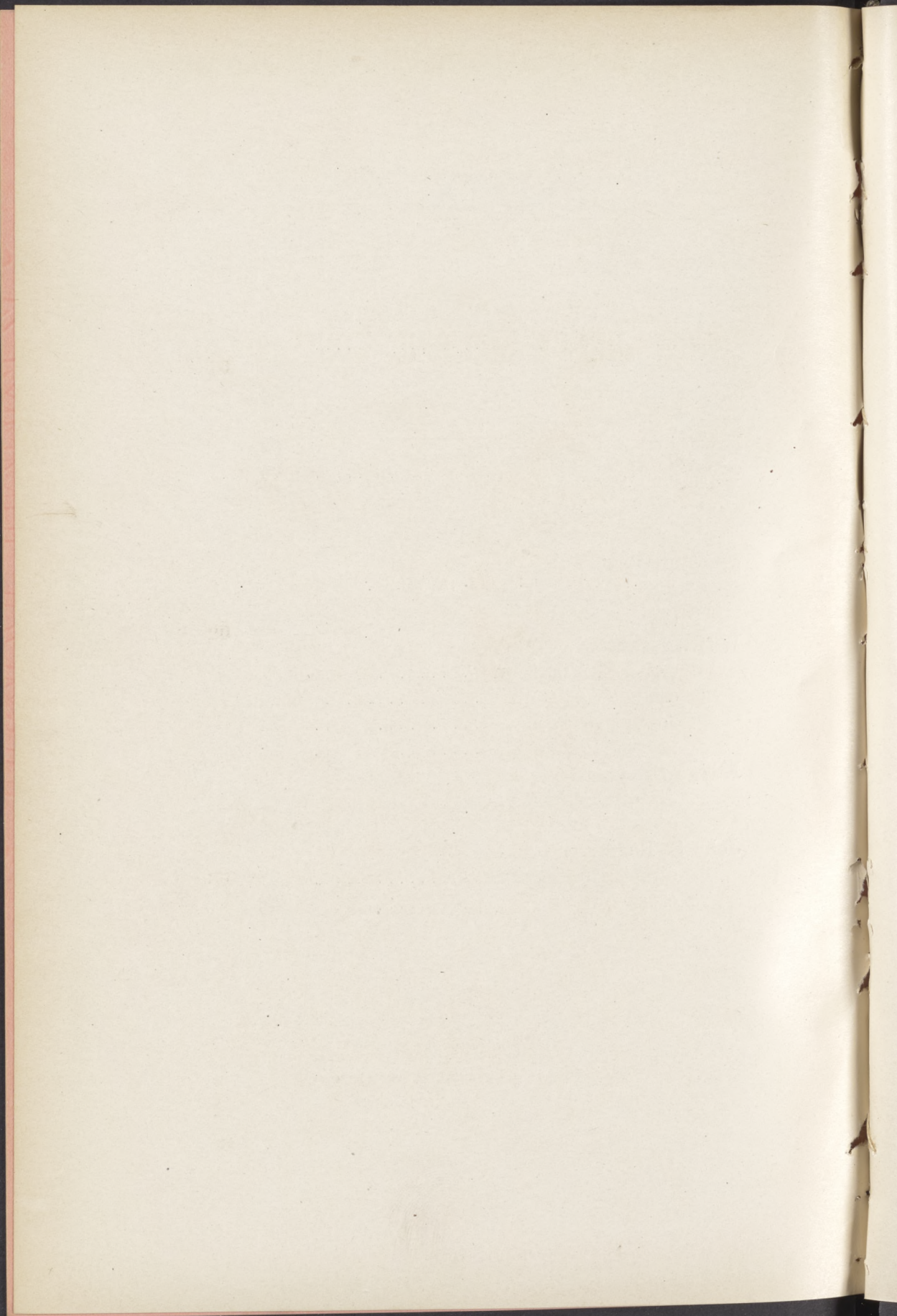


# INDEX.

	PAGE.
Notice of Appeal .....	1
Complaint .....	2
Answer .....	3
Judgment Record .....	4
Motion for Non-Suit .....	50
Motion to Direct Verdict .....	54
Charge to Jury .....	57
Exceptions to Charge .....	62
Grounds of Appeal .....	64

## TESTIMONY.

Susan T. Loid,	
direct examination .....	6
cross " .....	7
William Morton,	
direct examination .....	7
cross " .....	14
re-direct " .....	24
re-cross " .....	26
Ellsworth Davis,	
direct examination .....	28, 49
cross " .....	31, 49
John S. Rogers,	
direct examination .....	37
cross " .....	46



*Notice of Appeal.*

**Notice of Appeal.**

Filed June 9, 1917.

**New Jersey Supreme Court.**

10

---

SUSAN T. LOID, Admx. of &c.,  
of WILLIAM H. LOID, deceased,  
*Plaintiff-Respondent,*

*vs.*

J. S. ROGERS COMPANY,  
*Defendant-Appellant.*

---

*Action at Law.*

*Notice of Ap-  
peal.*

20

To Messrs Wescott & Weaver,  
Attorneys for Plaintiff-Respondent:

Please take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered for the plaintiff in the above stated cause.

Your obedient servant,

E. A. ARMSTRONG,  
*Attorney of Defendant-Appellant.*

30

Dated, June 1st, 1917.

Service of the within notice of appeal is hereby acknowledged.

WESCOTT & WEAVER,  
*Attorneys of Plaintiff-Respondent.*

40

*Declaration.*

NEW JERSEY SUPREME COURT.

10	SUSAN T. LOID, admrx. etc. of WILLIAM H. LOID, deceased,  <i>vs.</i>  J. S. ROGERS & COMPANY.	}	<i>In Tort.</i> <i>On Postea.</i>  <i>John W. Wes-</i> <i>cott,</i> <i>Attorney.</i>
----	--	---	---

As yet of the eleventh day of February, A. D. nineteen hundred and one.

Witness,

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

20 WILLIAM RIKER, JR.,  
*Clerk.*

BURLINGTON COUNTY, ss:

J. S. Rogers and Company, the defendant in this suit was summoned to answer unto Susan T. Loid, administratrix of the estate of William H. Loid, deceased, the plaintiff therein, in an action in tort; and thereupon the said plaintiff by 30 John W. Wescott, her attorney, complains for that heretofore, to wit, on or about the seventh day of August, nineteen hundred, plaintiff's intestate was employed by the defendant as a carpenter and was then and there engaged in working as such for the defendant, at New Lisbon, in said county, to wit, at Mount Holly, in said county; that the defendant then and there erected on the floor of the third story of the Alms House, at said New Lisbon, a derrick for the 40

*Answer.*

purpose of raising material from the ground to said third story, and carelessly and negligently failed to properly secure and fasten the feet or ends of the frame of said derrick so that the same, when used as aforesaid, would necessarily slip and fall; that the defendant negligently and carelessly failed to notify and inform plaintiff's intestate that said derrick would, when used as aforesaid, slip and fall; that the defendant carelessly and negligently required and directed the deceased to use and aid in using said derrick while in the condition aforesaid, whereby without the plaintiff's intestate fault, and while said plaintiff's intestate was using and aiding in using said derrick, the same slipped and fell, for the reason aforesaid, and killed said plaintiff's intestate; all to said plaintiff's damage ten thousand dollars, and therefore she brings her suit, &c.

And plaintiff further says, that letters of administration were granted to her by the Surrogate of the County of Burlington, on the twenty-sixth day of October, nineteen hundred: that plaintiff's intestate left him surviving his widow, Susan T. Loid, and four children, to wit, Morton Loid, aged fourteen years; Franklin Loid, aged thirteen years; Elie Loid, aged eleven years, and Herbert Loid, seven years, his next of kin, for whose benefit this suit is brought.

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

And the plaintiff doth the like, &c.

*Judgment Record.*

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

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

20 This case was tried before Judge Frank T. Lloyd with a jury, at the Burlington County Circuit, on May 1st, 1917.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for two thousand two hundred and fifty dollars (\$2,250).

30 Therefore it is considered that the said plaintiff do recover against the said defendant her said damages by the jury in form aforesaid found to two thousand two hundred and fifty dollars, and also one hundred and sixty dollars and twelve cents for her costs and charges, by the Court now here adjudged to the said plaintiff, and with her assent, which said damages, costs and charges in the whole amount to two thousand four hundred and ten dollars and twelve cents.

*Judgment Record.*

Judgment signed this seventh day of May, A.  
D. nineteen hundred and seventeen.

WILLIAM S. GUMMERE,  
*C. J.*

I, WILLIAM C. GEBHARDT, Clerk of the Supreme 10  
Court of the State of New Jersey, do certify that  
the foregoing is a true copy of the notice of ap-  
peal and also a copy of the judgment entered in  
the above stated cause as the same remains on  
file and of record in my office.

In testimony whereof I have set my  
[L. s.] hand and the seal of said Court at  
Trenton, this eighth day of August,  
A. D. nineteen hundred and seventeen.

WILLIAM C. GEBHARDT, 20  
*Clerk.*

30

40

*Susan T. Loid, direct.*

NEW JERSEY SUPREME COURT.  
BURLINGTON CIRCUIT.

10	SUSAN T. LOID,  <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> J. S. ROGERS & Co.,  <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>In Tort.</i>
----	--	---	-----------------

Mt. Holly, N. J., May 1, 1917.

TESTIMONY

20 before Hon. Frank T. Lloyd, Judge, and a jury.

APPEARANCES.

For Plaintiff: Messrs. Wescott & Weaver.  
For Defendant: E. A. Armstrong, Esq.

SUSAN T. LOID, sworn for plaintiff.

*Direct examination* by Mr. Wescott.

- 30 Q Mrs. Loid, you live where, please?  
A Pemberton, New Jersey.  
Q And your husband's name?  
A William H. Loid.  
Q How old was he at the time he was  
killed?  
A Forty-two.  
Q And what kind of health had he?  
A Good.  
Q And what were his habits as a man?  
40 A Well, they were good.

*William Morton, direct.*

Q And how much did he make at this business?

A Why, I suppose about \$2 or \$2.50.

Q And you have how many children?

A Four.

Q Are they all living yet?

A Yes, sir. 10

*Mr. Wescott.* I have the letters of administration. I will offer the letters of administration.

*The Court.* They will be received.

*Cross examination by Mr. Armstrong.*

Q How old are your children, Mrs. Loid?

A Now, do you mean?

Q Yes.

A The youngest one is twenty-two and the oldest one is thirty. 20

*By Mr. Wescott.*

Q Mrs. Loid, when was your husband killed?

A Seventeen years the coming next August, the August coming.

Q Do you remember the date?

A I think it was the 7th. I don't know.

*By Mr. Armstrong.* 30

Q He died on the 9th.

A I think it was the 9th.

WILLIAM MORTON, sworn for plaintiff.

*Direct examination by Mr. Wescott*

Q Where do you live?

A Pemberton.

Q You knew William T. Loid, did you?

A Yes, sir. 40

*William Morton, direct.*

Q And you had known him about how long before he was killed?

A Oh, I should judge fifteen or twenty years.

Q And what sort of a physical man was he?

A All right. He was good, honest and sober.

Q Well, I haven't come to that phase of it.

10 I mean physically was he a strong or a weak man?

A A strong man.

Q And healthy?

A Yes, sir.

Q What was his business?

A He worked at carpentering.

Q What kind of a mechanic was he?

A Fairly good.

20 Q And what were his habits as a man, do you happen to know?

A He had good habits in every way.

Q Do you remember the time he was killed?

A Yes, sir.

Q When was it?

A On the 7th of August, 1900.

Q And where was it?

A At the Burlington County Insane Asylum.

Q Were you there?

30 A Yes, sir.

Q And can you remember who was building that building, who was putting it up?

A John S. Rogers.

*The Court.* I suppose it is admitted that John S. Rogers & Company were a co-partnership?

*Mr. Armstrong.* Yes, sir.

Q You were working there at the time?

40 A Yes, sir.

*William Morton, direct.*

Q What kind of work did you do?

A Carpentering.

Q And how nearly was the building up?

A Well, it was getting pretty well along then, some parts of it.

Q Do you remember the derrick that Mr. Loid was working on? 10

A Yes, sir.

Q Were you working on it too at the same time?

A Yes, sir.

Q What floor was that derrick on?

A I think it was the third floor.

Q I had an impression it was the second. You say it was the third floor.

A For the ceiling of the third floor. We was hoisting the rafters for this furring or lining. 20

Q The derrick was on what floor?

A On the top floor.

Q Now about what was the size of that derrick, please?

A Oh, well, I should judge it was—what do you mean, in height?

Q Yes, take the height first.

A Well, I should judge it was ten or twelve feet high. 30

Q What shape was it? Just describe it.

A Well, it was a V shape.

Q Well, you haven't given us much of a description.

*Mr. Wescott.* You had a model here before. Have you got that, Judge?

*Mr. Armstrong.* No.

Q Give that to the jury, please. They probably understand it from what counsel said to 40

*William Morton, direct.*

them in his opening, but I want you to describe it a little more in detail so that I can get a notion of what that derrick was like.

A It was the same as a piece this way and one that and running up to a point. (Indicating.)

10 *By the Court.*

Q You mean an A shape instead of a V?

A Yes, sir; it ran up to a point above and they used this roller here to wind this rope on and these legs set generally on this board or plank.

*By Mr. Wescott.*

20 Q I don't want generally, but what was it sitting on then?

A It was sitting on boards.

Q And how big was that plank?

A I think it was a 3 by 8. I think it was.

Q And about how long?

A Well, it wasn't over eight feet long at the outside.

Q And you think the size of it was what? I didn't catch that. How thick was that?

30 *The Court.* 3 by 8, he said.

A It might have been 3 by 8 or 10.

Q And about what was the thickness of these uprights?

A They were about 4 by 4.

Q And that plank was a part of the derrick, was it?

A They used it; yes, sir.

Q I didn't ask if they used it. I asked if it was a part.

40 A Yes, sir.

*William Morton, direct.*

Q And how were these feet secured on this plank?

A How were they?

Q Yes.

A With just little inch blocks nailed right around them, little cleats around the foot of it.

Q Around the foot of each upright? 10

A Yes, sir.

Q Have you any idea of the weight of this derrick?

A No, sir; I do not know.

Q Well, was it heavy or light?

A Well, it was pretty heavy, very heavy.

Q Very heavy.

A Yes, sir.

Q And the plank on which these two up-rights rested rested on what? 20

A The plank? Rested on the joists. That is, there was some boards thrown down and they rested over them.

Q There was boards on the joists?

A Yes, sir.

Q The floor hadn't been laid yet?

A No, sir.

Q And the plank that held the two feet of this derrick rested on these boards?

A Yes, sir. 30

Q And where was the derrick located as to the front of the building, have you any idea?

A It was located on the west side.

Q I know, but how near the front?

A How near the front?

Q Yes.

A Well, I should judge, as near as I can say, it was about in the center of it. I don't think it was over twelve or fourteen feet, the space. 40

*William Morton, direct.*

Q Between the foot of the derrick and the wall?

A Yes, sir.

Q That is what you mean?

A Yes, sir.

10 Q What were you doing at the time of this accident, or just before this accident happened?

A Well, we was setting some window frames.

Q You were setting some window frames?

A I wasn't; no, sir.

Q What were you doing?

A Working around that derrick.

Q And what was Mr. Loid doing?

A Helping set some window frames.

20 Q And how far away was he from where this derrick was when he was setting these window frames?

A Oh, I suppose he was as far as from here to that outside door. (Indicating.)

Q On the same floor or another floor?

A Another floor.

Q And who had charge of the work?

A Ollie Lisbon, he was the assistant.

Q He was the foreman?

30 A Yes, sir.

Q And how did Mr. Loid happen to go there?

A He was called there.

Q By whom?

A By Mr. Sharp.

Q And what was Sharp's position?

A He was the assistant foreman.

*By the Court.*

40 Q You mean he was called to the derrick?

A Yes, sir.

*William Morton, direct.*

*By Mr. Wescott.*

Q And why was he called to the derrick?

A It leaned a little too far over the wall and they wanted to straighten it up and they undertook to raise it.

Q I haven't come to that yet. They wanted to straighten it up? 10

A Yes, sir.

Q And when you say it was leaning too far towards the wall, do you mean it was leaning too far towards the ground?

A Yes, sir. The same as if that was the wall (indicating) and it was leaning too far over that way.

Q And how many men were called, about, to straighten it up?

A Well, I should judge anyways from six to eight of them. 20

Q Were you one of them?

A Yes, sir.

Q And where did these men stand when when they undertook to straighten this derrick?

A When they undertook to straighten it?

Q Yes.

A Right under the derrick, right in the cleats of that. 30

Q And Sharp was there?

A Yes, sir.

Q And when you undertook to do that did you put pressure on the derrick in order to lift it up?

A Yes, sir.

Q And was Loid one of those?

A Yes, sir. 40

*William Morton, cross.*

Q Can you tell about where he was standing?

A Well, he was standing at the—right along the side. The same as the coil of rope was around here (indicating); and he was right under this leg trying to raise it.

10 Q Now when you gentlemen put pressure on this derrick what happened?

A Why, it slipped from the bottom and went over the wall.

Q Well, what slipped, the whole business?

A The whole business slipped.

Q Plank and all?

A Plank and all.

Q Now had that plank at that time any spikes or anything in the bottom of it to hold it?

20 A No, sir.

Q If there had been spikes in the bottom of it would it have held?

A Well, probably it would.

Q And when it went over, what happened to Mr. Loid?

A Well, he went over with it. The rope ketched him and he went over with it clean to the ground.

30 Q And what was the result of that?

A Well, it hurt him so that he died in a couple of days afterwards.

Q I stated it broke his back; was that correct?

A Well, I guess it was his spine or neck.

*Cross examination by Mr. Armstrong.*

Q When you went to the derrick how was it guyed?

40 A How was it guyed?

*William Morton, cross.*

Q How was it guyed? It had guy ropes on it, did it not?

A Yes.

Q And how did the guy ropes run?

A One right back of it.

Q Back in the building?

A Yes, sir. 10

Q And where did that guy rope run in front of it?

A Well, now, I don't think there was any in front of it. There might have been. If there was, it was fastened out in the field.

Q Well, but don't you remember there was such a one?

A Well, I won't be positive. It was a good while ago. I know there was one back of it.

Q And it was tied to the building? 20

A Yes, sir.

*By the Court.*

Q Was this derrick on hinges at the top, do you know?

A No, sir; I don't think so.

Q How was it held together?

A I think they were just bolted together, if I remember right. I won't be positive about that. 30

*By Mr. Armstrong.*

Q And across this derrick, in order to make a letter A, there was a cross-piece, wasn't there?

A Yes, sir.

Q And at that cross-piece there was a windlass, was there not?

A Yes, sir; from this right around. (Indicating.) 40

*William Morton, cross.*

Q And that rope ran to the top of the derrick. And down around this windlass?

A Yes, sir; it didn't go to the top of the derrick.

Q The rope that was on this windlass went part way up the derrick?

10 A Yes, sir; the biggest part of the way.

Q Do you remember giving testimony in this case in January, 1908? You don't remember the date, but do you remember being there?

A I remember being there.

Q And were you asked this question: "Were there any ropes attached to the derrick?" and you answered, "Yes, sir. Q Just describe what they were. A Well, there was guy lines.

20 One run back and one run in front of it. Q Where was the one that ran back attached, if it was attached? A Right to a joist. Q To a joist in the floor? A Yes, sir. Q And the one that ran forward? A That was attached out in the field there down below. Q What was that attached to, do you remember? A I couldn't say what it was tied to, whether it was tied to a pile of lumber down there or to something like that." Now does that refresh your recollection about that?

30 A Yes, sir; something like that.

Q There was a rope running down steadying this?

A I think there was.

Q How long had this derrick been used about this job?

A Well, it had been used quite a little around there.

Q All the time the building was being constructed?

40 A In different places; yes, sir.

*William Morton, cross.*

Q And on the different floors you used that to bring up material over the wall during the erection of this building and it was being put up for that purpose at this time?

A Yes, sir.

Q And as I understand you it was thought it was leaning too far out?

19

A Yes, sir.

Q And the purpose was to bring it up straighter?

A Yes, sir.

Q And who loosened the ropes, if you recall, some one of the party?

A Some one of the party.

Q But you don't recall which, when you and Loid got there, I suppose?

A No, sir.

20

Q And this plank that you spoke of was an ordinary piece of plank?

A Yes, sir.

Q That was about the building?

A Yes, sir.

Q And these cleats were nailed on?

A Yes, sir.

Q And what were the cleats like?

A The cleats were nothing but inch strips, or they might have been inch and a quarter or inch and a half wide.

30

Q And just tacked around so as to make a little pocket?

A Yes, sir.

Q And an ordinary piece of plank that you used about the building used to sustain it?

A Yes, sir.

Q And at times when you were on the floor did you use it without any plank at all?

A Not often. Generally we used plank.

40

*William Morton, cross.*

Q But sometimes you used it on the floor without any plank?

A I don't think they did. They had to have that stiffness of wood. We always used the plank themselves to make it more solid.

10 Q To make it stand more solidly?

A To take the weight off the joist.

Q And spread it over a greater space?

A Yes, sir.

Q And there was no attachment at all between the derrick and the plank?

A No, sir.

Q How would you lift it up? Or please describe to the jury how you lifted it up.

20 A All hands got under it and tried to raise it on each side of it.

Q What do you mean, they tried to raise it clear or tried to push it up?

A They tried to push it up and leave the bottom stand.

Q And the idea was to push it here without moving the bottom? (Indicating.)

A Yes, sir.

30 Q How did you secure the bottom of it before you started to straighten it up?

A No, sir; we left it just as it was.

Q You didn't tie any ropes around it or block it in any way or do anything of that kind?

A No, sir.

Q When you went over to straighten this up, Mr. Morton, you straightened it up a little and went away and were called back again, weren't you?

40 A No, sir.

*William Morton, cross.*

Q Who helped put it up in the first instance?

A Well, I couldn't say exactly who, but most all of them that was working around there had a hand into it.

Q Well, don't you remember who put it up in this place where you were undertaking to straighten it at that time?

10

A Do you mean the men?

Q Yes, did you and Mr. Loid—I don't care for all of them—did you and Mr. Loid work about putting it up at that time?

A Well, I wouldn't say positively about that. It has been so long.

Q Yes, I understand that, but those who were at work around there doing carpenter work from time to time, they were the ones that did put it up or did move the derrick as it was needed?

20

A Yes, sir.

Q And did you put it up many or few times about the building there?

A Well, I had helped put it up several times.

Q And during the progress of the building this was the derrick that was used?

A Yes, sir.

Q Now, I see that you testified as follows on the former trial: "Q Now, when it was erected you helped put it up in this place, didn't you? A I did; yes, sir. Q And you got it up and this rope tight and a looser rope running out to the ground there? A Yes, sir. Q And had left it, hadn't you? A No, sir; didn't leave it. We all stood right there. Q I thought you said you were called back to it? A We was; but we didn't none of us leave at the time. Q You hadn't left? A No, sir; none of us had gone downstairs. Q Hadn't none of them gone

30

40

*William Morton, cross.*

downstairs? A No, I hadn't. Q No, you hadn't; but I say some of them had gone downstairs? A Well, they might. Some of them had started, because they knowed where their stuff was and went to hitch on to it. Q I understood you to say that the plank sat on the joist? A

10 Yes, sir. Q There were loose boards scattered around in various places in the building? A Yes, sir. Q This plank did not sit on the boards? A No, sir; nothing but the joists. Q And the joists ran lengthwise and the plank crosswise of those? A Yes, sure. Q In putting down the plank do you remember who put it in place? A Who put the plank in place? Q Yes. A I couldn't exactly say that. Q Some one of your party? A Yes, some one of the

20 gang put it in place." Do you recall that now?

A Well, something like that.

Q Well, you testified to that effect before, did you?

A Well, if you have it down there why of course I must have.

*By the Court.*

Q Is that right? Is that as you now recall it? Is that the way you recall it?

30 A Well, yes.

*By Mr. Armstrong.*

Q When you started to put the derrick up, Mr. Morton—I am using this to represent the derrick, because I haven't got anything else—(indicating)—it would be lying flat on the joists or the floor or whatever it was?

A Yes, sir.

Q And then it would be raised from this end (indicating) up in place, would it not?

40 A Yes, sir.

*William Morton, cross.*

Q Well, how, when you started to do that, how was the other end held so as to raise it up?

A That was generally held.

Q Some one generally held it there?

A Yes, sir.

Q Did they tie it at times?

A No, sir; it might have been. I don't re- 10  
member, though.

Q You don't remember that?

A No, sir.

Q Some one would hold it?

A We would be at the foot and raise it up.

Q And would you be at the foot and holding it there until it got up so as to support itself?

A Yes, sir.

Q At this time do you remember whether there was anyone at the foot or not? 20

A Well, I don't exactly remember. There must have been when we raised it up there.

Q No, I don't mean when you first raised it up. Of course there must have been some one at the foot when you first started to straighten the derrick.

A No, sir; they were on the other side of it.

Q The idea being that the weight would be sufficient to hold it in place?

A Yes, sir. 30

Q And you thought it was not necessary to tie it or secure it in any way as you straightened it; is that correct?

A That is what they thought. I didn't think it was fit to raise it that way.

Q You didn't think it ought to be raised that way?

A No, sir.

*Mr. Wescott.* Aren't we getting into the realms of speculation? 40

*William Morton, cross.*

*The Witness.* It should have been tied to raise it in the shape it was.

Q If it was tied it wouldn't have toppled over?

A Not so well as it did, quite, because there would have been something to hold it there.

10 Q Was there anything said, so far as you recall, about tying it or anything of that kind?

A What?

Q Was there anything said among you about tying it at that time?

A No, sir.

Q That wasn't suggested to anyone or suggested by anyone, so far as you know?

A Well, if you have got it down there that way read it. Of course I might probably have said so.

20 Q Well, I don't know that you did at all. I haven't read it myself.

A I don't think there was any of them said anything about it, no.

Q You were asked this question: "And you are quite sure nobody had put their feet against the plank so as to hold it there? A I am quite sure that if anybody had put their feet against the plank and had stood—

30 Q Would that have held it all right? A No, sir; I don't think it could. No man could have held it with his feet against it in the way we was raising it. Q It was not possible to hold that in the way it was raised? A A man couldn't hold it; no, sir. Q Without having it fastened in some way? A

There was too much weight above us. Q Too much here? (Indicating.) A Yes, if we could have got closer to the top of it we would have held it. Q And by pushing here you couldn't

40 possibly do it? A No, sir. Q You didn't

*William Morton, cross.*

take any poles or anything of the kind to try to raise the top? A Couldn't get there. Q You could get it with an eight foot, couldn't you? A That wouldn't amount to much. You would have been right under it then. Q You could have got half way? A Well, just as I am telling you. But half way wouldn't amount to much, because there was too much weight above. Q You appreciated the danger at the time? A Yes, sir. Q And spoke of it, did you? A Yes, sir. Q In the presence of all these people, all that were working there? A Well, I spoke of it so the foreman understood what I said. Q Did the others understand? A I couldn't say about that. Q You spoke out loud? A Yes. Q And he said he thought it was all right? A Yes, he said it was all right, to get a hold and go ahead." 10 20

A I remember that.

Q Remember that now, do you?

A Yes, sir.

Q And then you went on with the work?

A Yes, sir.

Q The accident happened very suddenly, did it not?

A Yes, sir.

Q Was some considerable rope paid out before Mr. Loid was caught? I have forgotten about that. 30

A Well, not a great deal.

Q The derrick had gone over?

A He went pretty nearly the same time the derrick did.

Q He went almost the same as the derrick?

A Yes, sir.

Q Did you notice where it caught him?

A Right around his ankle. 40

*William Morton, re-direct.*

Q It coiled around his ankle and carried him over that way?

A Yes, sir.

Q And no one else was injured?

A No, sir.

*Re-direct examination by Mr. Wescott.*

10

Q Now wait a minute. I want you to notice the question I am going to ask you. You heard Judge Armstrong just read to you the statement by the foreman there and that you said to the foreman that you were afraid it wasn't safe, or something to that effect, and he said it was all right and to take hold and go ahead?

A Yes, sir.

20

Q That is correct, is it?

A Yes, sir.

Q Now, did I ask you or did I understand you to say that Mr. Sharp, the foreman, called Mr. Loid from another part of the building to come there?

A Yes, sir.

30

Q And you also said, or I understood you to say to Mr. Armstrong, that these plank on which the derrick rested, or the uprights, were ordinary pieces of plank? I understood you to say to him it was part of the derrick itself; was that correct?

A Yes, sir.

Q It wasn't a piece of plank you could pick up out of the road?

A Oh, no; they had that right there.

Q And how was this derrick moved from place to place?

40 A Moved? It was carried around from place to place.

*William Morton, re-direct.*

Q Well, when you got it up on the floor and wanted to move it to another part of the floor how did you move it?

A We got at the bottom of it and took it down.

Q And when you took it down how did you move it? 10

A Well, they slipped it around.

Q How?

A With bars from place to place.

*By the Court.*

Q Well, what was slipped?

A The whole business.

Q What do you mean?

A I mean the plank and the derrick and the whole thing slipped. 20

Q Do you mean they were all attached so that they would move wherever the derrick moved to?

A Yes, sir.

*By Mr. Wescott.*

Q You could take a crowbar and move it?

A Yes, sir; if it wasn't too far.

Q You said something about putting it up. What do you mean by that phrase "putting it up"? 30

A By "putting it up"?

Q Yes.

A It would have to be raised up.

Q You didn't mean that the derrick consisted of half a dozen different pieces and you put them together?

A No, sir; it was only just a frame of two pieces. 40

*William Morton, re-cross.*

Q And when you say put it up you mean raise it up?

A Yes, sir.

Q Well, now, was this derrick lying down when Mr. Loid came there?

A No, sir.

10 *Re-cross examination by Mr. Armstrong.*

Q In answer to his Honor you said that the plank was attached to the derrick. You didn't mean that, did you?

A The derrick set on the plank.

Q They were separate and loose?

A They were loose, but they were raised together and where one went the other went.

20 Q And the way you moved the thing, you shoved the planking by crowbars and steadied the derrick as it went around and was moved from place, where you didn't have to go too far?

A Where you didn't have to go but a little distance.

30 Q And you were asked this question: "Did you use different sized cleats or the usual sized cleats you always used? A Well, as near as I can tell we would put on anything we picked up, anything that came first. Q You would take the plank there that it stood on and nail cleats around, anything that you found? A Anything we ran across, yes. We didn't cut them out exactly. Q It only needed a little thing for that, I suppose? A As long as it stood straight; yes, sir. Q Do you remember when you made those cleats or don't you recall about that? A No, sir. Q You had been using it around in the job there? A Yes, 40 sir." Do you remember that?

*William Morton, re-cross.*

A Yes, sir.

Q And the cleats were part of the machine, weren't they?

A Yes, sir.

*Mr. Wescott.* Notice his questions and answer them with thought. Do not say yes to everything whether it is right or not. 10

*Mr. Armstrong.* No, please do not do that for anybody.

Q Now if these were pieces of plank—I think you said about eight feet long?

A Somewhere about that.

Q But pieces of plank anyway?

A Yes, sir.

Q And then these cleats were little boxes about the size or a little larger than the up-rights of the derrick, weren't they? 20

A No, sir.

Q Weren't they?

A Do you mean larger around?

Q Yes.

A Yes, sir.

*By the Court.*

Q Do you mean that they were actually, I suppose, larger than the derrick, the feet? 30

A No, sir; they were right up to it.

*By Mr. Armstrong.*

Q So that you could put the derrick feet in?

A Yes, sir.

Q And they came snug to it and close, came snug to the derrick feet, each piece?

A Yes, sir. 40

*Ellsworth Davis, direct.*

*By the Court.*

Q The cleats were nailed up against the feet of the derrick?

A Yes, sir.

Q And fastened?

A Yes, sir.

10

*By Mr. Armstrong.*

Q To the derrick?

A They were not fastened there at all times. You would have to nail on new cleats.

*By the Court.*

Q The question is were these cleats little strips. Were they fast to the plank or the feet of the derrick?

20

A To the plank.

Q And did the feet of the derrick sit in the sockets that the strips made?

A Yes, sir.

Q And was the derrick attached or loose?

A It was loose.

Q And you could do that without destroying anything if you wanted to?

A Yes, sir.

30

*By Mr. Armstrong.*

Q And when you referred to the foreman you spoke of, you meant Mr. Sharp, the underforeman?

A Yes, sir.

ELLSWORTH DAVIS, sworn for plaintiff.

*Direct examination by Mr. Wescott.*

Q Where do you live?

40

A I live in Lewistown now.

*Ellsworth Davis, direct.*

Q You live on the earth somewheres?

A Yes, sir.

Q You are a carpenter?

A Yes, sir.

Q Did you know Mr. Loid?

A I did.

Q What kind of a man was he physically? 10

A A good, strong, healthy man. I never knew him to be sick in my life.

Q What kind of a carpenter?

A Medium, fair, like myself always.

Q You knew him how many years, about?

A Well, I knew him thirty years ago.

Q And were you at the almshouse, or whatever the building was, when he was killed?

A Yes, sir.

Q Will you give us a description of this derrick? See how well you can describe it. 20

A Well, the derrick, I should judge was built in an A shape and about six feet from the ground there was a roller with a rope that wound up to hoist up with.

Q How high were the posts?

A Well, I would judge they were fifteen to eighteen feet, the top of them.

Q And was there a piece, or a cross, to hold the two sides? 30

A Yes, sir. That was about as high as a man could stand to turn it, about six feet, I should judge, from the floor.

Q And what did the feet of these uprights rest in?

A On the floor, with just a cleat nailed around the bottom of them.

Q Was that plank part of the derrick?

A It was. They never used it without the derrick. 40

*Ellsworth Davis, direct.*

Q Were there any spikes in the bottom of that plank when this accident happened?

A Never to my knowledge.

Q Well, don't you know whether there was or not?

10 A Well, no, there wasn't, because it was slipped occasionally across the floor with bars and you couldn't have slipped it with spikes in it.

Q And if there had been spikes there when this accident happened would the board have slipped, the plank have slipped?

(Objected to.)

*The Court.* I see no objection to it. The witness is a carpenter and presumably would know.

20 A Yes, sir; it would slip, because the boards it was stationed on wasn't fast.

Q If there were boards in the bottom—

A There were boards, but the boards were not nailed down. They were loose and they would have slipped the same if they were loose, but if there had been spikes through the planks, if it was a stationary floor, it wouldn't have slipped.

30 Q But if it wasn't stationary, if it had slipped out of the planks, or joists, would they have gone with it?

A Yes, sir.

Q How many of those boards were on the floor?

A Why, they throw them down loose. They were the ceiling joists of the second story. They throw them down loose to run over.

40 Q Well, do you happen to know where Mr. Loid was?

*Ellsworth Davis, cross.*

A Yes, sir; he was setting some window frames I should judge about thirty feet away.

Q And who got Loid to come there?

A The foreman called him over to help raise the derrick.

Q And were you gentlemen trying to get it more perpendicular? 10

A Yes, sir.

Q And when you put pressure on it the whole thing slipped from under?

A The bottom slipped out and the top didn't go up, the top went the other way.

Q And then what happened to Mr. Loid?

A He was caught by the foot by the rope and thrown over the wall.

Q And killed?

A Yes, sir. 20

*Cross examination by Mr. Armstrong.*

Q Where were you working before you were called?

A On the derrick right there.

Q Oh, you were working on the derrick?

A Yes, sir.

Q Did you operate the derrick yourself?

A No, sir.

Q How long had it been up in place before you decided to straighten it? 30

A Well, it hadn't been used at all in that place before it was put up.

Q Was it within an hour or so?

A I couldn't say just how long it had been there. The derrick had been up on top quite awhile, but hadn't been used since it had been put in that place.

Q It had been used in other places?

A Yes, sir. 40

*Ellsworth Davis, cross.*

Q And since it had been put upright in this place no use had been made of it?

A It hadn't been used.

Q And he called the men, you said, there to the derrick?

A Yes, sir.

10 Q And he called the other men, Morton and Loid?

A Morton was there. He wasn't called.

Q Morton wasn't called?

A No, sir.

Q He was there with you?

A Yes, sir.

Q And where was Loid?

A Setting window frames on the side of the building.

20 Q On the side of the building?

A Yes, sir.

Q About how far away?

A I should say forty or fifty feet from the derrick.

Q You were all there in the same neighborhood?

A Yes, sir.

30 Q And who called him, Sharp, this underforeman?

A Yes, sir.

Q And how many were there of you?

A I should judge six or seven, maybe eight.

Q And who held the feet of the derrick if anybody?

A Nobody.

Q And where were you, all underneath the derrick pushing on it?

40 A Yes, sir.

*Ellsworth Davis, cross.*

Q And do you recall who loosened the guy line?

A Yes, sir.

Q Who did?

A Sharp attended the guy line.

Q And which one did he have, the back one?

A Back in the building. 10

Q There was one on each end to straighten or raise the derrick?

A Yes, sir.

Q And how far was he back?

A I should judge he was twenty feet from the derrick.

Q Holding the guy line.

A Yes, sir.

Q And that held the weight of the derrick this way? (Indicating.) 20

A Yes, sir.

Q And the other line loosened, was it?

A That was not loose. It never was. Nobody unloosened it.

Q It hadn't had any loosening at all?

A No, sir.

Q And how far had you gotten the derrick up before it commenced to slip?

A We didn't lift it at all, the bottom went first. 30

Q You didn't get enough purchase so that you could push on it to raise the top, the bottom slid right out?

A Yes, sir.

Q How quickly did that occur?

A In a very few minutes. I can't say.

Q It was very sudden?

A Yes, sir. 40

*Ellsworth Davis, cross.*

Q Had you ever straightened the derrick up that way before?

(Objected to.)

A Never up there. Never up on that floor.

Q No, I mean any place that you straightened it?

10 A We did when it had been on a stationary floor.

Q But never on a loose floor that way?

A No, sir.

Q Now, as I understand you, these were boards that were laid on the floor. Were they boards or plank?

A Boards, inch boards.

Q Inch boards laid on the floor for a temporary walking place?

20 A Yes, sir.

Q And they were not secured to the joists at all?

A No, sir.

Q And did the plank sit on the boards or joists?

A On these boards.

Q Just sat on the loose boards?

A Yes, sir.

30 *By the Court.*

Q Which slipped; did the feet of the derrick come out of the socket in which it was or did the whole board slip? The plank and the whole thing went right out?

A Did what?

*By Mr. Armstrong.*

40 Q Did it come out of the socket immediately?

*Ellsworth Davis, cross.*

A No, sir; the board went with it, and then of course it had to come out.

Q Do you remember whether the boards slipped out or not?

A I couldn't say. I hadn't time to look.

Q But there was nothing to hold these boards except the weight of them? 10

A No, sir.

Q You remember testifying before?

A Yes, sir.

Q Now, you were asked: "The ends of this rope could have tied this plank to the joist so it would not have slid, couldn't it? A It could if they had used it. Q Or if two men, even, with the weight being so near straight, had got at the foot of the derrick, like they did when you first raised it, they could have held it, couldn't they? A No, sir. Q Couldn't have done it? A No, sir. Q Too much weight for that? A Two men couldn't hold what six men would push against them." Do you remember testifying as to that? 20

A Yes, sir.

Q Now you knew, of course, how the derrick was erected then?

A Yes, sir. 30

Q And when you pushed it up this way (indicating) did you suppose the weight of it was enough to hold it?

*Mr. Wescott.* I object to what this man supposes.

*The Court.* He has been asked a question of an expert nature, as to what would have happened.

*Mr. Wescott.* But we are dealing with Loid. 40

*Ellsworth Davis, cross.*

*The Court.* This witness has been called as an expert.

A I did not.

Q You thought it would slip, did you?

A Yes, sir.

10 Q Did you speak of it?

A I don't know as I did.

Q You don't recall having spoken of it?

A I done what I was told to do.

Q By Sharp?

A Yes, sir.

Q Did Sharp tell you where to take hold of it?

A He said, "Get under it and push it up."

20 Q He didn't tell you where to take hold of the derrick?

A I had to get under it to push it up.

Q You reached as high as you could and pushed on it?

A Yes, sir.

Q And that was up how far, six feet?

A I suppose that is about as high as I can reach and push.

30 Q And I understood you that this cross-piece making the A was about as high as a man could reach and turn the windlass.

A As high as he could reach. He had to stand on something to turn it.

Q And when it went up it was that much higher?

A Yes, sir.

Q And he could just about reach where that was?

A Yes, sir.

40 *Mr. Wescott.* If your Honor please, John S. Rogers testified in the first trial

*John S. Rogers, direct.*

of this case and I have the answers to the interrogatories, which is to the effect that he died on March 5, 1908. I did have a copy of this in the office and had the part marked that I wanted to read, when I can find it.

*Mr. Armstrong.* I suppose the whole of the testimony would have to be read if any of it is read. 10

*Mr. Wescott.* Well, I am willing that should be done. I suppose the jury is entitled to it. Then suppose we read it and I won't have to go on the stand. Will you read the chief?

(The testimony in chief of John S. Rogers was read by Mr. Armstrong as follows:) 20

JOHN S. ROGERS, sworn.

*By Mr. Armstrong.*

Q Mr. Rogers, where do you live?

A At Stanwick, New Jersey.

Q You are the president of the J. S. Rogers Company, the defendant in this case?

A Yes, sir. 30

Q Your company built the asylum at New Lisbon, in this county?

A Yes, sir.

Q When did you start that work?

A Some time in February, I think, it was laid out.

Q Did you know Mr. Loid?

A Knew him very well.

Q Did he work for you?

A Yes, sir; both on this and other jobs. 40

*John S. Rogers, direct.*

Q What kind of a man was Mr. Loid?

A A good all-round man; steady, sober and industrious; no objections to him at all whatever.

Q Was he a careful man, as far as you knew?

10 A As far as I knew, careful in every respect.

Q What was he working at on this building?

A He was working as a carpenter, and did whatever the gang with which he was working had to do.

Q You knew this derrick in question?

A Yes, sir.

Q How long did you have it?

A It had been in use about ten years.

20 Q Have you had a model made of the derrick?

A Yes, sir.

Q (Exhibiting model to witness.) Was this made under your direction?

A Yes, sir; under my supervision.

Q I show you this model and ask you to explain it.

30 A The model is exactly one-twelfth the size of the original derrick—that is, one inch to the foot; the derrick is a regular New York derrick, so-called, a two-legged derrick, and is used in this way, with a guy line inside and a guy line out, or a guy line and reverse guy line; this is the loaded guy, and this the safety guy (demonstrating with model).

Q What do you mean by the "loaded guy"?

40 A The guy that takes the load to the derrick, whatever it may be; this is the lighter guy line, generally called the "safety guy," carried off simply to prevent it from going around

*John S. Rogers, direct.*

backward; this (indicating) represents the pulling rope, which has usually a block and fall hanging in that way; this line is taken out a distance so as to clear the load to be lifted; the load is lifted by this line and this holds the derrick and the load which is carried; this derrick is exactly one-twelfth size; the original derrick was four by four; this, of course (indicating), is out of proportion, but the height, width and everything else is exactly one-twelfth. 10

Q What is the bottom piece there?

A The bottom piece is three by twelve—twelve feet long, which forms the foundation of the derrick.

Q What are the cleats?

A The cleats are two by three in this case.

Q What do you mean by two by three? 20

A Pieces of two by three.

Q Inches?

A Yes, inches—two by three inches—nailed on the two inch way.

Q How long had you used that derrick about your work?

A Oh, some seven or eight years prior to that time.

Q Had you used it on this job?

A From the start; yes, sir. 30

Q What inspection had you made of the derrick, as to its condition?

A I personally superintended the raising of it the first time it was raised on this job, as I always do in such cases.

Q Well, just how full was your examination of it—what parts of it did you examine?

A All parts of it, and I was also present when the first four loads were lifted with it the first time it was used there. 40

*John S. Rogers, direct.*

Q Was or was not this derrick in proper condition?

A As far as it had ever been it was perfectly safe as an appliance; there was nothing broken about it.

10 Q What do you mean by "as far as it had ever been"?

A Well, it was such a derrick as is commonly used in such work, and we have been using it for seven or eight years prior to that time, and are still using the same derrick without any alteration to it; we have three or four of these of different heights and weights, according to the load to be lifted.

Q How high was this derrick?

20 A Nineteen feet four inches from the ground to cap log.

Q Did you see this derrick erected on the day of the accident?

A I was at dinner at the time it was raised.

Q Where had the derrick been before the accident?

A My impression is it was in the third story of the administration building.

Q What is the administration building, what they call the main building?

30 A The administration building is the central building of the three; there is the administration building, or central building, back of that the culinary department, or kitchen department, and an east and west wing, connected with the administration building by what are called cut-off corridors, narrow corridors with oak doors hung in iron frames; the administration building was built first, and carried up first ahead of the other buildings because the brick hoisting apparatus was setting in the cen-

40

*John S. Rogers, direct.*

ter of the administration building, and all brick for the entire plant above the first floor were hoisted in wheelbarrows by power on this hoisting machine; they were hoisted into the administration building and wheeled out east and west to the other walls, therefore the wings were the last built.

10

Q At what place did this accident happen?

A It happened in the west end of the west wing, over what is called the day-room of the insane department, the men's department; that was the first wing built.

Q Did you know that the derrick was to be moved from the administration building to this building at that time; that particular fact?

A Not particularly; the derrick was there to be used, and Mr. Leishman, our superintendent, would naturally use it for heavy work.

20

Q I mean, did you know of this particular fact, that it was going to be taken that day or at that time?

A Not that day, no, sir; in the wings there were but two uses to which the derrick could be put; one was for the twenty-four inch I beam, about twenty-eight feet long, which carried the second floor joists, and the other was this truss directly above it, which carried the roof over it; there was no other heavy work in either of the wings excepting those two particular items; and this was, I suppose, being set up to raise the roof truss for that particular purpose.

30

Q Did you see the derrick set up on that day?

A I did not; I was not there at the time; I was at dinner.

40

*John S. Rogers, direct.*

Q What time did you leave the plant?

A I met the committee; the building committee were there that day, and whenever they were there we had dinner at one o'clock with the steward, and I presume I left there about half-past twelve, or a quarter to one.

10 Q What time did the men strike off work?

A Twelve o'clock.

Q So you did not see any of the erection of the derrick at all, you say?

A No, sir.

Q When you returned, had the accident happened?

20 A As I came down the lane I met one of the men—Mr. Leishman, the superintendent—coming on a run to get the sheriff's double carriage, and he told me that Billy Loid had fallen, and I said, "Is he hurt badly?" He says, "I am afraid he is." I says, "Phone into Pemberton and get Dr. Hollingshead out; if you cannot get him, get Dr. Harvey, or both."

Q Never mind your conversation.

30 A That was the conversation; I met them before getting to the building, and before I got to the building they brought him out on a cot bed and laid him under a tree at our tool shanty, and he lay there until the doctor came, and when the sheriff's double carriage came they took him into Pemberton.

Q Was he conscious or unconscious?

A He was conscious; I do not think he lost consciousness at all.

Q Badly hurt?

40 A We did not think he was until Dr. Hollingshead came, and he found by jabbing pins into his feet and extremities that he was

*John S. Rogers, direct.*

paralyzed, I judge, from the breast down; his back was broken, I believe.

Q What conversation did you have with him regarding the accident, if any?

A Why, I asked him how it happened; I don't know exactly what he said; there wasn't very much said; I remember asking him how it happened, and he said that the derrick rope, the slack of the pulling rope, had caught him by the foot and thrown him over the wall; I said, "You are not much hurt, are you, Loid?" "Well," he says, "I feel pretty sore," and he says, "I am afraid I am a goner"; but we did not any of us realize that he was so badly injured until Dr. Hollingshead arrived and we found he was paralyzed. 10

Q What about his shoe?

A I think his shoe was on his foot, but the sole was entirely torn off; evidently the shoe sole had caught either on the floor or on the rope and something had jerked the sole of the shoe off in going over the wall. 20

Q I see by the model that you have there tacks or pins holding the cleats, extending through the strip for the plank?

A Yes, sir.

Q Was that the case in the original? 30

A That is the way the original was made; there were still other additional spikes driven through it.

Q You describe, will you, please, just how this derrick is used and is necessary to be used in and about the work?

A Let me have that model, Judge, and I will try and do so. (Referring to another model now produced and handed to witness.) This represents the floor of the building on 40

*John S. Rogers, direct.*

which the derrick stood while working; this represents the thirty-inch steel I beam which spanned the building from side to side, and for which the derrick was used originally in this wing; this represents the floor below on which the guy line was fastened around the joists at the chimney trimmer; there was the action of the derrick (indicating); the load was on the ground below, down about thirty feet below this; this wall here was two feet high from the floor, and this represents the ladder-work, we call it, which was walled in with the brick; that was on, and the brick-work was in, and this was up to its height, ready for the wall-plate to carry the roof (indicating); the idea was to raise this truss here which went over the top of this to hold the hip roof above it, this being the floor below; now, in lifting a load of this kind it being a two-legged derrick, it is impossible to use it as you would a boom derrick; the custom then is, in raising a beam of this kind, to get as near the middle of your load as you can, and if it is not in the middle, when you come to lift your load it is necessary to shift this derrick endways, which is done with a crowbar here and a crowbar here, raising a load, and pushing it along like that (indicating), taking the load off the plank so as to land the load exactly where you want it; it is also necessary, at times, to throw this in or out (indicating), to make room to land your load here, which is brought up from the ground; therefore we put simply what are called spikes on the bottom of the plank to hold it; I will simply state, that in ten years' experience it is the first time it has ever fallen, this same derrick; there is the normal position of the derrick (indicating),

*John S. Rogers, direct.*

the head of the derrick hangs out just enough so that the load will swing clear; this being just one-twelfth size, or one foot to the inch, this would hang out about two inches (indicating); there would be the normal position of the load coming up from the ground (indicating); here was a block and fall with a winch (indicating); here was a three-hundred-pound winch fastened on here, with a crane at each end, with which the load was raised; this safety guy was taken out to the ground and a crowbar set in the ground and a half hitch set around it and two men in charge of it; two men had charge of this guy line at the time the accident occurred; this is simply a model that you may see the general shape and probably understand it better. 10

Q The moving, you say, from side to side? 20

A (Interrupting.) It is necessary to shift the derrick, and load in order to land your load with this kind of derrick; with a boom derrick you can raise or lower your load, or with an ordinary pole derrick you can shift with guys, but with a pole derrick it is necessary to have at least four guys, and on top of a building it is physically impossible to guy, and also with a boom derrick; therefore, this is the only derrick that is used, so far as we know; and it is in constant use; there was nothing broken about the derrick and is not today; I never had it to break. 30

Q About shifting it sideways, as you have said, do you do that after the load is on at times?

A In order to land we are compelled to.

*John S. Rogers, cross.*

(The cross examination was then read by Mr. Wescott as follows:)

*Cross examination by Mr. Wescott.*

Q Where is this derrick now?

A Down in the yard, I believe.

10 Q How long has it been out of use?

A Used the last time about two months ago, I think.

Q Where?

A It was used at Merchantville and at Moorestown, and has been used on several jobs; I really could not say which ones.

Q Where is the plank on which the feet of the derrick rest?

20 A I presume that is there, too; I really do not know.

Q Has it been in your possession ever since this accident?

A So far as I know; yes, sir.

Q And it is a part of your machine, and your company furnished this machine—this derrick and plank—which was a part of the derrick?

A Yes, sir.

30 Q You made a remark in your chief examination that the derrick “so far as it had ever been” was safe; what did you mean by that?

A I mean that there were no blemishes, no breaks and no defects.

Q Was there anything in this plank to hold it on the floor or any other place that you might locate it for the purpose of using it?

A There were spikes driven through it.

Q How many?

40 A I could not say; probably a dozen.

*John S. Rogers, cross.*

- Q How long?
- A I judge they were forty-penny nails.
- Q How long are they?
- A About four inches.
- Q And this plank was how thick?
- A Three.
- Q So that the ends of these nails would stick out an inch? 10
- A About that, I should judge; yes.
- Q And they were put in there for the purpose of preventing this plank from slipping, weren't they?
- A Yes, sir.
- Q And if they were in there of course it would not slip?
- A It would not slip, no.
- Q You were asked something about inspecting this machine; when did you last inspect it before the accident? 20
- A The preceding week I raised the brick hoisting apparatus with the same derrick—had charge of it—and it was then in good shape.
- Q Did you inspect the bottom of it—the bottom of the plank?
- A The bottom was in the same shape that it had always been; yes.
- Q And there were how many nails there then? 30
- A I could not say.
- Q Were there any?
- A Necessarily; yes.
- Q No, not necessarily; were there?
- A There were; yes, sir.
- Q You saw them?
- A I saw them.
- Q Looked at them?
- A Yes, sir. 40

*John S. Rogers, cross.*

Q How many nails did you see there—were there ten or twelve?

A That is a mere guess; I would not like to say positively; I suppose fully a dozen.

Q All right; we will take a dozen then; what would be the effect upon these forty-  
10 penny nails of moving this heavy derrick by means of the crowbar over a floor?

A The effect would be very slight because, moved with a crowbar, it had to be raised in order to move it.

Q Wouldn't it bend or break the nails?

A It would not break, and would bend very little, a forty-penny nail; it is very heavy wire.

Q Tear the floor a good bit, wouldn't it?

A It might, but they were nothing but rough  
20 floors, so that would not matter.

Q Did you ever use it on any other place than rough boards?

A No, sir.

Q When you said in your chief examination there were still other additional spikes driven through it, what did you mean by that?

A I meant in this model; there is simply  
30 springs there which hold the boxing around the derrick that come through (referring to the model), and in the other there were spikes driven through the plank; it is independent of this; this is there simply to show the idea (referring to model).

Q And there are none in it?

A There are none in it, excepting where the boxing is, simply springs.

Q What is the boxing?

A It is two by threes, nailed around the  
40 foot.

*Elsworth Davis, direct—cross.*

Q The cleats, you mean?

A The cleats that hold the foot of the derrick.

*By the Court.*

Q Mr. Rogers, was this machine bought by your company or made by you? 10

A Made; the derrick was made, your Honor, and the winch or windlass was bought.

Q Yes, but the wooden structure was put together in your yard?

A Yes, sir.

*Mr. Wescott.* Now I want to recall Mr. Davis for just one question. Mr. Davis, will you kindly come back, please?

ELLSWORTH DAVIS, recalled for plaintiff. 20

*Direct examination by Mr. Wescott.*

Q Mr. Davis, this escaped me, if your Honor please: you said that Mr. Sharp, the foreman there, was attending to the guy rope; is that correct?

A Yes, sir.

Q Now if he had secured that guy rope could that derrick have gone over the wall and killed Mr. Loid? 30

A It would have been impossible for it to have gone over the wall if it had not been untied.

*Cross examination by Mr. Armstrong.*

Q The guy rope pulled out of his hands and got away from him?

A Yes, sir.

Q And if he had left that secured or had taken a half-hitch or something of that kind he could have held it? 40

*Motion for Non-Suit.*

A He could have held it from going over the wall. The bottom would have slid back in the building. It was bound to go back. The guy rope wasn't long enough for the derrick to go over the wall if it hadn't been untied.

## PLAINTIFF RESTS.

10

*Mr. Armstrong.* I move for a nonsuit in this case. It is no different at all, except that Morton and this witness testify that they knew they were doing a dangerous thing. Now in the last case tried before your Honor, but not theretofore, and in the last testimony here by Davis, it was testified that what really caused the injury, the damage, was a fellow workman's poor judgment in unfastening the guy rope when he ought to have held it, in the opinion of this witness. So that the strongest case that can be made against this defendant is that this unfortunate accident happened by the default of a fellow workman. There is no testimony at all showing any defective construction. Quite the contrary, indeed. The president of the corporation, whose testimony was used by the plaintiff, must of course be accepted by him in this case, as well as the testimony of the others. And it does not at all indicate that there was anything wrong or dangerous in its proper use. There is no negligence on the part of the defendant shown in this case and the only suggestion of negligence is that of a fellow workman.

20

30

40

(Mr. Armstrong argues and cites from the opinion of the Court of Errors and Appeals in the case of *Loid v. Rogers.*)

*Motion for Non-Suit.*

*The Court.* What was the situation in the other trial I had, was there any defense offered?

*Mr. Wescott.* No defense.

*Mr. Armstrong.* There were no witnesses offered on the part of the defendant. I tried to make as strong a defense as I could. And I might call your Honor's attention to the fact that Mr. Sharp himself said that the nails or spikes, either one, could not prevent, under the circumstances, the sliding of this plank. 10

*Mr. Wescott.* Who said that?

*Mr. Armstrong.* Davis, the last witness. Sharp was the sub-foreman and there is no such thing as a vice-principal.

*The Court.* I do not think that the relations of Sharp in the act of moving this derrick were those in which he would be representing his principal. That is not a part of his instructing and overseeing. The difficulty that I see in the grounds advanced by the motion lies in the opinion of the Court of Errors dealing with this precise question and where it is treated as though the presence or absence of these spikes or nails in the plank upon which the uprights rested was a structural thing for which he himself might be responsible. 20 30

*Mr. Armstrong.* That was the difficulty your Honor experienced before.

*Mr. Wescott.* It wasn't in the case before. You can't find it in the case.

*Mr. Armstrong.* In the cross examination of the witnesses for the plaintiff their attention was all directed to that and your Honor agreed with me in my objection to that position, that the defendant had made no such proof or no 40

*Motion for Non-Suit.*

such offer in the case, and that therefore it did not come in. So that I do not suppose it matters how it comes in now, so long as it does come in. As it stands now, however, there is no question at all. It is a question of proof on the part of the plaintiff that the spikes were not in there. Some of the witnesses say they were not. The man who furnished the derrick said they were.

*The Court.* I apprehend the question turns on whether these spikes or heavy nails that Rogers mentions were a part of the construction itself, or whether it was a thing apart from the mere construction and was used apart from the derrick in the mere shifting around from place to place of the derrick. I see legal difficulties in the situation, but the Court of Errors has explicitly declared this made a case for the jury in the earlier trial, and I am afraid that nobody but the Court of Errors can say otherwise. You see the Court of Errors in the first opinion quotes specifically the testimony of Mr. Rogers, and of course it is to the identical effect which is introduced here.

*Mr. Armstrong.* This was offered as a defense.

*The Court.* It doesn't matter how it gets in. If it is in the case it doesn't matter in what part of the case it comes in.

Gentlemen, I will not dispose of this case until after the noon recess. The defendant may go on with his proof and I will rule on the question later in the case.

*Mr. Armstrong.* I think I will rest on my motion, if your Honor please.

*Motion for Non-Suit.*

(Trial of the cause resumed at 1 P. M.)

*The Court.* Gentlemen, I have decided to refuse the nonsuit in this case. The case on general principles is perhaps not free from doubt, but in the light of the earlier opinion of the Court of Errors, it seems to me there is nothing for me to do but to submit the case. On the first trial of this case the fact appeared, which did not appear in the second trial—and that fact was laid stress upon by the Court of Errors in its opinion as being the one element which bore upon the proper construction of the derrick itself, namely, that this derrick and the plank of which it was a part was an entire construction; that in the bottom of that plank were nails or spikes, which were also a part of its permanent construction, and which were intended to act as teeth in holding on to the floor, or whatever material of a permanent stationary character it might be placed on. This would have a bearing not only upon the defendant's negligence, but also upon the obviousness of the risk or danger. There is testimony in this case from which it may be inferred that the whole plank slipped, and that these nails which had been provided as part of the structure itself and which operated as teeth to hold it in place—without any action on the part of the men themselves—were absent on this occasion, that being the precise question which the Court of Errors dealt with in the earlier case, and in which case they indicated it might be a case of construction, as distinguished from manipulation and operation, and it seems to me the case is one in which I

10

20

30

40

*Motion for Direction of Verdict.*

must follow that ruling and proceed with the case.

An objection may be noted for the defendant.

10 *Mr. Armstrong.* The defendant rests and moves for a verdict in favor of the defendant on the grounds indicated in the motion for a nonsuit: that there is no negligence of the defendant shown here or nothing from which it might be inferred by the jury from the testimony of the plaintiff that there was any neglect or default on the part of the defendant in furnishing a proper appliance; the testimony on the part of the plaintiff being the only testimony, of course, in the case, showing that  
20 everything that was necessary was present, and that nothing else that could have been done to the structure as it was built and designed and generally used could have avoided the accident; that it was due entirely to the plaintiff's intestate and those acting with him, and his action, beyond any question, under the testimony here on the part of the plaintiff, contributed to the accident and the injury; that  
30 the testimony, which is uncontradicted and which must be accepted on the part of the plaintiff, is that spikes or nails or nothing else, even men, two men holding at the base, could have overcome the force of the six men pushing and that their actions together caused this injury. I ask for the direction of a verdict on that ground.

*The Court.* Mr. Armstrong, how can I disregard the Court of Errors' ruling for the purposes of this case as the law of this case? In  
40 the present case the precise testimony upon which the Court held that it was a jury ques-

*Motion for Direction of Verdict.*

tion has been presented here without the change of an iota in their testimony. Now that being the case how can I, sitting as a subordinate judge, disregard it?

*Mr. Armstrong.* If your Honor please, I may be mistaken, but if I am not mistaken the point that was in the original case was a controversy of fact which was alleged on the part of the defendant as against the claim of the plaintiff, whether or not certain spikes were driven through and protruding an inch beyond. The testimony here now is that the presence or absence of these spikes—that is the testimony of both of these two witnesses—that the presence or absence of these spikes themselves would not have prevented the accident. On direct examination by plaintiff's counsel the first witness said that they would not—I don't know whether on direct or cross examination—and the second said that. So that now it conclusively appears as a fact on the part of the plaintiff's case, that the injury or damage was caused because the guy rope was loosened and got out of Sharp's control. Now that is their case. It is entirely different from the other case. The point there was debated very considerably as to the question of spikes, but here is no debate on the question of spikes. Two of the witnesses say there were none and one witness says there were. Now one witness says there was, on the part of the plaintiff. And these six men pushing against the two men would overcome the strength of these two men and the only way to hold this derrick would be by its being tied, and surely that is not the same case that was before the Court of Errors by any manner of means. Now, of course, the

10

20

30

40

*Motion for Direction of Verdict.*

injury must have been caused, and must be established by the testimony, from the absence of these spikes. Now if that be an essential thing for the plaintiff's case that these spikes be absent how is that fact established? Two of the witnesses say they didn't see the spikes and the third witness says the spikes were there. Now it must be the absence of these spikes that decides this case.

10

*The Court.* You are arguing on facts that are not in the case. "We raised up the derrick and the whole derrick came down. There were no spikes in the board; if there had been it would probably have held." That is the testimony of Morton. I cannot disregard any testimony that is in the case. We may reason all we please about the mechanics of the case and the resistance of spikes, but that is in the testimony in the case, that their presence would probably have been efficient.

20

It is true in the second trial of the case there was an absence of this testimony of Rogers. And it is true in the second trial of the case that the Court indicated there was an assumption of the risk, but it was an assumption of the risk as the case then stood, namely, that these men were taking chances themselves in securing by their own method the proper attention to the foot of these uprights and not, as in this case, where as it is now and as it was on the first trial, reliance could be had upon the inherent structure of the plank with both its uprights in place to hold the plank in position. The presence or absence of these things would appear to be obvious to a carpenter if he had any part in supplying them or placing them; and that must necessarily be so, because if he

30

40

*Charge to Jury.*

noticed the absence of these nails which the master had undertaken to supply, that must be a risk which the employee would assume. I see no reason to change my ruling made on the motion for a nonsuit. The motion will be denied and an exception noted.

(Objection noted for defendant as ground of appeal.) 10

**Charge of the Court.**

Gentlemen, the relation of master and servant existing at the time this accident happened involved certain reciprocal obligations and certain rights upon the part of the parties. The master owed it to the plaintiff to use reasonable care to see that his employee was furnished with a reasonably safe appliance with which to do his work and a reasonably safe place in which to do it. On the part of the employee there was the assumption of certain risks which he ran. In the first place, he ran the risk of the dangers which were naturally incident to the employment in which he was engaged. He of course ran the risk of any negligent act of his own doing him an injury. He ran the risk, in addition to that, of those dangers which were created by the negligent acts of his fellow servants. And there was still another class of dangers which he ran the risk of, and they were those which were obvious or which, if he exercised reasonable care, would be obvious to him in the service in which he was working. 20 30

As this case stood without the testimony of Rogers, applying these various rules, there was 40

*Charge to Jury.*

no negligence shown in the employer. The testimony up to that point discloses that they were engaged in the use of a derrick that was leaning over beyond a perpendicular position and that one of the employees, who happened to be a sub-foreman, called to a number of men, of whom Loid was one, to help straighten it up. As they were in the act of straightening it up for some reason or other the foot of the derrick slipped, the upper portion of the derrick went down and carried with it one of the guy ropes, which in turn caught the deceased and carried him over the side of the building, by which he was killed. Up to this point you will see at once that all of these acts were the acts either of Loid, the deceased man, or the acts of fellow employees, because for the purposes of this case, no matter what Sharp's position may have been, whether he was a sub-foreman or otherwise, he was a co-employee and a fellow servant with Loid and his negligence would have been that of a fellow servant for whom Rogers would not be answerable.

It is at this point that another element comes into the case, and in substance it is that Rogers testifies that this plank on which the feet of the derrick rested was a part of the derrick itself, that is, a part of the construction of that derrick, and for the purpose of holding it in place when it should be deposited at any point, there were nails run through it, so that the ends of the nails projected approximately an inch beyond the bottom of the plank, and thereby was intended to grip the material, whatever it might be, that the plank was resting upon, which I suppose was of a permanent, fixed character. Now it is only in the event that you

*Charge to Jury.*

find that there was an undertaking on the part of Rogers to supply these nails and that there was a failure in that regard, that any negligence is established in the defendant. If, for instance, this derrick fell, not by reason of the slipping of the planking from the material on which it was placed, but by reason of the foot of the derrick coming out of the sockets made by the cleats on the planking, the defendant would not be answerable for that, because that would have no relation whatever to the thing that Rogers is alleged to have done to make the thing that they were using safe against falling. That would be a thing that the men themselves would undertake or would perform, namely, the proper fastening of the cleats and the proper placing of the feet of the derrick within those cleats. The same thing would be true if the accident happened by reason of the rope, the guy rope, being improperly loosened and thereby causing the death of the deceased. You can see at once that both of those things would be either the act of Loid or the act of others with whom he was working and for which the defendant would not be responsible, no matter how much personally they may be responsible for their wrongful acts.

So that you see the very first question for you to determine is whether there was negligence on the part of Rogers in not equipping or seeing that this plank was equipped with spikes, as he said they were. You will remember the testimony of one or two of the men to the effect that the spikes were not there, and there is testimony in the case that the plank itself slipped, although it is argued, and there is some testimony to bear it out, that that did

*Charge to Jury.*

not happen, but that the derrick jumped out of the cleats in the sockets on the plank.

Now, gentlemen, I have already indicated to you that the employee takes certain risks, and some of them I have illustrated and I want to repeat, that if this derrick jumped out of the cleats that would be a risk that he would assume, if by either his own negligence or the negligence of his fellow servants it was not properly placed in position or properly secured; the same thing being true of the guy rope if that was the cause of the fall.

There is another risk that he takes, and that is those risks which are naturally incident to the work in which he is engaged. Now was this slipping of this derrick one of those incidents? If it was then of course he took the risk of it and there could be no recovery if that was the cause of his death. And finally he took the risk of those things that were obvious. Now this is perhaps the most important phase of the case for you to consider. The law says, as I have indicated to you already, that an employee takes the risk of those dangers which are either obvious to his senses, or which, if he used reasonable care, were or ought to be obvious to his senses. Now if there were no nails in this plank was that an obvious danger, or ought one in the exercise of reasonable care to have recognized that as an obvious danger? If either were the case then their absence would be one of the things that the employee would take the risk of.

There is also, gentlemen, the question of what is known as contributing negligence. I have already alluded to it, but to emphasize it and to bring it more clearly to your minds: if this

*Charge to Jury.*

man by some act of his, some act that was negligent in its performance, helped to bring about his own death, then no recovery can be had, because the law does not measure the negligence of parties, but holds that where one by his own negligence contributes, no matter how slightly, to his own injury or death, that neither he nor those who may come after him can complain of the negligence of another which may have contributed to it. If any of these questions, gentlemen, in your deliberations are solved against the plaintiff that determines the case and your verdict is one of no cause of action. If they are all solved in favor of the plaintiff's contention and it has been established to you that the defendant's negligence, and that alone, was the cause of the decedent's death, then you come to the question of what compensation should be given to the next of kin.

This action is by the administratrix of Loid. She is also the widow, but she does not bring the suit in that capacity, but it has developed in the case that the administratrix is the widow and that there are four children.

The law in cases of this kind, gentlemen, awards no damages for pain or suffering, either physical or mental. It is purely a money transaction. The statute says that in such cases where death is caused by the negligent act of another, that the sole damage recoverable is the pecuniary loss suffered by the next of kin. In ascertaining that, gentlemen, the rule is that you must appraise that loss at its value as of the present time, taking the years that are past and the years that may be to come, in considering the expectation of life that would

*Objections to Charge.*

have been this man's if he had not been taken off.

The question was raised in this case that a number of years have passed since the accident happened. Very frequently these actions when they are brought promptly mean anticipation.

- 10 This may mean some anticipation, but it means considerable in the retrospect. But you are to take all of that into consideration in determining what is the present money worth, the present money value and the loss to the next of kin, if you reach that question. But before reaching that question take up all of the other questions which the Court has submitted to you and deal with them as the Court has indicated you should with regard to applying the law.

- 20 Gentlemen, the defendant has asked me to make certain charges to you, which perhaps have been largely covered in the charge.

*Mr. Armstrong.* I think they have.

*The Court.* Well, you may retire.

## PLAINTIFF'S OBJECTION.

- 30 *Mr. Wescott.* I want an exception to the statement that Sharp was a fellow servant under the circumstances.

## DEFENDANT'S OBJECTIONS.

- 40 *Mr. Armstrong.* I desire an exception to that part of your Honor's charge where your Honor referred to the derrick coming out of the socket as the cause of injury and leaving it to the jury to say if it was negligence if the plank slipped.

*Objections to Charge.*

I also desire to except to leaving it to the jury to say in this case that the absence of spikes in the plank would be considered negligence, and to what was said in relation to that.

Also I desire to except to the suggestion that if the plank slipped the jury might find it was negligence on the part of the defendant. **10**

And I also desire to except to what your Honor said as to the absence of nails being a matter of negligence, what was said in that connection.

*The Court.* The objections will be noted.

---

**20****30****40**

*Grounds of Appeal.***Grounds of Appeal.**

Filed July 14, 1917.

**New Jersey Court of Errors and Appeals**

10

SUSAN T. LOID, Admx. of &c.  
of WILLIAM H. LOID, de-  
ceased,

*Plaintiff-Respondent,**vs.*

J. S. ROGERS COMPANY,  
*Defendant-Appellant.*

*In Tort.**On Appeal  
from  
Supreme  
Court.**Grounds of  
Appeal.*

20

The appellant states the following grounds of appeal:

1. The trial court refused to direct a judgment of nonsuit against the plaintiff and in favor of the defendant, when thereunto moved by counsel for the defendant, and erred in so refusing.

30

2. The trial court refused to direct the jury to find a verdict in favor of the defendant, although thereunto moved by counsel for the defendant, and erred in so refusing.

3. The trial court erred in permitting the jury to find that the defendant was guilty of negligence.

40

4. The trial court erred in his charge by permitting the jury to find that there was an undertaking to supply nails in the plank, a part of the derrick, testified to in the case, which failure constituted negligence.

*Grounds of Appeal.*

5. The trial court erred in his charge by permitting the jury to find that the plaintiff's decedent came to his death in and about the defendant's employment by the use of an unsafe appliance furnished by defendant.

6. The trial court erred in not ruling from the evidence in the cause that the defendant was free from negligence. 10

7. The trial court erred in not ruling from the evidence in the cause that the accident to the decedent was caused by his own negligence.

8. The trial court erred in not ruling from the evidence in the cause that the accident was caused by the negligence of decedent's fellow servants.

9. The trial court erred in not ruling from the evidence in the cause that the decedent by his own negligence contributed to the accident. 20

10. The trial court erred as a matter of law in permitting the jury to find in this cause the absence of nails or spikes in the plank connected with the derrick was negligence of the defendant.

11. The trial court erred in permitting the jury to find from the facts and proof in this cause that the slipping of the plank was evidence of negligence on the part of defendant. 30

12. The trial court erred in permitting the jury to find that there was any breach of duty on the part of the defendant to the plaintiff's decedent in this cause.

13. There was no evidence in the cause from which it could be inferred that the derrick furnished by the defendant was in any way unsafe, improper or defective. 40

*Grounds of Appeal.*

14. The accident by which decedent met his death did not result from the use of the derrick by the decedent in the manner and for the purpose for which it was designed and furnished.

10 15. The trial court erred in permitting the jury, for the reasons above stated, finding a verdict for the plaintiff.

E. A. ARMSTRONG,  
*Attorney for Defendant-Appellant.*

We hereby acknowledge service of the foregoing grounds of appeal.

WESCOTT & WEAVER,  
*Attorneys for Plaintiff-Respondent.*

20

30

40

## New Jersey Court of Errors and Appeals

Susan T. Loid, Admx. of  
the estate of William H.  
Loid, deceased,  
*Plaintiff-Respondent,*

vs.

J. S. Rogers Company,  
*Defendant-Appellant.*

In Tort.  
On Appeal from Su-  
preme Court.

### BRIEF FOR RESPONDENT.

The plaintiff below seeks to recover damages for the death of her husband. The allegation is that death was due to negligence of the defendant.

There have been three verdicts favorable to the plaintiff and this appeal presents the matter to this Honorable Court for the third time. The two previous opinions will be found in 68 N. J. L., p. 713, and 77 N. J. L., p. 784, respectively.

A wooden appliance, called a "twoleggedderrick," used for hoisting materials to the top of a building in course of construction, while being pushed or pulled by the intestate and other employees of the defendant into an upright position, toppled over and fell from the top of the building. A rope attached to the falling derrick caught around the intestate's

feet and threw him to the ground whereby he was killed.

When this matter was first presented to this Honorable Court the case below was tried on the theory that the master had failed to properly fasten and secure the feet or ends of the frame of the derrick. When the matter next came to the attention of this Court the case below was tried on the theory that the master had failed to furnish the intestate a reasonably safe place in which to work. The trial which is now being reviewed proceeded on the same theory as the first trial; namely, that the base of the derrick was not properly secured. It will, therefore, be necessary to refer to the first of the two previous decisions only, 68 N. J. L., p. 716. Judge Vredenburg said, "If the defendant upon being denied this (non-suit) motion, had then rested his proofs, his right to the direction, by the Court below, of a verdict in his favor would have been entirely clear. No negligence imputable to the defendant had yet appeared." Later in the opinion Judge Vredenburg said, (page 717). "But the defendant corporation then injected into the case a disturbing element, by raising an *issue of fact* as to the proper construction of the derrick, and offered evidence to prove that, for the purpose of preventing the bottom of the supporting plank from slipping, it had, in its construction, caused a dozen or more nails or spikes to be driven into and entirely through the plank so that they extended or protruded about one inch beyond its bottom surface. The plaintiff, admitting this, brought proof to show that no nails extended from the bottom of the plank when seen before the accident by the plaintiff's witnesses." The only inference to be drawn from this opinion is that under all the proof there was a question for the jury. The

remainder of the opinion deals with the refusal of the trial Court to charge certain requests presented by the defendant corporation and because of such refusal the judgment of the lower Court was reversed.

The testimony referred to as raising an issue of fact came from the mouth of the president of the defendant corporation. At the trial now under review it appeared that this gentleman had died. His testimony given at the final trial was read into the evidence now under consideration and made part of the plaintiff's case.

The master testified that the plank at the base of the derrick was a part thereof (46), that there were a dozen or so spikes driven through the plank to hold it in place (46), that the spikes were used to keep the plank from slipping (47) and if the spikes were there the plank would not slip (47). It is not disputed that the base of the derrick did slip, in fact when the slipping took place the derrick, plank and the intestate all fell from the top of the building in course of construction (14). The plaintiff below produced testimony to the effect that the plank had no spikes in it (14) and that spikes would have held it (14). This is the evidence which this Honorable Court refers to as raising an issue of fact in 68 N. J. L., page 717. The one important point in the whole case turns upon this evidence.

If our conception of this appeal is correct it stands, with two exceptions, in exactly the same position as did the appeal which came to the attention of this Honorable Court fifteen years ago. On that appeal it was decided that the evidence presented a jury question but that the judgment favorable to the plaintiff below should be reversed because the learned trial Court had refused to submit certain of the defend-

ant's requests to the jury. The two points of difference between the case now under review and the first case to be reviewed are, that the evidence raising an issue of fact, which came out in the defendant's case in the first trial, is now a part of the plaintiff's case, and that there were no requests to charge presented by the defendant corporation in the case now under consideration.

The discussion between the learned trial Court and the attorney for the defendant corporation upon the motion to direct a verdict for the defendant pages 54-57 of the printed book) contains the crux of the situation and moreover shows that Judge Lloyd considers this case exactly similar to the case as it was tried the first time. A reference to page 14 of the printed book will show the recollection of the learned trial Court as to the evidence to be correct.

Since this Honorable Court has already determined that the evidence produced raises a jury question and since the charge of the learned trial Court is full, complete, proper and legally correct, we contend that the judgment should be affirmed.

Respectfully submitted,

WESCOTT & WEAVER,  
*Attorneys for Respondent.*

# New Jersey Court of Errors and Appeals

No. 39, November Term, 1917.

SUSAN T. LOID, Admx. of &c., of William H. Loid, deceased, <i>Plaintiff-Respondent,</i>	} <i>In Tort.</i>
<i>vs.</i>	
J. S. ROGERS COMPANY, <i>Defendant-Appellant.</i>	} <i>On Appeal from Supreme Court.</i>

## Brief for Defendant-Appellant.

### Statement.

The plaintiff-respondent's decedent was employed by the defendant-appellant as a carpenter in the performance of its contract for the erection of a hospital building for Burlington County at New Lisbon in that county. He had been working on this building for some months.

There was in use, and had been during the continuance of this work, what is called a "New York" derrick. This is a contrivance in the shape of a great letter "A". It stands 19 feet 4 inches high. The upright parts are composed of square timbers 4 inches by 4 inches, having a transverse piece of the same size, making the "A". This transverse piece is 4 or 5 feet from the bottom. There is a winch or windlass, with a crane at each side, at this transverse piece to be used for winding a hoisting rope. This rope ran from the winch up to a block at the apex. The purpose for which this derrick was used was to hoist timber and material from the ground to be used in the building. When it was in place and ready for use it inclined

forward at a slight angle, so that the top extended about 2 feet beyond the perpendicular line. The feet of this contrivance rested on a plank in little boxes or pockets made by strips of wood or cleats nailed to the plank. One witness says these cleats were made of strips 1 inch thick, and another says 2 inches thick. The plank itself, the resting place for the feet of the derrick, laid on joists, or the floor, or wherever the derrick chanced at the time to be erected. At this time some boards were thrown down loosely across the joists and the plank rested upon them. This plank was from 8 to 12 feet long, and either 8 inches or 12 inches wide and 3 inches thick. The plank and the foot of the derrick were not fastened in any way. They could not be, for in the use of the derrick the plank and the derrick were required to be shoved backward and forward and from one to the other side, as its use was demanded. For the purpose for which it was intended to be used and the way it was operated it could not be made fast while at work.

From the top of the derrick running back and tied to the building was a guy rope, which they called the loaded guy line; and from the front another guy rope tied loosely and used only for steadying purposes, called the safety guy, ran out and was fastened to the ground below; at this time, I believe, to a pile of timber.

Just after noon on August 7th, 1900, some six or eight of the workmen, including the decedent, were called to erect this derrick in place on the third or top floor of the building, for use there. It had just been brought from a lower floor in another part of the building and had not been put in use at all, nor indeed was it ready for use, at the time and place where the

accident happened. The derrick was erected and the guy lines fastened, but before the men who had erected it had left the place they came to the conclusion that it had too much lean and was too far away from the perpendicular for its purposes. It was placed close to the outer wall and leaned somewhat forward, as before stated, but only about 2 feet from the perpendicular line as measured from the top, but must be near enough the wall for the top to be beyond the wall.

Having concluded that the lean was too great they determined to straighten it. One of the men went to the loaded guy rope and the others gathered about the foot of the derrick in front of it, reaching up as high as they could, and by pushing on it backward undertook to raise it up in that way nearer to the perpendicular, or, as they expressed it, to straighten it. The man at the loaded guy rope loosened it from the building where it had been tied, with the apparent intention of taking up the slack of the rope as the others pushed the derrick nearer straight. The pressure, however, on the foot of the derrick was so great as to shove the foot of it out and back instead of straightening the top, apparently the plank and all slipping. The man at the guy was not able to hold the rope as the feet of the derrick slid back, the derrick went down, it being near the wall, and the major portion of it across the wall, it toppled and went over to the ground below. At the foot of the derrick was a coil of rope which was attached to the winch, and as the derrick went over it took this rope with it and as coiled it caught around the decedent's foot and carried him over to the ground and so injured him that he died the next day.

This case has been before this court twice before. It is first reported in 68 N. J. L. 713; and the second time in 77 N. J. L. 784. In the first trial the defendant offered testimony on the part of its president describing the construction and operation of the derrick. He, in describing this plank, said there were some spikes driven through the plank which protruded out nearly an inch, which he thought would have a tendency to give a grip to the plank and would have a tendency to hold the derrick in place when in use. At this trial witnesses for the plaintiff denied the presence of these spikes, and said they never had been in the plank. This court, upon error in that case, as will be seen (see p. 717) said:

“But the defendant corporation then injected into the case a disturbing element, by raising an issue of fact as to the proper construction of the derrick, and offered evidence to prove that, for the purpose of preventing the bottom of the supporting plank from slipping, it had, in its construction, caused a dozen or more nails or spikes to be driven into, and entirely through, the plank, so that they extended or protruded about one inch beyond its bottom surface.”

It was this issue of fact that the trial judge then submitted to the jury as controlling. This court said, on p. 718:

“The court by its charge (above quoted), confined and narrowed the inquiry of the jury to the solution of a fact which was not conclusive as to the negligence of defendant, and erroneously refused to charge them a principle of law to which the defendant was entitled.”

The judgment of the Supreme Court was reversed and a new trial ordered. At this new trial the defendant offered no evidence, while the plaintiff's evidence was practically the same as at the first trial. The president of the company, the witness the defendant offered in the first trial, was at the time of this second trial, deceased.

The trial judge, Circuit Judge Lloyd, at the new trial refused to non-suit the plaintiff or direct a verdict for the defendant. He seemed to think that the absence of any spikes in the plank made it a question for the jury to say whether or not the derrick was constructed in a negligent manner. The witnesses for the plaintiff said there were no spikes in the plank and the jury might therefore infer that the defendant was in some way negligent. He remarked that no matter how the fact of the absence of the spikes appeared, that made a jury question.

At the trial now under review the same judge, Circuit Judge Lloyd, held the circuit. The plaintiff called to the stand the same witnesses he had at the last preceding trial, and in addition thereto read as testimony the evidence given by the deceased president on the part of the defendant at the first trial, the plaintiff adopting the same as a part of his evidence. (See case, pp. 37-49.)

The defendant, when the plaintiff rested upon submitting his evidence, moved for a non-suit. This the trial court refused. He said:

“The difficulty that I see in the grounds advanced by the motion lies in the opinion of the court of errors dealing with this precise question and where it is treated as though the presence or absence of these

spikes or nails in the plank upon which the uprights rested was a structural thing for which he himself might be responsible.” (Case, p. 51, lines 23-31.)

And again, p. 52, lines 19-28:

“I see legal difficulties in the situation, but the Court of Errors has explicitly declared this made a case for the jury in the earlier trial, and I am afraid that nobody but the Court of Errors can say otherwise. You see the Court of Errors in the first opinion quotes specifically the testimony of Mr. Rogers, and of course it is to the identical effect which is introduced here.”

I could not then, nor can I now understand, how the trial court could so have read and interpreted the opinion of this court as he seems to have done. He based his rulings on things I cannot find anywhere in the opinion of this court.

Upon his refusal to non-suit the defendant offered no testimony, and moved for direction of a verdict (case, pp. 54-57), which was refused. The case was then submitted to the jury under instructions (case, pp. 57-62), upon which the jury subsequently returned a verdict for the plaintiff. On the judgment entered upon this verdict appeal was taken, and the case is before you.

The accident which resulted in the death of plaintiff's decedent happened while he and his fellow workmen were in the course of setting the derrick up to do the work for which it was designed, and for which it was provided. In setting it up these workmen did it in a way that had not theretofore been done, in a way obviously dangerous, as well as unusual. There

is no question but what the instrument itself was of proper design and character for the use for which it was provided. The plaintiff's evidence showed this.

It is insisted upon this appeal by the defendant-appellant:

There was no evidence of any negligence on the part of the defendant to submit to the jury or to support a verdict for the plaintiff. The injury to the decedent was the result of the assumption by him of an obvious risk. The injury to the decedent was the result of negligent conduct on the part of decedent and his fellow workmen.

### **Grounds of Appeal.**

The formal specifications of the grounds of appeal in this case are contained in fifteen articles and are found case, pp. 64-66.

The defendant made a motion for a non-suit at the close of the plaintiff's case, because there was no suggestion in the evidence, on which a jury could be justified in saying, that there was any neglect or failure in any way on the part of the defendant, which caused the accident in question; in addition to which, and for the further reason that it appeared conclusively by the evidence on the part of the plaintiff that the accident happened by the improper conduct of the decedent and his fellow workmen. This motion appears (case, p. 50) and the ruling thereon (case, p. 53).

The first ground of error as specified (case, p. 64) is upon this refusal, and is as follows:

"1. The trial court refused to direct a judgment of non-suit against the plaintiff and in favor of the defendant, when there-

unto moved by counsel for the defendant, and erred in so refusing.”

The defendant offered no testimony and rested his case upon the case as submitted by the plaintiff, and moved for the direction of a verdict in its favor, which was refused (case, pp. 54-57).

Upon this refusal is based the second specification, which is as follows:

“2. The trial court refused to direct the jury to find a verdict in favor of the defendant, although thereunto moved by counsel for the defendant, and erred in so refusing.”

These refusals are also covered in the grounds specified 3, 5, 6, 7, 8 and 9, as follows:

“3. The trial court erred in permitting the jury to find that the defendant was guilty of negligence.

“5. The trial court erred in his charge by permitting the jury to find that the plaintiff’s decedent came to his death in and about the defendant’s employment by the use of an unsafe appliance furnished by defendant.

“6. The trial court erred in not ruling from the evidence in the cause that the defendant was free from negligence.

“7. The trial court erred in not ruling from the evidence in the cause that the accident to the decedent was caused by his own negligence.

“8. The trial court erred in not ruling from the evidence in the cause that the accident was caused by the negligence of decedent’s fellow servants.

“9. The trial court erred in not ruling from the evidence in the cause that the de-

cedent by his own negligence contributed to the accident.”

The defendant excepted to the charge of the court, where he left it for the jury to say whether or not it was negligent if the plank slipped and caused the injury, and also to say whether the absence of spikes might be found negligence. These exceptions are covered in specifications 4, 10, 11 and 12, which are as follows:

“4. The trial court erred in his charge by permitting the jury to find that there was an undertaking to supply nails in the plank, a part of the derrick, testified to in the case, which failure constituted negligence.

“10. The trial court erred as a matter of law in permitting the jury to find in this cause the absence of nails or spikes in the plank connected with the derrick was negligence of the defendant.

“11. The trial court erred in permitting the jury to find from the facts and proof in this cause that the slipping of the plank was evidence of negligence on the part of defendant.

“12. The trial court erred in permitting the jury to find that there was any breach of duty on the part of the defendant to the plaintiff's decedent in this cause.”

The language of the charge in this particular is found, case p. 58, line 40, and p. 59, first 15 lines, and p. 59, lines 30-35:

“Now it is only in the event that you find that there was an undertaking on the part of Rogers to supply these nails and that there was a failure in that regard, that any negligence is established in the defendant. If, for instance, this derrick fell, not by

reason of the slipping of the planking from the material on which it was placed, but by reason of the foot of the derrick coming out of the sockets made by the cleats on the planking, the defendant would not be answerable for that, because that would have no relation whatever to the thing that Rogers is alleged to have done to make the thing that they were using safe against falling. \* \* \*

“So that you see the very first question for you to determine is whether there was negligence on the part of Rogers in not equipping or seeing that this plank was equipped with spikes, as he said they were.”

And case p. 60, lines 30-36:

“Now if there were no nails in this plank was that an obvious danger, or ought one in the exercise of reasonable care to have recognized that as an obvious danger? If either were the case then their absence would be one of the things that the employee would take the risk of.”

Another claim is that the trial court erroneously permitted it to be deemed an open question to be decided by the jury, whether or not the defendant furnished a reasonably safe and suitable appliance to do the work, on the ground that there was no evidence to show this; that this appliance had been used for several months, presumably with the knowledge of this workman, the decedent, and had properly done the work for which it was designed.

These grounds are set out in specifications 13 and 14. This accident did not happen in the use for which the derrick was designed, but happened from the obviously unsafe, improper and negligent way in which the decedent and his

fellow workmen undertook to set it up for use, a way different from what they ever had theretofore, and in a way which itself and of itself alone caused the injury.

These specifications are as follows:

“13. There was no evidence in the cause from which it could be inferred that the derrick furnished by the defendant was in any way unsafe, improper or defective.

“14. The accident by which decedent met his death did not result from the use of the derrick by the decedent in the manner and for the purpose for which it was designed and furnished.”

## Argument.

### I.

The trials of this case, and submitting it to the jury, seem to have gone on the assumption entirely that the decedent met his death while doing work with an appliance provided by the defendant to do the particular work that was being done at the time of the accident, and using the derrick for that purpose. Such is not the case at all. On the contrary, this appliance or derrick was being put in place for the purpose of using it, by the decedent and his fellow workmen. Even if a jury question might arise if such an appliance as this fell while in use and caused the injury, that is not this case. As the case stood when submitted to the jury, and as it stands now before this court, it is one in which workmen were setting up an appliance, precisely the same as if they were erecting a scaffold or any similar structure.

This case would seem to be exactly paralleled by *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557, and the line of cases following that. In that case a laborer was called from his special work to help erect a large frame. It was not properly braced and protected, not being fastened at the bottom, according to the claim, and fell and injured the plaintiff. This court refused to permit a recovery.

In *Steamship Co. v. Ingebregsten*, 57 N. J. L. 400, the duty of examining rested upon the employees, and the failure of one to make such examination did not render the master responsible.

In *Olsen v. Nixon*, 61 N. J. L. 671, the plaintiff's fellow workmen erected a scaffold, which fell, the claim being that it was improperly constructed by his fellow workmen, and this defeated a recovery.

In *Sofield v. Guggenheim Smelting Co.*, 64 N. J. L. 605, the plaintiff's decedent fell into a pit of molten copper and was burned to death. The cover of this pit in the night time had been left off by his fellow workmen. This defeated a recovery.

*Christiansen v. Cane Co.*, 75 N. J. L. 262, was the erection of what was called a derrick, and it was insufficiently guyed and fell, and the Supreme Court held in that case there could be no recovery. This case is again reported in 76 N. J. L. 234.

In *Knapp v. Voorhis*, 78 N. J. L. 508, some of the fellow workmen, with the plaintiff, failed to properly put up a scaffolding for shingling. It fell, and recovery was refused.

An examination of the facts in this case, it is confidently thought, will show that the applica-

tion of the rules pronounced in the above cases to this case, will make it impossible to sustain plaintiff's judgment.

## II.

The trial court correctly defined to the jury the duty of a master as to the furnishing to his servant of reasonably safe appliances and a reasonably safe place to work. He correctly laid down the fellow servant rule. He properly called attention to the assumption by the servant of obvious risk; as he did to contributory negligence. He made, however, the mistake that was made at the first trial without the same excuse for it. He charged the jury (case, p. 58, line 40, and p. 59, lines 1-4) as follows:

"Now it is only in the event that you find that there was an undertaking on the part of Rogers to supply these nails and that there was a failure in that regard, that any negligence is established in the defendant."

And on p. 59, lines 31-35:

"So that you see the very first question for you to determine is whether there was negligence on the part of Rogers in not equipping or seeing that this plank was equipped with spikes, as he said they were."

What was in his mind can well be understood from what he said in his ruling on p. 56, lines 11 and 12:

"Now it must be the absence of these spikes that decides this case."

In the first case, 68 N. J. L. 713, 718, this court said, in speaking of the charge then under review:

"The court by its charge (above quoted), confined and narrowed the inquiry of the

jury to the solution of a fact which was not conclusive as to the negligence of defendant."

And on the same page, at the top, this court says:

"Strictly speaking, this accident did not result from the use of the derrick. It was being straightened into a vertical position, so that it could be used. Until it was placed in its proper position for use it must be evident that the risk of a sudden fall of this topheavy frame, while being righted, should have been obvious to all ordinarily careful workmen," etc.

### III.

But it is respectfully submitted that this question on this trial had no importance at all in the case. Whether the spikes were present or absent, was and is in no sense controlling. The presence or absence of the spikes, even if they might be of any importance as affecting the use of the derrick itself in the work for which it was designed, cannot be important in an inquiry limited to the manner of placing the same in position. Two witnesses for the plaintiff say there were no spikes; one says there were. The decedent himself had the same opportunities for knowing as did these other witnesses, and he knew whether they were there, or not, or at least he must be presumed to have known. He was in a position to know, and it seems he must be charged with knowing. The particular plank in question was moved here with the derrick and was in plain view. Beside which the bottom held perfectly until the workmen did something to it. It stood upright, both guys were in place and

tied. There can be no doubt, then, there was nothing but what was entirely obvious to the decedent, as to derrick and plank.

#### IV.

Two of the fellow workmen of the decedent, William Morton and Ellsworth Davis, were sworn as witnesses of the plaintiff. They were eye witnesses, and the only witnesses to the accident sworn. They both testified that the derrick had been in constant use about the building. They described its construction and the use made of it. They had all helped set it up many times. They both testified that the bottom of it could not be made fast permanently, for it had to be moved from place to place in the general location where erected for the use for which designed, and this was accomplished by putting a crowbar under the plank, raising the whole thing up and shoving it along. They both testified that the feet could, at this time, have been tied by ropes, which were there, which would have held the feet of the derrick from slipping as they exerted force upon it, but that course was not followed. One of them, Davis, says that the derrick could not have gone over the wall if Sharp, another workman, had not loosened the guy line. While it would have fallen, by reason of the pressure they put on it, it would not have gone over the wall.

I think here I ought to read extracts from the testimony of both of these witnesses, Morton and Davis, so that we can conveniently have here their description of the accident and the reason for the accident. Morton testifies, when asked on

direct examination what he and the others were doing at the derrick (p. 13):

“Q And why was he called to the derrick?

A It leaned a little too far over the wall and they wanted to straighten it up and they undertook to raise it.

Q I haven't come to that yet. They wanted to straighten it up?

A Yes, sir.

Q And when you say it was leaning too far towards the wall, do you mean it was leaning too far towards the ground?

A Yes, sir. The same as if that was the wall (indicating) and it was leaning too far over that way.

Q And how many men were called, about, to straighten it up?

A Well, I should judge anyways from six to eight of them.

Q Were you one of them?

A Yes, sir.

Q And where did these men stand when they undertook to straighten this derrick?

A When they undertook to straighten it?

Q Yes.

A Right under the derrick, right in the cleats of that.

Q And Sharp was there?

A Yes, sir.

Q And when you undertook to do that did you put pressure on the derrick in order to lift it up?

A Yes, sir.

Q And was Loid one of those?

A Yes, sir.”

On p. 16, on cross examination, he was asked:

“Q How long had this derrick been used about this job?

A Well, it had been used quite a little around there.

Q All the time the building was being constructed?

A In different places; yes, sir.”

And upon cross examination, on p. 17, he describes the loosening of the guy, the planks and the cleat, and on p. 18, as follows:

“Q How would you lift it up? Or please describe to the jury how you lifted it up.

A All hands got under it and tried to raise it on each side of it.

Q What do you mean, they tried to raise it clear or tried to push it up?

A They tried to push it up and leave the bottom stand.

Q And the idea was to push it here without moving the bottom? (Indicating.)

A Yes, sir.

Q How did you secure the bottom of it before you started to straighten it up?

A No, sir; we left it just as it was.

Q You didn't tie any ropes around it or block it in any way or do anything of that kind?

A No, sir.”

And when he was asked as to the manner of first putting the derrick up when it was lying on the floor, he said, pp. 21 and 22, and the top of p. 23:

“Q Well, how, when you started to do that, how was the other end held so as to raise it up?

A That was generally held.

Q Some one generally held it there?

A Yes, sir.

Q Did they tie it at times?

A No, sir; it might have been. I don't remember, though.

Q You don't remember that?

A No, sir.

Q Some one would hold it?

A We would be at the foot and raise it up.

Q And would you be at the foot and holding it there until it got up so as to support itself?

A Yes, sir.

Q At this time do you remember whether there was anyone at the foot or not?

A Well, I don't exactly remember. There must have been when we raised it up there.

Q No, I don't mean when you first raised it up. Of course there must have been some one at the foot when you first started to straighten the derrick?

A No, sir; they were on the other side of it.

Q The idea being that the weight would be sufficient to hold it in place?

A Yes, sir.

Q And you thought it was not necessary to tie it or secure it in any way as you straightened it; is that correct?

A That is what they thought. I didn't think it was fit to raise it that way.

Q You didn't think it ought to be raised that way?

A No, sir. It should have been tied to raise it in the shape it was.

Q If it was tied it wouldn't have toppled over?

A Not so well as it did, quite, because there would have been something to hold it there.

\* \* \* \* \*

Q And you are quite sure nobody had put their feet against the plank so as to hold it there?

A I am quite sure that if anybody had put their feet against the plank and had stood—

Q Would that have held it all right?

A No, sir; I don't think it could. No man could have held it with his feet against it in the way we was raising it.

Q It was not possible to hold that in the way it was raised?

A A man couldn't hold it; no, sir.

Q Without having it fastened in some way?

A There was too much weight above us.

Q Too much here? (Indicating.)

A Yes, if we could have got closer to the top of it we would have held it.

Q And by pushing here you couldn't possibly do it?

A No, sir."

This witness shows clearly that pushing so near the bottom could not raise the top, but would push the bottom out, as it did. Continuing, he says:

“Q You didn't take any poles or anything of the kind to try to raise the top?

A Couldn't get there.

Q You could get it with an eight foot, couldn't you?

A That wouldn't amount to much. You would have been right under it then.

Q You could have got half way?

A Well, just as I am telling you. But half way wouldn't amount to much, because there was too much weight above.

Q You appreciated the danger at the time?

A Yes, sir.

Q And spoke of it, did you?

A Yes, sir.

Q In the presence of all these people, all that were working there?

A Well, I spoke of it so the foreman understood what I said.

Q Did the others understand?

A I couldn't say about that.

Q You spoke out loud?

A Yes.

Q And he said he thought it was all right?

A Yes, he said it was all right, to get a hold and go ahead."

Ellsworth Davis, the other eye witness of the plaintiff, on direct examination, p. 31, says:

"Q And were you gentlemen trying to get it more perpendicular?

A Yes, sir.

Q And when you put pressure on it the whole thing slipped from under?

A The bottom slipped out and the top didn't go up, the top went the other way.

Q And then what happened to Mr. Loid?

A He was caught by the foot by the rope and thrown over the wall.

Q And killed?

A Yes, sir."

And on cross examination, pp. 32 and 33, says:

“Q And how many were there of you?

A I should judge six or seven, maybe eight.

Q And who held the feet of the derrick if anybody?

A Nobody.

Q And where were you, all underneath the derrick pushing on it?

A Yes, sir.

Q And do you recall who loosened the guy line?

A Yes, sir.

Q Who did?

A Sharp attended the guy line.

Q And which one did he have, the back one?

A Back in the building.

Q There was one on each end to straighten or raise the derrick?

A Yes, sir.

Q And how far was he back?

A I should judge he was twenty feet from the derrick.

Q Holding the guy line?

A Yes, sir.

\* \* \* \* \*

Q And how far had you gotten the derrick up before it commenced to slip?

A We didn't lift it at all, the bottom went first.

Q You didn't get enough purchase so that you could push on it to raise the top, the bottom slid right out?

A Yes, sir.”

And on pp. 35 and 36:

“Q The ends of this rope could have tied this plank to the joist so it would not have slid, couldn't it?

A It could if they had used it.

Q Or of two men, even, with the weight being so near straight, had got at the foot of the derrick, like they did when you first raised it, they could have held it, couldn't they?

A No, sir.

Q Couldn't have done it?

A No, sir.

Q Too much weight for that?

A Two men couldn't hold what six men would push against them.

\* \* \* \* \*

Q Now you knew, of course, how the derrick was erected then?

A Yes, sir.

Q And when you pushed it up this way (indicating) did you suppose the weight of it was enough to hold it?

A I did not.

Q You thought it would slip, did you?

A Yes, sir.”

Davis was recalled by the plaintiff (case, p. 49), and this is his testimony then:

“*By Mr. Wescott.*

Q Mr. Davis, this escaped me, if your Honor please; you said that Mr. Sharp, the foreman there, was attending to the guy rope; is that correct?

A Yes, sir.

Q Now, if he had secured that guy rope could that derrick have gone over the wall and killed Mr. Loid?

A It would have been impossible for it to have gone over the wall if it had not been untied.

*Cross examination* by Mr. Armstrong.

Q The guy rope pulled out of his hands and got away from him?

A Yes, sir.

Q And if he had left that secured or had taken a half-hitch or something of that kind he could have held it?

A He could have held it from going over the wall. The bottom would have slid back in the building. It was bound to go back. The guy rope wasn't long enough for the derrick to go over the wall if it hadn't been untied."

As I stated before these are the only witnesses to the accident offered. Rogers, the president of the company, whose testimony was given at the first trial, and which was read at this trial, was not an eye witness. His testimony was as to the construction of the derrick, the plank and the nails which protruded. While it is at some length I think I have quoted all the essential evidence as to the cause and manner of the accident. We have, therefore, by their own testimony, that these workmen were doing something that was dangerous and was obviously dangerous; doing something that they had never done before. They were doing it, too, in a dangerous way. They did not do it ignorantly, but were aware of, and remarked upon the danger. They took no precautions either to fasten the feet of the derrick with the ropes that were there, or put any props against it or in any other manner to prevent its slipping. They got under a structure more than 19 feet high and then reached up as far as they could, less

than one-third, nearer one-fourth, of the distance, way below the center of gravity, and exerted sufficient pressure to force the bottom out. If the lean of the top were only 5 feet out, a slight mathematical calculation, taking into consideration the height and the size of the timber will show that the outer or back edges of the feet of the derrick were raised more than one inch, so as to be at or very near the top of the cleats. It can readily be understood what effect this pushing would have. Even then the structure would not have toppled over to the ground, according to Davis, if the guy line had not been unfastened, nor would the accident have happened if the rope had been up on the windlass as it ought to have been, instead of lying down coiled up at the foot of the derrick.

It clearly appears that this unfortunate accident happened by reason of what the decedent and his fellow workmen did, and from their failure to take precautions which they knew they ought to have taken. For what happened, they knowingly and wittingly took the obvious chances. It does not seem possible to say that there is any negligence as a matter of law which can possibly be attributed to the defendant, while, to the contrary, it can be said that the risky, improper and negligent conduct of the decedent and his fellow workmen was the direct cause of this most unfortunate accident.

## V.

It is respectfully submitted that the trial court erred: (1) In not directing a non-suit; (2) in not directing a verdict for the defendant; (3) in submitting to the jury the question he did. That from the evidence it is clear that the defendant was not as a matter of law at fault. That the decedent and his fellow workmen by what they improperly did caused the injury and damage. That the danger was obvious and was known. That the judgment is contrary to law and should be reversed.

November Term, 1917.

E. A. ARMSTRONG,  
*Of Counsel with Defendant-Appellant.*