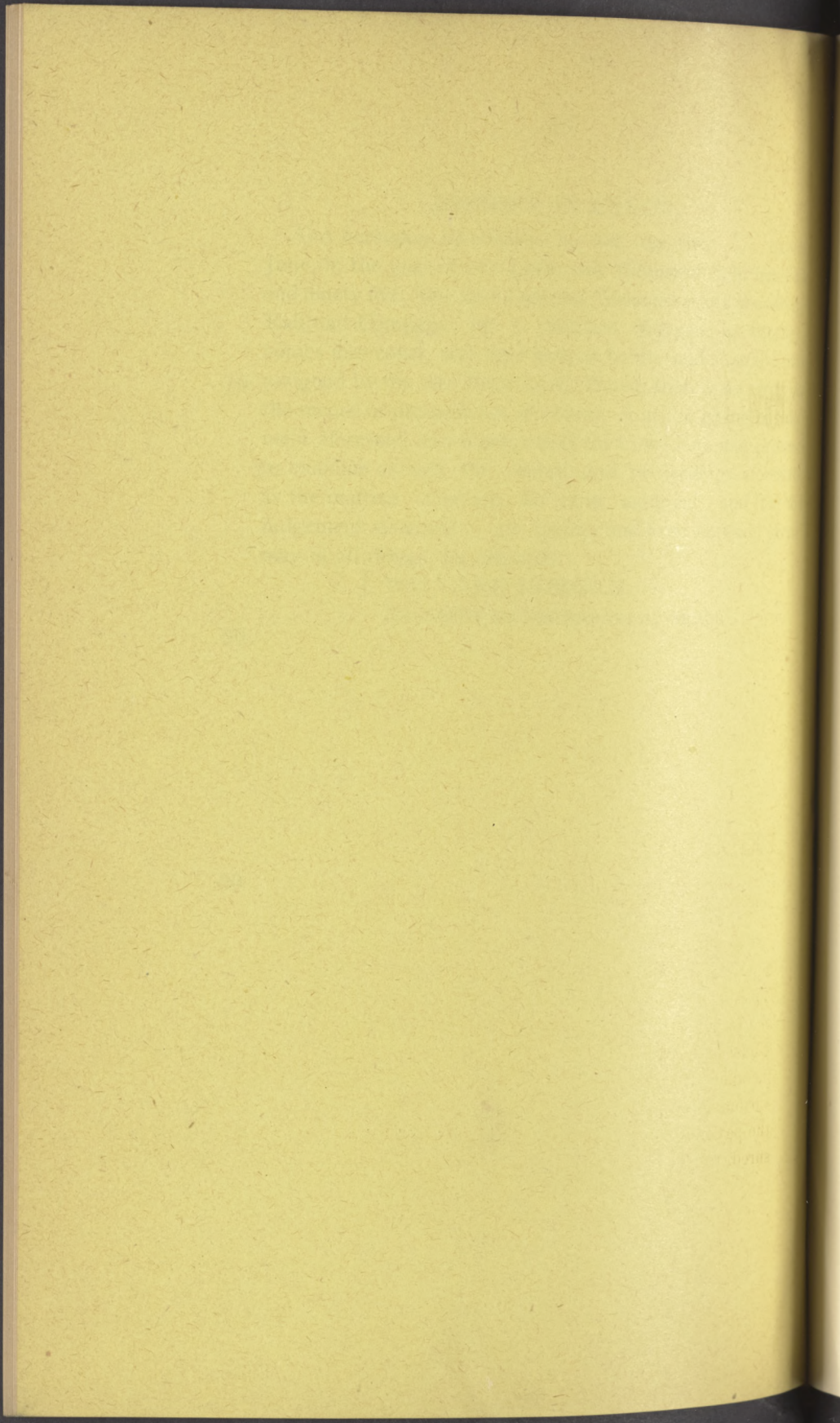
J. WILLARD MORGAN,

ATTORNEY OF DEFENDANT IN ERROR.

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