

NEW JERSEY COURT OF ERRORS AND APPEALS.

No. 37. March Term, 1907.

HENRY E. McCONNELL,

Defendant in Error,

vs.

ALPHA PORTLAND CEMENT COM-
PANY,

Plaintiff in Error.

IN TORT.

ON ERROR TO THE NEW JERSEY SUPREME
COURT.

BRIEF OF E. A. ARMSTRONG, FOR DEFENDANT, PLAIN-
TIF IN ERROR.

The verdict in this case was for \$10,000. The case was tried at the Camden Circuit before the Honorable Allen B. Endicott, Circuit Judge, June 14th, 1906. The accident, the basis of the suit, occurred December 19th, 1898, at defendant's plant at Alpha, Warren County.

At that time the plaintiff was twenty-eight years old. He had no trade or business, and had been employed as an oiler for about two weeks at this plant. He had been shown what his work was to be and things explained to him. He supposes he was told to be careful, but he knew that he needed to be anyway, whether told or not.

The large engine had stopped on the centre and a fellow employee, Cuthbert, was trying to push it off centre so that it would start up, using a piece of wood or scantling through the flywheel. His efforts were unavailing, and plaintiff seeing him as he entered the room went up and took hold of the piece of wood and pulled, and as soon as he put his strength upon it the engine started suddenly and the piece of wood flew over and struck him, inflicting serious injuries. He alleges negligence in the defendant, which allegation the verdict sustained.

JUDGMENT IMPROPERLY ENTERED.

The first objections we offer are as to the regularity of this judgment. Assignment of error 2 (page 77) and 3 (page 78) are not urged. We think there ought properly to be an order of reference, but we make no point of that. Assignments of error 4 and 5 (page 78) are, as we take it, important. This case was tried by a Circuit Court Judge, Allen B. Endicott. (See pages 6, 13 and 19.) This trial was had under the act, chapter 118, Laws of 1906, page 209, which provides:

“1. Issues joined in the Supreme Court may be tried by a Justice of said Court, or by a Judge of the Circuit Court, to whom the same may be referred by the Justice of the Supreme Court holding the circuit; and in

relation to the trial of such issues the said Judge shall have the same powers as a Justice of the Supreme Court, including the power to amend, to sign the postea, to settle and seal exceptions, and to grant a rule to show cause for a new trial."

The power of the Circuit Court Judge is exhausted with the trial, except by express provision he seals exceptions, signs postea and may allow a rule to show cause returnable before the Supreme Court. He has no further or other power. His authority is limited to "the trial of such issue," and for that purpose he sits with the power of the Justice, but that is all. When the trial ends his power is at an end except he may allow a rule to show cause.

In this case the plaintiff in error sued out a writ of certiorari upon return being made to the writ of error (page 18), and the return to it appears on pages 10 to 17, which includes the transcript (pages 10-13), postea (pages 13 and 14), notice of motion for judgment (page 15) and rule for judgment (page 17). This notice (page 15) was given under section 210 of the Practice Act which provides as follows:

"In actions in the Supreme Court whenever a cognovit or relicta is given or a verdict is obtained at the circuit, the party obtaining the same may, by order of a Justice, on notice and upon terms, file the circuit record and postea and enter judgment and issue execution thereon forthwith; but in case a rule for a new trial shall be granted, the proceedings on such judgment and execution shall be stayed until the determination of the same, and the Court or a Justice may stay execution."

This verdict was for \$10,000. The damages, according to the practice, were assessed to the first day of

then next term, November 1st, 1906. Notwithstanding this, judgment for \$10,000 was entered upon the verdict on June 19th, 1906, so that in addition to the amount of the verdict of the jury, this proceeding gave the plaintiff an additional sum of \$225, the interest from June 19th, 1906, to the first day of the November term. This is quite substantial. The Practice Act in the section above quoted permits judgment to be entered, but only upon the order of a Justice of the Supreme Court and *upon terms*. This judgment was entered by the order of a Circuit Court Judge and without terms. It is clearly improper, illegal and erroneous and certainly harmful to the plaintiff in error. This is not a mere formal objection; it is a material and substantial one. What purports upon its face to be a judgment is shown by the proceedings now before the Court to have back of it no proper or lawful authority, and it should be reversed for those reasons.

NON-SUIT SHOULD HAVE BEEN GRANTED.

The plaintiff submitted the question of liability to the Trial Court and the defendant moved for a non-suit (pages 69-72) which was refused and an exception allowed, which is made the basis of assignment of error 6 (page 78). It is respectfully submitted that the plaintiff entirely failed to show negligence of any kind on the part of the defendant company. The plaintiff was a man of good education, of very respectable family, twenty-eight years old, and according to the proof (page 25), was a bright, able young man, intelligent, very observing, very handy in everything, could turn his hand to almost anything, quick in getting ideas of things,

a ready, quick man. He was a bright boy, above the average. When he was employed he was taken by the superintendent (pages 28 and 29) and shown about, and an oiler (page 29, lines 18-32) sent around with him. There was nothing in his employment calling for skill or special knowledge. All that was required was ordinary care, so that if nothing at all had been said to the plaintiff he certainly would have been charged with knowledge that there was danger in his standing in front of a piece of wood being used to start the flywheel of an engine in motion, that stick being within the wheel, if he was unsuccessful in getting out of the way of it and the stick was not removed. This is the way he describes the accident, in answer to his counsel's questions, on page 32:

"Ques. What was Cuthbert doing when you entered the room?

Ans. He was trying to pry the engine.

Ques. Was he using this scantling that the superintendent told you to use?

Ans. Yes, sir.

Ques. Did he have it in the spokes of the wheel, just as the superintendent told you to put it?

Ans. Yes.

Ques. How was he making out?

Ans. Well, he couldn't push it over.

Ques. Did you go to help him?

Ans. I went to help him, yes.

Ques. Did you tell me how he was making out? Could he move it?

Ans. He couldn't move it.

Ques. What did you do?

Ans. Stepped up and gave him a lift.

Ques. Well, just tell me what you did?

Ans. Gave it a pry.

Ques. Which side was he on?

Ans. He was on the far side, opposite to me.

Ques. And you were on the other side opposite to him?

Ans. Yes.

Ques. What did you do?

Ans. I gave a pull.

Ques. And what did he do as you pulled?

Ans. He pushed and the engine started.

Ques. Started how?

Ans. It started like a horse kicks, came right over flying; the piece of scantling hit me.

Ques. Did it go rapidly or slowly?

Ans. Very rapidly."

Moreover, he says that he knew what would happen (pages 38-41), and also what ought to be done. And this is what he says on page 43:

"Ques. Well, you knew in which direction it was to turn when you saw Cuthbert pushing?

Ans. I knew in which direction we should have pushed it, so I imagine it must have gone that way.

Ques. You knew you were pushing it to have it turn in the direction you were standing?

Ans. Yes, sir.

Ques. Did the engine start unexpectedly to you?

Ans. Yes, sir.

Ques. You expected to be able to get out of the way of it of course, when you were pushing there, didn't you —when you were pulling?

Ans. I certainly did expect to get out of the way.

Ques. And the sudden turning of it is what surprised and struck you is it?

Ans. Yes."

When he was employed, he says to his counsel on re-direct examination, when asked concerning what the superintendent had said to him (page 54):

“Ans. He told me to oil the shafting and look after these engines, and told me about this engine stopping, and wouldn't go until you pushed it over with this piece of scantling. Then I asked him if there was any danger, that I didn't know anything about it, and I would rather not take the job if there was going to be any danger, and he said there was no danger, 'Just go ahead and you will soon catch on.'”

This was asked to offset what plaintiff had said at the bottom of page 49 and on page 60 as to his being told to watch out and be careful at the time he was employed; and on his re-cross examination, on page 68, he was asked:

“Ques. Did he tell you what to do, how to start this engine?”

Ans. He told me to use this piece of scantling, stick it in the wheel and push it over.

Ques. What is that—he told you to put this piece of scantling in the wheel, and told you to push it over that way?

Ans. Yes.

Ques. That is the way he told you it was to be started?

Ans. Yes, sir.

Ques. You are sure of that?

Ans. Yes, sir.

And in re-direct examination, in answer to his own counsel (page 69):

“Ques. What was his explanation to you, now, how to do this work?”

Ans. He told me to push the wheel over with this piece of scantling.”

It is manifest that being behind the wheel with the scantling and *pushing* it, was free from all possible dan-

ger, while getting in front of it and *pulling* it might be dangerous. It would hardly be thought necessary, I suppose, in the employment of a man twenty-eight years of age, who was directed to push loaded cars should they be stopped on the brow of the hill sufficiently to overcome their inertia until they got on the slope of the hill, that it was dangerous to get in front of such cars and pull them until they got over on the slope and started down by their momentum and weight. And if a man unusually bright and active had been told that it was his business to see that any such cars stopped were *pushed* until they were started, and he, instead of doing that, got on the track and pulled them and so the cars started, and before he could get out of the way he was knocked down and run over, I think it must be admitted that there would be no liability on the part of his master.

The plaintiff undertakes to give the impression that he was very careful, and that he was timid and cautious about the machinery, and yet he admits that he knowingly took the risk of doing what he did here. I understand of course that this Court must read all of the testimony. When that is done it is most respectfully submitted that it will be found that there is no suggestion of any negligence on the part of the defendant in the case. The motion for a non-suit, therefore, should have been allowed on the ground of the failure of the plaintiff to show negligence of the defendant, as well as upon the ground that the injuries were caused by the act of the plaintiff alone.

VERDICT FOR THE DEFENDANT SHOULD HAVE BEEN
DIRECTED.

After the failure of this motion for a non-suit upon the evidence of the accident, and evidence of the extent of the injury to the plaintiff had been given, the plaintiff rested. The defendant offered no testimony, rested his case and made a motion for a direction of a verdict for the defendant on the same grounds as those upon which he based his motion for a non-suit, which was refused and exception allowed (page 72), and this is made the basis to argue for the propriety of that would make it basis for the seventh assignment of error. Of course to argue for the propriety of that would make it necessary to repeat the same argument here as already made for a non-suit. The assignments of error 8, 9 and 10 are based on the same things.

EXCEPTIONS TO TESTIMONY AND CHARGE.

Assignments of error 11, 12, 13, 14 and 15 are upon the admission of testimony on the part of the plaintiff tending to show that a fellow workman, Edgar G. Cuthbert, was not a skilled man about machinery and the Court's charge concerning this. In the declaration, as well as in all counsel had to say to the jury, much was made of the employment of incompetent fellow workmen, but there is not a word of the testimony in any way to show that the injuries to the plaintiff had any relation whatever to the employment of incompetent workmen; nor is there any evidence that any incompetent workmen were employed; but notwithstanding that, the learned Trial Court permitted Cuthbert and McConnell, the plaintiff, to be asked whether he, Cuthbert, was skilled about

machinery, and then his Honor charged the jury, among other things (page 73): "It is the duty also of the master to employ competent fellow servants in the conduct of his duty to the plaintiff in any of these respects? * * * that it employed incompetent workmen, fellow servants of the plaintiff. * * * Did it fail in its duty to the complainant in any of these particulars? That is a question of fact which you must decide. If you conclude from the testimony in this case that the company was negligent in any of these particulars," &c.

The exception to this is found on page 76.

These matters were extremely harmful to the defendant because it permitted the jury, in connection with all that had been said by counsel through the trial, to take the statement of the witness Cuthbert, that he did not know about machinery, and then charge the defendant with negligence because they had a man employed about the works, entirely competent by the testimony to do what he was employed to do, and who did what he was employed to do, but who was, as he says, not a skilled machinist.

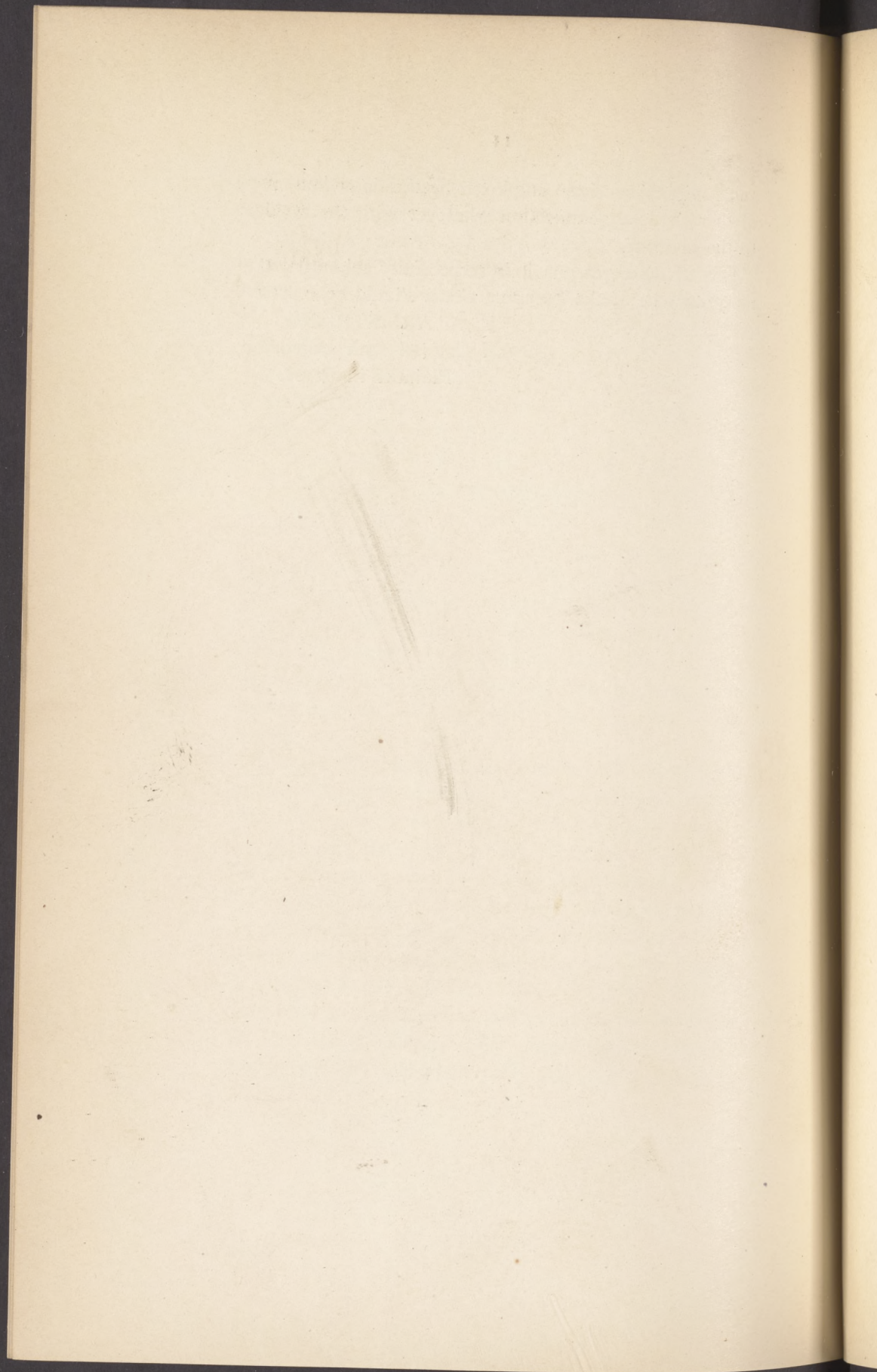
It is a very different situation from permitting matters that are not particularly harmful or of very little moment to come in. It was enough to mislead and misdirect the jury, and the error was very material as against us. The testimony ought not to have been admitted in the first instance, and its admission over objection was harmful error, and the treatment of it by his Honor in the charge, after it was in, was likewise error and intensified the damage done by its admission. As a mere statement of general law the words of the charge might be justified, but they could have no proper application to this case. No matter what or how many incompetent fellow ser-

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vants might have been employed by the defendant, none of them had any connection whatever with the accident to the plaintiff.

For all these reasons it is respectfully submitted that the judgment of the Supreme Court should be reversed.

E. A. ARMSTRONG,
Of Counsel with Defendant,
Plaintiff in Error.



NEW JERSEY COURT OF ERRORS AND
APPEALS.

HENRY E. McCONNELL,
Defendant in Error,
vs.
ALPHA PORTLAND CEMENT
COMPANY,
Plaintiff in Error.

In Tort.

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BRIEF FOR DEFENDANT IN ERROR.

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A large amount of testimony, taken at the trial, relative to Mr. McConnell's injuries and of his condition, does not appear in the case stated. There is also omitted an order by Justice Garrison, entered in the minutes of the Court a long time since, directing the clerk of the Camden Circuit, whenever any case was referred by consent of counsel to the Circuit Court to be there tried, to enter a rule applicable to that particular case. The return to the certiorari seems to omit the original order and to indicate that the particular rule in respect to the case was not entered. Besides the case was regularly noticed, listed for trial, referred to the Circuit Court by consent of the parties (6), moved and tried without objection and without exception taken. These facts

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would seem to dispose of assignments two and three (77, 78). Assignment one is a demurrer. It is too late now to demur. Besides, the case having been tried without objection to the declaration, it might, if necessary, be now amended to conform to the evidence. But the declaration does harmonize with the proof.

If the judgment was prematurely entered, as alleged in assignment four (78), it is an amendable clerical error and cannot vitiate the verdict.

10 The other assignments challenge the submission of the case to the jury and the legal propriety of the charge of the learned Judge. Three points are raised by the proof: (1) the failure of the defendant to properly instruct and advise the plaintiff; (2) the incompetency of a fellow workman, Cuthbert; (3) the safety of the machinery at which the plaintiff worked.

20 First Point. McConnell, although twenty-seven years old at the time of the accident, had no idea what his work was to be for the defendant (27) and had no knowledge, practical or theoretical, of machinery (27). He was hired by the superintendent, Rennell (28), told and showed how to oil the shafting (28), told that the engine got on centre, that he must not let it stop (28), told to take a piece of scantling and pry the wheel over (28), and, when he got a "little nervous about it, and asked if there was any danger in this; if there was any danger he would rather not take the job" (29), Rinnell replied "there is no danger," etc. (29, 49, 54). He was there a little over two weeks before his injury (29). He was hurt about ten o'clock at night (30). Cuthbert was trying to pry the engine off centre (32) and couldn't move it. McConnell came in at the time and stepped up to give him a lift (32). Cuthbert was pushing on the scantling and McConnell pulled. Cuthbert was foreman (32, 57; 60). He called McConnell to assist him (65, 66) and

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he had authority to do so (66, 67) and would have reported McConnell had he refused to help (67). It is obvious from these facts that McConnell did not know that what he undertook to do was dangerous, and that he was resting confidently in the assurance of his employer that the work was not dangerous. He would not have risked his life had he even suspected danger. But his very ignorance led him to rely upon the assurance of his master. Indeed his nervousness and uncertainty, as he expressed them to his employer, would probably have saved him, had his employer not assured him that there was no danger in prying the machine off centre. On this point both the conduct of the plaintiff and defendant were questions for the jury. 10

The Second Point. Cuthbert, a fellow servant, clothed with authority over McConnell, knew nothing at all about machinery (31, 58, 59). Rinnell also employed him and knew at the time he did so that Cuthbert was an inexperienced mechanic (59). He did a good bit of bluffing (61) and another man was put in his place (61). 20
 He had been there about two weeks before the accident (57, 58). He was subpoenaed by the defendant (57) and I did the risky thing of calling him to the stand for the plaintiff. From these facts the inference is plain that Cuthbert was incompetent and the defendant knew it. Had Cuthbert any adequate knowledge of his duties, had he been in the least qualified, he would not have allowed McConnell to pull the scantling. He would have told him that it was dangerous. The fact that he didn't, demonstrates his utter incapacity. It was little short of 30
 murderous negligence to put two such inexperienced men in charge of such an engine; it was more so to tell one of them that it was not dangerous, but that he should go ahead and he would soon catch on, etc., so that whether McConnell's terrible injuries were due to the

incompetency of a fellow workman was a jury question.

The Third Point. Was the machinery reasonably safe. This question must be answered in the light of the known experience and knowledge of Cuthbert and McConnell. The engine and the scantling may have been safe enough for experienced men, but for men of their knowledge they were dangerous and unsafe appliances. The danger was a hidden one. It was in no sense obvious. Appliances involving hidden and unknown dangers, when placed in the hands of inexperienced agents,
 10 known to be ignorant of such dangers, are inadequate and unreasonably unsafe appliances. So that this became a jury question.

Much was made, at the trial, of the evidence on pages 68 and 69, where McConnell said Rinnel told him to put the piece of scantling in the wheel and push it over. It was argued that McConnell did not do as he was told, and, had he done so, he would not have been injured. But he was told to push it over. He was not shown;
 20 the engine was running (68, 69). But what was meant and what understood by the term push were, under all circumstances, questions for the jury. On page 28 McConnell said Rinnel told him to pry the wheel over. On page 29 Rinnel told him "there is no danger; you take hold, now, and you will soon learn, and you will soon pick it up." On page 38 McConnell said Cuthbert was trying to start the engine, on page 40 he was trying to assist him in starting it, and he knew nothing about what would happen. On page 42 he says the man told
 30 him the wheel had to be turned around, started going; the suddenness of its starting is what surprised him (43).

After McConnell had apprised his employer of his ignorance, and asked for information as to the danger of the work assigned him, did the master discharge his whole duty by telling him to pry or push the wheel

over? Should he not have explained to him fully the hidden danger in case he pulled instead of pushed? Should he not have shown the plaintiff how to do the work and cautioned him against doing it in any other way? Should he not also have cautioned the plaintiff against the ignorance and incompetency of Cuthbert? And should he not have explained the deficiencies of the machinery and the likelihood of its starting with lightning rapidity when the scantling was applied? Should he not have explained to him the danger of being hurt by the speed of the revolving wheels even if he pushed instead of pulled? All these were jury questions. 10

Nor was the plaintiff guilty of negligence as a matter of law when he said he expected (p 43) to get out of the way of the scantling. He did not mean by such words that he knew the scantling would fly with dangerous speed. He simply meant that when the wheel moved the scantling would move and that he must remove it, or step away. He did not mean that he expected danger or risk. On the contrary his conduct shows that his master's assurance of the absence of danger was thoroughly relied upon. He naturally supposed that "to pry or push the wheel over" meant to place the wheel in a position to permit the engine to operate; for he had been told (p. 28) not to let it stop or rest in idleness. So that his entire conduct and all his language, in light of all the circumstances, were properly submitted to the jury to determine whether or not he was negligent, and to determine the meaning of the entire conversation between the plaintiff and his employer. 20 30

Push and pull are equivalent. McConnell had a perfectly blank mind so far as the machinery and its dangers were concerned, made so by his master's assurance. His dominant thought was to start the engine by turning the wheel, not to let the business stop and suffer loss.

To start it by pushing or pulling was the same thing to him. Especially in view of the act and commanding position of the incompetent Cuthbert, who was his superior. To push or pull would mean exactly the same thing to McConnell. He was told to start the engine, not let it stop, and was assured that there was, would be, no danger in doing so. For, if there was no danger in starting the engine off centre, would it make any difference whether he pushed or pulled? His master had
10 assured him that there was, would be, no danger in starting the machine off centre, and commanded him to so start it. Hence whether he should have known better or acted differently was a jury question.

Respectfully submitted,

JOHN W. WESCOTT,
Attorney for Defendant in Error.

ADDITION TO BRIEF.

Lastly "push", "pull", "turn over", are vernacular and interchangeable terms, all meaning the same thing so far as the result to be accomplished was concerned, to wit, getting the engine off centre. There is no distinction between "push" and "pull" in their relation to starting the engine off centre. The difference consisted solely in the risk. But the risk was non-obvious and unknown. The risk is the matter that the master assured the plaintiff did not exist. The risk was the matter which the defendant was negligent in not exposing and explaining. The incompetent Cuthbert, known by the defendant to be so, *pushed*, and his demand upon the plaintiff to *pull* was in effect injuring the plaintiff by Cuthbert's incompetence. Hence Cuthbert's incompetent act and command were the incompetent act and command of the defendant itself. The assurance of Rennell that there was no danger had the effect to remove from McConnell's mind, together with the other circumstances, all distinction between "push" and "pull".

It should be observed that no defence was offered in this case. The inability to deny is a confession of fault.

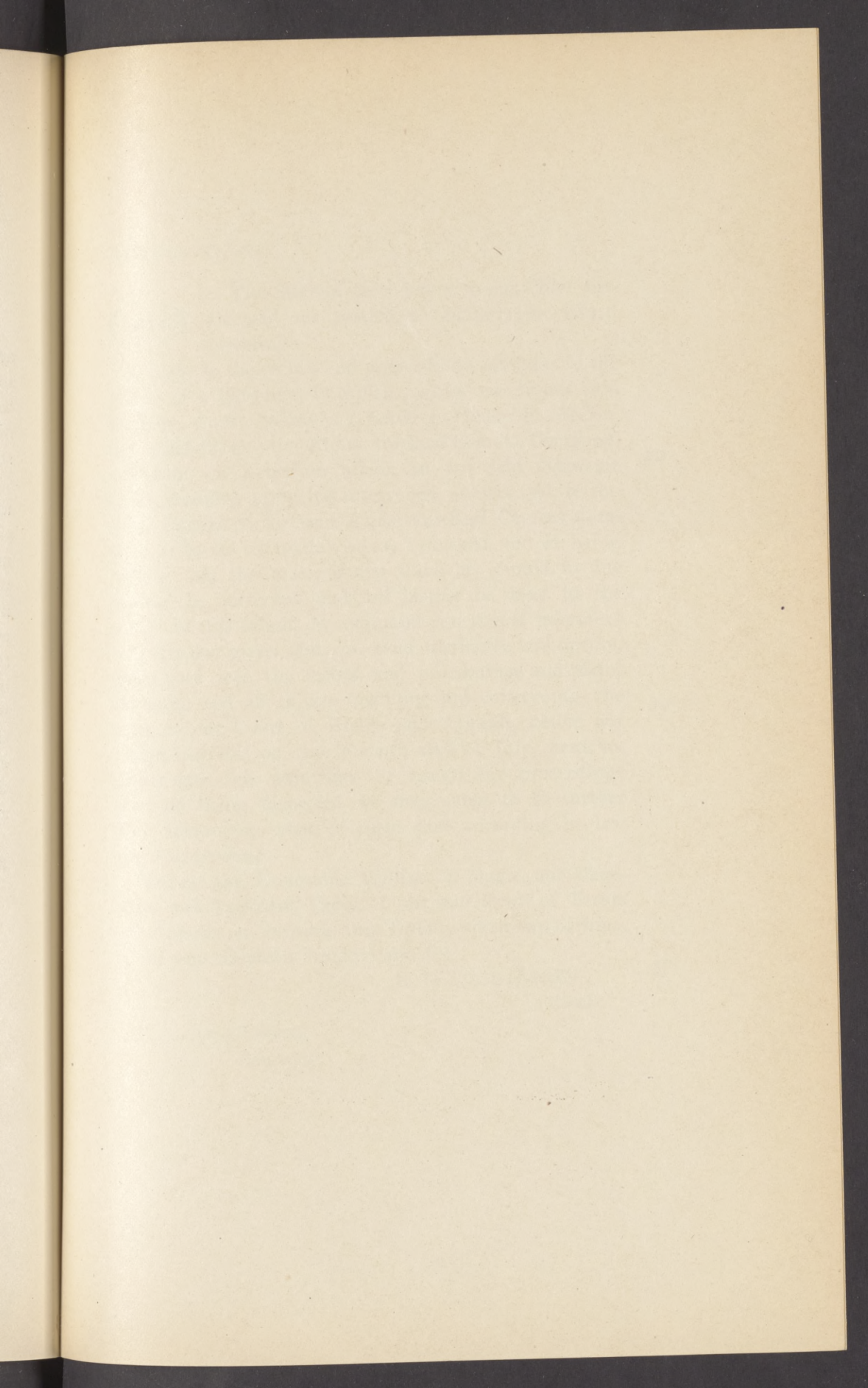
Respectfully submitted,

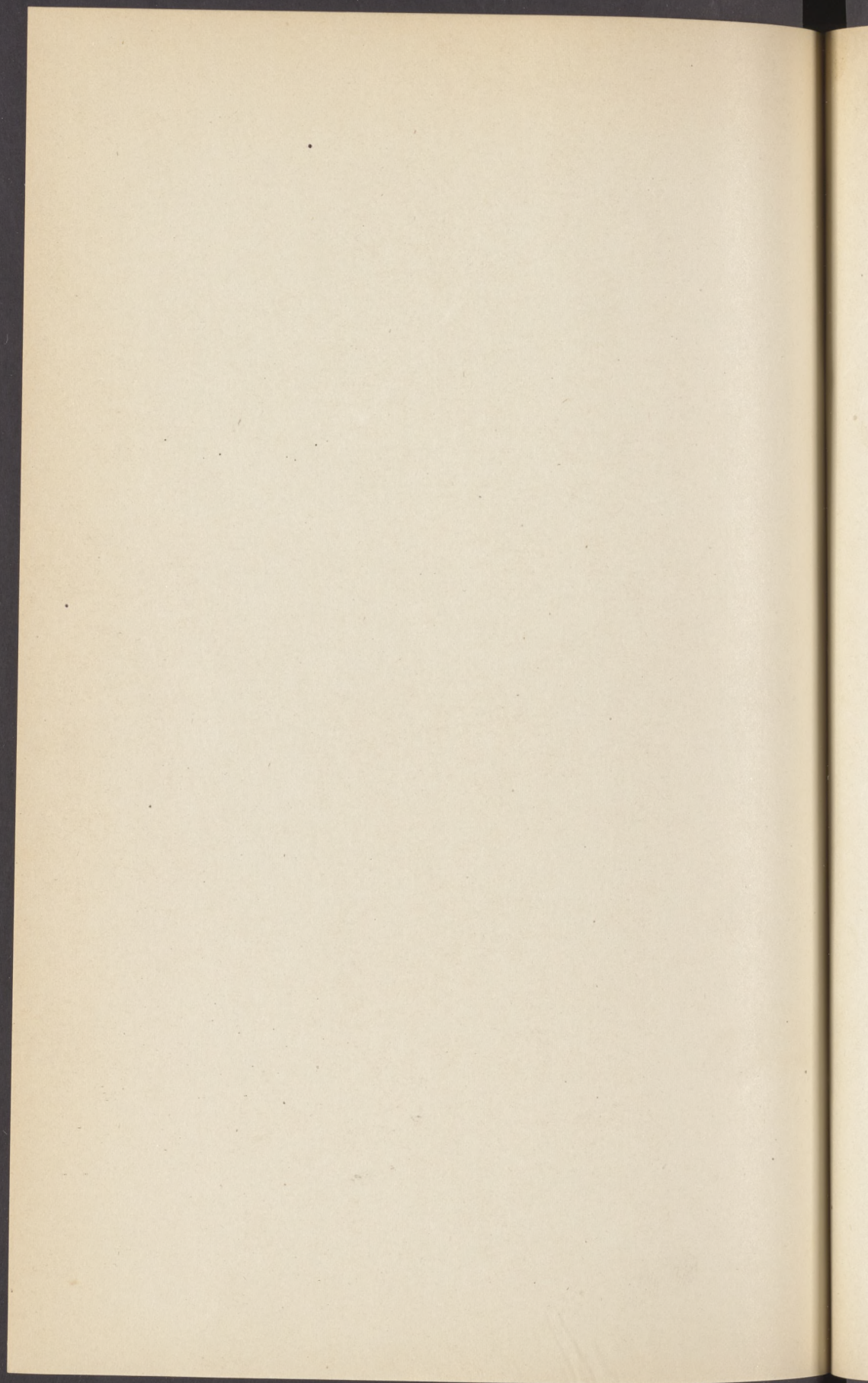
JOHN W. WESCOTT,
Attorney for Defendant in Error.

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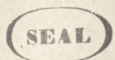
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NEW JERSEY, SS :



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

Because in the record and proceedings, and also in the giving of a judgment in a plaint which was in our said Supreme Court, before you, between Henry E. McConnell, plaintiff, and the Alpha Portland Cement Company, defendant on a certain action in our said Supreme Court, manifest error has intervened, as it is said, to the great damage of the said Alpha Portland Cement Company, as by its complaint we are informed, and we being willing that the error, if any there be, should in due manner be corrected and full justice be done to the parties in this behalf, do command you that if judgment be thereupon given that you send distinctly and openly, under your seal, the record and proceedings and plaint aforesaid, and all things touching and concerning the same, to our Court of Errors and Appeals, before our Judges thereof, on the fifteenth day of July, next, together with this writ, that the record and proceedings aforesaid being inspected we may cause to be further done thereupon what of right and according to law ought to be done.

Witness the Honorable William J. Magie, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, this Twenty-sixth day of June, in the year nineteen hundred and six.

S. D. DICKINSON,
Clerk.

E. A. ARMSTRONG,
Attorney.

RETURN.

The answer of the Justices of the Supreme Court of the State of New Jersey 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 said State, in a certain schedule to this writ annexed, as within we are commanded.

10 WM. S. GUMMERE, [SEAL.]
C. J.

(ENDORSED.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

HENRY E. McCONNELL, Def't in Error,

vs.

20 ALPHA PORTLAND CEMENT COMPANY, Pl'tff in Error.

IN TORT. ON ERROR TO SUPREME COURT.

Returnable July 16, A. D. 1906.

E. A. ARMSTRONG, Attorney.

Filed Jun. 29, 1906.

S. D. DICKINSON, Clerk.

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NEW JERSEY SUPREME COURT.

HENRY E. McCONNELL,	}	In Tort.	
vs.		On Postea.	
ALPHA PORTLAND CEMENT		John W. Wescott,	10
COMPANY.		Attorney.	

As yet of the twenty-third day of December, A. D. eighteen hundred and ninety-nine.

Witness, WILLIAM J. MAGIE, Esquire, Chief Justice.
WILLIAM RIKER, JR., Clerk. 20

CAMDEN COUNTY, ss:

The Alpha Portland Cement Company, the defendant in this suit, was summoned to answer unto Henry E. McConnell, the plaintiff in a plea of an action of tort; and thereupon the said plaintiff, by John W. Wescott, his attorney, complains for that heretofore, to wit: on or about the nineteenth day of December, eighteen hundred and ninety-eight, at Alpha in the County of Warren, in New Jersey, to wit: at Camden in the County of Camden, in New Jersey, the plaintiff was an employe and servant of the defendant; that the plaintiff to the knowledge of the defendant, was without experience and knowledge of the work to which defendant put the 30

plaintiff; that the defendant negligently and carelessly directed and required the plaintiff to oil certain machinery in and about defendant's premises and also to do and aid in doing any and all acts requisite to operation and maintenance of said machinery, that said machinery was old, dangerous, inadequate and unfit to be used and frequently stopped and came to a standstill; that thereupon defendant negligently and carelessly directed and required the plaintiff to start said machinery in motion and to keep the same in motion; that the doing of said acts by the plaintiff, so required of him by the defendant, was dangerous to the knowledge of the defendant; that, at the time and place aforesaid, while the plaintiff was endeavoring to start said machinery, stopped as aforesaid, without his fault, and because said machinery was old, dangerous and unfit for use, said machinery, suddenly started and struck, cut, bruised and permanently injured and crippled the plaintiff and caused him great suffering of body and mind, and to spend large sums of money endeavoring to be relieved of said sufferings, all to his damage ten thousand dollars.

And for that heretofore, to wit: on or about the nineteenth day of December, aforesaid, at Alpha, in said County of Warren, in New Jersey, to wit: at Camden, in the County of Camden, in New Jersey, the defendant carelessly and negligently directed and required the plaintiff, one of its employees, to start and keep in motion a certain one of its engines, that for the purpose of starting said engine it was necessary for the defendant to furnish plaintiff a proper and suitable and safe tool and device and machine, and, in place thereof, gave and furnished plaintiff with said proper and suitable and safe tool, device and machine, that the defendant carelessly and negligently and without plaintiff's fault, failed to furnish plaintiff with said proper and suitable and safe

tool and device and machine, and, in place thereof, gave and furnished the plaintiff an unsafe, unsuitable, improper and dangerous tool, device and machine for the purpose of starting said engine whereby and because thereof, while plaintiff was endeavoring to start said engine, with said dangerous, unsafe, improper tool, the same suddenly started and struck, cut, bruised and permanently injured and crippled the plaintiff and caused him great suffering of body and mind, and to spend large sums of money endeavoring to be relieved of said sufferings, all to his damage ten thousand dollars. 10

And for that heretofore, to wit: on or about the nineteenth day of December, aforesaid, at Alpha, in said County of Warren, in New Jersey, to wit: at Camden, in Camden County, New Jersey, the defendant knew the plaintiff was without experience of the work and duties the defendant required the plaintiff to do and perform; that the defendant likewise knew that the fellow servant provided by the defendant to aid and co-operate with the plaintiff in and about the service the defendant required of the plaintiff was also without knowledge and experience; yet, the defendant, disregarding its duty in this behalf, carelessly and negligently and without the plaintiff's fault required him to work at said time and place, with said fellow servants, and required them to oil, care for, stop and start a certain engine of the defendant, which said engine was old, defective and unfit for use; that the defendant negligently and carelessly failed to caution and instruct plaintiff, and said fellow servant of and concerning said machinery and the dangers to which they were subjected in the performance of said services and duties, and carelessly and negligently failed to supply them with safe, adequate and ordinary tools and means necessary to perform said services, whereby and because wherof while plaintiff and said fellow servant were en- 20 30

deavoring to perform such services, said engine, because of its defects and because of the inadequate and dangerous tools furnished aforesaid, and because of the incompetency of said fellow servant, suddenly started and struck, cut, bruised and permanently injured and crippled the plaintiff, and caused him great suffering of body and mind and to spend large sums of money to be relieved of said sufferings, all to his damage ten thousand dollars, and therefore he brings his suit, &c.

10 And the said defendant, Alpha Portland Cement Company by E. A. Armstrong, its attorney, comes and defends the wrong and injury when, &c., and says that it is not guilty of the supposed tort and wrong and injury as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country, &c. And the plaintiff doth the like.

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

And now at this day, to wit: the nineteenth day of June, A. D. nineteen hundred and six, before our said Supreme Court at Trenton comes the said plaintiff by his attorney aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:

30 Afterwards, to wit, on the fourteenth day of June, one thousand nine hundred and six, at a Circuit Court holden at Camden, in and for the County of Camden, before the Honorable Allen B. Endicott, Judge of the Circuit Court of the County of Camden, by consent of the parties the issue within named having been sent by the Honorable

Charles G. Garrison, Justice of the Supreme Court, holding the Circuit Court for the County of Camden, to be tried in the Circuit Court of the County of Camden, 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, by their respective attorneys within mentioned; and the jurors of the jury, where of mention is within made, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oath say that the defendant, The Alpha Portland Cement Company, is guilty in manner and form as the plaintiff hath in his declaration complained against it, and they assess the damages of the said plaintiff, on occasion thereof, over and above his costs and charges by him about his suit in this behalf expenses, at ten thousand dollars, and for those costs and charges, the sum of six cents. 10

Therefore it is considered that the said plaintiff do recover against the said defendant his said damages by the jury in form aforesaid found to ten thousand dollars and also for his costs and charges aforesaid, by the Court now here adjudged to the said plaintiff and with his assent, which said damages, costs and charges in the whole amount to 20

Judgment signed this nineteenth day of June, A. D. nineteen hundred and six.

WM. S. GUMMERE,

C. J. of 30

NEW JERSEY, SS :



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

Whereas, in the return to a certain writ of error sued out of the Court of Errors and Appeals to you directed, in a certain cause before you wherein Henry E. McConnell is plaintiff and Alpha Portland Cement Company is defendant, sued out by
 10. said Alpha Portland Cement Company, as plaintiff in error, diminution of the record is alleged in that said return does not contain the rules, orders and papers showing the reference of the said suit to the Camden County Circuit for trial, the report of said trial, the postea, the rule allowing the filing of such postea and for the entry of judgment.

These therefore are to command you that you do forthwith certify and send openly and distinctly over your
 20 seal on the 28th day of July, instant, to our Court of Errors and Appeals, all of the said rules, orders and papers referring said cause to the Camden County Circuit Court for trial, the report of said trial, the postea, the rule allowing the filing of said postea and for the entry of judgment in said cause ; and all things touching and concerning the same by whatsoever name they may be called, as fully and completely as they may remain before you, in order that we may examine the same and cause to be done thereupon what of right and according
 30 to law ought to be done.

Witness the Honorable William J. Magie, our Chancellor, and President Judge of our said Court of Errors and Appeals at Trenton, this 16th day of July, A. D. 1906.

S. D. DICKINSON, Clerk.

E. A. ARMSTRONG, Att'y.

RETURN.

I do herewith send to the Court of Errors and Appeals of the State of New Jersey, the proceedings as within I am commanded under the seal of the Supreme Court of New Jersey and my hand.



Dated July 23, 1906.

WM. RIKER, JR., Clerk.

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(ENDORSED.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

HENRY E. McCONNELL, Def't in Error,

vs.

ALPHA PORTLAND CEMENT COMPANY, Pl'tff in Error.

IN ERROR. WRIT OF CERTIORARI.

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Returnable July 28, A. D. 1906.

E. A. ARMSTRONG, Attorney.

Filed Sep. 7, 1906.

S. D. DICKINSON, Clerk.

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Pleas before the Justices of the Supreme Court of the State of New Jersey of the the twenty-third day of December, A. D. Eighteen hundred and ninety-nine.

Witness, WILLIAM J. MAGIE, ESQ., Chief Justice.

10 WILLIAM RIKER, JR., Clerk.

JOHN W. WESCOTT, Attorney for Plaintiff.

E. A. ARMSTRONG, Attorney for Defendant.

CAMDEN COUNTY, SS :

The Alpha Portland Cement Company, the defendant in this suit, was summoned to answer unto Henry E. McConnell, the plaintiff in a plea of an action of tort; and thereupon the said plaintiff, by John W. Wescott, his attorney, complains for that heretofore, to wit: on or about the nineteenth day of December, eighteen hundred and ninety-eight, at Alpha in the County of Warren, in New Jersey, to wit: at Camden, in the County of Camden, in New Jersey, the plaintiff was an employee and servant of the defendant; that the plaintiff to the knowledge of the defendant, was without experience and knowledge of the work to which defendant put the plaintiff; that the defendant negligently and carelessly directed and required the plaintiff to oil certain machinery in and about defendant's premises and also to do and aid in doing any and all acts requisite to operation and maintenance of said machinery, that said machinery was old, dangerous, inadequate and unfit to be

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used and frequently stopped and came to a standstill ; that thereupon defendant negligently and carelessly directed and required the plaintiff to start said machinery in motion and to keep the same in motion ; that the doing of said acts by the plaintiff, so required of him by the defendant, was dangerous to the knowledge of the defendant ; that, at the time and place aforesaid, while the plaintiff was endeavoring to start said machinery, stopped as aforesaid, without his fault, and because said machinery was old, dangerous and unfit for use, said machinery, suddenly started and struck, cut, bruised and permanently injured and crippled the plaintiff and caused him great suffering of body and mind, and to spend large sums of money endeavoring to be relieved of said sufferings, all to his damage ten thousand dollars.

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And for that heretofore, to wit : on or about the nineteenth day of December, aforesaid, at Alpha, in said County of Warren, in New Jersey, to wit : at Camden, in the County of Camden, in New Jersey, the defendant carelessly and negligently directed and required the plaintiff, one of its employees, to start and keep in motion a certain one of its engines, that, for the purpose of starting said engine it was necessary for the defendant to furnish plaintiff a proper and suitable and safe tool and devise and machine, and, in place thereof, gave and furnished plaintiff with said proper and suitable and safe tool, device and machine, that the defendant carelessly and negligently and without plaintiff's fault, failed to furnish plaintiff with said proper and suitable and safe tool and device and machine, and, in place thereof, gave and furnished the plaintiff an unsafe, unsuitable, improper and dangerous tool, device and machine for the purpose of starting said engine whereby and because thereof, while plaintiff was endeavoring to start said engine, with said dangerous, unsafe, improper tool, the

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same suddenly started and struck, cut, bruised and permanently injured and crippled the plaintiff and caused him great suffering of body and mind, and to spend large sums of money endeavoring to be relieved of said sufferings, all to his damage ten thousand dollars.

And for that heretofore, to wit: on or about the nineteenth day of December, aforesaid, at Alpha, in said County of Warren, in New Jersey, to-wit: at Camden, in Camden County, New Jersey, the defendant knew the
 10 plaintiff was without experience of the work and duties the defendant required the plaintiff to do and perform; that the defendant likewise knew that the fellow servant provided by the defendant to aid and co-operate with the plaintiff in and about the service the defendant required of the plaintiff was also without knowledge and experience; yet, the defendant, disregarding its duty in this behalf, carelessly and negligently and without the plaintiff's fault required him to work at said time and place, with said fellow servants, and required them to oil, care
 20 for, stop and start a certain engine of the defendant, which said engine was old, defective and unfit for use; that the defendant, negligently and carelessly failed to caution and instruct plaintiff, and said fellow servant of and concerning said machinery and the dangers to which they were subjected in the performance of said services and duties, and carelessly and negligently failed to supply them with safe, adequate and ordinary tools and means necessary to perform said services, whereby and because whereof while plaintiff and said fellow servant
 30 were endeavoring to perform such services, said engine, because of its defects and because of the inadequate and dangerous tools furnished aforesaid and because of the incompetency of said fellow servant, suddenly started and struck, cut, bruised and permanently injured and crippled the plaintiff, and caused him great suffering of

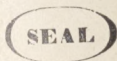
body and mind and to spend large sums of money to be relieved of said sufferings, all to his damage ten thousand dollars, and therefore he brings his suit, &c.

And the said defendant, Alpha Portland Cement Company, by E. A. Armstrong, its attorney, comes and defends the wrong and injury when, &c., and says that it is not guilty of the supposed tort and wrong and injury as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country, &c., and the plaintiff doth the like.

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I, William Riker, Jr., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above stated cause, as the same remains on file in my office.

In testimony whereof I have hereto set my hand and the seal of the said Court, this Seventeenth day of March, A. D. nineteen hundred.



WM. RIKER, JR.,
Clerk.

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Afterwards, to wit, on the fourteenth day of June, one thousand nine hundred and six, at a Circuit Court holden at Camden, in and for the County of Camden, before the Honorable Allen B. Endicott, Judge of the Circuit Court of the County of Camden, by consent of the parties the issue within named having been sent by the Honorable Charles G. Garrison, Justice of the Supreme Court, holding the Circuit Court for the County of Camden, to be tried in the Circuit Court of the County of Camden, 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, by their respective attorneys within mentioned; and the jurors of the jury, whereof

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mention is within made, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oath say that the defendant, The Alpha Portland Cement Company, is guilty in manner and form as the plaintiff hath in his declaration complained against it, and they assess the damages of the said plaintiff, on occasion thereof, over and above his costs and charges by him about his suit in this behalf expended, at ten thousand dollars, and for those costs and charges, the sum of six cents.

ALLEN B. ENDICOTT,
C. C. J.

(ENDORSED.)

NEW JERSEY SUPREME COURT.

HENRY E. McCONNELL,

vs.

ALPHA PORTLAND CEMENT COMPANY.

IN TORT. TRANSCRIPT.

JOHN W. WESCOTT, Attorney.

Filed June 19, 1906.

WM. RIKER, JR., Clerk.

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NEW JERSEY SUPREME COURT.

HENRY E. McCONNELL,	}	In Tort.		
Plaintiff,				
vs.		}	Notice.	10
ALPHA PORTLAND CEMENT COMPANY,				Defendant.

Please take notice that I shall apply to the Honorable Allen B. Endicott, Judge of the Camden County Circuit Court, at the Court House, in the City of Camden, on Monday, the eighteenth day of June instant, or as soon thereafter as Counsel can be heard for an order to file the circuit record and postea to enter judgment forthwith in the above stated case. 20

Dated Camden, N. J., June 14th, 1906.

To E. A. ARMSTRONG, ESQ.,
Attorney for Defendant.

JOHN W. WESCOTT,
Attorney for Plaintiff

(ENDORSED.)

NEW JERSEY SUPREME COURT.

HENRY E. McCONNELL, Plaintiff,

vs.

10 ALPHA PORTLAND CEMENT COMPANY, Defendant.

IN TORT. NOTICE, &c.

JOHN W. WESCOTT, Attorney.

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Service of copy hereby acknowledged, June 14, 1906.

E. A. ARMSTRONG, Attorney for Defendant.

Filed June 19, 1906.

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WM. RIKER, JR., Clerk.

NEW JERSEY SUPREME COURT.

HENRY E. McCONNELL,	}	In Tort.	
Plaintiff,			
vs.			
ALPHA PORTLAND CEMENT	}	Order.	10
COMPANY,			
Defendant.			

Pursuant to notice, it is on motion of John W. Westcott, attorney for the plaintiff, ordered that the plaintiff have leave to file circuit record and postea and enter judgment forthwith in the above stated cause. 20

Dated June 18th, 1906.

ALLEN B. ENDICOTT,
C. C. J.

(ENDORSED.)

NEW JERSEY SUPREME COURT.

HENRY E. McCONNELL,
Plaintiff,

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vs.

ALPHA PORTLAND CEMENT COMPANY,
Defendant.

IN TORT. ORDER

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JOHN W. WESCOTT, Attorney of Plaintiff.

Filed June 19, 1906.

WM. RIKER, JR., Clerk.

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CAMDEN COUNTY CIRCUIT COURT.

HARRY E. McCONNELL,	}	In Tort.	10
vs.			
ALPHA PORTLAND CEMENT			
COMPANY.			

APRIL TERM, 1906.

Appearances :

For the Plaintiff, J. W. WESCOTT, ESQ. 20

For the Defendant, E. A. ARMSTRONG, ESQ.

BEFORE ENDICOTT, J. AND A JURY.

SARAH B. McCONNELL, sworn.

By Mr. Wescott :

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- Q. Mrs. McConnell, where do you live, please?
- A. In Haddonfield.
- Q. In Camden County, New Jersey?
- A. Camden County, New Jersey.

Q. You are the mother of the young plaintiff in this case, are you?

A. I am.

Q. And you have two other sons?

A. Yes, sir.

Q. Is your husband living?

A. No, sir.

Q. What is your son's first name? I call him Harry, is that right?

10 A. Harry is his first name.

Q. How old is he now?

A. 36.

Q. 36?

A. Yes.

Q. Where was he born and brought up?

A. He was born in Philadelphia.

Q. Can you speak a trifle louder so these gentlemen can all hear you? He was born in Philadelphia?

A. Born in Philadelphia and lived there until he was
20 eight years old; then we came to Jersey, one year in Moorestown and the remainder of the time in Haddonfield with the exception of two years, when we went back to the city and returned again?

Q. Mrs. McConnell, from the birth of this boy Henry, down to the 19th of December, 1898, what kind of a physical boy was he?

A. He was always in perfect physical health.

Q. Always in perfect physical health?

A. Always well and strong in every way.

30 Q. Do you know whether he was engaged in any occupations of any sort before the 19th of December, 1898?

A. Yes, he had tried different things to find out which he would like best.

Q. Have you any personal knowledge as to how

much money he earned,—the highest amount of money he earned?

A. \$60 was the highest.

Mr. Armstrong: That answer should be yes or no; I object to that.

The Court: The answer should be yes or no.

Q. Have you personal knowledge of what he earned?

A. I have to the extent of \$60. 10

The Court: Madam, don't give the amount now, just state if you knew what he earned.

Mr. Wescott: She has said that she knew he earned \$60.

Mr. Armstrong: She may have known that from what he told her; I move to strike it out.

The Court: You may test her knowledge now. 20

By Mr. Armstrong:

Q. How do you know of your own knowledge as to his earnings,—what he told you?

A. I took it from what he told me.

Q. That is all you know about it,—what he told you?

A. Yes.

Q. And you believe what he told you?

A. Certainly.

Q. And that is why you are testifying?

A. Yes. 30

Mr. Armstrong: I move that it be stricken out.

By Mr. Wescott:

Q. Did you see the money that he earned?

A. No, I can't say that I did because he was away from home.

The Court: The motion is allowed.

Q. Mrs. McConnell, you say your boy was physically perfect. What do you know about his physical life which would indicate that he was physically perfect? Do you know about his working?

A. Yes, I know he was always strong and healthy.

10 Q. Do you know about his participation in games?

A. Yes, sir, I know he played games in Haddonfield, foot ball games.

Q. Did you see him play yourself?

A. Yes.

Q. Coming down to the 19th of December and starting from that point, do you recall receiving notice of his injury?

A. Yes. I recall it; I thought the first—May I answer this question?

20 Q. No, you simply recall receiving notice of his injury. It is not important to make an explanation now. Did you go to see him?

A. Yes.

Q. Where did you go?

A. Easton hospital.

Q. Where is the Easton hospital?

A. It is in Easton.

Q. And Easton is in what state?

A. Pennsylvania.

30 Q. Was it near Alpha where he had been working?

A. Yes.

Q. When you went in the hospital what did you see?

A. I saw the most dreadful looking object I ever want to lay my eyes on.

Q. What was that?

A. I never would have known my boy.

Q. Was he conscious then?

A. He was for a time; he was under the effects of opiates.

Q. How long did you stay there?

A. I was there a day the first time I went.

Q. A day?

A. But not all the time with him.

Q. Did you go back afterward to see him again?

A. Yes. 10

Q. How long afterward?

A. I think it was about two weeks afterward.

Q. What condition did you find him in then?

A. I think he was improved then a good deal.

Q. We can't understand you.

A. He was improved a good deal from the time I saw him first.

Q. Did he know you the second time he saw you?

A. Yes.

Q. Did you go back after that to see him again? 20

A. No, not again.

Q. Where did you see him afterward, the next time?

A. He was allowed to come home.

Q. And then he remained home?

A. No, he was only allowed home for a day.

Q. How long?

A. A day I think it was, and a night.

Q. Then where did he go?

A. Went back to the hospital.

Q. Well, did he come home finally? 30

A. Yes, sir.

Q. And stayed?

A. Yes, sir.

Q. Has he stayed there ever since?

A. Ever since.

Q. Mrs. McConnell, what change have you noticed in your boy since his wounds were healed, and he got as well as he is?

A. Well, he is a constant sufferer.

Q. He is a constant sufferer?

A. Very nervous with his head; I might say he is simply a wreck from what he was.

Q. Simply a wreck from what he was?

A. From his childhood, from what he was when he
10 was a young man.

Q. Has he been disfigured any?

A. Yes, sir.

Q. Do you know whether he is troubled with his head?

A. Very much.

Q. Is he troubled with his heart?

A. Very much, indeed.

Q. Did he ever have these troubles before he received this injury?

20 A. Never.

Q. Is he able to do any work?

A. No, sir.

Q. Who supports him?

A. His brothers.

Cross-examination.

By Mr. Armstrong:

Q. He is now how old, did you say?

30 A. 36.

Q. 36?

A. Yes.

Q. He had no business or profession at the time he was hurt, had he?

A. No.

Q. And had been trying various things?

A. Yes.

Q. To see what he liked?

A. Yes, sir.

Q. And had he been engaged in various different things up to that time?

A. He had tried several things.

Q. Now, was he a bright able young man?

A. Yes, sir.

Q. Intelligent?

A. Yes, sir. 10

Q. Observing?

A. Yes, sir, very.

Q. How was he,—was he a handy sort of a man?

A. Very handy in everything.

Q. Could turn his hand to almost anything?

A. Yes.

Q. Was he slow or quick in getting ideas of things?

A. I think he was quick.

Q. You would call him a ready, quick man. 20

A. Yes.

Q. Outside of a mother's partiality,—of course we all understand that—what would you say as to his intelligence, ordinary or a little above that?

A. If he was any other son but mine I should say the same about him. He was a bright boy.

Q. And you would call him above the average?

A. Yes, I would.

Q. Now, how long after the accident was it that you saw him? 30

A. After he was hurt that I saw him?

Q. Yes.

A. Three weeks.

Q. It was three weeks after the accident when you first saw him?

- A. When I first saw him.
- Q. Then you saw him about two weeks after that?
- A. I think it was about that time.
- Q. Well, in that neighborhood?
- A. I couldn't tell exactly.
- Q. Then how long after that time before he came home, about?
- A. Really, I can't say just how many weeks it was before he was allowed to come home for a day.
- 10 Q. You don't recall that?
- A. No, sir.
- Q. Does he make his home with you now?
- A. Yes.
- Q. Since he was hurt he has not done any work at all?
- A. He has tried, but he can't do anything.
- Q. Can't do anything at all?
- A. No.
- Q. Has not been engaged since then at all?
- 20 A. No.

HENRY E. MCCONNELL, SWORN.

By Mr. Wescott :

- Q. What is your age now, Mr. McConnell?
- A. 35.
- Q. Your mother had it 36.
- 30 A. I will be 36 next October; I am in my 36th year.
- Q. Have you any trade?
- A. No trade.
- Q. You lived in Haddonfield for a good many years, didn't you?
- A. Yes, sir.

Q. And up to 1898 what did you do? What different vocations did you follow?

A. Well, I was with the Barber Asphalt Paving Company in Buffalo and in the lumber business.

Q. Do you recall trying anything else, or was that all?

A. That was about all.

Q. What wages had you found yourself able to earn?

A. I had earned as high as \$60 a month.

Q. And at the time you went to work for the Alpha Portland Cement Company, where did you live? 10

A. Haddonfield.

Q. With your parents.

A. Yes.

Q. Your father was living there?

A. Yes, sir.

Q. You and your brothers and father and mother all lived together there?

A. Yes, sir.

Q. How did you happen to go up to this place to work, Mr. McConnell? 20

A. I was sent for by one of the superintendents.

Q. Do you remember his name?

A. Mr. Rinnell.

Q. When you were sent for did you know what your work was to be there?

A. No, I hadn't an idea what it was to be.

Q. Before you went up there had you any knowledge at all of machinery?

A. None whatever. 30

Q. Had you ever worked about machinery?

A. No, sir, never had anything to do with it at all.

Q. Had you ever given it theoretical examination or study?

A. No, sir.

- Q. Well, when you got up there whom did you meet?
- A. Why, I saw Mr. Rinnell.
- Q. The superintendent?
- A. The superintendent, one of the superintendents.
- Q. Did he engage you to work for this defendant company?
- A. Yes.
- Q. How much did he give you?
- A. He said he would give me \$10 a week.
- 10 Q. And did he define your duties?
- A. I beg pardon?
- A. Did he define your duties, tell you what you were to do?
- A. Yes, sir.
- Q. What did he tell you you were to do?
- A. He told me I was to oil all the shafting in the building and look after the three small engines.
- Q. Well, did you ever—Was that followed by any conversation with him?
- 20 A. Yes, he spoke to me about the engines.
- Q. What did he say about the engines?
- A. He said that,—he pointed out one of the engines, took me around and pointed out one of the engines, and said that that ran a kiln and that engine must be kept going, for whenever it was stopped it lost money for the company, and to keep the engine going, and he said that sometimes when it stopped it stopped on center, as he called it.
- Q. Did you ask him what that meant?
- 30 A. I asked him what it meant and he told me but it was beyond me, and then he told me the way to get it off this center; the way to start it was to put a piece of scantling that was standing up there in the wheel and pry the wheel over, and I told him I didn't know anything about engines and I began to get a little nervous about

it, you know. I said, "Now, Mr. Rinnell, is there any danger in this? If there is any danger I would rather not take the job." "Oh," he says, "there is no danger; you take hold, now, and you will soon learn; you will soon pick it up."

Q. About when was that, Mr. McConnell? If you can give us the exact time, give it to us; if you can't, give us the approximate time.

A. It was somewhere around the first of December.

Q. Somewhere about the first of December? 10

A. Yes.

Q. And how long did you work there before you got hurt?

A. Well, it was a little over two weeks.

Q. Did anybody, did the superintendent send anybody with you to explain or show to you the process of oiling these engines?

A. He sent an old oiler with me; he took his old oiler off this job and gave him another job and put me on in his place. He told his oiler to take me over the route and show me the places to oil. 20

Q. Did he do that?

A. He did it, yes.

Q. From that time on until you were hurt, what did you do, oil?

A. Oiled the engines and the shafting.

Q. Where this fellow showed you?

A. Yes.

Q. Was it your object to learn the cement business from top to bottom? 30

(Objected to.)

A. That is what I went there for.

(Objected to.)

The Court: It is a little leading.

Q. What was your object when you went there?

Mr. Armstrong: I object; that is altogether immaterial.

(Question withdrawn.)

Q. Do you remember the day you got hurt?

10

A. Very distinctly.

Q. What day was it?

A. The 19th of December; it was the night, Judge.

Q. Oh, it was in the night?

A. Yes.

Q. And what year?

A. 1898.

Q. Which one of the engines was it that you were working at when you got hurt?

A. It was this engine that ran this kiln.

20

Q. The one that the superintendent specially pointed out to you?

A. Yes, that one ran all the time, Judge.

Q. Day and night?

A. Day and night; the other engines only run when they were needed.

Q. Very well; now, about what time in the night was it that you went in the engine room?

A. It was about ten o'clock, as far as I can remember.

Q. Who was there at the time?

30

A. Mr. Cuthbert.

Q. Where did he come from?

A. He came out of the kiln room over-head.

Q. I know, but where did he live at that time, where was his home?

A. In Haddonfield.

Q. Did he go up there the same time you did to work?

A. No, went up before I did.

Q. Did he know anything about machinery?

(Objected to.)

A. No, nothing at all.

Mr. Armstrong: I object; you can show if you choose what this man knows about the knowledge of another, but the mere statement that he knows nothing about machinery is certainly immaterial. 10

Mr. Wescott: If this other employee was not a competent employee, then you involve the principle of law that it is negligence to put one employee to work with another that is not competent. Clearly the case is based in a measure on that theory. I shall show that Cutlbert knew nothing about machinery and that he had been sent for just a few days before McConnell got there, and put in charge of that engine; he never had charge of an engine before and knew nothing about it at all, and if I show that I have made out a case on that point according to all the authorities. 20

The Court: I will take the testimony.

Whereupon the defendant, by its counsel, prays a bill of exceptions which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge. 30

Mr. Armstrong: I move that the answer be stricken out.

The Court: The motion is refused.

Whereupon the defendant, by its counsel, prays a bill of exceptions which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge.

Q. What was Cuthbert doing when you entered the room?

A. He was trying to pry the engine.

Q. Was he using this scantling that the superintendent told you to use?

10 A. Yes, sir.

Q. Did he have it in the spokes of the wheel, just as the superintendent told you to put it?

A. Yes.

Q. How was he making out?

A. Well, he couldn't push it over.

Q. Did you go to help him?

A. I went to help him, yes.

Q. Did you tell me how he was making out? Could he move it?

20 A. He couldn't move it.

Q. What did you do?

A. Stepped up and gave him a lift.

Q. Well, just tell me what you did?

A. Gave it a pry.

Q. Which side was he on?

A. He was on the far side, opposite to me.

Q. And you were on the other side opposite to him?

A. Yes.

Q. What did you do?

30 A. I gave a pull.

Q. And what did he do as you pulled?

A. He pushed and the engine started.

Q. Started how?

A. It started like a horse kicks, came right over flying; the piece of scantling hit me.

Q. Did it go rapidly or slowly?

A. Very rapidly.

Q. And the scantling struck you where?

A. Struck me here, in here (indicating breast and chin.)

Q. From that time on did you know anything?

A. That ended it.

Q. Did Cuthbert have charge of this engine that you were trying to move off center?

A. I had charge of the engine. 10

Q. What was Cuthbert's business?

A. Cuthbert was foreman of the kiln room.

Q. Foreman of the kiln room?

A. Yes.

Q. Is Mr. Cuthbert here?

A. I believe he is.

Q. Now, then, Mr. McConnell, up to that time how much did you weigh,—let me get at it that way.

A. At that time I weighed 147 pounds.

Q. And what has been your weight since, on an average? 20

A. Anywhere from 129 to 142.

Q. You have gone up as high as 142?

A. 142; I have been as high as that; that is, at the present time.

Q. Up to the time you were hurt what kind of health had you?

A. Excellent.

Q. Anything the matter with you at all?

A. Nothing at all that I know of. 30

Q. Could you work?

A. I could do anything, Judge.

Q. Could you play rough games?

A. Yes, sir, I could take my share in most anything that came along.

Q. Could you play foot-ball?

A. Played it for five years.

Q. At that time had you any nervousness at all?

A. None at all, no, sir.

Q. The moving of your head and the twitching of your muscles about your face and your eyes that you now have, did you have that before you got hurt?

(Objected to.)

10 A. No, sir, I did not.

Mr. Armstrong: I object to the form of the question.

The Court: I think that question had better be omitted, and let this be described by some witness so it may appear in the usual way.

Mr. Wescott: I put that question in this way, because if the plaintiff sat there with both arms off the jury would be competent to see that fact; as he sits there
20 with his muscles twitching and jerking the jury are competent to see that fact.

Mr. Armstrong: I object to that statement from counsel.

Mr. Wescott: And it is because the jury have eyes to see that I put that question.

The Court: I will not over-rule it if you desire it.

Mr. Wescott: Very well; strike it out; I want to
30 please counsel on the other side.

Q. Mr. McConnell, do the muscles about your eyes and face and neck twitch and jerk at times?

A. Almost constantly, Judge.

Q. How long have they been doing that?

- A. Ever since the accident.
- Q. Can you control it in any way?
- A. No, sir, I can't stop it; I wish I could.
- Q. Is your face disfigured, Mr. McConnell?
- A. Well, somewhat crooked, I think.
- Q. Was it that way before the accident?
- A. No, sir.
- Q. Have you had any trouble with your head since the accident?
- A. Had very severe headaches. 10
- Q. How often do you have them, Mr. McConnell?
- A. Why, they last me two weeks at a time, then go off and then come back again.
- Q. About how often do you have them?
- A. Oh, I have them right along, Judge, with a week or maybe two weeks intermission; then they come back again.
- Q. Do you have to call upon a physician?
- A. No, I don't bother with them. I just grin and bear it; I don't like to take those things. 20
- Q. Did you have those headaches before you got hurt?
- A. I didn't know what a headache was before I got hurt; never had one that I know of.
- Q. Did you have any trouble with your heart before you got hurt?
- A. No, sir.
- Q. Have you had any trouble with your heart since you got hurt?
- A. Yes, I have.
- Q. What do you know about that? What sort of trouble have you? 30
- A. Well, it is trouble that makes you feel as though there was a vibration acting on you, a hammer there sometimes (indicating left breast); and it just makes you feel faint.

Q. Makes you feel faint?

A. Yes, makes me feel faint; I don't want to do anything; I must lie down.

Q. How often do you have these sensations?

A. Quite often; frequently.

Q. Did you have any trouble with your eyes before you got hurt?

A. Yes, I had astigmatism before I was hurt.

Q. Have you had any other trouble with your eyes since you got hurt? Have they grown better or worse?

A. They have grown worse.

Q. Have you undertaken to do any work since you got hurt, Mr. McConnell?

A. Nothing to speak of.

Q. Why not?

A. Because I have not been able to keep a position.

Q. Are you able to do physical work?

A. No, sir.

Q. Can you play games?

A. Not like I used to, no; I don't enter in games at all now, in games that use any exertion.

Q. Did you lose any teeth by this accident?

A. Yes, sir.

Q. How many?

A. I lost two on my lower jaw and two on my upper jaw.

Q. Did anything happen to your jaw in the accident?

A. Fractured.

Q. How much was it fractured?

A. Well, it is what they call—It was fractured in two places, in the center and over here (indicating.)

Q. Did you have to undergo any operations?

A. I underwent several operations.

Q. Did you take anything?

A. Took ether four times, I know that.

Q. You took ether four times?

A. Yes.

Q. Do you suffer any inconvenience outside of the nervousness and twitching of your muscles?

A. Well, my jaw is a little weak on the right side where the fractures were; so that ever since the accident when I have been able to smoke I have to shift my pipe to the left side of the mouth to hold it; it don't seem to be able to bear the weight.

Q. Do you sleep as normally and soundly as you did 10
before the injury?

A. I sleep fairly well, Judge, with the exception of twitching sensations at times.

Q. Fairly well except twitchings?

A. Twitchings at times, yes.

Q. Mr. McConnell, how much strength have you now compared with what you had before you were hurt?

A. Well, I haven't the strength to enter in games that I had before I was hurt.

Q. Well, in your ability to work? 20

A. My ability to work is not anything like up to what it was then.

Q. Have you earned anything since you got hurt?

A. Nothing to speak of, Judge.

Q. How do you live?

A. Well, I live at home.

Q. Your brothers take care of you?

A. Yes.

Cross-examination.

30

By Mr. Armstrong:

Q. I understood you to say that you had charge of this large engine?

A. Yes, sir.

Q. Did you start the engine?

A. No, sir, I didn't start the engine.

Q. Who was the engineer that started the engine?

A. I never saw it stopped before. I started it if it was necessary.

Q. Some engineer looked about it, didn't he, looked after it?

A. I was the only one that looked after it.

Q. So you turned steam on or off from it?

10. A. I would if necessary, yes.

Q. But it had never been necessary for you to do that?

A. I never saw the engine shut down before.

Q. Well, Cuthbert was working at the engine when you came there, was he?

A. Yes.

Q. And he had a piece of scantling in the spokes of the fly wheel?

A. Yes.

20. Q. And was pushing on it?

A. Yes, sir.

Q. When you saw him pushing, his force was not sufficient to start the engine off?

A. No.

Q. You knew what he was trying to do?

A. I knew he was trying to start the engine.

Q. He was trying to start the wheel of the engine going?

A. Yes.

30. Q. And going it would take the scantling away from him, would it, the way it was going, he was pushing against it,—if it started the wheel would go from him?

A. Certainly.

Q. When you saw that he was unable to start it, you

went up and went on the other side of the scantling, did you?

A. I walked right up to the scantling; I was on the other side.

Q. You walked up to it?

A. Yes.

Q. And laid hold of it with him?

A. Yes.

Q. Was he pushing all the time?

A. He was pushing, yes. 10

Q. When you laid your hands on it, how long before it started,—almost immediately?

A. As soon as I put my power on it with his.

Q. As soon as you put the pressure on it from your hands the thing started?

A. Yes, sir.

Q. And you say it started suddenly?

A. Very suddenly.

Q. Did it practically come up to its usual speed almost immediately? 20

A. I couldn't tell you that.

Q. But the start wasn't at its usual speed, was it,—or was it up to its usual speed when it started?

A. I don't know what its usual speed was when it started.

Q. No, when it was running?

A. I don't know; I don't know exactly how fast it really did start, except it jumped at me.

Q. And as it jumped at you the spoke of the wheel carried this piece of scantling over toward you, of course? 30

A. I suppose that was it.

Q. Don't you know that was it?

A. Naturally.

Q. That is what it would naturally do if the scantling still remained in it?

A. Yes.

Q. You had seen this engine running all the time you were there?

A. Yes.

Q. And you say it had never stopped before?

A. Not to my knowledge.

Q. If it had stopped, then it had stopped when other people were about, not when you were there?

A. Yes.

10 Q. You were on the night shift then?

A. On the night shift.

Q. After starting the engine this scantling was to be pulled out, was it, it was not to be left in there?

A. No, of course not; it was to be pulled out.

Q. It was just to be used to pry the engine off and then taken out?

A. That is it.

Q. And it started off so suddenly this time that there wasn't time to get it out,—is that correct?

20 A. I suppose, that is it, yes.

Q. Were you depending on Cuthberth pulling it out or were you meaning to pull it out?

A. I don't know anything about that, Judge.

Q. You simply went there to assist him?

A. Simply to assist about the engine.

Q. To assist Cuthbert starting the engine? He was himself trying to start it?

A. He was himself trying to start it.

30 Q. And you went there to add sufficient power to get that engine started to what Cuthbert himself was applying,—is that correct?

A. That is correct.

Q. And that is all you proposed to do about it, just lend him that hand, that assistance?

A. Certainly, that was all that would be necessary.

Q. I mean, you hadn't any charge or control of Cuthbert at all?

A. Oh, no.

Q. Cuthbert was not doing any of your work for you at that time, was he?

A. Well, if Cuthbert hadn't stepped to the wheel to do it himself, I would have had to do it.

Q. You would have gone where he was standing?

A. Yes.

Q. You had been working there since the 29th of 10
November, hadn't you?

A. It was the Saturday after Thanksgiving that I went up to Alpha.

Q. You won't be sure what the date was?

A. I can't swear to the date.

Q. But probably in that neighborhood sometime, sometime the latter part of November or first of December?

A. Somewhere about the first of December, I think.

Q. And you had worked continuously there? 20

A. After I started.

Q. You started on what shift, day or night?

A. I don't remember.

Q. You were working on the night shift at this time?

A. Yes.

Q. You don't remember how many times you were on day and how many times you were on night?

A. I couldn't swear to it.

Q. Did it keep you going all the time, oiling the machinery, the shafting, &c.? 30

A. I was very busy.

Q. Kept you going all the while, did it?

A. Yes.

Q. Now, these three engines you said you had charge of,—what do you mean by that?

A. Looked after the oiling of them and started them if necessary, if I was on hand to do it.

Q. Turned on the steam to start them?

A. Yes, sir.

Q. Could you start and stop those engines?

A. I expect I could if I tried; I never tried.

Q. I thought you said you did start them?

A. I would if it was necessary I say, but it had never been necessary for me to do it.

10 Q. The little engines?

A. The little engines.

Q. It never had been necessary for you to start those?

A. No.

Q. You had found how to start and how to stop them, had you?

A. Well, I had been instructed.

Q. But you had never found occasion to do that?

A. I never found occasion, no, sir.

20 Q. And as you now recall you had never seen the large engine stopped at all?

A. No, sir, I had never seen it stopped.

Q. And of your own knowledge you don't know how often that scantling had been used to start it?

A. No.

Q. When you were shown about starting the engine, when it stopped on center as the man told you, he told you that wheel had to be turned around and started going, didn't he?

30 A. Yes.

Q. When the engine was going the wheel revolved in the direction that you were going, did it?

A. I wouldn't swear to it, but I suppose it would.

Q. Well, you had seen that engine for some three weeks running, hadn't you?

A. Yes, but the old thing going there, I wouldn't notice which way the thing was going.

Q. You had been oiling about it for these three weeks?

A. I had been oiling about it, yes.

Q. You mean to say that you now don't recall how it was going?

A. No, I don't recall how it was going.

Q. Well, you knew in which direction it was to turn when you saw Cuthbert pushing.

A. I knew in which direction we should have pushed it, so I imagine it must have gone that way. 10

Q. You knew you were pushing it to have it turn in the direction you were standing?

A. Yes, sir.

Q. Did the engine start unexpectedly to you?

A. Yes, sir.

Q. You expected to be able to get out of the way of it of course, when you were pushing there, didn't you,— when you were pulling?

A. I certainly did expect to get out of the way. 20

Q. And the sudden turning of it is what surprised and struck you, is it?

A. Yes.

Q. Was Cuthbert at work there at the plant before you came?

A. He was there a short time before I came.

Q. When you came he was there, was he?

A. Yes, sir.

Q. When the oiler took you about and showed you your duties, did he tell you how to go in and out about the machinery? 30

A. He went right with me, showed me.

Q. Showed you where to go?

A. Yes, sir.

Q. You were then how old?

A. I was then 28.

Q. As you had gone in and about and around this machinery of course you had observed it from time to time, hadn't you?

A. Yes, sir.

Q. And you observed how these various engines ran, didn't you?

A. I tried to.

Q. Well, didn't you do it?

10 A. I tried to observe how they ran yes, sir.

Q. And you had been there about three weeks working?

A. Somewhere in that neighborhood, three weeks.

Q. And you had worked each day?

A. Each day or each night?

Q. Well, I mean during each day, during each 24 hours you had worked a shift there from the time you went to work?

A. Yes.

20 Q. After you were struck on the head, you were unconscious, were you?

A. I don't remember anything; I must have been unconscious.

Q. That blow, you take it, is what made you unconscious?

A. Yes.

Q. Now, do you remember when you regained consciousness?

30 A. I regained my consciousness for a few minutes when they put me in a hot bath at the hospital.

Q. Was that immediately after being taken to the hospital?

A. As soon as I was entered in the hospital.

Q. And then you lost consciousness again?

A. I don't remember being taken from the tub at all.

Q. And do you remember when you next regained consciousness?

A. It is very hard to say; it was somewhere about a week.

Q. Then you were in a ward of the hospital?

A. I was in a ward of the hospital, yes.

Q. How long did you stay at the hospital?

A. I was there about 13 weeks.

Q. Does that include the time you came home?

A. I was home two or three times toward the end of that period. 10

Q. Just for a day or so at a time?

A. Just for a day or so at a time, yes, sir.

Q. How long were you confined to your bed in the hospital?

A. I think it was three weeks.

Q. After that you were up and around the rooms, were you?

A. Up and around the room, yes, sir.

Q. You said that you had four operations,—where were they? 20

A. On my jaw.

Q. Yes, but where were they performed, I meant to ask.

A. At the hospital.

Q. At the hospital there?

A. Yes.

Q. When were these operations, in the first three weeks?

A. It was sometime during the first three weeks, yes, sir. 30

Q. All of them?

A. All of them.

Q. After your return from the hospital, did you have any medical attendance?

A. When I was home the first time, I was snowbound and I had to have my face dressed.

Q. That was the surgical dressing?

A. The surgical dressing.

Q. That is, you stayed longer than you had intended to stay because of the snow?

A. Yes, sir.

Q. Is that the only medical attendance you had except that which you had at the hospital?

10 A. That is all I had for my jaw.

Q. I understood you to say in answer to your counsel's question that you were not taking medicine when you had the headaches of which you complain,—you simply let them run their course,—now is that correct?

A. I am afraid to take headache powders; that is correct.

Q. You said you worked for the Barber Asphalt Company,—in what capacity?

A. Receiver and time-keeper.

20 Q. Working on the streets or in their factory?

A. On the streets.

Q. And you worked for some lumber company, you say?

A. Yes.

Q. In what capacity?

A. Well, I was in the office and I was in the yard, general clerk.

Q. One place you said you got \$60 a month,—where was that?

30 A. That was with the Barber Asphalt Paving Company.

Q. While you were acting as time-keeper?

A. Yes.

Q. Where,—Buffalo, New York?

A. Yes.

Q. Are those the only two places you have worked, for this lumber company and Barber?

A. I worked at two lumber places.

Q. What did you get there?

A. I started on \$3 a week and I got up to five.

Q. How long were you working with the Barber people?

A. Something less than a year.

Q. Well, it was just during the warm weather, wasn't it?

10

A. Just during the warm weather, yes, sir.

Q. And only the one season?

A. The one season.

Q. Now, what was the highest wages you ever got anywhere else than with the Barber people?

A. \$10.

Q. And that was with the Alpha, this defendant, wasn't it?

A. Yes, I got it at the Alpha.

Q. Well, where else did you work and get that much money?

20

A. Why, at the Standard Supply and Equipment Company.

Q. You got \$10 there, did you?

A. I got \$10 there.

Q. How long did you work for them?

A. A couple of months.

Q. When was that?

A. That was—I don't remember the dates; it was somewhere about a year after I was hurt.

30

Q. I am speaking about before you were hurt.

A. Oh, that wasn't before I was hurt.

Q. The only time you ever got anything above \$5 a week before you were hurt was the time you were working for the Barber people?

A. The Barber people.

Q. And you only worked for the two lumber firms and the Barber people before you were hurt?

A. Yes, sir.

Q. Now, when was it you went to work for the first lumber people?

A. That was the first position I ever had; I don't remember the date.

Q. How old were you then?

10 A. I suppose I was about 16 or 17, somewhere around there.

Q. Well, how long did you stay with them?

A. Stayed with them a couple of years.

Q. And got as high as \$5 a week?

A. Yes.

Q. Then when you went to the next lumber place, did you go immediately after that?

A. No, not immediately.

Q. Well, how long an interval?

20 A. I suppose six months, perhaps.

Q. And how long did you stay with them?

A. I was with them about a year?

Q. You went with them at \$5 a week, did you, or did you go lower?

A. No, I went with them at \$5 a week.

A. And retained that all the time you were there?

A. Yes, sir.

Q. Then where did you go next to work?

A. Then I went with the Barber people.

30 Q. And were there something less than a year?

A. Something less than a year.

Q. Then had you anything else to do before you went to the Alpha?

A. I don't think I did.

Q. When was it you were working with the Barber people?

A. I think I was about 19 years old when I went up with the Barber people.

Q. And then for 8 or 9 years you didn't do anything in the way of work?

A. No, sir.

Q. Where did you live then?

A. Haddonfield.

Q. With you parents? 10

A. My parents.

Q. The same place you live now?

A. Not the same house, no, sir.

Q. But in the same village?

A. In the same village.

Q. Your father was then living?

A. My father was then living, yes, sir.

Q. And you have two brothers?

A. Yes.

Q. They make their home at the same place? 20

A. The same place.

Q. Younger or older than you?

A. Younger.

Q. Well, during the 8 years that you were not working, who maintained you, your parents?

A. Yes, sir.

Q. One thing I omitted to ask you, Mr. McConnell: You were taken around by Mr. Rinnell, as you said, and you expressed some doubts because of your ignorance as to machinery whether you could do the work or not, did you? 30

A. Yes.

Q. And what was it he told you?

A. He told me there was no danger, to go ahead and learn, I would soon pick it up.

Q. You would soon pick it up?

A. Yes.

Q. Well, he told you to use good judgment and care about it, didn't he?

A. Of course.

Q. What?

A. I suppose he did; I don't remember.

Q. And you accounted yourself a man of average intelligence, didn't you?

A. Yes, sir.

10 Q. And in going about this work and machinery you endeavored to be reasonably careful, did you?

A. I did.

Q. Were you more or less fearful of trouble because of your ignorance?

A. Well, I was not easy on it at all?

Q. So that you undertook to be watchful, did you?

A. Yes, sir.

20 Q. And as you went about doing the work you were using at the time your best judgment as to the safe way to do things, were you?

A. Yes, sir.

Q. And up until this time you had met with no mishap whatever?

A. None whatever.

Q. And so far as you were able to judge, had gotten into no position of danger, or had you?

A. Not that I know of.

Q. You don't recall any?

A. No, sir.

30 Q. In relation to the room where this big engine was, where was it located?

A. Located under the kilns.

Q. Yes, but that does not tell me as to the room,—the side or center of the room?

A. The side of the room.

Q. Where was the fly wheel on the engine, inside or outside of the room?

A. Inside.

Q. And the engine was off the other side from where you were, was it? The engine itself was off to the other side of the fly wheel from where you were when you were prying on it?

A. Yes.

Q. About how many feet was there between the fly wheel and the wheel? 10

A. You mean where we stood to pry? As I remember, it was right almost chock up against the wall.

Q. Well, there was room for you to get in there, was there?

A. Room to get in there, yes, that is all; that is, if I remember.

Q. Wasn't there some 12 feet at least there?

A. 12 feet?

Q. Yes, between the fly wheel and the wall.

A. Not as I remember it. 20

Q. Well, there was some considerable distance between the fly wheel and the wall?

A. I don't remember.

Q. You don't remember how much?

A. I don't remember that there was any considerable distance.

Q. How long was this scantling?

A. That is hard to say; I should judge 8 or 10 feet long, but I wouldn't swear to it.

Q. Well, there was room for this scantling to go in the wheel without of course going through the wheel and be out in this passage-way, wasn't there? 30

A. Yes, sir.

Q. You worked for the Standard Supply Company for two months, you say?

- A. I don't remember exactly.
- Q. Well, about that?
- A. About that, I should say.
- Q. And who else have you worked for?
- A. The people I told you?
- Q. No, since the accident; I am asking you now since the accident.
- A. I have worked for my brother.
- Q. What doing?
- 10 A. Photographing for him?
- Q. Is that all the work you have done since the accident?
- A. That is all.
- Q. All the people you have worked for?
- A. Yes, sir.
- Q. And how much photographing have you done for your brother?
- A. Oh, I did quite a little, not much.
- Q. Does he have a studio?
- 20 A. He has a studio, yes.
- Q. How often do you go there?
- A. Whenever he calls for me.
- Q. You are not there constantly?
- A. No, sir.
- Q. You go whenever he calls for you to assist him?
- A. Yes.
- Q. How often has that happened?
- A. It depends altogether upon his work.
- 30 Q. Sometimes every day?
- A. Barely run two days in succession.
- Q. In the busy time average three days a week?
- A. Well, I might have a week with three days in it.
- Q. You don't get paid for that, of course?
- A. Oh, yes, I get something for that.
- Q. Does he pay you for that?

A. Yes.

Q. Is that one of the brothers that lives at home?

A. Yes, sir.

Q. Now how long have you been doing such photographic work?

A. About a year.

Q. Then did you do any other work at all than the two months about for the Standard Supply Company and this one year past work for you brother?

A. No, sir.

10

Q. None at all.

A. No, sir.

Q. And had no other employment?

A. Hold on, I inspected for the sewers out there for a short time in Haddonfield.

Q. Now, does that embrace all?

A. That is all as far as I can remember.

Q. You haven't sought any position anywhere else?

A. No, sir.

20

By Mr. Wescott:

Q. Mr. McConnell, how long have you worked for your brother?

A. About a year.

Q. How much have you made?

A. It is very hard to say, Judge.

Q. Well, approximate it. How much money has he paid you? You can tell that, can't you, if he has paid you any?

30

A. He might have paid me—I might have made \$50 in a year?

Q. Have you made over \$50 in the year?

A. I don't think I have.

Q. This is a question I omitted to ask you: Was

this the first experience you had with attempting to pry this engine off the center?

A. Yes, sir.

Q. You said in answer to Judge Armstrong as I recollect it, you supposed this superintendent told you to be careful,—what did you mean by that now, Mr. McConnell? You supposed—did he or didn't he?

A. He told me to be careful—

Q. Did he tell you to be careful?

10

(Objected to.)

Q. Did he tell you to be careful or didn't he? That is what I want to know. Don't reason about it.

A. I wouldn't exactly swear to it, Judge, because I don't remember, but I should imagine he did.

Q. Repeat to me now what he did tell you; I want to know what he told you.

A. That is all that I—

20 Q. When you went there and he employed you, what did he tell you? Now, it is perfectly simple for you to answer that question.

A. He told me to oil the shafting and look after these engines, and told me about this engine stopping, and wouldn't go until you pushed it over with this piece of scantling. Then I asked him if there was any danger, that I didn't know anything about it, and I would rather not take the job if there was going to be any danger, and he said, no, there was no danger, "Just you go ahead and you will soon catch on."

30

Q. Is that the whole of the conversation?

A. That is all I remember.

Q. Well, in any of that do you see his telling you to be careful?

(Objected to; objection sustained.)

Q. Now, Mr. McConnell, I want to know whether you are simply imagining that, reasoning it, or whether it actually occurred, that he told you to be careful?

Mr. Armstrong: I object; my examination was certainly nothing new, it was direct cross-examination, and this argumentative question is not proper on redirect-examination.

The Court: I think in view of the fact that the witness said he supposed he was told that I will allow the question. 10

Whereupon the defendant, by its counsel, prays a bill of exceptions which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge.

Q. Do you remember distinctly his telling you that?

A. Merely a supposition, Judge.

Q. You ought not to deal in your suppositions in your testimony. 20

By Mr. Armstrong:

Q. The language used by the man who gave you the instruction you cannot definitely recall, can you?

A. As far as I have said.

Q. Oh, you recall that, but I mean all the language he used you cannot distinctly recall?

A. He may have said other things that I don't remember. 30

Q. But from what he had said to you and what passed between you you got the impression that you must be careful as you went about there, didn't you?

A. Well, in thinking of it myself, I should say I would have to be careful.

Q. You knew that yourself without being told, did you?

A. I knew myself I would have to be careful.

Q. And from the instruction he gave you, it was quite precise and definite wasn't it, as to your duties?

A. Yes.

Q. And there was some considerable talk between you, wasn't there?

A. As far as I have stated.

Q. Wasn't there considerable talk, more than you
10 have stated? You have given the substance of it, as I understand it.

A. We talked on lots of subjects; I don't remember anything more about this subject that is under discussion now.

Q. No, but when the oiler went around with you he pointed out each particular place, didn't he?

A. He did.

Q. And told you about the operation of things, didn't he?

A. Yes.

20 Q. Did he show you anything about prying the engine off center?

A. No, sir.

Q. Was that mentioned between you?

A. No, that was not mentioned between the oiler and myself.

Q. But you said you supposed you had been instructed to be careful. Now, that was giving your conclusion as you recall from all that passed between you and this man that took you around or who defined your
30 duties,—is that correct?

A. Merely a supposition.

(Question repeated.)

A. I said that.

EDGAR G. CUTHBERT, sworn.

By Mr. Wescott :

Q. Mr. Cuthbert, have you been subpoenaed by the defendant to come here ?

Mr. Armstrong: I object to that as improper and immaterial.

The Court: I will allow the question.

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A. Yes, sir.

Q. Have you, Mr. Cuthbert ?

A. Yes, sir.

Q. Have you been subpoenaed by the plaintiff to come here ?

A. I have not.

Q. Do you know Mr. McConnell ?

A. I do.

Q. Were you working for the Alpha Portland Cement Company at the time he was hurt ?

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A. I was.

Q. How long before he was hurt had you been working for them ?

A. A short time ; I cannot say how long ; a very short time.

Q. And what had you charge of there ?

A. Had charge of the kiln house and machinery that ran it ; the kiln house and coal house.

Q. Was the machine that hurt McConnell under your jurisdiction ?

30

A. Well, it was out of room but it ran part of my machinery.

Q. Was it under your charge ?

A. And I think, I am not sure, but I think it ran

some other machiney; I am not sure.

Q. Did you have charge of it?

A. Well, in a way I did; if anything got wrong with it when I was running my machinery I was the first man naturally to get there to fix it.

Q. Did you have any knowledge of machinery at that time?

10 Mr. Armstrong: I object to that question as incompetent, irrelevant and immaterial.

Mr. Wescott: The proposition by me is to show that Mr. Cuthbert had no knowledge of machinery when he was employed by these people, had no experience prior thereto, and that therefore that raised a question for the jury, because it is the master's duty not only to supply safe machinery and safe places to work in, but reasonably competent fellow servants to work with.

20 The Court: (After argument.) I will take the testimony.

Whereupon the defendant, by its counsel, prays a bill of exceptions which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge.

Q. Mr. Cuthbert, before you went up there to work had you had any experience with machinery?

30 Mr. Armstrong: No, wait a moment; a question was asked and ruled on; let us have that.

(Question repeated.)

Q. At the time McConnell was up there?

A. I had none whatsoever except two weeks probably before he got there, a short time.

Q. Had you ever had any experience with machinery before you went there?

A. None whatsoever.

Q. Did you get any instructions about machinery after you got there?

Mr. Armstrong: Wait a moment; does my objection cover all this?

The Court: No, I think not; I think that is quite a different question now as to the instruction he received. 10

Mr. Armstrong: Then I object to this question because I claim it is incompetent, irrelevant and immaterial.

The Court: The Court's ruling is you may show his lack of information. Whether these officers instructed him when he came there I think is a matter which is dangerous to put in the testimony.

Q. Who employed you, this same superintendent that employed Mr. McConnell? 20

A. I think Mr. Rinnel did, yes.

Q. Did he know at that time that you were not an experienced mechanic?

(Objected to as incompetent, immaterial and irrelevant.)

(Question allowed.)

Whereupon the defendant, by its counsel, prays a bill of exceptions which is allowed and sealed accordingly. 30

ALLEN B. ENDICOTT,
Circuit Court Judge.

Q. Did he know at that time that you were not an experienced mechanic?

A. He did.

Q. And how long did you say you had been there?

A. Before he came?

Q. Yes.

A. Why, probably two weeks; I don't remember the date at all, it has been so long ago I have forgotten.

Q. And during that time what did you do,—what was your work?

A. Why, foreman of the kiln house.

10 Q. Did that embrace the care of these engines,—running them?

A. Not the care of them, no.

Q. Well; did it embrace running them?

A. Running them, looking after them; in other words, keep them running, because this engine ran my machinery, and that engine had to be kept going.

Cross-Examination.

By Mr. Armstrong:

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Q. Where did you live when you were employed there?

A. When I was employed there?

Q. Yes,—I mean where was your home?

A. In one of the company's houses, right there at the plant.

Q. I don't mean when you were up there.

A. Before I went there?

Q. Yes.

30

A. I left Haddonfield to go there.

Q. Did McConnell go up there at your invitation?

A. I cannot answer that.

Q. You told him about the place, didn't you?

A. I don't remember at all whether I did or not. I may or may not.

Q. You were friendly with McConnell before that time?

A. Yes.

Q. Are you related to him?

A. No relation.

Q. You say you were employed as foreman of the kiln room?

A. The kiln room, yes, sir.

Q. Well, you understand the duties that you had to perform, didn't you?

A. Well, I did a good bit of bluffing at it.

10

Q. Well, you pretended to know, then?

A. I pretended to know a good bit, yes; a good deal more than I did.

Q. Well, you did the work, didn't you,—or did you fail in it?

A. I can't answer that question; I don't know whether I failed or not; I stayed there for I don't remember how long, but there was another man put in my place. It never was explained whether I failed or not.

Q. How long were you there?

20

A. I don't remember now.

Q. When did you commence to make the bluff?

A. Probably after I had been there a short time; I don't know how long.

Q. How did you get the work in the first place?

A. Well, I went around; there was another man there and he explained things to me the best he could.

Q. The man explained to you the work, did he?

A. Yes.

Q. That was before you were employed or afterward?

30

A. No, that was before I was employed.

Q. Before you were employed?

A. Yes.

Q. Then you went and sought employment after you had it explained to you, didn't you?

A. Yes.

Q. And you told the man that employed you that you understood the work?

A. I did not.

Q. What sort of bluff did you make to him to get the employment?

A. He told me to come up there and stay around the plant and keep my eyes open, and after probably a week he would put me on the pay-roll.

10 Q. So that you were to come up there and keep your eyes open and learn the duties, and then you probably in a week would be able to go on the pay-roll, he told you,— is that it?

A. That is it?

Q. At the end of that week, that is when you started to put up the bluff, is it, that you knew?

A. Yes.

Q. And you went on the pay-roll from that?

A. I did.

20 Q. So far as you know you were able to do the work, weren't you?

A. Well, I have learned since that I didn't do very well at it.

Q. But at the time you supposed you were doing all right?

A. Why, I thought so, yes.

Q. Now, where was this engine situated?

A. In the clinker room.

Q. The room below?

30 A. The room below me, yes.

Q. How large a room was that?

A. I can't answer that question, never measured it; it was a large room.

Q. A very large room?

A. Yes.

Q. The engine set at right angles to the wall, didn't it?

A. The engine set close to the wall.

Q. Yes, but that was the end of the fly wheel was close to the wall?

A. The engine set with the wall, as I remember it.

Q. Just think again, Mr. Cuthbert, about it.

A. I am almost positive the engine set with the wall.

Q. Set with the wall?

A. Yes. 10

Q. Parallel with the wall?

A. Yes, sir.

Q. Not at right angles to the wall?

A. No, sir.

Q. How much space was there between the fly wheel and the wall?

A. Not much.

Q. Well, that—

A. I never measured it, I can't tell you, not a great sight, very close to the wall. 20

Q. There was room for you to be there with that piece of scantling, wasn't there?

A. Well, the fly wheel itself was large enough to give you room.

Q. What do you mean by it was large enough to give you room?

A. Because the fly wheel,—the engine set with the wall and the fly wheel was across the wall, wasn't it? The fly wheel was on the end of the engine and naturally the fly wheel itself crossed the wall. 30

Q. In other words, the fly wheel turned over to the wall?

A. I don't remember which way it turned.

Q. Or from the wall?

A. Turned one way or the other.

Q. The fly wheel itself was over at right angles with the wall?

A. Right angles, yes.

Q. That is what I mean, the fly wheel itself was at right angles of the wall?

A. Yes, the shaft of the engine which I suppose was the way it turned, the engine sets with the wall, with the fly wheel across the end of it.

Q. I am talking about the fly wheel; the fly wheel
10 was across the end so that there was the width of the building between the side of the fly wheel, and the fly wheel didn't run up right along by the wall?

A. Very close to it.

Q. The side of it didn't run very close?

A. No, the face of it.

Q. And when you were at the side of it you had the space of the room?

A. Well, not a great sight, because it was used as a storage room.

Q. Well, I understand, but the storage things were
20 away off from the wall?

A. Not far.

Q. Well, 10 or 15 feet away.

A. Probably 15 feet.

Q. When McConnell came to you there were you working on the engine?

A. I think I was, I wouldn't say positive; I think I was, yes.

Q. Did you put the piece of scantling in the wheel?

30 A. I don't remember that now; I judge I did, though.

(Objected to as not cross-examination.)

At this point a recess was taken until 1.30 p. m.

(Trial of the cause resumed after recess in the presence of counsel for the respective parties.)

EDGAR G. CUTHBERT, recalled.

The Court: I have read the testimony and the objection that this is not cross-examination is sustained.

Mr. Wescott: I will withdraw the objection. 10

The Court: The question may be answered then.

(Former question repeated as follows: "Q. Did you put the piece of scantling in the wheel?").

A. I think I did, I can't remember now.

Q. You don't recall about it definitely then?

A. Well, I judge I was about to try to start the engine when he came to me.

Q. I asked you whether you recall about the circumstances, not what you think you must have been doing? 20

A. Yes, I say I had the pry in the engine when he came there.

Q. And you were using this piece of scantling as a lever to push against the wheel and start it that way?

A. Yes.

By Mr. Wescott:

Q. Where was Mr. McConnell when you got the scantling? 30

A. When I first started he wasn't in sight.

Q. Did he come in the room?

A. He came in the room as I was trying to get the engine off center.

Q. Did you call him to assist you?

A. I did, yes.

Q. Now, how did you do this—how did you use this piece of scantling? Where did you put it in order to pry this engine off, this wheel?

A. I don't know; that is sort of hard to explain, but I put the pry through the fly wheel against the spokes right up close to the rim and around, the end through, so it struck the body of the engine, used that for leverage to push the wheel around.

10 Q. And you called to Mr. McConnell to come and help you?

A. I did, yes.

Q. Had you authority over him to do that?

(Objected to.)

The Court: That is a conclusion I should take it.

Q. Why did you call Mr. McConnell to help you?

(Objected to; question allowed.)

20 Whereupon the defendant, by its counsel, prays a bill of exceptions which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge.

A. Because I had authority to call the first man in sight to help me.

Q. You had charge—

A. I was foreman in that room and I had the right to call anybody to help me.

30 By Mr. Armstrong:

Q. What do you mean, had authority to call anybody to help you?

A. I was foreman and had authority to call any man in there.

Q. You were foreman upstairs, weren't you?

A. That engine was with that department.

Q. It was doing other work, too, wasn't it?

A. It might have been doing a little work, but I had as much charge as anybody else, had the right to call anybody to help me.

Q. Anybody that went by there to lend a hand?

A. Yes.

Q. What did you say to the plaintiff?

A. Told him to come and give me a hand to turn the engine off. 10

Q. That is all you said to him?

A. If he hadn't come—

Q. Never mind; that is all you said to him?

A. Yes.

Q. Then he came and gave you a hand?

A. He did.

Q. Then you started the engine.

A. Yes. 20

By Mr. Wescott :

Q. If he hadn't come, what?

A. I would have reported the matter to the master mechanic for not helping me.

HARRY E. MCCONNELL, recalled.

By Mr. Wescott :

Q. When you were employed by the superintendent and your duties defined to you, did he instruct you how to start this engine off center? 30

Mr. Armstrong : I object ; certainly he is not entitled to ask any question of that sort at this stage.

The Court: I am in doubt whether he was interrogated as to that or not; I think it is an important matter and I will allow it.

Whereupon the defendant, by its counsel, prays a bill of exceptions which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge.

10 Q. Did he tell you what to do, how to start this engine?

A. He told me to use this piece of scantling, stick it in the wheel and push it over.

Cross-Examination.

By Mr. Armstrong:

20 Q. What is that,—he told you to put this piece of scantling in the wheel and told you to push it over that way?

A. Yes.

Q. That is the way he told you it was to be started?

A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

By Mr. Wescott:

Q. Did he show you?

30 (Objected to; objection over-ruled.)

Whereupon the defendant, by its counsel, prays a bill of exceptions which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge.

Q. Did he show you how to do it?

A. He couldn't show me; the engine was running.

Q. When you say "push" what do you mean by that?

(Objected to.)

The Court: Yes, tell his language.

Q. What was his explanation to you, now, how to do this work?

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A. He told me to push the wheel over with this piece of scantling.

Mr. Wescott: Now, if you Honor please, that is all the evidence I have on the subject of liability.

Mr. Armstrong: I certainly move for a non-suit. There has been absolutely no negligence of this defendant shown in any way, no suggestion of any negligence in this defendant company. The starting of the engine by pushing it with the piece of scantling if properly done was evidently not a dangerous thing at all, or any dangers connected with it were patent to any one. This plaintiff was a man 28 years of age. At the time it was explained to him the duties that he had to do as he says, he was told, so he says that this engine was liable in its operation to stop on the center, and if it was stopped on the center it must be shoved off, and if necessary they were to use a piece of scantling that was pointed out to him and he says he was told to use that to push the engine off its center. It seems he came there when Cuthbert was endeavoring to push it and instead of joining with Cuthbert in the attempt to push it, he got on the other side of it, knowing the danger but saying frankly he thought he would have time to get out of the way, he expected to get out of the way, and it came too

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quick for him and struck him. Now, that is the whole case. There has been a good deal of suggestion here that there was somebody incompetent employed by the master, but that incompetence has not at all been shown. There was no danger here that was not apparent to any one 28 years of age. Where we have an unusually bright active man who observed and knew the danger and who went and pulled toward it, knowing which way the wheel would move, and knowing which way the lever would come,—he said he knew that—and the fact
10 that the engine started up suddenly, having its power on, as he knew—he knew that this move was for the purpose of starting the engine off of center—there is no suggestion of negligence on the part of the defendant company. There has been no suggestion that the starting of the engine was negligent in any way, but suppose it was, this plaintiff put himself knowingly in a position of danger, and by putting himself there and doing that
20 work, he was subject to all the incidental risks. He says that he was told that he should push it over, not pull it over; he was told it was his duty to push it over with the scantling. Your Honor can very readily understand the danger of getting under a weight and prying it up, and your Honor can very well understand the difference between pushing this way and pulling here. Cuthbert was standing on this side where he could have gone and joined in the push, in giving the force, and there would have been no danger; it would have gone out of the way. This plaintiff was pulling it; he was on the other side,
30 doing not what he was told to do, unless the turning over was the main part, and if that was so he must use his best judgment, and if he did not use his best judgment and was hurt, the master would not be responsible. He is bound to take whatever risks are apparent and necessary, or he is not bound to do the work. If I put

a man at work I am only to guard him against latent, unknown or unknowable things; I am not bound to guard him against the things that are obvious, that are before his eyes and mind. Now, the plaintiff has very frankly expressed that he was taken around and he asked, "Is there any danger in this machinery?" "No, look out, keep your eyes open and you will catch on," and he says the impression on his mind was he was told to be careful. The master was not bound to tell him that, but he did by something he said or did give that impression to the employee that he should be careful, because the employee says very frankly, "I not only got that from him, but I knew myself I had to be careful about it, and I was hurt because this turned more quickly than I thought it would; didn't have time to get out of the way, and I thought I did have time to get out of the way." It was not because he didn't know; he knew all about it; he had seen this engine revolving, knew the speed it went, he said it went so fast he couldn't tell, but he knows it went in that direction and he says he saw Cuthbert pushing on it and he took hold of it.

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Outside of there being no proof of negligence on the part of the defendant the proof on the part of the plaintiff is that he did this work in a way he was not told to do it. Suppose you say, "I won't as a matter of law say that it was careless for him to get on that side if he thought he could get out of the way." Well, by the same token, how can that be charged up against the defendant? If there was any carelessness at all the plaintiff is guilty of carelessness in this case. There is nothing that can be imputed to the defendant that cannot in greater measure be imputed to the plaintiff. I submit there is no negligence in any way in this case imputable to this defendant.

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The Court: (After argument.) The motion will be refused.

Whereupon the defendant, by its counsel, prays a bill of exceptions which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge.

10 (Testimony was then given as to the extent of the injury of the plaintiff, after which the plaintiff rested his cases.)

Mr. Armstrong. I ask, if your Honor please, for a direction of the verdict in the case for the defendant.

The Court. The motion is over-ruled.

Whereupon the defendant, by its counsel, prays a bill of exceptions which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge.

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Mr. Armstrong. I will offer no testimony; I think I am entitled to the direction.

DEFENDANT RESTS.

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CHARGE OF THE COURT.

ENDICOTT, J. :

Gentlemen: This action, as you have learned, is one for damages for injuries which the plaintiff received while in the employ of the defendant company. It does not follow as a matter of course that because the plaintiff was injured while in the employ of the defendant company that therefore the defendant company must respond in damages. Before there can be a recovery in this case against the defendant the plaintiff must by a preponderance of the testimony convince you that the defendant company was guilty of some negligence which was the proximate cause of this injury. When one enters into the employ of another the relationship of master and servant is established, and the servant by that very employment assumes all the ordinary risks of the business; the usual, ordinary dangers to which he is exposed are assumed by him, and he is presumed to have contracted with reference to those risks. But while that is true, it is also true that it is the duty of the master to use ordinary care to provide the servant safe machinery and a suitable place to work, to warn him against dangers which are not obvious, and if he is inexperienced to instruct him in the character of the work he is to do. It is the duty also of the master to employ competent fellow servants in the conduct of his business. Now, did the defendant company fail in its duty to the plaintiff in any of these respects? Counsel for the plaintiff claims that it did. The allegation here is that the defendant company did not provide suitable machinery, that it employed incompetent workmen, fellow servants of the plaintiff, and that in addition to that the officers of the defendant com-

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pany declared to the plaintiff that it was safe for him to start this machinery with the use of the stick of lumber which has been referred to. Was the defendant guilty of negligence in any of these respects? Did it fail in its duty to the plaintiff in any of these particulars? That is a question of fact which you must decide. If you conclude from the testimony in this case that the company was negligent in any of these particulars, then you must go a step further before you find a verdict in favor of the plaintiff and ascertain whether the plaintiff himself was guilty of any negligence which contributed to this injury; because no matter if the defendant company by its employees or its officers was negligent, if the plaintiff was himself guilty of negligence which contributed to this accident, there can be no recovery. So you must consider whether, after being instructed about the starting of this machinery when it was stopped, he placed himself in a position of danger in his effort to start it, a position which he need not have assumed,—

10 whether he used ordinary care such as a prudent man would under the circumstances to guard himself from danger in doing that work. If you find he was negligent in that respect and his negligence contributed to this accident, then there can be no recovery; but if you conclude he was not negligent and the company did fail in some of these particulars in its duty to him, then you would be justified in finding a verdict in favor of the plaintiff. And if in your deliberations you come to the conclusion that the plaintiff is entitled under the testimony in this

20 case to recover, then you should award him such sum as in your judgment you think will compensate him for the pain and suffering which he has heretofore, does now or which from the testimony you believe he will suffer in the future; also for the financial loss which he has sustained and which you believe, considering his age and

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the expectancy of life he will sustain during his ordinary life. What further I have to say to you is found in requests submitted.

Mr. Wescott: Are those my requests?

The Court: Yes.

Mr. Wescott: Well, you need not charge them because you have charged them exactly.

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The Court. Are they withdrawn?

Mr. Wescott: Yes.

The Court: Very well, you may retire then, gentlemen, to consider your verdict.

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DEFENDANT'S EXCEPTIONS.

The defendant, by its counsel, prays a bill of exceptions to the charge of the Court in each of the following particulars, viz.

1. To the Court's charging the jury, "If he (the plaintiff) is inexperienced it is the duty of the master to instruct him ; it is the duty also of the master to employ
 10 competent fellow servants in the conduct of his business" and whatever your Honor said in that connection, so far as your Honor left to the jury the question, "Now, did the defendant company fail in its duty to the plaintiff in any of these respects?" on the ground that they are not applicable to this case ; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, Circuit Court Judge.

2. Also as to the Court's saying to the jury that there
 20 was any question before them as to improper machinery and incompetent fellow servants, and that there was any proof that the plaintiff was instructed it was safe for him to start the machinery in the way he did, and what the Court said in that connection ; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, Circuit Court Judge.

3. Also to the Court's saying, " If you (the jury) conclude the plaintiff was not negligent and the company (the defendant) did fail in some of these particulars (which
 30 the Court had named) in its duty to him then you would be justified in finding a verdict in favor of the plaintiff" on the ground that some of the particulars stated were not applicable to the evidence in this case ; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, Circuit Court Judge.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

<p>HENRY E. McCONNELL,</p> <p>vs.</p> <p>ALPHA PORTLAND CEMENT</p> <p>COMPANY.</p>	}	<p>On Error to</p> <p>Supreme Court. 10</p>
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Afterwards to wit, on this day before the Honorable the Court of Errors and Appeals of the State of New Jersey, comes the said Alpha Portland Cement Company by E. A. Armstrong, its attorney, and says, that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in the giving of the verdict and judgment aforesaid, there was manifest error and assigns the following for causes of error: 20

1. That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said Henry E. McConnell to have his said action and judgment against the Alpha Portland Cement Company.

2 That by the record and proceedings aforesaid, it appears that no proper, legal or authorized trial was ever had of the issue joined in this cause to support the supposed verdict on which the aforesaid judgment was founded, and therefore the same is null, void and of no effect. 30

3. That no proper reference for the trial of said cause as appears by the record, was ever made or report or return of said trial ever made, and that the cause was never tried in the Supreme Court.

10 4. That the said cause was tried on the fourteenth day of June, in the year nineteen hundred and six and plaintiff's damages assessed by the jury as of the first Tuesday of November, nineteen hundred and six, at the sum of Ten thousand dollars, and that judgment was thereupon erroneously, improvidently and prematurely entered for Ten thousand dollars on the nineteenth day of June, nineteen hundred and six, when the same could not be properly entered for said sum until the first Tuesday of November, nineteen hundred and six.

20 5. That the judgment brought up for review by the writ of error in this cause, was entered without proper order and authority in law and was improvidently, irregularly and illegally entered, without authority of the Supreme Court or other lawful authority.

6. Because the Judge before whom the said action was tried, refused at the close of the plaintiff's case to order a non-suit entered as he ought to have done, although requested so to do by defendant's Counsel.

30 7. Because the Judge before whom the said cause was tried, refused to direct the jury to find a verdict for the defendant Company as he ought to have done, although requested so to do by the defendant's Counsel.

8. Because there is no negligence proved or shown on the part of the defendant Company in anywise causing or contributing to the injury of the plaintiff.

9. Because any injury sustained by the plaintiff was

occasioned solely by his own action and negligence, and his own default and neglect.

10. Because the plaintiff was guilty of contributory negligence which caused the injury complained of.

11. Because the Judge before whom the said action was tried, permitted, over the objection of defendant's counsel the plaintiff to ask questions and the same to be answered, tending to show that Edgar G. Cuthbert, a fellow employee with the plaintiff, was inexperienced and not familiar with the machinery, the same being entirely improper and immaterial. 10

12. Because the Judge before whom the said action was tried, permitted Edgar G. Cuthbert to be asked and to answer the following improper, irrelevant and immaterial question, although objected to by defendant's counsel—"Why did you call McConnell to help you?"

13. Because the Judge before whom the said cause was tried, improperly and unlawfully instructed the Jury "It is the duty also of the master to employ competent fellow servants in the conduct of his business. Now did the defendant company fail in its duty to the plaintiff in any of these respects?" And wherein the Court permitted the Jury to find a verdict for the plaintiff upon the answer of this question on the ground that the same was not properly before the Jury, and was improper and immaterial. 20

14. Because the Judge before whom the said cause was tried, improperly submitted to the Jury the question whether or not there was improper machinery and incompetent fellow servants, and whether or not the plaintiff had been properly instructed in the starting of the machinery. 30

15. Because the Court instructed the jury that if they were satisfied that improper machinery was used and incompetent workmen, fellow servants of the plaintiff, were employed and that it was unsafe for the plaintiff to start the machinery with the use of the stick of lumber referred to, they might find a verdict for the plaintiff on the ground that the same is an illegal and improper instruction under the evidence in said cause.

10 And the Alpha Portland Cement Company prays that the judgment aforesaid may for the reasons aforesaid, be reversed, annulled and altogether for nothing, and that it may be restored to all things which it has lost by occasion of said judgment, &c.

E. A. ARMSTRONG,
Attorney for and of Counsel with
Defendant, Plaintiff in Error.

20 Service of a copy of within Assignment of Errors acknowledged this sixteenth day of August, A. D. 1906.

JOHN W. WESCOTT,
Attorney for Defendant in Error.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

HENRY E. McCONNELL,	}	In Error.	
vs.			
ALPHA PORTLAND CEMENT COMPANY,		Joinder in Error.	10

And hereupon afterwards, on this day, the said Henry E. McConnell by John W. Wescott, his attorney, comes into Court and says that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid and prays here that the Court here may proceed to examine as well the records and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid in manner aforesaid given, may in all things be affirmed, &c. 20

JOHN W. WESCOTT,
Attorney for and of Counsel with
Plaintiff, Defendant in Error.

