

# New Jersey Supreme Court.

MARY BURNS,  
*Administratrix, &c., of* } *In Case on Postea, &c.*  
*James Burns, deceased,* } LINN & BABBITT,  
*vs.* } *Attorneys.*  
JOHN McANDREWS.

As yet of the term of February A. D., eighteen hundred and seventy-five.

Witness :                      MERCER BEASLEY, *Esquire,*      20  
*Chief Justice.*

BENJAMIN F. LEE, *Clerk.*

## HUDSON COUNTY, ss :

John McAndrews, the defendant in this suit, was attached to answer unto Mary Burns, administratrix, &c., of James Burns, deceased, the plaintiff therein, in a plea of trespass on the case, and thereupon the said plaintiff, by Linn & Babbitt her Attorneys, complains :      30

For that, whereas, heretofore, to-wit, on the twenty-third day of December, A. D. eighteen hundred and seventy-four, and for some time previous thereto, in the County of Hudson, aforesaid, the said defendant was and had been employed in excavating and constructing a tunnel for the Delaware, Lackawanna and Western Railroad Company, or for the Morris and Essex Railroad Company, for the use of the railroad operated by said Delaware, Lackawanna and Western Railroad Company, through Bergen hill in said County of Hudson, and in 40

the construction of said tunnel the said defendant employed a large number of workmen and laborers, and was obliged to and did use a variety of tools, implements, machinery and engines in the prosecution of said work; and the plaintiff saith that before and at the time of the happening of the grievances hereinafter mentioned, the said James Burns since deceased was in the employ of said defendant as one of his workmen and laborers in the excavation and construction of said tunnel.

10 And the plaintiff further saith that in the prosecution of the work of constructing said tunnel it became and was the duty of said defendant to furnish and provide safe and proper means whereby the laborers and workmen in his employ could be safely and securely let down from the surface of the ground through the shafts into said tunnel, where the work of such excavation was being carried on; and the plaintiff saith that said defendant did not furnish and provide safe and proper means whereby the laborers and workmen in his employ in the con-  
 20 struction of said tunnel could be safely and securely let down from the surface of the ground through the shaft into said tunnel where the work of said excavation was carried on, but wholly neglected and failed so to do, in this, to wit: That the buckets, or some of them, in which said workmen were let down in said shafts had plain common bails, and were not furnished with bails having rings or loops to prevent the hook holding the same from slipping from one side to the other while descending into said shaft, as the same should have been,  
 30 to wit: at &c., aforesaid:

And the plaintiff further saith that afterwards, to wit: on said twenty-third day of December, A. D. eighteen hundred and seventy-four, in the County of Hudson aforesaid, the said James Burns, while in the employ of said defendant, as aforesaid, in the night time, was in bucket furnished by said defendant for letting said said workmen down through shaft No. (5) five into said tunnel and was about being let down for the purpose of resuming work in said tunnel, when by reason of the bail  
 40 of said bucket being a plain bail, and not being provided

with a loop or ring into which the hoop holding the same could catch the said hook holding said bail, and attached to the rope supporting said bucket and intended to support the same while being let down into said shaft, became detached from said bail, and the said James Burns, by reason thereof, was precipitated with said bucket violently to the bottom of said shaft a great distance, to-wit: the distance of sixty feet, and was so shocked and bruised by said fall that from the effects thereof he immediately thereafter died, to-wit, &c., aforesaid; and so the plaintiff saith that the death of said James Burns was caused by the neglect and default of said defendant in not furnishing or providing safe and proper means whereby the said James Burns, so in his employ as aforesaid, could be safely and securely let down into said shaft for the purpose of resuming his work for said defendant.

And whereas, also, the said defendant, heretofore, to-wit, on the twenty-third day of December A. D., eighteen hundred and seventy-four, at Jersey City in the county of Hudson aforesaid, and for some time immediately prior thereto, had been and was engaged in excavating and constructing a certain other tunnel for the Delaware, Lackawanna and Western Railroad Company, or for the Morris and Essex Railroad Company, for the use of the railway operated by said Delaware, Lackawanna and Western Railroad Company, through Bergen hill in said county of Hudson, and in the construction of last said tunnel, said defendant employed a large number of workmen and laborers, and was obliged to and did use a variety of tools, implements, machinery and engines in the prosecution of said work. And the plaintiff saith that before and at the time of the happening of the grievances hereinafter mentioned, the said James Burns, since deceased, was in the employ of said defendant as one of his workmen and laborers in the excavation and construction of last said tunnel. And the plaintiff further saith that in the prosecution of the work of constructing last said tunnel, it became and was the duty of said defendant to furnish and provide safe and

proper means whereby the laborers and workmen in his employ, the said James Burns among the rest, could be safely and securely let down from the surface of the ground through the shafts into the said tunnel where the work of such excavation was being carried on. And the plaintiff saith that said defendant did not furnish and provide safe and proper means whereby the laborers and workmen in his employ in the construction of last said tunnel could be safely and securely let down from the  
10 surface of the ground through the shafts into last said tunnel where the work of said excavation was carried on, but wholly neglected and refused so to do, in this, to-wit: that the hooks furnished and provided by said defendant for holding the buckets, and which were fastened to the rope supporting said bucket while descending into said shafts, were plain common hooks, (which buckets were furnished by said defendant and used for the purpose of letting the workmen down into said shafts) and were not provided with any guards or clasp to prevent  
20 the same from slipping or becoming detached from said buckets as the same should have been, to-wit, at, &c., aforesaid. And the plaintiff further saith that afterwards, to-wit, on the said twenty-third day of December, A. D. eighteen hundred and seventy-four, in the night time, in the county of Hudson aforesaid, the said James Burns, while in the employ of said defendant as last aforesaid, was in a bucket furnished by said defendant for letting his workmen down through shaft No. (5) five into last said tunnel, and was about being let down  
30 for the purpose of resuming work in last said tunnel, when by reason of the hook which held the said bucket, and which was fastened to the rope supporting said bucket and used and intended to be used in supporting the same while descending into said shaft, being a plain common hook, and not provided with any guard or clasp to prevent the same from slipping or becoming detached from said bucket as it ought to have been, the said hook became detached from said bucket, and the said James Burns, by reason thereof, was precipitated with last  
40 said bucket suddenly and violently to the bottom of said

shaft, a great distance, to-wit: the distance *the distance* of sixty feet, and was so shocked and bruised by said fall that from the effects thereof he immediately thereafter died, to-wit, at, &c., last aforesaid. And so the plaintiff saith that the death of said James Burns was caused by the neglect and default of said defendant in not furnishing and providing safe and proper means whereby the said James Burns, so in his employ as last aforesaid, could be safely and securely let down into last said shaft for the purpose of resuming his work for said defendant. 10

Wherefore, by reason of the premises, the plaintiff saith that she, as administratrix as aforesaid, is injured and has sustained damage to the amount of Five Thousand Dollars, and thereupon she brings her suit.

And the said plaintiff brings into Court here the letters of administration of the Surrogate of the said county of Hudson, which give sufficient evidence to the said Court here of the grant of administration to the said plaintiff as aforesaid, the date whereof is a certain day and year therein named, to-wit: the twelfth day of January, A. D. eighteen hundred and seventy-five.

And the said defendant, by Job H. Lippincott, his attorney, comes and defends the wrong and injury, when &c., and says that he is not guilty of the said supposed grievances, above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, and of this he, the said defendant, puts himself upon the country, &c.

And the said plaintiff doth the like.

30

Therefore, let a jury thereupon come before the Chief Justice, or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Jersey City in and for the county of Hudson, on the first Tuesday of December in the year of our Lord one thousand eight hundred and seventy-five, by whom, &c., and the same day is given to the parties aforesaid, there, &c.

40

And now, at this day, to-wit, the twenty-third day of February, A. D., eighteen hundred and seventy-six, before our said Supreme Court, at Trenton, comes the said plaintiff, by her attorney aforesaid, and the Justice before whom, &c., having sent hither his record had before him in these words, to-wit :

Afterwards, to-wit, at a Circuit Court holden at Jersey City, in and for the county of Hudson, before the Honorable Manning M. Knapp: one of the Justices of  
 10 said Supreme Court, on the fourth day of January, eighteen hundred and seventy six, according to the form of the statute in such case made and provided, comes as well the said plaintiff as the said defendant, by their respective Attorneys within mentioned, and the jurors of the jury between the parties aforesaid in the plea aforesaid, being also summoned also come, who to speak the truth of the matters and things within contained, being chosen, tried and sworn, upon their oath say that the said  
 20 defendant is guilty of the grievances in the said plaintiff's declaration complained against him, in manner and form as the said plaintiff hath above in her said declaration complained against him. And they assess the damages of said plaintiff by reason of the premises, at one thousand dollars besides costs of suit to be taxed.

Therefore it is considered, that the said plaintiff do recover against the said defendant her said damages by the Jurors in form aforesaid found to one thousand dollars, and also one hundred and sixteen dollars and seventy-eight cents, for her costs and charges aforesaid, by  
 30 the Court now here adjudged to the said plaintiff, and with her assent, which said damages, costs and charges in the whole amount to one thousand one hundred and sixteen dollars and seventy-eight cents.

Judgment signed the twenty-third day of February, A. D. eighteen hundred and seventy-six.

M. BEASLEY, Chief Justice.

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

In Testimony Whereof, I have hereto set my hand and the seal of said Court at Trenton, this ninth day of March, A. D. eighteen hundred and seventy-six.

[L. s.]

BENJ. F. LEE, Clk. 10

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# NEW JERSEY SUPREME COURT.

## HUDSON COUNTY.

December Term, 1875.

MARY BURNS, *Admx.*, &c.,

*vs.*

JOHN McANDREWS.

} *In Case.*

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Before Hon. M. M. KNAPP, with a Jury.

JOHN LINN, Esq., and B. F. SAWYER, Esq., for  
Plaintiff.

JOB LIPPINCOTT, Esq., and JACOB VANNATTA, Esq.,  
for Defendants.

Mr. Linn opens for plaintiff, and offers evidence as  
follows :

*John Flannery*, for plaintiff, sworn, testifies as fol-  
lows : 20

*Direct examination* by Mr. Linn.

Q Did you know James Burns, deceased, in his  
life time ?

A Yes sir.

Q Where was he on the 23d December, 1874 ?

A The last I saw of him on the 23d of December,  
was in the Engine House of No. 5 Shaft, of the Dela-  
ware, Lackawanna Tunnel.

Q Who was putting that tunnel through ? 30

A I believe John McAndrews was.

Q You were employed there ?

A I was employed there as engineer.

Q By whom ?

A I suppose by Mr. McAndrews.

Q At what station were you employed ?

A No. 5.

Q Was James Burns working in that shaft?

A No sir; he was working in the opposite shaft.

Q What time of day or night was it you saw him?

A About a quarter to six o'clock in the evening.

Q How far was the engine house from the mouth of the shaft?

A The engine house was between twelve and fifteen feet from the mouth of the shaft.

10 Q Do you know when he started to go down into the shaft?

A I believe about a quarter past six o'clock in the evening. The majority of the men were gone down before he went down. I did not see him after that, till the next morning, when he was dead.

Q Did you see him brought out of the shaft?

A No sir.

Q Were you there at the time the bucket fell into the shaft?

A No.

20 Q What kind of a bail was there on that bucket which was used?

A It seemed to be a common bail, same as most any of the others.

Q Did you see the bucket that was used, into which these men were let down into the shaft that night?

A I seen it previous to the accident, and I seen it afterwards.

Q What kind of a bail was it?

30

(Question objected to as hearsay.)

Q How many buckets were used in that shaft?

A Three buckets.

Q What kind of bails were there on those buckets?

A Two of them had an eye in the bail for the hook to go in, and the other was open; it had no eye in it.

it had a hook open at the botton ; two of them had a twisted loop in, a turn the same as a ring ; the other was turned up, but was open at the bottom, and did not have the twist in it.

(Witness draws a diagram of the bails.)

Two of them was like No. 1, and the other was like No. 2 ; No. 2 was open at the bottom.

Q How many ropes were used to let the bucket  
down into the well ? 10

A One rope ; a wire rope.

Q What kind of a hook had that rope ?

A A large hook that opened.

Q Was there any other hook used ?

A No sir ; not on that shaft.

Q How were the men let down into the shafts ?

A The men always went down in the bucket ; caught hold of the rope, and stood on the edge of the bucket to go down. 20

Q Do you know whether this bucket, which had the open bail, had any rope attached to it around the bail ?

A Yes ; on the evening of the 23d I noticed a small piece of hemp rope, one stran of hemp rope tied around the lower part of the bail, where the eye was open, it was tied right around it.

Q What was this for ?

A I suppose to keep the hoop from leaving the bail. 30

Q (By Court) Can you describe that more particularly ?

A It was tied around the opening, across the bottom of the opening of the curve in the bail.

Q Was there anything to prevent this hook, when the bucket was lowered to the bottom of the shaft, and the rope a little slackened, from slipping off ?

A Nothing whatever.

Q When did you see the bucket, which went down with these men ?

A I saw it on the morning of the 24th.

Q What was its condition ?

A It came up all right.

(Last answer objected to as hearsay.)

10 Q Did you see one of the buckets which was used in that shaft, and which had the open bail, the next morning ?

A Yes ; I hoisted it out of the shaft.

Q What was the condition of the bucket ?

A The bucket was dented in on the top, and the bail bent to one side of it ; with that exception, there was nothing the matter with the bucket.

Q (By Court) Was the string on then ?

A The string came up on the bucket broken.

20 Q Who was present when you brought it up ?

A Mr. Brown, the walking "boss," the coroner and the jury and John Kelly, who was foreman of No. 6 shaft, and several others I could not name.

Q Who furnished these implements and this machinery, by which the men were let up and down the shaft ?

A To the best of my knowledge, Mr. McAndrews did.

Q How long had you been to work there ?

30 A From the 15th of June.

Q As engineer of that shaft ?

A Yes sir.

Q Did you ever see Mr. McAndrews there ?

A Yes, most every day there.

Q What did he do when he was around there ?

A Generally came in, and asked if every thing was all right.

Q With what hook did you bring the bucket up next morning?

A I lowered another bucket with two men on it; gave them the rake of the fire, and they took it, down, and brought the other bucket up fast to it; they fastened a chain around the other bucket, and brought it up fastened to the rake.

Q The hook which had been used there, was that broken?

A No sir. 10

Q It was the same hook that you had always been using there?

A The same hook.

Q When you brought the bucket up the next morning, was the bail still attached to it?

A Yes sir.

Q Unbroken?

A Unbroken.

Q Only bent?

A Only bent a little. 20

Q Do you know what kind of a rope that was which was around the curve on the bail?

A I believe it to be one stran of a manilla rope.

Q What size?

A I could not say the size of it.

A Do you know whether it was new or old rope?

A I believe it was a piece of old rope.

Q Do you know who tied it on?

A I do not.

Q Do you know what kind of materials McAn- 30  
drews furnished for use there at the shaft at the tunnel?

Mr. Vannatta—Materials for what?

Mr. Linn—For letting men down and bringing them up.

Mr. Vannatta—That is too general.

The Court—The examination had better be confined to particulars.

(The question is withdrawn.)

Q What was the business of James Burns; what did he do?

A He was a miner; he worked in the heading, I believe, drilling the rock.

10 Q Do you know who else were killed there that night?

(Question objected to as irrelevant.)

The Court—It is part of the transaction.

A Martin Conley, Daniel Murphy and Martin Sullivan.

Q You were not there when the bodies were brought out?

20 A No sir.

Q Who was the engineer in charge at that time?

A John Lennihan.

Q Where is he?

A I understood he was in Massachusetts.

Y Who was top man?

A Patrick Lovett.

Q That was the man that stood at the top, and steadied the rope, when the bucket started to go down?

A Yes sir.

30 Q (By the Court) What was his duty?

A To stand on top, and swing the bucket in from the opening of the shaft.

Q Was it his business to give the engineer the signal to lower or hoist?

A He always gave the signal to lower or hoist away?

Q Was McAndrews there that next morning?

A I did not see him.

Q Did not see him about there at all ?

A No sir.

*Cross-examined.*

Q I understood that you went to the shaft, No. 5, on the 15th of June, 1874 ?

A Yes sir.

Q When did you quit there ?

A On the night of December 25th, 1874. 10

Q You have not worked there since ?

A No sir.

Q You have been away over a year now ?

A Yes sir.

Q You left the tunnel entirely ?

A Yes ; two days after the accident.

Q When did you begin work on the tunnel ?

A On the 15th of June.

Q You had not worked on any part of the tunnel before that ? 20

A No sir.

Q Where did you come from ?

A From South Bergen, the Rubber Works there.

Q So that shaft, No. 5, was the first place you worked at on the tunnel ?

A Yes sir.

Q What were your hours ?

A From seven o'clock in the morning till seven o'clock in the evening ; then I was relieved for twelve hours. 30

Q I think you said that engine house was about fifteen feet away from the shaft, did not you ?

A That is, the end of the engine house was twelve or fifteen feet away from the shaft.

Q What was your position when on duty ?

A About twenty or twenty-five feet from the shaft, at the engine.

Q Inside of the engine house ?

A Yes sir.

Q And your duty was to shut off or let on the steam ; and you let it on or shut it off, as you got the signal from the top man ?

A As I got the signal from the top man, I hoisted the bucket or lowered it.

Q You had nothing to do with loading or unloading the buckets ?

10 A Nothing whatever.

Q Nothing to do with taking them off and putting them on ?

A Nothing.

Q You said Lovett was the top man ?

A Yes sir.

Q There was another one, was not there ?

A Yes ; Lovett had the night shift at this time.

Q (By the Court) Was he on duty at the time the bucket fell ; was he top man then ?

20 A Yes ; that was his time to be there.

Q Did you know Burns before he began to work there ?

A No sir.

Q About what time did he first begin to work at shaft No. 5 ?

A He was only working there six or seven weeks at the time.

Q How do you fix the time that he was to work there ?

30 A The night he first went to work there, I was off and had gone to a temperance meeting, and wanted him to go and join with me ; he said no, he was going to work at No. 5. He was working on the night shift then, and I was on the day shift.

Q Had he just commenced ?

A No ; he was just commencing that night that I asked him to come and join a society with me.

Q Can you give the date of that ?

A No.

Q Did he continue to work on the night shift ?

A He was on it alternately, one week night and the other week day time.

Q That was about six weeks before his death ?

A Yes sir.

Q Where did he work before ?

A He worked in No. 6 shaft previous to that, and previous to that, he worked in No. 2. 10

Q Were the three buckets there when you first went there ?

A No sir, there was but one ; one bucket that worked with, when I first went there.

Q Which one of the three was that ?

A That was not in use at the time of the accident ; it was cast one side entirely.

Q Used up ?

A Used up ; the bottom was out of it ; it was not fit for anything. 20

Q When was the next bucket got ?

A We were working about two weeks when this other bucket was got.

Q Which ?

A The one with the open bail.

Q About two weeks after you were there ?

A Yes, a week or two weeks.

Q What bucket was that ?

A That was the bucket, but it had no bail on it, it fell off the rope and broke the bail. 30

Q It was not a new bucket, when it was brought there ?

A No, it was an old bucket ; I broke the bail hoisting it up the shaft, hoisting water ; it struck against the side of the shaft, and broke the bail off it.

Q When was that ?

A I think it was in August or September.

Q Then there was a new bail put on ?

A Yes.

Q Who put that on ?

A One of the blacksmiths at No. 3 shaft ; I don't know his name.

Q Was it a new bail ?

A It was a new bail.

Q (Showing witness diagram) Look at this diagram, and see whether this is anything like it ?

10 A Yes, that is like the bail.

Q Can you tell us the size of the iron in that bail ?

A I think it was a quarter or an eighth inch thick, round iron.

Q That bail continued unbroken while you remained there ?

A Yes sir.

Q You left it sound ?

A Yes ; only it was bent the night of the accident ; it remains on the bucket unbroken.

20 Q And the hook that was on the rope, you saw that the next morning ?

A Yes sir.

Q That was not broken ?

A That was not broken.

Q Can you give us an idea what the length of that hook was, as it hung ?

A As it hung from the chain, it was about eight or nine inches from the top of the hook to the bottom. It turned up about six inches.

30 Q What was the size of the iron of which it was made ?

A It was about one and a half inch at the thick end, and was not more than one inch at the small end.

Q At the bend ?

A At the bend, it was about one and a quarter or one and a half.

Q That hook was there when you went there ?

A Yes sir.

Q It was there when you left ?

A Yes sir.

Q Unbroken ?

A Unbroken. The hook had been broken once ; it struck against the side and bent it ; it did not exactly break it, but it bent it, so I had to have it welded together again.

Q (Showing witness a hook.) Is that the hook ? 10

A That is the same hook.

Q Is that the same hook that was broken ?

A That hook was broken across there (indicating) and I got the blacksmith to weld it again, the day after it was broken.

Q You found that there when you went there ?

A Yes ; and it was there till I left.

Q What are those holes for ?

A For a clevis or catch to go in, I suppose.

Q Was there a clevis or catch there when you went there ? 20

A No sir.

Q Had there been ?

A There had not been ; I had the blacksmith, through Mr. Burns' orders, put a light one of three-eighths iron.

Q When did you have it put on ?

A It was in November I had it put on. Mr. Brown was the walking Boss, and he told me to have it put on, and I had it put on ; I had one put on this hook. 30

Q How long did it stay there ?

A It staid there three or four days, and it was broken off.

Q Who broke it off ?

A One side or it was broke off by the bucket coming up on it. After that I did not see any more of the clevis.

Q Do you know who took it off?

A No sir.

Q Did McAndrews take it off?

Q I don't know.

Q Was he there at the time it was taken off?

A Not to my knowledge.

Q This was the only hook used?

A Yes. The bucket broke one side of it off, and where ever the rest of it went, I never knew.

10 Q Who was top man at the time it broke?

A John Owens.

Q Do you say the bail of the bucket was on top of this clevis?

A After the bucket dipped itself and filled with water, the bail came up on top of the catch, instead of coming on the hook. I have hoisted it that way hundreds of times.

Q Did not the men that used this, object to the trouble of using it, hooking it on?

20 A I heard some remonstrance; they said it was not worth while having it there; it was not worth the trouble.

Q See if you can show the jury how this thing was rigged, when you fixed it up as Mr. Brown told you?

A The first Sunday night it was on, in place of the bail being on the bottom of the hook, it was fast on top of this clevis.

Q You say, along in August you think, you got that place mended where the fracture was?

30 A Yes.

Q And along in November, you got the catch put on?

A Yes; and that lasted two or three days.

Q And the balance of the time, it was used how?

A Without any; we used to take a piece of twine rope, and run it from one hole over one side of the hook to the other. We did that on Sunday nights,

because on Sunday nights we only used one bucket. We were hoisting water, and there was nobody at the bottom. We put that on so it would not slip off when it dipped; other nights we had three buckets, and the men was in the bottom to look after it, to see that it was hooked to it. It was not considered necessary then to put a wire rope on.

Q The 23d of December, was what day of the week?

A I think it was Wednesday.

10

Q You were not hoisting water that night?

A On the night of the 23d, I hoisted water. The night the accident occurred they were not hoisting water; they were hoisting water and rock. Between twelve and one o'clock of the morning of the 23d the accident occurred—on the evening of the 22d or morning of the 23d about midnight he was killed. He had been down there six hours, and had come up, and was going down the second time,

Q (Showing witness diagram) What does that represent?

20

A The engine house, the shaft house and bucket.

Q And your place was in the engine house here?

A Yes; (witness points out where the men got on the bucket, at the place marked "*landing*," and points out the drum on which the rope was wound up, and points out the rope and the shafting.)

Q What was about the size of that hole?

A Forty to fifty inches one way, and fifty-five to sixty the other.

30

Q Did the bucket pretty nearly fill up the space?

A Within eight or nine inches; it had room to play—that is two of the buckets; the other did not have only just room.

Q When it came up loaded with rock, how was it emptied?

A Then we hoisted it through the top, and further

over the shaft was a cross beam, and there there was a rope and hook, and that was hooked to the bucket, and on lowering the bucket it would swing it one side. On the other side the water was dumped out.

Q When it was drawn up for the men to get on, how high up was the bucket brought?

A To a level with the landing, so that the men could step off even with the surface; when the men put their feet on the edge of the bucket, they caught  
10 the rope with their hands, so that the hook was between their hands and their feet.

Q Right before them?

A Yes; they could not see it very well in the darkness.

Q How high were those bails?

A The bail was about twelve or fourteen inches from the edge of the bucket.

Q How high did the bend of the bail rise above the top of the bucket?

20 A About fourteen inches.

Q The hook was somewhere about level with their knees, was not it?

A Yes, sir.

Q And whenever they put their hand on the rope they looked towards their feet; the hook was right before their eyes, was not it?

A Yes.

Q Was there anything in there to light the room?

A There was a lamp stood in the far corner of the  
30 shaft-house; it was a large kerosene oil lamp, with a reflector, and the men had small tin lamps on their caps.

Q How often did they go up and down?

A Generally four times a day; some of them thirty or forty times a day.

Q By this same way?

A Yes.

Q And Burns had gone up and down four times a day while he had been there?

A Yes ; twice down and twice up.

Q Where was this rope that you spoke of ?

A Tied across the edge.

Q When was it first put on ?

A I seen it several days previous to the accident.

Q Do you know how long it had been there ?

A No.

Q Do you know who put it there ?

A No.

Q What was it there for ?

10

A I don't know ; I never see any use made of it.

Q Was not it used by the topman to pull the bucket towards him ?

A No, sir.

Q Are you sure of that ?

A Yes ; the topman could not reach it because it was too far from him ; the bucket had to go up nearly eight feet ; it was as much as he could do to reach it with a slinging hook.

Q Did you leave of your own accord, or were you discharged ?

20

A McAndrews and I had a quarrel on the day following Christmas ; I demanded my pay of him ; I wanted him to discharge me so I could get my money of him, and he would not do it—still he refused to let me go to work.

Q You made some threats towards McAndrews ?

A Only if I could not get my money I would sue him ; I said that to Brown.

Q Did'nt you say something about getting even with him ?

30

A No.

*Re-direct Examination :*

Q Was this indenture or loop upon the top of the bail as deep as is shown upon this drawing shown to you by defendant's counsel ?

A It come up a little straighter than this ; it was not gathered in at the bottom as much as the drawing represents.

Q I understood you to say that a key of this kind was never used when this clevis was used ; you used a piece of wire rope ?

A I had first a small bolt, then I had a piece of wire rope.

Q You had this clevis put on yourself ?

10 A I had, by orders of Mr. Brown, the walking boss.

Q It was soon broken, and then not put on again ?

A Yes, sir.

Q If this clevis had been on, fastened with a key of this kind, could this accident have happened ?

(Question objected to.)

Q If this clevis had been on the hook, fastened with a key of this kind, could the hook have become detached from the bail without either the hook or the bail breaking ?

20 (Question objected to.)

*The Court :* That is a matter that the jury can judge of as well as the witness.

Q Had you any more difficulty with this bucket than the others ?

A No ; I never had.

*Patrick Lovett*, for plaintiff, sworn, testifies as follows :

30 *Direct Examination.*

Q You were in the employ of Mr. McAndrews, December 23rd, 1874 ?

A Yes, I was topman at Shaft No. 5, of the Delaware, Lackawanna and Western Tunnel.

Q Did you know James Burns ?

A Yes.

Q Did you see him that night ?

A Yes.

Q When did you last see him alive ?

A Just about a minute before he was killed ; I saw him getting on the bucket.

Q Describe what took place at that time, and when it was.

A It was the morning of the 23rd. When we got orders to go to work I went up on top, and there was four men went down on the first bucket,—four or five, I can't say which ;—that bucket was left at the bottom to fill ; the hook was sent up and the other bucket, that was hanging where we used to dump the rocks, I took it off the hook and lowered it down low enough for the men to get on, and four or five men got on and was lowered down to the bottom ; and then the bucket came up again, and when they stepped on the bucket then the four men went down ; it went from under them before I had time to holler to the engineer to lower down or move ; I just reached out to put my hand to the bucket to steady it for them, and as soon as I did it was gone and themselves.

Q What four men were they ?

A James Burns, Barney Curley, Daniel Murphy and Martin Sullivan.

Q Did they say anything, or do anything ?

A No, sir ; they only hollered when they felt themselves going—they screamed out when they felt themselves going.

Q (Showing witness diagram) Is that the hook that was used ?

A I don't know ; a hook something similar to it.

Q Had the hook a clevis on at that time ?

A No, sir.

Q Had the hook had a clevis on before ?

A It had sometime before that ; it was broke off.

Q What bucket was it that was used ?

A A small bucket.

Q What kind of a bail had it ?

A A bail something like this on this diagram.

Q Was there any rope on that bail ?

A There used to be a rope used across the neck of it.

Q Was there a rope at that time ?

A I should'nt wonder but there was ; I could'nt exactly swear to it, because I did'nt see whether it  
10 was on or not.

Q When did you see that bucket afterwards ?

A I did'nt see it for a couple of days.

Q When did you see the rope upon that bail ?

A I saw it when I was taking the hook off ; we used to swing the buckets therewith.

Q How long before this occurred ?

A Ten or fifteen minutes—more or less.

Q When the bucket went down, it had the rope on that night ?

20 A Yes.

Q In the first place it went down with four or five men ?

A Yes.

Q Then the rope was on ?

A Yes.

Q You don't recollect noticing the rope afterwards

A No.

Q Do you know what that rope was there for ?

A Yes ; for the safety of the men that was at the  
30 bottom working underneath us. When we used to hook it on to this, if the engineer rose it a little extra higher than usual, this hook would run down and be apt to tip the rocks into the pit.

Q Explain why that rope was used there.

A To hook on a hook and swing the rock bucket from over the shaft ; and if the engineer rose it any higher than usual when this rope was not here, the

hook would run down into the arms of the bucket and cause us a great deal of trouble, and that was what they were there for. We used to use a wire rope.

Q If the bail had had a ring in it, or a loop, would there have been any use of a rope?

A No, sir, I don't suppose there would.

Q Don't you know?

A I don't think there would be any use of a rope if there was any such thing as that in it. 10

Q After the bucket went down with these men, what next occurred?

A We had to get the rope that went over the shaft and get it back again into its own place and lower it down to the bottom. We lowered the rope and we dumped the water out of the water bucket at the bottom and brought these men up one at a time in the water bucket. They were dead.

Q Did anybody come up with the bodies?

A Yes, a man came up with each of them, and probably two for all I know. 20

Q Where did the lamp in the covering over the shaft stand?

A That lamp hung up to the east side of the shaft overhead on the top.

Q Was McAndrews there that day?

A I did'nt see him; he might be.

Q How often did he come there?

A Sometimes we would see him once a day, sometimes we would not see him for a week. 30

Q What did he do when he came there?

A He might pass by and would not even look at us sometimes; or he would stand and look around the place and walk off again.

Q How long had you been topman there?

A I was about seven months when that happened.

Q What was your business?

A Dumping the water buckets and rock buckets.

Q Anything else?

A I gave the signal to hoist and lower the bucket according as I would get it from the bottom.

Q Did you give the signal for hoisting and lowering the men?

A Yes.

*Cross-Examination.*

10 Q When did you go to work at Shaft No. 5?

A Sometime in the month of June last year.

Q And you have stayed there how long?

A Up to about the 15th of last August.

Q Where have you been since?

A I have been down in Jefferson avenue, in a butcher's shop?

20 Q Were you topman all the time you were there at Shaft No. 5?

A Yes, except two months when I was sick.

Q How long was James Burns working at Shaft 5?

A I couldn't exactly tell you; it might be a month; it might be six months, for all I know.

Q How long do you know of his being there?

A I know he was there two or three weeks, anyhow. That was as far as I know.

Q Do you know whether he had been to work on the night shift or day shift?

A I couldn't tell you, but he was working on the night shift at that time.

30 Q Did you ever know him to work at that shaft on the day shift?

A I don't know.

Q Do you recollect to have seen him there at that shaft at night time before that night?

A Yes; several times.

Q Was it during the night shift or day shift?

A I would see him every night that I was going to work.

Q Did you ever see him going to work in the day time at that shaft?

A Yes.

Q When was that?

A I suppose it was the week before that.

Q What time did you begin work the night the accident occurred?

A At the usual time of going to work; seven 10 o'clock.

Q Did the men stop at midnight?

A Yes, they used to stop at twelve o'clock for supper.

Q How long did they stop for supper?

A Sometimes an hour, more or less.

Q Did they come up to get their suppers or take it below?

A Came up.

Q Did they that night?

20

A Yes.

Q How many came up.

A I don't know how many were working at that time; there might be about twenty-five.

Q You were there when they came up that night?

A Yes.

Q You were there when they started to go back again?

A Yes.

Q Before any of them began to go down how many 30 buckets had you at the top of the shaft? How many were up before any of them went back?

A Two buckets on that landing.

Q Which two were they that were on the landing?

A The big water bucket was down below at the time of the accident, and the one the men got killed on; they were up.

Q How many buckets were at the top of the shaft before you sent any of the men down after supper?

A There were two to my knowledge: one hanging on the side rope—on the swining rope—and the other was hanging on the fall rope.

O Which two were they?

A The water bucket and the rock bucket.

Q Which was the rock bucket?

A The one that was hanging one side on a swinging  
10 hook.

Q Where was the other one?

A It was hanging right over the shaft on the fall rope.

Q Where was the other bucket?

A Hanging to one side.

Q The third—where was that?

A I could not account for that; that is all I have knowledge of.

Q You say when the men got done their supper you  
20 let five of them down?

A There were two buckets of them went down; about eight men.

Q How many first went down on the first bucket?

A Four or five on the first bucket.

Q Did they go down in that bucket which hung in the mouth of the shaft?

A Yes, sir.

Q Was that the bucket which afterwards fell?

A No, sir.

30 Q Did they go down safely?

A Yes, sir.

Q What was done when they got to the bottom?

A The men that went down in charge of that bucket took the bucket off and commenced to fill water in it, and sent up the hook to take down this bucket that was hanging to one side.

Q The rope came up without the bucket?

A Yes. When the hook got up I put it on the bucket that was one side ; that was the rock bucket—the bucket that the men were killed on.

Q Then you hooked that rock bucket on this hook ?

A Yes ; or a hook like that ; and lowered four or five men to the bottom. Those men went down all safe.

Q That was the second bucket that had gone down ?

A Yes.

Q And then ?

10

A Then the men below hollered to hoist away ; then I hollered to the engineer to hoist up, and the bucket came up ; then the men got on it, and just as the four men got on, the bucket and all went down.

Q That was the bucket that you had hitched on ?

A Yes.

Q And on which four men had gone down safely ?

A Yes, sir.

Q When you hitched that on what did you hitch it to ?

20

A On to the bail ; I put the hook in the bail.

Q Are you sure you did

A I suppose only if I did it would not take them four men down to the bottom safe.

Q Could you say whether you did it or not ?

A Yes, sir.

Q Was it light or dark ?

A It was middling light.

Q And then it swung over and four men went down on it ?

30

A Yes.

Q Then the bucket came up again ?

A Yes.

Q And then four men got on ?

A Yes.

Q Who were they ?

A Burns, Sullivan, Curley and Murphy.

Q How long had the bucket been up before they got on?

A Not half a minute, I guess.

Q Where were you when it got up level with the platform?

A Standing right back of the men; they were crowding around the shaft waiting to get on, and I was standing one side.

Q Did you start to go to the bucket?

10 A I did, and I didn't get time to put my hand to the bucket when it was gone.

Q Were the men on it before you got there?

A They were on it.

Q Did they get on it quickly or slowly?

A Got on quick.

Q And before you got up to it, it went down?

A Yes.

Q How many men stood there on the platform?

A Ten or twelve, more or less.

20 Q Was the hook broken?

A No, sir.

Q You lowered it then?

A We did.

Q When the bucket dropped the hook flew up on that wheel?

A Yes; it went right over the shield, and we had to get up on the frame to get it over and lower it.

Q You looked at the hook?

A Yes, sir.

30 Q Was the hook broken?

A No, sir.

Q All sound?

A All sound.

Q When did you next see the bucket that fell down?

A A couple of days after.

Q How was the bail in that bucket when you next saw it?

A I didn't see the bail of it.

Q Was the bucket broken ?

A It was dinged in a little in the bottom.

Q Was it an iron bucket ?

A Yes.

Q You were not there when the bucket was brought up ?

A I was not there when the bucket was brought up.

Q (*By the Court*)—Was the bail removed from the bucket when you saw it ? 10

A It was not when I saw it.

Q Do you know sure when you next saw the bucket the bail was not on ?

A Yes.

Q I did'nt understand you as to what that rope was used for—that short rope ?

A It is very easily explained. If there had been no guard cross here, if the engineer rose the bucket two or three inches too high, so as to let the rope slack down, it would run in here (pointing) and make 20 the bucket turn on its side.

Q The object of that was to prevent the rock that was in the bucket from falling down the shaft on the men at the bottom of the shaft ?

A Yes, that was the object of that piece of rope.

Q So that when you swung it over and was going to turn it ; or, if the engineer made a jerk that the rock would not fall out and go down,—was that it ?

A Yes, it would keep the hook in its place.

Q (*By the Court*)—The time when that was liable 30 to get out of order was when the bucket was up, was it ?

A Yes, that was the time ; it would slip back here (showing).

Q Had you ever acted as topman at any other shaft on any other work ?

A No.

Q Suppose you kept a key like this on the hook, were the men who were working down there willing to use it or not ?

(Question objected to as immaterial Question waived.)

*Thomas Flynn*, for plaintiff, sworn, testifies as follows :

10 *Direct examination.*

Q You were in the employ of McAndrews last December ?

A Yes, I was tool boy in shaft No. 5.

Q What was your business ?

A To carry the sharp tools to the men, and the dull drills to the bucket, and send them up to the top, and then when they came down again sharpened to bring them back to the men again.

20 Q Were you there at that shaft the night when the men were killed ?

A Yes.

Q At the time they were killed ?

A Yes.

Q Did you see the bucket fall ?

A No sir, I didn't.

Q Where were you ?

A I was stepping off the bucket and letting James Burns on it to go down. I turned my back and got off. Just as I got off he got on, and the bucket went  
30 down.

Q You had been on yourself ?

A Yes.

Q What had you been doing ?

A I was going to go down, and he asked me to let him on to make a place to start the work.

Q When you got off, how many men were on the bucket ?

A Three besides me. Then I got off and let Burns on.

Q About how long did the bucket hang there before it fell?

A About a minute, I suppose.

Q [By the Court.] Did you see it at all after they got on?

A No. I turned my back after I got off, and stepped one side to make room, and I heard the crash. That is all I know about it, and the four men went with the bucket. 10

Q Did you hear any noise from the men?

A No sir, I didn't.

Q Did you see them brought up?

A Yes.

Q Do you know what kind of a bail was upon that bucket?

A The same one that has been shown on this diagram.

Q Was there any rope about it? 20

A Yes, a manilla rope, tied across the eye on the open part of the eye.

Q What kind of a hook?

A Pretty much like this, but no clevis was on it.

Q How many buckets were used at that shaft?

A Three.

Q What kind of bails had the other two buckets?

A The other two had a kind of a twist in it—a loop in the bail.

Q Did you see that bucket brought up from the 30 bottom?

A No.

Q When did you see it afterward?

A About an hour after it came up.

Q Where was it?

A Lying between the engine house and the shaft.

Q What was its condition?

A The side of the bail was bent. The bail was bent from the fall, and on the bottom of the bucket was a big dinge in the bottom edge of it.

Q Was the rope on the eye ?

A I saw the piece of rope that was there. The coroner had it. He had taken it.

Q The same that the coroner had was the rope that was upon the bail ?

A Yes.

10 Q You are sure of that ?

A Yes, I'm sure.

Q Was the bail broken ?

A No.

Q Do you know who took the bail off the bucket ?

A No.

Q Do you know what became of the bucket afterwards ?

A No.

20 Q Did you see McAndrews around there at any time ?

A It was seldom I saw him. I used to be down the shaft all the time.

Q You have seen him around there ?

A Yes ; not very often. He would come and look around and walk off again.

Q Did he ever come down the shaft ?

A Not while I was there.

Q How long were you at work there ?

A I guess about a month and a half.

30

*John Ryan*, for plaintiff, sworn, testifies as follows :

*Direct-examination :*

Q Were you ever in the employ of McAndrews ?

A Yes.

Q When ?

A I have been in his employ for some time ; next May will be two years.

Q Working where and at what ?

A I worked on several shafts on the Delaware and Lackawanna tunnel.

Q Were you at work on the 23d of December, last ?

A On the morning of the 23d I was working in No. 5 shaft ; that is between one and two o'clock, or thereabouts.

Q Were you down in the shaft at that time ? 10

A I was.

Q Did you know James Burns ?

A I did.

Q Did you see him that night ?

A I did.

Q When ?

A I went down on the bucket with him at six o'clock, when we started to work, and I seen him when I was going down on the bucket at one o'clock ; that was the last I seen him alive. I went down on the bucket previous to him. 20

Q How many men went down on the bucket previous ?

A Three other men and myself.

Q Was that the same bucket which fell ?

A Yes, it was.

Q What kind of a bucket was it ?

A. It was not so large as the other buckets that we have used in the other parts of the tunnel ; it might be two feet one or two inches across the mouth of the bucket ; the bail I believe was between twenty-five and thirty inches wide—possibly twenty-eight and a half. The bail was something like this diagram. 30

Q Had it any rope on it ?

A It did ; across the open part of the eye.

Q Did you see the bucket after it fell ?

A I did.

Q Where?

A In the bottom of the shaft.

Q Was the rope then upon it?

A At that time I didn't take any particular notice how the rope was on the bucket.

Q Did you see it afterwards?

A I seen the bucket afterwards on top, on to a cart just after coming up; may be half an hour or an hour.

Q Was the bail upon it then?

10 A The bail was bent a little to one side, and on the bottom of the bucket there was an indenture.

Q Did you see the rope then?

A No; I didn't see the rope till afterwards.

Q When did you see the rope?

A At the coroner's inquest—the coroner had it.

Q Was that the same rope that had been upon it?

A I couldn't say that.

Q Do you know what kind of a rope was upon the bucket?

20 A It was what is usually called a manilla or grass rope.

Q Was it an old or a new piece of rope?

A An old piece.

Q Do you know who put it on?

A No.

Q What was the first you knew of the accident?

30 A I was standing up in the east heading of the tunnel, myself and another man, and I heard a shock like, and turned around and I seen a flash of fire; then I heard a kind of a dull thud like on the bottom, and I says, "there goes the bucket;" and with that there came a kind of a moan or shriek that we could not tell whether it was a moan from any of the men that fell or from terror by the man that was down there; and I says, "Bergen is hurt"—that is the man that used to fill the water—and so me and this other man run back, and I went down to the bottom, and I could

not exactly make out at the time what it was, I was horror stricken; I came back and I went forward again and I recognized one of the men; he was a miner or man in the work, and I says, "Martin Sullivan is dead anyhow, and here is another man." Then I think I hollered up for the rope, and told them to have a priest and doctor on top; I thought there might be some hopes for some of them; so me and the man that was in the bottom of the shaft dumped out the bucket of water that he was filling—there was one bucket standing in the bottom—when the rope came down we attached it on to the water bucket, and we put in Martin Sullivan first, and either one or two men went up with him, and we put them in one after another and so on; James Burns I believe was the second or third.

Q They were all dead?

A. They were, from all we could make out; we never heard a breath or sigh from them.

Q What was James Burns' business in the tunnel?

A He was a miner, boring and drilling. 20

Q What kind of a hook was attached?

A I don't hardly think this is the hook; it don't seem to be; it didn't seem to be so high a hook as this. When I seen the hook afterwards I took particular care to take notice of it, and I don't think it was over four inches from the bottom of the hook inside to the top.

Q Had the one in use any clevis to it?

A No; but I believe there was a hole same as this in the outside tongue of the hook.

Q Do you know what kind of hooks there were in use at the other shafts upon this tunnel—whether they had clevises or clasps on, or whether they were open hooks like that? 30

[Question objected to as irrevelant.] Admitted.

Defendant excepts, and prays the exception may be sealed; and it is sealed accordingly.

M. M. KNAPP, J. [L.s.]

A In No. 2 shaft of that tunnel some time previous there was a guard on the hook; when James Burns was there, foreman, I worked for him in No. 2 shaft, and I remember seeing a guard on the hook; I don't remember whether it was iron or wire.

Q Any other you recollect of seeing?

A I would not be positive about any other.

[Adjourned for the day.]

10

December 30th.

Q How deep was this shaft at the time this occurrence took place?

A Somewheres between sixty and eighty feet—might be seventy or seventy-one.

*Cross-examination.*

Q How long had you worked at this shaft before this accident?

20 A Somewheres between two and three months, more or less—between two and four months in this shaft; it was either September or October I went to work there.

Q How many men were in the shaft during that time?

A I couldn't say exactly; might be thirty, more or less—that is on each day; but there was a gang working day and night, and in both gangs there might be sixty, more or less; there was about thirty men on a shift.

Q How did they get up and down this shaft?

30 A On a bucket.

Q All the time you were there?

A Yes.

Q You worked one week on the night shift and one week on the day shift?

A Yes.

Q And you went down how many times a day?

A I couldn't say; sometimes I might have business

up, and I might go up and down more one day than another; I would always go up and down twice each day.

Q But often times more frequently?

A Yes.

Q And the other men working there did the same?

A Yes.

Q Lovett was head man all the time you was working there?

A I believe so.

10

Q What did you do down in the shaft?

A Mining, boring, drilling.

Q You spoke about working at shaft No. 2?

A I did.

Q When did you begin to work there?

A Some time in June, 1874.

Q Was that shaft east or west of No 5?

A East.

Q How deep was that?

A At the time I went to work at it it was only sinking. When I left it was not sunk to grade. It was 20 sunk to the grade of the heading. That might be between fifty and seventy feet, I would not be positive to the exact depth of it.

Q About how many men worked there?

A Between twenty and thirty on each shift.

Q How did they come up and down?

A On a bucket.

Q You saw Burns work at No. 2?

A He did, as foreman of the mining and laboring department of No. 2, that is, sinking and showing the 30 men their work.

Q Which men?

A Those men that worked at the bottom of the shaft.

Q His position was in the shaft?

A Yes, I believe he was boss of those who worked

on top of the shaft, and of the men that were in the bottom.

Q What do you know about it?

A I know at that time I remember seeing clasps on the bucket.

Q About his having charge of the men on top?

A No more than I have seen them obey his orders.

Q Who?

A I have seen Thomas Casey, he was top man at  
10 that time of No. 2.

Q How many buckets were used there?

A I believe two. I would not be positive.

Q You were there at No. 2 before Burns came?

A Burns was there before I got at No. 2.

Q And you say there was a clasp on the hook?

A I remember at one time seeing a clasp on the  
hook.

Q How long was it on?

A I couldn't say.

20 Q Was it there when you quit?

A I am not sure.

Q How long was it on?

A I don't know. I am not positive of the time. I  
remember seeing it.

Q Did you see it more than once?

A I did.

Q How often?

A That I could not be positive of.

Q Who put it on?

30 A I don't know.

Q How did it come to be put on?

A I don't know.

Q What use was made of it?

A To protect the bucket from falling to the bottom, I should think. That is in case the hook should turn on the bail, then if any accident happened on the top, such as the bucket would lean or anything, the hook

would not slip out and the bucket fall away ; that is what I understood it was for.

Q Did you see anybody put it in ?

A No.

Q Or take it out ?

A No.

Q Who was the blacksmith at the shaft ?

A I don't know his name.

Q Which quit at No. 2 first, you or Burns ?

A Burns. 10

Q How long before you quit there ?

A I quit there some time in September or October.

Q When did he quit ?

A I don't know ; he left there after me, so I don't know.

Q He worked there as long as you did ?

A Yes.

Q Are you sure of that ?

A Yes ; I worked for him and he was my foreman while I worked in it ; that was some time in September 20 or October.

Q When you quit No. 2, did you go to work right away at No. 5 ?

A I would not be sure about that ; I believe I worked in No. 6 for some time, but I would not be sure.

Q Burns was discharged from No. 2, wasn't he ?

A I don't know.

Q Didn't he tell you so ?

A He did not. 30

Q Didn't you hear him talk about it ?

A Not that I know of.

Q Didn't you hear him talk about a dozen times ?

A No sir, I didn't ; not that I can remember.

Q Wasn't he discharged long before you left there ?

A If he was, he must have been taken back again.

Q Was John Riley foreman or boss of shaft No. 2 ?

A He was.

Q When was he boss ?

A He came there some time before I left.

Q How long before you left ?

A That I would not be positive of.

Q About how long ?

A I couldn't say.

Q Didn't he come there in July ?

A I don't know, he might.

10 Q Burns left before Riley came, didn't he ?

A No ; not that I know of.

Q Was he and Riley boss at No. 2, at the same time ?

A They were on opposite shifts ; Burns was bossing on the shift that I worked on, and Riley was bossing on the other shift ; I remember now, at the time you asked me I didn't—that I did not stay in No. 2 shaft till September ; I believe I left it before that, I must have left it in August.

20 Q Didn't you have a strike in No. 2 ?

A There was a strike in the opposite shift.

Q Wasn't there a strike among the men in No. 2 ?

A There was, I believe ; I am not positive—not at the time I worked in it.

Q While you were there ?

A No sir ; not on my shift ; there was on the opposite shift in the same shaft.

Q What time was that strike ?

30 N I could not fix the time it happened ; whilst I was there I believe, it might have happened twice or once ; I don't know how often it was, therefore I can't fix the time.

Q I want to know whether Burns was not discharged at the time of the strike ?

A He was not discharged at the time of the strike that I mean. The strike that I mean was against the

foreman of that shaft, by the men under his control—  
it had nothing to do with Burns.

Q Wasn't Burns himself among the strikers?

A Not at that time.

Q When was he?

A Not at that time.

Q What time was he?

A I don't know.

Q (By the Court) Do you know of any time when  
he was in a strike with the men? 10

A We had strikes there, but whether Burns was  
agreeable to the strikes or not I don't know.

Q Don't you know that in June or July Burns was  
discharged from shaft No. 2?

A I don't.

Q And told never to come on to the work again?

A I don't.

Q Wasn't it talked over among your gang, over and  
over again, that Burns had been forbidden on the work?

A Not that I am aware of. 20

Q Do you know anything about Burns having quar-  
relled with the engineer at shaft No. 2—having a dis-  
pute with the engineer at shaft No. 2?

A Not at the time I worked there.

Q Did he at any time?

A I believe he did afterwards—I am not sure—I  
never seen it; only what I heard.

Q Then there was no dispute between Burns and  
the engineer while you worked at shaft No. 2?

A Not that I know of. 30

Q Didn't hear of any at the time?

A No sir.

Q Do you remember the engineer being discharged?

A I don't.

Q And then put back by McAndrews, and Burns  
discharged?

A I don't.

Q Didn't hear anything of that ?

A I don't know whether I did or not.

Q How long did Burns work at shaft No. 5, before he got killed ?

A I could'nt say.

Q As near as you can tell ?

A I remember working with him, but any length of time—might be two weeks—I didn't take no notice of the thing.

10 Q Did he go up and down the same way you did ?

A He did.

Q How often did he go up and down on these buckets at the same time you did ?

A I only remember once.

Q When was that ?

A The night he was killed.

Q Were you going up or down then ?

A We were going down then.

Q What time ?

20 A Between six and seven o'clock in the evening, we went down together.

Q Did he have any talk with you about those buckets ?

A He did; he remarked going down that we should be very careful, that they were very dangerous things.

Q Who did he say that to ?

A He said that to the whole of us.

Q Tell all he said upon that subject about the buckets being dangerous ?

30 A The exact words I can't remember, but I can remember him saying we should be very careful.

Q Did he tell you what you must do ?

A Nothing more than I have said.

Q Did he say what you should be careful of, or what you should attend to, or how you should exercise your care ?

A If he did, I forget it.

Q You say he simply said you must be careful; about what?

A About the bucket and some things else, what they were I forget.

Q What did he say about the buckets?

A When the buckets was going down, it was very narrow at the mouth of the shaft, and when we were stepping on we were liable to knock off a little hook that was used for holding the bucket attached to the bail; if that ring opened, touched against the side so as to raise it up a little, the bucket would dump over, and he drawed our attention to that that night; and if the bucket dumped over, the men that were standing around the rim of it if they didn't have very good hold of the rope they were likely to go down. 10

Q It was then he spoke about that?

A He spoke about that that night.

Q Was it before you started to go down?

A I remember his calling our attention to that that night; I don't know whether it was before we started to go down or on the way down. 20

Q To what—the liability of the bucket to tip?

A He called it a damned little monkey that was on the side.

Q Whereabouts on the side? [Showing witness diagram.] Does that represent the bucket?

A Yes; on each side here, there is supposed to be a horn there and there, [pointing] and here is a ring which sets in on the bail; you can never get that off the bail but by lifting it up, or if it comes off the bucket that allows the bucket to dump, and when this is on the bucket can't dump. 30

Q It holds the bucket fast in the bail?

A Yes; protects it from dumping.

Q When you slip that up, it will let it turn?

A Yes.

Q It was that thing he said might get knocked out of place?

A Yes.

Q And then the bucket turned over?

A Yes.

Q [By the Court.] There was an iron projecting up on the bucket, and then there was something that clasped the bail to this iron?

A Yes; to protect it from dumping.

10 Q And you say he spoke about the men being careful when they got on the bucket?

A He said they should be very careful of that.

Q Was that as you were stepping on the bucket?

A I don't remember that.

Q Or after you had got down?

A That I won't be positive of; it might be before we got on or it might be on our way down; we could not say all the words at the time we were standing on the top.

20 Q At any other time had he said anything to you about the danger there?

A I don't remember him doing so now.

Q My recollection is that you went down in the bucket ahead of the one that he got on that night?

A I went down in the same bucket but one turn ahead of him.

Q Do you recollect how many men went down on that bucket that you went down on?

A Three besides myself.

30 Q Can you tell who they were?

A I can't remember them.

Q When you got down the shaft what did you do?

A For my part I made my way to the heading as fast as I could; what the others done I don't know.

Q Was anything done with the bucket when it got to the bottom of the shaft?

A Not that I'm aware of.

Q The men just jumped off?

A Yes.

Q And went on to their work?

A Yes.

Q Was there anybody then standing at the place where the bucket landed?

A Not right where it landed.

Q Did the bucket touch the bottom or hang a little distance above the bottom? 10

A It touched the bottom.

Q It stood on the bottom?

A Yes.

Q You are sure of that?

A I am.

Q What drew your attention to that?

A Because they were blasting in the bottom of the shaft and the rocks were upturned; I remember that the bucket struck on the point of a rock, and that I had to walk around the bucket half ways, or may be the whole ways, before I got quite around; it was twisted—twisting on the rock before it settled down, and I had to walk around or half ways to jump on a dry spot. 20

Q How many men were down when you got down?

A There might have been four or five besides those that went down with me.

Q Did all the men that were in the shaft come up to supper?

A I believe they did come up; I don't know. 30

*Re-direct Examination :*

Q You recollect about the depth of this curve or indentation on the top of the bail to that bucket?

A To the best of my recollection it might be four to six inches; I wouldn't be positive to the exact depth.

Q Was there any ladder leading down into any of those shafts that you saw on this tunnel?

A Not at any time that I can remember previous to that.

Q Was there ever afterwards?

A There was in No. 4 shaft under the control of Richard Tippit.

Q That was under the control of another sub-contractor?

A Yes.

10 Q So that the only way of going down into the tunnel was by means of the bucket?

A Yes.

*Jacob Reinhart*, sworn for plaintiff, testifies as follows:

*Direct Examination.*

Q You were one of the Coroners of this county in December, 1874?

A I was.

20 Q Do you recollect the time of this occurrence, when these four men were killed in Shaft 5?

A I do.

Q Did you hold an inquest?

A I did.

Q Did you see that bucket and bail?

A Yes.

Q Where did you see it first?

A I saw them hoisting it out of the bottom of the pit.

30 Q What was the condition of the bucket?

A There was two or three dents on the side of it, and the bail was knocked a little one side, but it was not broken.

Q Was there any rope upon it?

A I took a little piece of rope off the side of the bail when the bucket hung down—on the side of the bail.

Q How long was that piece of rope ?

A About six or eight inches.

Q What kind of a rope ?

A It looked like tar rope—stranded rope.

Q Old, or new rope ?

A It had been used sometime, I should think.

Q Manilla rope ?

A I don't know what they call manilla rope ; this was what I should call a tar rope.

Q What did you do with the bail and bucket ? 10

A Left it there on the ground.

Q Do you know what became of the bail afterwards ?

A No.

Q What became of the rope ?

A The rope I had in my possession quite some time ; and one of my men was cleaning out my store about two weeks ago and he threw it out amongst the rubbish.

Q How long was this piece of rope ? 20

A About six or eight inches, I thought.

Q Was this rope on one side of the bail or on both sides ?

A One side.

Q That piece you picked off, was it whole ?

A That is all there was. It seemed to be wound around the bail, and the water from the bottom of the shaft had stuck it against the bucket. The rope looked as if it had been tied and had been worn against there on the side of the bail—it looked as if 30 it had been worn on the side of the hook.

Q Had it any appearance of having been broken ?

A I don't know ; it was a pretty rotten piece of rope.

Q How ?

A It was a pretty weak piece of rope, and where it had been worn into was all unravelled.

Q Was that on the part that was tied to the bail or the other end ?

A It looked to me right in the middle of the rope ; it looked as if the rope had been tied and had been worn.

Q (*By the Court*)—Was there any sign of a knot on the loose end of the rope ?

A No, not on it.

Q Anything to indicate that it had been fastened  
10 to the bail in any way ?

A Nothing that I could see ; it was just a straight piece of rope and was pretty well worn ; it didn't look as if it had been tied.

Q (*By the Court*)—One end of the rope was tied to the bail ?

A No ; the unravelling of this rope had got around a portion of the bail down near the bucket, and the other portion of it, which was pretty well unravelled, the water had stuck it against the bucket ;—  
20 one end was wound around the bail and the other end was stuck against the bucket.

Q That end which stuck against the bucket, was that even and smooth as the end which was fastened to the bail ?

A Just about the same, I thought.

Q Were both ends smooth and even, or were they ragged ?

A Not very ragged ; looked to me pretty near a square cut,—it didn't look like a break or anything  
30 of that sort.

Q (*By the Court*)—Do you speak of each end of the rope now ?

A Yes, there was some little ravel stuck out.

Q This part which was worn was in the middle of the rope ?

A Yes, on the side of the rope, about three inches from the end.

Q Who untied that rope to take it off ?

A I did ; as soon as the bucket came up I went to the bucket and took the rope off.

Q Was it tied ?

A No, it was'nt tied at all ; it was just washed around the bail.

*Cross Examination.*

Q (Showing witness diagram.) Point out to the jury on this diagram whereabouts that rope was. 10

A A portion of it hung here (pointing) ; and the rest of it hung right against the bucket.

Q As I understand you both ends of the rope were loose, that is except the sticking ?

A Yes ; it was merely twisted around the bail.

Q (*By the Court*)—Can you show about how many turns around the bail ?

A The ends of the rope were bushy, and there might have been an inch or so unravelled each end, and it being down in the wet, it got wet and some of 20 the strands might have wound around the bail.

Q About how many times did the rope get around the bail—how many coils ?

A There was'nt more than one coil around and the ends were loose ;—one end was down against the bucket, and the other was up on the corner of the bucket and corner of the bail.

Q And all you had to do to take it off was to turn it around a little ?

A That is all. 30

Q About the middle of it it appeared to be worn ?

A Yes.

Q Half through ?

A Not quite half through ; a little portion.

Q The bail itself was unbroken ?

A The bail was unbroken.

*John Bergen*, for plaintiff, sworn, testifies as follows :

*Direct Examination.*

Q You were employed at Shaft No. 5 last December, at the time these men were killed ?

A Yes.

Q Where were you that night ?

A On the top.

10 Q What were you doing ?

A I was standing by to get on to the bucket; there was four men on the bucket and I was going to get on myself and the bucket went down.

Q Why did'nt you go ?

A I was stopped to turn around to look at a man that had a sore finger ; and I turned to go back and the bucket went down before I could get to it.

Q How many men went down in the bucket ?

A Four.

20 Q Did you ever see any more than four go down at a time ?

A I often see five.

Q You would have made five if you had got on ?

A Yes.

Q Do you know what kind of a bail and hook this bucket had ?

A Yes, it was a hook without that clevis.

Q (Showing witness diagram) What kind of a bail ?

30 A That is the shape of the bail.

Q Was there any rope upon the bail ?

A Yes, there was a piece of rope across the bottom of the eye.

Q Do you know what kind of a rope that was ?

A About as thick as my finger, I should say.

Q Do you know who put that rope there ?

A I don't.

Q Do you know how long it had been there ?

A I don't.

Q Did you see that rope on that after the accident happened ?

A I didn't see the bucket for a while after ? I seen it but it wasn't working.

Q Did you see it before the rope was taken off it after the accident happened ?

A No.

Q Do you know how that rope was fastened ? 10

A No.

*Cross Examination.*

Q What did you do in the shaft ?

A I used to be filling rocks in the bucket and sometimes bailing water.

Q Did you drill any ?

A No.

Q Did you see the men drilling ?

A Yes, many a time. 20

Q When they were drilling holes in the rocks, did they put anything around the drill ?

A Yes, they put a thing they called a washer to keep the water from slopping in their eyes.

Q What was that washer ?

A A piece of leather with a hole in it—sometimes a cloth, sometimes a rope—anything to keep the splashes from going in their faces.

Q These pieces of rope that went down and were used for washers, how did they get them up and down ? 30

A I don't know ; each man would look out for himself.

*Re-direct Examination.*

Q Your business was at the bottom of the shaft, to fill the bucket with rock and water ?

A Yes, sir.

Q Was there any person stationed at the bottom of the shaft, whose business it was to see that the buckets were all right, except when they were filled with rock and water ?

A Not to my knowledge.

*Re-cross Examination.*

Q How much rock did these buckets hold ?

10 A I couldn't exactly say.

Q Would they bring up a ton ?

A No, I don't suppose they would hold a ton they would hold about twelve hundred or so.

*John McNamara*, sworn for plaintiff, testifies as follows :

*Direct Examination.*

Q Were you there in the employ of McAndrews at  
20 the time these men were killed ?

A Yes, and before.

Q What were you doing ?

A Drilling.

Q Where were you at the time the accident happened ?

A I was in the heading ; I went down in the first bucket.

Q What was the first you saw or heard in reference to it ?

30 A When I was in the heading cleaning out the stuff I heard a moan outside—just a holler like ; and I heard the shock of the bucket, and I couldn't exactly say whether it was a rock that fell or was it a mishold ; I went out that time ; with that I came out and stood on the bench, and the water boy that was there at the time hollered and said the men was killed ; with that I went out and there I see the men.

Q Do you recollect what kind of a bail was to this bucket, and what kind of a hook ?

A Yes.

Q Is that the hook there ?

A I couldn't exactly say ; it is like it.

Q Was there any rope attached to the bail ?

A Yes ; at the bottom of the eye.

Q When did you see that rope ?

A I seen it just the same night ; that is a rope that was put on there for the purpose of holding the long steel in so it would not strike the sides going up. 10

Q The tools or steels were sent down in the buckets and that was put on for the purpose of preventing its striking the sides in coming up ?

A Yes.

Q How long had it been on ?

A I couldn't say.

Q Do you recollect when you had seen it before ?

A I know it was over two weeks—probably more ; it used to be sometimes on and sometimes off. 20

Q Do you know how that rope was fastened ?

A It was tied around the bail both sides.

Q What kind of a rope was it ?

A A bit of hemp rope ?

*Cross Examination.*

You say that was put on to keep the steel in ?

A Yes. 30

Q You sent steel down in the shaft ?

A Yes.

Q How long pieces ?

A Sometimes two feet, sometimes three feet, and according to the length of the steel, probably six feet and less.

Q And it was stood up in the bucket ?

A Yes, because if it was laid in the bucket it would strike the side going up.

Q So it was stood up in the middle of the bucket?

A Yes; the rope was put on to keep it up straight; I often put a steel in like that myself.

Q (*By the Court*)—How did that hold the steel up?

A The steel would be put down between the rope; it used to lean against the rope; in between the ropes.

10 *Re-direct Examination.*

Q How often did they take up steel and let it down?

A I could not say.

Q Once a day or once a week?

A Sometimes twice a day, according as they would be dull they would be sent up to be sharpened and sent down again.

20 *Examined by the Court.*

Q On these buckets where there was a loop instead of an eye what kind of an arrangement was made for carrying the steel?

A I don't know about that.

Q Some of the bails had a turn at the top instead of this eye?

A Yes.

Q You have seen this bail that is turned on top here?

30 A Yes.

Q Were there bails on any of the other buckets arranged different at the places where the hook fastened?

A Well, for what I have seen there is none but just like that.

Q Do you recollect seeing any closed ones with a loop?

A Yes; there is some that now are closed entirely.

Q In those what arrangement was made for carrying the steel, if any?

A I don't know. The short steel we would put in the bottom of the bucket.

Q Was there any arrangement on those for carrying the long steel?

A No, sir.

Q Did you see some buckets like this with a closed eye? 10

A I guess I did.

*Henry Kelley*, for plaintiff, sworn, testifies as follows:

*Direct examination:*

Q Were you in the employ of McAndrews last December, at shaft No. 5?

A Yes.

Q What were you doing? 20

A Blasting.

Q Where were you when these men were killed?

A At the engine house.

Q What were you doing?

A Nothing.

Q Were you preparing to go down?

A No sir.

Q Do you know what kind of a bucket and bail and hook was used?

A Yes. 30

Q What kind of a bail was it?

A The bail was one without any loop.

Q Were some of the bails looped bails?

A Yes, so far as I can remember, there was one looped bail.

Q Was there any fastening on the hook?

A No.

Q Was there any rope upon this bail ?

A Yes.

Q Whereabouts ?

A Under the eye, across from one side to the other.

Q Do you know for what purpose it was put there or used ?

A I believe it was to protect and keep the hook from dropping out, and it was sometimes used to keep the steel up.

10 Q How was that rope fastened ?

A Well, sir, I believe it was tied.

Q How long had the rope been there ?

A I dare say two or three weeks.

Q Do you know who put it there ?

A I don't know except it was the topman.

Q Did you see the rope after this accident ?

A No.

*Mary Burns*, the plaintiff, sworn in her own behalf,  
20 testifies as follows :

*Direct examination.*

Q You are the widow of James Burns ?

A Yes.

Q Where were you living at the time of this accident ?

A Near No. 5 shaft.

Q What is your age ?

A Twenty-four.

30 Q How old was your husband ?

A Thirty-three.

Q How many children have you ?

A One ; it is three years and one month old.

Q Who supported you and your family ?

A My husband.

Q Do you know what wages he was getting ?

A I am not exactly sure, but part of the time he

was getting two dollars, and a dollar seventy-five at other times.

Q Did he own the house he lived in?

A No sir; he rented it.

Q Do you recollect the time when this thing occurred?

A Yes.

Q Your husband was brought home a corpse?

A Yes.

Q Did you see Mr. McAndrews?

10

A No.

Q Did you ever see him?

A I often saw him passing.

Q Since your husband's death have you seen him?

A No.

Q He didn't come to the house?

A No.

Q Did he assist you any after the accident?

A No.

Q What means of support have you now?

20

A My two brothers—and I keep two boarders who work for McAndrews.

Q Your husband left no property?

A No.

Q You took out letters of administration?

A Yes.

[Plaintiff rests, subject to calling Mr. Donnelly, if it becomes necessary, if he comes in before case is closed.]

30

Defendant moves to nonsuit the plaintiff, on the ground that there is no evidence whatever of Burns, the deceased, being the employee or servant of McAndrews, and even if they had shown the employment, there is still no ground of action shown, because it does not show any fault in the defendant, for which the law makes him liable. Plaintiff has not

shown affirmatively that he was guilty of any negligence himself.

After hearing the argument of counsel on both sides, the Court withholds ruling on the motion to nonsuit, and directs the case, on the part of the defendant, to be developed, and will rule specifically on the question of nonsuit, at the close of the case.

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DEFENCE.

*Mr. Lippincott* opens for defendant.

*John McAndrews*, the defendant, sworn in his own behalf.

*Direct examination :*

Q Where do you reside ?

20 A Old Hudson City ; New Jersey City.

Q How long have you been resident of Jersey City ?

A A little over two years.

Q What is your business ?

A Contractor, engaged in building the tunnel through the hill.

Q How long have you been engaged in that ?

A Since about August, 1873.

Q Before that time what was your business ?

30 A Contractor for the company for the last 16 years, on the line of this road, for the Delaware, Lackawanna and Western, from Syracuse to Hoboken, on their line, in all places where they had work to do.

Q What kind of work ?

A Excavation and masonry, and mining. I had charge of the sinking of their shafts at Scranton, and fixing up their coal works. I have done some work outside for other companies, excavating rock ; some

for the Pennsylvania railroad company, some for the city of Scranton.

Q Your mining at Scranton was for the Delaware and Lackawanna ?

A Yes.

Q Have you constructed any other tunnels for this company ?

A Small pieces.

Q And for other companies ?

A I didn't construct a tunnel for any other company but this one. 10

Q In mining at Scranton what kind of buckets did you use ?

A The same as I have here, and the same kind of drums and apparatus as I have on this work.

Q In the mining operations there did you use the same kind of buckets that have been used in shaft No. 5 ?

A They are the very buckets I used on work that I have here. 20

Q [By the Court.] Which work ?

A The Delaware and Lackawanna work at Scranton.

Q How deep were those shafts ?

A About 320 feet.

Q You had the same buckets there that you used on shaft No. 5 here ?

A Yes, the same buckets here.

Q Were those the same buckets in use here at the time of this accident ? 30

A I think so.

Q Have you been in any other mines or tunnels where work was going on ?

A Yes, I have.

Q Where ?

A I have been on the Jugtown tunnel ; that is the last tunnel on the Lehigh Valley.

Q Did they have shafts on that tunnel ?

A Yes.

Q What was the apparatus they used there ?

A The same as we use here ; that is what is used in all sinking.

Q Have you seen them used anywhere except in your own operations ?

A Yes, I have seen them in several other shafts of our company, and the Pennsylvania company, and  
10 several other small operators. These are the kind that are in general use.

Q When did you commence to sink shaft No. 5 ?

A I suppose it was late in the season of 1874. I could not tell you the time.

Q Who was your superintendent at the time ?

A When we commenced that it was a man named Sidney Mears, but there was not much done on it till Mr. Adam took charge of it.

Q Were the headings reached when Mears was  
20 there ?

A No.

Q How long was Adams superintendent there ?

A He was there at the time this accident occurred, and ever since except about a month, when he was sick and away, but that was after the accident.

Q As to the arrangement of your hooks upon those buckets, what were your orders to Mr. Adams ?

A The orders was always to Mr. Adams to see and keep these all in good order, and to the blacksmith.

30 Q Who was blacksmith there then ?

A There was so many of them there I could not remember his name, but I think his name was Jackson.

Q How long was he there ?

A I couldn't say.

Q Did you have a blacksmith at shaft No. 5 ?

A Yes, there is a blacksmith at every shaft.

Q You always had a blacksmith at shaft No. 5 ?

A Yes.

Q Did you have a shop for him ?

A Yes, and tools such as were required.

Q In relation to this hook, did you give to Mr. Adams, or any of your employees, orders as to these clevises ?

A These guards, we gave orders to them to keep them always in good order.

Q Did you give orders to Mr. Adams, or your employees, to have those furnished ? 10

A I think I did, sir ; and to see that it was done.

Q Are all of your hooks constructed for those guards ?

A Principally. Three is another different guard beside this, but we think this is as good a guard as we can put on.

Q Who did you give instructions to ?

A Mr. Adams. Some of these were on before Mr. Adams came, in other shafts, and they were built to the same patterns. We got different patterns of these, but 20 this was the pattern that was at that time.

Q In case the guards were broken, or got off by any means, what were the instructions to those in charge—the superintendent and those in charge about it ?

A Their business was to look after this.

Q Where should they go ?

A To the blacksmith's shop, to get them made, and if they knew it they always did it, and used as great a precaution as they could to look after it. Some times 30 the men would take hold and break them off.

Q How do you know that ?

A I heard it from the men themselves saying they would rather have it open.

Q Do you mean these men that were employed ?

A Yes ; these men that was employed would rather have it without the guards on where they worked with

two tubs, one for water and one for rock ; but we always cautioned them to keep this thing in good order.

Q Who else did you have here to manage these things besides yourself and Adams ?

A Mr. Welsh was there some of the time, and one or two more men. Michael C. Brown was the superintendent for the night ; the foreman that had charge of the shift, Leary I believe is his name, he was there, and he had the same precaution to look after these.

10 Q How is your time employed on the tunnel ?

A Sometimes I go over the work once or twice a day, sometimes not at all ; I have done my own purchasing principally for the supplying of the work, and I would have to be most of my time in New York looking after such things as they would require ; may be once every other day or once a day ; when things was required on the work I would be there.

Q About how much of the time does that take you away from your work ?

20 A At that time it took more than a half of my time away, but lately it doesn't take so much time.

Q You did all the purchasing of the materials for the construction of the tunnel ?

A Mr. Bragy may have done some little of it in the powder line and other small items.

Q How many men have you had on an average ?

A Sometimes 600 to 900 ; sometimes my timekeeper would report to me a 1,000.

Q Did you know James Burns ?

30 A Yes.

Q When did you first get acquainted with him ?

A About the time the tunnel commenced.

Q You employed him to work there, did you ?

A Yes.

Q In what capacity ?

A As laborer for quite a while.

Q When was that ?

A I think it was about January, 1874; I wouldn't be sure about the time.

Q Whereabouts was he employed as laborer?

A On the east approach of the tunnel.

Q How long was he employed there?

A I couldn't say; I didn't keep his time; that was done by timekeepers.

Q To what other position did you appoint him?

A To No. 2 shaft; I gave him charge of a shift there. 10

Q He was there as foreman?

A He was there for about a couple of months.

Q Where was his duty?

A Below.

Q Do you know how long he was engaged in No. 2 as foreman?

A Two or three months.

Q What occurred then?

A He and the men seemed to have a quarrel, and we had a good deal of trouble getting men to stay with him, and he began to quarrel with the engineers; he said he wouldn't have that engineer to run that engine; they quarreled with one another and I came over at the time of the quarrel and he was pretty well elevated with liquor, so that I told him he was discharged; he said he would not take no discharge from me, and all the men rose in a mob that night against me. I left them alone that night and went away, because I believed they were all near alike in that same shape, and I came the next morning and I told him he must consider himself discharged, and he could go to the office and get his pay. 20 30

Q Was anybody discharged there on account of him?

A I discharged him and the engineer both.

Q Was the engineer taken back again?

A I believe he did come back again.

Q When was Burns discharged ?

A I think it was in July some time.

Q Did he come to the office ?

A He didn't come to the office, but he came out to the west end of the tunnel, and said he wanted his pay, and I had the paymaster there along with me, and I paid him in the place where he met me.

Q Who was present there ?

A Mr. Bragy, the paymaster.

10 Q Who was present at the time you told him at the shaft he was discharged ?

A All the men where there ; I don't remember any of their names.

Q When you discharged him, what did you say to him ?

A I told him he was discharged, and he never could get another tip on that tunnel.

Q Another tip on that tunnel ?

A Another day's work on the tunnel.

20 Q You paid him !

A Yes.

Q When was that ?

A Sometime in July.

Q Did you ever employ him to work on the tunnel afterwards ?

A No.

Q Did you ever authorize your agent or any employee to do so ?

30 A No ; I told the superintendent, Mr. Adams, and all our men—I cautioned them not give him any more work on that tunnel.

Q You told all those that had power to employ men, not to employ him ?

A I think I did ; I don't know that I told them all ; I told the superintendents, both Brown and Adams.

Q They had power to employ men ?

A Yes ; there was no other one had power to em-

ploy men ; Adams had power and Mr. Brown had power to put men to work.

Q Anybody else ?

A I notified them that nobody except the superintendents had power to put men to work there, after I found they were taking in more men than we wanted. These men that had charge of shifts had no power to hire a man nor to discharge a man. I gave that order to Brown and Adams and to John Brisbin, Jr.

Q From the time you discharged Burns, till the time of the accident, did you know of his employment there ?

A I did not till I heard that he was in that accident. I met him several times, but he never asked me for a day's work. I didn't know of his being to work there at the time of this accident ; several men could work there, and I know nothing about it ; you wouldn't know them if you were in there.

Q Did you ever meet him on the work ?

A He was on the line of the work, but I never met him in any active service in the work.

Q (By the Court) How often did you pay your men ?

A Once a month.

Q Who did that ?

A My son.

Q You had the pay roll with all the names ?

A Yes ; but I never examined the pay rolls at all ; Mr. Bragy and my son attended to all that matter.

Q (By the Court) Do you know whether or not Burns' name was on your pay roll from July up to the time of his death ?

A I did not, nor nobody reported it to me.

Q (By the Court) If he was he received his pay ?

A I suppose so ; I left that to others, to my book-keeper and my son to attend to that matter altogether.

Q Where were you at the time of this accident ?

A Pretty close to No. 3 shaft ; I was in the office.

Q How soon did you hear of it ?

A Probably half an hour or less than that after it happened—as fast as a man could run from that place to the office.

Q Did you go there ?

A Yes ; they were all taken away at the time I got there.

10 *Cross-examination.*

Q Were Adams and Brown superintendents at the same time ?

A I think so, one for the night and one for the day.

Q What was their special business as superintendents ?

A To see that there was tools and powder and all other apparatuses which is required for our work, and  
20 to employ men.

Q When did Mr. Adams commence his service with you as superintendent ?

A I think in June, 1874.

Q Did he continue till after this accident ?

A He did.

Q When did Brown commence with you ?

A He has been there very nearly since we commenced work there ; he has the night shift.

Q You yourself purchased and furnished the materials and implements with which this work was carried out ?  
30

A Yes.

Q Did you bring the machinery with you, or purchase it after you came here to commence the work ?

A I took some of it here and some I had built here ; some purchased already built.

Q Did you buy a considerable amount of second-

hand implements, apparatus, tackling, engines and so forth?

A Yes.

Q What did you do when you were about your work here?

A Looking how the work was going on.

Q Did you go down the shaft sometimes?

A No; I haven't been down the shaft.

Q You looked around the top?

A Yes; on the top or in the ends. 10

Q Did you inspect the machinery and things in use?

A Yes; when anything is reported to me wrong with the machinery, I go as fast as I can, but we never had any trouble with our machinery, ropes or hooks, or anything else.

Q You went sometimes in the night time and sometimes in the day time?

A Yes.

Q Did you stop sometimes to talk with the engineer, and ask him how things were going? 20

A Yes.

Q Sometimes stopped to talk with the topman?

A Very seldom I talked to the topman; I don't think I did hardly ever unless I see something going wrong; I didn't consider it my business to interfere with superintendents; if anything was going wrong I would report it to them.

Q The superintendent had nothing to do but superintend and overlook and see that things were going along properly? 30

A Yes; inside and outside.

Q To see that the men were there at work?

A Yes; to see there was proper care taken of our work.

Q (*By the Court*): Whose business was it to see that the men who were on the pay roll were actually at work?

A The superintendents.

Q You hardly know what the whole duty of the superintendents was ?

A Yes, I do, because I told him what his business was.

Q Was it his business to see that the men who were on the pay rolls had been actually at work ?

A I should think so ; we had two time keepers—they would keep the time.

10 Q Who were the time keepers ?

A Joseph Hand, and another young fellow named Reynolds.

Q They were time keepers ?

A Yes.

Q Adams and Brown were called superintendents ?

A Of the work.

Q They were superintendents to look after things when you were not there ?

A Yes, and when I was there they had charge of it.

20 Q When you were there you were chief superintendent of the whole work ?

A Certainly.

Q Did you ever look at the machinery with which they were at work ; the engines, the hoisting apparatus, the drums, the ropes, the buckets and those things ?

A I did, time after time.

Q You kept your eye on those things to see that they were right ?

A I did.

30 Q You gave instructions to have clevises on all those hooks ?

A Yes.

Q Did they keep the guards on the hooks ?

A Sometimes they did and sometimes they didn't ; it appears by this one that they didn't keep it on ; that they took it off.

Q How did they do at the other shafts ?

A Some of the other shafts did the same ; took it off.

Q Did you see them off ?

A Yes, I did.

Q Why did you direct them to use guards at all ?

A They wanted them when they are dipping out water. Sunday they let the water flow in, and about 12 o'clock Sunday night they begin to dip out water; without having this guard on, the hook will slip off the bucket and it wouldn't fill itself in hoisting up. 10

Q A hook with a guard on you consider safer than one without the guard ?

A It is safe to take a bucket up when you are dipping water.

Q Is n't it safer with the guard than without the guard ?

A I suppose it is.

Q Wasn't that really the reason you directed the guards to be used, because it was safer ?

A The reason I directed the guards to be used was, 20 because we had to dip out water, and if you let the bucket go down it would tip over, and the hook would go out unless you had a guard on.

Q When a bucket of stones or rock was brought up, a man would be there to see that it was hooked ?

A Yes.

Q When the water was taken out the man was below ?

A Yes; he was below to bail the water till he would take the last of it. 30

Q Were there any other means furnished to the men for descending into the shaft except by means of this hoisting apparatus ?

A There's a scale on some of the shafts.

Q Was there any scale at this No. 5 ?

A I don't think there was then, because there was

not much done there then ; the shaft was only just about sinking.

Q How deep was the shaft when this happened?

A Between 60 or 70 feet.

Q How deep did it have to go?

A About  $77\frac{1}{2}$  feet.

Q Were they not at work at the heading in the tunnel?

A They were just sinking—entering the heading in the tunnel; then they had to go 24 or 25 feet deeper.

Q Did you ever notice this hook at shaft No. 5, with the guard off it?

A I did not.

Q Did you ever give directions when you saw a hook with the guard off, to put it on and use it?

A I got new hooks made with guards on, for fear any one would give out, and I gave them directions to do so.

Q When you would visit any shaft and see the hooks being used with the guards off, did you tell them to put the guard on and use it?

A I think I did; they couldn't hoist water without it.

Q Was not the guard upon the hook a safer means of letting men down in the shaft?

A No; it is just as safe the other way; it is as safe one way as the other; the guard is merely for the hoisting of the water; you can't dip the water out of the shafts without losing your tub, unless that is on.

Q When the 30 men are let down into the shaft, has it been the practice to keep a man at the bottom to see that the hook was in the bail when it came up?

A Yes, generally; because there is always a man at the bottom.

Q How do you know that?

A A man is placed there for that purpose.

Q Who had you there at this shaft No. 5 for that

purpose? When one tub comes forward filled with rock they change that from one to the other. Do they let one bucket down to bring another up?

A While one is loading, the other is going up. They can't dip water out any of the buckets without the guards was on. If they did they would lose their bucket. It must have been taken off. I didn't see it taken off; because when they would begin to dip the water they would have to put it on.

Q If they let the bucket down to dip water itself, 10 they must have the guard on?

A Yes; or the hook would go out of the bail if you didn't have it on.

Q Do you know how this accident happened?

A No.

Q Did you ever see the rope upon this bail round the bottom of the eye?

A I guess I did.

Q Do you know who put the rope there?

A No. 20

Q Do you know what it was put there for?

A I don't know.

Q Were the bails to the buckets at the other shafts, such as this with the eye or with the loops?

A Some of them with an eye and link, and some like this, some with a hook, and some for hoisting water, some for hoisting rock. We tried every kind.

Q You say you noticed a string tied on the bottom of the eye; what was that for?

A I think it was to not let the hook out. 30

Q If that hook had been in an eye or link, would it have slipped out of the loop?

A Sometimes it would; sometimes it would run round on the bail; it is owing to how much slack the engineer would give to the rope; it would sometimes come out, sometimes not.

Q But when the bucket touched the bottom, the hook would slip out?

A It would probably slip out.

Q It could not get out so easily if it was in an eye, or link, or loop?

A I guess it would not; but there's always a man on the bottom to always hitch on the hook.

Q The most of them that you had, had an eye and a link?

A No; there's as many of this kind as the other. We have tried them every way, and found this works  
10 as well as any.

Q Where a great many men are being let down into a shaft, wouldn't it be a much safer contrivance, to have a hook always supplied with a guard, like that hooked into the bail?

A It would be safer, and we had that safety; but the men themselves would take that off, and we could not watch them all the time.

Q Did you ever see the men take it off?

A No; but I have seen it off, and ordered it on  
20 again.

Q Did you ever see it off at this shaft?

A I don't think I did.

Q You have seen it off at other shafts?

A Yes; and I ordered it put on again.

Q Did you tell the men at the other shafts it was safer for themselves to have it on?

A Of course I did; but the men always thought it too much trouble to be taking it off and changing it on the buckets, till we began hoisting the water; and  
30 then when they began hoisting the water, this was put on and remained on till the water would be up.

Q The men that went down the mine to work—that is the drillers—had nothing to do with the fixing of that hook?

A Yes; they had all to do with it; every man going up and down has to do with it.

Q Hitching on the bucket and taking it off—whose business is it?

A The man that stands at the top, and the foot man; there is a man above as well as below.

Q Was there a man always kept at the foot?

A Always one was engaged to be at the bottom, to hoist it up.

Q Was there a man kept at the foot, when they were lowering the men down and hoisting the bucket up to take other men down?

A There was a man allowed for that; I could not say whether he was there this time or not. 10

Q Was Adams the next superintendent after Mears?

A Yes.

Q Did you have a man by the name of Price?

A Price was in Mr. Brown's place. Adams was superintendent at this time when this happened.

Q What were you paying you men at this time?

A The majority of them \$1.60 and \$1.50, owing to the kind of work they were doing.

Q Do you know how many men have been killed at this tunnel? 20

A I didn't kill any.

*Re-direct examination.*

Q When you say the rope was put there to prevent the hook from coming down, which hook do you mean?

A The side rope, the guy—I mean the side hook that hitches on to the bail to draw it one side and dump it. 30

Q You were asked if there was a cord tied around the bottom of the eye?

A No; I never saw any cord tied around the bottom of the eye; what I had reference to was the dumping rope; I never authorized anybody to do it.

Q (By the Court.) What did you mean when you

said the rope was to prevent the hook slipping on the bail ?

A I meant the side rope that is hooked on to the bail ; there was an iron band on one of the bails, under the eye.

Q (By the Court.) Did you or not, at No. 5, see a rope tied around the eye to answer the purpose of that iron band ?

A They didn't require any rope there at this shaft,  
10 because this guard was there, and if it was not on they had it there to put on.

Q The question is this: At shaft No. 5, did you ever see a rope around the bottom of the eye ?

A No sir ; nor I don't think there was one ; I meant the side rope, the tag rope.

Q You say you keep these guards ready-made ?

A Yes, and they were in use at this time.

Q Where were they kept ?

A At No. 3.

20 Q They were for the general use of the tunnel ?

A Yes.

Adjourned for the day.

Dec. 31st, 1875.

*The Court.* On this question to non-suit, I have come to the conclusion that there are some questions of fact in the case that the plaintiff is entitled to have  
30 submitted to the jury. I therefore decline to non-suit, and defendant may an exception if he wishes.

Defendant excepts to the refusal to non-suit, and prays that his exception may be sealed, and it is sealed accordingly.

M. M. KNAPP.

Mr. McAndrews' *cross-examination* continued by Mr. Linn.

Q Did you say yesterday that a man was employed to keep at the bottom of the shaft all the time to hook on the buckets when the men get down, and before the buckets were taken up?

A There's a man kept at the top and the bottom for hooking on the bucket, and the one at the top gives a signal to the engineer to lower and hoist.

Q That was done all the time before the accident?

A That is the customary way.

Q That was the customary way?

10

A That is the orders.

Q Was that done?

A I don't know whether they were all the time there, but they should be there. You could not hook and change a hook at the bottom without there was a man there.

Q Whose duty was it to see that the man was kept there?

A The duty of those men having charge of the shaft, and the duty of the superintendent, when he was there. He could not be there all the time. 20

Q Did you say that there was any scale at any one of the shafts before this accident happened?

A I would not be sure; I know there was scales there, but whether there was at this time or not I cannot say.

Q There has been since?

A I know we are using them now, as well as tubs, but whether they were there before the accident I cannot say. I don't think there was, though, at that shaft. 30

Q Is there at that shaft now?

A I don't know.

Q What is a scale?

A A platform about as wide as this table, square, with three chains on it, two on one side and one on the other, to hoist dirt and rock.

Q And not for letting men down and taking them up?

A Men go down and up on it; they take their ways of going up and down. I will pronounce the tub a great deal safer than the scales.

Q What do you mean by tubs?

A Buckets.

Q Why is the bucket safer than the scale?

A Because they have better chances to stand on it,  
10 and a better balance.

Q The scale has a solid bottom, and they stand on the bottom, don't they?

A They stand on the edge around and take hold of the rope.

Q Why is the bucket safer than the scales?

A Because it is built of better and stronger material.

Q The bucket can tip?

A It never does tip; we have it so fixed that there  
is no tip to it; it never did tip.

20 Q You said yesterday you reside in Jersey City?

A Yes.

Q Where is your family?

A They are here, or most of them.

Q Whereabouts do you reside in Jersey City?

A I don't keep house myself, I stop over here in Finck's some of the time, and I have been around where it happens at night.

Q You have no permanent abiding place—no house where you make your home?

30 A No, unless it is with my son; my son is living here and keeping house.

Q Do you make that your home?

A Not all the time; my business calls me to the other side of the river to see the chief engineer; may be some nights I stay over there, and some times over here.

Q Don't your family reside at Hyde Park, Pennsylvania?

A No sir, not one of them.

Q Doesn't your wife reside there ?

A No sir.

Q Where is she ?

A In Scranton, I believe ; that is something I don't know within a few days ; she may be down here. I don't keep house now

Q Did you ever discharge one of these superintendents for drunkenness ?

A Which one ?

10

Q Either Brown or Adams ?

A I never did.

Q Did you ever know that one of them was addicted to the excessive use of intoxicating drinks ?

(Question objected to and withdrawn.)

*Michael C. Brown*, for defendant, sworn, testifies as follows :

20

*Direct examination.*

Q You reside in Jersey City ?

A Yes sir.

Q How long have you resided here ?

A About twenty years.

Q What is your business ?

A Sometimes superintendent, and other times contracting myself.

Q In what line ?

30

A Different constructions, principally in tunnel works and rock work, constructing avenues &c.

Q How many years since you were engaged in tunnel work ?

A About 28 or 29 years ago.

Q Where was that ?

A In England.

Q What kind of tunnels ?

A Long constructions ; same character as this here, some larger and some smaller.

Q In this country, where ?

A I have been in this country on the Erie road, and on the State road, Pennsylvania.

Q Whereabouts on the Erie road ?

A This Erie tunnel through the hill here.

Q You are now engaged in what ?

10 A I take charge of the night shift in the Delaware and Lackawanna tunnel, now in construction.

Q How long have you been engaged in that work ?

A About a year and a half.

Q What are your duties as superintendent ?

A My instructions as superintendent is, to see that the night gangs do their duty according to the plans; and see that the stationary foremen do their duty correct; and see that the cables are all sound, and bails and buckets and fastenings in good order.

20 Q You are on the night shift altogether ?

A Yes, pretty much so.

Q How many times do you pass over the work ?

A Sometimes six or eight times; sometimes two, three or four times, as business requires it.

Q Over the whole line ?

A Yes, pretty much so.

Q At every shaft ?

A Yes; wherever the chief business is to attend to; wherever there is any bad roof, or extra drilling, that  
30 calls my attention more than where it is solid rock.

Q Are you inside or outside ?

A Inside and outside both.

Q Do you go down the shafts in the progress of your work ?

A Yes.

Q How do you go down ?

A On the bucket; and sometimes I step on the scale

—principally on the bucket—if the bucket is up I prefer the bucket.

Q Why?

A Because it is more substantial to take hold of the chain, and it is a nearer reach to catch hold of the main cable than to take hold of the three chains of the scale.

Q Which was the last tunnel you were engaged at work in, previous to this tunnel?

A The West Point tunnel. 10

Q Does that have shafts too?

A No, no shafts.

Q Where was the last tunnel that you worked in that had shafts?

A The Erie tunnel.

Q What kind of machinery was used there?

A The same kind of buckets; some of these buckets I prefer to some we had on the Erie; we were improving them as we went along, but these are better and more substantial bails. The other bails were principally flat. 20

Q The same kind of buckets?

A Pretty much the same shape.

Q What do you mean by flat bails?

A Made of flat iron instead of round iron.

Q How were they fastened to the hook, these buckets?

A A plain open link and hook connected to the bail.

Q (Showing witness hook) How were the hooks? 30

A Like this.

Q. How were the bails?

A Some of them was connected with the bail by a clevis, and then the hook was hooked into that.

Q That construction would be in the flat kind of bail?

A Yes, that was in the flat kind.

Q Besides the Erie tunnel what other tunnels have you seen these used on ?

A I have been on a great many tunnels ; I have been through the Ashton and Underline tunnel and through the Huddersfield.

Q Did they use the buckets there ?

A Yes, some places ; some places they run them out in the ends where there was no shafts.

Q How do these contrivances in the tunnel now  
10 being operated for the Delaware, Lackawanna and Western, by McAndrews, compare in safety ?

A The means of elevating the rock is pretty much the same construction, I haven't seen any better, and I believe there is no better buckets than there is used on this tunnel.

Q Why ?

A Because they are substantially made, and when there is any signs of their being out of order they are ordered to the jobbing shop for repairs ; we have one  
20 always on hand to replace it.

Q You know the location of shaft 5 ?

A I do ; I sunk that shaft from the top to pretty near grade before I was taken to oversee the night work.

Q Did you know James Burns ?

A I did ; I hadn't much acquaintance with him at all.

Q Did you know him when he was at work on the tunnel ?

A I heard his name before I knew his features.  
30 This was the first work I ever knew him to be on.

Q (By the Court) Which was the first ?

A This work here was the first place I ever knew him to be in.

Q (By the Court) Do you mean in No. 5 shaft ?

A I had no acquaintance with him till just before

he got killed ; it was only a few days before he got killed that I heard his name was Burns.

Q Did you employ him ?

A No sir, I have no personal knowledge of it.

Q You say you never knew of him ?

A I heard the name of Burns spoken by the men, but I had no acquaintance with the man ; I would not recognize him till a few days before his death.

Q Do you know how he came to be at work in shaft No. 5 ?

10

A I don't know how he came to be employed there. There was several gangs talked to me about work, but I have no personal knowledge, and it was against the order or rule of the work that any foreman could hire any man without my consent or Mr. Adams'. If the foreman put him to work it was against the rule, or any other man, without my consent ; that was my instructions to the foreman.

Q Who were the persons authorized to hire men ?

A I was when they were needed, by application of the stationary foreman to let me know that they wanted men ; then I would select the men and send them there on my shift.

Q Did you ever select Burns and send him to this shift ?

A I never remember that I did.

Q (By the Court.) Do you remember whether you did or not ?

A I remember I did not, because I would either go with the man or send a note with him ; that was my practice, I always went with the man to the foreman or else gave him a written note.

Q Had you heard of Burns' being discharged from No. 2 ?

A Yes, I heard the men talking about it ; I heard the men talking about a man being discharged, but I was not acquainted with Burns then.

30

Q This contrivance fastened to the buckets for lowering them and bringing them up and taking down and bringing up materials, did you see that at shaft 5?

A Yes, I rode up and down several times on that bucket.

Q Did you examine it so closely as to identify the hook that was there?

A I believe this is the same hook, if it is not, it is one just like it. A man can't help seeing the hook  
10 and the bucket; the hook and the connection to the bail is midway between the foot and where you take hold with your hand, so you must see where you stand on as well as where you take hold of the rope.

Q At shaft No. 5 you had a topman there; was anybody below?

A We always had men employed, one for the top and one for the bottom. The topman's duty was to receive the bucket and see that the contents is dumped and delivered above. The duty of the man at the bot-  
20 tom is to see that the hook is put on when a load comes there; first he gives orders to hoist—it stands a little while till the cable straightens—then he gives orders to hoist away and it will go up. The first order is given to the man at the top, and then the topman gives it to the engineer. When it goes to the top the contents is delivered. If it is men, they are let out on the platform; if it is material, it is dumped on the dumping ground.

Q Suppose you were taking men down?

A The bucket is hoisted to the level of the shaft  
30 and steadies there till the men get on, and then the topman tells the engineer to lower down when they are ready. When they are down the shout comes to hoist, and it comes up and then another gang gets on.

Q Where is the topman's duty?

A To stand by the bucket.

Q What is his duty in relation to it when it comes up?

A His duty is to receive it and see that the bucket stands there without raising or lowering till they get off.

Q Suppose a bucket comes up empty?

A Then the engineer can see the bucket when it comes up. The topman is to see that the men get on and let them down; then his duty is to give the word to the engineer to lower them down.

Q Before the men get on what is his duty?

A To stand still there till the men get on. 10

Q Does the topsman look at the hook before the men get on?

A They are supposed to.

Q (By the Court.) Has the topsman any duty to perform in reference to any hook or attachment of the bucket?

A Yes, when changing them above it is his duty to make the change of buckets. When no change is to be made to bring them to the proper position at the top, to lower it according to orders. 20

Q (Showing witness apparatus.) There is a clevis and guard; what is that used for?

A That was principally for dipping the buckets, bailing water. On Saturday night the miners are all idle; there is no mining work done from Saturday night till Monday morning, and Sunday nights the water may be six or seven feet high, consequently to save the cable from getting off the hook we put this on; this is so that when we dip the bucket down it tips itself, by means of a weight on one side of the bucket. 30  
Then there is no man below to attend to it, because the water is too deep. If it is so low that the bucket cannot exactly fill itself, there is a man to bail, and they may use two buckets, and they change this cable from one bucket to the other, and there is no necessity for for this on at that time.

Q Did you ever see that guard attached to the hook in No. 5?

A Yes, or one something of this character.

Q (By the Court.) When?

A I could not exactly say when.

Q Before or after the accident?

A I think there was a clevis on while they were dipping water before; I took no notice of the date.

Q How far had shaft 5 proceeded by December 23, 1874?

A Not very far; they were not down to grade yet.  
10 I know after that there was some excavation in the bottom.

Q What has been the custom about using those guards, in hoisting men and materials and letting them down?

A I don't know any use it is. Generally the engineer has a mark on his cable.

Q (By the Court.) The question is, what has been the custom as to using this?

A In fact I never saw one before used in lowering  
20 men. This is more designed for dipping water. The engineer has a mark on the cable on the drum, and it only comes up to the mark; it may come up a little higher by accident, but he has to lower it to the position of the men before they get on. That is his duty.

Q How often did you visit shaft 5 before the time of this accident?

A Sometimes I have been six times a night through up and down.

Q Generally on an average?

30 A I have been day and night through them; I might sometimes be two to eight times, according to my calls along the work.

Q Was there any night that you were not there?

A I don't remember a night that I was not there to see about the work, to see that the foreman is on duty, and the blacksmith and engineers.

Q Did any of the men engaged at that shaft, either

Burns or any of the men there, ever complain that the apparatus for lowering them was not safe?

A No; I never heard a word about that; if they did they would be apt to tell me.

Q Did you hear anything—did they tell you or make any complaint?

A They never told me it was dangerous to come up or down the shaft; I never heard complaints about danger of going down the shaft.

Q At times when you were there, was anything asked by the workmen there for their protection that was not furnished?

[Question objected to.]

Q Did the workmen ever ask you for any additional guards?

[Question objected to as immaterial. Overruled.]

*Cross-examination.*

20

Q When did you come to this country first?

A In 1852.

Q How old are you?

A I am close on 50 or over—I don't know exactly.

Q Of what tunnels had you superintendence in England before you came here?

A I didn't superintend any in England, only my own contract. I have built branches of railroad in England; I completed the L— in the county of Durham.

Q What length of tunnel?

A There were several—all together, might be three-quarters of a mile.

Q You never had anything to do with any tunnel in England?

A I traveled with the engineer sometimes; some-

times I held the tape and whatever a man was required to do.

Q That is all you did in England ?

A I superintended the repairs of the main railroad from London to Manchester.

Q Had you anything to do with excavations of tunnels in England ?

A Not as to excavating ; I had charge of certain parts of the road, to see that it was widened a certain  
10 width.

Q You was a laborer ?

A No ; I had charge of a gang of hands for a short time, whose duty it was to excavate.

Q They were open cuts ?

A They were open cuts.

Q You had nothing to do with any tunnels ?

A Nothing in the line of general superintendence of tunnels.

Q When you came to this country, what tunnels  
20 had you any connection with ?

A I was engaged at the Altoona tunnel ; I superintended a contract there.

Q How long a road ?

A It might be over a mile.

Q You superintended the workmen of a contract about a mile in length ?

A Yes.

Q Was that putting a tunnel through ?

A No ; it was an open cut.

20 Q What was your business as superintendent there ?

Q To see that the grades were kept to the directions of the engineers, and carried to its shape, according to the plan of the road.

Q Where next were you ?

A I then went to the Broad Top road, between Huntington and Bedford City.

Q Where did you first superintend in the construction of any tunnel in this country ?

A I had the general superintendence of this Erie tunnel.

Q Under whom ?

A Under both Mr. Mallony and Mr. Seymour.

Q What was your duty as general superintendent there ?

A To see that the work was carried on according to the plans.

Q Did you employ hands there, and discharge 10 them ?

A Yes ; foremen and workmen and all.

Q You then had the superintendence under both Seymour and Mallony ?

A Yes.

Q When was that ?

A About twenty years ago.

Q Who purchased the machinery and implements which were used in the construction of that tunnel ?

A I bought part of them—Mr. Seymour and Mr. Mallony, and probably the engineer might buy the 20 machinery—but I bought several cargoes of steel picks, shovels and such.

Q You had the general superintendence of the whole work ?

A The excavation of the tunnel from the time I got charge of it until it was finished.

Q How long were you engaged on that tunnel ?

A Till the cars passed through.

Q How long were you engaged in that tunnel ?

A Pretty nearly three years, off and on. I sunk 30 shaft No. 5 ; before I had sunk, I was appointed superintendent of all the mining department.

Q When did you commence to work at this tunnel of the Delaware & Lackawanna ?

A I think about nineteen or twenty months ago—I could'nt say.

Q What were your duties when you first went there ?

A I acted as foreman in sinking shaft 5.

Q How long were you engaged in that work?

A Till that was down within a few feet of the bottom of the shaft—it might have been down about sixty feet.

Q Were you there two or three months engaged as foreman of that shaft?

A Yes, about two months—might be a little over.

Q When they first commenced sinking the shaft  
10 you commenced work there?

A No; from the rock work down.

Q How deep were they before they struck the rock?

A 17 or 20 feet.

Q Then you commenced to be foreman sinking that shaft, till they got down 60 or 70 feet?

A Yes.

Q What was your duty there?

A To excavate the rock and direct the men how to do the work.

20 Q Had you charge of one gang of men?

A One at this time.

Q Was James Burns there then?

A No sir.

Q After you ceased to act as foreman in sinking that shaft, what then did you do?

A I was appointed to take charge of all the miners on the tunnel, on the night shift.

Q You was appointed superintendent of the night shift of the whole tunnel?

30 A Yes.

Q Who was superintendent on the day?

A Mr. Adams.

Q Was he there before you or after you?

A Before me.

Q Who appointed you.

A Mr. Adams spoke to me under the direction of Mr. McAndrews, I believe.

Q Did Mr. McAndrews hire you yourself?

A He gave me several directions regarding the plan of the work.

Q What do you mean by McAndrews employing you?

A Mr. Adams told me he was sent by McAndrews to instruct me as to my duties, and they were both pretty near together.

Q Just tell us again in your own way, plainly, what all your duties as superintendent were? 10

A To see that the foremen and blacksmiths and engineers and topsmen were at their posts—that was the first part of my duty. My second duty was to go down and take a view along the work inside, and see if the work was executed according to the diagram which was my guide, and to straighten the lines—to make it straight for the success of the work—to see that the material was filled and hoisted according to the instructions of the contractor; that was principally my duty; and further, I got instructions to view the 20 cables every time I passed, and if there was any danger, to report it immediately.

Q Report to whom?

A To Mr. Adams; he was the day traveling man, and had the superintendence of the day work in the absence of McAndrews.

Q (By the Court) Was that all your duty in reference to the hoisting apparatus—to look at the cables?

A That might be with the exception of sending off materials off the top. 30

Q (By the Court) You said to see that the bails and buckets and fastenings were in good order? You said that in your direct examination.

A That is, to see everything connected with it in that way.

Q Was it your instructions and duty to do what McAndrews would have done if he had been there

himself; to take his place in looking after these things!

A All that part of the duty was assigned to my care, to do what McAndrews would do if he had superintended it himself. I went by the directions of Mr. Adams, who was performing the duty of McAndrews in the day time. I would do the same as though the work was my own.

Q When did you first see James Burns to know him?

10 A I could not tell exactly, it was shortly before his death.

Q Where did you see him?

A I seen him standing in the engine room. I might have met him several times, but there was so many men on the work I paid no attention to any man.

Q How did you recognize him at that time as James Burns?

A I noticed him because he was standing with his back to the indicator of the engine, and he was pretty  
20 near next to me in the door, and he had a long, new clay pipe, and I was told that was James Burns.

Q Who told you that was James Burns?

A The men had a conversation, and I objected to their conversation that night, and one of the men told me his name was James Burns.

Q How did you know that was James Burns?

A I enquired because there was a conversation that I objected to—and then I enquired. They were talking about tunnels—rough language.

30 Q Who was he talking to?

A One Sullivan—one of the men that got killed.

Q When was that?

A The same night they got killed.

Q Just before they went down?

A Before they went down; the time wasn't up for them to go down.

Q How long was that before they went down?

A It might be a quarter of an hour or twenty minutes, a little before time to go down ; they were waiting for the time to go down.

Q What time did they come up ?

A They were supposed to come up about 12 o'clock at night, and go down about 1 in the morning.

Q You saw him between twelve and one ?

A No, I didn't ; I saw him before they went to work in the fore part of the night, between five and six, a little before the time to go down to work in the first part of their shift. 10

Q Was that the first time you ever knew James Burns ?

A I might know him.

Q Is that the first recollection you have of him ?

A I had no personal recollection or acquaintance with the man at all.

Q You knew his face ?

A I knew he was one of the workmen this night, and I knew his name to be James Burns that night. 20

Q Was that the first time you knew his name was James Burns ?

A I might know it before, but not to my personal knowledge.

Q (By the Court.) You have no recollection of it ?

A No.

Q But you had seen the same man at work there, and knew that he was working in that tunnel before that ?

A I passed no notice to him at all. 30

Q Didn't you know that that man you saw there that night was a man that had been to work on that tunnel for a considerable time ?

A I did not know that he had been to work there for a considerable time ; I knew he was working there that night, and before that night I knew he was working there.

Q How long did you know he was working there?

A I knew he might be working there about a month.

Q How many men were there at work on this tunnel on the night shift?

A There might be 250 or 300.

Q Did you know the names of all those men?

A No; I didn't.

Q Did you know them by sight at all?

A Some of them.

10 Q Could you pick out those men, if you saw them anywhere else, and say that they worked on that tunnel?

A I could not pick out the four men that was killed; I would have to inquire their names if they were down there to-day?

Q Were you familiar with their faces?

A No; I knew Sullivan's face well.

Q What proportion of the men working there were known to you by name?

A More or less, according to the time they were  
02 working there.

Q Was it as much as one in ten?

A Yes; more than that; in some places I knew all the gangs, and in some places I didn't know three of them; there is strangers coming and going.

Q This night when this accident happened was the first night that you knew that a man by the name of James Burns was working there—that you recognized that man by name?

A Yes.

30 Q There had been some men discharged from shaft No. 2 before that?

A Yes; several men.

Q Can you tell their names?

A No, sir; I can't tell the names of all them.

Q Can you tell the names of any of them?

A I heard of Burns being discharged out of it.

Q Is that the only name you recollect ?

A Yes ; there is another one ; I can't recollect his name now.

Q Burns is the only name you can recollect ?

A I didn't discharge him .

Q How does it come you can recollect the name of Burns having been discharged, and no other man ?

A I can tell you several other men if I had my note-book ; Burns' name is now in question, and it refreshes my recollection. 10

Q You have talked this thing over with McAndrews and other persons recently, within a day or two ?

A I never had any conversation with McAndrews about it.

Q Or in his presence ?

A No, sir ; nothing consisting of the suit.

Q You haven't been in the office of counsel, talking this thing over ?

A No, sir ; not all over.

20

Q Any part of it ?

A He asked me something about how long I knew Burns ; I told him I didn't know him very long.

Q You heard them talk about his being discharged at No. 2 ?

A Yes ; McAndrews told me ; told me lately.

Q McAndrews told you lately that he was discharged at No. 2 ?

A He said he was the man that is in question.

Q Did you employ any men at all ?

30

A Yes.

Q Do you recollect the names of the men that you employed ?

A I employed only two foremen.

Q Did you employ other workmen at all ?

A I did, but I never asked their names when I employed them. It is not my duty to put down their

names, the bookkeeper took their names. I didn't pay any attention to men's names at all. All I conversed with was the foremen.

Q Your duties called you from one shaft to the other along the line, across all this work ?

A Pretty much.

Q You went from shaft to shaft, and from opening to opening, from heading to heading, every night.

A Yes.

10 Q Were hooks like that, with guards like that, furnished by McAndrews, to be used in the different shafts of that tunnel ?

A Not altogether.

Q Was some furnished by him ?

A I saw this one.

Q Do you know when McAndrews furnished hooks of that character, supplied with guards like that, and directed them to be used in the different shafts ?

A That was not part of my business, because the  
20 day superintendent had all these things to supply.

Q You had nothing to do with that ?

A No.

Q (*By the Court.*) Do you mean to say you saw this hook while it was there in use, furnished with a guard like that ?

A I don't believe there was a guard like this when we first started.

Q Did you ever see that hook in use, with that guard upon it, or a guard like that ?

30 A I did see it with a guard like this.

Q When ?

A Some months ago.

Q Before this accident happened ?

A I could not say before or after. There was a clevis on it before for the purpose of keeping the bucket in place for bailing water.

Q When before ?

A I could not tell how long. Before this clevis was put on we put a wire in here from one hole to the other, to keep the bucket from coming off.

Q You can't tell when you saw that hook used in shaft 5, with the guard upon it, before the accident happened, if at all?

A No; I couldn't tell the exact time.

Q Are you sure you ever saw that hook in shaft 5, with the guard upon it, in use before the accident happened? 10

A I couldn't tell.

Q Did you take any notice at all of the hook and guard?

A Yes.

Q Then can't you tell whether it was used or not?

A No, I took no notice of these guards before this accident happened.

Q Were any other hooks or guards like that in use at any of the other shafts before this accident happened? 20

A There was fastenings for all the hooks in every shaft for bailing water; some had wires in to keep the bucket from slipping off.

Q Have they been in use since this accident happened, that kind of hook, with guards upon it, at all the shafts?

A No, sir, some on and some off. They have pumps now in some of the shafts.

Q Who tied the rope on this bail that was used at Shaft 5? 30

A I believe it was the rigger, Pat Murphy. He is a man for the purpose of rigging up these hooks and ropes and cables; that is his duty.

Q Was his duty confined at one shaft, or all the shafts?

A He is to work all over.

Q Patrick Murphy called the rigger?

A Yes.

Q To rig all these things ?

A Yes, for the purpose of replacing or putting them up new.

Q Do you know that he tied the rope upon this bail ?

A I don't know.

Q When did you see the rope on it ?

A The main rope, do you mean ?

10 Q No, the rope that was tied on the bail ?

A I have no reference to that rope at all ; I mean the cable.

Q The rope you have been speaking about is the cable ?

A Yes.

Q I asked you who tied the rope upon the bail that was used in Shaft 5 ?

A I don't know.

Q How long was that upon that bail ?

20 A I could not tell anything about it.

Q Did you see the rope on at all ?

A I saw a rope to steady the long drills.

Q There was a rope across the eye of the bail ?

A A little bit of a string ; a common bit of manilla strand, something like that.

Q And the drills rested against that ?

A The drills were supported by that.

Q The drills stood down in the bottom of the bucket, and the top of them leaned against this rope ?

30 A Yes.

Q Can you tell when you saw that rope there ?

A That little bit of a string was generally in all the shafts ; the boys puts them on to steady the long drill, to keep it from leaning one side—the boys put them on to steady the long drills.

Q How many men were at work on a shift at No. 5 ?

A From 25 to 40.

Q In that Shaft 5, were there one or two gangs of men?

A Sometimes two.

Q Those men came up out of the shaft twice a day and went down twice a day?

A Yes.

Q When the men were being let down into the shaft, was there any person kept at the bottom to see that the hook was properly fast to the bail to raise it again? 10

A There is a man always supposed to be there for that purpose, to take care of the bucket and the bail.

Q Was there a man kept there for that purpose while the men were being let down?

A Yes.

Q Who was it that time?

A I don't know.

Q Do you know that there was a man there? 20

A There was a man employed for that purpose, but I was not in that shaft at that time, and I don't know whether he was there or not.

Q Who was employed in that shaft for that purpose at all?

A John Bergen was employed as one of the men for the purpose.

Q He was employed for the purpose of being at the bottom of the shaft to hook on the bail?

A At that night the man that was in the bottom I believe, to the best of my belief, his name was Dan Shea. 30

Q He was in the shaft at that time when the men were being let down between twelve and one o'clock?

A Yes.

Q For the purpose of fastening the hook to the bucket for the men to be hoisted?

A Yes, I heard that from the foreman and the men that were there.

Q Who was the foreman?

A Leary.

Q Where is he?

A I don't know.

Q Where is Dan Shea?

A I can't tell; when the man is absent there is always a man provided by the stationary foreman to  
10 be there to take his place.

Q Wasn't this man whose duty kept him at the bottom of the shaft employed there to bail the water and to fill the buckets with rock?

A His duty principally was to see to the buckets, and when there was no rock to fill it with water.

Q His principal duty was what?

A To attend to the bucket at the bottom and see that it was hooked on and steadied for the engineer to raise.

20 Q When the bucket was coming up?

A Yes, whether it was empty or full, there was a man paid for that purpose; in every shaft there is a man for that purpose.

Q Did you ever superintend any work for Mr. Shannon?

A Yes, I believe I did for a few weeks.

Q Where?

A Down near the Town Hall.

Q In doing what?

30 A In excavating for a sewer.

Q Was James Burns at work there?

A I could not tell.

Q Didn't you know him at that time?

A I did not know him personally at all then?

Q Did you know him by sight then?

A I think not.

Q How many men were at work there under your superintendence?

A There was more gangs than I superintended ; I could not tell how many.

Q Did you ever tell McAndrews that there would be some accident at this Shaft No. 5 unless there was some change in the machinery ? Did you ever tell McAndrews that unless some change was made in the guards of the machinery, or in some of the implements used there, there would be an accident ?

A No, sir ; never.

Q Did he ever say to you he didn't care whether an 10 accident happened or not ?

A No, sir ; nothing of that kind.

Q Did you ever tell anybody that he said so ?

A No, he never spoke to me to that effect at all.

Q Don't you recollect telling that in conversation to some persons in the engine house, immediately after the conversation took place to which I alluded ?

A That he refused to furnish ?

Q No. Didn't you tell some persons that you had told McAndrews that an accident would happen, or 20 there would be some persons killed in going down that shaft unless there was some change made in the hoisting apparatus, and he said he didn't care whether they were killed or not ?

A No, sir ; I don't remember anything about that ; I never remember a word about it.

Q (*By the Court*)—Can you swear now that no such conversation took place ?

A I never told anybody that McAndrews refused to furnish hoisting apparatus. 30

Q Did you tell anybody at the engine house that he said he didn't care if men were killed, or anything of that kind ?

A I never remember a word about it, and I believe not ; I could not be positive.

Q And you say that you did not have any such conversation with anybody at all ?

A No, sir ; not to my knowledge at all.

Q You are still in the service of McAndrews ?

A Yes ; on the night gang, acting as superintendent.

Q Didn't you have such conversation as I have alluded to at the engine house of Shaft 5, before this accident in September ?

A No ; might ask for some protection at the time of hoisting water to keep the bucket on, but nothing  
10 in regard to hoisting rocks or men ; might be something in regard to fastenings when they were bailing water.

Q Have you had any conversation with Mrs. Burns in reference to the death of her husband ?

A Yes.

Q Did you say to her that if Jimmy had told you that he was afraid of this that you would have had him living this day ?

A No, sir, no such thing as that ever passed.

02 *John Scott*, for defendant, sworn, testifies as follows :

*Direct Examination.*

Q You live in Jersey City ?

A Yes.

Q What is your trade ?

A General blacksmith.

Q How long have you been engaged in that business ?

30 A Since I was twelve and a half years of age ?

Q Where are you now engaged ?

A By McAndrews on the tunnel.

Q Where is your shop ?

A At No. 3 at present.

Q How long have you been engaged there ?

A I suppose I have been there about three months  
at No. 3.

Q How long have you been engaged on the work there as blacksmith ?

A Since a year ago last September—part of the time at No. 5, part of the time on the East End approach, part of the time at No. 3.

Q Where is the general blacksmith shop of the tunnel ?

A While I was working at No. 5 that shop was supposed to do the general work for No. 5 ; that is anything they wanted done. 10

Q When did you work at No 5 ?

A I believe I went there about the middle of September, and I worked there until February in the succeeding year ; that was in 1874.

Q At the time of this accident you were working there ?

A Yes, I was working on the day shift at that time.

Q Who worked on the night shift at that time ?

A Peter Dunlevy was on the opposite shift with me ; he was the regular blacksmith, but he was not there that night, I believe. 20

Q Have you been down in Shaft 5 ?

A No, I was never down.

Q You have been where it is ?

A Yes.

Q Do you know this hook ? (showing witness hook.)

A That was in use at No. 5.

Q You have seen it before, have you ?

A Yes. 30

Q Do you know who made it ?

A No, it was there when I went there.

Q Is that a hook that has been broken and welded ?

A No, that hook has never been broken.

Q Did you ever make any guards for that hook ?

A Yes.

Q When did you make them ?

A I put a guard on there at the time of the strike; that was in the beginning of November.

Q How did you come to put a guard on?

A For the purpose of protecting the bail from coming off the hook while they were raising water.

Q Were the holes in that hook before that?

A Yes.

Q You put it on?

A Yes, I put the guard on.

10 Q How about the guard before that time; do you know anything about whether there was any there or not?

A I don't know, I hadn't been there long at that time. I put this on in November, and I went there about the beginning of October, or latter part of September.

Q About what time in November did you put it on?

A As near as I can recollect about the 8th or the 10th.

20 Q Give us a description of the guard you put on?

A It is as near like this as I can possibly recollect.

Q What kind of a key had it?

A A spring key like this.

Q You saw it put on?

A Yes, I did it myself.

Q What do you think about the strength of it; was it as strong as that?

A Yes, it was made out of  $\frac{5}{8}$  iron, the same as this. When I got orders to put the guard on, I had  $\frac{1}{2}$  inch  
30 iron at the time, but I had no  $\frac{5}{8}$  iron, and I wanted some rivets to put in a bucket, and I went to No. 3 and got as much  $\frac{5}{8}$  iron as made the rivets and made the guards for the hook.

Q Who gave you directions as to that?

A Mr. Adams and the foreman of the shaft, Patrick Riley; they were both there at the time.

Q What were the instructions?

A I had to put them on there and see that they were kept on ; when I got orders one was broken, to see that another was put on.

Q How long did it stay there, do you remember ?

A It was the day shift when I put it on, and I think it was the back part of the week following, when I was on the night shift, that I missed it.

Q The week after you put it on ?

A Yes.

Q What then ?

10

A I made the remark to the men, what had become of the guard on the hook, and they said it wasn't worth bothering with, it was too much trouble.

Q When was this ?

A This was while they were eating supper in the shop.

Q Who was eating supper ?

A There was a good many of the men eating supper, and after having had their supper—it was cool weather and they came in there for warmth.

20

Q (By the Court) Did you hear anything said about that guard having been broken ?

A No sir ; when this talk in the shop was, they said it wasn't worth the trouble they had taking it off ; it wasn't mentioned being broken, but taken off.

Q Did Flannery say anything to you about the guard being broken ?

A No sir.

Q You know Flannery ?

A Yes.

30

Q And did at that time ?

A Yes, he was running on the same night shift that I was.

Q You were prepared at all times to repair any of the machinery there ?

A Yes, within a few minutes' notice.

Q That was your business there ?

A Yes.

Q Did you know the topman at that shaft ?

A I did ; Mr. Lovett.

Q Did you know who the bottom man was ?

A No ; I was never down in the shaft.

Q You were not there the night of the accident ?

A No.

Q Had you been there the day before ?

A Yes.

10 Q Were you there the day after ?

A Yes, I was around there ; there was no work being done.

Q You were on the day shift ?

A Yes.

*Cross-examination.*

Q Who was present when these men were talking in the house about the guard being unnecessary ?

A There was, I dare say, about a dozen. I hadn't  
20 been there long at that time, and I was not acquainted with them only by sight.

Q You can't tell the names of any of them ?

A I don't suppose I could positive.

Q How did it come to be spoken of ?

A I remember it first that the guard was off.

Q That was about a week after you put in on ?

A Yes, it was the back part of the week after.

Q You didn't make any new guard after that ?

A No, I never had any orders to do it.

30 Q Had no orders from McAndrew or Adams or Brown ?

A No.

Q Did Adams, in the first place, direct you to make this guard ?

A Yes.

Q And that when you had orders to make new ones, to make new ones ?

A Yes.

Q You never had any orders after that to make any at all?

A No.

Q You could see without any difficulty that the hook was there without any guard on?

A Yes.

Q There was no difficulty in seeing that hook, it was hanging there?

A No sir. 10

Q Was there a guard on any of the hooks?

A Yes, I have seen guards on them, several of them, and known them to be taken off; I have seen guards on No. 3, and known them to be taken off; I have seen guards on No. 2, and known them to be taken off.

Q On any other?

A I don't remember any other; I might, but I don't remember.

Q Do you recollect anything about the bail that 20 was used for buckets in shaft No. 5?

A Yes.

Q Whether they were plain bails, or with loops or with eyes?

A There were several kinds; some plain and looped and some an eye.

Q Did you ever see McAndrews about shaft No. 5?

A Once in a while.

Q What would he do when he came there?

A Just look in and walk along. 30

Q Did you see Brown around there?

A Sometimes I used to see Brown; when I was on the night shift I would see him.

Q He would walk along and look at things the same as McAndrews, and go away?

A No; he would go around and see we were all at work; if he saw anything wrong, anything broke, he would order it to be repaired.

Q Did McAndrews ever give any orders around there?

A I never heard him give any orders.

Q Who employed you to work there?

A Mr. Adams.

*Cross-examined by the Court.*

Q Did you see any of these buckets with a bail and  
10 link in?

A Yes.

Q Did you make any sort of a guard or strap to go around the bottom of the eye for those bails that had an eye instead of a loop?

A No sir.

Q Do you recollect whether there were many of those bails arranged with an eye?

A I don't think there was more than two or three; I could not positively say; I haven't seen all the  
02 buckets; two or three of each kind.

Q What do you mean by that?

A There are some flat bails, some with an eye, and some looped bails.

Q The flat bails had a link?

A The flat bails had a link.

Q You think there was about an equal number of each used on the general work?

A Yes, I suppose there was, I wouldn't be certain.

30 *Re-direct examination.*

Q You say your orders were to make one of these guards and put it on and keep one on?

A Yes.

Q When you saw the guard off, why didn't you make another and put it on?

A The men said that they wouldn't bother with them; they were not worth the trouble to be lifting

the hook up and hitching it on—they said it was quite a good deal of trouble, and it wasn't worth the trouble.

(By the Court) Was there any other case in which you disregarded the orders of the superintendent, at the instance of the men?

A No sir.

Q (By the Court) The superintendent ordered you to make these and keep them on?

A He ordered me to put a guard on this hook, and so far as I could, to see that it was kept on. 10

Q You said in answer to a question on cross-examination, that there were guards on the hook at No. 3 and No. 2

A Yes.

Q But they were taken off?

A Yes.

Q Taken off by whom?

A I don't know; I have seen them off—taken off without being broke. 20

Q Do you know who took them off?

A I don't.

*Re-cross examination.*

Q Did you ever see the guard that you made for this hook at shaft No. 5, off—did you see the guard itself after it was taken off?

A No; I saw that it was off.

Q Then you didn't make another, because you had no orders to make another? 30

A Yes; and because the men objected to it.

Q Because you heard the men talking that it was not necessary to have it?

A Yes.

Q You had no orders from the foreman or from anybody else in charge to make another?

A No.

Q And your instructions were, when it was put on, that as soon as it was off, and you had orders to make another, to put another on ?

A Yes.

Q You were not obliged to make another till you had orders ?

A No sir.

Q You didn't neglect any duty imposed upon you ?

A No sir ; not so far as I could understand the  
10 order.

*Joseph H. Hand*, sworn for defendant, testifies as follows :

*Direct examination.*

Q Where do you reside ?

A Hudson city.

Q What is your occupation ?

A Connected with the Powder Company in New  
20 York.

Q What are you doing now ?

A That is what I am doing now.

Q In 1874 ?

A I was working for John McAndrews.

Q When did you commence work for John McAn-  
drews ?

A In June, 1874.

Q Whereabouts ?

A On the tunnel, as time-keeper.

30 Q How long did you stay there ?

A From June till the day before Christmas, the  
24th ; then I was away three days, and came back and  
stayed a week, and then I left for good.

Q Did you know James Burns ?

A Yes.

Q When did you get acquainted with him ?

A In June, the first month that I was there.

Q How ?

A I, as time-keeper, and he as foreman of No. 2 shaft.

Q How long was he engaged at No. 2 shaft ?

A Until some time in July.

Q How came he to leave No. 2 ?

A For being saucy and getting up a disturbance between the engineer and the men, so the men would not go down in the shaft. I think at the time he was a little intoxicated. 10

Q Were you there ?

A Yes, they sent for me from the place where I was boarding to come over there, and I went there ; there was a good deal of swearing there on both sides between Burns, the men, and the engineer.

Q What was the difficulty about ?

A I don't know ; I think it was something about Burns ; said he wouldn't go down under the engineer ; wouldn't let that engineer put him down.

Q What then ? 20

A A few days after that he had some disturbance with McAndrews, and McAndrews discharged him.

Q How do you know that ?

A Because I was called upon to make out his time, and I turned it off the small book and put it on the large book.

Q In what other way did you know that he was discharged ?

A I saw his name had been marked paid on the book.

Q Did you ever see Burns ? 30

A Yes.

Q Did you talk to him after that ?

A Yes.

Q When did you see him after that time ?

A I should judge 3 or 4 weeks.

Q What occurred between you and Burns—what did he say to you and you to him ?

A He wanted me to see McAndrews and see whether he could get back to work. I spoke to McAndrews about it, and asked McAndrews whether James Burns could go back to work, and he said no, and says he, "I want you to remember it, that he must never do a day's work for me, and bear it in mind." Then I asked Adams about it a few days after, and he said—[Interrupted by objection.]

10 Q Did you have any other talk with Burns after that time?

A I used to meet him in the street.

Q Did you tell him what McAndrews had said?

A I don't know whether I did or not.

Q Didn't you see him afterwards?

A Yes.

Q After you had talked with McAndrews didn't you report to Burns what McAndrews had told you?

20 A I can't say positive whether I did or not, I think I did; then Burns asked me again and I spoke to Mr. Adams.

Q What did he ask you for?

A For work.

Q What did he say to you?

A He wanted to know whether I could get him on; that he was a poor man.

Q That was after you had been to McAndrews?

A Yes.

Q Then you went to Adams?

A Yes.

30 Q Well?

A Mr. Adams said he could not do anything for him, because McAndrews didn't want him to work.

Q Did you tell Burns what Adams said?

A I think I did, yes.

Q What then took place between you and Burns?

A Then he used to meet me on the street—and all at

once I noticed, in making the time for the night time-keeper that turned it in at the office, his name on the book. I didn't say anything about it.

Q In what shaft?

A From No. 6 shaft.

Q Who was foreman of 6 shaft?

A Martin Keegan.

Q About what time was it when you noticed this?

Q I think that was late in October or the first of November. 10

Q Did you say anything to McAndrews about it?

A No sir.

Q Or to Adams?

A No sir.

Q How long was he on shaft 6?

A I think he left along in the first week in December.

Q Where did he turn up then?

A Turned up in No. 5. 20

Q [By the Court] Directly?

A Yes; may be two or three days after.

Q About what time in December was it he turned up in shaft 5?

A From the 10th to the 13th of the month, I should think?

Q On what shift?

A On Leary's shift. I don't know whether that was the day or night, but I think it was night?

Q How did you find out he was on that shift? 30

A I saw his name; when it was changed from one place to another, when the time was turned in to me by the night time-keeper, I saw the change.

Q Did you inform McAndrews of that?

A No, sir.

Q What did you say to Burns after you found him at shaft No. 6?

A I spoke to the foreman about his working. [Interrupted by objection.]

Q Did you speak to Burns about it?

A I can't say positively.

Q Did Burns speak to you about it?

A I think he did; yes.

Q What did he say to you about it?

A He said he was a poor man, and he needed the work, and to not say anything about it; and that is just  
10 what the foreman told me.

Q What did Burns say to you about it?

A That he was a poor man and needed the work, and not to say anything about it.

Q (By the Court.) Was Burns present at the time?

A That is what Burns said to me, and that is just what the foreman told me.

A Now give all the conversation you had with Burns at that time about that matter?

A That was the whole of it; I was always in a hurry, and never stopped to talk with anybody.  
20

Q Give us the exact language that Burns used about this matter to you?

A That is all I remember at 6 shaft; he didn't want me to say anything about it; that he was a poor man and needed the work, and had been idle some time.

Q How came he to say that?

A Because I saw him there.

Q How came he to tell you that?

A I spoke about it.

30 Q What did you say to him about it?

A I asked him what he was doing here; says I—"Jimmy, are you in here?" Says he, "yes." Then he answered me in that way; he needed the work and didn't want me to say anything about it, and I never did; I didn't think it was any of my business.

Q Keegan, the foreman, what did he say?

A He said he was a good man and was a poor man ;  
I was talking to Keegan on top.

Q Did Keegan talk to you down in the tunnel in the  
presence of Burns ?

A No, sir.

Q Did you ever say anything to McAndrews or to  
Adams about it ?

A No.

Q How many of the name of Burns were there at  
work ? 10

A I remember of two besides him, but I don't re-  
member their first names; there may have been more.

Q Did you see him at shaft No 5 ?

A I think I did; if he was on the day shift I must  
have seen him, because I always went down into the  
shaft; I think he was partly on the day shift and partly  
on the night.

Q Do you recollect talking with him there ?

A No.

Q Did you inform McAndrews or Adams that he  
was there ? 20

A No.

Q When were the men paid ?

A The 20th of the month was pay day ; we started  
on the 20th and paid part of the tunnel on that day and  
finished on the 21st.

Q Do they pay the men up to the 20th or 21st, or  
up to the 1st of the month ?

A Always kept back 20 days--they are paid to the  
1st of that month. 30

Q (By the Court) Do you recollect when Burns  
was paid ?

A He was paid on the 20th or 21st--that was the  
usual pay day.

Q (By the Court) Do you recollect whether the pay  
was made in the month of December ?

A To the best of my belief it was ; yes sir.

Q You kept the men's time?

A Yes.

Q You put their names on the pay roll?

A Yes; on the blotter.

Q At whose instance did you put their names on the pay roll?

A The night time-keeper's.

Q At whose instance, or suggestion, or direction did you put the men's names on the pay roll?

10 A I got the names at the shaft.

Q Do you know who gave you the name of Burns, to be put on the blotter?

A I think he went on the night time first, and I took it off the night time-keeper's book.

Q (By the Court) He was entered regularly as the other laborers, was he?

A Yes.

Q (By the Court) And his time was counted?

A Yes.

02 Q (By the Court) As the others?

A Yes.

Q (By the Court) And paid as the others were paid?

A Yes; that is from the time he commenced work in shaft No. 6, to his death.

Q You didn't pay the men?

A No.

Q And had no power to employ or discharge men?

A No.

30 Q (By the Court) Who is it controls the movements of the men, from one shaft to another?

A The superintendent.

Q Describe how the men are paid—the process of paying?

A The amount is carried out on the pay rolls, and Mr. McAndrews' son and Mr. Bragy would start from the east end to pay the east end men, at 2, 3, 5 and 6—they paid every man where he worked.

Q How did they know whom to pay ?

A Their names was on the book, and the foreman generally stood there ; they would call their names on the pay roll and the foreman would stand there and nod his head, and say that it was all right ; and the young Mr. McAndrews would count it out, and hand it to them—each man received his own money in his own hand from the pay-master.

Q (By the Court) The foreman was there to indicate that he was the right man ? 10

Q Yes.

Q Who was the pay-master ?

A John McAndrews, Jr.

Q Who was book-keeper ?

A Mr. Bragy.

*Cross Examination.*

Q Do you know whether Mrs. Burns has been paid since the death of James Burns for the work done in December ? 20

A I don't know.

Q While James Burns was working at No. 5, he was paid for the work he did at No. 6 ?

A Yes.

Q So that when the pay was made for the month of November, if he was working at No. 5 he was paid at No. 5 for the work he did at No. 6 ?

A I don't know myself.

Q Suppose a man had been changed ; that he had been working in November at No. 6, and went to work on the first of December at No. 5, on the 20th of December when he received his pay he would be working at No. 5 and he would be paid there at that place ? 30

A He would be paid at No. 6. My idea of the matter was that every man should be paid where he worked.

Q Must he go back to the place where he worked in order to get his pay, or would he be paid where he was at the time ?

A As I never paid the men I could not say.

*Lewis Bragy*, for defendant, sworn, testifies as follows :

*Direct Examination.*

10

Q Where do you reside ?

A Jersey City.

Q How long have you resided there ?

A Two years.

Q What is your business ?

A Bookkeeper for Mr. McAndrews.

Q How long have you been bookkeeper for Mr. McAndrews ?

20 A I have been his beokkeeper about two years. I came here about two months after he commenced the tunnel.

Q Have you any duties outside of keeping the books ?

A At one time I had something to do with purchasing for the tunnel ; at present I only keep the books and assist in paying the men pay days.

Q Did you know James Burns ?

A Yes.

Q How long did you know him there ?

30 A Probably about a year.

Q Where was he at work ?

A When I first remember him he was to work as foreman of No. 2 Shaft.

Q You were present at an interview between him and Mr. McAndrews ?

A Yes.

Q About what time of the year did that occur ?

A A few days after the 20th of July, may be the 23rd or 24th of July.

Q Where was it?

A At the west end of the tunnel, out in the lots.

Q What occurred there between McAndrews and Burns?

A Mr. McAndrews and I were standing together there and Burns came up and asked McAndrews whether he would set him to work again. McAndrews told him no, he didn't want any drunkard to work for him, and handed me the money that was due Burns and I handed it to Burns; that was about the 23rd or 24th of July.

Q Give us all the conversation at that time.

A McAndrews and I was standing there and Burns came up and asked McAndrews for work; McAndrews said he would not give it to him, and McAndrews and I turned to walk away and Burns approached him again, then McAndrews told him he didn't want any drunkard to work for him at all, he said he would never give him any work again at any time; and Burns says, "if you are not going to give me work I want my money"; and McAndrews asked me what amount was due Burns. I told him, and he gave me the money and I handed it to Burns. Also after paying him he told him he never wanted him to do any more work for him.

Q In what capacity had Burns been to work?

A Foreman at No. 2.

Q Do you know the location of Shaft No. 5. 30

A Yes.

Q Do you know anything about its workings?

A Nothing more than any of the other shafts.

Q Part of your duties was to assist in making payments on pay day?

A Yes.

Q Pay day is what day?

A The 20th of the month, unless it falls on Sunday ; we pay part of the men on the 20th and the other on the 21st ; I have the books and call off the names with the amount due, and Mr. McAndrews, Jr., counts out the money and hands it to the men, the foremen being present to identify them.

Q In December, 1874, who made that payment ?

A In December the day we paid, the 20th I think, we paid all the men in one day as far as No. 2, McAndrews, Jr., and I, and then Mr. McAndrews, the contractor came up and said he wanted me to go to New York with him, and he took me away, so I wasn't there any more during the pay of that day ; I don't know how the payment was made after that.

Q Did that include Shaft No. 5 ?

A No ; only the east end, No. 1 and No. 2.

Q Who was left to pay the men ?

A Mr. Hand, I believe, took charge ; I called Mr. Hand to take my place.

20 Q Did you know that this James Burns' name was on your book at that time ?

A I did not.

Q Do you know how many men by the name of Burns were in the employ of McAndrews at that time, or were on the books.

A I remember two or three ; I remember John Burns being on the roll ; I don't remember the first name of any of the others ; I think there were two or three Burns ; I don't remember exactly.

30 Q When did you first learn that James Burns had come back to work on the tunnel ?

A Not till I heard of his death.

*Cross Examination.*

Q Did you assist in making payments in the month of November ?

A Yes.

Q Was James Burns paid then?

A No; I am pretty sure he was not.

Q You are sure he was not?

A I am almost sure, for I think I would have remembered it if I had called his name; I knew him.

Q Do you know that he was not at work in the month of November?

A I think he was to work in the month of November; he would have to have been working in October to get any pay in November. 10

Q Wasn't he to work in October.

A I am sure he was not for I have looked to see.

Q Did you look at the pay roll for that month?

A Yes, I looked to see and I couldn't find his name on my books for that month; that, of course, is the only knowledge I have.

Q Do you recollect that any of the men that were on the tunnel boarded with James Burns?

A No, I don't recollect that.

Q Don't you recollect that you collected or retained 20 a part of the pay due some of the men who boarded with James Burns and paid that money to him for their board?

A No, I don't.

Q When you was called away on the 20th of December, while the men were being paid, Mr. Hand took your place?

A Yes.

Q And he proceeded with young McAndrews to finish the pay roll? 30

A Yes.

Q Can you recollect now the name of any man who had been in the employ of McAndrews at that time, and say whether he was employed at that time?

A Not all of them.

Q Do you recollect the names of any men at No. 5 besides James Burns, in November or December?

A Yes; Leary was foreman, Flannery was engineer, John Bergen, Curley, Kelly and Lovett.

Q Do you recollect any that were working on shaft No. 2, in December last?

A Yes.

Q Who?

A John Riley was foreman there, I believe.

Q You have been assisting in the preparation of this defence, and taking an active part in behalf of  
10 Mr. McAndrews?

A I am here to testify what I know in reference to the case.

Q You have been consulting counsel?

A Yes.

Q And posting them as to what the facts were?

A Yes.

Q And examining witnesses?

A I didn't examine any witness; I have talked to some of the witnesses.

20 Q Been assisting McAndrews in preparing this defence?

A Yes.

Q Do you know whether Mrs. Burns has been paid since the death of her husband?

A I think she has; I remember her coming to the office; I don't know; I didn't notice that particularly.

[Defendant's counsel moves to overrule the last question and answer because there is no evidence that  
30 John McAndrews knew of it, and because if he saw fit to give her money afterwards it was no proof that he knew that this man was in his employ at that time.

The Court refuses to overrule the testimony, and allows the defendant an exception.] And defendant prays it may be sealed, and it is accordingly sealed.

M. M. KNAPP, J. [L. s.]

*Re-direct examination :*

Q What do you know about her being paid ?

A I don't know anything about it ; I remember her coming up there once and asking for it.

Q Do you know whether she was paid or not ?

A No, I do not.

Q Did you pay her ?

A No.

Q Did you see her paid ?

10

A No.

Q Do you know of men working in the tunnel under fictitious names ?

A Yes.

*Re-cross examination :*

Q Did McAndrews keep a store where the hands traded ?

A No.

20

Q Were they not supplied with goods ?

A Not from any store that Mr. McAndrews kept.

Q Was there a company's store there ?

A No ; it was Mr. Welsh's store.

Q It was a place where many of the hands got goods on orders from McAndrews ?

A No ; they traded at the store, and the boarding house keepers would send in a board bill to the office and Mr. Welsh would send in a grocery bill, and instead of paying the men they would pay that amount to Welsh. 30

Q Had James Burns anything at the store that was paid for by you for McAndrews for him ?

A I don't recollect anything about it.

*John McAndrews, Jr.*, sworn for defendant, testifies as follows :

*Direct-examination.*

Q You reside in Jersey City ?

A Yes.

Q What business are you in ?

A Acting as paymaster for my father, John McAndrews, in the line of the Delaware and Lackawanna Tunnel.

Q Any other business outside of that ?

10 A Yes ; attending to his business at Scranton.

Q So far as the tunnel is concerned have you had anything to do with it except to act as paymaster ?

A Yes ; to help in purchasing.

Q Any superintendence over the work ?

A No.

Q In December last, in making the payments, do you recollect paying James Burns ?

A I don't.

Q Do you remember the time of paying shaft 5 ?

02 A Not any particular case.

Q Do you recollect in paying shaft No. 6 in December ; do you have any recollection of James Burns being there, or hearing of his name ?

A No sir.

Q Describe how you make payments.

A We begin to pay on the 20th of every month unless it falls upon Sunday ; we commence at the east approach of the tunnel and pay as far that afternoon as we can pay to six o'clock ; then, the next day, we  
30 finish the balance of the tunnel men.

A When you come to the shaft to pay, how do you know whom to pay ?

A We call the foreman and he identifies the men.

Q Who calls the names ?

A The book-keeper, Mr. Bragy.

Q At the December payment, 1874, was Bragy with you then, and if so, how far and where ?

A I rather think he was, but as to certainty I couldn't say as to that particular month.

Q Have you any recollection about it?

A No; I haven't the slightest.

Q Did you know James Burns?

A Yes, I did.

Q Where was he when you knew him?

A When I first knew him to speak to him was after the time that he got discharged; then the reason why I got to know him was because he asked me if I wouldn't see my father to get him back to work again. 10

Q You were not present at the discharge?

A No sir.

Q About what time was it when he came to you?

A That I couldn't say; it was some time after his discharge.

Q Give us all he said to you.

A I don't recollect everything he said; in substance he said to me: "Johnny, will you see the old man for me?" and what followed that I don't recollect; we had some few words; I met him time and again; I met him probably a dozen times, and every time I met him he would ask me about it. 20

Q Did you ever see "the old man?"

A I did not, to speak about this getting him back.

Q After that did you ever pay Burns, knowing it?

A No sir.

*Cross-examination:*

Q When was he discharged? 30

A I couldn't say.

Q Tell me as near as you can?

A I should suppose it was some time along in the fall, pretty early in 1874.

Q About what time in the fall do you think it was?

A I think it was along in August or September; I couldn't tell exactly.

Q Did you pay him after August ?

A No sir.

Q You are sure of that ?

A That is to the best of my knowledge, I haven't paid him anything after that ; I didn't pay him at the time he was discharged, either.

Q Did you pay him before he was discharged ?

A I am not positive about that.

Q You are not positive that you ever paid him ?

10 A No sir.

Q Can you say that you did not pay him after August ?

A I don't recollect that I ever paid him.

Q He might have been paid amongst the others and you not have noticed it ?

A I think after that time I would know him pretty well.

Q You didn't care much whether he worked there or not ?

20 A No.

Q If his name had been on the roll, and called off by Mr. Bragy, stating the amount, would you hesitate to pay him ?

A No.

Q Would you have noticed it at all ?

A I don't know ; I might have noticed him in particular for the very reason that he had spoken to me about getting him to work.

30 Q You might and might not; it wasn't a thing you charged your mind with specially ?

A No sir.

Q It was your business to go through and pay the men whom the foreman represented to be all right ?

A Yes.

Q It was merely your business to find out how much money was due the men you were told to give it to ?

A Yes.

Q How long have you been paymaster ?

A Three years I had charge of it ; previous to that I was assisting my father.

Q Have you paid Mrs. Burns since the death of her husband ?

A No.

Q Do you know that she has received pay for the work her husband did in December ?

A I don't know.

Q Did you make the payments in the month of December, 1874 ?

A Yes, I did.

Q You recollect distinctly that ?

A I do.

Q Did you make the payments in the month of September, 1874 ?

A Yes ; I have made all the payments that have been made on the tunnel, with the exception of one or two little payments outside of the regular pay day.

Q Do you recollect that you paid Mrs. Burns since the death of her husband, the balance that was due to him for the work that he had done in the month of December, after deducting \$8 and some cents, which he owed at the company's store ?

A I don't recollect.

*Peter Welch*, for defendant, sworn, testifies as follows :

*Direct examination :*

30

Q You reside at Jersey City ?

A Yes.

Q What is your business ?

A At present I am keeping store.

Q About what time did you come to reside in Jersey City ?

A In September, 1873.

Q What was your business there ?

A I was then supervising all over the tunnel with McAndrews.

Q Did you know James Burns ?

A Yes.

Q And where he was employed ?

A Yes.

Q As foreman at No. 2 ?

A Yes.

10 Q Were you present at the time he was discharged and paid ?

A No.

Q Did Mr. Burns see you afterwards ?

A Yes ; saw me next day after he was discharged. He said that McAndrews had discharged him, and he wanted that I should intercede for him to go to work again. Mr. McAndrews told me that he had discharged him, and he would not give him any more work on that tunnel ; McAndrews said he would never  
20 give him any work again ; he kept drunk about all that week ; I told him he must keep sober if he intended to go to work.

Q Do you know of his being to work there after that ?

A No. For a length of time he hung around there after myself and the other foreman, Mr. Price ; he kept requesting me to speak to the old man again, and I spoke to McAndrews, and he said that he talked so overbearing he could not and never would give him any work.

30 Q Have you been engaged in the work of constructing tunnels ?

A No ; but I have in sinking shafts.

Q Where ?

A At Scranton.

Q What kind of shafts ?

A Round shafts, 13 feet in circumference, for mining coal. I sunk up to 162½ feet deep.

Q What kind of appliances were used there ?

A The same that is used at the tunnels here.

Q At other places ?

A I have seen coal raised from shafts with the same appliances.

Q Have you seen the appliances at other tunnels ?

A Not working.

Q You are acquainted with the locality of shaft 5 ?

A Yes.

Q Do you know anything about the appliances used there ? 10

A Yes.

Q How often did you visit that shaft ?

A Sometimes twice or three times a week ; sometimes twice or three times a day.

Q As to the time of the accident ?

A Yes, previous to that and afterwards.

Q Did you examine the gearing there ?

A Yes ; my advice would always be to the topmen to look and see that the ropes and gearing were all in good order. 20

Q Did you ever see this guard used ?

A I don't recollect.

Q What are those guards used for ?

A To keep the hook from slipping out when they are bailing water, mostly.

Q Do they use them at any other time ?

A They may have used them ; I never used them when I was sinking. I rode on them without any of those guards at all ; hadn't one on all the time I was sinking. I used to go down frequently in the shaft 30 myself.

Q Did you ever see guards on any other hooks like that used in coal mines ?

A Very seldom ; I have seen them where they could have them on, and sometimes they would take them off, where they were using more hoops than one.

Q You say that you have been up and down shaft 5 ?

A Yes.

Q Upon the buckets ?

A Yes.

Q With this same hook ?

A If it is not the same it is one similar to it.

Q You consider that a safe way of going up and down ?

A Yes.

10 *Cross-examination :*

Q How many times have you been up and down shaft 5 ?

A I couldn't say.

Q What was your object ?

A To see how they were doing the work.

Q When did you commence keeping store ?

A In November, 1874.

Q Before that you had been employed as superintendent ?

A I don't know as I was employed at all.

Q Then you had no business there ?

A Yes, I did.

What business ?

A I was McAndrews' bondsman, and I was in duty bound to see that this work was put through; I came here to aid and assist him in having it put through.

Q You had no authority ?

A I used to exercise authority.

30 Q [By the Court.] Had you any appointment under McAndrews ?

A He gave me directions to come and aid and assist him in seeing that the men worked properly.

Q Did he pay you for it ?

A No sir.

Q It was a mere gratuitous service on your part ?

A Yes.

Q You say you have seen hooks with guards some-times, and sometimes without guards in Pennsylvania?

A Yes.

Q And some here have hooks with guards and some without guards?

A Yes.

Q Don't you consider a hook with a guard safer than one without a guard?

A I don't know but what it would be safer.

Q Where do you keep this store? 10

A In Jefferson avenue.

Q Keeping store yourself?

A Yes.

Q Is that the store they called the Company's store?

A Yes.

Q Why do they call it the Company's store?

A I don't know.

Q Is any body interested in it but you?

A It was supposed that John McAndrews was, but I bought the goods myself. 20

Q He is not interested in it all?

A No sir.

Q And has not been?

A The goods were bought in the name of John McAndrews & Co.

Q John McAndrews was in the Company?

A Well, it might be so considered.

Q Did Burns ever get goods at the store?

A Yes. 30

Q How did you get your pay?

A By putting it in the office, and it was taken out of his pay.

Q After Burns' death was any thing paid to you then?

A I couldn't tell.

Q Wasn't there \$8.92 kept out of his pay for you?

A I don't know.

Q You knew James Burns?

A I did.

Q You knew that he traded some at your store?

A I think he got a pair of boots; that is as far as I can remember.

Q And you got your pay by handing it into the office?

A I can't say positively if I put it into the office; I  
10 know I got my pay.

Q Do you think you did, or not?

A I can't swear to it.

*Re-direct examination.*

Q You say you got your pay if you put it into the office?

A Yes.

Q Did you ever ask McAndrews about it?

A No; he didn't know anything about it.  
20

Q About the Burns bill—did he know anything about that?

A He didn't know a particle about it.

*Re-cross examination.*

Q McAndrews does not know who is paid or how much?

A No.

Q He don't know who is employed or who is not  
30 employed?

A His superintendents managed that.

Q Did you employ James Burns at shaft 6 after he had been discharged?

A No.

Q Did you put him to work there?

A I seen him coming from the shaft, but I didn't know that he worked there, and he did not tell me.

Wayland B. Adams, for<sup>d</sup>defendant, sworn, testifies as follows :

*Direct examination.*

Q You have had some service on the Tunnel Company's works.

A Yes.

Q Of what character ?

A Different kinds of work—different kinds of railroad work. 10

Q For how long ?

A I think I commenced to work for the Delaware & Lackawanna in 1857.

Q Have you been employed by McAndrews on this tunnel ?

A Yes.

Q When did your employment commence ?

A I think it commenced on the tenth of July, 1874.

Q In what capacity ?

A As a general superintendent of his work. outside 20 pretty much; the understanding was that I was not expected to go into the mines altogether; that I would have a man to do that part of the work.

Q What, if anything, had you to do with the employment of men ?

A I had all to do about it, I suppose.

Q Explain what you mean by that ?

A That I had the hiring of men; it was seldom that McAndrews set a man to work without speaking to me about it; but men went to work there under my direc- 30 tions.

Q After you became superintendent, who else, if anybody, hired men besides you ?

A Nobody, except McAndrews might sometimes set a man to work.

Q How about Mr. Brown, after he became superintendent ?

A Mr. Brown did hire men, but the matter was talked between him and me; it was generally under my directions; if he said that at such a shaft he needed more men, I told him to put them on.

Q Did you know James Burns?

A Yes.

Q When did you first become acquainted with him?

A Pretty soon after I went on the tunnel I remember seeing him at shaft No. 2, as I went over the work.

10 Q Burns was then at No. 2?

A Yes.

Q How long did he remain there?

A I think some time the latter part of that month he was discharged.

Q You were not present at this discharge?

A No, sir.

Q He was not discharged by you?

A No.

Q You were informed of his discharge?

02 A Yes sir; by McAndrews.

Q Anybody else?

A No.

Q Did Burns have any communication with you after that?

A Yes, he had.

Q How long after he was discharged?

A I couldn't say exactly, but a number of times afterwards—perhaps a week or ten days, I should judge.

30 Q State what he said.

A He wanted I should get him back to work. He said he thought I could do it if I had a mind to. I told him that I hadn't a mind to; that McAndrews had discharged him because he was insolent, and McAndrews had told me not to give him employment. I told him several times that if he got a written order

from McAndrews, I would set him to work, otherwise I could not, that I had no authority to do it.

Q Did you tell him that more than once?

A Yes.

Q How long before his death was the last communication that you had with him on that subject, as near as you can tell?

A My recollection is that I saw him quite frequently for two or three months; he lived near No. 5 shaft. I met him quite often, and I couldn't say how many times I spoke to him, but would suppose, perhaps twenty, may be not over ten. He spoke to me very often about getting him back—if I said anything to McAndrews; I told him I had not.

Q Did you ever employ him?

A No sir.

Q Did you authorize anybody to employ him?

A I did not.

Q When, if at all, did you first learn that he was working in the work? 20

A I don't know that I ever knew that he was working on the work after his discharge. I didn't suppose that anybody would set him to work.

Q How far did you inform the foremen of the gangs?

A I don't know that I ever said anything particular to any of the foremen about him, any more than any other discharged man; men that has been discharged they must not hire.

Q Is there any rule as to discharged men? 20

A Yes; the foremen all understand that a man being discharged, they can't set them to work without a written order from the superintendent.

Q You say that is understood on this work?

A Yes; it is understood on this tunnel.

Q How do you know that?

A Because I have given the order a good many times to the foremen of gangs.

Q State what the order is?

A The order is, that a man being discharged, cannot be set back to work without an order, written or verbal, from the superintendent or McAndrews. Men are discharged and set to work again in some instances.

Q Did you know his name was on the pay-roll?

10 A No.

Q Before his death, had you learned in any way that his name was on the pay-roll?

A No, I hadn't.

Q Were you at shaft 5, when this injury occurred?

A Yes, but not very often; I suppose that I was never in that shaft three or four times.

Q You were about the top frequently?

20 A Yes, quite often; there would be days I would be there half a dozen times; and there would be days, perhaps, that I wouldn't be at five at all. I was back and forth over the whole work.

Q As a general thing you were at the surface of shaft 5 how often?

A I suppose on an average of twice a day for a year.

Q Prior to this injury?

A Yes.

Q While you were there what did you do?

30 A To look generally; I would go along and go to the engineer and say, "How is it going along here this morning—all right?" I had more to do at the approaches and at the dumps, and putting up work, more particularly, than to go into the mines, except to see that the general out-door work was carried on properly.

Q Did you see the buckets that were used there?

A Yes.

Q Did you have any concern with regard to them?

A Yes, to see that the buckets were kept in order ; any repairs or anything being out of the way with the ropes, or buckets, or drums, or engines, it came to me.

Q From whom did it come?

A From anybody that was about the tunnel—the topman, the engineer, the foreman.

Q Did you leave any orders to have word sent to you when anything needed attention? 10

A That was always understood, that I was the one to send to, to send to No. 3 shaft.

Q About the bail of these buckets, what was your judgment about their suitableness for the work that they were put to?

A Always made of good iron, and sufficiently strong so that there could be no danger. I had a good many bails made; had different shaped bails made.

Q I am speaking particularly of bails at shaft 5?

A We had two that made an eye by turning the 20 iron around and one hook; this one; and I think this bucket was the bucket that they used generally for men to go up and down on, because it was a smaller and safer bucket than the others.

Q You say that that bucket was the one that the men generally used?

A I think so.

Q Do you know why they generally used it?

A Because it was smaller than the water buckets, and it was a steadier bucket. 30

Q If it was hooked in the hook, how was it then as to safety?

A I considered it safe.

Q With regard to that guard, did you give any orders with regard to that guard?

A I can't say about that guard as I ever did, but generally to keep all those things in order.

Q You did give orders to keep all those things in order ?

A Yes ; have a man expressly to do that, to look after that ; his name was Murphy—the man whose business is to go two or three times a day to examine all the apparatus, ropes, engines, and repair them.

Q Had the blacksmith any such orders ?

A I can't say that he had ; he had orders to fix such things when they came to the shop.

10 Q The order to the blacksmith at the shaft ?

A I don't recollect ; but I recollect this blacksmith being there, and I know we had him to do this kind of work.

Q He had orders what to do ?

A Yes, I suppose so ; but I don't recollect making an order for this particular one ; he had general orders to do these things.

Q Any particular order to keep those guards provided ?

20 A To keep the hook on the bucket while dipping water.

Q With reference particularly to dipping water ?

A Yes ; they let go as the bucket tips over if it is not on ; I attempted to keep them on, but I couldn't keep them on ; the men would take them off and throw them away.

Q Why didn't you keep them on ?

A Because they were thrown away so often ; the men would not keep them on ; they would take out those bolts, or destroy them in some way.

30 Q [By the Court.] Do you know of their ever being lost at shaft 5 ?

A I don't know particularly at 5 ; I know they were complained about all the time at different places ; they would be taken away and disappear ; I have no doubt if I came to No. 5, and found that gone, I gave the order ;

I can't remember a man, that is, judging from my general course. My general course was to overhaul everything pertaining to hoisting rock or men, or about the ropes; and to keep them in order, and let me know at once if the ropes showed any signs of giving way, or a hook or a bail; to take no chances on ropes or anything pertaining to the hoisting.

Q [By the counsel.] You were at the shaft every day in the month of December?

A Yes. 10

Q Did you ever look at the hook during that month?

A I don't know that I looked particularly at that hook; I always was looking about the work, examining it; but I don't recollect particularly of going to No. 5 to look at the hook.

Q Have you ever gone down Shaft 5?

A Yes.

Q How did you go down?

A On the bucket. 20

Q When a man gets on the bucket to go down what opportunity has he to see whether it is hooked?

A If a man is looking where he is he could not go down without knowing where he is and what he is about; I know men sometimes get careless.

Q How is that bucket with reference to the platform?

A The bucket should come up about level with the platform.

Q Then how high above the platform would the bail stand? 30

A There is difference in bails; some are higher than others; that style of bail I should judge would be about fifteen inches. We calculate to run them up so that the bucket would turn over.

Q The hook where it goes through the bail is about what part of a man's person?

A About his knees.

Q Did any man at that shaft ever make any complaint to you that there was any want of safety in the apparatus used there?

A I don't remember of any time particularly; I know I changed the ropes about two or three months ago; since this accident I recollect of no complaint at No. 5.

*Cross Examination.*

10 Q When did you first enter the employ of McAndrews?

A About the first of July, 1874.

Q Was James Burns at work there then?

A Yes.

Q Do you know how long he had been there before?

A No.

Q How long after that was it before he was discharged?

02 A I think the latter part of the month.

Q Did you know him at that time?

A Nothing more than being introduced, and McAndrews going over the work and telling the men along that I had charge.

Q You didn't know any of the men until that time?

A No, sir.

Q You didn't know James Burns from any other man?

A No.

30 Q How long did you continue to act as superintendent for McAndrews?

A About a year.

Q Then you left?

A I was gone, I think, for seven or eight weeks.

Q How did you come to leave?

A I wasn't very well and went home and stayed at home.

Q You left voluntarily ?

A Yes.

Q And was not discharged ?

A No.

Q Did you ever have any dispute with McAndrews ?

A No.

Q You was only gone about eight weeks ?

A Yes.

Q What time did you come back ? 10

A The last day of August.

Q You have been there since ?

A Yes.

Q You were not discharged by him ?

A No.

Q How did you come to return ?

A I had worked pretty hard for a year, and after I got to feeling better I came back.

Q Came back of your own accord ?

A Yes. 20

Q He didn't send for you ?

A I was here quite often during my absence.

Q Did you request to come back, or did McAndrews send for you ?

A I think McAndrews sent word for me.

Q When you were engaged there your business called you from one end of the tunnel to the other ?

A Yes ; and at different points as far as the river at the east end of the tunnel.

Q You was general Superintendent ? 30

A Yes.

Q In what respect did your duties differ from those of Mr. Brown ?

A He had nothing to do with teams and horses and quarries and that kind of work ; he was confined particularly to the inside work of the tunnel.

Q You engaged Mr. Brown ?

A Yes.

Q By whose direction ?

A Mr. McAndrews.

Q You made it your business to visit the shaft two or three times a day ?

A Yes.

Q And was at Shaft 5 frequently ?

A Yes.

Q During the month of December, 1874, how often  
10 were you at Shaft 5 ?

A I was there often.

Q Was the guard upon that hook then ?

A I can't say.

Q Was there any rope upon the bail ?

A I didn't notice.

Q When you went there to the shaft your object was to see whether everything was in proper condition ?

A Yes ; if I wanted to know anything from the  
20 men below I would have the foreman called up.

Q Where is Mr. Murphy that you employed ?

A In the Court room.

Q In your examination of the machinery and implements in use about the shafts, you relied upon your own judgment as to whether things were in order when you were there looking at things ?

A Yes.

Q You looked around to see whether everything was all right, didn't simply depend upon asking  
30 others ?

A It has been a habit of mine to ask as I go along and look myself at things.

Q You say that at the other shafts these hooks with guards were used ?

A Some of them were and some were not ; when we use a pump we don't use them, when we bail water we use them.

Q Was there any extra quantity of those guards made to be ready for use at any time?

A I think we had a number of them on hand.

Q Where were they?

A At No. 3; a number of hooks with guards and hooks without, and all kinds of improvements—all kinds of riggings.

Q When were they got, before or after this accident?

A There has been no extra ones got since the accident; there has been the same care taken since that there was before. 10

Q The hook with the guard is safer at all times than without the guard?

A I don't know that it is.

Q If the hook is hooked into the bail with the guard there is no possibility of the bail getting loose?

A There is no possibility of the bail getting out of the hook if it is put in, whether there is a clevis or not. 20

Q If the guard had been used when the bucket was let down and the rope slacked the bail could not come off the hook then, could it?

A No, sir.

Q If the bucket was let down to the bottom of the shaft and the rope slacked and the hook had not the guard on, it might slip out of the bail?

A It might.

Q But if the guard was on, it could not slip out?

A I don't suppose it could. 30

Adjourned for the week.

Monday, January 3d, 1876.

*Gayland B. Adams.*

*Cross-examination* continued by Mr. Linn.

Q Was the charge made against you during the time you were employed by McAndrews of drunkenness or excessive use of intoxicating liquors ;

A No sir.

10 Q Were you addicted to the excessive use of intoxicating drinks during the time you were employed by McAndrews on this work ?

[Question objected to as irrelevant and immaterial.

Question admitted, and defendant excepts, and prays the exception may be sealed, and it is sealed accordingly.]

M. M. KNAPP, J. [L. s.]

20 A I have drank liquor on the work.

(By defendant's counsel.) That is not the question.

(*The Court.*) The question is the excessive use of intoxicating liquors.

A No sir.

Q Did you occasionally, while thus employed, indulge in the use of intoxicating drinks ?

30 [Question objected to. Admitted, and defendant excepts and prays the exception may be sealed, and it is sealed accordingly.]

M. M. KNAPP, J. [L. s.]

A No sir, not upon the work.

Q Why do you qualify, not upon the work ?

A I have done a great deal of work during my lifetime, and I have made it a point not to drink with my

men, or to drink to excess on my work. I don't say that I never have taken a drink of intoxicating liquor upon the work, but not to get intoxicated.

Q Have you never been intoxicated while going from one part of this work to another ?

A No sir ; I don't think I was.

Q Never ?

A No sir.

Q While inspecting or keeping in repair the machinery ? 10

A I think not.

Q Are you sure not ?

A I think not.

Q Are you sure not ?

A Yes sir, I am sure.

Q Haven't you been so under the influence of intoxicating liquors, while thus engaged, as to be the subject of remark by the laborers and men employed ?

[Question objected to.]

02

*Mr. Linn.* All these questions are intended to apply to the time prior to this accident. You so understand these questions, don't you ?

A I don't think I was ever on the work when there was any cause for remark ; I don't think I was ever on the work intoxicated.

Q So as to be noticeable by others ?

A What might have been said I don't know.

Q Do you think you ever was so far intoxicated as 30 to make it noticeable ; as to make it apparent to others that you were in that condition ?

A I don't think I ever was.

*Re-direct examination.*

Q I understood you to say on Friday last that you thought, for the purposes of taking men out of the

shaft and letting them down, that a hook without a guard was safer than one with a clevis or guard ?

A I said so.

Q Explain your reason for that opinion ?

A The bucket might get hooked on top of the guard, with the guard on ; that is the only reason I have ; it would be safer to be down in the hook than to lay on the guard.

Q Is either safe, unless the men use due care in putting it on ?

A It was impossible to keep the guards on.

Q The question is, whether either was safe unless the men used due care in putting the bail in the hook ?

A There should be care used, certainly.

Q You said it was impossible to keep those guards on ?

A We didn't succeed in keeping them on.

Q What were the difficulties ?

A They claim that taking out the pin and unhang-  
20 ing them was too much trouble ; the men wouldn't do it, they wouldn't keep them on ; they would slide them off in some way, taking the buckets off and on a hundred times a day.

Q Do you remember what hoisting apparatus there was at shaft No. 2, at the time you went there to work ?

A Similar to this, similar bail and hook, similar in all the shafts ; same engine there with a wire rope ; same contrivance substantially as at No. 5 ; the engines  
30 were not all just alike, the drums were not all alike, the hooks were not all the same pattern, but in the main about the same.

*Re-cross examination :*

Q Now, if I understand you correctly, you said the other day that a hook without the clevis was safer than the hook with, and the reason of it you give is

that with the clevis it might get hooked top of the clevis?

A Yes, that is the only reason I have for it being any safer with it off than with it on. It would get a better bearing on the hook than laying on the clevis.

Q If the guard was used on the hook, and used properly, then the hook would be safer with the guard upon it than without?

A Yes, I think it would be safer.

Q Wouldn't a contrivance of this kind, the hook with the guard properly used upon the bail, be safer for letting the men down into the shaft, and bringing up the bucket again when no man was at the bottom, than the hook without the clevis?

A I can't see how the bail can get out of the hook when you are raising the bucket, if it is hooked in the hook.

Q I would like to have you answer my question?

A It would be safer if it was kept in.

Q (By the Court) If the bail is properly hooked in the hook it is just as safe with or without?

A It is if it is properly put in the hook; it is just as safe one way as the other; but as he says if that guard was kept on there the bucket could not get out.

Q If the guard was upon the hook in this way, and through carelessness the hook should be hooked on top of the guard, this would be strong enough to hold it?

A I would feel safer with the bail on the hook, than with the bail on the guard.

Q Do you recollect seeing any of these guards on the hooks at shaft 2, prior to December 23d, 1874?

A No, I don't remember of any at No. 2; they were at 5 and 3, I remember, but at 2 I could not be positive.

Q Do you recollect seeing any manilla rope around the bottom of the eye at shaft 2, around this time?

A No sir.

*Patrick Murphy*, for defendant, sworn, testifies as follows:

*Direct examination.*

Q Are you one of the employees upon the construction of the tunnel through the hill?

A Yes.

Q How long have you been employed upon the tunnel?

10 A About two years.

Q What has been your part of the work?

A To take charge of the ropes and derricks.

Q What were you engaged upon during part of your work on the tunnel?

A I was down at the east end, chaining stones and in charge of a derrick. Then McAndrews sent me along the tunnel to take charge of the ropes. I am called the rigger.

20 Q You have been how long in the performance of those services?

A About eight years.

Q On the tunnel, how long have you been engaged as rigger?

A Pretty near since the tunnel started.

Q Do you go below at all?

A Once in a while.

Q What are your duties below?

30 A When the bench was close to the shaft we used to bring the rope in under the heading, and it used to wear out, and I used to go down and look after it?

Q What were your duties on top?

A To go over the tunnel once or twice a day to look after the rope.

Q What ropes did you look after?

A At the different shafts—all the ropes that are in use upon the work.

Q How many times a day do you visit the shafts?

A Sometimes 3 and 4; sometimes not at all; I might be off at some other place, and could not get there.

Q Were you engaged in that duty prior to December, 1874.

A Yes.

Q Did you know James Burns?

A Yes.

Q When did you first become acquainted with him? 10

A About five years ago, working before the Court House; when I first met him at the tunnel was down at the east end laboring.

Q Where did he go from there?

A To No. 2; I saw him there.

Q How often did you visit No. 2 shaft?

A I might go a couple of times a day, more or less.

Q How far is that from No. 5?

A There is two shafts between them.

Q How far apart are the shafts? 20

A 300 or 400 feet, if not more.

Q Do you know how the gearing at No. 2 was constructed?

A Just the same as all the others.

Q How was it at shaft 5?

A They are all just about the same.

Q You remember when Burns was employed at shaft No. 2?

A Yes.

Q Do you remember what kind of bails and hooks were used there then? 30

A They are all just pretty much the same as this here.

Q Were they open or looped bails?

A I couldn't exactly tell you.

Q You saw the gearing at shaft 5?

A I have.

Q How was that?

A Just about the same as all the others—no difference in none of them hardly.

Q Do you remember when Burns was killed?

A I do.

Q Where were you then?

A I believe I was in bed.

Q How long before that had you visited at shaft 5?

A I believe I was there the evening previous.

10 Q Did you ever see any of those guards used at No. 5?

A Yes.

Q What had you to do with those guards?

A Generally when I put a rope on, I put a hook on, and there's always generally a guard on the most of them.

Q Repeat that?

A When I used to put a rope on, I used to put a hook in.

02 Q What ropes do you mean that you put on?

A The cable rope.

Q When you put those on, you always put a hook on?

A Yes.

Q And when you put a hook on, did you use that guard?

A Yes; pretty much in three or four of the shafts where they used to make water; I never put but one on shaft No. 1; I never put any guard on shaft No. 4, because they make no water.

30 Q. Do you remember putting any guards on 5?

A Yes; I put one on three months previous to the accident, and changed the rope too.

Q How was it with those guards—any difficulty in keeping them on?

A They was too much trouble, the men would say, and they would not keep them on; too much trouble

changing from one bucket to another; they would take them off and throw them down the shaft, one side.

Q Did you ever go down shaft 5?

A I did often.

Q Down shaft 2?

A Yes.

Q How did you go down?

A In the bucket, and without a bucket; I have gone down standing on the hook.

Q How did you come out? 10

A With the buckets.

Q Up No. 5?

A Yes.

Q And in No. 2?

A Yes.

Q Did you ever have any control over the workmen employed there?

A No.

Q What instructions have you received in reference to those guards? 20

A I got instructions to keep them on the shafts where they were making water.

Q Instructions to keep them on shaft 5?

A Yes.

Q And what others did you have instructions to keep them on?

A No. 2, No. 3, and No. 6.

Q Who did you get those instructions from?

A Mr. Adams.

Q When you discovered a guard off, to whom did you go to get another? 30

A I would go to the blacksmith.

Q Did you ever go to Scott?

A No, sir.

Q What blacksmith did you go to?

A Mike Nealin, at shaft 3, that was the main jobbing blacksmith shop.

Q What time of evening were you at shaft 5 ?

A About when the men were going down at half-past 6.

Q How many were going down then ?

A I couldn't exactly tell you.

Q You saw them going down ?

A Yes.

*Cross-examination.*

10

Q Your business was to look after the ropes ?

A Yes.

Q What for ?

A To take care of them and watch them, so no accident would happen.

Q What did you do ?

A I would examine them once or twice a day, and watch them for fear the strands might break, to see if the rope was wearing out or giving way in any shape.

20 Q If you saw it was wearing or likely to give way in any place, then you would get a new rope ?

A I would get another rope.

Q That was your principal business ?

A Yes.

Q Were those ropes new ropes or second-hand ropes that you would get ?

A Some new and some second-hand.

Q Did you supply shaft No. 5 with any rope ?

A Yes.

30 Q How often ?

A I have put on two since we started.

Q Did you put on a new hook every time ?

A Yes, pretty much, with the exception of general connections and the chain ; they would wear once in a while, then I do nothing but cut the bit out and then put the same hook on again.

Q Do you recollect whether this hook that was used

on shaft 5, at the time of this accident, was a new hook at the time it was put on?

A It was a new hook, made by the blacksmith, Mike Nealin, at No. 3 shaft.

Q Every time you put on a hook you put a guard on?

A No, not every time; but whenever I bring in a new rope and hook there, I generally have a guard on.

Q Every time?

A I generally had. 10

Q For what purpose were the guards put on?

A For the purpose of Sunday night, when they were bailing water.

Q That is all they were used for?

A Yes.

Q They are not considered necessary for any other purpose?

A No, the men wouldn't use them; they were left on and the men wouldn't keep them on.

Q It was not considered necessary only when they were bailing water? 20

A No; the men would not keep them on.

Q Did you ever see the men take them off?

A No, I haven't, but they must have taken them off or they would not be off; they never broke off.

Q All you can say is, they disappeared?

A Yes.

Q When you came there and saw the guard was not upon the hook, did you have a new one made and bring it there? 30

A No; that was not my business.

*Re-direct examination.*

Q Did you ever talk with the men about keeping guards on?

A I did, in No. 5.

Q Whom did you talk to?

A I don't know who; I could not keep an account of every man.

Q What particular man did you talk to?

A I never spoke to any particular man; I would mention to every one that would be there that they ought to be kept on; they would say they were of no use there except when they were bailing water.

10 Q You told them to keep them on, and they said they were no use?

A They were of no more use except to bail water.

[*The Court.* The deceased ought to be connected with this in order to make the testimony competent.]

Q Did you ever see James Burns at shaft 5?

A He lived a couple of doors from there, and I used often to see him standing around there.

20 Q I mean engaged in work there, in the shaft or out of the shaft?

A No, I don't know as I ever seen him engaged in work at shaft 5.

*John Riley*, sworn for defendant, testifies as follows:

*Direct examination:*

Q You live in Jersey City?

A Yes sir.

30 Q Been living here how long?

A About twenty years.

Q You know this tunnel?

A Yes.

Q Were you ever engaged at shaft 2?

A I was, as foreman.

Q Did you know James Burns?

A I did.

Q Was he engaged there at that time?

A He was; he was foreman on the opposite shift to me—every other week day and night.

Q Do you remember at that time hooks of this kind being in use there?

A Yes.

Q At the time James Burns was at work there?

A Yes.

Q And at the time he was at work there, was there any used there with the guards? 10

A There was no guards on at all; they had holes in the hook the same as this, but no guards on.

Q How long did he work there?

A I couldn't tell.

Q About how long?

A He was there from the time they started the blasting of the shaft.

Q You were then at work how long?

A I was at No. 2 about 13 months.

Q At that time did men go up and down the buckets with the hook of that kind? 20

A Yes.

Q Were you present at the accident to know anything about it?

A No.

*Cross-examination :*

Q When was your attention called to the fact that the hooks used in shaft No. 2 had no guards on? 30

A I never seen any guards there till after this accident happened.

Q Were they put on after this accident happened?

A Yes.

Q Kept on?

A No, they were not kept on; they were kept on for a while.

Q And then got off again ?

A Yes.

Q Never any before ?

A Never any before. There would sometimes be a piece of rope or a piece of string tied around the hook and right across the hook.

Q How soon were they put on after this accident happened ?

A In a few days after, I believe.

10 Q How long were they kept on ?

A Till they were broke off, I believe.

Q Then they were not put on again ?

A No ; I didn't see any more.

Q How deep is shaft No. 2 ?

A I think it is 87 or 88 feet.

*Re-direct examination.*

20 Q Did you ever use those wires or ropes except when you were bailing water ?

A We never used them on No. 2 when we was bailing water.

Q Did you bail water at No. 2 ?

A Yes.

Q What did you have to keep the bucket on ?

A We used to have a man go down and bail the water.

Q Suppose the water was deep ?

A No. 2 didn't use to make much water.

30 Q Why were they not kept on ?

A I heard some of the men say they were a nuisance, and it was too much trouble hooking them on and hooking them off.

*Re-cross examination.*

Q Who made that objection that they were a nuisance ?

A The men that worked in the shaft.

Q The men whose business it was to fill the bucket with stone and water at the bottom of the shaft ?

A Yes.

Q Not the miners that were at work ?

A No ; not the miners.

*Gayland B. Adams* re-called for defence, testifies as follows :

*Direct examination.*

10

Q Did Mr. McAndrews engage or hire any man especially to attend at the bottom of the shaft to hook and unhook the bucket there ?

A No sir ; we left that with the foreman ; the foreman of the gang handled that.

Q Which gang ?

A The men working the shaft.

Q You appointed no man especially for that purpose ?

20

A No sir.

Q But the foreman of the gang had it done by his men ?

A Any man that he chose—that he saw fit.

Q Was that the case at No. 5 ?

A Yes, so far as I know ; I never used any man for that purpose.

*Cross-examination.*

Q Didn't you testify that a man was always employed for the purpose of hooking and unhooking at the bottom of the shaft ?

30

A We always necessarily had a man there—there necessarily had to be a man there for that purpose, bailing water.

Q Didn't you testify that you hired a man specially for that purpose ?

A No sir.

Q Now you say that no man was ever hired for that purpose ?

A I don't know, there might have been ; the foreman had all to do about that.

Q To your knowledge, was any man ever specially employed for the purpose of standing at the bottom of the shaft, and hooking and unhooking the buckets ?

A Not by me.

10 Q Nor by McAndrews, so far as you know ?

A Not so far as I know.

Q The man who filled the bucket with rock, usually hooked it on ?

A There are two or three men necessarily about the bottom—two or three men kept there.

Q What was their business at the bottom ?

A They run their car out, and the bucket was on the car, and they would run out with it, and change the bucket.

20 Q Then it was nobody's business specially, to hook and unhook the bucket ?

A I don't know as it was ; whoever that man was he was put there by the foreman.

Defendant rests.

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#### REBUTTAL.

30 *Mary Burns*, recalled for plaintiff, testifies as follows :

*Direct-examination.*

Q Did you hear the testimony of Peter Welsh and John McAndrews, Jr., when they were on the stand the other day ?

A Yes.

Q Was you paid for the wages earned by your husband, from the 1st of December up to the time of his death ?

[Question objected to as irrelevant, unless it was paid by defendant, or by his knowledge or direction—no authority is shown in any body from McAndrews, to settle such claims as that after the death of Burns.]

10

Court admits the testimony and defendant excepts, and prays the exception may be sealed, and it is sealed accordingly.

M. M. KNAPP, J. [L. s.]

A Yes sir.

Q Were you paid the wages of your husband from December 1st to the time of his death, after he was killed ?

A Yes sir.

20

Q By whom were you paid ?

A By young McAndrews and the book-keeper.

Q John McAndrews, Jr., the pay-master, and the book-keeper Bragy ?

A Yes sir.

Q They were both present ?

A Yes sir.

Q Was a bill deducted at that time from your husband's wages ?

A Yes sir.

30

Q How much was that bill ?

A \$8 and some cents.

Q What was it for ?

A For a pair of boots my husband got, a paper or two of tobacco and some fish, a quart of kerosene oil and a pound of coffee.

Q Where did you get it ?

A From Mr. Welsh, at the company's store.

Q Who carried on that store?

A Mr. Welsh, and it goes by the name of the company's store.

Q How much did you receive in money?

A \$15 and some odd.

Q Whom did you receive it from?

A From young McAndrews and Mr. Bragy, and I had to sign my name; I touched the pen for Mr. Bragy, and there was a few persons inside; when Mr. Bragy saw me come he says "pay Mrs. Burns and let her go first," and he did.

Q Was that before or after you was appointed administratrix?

A I don't know what you mean.

Q Before you took these letters out in the Surrogate's office?

A Yes, before I thought to do it at all.

Q How long were you married to Mr. Burns?

20 A Four years and nine months at the time of his death.

Q Was he a man of temperate habit?

A Yes he was, except that he would drink occasionally.

Q You mean he drank occasionally?

A Yes, but not to get drunk.

Q When did he leave off?

A Four months before his death?

30 Q Do you know for a certainty that he drank no spirituous liquors for four months before his death?

A Yes sir.

Q You are positive of that?

A I am positive of that.

Q Was your husband a man of good health, generally speaking?

A Yes.

Q Did he have any disease or tendency to consumption, or anything of that kind?

A Not that I know of.

*Cross-examination :*

Q Can you tell us how long after your husband's death it was that you got this pay ?

A I can't exactly tell, but I think it was inside of a week after, because I went a couple of times to the office for it, and young McAndrews was away, and Bragy told me that he was in Scranton, some place, 10 and I could not get it till he came back ?

Q When did you get your letters of administration ?

A I am not sure.

[*Mr. Linn.* It was on the 12th of January.]

Q How much money did you get ?

A \$15 and some odd cents.

Q And there was taken out what ?

A \$8 and some odd cents.

20

Q For charges at Welsh's store ?

A Yes.

Q Anything else besides \$8 ?

A \$5 was for the boots, and then he drew some tobacco and I drew the rest—things out of the store.

Q I understood you were keeping boarders ?

A Yes.

Q In your husband's lifetime ?

A Yes.

Q How long did you keep boarders during his 30 lifetime ?

A About a year.

Q How many ?

A Sometimes more, sometimes less.

Q You averaged how many ?

A Sometimes we used to keep 6 or 7 ; they were back and forward, 4 and 2 and 1, and so on.

Q Did you do all the work yourself?

A Yes.

Q Who collected the board money?

A Sometimes I used to ; if he was working in the day they got paid, I would collect it ; if he was not working, he would collect it.

Q What did you do with what you collected?

A I would pay the grocery and butcher's bill with it?

10 Q You laid out what you got in supplies for the house, I suppose?

A Yes.

*Re-direct examination.*

Q You stated that at the time you were paid off that they were paying off other parties, and Mr. Bragy suggested to give you the preference?

A Yes.

Q Was that on pay day?

20 A No ; but it was after the board bill had been collected—about a week or two after pay day.

Q Pay day was on the 20th of the month?

A Yes, but I didn't go for it.

Q May you not have received your pay after you took out your letters?

A I don't know ; I can't recollect that, but I know I got the pay before I took out the letters from the Surrogate's.

30 Q Were other parties getting their pay at the same time?

A They were ; the office was almost full, and when Bragy looked around he saw me and said that.

Q You said you made your mark?

A Yes, I signed that I received the money ; he told me to touch the pen.

Q What sort of a paper was it?

A It was in the book.

Q You don't read writing ?

A No sir.

Q You saw other names on the book ?

A I couldn't see very well, because the desk was rather high.

*Re-cross examination :*

Q Do you write your name ?

A Sometimes.

10

Q Did you on this occasion ?

A No sir ; only he asked me to touch the pen.

Q What did you do with the pen ?

A I just touched the tip of it.

Q Did you make any mark with the pen ?

A No sir.

Q Did you make a mark with the pen at the time you made your mark ?

A Mr. Bragy did.

*Re-direct examination.*

20

Q Did you ever do that on any other occasion ?

A Yes ; often, whenever I received board money, I always done it.

Q Did you ever collect the wages of your husband at any other time ?

A No.

Q Was there any board money paid you at this time ?

A Yes.

Q How much money was paid you at this time ?

30

A I could not tell.

Q As near as you can tell.

A I can't say ; is it \$40 or some odd.

*Re-cross examination.*

Q Who paid you that board bill ?

A Mr. McAndrews at the same time with Mr. Bragy.

Q How often did you put your hand to the pen on that occasion?

A Only once.

Q You had drawn board money there before?

A Yes.

Q For men that were working in the works and boarded with you?

A Yes.

Q Their board was kept back at the office, and paid  
10 to you?

A Yes.

Q On those occasions did you always put your hand to the pen when you got board money?

A Yes.

*John J. Ryan*, recalled by plaintiff, testifies as follows:

Q Was there any one before this accident, hired to remain at the bottom of the shaft to hook on the buckets, or to see to them after the miners came down?  
20

[Question objected to as immaterial and irrelevant. Admitted and defendant excepts, and prays an exception may be sealed, and is sealed accordingly.]

M. M. KNAPP. [L. s.]

A Not that I have ever known.

Q You never saw one?

A No.

Q State the course of the miners when they come  
30 down in the bucket—what do they do? Do they stop and see to anything about the bucket or bail, or do they turn off to their work?

A They always make off for their own heading; they don't want to stay in the water because the heading is dry.

Q They don't stop to see anything about the bucket?

A No sir.

Q It is not a part of their business?

A No part of their business.

Q Was there a time-keeper at shaft No. 5?

A Yes.

Q What time did he call the names of the miners, and how often?

A Before they went to work in the evening.

Q Describe the mode of calling the miners' names?

A The time-keeper came in and Mr. Brown was generally along with him; when he would not be with him he would once in a while make an inquiry for him, or if he had been here; and if he happened to be with him, Brown would stand one side of him and look over his shoulder, or look around; mostly he looked over his shoulder; and when each man's name was called out he had to say "here," and if a man was behind the boiler, or outside the door and another man answered for him and said he was here, he would get no time at all till he showed himself; that was the rule; Mr. Brown would not allow him to make his time till he showed his face. 10 20

Q Was the name of each called out aloud?

A Yes.

Q In the presence of Brown, the time-keeper?

A Yes, when Brown was there.

Q Was that the practice during the whole of the month of December?

A Yes.

Q Up to time of the accident?

A Yes, and I believe afterwards for some time.

Q Do you know of more than one or two exceptions, during the time Burns was at work there, when Brown was not present? 30

A I could not state the number of times he was not present, but I think I have seen him there more times than I have seen him absent.

Q How often was this time taken?

A At that time it was called only once in the day

in this shift; the night shift would be called about 6 o'clock in the evening—it was called once a day.

Q That was the invariable practice, to take the time in that way?

A It was at that time, and I believe is still.

Q That was done every day, wasn't it?

A Yes.

Q Do you know of any other man by the name of James Burns on either of those shafts at that time, but  
10 this James Burns?

A No, I don't.

Q Did you ever hear any name of Burns but that of James Burns, at shaft No. 5, in December?

A No.

Q You are acquainted with Michael C. Brown and G. B. Adams?

A I know them by name; they are superintendents.

Q Have you ever seen Mr. Adams intoxicated, on that work?

20

[Question objected to and overruled.]

Q What was the habit of James Burns at the time he was to work on shaft 5?

[Question objected to and overruled.]

*Cross-examination:*

Q You say there was a roll-call just before you went into the night shift, before you went down?

30

A Yes, every night.

Q Was the time-keeper there?

A Yes.

Q Who was the time-keeper in that shaft in December, 1874, on the night shift?

A I don't know his name; I believe there was an old man who used to call the roll every night, and there was another time-keeper for the day.

Q Who was the time-keeper in December, 1874, in shaft No. 5, on the night shift?

A I don't know his name.

Q What was the old gentleman's name you spoke of?

A I don't know.

Q He was the only one acting on the night shift?

A That is all I have seen.

Q Was there any time taken except to call the roll before the men began work? 10

A I don't know any further.

Q Wasn't there a time-keeper that went into the shaft during the course of the week to see who was there at work?

A I have never seen him in the shaft.

Q Didn't the foreman of the gang report every night men who had worked and who had not worked?

A I don't know.

Q Do you mean to say there was no note of the time kept, except calling the names of the men before they went to work in the night shift? 20

A That was the foreman's duty to keep the time; I don't know whether he did it or not. I suppose when the roll was called men were supposed to work all night; any one that didn't work, I think it was the foreman's business to report it to the time-keeper.

Q Didn't the foreman make a report every day, of who had worked on the night shift?

A I don't know.

Q (By the Court) Do you know whether it was his duty to do so, by any recollection that you have here? 30

A It is customary for the foreman to do so.

Q You say that there was no man kept at the bottom?

A Not to my knowledge.

Q How did the rock get into the buckets?

A There was men there to load the rock ; there was also the water man, and it was just according to whichever man was nearest to the hook, would take it and put it on their own bucket—that is the rock bucket ; the water man when he wished to send up the water, he would hitch on his own bucket. If any man was going up, if he came there and found an empty bucket and the hook fastened on to another bucket, he would hitch it on himself.

10 Q So that the man who happened to be the nearest there at the time, would hook it on ?

A If he was a laborer he had to hook it on his own bucket.

Q And if a miner wanted to go up he would hook it on himself ?

A Yes.

Q So that it never got hooked on without somebody being there to hook it ?

A Different persons hooked it on, no one man  
20 hooked it on all the time.

Q But it was some man working in the shaft ?

A It might be a miner, laborer, or a water man.

Q But all of those men were under the direction of the gang boss ?

A Yes.

Q And they worked at one place or another, as the boss directed them ?

A Yes.

Q Those that were working at the buckets, hooked  
30 the bails to the buckets ?

A Every man hooked his own bucket ; that is, the laborers hooked their own buckets, and the water men hooked their buckets. If the bucket was hooked and the man wanted to go up he would go up on it, but if not, he would hook it himself.

Q (By the Court) Were the buckets unhooked for the purpose of loading ?

A They would draw the buckets in, and sometimes they would leave the hook on, and sometimes they would let it swing.

Q The buckets were often changed, often taken off and put on ?

A They were when they were working.

*Henry Kelly* re-called by plaintiff, testifies as follows :

10

*Direct examination.*

Q While you were at work at shaft 5, what time did they take the time of the miners ?

A In the night ; the time-keeper always came around between half-past five and six o'clock, and the men were assembled in the engine-house. He and Mr. Brown generally came together ; Brown and he retired up to where the engineer stood, and the working men assembled at the further end of the engine-house next to the shaft. The time-keeper opened his book and Brown generally stood looking over his shoulder into the time-book. The time-keeper commenced with the foreman's name first ; then he called each man consecutively, and every one answered their own name aloud, so that there could be no mistake as to who was working or was not ; and if it happened that a man was behind the boiler or any other place concealed, and that anybody would answer for him, Brown said, "Who is answering there ?" He might make the observation and might not ; sometimes he would, sometimes not ; but if he happened to do it, you had to come up and answer each name so he could see you, so there would be no fraud—no mistake.

20

30

Q What remark did Brown ever make in reference to his being so particular about it ?

[Question objected to and overruled.]

Q Do you recollect any other man being employed at shaft 5, in December, 1874, by the name of Burns?

A No, not to my memory or knowledge; no man ever worked in 5 by the name of Burns, except James Burns.

Q Do you know how long Mr. Burns worked at shaft 6 before he came to 5?

A No, sir; I was not acquainted with James Burns till he came to work at No. 5.

10

*Cross examination.*

Q Do you mean to say there was no time-keeper came into the shaft during the night time?

A I have seen this time-keeper down once in shaft 5; he always bore a great repugnance to coming down; I believe he was afraid of going down.

Q Who was that time-keeper?

A I never knew his name, but he was an old man; Mr. Leary, the foreman, came out at half-past four or five to the top and gave him the other half-shift's time; the time-keeper took the first half-shift's time on the top before they went into the bottom, then the foreman generally came up and met him on top, and the foreman gave him the time; if any man was absent he told him; the time-keeper was always there when we went down, and he would be there again between three and four o'clock; I was at the bottom myself pretty much till I would go down to blast.

20

*John Bergen, recalled for plaintiff, testifies as follows:*

*Direct examination.*

Q Where did you work in September, October, November, and December, 1875?

A At No. 5.

Q Was any man hired to attend at the bottom of the

shafts to hook on the buckets for that special purpose ?

A No, sir ; not for that purpose ; not to my knowledge.

Q At the time James Burns worked on shaft 5, was Michael C. Brown present when the time of the men were taken ?

A Yes ; he was.

Q Healways officiated at the time of taking the time ?

A Yes.

Q Since December has there been a man specially hired and kept at the bottom of that shaft to hook on the buckets ? 10

A Yes, sir.

*John Flannery* recalled for plaintiff :

Q You were engineer at No. 5 ?

A Yes, sir.

Q How frequently was the time of the men working at that shaft taken ?

A It was taken twice in the day-time and once in the night-time. 20

Q Did you ever see Michael C. Brown present attending the taking of the time of the men ?

A Yes, generally on the night shift he come there with the time-keeper, or after him.

Q Was he there every night ?

A I couldn't say every night.

Q As a general rule you say Brown was present ?

A Generally ; not always.

Q Half of the time ? 30

A He was there more than half the time ; most every night he was there ; one or two nights he would be away, perhaps once a month.

Q Were the names of the men called out in a loud voice so Brown could hear.

A Yes, so everybody could hear, both outside and inside the engine house.

Q How near did Brown stand to the man who called the names ?

A He generally stood alongside him.

Q How far were they from the parties ?

A Sometimes they were right in among them; sometimes six or eight feet away from them in the engine room. There was a lamp hanging over the engine and the time-keeper used to stand under this lamp so he could see the men.

10 Q (*By Court*)—Were the faces of the men visible?

A Yes, sir.

Q If Burns was there would there be any difficulty in Brown distinguishing him ?

A No difficulty at all.

Q Did you ever know anybody by the name of Burns besides James Burns working on that shaft ?

A No.

*Cross Examined.*

20 Q In the month of December, did you ever hear James Burns' name called by the time-keeper ?

A Yes, I heard it for two weeks before the accident.

Q Did you see Burns there ?

A Yes, sir.

Q Did you know he had been discharged in the preceding July ?

A Yes, sir.

30 Q Did you know that McAndrews had told him he never could work on the tunnel again ?

A No.

Q Did Burns never tell you that McAndrews had told him he never could work on the tunnel again ?

A No, never.

Q Do you know whether Brown knew Burns at that time ?

A I don't know. I know he has been in his com-

pany previous to that. I have seen him calling him out of the house and talking to him.

Q When?

A I think it was in August or September. It was during the time Burns was walking round.

Q How far was Burns' house from the shaft?

A Fifty or sixty feet.

Q How long did Burns live in that house before his death?

A He lived there before I went to work on the 10 shaft; he was living there when the shaft was begun.

Q You were pretty intimate with Burns?

A Yes, very intimate with him.

Q Did he ever work in the Erie tunnel?

A I don't know; I never heard him say.

*Patrick Gilroy* for plaintiff, sworn, testified as follows:

Q At what shaft did you work?

A No. 2, the last place.

20

Q Did you ever work at No. 5.

A No, sir.

Q Were you ever present at any time between a conversation between Michael C. Brown and James Burns?

A I was.

Q What do you know about Brown hiring Burns?

[Question objected to, because Brown's attention has not been called to it. Admitted. The defendant excepts and prays an exception may be sealed, and it is sealed accordingly.]

30

M. M. KNAPP, J. [L. S.]

A Mr. Burns and I went to see Mr. Brown one evening to see if we could get work from him, and he told us he had no place till the next evening, so we went off. The next evening, about half-past five o'clock, at Shaft No. 5, James Burns and I was together, and the

time-keeper called all the names, and the men had gone down and Mr. Brown hadn't come yet, so we staid ; we waited till he would come ; when the last bucket was gone down Brown come around and they were all gone down but the foreman, Leary, and he come up and we asked him if he had any place for us ; he said he didn't know till he saw Leary ; he asked Leary if he had any place for any more head men ; and Leary said he had a place for one ; and

10 Brown said, Jimmie, you go down there, and he says to me, you go down to the West End. I staid there and I saw Burns go down the bucket and I went away then.

Q Brown appeared to know him very well ?

A Yes, sir.

Q He called him Jimmie ?

A Yes, sir.

*Cross Examined.*

20 Q When was that ?

A The beginning of December, 1874 ; I don't remember the date.

Q Who was present then ?

A Burns, Brown and I ; Leary was a little ways away from us.

Q Where was it ?

A Alongside the engine house of No. 5 Shaft.

Q How far from the topman ?

A About fifteen or twenty feet.

30 Q Was he there ?

A I don't know.

Q Did you go to work ?

A Yes ; Mr. Brown told me to go to the West End and go to work ; they were just beginning to open the approach there, and I thought it was too cold, and I went down to the East End and got work down there.

Q Who hired you there ?

A One Palister.

Q How long did you work there ?

A Till some time in March, I think ; then I went to  
No. 2 Shaft.

Q How long did you stay there ?

A Till it stopped.

Q Where are you working now ?

A No place.

Q How long have you been out of employment ?

A Four or five weeks ; since No 2 stopped. 10

Q You say that Brown asked Leary if he had any  
place ?

A Yes ; Leary said he had a place for one.

Q What then ?

A Mr. Brown says, "Jimmie you can go to work  
there." and Burns went and got onto the tub and went  
down with Leary.

Q That was in the night ?

A Yes, sir ; in the evening. 20

Plaintiff re-rests.

*Michael C. Brown* recalled for defence.

Q You heard the testimony of this last witness ?

A No, not plain.

Q About taking the time at night in December, 1874,  
were you there when the time was taken at No. 5 ?

A Sometimes I was and sometimes I was not.

Q How much of the time were you there ?

A Generally, if I happened to meet the timekeeper, 30  
I would travel right through the work with him and  
see the time taken.

Q Where did he take it ?

A He took it on the bottom of the shaft, and some-  
times on top.

Q How frequently were you at the top of the shaft  
when the men were called ?

A I couldn't say to a certainty.

Q In December, 1874?

A I couldn't tell you; might be about two-thirds of the time.

Q In December, 1874, did you hear the name of James Burns called as one of the men working there, or see him there as one of the workmen?

A As far as the name is concerned I never took any particular notice of any certain name, because we have  
10 so many men; I didn't take any particular notice of any one man so as to remember it correctly.

Q (*By Court*)—You wanted a man to answer to every name?

A Yes; I didn't care about the name so that the number of answers was to the number of men.

Q Do you remember James Burns applying to you for work in December, 1874, at Shaft No. 5?

A There was droves to me every day, and I couldn't say.

20 Q Do you remember Burns making application to you there?

A There was several Burnses.

Q This man James Burns—did he apply to you in December?

A He might, but I couldn't remember.

Q Do you know Patrick Gilroy, who has just been sworn here?

A I do not.

30 Q Do you remember him and Burns coming to you in December and asking for work?

A I do not.

(Gilroy is directed to stand up by the Court.)

Q (*By Court*)—Do you know that man by sight?

A I have seen him before, but I couldn't call him by name.

Q Do you remember him and Burns calling on you in December and asking for work ?

A I do not.

Q You knew James before that ?

A I didn't know him personally at all ; I might have seen him, but I had no personal acquaintance with him ?

Q Did you know the man that had been foreman at No. 2 in the early part of the Summer !

A No ; I heard the name of Burns, but I wasn't 10 personally acquainted with him.

Q Did you know of his discharge ?

A I wasn't foreman of the work at that time ; I come on after his discharge.

Q What time did you begin as foreman ?

A Some time after Adams.

Q You didn't personally know the man who got killed, called James Burns ?

A I had no personal acquaintance with him before, to have any conversation. 20

Q Did you know that that man had been discharged in the summer by McAndrews.

A I heard tell of the name ; I heard the men talking about it.

Q Did you know the individual ?

A No.

Q Did you ever tell James Burns to go to work on shaft No. 6 ?

A I haven't the slightest recollection that I ever set him to work. 30

Q [By the Court.] Do you know whether you did or not ?

A I believe I did not ; to the best of my knowledge I didn't send him personally to work, because the order was at that time to go personally or send a note ; that was the order from McAndrews, that no stationary foreman should employ any man.

Q Did you go with James Burns to the foreman and tell him to put Burns to work?

A No.

Q Have you ever told him to put James Burns to work?

A I never remember a bit about it, either going personally with him, or sending a note with him either.

10 Q You spoke before about having had a conversation with Burns the day he got killed, or about that time?

A It was not personally with him; there was 5 or 6 of them by the engine-house before they went down to work; that was previous to the accident, the same evening of that day; they had a rough conversation inside.

Q Who was he talking to?

20 A I couldn't exactly say; they were all talking together, and the word was spoken reflecting upon things, and one thing or another in a jest; one would say, I wouldn't insure my life for a cent and go to work in this tunnel; something to that effect; and I stepped in and I says, young men, rough conversation is not very proper or appropriate here before you go to work; any man that don't want to go to work there is no compulsion about, you can go outside and not go to work; then I walked away.

Q Who made the rough remarks?

30 A When I was on the street they were standing in a row, about the length of the boiler around in a double file; this man James Burns stood pretty near the door, near to the engineer's place, and the reason I took notice of him was, he had a long clay pipe, a new pipe, and I asked one of the men who he was, and he said his name was Burns.

Q Tell us what he said?

A He said he wouldn't insure his life to go down the work for a cent; I stepped in and said, if any man didn't

consider himself safe to go down he could go home, there was no compulsion about it.

Q What did he say?

A He didn't make any answer at all.

*Cross-examined by Mr. Sawyer.*

Q Have you talked with anybody since you were on the stand before about this particular conversation? 10

A You are the first gentleman I conversed with after getting off the stand.

Q Did you tell me about this testimony?

A You are the first man that asked me about it.

Q Who else have you talked with about this particular conversation?

A I might have conversation with several of the men.

Q Have you talked with McAndrews about it since you were on the stand before?

A Not about that very fact. 20

Q You have had a conversation with him about this matter?

A I traveled with him yesterday afternoon, and talked with him about it.

Q Did you tell him if you were called to the witness stand again you would relate this conversation and implicate Burns?

A The only thing that I heard was that a young man, an engineer, said that he would prove that I had said that McAndrews said to me he didn't care whether the men were killed or not; that wasn't so, anyway.

Q You say you didn't know James Burns before December, 1874?

A To identify the man as the person himself, I did not.

Q Do you say you didn't know James Burns till December, 1874?

A I never knew him to be the same James Burns that got killed in No. 5.

Q You didn't?

A No sir.

Q Did you ever call him out of his house and have a conversation with him in the month of September or October?

A I don't remember anything of the kind.

Q Do you swear that you never went to James Burns' house in the months of September, October, November or December, and called him out to have a conversation with him?

A Not to my knowledge.

Q You swear positivey you never did?

A Not to my knowledge.

Q Do you recollect a man calling with Burns upon you for employment in December?

A There might be several.

Q Do you recollect James Burns calling on you for employment?

A I don't know that the man ever asked me for work.

Q Did you ever hear the name of James Burns called out in the month of December?

A I might and might not; there is from one to eight hundred names; I never took notice of the names.

Q You say you know he was discharged from No. 2?

A I heard the name, and that he was forbidden to work on this tunnel; I didn't know the man.

Q But you knew his name was James Burns?

A I didn't know him personally.

Q Didn't you know a man by the name of James Burns had been discharged from No. 2?

A I heard of it.

Q When you had instructions not to employ him, when you heard his name called, don't you recall it?

A I had no acquaintance with the man at all.

Q Give us the names of some of the men that were there at the time Burns made this remark you have testified to?

A We had a time-keeper for that purpose; I kept no calendar of the names except when he committed a misdemeanor, then I would take his name.

Q Give us the name of another party who was present at the conversation you speak of?

A I could not identify the parties; I just came by; just saw that the engineer and blacksmiths were there. 10

Q How long was you there?

A I couldn't tell you.

Q How long did it take?

A I couldn't tell.

Q Give us what was said?

A It was rough, loud talk.

Q You singled out James Burns as the man who spoke about insurance?

A Generally when a man talks pretty loud you take some notice of him, and I asked one of the men 20 who that was, and I think the time-keeper said to me it was James Burns.

Q You say you didn't know he was to work in December?

A I hadn't the least knowledge that he was to work.

*Lewis Bragy* re-called for defence.

Q Were you here when Mrs. Burns was examined this morning?

A Yes sir. 30

Q You heard her evidence about getting pay at the office?

A Yes sir.

Q Have you any recollection about her story of having paid her, or directing her to be paid, any wages?

A Not the slightest. If any such thing had occurred as she mentioned I should remember it.

Q When you paid workmen, did you ever take receipts for wages?

A No sir.

Q Explain how you pay workmen?

A Each man's name was called off on the pay-roll; I called out the amount opposite his name, and the paymaster would pay the amount due him.

Q If you paid the wages to the wife, did you take a receipt?

10 A No sir.

Q If you kept money back for board, when you paid the boarding mistress did you take a receipt for money paid for board?

A Yes, when we paid board bills, we took receipts.

Q Do you remember Mrs. Burns having got pay for board?

A No sir; I think some time ago she did have some board bills in the office.

Q But you still have no recollection of ever paying her any wages?

20 A No sir, none at all.

Q Do you remember her asking you for wages?

A I believe she came to the store one time after her husband's death. All I recollect is her coming to the store and seeing her there; that is all I recollect in reference to it.

Q Had you any instructions from Mr. McAndrews to pay any wages for Burns?

A No sir.

30 Q Do you remember who the time-keepers were at No. 5 in December, 1874?

A Yes sir.

Q Who were they?

A One was Mr. Trusdell, and the other was Mr. Hand.

Q How were they required to get the time of the men?

A They were required to go down the shaft twice a day, or twice a night, and call off the names of the men down there to see that the men were at work.

Q Did you permit the men to take the time without going down into the shaft?

A No sir; as soon as we discovered that he did that, we discharged him.

Q It was against the rules?

A Yes sir.

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*Cross-examined.*

Q Do you know whether James Burns had any knowledge of the rule about keeping the time?

A I don't know; I think he must have, as he was a foreman.

*Re-direct examination.*

Q Who took the time of the men at No. 2 when he was foreman there? 20

A Hand and Trusdell.

Q Did they take it by going into the shaft?

A I don't know; their orders were to go in always; Mr. Hand always went in.

Q As soon as you discovered Trusdell, didn't you discharge him?

A Yes sir.

*Re-cross examination.*

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Q When was Trusdell discharged?

A About January, 1873.

Q After this accident?

A Yes; he was there at the time.

Q Were you present at any time when time was taken?

A No sir.

*Re-examined in chief.*

Q The time was all turned in to you to be entered on the general book?

A Yes sir.

Q (By Court). What is there on the book to show who are paid?

A Their names are crossed.

Q (By Court). Where are those time-books of 1874?

10 A We have got them at the office.

Q (By Mr. Linn). Why didn't you bring them here?

A I didn't know you wanted them brought here.

Case closed.

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DEFENDANT'S REQUESTS TO CHARGE.

20 The defendant requests the Court to instruct and charge the jury as follows:

I.

30 *a.* This action is founded upon the allegation, that Burns, the plaintiff's intestate, had been hired by, and when he received the injury of which he died, was by virtue of such hiring, engaged in the service of the defendant; and without legal and sufficient evidence of that allegation, no verdict in favor of the plaintiff in this action, can be legally rendered.

*b.* That except as between parent and child, the relation of master and servant can be formed only by contract, express or implied, between the employer and the employed, and such contract cannot be made without the consent of the employer, as well as of the employee; and without the consent of the parties, no such contract or relation can be formed.

*c.* That in this case there is no evidence whatever of any express contract between said intestate and the defendant, in or by which the defendant employed said \_\_\_\_\_ for any purpose whatever after the defendant discharged said Burns from work at shaft No. 2.

*d.* That if the jury believe that before said Burns began to work at shaft No. 5, he was discharged from the defendant's service by the defendant himself, and notified by the defendant, that he, the defendant, was unwilling that he, said Burns, should, at any time thereafter, do any work on the tunnel the defendant was then engaged in constructing, no contract of employment of said Burns by the defendant, to work in or about said tunnel, can be implied without proof that the defendant afterwards himself employed said Burns, or knowingly consented to his being employed on said work, or personally knew that said Burns was working on said work; and after obtaining that knowledge, without objection made known to said Burns, permitted him to continue at work there.

*e.* That after said Burns was discharged and notified by the defendant to not thereafter work in or about said tunnel, he had no right to accept work on that tunnel from the defendant's employees, on the defendant's account, without the personal consent of the defendant to his being again employed. And that the fact that defendant's time-keeper and gang boss knew that said Burns was working in said tunnel, and did not object to his doing so, cannot make an express or implied employment by the defendant of said Burns, because, without the personal consent of the defendant, said Burns had no right to accept such employment, nor without such consent had the time keeper or gang boss the power or right to permit said Burns to work on said tunnel; and their doing so, with or without

collusion with said Burns, was a fraud upon the defendant, from which said Burns, or his personal representative, can derive no rights, privileges or advantages.

10 *f.* That there is no evidence in this case which will authorize the jury to find, or which will support or justify a verdict finding that there was, at the time when said Burns received the injury of which he died, an express or implied contract between said Burns and the defendant, by which the defendant hired or employed said Burns to work for him in or about said tunnel.

## II.

20 *a.* That the defendant was under no legal obligation to his workmen to furnish more or different means for letting his workmen down and taking them up shaft No. 5, than he had therefor use for that purpose, at the time when said Burns began to work there, and when he received the injury complained of. If any workman knowing, or having the opportunity to see and know the means the defendant had provided for use in descending and ascending the shaft, was not willing to assume the risks of passing up and down the shaft by the use of these means, it was his right and his duty to refuse to enter upon, or to quit the defendant's service; and if knowing, or having the opportunity of seeing and knowing what means the defendant had provided to be used by the workmen in  
30 descending and ascending the shaft, he voluntarily engaged in working in that shaft, the law presumes that such workman assumed and agreed to bear all the risks to himself, of the use of those means, so that if, in the careless or negligent use of those means by himself, or his fellow workmen, he was injured, he has no claim upon his employer for compensation for such injury.

*b.* That, in this case there is no evidence that said Burns did not know before he began to work at shaft No 5, and while he was at work there, all about the means furnished by the defendant for the purpose of letting the workmen down into, and bringing them up from that shaft, and the risk to be run in the use of those means ; the evidence shows that he had ample opportunity to know all about those means and the risks of using them ; and without incredible carelessness, could not have been ignorant of them. The law, 10 therefore, presumes that he had that knowledge, and as he, with that knowledge, voluntarily entered upon that work, he assumed the risks of that service, and had no right of action ; nor has his administratrix, against the defendant, for any injury he suffered from the want of care by himself, or his fellow workmen in the use of the means the defendant had provided.

*c.* That the only duties and obligations of the defendant, as to means for the workmen to get into and 20 out of shaft No. 5, was to see that such means as he did provide for that purpose, had sufficient strength for the service they were to be put to, and that, when used as they were intended to be used, they would be safe for such service ; but the defendant was under no obligation to any workman in that shaft, to see that his fellow workmen, in and about the shaft, exercised all and every care or caution requisite to preserve their fellow workmen from injury, and if thus neglected so to do, the defendant cannot be made liable in 30 this action for such neglect.

*d.* That it is proved and undisputed that the rope, hook, buckets and the bails of the buckets used at shaft No. 5, were of sufficient strength to, and did endure, unbroken, the use to which they were put ; that upon the evidence in the case, it is proved beyond reasonable doubt, and conceded by both sides, that the

bucket on the occasion when said Burns was killed, fell from the top to the bottom of the shaft, because the bail of the bucket, at the time said Burns got upon it, was not in the hook. That if said bail had then been in said hook, as it could and should have been, had said Burns and his fellow workmen then and there exercised due care and caution, said bucket could not and would not then and there have fallen; and as said bail, according to the proof, was not in  
 10 said hook, because some of the fellow workmen of Burns had then and there neglected to put it there, and because said Burns and three of this fellow workmen, then and there stepped upon, and put their weight on said bucket, without looking to see whether said bail was in said hook (although the bail and hook were directly before them, easy to be seen, and their personal safety depended upon the bail and hook being properly connected) it is demonstrated, that the fall-  
 20 ing of said bucket, and the death of said Burns, were not caused by the negligence of the defendant, but were caused by the negligence of said Burns and his fellow workmen, in not exercising due care and caution in the use of the bail and hook, and therefore the defendant is not liable in this action.

### III.

That in order to render the defendant liable in this action, if the deceased was hired by the defendant, the plaintiff must have proved that the deceased, at  
 30 the time, and immediately before he received the injury, was exposed to risks of which he was ignorant when he engaged in work at that shaft, and which, by reasonable observation and attention, he could not discover or reasonably expect, and of which the defendant should have given him notice before he engaged in that work, or before he was injured, so that in consequence of that to him unknown and un-

discoverable risk, he could have refused to engage in that work, or, having engaged, and quit, before he was injured; and as there is no evidence in this case, that the defendant was guilty of any such omission, concealment or fraud, the plaintiff can not recover in this suit. If the last request is refused, then we ask that it be given, except and omitting the latter part, which states, that there is no evidence in this case that the defendant was guilty, &c., and that the plaintiff cannot recover in this suit.

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### CHARGE TO THE JURY.

*Gentlemen of the Jury* :—This case, like every other case that is brought in a court of law, must be determined according to the law and the evidence. Human sympathy is all very well, and its exercise often is commendable; a man who is destitute of it, hardly fills his proper place in life; but if there is any place where its exercise is ill-timed, it is just here where you and I are discharging our responsibilities. Beside, that sympathy has very little value, except where it is followed by practical results. The man who sympathizes with the affliction of another, only gives fair proof of it when he puts his hand in his pocket and contributes toward the suffering. It is a different thing, however, to put your hand into somebody else's pocket, and contribute to it; that is no sympathy. Here you have simply to determine the question of right between these parties, without regard to any sympathy at all, according to law and according to the evidence. If the evidence in the cause, under the law, as it will be given to you by the court, brings responsibility, then the question of how much compensation—not that you shall pay to the

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plaintiff, but that somebody else shall pay to her— becomes a question to be decided by you upon principles of prudence, common sense, and common justice. But a few years ago, no action of this kind would lie for any damages for such an injury. By the common law, nobody could recover damages for an accident which occasioned the death of another, no matter how much such death may have afflicted them, or brought pecuniary loss upon them. But by our

10 statute, and by a like statute in many States in the Union, provision is made now, whereby those who were interested in the life of the person, may, where they show that the death has been caused wrongfully, as by negligence of another, recover such compensation for that loss as is equivalent to the interest which that person had in the life of the one destroyed. That is the effect of our statute now, and that is the extent to which a recovery in any case can be had ; and by

20 the statute a recovery can only be had where it could have been so, had the person injured not been killed, but been in life, and brought the action himself. So that the same rules that govern in determining liability in the case of a man bringing an action against another for an injury to himself, he being in life, govern in trying a cause like this. The action is based upon the claim that the defendant was negligent in his duty towards the plaintiff's intestate, by which negligence the death of the intestate was caused.

The administratrix of James Burns is the plaintiff

30 here, and she claims in the suit against McAndrews for the injury alleged to have been caused by the negligence of the defendant in maintaining machinery at shaft No. 5, on the tunnel of the Delaware, Lackawanna and Western Railroad Company, and which negligence caused his death, alleging that he, at the time, was the servant of the defendant, and received the injury which caused his death while in the per-

formance of the service in which he was employed.  
That is the claim.

The first question, gentlemen, that meets us in this case, and upon its threshold, is the question whether the relationship of master and servant existed between the decedent and the defendant, and this is a question of fact, to be settled on the evidence by the jury. If Burns was a mere intruder, or volunteer, or there on this work by any fraud upon the defendant, the defendant then owed him no duty; he was not as to him 10  
in such case bound to furnish anything, and the plaintiff would have no ground of recovery at all, or for any injury but a wilful injury. If he was there by fraud upon the defendant, or if he was there as a mere volunteer and intruder in this work, the defendant owed him no legal duty, and there would be no right of recovery.

The relationship of master and servant is one existing in contract; on the one part an agreement to hire and to pay for services, on the other to serve the em- 20  
ployer for pay. It is not in all cases by express contract; the law will oftentimes imply such contract from existing facts and circumstances. If the work and services are rendered at the request of the party to whom they are rendered the law will imply promise to pay for the services, thus by implication the law, you see, completing the contract. This request may often be implied, and usually is so when the master accepts and appropriates the benefits and the products of the services; where he receives, accepts and appro- 30  
priates to himself, although there may have been no actual request, the law will imply a request on his part in the performance of the services, and thus complete the contract by implication. It is true, gentlemen, that consent is of the essence of all contracts. Consent in the absence of fraud of an authorized agent, or the consent of an authorized agent in the

absence of fraud is the consent of the principal. There can be no consent without knowledge. This is a truism, self-evident as a proposition, that a man cannot consent to a thing that he does not know. But, in the complications of business, men oftentimes do and are obliged to act by and through the agency of others, and the rule is that knowledge of the agent is knowledge of the principal. Where you authorize another to hire a man in your employment, and that other, acting as your agent, engages with such person—engages with a man to serve—although you may not know it, having set your agent in motion, you are nevertheless chargeable in law with the knowledge of it, because that agent knew it, and you had authorized him to act. In this case, if Brown was authorized by the defendant to employ men upon this work generally, and in the exercise of that authority he employed this man and set him to work, there is knowledge, and there is an express contract, because what the defendant did through his agent in law he did himself, and the knowledge that his agent had, that this man was employed upon this work, is the knowledge of the defendant. Now, gentlemen, fraudulent collusion with another's agent, as if Burns in his lifetime had entered into a fraudulent collusion with the agent of McAndrews, knowing that McAndrews himself would not employ him or have him in his service, but by fraud and with intent to deceive McAndrews an arrangement like this was made, that would make it a void arrangement and he could not be regarded as his servant. But that must be proved. Fraud can never be guessed at—never be presumed—it must be proved.

Now you look at all the circumstances of this case, because this question, as properly said by the counsel, lies at the very threshold—on the very borders of this case—and unless you find as matter of fact that the relation of master and servant existed between

Burns and the defendant, this case is at an end. It is only when you are satisfied from the evidence before you, that the relation of master and servant existed between them, that you go to the other branches of the case ; and you have a right, gentlemen, to take into account all the circumstances that surround this case in determining this question. Burns it is true is not here to testify ; the testimony that comes to you on the part of the defendants upon this point is testimony that you may believe to be somewhat stimulated by interest that surrounds the case, the interests of the defendants ; that you are to look at and weigh it and give such weight to the testimony as you in your judgment think it honestly deserves. You have a right to look at the fact that his name appeared for a time on the books, and that he was regarded as one of the employees and was paid as such, at least once, I think the evidence is. You have a right to take into account the witness' testimony, who said he was present when Brown set him to work ; also the fact that after the death of Burns, as testified to, somebody acting for the defendant settled with his widow, although she had not then the legal right to enforce the payment of the money ; yet you are to judge whether that is not, with the other circumstances, evidence going to show that this relation did exist. If you find it did exist, then you proceed to the other branches of the case ; if you are not satisfied from the evidence that the relation of master and servant existed between them, that ends the case. Suppose you find that such relation existed, and that James Burns was in point of fact the servant of the defendant, and he received the injury which caused his death while in the performance of the service in which he was employed. There seems to be no question as to the fact that Burns with others fell down this shaft and was killed. If he was employed by the defendant

he was killed while in the service of the defendant, because his legitimate employment, if he had any there, was working at this shaft.

Now to entitle the plaintiff, as his administratrix, to recover at all in this case you must be satisfied by the evidence that the defendant was negligent, in act, or omission, in the performance of some duty which he owed to the intestate by contract or other legal obligation, and that such negligence—that is the negligence that you shall find—was the proximate cause of the injury. It would be valueless as matter of proof in a case like this to say that defendant was negligent in some outside matter that had no relation to the cause of death. The negligence for which a man is answerable in a suit is that negligence which produces the injury, and that only. You cannot make up a general account of a defendant's carelessness and then hold him responsible for an accident that happened; the actionable injury must be by reason of some specific careless thing. The only inquiry on the question of negligence, in a suit like this, is as to the particular negligence which caused the injury; and in that the proof must sustain the fact of the negligence. Now the relation of master and servant is attended with responsibility and obligations somewhat different from those between mere strangers. Such relations exist by contract between the parties, and a part of the contract is that the servant, or employee,—and I use the words master and servant for convenience, gentlemen, as you will understand,—and that relates to all kinds of employment, a part of the contract is, that the servant, or employee, on entering the service, takes upon himself and assumes, in consideration of the compensation to be paid to him, all the ordinary and usual risks of the employment in which he engages, whether they are more or less dangerous; and among these risks is that of injury

which may arise to him from the negligence of his fellow laborers engaged in the same general service with himself, while they are so engaged. And the master on his part engages to employ competent and trustworthy servants in the performance of the work to be performed, and to furnish for their use, in the performance of such services, suitable, proper and relatively safe machinery, means, appliances and instrumentalities to be employed and used in the service in which they are engaged, and also to maintain them in such condition while they are in use ; and that means this—where means and machinery or instrumentalities are necessary in the work, and the master undertakes to provide them, they must be of the character I have stated ; if he does not undertake to provide them at all, why the servant knows that that duty is not assumed by the master, and he may either leave the service for want of proper material, or, if he so contract, may provide them himself, and when he provides them himself of course he would be answerable for the consequences of any mistake he makes ; but where the master undertakes to furnish the machinery the law holds him to the responsibility of furnishing the materials and means of the character I have stated. And these are, gentlemen, the terms of this contract in respect to the question of negligence and injury. They are terms, it is true, not expressed generally between the parties orally, but they are terms implied in the law, and they are equally binding upon the parties as if they had been disclosed one to the other in the most solemn manner. The relative rights and duties of the parties depend upon these implications of law ; and it is in the light of these terms that we are to determine the rights and duties of these parties. And it is necessary that we should understand what responsibilities the injured servant has assumed, what injuries or risks of injuries he has engaged to bear,

without claim for redress or compensation from the employer ; and it is also important to know what duties and responsibilities the employer has assumed toward his employee, in order to determine whether he has been negligent in the performance of such duties.

Now the rule, gentlemen, is that in the performance of duties of this sort, ordinary care and prudence is to be exercised. That means such prudence as a man competent to do the work he undertakes, sufficiently  
 10 informed of its requirements in the transaction of the business, as a prudent man—where the safety of life is concerned, regarding such safety—would and should exercise. In this case, if McAndrews used due care and diligence in the selection of the co-laborers of Burns, and of that there seems to be very little question that can come in this cause, and also the same care in providing and maintaining for use suitable and proper machinery and means for their work, that is all the law required him to do, and for all risks outside  
 20 of that Burns assumed to bear the responsibility. I will repeat, if McAndrews used due care and diligence in the selection of the co-laborers of Burns, and due care and diligence in providing and maintaining for their use suitable and proper machinery and means for this work in the shaft, and for raising and lowering the men, he did all the law required him to do, and for all risks outside of that Burns assumed to bear the responsibility. If McAndrews did this, he was not negligent. To find him negligent, you must be satis-  
 30 fied from the evidence that he failed in the performance of the duty which he assumed toward Burns by virtue of this employment. Now it is alleged that he neglected to provide and maintain suitable apparatus for lowering the employees into the shaft where their duties called them. This is a question of fact also for the jury. The duty imposed upon the defendant was the exercise of reasonable care in providing and main-

taining suitable and proper apparatus for the use of the men, and the question in this case is, did he do this? There is no doubt of the fact that the bucket fell, and that Burns and three men were killed. The question is, was this an accident beyond reasonable human control, or was it the result of the defendant's negligence in failing to supply suitable apparatus, or was it the result of the carelessness of the men themselves in using suitable apparatus? Precisely how this injury arose I suppose it is almost impossible, at least exceedingly difficult, to be assured of. There seems to have been no want of strength in the parts of the machinery that were provided; nothing that was there that properly belonged to the apparatus was broken; the hook was sound, the bail was sound, the rope maintained its integrity, it was not broken, but in some way this bucket, which had carried down four men just previous to the accident, returned attached to the hook, and it was held in position some way by this machinery, so that to appearance, at least, it was in fit condition and shape for men to step upon and return down the shaft. And it was attached in such a way and with such degree of tenacity, that it was able to support three men and a boy before it fell, and before decedent got on it, and yet I think we all agree in this that it could not have been hooked. Precisely how it was attached, by what arrangement this deceptive appearance was taken on by this machinery, it is perhaps very difficult to tell; and it may become a question in this case, whether it was one of those unforeseen and uncontrollable disasters which no human foresight could guard against, or whether it was the result of carelessness or negligence in furnishing appliances which could get in such deceptive shape. Now, several ways have been suggested by which this accident may have happened, by which this deception might have been taken

on. It is suggested that a slight cord that was tied across the bail of the bucket, was that in which the hook caught and that raised the bucket. Could that hold three men and a boy without breaking? It was testified that it was a single strand. It seems to me that that is not satisfactory. It is suggested again that it might have been upon the point of the hook. It seems to me that from the jar that would result from the drawing it up a distance of 70 feet, and especially  
10 from three men stepping on it and stepping off it, it could never have been poised on the point of that hook; that it was unhooked is abundantly clear; how it was held precisely may not be so clear. It has occurred to me as one of the theories as to the means by which it might have occurred, that the hook was properly hooked in the bale, and descended with the bucket and touched the bottom, and the hook may have slid down from its position, and then it may have come up wedged in the bail in this way [Court illustrates with  
20 a small hook and bail], because an examination of the hook shows that in the major bend there is greater width than there is between the points and the main shank of the hook, and then it might have held there because there is a difference of at least one-eighth of an inch in the width, and it might have been sufficient to have carried the three men down had not the bail sprung open, breaking the string on the bail, and allowed the hook to escape. That seems to me to be the most plausible theory of the accident. That involves  
30 the question, perhaps, of the string being there; and it seems to me so far as that string is concerned, if placed there by the men who were engaged to do this work, either the top man for his convenience, or the men below, if done by them, unless it was a part of the appliances placed there to fill the place of some other necessary thing; the fact of the string having been put there is not a fact for which this defendant

could be chargeable ; because if the accident resulted by the negligent act of a fellow servant, as I said before, each servant assumes the consequence of the negligence of the other servants ; I mean if it was not there to supply the place of some other thing that you might regard under the circumstances as being a necessary part of such an apparatus, and that should have been placed there by a man exercising ordinary care and prudence for the safety of the men, whether that is so or not, would be a matter very 10 much of fact for the jury. There is no doubt at all that the appearances deceived these men ; and while it is true, as stated by counsel for defendant, that it is a rule, that unless men in the use of machinery like this, especially with the risk and peril that is before them, exercise ordinary care and prudence in examining into its condition when in use, a recovery cannot be had ; yet it is only the exercise of ordinary care and prudence, suited to the circumstances of the situation, however, that is required of them, because to some 20 extent, at least, they have a right to presume upon the defendant, or the party who is supplying the machinery--they have a right to presume upon the belief that he has performed his duty ; but a plain patent risk, or one that in the exercise of ordinary prudence could be observed by one using machinery, would be such a risk as the person receiving an injury from its use would be answerable for himself. The law does not permit any man to be careless in the exercise of such duties, and then hold others responsible ; each 30 man must be in the exercise of ordinary care and prudence, in order to hold others answerable for negligence.

The complaint is in substance that the machinery was defective and dangerous, in that it allowed of so dangerous an adjustment, and was liable to it and could not be guarded against

by ordinary prudence of the men. The claim is that the hook should have had a guard on it, or if not, that the bail should have been so arranged that it required not the string or any other appliance into which the hook might be caught, and thus deceive the men by the possibility of its being insecurely suspended from the rope. This is in substance what I understand to be the claim of fact by the plaintiff. Now it is clear, that with the best of all machinery that you

10 may devise, there are possible difficulties, possible shapes in which, and out of which, injuries may arise which ordinary care or the greater care cannot guard against. Injuries arising in that way are to be regarded as accidents beyond reasonable control. For such accidents nobody is answerable; no one is answerable for unavoidable accidents. Every man is answerable for his negligence in the performance of his duty where accident arises, unless the party receiving the injury had knowledge of it and disregarded it, and took the

20 risks upon himself. The question becomes quite a narrow one in this case, upon this subject of liability, as to whether the defendant exercised ordinary care and prudence in the supplying of the machinery, whether it was such as a reasonable man, having ordinary care for the men employed, regarding their life and the risks that they encounter—whether it was such as such a man would furnish. A man is not obliged to make any unreasonable effort, nor to exercise any special skill in providing such appliances; he is bound

30 to the exercise of ordinary care, prudence, and skill in providing machinery, having reference to the dangers that are assumed by the parties who use it. When he has gone to that point he has discharged his legal duty, and is not responsible for consequences that come after it; but that duty he must perform. It is always a question of fact, or in this case, at least, it is a question of fact to be determined by this jury upon the

evidence in the case, whether this machinery as it was, was reasonably sufficient to perform the service for which it had been designed, and how far, in its supply, the exercise of ordinary care by the defendant is apparent in its condition as it appears there in the shaft. There is evidence in the cause, and that is for the jury, that the guard on this hook had been ordered by the defendant, and that as a rule guards had been provided for these hooks ; and you will recollect what is testified by the witnesses as to the reason why that was done, and you will consider whether the same reasons that moved the parties in putting this guard on in order to prevent the bucket from slipping off when they were dipping water, do not also obtain with reference to the carrying of men up and down this shaft. These guards may or may not, in your judgment, have been a necessity, and on that point the Court say to you that if you regard them as a necessity, as reasonably necessary, in the exercise of the kind of prudence and care that I have mentioned, to have been there, that they should have been supplied by the defendant in the exercise of such care, then it was the duty of the defendant to see that they were supplied, and to see that they were continued there ; to exercise ordinary care and prudence to see that they were continued there in use, and it would not be a sufficient excuse for their discontinuance that some of the men objected to their use. The objection to the master of some of the men to the use of an appliance that is reasonably necessary to be there, would not excuse the master as to others from the performance of his duty to those others. His duty was, if you so find, notwithstanding some may have objected to the inconvenience of having them there—his duty as to others who did not object, was to have them there so that they could be used if they were necessary to be used. But if they were not reasonably necessary for the safety of these men, if such guards

as these were not reasonably necessary for the safety of these men, although the defendant had ordered them there, he would not be liable. What he did in ordering them may be some evidence of what is necessary ; but if you should find that the machinery and appliances were sufficient without them, although he had ordered them there, and they had neglected to put them on or use them, there would be no responsibility on the master, even though the accident may have hap-  
 10 pened from their absence. But if in your judgment it was necessary in the exercise of ordinary care and prudence that the guards should have been there upon those hooks, or supplied for the hooks, and either he or his men failed to have them there, and the injury resulted from that cause, there would be a liability.

I have said that the employees had a right to suppose that the arrangement they found there for raising and lowering them was reasonably safe for its purpose, if nothing appeared to show it otherwise, because it was  
 20 the defendant's duty to supply such, and to exercise care in keeping and maintaining them during all the time of the services ; and if he knows they are otherwise than safe—and knowledge of his agent is knowledge of the principal—if he knows they are otherwise than safe and secure, or in the exercise of proper care ought to have known or might have known that they were insecure, he fails in his duty, and is responsible for accidents resulting therefrom, unless it appears that the intestate was negligent  
 30 in the use of the means provided, in such way that the injury would not have happened to him had he not been so negligent. The doctrine is well established that, where one seeks to recover for an injury, upon the alleged negligence of another, himself must be free from contributory negligence. If he is not so, but is himself negligent, and in such way that the injury would not have resulted to him but for his own

negligence, there is no right of recovery. And this principle applies here in this case. If in any way in the use of this machinery, even though it was insufficient for the purposes for which it was intended, even though you should find the defendant had not done his duty, if Burns had during the time been negligent himself in such manner that he contributed to the injury, then there would be no right of recovery. But if the appliances were insufficient, and the other agents and servants acted negligently, although in some cases, as I have said, a servant takes upon himself the risk of the negligence of his co-laborers, yet in this case, if the defendant himself were negligent in providing the means as he should have provided them, and the negligence of other servants than Burns, has contributed toward the injury, that would not save the defendant; he would be liable, even though others were negligent and contributed, so that if the defendant were negligent in providing the proper and safe machinery, and injury resulted therefrom, although the carelessness of other servants may have aided in the injury, the defendant would be, nevertheless, liable. Negligence of the defendant cannot be excused, because others by their negligence aided in causing the disaster. But if the machinery was in itself reasonably sufficient, or such as a prudent man, who understood the necessities of this work, and the usual requisites for the safety of his men in the exercise of ordinary care and prudence in providing for their safety would furnish, it would be a compliance with his legal duty, and to hold him responsible, would be injustice. If the carelessness of the servants—and this I have spoken of before—if the carelessness of the servants who were engaged with Burns in this work, the topman or other men at the bottom who were employed there—the defendant being free from it,—if their carelessness caused the injury, there can be no recovery.

Another question has been raised and discussed in this case, and it is proper for the Court to refer to it. If defective machinery is used by men in the employ of another, and such defects are open and visible, so that with the exercise of ordinary observation the party using it could see the defects, and he still continues to use them, in presumption of law he takes the risk of the accident that results from that. But they must be such defects as in the exercise of ordinary care and  
 10 prudence a man can see; if latent or hidden, and such as the master, in the exercise of his duty, ought to have provided against, the servant cannot be chargeable with the consequences if injury result from such latent, hidden defects, or such defects as cannot be observed by ordinary foresight and sagacity. There is proof in the cause that the defendant had these clevises for the hooks, and that he ordered the superintendents and other employees to supply them, and they were broken. If it was necessary to have these supplied at  
 20 all—and that is a question for the jury—if it was a duty properly chargeable upon the defendant, although the defendant ordered it to be done and directed his superintendent and agents to do it, if they did not do it, this, although the negligence of servants was not such negligence of servants as a servant injured, in contemplation of law, assumes when he enters into service; he is not to be held as taking the risks resulting from the negligence of servants who are in the discharge of a duty which is devolved upon the  
 30 employer; in that they are his agents, and the duty that is to be performed by him he commits to them. To the extent they are negligent in the performance of the duty devolved upon him, just so far is he himself answerable for their negligence, and the servant is not. So that if a duty in respect to this devolved upon the defendant, and that duty was committed to his servants, his superintendents, any one under him, to

perform, and they were negligent and failed to perform that duty, that is a matter for which he must be answerable; it is not a risk the other servants assume to bear. If the superintendents did their duty as they were directed—if you should regard that as a part of the duty of the defendant—if they did this duty—if they supplied these things to the men so that they could use them if they pleased—if they had them there to use and they neglected the use after the master had done his duty in supplying them, the master cannot be held answerable, because he has performed his duty, and it would then be by their own carelessness that injury arose. The duty of the master is to supply them; he is not bound to stand there and see that they are used; the men whom he employs must exercise their senses in protecting themselves from injury; the best that he could do, and all the duty that the law casts upon him is to see that the necessary appliances are there and in their places. If the men disregard their use, or will not use them, he cannot be answerable for that, and ought not to be.

It seems to me that I have touched all the matters of law that are raised in the case, and it comes about to this: whether the false adjustment that took place on this occasion between the bucket and the hook, and which caused the death of these parties, was from a defect inherent in the appliances themselves, and one which should have been guarded against by the master in the exercise of ordinary care for the safety of his men under the circumstances, or whether it was owing to the carelessness or negligence of the intestate or other servants in the handling of the machinery provided? Or, again, was it an unavoidable accident? If you should find that the defendant had failed in providing the necessary means for the safety of these men, and that there was no neglect on their part in their use, then there would be responsibility in him.

If the decedent was negligent in the use of proper machinery, so that his death was the result of it; or if other servants with him were negligent in the use of proper machinery, so that his death was the result of it, there could be no recovery here. If the defendant was negligent in providing proper machinery, although the accident might in part have been caused by the negligence of others than Burns, that would not hinder a recovery. If the cause of the injury was the negligence  
 10 of the defendant in respect to this machinery, and was of such a character as was open and observable by common observation, although not such as you would think he was required to furnish, and the decedent had means of seeing it and knowing it, and did not exercise his own senses, but was careless and imprudent about it, then there could be no recovery; but if he was in the exercise of ordinary prudence, and the machinery furnished was not such as should have been furnished, and death resulted from such neglect,  
 20 then there would be a right of recovery. You take this case under the rules the Court have given you and determine whether there is responsibility.

The question of damages is one upon which the rules are perhaps more indefinite than in any other class of cases. The jury cannot give damages *ad libitum*; but it is very much a question for the jury where there is recovery what the damages should be in cases of this sort. It is to be determined by you  
 30 upon this question, however, what the loss of the life was to the widow, or the representatives of the deceased,—what the loss of the life was to those who had an interest in his life, either by right or otherwise. It is not all that a man earns surely that they have an interest in, or what he could have earned in his life. A man earns, and he is entitled to live of his earnings. A man like Burns—a laborer—had to live out of what he earned; and those who were in-

terested in his life, were interested certainly not beyond the excess of what he could earn over what he required for himself. It is not a question how much will support this widow, or this child; but it is a question, so far as you are able to settle it, how much they would have gained pecuniarily from him had he lived; and in the best way that you are able to you are to get at the solution of that question. It is to be purely compensation. It is not to punish anybody, or to teach lessons; it is purely to make up the money loss, as near as the jury can do it, that the party suffers by reason of the death of the decedent. And, as well suggested by counsel for the defence, it would not do to take the amount that a party would give each year of his life to his wife and his children, and make the sum of that the amount of your verdict, because the verdict is an amount in the present. Now there are some rules in some of the courts, and are reasonably close mathematical; rules, by which the present value of an annuity, or yearly sum, can be ascertained. The law of this State has never yet declared that to be a rule for estimating damage in these cases; but it is a rule that some courts adopt, and a knowledge of it may not be objectionable here: it does not bind this jury. I think this man was thirty-three years old. Now under the rule as to annuities, about \$1,250 gives \$100 a year for the chances of life that a man of that age would have—that is a \$100 a year for this woman and child as long as by the ordinary chances of life Burns would have lived — would be paid for by a present sum of about \$1,250; double that yearly sum would be double that amount and proportionately in either direction—\$1,250 about represents \$100 a year. I mention that as the only rule that I know of having any claim to mathematical accuracy that is ever applied for the determination of these questions. It is

not a rule, however, to govern you. You decide this matter according to the best judgment that you can bring to bear upon it in view of the rule, that it is to be only compensation, and the compensation is to be for the loss that the widow and those having an interest in his life suffer by his death.

Now, gentlemen, to recapitulate what I have said: The defendant's duty was to exercise reasonable care and diligence in providing and maintaining  
 10 suitable machinery and means for the lowering and raising of employees in the shaft, such suitability having reference to the circumstances of danger attending the situation, and he is answerable for negligence in this regard as well as the negligence of his servants charged with this duty for injury which results therefrom. Plaintiff's intestate was bound to exercise reasonable care and diligence in the use of the machinery furnished, whether suitable or otherwise, for the purposes; and if his own negligence contributed to the  
 20 injury in the use of the machinery actually in use there, the plaintiff cannot recover. The plaintiff must prove the negligence of the defendant and the resulting injuries, and also that the risk by which he was injured was not one of those which was incident to his employment, and for which he agreed in law to assume. If neither party were in fault, but the accident was beyond all control of reasonable care, the plaintiff cannot recover. If the machinery was dangerous and imperfect, and intestate knew it, or in the exercise of  
 30 ordinary care and diligence might have known it, then the plaintiff cannot recover. If the defendant exercised by himself, or his servants or agents, the ordinary care and diligence in furnishing suitable machinery for raising and lowering the decedent and others in the shaft, and kept them in proper repair, he performed his duty, and the plaintiff could have no right of recovery. If the defendant was negligent in providing

proper machinery for the purposes stated, and did not keep it in proper condition and repair, or his agents or employees charged with this duty were thus negligent, and the injury resulted therefrom, he would be liable, although the carelessness of other workmen than deceased in the use of this machinery contributed to the accident. If the injury resulted from the careless use of proper machinery by decedent or his fellow workmen, the defendant is without legal fault, and the plaintiff cannot recover.

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The defendant, through his counsel, prays that an exception may be allowed to the Courts, refusing to charge propositions *e* and *f*, under head I, and prayed that its exception might be sealed, and it is sealed accordingly.

M. M. KNAPP, J. [L. s.]

The defendant, through his counsel, prays that an exception may be allowed to the refusal of the Court to charge the proposition contained under head II, except so far as charged, and prayed that its exception might be sealed, and it is sealed accordingly.

M. M. KNAPP, J. [L. s.]

The defendant, through his counsel, prays an exception may be allowed to the refusal of the Court to charge the request contained under head III, and prays that the exception may be sealed, and it is sealed accordingly.

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M. M. KNAPP, J. [L. s.]

The defendant, through his counsel, prays an exception may be allowed to that part of the charge of the Court, in which the Court instructs the jury that where the master undertakes to furnish machinery he must furnish sufficient and suitable machinery for the

purposes, and prays that the exception may be sealed, and it is accordingly sealed.

M. M. KNAPP, J. [L. s.]

The defendant, through his counsel, prays that an exception may be allowed to so much of the charge of the Court as instructed the jury that it is a question of fact for the jury, whether the defendant furnished suitable appararatus for lowering the men, and prays that an exception may be sealed, and it is sealed ac-  
10 cordingly.

M. M. KNAPP, J. [L. s.]

The defendant, through his counsel, prays that an exception may be allowed to so much of the charge of the Court, as instructed the jury that if the jury regard the guards on the hooks as necessary to have been there, it was the duty of the defendant to provide them, and to see that they were continued there, and prays that the exception may be sealed, and it is sealed ac-  
accordingly.

M. M. KNAPP, J. [L. s.]

20 The defendant, through his counsel, prays that an exception may be allowed to so much of the charge of the Court as touches the question of damages, and prays that the exception may be sealed, and it is sealed accordingly.

M. M. KNAPP, J. [L. s.]

*The Court.* All these exceptions are subject to the language of the Court.

# New Jersey Court of Errors and Appeals.

JOHN McANDREWS,  
*vs.*  
MARY BURNS,  
*Administratrix, of James*  
*Burns, deceased.* } *In Error.*

## ASSIGNMENT OF ERRORS.

Afterwards, that is to say, on the \_\_\_\_\_ day of March,  
in the year of our Lord eighteen hundred and seventy-  
six, in the Court of Errors and Appeals, comes the said <sup>20</sup>  
John McAndrews, by

his attorney, and says that in the record and proceedings  
aforesaid, and also in the matters recited and contained  
in the said Bills of Exception, and in the verdict and  
judgment aforesaid, there is manifest error in this, to-  
wit:

1. That the declaration aforesaid, and the matters  
therein contained, are not sufficient in law for the said  
plaintiff to have her said action thereof against the said  
John McAndrews.

2. There is manifest error in this, to-wit: That the <sup>30</sup>  
said Justice before whom the said issue was tried, at  
the trial of the said issue so joined, between the parties  
aforesaid, when John Ryan, a witness called by and  
sworn for the said plaintiff was giving his testimony,  
notwithstanding the objection of the said defendant,  
was by the plaintiff asked, and by the said Court  
permitted to answer, this question: "Do you  
know what kind of hooks there were in use at the  
other shafts upon this tunnel; whether they had clevises  
or clasps on, or whether they were hooks like that?" <sup>40</sup>

whereas, by the law of the land, the said plaintiff should not have been permitted to ask, nor the said witness to answer the said question.

3. There is also manifest error in this, to-wit: after the said plaintiff had closed the testimony offered by her to prove and maintain the said issue on her part, and had rested her case on the said testimony, the said defendant, by his counsel moved that the said plaintiff be called, which motion the said Justice denied, and refused  
10 to non-suit the said plaintiff, as is mentioned in the said bill of exceptions in that behalf; whereas, by the law of the land the said Justice should have granted the said motion and non-suited the said plaintiff, because the said plaintiff had not proved any facts sufficient to make the defendant liable in the said action.

4. There is manifest error also in this, to-wit: That the said Justice, on the cross examination of Galen V. Adams, a witness called by and sworn on behalf of the said John McAndrews, notwithstanding the objection of the  
20 said defendant, did permit the said plaintiff to ask, and did require the said witness to answer this question:—  
“Were you addicted to the excessive use of intoxicating drinks during the time you were employed by McAndrews on this work, whereas, by the law of the land the said question should not have been permitted to be asked, nor allowed to be answered.

5. There is also manifest error in this, to-wit: That the said Justice, on the trial of said issue, on the cross examination of Galen B. Adams, a witness produced by  
30 the said plaintiff in error, permitted the said plaintiff below to ask, and required the said witness to answer, this question: “Did you occasionally, while thus employed, indulge in the use of intoxicating drinks?” whereas, by the law of the land, the said question ought not to have been asked, nor required to be answered.

6. There is also manifest error in this, to-wit: That the said Justice, on the trial of said issue, notwithstanding the objection of the said plaintiff in error, on the examination of the said Mary Burns, who was testifying in  
40 said trial in her own behalf, permitted the said Mary

Burns to be asked, and allowed her to answer this question: "Was you paid for the wages earned by your husband from the first of December up to the time of his death?" whereas, by the laws of the land, the said question should not have been asked nor allowed to be answered.

7. There is also manifest error in this, to-wit: That the said Justice before whom the said issue was tried, on the trial of the said issue, notwithstanding the objection of the said plaintiff in error, permitted the said 10 Mary Burns, by her counsel, to put one John J. Ryan, a witness called, sworn and examined on behalf of the said Mary Burns, and required the said witness to answer this question: "Was there any one before this accident hired to remain at the bottom of shafts to hook on the buckets, or to see to them after the miners came down; whereas, by the law of the land said question ought not to have been asked nor answered.

8. There is also manifest error in this, to-wit: That the said Justice, on the trial of the said issue, notwithstanding the objection of the plaintiff in error, permitted the said Mary Burns to put to Patrick Gilroy, a witness sworn and examined on said trial on behalf of the said Mary Burns, and required said Gilroy to answer this question: "What do you know about Brown hiring Burns?" whereas, by the law of the land, said question ought not to have been asked nor answered.

9. There is also manifest error in this, to-wit: That the testimony of each side having been closed, and the said parties respectively having rested the cause, the said plain- 30 tiff in error, by his counsel, requested the said Justice, before whom the said trial was had, among other things to charge the said jury "that after said Burns was discharged and notified by the plaintiff in error to not thereafter work in or about said tunnel, he had no right to accept work on that tunnel from the employees of the plaintiff in error on account of the plaintiff in error, without the personal consent of the plaintiff in error to said Burns' being again employed;" and that the fact that the plaintiff in error's time keeper and gang boss knew that the 40

said Burns was working in said tunnel, and did not object to his doing so, cannot make an express or implied employment of said Burns by the plaintiff in error, because without the personal consent of the plaintiff in error said Burns had no right to accept such employment, nor without such consent had the time keeper or gang boss the power or right to permit said Burns to work on said tunnel, and their doing so with or without collusion with the said Burns was a fraud upon the plaintiff in error, from which said Burns or his personal representatives can derive no rights, privileges or advantages."

That there is no evidence in this case which will authorize the jury to find or which will support or justify a verdict finding that there was when said Burns received the injury from which he died, an express or implied contract between said Burns and the plaintiff in error, by which the latter hired or employed said Burns to work for him in or about said tunnel.

Whereupon the said justice declined to charge so as aforesaid requested, but charged the jury in that behalf as stated in said charge, whereas by the law of the land the said justice should have charged the said jury so as aforesaid requested.

10. There is also manifest error in this, to wit: that after the said testimony had been concluded on both sides and the cause rested, the plaintiff in error, among other things, requested the said justice to charge the said jury that the plaintiff in error was under no legal obligation to his workmen to furnish more or different means for letting his workmen down and taking them up shaft No. 5 than he had there for use for that purpose at the time when said Burns began to work there and when he received the injury complained of. If any workman knowing or having the opportunity to see and know the means the plaintiff in error had provided for use in descending and ascending the shaft was not willing to assume the risk of passing up and down the shaft by the use of those means it was his right and his duty to refuse to enter upon or to quit the service of the plaintiff in error; and if knowing or hav-

ing the opportunity of seeing and knowing what means the plaintiff in error had provided to be used by the workmen in descending and ascending the shaft, he voluntarily engaged in working in that shaft, the law presumes that such workmen assumed and agreed to bear all the risk to himself of those means, so that if in the careless or negligent use of those means, by himself or his fellow workmen he was injured, he has no claim upon his employer for compensation for such injury.

That, in this case there is no evidence that said <sup>10</sup> Burns did not know before he began to work at shaft No. 5 and while he was at work there all about the means furnished by the plaintiff in error for the purpose of letting workmen down into, and bringing them up from that shaft, and the risk to be run in the use of those means; the evidence shows that he had ample opportunity to know all about those means and the risks of using them; and without incredible carelessness, could not have been ignorant of them. The law, therefore, presumes that he had that knowledge, and as <sup>20</sup> he, with that knowledge, voluntarily entered upon that work, he assumed the risks of that service, and had no right of action; nor has his administratrix, against the plaintiff in error, for any injury he suffered from the want of care by himself, or his fellow workmen in the use of the means the plaintiff in error had provided.

That the only duties and obligations of the plaintiff in error, as to means for the workmen to get into and out of shaft No. 5; was to see that such means as he did <sup>30</sup> provide for that purpose, had sufficient strength for the service they were to be put to, and that when used as they were intended to be used, they would be safe for such service; but he was under no obligation to any workman in that shaft, to see that his fellow workmen, in and about the shaft, exercised all and every care or caution requisite to preserve their fellow workmen from injury, and if thus neglected so to do, the plaintiff in error cannot be made liable in this action for such neglect.

That it is proved and undisputed that the rope; <sup>40</sup>

hook, buckets and the bails of the buckets used at shaft No. 5, were of sufficient strength to, and did endure, unbroken, the use to which they were put; that upon the evidence in the case, it is proved beyond reasonable doubt, and conceded by both sides, that the bucket, on the occasion when said Burns was killed, fell from the top to the bottom of the shaft because the bail of the bucket at the time said Burns got upon it was not in the hook; that if said bail had been in said hook, as it  
 10 could and should have been, had said Burns and his fellow workmen then and there exercised due care and caution, said bucket could not and would not then and there have fallen; and as said bail, according to the proof, was not in said hook, because some of the fellow workmen of said Burns had then and there neglected to put it there, and because said Burns and three of his fellow workmen then and there stepped upon and put their weight on said bucket without looking to see whether said bail was in said hook (although the bail  
 20 and hook were directly before them, easy to be seen, and their personal safety depended upon the bail and hook being properly connected) it is demonstrated that the falling of said bucket and the death of said Burns were not caused by the negligence of the plaintiff in error, but were caused by the negligence of said Burns and his fellow workmen in not exercising due care and caution in the use of the bail and hook, and therefore the plaintiff in error is not liable in this action, whereupon the said justice declined to charge so as last aforesaid re-  
 30 quested, but charged the jury in that behalf as mentioned in said charge, whereas, by the law of the land, the said justice should have charged the jury as last hereinbefore requested.

II. There is also manifest error in this, to wit: that after the said parties had respectively closed their evidence and rested said cause, the said plaintiff in error requested the said justice, among other things, to charge the said jury that in order to render the plaintiff in error liable in this action, if the deceased was harmed by  
 40 the plaintiff in error, the said Mary Burns must have

proved that the deceased, at the time and immediately before he received the injury, was exposed to risks of which he was ignorant when he engaged in work at that shaft, and which, by reasonable observation and attention, he could not discover or reasonably expect and of which the plaintiff in error should have given him notice before he engaged in that work or before he was injured, so that in consequence of that, to him, unknown and undiscoverable risk, he could have refused to engage in that work, or, having engaged, and quit, before he was injured; and as there is no evidence in this case, that plaintiff in error was guilty of any such omission, concealment or fraud, the plaintiff can not recover in this suit. If the last request is refused, then we ask that it be given, except and omitting the latter part, which states, that there is no evidence in this case that McAndrews was guilty, &c., and that the plaintiff cannot recover in this suit. Whereupon the said Justice declined to charge as last hereinbefore requested, but charged the jury in that behalf as appears in and by said charge, whereas, by the law of the land, the said Justice should have charged the jury as last hereinbefore requested.

12. There is also manifest error in this, to-wit: That on the said trial, after the evidence on both sides had been closed, and the cause rested, the said Justice, among other things, charged the said jury that when a master employs or receives a servant into his service, the master on his part engages to employ competent and trustworthy servants in performance of the work to be performed, and to furnish for their use in the performance of such services, suitable, proper and relatively safe machinery, means, appliances and instrumentalities to be employed and used in the service in which they are engaged, and also to maintain them in such condition while they are in use; and that means this, where means and machinery or instrumentalities are necessary in the work, and the master undertakes to provide them, they must be of the character I have stated; whereas, the said Justice, by the law of the land,

should not have so charged the said jury, but should have charged them as in that behalf requested by the plaintiff in error.

13. There is also manifest error in this, to-wit : That in the aforesaid charge the said Justice, among other things, charged the said jury that is always a question of fact, or in this case at least it is a question of fact, to be determinèd by the jury upon the evidence in the case, whether this machinery as it was, was reasonably sufficient to perform the service for which it had been designed, and how far in its supply the exercise of ordinary care by the plaintiff in error is apparent in its condition as it appears there in the shaft, and left it to the said jury to say whether or not the plaintiff in error was under obligations to said Burns to keep and maintain a clevis or guard on the hook which held the bail, and that if the jury regarded them as a necessity as reasonably necessary, in the exercise of the kind of prudence and care that the said Justice had mentioned to have been there, that they  
 20 should have been supplied by the plaintiff in error, then it was his duty to see that they were supplied, and to see that they were contined there; whereas, by the law of the land, the said Justice should not have so charged the said jury.

14. There is also manifest error in this, to-wit: That the said Justice then and there charged the said jury upon the question of damages, that said jury were to decide that matter according to the best judgment they could bring to bear upon it in view of the rule that it is to be  
 30 only compensation and the compensation for the loss that the widow, and those having an interest in his life, suffer by his death; whereas, by the law of the land, the said Justice should not have so charged, but should have given some rule to said jury by which to estimate said damages.

15. There is also manifest error in this, to-wit : That by the record aforesaid, it appears that judgment in the plea aforesaid was given for the said Mary Burns, administratrix, &c., against the said John McAndrews, when  
 40 by the law of the land, judgment in said plea ought to

have been given for the said John McAndrews and against the said Mary Burns, administrator, &c.

Therefore the said John McAndrews prays that the judgment aforesaid, by reason of the aforesaid errors, and of the errors appearing in the record and proceedings aforesaid, may be reversed, annulled and for nothing holden, and that the said John McAndrews may be restored to all things he has lost on occasion of the said judgment, and that the said Mary Burns, administratrix, &c., may rejoin to said errors.

JACOB VANATTA,  
Att'y of Plff. in Error.

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# New Jersey Court of Errors & Appeals

JOHN McANDREWS

*vs.*

MARY BURNS, ADMINISTRATRIX OF  
JAMES BURNS, DEC'D.

*In Error.*

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## POINTS OF THE PLAINTIFF IN ERROR.

1. That the liability of the master to the servant for injuries received by the latter in the service of the former does not rest upon any contract expressed or implied.

Riley *v.* Baxendale, 6 H. & N., 445.

Roberts *v.* Smith, 3 H. & N., 213.

Wright *v.* the N. Y. Central R. R. Co., 25 N. Y., 20  
565, proposition 4.

Orman *v.* Holland, Ellis, Blackburn & Ellis 102.

McMillan *v.* the Saratoga, &c., R. R. Co., 20 Bar-  
bour, 449.

Parsons on Contracts, 528.

A contrary view seems to have been held by the Supreme Court in Harrison *v.* the Central R. R. Co., 2 Vroom, 203.

Farwell *v.* The Boston, &c., R.R.Co., 4 Metcalf, 55. 30

2. The liability of the master to the servant rests upon the social obligation of the former to not deceive or mislead the latter in respect to the danger of the service :

Wharton on Negligence, §§ 205, to 223.

Paulmier v. The Erie Railway Company, 5 Vroom, 153

Roberts v. Smith, 2 H. & N., 213.

Griffiths v. Gidlow, 3 H. & N., 648.

Williams v. Clough, 3 H. & N., 258.

Priestly v. Fowler, 1 M. & W., 5.

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Mellor v. Shaw, 1 B. & S., 437, 444.

Wharton on Negligence, §§ 209, 214.

Assop v. Yates, 2 H. & N., 767.

MacMillan v. Saratoga &c. R.R. Co., 20 Barbour, 449.

Owen v. The N.Y. Central R.R. Co., 1 Lansing, 108.

Salters v. Delaware & H. Canal Co., 3 Hun., 338.

Warren v. The Erie Railway Co., 39 N. Y., 468.

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3. The plaintiff below should have been nonsuited, because the evidence did not show any defect in the strength or sufficiency of the machinery furnished by McAndrews at shaft No. 5, because it showed that long before the injury received by Burns and when he began working at shaft No. 5, he knew  
30 all about what that machinery was and what dangers and risks were incident to its use and with that knowledge voluntarily commenced and continued to work at that shaft without any notice or complaint to McAndrews, and because the injury was not caused by any defect in the machinery but was caused by the neglect of Burns and his fellow workman, to properly and carefully use the machinery in the manner they all knew it was intended and was necessary to be used.

Wharton on Negligence, 214.

40 Griffiths v. Gidlow, 3 H. and N. 648.

Tinney v. The Boston & Albany Railroad Company,  
62 Barbour, 218.

Salters v. The Delaware and H. Canal Company,  
3 Hun, 338.

Priestly v. Fowler, 3 M. & W. 1.

Farwell v. Boston & Worcester Rail Road, 4 Met-  
calf 49.

Tarrant v. Webb, 18 C. B. 796.

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4. The declaration shows no cause of action, because there is no averment that the defendant had any knowledge, or notice of any defect in his machinery, nor is there any averment, that the deceased was ignorant or had no notice of the alleged defects in or insufficiency of the machinery. 20

Seymour v. Maddox 16, A. & E., N. S. 326.

MacMillan v. The Saratoga, &c. R. R. Co., 20 Bar-  
bour, 499.

Priestly v. Fowler 3 M. & W. 1.

Williams v. Clough, 3 H. & N. 258.

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5. The defendent below was under no legal obligation to his workmen to furnish more or different means for letting his workmen down into and for taking them up out of shaft No. 5, than he had there for use for that purpose at the time when said Burns began to work there, and when he received the injury complained of. Burns knew and had 40

opportunity to see and know the means McAndrews had provided for use in descending and ascending the shaft and by voluntarily assuming the risk of passing up and down the shaft by the use of those means he and his representatives are precluded from making any claim for any injury he may have received in consequence of the careless use of those means.

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6. That as a consequence of the first and second of the aforesaid points it follows that the only duties and obligations of the plaintiff in error as to means for the workman to descend and get out of shaft No. 5, was to see that such mean as he did, in fact provide for that purpose had sufficient strenght for the service they were to be put to and that when used as they were intended to be used, and as Burns knew they were to be used, they would be safe for such service, but he was under no obligation to any workman in that shaft to see that his fellow workmen in and about the shaft exercised all and every care or caution requisite to preserve his fellow workmen from injuring each other and if they neglected so to do the plaintiff in error is not responsible in this action for such neglect.

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7. The relation of master and servant did not in law exist between McAndrews and Burns at the time the latter was injured because McAndrews had not employed Burns nor consented to his being employed and because said Burns was among the workmen of said McAndrews fraud-  
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