

NEW JERSEY COURT OF ERRORS AND
APPEALS.

MAMIE PROSSER,

Administratrix, Etc.,

Plaintiff,

vs.

WEST JERSEY & SEASHORE

RAILROAD COMPANY,

Defendant.

In Tort.

On Error.

BRIEF FOR PLAINTIFF.

BLEAKLY & STOCKWELL,

JOHN W. WESCOTT,

Counsel for Plaintiff.

STATEMENT OF FACTS.

The plaintiff is the widow of Benjamin Prosser who was killed August 12th, 1902, near Haddonfield, Camden County, N. J., by one of the cars of the defendant Company.

Prosser was 36 years old at the time of his death and left him surviving the plaintiff, his widow, and a little girl aged six years.

On August 12th, 1902, about the middle of the afternoon (p. 32 and 43) he was working for Henhoeffler & Vaughn, bridge builders, who were about to repair a bridge for the defendant Company near Haddonfield.

Prosser was working on or about a pile driver which was attached to a flat car of the defendant Company.

This flat car was used to transport the pile driver and the bridge builders' tools and equipment (p. 50) over the defendant Company's road, from Springdale to Haddonfield and was taken by the defendant Company and placed on a siding near Haddonfield, just previous to the accident.

It will thus be seen that Prosser was no trespasser—he was placed in this position (one of supposed safety) by the defendant.

In transporting this pile driver, one of the bolts which held it to the bottom of the car became bent and in preparing the apparatus for use that night, it was necessary to unfasten it so that it could be used for driving piling later on in the evening (p. 66).

To loosen this bolt, Prosser had to go under the car to knock it up with a maul (p. 66). As he did this, a string of freight cars, belonging to the defendant Company were backed by an engine of the Company from the north end (p. 39, line 21) in upon this siding with

such force as to cause two box cars (which were standing unattached in front of the flat car), to collide with this flat car and push it back fifteen or twenty feet (p. 33). As the flat car came back, it struck and instantly killed Prosser.

The flat car belonged to the defendant Company (p. 17, line 26).

It had been taken by the defendant Company from a place on its main line to the Haddonfield siding, the place of the accident (p. 17). 10

This main line runs north and south past Haddonfield; and the siding in question lies 100 feet to the east of the main line and in full view of all trains passing up or down on said main line (p. 22).

It is true, there is at one point between the main track and this siding, a water tank, but this tank was elevated on an open trestle work (p. 22).

No bell was rung nor did the engine that backed down on Prosser give any warning by blowing a whistle (p. 48, 54 and 66). 20

About fifteen or twenty feet ahead of the flat car were two box cars (p. 33 and 67) and back of it fifteen feet was the living or cabin car. So that the flat car stood by itself in plain sight.

To show the force of this crash and the utter recklessness of the defendant's employees, we should note that the engine and cars which were backed in upon this siding had to come some distance before they crashed into the two box cars and then these two cars were pushed about fifteen feet into the flat car and it was pushed fifteen feet into the cabin car which in turn was pushed four or five feet further on, and this even with its brakes locked (bottom of p. 67). 30

At the time of the accident and for some time previous thereto a gang of nine or ten men (p. 19 and 40) were

working in, on top of, and about (p. 53 and 50 and 62 and 34) this flat car and the pile driver in question.

The pile driver was in full view and about twelve feet above the flat car (p. 63).

The men with whom Prosser was working were up and down on this car (p. 34 and 62) and at the time of the accident, one of them was on the side toward the main line (p. 49) and Prosser was on the other end of this car (p. 50).

10 It thus will appear that the employees of the defendant Company had a clear view of Prosser and his fellow-employees.

Prosser and his fellow-employees were not repairing the bridge for the defendant Company at the time of the accident. They were preparing the pile driver for this purpose and this pile driver was necessarily attached to and was to be used on the flat car of the defendant Company (p. 17).

20 This flat car had been placed on this siding by the defendant's employees. As far as Prosser was concerned, it was in somewhat the same relation as a freight car would be, from which the employees of a party to whom freight had been consigned, were removing merchandise (in this case it was the equipment such as tools, etc., p. 43 and 50) freighted there by the defendant Company. And Prosser had a perfect right to work in or about this car while on this siding — on the assumption that he would not be disturbed or harmed while so working, or at least without some special warning in advance, the defendant Company having so placed the car in question.

30 He had to go under the car (p. 66) and the witness Miller was on the other side toward the main line under the car just two seconds before the accident (p. 49).

Now the freight conductor, engineer, fireman and the brakeman of the train that caused the accident must have

seen Prosser and his fellow employees as they passed them 100 feet away on the main line on their way up to Haddonfield.

The defendant's employees knew they were there, they could not help but know if they had looked.

RED FLAG WARNING.

But aside from the fact that these men were in plain view of defendant's employees, we have the additional fact that about ten minutes before the accident, one 10
of the gang had been sent in a northerly direction, up towards Haddonfield Station with a red hand flag (p. 68 and 57 and 58).

The rear brakeman of the freight, the end of which was standing just opposite the car in which Prosser was killed, was facing the place of the accident (page 26 and bottom of page 27 and lines 26 to 28 on page 29; see also page 47, lines 12 to 15, and bottom of page 49).

Mr. Powell, the foreman who was working on and about the car just at the time of the accident says (on 20
page 68, line 8) that "five or ten minutes before the accident he saw a man up the track with a flag, towards Haddonfield." And on page 68, line 24, he said "this man was up there from ten to fifteen minutes."

Mr. Hiram Webb, another witness said that ten minutes before the accident (page 57, line 9) he went into the woods and then he heard the crash; and on page 57 he says that just before he went into the woods he saw a man with a red flag. At the top of page 58 he says I saw this man with the flag towards the Haddonfield 30
Station.

He says also (on page 59) that he saw the defendant's employees working around there about five minutes before he went into the woods. So that at this particular time the flag was in sight and they should have seen it.

Mr. Powell (at the bottom of page 68) says that after young Henhoeffler went up with the flag, Mr. Webb went into the woods and while Henhoeffler was up the road with the flag, Webb was down in the woods, and that after that he saw young Henhoeffler up there with the flag five or ten minutes.

At the top of page 72, Mr. Powell says the freight train had been there ten or fifteen minutes before young Henhoeffler went up with the flag and that this was some
10 eight or nine minutes before the accident.

At the bottom of page 71, Mr. Powell says he did not see anyone up there with a flag, but what he means is just at the time when the crash came, which he speaks of on page 71, line 23.

Mr. Powell at the exact time of the accident was working under the car, or had just stepped out to let Prosser go under the car. (See bottom of page 65 and top of page 66). So that, as a matter of course, at the time of the accident, Powell was not looking at the man with
20 the flag, but was helping his men. He was not supposed, after he had sent the man up the track with the flag to stand and watch him.

Neither is it presumed that the man put the flag in his pocket. However, Webb said he saw him up there with the flag just before the accident.

Nor is the fact that the flag was afterwards found down alongside of the track near the pump house to be taken against the plaintiff, but rather in her favor, as being an incident tending to show that some one of the gang
30 before the accident had the flag up there in the direction of the Haddonfield end of the station from which end the freight came in on the siding. See bottom of page 30.

ARGUMENT.

There are four propositions in favor of the plaintiff's case any one of which, if true, was sufficient to send the case to the jury.

1st. The defendant's employees not only readily could have seen the plaintiff's intestate while at work on its car with his fellow employees, but by reason of their close proximity and their unobstructed view they must have seen him and his co-employees. The jury on this point should have been allowed to find whether or not this did not amount to a wanton killing on the part of the defendant. 10

2nd. The car which killed Prosser was protected by two detached cars in front belonging to the defendant Company, and twenty feet to the south towards the other end of the switch was a living or cabin car. This pile driver car was therefore in a place of safety. 20

3rd. The engine that backed in on this siding struck the two box cars which were not attached to any engine and sent them on a flying drill against the pile driving car under which Prosser was killed, and this without any warning to Prosser. The jury had a right to say whether or not this did not amount to gross negligence on the part of the defendant.

4th. Prosser's foreman sent a man up the track with a red flag just before the accident and whether this danger signal was or should have been seen by the defendant's employees was a question of fact for the jury to determine on the whole case. 30

SAME AS A FLYING DRILL.

The fact that the two box cars which collided with the flat car on which Prosser was working, were detached cars, not connected with any engine, classes this case with those where flying drills are made, since in this case it clearly appears that these two box cars were themselves unattached to any engine or other cars and these detached cars were put in motion without any employee, such as a brakeman or conductor, being placed thereon to give
 10 warning of their approach.

CASES CITED.

The following cases are cited in support of the above propositions, viz:

DEFENDANT NEGLIGENT.

“Putting detached cars in motion without placing a brakeman upon them to give warning of their approach or to control their movements is negligence on the part
 20 of the Company.” 23 Ency. (p. 743).

Goodrich vs. Bur. R. Co., 103 Iowa, 412.
 Watson vs. Wabash, 66 Iowa, 164, (23 N.W., 380).
 Shelby vs. Cin. R. Co., 85 Ky., 224.
 Chicago R. Co. vs. Digman, 56 Ill., 487.
 Ill. Cent. R. Co. vs. Hanner, 72 Ill., 347.

SPECIAL NOTICE TO PROSSER NECESSARY.

“When a railroad company places freight cars on a
 30 side track for the purpose of being loaded or unloaded by the owners of the freight and such owners or their agents or servants with the express or implied consent of the Company, proceed to load or unload the freight, the Company in such case has no right to run or back a train in upon such side track so as to move the car which

is being loaded or unloaded, without special notice or warning to those employed."

See numerous cases cited in Vol. 23, page 746 of 2nd Ed. Amer. Enc. of Law.

TRACK AND TRAIN CONTROLLED BY DEFENDANT.

"Where the plaintiff is injured at a place where the track or the train are entirely under the control of the Company, a presumption of negligence arises, and in order for the Company to exonerate itself from liability, it must show that the accident could not have been avoided by the exercise on its part of the utmost care and foresight reasonably compatible with the prosecution of its business." Kinkead on Torts, page 348, and cases there cited. 10

PLAINTIFF THERE BY EXPRESS INVITATION.

"Employees of an independent contractor employed by a railroad company upon its right of way or to repair bridges or trestles come upon the railroad premises by express invitation, and the Company owes to them the duty of exercising ordinary care." 23 Ency. 738; Chicago R. Co. vs. Dunleavy, 129 Ill., 132; Young vs. N. Y. Cent. R. Co., 30 Barb., N. Y., 229. 20

SAME AS LOADING CARS.

Persons loading or unloading freight come on Company's premises by implied invitation and Company owes him the duty of exercising ordinary care. 23 Ency., 739. The kind of care is the same as in the case at Bar. See also 23 Ency., 733. Even a trespasser is not to be wantonly killed. 23 Ency., p. 735. 30

DEFENDANT SHOULD PROTECT PLAINTIFF.

"A person receiving goods at a freight station or at a point selected by agreement between such person and the

railroad Company has a right in doing so to occupy a position designated by the agent of the Company. Even if such a position be hazardous, he has a right to rely upon the diligence of the Company to protect him from harm." *Pittsburg R. Co. vs. Jones*, 12 Ind., app. 602.

KNOWLEDGE OF DEFENDANT'S EMPLOYEES IS
IMMATERIAL.

10 "The fact that no agent of the Company knew that the car was being loaded or unloaded at the time is immaterial if the car was placed upon the side track for that purpose and the person injured was at the time rightfully employed in the work." *Watson vs. Wabash R. Co.*, 66 Iowa, 164. If they might have seen they should have seen. *Ill. Cent. vs. Hoffman*, 67 Ill., 287.

NO LOOKOUT OR FLAG NECESSARY.

20 "A person unloading a car which has been placed by the railroad company on a side track for that purpose has a right to assume that the car will not be moved without warning, and his failure to maintain a lookout is not negligence." *Illinois Cent. L. Co. vs. Shultz*, 64 Ill., 172; *Chicago R. R. Co. vs. Goebel*, 110 Ill., 515.

There was no duty, implied or otherwise, on the part of the plaintiff or his associates to put up a flag or maintain a lookout, even (under the *Hardy* case 29 *Vroom*, 205-30; *Vroom* 35-502) if they had been on the main line, and particularly not when on a siding of the defendant where they had been put by the defendant.

30 It was not necessary for Prosser to be on a constant watch for trains when he was on this side track. *Ill. Central vs. Shultz*, 64 Ill., 172; *Toledo vs. Hanck*, 8 Ind. app. 367, 35 N. E., 573. Prosser had a right to give his undivided attention to his work. *Gessley vs. Missouri Pacific*, 32 Mo. app., 413.

In *Murphy vs. N. Y. Central*, 118 N. Y., 527-531-532, the Court said "Defendant's conductor was guilty of negligence in shunting an unattended freight car down upon a branch track against the cars under which the plaintiff was working, when he knew he was at work there, or could have seen his warning flag by looking." In either case negligence was shown, viz: either by knowing he was there or if he could have seen his flag.

The Court also said in this case (p. 532) that the question of plaintiff's contributory negligence was a question for the jury. 10

WILFUL NEGLIGENCE.

But the defendant's negligence was wilful and the contributory negligence, if any, of plaintiff's intestate is not an element. See *Fetter on Carriers of Passengers*, Vol. 1, Par. 190, page 494, where this proposition is laid down: "The party who has a last clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible." See cases there cited and notes on pages 495 and 496. 20

QUESTION FOR JURY, ANYHOW.

Mass. 1896—*Murray vs. R. Co.*, 165 Mass., 448, 43 N. E., 190: "A sleeping car and two coaches were left on a side track with brakes set,—a switch engine backed down, pushing some cars into the standing cars—decedent was caught as he was passing between them and the bunting post. The person in charge of the switch engine should have known that persons were at work about the standing cars, oiling and cleaning them. Held 30 —it was a question of the jury whether the persons in charge of the switch engine were grossly negligent," See also *Spotts vs. Wabash*, 111 Mo., 380, 20 S. W., 190. See also *Barton vs. N. Y. Cent.*, 1 *Thompson, &c.*, 297, app. 56 N. Y., 660.

However, there were sufficient facts in this case to send to the jury the question whether or not a red flag or danger warning was not in sight at or immediately preceding the time of the accident.

And anyhow this fact, taken in connection with the fact that Prosser's co-employees were in plain sight for ten or fifteen minutes and could have been seen by defendant's employees, was sufficient notice to the defendant not to send down on this side track by a flying drill
 10 the cars which caused the accident, and was enough to send to the jury the question whether or not the defendant was so grossly negligent as to excuse the contributory negligence (if any) on the part of the decedent.

→ Respectfully submitted,

BLEAKLY & STOCKWELL,
 JOHN W. WESCOTT,
 Counsel for Plaintiff.

Finally, it is exceedingly clear that the defendant, in legal sense, knew that Prosser and his associates were there because the defendant put them there. They were on the track by the purpose, design and act of the defendant. The duty at once arose by necessity to use reasonable care not to injure Prosser and his associates. Whether that duty was performed reasonably only a jury could determine.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MAMIE PROSSER, ADM'X.,

Plaintiff in Error,

vs.

WEST JERSEY & SEASHORE

RAILROAD COMPANY,

Defendant in Error.

IN TORT.

ON ERROR.

BRIEF FOR DEFENDANT.

This action arises out of the death of Benjamin Prosser by reason of being crushed under a derrick car on a siding at Haddonfield, on August 12th, 1902.

The allegation of negligence in the defendant was that it was the duty of the defendant company to keep the said car in a safe position on the siding while being made ready for use, and to take care that the car would not collide with any other of the defendant company's cars, yet the defendant so carelessly operated an engine and cars from the main line on to the siding that a car of

the company collided with the derrick car and caused the same to strike the person of Benjamin Prosser, whereby he died.

Upon the trial of this cause the Trial Judge granted a non-suit at the close of the plaintiff's case, which the plaintiff alleges to be error.

The facts are similar to the facts in the same suit of *Prosser vs. West Jersey & Seashore R. R. Co.*, found in 63 *Atl. Rep.*, 494. At the time of Prosser's death he was an employee of the firm of Henhoeffler & Vaughn, contractors engaged in the work of repairing bridges along the lines of the defendant company's railroad. In the prosecution of that work they used a pile driver which had been installed upon a flat car furnished to them for the purpose by the defendant company. As occasion required, this flat car was moved from one place to another along the defendant's railroad, and when it was in course of transit the pile driver was laid back upon the car and secured in its position by a screw bolt which ran down through the platform of the car. Shortly before the accident the car had been moved from Springdale and placed upon a siding at Haddonfield, upon which a number of freight cars had been laid off. It was placed upon the siding at about 4 or 5 o'clock in the afternoon to be gotten ready to go next to Cooper's Creek that night for the purpose of working upon a bridge at that place. After the flat car had been put upon the siding, it was discovered that the screw bolt which secures the pile driver in position when laid back had, in some unknown way, become so fastened to the car that it was difficult to remove it. In order to loosen it, Prosser got under the body of the car to knock it out with a maul.

While he was engaged in this work a part of a freight train of the defendant company was backed in upon the siding to pick up some of the freight cars which were standing there. In making its coupling, the train struck the freight car nearest it with such violence as to drive it against others with force enough to cause them to collide with the flat car under which Prosser was working and moved it from its position so far that it ran over and killed him.

The case at bar now differs from the case cited in that testimony was offered to show that the cabin car some fifteen or twenty feet distant from the flat car was of a different character from other cars, showing that it was a car in which workmen lived; also that part of the gang was about the flat car. It seems that two men were on the east side of the car, both of whom had gotten out from under the car only a few seconds before, and that one man was on the west side. The freight train on the main track stopped with the rear car opposite the water tank, and the forward part of the train pulled on up the track and backed on to the siding.

Further testimony was produced to show the use of the red flag. As the use of such a flag is the important feature of the case, we refer to that more particularly. Mr. Henhoeffler said (p. 29), it was the custom for his men working on the main line to protect themselves with flags, but he does not know whether any flag was put out on this siding (p. 30); he did not see any, and did not give any orders for any to be put out. After the accident, he saw a flag on the ground alongside the cars, and could not tell whether it had been stuck up in the ground. Pemberton Carlisle, a workman in the gang, said (p. 39) he did not

see any flag put up there, or anything of that sort. Hiram Webb, a workman in the gang (p. 57), said on direct examination, that before he went into the woods he saw somebody with a red flag which we use to stop a train from coming into us; that when we stop anywhere we put a flag up on each end of the road; that this man took the flag toward the Haddonfield station, but did not know what become of the flag. Thomas J. Powell, foreman of the gang, said on direct examination (p. 68) that five or ten minutes before the accident he saw a man up the track with a flag; that the man was Henhoeffer's son; that the flag is used generally as a danger flag to stop a train that came along; that the man with a flag was up toward Haddonfield ten to fifteen minutes. On cross-examination (p. 71) he said that he did not see anyone up toward Haddonfield with a flag, and on page 72 that he does not know what the man did with the flag, but after the accident he saw the flag alongside the pump-house by the water tank, which was located between the siding and the main track, and was in another direction from that in which it had been taken; that it had been brought back and put alongside the ice chest. On re-direct examination (p. 73), witness says he knows it was the same flag, for it was a pocket flag that the witness generally carried in his pocket.

Thereupon, motion was made to non-suit on the ground that there does not appear from the testimony any duty owing from the defendant to the deceased from the breach of which this man met his death. Counsel for plaintiff states in his argument upon the motion (p. 79) that the trial of the case was conducted upon the principle that Prosser's death resulted from the negligent performance

of the duty which the railroad company owed to the employees of Henhoeffler & Vaughn to run its trains with a due regard to their safety while they were engaged in the work of repairing the company's bridges. Counsel for defendant contend that such duty was not a continuous one but only existed while going to and from work over the tracks of the railroad company; and while the repair cars, when stationary, were protected by red flags, or other notice to the company that the safety of the repair gang was imperiled. So far as the company knew, their work had temporarily ceased while the car was laid off on the siding, and they did not know it needed attention from Henhoeffler & Vaughn's employees. Certainly there was nothing in its surroundings to suggest to the defendant company's employees who were operating its freight train that any carelessness on their part in running against the box cars which lay between them and the flat car—each being separated by an interval of space—might jeopardize the safety of a member of Henhoeffler & Vaughn's repair gang.

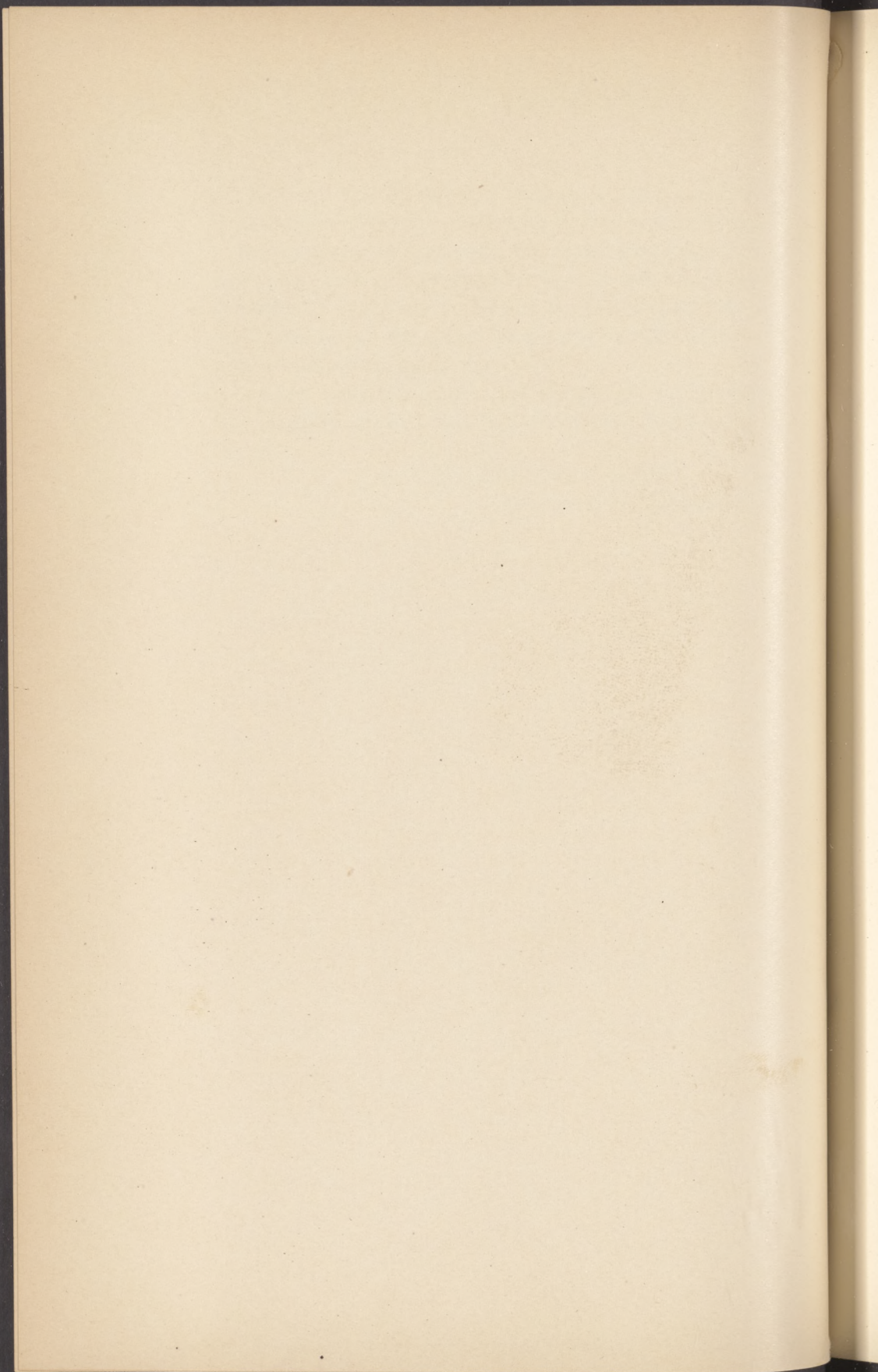
In the case of *Prosser vs. West Jersey & Seashore Railroad Co.*, 63 Atl. Rep., p. 495, Chief Justice Gummere, writing the opinion of the Court said: "The duty of using care to avoid injuring Prosser while coupling on to the side-tracked freight cars could only be imposed upon the train crew by bringing to their attention the danger to which he would be exposed unless care was used by them in the performance of their work." It has been shown that Henhoeffler & Vaughn's repair gang were provided with flags, both red and blue, and knew how to use those flags (p. 73), yet there is not a scintilla of evidence to show that a flag was used to protect this flat car or to

signal to the railroad company's employees that care must be used by them in the performance of their work. There is no testimony to show that the repair gang signalled with their arms or otherwise to the railroad company's employees. There was nothing to put the company upon notice that a man was under the flat car and that by moving it he would be put in peril.

Counsel therefore submit that the motion to non-suit was properly granted, and that judgment should be affirmed.

GASKILL & GASKILL,
Attorneys of Defendant.





PROSSER VS. WEST JERSEY AND SEASHORE
RAILROAD CO.

MEMORANDUM TO ACCOMPANY BRIEF.

As this case is to be submitted on briefs, and as it may be urged that there is new testimony concerning a flag, the attention of the Court is directed to the following extracts from testimony at the first trial as contained in the state of the case on file in this Court, upon which the former decision of this Court was based, showing that there is no difference whatever between the testimony of the former trial and the testimony at the second trial.

Direct examination of John Henhoeffler, called by plaintiff, printed state of the case, page 39, line 34 :

“Ques. Did you see any flag stuck up on the track?

Ans. No, s.r.

Ques. Ahead of your pile driving car?

Ans. No, sir.

Ques. Did you see any flag about there at all?

Ans. When we came up there we were stripping the cabin car of the ice chest and things, and we had the flag out when we were on the main line, but I don't know whether there was a flag—after the accident I found a flag lying close to the ice box; whether through the excitement the thing had been thrown there, or whether it was up at all that I am not able to tell.”

And on cross-examination, printed state of the case, page 43, line 12 :

“Ques. And at times you work on the main track?

Ans. Yes.

Ques. Now, Mr. Henhoeffler, your gang of men when thus working are provided with flags, aren't they?

Ans. Yes, sir.

Ques. And your men, themselves, put out the flags in order to protect themselves, don't they?

Ans. Yes, sir."

And on page 44, witness further says :

"Ques. What kind of a flag was this, Mr. Henhoeffler?

Ans. Red.

Ques. How large a flag?

Ans. Oh, I suppose probably two feet square; may be not so large as that.

Ques. Is it a flag that had a stock or staff at each end of it?

Ans. No; sometimes we use one of them, and sometimes we just use a single.

Ques. What was it that you had used the day of the accident when you were on the ma'n line?

Ans. A red flag.

Ques. Well, a single flag, or one with two sticks to it?

Ans. No; single.

Ques. Single?

Ans. Yes.

Ques. Now, so far as you know, there was no flag put out when you were there on the siding?

Ans. Not to my knowledge; no, sir."

The above quotations which might be multiplied show clearly and conclusively that there was nothing new brought into the case on the second trial, and that the testimony is practically in all respects identical with that which was before the Court in the former case when it reversed the verdict and declared the plaintiff could not recover upon the facts as presented.

GASKILL & GASKILL.

NEW JERSEY, SS.



The State of New Jersey to the Chief
Justice and other Justices of our Su-
preme Court of Judicature, Greeting:

Foreasmuch as in the record and proceedings, and also
in the giving of judgment in a certain plaint, which was
in our said Supreme Court of Judicature, before you, be-
tween Mamie Prosser, Administratrix, etc., plaintiff, and
the West Jersey and Seashore Railroad Company, de- 10
fendant, in an action in tort, manifest error hath inter-
vened, to the great damage of said defendant, as it is
said, we being willing that the error, if any there be,
should, in due manner, be corrected, and full and speedy
justice done to the parties aforesaid in this behalf, do
command you, that if judgment be thereupon given and
affirmed, then you distinctly and openly send, under your
seal, the record and proceedings aforesaid, with all things
touching the same, to our Judges of our Court of Errors
and Appeals in the last resort in all causes, at Trenton, 20
on the tenth day of October, 1906, together with this
writ, that the records and proceedings aforesaid being
inspected, we may cause to be further done thereupon,
for correcting the error, what of right and, according to
the law and custom of the State of New Jersey, ought to
be done.

Witness, our Chancellor and President Judge of our
said Court of Errors and Appeals, at Trenton, aforesaid,
the fourth day of October, 1906.

S. D. DICKINSON,
Clerk.

BLEAKLEY & STOCKWELL,
JOHN W. WESCOTT,
Attorneys.

30

RETURN.

The answer of William S. Gummere, Esquire, Judge, Chief Justice of the New Jersey Supreme Court, within named.

The record and proceedings of the plea whereof mention is within named, with all things concerning the same to the New Jersey Court of Errors and Appeals, within specified, on the day and place within contained,
10 I certify in a certain schedule to this writ annexed, as I am within commanded.

WILLIAM S. GUMMERE,
Chief Justice.

NEW JERSEY SUPREME COURT, CAMDEN
COUNTY CIRCUIT.

MAMIE PROSSER,	}	In Tort.	10
Administratrix, &c.,			
vs.			
WEST JERSEY AND SEASHORE	}		
RAILROAD COMPANY.			

SEPTEMBER TERM, 1906. No. 80. 20

Appearances:

For the Plaintiff, JOHN W. WESCOTT, ESQ.
H. C. KRAMER, ESQ.
BLEAKLEY & STOCKLEY.

For the Defendant, GASKILL & GASKILL, ESQ. 30

Before ENDICOTT, J. and a Jury.

MAMIE PROSSER, SWORN.

By Mr. Wescott:

- Q. Where do live, Mrs. Prosser?
 A. I live 62 McKinley Avenue, Trenton, New Jersey.
 Q. What was your husband's name?
 A. Benjamin Prosser.
 Q. How old was he at the time of his death?
 10 A. Thirty-six.
 Q. And he lived where at that time?
 A. When he was killed?
 Q. Yes.
 A. 205 York Street, Camden.
 Q. Did he leave any children?
 A. One.
 Q. You took out letters of administration upon his
 estate?
 A. Yes.
 20 Q. And you are the plaintiff in this case?
 A. Yes, sir.
 Q. What kind of health generally speaking had your
 husband while he was living?
 A. He was generally very healthy.
 Q. And what was his business?
 A. He was working at wharf building when he was
 killed; his trade was carpentering.
 Q. What kind of habits had your husband?
 A. He had good moral habits.
 30 Q. Have you any knowledge about his habits of in-
 dustry?
 A. He was very industrious.
 Q. Did he use intoxicants?
 A. No, sir.
 Q. Did he use tobacco?

A. Yes, sir.

Q. In what form, do you know?

A. Well, he chewed tobacco and he smoked tobacco very lightly.

Q. Very lightly?

A. Yes, sir.

Q. Can you tell us whether he worked continuously?

A. No, he often times would be out of work on account of stormy weather.

Q. I mean outside of the elements stopping his work, 10
did he work generally?

A. Yes, sir.

Q. Now, what was he making a week at the time he was killed?

Mr. Nelson Gaskill: I object for the reason that the wages of the decedent are not necessarily within the knowledge of this witness.

The Court: The question is allowed.

20

(Exception noted for the defendant.)

Q. Will you tell us, please, what he was making a week at the time of his death?

A. At the time of his death he was making from \$13.50 to \$17.00.

Q. How do you know that?

A. He always brought me his envelope home and the amount of the salary was endorsed on the outside of the envelope.

30

Q. And he gave you the money?

A. He gave me the money.

Q. Can you give the jury any idea about how much of that sum was consumed in the support of you and your child?

A. Well, all that was necessary to our comfort.

Q. No, but what proportion of it,—have you any idea?

A. Well, no; I never took particular notice; we just paid our debts and clothed ourselves and saved what we could.

Q. Do you remember what the rent was, for instance?

A. At the time he was killed we were paying \$12 a month.

Q. Can you tell about what your grocery bills were
10 per week?

A. Well, they generally amounted to \$6, between \$6 and \$7.

Q. Out of that I suppose your husband was kept as well as you and your daughter?

A. Yes, sir.

Q. Did your husband wear expensive clothing?

A. No, sir.

Q. Have you any idea how much of his wages were consumed in clothing himself?

20 A. Not very much.

Mr. Nelson Gaskill: I object to that for the reason that that also could not lie within the knowledge of this witness.

The Court: Well, she is asked; she may tell if she knows.

(Exception noted for the defendant.)

Q. How much?

30 A. I could not tell you exactly, he did not wear expensive clothing nor he didn't wear them out very fast. He was generally working and all he needed was working clothes.

Q. Do you know how much it cost you and your daughter for shoes, for instance, through the year?

A. I don't know what it cost me then, but I know it costs me a good bit now. I couldn't tell you exactly, no.

Q. Have you any knowledge as to how much he spent for tobacco during the year?

A. During the year? No, I couldn't tell you during the year, but—

Mr. Nelson Gaskill: I object; the witness has answered the question. She was asked as to her knowledge and she has answered as to her knowledge, and I ask that the rest be stricken out as not responsive. 10

(Question repeated.)

Q. Have you any knowledge what it cost him for tobacco?

Mr. Nelson Gaskill: I object; she has already stated she did not know.

The Court: She has said no. (To the witness.) Do you desire to change your answer? 20

Mr. Wescott: No, I beg your Honor's pardon; she has not said no. I asked her if she had any knowledge what it cost per year and she said no. I ask her now if she has any knowledge what it cost her husband to get tobacco. That is not by the year, it is a totally different proposition. She has not said no to that.

Mr. Nelson Gaskill: We insist that the subject matter was practically the same, and therefore covered by our previous objection and by her answer. 30

The Court: She may answer.

(Exception noted for the defendant.)

Q. What do you know about—

A. Well he spent about 25 or 30 cents a week.

Q. In tobacco?

A. Yes, he did not buy it yearly, he bought it by the week?

Q. Had he any expensive habits that you knew of?

A. No, sir.

Q. Have you any conception as to how much was saved out of his income of thirteen or between thirteen
10 and seventeen dollars per week or month?

A. Well, we would not save very much when we paid the expenses and clothed ourselves and everthing, and when we saved for a rainy day when he would be laid off on account of rainy weather we could manage.

Q. But take it year in and year out it about consumed his earnings for your daughter and yourself?

A. Yes.

Q. How old'is your child?

A. At the present time?

20 Q. Yes.

A. Eight years old.

Q. Do you know when your husband was killed?

A. Killed on the 12th day of August, 1902.

Cross-examination.

By Mr. Nelson Gaskill:

Q. When was the last time that your husband was sick before this accident occurred?

30 A. The last time before he was sick was about—before the accident occurred?

Q. Yes.

A. About six years.

Q. What was the matter with him at that time?

A. Rheumatism.

Q. How long was he suffering from rheumatism?

A. At that time?

Q. Yes.

A. Nine days.

Q. Was he sick at any time during your knowledge of him prior to that?

A. Yes, sir.

Q. When; before the last attack that you have mentioned?

A. I made a mistake in that first question. 10

Q. What was the proper answer?

A. His last sickness was about between five and six years.

Q. And what was the matter with him then?

A. Rheumatism.

Q. And was that the time that he was laid up these nine days?

A. No, it was about between three and four weeks then.

Q. What sort of rheumatism was it?

A. I believe it was muscular. 20

Q. What they call inflammatory rheumatism?

A. I don't know; muscular the doctor said.

A. And he was confined to the house?

A. Yes, sir.

Q. And when prior to that was he sick?

A. About six years.

Q. That would be the two attacks then came within about a year of each other, did they?

A. Yes, sir.

Q. How long was he sick then? 30

A. Nine days.

Q. And with rheumatism also?

A. Yes, sir.

Q. Did he have any sickness prior to these two attacks?

A. He had rheumatism and tonsilitis.

Q. When?

A. About the period of one or two years apart; it would be when his work would be in the water.

Q. That brought on rheumatism?

A. Yes.

Q. Well, was he sick during your knowledge of him more than these three times you have mentioned?

A. He had tonsilitis.

10 Q. Any other illness prior to that?

A. No, sir.

Q. During what portion of the year was he making \$17 a week?

A. The way he would make seventeen dollars a week would be over-time.

Q. And it was only on special occasions that he made this over-time?

A. Yes, sir.

20 Q. His ordinary salary when he was working was about \$13 a week?

A. About \$13.50.

Q. That was the figure on the outside of the pay envelope, was it?

A. Yes, sir.

Q. Did the figure on the outside of the envelope state that it was for wages?

A. No, sir.

Q. What were the words on the outside of this envelope?

30 A. "Benjamin Prosser, \$13.50."

Q. It did not state by whom it was paid?

A. No, sir.

Q. Do you know in whose handwriting it was?

A. No, sir.

Q. That is all the information you have as to the sum of money your husband was earning?

A. Yes, sir.

Q. Did you keep any bank account?

A. No, sir.

Q. Did you keep any savings account?

A. Saved what we could after we paid our expenses.

Q. What did you do with the money that you saved? Did you keep it in the house or put it in the bank?

A. Kept it in the house. 10

Q. And that was just about enough, you say, to carry you over the period when your husband was not working?

A. Yes, sir.

Q. Well, was your husband working two-thirds of the year?

A. Yes, sir.

Q. Working more than that?

A. Yes, sir.

Q. Was he working ten months in the year?

A. Yes, sir. 20

Q. During all the years that you were married to him was he working ten months in the year?

A. No, not when he was sick.

Q. His sickness interfered?

A. Yes, sir.

Q. Now, Mrs. Prosser, since the death of your husband in 1902, have you remarried?

A. No, sir.

Q. You have supported yourself in the meantime?

(Objected to as immaterial and not cross-examination.) 30

(Question withdrawn.)

Q. You are engaged to be married, are you not?

A. No, sir.

Mr. Wescott: I object to that and ask to have it stricken out.

The Court: She says no; I will strike it out, though, on motion.

(Exception noted for the defendant.)

Q. Mrs. Prosser, is it not a fact that you have been prevented from remarrying by the existence and continu-
10 ance of this suit?

Mr. Wescott: I object to that on the ground that it is immaterial.

The Court: I am not certain. I think I made a mistake in striking out the order. If the plaintiff was about to be married it might have some effect upon the amount she seeks to recover.

Mr. Wescott: The statute determines that.

20

The Court: I will reverse myself and allow the question and her answer to stand.

Whereupon the plaintiff, by her Counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge.

Mr. Nelson Gaskill: What becomes of the present question?

30

The Court: The question whether she was engaged to be married was answered no. I have allowed it to stand as part of the testimony.

(Question repeated.)

Mr. Wescott: I object to it on the ground that the statute controls the thing and on the further ground that it is not cross-examination and nobody's business.

The Court: I have doubts whether it is competent, but I will allow it.

Whereupon the plaintiff, by her Counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge. 10

A. No, sir, it has nothing to do with it.

Q. Is it not a fact, Mrs. Prosser, that you have been advised not to remarry until after the conclusion of this suit?

Mr. Wescott: I object to that on the ground stated. If this is a proper subject matter of inquiry we could go into the amative propensities of this lady here and what the probabilities and chances are of running into some man she might take a fancy to. 20

The Court: The objection is sustained.

(Exception noted for the defendant.)

Q. Mrs. Prosser, haven't you been advised by your counsel in this suit not to remarry until the conclusion of this suit?

A. No, sir.

(Objected to.) 30

The Court: The question is answered.

Mr. Nelson Gaskill: Did the Court rule upon the objection made?

The Court: It was answered before I heard the objection; it may stand.

Q. Mrs. Frosser, listen to this question carefully, and do not answer until the Court has ruled upon a possible objection. Is it not a fact that you are now keeping house for an engineer by the name of Joseph Jones, to whom you are engaged to be married?

10 Mr. Wescott: I object to that.

The Court: As put I will over-rule the question because she has said she was not engaged to be married.

(Exception noted for the defendant.)

20 Q. And is it not a fact—don't answer this also until the Court has ruled upon a possible objection—is it not also a fact that you have been restrained from marrying Mr. Jones, or advised not to marry Mr. Jones until after this suit shall have been settled, for the reason that it would affect, or might affect, the amount of money which you might receive in this suit?

Mr. Westcott: I object to that on the ground that it is immaterial and can in no wise be a defense to this case, because the statute controls what she would be entitled to receive by the death of her husband, even though she were married a thousand times.

(Question repeated.)

30 The Court: She may answer.

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

ALLEN B. ENDICOTT,
Circuit Court Judge.

A. No, sir, I have not been—

Mr. Wescott: That is enough.

Mr. Nelson Gaskill: If the Court please, I now move that the testimony of this witness with reference to the earning capacity of her late husband be stricken from the record, for the reason that it appears her only information comes from the fact that there were certain unidentified writings on the outside of an envelope called the pay envelope. It does not appear that the writing is that of the employer, that it is that of the husband, or that it is of any identified person whatsoever. It is merely an inference on the part of this witness that that envelope contained all the money which the decedent received in recompense for his labor, and for that reason being a conclusion and inference on the part of this witness we move that that testimony be stricken from the record.

The Court: The motion is refused.

(Exception noted for the defendant.)

JOHN M. HENHOEFFER, sworn.

By Mr. Wescott:

Q. Mr. Henhoeffler, where do you live, please?

A. I live at 1336 East Montgomery Avenue. Talk a little louder, please, I am a little deaf on this side.

Q. Philadelphia?

A. Philadelphia, yes, sir.

Q. Did you know Mr. Prosser?

A. Well, he was in my employ.

Q. Who was your partner?

A. H. V. Vaughn.

Q. What kind of a man was Mr. Prosser?

A. Well, so far as I know he was a very nice man, a perfect gentleman.

Q. What were his habits as to work?

A. I never follow up any of our men's habits. We employ them for ten hours—

Q. Did he do his work?

10 A. Yes.

Q. Or you wouldn't have kept him?

A. No, we would not, certainly not.

Q. Do you remember when he was killed?

A. Yes, sir.

Q. When was it.

A. Well, now, I don't remember the date; it was in August; I don't remember the date.

Q. At that time what was your business?

20 A. Well, my business, our business is pile driving, bridge building, wharf building, moving buildings or anything that anybody else won't do.

Q. Well, at the time just before the time that Prosser was killed you were working for whom?

A. The West Jersey & Seashore Railroad Company.

Q. The West Jersey & Seashore Railroad Company?

A. Yes.

Q. Where had you worked the last time before he was killed?

A. Down at Springdale.

30 Q. Is that on the Medford branch?

A. That is on the Medford branch, yes, sir.

Q. Then from there you went where?

A. Well, from there we was brought up to Haddonfield. I don't know exactly the date but we had a very hard storm in Jersey that cut—

Q. Well, you were brought up from Haddonfield ?

A. From Haddonfield.

Q. By the railroad company ?

A. No, sir.

Q. The West Jersey & Seashore.

A. Yes, sir.

Q. What did they bring ? What was it you had that they brought up to Haddonfield ?

A. Well, we had a flat car, and a cabin car, one which the men boarded in, lived in while they worked. 10

Q. Did their cooking and slept there ?

A. Did their cooking and slept there.

Q. And what was on the flat car ? What was that used for ?

A. A pile driver on the flat car.

Q. In time of transportation was the pile driver up or down.

A. Oh, we always took it down.

Q. And when it was up it was about how high ?

A. Well, I don't remember, but we generally have 20 them for the road work that way from 28 to 30 to 35 feet high.

Q. And did this sleeping car and flat car belong to the railroad company ?

A. No, the boarding car belonged to our firm and the flat car belonged to the West Jersey & Seashore Railroad.

Q. When they brought you to Haddonfield where did they put your sleeping car and the flat car ?

A. They put us on the siding. 30

Q. Will you look at that map and see if it is so far as it goes a representation of the locality (handing witness blue print) ?

A. I will have to get my window shutters on.

Q. I call them eyes; you call them window shutters ?

A. I call them window shutters. Yes, sir, that is the place.

Q. That is the place?

A. Yes, sir, this is the Medford branch coming in here; that is the water tank (indicating).

Q. And does this map show the two main tracks that run from Camden to Atlantic City?

A. Yes, sir, these are the two main tracks here (indicating).

10 Q. It shows the track going from Haddondfield on toward Medford.

A. That is it.

Q. And the side track?

A. This is the side track.

Q. When you came in, when you were brought in, were you put on the siding?

A. Yes, sir, on this siding.

Q. As you came from Medford?

A. Yes, sir.

20 Q. Can you tell about what time of day you were put on the siding track?

A. I cannot.

Q. It was warm weather as I understand it?

A. Yes, it was warm enough so I had to sit under the tank to keep cool.

Q. Any mosquitoes there?

A. No, there would have been if it had been night, I guess.

30 Q. Now, can you tell us about where the sleeping car, the living car, was left on the siding track?

A. Well, it was left,—I can't tell you exactly the number of feet, but they were about 12 or 15 feet apart, I suppose.

Q. That is the sleeping car?

A. The sleeping car and the flat car.

Q. Were some distance apart.

A. About 12 to 15 feet, somewhere in that neighborhood.

Q. Then further on toward the station did you notice any other cars?

A. There were two cars there, two box cars.

Q. About how far away?

A. They were about the same distance.

Q. From the flat car?

A. Yes, sir.

Q. And they were the cars of the company, the railroad company?

A. They belonged to the company, I suppose so, I don't know.

Q. About how many men did you have there working at that time, at the time Prosser was killed.

A. Well, we generally run from nine to ten men in a gang of that kind. I don't know whether they had a full gang or no; I don't remember.

Q. After your cars were put on the siding what did your men do, generally speaking?

A. Well, they were getting ready to go off on the main line that night.

Q. And getting ready means what?

A. Means to get the pile driver in order so that they could raise it.

Q. Did that require the moving back and forth of your gang of men?

A. No.

(Objected to.)

Q. What did it require?

Mr. Nelson Gaskill: Just wait a moment; I have not heard the answer of the witness but my objection is this—

The Court: The answer is no.

Mr. Nelson Gaskill: That the question is leading; my objection was made before the answer so far as I could tell.

The Court: The question is answered; I will allow it to remain.

(Exception noted for the defendant.)

10

Q. Did you have tools?

A. Yes, sir.

Q. Now, in getting ready to go on with your work—where were you going to work after you got ready?

A. We were going to work at Cooper's Creek.

Q. For the same company?

A. Yes, sir.

Q. How far from where you were then working?

20 A. Well, I suppose it is,—well, probably a mile and a half or two miles, somewhere in that neighborhood.

Q. Now, in getting ready what do your men do, generally?

A. Well, they renew bent bolts or get the machine in order so that they have no trouble working.

Q. What would that necessitate the men doing?

A. Well, they were underneath of the car, I believe, backing out a bolt.

Q. Did that work require them to get on the car?

A. Sir?

30 Q. Did that work require them to get on the two cars?

(Objected to as leading.)

Q. The work generally, I mean?

The Court: I think it is harmless; I don't know how he can indicate to the witness what he wants to develop very well in any other way. I will allow it.

(Exception noted for the defendant.)

Q. Did these men while they were there doing whatever work they had to do sometimes get on the car?

A. Why, of course.

(Objected to for the same reason.)

10

(Same ruling; exception noted for the defendant.)

Q. Did they get off the car?

A. Certainly, got off and on to do the work; couldn't do otherwise.

Q. And they did move about, did they?

A. Certainly.

Q. You said a moment ago they didn't.

A. If they didn't move about I would soon get rid of them.

20

Q. Now, while you and your men were there with these cars engaged in this work, did you see a freight train come up the track?

A. I did not see a freight train on the Medford branch until it had done the damage.

Q. Did you see the freight train on the main tracks?

A. Yes, sir, I was talking to the rear brakeman.

Q. Where did that freight train stop?

A. Stopped right in front of the water tank.

Q. And right opposite where this box car and flat car were?

30

A. Yes, sir.

Q. What was about the distance between the siding track and the main tracks where this freight train stopped?

A. Oh, well, I should judge 100 feet or 125 feet, somewhere in that neighborhood, as near as I can tell.

Q. And was it open and clear between the two tracks?

A. Except the water tank between it.

Q. Well, this water tank,—how was that arranged?

A. It was on a trestle.

Q. How high?

A. I suppose the trestle was 10 feet high.

10 Q. Well, did that form an obstruction to any one seeing?

A. No, I should not think it would.

Q. Now, you said you were conversing with the rear brakeman of this freight train?

A. I was talking to him; yes, sir.

Q. Where were you standing when you were talking to him?

A. I was underneath the tank.

20 Q. Now, the tank was located where as to these two tracks?

A. Between the two tracks; it shows it on that blue print.

Q. About midway between them?

A. No, closer to the main line.

Q. Do you think so?

A. Yes, sir.

Q. Well, it was between the tracks anyhow?

A. Yes, sir.

30 Q. Did he leave the freight train and come to talk to you?

A. No, sir.

Q. Did you ask him to come and talk to you?

A. No, sir.

Q. How did he get from the freight train to talk to you?

A. He was standing on the rear end, on the platform of the cabin, the caboose.

Q. Oh, you were on the rear end?

A. No, he was.

Q. Then did he get off and come and talk to you?

A. No, sir.

Q. This was the caboose of the freight train that came up on the two main tracks?

A. Yes.

Q. Or the one main track?

10

A. On the north bound track, yes.

Q. Have you any idea how long that freight train stood there?

A. No.

Q. Did you see other employees of the defendant on that freight train?

A. Not until after the accident happened.

Q. Was the subject matter of your conversation your being there?

A. No, sir.

20

Q. Or what you were going to do?

A. No, sir.

Q. What was it?

(Objected to.)

A. I can't tell you; it has been so long, been four years.

Q. You still work for the Pennsylvania Railroad Company and the West Jersey & Seashore?

A. Whenever I hit a contract I can, my figure gets low enough.

30

Q. When your figure gets low enough?

A. Yes.

Q. And not until your figures do get low enough?

A. You can't make many aughts; they count too fast.

Q. Have you any notion of how long you were in conversation with this rear brakeman?

A. I have not.

Q. Well, I suppose it was some time, wasn't it?

(Objected to.)

A. I said I did not know; didn't I tell you?

10

The Court: He may ask for his best judgment.

Q. What is your best judgment as to the time?

A. I can't tell you, it has been four years, my dear friend, and I have been asleep a good many night since that.

Q. Would it be safe to say that it took some time?

(Objected to.)

20 A. I can't say, I tell you; I can't say whether it was five minutes or what.

The Court: I will allow that.

(Exception noted for the defendant.)

Q. Did it take long enough for him to talk and you to talk?

(Same objection.)

30 A. Why, certainly.

Mr. Nelson Gaskill: I object to that and ask that that answer go out pending the ruling of the Court.

The Court: I will allow it; I think Counsel is en-

titled to have his opinion as to how long it was. These questions are meant to develop that. Proceed.

(Exception noted for the defendant.)

Q. After you finished your talk with this rear brakeman where did this train go—I mean the train that came up on the north bound main track?

A. Well, if I was put to death I couldn't tell you.

Q. Well, I don't want to put you to death. Do you know whether it went toward Atlantic City or toward—

(Objected to.)

A. I don't know, I say. When I heard of the accident I became so paralyzed I knowed nothing.

The Court: I will allow the question to stand.

(Exception noted for the defendant.)

Judge Gaskill: I would like the stenographer to note that these objections come in before the answer, and it is your Honor's delay in ruling upon the objection that causes the answer to be interposed. I do not want the record to appear that we have waited to object until after the answer is made, and your Honor will bear us out that it is the delay of your Honor to rule that causes us to appear in that shape.

The Court: I presume the stenographer takes the conversation as it occurs.

Mr. Wescott: I do not want the record to appear as counsel states it; I want it to appear as it should appear, just exactly as it occurs; that is all I ask.

The Court: You may record the allowance of the question before the answer is given.

Q. Did the accident happen before or after this conversation with the rear brakeman?

A. Well, I don't know how much before, but when I was told I was talking to him; I was told that the accident had happened.

Q. Oh, you were talking to him?

10 A. I was talking to him when the accident happened, and when I was told I knew nothing.

Q. Was the brakeman when he was talking to you facing the place, the spot where the flat car and sleeping car were on the siding track?

A. Well, now, I couldn't say that, because in conversation with a person you couldn't tell which way that man was looking, whether he was looking up the track or down the track.

Q. Was he looking toward you?

20 A. Why, we were in conversation, and every gentleman when they talk to one another, they try to look at one another.

Q. If he were looking at you at the time he would be looking in the direction of the sleeping car and flat car?

(Objected to as a conclusion.)

A. No, I couldn't say that he would.

(Objection sustained.)

30 Q. While you were talking to him you stood near the tank, as I understand it.

A. I was under the tank.

Q. Under the tank?

A. Under the tub.

Q. And the freight train was on the main track just opposite?

A. Yes, sir, on the north bound track.

Q. When the accident happened, or immediately after, did you see the freight cars standing on the Marlton and Medford track?

A. I couldn't answer.

Q. Couldn't tell?

A. No, sir.

Q. Who was your foreman at the time, Mr. Powell? 10

A. Mr. Powell.

Q. Was Powell working there at the time?

A. He was alongside of Mr. Prosser.

Q. Had he charge of Mr. Prosser at the time?

A. Yes, sir.

Q. Did he pay your men off?

A. No, sir.

Q. Who did?

A. Well, sometimes it was given to him and sometimes I done it myself, and at other times somebody else, 20
it didn't make much difference.

Q. Sometimes you and sometimes Powell and sometimes somebody else?

A. Yes.

Cross-examination.

By Mr. Nelson Gaskill:

Q. Did I understand you correctly to say that it was while you were standing under this tub talking to this 30
brakeman that the accident occurred?

A. Yes, sir.

Q. The brakeman was standing on the rear of the car at the time?

A. Yes, sir.

Q. You don't work always for the West Jersey & Seashore Railroad, do you?

A. No, sir.

Q. You work for other people?

A. Everybody that wants work done.

Q. You are a general contractor, in other words?

A. Yes.

Q. Where did you get this flat car on which the pile driver was mounted?

10 A. Why, the Railroad Company furnished it.

Q. And did the Railroad Company have charge of the car after the pile driver was put on it, or did you use it in your work wherever you went?

A. Well, we used it wherever they sent us.

Q. You used this car and this pile driver in doing your contracts on the West Jersey road?

A. I had no contract at that time.

Q. You were doing special work?

A. Yes.

20 Q. Wherever it was necessary?

A. Yes, sir.

Q. How long had you been on this siding before this freight train came up?

A. I couldn't tell you.

Q. Do you remember exactly how many men there were in your gang?

A. No.

Q. What was being done about this pile driver car when you left it and went over under the tank?

30 A. How is that?

Q. What were your men doing around the pile driver car when you left and went over under the tank?

A. Well, they were getting a bolt out from the bed frame.

Q. Was that all that was being done at that time?

A. When I left them to go over there?

Q. When you left them, they were engaged in getting out this bolt?

A. Yes.

Q. Who was engaged in getting out this bolt?

A. That is something I can't tell you; I have forgotten it.

Q. Was Prosser engaged in getting out this bolt?

A. He was one of them, of course.

Q. Was Prosser on the car or under the car? 10

A. Underneath, I guess, or else he wouldn't have been killed.

Q. At the time you left, was he on the car or under the car?

A. How is that?

(Question repeated.)

A. I could not say that.

Q. Could you say that there were any others on the car at the time you left? 20

A. No, I couldn't, because the men work around different places, you know.

Q. Then you have no knowledge as to just where these men were at the time this accident occurred, your back being turned and you being under the tub?

A. I have no exact knowledge where the men were but they were under the car.

Q. Mr. Henhoeffler, is it the custom for your men to protect themselves with flags when they are working on the tracks? 30

A. Well, when we are working on the main line, it is.

Q. Was any flag put out when you were on the siding?

A. I don't know.

Q. You didn't see any?

A. No.

Q. You didn't give orders for any to be put out?

A. No, sir, that is generally the foreman's place.

Q. After the accident, did you see a flag anywhere?

A. I saw one laying on the ground alongside—that is a faint recollection. Now, I wouldn't be qualified and be positive of it, but it seems to me it laid on the ground alongside of the cars.

10 Q. On the ground?

A. On the ground, yes.

Q. Was it near the ice chest?

A. That I can't tell you, because after the accident happened, as I said before, I was so overcome that I knew nothing, hardly knew my own name.

Q. Where was the flag with reference to the water tank?

A. How is that?

20 Q. Where was the flag with reference to the water tank—anywhere near the water tank?

A. No, it wouldn't have been any good if it had been over under the water tank—100 feet away, that was.

Q. Anywhere along the track with reference—

A. It must have been along the track or else it wouldn't have been of any use.

Q. And it was lying down when you saw it?

A. Yes, sir.

Q. You didn't see where it had been stuck up?

30 A. I couldn't tell you that; I didn't hunt for the place, where it was stuck up.

PEMBERTON CARLISLE, SWORN.

By Mr. Bleakley:

Q. Where do you live, Mr. Carlisle?

A. Leesburg.

Q. What is your business?

A. Bridge builder.

Q. And carpenter, aren't you?

A. Yes, sir.

Q. On August 12th, 1902, by whom were you employed? 10

A. Mr. Henhoeffler and Vaughn.

Q. And where were you working on that date?

A. On the Medford branch.

Q. Well, near what station?

A. Well, we left down there in the morning or some time—

Q. Near what station were you? On the line of the West Jersey & Seashore Railroad, near Haddonfield, 20 wasn't it?

A. Yes, sir.

Mr. Bleakley: This map will be admitted, will it not?

Mr. Gaskill: Yes.

(Blue print map heretofore produced is now marked Exhibit P. 1.)

Q. Now, will you look at that map, Mr. Carlisle. 30 Do you see the location of the water tank there?

A. Yes, sir.

Q. And the location of the Medford siding?

A. Yes, sir.

Q. Or rather the Medford line?

A. Yes.

Q. And the siding alongside of it to the east—is that right?

A. Yes, sir, this is the siding.

Q. Now, about what time of the day was it that you got there?

A. I couldn't say that.

Q. Well, was it afternoon or morning?

A. It was afternoon, yes, sir.

10 Q. And you need not say the exact hour—but about what time, whether it was early or late after noon?

A. Well, I judge about the middle of the afternoon.

Q. What cars were your men using?

A. That flat car with the pile driver on it.

Q. And you had a cabin car also, hadn't you?

A. Yes, sir.

Q. Now, they had been placed on this siding, had they?

A. Yes, sir.

20 Q. Where had they brought you from, the Railroad Company?

A. Well, brought us from down that Medford branch; I can't just remember the name.

Q. Brought you up and put you on this siding, did they?

A. Yes, sir.

Q. And at the time of the accident, what were the employees of Henhoeffler & Vaughn doing?

30 A. Well, they were getting that car ready for to work that night.

Q. You mean the flat car?

A. The piling machine, yes, sir.

Q. Now, just tell the Court and Jury about the location of the flat car and the cabin car and any other cars, if there were any on this siding at the time of the acci-

dent; just explain their location. What car, if any, was toward the Medford end of the siding?

A. Our living car.

Q. That is the cabin car, is it?

A. Yes, sir.

Q. And the next car north of that was what?

A. The flat car with the pile driver.

Q. And about how far away was it?

A. Well, I should judge about 20, maybe 25 feet, couldn't say exact, wouldn't undertake to.

10

Q. Then north of the flat car were there any other cars?

A. There were some freight cars there, I wouldn't say how many.

Q. And how far away from the flat car were these freight cars to the north, as near as you can tell?

A. Well, I should judge maybe 15 or 20 feet, something like that, probably 30.

Q. Now, when the accident happened, how much of your work had you gotten done?

20

A. Well, I couldn't tell you; we hadn't gotten very far advanced with it.

Q. And on which car were the men working for Henhoeffer & Vaughn?

A. On the flat car, the one that the machine was on.

Q. How many men were there about, as near as you can tell? Give your best recollection.

A. Well, I know of four or five that was there.

Q. At the time of the accident, what were you doing?

A. Well, just at the time of the accident, I was not doing anything.

30

Q. At which end of the car were you at the time of the accident?

A. On the south end, the end toward Medford.

Q. And where was Prosser?

- A. He was under the car.
- Q. Did you see him?
- A. I saw him under there, yes, sir.
- Q. Where were you when he was killed?
- A. I was on the east side of the car.
- Q. How far from him?
- A. Well, nearly opposite, taking it from him.
- Q. Well, I mean how many feet, about?
- A. Well, somewhere about 5 feet, maybe.
- 10 Q. Where had you been just previous to the accident?
- A. Well, that is hard to tell; I couldn't tell. I was stirring around there; I was on the front of the car, somewhere around there. I know I stepped around the end of the car.
- Q. You came around from the west end of the car to the east end of the car—is that right?
- A. No, I came around the end, off the south end, taking the way the track ran, and stepped around to the eastward.
- 20 Q. Now, what work had the men done in reference to tool boxes or anything of that kind, if you recollect, just before the accident?
- A. I don't remember about any tool boxes.
- Q. Well, an ice box, or anything else?
- A. I don't remember that.
- Q. Do you know what part of the car the men had been working?
- A. What part?
- Q. Yes, that is, you or any of the other men, whether
- 30 they were on the car or off the car or alongside the car?
- A. Well, they were working on the car.
- Q. Some of them were on the car.
- A. Sure.
- Q. Do you mean on top of it?
- A. On top of the flat car, yes, sir.

Q. And that was before the accident, was it?

A. Yes, sir.

Q. Now, do you remember this freight train coming up from Atlantic City?

A. Yes, sir, I remember the freight coming there.

Q. Was that just before the accident?

A. I can't say how long before; it was before the accident, yes, sir.

Q. Well, after this freight train went up the track, what did it do? 10

A. I couldn't tell you.

Q. Do you know whether any cars or engines came in on the siding?

A. There were cars came in there, yes, sir.

Q. Well, tell what happened?

A. Well, the man was killed; that is about all I know.

Q. Well, just tell how; how was he killed?

A. By that car hitting him, the car which he was working on. 20

Q. The flat car ran over him,—is that right?

A. Backed back and hit him.

Q. How far did it go back?

A. I don't know that.

Q. Well, tell whether or not it struck the cabin car?

A. I don't think it did; I wouldn't say positive, but I don't think it struck the cabin car.

Q. What was it that hit the flat car?

A. These freight cars that were ahead of them.

Q. As I understand it, they were there before this freight train came up from Atlantic City? 30

A. I think they were, yes, sir.

Q. What hit the two box cars?

A. I don't know what hit them.

Q. Was there any signal, a bell or whistle?

A. Not that I remember of.

Q. Did you hear any?

A. No, sir, I wouldn't say that I didn't or wouldn't say that I did; working that way and getting used to it, I wouldn't say.

Q. You remember the other trial of this case? You were a witness in it?

A. Yes, sir.

Q. Don't you remember saying that you didn't hear
10 any bell or whistle?

(Objected to; objection sustained.)

Q. You are now in the employ of the Railroad Company, the defendant in this case, Mr. Carlisle?

A. I am.

Cross-examination.

20 By Mr. Nelson Gaskill:

Q. This siding is a siding that is open at both ends, isn't it?

A. It was at that time; I wouldn't say now.

Q. It was at that time?

A. Yes.

Q. And these freight cars of which you speak were on the siding at the time your cars were put in from the other end, weren't they?

A. I don't know about that neither.

30 Q. You don't recall that?

A. No, sir, I couldn't say which end we were put in from.

Q. Do you recall those freight cars being put in after you were there?

A. No, sir.

Q. Do you remember whether those cars were box cars or platform cars?

A. I am positive one of them was a box car.

Q. Which one was that?

A. The one nearest to the pile machine.

Q. About how far away was that box car from the piling machine?

A. Well, I should judge somewhere about 15 to 20 feet, probably further—I wouldn't like to say sure about that. 10

Q. How high is that pile driver on the car, when it is lying flat, as in transit?

A. I don't know how high that is.

Q. As high as a man's head?

A. Oh, it is higher than that.

Q. Higher than a man's head?

A. Yes, sir.

Q. Do you remember when this train came up, this freight train came up and stopped? Do you remember the train coming up? 20

A. I remember the train coming up, yes, sir.

Q. And did you observe whether that train stayed on the main track or not?

A. No, sir, I did not.

Q. You did not observe that?

A. I don't know whether she did or didn't.

Q. At the time this train came up, how many men were there in that gang of yours?

A. Working on the cars?

Q. No, how many men were there in the gang all together? 30

A. I don't know.

Q. About how many?

A. Well, as I said before, I know there was four or five of us around there.

Q. Four or five?

A. Yes, sir.

Q. Do you remember Mr. Henhoeffler being over under the water tank?

A. I don't remember where he was; I know he was down there.

Q. Was there any one with him?

A. I don't know where he was.

Q. Well, wherever he was, was there any one with
10 him or was he alone?

A. I don't know.

Q. Now, if Mr. Prosser was under the car and you were outside of the car, where were the other two or three men?

A. I don't know where they were.

Q. You don't recall what they were doing?

A. No, sir.

Q. Were you on top of the car at the time Prosser was underneath?

20 A. No, sir.

Q. You were off on the side, were you?

A. Yes.

Q. Was any one on top of the car at the time the accident occurred?

A. I couldn't say.

Q. You don't recall?

A. No, sir.

Q. Do you remember any one being knocked off that car by the force of the blow?

30 A. Do I remember?

Q. Yes.

A. No, I do not.

Q. Prosser was the only man hurt, wasn't he?

A. The only one I heard them speak of.

Q. The only man you saw hurt, wasn't he?

A. Yes, sir.

Q. Did you see any flag put up there, or anything of that sort?

A. No, sir.

Q. Did you see this engine back down on the siding?

A. No, sir.

Q. The first notice you had was the crash, was it?

A. Yes, sir.

Q. After the box car was pushed back into the piling car, what did the engine do with those cars that were ahead of you on that siding? 10

A. I don't know whether she moved them or let them stay there.

Q. You don't recall?

A. No, sir.

Q. Do you remember how many cars there were on this siding ahead of this box car?

A. Do I remember?

Q. Yes.

A. No, sir, I do not. 20

Q. The engine came in from that other end where these cars were, didn't it?

A. Came in from the north end, yes, sir.

Q. So that the box car was between you and the engine?

A. Between the piling machine?

Q. Yes.

A. Yes, sir.

Q. And you don't recall whether that engine took any of these cars off that siding or not? 30

A. No, sir.

Q. Or whether it left any cars there?

A. I couldn't say.

ROBERT W. MILLER, sworn.

By Mr. Wescott:

Q. Where do you live, please, Mr. Miller?

A. 2870 Amber Street, Philadelphia.

Q. Were you employed by Henhoeffler & Vaughn, together with Mr. Prosser at the time he was killed?

A. I was.

Q. What sort of a workman was Prosser?

10 A. He was a first-class mechanic.

Q. An industrious man, was he?

A. He certainly was.

Q. Do you recall about how many there were in the gang.

A. I couldn't say exactly; about seven, seven to nine.

Q. You had been working down at Springdale?

A. Yes, sir.

Q. On the Marlton and Medford road?

A. Yes, sir.

20 Q. You were brought up by the defendant company and put on this side track there at Haddonfield?

A. Yes, sir.

Q. Do you remember which end of the switch you went into, whether it was the Marlton end or the Haddonfield end?

A. I couldn't say positive, but if I am not mistaken we went in from the Marlton end.

Q. The south end, that would be?

30 A. The south end. I am almost sure we went in there. Of course, I would not be positive.

Q. And you had a flat car with this pile driver on it and a house car, a living car?

A. Yes, sir.

Q. Now, was this house car distinguishable from other cars?

A. I don't see why it shouldn't be; any railroad man would know it.

Mr. Nelson Gaskill: I object to that and ask that the answer be stricken out as not responsive and as calling for a conclusion.

The Court: Yes, let him answer a new question. Strike out all the answer.

Q. I ask you if this house car was distinguishable from other cars? 10

A. It would be by any railroad man.

Mr. Nelson Gaskill: I object to that as calling for a conclusion. The facts of differentiation are not asked for or stated.

The Court: The objection is well taken.

Mr. Wescott: How is that asking for a conclusion? I simply asked whether one thing differs from another, and if the witness says it does, it seems to me I am simply getting his knowledge on the subject, and I protest against the evidence being ruled out on that ground. 20

The Court: The ruling will stand.

Whereupon the plaintiff, by her Counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge. 30

Q. You know a house car, a living car, when you see one?

A. I certainly do.

Q. Do you know a flat car when you see one?

A. I ought to, been around the railroad about six years.

Q. Is there any difference between a house car and a flat car?

A. One you often see stone hauled on—the other looks more like a passenger coach. I suppose there is some difference.

Q. And one is distinguishable from the other?

A. It certainly is.

10 Q. Now, what is there about a house car which makes it look different from any other car?

A. Any railroader would know it; for instance—

(Objected to.)

The Court: Just answer the question; the question is: What is the difference?

A. Why, there is two letters on the car, "W. M." on all house cars.

20 Q. Was that on this car?

A. It was, yes, sir.

Q. And what is the meaning of those words?

A. Maintenance of way.

Q. How about smoke-stacks?

(Objected to as leading.)

Q. Smoke pipes, does one of these cars have a smoke pipe?

30 The Court: I will allow it.

(Exception noted for the defendant.)

A. There certainly is a smoke stack on; if there wasn't the cook stove wouldn't draw.

Q. A cooking stove in them?

A. Yes.

Q. Was there one in this?

A. Yes.

Q. A bench?

A. Yes, a table.

Q. Were there curtains to the windows?

A. Some of them.

Q. Now, do ordinary freight cars have those windows and curtains and cook stove and beds and chimney pipes in them? 10

A. In my six years of railroad I have never seen anything that looked like a cabin car that was not one. All the windows are alike, bars across them on the inside; evidence enough to show it is a cabin car.

Q. Can you tell about what time in the day you got there, Mr. Miller?

A. Somewhere between half-past three and five o'clock; I couldn't swear to the hour.

Q. It was in daylight? 20

A. Yes, sir.

Q. Now, after you got there, state generally what was done by the gang?

A. Well, there was some tools being taken off the car and others getting ropes ready and falls out for to hoist the machine with, and there was a couple of others getting bolts out from the bed frame of the car, the bed frame of the engine, that had been passed through the car.

Q. Is it true that the gang was moving around there from place to place? 30

A. Yes.

Q. In open sight, doing this work?

Mr. Nelson Gaskill: I object; open sight may refer

to one thing and may refer to another. If it calls for a conclusion as to general open sight I object to the question and ask that the answer be stricken out.

The Court: Yes, the motion is allowed.

Q. Well, when the men moved around there in daylight, did they conceal themselves with anything?

A. No, sir, not in the habit of doing anything of that kind.

Mr. Nelson Gaskill: I object to that and ask that the latter part be stricken out.

Mr. Wescott: You had better strike that out. (To the witness.) I want to know whether if a man got up on the car he got some sort of device and surrounded himself with it so nobody could see him?

A. No, sir, I don't know as there was anybody done anything of that kind.

20 Q. What was Mr. Prosser doing when he was killed?

A. Well, sir, I don't know just what he was doing when he was killed; he was supposed to be backing a bolt up; he was underneath the car.

Mr. Nelson Gaskill: I object to that as not in the knowledge of this witness and ask that the latter part of the answer be stricken out.

The Court: It may be stricken out.

30 Q. Was he under the car?

A. He was.

Q. Had you been under the car?

A. I had.

Q. Where were you at the time of the accident?

A. At the instant of the accident I was about 12 inches from the rail on the west side of the track, the north-west end of the car.

Q. Standing alongside of this flat car?

A. Standing or stooped over, about to pick up a bar.

Q. How long had you been out from under the car before the accident happened?

A. Probably five or six seconds.

Q. Were you standing in the open or were you concealed by something?

A. Standing right alongside of the car.

10

Mr. Nelson Gaskill: I object; standing in the open or concealed must refer always to some particular view point which is not here stated, and whether or not the witness would be in the open or concealed with reference to that view point is a fact that must be beyond his knowledge. I ask, therefore, that the answer be stricken out and the question disallowed.

The Court: I will let that stand.

20

(Exception noted for the defendant.)

Q. Was any one else under the car with you and Prosser?

A. There was no one with me; whether there was any one with him or not I don't know.

Q. What was it struck the car that killed Prosser?

A. Well, it must have been the two cars that were ahead of us.

30

(Objected to.)

Q. Don't say "must"—that makes them object right away. Just state what it was.

A. Two box cars that stood about 20 or 25 feet ahead of the pile driver.

Q. What struck those cars and made them move?

A. I couldn't say whether there was cars on the other end that hit them or what it was; I suppose it was cars came in on the siding.

(Objected to.)

10 Q. Don't say "suppose"; they object to that; after the accident did you see the engine on that track?

A. I did at the mouth of the switch.

Q. What say?

A. On the north end of the switch I saw the engine.

Q. And what was that engine attached to?

A. That I couldn't say.

Q. Well, were there cars between that engine and the two freight cars which struck the flat car that Prosser was under?

20 A. There was.

Q. Did you hear any collision of any sort while you were standing there, any noise?

A. I heard it when it hit.

Q. What?

A. I heard the cars when they hit the pile driver.

Q. How far about was the pile driver knocked, if it was knocked at all?

A. Well, it must have been drove back 15 or 20 feet; went back far enough to hit the living car.

30 Q. Was Prosser killed instantly?

A. When I went to him about half a minute afterward he breathed his last.

Q. While you were working about that car together with the other members of the gang did you see the freight train come up the main tracks?

A. There was a freight train came up the main tracks of the Camden & Atlantic.

Q. Now called the West Jersey & Seashore?

A. I don't know what they call it now; I haven't been on the road now for three or four years.

Q. Where did that freight train stop?

A. Just opposite where we were working.

Q. Right opposite where you were working?

A. Yes, sir.

Q. Did you see any of the men on that freight train talking with anybody? 10

A. Well, I saw one man; I couldn't say, I can't just remember whether he was on the car or on the ground, but there was one of the crew stood there looking right over where we were at; whether he was talking to anybody or not I couldn't say.

Q. Was there anything to obstruct their view of what was going on about the car?

A. Nothing whatever that I could see.

Q. Did you see that train move away from there afterward? 20

A. I didn't take notice to it going away.

Q. Or any portion of it?

A. I couldn't say; there must have been a portion of it cut away to come back toward the switch that we were on, but the rear end of the train was still left standing on the Camden & Atlantic.

Q. The rear end of the train?

A. Yes.

Q. While the engine came back on the switch where you were working? 30

A. While the engine took part of the train away; I don't know whether it did or not.

Q. The engine brought that train up that backed down on the switch?

A. The engine was seen at the mouth of the switch; I don't know whether it backed down there or not. It must have done it, or it wouldn't have been there.

(Objected to.)

The Court: I don't think I will strike that out.

(Exception noted for the defendant.)

10 Q. An engine can't jump from one track to another?

A. Certainly not.

Q. Was there any other engine there?

A. Not that I saw, any more than the engine on the pile driver.

Q. Was there an engine on the pile driver?

A. There was a hoisting engine, yes, sir.

Q. Which end was that on?

A. The north end of the car.

Q. How big a device was that?

20 A. About 14 horse power boiler.

Q. A boiler.

A. Yes.

Q. How high up in the air did it extend?

A. Well, smoke-stack and all about 14 feet from the ground.

Q. Was it on that flat car all the time that you were there?

A. It was. The stack wasn't on it all the time; we took the stack off in moving the car.

30 Q. Were there any signals by bell or whistle or word of mouth signals given that an engine was going to back down that side track?

A. I heard none.

Cross-examination.

By Mr. Nelson Gaskill:

Q. When that freight train came up what you call the Camden & Atlantic track, was it the head of the train—or where was the head of the train when it stopped?

A. I couldn't see the head of the train; all I could see was the caboose and about eight cars.

Q. It was the rear of the train then that stopped opposite to you? 10

A. Right opposite where we were, yes.

Q. And that remained there until after the accident?

A. It did.

Q. How many cars were there ahead of this pile driver car, between you and the upper end of the switch? 10

A. Previous to the accident?

Q. Yes.

A. Two.

Q. Only two? 20

A. Only two.

Q. What were they?

A. One was a slate colored box car, and the other one was a red one.

Q. A red box car?

A. One was a red box car and the other was slate colored.

Q. Both were box cars?

A. Yes, sir.

Q. On which side of the track were you at the time the accident occurred? 30

A. On the west side.

Q. Is that the side toward the main track?

A. The side toward the main track facing Haddonfield.

Q. You had just come out from underneath?

A. I had, yes, sir.

Q. Was there any one working on top of the car when you came out from underneath?

A. I had no time to look up to see whether there was anybody there or not; I was still stooped over looking for a bar at the time of the accident.

Q. Was anybody working on top of the car when you were underneath?

A. That I couldn't say.

10 Q. Any one working there in connection with you?

A. Not where I was, no, sir.

Q. Your labors under the car were not being supplemented by anybody on the car?

A. The work I had to do was simply to back a bolt up going through the bed frame of the machine to the car.

Q. Mr. Prosser was doing practically the same sort of work, wasn't he?

A. Yes, sir, on the opposite end of the car.

20 Q. The other men you say were engaged in rigging a fall?

A. They were getting out the blocks and falls and appurtenances that were used in handling the machine.

Q. Where was this equipment unloaded?

A. We carried them right on the car that way.

Q. It had been taken off the car on to the ground, hadn't it?

A. Well, not all of it, not necessarily all of it.

30 Q. These falls that the men were working with were on the ground, weren't they?

A. I couldn't say that.

Q. Well, men don't straighten out falls on top of the car—or would you?

A. Oh, yes, I have seen them straightened out in 10 feet, many a time.

- Q. Was the smoke stack on this boiler?
 A. Well, at the time of the accident I don't think it was.
 Q. Did you see where Mr. Henhoeffler was standing?
 A. That I didn't; I didn't take notice of him. I don't very often watch the boss; I let him watch me.
 Q. Had you seen the ice box unloaded from the car?
 A. I had.
 Q. Just before the accident?
 A. Well, I should judge between five and ten minutes 10
 before the accident.
 Q. Where had that ice box been placed?
 A. Stood alongside of the water tank.
 Q. Was anybody in charge of it?
 A. No, only the men that got hold of it and carried it over.
 Q. Was anybody working with the ice box at the time of the accident?
 A. Not at the time of the accident, no, sir.

20

JAMES MOORE, sworn.

By Mr. Bleakley:

- Q. Where do you live?
 A. 417 North Eighth Street, Philadelphia.
 Q. What is your business?
 A. Engineer for the West Jersey & Seashore Railroad, 30
 bridge builder.
 Q. Where were you working on August 12th, 1902?
 A. Haddonfield.
 Q. For whom?
 A. Henhoeffler & Vaughn.
 Q. At the place where Prosser was killed?

A. Yes, sir.

Q. Where were you at the time he was killed?

A. Well, I was over close by the pumping station.

Q. East of the—

A. East of the car.

Q. Did you see the train come down?

A. No, sir.

Q. Hear any bell or whistle?

A. No, sir, not as I can remember.

10 Q. Did you hear the crash?

A. Well, couldn't say; I don't remember.

Q. Did you hear somebody holler "Man killed" or anything like that?

A. Yes, sir.

Q. What did you do?

A. I turned around and seen the man lying under the wheel and I walked away.

Q. Now, previous to the accident where was the cabin car located?

20 A. I couldn't say; I don't remember that.

Q. Did you see these two box cars ahead of the pile driving car on the siding toward the mouth of the switch, the Haddonfield end?

A. I don't remember what was lying ahead of her.

No Cross-examination.

HIRAM WEBB, SWORN.

30 By Mr. Wescott:

Q. Where do you live?

A. 41 Cooper Street, Camden.

Q. How old are you?

A. Sixty-five.

Q. Did you work for Henhoeffler & Vaughn together with Mr. Prosser at the time he was killed.

A. Yes, sir.

Q. A member of the gang?

A. Yes, sir.

Q. From the time you went on the side track up to the time of the accident, speaking generally, what were the men doing around there?

A. Well, when I left them and went out into the woods—

10

Q. No, before you went out in the woods.

A. We were working on the car getting the machine ready to hoist up to drive that night on the main line.

Q. Getting on and off of it?

A. Up and down on the car and underneath it.

Q. And in the living car?

A. Yes, sir, backward and forward.

Q. Did the men move around both of these cars?

A. Yes, sir.

Q. Sometimes on one side and sometimes on the other? 20

A. Yes, sir, all the time.

Q. All the time they were there, they were working around these two cars?

A. Yes, sir.

Q. Well, after you had been working there awhile did you go somewhere?

A. They sent me out into a little strip that was there to cut some crouchers, they call them, what they use to hold the pile in the machine.

30

Q. There was a small strip of woods right near at hand where this pile driver was?

A. Yes.

Q. And you went there to cut what?

A. Crouchers, we call them.

Q. Did this accident happen while you were there?

A. Yes, sir.

Q. How did you know the accident happened?

A. I heard the crash of the cars come together and heard the train people holler.

Q. Did you hear any whistle or bell or signals of any sort given just before the crash?

A. No, sir, didn't hear anything before I heard the crash.

10 Q. What caused these cars to come together?

Mr. Nelson Gaskill: I object to that. It appears that this witness was off in a piece of woods at the time this accident occurred and he is now asked what caused these cars to come together. It clearly appears to be beyond this witness' possibility of knowledge.

The Court: Suppose you ask him if he saw what caused them to come together.

20 Mr. Wescott: He said he heard them come together, heard the crash.

The Court: Let him answer the question if he knows.

(Exception noted for the defendant.)

Q. What caused this crash?

A. I know what caused the crash without being there to look at it.

30 The Court: Don't tell unless you saw it.

A. I didn't see it but I heard it. I have seen it many times; I know what caused it all right.

Q. Well, did you see a freight train standing on the main track before you went to cut this piece of wood?

A. No, sir.

Q. After the crash and you came out, what did you see on the track, on the Medford track?

A. I didn't see anything on the Medford track; our cars was on the siding.

Q. Well, on the siding what did you see?

A. The car we lived in and the car the pile driver was on, there was two box cars ahead of them, and I don't know how many was ahead of that still that had come in.

10

Q. What?

A. I say, there was two box cars ahead of our car on the siding.

Q. After you came out of these woods, you certainly saw something, didn't you.

A. Yes, sir.

Q. No, just tell us what you saw.

A. I didn't know what was the matter until the undertaker asked me if I would have him—

Q. Never mind about the undertaker; tell us what you saw. Did you see any cars there?

20

A. Yes, I seen the cars on the siding where we were with two cars ahead of us before I went away, and I don't know how many was ahead of them still, because I didn't notice.

Q. What did you see on the track before you went into the woods to cut this stick?

A. Well, there was only two boxes on the siding outside of ours.

Q. There was your living car?

A. Yes, sir.

30

Q. The house car?

A. Yes, sir.

Q. The flat car with the pile driver on it?

A. Yes, sir.

Q. And two box cars?

A. Yes.

Q. And they were about how far apart?

A. Oh, they wasn't over 20 feet, 15 or 20 feet.

Q. Now, there was nothing else on that side track when you went away?

A. No, sir.

Q. When you came back, what was on that side track?

A. I don't know how many was ahead of them, but
10 there was several there.

Q. Several what?

A. Cars.

Q. And the engine attached to them?

A. I didn't notice any engine attached to them.

Q. Did you see any engines around there anywhere at all?

A. No, I didn't notice them.

Q. Had any of these cars moved?

A. No, they were standing still when I saw them.

20 Q. Did they ever move before?

A. Not while I was there.

Q. Since they were made in the factory?

A. What do you mean,—the two cars that were ahead of us?

Q. Yes; they were made in the factory somewhere. Now, did they move from the time they were made until the time they were there?

A. They were fast when I got down there; they were jammed down in our car.

30 Q. What was jammed down in your car?

A. The two box cars that were ahead when I went away.

Q. Was there any damage done to these cars?

A. The damage that was done there, there was a man dead underneath the car.

Q. To the cars themselves when they were jammed together?

A. No, there wasn't any damage done to the cars.

Q. What?

A. I didn't notice any damage done to the cars when they were jammed into the car we lived in.

Q. How soon did the accident happen after you went in the woods, right away?

A. I hadn't been gone more than ten minutes when it happened. 10

Q. Well, what do you mean by ten minutes, please?

A. Well, about ten minutes from the time I left the car until I heard the crash.

Q. Was it as much as ten minutes, do you think?

A. I guess it was ten minutes; I couldn't tell exactly.

Q. Well, just before you went in the woods, did you see anybody with a flag?

A. Yes, sir.

Q. What kind of a flag was it?

A. A red flag. 20

Q. And what does that flag mean—what is it used for?

A. Well, we use it for to stop a train that is coming into you, danger.

Q. Did you have such a flag aboard your car?

A. Yes, sir, all the time.

Q. When you stop anywhere you take that flag out to protect yourself?

A. One on each end of the road?

Q. And who was it had the flag? 30

A. I couldn't say that.

Q. Do you know who directed the man to take the flag?

A. No, sir, I couldn't say that.

Q. And did he take the flag up toward the station?

A. Yes, sir.

Q. Toward the Haddonfield station?

A. Toward the Haddonfield station.

Q. Was it one of the gang that took the flag?

A. Oh, it was one of the gang, sure.

Q. What?

A. It was one of the men, of course.

Q. Did you see after the accident what became of that flag?

10 A. No, sir, I don't know; it paralyzed everybody around there pretty much, you know.

Q. What?

A. It seemed to take all the wind out of everybody around there pretty much, and of course they didn't know much; I didn't take much notice myself.

Q. Did you see any of the employees that had charge of the freight cars there at all?

A. I didn't notice any when I came back; I seen them walking around there before I went away.

20 Q. You saw them walking around there before you went away?

A. Yes, over on the left-hand side of the track leading from Haddonfield—well, between the water tank and the station at Haddonfield there were two or three of them I seen there.

Q. And they were the employees that had charge of this freight train?

A. Employees of the railroad; I don't know what position they were filling.

30 Q. How?

A. Employees of the railroad; I don't know what position they were filling.

Q. I am not asking you what position, but they were the men that had charge of that freight train?

A. They were men walking around there employed by the railroad company?

Q. Were they men that had charge of that freight train?

A. I don't know about that, sir.

Q. How long had they been walking around there, about, before you went in to cut the stick?

A. I didn't notice them, I suppose, over five minutes before that.

Q. You had noticed them about five minutes? 10

A. About five minutes before, yes, sir.

Q. Did you see any of them talking with Mr. Henhoeffler?

A. No, not when I went away.

Q. Did you see any of these same railroad men after the accident happened, after you came back, after the crash when you came out of the woods?

A. No, sir, I didn't see any of them.

Q. Did you see any of them at all?

A. Oh, yes, I seen Mr. Henhoeffler sitting over there 20 close to the tank.

Q. Didn't you see anybody else?

A. Nobody talking to me. Of course I met the foreman there, Mr. Powell, and the rest of the men around there, but they was not working.

Q. They were not at work?

A. No.

Q. Of course, they weren't at work, but you saw them around there?

A. Seen them around there, certainly. 30

Q. Didn't you see some of the railroad people who had charge of the train?

A. No—

Mr. Nelson Gaskill: I object; this man had been

asked three separate times if these men had charge of the railroad train and he said no. He is not an adverse witness.

The Court: He said no; that does not harm you.

Q. What I am asking you now is not whether they had charge of the train but whether you saw after the accident some of the railroad men there. Did they come there after Prosser was killed?

10

A. Oh, yes, they were there; certainly they were there; there when we took the man out from under the car and put him in the wagon.

No cross-examination.

THOMAS J. POWELL, SWORN.

20 By Mr. Wescott:

Q. Where do you live?

A. 1320 Broadway, Camden.

Q. Were you the foreman of Henhoeffler & Vaughn when Mr. Prosser was killed?

A. Yes, sir.

Q. Did you have charge of the gang?

A. I had charge of the gang, yes, sir.

Q. Did you pay Mr. Prosser?

30 A. Generally always, yes, sir; they generally always sent the money to me and I gave it to the men.

Q. Did you give it to them in an envelope?

A. Yes, sir.

Q. With the amount on the outside?

A. Yes, sir.

Q. And the money on the inside?

A. Yes, sir.

Q. What kind of a mechanic was Prosser?

A. Well, Mr. Prosser was a handy man, you might say; he was good at most any kind of work.

Q. I know, but what sort of a mechanic was he—a dumb one, a poor one?

A. No, sir, he was a good mechanic at the work we was doing.

Q. A carpenter by trade?

A. A carpenter by trade, yes, sir. 10

Q. What sort of a physical man was he?

A. Well, now, I might say a nice clever man—

Q. I mean in respect to his strength, his physical capacity. Could he lift a ten-penny nail?

A. Now, we don't want no talk like that. Mr. Prosser was a good man to work; he could do his part in most any kind of work he went at.

Q. What kind of health had he?

A. As far as I know, he had good health.

Q. Do you know how much money he was earning about that time? 20

A. When he was working with me he got \$2.25 a day.

Q. Did he do over-time?

A. Sometimes he would make over-time, maybe make a day and half over-time in a week.

Q. Was Mr. Prosser an industrious man?

A. He was.

Q. When a man works over-time for this company, what was his pay by the hour? 30

A. Well, if he worked on a week day he got time and half time for over time; Sunday he got double time.

Q. What sort of habits had Mr. Prosser? Do you know enough about him to know what his habits were?

A. Well, I have been going around with him about

two years this last time he was working with me and he had good habits.

Q. Did he lose any time by idleness when he was under you?

A. No, sir, not while he was working with me he didn't lose any time for illness.

Q. Now, then, Mr. Powell, you were present at the time of this unfortunate occurrence, weren't you?

A. I was there, yes, sir.

10 Q. And what were you and your men doing generally all the time you were there?

A. Well, when we first came there we was getting our things out of the cabin car and putting them up alongside of the pump house, and as soon as we got done there we went to work at our piling machine to get ready to go to work that night.

Q. That required the men, generally speaking, to do what?

20 A. To get the machine ready to work that night, get our falls ready and the bolts out of the machine, so we would be all ready to go to work when we got ready to come to it.

Q. While the men were doing that did they have to move around these cars?

A. Yes.

Q. Get on?

A. On and off them, yes, sir.

Q. On either side or either end?

A. Either side or either end.

30 Q. What was there on the flat car?

A. A pile driver.

Q. Was there an engine on it?

A. Yes, sir.

Q. How big a thing was that?

A. Well, the engine was about 4 feet in diameter, about 12 feet high.

Q. That was on this flat car?

A. On the flat car, yes, sir.

Q. And the sleeping car, eating car, living car,—how did that look?

A. That looked like a sleeping car; most any man would know what it meant if he seen it on the road.

Mr. Nelson Gaskill: I object to that and ask to have it stricken out. 10

The Court: I will let the first part stand; the latter part is stricken out.

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

Trial of the cause resumed after recess in the presence of counsel for the respective parties. 20

THOMAS J. POWELL, resumed.

By Mr. Wescott:

Q. Did you tell us about the engine? Did I ask you about that being on the flat car? I think I asked you about that. 30

A. You asked me about the engine, yes, sir.

Q. Where had you been working? Where had you worked last?

A. Why, we had been working on the Marlton and Medford road out to Springdale.

Q. How far was that, about, from Haddonfield?

A. Well, I should judge it was about five miles from Haddonfield.

Q. Then the company brought you up to Haddonfield from Springdale?

A. Yes, sir.

Q. And where were you to work next?

A. We were to work at—

Q. Cooper's Creek?

10 A. Cooper's Creek?

Q. Well, right close there, wasn't it?

A. Well, about two mile and a half from Haddonfield station, where we was to work at.

Q. Well, was it where the big trestle is?

A. No, sir.

Q. The high bridge?

A. No, sir.

Q. Just below Haddonfield?

A. No, sir, that trestle work is on the Marlton and
20 Medford road, but this work we was to do was on the
C. & A., we used to call it.

Q. Well, this was the nearest place for you to go in order to get to that work at Cooper's Creek, wasn't it?

A. Yes, sir, that was the nearest place for us to get at.

Q. And the company put you there?

A. Yes, sir.

Q. And how soon were you to go to work?

A. We were supposed to pull out about half-past
eight o'clock that night.

30 Q. You were to go to work that night.

A. Go to work that night, yes, sir.

Q. And you were put at this place in order to make your preparations to go to work,— is that it?

A. Yes, sir.

Q. Now, while your men were working around there

to prepare for the night's work, did you see a freight train on the main track come up?

A. I did, yes; I seen a freight train come up on the main line.

Q. Where did it stop?

A. The rear end of the freight train stopped about at the end of the pumping station.

Q. Right opposite where your car was?

A. Right opposite where the car was standing.

Q. Did you see any of the men in charge of that train around there? 10

A. I couldn't say; I didn't take notice to anything of that kind, for they were getting ready to go to work; didn't notice the men at all.

Q. Did you see any of the railroad employees around there?

A. I couldn't say; I couldn't say whether I seen them there or not.

Q. Did you see Mr. Henhoeffler talking to any of them? 20

A. No, sir, I didn't see Mr. Henhoeffler say anything to the working men at all.

Q. Now, were you under this car with Prosser?

A. No, sir, not when Prosser was under it, I wasn't under it.

Q. What?

A. Not when Prosser was under the car, I wasn't under the car.

Q. Were you under the car?

A. I was under the car, yes, sir. 30

Q. How long before Prosser got hurt?

A. Well, I suppose about three or five seconds.

Q. You just got out?

A. I got out from under.

Q. Which side of the car were you on?

A. I was on the east side of the car.

Q. How was it you got out from under there?

A. When we ship a machine we generally put a bolt down through the machine to the car, and in some accident this bolt kind of got bent, coming from Springdale into Haddonfield, and we couldn't pull it out from the top. I was under the car there knocking the bolt up and Mr. Prosser got under it inside where I was standing and he says, "Tom—

10

(Objected to.)

Q. Don't say what he said; just say what he did.

A. He says, "I can hit that bolt better than you can." I gave him the maul and he hit the bolt once when the crush came back.

Q. Was it necessary to get under the car to do the work?

A. Yes, sir.

20

Q. Now, was there any bell or whistle or other sound or warning given?

A. Not to my knowledge, no whistle or no bell; I didn't hear any, no, sir.

Q. Had you good hearing?

A. I had.

Q. What caused this crash that you speak of?

A. Well, it must have been the car—

(Objected to.)

30

Q. No, don't say, "It must have been"; what caused it?

A. The crush came back against the car we were working on.

Q. What came back and hit it?

A. It was a box car right ahead of us.

- Q. What hit the box car?
- A. I can't say; I didn't see it.
- Q. After that what did you see?
- A. I didn't see anything; I seen cars along ahead of them after this was over.
- Q. With an engine?
- A. No, sir.
- Q. Was there any engine around there at all?
- A. No engine as I seen at all, no, sir.
- Q. Where was the freight engine? 10
- A. The freight engine must have been up at the Had-donfield station.
- Q. Did you see the freight engine?
- A. I seen the freight engine when it went by the pumping station.
- Q. Was there any freight engine up around the station at that time?
- A. The engine was up at the station when these cars came back.
- Q. Well, that was the only engine that was there, 20 was it?
- A. The only engine as I seen, yes, sir.
- Q. That was the engine that drew the freight train up on the main track?
- A. Yes, sir.
- Q. Now, how far was this car knocked that Prosser was under.
- A. Well, the cars laid about 15 or 20 feet apart.
- Q. Did the car that Prosser was under hit any other car? 30
- A. Yes, sir, hit our cabin car.
- Q. With how much force?
- A. Now, I couldn't say. We had a hard brake on the cabin car and it knocked it about 20 feet.
- Q. Knocked it about 20 feet?

A. Yes, sir.

Q. Now, did you see anybody do anything with the flag?

A. Not just at that time, no, sir, I didn't.

Q. Oh, well, did you at all?

A. I did, yes, sir.

Q. Just before that? Just before the accident?

A. Well, I suppose five or ten minutes before that I seen a man up the track with a flag.

10 Q. One of the gang, one of your men?

A. One of Henhoeffler & Vaughn's sons was up the road with a flag while we was shipping the stuff from the cabin car up to the pump house.

Q. Was that toward Haddonfield?

A. Toward Haddonfield, yes, sir.

Q. And was Henhoeffler's son one of the gang?

A. No, he didn't work in the gang; he came down once in awhile through the day.

Q. What was this flag used for?

20 A. Used to stop any train that came; any danger at all, the train should stop.

Q. About how long had you seen him there with the flag up there?

A. Well, he was up there from ten to fifteen minutes.

Q. And was that while this old gentleman who testified was down in the woods, Mr. Webb?

A. No. Well, he went away after he went up with the flag; Mr. Webb went down to the woods after he went away with the flag, but while he was up the road with the flag Mr. Webb was down in the woods.

30 Q. Then you saw this man up there about five or ten minutes after that?

A. Yes, sir.

Q. And that was when the crash occurred?

A. Yes, sir.

Q. You say, as I understand you, Mr. Henhoeffler sent his son up there with this flag?

(Objected to; objection sustained.)

Q. What was Henhoeffler's son doing there before he went with the flag?

A. Well, he just came down from Springdale; he came in with us.

Q. He came in with you?

A. Yes. 10

Q. Was he helping about there?

A. Well, he was just kind of helping with the flag or anything like that, to send him away with the flag or anything like that.

Q. Now, how far was the place of the accident from Haddonfield station, about, according to your best judgment?

A. Now, I should judge about three squares, from where it happened. 20

Q. Was there anything between the freight car and your car where Prosser was killed to obstruct the vision of the people?

Mr. Nelson Gaskill: I object. As I said before, vision always refers to a point of view, and unless the point of view is fixed it is impossible for any witness to say whether the view is obstructed or not.

The Court: The question is allowed. 30

(Exception noted for the defendant.)

A. Two box cars laid ahead of our pile driver.

Q. Do you know where the main tracks were?

A. Yes, sir.

Q. Well, between the main tracks where this freight train stopped and the siding track where your two cars were, what was there to obstruct vision, if anything?

(Same objection; question allowed.)

(Exception noted for the defendant.)

Q. Now, listen to it and see if you understand it.

10 (Question repeated.)

A. There wasn't anything?

Q. Did I ask you about paying Prosser? I did, didn't I?

A. Yes, you asked me about that.

Q. Did you see any railroad employees outside of your own gang, now, around there after Prosser was killed, right afterward.

A. Now, I couldn't say; I couldn't say that at all; I wouldn't say that.

20

Cross-examination.

By Mr. Nelson Gaskill:

Q. When this freight came up, was it the head of the train or the rear that stopped there by the water tank?

A. The rear of the train stopped about opposite to the water tank.

Q. Do you recall about how long a train it was, whether it was long or short?

30 A. I couldn't say; I did not notice the train, how long it was, when it went by at all. I was busy working, and I didn't notice how many cars it had on at all.

Q. Did you see what the other men were doing while you were under the car, where they were standing and what they were doing?

A. There was two men under one end and two under the other end working.

Q. Now, Miller got out from one end and said there was no man working with him. You and Prosser were at the other end—

Mr. Bleakley: Let him answer that; you interrupted the answer.

Mr. Gaskill: Just a minute, Mr. Bleakley; wait until I get through and then you can have a chance. Mr. Miller was under one end of the car and you and Mr. Prosser were under the other. Now, Miller got out and you got out and that left Mr. Prosser under the car? 10

A. Yes.

Q. What side of the car did you get out from?

A. Got off on the east side of the car.

Q. Mr. Miller got off on the west?

A. I couldn't say anything about Mr. Miller, because he was on the other end of the car, the west end of the car. 20

Q. You were clear of the car when the crash came?

A. When the crash came I was just clear of the car, yes, sir.

Q. Did you have occasion to look up the inside track toward Camden or toward Haddonfield at all?

A. I did not, no, sir.

Q. You didn't know what was going on up there?

A. I did not.

Q. Didn't see any one up there?

A. No, sir. 30

Q. Didn't see any one up there with a flag?

A. No, sir.

Q. Did you see Mr. Henhoeffler's son get this flag?

A. I did.

Q. How long had the train been up, or how long had you been on the siding before Mr. Henhoeffler's son went up with this flag?

A. I suppose we had been on there about ten or fifteen minutes.

Q. Before he went up with the flag?

A. Before he went up with the flag, yes.

Q. How long was this before the accident happened?

A. I suppose about eight or nine minutes, as near as
10 I could say.

Q. Did you see him go up the track with the flag?

A. I did, sir.

Q. How far up did he go?

A. Now, I just couldn't say how far he went up; I suppose he went up about a square, maybe.

Q. You saw him go up; that is all you know?

A. Yes, sir.

Q. Do you know what he did with the flag?

A. I couldn't say.

20 Q. Did you see it lying on the ground after the accident?

A. I seen the flag, yes, sir, alongside the pump-house after this thing occurred.

A. Alongside of the pump-house?

A. Alongside of the pump-house.

Q. That is the water tank?

A. The water tank.

Q. That is between the siding and the main track?

A. Yes, sir.

30 Q. Was that in the direction in which you saw Henhoeffler take the flag?

A. No, sir.

Q. It was in another direction?

A. Another direction, yes.

Q. It had been brought back from the direction in

which you saw it taken and put alongside of the ice chest?

A. Yes, sir.

By Mr. Wescott:

Q. Do you know whether this was the flag that you saw taken up the track?

A. Yes, sir, the same flag.

Q. How do you know it was?

A. Why, it was the flag that I gave him; a pocket flag that I generally carry in my pocket. 10

Q. How many of these danger flags did you have with the gang?

A. Well, we generally have two flags; we have one blue flag and one red flag.

Q. Was this a red flag?

A. This was a red flag, yes, sir.

Q. And what does that mean?

A. That means stop every train that comes.

20

PLAINTIFF RESTS.

Mr. Nelson Gaskill: If the Court please, the defendant moves that the plaintiff be non-suited in this case for two reasons: First, there has been no proof that there was any action on the part of the employees of the defendant company which produced a backward movement of these cars. None of these witnesses for the plaintiff have testified that they saw an engine come down this siding or that they saw the engine which produced this collision. The sum total of the testimony is that there was a freight train which came up the main track, the rear of which halted opposite this water tower. The inference is that 30

the train was broken there and moved up ahead, because some of the witnesses for the plaintiff have placed the engine at the head of the switch, but no one of these witnesses have put this engine any further down the track, have put these men toward the rear where these cars on which the deceased was working were lying; nor has a single one of them put that engine down in such a way that there has been any connection whatever between that engine and the backward movement of the car—if there is
10 any connection whatever it is purely inferential. The second reason is that there does not appear from the testimony of the plaintiff any duty owing from the defendant to the deceased from the breach of which this man met his death. The case which was tried before, as your Honor recollects, differs from this in very slight particulars, mainly with reference to a flag. In this case there have been produced witnesses with reference to a flag, which, as your Honor recalls, was purely incidentally brought out in a former suit. The opinion rendered in
20 reversing that former judgment is very clearly to this effect—the language admits of no doubt. Judge Gummere there said “The duty of using care to avoid injuring Prosser while coupling on to the side track freight cars could only be imposed upon the train crew by bringing to their attention the danger to which he would be exposed unless care was used by them in the performance of their work.” The testimony with reference to the operation of the bridge gang around this car has not
30 been changed. The witnesses for the plaintiff on the former trial testified as they did in this trial that they were engaged in preparing this pile driver for the evening’s work. They were engaged in straightening out their material, and this made it necessary for them to mount and dismount from this car on both sides, and that the men were passing and repassing. The testimony of

Carlisle and of Powell varies in that particular no whit; it could almost be read from one book in to the other. Of course, there is a great deal more information in the questions asked by counsel than is contained in the replies of the witnesses; but it is not in evidence that these men were in this case doing anything more than was shown to the Court in the case before. They were engaged in exactly the same occupation in the same way. It may be argued that the position of the man Miller alongside the car was so close to the car that the movement of the train would be dangerous, but I call your Honor's attention to this fact: That Miller stepped out, as he said, upon the west side of the track. A reference to the map shows that that track curves from the east toward the west, and these two box cars standing ahead of Miller, as they did, would effectually bar any sight anybody coming down that track would have of Miller or any one else standing on the west side of that track. The men occupying a position on the other side of the track were in this case the same as they were before, moving to and fro upon the car and back of the car. The only difference is, it is attempted to be shown that a flag was put out. The old man who went into the woods disappeared from the scene of action some ten minutes before this crash occurred; therefore whatever may have been the condition or position of the men working about that car at the time this man disappeared does not necessarily reflect any light upon the conditions at the time the accident occurred. This man testified that he has some vague recollection of having seen a flag. Henhoeffler, if you remember, also says that after the accident he remembers seeing a flag lying upon the ground. It is evidently the intent of the plaintiff to show by the witness Powell that the train was properly flagged and I think your Honor must recall that testimony, which

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must ring in the Court's ears, almost, it has been so recent that Powell ten minutes after the train had been on this siding saw Henhoeffer's son go forward with a pocket flag, that is to say, a square flag to be folded and put in the pocket, a flag which must be held in the hand, and with which a party must signal with his hand. It was some ten minutes after Henhoeffer's son had gone forward—eight or nine minutes, to be more accurate that this accident occurred; therefore there is a lapse
10 from the time the signal man went forward, if he went forward, of eight minutes until the accident occurred. Now, there is not a particle of evidence to show what Henhoeffer's son did, how far up that track he went, what his location was at the time this engine came down this siding, if it came down. There is not a particle of evidence to show he had this flag anywhere except in his pocket. The flag is found after the accident, not in the direction in which Henhoffer took it, but lying under a water tower between the tracks opposite the point where
20 the pile driver car had lain. This indicates absolutely that the party who held that flag, if he did anything with it at all, carried it with him and dropped it under this water tower; he did not drop it on the scene of action. It cannot be argued that the train was flagged from a proper place because the flag was lying in the proper place, but the flag was found lying in a place where it could be of absolutely no use whatever, and as I say, it does not appear that the train crew could or should have
30 seen this flag. Now, it must appear, according to the decision in the former case, that the train crew should have had some idea that men would be working under that car, so that they should be put on notice of the dangerous position in which that man was, so that in backing down on that car they were under an obligation to use care in backing into it. I submit the circumstances

have not changed; they are the same in every particular as in the former case, and the motion for non-suit should be granted.

Judge Gaskill: The situation with reference to the flag is practically the same as it was at the former trial. I call your Honor's attention to the record of the former trial, the examination of Mr. Henhoeffler by Judge Westcott. (Reading testimony.) You will see there is the same uncertainty as to the flag being up as there is now, and the situation has not been changed at all by this new testimony of Powell. We submit there has been absolutely no change in the testimony with respect to a flag by this new declaration of Powell's from what the case was before. In other words, there is an uncertainty, to say the most for their side you can say for it, as to whether there was a flag signal given or not. They say Henhoeffler's son took this flag; they do not account for the absence of Henhoeffler's son and the presumption must necessarily be that he is alive and that he would not swear that he had taken the flag and given the signal or they would have called him. Now, where there is evidence within reach of a party which they do not produce, the strongest inference is to be made against them. Now, only a word as to Chief Justice Gummere's decision in the former case. As to the body of the decision, the situation is exactly the same as it is now, that is to say, that the car was placed upon the siding. We had done our work then; that is to say, the railroad company had performed their obligation to these men when they put them on the siding. They were independent contractors; they were not railroad people; so that we owed them no further duty. (Reading.) "When Prosser got under the car no flag was put upon it to indicate that some one was at work upon or about it, nor was anything

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else done, either by himself or his fellow workmen, to notify third persons of his presence there or to protect him while he was engaged in his work. No member of the crew of the freight train nor any other employee of the defendant company (so far as the case shows) had any knowledge that he was under the car." Now, where have they brought home to any of the defendant's employees the knowledge that the man was under the car either by flag or otherwise? Then the Chief Justice says,

10 "That work had temporarily ceased at the time of the accident and the car had been laid off the siding. While it lay there it needed no attention from Henhoeffler & Vaughn's employees, so far as the railroad company or its employees knew"—that is to say, we had no knowledge that that bolt had been bent so it required the stroke of the maul in order to straighten it so it might be pulled out from the top of the car—"and there was nothing in its surroundings to suggest to the defendant company's

20 employees who were operating its freight train that any carelessness upon their part in running against the flat car might jeopardize the safety of a member of the bridge repair gang." Even if we were careless, the Court says there was nothing to notify any of our people, even if careless, that we would hurt any one. "The duty of using care to avoid injuring Prosser while coupling on to the side track freight cars could only be imposed upon the train crew by bringing to their attention the danger to which he would be exposed." Now, we submit they

30 have not brought it to the attention of the engine man, the fireman, the conductor, or any one else in that crew that any fatal result would follow from their backing down on these freight cars.

Mr. Bleakley: As far as the first point is concerned, that there was no proof about this engine backing down,

it is ridiculous in the extreme. You have got to assume, even if there was any proof, according to their theory, that these cars flew down the track with such tremendous force that they knocked a braked car 20 feet. Now, there was only one engine there; that engine after this accident was on this track, and we prove it on the track right ahead of these cars. There was nothing else on the tracks to move them. Even if it was only an inference, it is such a fair inference it requires no discussion and needs no argument. I claim that the testimony shows it is more than inferential, that the proof is strong enough to exclude any other theory. I imagine, however, that Counsel's main point is the other reason. They say this case is tried exactly the same. Now, it is not. The Chief Justice said, "It apparently was considered, upon the trial of the case, that Prosser's death resulted from the negligent performance of the duty which the Railroad Company owed to the employees of Henhoeffler & Vaughn to run its trains with a due regard to their safety while they were engaged in the work of repairing the Company's bridges." So it was; that is the way the case was tried. Take the testimony of the man Powell; is there a single line asked him about the flag? Did we think it was necessary in the other case? Not for a moment. He was not asked a single line about the flag because we did not think it was necessary; but now there is no inference about the flag. It is so clear that it is beyond dispute and argument as to where that flag was.

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The Court: It was where?

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Mr. Bleakley: Right up the track toward the station.

The Court: Well, he says Henhoeffler's son started up with it; he don't say what he did with it.

Mr. Bleakley: He said he saw him up there with it.

Mr. Nelson Gaskill: He did not say that; he distinctly said he did not.

Mr. Bleakley: I don't see that he would have to swear that he stood there waving the flag. Mr. Webb saw it—Mr. Webb saw the man there with the flag. Now, then, they say this does not gee with the other case. If they will read Mr. Henhoeffer's testimony in
 10 the other case, it was not the same flag or the same time, for it was a flag with a single stick. In the other case it was a flag on the main line, and this was a flag without a stick. Now, they say they found a flag dropped up by the water tank. This is a most important fact to prove just what we contend for. What happened? What did everybody do? To drop everything instantly and run was a natural impulse, and where do we find the dropped flag? Right up at the exact spot where the men swear
 20 it was, right up there. What is the natural inference from that, let alone any testimony of Webb? It is that he got up there with the flag and dropped it instantly. Of course, they had dropped everything, all of them did with a man killed, the same as any person would do. That fact, instead of being against us, supports our theory conclusively and supports Webb and Powell.

(At this point the testimony of Powell in regard to a flag was read by a stenographer.)

30 Mr. Bleakley: Now, according to the other side we have got to have a man there and have him swear he stood there waving the flag. Now, he was seen going up there with the flag, not in his pocket—

The Court: Do you expect the jury to infer that be-

cause the man started back with the flag that he displayed it where the crew could see it? That is your position?

Mr. Bleakley: Well, that is part of it.

The Court: What other position do you take now?

Mr. Bleakley: Their cross-examination refers to after the examination, and tied up with what went before, that man's story is as straight as a string; and taking the story of Webb together with his story and the fact that the flag was found up at this point, taking the whole thing together, it seems to me it is perfectly clear; and if it was not, certainly it is enough without any proof to the contrary. It is enough of a warning, because these men were ten or fifteen minutes around there previous to the time of this freight train. There were other men there belonging to this crew of railroad men—that has been proved in the first part of the case by the witnesses. Now, then, taken in connection with the other thing, that they could have seen Miller—here was the end of the freight train and here was Miller just 100 feet away, referring to Mr. Henhofer's testimony—and the man going up there with the flag all just previous to the accident—why, we couldn't tie it any closer. We would have to have stop watches there to prove it the way they want it.

The Court: The Supreme Court has said this Company owed no duty to your men unless it was brought to their attention that this man was in a place of danger. I do not see that you have shown how it was brought to their attention. You have shown it might possibly have occurred, that their attention was drawn to it, that somebody started to give notice, but no one has said that no-

tice was given. I do not see any difference between the case as it is now and as it was before.

Mr. Wescott: Now, I want to make just these few observations in order that your Honor may get all the light you can before you finally decide. On the point that we have not shown whether or not the defendant backed that train, let me say that the proof is by Mr. Powell that there was only one engine there. There
10 was no engine at the Haddonfield depot before this freight train arrived, and the same engine that pulled the freight train up was on the side track after the accident. There being no other engine there, of course that engine must by necessary inference have backed those cars. That fact rests upon inference, and there can be no other inference drawn. So much for that. I will not assume for a second that your Honor would say that we had not proven that the defendant backed that train. Now, in respect to the other branch of the case, this case differs
20 from the other in several very important features. The first one is that it is shown in this case and was not shown in the other that this gang was working for the defendant company at Springdale—that was shown in the other case—and after it finished its work this house car and flat car were brought by the defendant itself and put on that side track in order that it might prepare itself to continue the defendant's work that same evening at Cooper's Creek. Now, that is a profoundly important fact in this case, for this reason—it makes a continuous
30 service; that is to say, the defendant company itself said to Mr. Henhoeffler and Vaughn and his agents, "We want you to go to this side track in Haddonfield and prepare yourselves to go from there to Cooper's Creek; we not only want you to do that, but we will put you there." Therefore, it appears most clearly in this case as it now

stands that the defendant itself took these men for the defendant's own purpose, intending to use them and intending that they should work where they put them in order to continue the service at Cooper's Creek. They could not have done that without knowing it; therefore I say that Judge Gummere's criticism is incontestably met by the circumstance that the defendant itself put these people on that side track.

The Court: That was all before the Court in the other case. 10

Mr. Wescott: Very well; if it was then I have nothing further to say about it except this; that when Judge Gummere said the defendant did not know those people were there, if that fact was in the other case, he certainly misunderstood the evidence, because if the defendant put them there it knew it. In the next place this case as now tried differs from the other in these essential particulars: We have brought out in this trial with great clearness that this house car, sleeping car, differs from other cars. It was in plain sight. The flat car had an engine on it which was conspicuous, that was exposed to the sight of any one. These two cars stood in exposed view to the agents of the defendant who by the testimony in this case were there in numbers—several of them were there and saw these cars. We have also proven fully in this case—and in this respect it differs from the other—that the gang working at those cars were on the cars, around them, on the sides, at the ends and on top of the cars and in and out of them while the agents in charge of the freight train were there and saw them. Now, the law is that what a man must see he did see; that has been held over and over again. Now, it passes belief that the agents of the company did not 20 30

see these cars and these men working there and whether they did or not is purely a jury question. They must have seen them. Henhoeffler said he was talking to one of them and he was facing the cars, so he could not help but see them. Another witness said that three or four of the railroad men were there while they were standing there and working around these cars. Now, it was these same men that shunted these freight cars down there; therefore they must by resistless inference have known
10 these people were there. Now, that fact being so conspicuous in this case, I know if this case were before your Honor for the first time you would unhesitatingly say what these men must have seen they did see. Now, in the third place we differ in this case about the flags. The proof fairly is that this red flag was a danger flag, that Henhoeffler & Vaughn's men had this flag, a danger signal, for the purpose of protecting themselves; that one of them was sent up the track toward Haddonfield with this danger flag, and he was up there some time. Your
20 Honor asked whether or not that flag was displayed, whether or not the employees of the defendant company saw that flag. That brings us again to a question of inference. In the first place, the flag was meant to be used as a danger signal; in the second place the man was directed to take that flag up the road as a danger signal. He did take it up there and he was there from ten to fifteen minutes with that flag. Now, then, because we are unable to show that some of the employees of the defendant saw that flag, the argument is we are not entitled
30 to go to the jury. We are not obliged to prove that we exposed that flag to these people. We took this danger signal up the road for the purpose of exposing it to these people and had it there ten or fifteen minutes for that purpose, and we are not to be saddled with the fault that they didn't see it; because it is incontestable, it seems to

me, as an inference from the situation that they did not see it because they were not there to see it. The probabilities are that there was nobody on the rear of the car to see the flag on that train, but the flag was there and it was the duty of these people to heed that signal, and if they did not heed it because they were not there it was their fault. Now, it seems to me it is moonshine to say we had to show exactly how the flag was held, that we were obliged to do more than hold that signal up there.

The Court: You do not show that it was displayed at all. None of your men say they displayed it; no man comes here and says he displayed it.

Mr. Wescott: You have no more right to draw the inference that they did not display the flag than you have to draw the inference that they did display it. The question is now whether you are going to infer when the man was sent up there with the danger signal and stood there ten or fifteen minutes that he put it in his pocket and did not show it or whether you are going to leave that to the jury. On that precise point the final bit of evidence which I think should send the case to the jury is this, that two witnesses saw that man up there with the flag. If they could see the flag could not the employees of the defendant see the flag?

The Court: (After further argument.) I cannot resist the impression that I should non-suit.

Whereupon the plaintiff, by her Counsel, prays a bill of exceptions, which is allowed and sealed accordingly.

ALLEN B. ENDICOTT,
Circuit Court Judge.

SUMMONS.



THE STATE OF NEW JERSEY, to our
 Sheriff of our County of Camden,
 Greeting:

We command you to summon the West Jersey and
 Seashore Railroad Company to be and appear before the
 Supreme Court of the State of New Jersey, to be held at
 10 Trenton, in and for said State, on the fourteenth day of
 April, A.D. nineteen hundred and three, to answer unto
 Mamie Prosser, administratrix of the goods, chattels,
 effects, etc., of Benjamin Prosser, deceased, in an action
 of Tort to the plaintiff's damage twenty thousand
 dollars, and have you then and there this writ.

Witness, Honorable William S. Gummere, Chief
 Justice at Trenton, aforesaid, the fourth day of April,
 A. D. nineteen hundred and three.

WILLIAM RIKER, JR.,
 Clerk.

20 H. C. KRAMER,
 E. G. C. BLEAKLEY,
 Attorneys.

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NEW JERSEY SUPREME COURT.

30 Of the fourteenth day of April, A. D. nineteen hun-
 dred and three.

CAMDEN COUNTY, SS.:

The West Jersey and Seashore Railroad Company, the
 defendant in this suit, was summoned to answer unto

Mamie Prosser, administratrix of the goods, chattels, effects, &c., of Benjamin Prosser, deceased, plaintiff therein, in an action of tort, and thereupon the said plaintiff by H. C. Kramer and E. G. C. Bleakley, her attorneys, complains for that whereas, before and at the time of the committing of the grievances hereinafter next mentioned, to wit, on the twelfth day of August, A. D. nineteen hundred and two, at Haddonfield, in the County of Camden aforesaid, and within the jurisdiction of this Court, the said Benjamin Prosser was employed by Henhoeffler & Vaughn to perform general work and to do certain labor in, on and about a certain pile driver apparatus at or near Haddonfield, in the County aforesaid; that the defendant Company controlled, operated and managed, under and by virtue of legislative sanction of the State of New Jersey, a steam railroad extending from the City of Camden through and across the County of Camden to Atlantic City in the County of Atlantic, and was engaged in the business of a common carrier of passengers and freight thereon for hire and reward, and which said railroad extending as aforesaid runs in a northerly and southerly direction in and through Haddonfield, in the County aforesaid, and from the main line of which said railroad, near Haddonfield aforesaid, there was then and there erected and maintained by said defendant Company, a siding or branch railroad connected with the said main line railroad by a switch or switches and frog rails, &c., and on which said siding or branch railroad there were then and there maintained and operated by the said defendant Company, engines, coaches, carriages and cars. And the plaintiff further avers that the said defendant Company was then and there possessed of a certain locomotive or engine propelled by steam, and of certain coaches and freight cars designed to be drawn and propelled by said engine over

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and upon the said tracks of said railroad, and which said engine, carriages and cars were then and there under the care, government and direction of a certain servant or servants, then of the said defendant Company, who were then and there propelling and moving, or causing to be propelled and moved, the said engine, carriages and cars from off the main track of the defendant Company, near Haddonfield aforesaid, in and along and on said siding.

And the plaintiff further avers that the said defendant
10 Company, as a common carrier of freights as aforesaid had then and there transported said pile driver apparatus for him and reward paid to it in its capacity as a common carrier of freight, for the said Benjamin Prosser's employers, viz., Henhoeffler & Vaughn, from its main line aforesaid, on to said siding at or near Haddonfield aforesaid and said defendant Company then and there represented to the said employers and their employees and to the said Benjamin Prosser, that they were to work in,
20 on and about the said pile driving apparatus while the same was located on said car of the defendant Company stationed on said siding, and that they could then and there so work and be employed free and safe from any danger or injury from the said defendant Company or its servants or employees; and then and there assured the said employers, their servants and the said Benjamin Prosser, that the said car on which the said apparatus was then and there located, would be safe from injury and danger of collision with the locomotive and cars of the said defendant Company, while the said employers, their
30 employees and the said Benjamin Prosser were working in, on and about the said pile driving apparatus. And the said defendant Company particularly represented that its said car on which said apparatus was then and there maintained, and in, on and about which the said Benjamin Prosser was then and there employed, as lawfully he

might, and that while he was so employed, would be so placed that no car or engine of the said defendant Company would disturb its position or collide therewith and that it would be safe for the said employers and their servants, and the said Benjamin Prosser then and there, to work in, on and about the same.

And thereupon the said Benjamin Prosser, on the day and year aforesaid, confiding in the representations, promises and undertakings aforesaid of the said defendant Company, was then and there lawfully engaged as an employee of the said Henhoeffler & Vaughn, contractors, were then and there engaged in certain work, to wit, repairing a bridge, as such contractors, as lawfully they might be, at or near Haddonfield aforesaid, and near the said siding or branch road aforesaid, and by command and at the request of said defendant Company, the said Benjamin Prosser, then and there, not knowing that the said car, on which said pile driving apparatus was placed, was dangerous and unsafe for the purposes of his employment as aforesaid, and in the ordinary performance of his duty in working on, in and about the said apparatus and the said car on which said apparatus was erected and maintained on said siding as aforesaid, went on and under said car to perform his duty as aforesaid, and that at the time he went thereon, the said car was wholly unsafe and dangerous in that the said car was not free from the danger of collision with the defendant's other cars and that the defendant then and there well knew and long before then well knew and had full means of knowing that its said car on which said apparatus had been so transported and on which it was then and there maintained, was dangerously located and likely to be collided with by its other cars and engines and thereby likely to cause injury and damage to the said Benjamin Prosser and others then and there using the

same and working in and about the same in the ordinary manner of their employment and for the purpose aforesaid, as lawfully he and they might.

And the said plaintiff further avers that it was the duty of the said defendant Company to keep the said car stationary and in a safe and secure position for the purposes aforesaid and to have taken care that the said car would not be unsafe and dangerously located but that the same would be in a proper
10 and safe location and condition for the purposes aforesaid, and that the same would not be collided with or struck by any of the defendant Company's locomotives, engines or cars.

And said plaintiff further avers that then and there, by reason of the aforesaid insecure, negligent, wrongful and improper conduct of the said defendant Company, by its servants and employees, in not taking proper care that the said car containing said pile driving apparatus was in a safe and proper place, and sufficiently guarded
20 for the purpose aforesaid, and by reason of the dangerous, negligent, insecure and unsafe placing, locating and maintaining of its said car, and while said apparatus located on said car was being used as aforesaid in the ordinary manner and with due and reasonable skill and care on the part of the said Benjamin Prosser; and while the said Benjamin Prosser was in, on and about the said car, performing his duties as aforesaid, as lawfully he might, the said defendant Company so carelessly managed, moved, operated and conducted its said engine,
30 coaches and cars off from said main line onto and along said siding that by and through the said careless, negligent, wrongful and improper conduct of the said defendant Company, by its servant or servants in that behalf employed, a car of the said defendant Company, then and there, ran into and collided with and struck with

great force and violence the said car containing said pile driving apparatus in, on or about which the said Benjamin Prosser was then engaged in his duties as aforesaid, as lawfully he might, and then and there caused its said car on which said apparatus was maintained to strike with great force and violence on and against the person of the said Benjamin Prosser, and by reason of the bruises, hurts and wounds then and there by the said defendant Company thereby caused, the said Benjamin Prosser was so injured, that he died, to wit, on the 12th day of August, A. D. nineteen hundred and two, at Had-

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donfield, in the County of Camden, aforesaid. And the plaintiff further avers that the said Benjamin Prosser left him surviving this plaintiff as his widow aged twenty-nine years and that he also left him surviving one child aged five years as his next of kin, and that they have, by reason of the premises sustained and suffered great loss, injury and damage, to wit: the sum of twenty thousand dollars whereby and by force of the statute in such case made and provided an action hath accrued to the plaintiff as administratrix of the goods, chattels, effects, &c., of the said Benjamin Prosser for the benefit of the said Mamie Prosser, widow and said child, the next of kin to the said Benjamin Prosser, deceased, to demand and have from the said defendant Company the said several sums of money above demanded in manner and form as in above demanded, and therefore, she brings her suit, etc.

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And said plaintiff brings here into Court the letters of administration granted to the plaintiff of the goods, chattels and effects of the said Benjamin Prosser, by George S. West, the then Surrogate of the County of Camden, which said letters give sufficient evidence to the said Court of a grant of administration to said plaintiff as

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aforesaid, the date whereof is a certain day and year therein named, to wit, the fifteenth day of November, A. D. nineteen hundred and two.

H. C. KRAMER,
E. G. C. BLEAKLEY,
Attorneys for Plaintiff.

Plea—General issue.

10 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 Camden in and for the County of Camden on the fourth Tuesday of September, in the year of our Lord, one thousand nine hundred and six, by whom, etc., and the same day is given to the parties aforesaid there, etc.

20 And now at this day, to wit, the third day of October, A. D. one thousand nine hundred and six, before our said Supreme Court at Trenton, comes the said party by her attorney aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:

30 Afterwards, that is to say, on the twenty-first day of September, in the year of our Lord, one thousand nine hundred and six, at the place within contained, before the Honorable Allen B. Endicott, one of the Circuit Court Judges of the State of New Jersey, to whom the within issued joined in the Supreme Court of said State was referred by the Justice of said Supreme Court holding the Camden County Circuit, according to the form of the statute in such case made and provided, come as well the within named plaintiff, Mamie Prosser, administratrix, etc., by Messrs. Bleakley & Stockwell, and John W. Wescott, Esquire, her attorneys, as the within named West Jersey and Seashore Railroad Company, defendant,

by Gaskill & Gaskill, Esquires, their attorneys, and the Jurors of the Jury, being summoned, also come, who, to speak the truth of the matters within contained, were tried and sworn; and after evidence being given thereupon in behalf of the plaintiff, whereupon the defendant moved that the plaintiff be non-suited, and the Court having considered the matter and being of the opinion that the testimony adduced by the plaintiff was not sufficient in law to support the case set forth in the declaration, directed that a non-suit be entered.

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Therefore it is considered that the said Mamie Prosser, administratrix, etc., of Benjamin Prosser, deceased, take nothing by her said writ and that the said The West Jersey and Seashore Railroad Company do go thereof without day, etc.

Judgment signed this third day of October, A. D. nineteen hundred and six.

WILLIAM S. GUMMERE, C. J.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

	MAMIE PROSSER,	}	In Tort.
	Administratrix, &c.,		
	Plaintiff in Error,		
10	vs.	}	Assignment of Errors.
	WEST JERSEY AND SEASHORE		
	RAILROAD COMPANY,		
	Defendant in Error.		

And now on this day the plaintiff assigns the following cause of error:

20 First.—Because the Trial Judge erroneously and unlawfully non-suited the plaintiff.

Second.—Because the said proceedings are in sundry other respects irregular, illegal and void.

Third.—Because the said verdict is contrary to the law and evidence.

BLEAKLEY & STOCKWELL,
JOHN W. WESCOTT,
Attorneys for Plaintiff.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

MAMIE PROSSER,

Administratrix, &c.,

Plaintiff in Error.

vs.

WEST JERSEY AND SEASHORE

RAILROAD COMPANY.

Defendant in Error.

In Tort.

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Joinder in Error.

And afterwards, the said West Jersey and Seashore Railroad Company, by Gaskill & Gaskill, its attorneys, comes into Court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and it prays here that the Court here may proceed to examine the record and proceedings aforesaid, as the matter aforesaid assigned for error, and that the judgment aforesaid in manner aforesaid given, may in all things be affirmed, &c.

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GASKILL & GASKILL,
Attorneys for Defendants.

THE HISTORY OF THE
CITY OF BOSTON

IN THE

SEVENTEENTH CENTURY

BY

JOHN H. COOPER

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