

I N D E X

	PAGE
Summons	1
Complaint	2
Answer	8
Reply	13
Amended Answer	14
Notice	17
Order	19

PLAINTIFF'S TESTIMONY:

Samuel S. Errickson—Direct	22
Cross	47
Re-direct	60, 65
Re-cross	64
Recalled—Direct	85
Recalled—Cross	89
Samuel Bowker—Direct	66
Cross	83
Albert C. Wescoat—Direct	92
Cross	97
George D. Hampton—Direct	98

	PAGE
Motion for Non-suit	101
Exhibit P2, Deposition of William Schwiers..	102
Exhibit P3, Letter, F. W. Schwiers, Jr., Co., to Hill Dredging Co., 10/20/27.....	117
Postea	118
Notice of Appeal and Grounds	119
Notice of Argument	121

SUMMONS.

(Filed October 18, 1929.)

10

THE STATE OF NEW JERSEY, to F. W. Schwiers, Jr.,
Company, a corporation of the State of
New York. You are summoned to answer
(Seal) the annexed complaint of Samuel E. Er-
rickson and Etta Errickson, his wife,
jointly, in an action at law in the New Jer-
sey Supreme Court. And take notice that unless
you file your answer to the said complaint with the
Clerk of the New Jersey Supreme Court, at Trenton,
New Jersey, within twenty days after service upon 20
you of this writ and the annexed complaint, the plain-
tiffs may proceed in the suit and judgment may be
entered against you.

Witness Honorable William S. Gummere, Chief
Justice of the New Jersey Supreme Court, at Tren-
ton, this sixteenth day of October, 1929.

FRED L. BLOODGOOD,
Clerk.

SAMUEL MORRIS,
Attorney.

30

COMPLAINT.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

10

SAMUEL E. ERRICKSON, and
 ETTA ERRICKSON, his
 wife, jointly,

Plaintiffs,

v.

F. W. SCHWIERS, JR., COM-
 PANY, a corporation of
 20 the State of New York,
Defendant.

Action at Law.
 Complaint.

FIRST COUNT.

30 The plaintiff, Samuel E. Errickson, of the City
 of Atlantic City, County of Atlantic and State of
 New Jersey, says that:

1. On October 19, 1927, he was employed as a
 laborer by the Hill Dredging Company on the lat-
 ter's scow in Ship Channel, Great Egg Harbor Bay,
 Somers Point, in the County of Atlantic and State
 of New Jersey.

2. The defendant, F. W. Schwiers, Jr., Company, was the owner of, operated, and controlled a certain derrick or crane on the land near the aforesaid scow.

3. The Hill Dredging Company entered into a contract with the F. W. Schwiers, Jr. Company, whereby the latter, as an independent contractor, agreed, for a consideration, to hoist and deliver cer- 10
tain lumber from the land to the aforesaid scow, using its, the said defendant's, derrick or crane in said operation.

4. The defendant, F. W. Schwiers, Jr. Company owed a duty to the public and to the plaintiff, Samuel E. Errickson, to exercise due and lawful care in the operation of the said crane or derrick.

5. While the plaintiff was employed as aforesaid 20
on the said scow, the defendant, through its servant, agent or employe, at the time and place aforesaid, hoisted and swung and permitted to be hoisted and swung, a load of lumber from the land towards the scow in such a careless and negligent manner that the said load of lumber fell and dropped on the plaintiff.

6. Said load of lumber was, prior to its being hoisted for delivery onto the said scow, to the knowl- 30
edge of the defendant, negligently and carelessly fastened and was swung and permitted to be swung in said condition.

7. As a result of being struck as aforesaid, the

plaintiff was painfully and grievously injured and bruised in and about his head, face, arms, body and legs, and particularly in and about his pelvis and hips.

8. The plaintiff has suffered and will continue to suffer great mental anguish, as a result of the injury aforesaid.

9. As a result of the injuries aforesaid, the plaintiff suffers and will suffer temporary and permanent disability.

10. As a result of the injuries aforesaid, the plaintiff was compelled to expend, and will be compelled to expend great sums of money for medical care and attention.

11. The plaintiff, before the injuries, aforesaid, earned about thirty dollars (\$30.00) per week, but, as a result of said injuries, his earning capacity has been, and will continue to be, greatly and exceedingly reduced and impaired.

The plaintiff, Samuel E. Errickson, demands as damages on the first count, the sum of seventy-five thousand (\$75,000.00) dollars.

30

SECOND COUNT.

The plaintiff, Samuel E. Errickson, repeats all the allegations of the first count and says that:

1. He particularly repeats the allegations of the first paragraph of the first count.

2. He particularly repeats the allegations of the second paragraph of the first count.

3. The Hill Dredging Company entered into a contract with the F. W. Schwiers, Jr., Company, whereby the latter, as an independent contractor, or otherwise, for a consideration, agreed to hoist and deliver certain lumber from the land to the aforesaid scow, using its, the said defendant's, derrick or crane in said operation. 10

4. Said crane or derrick was a dangerous instrumentality, likely to injure persons unless same were operated in a careful, lawful and prudent manner. 20

5. The plaintiff more particularly repeats paragraph four of the first count.

6. While the plaintiff was employed as aforesaid on the said scow, the defendant, through its servant, agent or employe, at the time and place aforesaid, hoisted and swung and permitted to be hoisted and swung, a load of lumber from the land towards the scow in such a careless, negligent and dangerous manner, that the said load of lumber fell and dropped on the plaintiff. 30

7. Said load of lumber was, prior to its being hoisted for delivery onto the scow, aforesaid, to the

knowledge of the defendant, negligently, carelessly, indifferently, wantonly, dangerously and perilously fastened, and was swung and permitted to be swung in said condition.

8. The defendant knew, or ought to have known, that injury would result to someone or the plaintiff,
10 by reason of permitting the hoisting of the load in its aforesaid condition.

9. The defendant did not exercise the necessary legal care and skill in permitting the aforesaid load to be hoisted and swung onto the scow in its aforesaid highly dangerously fastened condition.

10. As a result of being struck as aforesaid, the plaintiff was painfully and grievously injured and
20 bruised in and about his head, face, arms, body and legs, and particularly in and about the pelvis and hips.

11. The plaintiff has suffered and will continue to suffer great mental anguish, as a result of the injuries aforesaid.

12. As a result of the injuries aforesaid, the plaintiff suffers and will continue to suffer temporary
30 and permanent disability.

13. As a result of the injuries aforesaid, the plaintiff was compelled to expend and will be compelled to expend great sums of money for medical care and attention.

14. The plaintiff, before the injuries aforesaid, earned about thirty dollars (\$30.00) per week, but, as a result of the said injuries, his earning capacity has been, and will continue to be, greatly and exceedingly reduced and impaired.

The plaintiff, Samuel Errickson, demands as damages on the second count, the sum of seventy-five thousand (\$75,000.00) dollars. 10

THIRD COUNT.

The plaintiff, Etta Errickson, of the City of Atlantic City, County of Atlantic and State of New Jersey, repeats all the allegations of the first and second counts, and says that:

1. She is the wife of the plaintiff, Samuel E. Errickson. 20

2. As a result of the injuries received by her husband, as mentioned in the first and second counts, she has sustained and will continue to sustain a pecuniary loss, in the reduced earning capacity of her said husband.

3. She has sustained and will continue to sustain the loss of her husband's consortium, as a result of the injuries mentioned in the first and second counts. 30

The plaintiff, Etta Errickson, demands as damages on the third count the sum of ten thousand (\$10,000.00) dollars.

SAMUEL MORRIS,
Attorney for Plaintiffs.

ANSWER.

(Filed Dec. 3, 1929.)

NEW JERSEY SUPREME COURT.

10

ATLANTIC COUNTY.

SAMUEL E. ERRICKSON and
 ETTA ERRICKSON, his
 wife, jointly,

Plaintiffs,

v.

20 F. W. SCHWIERS, JR., COM-
 PANY, a corporation of
 the State of New York,
Defendant.

Action at Law.

Answer.

FIRST COUNT.

30 The defendant, F. W. Schwiers, Jr., Company, a
 corporation of the State of New York, answering
 plaintiff's complaint, says that:

1. It has no knowledge sufficient to form a belief
 as to the allegations in paragraph 1 and asks that
 the same be proven.

2. It denies paragraph 2.

3. It denies paragraph 3 as alleged in the complaint and further answering the same says that its only contract with the Hill Dredging Company was to furnish the crane.

4. It denies the allegations of paragraph 4 and further answering the same says that if it owed any duty to the plaintiff, Samuel E. Errickson, it performed that duty. 10

5. It denies paragraph 5 and further answering the same says that the fall of the lumber which occasioned the injuries of which the plaintiff complains was not caused by the hoisting or swinging of said lumber. 20

6. It denies paragraph 6 and further denies that it had any control over the fastening of said lumber or the swinging thereof.

7. It denies paragraph 7.

8. It denies paragraph 8.

9. It denies paragraph 9. 30

10. It denies paragraph 10.

11. It denies paragraph 11 and further answering the same says that plaintiff received workmen's compensation for such injuries as he sustained which

has fully and adequately compensated him for said injuries, said compensation being paid to him by his employer or its insurance company in that behalf.

ANSWER TO SECOND COUNT.

- 10 1. It makes the same answer to paragraph 1 of the second count as it made to paragraph 1 of the first count.
2. It makes the same answer to paragraph 2 of the second count as it made to paragraph 2 of the first count.
- 20 3. It denies paragraph 3 and in further explanation thereof repeats all the allegations and explanations contained in its answer to the 3, 4, 5 and 6 paragraphs of the first count.
4. It denies paragraph 4.
5. It makes the same answer to paragraph 5 of the second count as it made to paragraph 4 of the first count.
- 30 6. It denies paragraph 6 and in further explanation thereof repeats all the allegations and explanations contained in its answer to the 3, 4, 5 and 6 paragraphs of the first count.
7. It denies paragraph 7 and in further explanation thereof repeats all the allegations and explana-

tions contained in its answer to the 3, 4, 5 and 6 paragraphs of the first count.

8. It denies paragraph 8.

9. It denies paragraph 9 and in further explanation thereof repeats all the allegations and explanations contained in its answer to the 3, 4, 5 and 6 paragraphs of the first count. 10

10. It denies paragraph 10.

11. It denies paragraph 11.

12. It denies paragraph 12.

13. It denies paragraph 13.

20

14. It denies paragraph 14 and further answering the same says that plaintiff received workmen's compensation for such injuries as he sustained which has fully and adequately compensated him for said injuries, said compensation being paid to him by his employer or its insurance company in that behalf.

AFFIRMATIVE DEFENSES TO FIRST AND SECOND COUNTS. 30

1. Said accident was caused entirely by the negligence of the plaintiff Samuel E. Errickson.

2. Said accident was caused entirely by the con-

tributory negligence of the plaintiff Samuel E. Erickson.

3. The accident occurred through the very nature of the plaintiff's employment and was a risk assumed by him in such employment.

10 4. The accident occurred through the negligence of the fellow employes of the plaintiff.

5. The accident occurred through the negligence of the employer of the plaintiff, its servants, agents, or employes.

6. The defendant was an independent contractor, and faithfully and fully performed its contract in every particular.

20

7. The defendant was an independent contractor and had no specific control or dominion over the fastening of the lumber, the hoisting, swinging, controlling or operating of the movements of the same from the land to the scow, it being entirely under the orders and control of the employer of the plaintiff, its servants, agents or employes in that behalf.

30 8. The injuries which the plaintiff alleges he received are not such as can be compensated for in an action of this kind, he having received them in the course of his employment and having been fully compensated therefor by his employer.

THOMPSON & HANSTEIN,
Attorneys of Defendant.

REPLY.

(Filed Dec. 4, 1929.)

NEW JERSEY SUPREME COURT.

10

ATLANTIC COUNTY.

SAMUEL E. ERRICKSON,
Plaintiff,

v.

F. W. SCHWIERS, JR., COM-
PANY, a corporation of
the State of New York,
Defendant.

Action at Law.
Reply.

20

The plaintiff, Samuel E. Errickson, of the City of Atlantic City, County of Atlantic and State of New Jersey, replying to the defendant's answer, says that:

1. The plaintiff denies the affirmative allegations of the defendant's answer. 30
2. The plaintiff joins issue on the defendant's answer.

SAMUEL MORRIS,
Attorney for Plaintiff.

AMENDED ANSWER.

(Filed Oct. 28, 1930.)

NEW JERSEY SUPREME COURT.

10

ATLANTIC COUNTY.

SAMUEL E. ERRICKSON and
ETTA ERRICKSON, his
wife, jointly,

Plaintiffs,

v.

20 F. W. SCHWIERS, JR., COM-
PANY, a corporation of
the State of New York,
Defendant.

Action at Law.
Amended Answer.

The defendant, F. W. Schwiers, Jr., Company,
answering the plaintiffs' complaint, says that:

30

ANSWER TO FIRST COUNT.

1. It has no knowledge as to the allegations of
paragraph 1 and asks that the same be proven.

2. It denies paragraph 2, except that defendant admits that it was the owner of a derrick.

3. It denies paragraphs 3, 4, 5, 6 of said complaint.

4. It has no knowledge as to the allegations contained in paragraphs 7, 8, 9, 10 and 11 and asks that the same be proven.

10

ANSWER TO SECOND COUNT.

1. It makes the same answers to paragraphs 1 and 2 of this count as it made to paragraphs 1 and 2 of the first count.

2. It denies paragraphs 3 and 4.

20

3. It makes the same answer to paragraph 5 of this count as it made to paragraph 4 of the first count.

4. It denies paragraphs 6, 7, 8 and 9.

5. It has no knowledge as to the allegations contained in paragraphs 10, 11, 12, 13 and 14 and asks that the same be proven.

30

AFFIRMATIVE DEFENSES.

Defendant, further answering, by way of affirmative defenses, says that:

1. Defendant was the owner of a certain crane, or derrick, which it rented, together with its operator, to the Hill Dredging Co. for such use as it saw fit to make of said equipment and operator.

2. The alleged accident to plaintiff happened while said crane was being operated by the Hill
10 Dredging Co.

3. At the time of the alleged accident said crane, and operator, were in the employ, and under the direction and control of the Hill Dredging Co., and not under the direction and control of this defendant, and was engaged in doing work for the benefit of the Hill Dredging Co.

4. Defendant had no control over said crane, or
20 its operator, at the time of the alleged accident.

5. Plaintiff contributed to his own injury.

6. Plaintiff assumed the risk of said injuries.

7. Said accident was caused by conditions over which this defendant had no control.

THOMPSON & HANSTEIN,
Attorneys for Defendant.

NOTICE.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

10

SAMUEL E. ERRICKSON and
ETTA ERRICKSON, his
wife, jointly,

Plaintiffs,

v.

F. W. SCHWIERS, JR., COM-
PANY, a corporation of
the State of New York,

Defendant.

Action at Law.
Notice.

20

To Samuel Morris, Esquire, Attorney for Plaintiffs:

Take notice that on Friday the 15th day of November, 1929, at about the hour of eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, we will move, before Honorable W. Frank Sooy, Esquire, Judge of the Atlantic County Circuit Court and Supreme Court Commissioner, to strike the complaint heretofore filed in this cause for the reason that the cause of action set out in the said complaint cognizable only in the Admiralty Courts.

30

Take further notice that we will move to strike the third count of the said complaint for the reason that the same fails to set up a cause of action for which reimbursement may be had in courts of law and that if damages be permitted to be recovered on the third count of the above-mentioned complaint, a double recovery will be had by the plaintiffs and a double
10 liability be placed on the defendant for the same cause of action.

Dated November 13, 1929.

THOMPSON & HANSTEIN.

ORDER.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

10

SAMUEL E. ERRICKSON and
ETTA ERRICKSON, his
wife, jointly,

Plaintiffs,

v.

F. W. SCHWIERS, JR., COM-
PANY, a corporation of
the State of New York,

Defendant.

Order.

20

This matter being opened to the Court by Thomp-
son & Hanstein, Esqs., attorneys for the defendant,
on a motion to strike the plaintiffs' complaint for
the reason that the cause of action set forth in said
complaint is cognizable only in the Admiralty
Courts;

30

It further appearing that the defendant also
moved to strike the third count of said complaint on
the ground that same fails to set up a cause of ac-
tion;

It further appearing that the attorney for the

plaintiffs has consented that the third count be stricken;

The Court having read the briefs submitted by counsel and being satisfied that the motion should not prevail as to the first two counts;

It is, on this 26th day of November, 1929, ordered that the defendant's motion to strike the first two
10 counts of the plaintiffs' complaint be and is hereby denied.

It is further ordered that the third count of the plaintiffs' complaint be stricken.

And it is further ordered that the defendant shall have ten days from the date hereof in which to answer said complaint.

W. F. Sooy,
S. C. C.

20 We hereby consent to the form of the within order.

THOMPSON & HANSTEIN,
Attorneys for Defendant.

SAMUEL MORRIS,
Attorney for Plaintiff.

TESTIMONY.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

10

SAMUEL E. ERRICKSON and
ETTA ERRICKSON, his
wife, jointly,

Plaintiffs,

v.

F. W. SCHWIERS, JR., COM-
PANY, a corporation of
the State of New York,

Defendant.

20

Atlantic City, N. J., Tuesday, October 28, 1930.

Before HON. WILLIAM FRANK SOOY, J., and a jury.

30

APPEARANCES:

SAMUEL MORRIS, Esq., for the plaintiffs.

MESSRS. THOMPSON & HANSTEIN, (by Mr. HAN-
STEIN), for the defendant.

(A jury was empaneled and sworn.)

(Mr. Morris opened the plaintiffs' case to the jury.)

(Mr. Hanstein opened the defendant's case to the jury.)

10

SAMUEL S. ERRICKSON, the plaintiff, called as a witness in his own behalf, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Morris:

20

Q. What is your full name?

A. Samuel S. Errickson.

Q. And where do you live?

A. Present time, Tuckahoe.

Q. Do you recall the day of October 19th, 1927?

A. Yes, sir.

Q. Where were you working?

A. I was working at Somers Point.

Q. For whom?

30

A. Hill Dredging Company.

Q. And what were your duties?

A. My duties that day was to place lumber on a float, scow.

Q. You were on the scow?

A. Yes, sir.

Q. Where was this scow?

A. Tied at a wharf at the trolley track, freight track—at Somers Point.

Q. And where was this scow operating to and from?

A. From this wharf to a road that the Hill Dredging Company was building, leading to the bridge, Somers Point to Beesley's Point.

Q. And you were on this scow that was carrying 10 this lumber from the wharf to the bridge; is that right?

A. Yes, sir.

Q. Now where did this lumber come from that was put on the scow?

A. Off of the car.

Q. Freight car?

A. Freight car.

Q. And how was the lumber hoisted from land to sea? 20

A. By a crane.

Q. Whose crane?

A. Schwiers & Company.

Q. The defendant, F. W. Schwiers Company?

A. Yes, sir.

Q. And who operated that crane? The Hill Company or the Schwiers Company?

A. Schwiers.

Mr. Hanstein: Now I object, if you are going to draw a conclusion out of this. 30

The Court: I presume that is all he can testify to, a conclusion.

Q. Do you know the name of the man who operated the crane?

A. I was not personally acquainted with him.

Q. Do you know his name?

A. His name was Carter.

Q. And do you know whether he was generally employed by the Hill Company or by the —

10

Mr. Hanstein: I object.

The Court: I assume, Mr. Morris, that the only way to prove his employment would be either by Hill or by Schwiers. This man's testimony must necessarily be hearsay.

Mr. Morris: I see.

20 Q. Now on this particular day that the lumber was being hoisted from land to sea, what happened?

A. The chain was placed around —

Q. Before we get to that. I withdraw that question. What were your duties, did you say?

A. Placing the lumber on this float or scow.

Q. And what else—you mean to receive the lumber as it was hoisted over?

A. To receive it and place it in place; yes, sir.

Q. You were on the scow?

30 A. Yes, sir.

Q. And the crane and crane operator were on the land?

A. Yes, sir.

Q. And this lumber was being hoisted from land to sea. Now, what were your duties outside of placing the lumber?

A. After the lumber was swung by the crane over to me, it was my duty to give the operator of the crane —

Mr. Hanstein: Now, wait. I am certainly going to object to our being bound by anything that was this witness's duty. Now if this question is directed to, "What are your duties in regard to piling up lumber?" or something like that, that is another thing. 10

The Court: What I understand the purpose of the question to be is this: To show what he was doing that day.

Mr. Hanstein: The question is "What were your duties?" 20

The Court: Yes.

Mr. Hanstein: He might have been entrusted with any sort of duty, but that is not going to bind us, the fact that he has got some duty.

The Court: No; I think the whole question is what he was doing.

Mr. Morris: That is right; and what he was supposed to do when the load was hoisted there. 30

The Court: I don't suppose they are responsible for what he was supposed to do. What he was doing is what binds them, or what he was doing is what either helps or fails to help this man.

Mr. Morris: My object is this, and I want—I don't know if I should—I don't want to tell the jury this fact if it is going to harm Mr. Hanstein. I think my question is proper, if your Honor knew my purpose.

The Court: Come around and tell me.

10

(Court and counsel confer.)

(The question and answer were read by the stenographer as follows:

“Q. And this lumber was being hoisted from land to sea. Now, what were your duties outside of placing the lumber?”

20 “A. After the lumber was swung by the crane over to me, it was my duty to give the operator of the crane——”)

The Court: Well, there was an objection made to the question, as I understand it.

Mr. Hanstein: Yes, sir.

The Court: I will overrule the question in its present form and allow you an exception, Mr. Morris, permitting, however, you to ask the question
30 as to what he was doing at the time the lumber was being unloaded from the land to the scow.

Q. What were you doing as this lumber was being hoisted from land and being swung towards the scow?

A. I was standing on the scow.

Q. And what were you doing, outside of standing there, what were you about to do?

A. When the lumber got over to me——

Mr. Hanstein: Now, just a moment. I don't think we are bound by what he was about to do.

The Court: I will permit him to say what he was doing. And that includes everything you were doing. 10

Q. Includes what you were doing and what you were about to do.

Mr. Hanstein: No. I think I want to object to what he was about to do. A man might say he was about to jump in the river or something.

Mr. Morris: Well, he wasn't. 20

The Court: I will permit him to testify what he was doing. Let's get that done, first.

Mr. Morris: All right.

Q. What were you doing?

A. When the lumber was swung over to me, I would give the operator of the——

Mr. Hanstein: No. Wait. I want to object to that. 30

Mr. Morris: He is telling.

Mr. Hanstein: He was asked what he did. Now

he says, "I was to do something or other." Now that all goes back to this business of what some one may have given him orders to do. I don't know. And we are certainly not bound by some orders somebody may have given him that I don't know anything about.

10 The Court: I will permit you to testify, Mr. Errickson, what you were doing as they were unloading this lumber and what you had been doing as the lumber was unloaded—not this particular piece that came over at that particular time, but what you were doing generally as the work of unloading proceeded.

A. When the lumber was swung over to me, after it got over on top of the scow, I give the operator
20 signals to lower it down and place it as near as possible where we wanted it on this scow, and then unloose the chain, and Mr. Oscar—I can't recall his last name——

Q. Harper?

A. Harper; he and I would finish placing it, racking it up straight.

The Court: That is generally what you were doing that day?

30

The Witness: Yes, sir.

The Court: Now, then, what were you doing when this particular load of lumber came over?

The Witness: When this particular load came

over—excuse me, Judge. Should I tell from the time it started?

The Court: Yes; what you saw.

The Witness: From the time it started from the car, they put a big bundle in a chain hooked to the crane, and started to take it off, and it slipped off. 10
They didn't get it clear, so it slipped off onto the wharf, and then they hooked the chain around part of the lumber and started to take it over again, and it slipped some, and Mr. Champion held up his hand to stop the crane, but he kept it on coming—it kept on coming over until it was swung over my head, much higher than my head at first. Then the operator, not waiting for my signal to drop it, he dropped it down and it struck this scow where I was right on its end, and fell over onto me. 20

Q. Now how many—was there a single chain or double chain on that boom?

A. Single chain.

Q. And how many rings were tied around this load of lumber?

A. One.

Q. You say that—where did this load begin slipping, that is, the second time—while it was on the dock side or on the scow side? 30

A. On the dock side as we immediately started to move it.

Q. So that before it was swung over towards the scow it began slipping?

A. Some—yes, sir.

Q. Could the crane operator have lowered the load before he got on the scow?

A. Yes, sir.

Mr. Hanstein: I object.

The Court: Why do you try to get him to draw
10 a conclusion as to what the crane operation could have done? What was done is what we are bound by.

Mr. Morris: Mr. Hanstein in his opening said this crane couldn't do anything else but go on.

The Court: You are asking this witness to draw a conclusion as to something that could or could not have been done. It is for the jury to determine
20 whether he could or could not have done it. What was done is what we are bound by.

Q. So that after the load began slipping the second time—you say the first time it had slipped and they re-fastened it?

A. Yes, sir.

Q. Then they fastened it a second time and it began to slip then?

A. Yes, sir.

30 Q. And in spite of the fact that it slipped, they continued to swing it on to the scow?

A. Yes, sir.

Q. Now what—on what part of the boat were you, or the scow?

A. I was on the end—on the end of the scow where this lumber was to be placed.

Q. Can you stand up, Mr. Errickson and demonstrate here exactly where—not exactly, but as well as you can where the scow was and where the dock was and where the crane was and where you were?

A. I am not much of an artist. (Draws diagram.)

Q. What is that?

A. That is the deck of the scow, almost square, but some longer than it was wide, and we were 10 placing lumber in four piles.

Q. Wait a minute. Put the dock down first and the crane.

A. Well, the wharf was right alongside, the scow was tied up to the wharf as close as possible.

Q. Put some lines showing where the wharf is.

A. This would be the wharf. It—the wharf extended up to the height of my shoulders above the scow. In other words, the water was about that much lower than the top of the wharf.

20

Q. Where was the crane?

A. On land. There was a car with the lumber here, and the crane right close to it. After the crane got hold of this lumber, it was necessary for it to move ahead just some—I don't know how far, just a little ways, perhaps its length—and then it had, of course, a long arm which swung around.

Q. The boom, you mean?

A. Boom of the crane.

Q. Crane.

30

A. After he came down here and swung around here, just come right around in here, the lumber struck on the end of the scow. I was standing at the post here, big mast, like. I was standing right here ready to receive this lumber, which was my duty when it came around to me, I put my hand on

the pile of lumber in the chain, it is hooked on the crane, and give the signal to drop it. This particular time he didn't wait for the signal, and I was standing here, and after it had landed here I went to shove it off of here and it fell and it caught me before I could get out of its way.

10 The Court: When he says he "went to shove it off of here," he points to the bow—one end of the scow. In other words, you went from the central position in the scow up to one end of the scow in order to try to push off the lumber that had hit that end?

The Witness: If your Honor please, the lumber was hit on this end of the scow, yes, sir, and I was in the center, to shove it off, so that it would come
20 down.

The Court: Yes.

The Witness: The lumber was hanging straight from the crane in that position. They were standing in that position. When it struck here we had to push it off, so it would come down this way, where if it had been hung maybe that way it would come down square. But while it was coming down
30 ordinarily I would put my hand on it and guide it to where we wanted it, at the same time give the operator a signal to drop it down.

The Court: Now, then, when you went up to the end of the scow for the purpose of righting the lumber that had hit the end, you got it right, did you?

The Witness: No, sir.

The Court: Didn't get it right?

The Witness: No, sir. Fell before I had a chance.

The Court: Fell.

10

Q. Now was the scow empty at the time of this accident?

A. No, sir.

Q. Will you indicate where any of the lumber was on the scow?

A. There was lumber on this quarter and on this quarter.

The Court: Pointing to the two.

20

The Witness: It is—well, call the front of the scow.

Q. Facing the dock; is that right?

A. No; it was sideways to the dock.

Q. Yes.

A. This—there was one quarter there next to the dock and there is the bridge, the railroad bridge, a trolley line, is over here. This here had a load on, and this had a load on, and the load we were to place was right here.

30

The Court: In other words, the—there was a load on the right front of the scow and the right rear of the scow?

The Witness: Yes, sir.

The Court: And the right of the scow was lying next to the wharf and the front of the scow was to the trolley bridge? That is right?

The Witness: Yes, sir. And we were to place
10 this load on the left front.

Q. Was there any lumber here?

The Court: Indicating the left rear.

A. I am not right positive. I think there was one crane load. Would take about four crane loads to load each corner, and I think there was one crane load laid off here on the left rear.

20 Q. So that outside of this corner where you were attempting to receive this load, the scow was pretty well filled with lumber, was it?

A. Yes, sir.

Q. And you didn't have much room to move around, did you?

A. No, sir.

Q. Now when you saw this load coming, you saw it slip, what did you do?

A. I attempted to get out of the way.

30 Q. And what happened?

A. Well, it hit me before I could get out of the way.

Q. How did it strike you? Will you demonstrate? Stand up and show how it struck you,

A. Well, I had turned partly around to run away and it had struck me in the back.

Q. How long was this—how long were these pieces of lumber, do you know?

A. Sixteen feet.

Q. By what?

A. By—some was 2 by 16, and some was—that is two inches thick.

Q. Two inches thick.

A. And either 8—either 10 or 12 inches wide, I am not right positive. It was either 10 or 12 inches wide, 2 inches thick, and 16 feet long, and there was some inch boards of the same width in the lot.

Q. I show you what purports to be a picture, indicating a car and some lumber and a crane. Will you tell me what that indicates (showing paper to witness)?

A. Well, I should say—

Mr. Morris: Want to see it? Wait a minute. 20

(Picture shown to Mr. Hanstein.)

The Court: I don't quite understand. When this lumber hit you, did it hit you as a result of falling out of the chains or was it still in the chains?

The Witness: Out of the chains.

The Court: Fell out of the chains? 30

The Witness: Yes.

The Court: And then it scattered over the deck, did it?

The Witness: Fell practically in a bunch; yes, sir.

The Court: Fell practically in a bunch. But it had fallen out of the chains?

The Witness: Yes, sir.

10

Q. Mr. Errickson, the lumber you see on that picture, is that about the size of the lumber which you were using that day?

Mr. Hanstein: I object to that. I think he has described the lumber. I don't see any point in it.

The Court: I will permit him to answer this question.

20

A. No, it is not.

Q. Is that bigger or smaller or what?

The Court: Well, it isn't so——

Mr. Morris: Well, all right.

Q. Is this a picture of the crane which was used on the day of the accident?

30

A. I should say it was; yes, sir.

Mr. Morris: Any objection to that?

Mr. Hanstein: Let me see that again. Well, there is no doubt there was a crane there, and if this is the crane, I have no objection.

The Court: Only for the purpose of illustrating a crane. There is no allegation that the crane was defective.

Mr. Hanstein: Oh, no.

Mr. Morris: I offer this in evidence.

(Picture offered is received in evidence and marked Exhibit P-1.)

10

Q. Now the lumber fell on you?

A. Yes, sir.

Q. It struck which part of your body first?

A. I couldn't just say.

Q. Struck your back or front?

A. Struck me in the back; yes, sir.

Q. And you say it was about 16 feet long, the 20 lumber?

A. Yes, sir.

Q. The back and how far down your body?

A. Struck me right across the hips.

Q. Yes. Did it strike any other part of your body?

A. Well, after—it—yes, it knocked me down and then come all the way down from the hips all the way down after I fell.

Q. All the way down to the bottom. Will you 30 take your shoe and stocking off and show what injuries you sustained to your foot?

(Witness exhibits foot to jury.)

A. Foot was broken in here, bent back.

Q. Suppose you take your other shoe off, so we can see the difference.

A. The leg was broken here.

Q. Can you take your other shoe off?

A. You can see it is swollen there; and here is where it is giving me the most trouble now, is right over there, the leader that leads across there, and
10 right in there (indicating).

The Court: I don't suppose the other foot—

Mr. Morris: Well, we don't need the other foot.

The Court: No, because the doctors will testify as to the difference in measurement.

Q. Will you come out here a minute?

20

The Court: Could the jury see the foot? They have all seen it. Just put it up so that they can.

(Witness shows jury his foot.)

Q. Did the lumber strike that part?

A. Up here.

The Court: The stenographer can't see that. Just
30 let the jury see the foot and let the witness come back to the stand.

(Witness resumes witness chair.)

The Court: Put your shoe and stocking on, so you won't get cold.

Q. So you say the lumber fell on your back and it covered the lower part of your body down to the foot; is that right?

A. Yes, sir.

Q. And your foot was caught in some other lumber, is that it, caught between the lumber that fell on you and the other lumber; is that it?

A. Between the lumber that fell on me and the deck of the scow. 10

Q. And what happened to you then?

A. Well, the first thing I remember after that was Oscar Harper—can't remember that man's name—

Q. Mr. Harper.

A. Mr. Harper and Mr. Champion was lifting on the lumber and Mr. Champion took hold of me and pulled me out from underneath it. That is the first thing I remember. 20

Q. And where were you taken?

A. I was first taken home, my own home.

Q. And then where were you taken?

A. To the hospital.

Q. And how long were you home before you were taken to the hospital?

A. Well, a very short time. I couldn't say just how long. About as long as it would take to call up—there was a doctor brought to the house and he immediately called up the ambulance at the hospital. Was practically an hour. 30

Q. And you were then taken to the hospital in an ambulance?

A. Yes, sir.

Q. How long did you remain in the hospital?

A. Eight weeks.

Q. In bed?

A. All but the last three days.

Q. And then where did you go?

A. Went home.

Q. And how long did you remain at home, in the house?

A. In the house—I wasn't out of the house from
10 the time they took me home until well along in the warm weather, I should say the last of April.

Q. You say the accident happened October 19th; you were in the hospital for two months?

A. Eight weeks exactly; yes, sir.

Q. So that was December 19th, you—about December 19th you came home?

A. Yes, it was.

Q. And you were in the house—

A. Wednesday before Christmas, I am pretty
20 sure.

Q. What is that?

A. Wednesday before Christmas, I am pretty sure. I don't know the exact date.

Q. And you were in the house until about when?

A. The very last of April, or perhaps the first of May.

Q. So you were in the house over four months?

A. Yes, sir.

Q. Well, were you in bed all that time?

A. Not in bed; no.
30

Q. What were you doing?

A. I could only sit around in the chair; I could walk some on crutches around the room.

Q. How about without crutches?

A. Couldn't get along without crutches.

Q. And then, when you got out of the house, when

you were able to go outside, around May the first, were you able to walk without your crutches?

A. No, sir. I walked on crutches.

Q. How long was it before you were able to walk without your crutches?

A. It was—I would say from a month or six weeks after that, at least.

Q. And how long was it before you were able to do any work at all? 10

A. Thirteen months.

Q. From the time of the accident?

A. Yes, sir.

Q. And what kind of work were you then able to do?

A. Why, really wasn't able to do any work. Just hold a job as —known as a night attendant, feeble-minded home, at Woodbine, for the State.

Q. Night attendant in a feeble-minded home in Woodbine? 20

A. Yes, sir.

Q. How much do you make at that job?

A. I started at \$45 a month.

Q. \$45 a month; and your hours are what?

A. Quarter of seven until quarter of seven; twelve hours.

Q. Quarter of seven in the evening until a quarter of seven in the morning?

A. Yes, sir. 30

Q. Making \$45 per month?

A. Yes, sir.

Q. And what were you making at the time of the accident?

A. Mr. Hill—the Hill Company was paying me \$30 a week.

Q. And how much had you been making prior to the time you were in the Hill employ?

A. At the time with Hill?

Q. No; prior to the time you went with Hill.

A. I was making \$8 a day, or a dollar an hour.

Q. As what? What kind of work?

A. It was carpenter work.

10 Q. Carpenter work. Now, since the accident, have you been able to do any carpenter work?

A. No, sir.

Q. And you say you are night attendant at this feeble-minded home. What kind of work does that entail?

A. Well, the first—I go in at quarter of seven and receive the boys from what we call the day room. They are all up and perhaps sitting in chairs, and like of that.

20 Q. Mostly sitting; is that it?

A. Yes, sir.

Q. Do you do any hand work or any lifting or anything like that?

A. The heaviest thing I have to lift is a sheet.

Q. A sheet. Are you able to lift any load or anything like that?

A. I couldn't lift anything of any weight if I had to bend over to do it.

Q. Are you married?

30 A. Yes, sir.

Q. And how many children do you have?

Mr. Hanstein: I object.

The Court: I don't see that makes any difference.

Mr. Morris: The fact that the man has a family to support.

The Court: No. This is not a death action, fortunately.

Q. Now, how do you feel now?

A. Well, I have a good bit of distress any time that I stoop over, or, in fact, if I sit any length of time it bothers me quite a little; and I have a distress here in my leg. While it is not a pain, I can't explain it. It feels awful cold. It gets me so nervous that I don't know what I am doing hardly at times. And my foot—my foot hurts whether I am on it or not.

Q. Your foot hurts what?

A. My foot hurts whether I am on it or not. There is a distress right in here.

Q. Even hurts up till this day?

20

A. Today, right this minute. It is right on the top of my foot.

Q. How about your back?

A. My back hurts me 'most all the time, right down here, below the kidneys. It is down on the hip, right across there, it hurts almost all the time.

Q. Does it hurt you more some days than others?

A. Oh, yes.

Q. Does the weather affect it?

A. Yes, sir; change of weather, like a storm coming up, or anything like that.

30

Q. Feel it?

A. Yes.

Q. How about walking about? Are you able to walk around anywhere you want without any trouble?

A. I can't walk only where it is level. If there is loose stones or sticks or brush or anything on that order, I can hardly get along at all.

Q. Are you able to go hunting as you used to?

A. No, sir.

Q. That is, hunting in the woods. Why?

A. I can't get around where there is anything
10 rough, like brush.

Mr. Morris: That is all.

By the Court:

Q. What time of day did this accident happen?

A. I would say, as near as I can remember, about
two-thirty.

Q. Two-thirty in the afternoon?

20 A. I wouldn't want to say that was the exact time.

Q. And what time did you go to work in the morning?

A. Well, that day it rained, and we didn't work
in the morning. We went to work right after dinner.

Q. What time was that?

A. Twelve-thirty, I should say; was the regular
time. I should say we went to work around the
regular time. At first I drove Mr. Champion up, the
30 foreman, from the wharf over to Ocean City.

Q. I don't care about that. You had worked approximately two hours when this accident happened?

A. Yes.

Q. Now, then—

A. But, Judge, not unloading the lumber all that
time.

Q. Oh, you hadn't been?

A. No.

Q. Had you been unloading the lumber on this boat the day before?

A. No. After we drove to Ocean City and back, then we went to work on the lumber.

Q. Was all the lumber that had been loaded on that boat put on there that day? 10

A. Yes, sir.

Q. I want you to explain to the jury the method of unloading that lumber from the cars right on down to the boat, just how they were doing it. For instance, you had a man in charge of the crane, didn't you?

A. Yes, sir.

Q. What did he do?

A. You mean the operator?

Q. What did he do? 20

A. It was his duty—

Q. Not what his duty was. What he did?

A. He would move the crane from place to place, swing the arm around over the car.

Q. Yes, and after the lumber was passing—who was passing the lumber?

A. There was two men on the car.

Q. Two men on the car passing the lumber. And then what would happen?

A. Then he would swing the lumber around to 30 the scow.

Q. How did he know to swing it?

A. He was told to swing it by Mr. Champion.

Q. Mr. Champion would give him the signal to swing it?

A. Yes.

Q. And then he would swing it around to the scow. Then what would happen?

A. After it got over to the scow, I would give him a signal to drop it.

Q. To lower it?

A. To lower his load.

Q. And would you designate the place on the boat
10 where it was to be lowered?

A. Well, yes. Of course, Mr. Champion could see that, which quarter of the deck we wanted it on, he could see that.

Q. Then Mr. Champion would direct him over that portion of the boat where he wanted to load it?

A. Over to the quarter on which the load would go on.

Q. And you motion it there.

A. As it was opposite the quarter on which it
20 should go on.

Q. At this particular time when the accident happened, the lumber never got over to the point where you were standing to have it lowered, but hit up against the bow of the boat?

A. Then it got opposite to where we should place it, yes, sir. But I hadn't yet given the signal to drop it, because before I gave him the signal to drop it, he lowered it until it hit the scow.

30 The Court: I see. All right.

Mr. Morris: One more question, your Honor.

By Mr. Morris:

Q. Did anyone tell you to keep away from this

particular place where you were just prior to the accident?

A. No, sir.

Q. Was that your customary place to receive the lumber?

Mr. Hanstein: I object.

10

The Court: You are anticipating a whole lot.

Mr. Morris: All right; that is all.

The Witness: Is that all?

Mr. Morris: No.

Cross-examination.

20

By Mr. Hanstein:

Q. Mr. Errickson, this particular load of lumber started from the car, did it not? I mean the first time you saw it was when it was getting out of the car, wasn't it?

A. Yes, sir.

Q. All right. And who fastened that lumber on to the boom of the derrick or crane?

A. Mr. Champion.

Q. Well, he didn't fasten the chains on, did he?

A. Mr. Champion?

Q. Yes.

A. Yes, sir.

Q. Didn't he have some men working for him in the car?

30

A. Mr. Champion worked just the same as the rest. Although he was foreman, he worked along with us just the same as the rest.

Q. All right. He had a couple of men working, didn't he?

A. There were three others.

Q. How many men were working in the car?

10 A. Two.

Q. Besides Champion?

A. Yes, sir.

Q. Two men besides Champion?

A. No, sir; not besides him.

Q. Champion and another man?

A. Yes, sir.

Mr. Morris: What car do you mean?

20 Mr. Hanstein: The freight car.

Q. Now, Champion and this other man were both employes of the Hill Dredging Company, weren't they?

A. Yes, sir.

Q. And they fastened the chain around that lumber, didn't they?

A. Yes, sir.

30 Q. Then they fastened that on to the boom of this crane?

A. Well, the chain was already hanging on the boom of the crane.

Q. Didn't they put it over a hook?

A. Well, it was—that is the way they worked it. It was always hanging there, and the other end would be taken off the lumber when we got to the

place where we wanted it, and go back after another load. That chain wasn't taken off the crane at all.

Q. After they got it fastened on, then did you see Champion give the signal to start?

A. No.

Q. You didn't see him give the signal to raise it up?

A. No, sir.

10

Q. Did you see when he gave the signal for them to lower it on the deck?

A. When he gave——

Q. Right after it came out of the car, I mean.

A. Well, there is quite a space from the time it left the car until it got over to the boat.

Q. I am not talking about that. Didn't you see this lumber come out of the car and then didn't you see it placed on the deck again because there was too much lumber in the sling?

20

A. On the wharf, you mean?

Q. On the deck of the wharf, yes.

A. Yes.

Q. You saw that?

A. Yes.

Q. Did you see Champion give the signal for them to lower it that time?

A. He couldn't give a signal to lower it because it slipped; slipped right off. They didn't get it raised clear.

30

Q. Do you mean to say when they first lifted it out of the car, it fell off?

A. I do.

Q. And fell all around the deck?

A. Fell in a bunch.

The Court: Fell in a bunch where?

The Witness: Right on to the wharf.

Q. What fell? Did the lumber fall out of the chain?

A. The lumber fell from the chain, and slipped
10 right off the car; didn't get lifted clear.

Q. Didn't get out of the car?

A. Wasn't suspended in the air at all at that time.

Q. How did it get on the deck?

A. It fell.

Q. The crane lifted up in the air and then it fell out, is that it?

A. Well, they started to raise it, but they didn't get it clear, didn't get it up clear, suspended in the
20 air.

Q. And you didn't see Champion tell them to lower it?

A. No, sir.

Q. Did not. All right. Did you see these men fasten the lumber together again?

A. Yes, they straightened the pile up and—

Q. Who did that?

A. Mr. Champion and the man that was working with him, and the man that was on the boat with me
30 got out on to the wharf and helped straighten them up, and they took hold of it again.

Q. All right. Now you say that—who was on the boat with you?

A. Oscar.

Q. Oscar; and you say that Oscar was not on the boat when you got hurt?

A. Not right at the minute; no, sir.

Q. He wasn't on the boat at the time that lumber came on the boat?

A. No, sir. He got out——

Q. All right. All right. Now then, did you see— after this lumber was rearranged, did you see Champion tell them to raise it?

A. This was after it was hooked on the second 10 time?

Q. Yes, the second time.

A. Well, I couldn't just say that I seen him give the signal.

Q. Didn't see him give that signal. Did you see him give the signal for them to swing it over the boat?

A. After the lumber started——

Q. Now, answer the question.

20

Mr. Morris: What is the question?

Mr. Hanstein: Wait a minute. I am asking the witness a question.

Mr. Morris: I think the question ought to be repeated. I didn't hear it.

The Court: All right.

30

(The question was read by the stenographer as follows:

“Q. Did you see him give the signal for them to swing it over the boat?”)

Q. Do you understand the question?

A. No, sir.

Mr. Hanstein: Repeat it to him.

(The question was again read to the witness by the stenographer.)

A. I wouldn't say that I did.

10 Q. You wouldn't say that you did. And did you see the lumber start over the boat, start for the boat?

A. Yes, sir.

Q. Saw that, didn't you?

A. Yes, sir.

Q. And where was Champion?

A. Champion stood right by the bundle of lumber.

Q. Stood right by what?

20 A. By the lumber—pile of lumber that he had just chained on.

Q. That was—part of it was up in the air, wasn't it?

A. Not when he gave the signal; no.

Q. Well, you didn't see Champion give the signal to start the lumber, so there is no use talking about that. When the lumber went up in the air, it started for the boat, didn't it?

A. Yes, sir.

Q. You saw that, didn't you?

30 A. Yes, sir.

Q. Where was Champion when the lumber started for the boat?

A. Standing on the wharf about where the lumber started from.

Q. About where it started from?

A. Yes.

Q. And what did you see Champion do while that lumber was going towards the boat?

A. I see him have his hand out like he was going to give a signal.

Q. Like he was going to give a signal?

A. Yes, sir.

Q. But you didn't see him give any signal?

A. I wouldn't say it was a signal, because his hand 10
was only out.

Q. I see; which is not a signal?

A. I wouldn't say so.

Q. All right. As the lumber came over onto the boat, the lumber wasn't laying horizontally, was it?

A. No, sir.

Q. It was not hanging horizontally?

A. No, sir.

Q. What happened to that lumber on its way to the boat? 20

A. Well, when it first started over it slipped a little bit.

Q. And what—and one end was lower than the other, wasn't it?

A. Yes, sir.

Q. And as it came over the boat, one end struck on the end of the boat, didn't it?

A. Not as it came over; no, sir. The wharf was the height of my—about my shoulder from the deck of the boat. Not much higher. About that high. 30

Q. The wharf was about the height of your shoulder higher than the deck of the boat?

A. Yes, sir.

Q. All right. So then you say the lumber came over in a crooked position?

A. Almost straight up and down.

Q. Almost straight up and down?

A. Yes, sir.

Q. And then what happened?

A. Then the operator dropped it down; lowered it down, I should say, instead of dropped.

Q. Lowered it down how far?

A. Well, it was swinging clear of the dock, and
10 then the length of the dock from—to the deck of the boat.

Q. All right. Then, as I understand you, he lowered it down until one end of this lumber struck the end of the boat?

A. Yes, sir.

Q. And it was standing up in that position, was it?

A. Yes, sir.

Q. And you were told to go and get it off, weren't
20 you?

A. I went to push it off the end; yes, sir.

Q. Now if you had stayed where you were before, as it came over, that lumber wouldn't have fallen on you, would it?

A. Well, perhaps not, but it might have been there yet.

Q. Well, I am not asking you about anything but whether that lumber would have hit you if you had stayed where you were?

30 A. Well, perhaps not.

Q. All right. Now, then, you went over to get this lumber loose, didn't you?

A. Yes, sir.

Q. And you say there was nobody else on the wharf with you?

The Court: On the boat.

Q. On the boat with you?

A. Not when this load came over; no, sir.

Q. All right. And how wide was this bundle of lumber?

A. Well, it was more round—after—

Q. Well, what was the greatest diameter of the bundle? 10

A. Well, I should say the chain was about six foot. It was just about what you could wrap the chain round.

Q. Do you mean the bundle was six feet through in width, this bundle of lumber?

A. About five; yes, sir.

Q. About five feet in width?

A. Yes, sir.

Q. How wide was the barge, about? 20

A. Why, I should say there was—must have been about ten feet clearance on each side.

Q. And do I understand you say this bundle of lumber as it came down and struck was perfectly perpendicular—that is, perfectly straight up and down?

A. Yes, sir.

Q. Perfectly straight up and down?

A. Yes, sir.

Q. And had you put your hands on the lumber before it fell? 30

A. No, sir.

Q. Hadn't gotten to it?

A. No, sir.

Q. And what happened? The lumber just fell out of the chain?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now, then, that lumber fell flat down on the boat?

A. Yes, sir.

Q. That is right, isn't it? You had worked on
10 unloading lumber before, hadn't you?

A. Not with a crane; no, sir.

Q. Hadn't you ever worked on this barge or another barge out at this same wharf, unloading lumber, on several occasions for the Hill Dredging Company?

A. I had never helped with a crane, loading it on to the scow; no, sir.

Q. Is this the first day you did it?

A. I think it was the first day as I ever helped
20 unload the lumber; yes, sir.

Q. Not sure about that, are you?

A. 'Most positive.

Q. What work did you do on the other days?

A. Well, most—our main job was on what is known as the testing machine. This wasn't our regular work.

Q. Well, now, let me ask you this. You don't remember any other dates when you worked there unloading lumber do you?

30 A. No, I don't.

Q. Now, did somebody tell you to go over there and loosen that lumber up?

A. I wouldn't like to say they did.

Q. Well, can't you remember whether some one told you or whether they didn't?

Mr. Morris: Whether somebody did or whether they didn't?

Q. Whether somebody told you or whether they didn't?

A. I wouldn't like to say; no, sir.

Q. Do you remember giving some testimony in connection with this accident back in April—March 10 of this year?

A. Was that the day I was in your office?

Q. Yes; do you remember that?

A. I remember being in your office; yes, sir.

Q. Did you remember any more about that accident then than you do now?

A. That is hard to say.

Q. Well, do you remember being asked this question: "Did anybody say anything about this particular load?" And you said, "Yes." 20

Question: "Before the accident?" And you answered: "Yes, sir."

And then the question was asked: "What was said?" And you gave the answer: "The load got on the end of the float where I was on, and I was told to push it off, but before I got to it it fell on me." Do you remember saying that?

A. I don't just recall. I won't doubt that I said it.

Q. And then you were asked this: "Who told 30 you to push it off?" And then you answered: "Jesse Champion." Do you remember that? And then you were asked again: "Did the scow hit the lumber as it moved, caused by the water?" And you answered: "No, the lumber was lower on the end like that when Mr. Champion told me to push it off,

so it would come down flat, but before I could get to it, it fell." Remember saying that?

A. Well, I remember something along that line, but I don't just recall being told to do it.

Q. Well, is your memory better now than it was when you were in our office and telling us about it?

A. I don't know as it is any better.

10 Q. Now, then, when you saw this lumber slipping out of the chain, you undertook to run away from it, didn't you?

A. Yes, sir.

Q. And you started to run lengthwise of the lumber?

A. Yes, sir.

Q. And you didn't run to the side?

A. Wasn't room to run to the side.

Q. And you worked for the Hill Dredging Com-
20 pany?

A. Yes, sir.

Q. And Champion did?

A. Yes, sir.

Q. And all the other men. That man Oscar that you talk about did, and the other man who worked on the car with—

A. Yes, sir.

Q. —with Mr. Champion did; isn't that right?

A. Yes, sir.

30 Q. And this was lumber for the Hill Dredging Company, wasn't it?

A. Yes, sir.

Q. And the man who directed you in your work there was Mr. Champion; that is right, isn't it?

A. Yes, sir.

Q. He was what; the overseer?

A. He was the foreman.

Q. The foreman. And in this hospital where you are working you get your board and lodging too, don't you?

A. Oh, yes.

Q. What is that?

A. Yes, sir. Beg your pardon, there. I thought you were speaking about the hospital here. 10

Q. No, no; I mean where you are working now.

A. You are entitled to your room and board; yes, sir; but I don't get it.

Q. Well, it is there for you as part of your wages?

A. Yes, sir.

Q. Now, I want to understand something else that you testified to, if I can. Did I understand you to say that as the lumber this particular time was coming on to the barge, it passed over your head?

A. No; not over my head. 20

Q. Well, I may have misunderstood you, but I did think you said that.

A. It swung along about that position.

Q. You were standing right where we will put this circle; is that right?

A. Yes, sir.

Q. And this square box here represents the crane, does it?

A. Yes, sir.

Q. And this dotted line—now suppose we draw 30 this dotted line—that represents the course that the lumber took?

A. That is about it; yes, sir.

Q. And there was a railroad car off here, I suppose?

A. I drew that for the car (indicating).

Q. All right; this is the railroad car. Not a very pretty one. And this—so that none of this lumber did in fact pass over your head, did it?

A. No, sir.

Mr. Hanstein: I think that is all.

10 Mr. Morris: I omitted to ask one question, your Honor.

Re-direct examination.

By Mr. Morris:

20 Q. Was the crane operator in a position to see the lumber from the time it was picked off the ground until the time it was to be loaded on to your barge?

Mr. Hanstein: I object.

The Court: He may testify where the crane operator stood and where the barge was, and not draw the inference.

Mr. Morris: Was he in a position to see?

30 The Court: I know, but there is the vice of the question; that calls for the conclusion on his part.

Q. Will you tell me where the operator was from the time that the lumber was picked off the ground, in the car, to the time it was landed on the scow?

A. He was standing by his levers, right in front of the front part of the crane.

Q. Was he—did he follow the load—could he see the load?

Mr. Hanstein: I object.

The Court: I sustain the objection. He was 10 standing in front of the crane. About how far away from the edge of the dock?

The Witness: Couldn't just say. He had to move, from the time he picked up the load until he lowered it, he would have to move.

The Court: That is, this crane and he would move with it?

20

The Witness: Move his crane ahead, some little.

The Court: How near the edge of the dock would he get?

The Witness: I should say about 6 feet.

The Court: About 6 feet from the edge of the dock. And where did he stand with reference to the deck? Was he higher? 30

The Witness: He was higher.

The Court: How much higher, about?

The Witness: I should say four and one-half feet.

Q. Where would he stand when the load was being swung around?

A. He would stand right where he could see his boom.

10

Mr. Hanstein: I ask that be stricken.

The Court: "He could stand where he could see his boom." I will permit it to stand.

Q. And was he standing—did he move with the boom?

A. Yes.

20 Q. In other words, the crane operator, say, was standing here (indicating); the boom was out like that, wasn't it?

A. Yes, sir.

Q. The load of lumber was suspended, and as the crane swung around, he swung around, too; is that right?

A. Yes, sir.

Q. There was nothing to obstruct his view of the lumber, was there?

30

Mr. Hanstein: I object.

Q. Was there anything to obstruct the crane operator's view of the lumber as it was being swung around?

A. No, sir.

Q. Do you know whether the crane operator saw

the load slip out of the chain the first time it was attempted to be hoisted?

Mr. Hanstein: I object.

The Court: I sustain the objection. You are having him testify as to what some one else saw.

Mr. Morris: Whether the crane operator saw it.

10

The Court: He can't testify whether the crane operator saw it.

Mr. Morris: If your Honor please, if Mr. Errickson was standing in a position where he could see the crane operator was looking at the load.

The Court: Supposing the crane operator shut his eyes.

20

Mr. Morris: Well—

Q. Where was Mr. Harper at the time you were on the boat just prior to the accident?

A. He was up—helping straighten up this pile that had fallen off.

Q. That is, that had fallen off the first time?

A. Fallen off the car.

30

Q. What is the signal that Mr. Champion is supposed to give before the lumber was to be hoisted?

A. Like this (illustrating).

Q. And at the time that this lumber was hoisted, what was Mr. Champion's position?

Mr. Hanstein: I don't understand how that——

Mr. Morris: The witness testified before that Champion's hand was out.

The Court: I understand that. That is all right. He now testifies the usual was with the thumb extended up.
10

Q. So that the usual signal Mr. Champion gave was thumbs up when he——

A. Just hold your hand up and point your thumb up.

Q. And this time he didn't have his thumb up; just had his hand out?

A. I wouldn't say.

Q. Did you see whether the thumb was up?
20

Mr. Hanstein: I object to this cross-examination.

The Court: This is not what you started out to do. You said you forgot one question.

Mr. Morris: All right. That is all.

Mr. Hanstein: Just a moment, as long as you are here.
30

Re-cross examination.

By Mr. Hanstein:

Q. This barge, did it have a high side, or is it perfectly flat?

A. It just had an edge around it, I should say a four-by-four around the edge.

Q. Is that all there was, just a flat——

A. Flat, yes, with a mast up. It had a hoisting arrangement on it, a hand-hoisting arrangement.

Mr. Hanstein: Well, I don't care anything about that. That is all.

10

The Court: That is all.

Mr. Morris: Your Honor, was there any testimony here as to how many pieces of lumber would be fastened together?

The Court: He said it was about six feet; five feet.

20

Mr. Hanstein: Five feet in diameter.

Mr. Morris: I would like to ask him one more question.

Re-direct examination.

By Mr. Morris:

Q. About how many pieces of lumber were fastened together? 30

The Court: In one load, as lifted by the crane.

A. I couldn't say about the lumber.

Q. About how many?

A. There was quite a number.

Q. About?

A. What the six-foot chain would wrap around.

Mr. Morris: All right. That is all.

10

SAMUEL BOWKER, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Morris:

20 Q. Where do you live, Mr. Bowker?

A. Tuckahoe, New Jersey.

Q. And what is your occupation?

A. Hoisting engineer.

Q. You operate a crane, do you?

A. Yes, sir.

Q. Do you—what kind of cranes do you operate?

A. Steam or gas.

Q. And how long have you been in that—how long have you been operating cranes?

30 A. I should say around twelve years.

Q. Have you been operating the cranes, hoisted different loads such as lumber and the like?

A. Yes, sir.

Q. What kind of chain would you say would be safe to use in hoisting a load of lumber that would be thick enough to be enclosed in a six-foot chain?

Mr. Hanstein: I object.

The Court: No allegation this chain broke or that the accident was occasioned by the breaking of the chain. You say that your load slipped.

Mr. Morris: My purpose is to show it was carelessness on the part of the crane operator and crane owner to operate this crane with a single chain; that they should have used a double chain. 10

The Court: Your question is not in the proper form for that.

Mr. Hanstein: Your Honor, I want to get this on the record, before I seem to acquiesce in it. There has not been the least suggestion in this case that we were called on to meet a case of not having a proper chain, or anything else improper about the equipment. 20

The Court: No; they simply say you negligently and carelessly fastened and swung and permitted to be swung——

Mr. Morris: And permitted.

The Court: —the lumber when it was carelessly and negligently fastened. 30

Mr. Morris: Now, if they used a single chain in fastening a load of lumber, and that is not the proper kind of material to use——

The Court: I am not passing on that at the present time. I have now before me the question that doesn't go to what you say you want it to go.

Mr. Morris: Repeat the question.

(The question was read by the stenographer as follows: "Q. What kind of chain would you say would be safe to use in hoisting a load of lumber that would be thick enough to be enclosed in a six-foot chain?")

The Court: Now, I overrule that question.

Q. What kind of chain would you say would be safe enough—

20 The Court: You are not basing your allegation on the fact that they did not use the right kind of chain. You are basing it on the fact that they negligently fastened the chain they used.

Mr. Morris: I don't think I confined myself to the negligent fastening. Here is the allegation: The plaintiff—the defendant Schwiers Company owed the duty to the public and to the plaintiff to exercise due—paragraph 4—exercise due and law-
30 ful care.

The Court: The allegation of the duty is immaterial.

Mr. Morris: All right. While the plaintiff was

employed as aforesaid, the defendant through its servant——

The Court: That is simply a general allegation.

Mr. Morris: Carelessness.

(The Court reads complaint.)

10

Mr. Morris: If your Honor please, the defendant did not object that the complaint was not——

The Court: Don't have to object.

Mr. Morris: —that the complaint did not set forth all the details of the negligence.

The Court: Oh, yes—no; he had before him three 20
statements. He has a statement wherein you say it was the duty of the defendant to do so and so. We don't care anything about that, because that is absolutely immaterial.

He has your conclusion that whatever was done was negligently and carelessly done. He don't care anything about that, because that don't give him anything at all that he is called upon to answer.

And then he has your conclusion of his carelessness and negligence, based on the fact that you allege 30
that he carelessly and negligently fastened and swung and permitted to be swung while carelessly and negligently fastened.

Mr. Morris: All right, your Honor, if the load was swung or permitted to be swung in a condition

which—wherein the load was carelessly fastened, I say that we have the right now to show that it was imprudent to fasten the load with a single chain.

The Court: But your question don't go to that, Mr. Morris.

10 Mr. Morris: All right.

The Court: Repeat your question.

Mr. Morris: I withdraw the question.

Q. Mr. Bowker, would you say that it was safe to hoist a load of lumber with a single chain, a load that was large enough to fill a chain six feet in circumference

20 Mr. Hanstein: Now, I object to that. The chain is too big.

Mr. Morris: I will reframe the question.

Q. Mr. Bowker, would you say that it was safe to hoist a load of lumber using a chain six feet long?

Mr. Hanstein: Now, I object.

30 The Court: I haven't got the question yet.

Mr. Hanstein: He is through with the question.

Mr. Morris: Repeat that question.

(The question was read by the stenographer as follows: "Mr. Bowker, would you say that it was safe to hoist a load of lumber using a chain six feet long?")

The Court: I sustain the objection.

Q. Mr. Bowker, would you say that it was safe to use a chain six feet long in hoisting a load of lumber—

10

Mr. Morris: Isn't there some testimony as to how many pieces of lumber in there?

The Court: No; he said there was enough lumber in the load to—as much lumber in the load as the six-foot chain would stand.

Mr. Morris: That is what I am trying to say.

20

Q. Mr. Bowker, we have here a load of lumber that—what was that?

The Court: You have got a load of lumber, some of it 16 feet long, 2 inches thick, by 8 or 10; some 1 inch thick; and its diameter is 5 feet, and the circumference is as big as a 6-foot chain will stand.

30

Mr. Morris: Yes.

Q. Did you hear that?

A. Yes, sir.

Q. Well, would you say that it would be safe to use a single chain to hoist such a load of lumber?

Mr. Hanstein: Now just a minute. I want to object on the ground the question is not properly put; irrelevant and immaterial. It is not within the complaint, and there is no proof as to size of the chain, the quality of it, the age of it, the condition of it, or any of the other elements that would permit this as proper testimony; and, furthermore,

10 Mr. Bowker's sole qualification up to date is, as I understand it, that he is a hoisting engineer, and not a metallurgist or anything else that would qualify him.

The Court: I am never going to let him endeavor to prove that the chain that was used was not safe from the standpoint of the chain itself, because there is no allegation that there was a defective chain there or that the chain was not big enough, or any-

20 thing else; but I will permit him to prove by expert testimony, if he can, the proper way of wrapping the chain around the lumber in order to transport it from its place in the car to the boat.

Mr. Morris: All right.

Q. Mr. Bowker, we have the load of lumber which was described by the Judge. You heard that description?

30 A. Yes, sir.

Q. Now, what would be the proper way of hoisting such a load of lumber?

Mr. Hanstein: Now just a moment. I want to object again for the simple reason the man has not qualified as being in any way qualified to pass on the

question presented. In the next place, there is no suggestion in this case that the defendant had anything to do with tying this bundle of lumber together.

The Court: Well, I naturally assume that as to that, he expects to be able before he is finished, to connect up the defendant with the work of unloading this lumber. It would be futile to go ahead if he didn't. 10

Mr. Hanstein: He is asking about wrapping chains around. Their testimony already is that the Hill Dredging men were the men who wrapped the chains around it.

The Court: If he has testified to that, that is all the testimony there is in. But I expect before he is done, he is going to connect up the whole operation with the Schwiers Company—are you not, or is it just the operation of the— 20

Mr. Morris: My idea is that the Schwiers Company permitted this load of lumber to be swung in this careless condition.

The Court: Yes.

Mr. Hanstein: The Schwiers Company? 30

The Court: Yes.

Mr. Morris: They were the one who, I contend, operated the crane, and they permitted this crane—

this load of lumber to be swung in this careless condition.

The Court: I am going to assume before you are done you are going to connect the Schwiers Company with the negligence of which you complain in your complaint.

10 Now then, where are we?

Mr. Hanstein: We have got this question.

Mr. Morris: Will you repeat the question?

(The question was read by the stenographer as follows: "Q. Now, what would be the proper way of hoisting such a load of lumber?")

20 The Court: I will sustain the objection. I think we are not getting very far with the expert testimony just at the present time.

Mr. Morris: I thought your Honor permitted it.

The Court: I said I expected you before you were done, you would have the Schwiers Company connected.

30 Mr. Morris: Do you want me to do that first?

The Court: No.

Mr. Morris: The question I thought you permitted.

The Court: No, that is overruled. All you have got so far, Mr. Morris, if you look the situation over, is this: that you have a man that testifies he has operated a crane, and operated a crane for twelve years, and during the time he has operated a crane, that crane has hoisted lumber and bricks and other things. There is no testimony on his part that he has ever had anything to do other than simply 10 operate the crane; nothing to do with the loading, which seems to be a separate and distinct branch.

Q. Mr. Bowker, have you ever refused to lift a load of lumber if it was not properly fastened?

Mr. Hanstein: I object.

The Court: I sustain the objection.

20

Q. Mr. Bowker, as crane operator for twelve years, have you had anything to do with determining whether it was proper or improper to lift a load at any particular time?

Mr. Hanstein: I object.

The Court: I will permit it.

Mr. Hanstein: May I have an exception?

30

The Court: Yes.

Mr. Hanstein: It is not within the scope of the complaint.

The Court: You may have an exception.

Mr. Morris: Will you repeat the question?

(The question was read by the stenographer as follows: “Q. Mr. Bowker, as crane operator for twelve years, have you had anything to do with determining whether it was proper or improper to lift a load at any particular time?”)

Mr. Hanstein: That seems to me just as far from anything binding—

The Court: You have your objection, Mr. Hanstein, and an exception.

Q. Will you answer the question, please?

20 A. I have, yes.

Q. And what has been your experience in lifting loads—different loads of lumber or anything else?

Mr. Hanstein: I object.

The Court: I will permit him to tell what his experience has been; and allow you an exception. In other words, in the operation of a crane, do you just attend to the mechanical operation of the crane, or do you also attend to the securing of the load the crane is going to carry?

30 The Witness: The crane operator to a certain extent should know—

The Court: I don't ask you that. I ask you

whether or not in the operation of your crane, you are solely engaged in the operation of the crane itself and some one else is attending to the fastening and securing of the load.

The Witness: Oh, the operator don't fasten the load; no.

10

The Court: And don't secure the load?

The Witness: No, sir.

The Court: All he does, as I understand the business, is to obey the signals of the person who gives the signals, and either hoist or lower, or whatever it may be?

The Witness: Yes, sir; he obeys the signals; but, 20
on the other hand, if he sees the load is not safe——

Mr. Hanstein: I object to that.

Mr. Morris: That is the exact crux.

The Court: You put your question.

Mr. Morris: Oh, my question.

30

The Court: You put your question——none pending at the present time.

Q. What were you going to say, Mr. Bowker——

Mr. Morris: I withdraw that question.

Q. Now, you say that a crane operator usually awaits the signal of the man on the ground, as to whether or not the load should be hoisted; is that right?

A. Yes, sir.

Q. Now, when—have you ever refused to obey the signal of the man in charge of the load?

10

Mr. Hanstein: I object.

The Court: I sustain the objection.

Q. Does a crane operator always obey the signal of the man in charge of the operation?

A. No, sir.

The Court: Sustain the objection.

20 We will recess until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken to Wednesday, October 29th, 1930, at 10:00 o'clock A. M.)

Atlantic City, N. J., October 29, 1930.

(Trial of the cause resumed at 10:00 A. M.)

SAMUEL BOWKER, resumed.

10

Direct examination, continued.

By Mr. Morris:

Q. Mr. Bowker, you say you have been a crane operator for twelve years?

A. Yes, sir.

Q. Do you hold any license in the State of New Jersey?

20

A. Yes, sir.

Q. What license do you hold?

A. A hoisting engineer's license.

Q. You hold a license in the State of New Jersey as a hoisting engineer?

A. Yes, sir.

Q. In order to obtain such a license, is it necessary for you to have a knowledge of safe methods of fastening and handling loads?

30

A. Yes, sir; it is.

Mr. Hanstein: I object. That does not amount to a qualification.

The Court: I will permit the answer.

(Exception noted for defendant.)

Q. The answer was yes?

A. Yes.

Q. During those twelve years that you have been a crane engineer, has it been necessary for you to exercise your knowledge of and concerning the handling and fastening of loads of lumber?

10

A. Yes, sir.

Mr. Hanstein: I object. I do not think the mere fact that someone has to exercise knowledge amounts to a qualification.

The Court: I assume that carries with it the fact that he has exercised it. I will permit it and will allow you to supplement the question by asking him if he has.

20

(Exception noted for defendant.)

By the Court:

Q. And have you exercised that knowledge during the last twelve years?

A. Yes, sir.

Q. How frequently?

30 A. Well, it is nearly an everyday occurrence.

By Mr. Morris:

Q. During these twelve years, then, you have observed the methods of fastening and handling loads?

A. Yes, sir.

Q. Did that include loads of lumber?

A. Yes.

By the Court:

Q. How frequently has it been necessary for you so to do? You say daily?

A. Sir?

10

Q. You say it has been necessary for you daily?

A. Well, no, I wouldn't say daily.

Q. How frequently?

A. Well, most every week. A day or so, probably, in a week.

By Mr. Morris:

Q. We are dealing now with a load of lumber consisting of boards about 16 feet long, 2 inches thick, requiring a chain about 5 feet long to wrap it once. Would you say that it was reasonably safe to lift such a load of lumber with a single chain?

20

Mr. Hanstein: I object. This man has not been qualified as an expert on the subject of safety or of method, and in the next place, there is no allegation in this complaint that the size of the load or the use of a single chain was a part of the negligence charge.

30

The Court: The charge is that it was negligently and carelessly fastened, and this question is directed to the fastening of the load.

Mr. Hanstein: There is no charge in the com-

plaint that we fastened it, nor is there any proof that the defendant fastened it.

Mr. Morris: We do say that they permitted this load, which was carelessly fastened, to be hoisted.

The Court: I will permit the question.

10

(Exception noted for defendant. Question repeated.)

A. No, sir.

Q. What would you say would be the safe method of lifting such a load of lumber?

Mr. Hanstein: I want to note the same objection to this question.

20

The Court: I will sustain the objection.

Q. Can you tell the Court and Jury what, in your opinion, would be a safe method of lifting such a load of lumber?

Mr. Hanstein: I make the same objection.

The Court: I will sustain the objection.

30

Cross-examination.

By Mr. Hanstein:

Q. Mr. Bowker, as engineer of a crane, you never had anything to do with fastening the loads on to the crane, did you?

A. The operator doesn't fasten the loads, no. 10

Q. And whether or not a single chain is a proper method to be used in lifting a given load would depend on the size of the chain as one element, wouldn't it?

A. Yes, sir.

Q. And the weight of the load would make a difference also, would it not?

A. Yes, sir.

Q. Do you know the size of the chain that you were being asked about in the question Mr. Morris asked you? 20

A. No, I don't know the size of the chain they used.

Q. Do you know the weight of the lumber that was to be lifted on a single chain?

A. In this particular load?

Q. Yes.

A. No, sir.

Q. Those two elements are certainly important elements for you to know in order for you to know as to whether or not the method used was safe, aren't they? 30

A. That would be in case the chain broke.

The Court: Was your answer based solely on the question of the chain breaking?

A. No, sir.

Q. In what way would you say it wasn't safe to lift such a load with a single chain without knowing the thickness of the chain or the weight of the load? What is unsafe about it?

A. Using one chain; only one chain.

Q. Have you ever seen lumber lifted by one chain?

10 A. Yes, sir.

Q. What?

A. Yes, sir.

Q. You have worked on a good many operations where cranes were used?

A. Yes, sir.

Q. And you have seen a single chain used, haven't you?

A. Yes, sir.

20 Q. You would say it was in common use, wouldn't you?

A. Yes, sir.

By the Court:

Q. What is unsafe about using one chain?

A. Because the load is apt to slip, and more so with creosote lumber.

30 Q. Well, if the chain is broad enough, it is no more apt to slip with one chain than it would be with two smaller chains, is it?

A. You can't fasten it in the one so it brings the bulk so it is tight.

Q. Why not?

A. Well, just because you can't do it. You can't get close enough.

SAMUEL E. ERRICKSON, recalled.

Direct examination.

By Mr. Morris:

Q. Mr. Errickson, can you tell the Court what 10
kind of a chain this was that was used on the day
of the accident?

A. Why, I would say it was about a three-quarter
iron.

Mr. Hanstein: I ask that be stricken.

The Court: Strike the answer. The answer is
yes or no.

20

Q. Do you know? Do you know the size of this
chain that was used on the day of the accident, to
the best of your knowledge?

A. Well, I know by the looks of it.

Q. So you do know? About what was the size?

A. Three-quarters iron.

Q. Can you tell about how heavy the load was that
was lifted at the time of the accident?

Mr. Hanstein: I think this witness ought to qual- 30
ify himself, if he is going to testify as to that.

The Court: The answer is yes or no.

Q. Do you know about how heavy the load was?

Mr. Hanstein: I object. I do not think about how heavy it is is material.

The Court: I will permit him to answer yes or no.

A. Well, approximately.

10 Q. Do you know about how heavy this load was?

A. No, I don't.

Q. You know what it consisted of, don't you?

A. Yes, sir.

Q. Of what did it consist?

The Court: He has already testified to that.

20 Q. Do you mean that you can't give the exact number of ounces in this load, or that you know about how heavy the load was, but not down to the ounces?

A. I couldn't tell down to the ounces.

Q. But you know about how heavy it was?

A. Yes, sir.

Q. About how heavy was it?

The Court: How do you know?

30

The Witness: Just by handling lumber.

Q. For how many years have you been handling lumber?

A. I worked as a carpenter for five years.

By the Court:

Q. How much does a plank 16 feet long, 2 inches thick and 8 inches wide weigh?

A. A creosoted plank like that would weigh about 90 pounds.

Q. How many of those planks were there in this load?

10

A. There were about fifteen.

Q. And how many planks of other kinds were there in the load?

A. There were some 1-inch boards; I imagine four or five.

Q. What would they weigh?

A. Half as much.

By Mr. Morris:

Q. Then what do you say is about the weight of the load which was lifted that day at the time of the accident?

20

A. Between four and five hundred pounds.

By the Court:

Q. You said that you were standing on the scow and that Mr. Champion, I think it was, would give the signal to the operator of the crane to put the lumber in position over the boat?

30

A. Yes, sir.

Q. And then you would give a signal to lower it after Champion had given that necessary signal to get the lumber over the boat?

A. Yes, sir.

Q. In giving your signal, did you give it to Champion?

A. No, sir.

Q. To whom did you give your signal?

A. To the operator.

By Mr. Morris:

10

Q. Since you left the hospital, Mr. Errickson, were you attended by any physician?

A. Yes, sir.

Q. By whom?

A. First by Dr. Silvers.

Q. For how long?

A. Dr. Silvers examined me once in four weeks for a period of, I should think, about four months.

Q. Who was your next doctor, if you had one?

20 A. At that time I was attending the clinic, the State Clinic here in Atlantic City.

Q. Under whose care?

A. Dr. Mason.

Q. How long were you under his care?

A. About the same time I was going to Dr. Silvers. Dr. Silvers was examining me——

Q. Did you have any doctor after that?

A. Yes, sir.

Q. Who?

30 A. Dr. Sheppard.

Q. Where is he?

A. Millville.

Q. How long did he treat you?

A. I just went to him at different times.

Q. About how often?

A. I went to him three or four times.

Q. Did you pay him any money?

A. Yes, sir.

Q. How much did you pay Dr. Sheppard?

A. Paid him ten dollars for the X-rays and two dollars for office calls, I think it was.

Q. About how many visits did you make there?

A. Three office calls.

Q. Have you paid Dr. Mason?

10

A. No, sir.

Q. Have you paid Dr. Silvers?

A. No, sir, I didn't.

Q. When is the last time you saw a doctor in reference to the injuries which you sustained as the result of this accident?

A. I couldn't tell you the exact time.

Q. About when?

A. It was about three months ago.

20

Cross-examination.

By Mr. Hanstein:

Q. Mr. Errickson, you say you gave some signals to the operator of the crane. After this lumber was put over the barge, it was lowered down to about the level of your waist, where you could put your hand on it, wasn't it?

A. Not until I gave the signal.

30

Q. Here is what I want to get straight. On the signal from Champion, wasn't that lumber brought over the barge and lowered to the point where you could get your hands on it?

A. Not lowered.

Q. How many signals did you give to the operator with each load?

A. Just the signal to lower it.

Q. How many times would you do that with each load?

A. Well, continually while it was coming down. I would just keep my hand going.

10 Q. That would be one continuous signal?

A. Yes.

Q. Is that all?

A. Yes, sir.

Q. Isn't it a fact that this crane operator in swinging the lumber over, could not place it exactly where you men wanted to place it who were loading it? He couldn't place it exactly, could he?

A. He could place it, I would say, exactly where we wanted it, except when the chain was taken off, it would naturally fall over. It wouldn't stay just in one position.

20 Q. So you had to designate to him where you wanted it put on the ground, so you could take the chain off, didn't you?

A. On the boat, yes, sir.

Q. He didn't hold this lumber up in the air over your head until you signaled for it to come down, did he?

A. Always before, yes, sir.

30 Q. Always kept it up in the air and then where would you be when it was up in the air?

A. Right close to where I wanted it placed.

Q. Did he have this lumber over your head?

A. Not over my head, no, sir.

Q. Well, did he have it near you?

A. Well, close to me, yes, sir.

The Court: You say this lumber. Are you referring to this particular load?

Mr. Hanstein: No, I am talking generally.

Q. You couldn't get your hand on it when it was up there, could you?

A. No, I couldn't when it first came over. 10

Q. And that lumber might be lengthwise or sideways to the boat, or any other angle, as it was dangling up in the air, might it not?

A. Yes.

Q. You know the crane operator couldn't control at which angle this lumber came, could he?

A. Oh, no. That is why I —

Q. All right. Isn't it a fact—I just want you to tell me this: Isn't it a fact that he lowered this lumber without any signal from you down to the point where you could get your hands on it, you and the other man who was with you, and then after you had gotten your hands on it and had steered it to the point where you wanted it dropped, then you gave him the down-signal? Isn't that the way this worked? 20

A. No, sir.

Q. This clinic you say you attended, that was the compensation clinic, wasn't it?

A. It is run by the State, I understand. 30

Q. The compensation clinic?

A. Yes, sir.

ALBERT C. WESCOAT, SWORN.

Direct examination.

By Mr. Morris:

10 Q. Captain Wescoat, where do you live?

A. 424 North Massachusetts.

Q. What is your occupation?

A. Pile driving, dredging, house-moving.

Q. Rigging, too?

A. Yes, sir.

Q. How long have you been so occupied?

A. 30 years.

20 Q. Captain Wescoat, we are dealing with a load of creosoted lumber, some pieces 16 feet long, two inches thick, requiring a chain about five or six feet long to wrap it once. In your opinion as a result of your experience, would you say that it was reasonably safe to hoist such a load of lumber with a single three-quarter inch iron chain?

Mr. Hanstein: I want to object to that.

30 The Court: You have not given enough detail. You have now 15 pieces of your creosoted lumber of the dimensions you have stated, you have about five pieces of one-inch lumber, and you have a weight of approximately 500 pounds.

Q. Add to what I said the load weighs about 500 pounds.

The Court: Reframe your question.

Q. We are dealing with a load of creosoted lumber that weighs about 500 pounds, consisting of boards about 16 feet long, two inches thick, about 15 of them, and five boards an inch thick, and the circumference of the entire load of creosoted lumber is equivalent to a five-foot chain, three-quarter inch iron chain. Would you say that it was safe to lift that load of lumber with such a single iron chain? 10

Mr. Hanstein: I would like, in addition to my other objection, to state as an additional objection to this question that probably that is the very question the jury might have to determine, if it is within the issue, and in the next place I want to say it is not within the issue of the complaint; it is not an allegation of negligence on our part, and furthermore, the test, it seems to me, is solely whether this is a method that is in common use. We are not bound to use the best method or some other method. It is sufficient if we use a method in common use. 20

Mr. Morris: I merely asked is it reasonably safe. The mere fact that people are accustomed to using dangerous methods in hoisting loads of lumber —

The Court: All these people were required to do was to use the methods in common use. 30

Mr. Morris: If they were reasonably safe.

The Court: I presume it follows naturally if they are in common use they are reasonably safe. They

are only required to use that degree of care which the other riggers engaged in the same business would use, and that is surely the method in common use. I will overrule the question in its present form.

(Exception noted for plaintiff.)

10

Q. Mr. Wescoat, would you say that it was reasonably safe to lift a load of lumber —

The Court: I will overrule the question in advance so you won't have all that long line to go through, because it is in exactly the same form as the other question.

20 Q. Mr. Wescoat, is it a matter of common usage to lift the following load of lumber with a single three-quarter inch iron chain five or six feet long; to wit, a load of lumber consisting of about 15 boards two inches thick, 16 feet long, five other boards, and the load weighs about 500 pounds, and the circumference is the equivalent of a six-foot chain. Would you say that it is a matter of common usage in your rigging business to lift such a load of lumber with such a single chain, wrapped once?

30

The Court: Do you understand the question?

A. I understand the question. What kind of an answer do you want? A chain of that size would lift five times that much, and you can lift five times that with a chain, but it is only good commonsense

when you lift a load of creosoted lumber, where it is bundled up, to keep out from under, for they will slide out the same as a bundle of plastering lath. You pick up a bunch of plastering lath, that lath in the center will slide out.

By the Court:

10

Q. What he wants to know is whether it is common usage in your business to lift such a load with a chain wrapped once, that kind of a chain.

A. When I lift creosoted lumber more than one piece to a time, I use two.

By Mr. Morris:

Q. Two chains?

A. Two, and keep people out from under.

20

Q. I am not talking about the people. I am talking about the load.

A. Well, that is the safe part. If it breaks it can only drop then on the ground.

The Court: That is not an answer to the question. I will strike out the answer. The witness is doing the best he knows how to do, but it is not responsive to the question.

30

Q. Mr. Wescoat, I want to know from you—you understand this kind of load we are lifting?

A. Yes, sir.

Q. I want to know from you whether or not it is common custom among the riggers to hoist such a load of lumber as I have heretofore described with

a single three-quarter iron chain. Is it common custom or common usage?

A. I wouldn't think it would be common use to lift over two pieces.

Q. Then it isn't common custom or common usage to use a single three-quarter inch iron chain to lift such a load, is it?

10 A. Well, I wouldn't use it.

Q. Is it common usage, though?

Mr. Hanstein: I move that answer be stricken.

The Court: It will be stricken.

Q. Is it common usage or common custom to use such a chain?

A. Not on more than one or two pieces of lumber.
20 It would draw up.

Q. We are dealing with the particular load which I have described, consisting of more than 15 pieces of lumber.

A. Well, I never used a single chain on more than two pieces, nor I never saw anybody use it on more than two or three pieces.

Mr. Hanstein: I ask that be stricken.

30 The Court: Strike it. The question is, is it common custom to lift such a load with one chain. Yes or no answers that.

A. No.

Cross-examination.

By Mr. Hanstein:

Q. You have worked around where they have handled creosoted lumber, haven't you?

A. All the time.

Q. And you have seen big bundles of creosoted lumber lifted all in one bundle, haven't you? 10

A. Yes, sir.

Q. And in loading and unloading this lumber, not by way of putting it in place, but merely in unloading a carload of it, isn't it common practice to gather up as much of it as you can and fasten a chain around it and handle as much of it as is possible at one time?

A. That is very dangerous.

Q. I am not asking you about it being dangerous. 20

A. No, but you can't do it.

Q. Haven't you seen it done?

A. No, sir.

Q. Never saw it done?

A. Not with one chain.

Q. Let me ask you this: Doesn't the tightness with which that chain is wrapped around that bundle affect your opinion?

A. It can't be wrapped tight.

Q. Well, why can't you wrap a chain just as tight around creosoted lumber when it is lying on the ground as around some other kind of lumber? 30

A. It will draw on the outside pieces, but as the chain comes up like that they will slide out.

Q. If the chain is pulled tight around this bundle and then fastened, won't that hold the lumber?

A. That will hold the outside, but the center pieces will slide out if it comes on an angle like that. Creosoted lumber is very slippery, and the center pieces will slide out, the same as you pick up a bundle of plastering lath, the middle of them will slide out.

10 Q. So if you were operating a crane in order to unload a carload of lumber where you were using one chain, you would only lift one piece of lumber at a time; is that it?

A. Probably if I was operating a crane and working for someone I would have to do as they told me.

Q. If you were the crane operator? That is right. Your idea of handling creosoted lumber is that the first principle is to keep from underneath?

20 A. Keep from underneath it, or anything. No matter if you are only lifting 100 pounds, keep away from under it.

GEORGE D. HAMPTON, SWORN.

Direct examination.

By Mr. Morris:

30 Q. Mr. Hampton, where do you live?

A. 7309 Ventnor.

Q. What is your occupation?

A. Builder.

Q. Was Mr. Errickson, the plaintiff here, ever in your employ?

A. He was.

Q. As a carpenter?

A. Yes.

Q. When?

A. 1921. Beginning 1921, for about five years.

Q. What were his weekly wages then?

A. Eight dollars a day. About the last two years of the five, eight dollars a day. Prior it was seven.

Q. What was his physical condition at that time? 10

A. Good.

Q. Able to get around and act as a carpenter?

A. Oh, yes.

Q. Mr. Errickson was injured on October 19, 1927. Did you see him about that period, before that period?

A. Oh, yes, I saw him quite often.

Q. What was his physical condition, as far as you know?

A. As far as I know, it was as good as it ever 20 was.

Q. Did you ever go hunting with him through the woods?

A. Oh, yes.

Q. As far as you know, he was in good physical condition?

A. Perfect, yes, sir.

Q. What have you observed about his condition after the accident?

A. Why, his condition is nowhere near the same. 30

Mr. Hanstein: I don't think we ought to be bound by this layman's interpretation of it.

The Court: He may testify as to what he observed.

A. He was unable to do the things he was accustomed to do, that is, go off in the fall gunning and like that. He couldn't lift anything, he couldn't drive a car.

Q. You have observed the way he walks around the court room?

A. Yes.

10 Q. Is that about the way he walks outside?

A. The same way. Sometimes worse than he is walking around this room.

(No cross-examination.)

(Mr. Morris read to the jury the deposition of William Schwiers, taken on January 20, 1930.)

20

Mr. Morris: I offer the deposition in evidence.

(The deposition was marked Exhibit P2.)

Mr. Morris: I also offer copy of the letter from Schwiers to Hill Dredging Company, dated October 20.

(The letter was marked Exhibit P3.)

30

(Mr. Morris read Exhibit P3 to the jury.)

The Court: That is all your testimony on the question of liability, is it?

Mr. Morris: Yes.

(The following motion was made in Chambers:)

MOTION FOR NON-SUIT.

Mr. Hanstein: I move for a non-suit on the ground, first, that there has been no showing of negligence on the part of the defendant, Schwiers. The proof shows that Schwiers rented a crane and operator, who was under the direction and control of the Hill Dredging Company, and he became, for the purpose of doing this work, the agent of the Hill Dredging Company. Second, there is no showing of any negligence that could be charged against the operator of the crane. Third, the experts seem to agree that it is highly negligent to work under creosoted lumber while it is in a sling, and the proof is that this plaintiff would not have been injured had he stood where he was; he was in just as good a position to see the danger of the position as anybody else was, and nevertheless walked into a position of danger with his eyes open, for which negligence, as a matter of law, he should be barred from an action here.

(Argument followed.)

The Court: It seems to me in this case a non-suit should be granted, because it seems to me to be clear that the allegation of negligence in the complaint against the defendant, Schwiers, has totally failed. It seems to me that the contract of hiring, as gathered from all the evidence, must have been

such a contract as pro hac vice put the operator of the crane in the employ of Hill, and being in his employ, the plaintiff could not recover in an action for negligence for his co-servant's negligence, but must be driven to his remedy in the compensation court.

10

(Exception noted for plaintiff.)

EXHIBIT P2.

10/29/30

NEW JERSEY SUPREME COURT.

20

ATLANTIC COUNTY.

SAMUEL E. ERRICKSON,
Plaintiff,

v.

F. W. SCHWIERS, JR., COM-
PANY, a corporation of
the State of New York,
Defendant.

} Action at Law.
} Examination Before
} Trial.

30

Examination of adverse party before trial, held before Claude W. Myrose, Supreme Court Examiner, by consent of the parties, on January 10th,

1930, at the office of Messrs. Thompson and Hanstein, Real Estate and Law Building, in the presence of Samuel Morris, Esq., attorney for plaintiff, and Wilbur C. Bishop, Esq., of Messrs. Thompson and Hanstein, attorneys for defendant.

Examiner's Fees.

1 sitting,	\$6.00	10
Swearing 1 witness,	.25	
Marking 2 exhibits,	.30	
40 folios, @ 30¢	12.00	
	<hr/>	
	\$18.55	

WILLIAM SCHWIERS, SWORN.

20

By Mr. Morris:

Q. Where do you live, Mr. Schwiers?

A. New York.

Q. Where?

Mr. Bishop: I object to that as irrelevant.

A. 619 West 140th Street.

Q. What position do you occupy with the F. W. Schwiers, Jr., Company?

A. Vice-president.

Q. Were you in charge of the work of the Schwier Company on the Somers Point-Beesley's Point bridge construction on or about the time one Samuel Erricksn was injured?

Mr. Bishop: That is objected to as irrelevant and immaterial.

A. What do you mean, was I superintendent in charge?

Q. Yes.

10 A. No.

Q. What was your position with the company at that time?

A. Executive officer in the New York office.

Q. What were your duties in connection with the job, the Somers Point-Beesley's Point road?

Mr. Bishop: All testimony connected with Schwier's contract on the Somers Point-Beesley's Point road is objected to as irrelevant and imma-
20 terial.

A. You mean the Somers Point-Beesley's Point bridge?

Q. Yes.

A. I was paymaster, attended to ordering materials, kept records of the force, checked the payrolls, and general office duties of that nature pertaining to the construction.

30 Q. What member of the firm superintended the construction work?

A. No member of the firm superintended the construction work.

Q. Who did superintend the construction work?

A. Do you mean by member of the firm an officer of the company?

Q. Yes.

A. No officer out in the field.

Q. Nobody out in the field?

A. Not an officer of the firm out in the field. Our field superintendent was there.

Q. Who was your field superintendent?

10

Mr. Bishop: I object to that and do not want him to answer it. You are not entitled to the names of our witnesses. Don't answer that question.

Q. What member or employe of the defendant firm, F. W. Schwiers, Jr., Company, superintended the construction of the Somers Point-Beesley's Point bridge when the plaintiff, Samuel E. Errickson, was injured?

20

Mr. Bishop: I object to that question unless it is limited to a member of the firm, and I refuse to allow my client to answer it.

Q. What was the contract between the F. W. Schwiers Company and the Hill Dredging Company in relation to the hoisting of lumber from land to scow?

A. We didn't have any contract in relation to that.

30

Q. What understanding did you have with the Hill Company in relation to the hoisting of lumber from land to sea?

A. We didn't have any understanding with relation to that with them.

Q. What paper do you have before you?

A. A letter from the Hill Dredging Company.

Mr. Bishop: We will offer it to you to put in evidence if you want to.

10 Mr. Morris: I offer it.

(The paper was marked Exhibit P1, reading as follows: On the letterhead of the Hill Dredging Company, dated October 21, 1927. "F. W. Schwiers, Jr., Co., 90 West St., New York City. Gentlemen: In answer to yours of the 20th would say we have used your derrick and it will be proper to bill same to us. There will little occasion for us to use the crane, but we surely would appreciate it if you would accommodate our men whenever they ask for assistance. Yours very truly, Hill Dredging Company, Elton Risley, General Manager.")

Q. The crane which was used in hoisting the lumber from land to scow, the scow on which the plaintiff was employed, the crane which was used in that operation was owned by Schwiers Company?

A. I don't know if it was. I wasn't there.

30 Q. Do you know whether the Schwiers Company had a crane on the job?

A. Yes, we had a crane there.

Q. You only had one crane on the job?

A. Yes.

Q. And that crane was situated where?

A. In our yard at Somers Point, New Jersey.

Q. Where was your yard?

A. Opposite the Gateway Casino, adjoining the Pennsylvania Railroad tracks there.

Q. Who operated that crane on the date that the plaintiff was injured?

Mr. Bishop: I object to that if it relates to the name of the operator. I direct my client not to answer. 10

Q. Did one of your employes operate this crane on the day and time that the plaintiff was injured?

A. Why, I assume so. I haven't looked up the records to see that date, but undoubtedly he did, because we had that crane —

Q. How much were you paying your crane operator at that time? 20

Mr. Bishop: That is objected to as immaterial and irrelevant.

A. \$65 a week.

Q. How much did you receive from the Hill Dredging Company in connection with the operation of that crane?

Mr. Bishop: I object to that. There is nothing shown as yet that they received anything, and I do not want him to answer it yet. 30

Q. Did the F. W. Schwiers Company receive any

money in connection with the use of its crane on or about October 19, 1927?

A. Did we receive anything from Hill?

Q. Yes.

A. I believe so.

Q. How much did you receive?

10 A. I don't know. I will have to look up the bill.

Q. Will you look up your records?

A. I think it was \$111.20, but I wouldn't say for sure. No, it was more than that. Here are a couple of bills. Do you want it for just that day or for the whole time they had it?

Q. That day and the whole time they had it.

A. I wouldn't vouch for this as being absolutely correct. I think the total is \$439.78.

Q. For what?

20 A. Crane hire.

Q. What do you mean by crane hire?

A. We hired the crane to them and they paid us for it.

Q. What do you mean, you hired the crane to them?

A. What was the basis of the agreement or the contract?

30 Q. Yes, what was the basis of the contract, or what was the contract under which you hired, as you say, this crane to the Hill Company?

A. They had some creosoted material to unload which came in on the cars for the construction of a bulkhead they were putting up, and these cars came in on our siding, or, rather, the Pennsylvania Railroad siding where we were unloading our stuff

there, and they asked us if they could hire the crane to unload these cars, so we said yes, they could hire it on an hourly basis, and that is what they did.

Q. So what did you hire to them?

A. We hired them the crane and the operator on an hourly basis.

Q. How much did they agree to pay you per hour? 10

A. \$6.50 an hour for the crane and the operator's wages in addition.

Q. In other words, the Hill Company paid you what you paid the operator, plus \$6.50 per hour; is that right?

A. Yes. They took the operator with the crane.

Q. That is not responsive. What were the duties of your crane operator in connection with the hoisting of the lumber, do you know?

A. He was under their foreman's orders. 20

Q. Do you actually know? Under the contract which you had with the Hill Company what were you supposed to do?

A. Just to furnish the operator and the crane.

Q. You were just to furnish the operator and the crane?

A. Yes.

Q. You were to furnish the operator and the crane in order to hoist lumber from land to sea; is that right? 30

A. Not necessarily.

Q. What else?

A. Whatever they wanted to do with it. There was no understanding that they were to use it for that.

Q. What did they need this crane for?

A. Well, they used it to unload their material as it came in, but there wasn't any definite stipulation that that is what it was to be used for.

Q. Who had the understanding with the Hill Company, you or some other member of the firm?

10 A. We did it through correspondence. No, it wasn't through correspondence. I don't know who it was.

Q. What member of your firm actually consummated the deal for hiring this crane? Did you or some other member of the firm?

A. Someone else.

Q. Who was it?

A. I don't know who it was.

20 Q. Are any of these statements here made of your own knowledge?

A. Yes, certainly they are made of my own knowledge. What do you mean, made of my own knowledge? The statements I am giving you are of my own knowledge. Hill asked—I think they asked our superintendent if they could have the crane and he got in touch with the office and we said yes, and we hired them accordingly through the office.

Q. Will you show me the bills?

30 A. Yes. There is a list of the cars that were unloaded there.

Mr. Morris: I offer it in evidence.

(Two sheets were marked Exhibit P2, reading as follows:

Exhibit P2, Deposition of William Schwiers 111

"Nov. 15, 1927

Hill Dredging Co.,
5601 Atlantic Ave.,
Ventnor, N. J.

For Use of services rendered at Somers Point
Oct. 3rd. WAB 8847

	227 pcs. 6x8x11)		10
	100 " 2x10x12)		
	16 " 2x12x16)4½ hours	21.53	
	16 " 6x8x16)		
10th.	Moving 1" boards		10.62
13th	WAB 7682		
	360 pcs. 2x10x16 3 " "	11.12	
19th	WAB 8607		
	97 pcs. 6x6)		
	16 " 2x12x20)		
	53 " 2x10x16)3 " "	4.36	20
	100 " 1x10x12)		
20th	WAB 8607		
	228 pcs. 1x12x16)		
	365 " 1x10x16)2 " "	2.88	
21st	PRR 775201		
	44 pcs. 22' long)		
	32 " 18 ")5 " "	7.50	
	40 " 14 ")		
11th	WAB 8523)		30
12th	")		
	486 pcs. 2x10x16)4½ " "	21.63	
	2 " "	13.51	
22nd	PRR 775201		
	Piles 116 9 " "	12.99	

112 *Exhibit P2, Deposition of William Schwiers*

	24th	PRR 775201			
		Piles	1	"	1.44
					<hr/>
			34	"	\$107.58
		Crane hire—34 hours @ 6.50 per hr.			\$221.00
		Labor—total			107.58
10					<hr/>
		SUM TOTAL			\$329.58
		For month of October.			

Dec. 13, 1927.

Hill Dredging Co.,
5601 Atlantic Ave.,
Ventnor, N. J.

For use of services rendered at Somers Point.

	Nov.-1st	LV 29119 bolts and tie rods	1	hour	1.44
		4th WAB 8530 loading on dock	3	"	4.32
20		5th WAB 7214 reloading on scow	3	"	4.36
		7th 8091 unloading slings	3	"	4.32
		8th 8091 " "	3	"	4.32
		9th 8091 " "	1	"	1.44
					<hr/>
					20.20
		Crane hire—14 hours @ \$6.50 per hr.			\$91.00
		Labor—total			20.20
					<hr/>
30		SUM TOTAL			\$111.20
		For Month of November.")			

Q. Do you have any other correspondence with the Hill Company concerning the use of this crane?

A. That other letter that was offered before. That is all.

Q. No other correspondence there relating to the use of this crane?

A. No.

Q. What does it mean when it says here, "October 3, WAB 8847 227 pcs. 6x8x11, 4½ hours"?

A. That was what was loaded.

Q. Referring to Exhibit P2. 10

A. We submitted them this bill so they could identify it, you see.

Q. Can you tell me what this means on Exhibit P2, "October 3, WAB 8447, 227" —

A. That is the car number and that is what was on the car.

Q. What do you mean, the car number?

A. The freight car number.

Q. What is 227 pcs.?

A. 227 pieces. That is what was on the car. 20

Q. In other words, on October 3, 1927, this crane unloaded 227 pieces of lumber six by eight by eleven from this particular car; is that right?

A. Yes.

Q. You don't know anything concerning the actual loading or unloading of this lumber?

A. No.

Q. You were never present at any time when the lumber was being loaded or unloaded?

A. No. 30

Q. You never saw anything on the job, then?

A. No.

Q. Didn't you or some other member of the firm often go around to supervise or visit the work being done?

A. Yes.

Q. Did you go around?

A. I think one time when I was down there they were unloading that stuff, if I recall correctly. Yes, they were.

Q. What did you see when you were down there?

A. Well, they had their own men loading up this
10 stuff, piling it up and putting it on the scow.

Q. What kind of a crane was this, do you know?

A. The make?

Q. Yes.

A. Link Belt.

Q. Can you describe it otherwise, what kind of a particular crane it was?

A. It was a gasoline operated crawler crane with a forty foot boom, for revolving.

Q. How long had this crane operator been in your
20 employ?

A. About two and a half years. Two to two and a half years.

Q. Is he still in your employ?

A. Yes.

Q. As I understand it, the only purpose of Hill in hiring this crane was to have certain lumber hoisted from land to sea; is that right?

A. I suppose so.

Q. And they hired your crane and crane operator
30 for that purpose?

A. Yes.

Mr. Bishop: I may want to use this Exhibit P2 at the trial. Mr. Schwier has made pencil additions here on the second sheet. Will you stipulate that

that shall not destroy its usefulness for use at the trial?

Mr. Morris: Yes.

Q. You say that this paper, Exhibit P1, is the only written memorandum of any understanding between Schwiers Company and the Hill Company? 10

Mr. Bishop: With regard to what?

Q. With relation to the hiring of this crane —

A. I believe it is. Let me see it.

Q. —and crane operator.

A. No, that isn't, because they refer to a letter of ours of the 20th, which I evidently haven't got here, but I recall I wrote that letter to them on the 20th and said I understood they wanted to hire the crane and that we would bill them accordingly if it would be all right, and this is what he writes back, saying that that was correct. 20

Q. Will you produce that letter?

Mr. Bishop: Will you look for that letter and if you have it send it down, a copy of that letter, if you can locate it. 30

A. Yes.

Q. As nearly as you can recall what is the substance of the correspondence previous to that letter?

A. The letter that is referred to here, you mean?

Q. Yes.

A. That I understood they wanted to hire our crane and that —

Q. Crane and crane operator?

A. The crane and the operator, and would they please advise us if it would be O. K. for us to bill them at those standard charges. I stipulated the
10 rates there. They wrote back and said yes, that was correct.

Q. And outside of that letter to which you refer, to which Exhibit P1 is an answer, outside of those two letters, your letter and Hill's letter, there is no other written memorandum or evidence of an understanding between Schwiers Company and Hill Company?

A. No.

Q. Concerning the hire or use of the crane oper-
20 ator or crane?

A. No.

Q. You will produce that letter?

A. I will attempt to, yes.

Mr. Bishop: If not, I will make an effort to get the original from Hill.

A. I really think you had better do that, because
30 my impression is that that has been destroyed, because we had the bills from them, you see, and I didn't keep any of that stuff, because the job has been through over a year and we cleaned out the file on it. Of course, we didn't know this case was coming up or anything and we didn't keep any of that stuff. I will look through the file, anyway.

I hereby certify that the foregoing is a full and accurate transcript of the testimony taken before in the before-entitled cause.

CLAUDE W. MYROSE,
Supreme Court Examiner.

10

EXHIBIT P3.
10/29/30.

F. W. SCHWIERS JR. CO.
90 West Street
New York

20

October 20, 1927.

Hill Dredging Co.,
Atlantic City, N. J.

Gentlemen:

We note from our daily reports that your account is being charged with labor and crane hire for unloading cars of creosoted lumber at the dock at Somers Point.

Please advise us if this is in accordance with your understanding, and to whom we should forward the 30 bill for this work.

Yours very truly,

F. W. Schwiers Jr. Co.,

William Schwiers.

WS:LC

POSTEA.

(Filed Oct. 30, 1930.)

NEW JERSEY SUPREME COURT.

10

ATLANTIC COUNTY.

SAMUEL E. ERRICKSON and
 ETTA ERRICKSON, his wife,
 jointly,

Plaintiffs,

v.

20 F. W. SCHWIERS, JR., COM-
 PANY, a corporation of the
 State of New York,

Defendant.

Action at Law.
 Postea.

This case was tried before Hon. W. Frank Sooy,
 with a jury, at the Atlantic County Circuit Court,
 on October 28th and 29th, 1930.

30 The Judge directed that the plaintiffs be non-
 suited and that a judgment of non-suit be entered
 in favor of the defendant, F. W. Schwiers, Jr., Com-
 pany, and for taxed costs, amounting to \$

W. F. Sooy,
 J. C. C.

NOTICE OF APPEAL AND GROUNDS.

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

10

SAMUEL E. ERRICKSON,
Plaintiff,
 v.
 F. W. SCHWIERS, JR., COM-
 PANY, a corporation of the
 State of New York,
Defendant.

Action at Law.
 Notice of Appeal and
 Grounds.

20

*To Thompson & Hanstein, Esqs., Attorneys for De-
 fendant:*

Take notice that the plaintiff in the above-entitled
 cause appeals to the Court of Errors and Appeals
 in the last resort in all causes in New Jersey from
 the whole of the judgment entered in this cause on
 the following ground, to wit:

30

1. Because the New Jersey Supreme Court erred
 in giving judgment of non-suit against the plaintiff
 and in favor of the defendant.

2. Because the New Jersey Supreme Court erred

in entering a judgment of non-suit against the plaintiff and in favor of the defendant, there being a factual question for a jury to determine as to whether or not the testimony and exhibits proved that the defendant was an independent contractor and as such liable for his negligence.

- 10 3. Because the Court below erred in taking away from the jury a factual question, to wit: whether or not the defendant, F. W. Schwiers, Jr., Company, was an independent contractor and hoisted and swung and permitted to be hoisted and swung a load of lumber in a careless and negligent manner.

SAMUEL MORRIS,
Attorney for Plaintiff.

20

30

NOTICE OF ARGUMENT.

(Filed Feb. 5, 1931.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10

Between

SAMUEL E. ERRICKSON,
Plaintiff-Appellant,
and

F. W. SCHWIERS, JR.,
COMPANY, a corporation
of the State of New
York,
Defendant-Respondent.

} Notice of Argument.

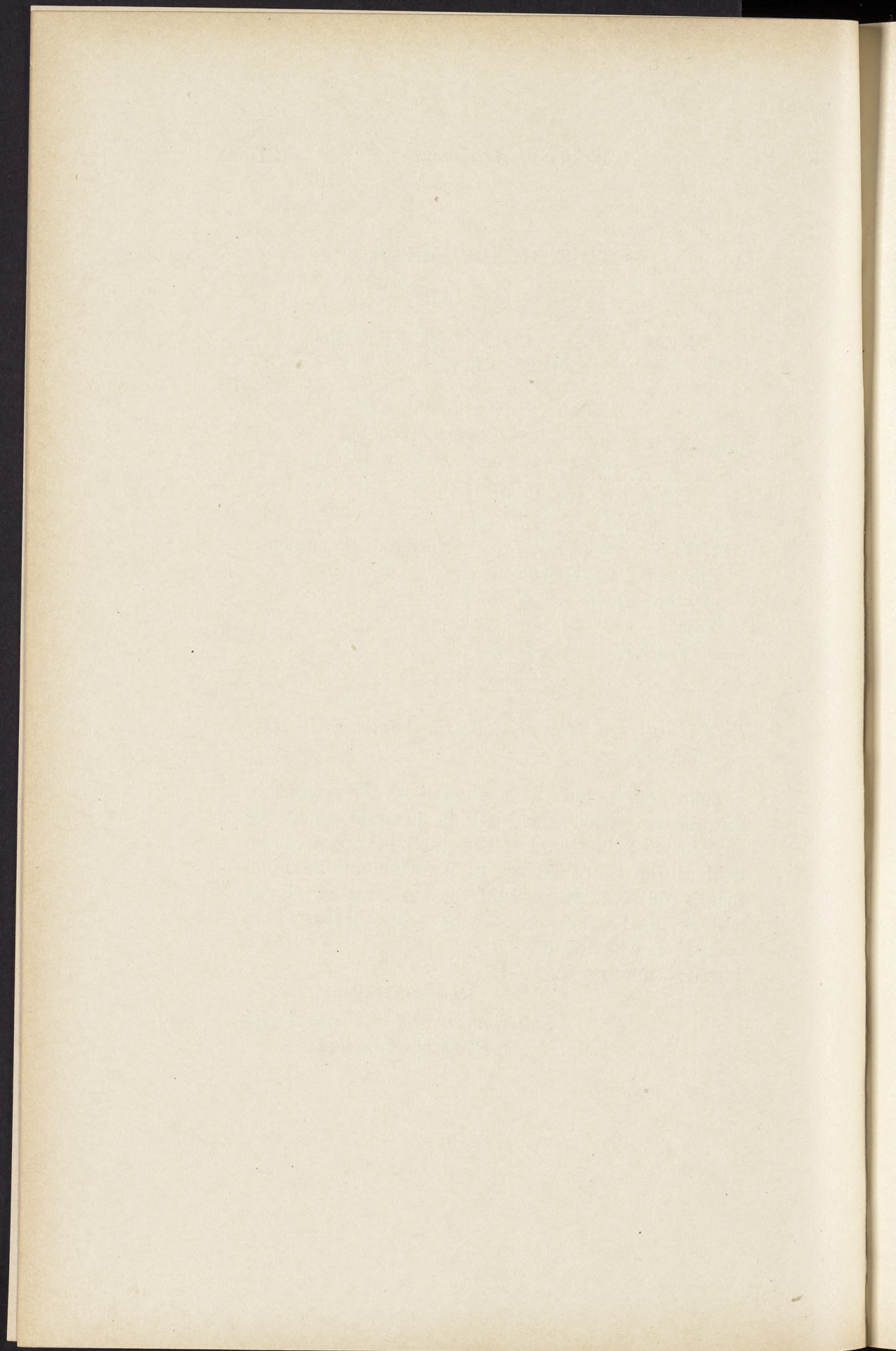
20

*To Thompson & Hanstein, Esqs., Attorneys for De-
fendant:*

Take notice that the argument of the appeal in the above-entitled cause will be brought on at the next term of the Court of Errors and Appeals, to be held at the State House, at Trenton on the nineteenth day of May, 1931, at the hour of eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard. 30

Dated: January 15, 1931.

SAMUEL MORRIS,
*Solicitor for and of Counsel with
Plaintiff-Appellant.*



NEW JERSEY COURT OF ERRORS
AND APPEALS

SAMUEL E. ERRICKSON,
Plaintiff-Appellant,

v.

F. W. SCHWIERS, JR., COMPANY, a corporation of the
State of New York,
Defendant-Respondent.

ON APPEAL FROM THE NEW JERSEY SUPREME COURT.

BRIEF OF PLAINTIFF-APPELLANT.

FACTS.

The plaintiff was employed by the Hill Dredging Company as a laborer on a scow which was towing creosoted lumber from a wharf at Somers Point to a bulkhead for a road which the said company was building, to Beasley's Point (S. C., pp. 22, 23). The Hill Company, not having the facilities to unload from the freight cars, said lumber, agreed to pay the defendant, F. W. Schwiers, Jr., Company, for

services rendered in said unloading, a sum of money based on the time spent by its crane operator and crane in said operation (S. C., p. 106, l. 15; p. 108, l. 32; p. 111, p. 117). The crane was a link belt gasoline crawler with a forty-foot boom.

The defendant hired and paid Carter, the crane operator (S. C., p. 107, ll. 15, 16, 25). There was no evidence of an express or implied agreement that Carter was to operate under or be employed by a new master, the Hill Company. The Hill men fastened the lumber on a single chain of the boom (S. C., p. 29, ll. 23, 24; p. 48, ll. 22, 28), and informed by signal the crane operator when to hoist, swing and lower (S. C., p. 45, l. 34; p. 46, l. 3; p. 63, l. 31; p. 87, ll. 28, 34).

In hoisting and swinging the load, there was nothing to obstruct the crane operator's view of the entire operation and condition of the load (S. C., p. 62, ll. 12, 28).

While the plaintiff was employed on the scow, a load of creosoted, sixteen-foot boards, weighing about 500 pounds (S. C., p. 87, l. 24; p. 35, ll. 6, 10), was wrapped once (S. C., p. 29, l. 27) and fastened on a single six-foot chain (S. C., p. 66, l. 3) of the boom by the Hill men (S. C., p. 47, l. 30). When the load was first hoisted it slipped and fell on the wharf. The load was re-fastened and hoisted and began slipping again (S. C., p. 30, ll. 26, 30). Mr. Champion, Hill's foreman, held up his hand to stop the crane, but Carter ignored the signal and kept on moving the load. Carter also failed to await from the plaintiff the necessary signal—and lowered the load in an upright position (S. C., p. 55, l. 28). The heavy load struck the scow, slipped out of the

chain, scattered and fell on the plaintiff, who had just gone to direct the load (S. C., p. 29, ll. 18, 29; p. 32, ll. 1, 5, 24; p. 35, l. 34). The plaintiff was grievously, painfully and permanently injured so that he is now unable to do any work except to act as an attendant in a feeble-minded home (S. C., p. 39, l. 1; p. 41, l. 18).

The crane operator could have again lowered the load on the wharf before it finally fell on the scow (S. C., p. 30, ll. 13, 30). Experts testified that it was unsafe to lift such a load with a single chain (S. C., p. 82, l. 14; p. 96, ll. 15, 32).

On the defendant's motion, the Court granted a non-suit on the ground that the crane operator was not in the employ of the defendant, but was in the employ of the Hill Company.

POINT.

1. Was the defendant, F. W. Schwiers, Jr., Company, acting as an independent contractor in hoisting and swinging the lumber?

ARGUMENT.

It would seem from Exhibits P1 (p. 106), P2 (p. 111), and P3 (p. 117), that the defendant, Schwiers Company, agreed to furnish and was charging the Hill Company for services, to wit, hoisting and swinging lumber from land to scow. To determine

whether the defendant, Schwiers Company, was an independent contractor in hoisting and swinging the lumber, it is necessary to determine who had control over the hoisting and swinging of the lumber.

We admit that the Hill men fastened the lumber to the chain; that the Hill men directed Carter when to lift, and where to unload.

We submit that the Schwiers Company crane operator obviously controlled the crane. He did not have to lift, if he saw that the load was insecurely fastened or by reasonable prudence, could have seen the said condition. If he saw that the load was insecurely fastened and that the load began to slip from the chain while it was being swung, he could have stopped the operation and could have prevented the load from falling on the scow.

For whom was Carter working at the time of the accident? There is no doubt that the plaintiff was hurt by the load of lumber falling on him; that the load fell on him through the negligence of Carter, operating the crane; that Carter was hired and paid by the Schwiers Company. Certainly, Carter was as much the master of the machine as an automobile driver is of the car he drives. It seems ridiculous to say that any man but the man at the lever controlled the crane. Even though he may have accepted suggestions in the form of signals from the Hill men, he, and not Hill's men, actually controlled the machine. None of Hill's men were in the operating room of the crane.

The facts in the instant case are almost identical with the facts of the case of *Giroud v. Stryker Co.*, 104 N. J. Law 424:

1. Schwiers, Jr., Company owned the crane.

1. Giroud owned the truck.

2. Schwiers, Jr., Company contracted with the Hill Company for use of services (p. 111, l. 5), *i. e.*, to load lumber and swing same from land to sea.

2. Giroud contracted with Stryker to haul dirt from one place to another.

3. Schwiers, Jr., Company furnished the crane and paid all the operating expenses and operator and was paid a certain sum per hour by Hill Co. for the services.

3. Giroud, owner and driver furnished the truck, paid all the operating expenses and received \$2.75 per hour, being paid once per month.

4. Schwiers' duty was to hoist the load which was attached by Hill men and then proceed to unload on the scow.

4. Giroud's duty was to drive his truck to the gravel pit of the Stryker Co.; to have truck loaded by Stryker's steam shovel and then proceed to place of fill and deposit the load. At the time of the accident he was going for another load.

5. Schwiers' man reported for work and operated the crane.

5. Giroud reported for work to one L. T. who was employed by Stryker

Champion, Hill's foreman, gave directions to fasten the load and gave the signal to Schwiers' man when to hoist.

6. The foreman, Champion, directed Schwiers' man where to deposit the load, but his principal duty was to designate where the crane should pick up the load, when to hoist and where to unload.

7. Schwiers' operator had exclusive care, control and management of the crane and no one directed him what direction he should use in swinging the load or at what speed same was to be operated. He could have stopped swinging any time, to have load refastened securely. He could have refused to swing the load. Schwiers Co. alone which hired him, could discharge him. Hill could not discharge him.

as general foreman, in charge of the fill and who furnished the time card to the driver and kept the time.

6. The foreman directed the driver where to load and where to deposit the dirt gravel but his principal duty was to designate where the truck should back up at the place of fill and unload.

7. The driver of the truck had exclusive care, control and management of the truck, and no one directed him what route he was to take or what speed the truck was to be driven.

In the Giroud case the Court said:

“The question before us is whether the driver, in collecting and delivering the gravel, was a servant for whose acts the appellant was liable under the doctrine of respondeat superior, or an independent contractor for whose acts it was not liable.

The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done but how it shall be done.

The appellant exercised no control over the driver in the performance of the work other than to direct where the material should be collected and delivered. It paid an agreed compensation for the work. We are unable to hold that the doctrine of respondeat superior applies.

We do not think that the fact that the appellant's agent, exercising some kind of supervision for the purpose of seeing that the work was done in accordance with the contract, prevented the driver from being an independent contractor.”

Hill did not direct how the work was to be done. It only gave information. In the final analysis, it was up to the crane operator to determine whether and how and in what manner the load should be lifted.

Neither were there any of Hill's men in the oper-

ating room of the crane, directing the operation of the crane.

“The party hiring the cab must, in some way, have cooperated in producing the injury complained of before he incurs any liability for it. If the law were otherwise, as said by Depue, J., ‘not only the hirer of the coach, but also the passengers in it would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or against the equally irresponsible owner of a coach taken, it may be from a coach stand for the consequences of an injury.’ ”

Little v. Hackett, 18 Vroom 171. Cited in 116 U. S. 366.

So, in the instant case, it may be that if the Hill Company knew that it was to be held liable for negligence in the control of the crane, it might have elected to place one of its own men in the operating room of the crane.

In the above-mentioned case of *Little v. Hackett*, it was left to the jury to say whether the plaintiff had exercised any control over the conduct of the driver other than to indicate the place to which he wished him to drive. The instructions of the Court were that unless he did exercise such control and required the driver to cross the track at the time the collision occurred, the negligence of the driver was not imputable to him so as to bar his right of action against the defendant was therefore correct.

In *LaCombe v. Cudahy Co.*, 103 N. J. L. 651, the Court said:

“The controlling question is, who was in control and operation of the vehicle at the time the accident occurred? The one who is in control and operation either personally or by a servant, is the one who must respond in damages to the person injured, if negligent operation of the vehicle is proven. It is quite immaterial how many stops or how many directions were given so long as the control and operation of the truck was that of Dawkin, who was an independent contractor.”

In the above case the Cudahy Co. had a man on the truck to direct where the driver should go and to make the delivery himself, but the driver Dawkin controlled and operated the truck. It was, therefore, held that Dawkin being an independent contractor, was not liable for his negligence.

In *Courtinard v. Gray Burial, &c., Co.*, 98 N. J. Law 493, at 496, the Court says:

“In the Steimbrenner case, the elements of hiring, control, direction and power of dismissal are made distinct ratio decidendi.

Nor can the factual and legal status of the driver be ignored in dealing with the liability of the parties; *for manifestly as a sentient being capable of choosing his own employment, his services could not be transferred to another without his consent, expressly or impliedly given; and whether such transfer was, in fact, made a jury question if the facts are in dispute.*

A sound public policy, however, requires that where a wrongful act was done by a servant or agent in the course of his employment and while on his master's business, to the injury of a third person, such wrongful act shall be attributed to the master or principal, who shall be answerable therefor." (Id. 504.)

There was no evidence in the instant case of a transfer or change of masters.

The facts in the instant case are analogous to those in the case of *Standard Oil Co. v. Anderson* (U. S.), 53 Law Ed. 480.

"A winchman in the general employ of a shipper remains the latter's employe for the purpose of fixing the responsibility for injuries inflicted through his negligence upon a longshoreman employed by a master stevedore whose contract with the shipper to load a vessel requires him to pay the latter an agreed compensation for the hoisting, and who has no control over the movements of the winchman except that the latter's hours of labor necessarily conform to those of the longshoreman, and that, in timing the raising and lowering, he obeys the signals of a gangman representing the master stevedore."

Standard Oil Co. v. Anderson (U. S.), 53 Law Ed. 480.

"The plaintiff sued the defendant for injuries caused by the negligence of the defendant's servant. The plaintiff was employed as a longshoreman by one Torrence, a master

stevedore who, under contract with the defendant, was engaged in loading the ship, Susquehanna, with oil. The plaintiff was working in the hold, where, without fault on his part, he was struck and injured by a draft or load of cases containing oil, which was unexpectedly lowered. The ship was alongside a dock belonging to the defendant, and the cases of oil were conveyed from the dock to the hatch by hoisting them from the dock to the point over the hatch, whence they were lowered and guided into the hold. The work was done with great rapidity. The motive power was furnished by a steam winch and drum, and the hoisting and lowering were accomplished by means of a tackle, guy rope, and hoisting rope. The tackle and ropes were furnished and rigged by the stevedore and the winch and drum were owned by the defendant and placed on its dock, some 50 feet distant from the hatch. All the work of loading was done by employes of the stevedore except the operation of the winch, which was done by a winchman in the general employ of the defendant. The case was tried before a jury and the plaintiff had a verdict. The verdict established that the plaintiff was in the use of due care, and that his injuries were suffered by reason of the negligence of the winchman in improperly lowering the draft of cases into the hold.

The only question presented is whether the winchman was, at the time the injuries were received, the servant of the defendant or of the stevedore. If he was the servant of the defen-

dant, as he was found to be by the courts below, the defendant was responsible for his negligence. If not, that is the end of the case, and it is not necessary to inquire what would be the measure of the liability of the stevedore.”

Id. 482.

“The winchman was hired and paid by the defendant, who alone had the right to discharge him. The stevedore agreed to pay the defendant \$1.50 a thousand for the hoisting. The stevedore had no control over the movements and conduct of the winchman, except as follows: The hours of labor of the winchman necessarily conformed to the hours of labor of the longshoreman. The winch and winchman were at a place where it was impossible to determine the proper time for hoisting and lowering the draft of cases of oil, and the winchman necessarily depended upon signals from others. These signals were given by an employe of the stevedore, called a gangman, who stood upon the dock of the ship and gave signals to hoist or lower by the blowing of a whistle which could be heard for a long distance. *The negligence consisted in lowering a draft of cases before receiving this signal.*

In *The Slingsby*, 120 Fed. 748, the winchman was held to be the servant of him who furnished the winch.”

Id. 483.

“It is insisted by the defendant that the winchman though in its general employ, had

ceased to be its servant, and had become, for the time being, with respect to the work negligently performed, the servant of the master stevedore. If it is true, the defendant is not liable. The case, therefore, turns upon the decision of the question, *whose servant was the winchman when he was guilty of the negligence which caused the injury?*”

Id. 483.

“It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who do it nor is willing to take such persons in his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom workmen are furnished is responsible for their negligence, in the conduct of the work, *because the work is his work*, and they are, for the time, his workmen.”

Id. 483.

“In the second case, he who *agrees to furnish the completed work* through servants over whom he retains *control is responsible for their*

negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still, in its doing, his own work."

Id. 483.

"To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between *authoritative direction and control, and mere suggestion as to details or the necessary cooperation*, where the work furnished is part of a larger undertaking."

Id. 484.

"In many of the cases the power of substitution or discharge, the payment of wages, and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control."

Id. 485.

"Let the facts in evidence now be considered in the light of the foregoing principles of law. Was the winchman at the time he negligently failed to observe the signals, engaged in the work of the master stevedore, under his rightful control, or was he rather engaged in the work of the defendant, under its rightful con-

trol? We think that the latter was the true situation. The winchman was undoubtedly in the general employ of the defendant, who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct or any other reason. In order to relieve the defendant from the results of the legal relation of the master and servant *it must appear that the relation, for the time, had been suspended* and a new like relation between winchman and stevedore had been created. The evidence in this case does not warrant the conclusion that this changed relation had come into existence. For reasons satisfactory to it, *the defendant preferred to do the work of hoisting itself, and received an agreed compensation for it. The power, the winch, the drum and winchman were its own. It did not furnish them, but furnished the work they did to the stevedore. That work was done by the defendant, for a price, as its own work by and through its own instrumentalities, and servant under its own control.*"

Id. 485.

"Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking there must be cooperation and coordination or else there will be chaos. *The giving of the signals under the circumstances of this case was not the giving of orders,*

but of information; and the obedience to those signals showed cooperation rather than subordination, and is not enough to show that there has been a change of masters."

Id. 485.

"But the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master, does not make him that person's servant; more than that is necessary to take him out of the relation established by the only contract which he has made, and to make him a voluntary subject of a new sovereign—as the master sometimes was called in the old books * * *."

Id. 485, 486.

Holmes, C. J., in *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922, said:

"In this case the contract between the defendant and the electric light company was not stated in terms, but it fairly could have been found to have been an ordinary contract by the defendant to do his regular business by his servants in the common way. In all probability it was nothing more. Of course, in such cases the party who employs the contractor indicates the work to be done and in that sense controls the servant as he would control the contractor, if he were present. But the person *who receives such orders is not subject to the general orders of the party who gives them*. He does his own business in his own way, and the orders which he receives simply point out to him the work

which he or his master has undertaken to do. There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act."

Quoted from *Standard Oil Co. v. Anderson*,
supra, at 486.

The identical arguments in the Anderson case are applicable to the instant case. The questions of control of crane; whether Schwiers furnished work or machine and man; whether there was a change of masters; effect of signals, were similar to those in the Anderson case and should have gone to the jury.

"It is clear that each company retained control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline and orders, this was for the purpose of coordinating their movements to the other operations of the owning company, securing the safety of all concerned and furthering the general object of the agreement between the companies."

Hull v. Philadelphia & R. R. Co., 64 L. Ed.
at 673.

"To establish the relation of master by such a servant it must appear that the servant has, expressly or by implication, consented to the transfer of his services to the new master and

to accept him as his master *pro hac vice*, and has entered upon such service and submitted himself therein to the direction and control of the new master.”

D., L. & W. R. R. Co. v. Hardy, 59 N. J. L. 35.

“The question of master and servant is usually for the jury.”

See 37 L. R. A. 49, *Kimball v. Cushman* (Mass.), 4 Am. R. 528.

“The trial Judge charged as follows: ‘The only way that a person not the driver of the car can be made liable is that the driver of the car was in a legal sense an agent or servant of that defendant. That does not necessarily mean that there must exist a written contract of employment between the two, or that anything need be evidenced by any formality, such as a written contract. But the relationship of master and servant is not necessarily created by any written document. It may be created by circumstances as they exist. The test as to whether there is a relationship of master and servant is that the driver, the so-called servant, was at the time of the accident engaged in something for the master. * * * So the question for your determination is whether the evidence has disclosed by a fair preponderance of the evidence that the driver was, technically speaking, a servant of the news company, that is, whether he was doing something for the news company, and that at its request or by its acquiescence or by

its permission. If he was, then, of course, the news company would be liable for the acts of their so-called servant.' ”

Meicke v. Silk City News Co., Vol. VIII,
N. J. Advance Reports, No. 25, p. 413,
150 A. 391.

“If the identity of a car is established then with it arises the presumption that it was operated by the owner, his agent or servant with his authority and within the scope of the latter’s employment, subject to being overcome by proof to the contrary.”

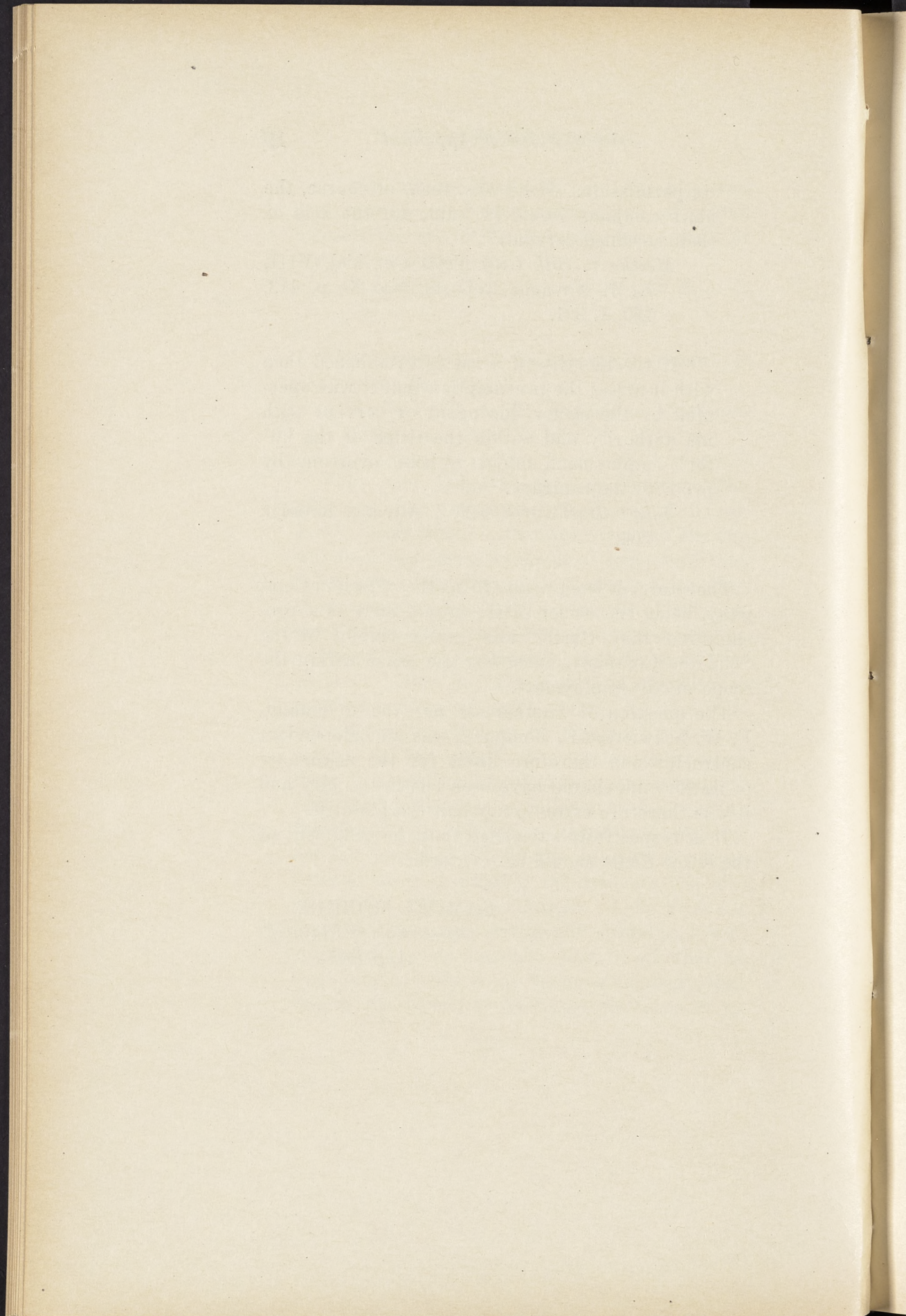
Lily v. Duckworth, 6 N. J. Advance Reports
504.

Therefore, at least *prima facie*, the Schwiers Company, being the owner of the crane, there is a presumption that Carter was in the employ of the Schwiers Company, operating the crane within the scope of his employment.

The question of whether or not the defendant, F. W. Schwiers, Jr., Company, was an independent contractor and therefore liable for the negligence of its servant, should have been left to the jury and it was therefore error to non-suit the plaintiff.

It is respectfully submitted that the judgment of the lower Court should be reversed.

SAMUEL MORRIS,
*Attorney for Plaintiff-
Appellant.*



NEW JERSEY COURT OF ERRORS AND
APPEALS.

SAMUEL E. ERRICKSON and ETTA ERRICKSON, his
wife, jointly,
Plaintiffs-Appellants,

v.

F. W. SCHWIERS, JR., COMPANY, a corporation of the
State of New York,
Defendant-Respondent.

ON APPEAL.

BRIEF OF DEFENDANT-RESPONDENT.

This case brings up for review a judgment in favor of the defendant entered upon a non-suit against the plaintiff.

The plaintiff, Samuel E. Errickson, claimed to have been injured by reason of the falling upon him of certain lumber, which was being transferred from a freight car on a wharf to a barge lying against the wharf. The lumber belonged to the Hill Dredging Company, and was being handled by its employes, of which the plaintiff was one.

This suit is brought against the defendant, F. W. Schwiers, Jr., Company, which happened to be the owner of a derrick, or crane, which, at the time, was handling the lumber. The crane was being operated by an employe of the defendant company, and the theory of the plaintiff's case is that Schwiers Co. was operating the crane as an independent contractor.

The Court determined that the testimony adduced by the plaintiff failed to show that the Schwiers Co. was operating the crane as an independent contractor, but considered that the testimony showed that the crane and its operator was at the time under the control and dominion of the Hill Dredging Company, plaintiff's employer, and that, therefore, the plaintiff's action against Schwiers Co. must fall.

HILL DREDGING COMPANY HAD ABSOLUTE
CONTROL AND DOMINION OVER THE
DERRICK.

Exhibit P3 (S. C., p. 117), a letter from Schwiers Co. to Hill Dredging Co. reads as follows:

"F. W. SCHWIERS JR. CO.
90 West Street
New York

October 20, 1927

Hill Dredging Co.
Atlantic City, N. J.

Gentlemen:

We note from our daily reports that your account is being charged with labor and crane

hire for unloading cars of creosoted lumber at the dock at Somers Point.

Please advise us if this is in accordance with your understanding, and to whom we should forward the bill for this work.

Yours very truly

F. W. Schwiens Jr. Co.

William Schwiens."

WS:LC

To which letter Hill Dredging Company replied by Exhibit P1 (S. C., p. 106), which reads as follows:

"HILL DREDGING COMPANY

Ventnor City, N. J.

October 21, 1927

F. W. Schwiens Jr. Co.

90 West St.,

New York City, N. Y.

Gentlemen:

In answer to yours of the 20th would say we have used your derrick and it will be proper to bill same to us. There will (word "be" apparently omitted) little occasion for us to use the crane, but we surely would appreciate it if you would accomodate our men whenever they ask for assistance.

Yours very truly

Hill Dredging Company

Elton Risley

General Manager."

These two letters, which evidence the contract between Schwiens and Hill as to the use of the crane and crane operator, clearly evidenced that the Hill

Co. rented the crane and its operator from Schwiers Co., for whatever use Hill saw fit to make of it, for which Hill paid for the time it used the same. The bills in evidence on pages 111 and 112 of the State of the Case clearly show that a charge was made on a time basis, so much for the crane per hour, and so much for the labor of the operator of the crane.

The test in all the cases seems to be who had the control of the operation. In this case it clearly appeared that the entire operation of the crane was directed and controlled by the employes of the Hill Co.

The plaintiff testified:

“Q. I want you to explain to the jury the method of unloading that lumber from the cars right on down to the boat, just how they were doing it. For instance, you had a man in charge of the crane, didn't you?

A. Yes, sir.

Q. What did he do?

A. You mean the operator?

Q. What did he do?

A. It was his duty —

Q. Not what his duty was. What he did.

A. He would move the crane from place to place, swing the arm around over the car.

Q. Yes, and after the lumber was passing— who was passing the lumber?

A. There was two men on the car.

Q. Two men on the car passing the lumber. And then what would happen?

A. Then he would swing the lumber around to the scow.

Q. How did he know to swing it?

A. He was told to swing it by Mr. Champion (Hill employe).

Q. Mr. Champion would give him the signal to swing it?

A. Yes.

Q. And then he would swing it around to the scow. Then what would happen?

A. After it got over to the scow, I would give him a signal to drop it.

Q. To lower it?

A. To lower his load.

Q. And would you designate the place on the boat where it was to be lowered?

A. Well, yes. Of course, Mr. Champion could see that, which quarter of the deck we wanted it on, he could see that.

Q. Then Mr. Champion would direct him over that portion of the boat where he wanted to load it?

A. Over to the quarter on which the load would go on.

Q. And you motion it there?

A. As it was opposite the quarter on which it should go on" (S. C., p. 45, ll. 11-35; p. 46, ll. 1-20).

The lumber was first wrapped in a chain by Hill employes who determined the amount of lumber to be included in each load; determined the security of its fastening; gave the signal for starting the lumber towards the scow, and in cases where they

were uncertain as to the safety of the fastening of the load, directed the replacing of it upon the deck of the wharf and re-secured the fastening and directed the renewed moving of the load (S. C., pp. 48, 49, 50 and 51).

The crane operator had nothing whatever to do with any of the moving of the material other than to obey the signals given to him by the Hill employes. He was not in a position to determine the safety of any load, nor was he even in a position to refuse to move a load if it should appear to him to be unsafe, because, obviously, everyone considered the crane operator as merely a cog in the machinery, who, had he proceeded to operate on his own judgment, might very easily be dropping lumber upon the heads of men who had no reason to expect it, or might be placing it where it was not wanted by his fellow employes. He was clearly a fellow employe of the plaintiff, and obviously no cause of action was made out as against the defendant.

The determination of whether Schwiers was an independent contractor or fellow servant was properly one for the Court.

Giroud v. Stryker Transportation Co., 104
N. J. Law, 424;

Lacombe v. Cudahy Packing Co., 103 N. J.
Law, 651.

In New Jersey, an independent contractor is defined to be one who, carrying on an independent business, undertakes to do a piece of work according to his methods and without being subject to the control of his employer as to the means by which

the result is to be accomplished, but only as to the result of the work.

Kappertz v. The Jerseymen, 98 N. J. Law, 836;

Reisman v. Public Service Corporation, 82 N. J. Law, 464;

Giroud v. Stryker Transportation Co., 104 N. J. Law, 424;

Lacombe v. Cudahy Packing Co., 103 N. J. Law, 651;

Courtinard v. Gray Burial, &c., Co., 98 N. J. Law, 493.

The last three cases are all cited by the plaintiff in support of his proposition, but in each one of them it is clear that the right to control the operation of the automobile in each case remained in the owner and the driver of the car was subject to the control of no one as to the method and manner of the operation.

The only other case cited by the plaintiff in this case is *Standard Oil Company v. Anderson* (U. S. 53 Law Ed. 480). The decision in that case is founded on *Sanford v. Standard Oil Company*, 118 N. Y. 571, and *Johnson v. Netherlands American Steam Nav. Co.*, 132 N. Y. 576, which cases, together with the United States case above cited, use as a basis for determining the question of independent contractor the right or the lack of right of the employer to hire and discharge. New York is alone in adopting that rule and later decisions of the New York Courts, in which the question is discussed at

length, are wholly inconsistent with the judgments rendered in the Sanford and Johnson cases. See

Wyllie v. Palmer, 137 N. Y. 248;

Anderson v. Boyer, 156 N. Y. 93, reversing
43 N. Y. Supp. 87;

Higgins v. Western Union Telegraphic Co.,
156 N. Y. 75;

Murray v. Dwight, 161 N. Y. 301.

In *Ewan v. Lippincott*, 47 N. J. Law, 192, the defendant owned a saw mill and gave an order to D. & W., master machinists, to make some alterations in the gearing of the water wheel of the mill. D. & W. sent workmen to do the work. It was arranged between the workmen and the defendant that the mill would run at such times as the workmen were not actually at work upon the wheel. The engineer of the defendant negligently started the wheel while the workmen were at work, injuring the plaintiff. The Court held the plaintiff was a servant of the defendant's, engaged in a common employment with the engineer, saying:

“The owner of the mill had the control of the workmen to the same degree that he would have had control over the masters of the workmen had they done the work personally. He had power to direct the work in regard to the extent and character of the alterations and in respect to the time at which and the circumstances under which it was to be done. He had the power to change, terminate and suspend the work at any moment.”

Numerous other cases applying the same test to the question of independent contractor are contained in 17 L. R. A. (N. S.) 370, and the cases cited in the footnotes thereto. See particularly *Keys v. Second Baptist Church*, 99 Md. 399, 59 Atl. Rep. 446, in which a master carpenter agreed to furnish men, material and a team of horses at so much per day to the defendant, who was having its building enlarged. The carpenter and his helpers were told what to do and how to do it. The Court held that the master carpenter was not an independent contractor but that he and his workmen were employes of the church.

In *Puhlman v. Excelsior Express & Standard Cab Co.*, a Pennsylvania case reported in 103 Atl. Rep. 218, the Duquesne Light Company hired from the defendant the services of a horse, wagon and driver to assist in erecting wires and poles. The defendant's driver, at the request of an electric company workman to pass him a chisel, threw it, striking and injuring the plaintiff. It was held that the injured servant could not recover of the electric company, as the driver was his fellow servant in the special employ of the light company at the time, although generally an employe of the defendant.

A case identical in every particular with the case at bar is *Bojarski v. Howlett, Inc.*, 291 Pa. 485, 140 Atl. Rep. 544. Bojarski was employed by Murphy, Cook & Co., stevedores engaged in unloading a vessel. Murphy, Cook & Co. being without the neces-

sary hoisting apparatus, hired from Howlett, Inc., a crane, with a fireman and engineer to operate it, for compensation at a rate of \$10 an hour. The crane operator, in violation of the signal given him by an employe of Murphy, Inc., swung the crane and injured the plaintiff. There was a verdict for the plaintiff, but the Court entered judgment for the defendant notwithstanding the verdict. On appeal from that judgment, the appellate court held that the crane operator was a fellow servant of the plaintiff and the plaintiff was barred from recovering for that reason, saying that Howlett, Inc., were not independent contractors but were under the services of Murphy, Cook & Co., who in renting the crane controlled the movements of the crane and the method by which the work was to be done. The Court specifically pointed out that Howlett, Inc., could not be an independent contractor because an independent contractor is one who is employed to perform work in such a manner that he is free from the control of his employer respecting the manner in which the details of the work are to be executed.

ALTHOUGH THE COURT APPARENTLY DECIDED THE MOTION FOR A NON-SUIT SOLELY UPON THE ABOVE POINT, THE COURT WAS OBVIOUSLY RIGHT IN DIRECTING THE NON-SUIT ON THE GROUND THAT, EVEN ASSUMING THAT SCHWIERS WAS AN INDEPENDENT CONTRACTOR, NO NEGLIGENCE WAS SHOWN AS TO SCHWIERS.

The effort made throughout the case was to show that the lumber should have been wrapped with something more than a single chain. The lumber was wrapped by Hill employes, and Schwiers had nothing whatever to do with it. The manner of the wrapping was not the concern of the crane operation, and if the lumber fell because it was only wrapped with one chain, that was clearly the fault and responsibility of the Hill Co., and not of the Schwiers Co., which had nothing whatever to do with that part of the work.

At the time the lumber fell, it was hanging suspended from the boom of the crane, and was not at all in motion. Nothing relating to the operation of the crane caused the lumber to fall. It had been moved to the point where it was caught by the side of the barge, upon the direction of the Hill employes. Therefore, there was no showing whatever of any negligence on the part of the crane operator.

THE PLAINTIFF'S NEGLIGENCE WAS SUCH
THAT AS A MATTER OF LAW HE IS PRE-
VENTED FROM RECOVERY IN THIS
SUIT.

The plaintiff's version as to the manner of the falling of the lumber was that, as the lumber came over the scow it tipped, instead of lying horizontally, with the result that one end of it struck the end of the barge. The plaintiff went under the lumber to push it off. He deliberately walked from a place of safety into a place of danger.

“Q. Now, if you had stayed where you were before, as it came over, that lumber wouldn't have fallen on you, would it?”

A. Well, perhaps not, but it might have been there yet.

Q. Well, I am not asking you about anything, but whether that lumber would have hit you if you had stayed where you were?

A. Well, perhaps not” (S. C., p. 54, ll. 22-30).

The plaintiff went deliberately; no one told him to go.

“Q. Now, did somebody tell you to go over there and loosen that lumber up?”

A. I wouldn't like to say they did” (S. C., p. 56, ll. 31-33).

The experts called by the plaintiff clearly show that this action on the part of the plaintiff was gross negligence.

“Q. If you were the crane operator? That is right. Your idea of handling creosoted lumber is that the first principle is to keep from underneath?

A. Keep from underneath it, or anything. No matter if you are only lifting 100 pounds, keep away from under it” (S. C., p. 98, ll. 15-20).

It was very clear in this case that the plaintiff was in a place of safety. He could have signaled for the load to be lifted, if it was in such an awkward position that it could not be handled with safety. Instead of that he deliberately walked under the lumber. He could, had he seen fit, have walked to the side of it if he wanted to get near the lumber, but instead of that, he walked underneath of it, and the resulting injury was inevitable, when the lumber slipped out of the sling.

It is, therefore, respectfully submitted that the judgment of the Court in non-suiting the plaintiff, was eminently proper.

Respectfully submitted,

THOMPSON & HANSTEIN,
*Attorneys for Defendant-
Respondent.*

The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom.

The second part is devoted to a discussion of the experimental results obtained by the various investigators.

The third part is devoted to a discussion of the theoretical results obtained by the various investigators.

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The fifth part is devoted to a discussion of the theoretical results obtained by the various investigators.

The sixth part is devoted to a discussion of the experimental results obtained by the various investigators.

The seventh part is devoted to a discussion of the theoretical results obtained by the various investigators.

The eighth part is devoted to a discussion of the experimental results obtained by the various investigators.

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The eleventh part is devoted to a discussion of the theoretical results obtained by the various investigators.

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The fourteenth part is devoted to a discussion of the experimental results obtained by the various investigators.

The fifteenth part is devoted to a discussion of the theoretical results obtained by the various investigators.

The sixteenth part is devoted to a discussion of the experimental results obtained by the various investigators.

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The eighteenth part is devoted to a discussion of the experimental results obtained by the various investigators.

The nineteenth part is devoted to a discussion of the theoretical results obtained by the various investigators.

The twentieth part is devoted to a discussion of the experimental results obtained by the various investigators.

INDEX

	Page
Bill of Complaint	1
Answer of Peter Jacobs and Wife	6
Answer of Anna Sophia Lorchheim	8
Return of Vice-Chancellor	10
Final Decree	11
Notice of Appeal	12
Order of Appeal	14

TESTIMONY.

For the Plaintiff.

William H. Wilson,		
direct examination		12
cross	17, 19, 23	
re-direct		22
re-cross		22
William G. Netherly,		
direct examination		24
cross		27
William H. Badhe, Jr.,		
direct examination		27
cross	28, 29, 31	
re-direct		30
William H. Temple,		
direct examination		33
August Lorchheim,		
direct examination		35
cross	41, 48	
re-direct		50

For the Defendants.

Anna S. Lorchheim,		
direct examination		52
cross		55
re-direct		53
further cross		58
Robert A. Sauer,		
direct examination		59
cross		61
re-direct		63

