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TESTIMONY.

For Plaintiff.

TESTIMONY.

FOR DEFENDANT.

REBUTTAL FOR PLAINTIFF.

(STATEMENT OF COWARD.)

Summons.

(Filed Aug. 30, 1924.)

THE STATE OF NEW JERSEY

to

OTIS ELEVATOR COMPANY, a corporation.

You are summoned to answer the annexed complaint of Jessie Catterall as administrator ad prosequendum of the estate of George Catterall, deceased, in an action at law in the New Jersey Supreme (Hudson Co) Court. And take notice that unless you file your answer to complaint with the Clerk of the said New Jersey Supreme (Hudson Co.) Court, at Trenton within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton this thirtieth day of August nineteen hundred and twenty-four.

J. RAYMOND TIFFANY,
Attorney.

EDWARD J. KELLEHER,
Clerk.

Complaint.

(Filed Aug. 30, 1924.)

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

JESSIE CATTERALL as administratrator ad prosequendum of the estate of GEORGE CATTERALL, deceased, *Plaintiff,* *vs.* OTIS ELEVATOR COMPANY, a corporation, *Defendant.*	Action at Law.

Jessie Catterall, complaining of the defendant Otis Elevator Company, says:

1. At all times hereinafter named the defendant, Otis Elevator Company, was and now is a body corporate.

2. On or about June 4, 1923, the plaintiff's intestate George Catterall was employed at work in and about building, in the course of the construction adjoining and adjacent to the building occupied by R. H. Macy Co., on 34th Street, New York City, New York, known as the R. H. Macy Extension.

3. The defendant company by its agents and servants was at said time and place installing and operating newly installed elevators for its own use and purposes.

4. On said day and while plaintiff's intestate was working in and about said building in accordance with the instructions of his employers, the defendant company, by its agents and servants, without warning to plaintiff's intestate and with utter disregard for his safety, wantonly and with gross negligence and carelessness, deliberately and willfully operated one of its said elevators, in such a careless and negligent manner so as to cause plaintiff's intestate to sustain numerous and serious bodily injuries of such a nature as to cause the immediate death of said George Catterall.

5. At the time defendant company operated the said elevator by its agents and servants as aforesaid, it knew or should have known from the warning given to it of the presence thereabout of the said George Catterall and that the operation of said elevator without warning to the plaintiff's intestate would result in injuries to him that would cause his death.

6. Said George Catterall, plaintiff's intestate, left him surviving as his next of kin, his widow, Jessie Catterall, the plaintiff herein, and three infant daughters, Jessie Catterall, Ethel Catterall and Winifred Catterall, all of whom have sustained great pecuniary loss, damage and injury by reason of the death of the said George Catterall.

7. On or about May 19, 1924 the plaintiff herein was granted administrator ad prosequendum of the estate of the said George Catterall, deceased.

Plaintiff demands damages in the sum of Fifty Thousand ($50,000) Dollars and cost of suit.

J. RAYMOND TIFFANY,
Attorney for Plaintiff.

Answer.

(Filed Sept. 15, 1924.)

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

JESSIE CATTERALL as administratrator ad prosequendum of the estate of GEORGE CATTERALL, deceased,

Plaintiff,

vs.

OTIS ELEVATOR COMPANY, a corporation,

Defendant.

Action at Law.

The defendant, OTIS ELEVATOR COMPANY, a domestic corporation, having its office at No. 15 Exchange Place, Jersey City, Hudson County, New Jersey, answering the complaint herein, says:

Answer.

1. It admits paragraph 1.

2. It denies that it has any knowledge or information sufficient to form a belief as to the truth of paragraph 2, and, therefore, denies the same.

3. It denies paragraph 3.

4. It denies paragraph 4.

5. It denies paragraph 5.

6. It denies it has any knowledge or information thereof sufficient to form a belief as to the truth of any of the allegations of paragraph 6, and, therefore, denies the same, and places plaintiff to the proof thereof.

7. It denies it has any knowledge or information thereof sufficient to form a belief as to the truth of paragraph 7.

FIRST DEFENSE.

FURTHER ANSWERING THE COMPLAINT, the defendant alleges that any injuries which the plaintiff's intestate may have sustained at the time and place described in the complaint were caused or contributed to by negligence on his part in that he knew or should have known of the presence of the elevator in the shaft where he was at work, and that the same was operated from time to time, and failed to take precaution so that the operation of the said elevator would not endanger the platform upon which he was working, and failed to give warning to the defendant of his presence in the shaft or of his intention to enter

the shaft, but on the contrary, with utter disregard for his safety and with gross negligence and carelessness he entered the elevator shaft and constructed therein a platform in a negligent and careless manner, and otherwise negligently and carelessly exposed himself to danger,

WHEREFORE, the defendant demands judgment in favor of the defendant with costs of suit.

WALTER L. GLENNEY,
Attorney for defendant.

Reply.

(Filed Sept. 17, 1924.)

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

JESSIE CATTERALL as administratratrix ad prosequendum of the estate of GEORGE CATTERALL, deceased, *Plaintiff,* *vs.* OTIS ELEVATOR COMPANY, a corporation, *Defendant.*	Action at Law.

Plaintiff, Jessie Catterall, as administrator ad prosequendum, replying to the answer filed in this cause says:

REPLY TO THE FIRST SEPARATE DEFENSE.

She denies the allegations contained in the first separate defense and says that her intestate took such precaution as a reasonably prudent person would take under the facts then present to safeguard himself from injury, and he informed the said defendant, its agents and servants of his presence in the shaft.

J. RAYMOND TIFFANY,
Attorney for Plaintiff.

Judgment.

(Filed April 16, 1925.)

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

JESSIE CATTERALL as administratratrix ad prosequendum of the estate of GEORGE CATTERALL, deceased, *Plaintiff,* *vs.* OTIS ELEVATOR COMPANY, a corporation, *Defendant.*	Action at Law.

It is ordered that judgment be and hereby is

entered in favor of plaintiff and against the defendant for the sum of twenty-two thousand five hundred dollars, besides costs to be taxed nisi.

Entered April 16, 1925.

On motion of
J. RAYMOND TIFFANY, Attorney.

Rule to Show Cause.

(Filed April 15, 1925.)

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

JESSIE CATTERALL as Adm. ad pros. of the estate of GEORGE CATTERALL, deceased. *Plaintiff,* *vs.* OTIS ELEVATOR COMPANY, a corporation, *Defendant.*	Action at Law.

Application having been made within six days after the rendering of the verdict in the above entitled action, for a rule to show cause requiring the plaintiff to show cause why the verdict rendered in her favor should not be set aside and a new trial granted, it is, on this 15th day of April, 1925,

Rule to Show Cause.

ORDERED that the plaintiff show cause before the Supreme Court of this State at the next term why the verdict should not be set aside and a new trial granted. It is

FURTHER ORDERED that the exceptions taken by the defendant at the trial be reserved; and it is

FURTHER ORDERED that pending the determination of this rule, the issuing of execution be stayed.

On motion of
WALTER L. GLENNEY,
Attorney of Defendant.

WILLARD W. CUTLER,
Judge.

Reasons.

(Filed May 13, 1925.)

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

JESSIE CATTERALL as Adm. ad pros. of the estate of GEORGE CATTERALL, deceased.

Plaintiff,

vs.

OTIS ELEVATOR COMPANY, a corporation,

Defendant.

at Law. Action

The following are the Reasons upon which the defendant rests the motion for a new trial of the above state cause:

FIRST: The verdict of the jury was contrary to the weight of the evidence.

SECOND: The jury found for the plaintiff, whereas, in fact, they should have found a verdict for the defendant, since it appeared from the evidence that the plaintiff was guilty of contributory negligence and that the defendant exercised due care.

THIRD: The verdict of the jury was contrary to the charge of the court.

FOURTH: The damages awarded by the verdict are excessive.

WALTER L. GLENNEY,
Attorney of Defendant.

Testimony.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

JESSIE CATTERALL as administratrator ad prosequendum of the estate of GEORGE CATTERALL, deceased,

Plaintiff,

vs.

OTIS ELEVATOR COMPANY, a corporation,

Defendant.

Before:

HON. WILLARD W. CUTLER, Judge, and a Jury.

Jersey City, New Jersey,
April 13, 1925.

APPEARANCES:

HON. J. RAYMOND TIFFANY, attorney for plaintiff.

MESSRS. EDWARDS & SMITH, attorneys for defendant,

EDWIN F. SMITH, ESQ, of counsel.

A jury was empanelled, declared satisfactory and sworn.

Mr. Tiffany opens for the plaintiff.

Mr. Smith opens for the defendant.

MR. TIFFANY: With the permission of the court, I have one witness here I would like to call out of order and let him go.

THE COURT: You may.

GEORGE F. SALTER, sworn as a witness for the plaintiff, testifies:

DIRECT EXAMINATION BY MR. TIFFANY:

Q. Mr. Salter, what is your profession? A. Life insurance actuary.

Q. With what company are you connected? A. The Prudential of Newark.

Q. In what business are you engaged? A. I am in a department which is known as the arithmetical department, that is really the actuarial department.

Q. Having, among other things, to do with the expectancy of lives of individuals? A. Yes.

Q. What study have you made of your profession? A. I have been connected with life insurance since 1891, and twenty years of that time I have been connected with the Prudential. I am an associate of the Actuarial Society of America, to which society all qualified actuaries belong.

Q. Have you a table with you showing the various expectancies of life at different ages? A. I have.

Q. Will you produce it, please? A. It is in this book (produces book).

Q. What is the book you produce? A. It is the standard book on that subject, by David

Chisolm, and contains the Carlisle Tables of Mortality.

Q. Will you tell me, after reference to that book and from your experience, what would be the expectancy of life of a man who was born October 4, 1881, as of June 4, 1923? A. (Refers to book) Twenty-six years and three-tenths of a year.

Q. And the expectancy of life of a lady, who was born on April 2, 1884, as of June 4, 1923? A. Twenty-eight years and three-tenths of a year.

Q. And the expectancy of life of a female child, who was born June 6, 1913, as of June 4, 1923? A. Forty-eight years and eight-tenths of a year.

Q. And the expectancy of life of a female child born December 27, 1915, as of June 4, 1923? A. Fifty years and eight-tenths of a year.

Q. And the expectancy of life of a female child born January 26, 1923, as of June 4, 1923? A. Thirty-eight years and seven-tenths of a year.

Q. When you say the expectancy of life and give the various years you have, in answer to my questions, is that the number of years you have figured according to the Tables that those various persons would live in the ordinary course of events? A. Yes, that is correct.

Cross Examination by Mr. Smith:

Q. You do not mean, do you, Mr. Salter, the length of time that the people would live in the ordinary course of events? A. I see your point. A person of that age——

Q. You take that table, which is made up from a vast number of lives? A. That is true.

Q. And you take the average life in a vast

number, you take that as the avarage life of that number; you take the aggregate of all the lives of the same year of birth and the number of years they live until their death, and dividing by the number of lives gives the mean? A. Yes.

Q. But you do not mean to say that any particular person, no matter what his condition of life, would live that time? A. On, no.

MR. TIFFANY: I offer the book in evidence.

Received and marked exhibit P-1.

MR. TIFFANY: I offer in evidence certificate to Jessie F. Catterall, as administrator ad prosequendum, on the estate of George Catterall, deceased, granted June 1, 1924.

Received and marked Exhibit P-2.

MRS. JESSIE J. CATTERALL, sworn.

DIRECT EXAMINATION BY MR. TIFFANY:

Q. You are Jessie Catterall? A. Yes.

Q. You are the plaintiff in this suit? A. Yes, sir.

Q. What was your husband's name? A. George Catterall.

Q. What was his business on June 4, 1923? A. Carpenter.

Q. How long was he engaged as a carpenter? A. That I don't know, how long.

Q. Well, for one day or a week? A. Longer than a few weeks.

Q. How long had he been a carpenter for any one? A. All his life he has been a carpenter.

Q. Do you know when he was born? A. Have you got those papers?

Q. You can't ask that; do you know how old he was on June 4, 1923? A. Forty-two.

Q. How old are you? A. Thirty-nine.

Q. When were you born? A. April 20.

Q. What year? A. I will have to think of that.

Q. Think it out if you can; was it 1884? A. Yes.

Q. How many children have you? A. Three.

Q. All children of your marriage to your husband George Catterall? A. Yes.

Q. One of them was Jessie? A. Yes.

Q. When was she born? A. June 6, 1913.

Q. There was also a daughter Ethel? A. Yes.

Q. When was she born? A. December 27, 1915.

Q. Was it in 1915? A. Yes, 1915, Judge.

Q. And the other child was Winifred? A. Yes.

Q. How old is she? A. Four months old.

Q. When was she born? A. January 26, 1923.

Q. Then how old is she? A. She is two years old now.

Q. That is the baby you have in your arms? A. Yes.

Q. Born January 26, two years ago? A. Two years ago, Judge.

Q. Do you know whether your husband was born October 4, 1881, or not? A. Yes, sir.

Q. Was he? A. Yes.

Q. Do you recall that now? A. Yes, Judge.

Q. On the morning of June 4, 1923, did you see him, did you see your husband? A. Yes, sir.

Q. That was the day he was injured, killed? A. Yes.

Q. What was the condition of his health that morning? A. In the best of health, Judge.

Q. Had he been sick before that? A. No, sir.

Q. Do you know where he was working that day, whereabouts? A. I don't know whereabouts, but I know he was working on Macy's new building.

Q. In New York? A. Yes.

Q. Employed by whom? A. Norman & Seton.

Q. Do you know what your husband made a day? A. He just started to make ten dollars a day.

Q. Had he turned over any money to you the week before? A. Yes.

Q. How much money did he turn over to you? A. Forty-nine dollars.

Q. Did he turn that over to you every week? A. Certainly, he would. Sometimes more than that.

Q. How much did he turn over? A. Whatever he earned.

Q. You say he earned forty-nine dollars a week? A. Yes, and sometimes more than that.

Q. How much more? A. Sometimes seventy-nine dollars.

Q. For how long a period? A. Sometimes for three months at a time.

Q. Seventy-nine dollars for how many days a week? A. There was overtime in that.

Q. How many days a week? A. A week.

Q. What was the lowest money he ever turned over to you from his earnings? A. Never less than forty-nine dollars.

Q. And what was the greatest amount he turned over? A. Sometimes seventy-nine dollars and sometimes eighty-four dollars, and so on.

Q. And did you take care of the money for him? A. I certainly did.

Q. Did you see your husband alive again after he left you on the morning of June 4, 1923? A. No, I did not see him alive.

MR. TIFFANY: For the sake of the record, it is admitted that he died on June 4, 1923, as a result of the accident.

MR. SMITH: It is admitted for the record.

CROSS EXAMINATION BY MR. SMITH:

Q. Mrs. Catterall, you mean to say your husband worked every day in the year? A. Well, some days, but he was never long out of work, and then when he got work he made up for it.

Q. Some days he was out of work? A. He was not long out of work, just when a job was finished.

MR. TIFFANY: I wish it noted on the record, if the court please, that a notice to produce was served upon the attorney for the defendant to produce all sketches, drawings, etc., of elevator No. 21, in that building, and I call for the production of those records.

ANDREW ANDERSON, sworn.

DIRECT EXAMINATION BY MR. TIFFANY:

Q. Mr. Anderson, what is your business? A. Superintendent of construction, building business.

Q. By whom were you employed on June 4, 1923? A. Marc Eidlitz & Son.

Q. They were the general contractors on the Macy & Company extension job? A. Yes, sir.

Q. Who were the contractors having to do with the elevator? A. Otis Elevator Company.

Q. What was the business of Norman, Seton & Co. about those premises? A. Hanging elevator doors and track work.

Q. Carpenter work? A. Yes.

Q. Did you know Catterall? A. I must have known him but not by name, I know them all practically.

Q. In whose custody and control was elevator shaft No. 21, on June 4, 1923? A. Otis Elevator Company.

Q. On this day had it been turned over to Marc Eidlitz & Son? A. No, sir.

Q. Do you know whether the elevator had been finished in that shaft? A. It was not.

Q. Do you know the state of completion it had progressed to? A. Well, the platform was set, that's about all, and ropes hung.

Q. How many stories were there in that building? A. Nineteen.

Q. Was there a battery of elevators adjacent to 21? A. There were six other elevators.

Q. Were any of them completed in that battery? A. Not at that time.

Q. Were any of them being used for emergency work? A. We were using one for passengers.

Q. Under authority of the Otis Elevator Company? A. Yes, by permission from them.

Q. What elevator was that? A. No. 22.

Q. Do you know the name of the foreman in charge of the Otis elevator work on that job? A. James Coward.

Q. Now, what battery of elevators were the Norman-Seton employees working on June 4, 1923? A. They were working on that battery.

Q. Including Elevator No. 21? A. In 21 they were working.

Q. They were in the same battery, weren't they? A. In the same line, absolutely.

Q. What were they doing on that day about them? A. Hanging overhead tracks, putting the door slides on.

Q. And in hanging tracks such as they were working on was it necessary to go into the shaft? A. Yes, absolutely.

Q. Was there any arrangement or working agreement between the Marc-Eidlitz Company and the Otis Elevator Company, as to the use of these shafts by the carpenters when fixing the tracks? A. No agreement of any kind only to use them when wanted.

Q. What was that? A. We had to guarantee to work like any other trade, we worked in sections with one another.

Q. What was that? A. The Otis Elevator Company had first call in the shaft; if we wanted to get any other trade to work in that shaft, we had to find out from them when it would be available to get in the shaft, and notify them how they could get in the shaft and when.

Q. Was that the practice pursued? A. Absolutely.

Q. Will you describe the rigging necessary in order to work in that shaft and construct these tracks? A. There was a couple of jacks made and hung to outside door with the top across, and they had to put the corner on that in the shaft.

Q. Where would the men work? A. Standing in the shaft.

Q. Do you know what the construction of elevator 21 was on June 4, 1923, as to its hanging cables? A. The cables were hung.

Q. Were they straight or loose? A. Travelling cables were looped.

Q. When the elevator moved upward did the loop move upward or downward? A. It followed the elevator up.

Q. What would be the effect if a scaffolding were placed in that shaft above the loop when the elevator moved up? A. Why, the loop would catch the scaffold.

Q. Did you examine the sides of the loop of elevator 21 after this accident on June 4th? A. I did not, no.

Q. Did you talk to Coward, the foreman of the Otis Elevator Company, after the accident, about the accident? A. I don't remember doing so, I don't remember anything about it.

CROSS EXAMINATION BY MR. SMITH:

Q. Mr. Anderson, in operations of this kind, you say in the use of it the Elevator Construction Company had the first call upon the shaft? A. Positively.

Q. And if you wanted any other sub-contractor to work in the shaft, you would first have to notify the foreman of the Otis Company as to the time the sub-contractor could go in? A. I would ask him when it was possible for us to get into a certain shaft, and he would say when, and I would notify the sub-contractor that it would be possible for him to get into that shaft at that time; possibly they might not get in for two days afterwards, or it might be a day or half a day later.

Q. But there would be a time fixed? A. No, not definitely, but possibly the Otis people would be through at that time.

Q. How would you then arrange for the sub-contractor to get in? A. I would tell them the probabilities were that they would be able to use the shaft at that time, and then the sub-contractor would go and find out if it was ready or not, and, if not, he would make arrangements with the Elevator Company as to the time when he could get in for sure.

Q. So there would have to be arrangements made between you or the foreman of the sub-contractor and the foreman of the Elevator Company? A. Yes, naturally.

Q. That would have to be arranged? A. Naturally, we would do it.

Q. That is the usage in construction work of this kind? A. Yes, they wouldn't go in without notifying the sub-contractor.

Q. And so the sub-contractor would not go in to the elevator without notifying the foreman of the elevator people? A. Naturally they would not.

Q. How long have you known that to be the custom? A. Ever since I can remember.

Q. How long would you say that was? A. I have been in this business a long time.

Q. How many years? A. Twenty-five years with this concern.

Q. And that would be the custom all during the time you can remember? A. Yes.

Q. Now, when did you first know that the Seton men were working on shaft 21 on June 4th? A. I might have noticed them about—they walked through the building, but they were not drawn to my attention particularly.

Q. Had the Seton men made any arrangements with you? A. No, sir.

Q. So, as far as you know, no arrangements had been made with you by the foreman of the sub-contractor, for them to be in the elevator then? A. No. I may have made arrangements or told Mr. Seton when it was possible for him to get in, but no definite time.

Q. So that on June 4th you had not made any arrangements for that day for Mr. Seton's men to go in there? A. No.

Q. Now, Mr Anderson, elevator No. 22 had been turned over to Marc-Eidlitz & Company, when? A. We had taken that for a passenger car.

Q. That was taken over by them for temporary use some time in May? A. I wouldn't say the date.

Q. But it was before June 4th? A. Yes.

Q. Who was in charge of that? A. Of what?

Q. Of that elevator number 22? A. We had an operator running it.

Q. What was his name? A. He was an elevator boy of the contractor.

Q. Do you remember his name? A. He had an oddish name, I don't know.

Q. Elevator No. 21, had, on June 4th, the platform on? A. And some ropes.

Q. It was not finished? A. It was not finished, no.

Q. These elevators, of course, run up and down, and these travelling cables that you speak of, you mentioned one loop as being attached to the top of the elevator shaft? A. Yes.

Q. And the other runs up? A. Half way up the shaft.

Q. And as the elevator comes down the loop lengthens. A. Yes sure.

Q. And as you go up the loop follows? A. Follows the car up.

Q. Now you say in this shaft working there, were men of the Seton Company, they put jacks across? A. Yes.

Q. At that time of working shafts were open? A. Yes.

Q. They were closed on each floor? A. No, sir.

Q. So the jacks you speak of were just planks at right angles? A. Yes.

Q. And placed across the space? A. Hung to the front of the door, as far as I could see, or hung on the jamb.

Q. Hung on the jamb there? A. It might be; I wouldn't be positive.

Q. Hung on the ridges or the jamb? A. Yes.

Q. On those jacks you placed a plank? A. Yes.

Q. There are two jacks? A. Yes.

Q. And the planks are inside the shaft? A. Yes.

Q. Now, the loops of the cable hung down? A. Yes, sir.

Q. And when you put these planks in the shaft, isn't it wise to see that the planks do not run into

the loop? A. They don't run into the loop, they are longitudinal with the shaft, and the loops are in the center of the shaft.

Q. To the side? A. Hanging to one side in the center of the car.

Q. Now, Mr. Anderson, so we may understand each other, I show you a photograph and ask you if that shows what I and you term the loop of the cable? (Photograph shown witness.) A. This is in the center of the shaft (indicating), this is on the bottom of the car, in the center, and that is on the side of the shaft.

Q. I don't quite catch you when you say on the side? A. Right on the side here (indicating); this is in the center.

Q. That runs crosswise? A. A little diagonally, and to the front.

Q. How about this near one (indicating on photograph)? A. That is about a foot.

Q. What I want to get at is, when you build your planks lengthwise, we will call it, with the shaft, are not the men careful to see that the planks do not come within the loop? A. The loop wouldn't be there, the loop would be below.

Q. Below where? A. If the loop was below the scaffold you wouldn't see the loop. That cable that you point to me now is not in sight when the car is down, they can't see the side cables.

Q. But I am asking you now if it is not a fact that these men were careful to see the end of the plank did not come to the end of the shaft here so it would catch it? A. The loop is in the center of the shaft down below.

Q. Then what did they do, put the planks right through the cable? A. No, not right

through the cable; these two cables are against the wall, this other is in the center, isn't it?

Q. So it is, I did not realize that. A. It would be in the center if the cable was pulled up.

Q. Does the car occupy the whole shaft? A. Yes.

Q. Where is the cable attached to the car, right in the center of the car? A. Yes.

Q. And then it runs diagonally, you say, across the side? A. Yes, across the wall, to lie against the wall when the car is down.

Q. And your understanding is that the loop of the cable would run parallel with the plank? A. No, diagonally across the plank.

Q. Well, if the loop was down and the elevator ascended, would the cable interfere with the plank at all? A. Naturally, it would catch the plank.

Q. No matter how you put the plank there? A. Unless you put one plank in, and you could not stand on one plank, the cable has got to catch.

Q. Then, as I understand you, no matter how these planks are placed, if the elevator starts up the loop is bound to catch the planks? A. Yes.

Q. So, with an elevator in operation, or a shaft in operation, it is dangerous to put the jacks in? A. There is no mechanic would work with one in operation.

Q. In other words, it is dangerous? A. They won't work in the shaft, naturally, it is not safe.

RE-DIRECT EXAMINATION BY MR. TIFFANY:

Q. Mr. Anderson, were you the only person that made any arrangements, or was there a man named McGarry, who also made arrangements with the Otis Elevator Company? A. No, there

was one of my assistants named Bader, who used to make some arrangements.

Q. And you said something about the foreman of the carpenters making his own arrangements directly? A. Naturally, he would go to elevator superintendent, and ask if everything was clear.

Q. Do you know whether or not the Otis Elevator Company representative knew that these shafts were in the course of construction, and work was being done on them constantly? A. Surely.

RE-CROSS EXAMINATION BY MR. SMITH:

Q. You do not mean to say, do you, that the Otis people knew the Seton men were working in the shaft on June 4, 1923, on Shaft 21? A. I could not say that positively, but men were working on the shaft all the time; if they were not there somebody else would be.

Q. What you mean is if the Otis people were not using the shaft, there must have been somebody else ready to use it? A. Surely.

RECESS.

AFTERNOON SESSION.

April 13, 1925.

Trial resumed at 2 P. M.

ANDREW ANDERSON resumes the stand.

BY MR. TIFFANY:

Q. How quickly after the Otis Company is through running the elevator would you have men working in this shaft, this 21 shaft? A. As soon as possible after.

Q. What do you mean by as soon as possible after? A. We have to keep the work going all the time in the shaft in order to have it completed; some or other of the trades.

Q. Would it be simply a matter of the trade? A. We couldn't lose a day on it, possibly an hour or so, a couple of hours.

Q. What do you mean by possibly an hour or a couple of hours? A. As soon as the arrangements could be made to transfer another gang in there, they would go in.

Q. So that when you saw the Otis Elevator Company was not using the shaft, you mean another trade would go in even for a period of an hour or two? A. They wouldn't go in for an hour or two.

Q. For what length of time would they go in? A. For a day or a day or two, whatever they could get.

BY MR. SMITH:

Q. When you say that—the fact is, I understand you to say, that arrangements would have to be made as to when another trade could go in the shaft? A. Yes, between the various trades and the Otis Company, and us.

Q. And you would have to have arrangements made with the Otis Company? A. Naturally; no

sub-contractor would go in this shaft if the car was running.

Q. You mean if the car was in operation? A. Naturally, no.

Q. And in order to ascertain when it would be safe for the men to get in, arrangements would have to be made with the Otis Company as to time? A. Positively, yes.

BERT AUGUSTEEN, sworn.

DIRECT EXAMINATION BY MR. TIFFANY:

Q. Where do you live? A. 919 Willow Avenue, Hoboken.

Q. Did you know in his lifetime George Catterall? A. I did.

Q. What was your business in June, 1923? A. Carpenter.

Q. By whom were you employed? A. Norman & Seton.

Q. On what job? A. Macy's.

Q. Were you working with Catterall that day? A. I was.

Q. What wages were you receiving a day? A. Ten dollars a day.

Q. Do you know what wages Catterall received? A. Ten dollars a day.

Q. What particular kind of work were you doing on June 4, 1923? A. Working on hoods and tracks.

Q. Hoods and tracks for what? A. Elevator doors.

Q. Do you know the number of the elevator

shaft or battery you were working on? A. Working 27 to 21, on that battery.

Q. Before you went to work on that shaft, what floor were you working on on June 4th? A. The fifth floor.

Q. Who was your foreman? A. Aleck Moberg.

Q. You say he was your foreman? A. Yes, sir.

Q. How many carpenters were working in that battery? A. In that particular shaft?

Q. In that battery of shafts, in your gang, I will put it that way. A. That day I think there was three carpenters and a helper.

Q. And in shaft 21 how many were working? A. During the day I can't say.

Q. Just about the time of the accident? A. Just Mr. Catterall and myself.

Q. Who gave the instructions to you to go into that shaft? A. Our foreman.

Q. Had you before that day had anything to do with the Otis Elevator Company in connection with working in that shaft? A. We had.

Q. What was it?

MR. SMITH: I object to "We had".

THE COURT: Let him tell what he did himself.

Q. Did you personally have anything to do with the Otis Elevator Company in connection with working in that shaft? A. I did through my own foreman.

Q. Now, do you remember what day of the week it was, June 4, 1923? A. On Monday.

Q. What were you doing, what particular kind of carpenter work? A. Working on hoods and tracks.

Q. On the fifth floor? A. Yes.

Q. In your work on the fifth floor, did you work on the floor proper or in the shaft? A. We had to work in the shaft.

Q. You say you worked in the shaft? A. I did, certainly.

Q. Did you work on 21 shaft that afternoon? A. Yes.

Q. On a scaffold? A. Yes.

Q. Who were working on the scaffold? A. Mr. Catterall and myself.

Q. Before you put the scaffold in there, what did you do as to the elevator itself? A. We done nothing to the elevator itself.

Q. What did you do to insure yourself and your safety from any one running the elevator? A. The elevator was not supposed to run.

MR. SMITH: I move to strike that out as not responsive.

THE COURT: Strike it out.

Q. Do not use the word "supposed", do you know whether they were running that day? A. No.

Q. Do you mean you don't know? A. I don't know that they had been running.

Q. Did you do anything in reference to protecting yourself against any one running the elevator? A. We always look up and down the shaft.

Q. Did you do that on this day? A. Yes.

Q. When you looked up and down the shaft, where was Catterall? A. He looked up with me.

Q. Did you then put up your scaffold? A. No.

Q. When you looked up and down the shaft, what did you see? A. I saw the elevator parked permanently on the ninth floor, I think.

Q. What did you do then?

MR. SMITH: I object.

Q. Did you talk to Catterall? A. Yes.

Q. After you talked to Catterall where did you go? A. I went to the ninth floor or the eleventh floor, I don't recall which.

Q. Was the fact that you went to the ninth or eleventh floor the result of your conversation with Catterall? A. It was.

Q. When you got to the ninth or eleventh floor what was there? A. The elevator of 21 was parked there.

Q. What did you do in connection with the elevator of 21 shaft? A. I first inquired if any one was working round it, from the labor on the floor.

MR. SMITH: I object to any conversation with any laborer on the floor.

THE COURT: Yes. Strike that out.

MR. TIFFANY: He simply said he made inquiries.

Q. Did you see any one on 22 elevator shaft? A. I did, a fellow of the name of Bach.

Q. What was his job? A. Running the elevator.

Q. Did you make any inquiry of him? A. I did.

Q. After you made this inquiry, what did you do? A. I placed a sign on the gate which was standing in front of the elevator.

Q. Which elevator? A. 21.

Q. Where did you get the sign? A. A piece of board that I picked up from the floor.

Q. How large a board? A. I should judge approximately eighteen inches or so.

Q. Long or wide? A. That is in length.

Q. How wide? A. Six or eight inches, I don't recollect exactly.

Q. The sign was not on it, was it? A. No, I wrote on it with blue crayon: "Working below".

Q. Are those the exact words that were on it? A. As far as I recollect.

Q. After you had written that on where did you put it? A. I placed it on the center of the gate, on the temporary gate.

MR. TIFFANY: I ask counsel for the defense to produce any and all signs of warnings used by the defendant on or about June 4, 1923.

MR. SMITH: I say we never had it, we can't produce it.

MR. TIFFANY: I asked you to produce it and you refuse.

THE COURT: He says he has never had it. That is an answer.

MR. SMITH: The fact that he is asking me to produce it when I have already told him we have not got it, is absurd; when he says we refuse to produce it, that is only foolish.

MR. TIFFANY: You may not think so when I get through.

Q. Could you see the sign after you wrote and placed it? A. I could or any other man I should think ought to be able to.

MR. SMITH: I ask to strike that out.

THE COURT: Strike it out.

Q. Just describe the sign as well as you can—

that is to say, whether it was legible or not? A. In my opinion it was.

Q. How large were the letters? A. Possibly an inch or an inch and a half.

Q. Was it written or printed? A. Written.

Q. How big a board was this? A. Seven eighths.

Q. Where did you put the sign? A. On the center of the gate.

Q. Was it possible for any one to get into that gate without passing that sign? A. No; they would have to remove the gate.

Q. What kind of gate was it? A. It was quite a temporary gate or safety gate, to prevent anything happening, and it simply hung there.

Q. And about how high from the floor did you place the sign? A. Two feet six to three feet; the gate was approximately two feet six to three feet.

Q. What part of the gate did you put the sign on? A. In the center.

Q. As to the top or bottom or middle of the gate, how was it? A. There was a board shape on the gate with two legs and two crossboards, and that became double thickness to the extent of seven eighths and one half.

Q. Was it on top of it? A. It was on top of it.

Q. After you had placed the sign, what time of day was it you placed the sign there? A. 3:15 or 3:10.

Q. After you placed the sign where did you go? A. Returned to the fifth floor.

Q. Was there anybody about the elevator at that time? A. On which floor?

Q. On the floor at which you placed the sign? A. I couldn't tell.

Q. Did you see anybody in the elevator? A. I didn't come down, I saw Bach and told him I had placed the sign there.

Q. What shaft was he working on? A. 22.

Q. Was he engaged on the platform or elevator, of 21 in any way? A. None whatsoever.

Q. When you got down to the fifth floor who was there? A. Mr. Catterall.

Q. Did you talk to him? A. I did.

Q. About what? A. About erecting this caution.

MR. SMITH: I move to strike that out.

THE COURT: Strike it out.

Q. After you talked to Catterall, what did you do and what did Catterall do? A. We were erecting the scaffold.

Q. Where? A. In elevator shaft 21.

Q. Which floor? A. The fifth.

Q. How large a scaffold was it? A. The planks used for the scaffolding were two by twelve, I think.

Q. How many planks did you use? A. Two.

Q. Did any part of the scaffolding protrude outside of 21 shaft? A. No, sir.

Q. Now, after you had erected this scaffold, where did you go? A. Went on the scaffold and went to work.

Q. How long did you work before anything happened? A. Approximately half an hour.

Q. Then what happened? A. Why, the loops commenced to come up, the cable loops.

Q. What did you do then? A. We hollered and told them to stop the elevator.

Q. Did it stop? A. Why, in the next second the crash came.

Q. How long did it take from the time you first noticed the movement in these loops until the crash came? A. A moment.

Q. What do you mean by a moment? A. A very short time.

Q. When the crash came what happened? A. I felt myself going through the air.

Q. Where did you land? A. I caught hold of the hood on the fifth floor and swung in on the fifth floor.

Q. Did you see Catterall? A. I saw him standing on the end of the plank and as the plank went down he went down with the plank.

Q. What happened to him, do you know? A. He fell down to the bottom, to the basement.

Q. How many floors below? A. We worked on the fifth floor and he was in the cellar, to the pit.

Q. Where did you go? A. First I hollered up for somebody to go down; then a man went down to the pit.

Q. When you got down there what did you see? A. I saw them take Mr. Catterall out of the pit.

Q. Did he talk to you? A. He did not.

Q. What did you do after that? A. I went and sat on the sandpile.

Q. When did you go back upstairs, or did you go back upstairs afterwards? A. Yes, in about an hour or twenty minutes afterwards.

Q. Where did you go? A. I returned first to the foreman's shanty.

Q. And from there where did you go? A. I

went up to the ninth or to the eleventh floor, I don't remember which.

Q. What did you go up there for? A. For the sign, to see what had been done with it.

Q. Did you see the sign? A. I did.

Q. Where was it? A. Lying about three feet from the gate, thrown back.

Q. On what was it lying? A. On the floor.

Q. In what condition was it? A. Laying on the floor.

Q. Could you read it? A. I certainly could.

Q. What did you do then with it? A. I brought it down to the foreman's shanty.

Q. What did you do with it there, did you show it to anybody? A. To Mr. Moberg.

Q. During this time did you see anybody connected with the Otis Elevator Company? A. I saw the foreman.

Q. Is he in court here today? A. Yes.

Q. Did you have the sign at that time? A. No.

Q. After you brought the sign down did you see the foreman for the Otis Elevator Company? A. I saw him before this happened.

Q. I am asking about after you had the sign, after it happened? A. The following day.

Q. Was he where the sign was; where did you put the sign? A. I turned it over to Mr. Moberg.

Q. Your foreman? A. Yes.

Q. Where did he put it? A. In the shanty.

Q. Did you see the foreman of the Otis Elevator Company near that sign after that? A. No.

Q. How long prior to 3:15 on the 4th of June had you been working in the battery of elevators —on that particular day, I mean? A. On that particular day?

Q. Yes. A. I worked there all day.

Q. Now, I will repeat the question; how long prior to 3:15 on the 4th of June had you been working in the battery of elevators, on that particular day? A. From 10 to 12, and from 12 to the time of the accident.

Q. Had you worked on 21 shaft prior to that on June 4th? A. I think we had.

Q. For how long had you worked on it? A. For a few minutes.

Q. What was the attitude of the foreman of the Otis Elevator Company when you saw him immediately after the accident, as to things you saw about him?

MR. SMITH: I object to what his attitude was.

MR. TIFFANY: I will change the word "attitude".

Q. What was the conduct of the foreman of the Otis Elevator Company immediately after the accident?

MR. SMITH: I object to that, what relevancy can that have?

THE COURT: I cannot see what relevancy.

MR. TIFFANY: I will withdraw it.

CROSS EXAMINATION BY MR. SMITH:

Q. When did you work in shaft 21 prior to June 4th? A. On many occasions; the dates I could not tell you.

Q. But you had not worked there inside of that shaft, had you? A. I had.

Q. In shaft 21? A. I had.

Q. You had worked there? A. Yes, sir.

Q. Can you give any date? A. I can't, no.

Q. Repairs were going on by Eidlitz & Company? A. I was only a carpenter, I don't know.

Q. What date did this accident happen? A. June 4th.

Q. Tell me within a week, what day you worked on shaft 21. A. I couldn't tell you.

Q. You did not work there on the 25th of May, did you? A. No.

Q. And you did not work there on the 26th of May did you? A. Well, I couldn't say.

Q. And you did not work there on the 27th of May, did you? A. I couldn't recall that; I couldn't answer that question.

Q. You don't remember how long prior to the date of this accident, you, or any one else of Seton's men, had worked there on shaft 21? A. We worked on 21 track every day.

Q. When and for what period? A. Why, we were erecting tracks, hoods, and coastings.

Q. For what period? A. From the day I went to work with Norman & Seton, the date I don't recall.

Q. Was that in May, or April, or June? A. I undoubtedly can say in May.

Q. And you mean to say you worked in shaft 21 every day? A. Every day—well, not every day all day, but some part of the day.

Q. Do you have any records in your concern showing what day or dates you worked on shaft 21? A. No sir.

Q. Does not your concern have a book showing your foreman's report? A. We don't make any report.

Q. Now, tell me what you were doing in shaft

21 on the 3rd of June? A. I was home on the 3rd of June.

Q. That is one day that you did not work around there. What were you doing on the 2nd of June in shaft 21? A. I couldn't tell you.

Q. Don't you know you did not work on shaft 21 at all from May 25 right down to June 4th? A. Yes, I did work there.

Q. In shaft 21? A. Yes.

Q. And you worked in shaft 22? A. No.

Q. You worked in shaft 23? A. I did.

Q. And shaft 24? A. I did.

Q. And shaft 25? A. I did.

Q. And shaft 26? A. I did.

Q. And shaft 27? A. I did.

Q. So you worked on each shaft every day? A. Not every day all day, but some part of that day.

Q. Tell me what was the last date prior to June 4th that you worked in shaft 21? A. I couldn't tell you the date.

Q. Was it the day before, was it the 3rd of June? A. It was during the course of the week's time, two or three days just prior, possibly on Friday, and this accident happened on Monday.

Q. What floor were you working on? A. From the ninth floor down.

Q. On all the floors? A. Yes sir.

Q. How much time did you work on each floor? A. As much as it took us; we were putting it on in sections.

Q. You put the kalsomine work on each floor? A. Yes.

Q. And you did that on each floor? A. Only on the shafts, we were told to put it on.

Q. Who worked with you? A. George Catterall.

Q. Each day? A. Yes, sir.

Q. Now, if you worked there the day before, say on the Friday before, was this elevator in running order at that time, shaft 21? A. In running order?

Q. Yes. A. The elevator was not complete.

Q. I did not ask that. How long prior to June 4th 1923 did you know that elevator 21 was being used in the job? A. It was never used, to my knowledge, only to hoist the material.

Q. Then it was used? A. By specific orders, and then we were notified they were going up.

Q. I did not ask that. What I am trying to find out from you, is this, how many days prior to June 4, 1923, did you know that the elevator in shaft 21 was being used, going up and down? A. Approximately eight days.

Q. Now, you say that when you went in there, you went in under specific instructions? A. It had to be, for protection and life saving, to go in there.

Q. I asked you were they to be specific or not? A. The same as any passenger.

Q. Were you given definite orders or not? A. The orders that any craftsman gets to go in.

MR. SMITH: I move to strike that out as not responsive.

THE COURT: Strike it out.

Q. Were you given specific orders to go in each time when you went in? A. No craftsman got that. I couldn't say I got it.

MR. SMITH: I move to strike that out as not responsive.

THE COURT: Strike it out.

Q. You can say yes or no to that question. You said on some occasion you went in under specific orders; is it a fact that each time you went into that shaft you had specific orders? A. I believe I answered the question that I had specific orders.

Q. Well, I ask you, did you each time you went into the shaft, get specific orders from your foreman to go in? A. Numbering the shaft?

Q. Yes. A. No craftsman gets them orders.

MR. SMITH: I move to strike that out as not responsive.

THE COURT: Strike it out.

Q. You can tell me that, yes or no? A. I am trying to answer your questions.

Q. If you can't answer say so, but answer yes or no. A. I had orders to go and work on the whole battery, from 27 to 21, and that there was absolutely going to be nothing running.

Q. Who told you that? A. My foreman.

Q. What is his name, is his name Moberg? A. It was.

Q. When did he tell you that? A. At eight o'clock in the morning, and again at 12:30 in the afternoon.

Q. On what day? A. On Monday, June 4, 1923 and every other day.

Q. Every other day? A. Every day we went to work, after and before lunch.

Q. So your foreman told you in the morning at eight o'clock, every time you went there, to go to work in the shaft? A. Yes.

Q. And then again after lunch your foreman would again tell you to go to work in the shaft? A. Exactly.

Q. By the shaft, you mean the whole battery of shafts? A. Yes.

Q. That would be from 27 to 21? A. Yes.

Q. And those were the orders you say your foreman gave you? A. That is it, exactly.

Q. And your foreman was Moberg? A. Yes, sir.

Q. What time did you go into shaft 21 on June 4th? A. Between 3:10 and 3:15.

Q. Now, had you been working there that day anywhere around shaft 21 before 3:10? I had.

Q. Had you seen the elevator in shaft 21 used at all that day? A. No, sir.

Q. How near to it had you been working? A. About fifteen feet, I think.

Q. About fifteen feet away? A. Yes.

Q. And you had not seen it used at all that day, from eight o'clock in the morning on? A. No, sir.

Q. Until the time you went in there? A. No, sir.

Q. Is that right? A. Positively.

Q. So you say your foreman said to you that the elevator was not to be running that day? A. That was our orders.

Q. That is what your foreman said? A. Exactly.

Q. Now, you say that at 3:10 or 3:15, you and Mr. Catterall went to shaft 21 and looked and saw the elevator on the ninth or eleventh floor? A. Yes.

Q. And then you went upstairs to the floor where this elevator was, and there you wrote out

a sign on this piece of board, "Working below", that is right, isn't it? A. That is right.

Q. You wrote it with a blue crayon? A. Yes.

Q. And then you put this sign on the temporary gate to let them see—the temporary gate which you say was there in front of the shaft? A. Yes.

Q. You put the sign on there? A. Yes.

Q. Well, Mr. Augusteen, you knew, didn't you, that that elevator, according to your foreman, was not to be run that day at all? A. Exactly.

Q. Why did you put the sign up then? A. Because Otis was too careless, that foreman was, and life is dear to us all.

Q. And you thought the elevator might be run? A. Well, I would take precaution for my life, if I didn't take precaution for my life nobody would.

Q. And you thought the elevator might be run? A. I didn't have any time to think.

Q. I did not ask you whether you had any time to think or not; you put this thing there because you thought the elevator might be run? A. A caution that it should not be run.

Q. As a precaution you put the sign there in the event that if they might think of running it they would know men were working in there? A. Yes.

Q. Although you had definite instructions from your foreman that it would not be run? A. A foreman can't give me any life, and I took that precaution myself.

Q. So you had a reason for putting up that sign, "Working below" there, did you? A. We always take precautions.

Q. And that was to notify anybody that somebody was below? A. Exactly.

Q. Now, you say that was up on the ninth or eleventh floor? A. Yes, I am not positive which.

Q. And there was a temporary gate which you say consisted of pieces of joist? A. They are made out of boards 7/8 by 6.

Q. And made into a sort of frame? A. Made into a frame like a fence.

Q. Crosspieces? A. Two cross bars.

Q. Where did you put the sign? A. In the center of the gate; the crossbar comes this way (indicating), and there is a centerpiece extending an inch and a half out, and you put the sign on the centerpiece so it had a ledge to rest on.

Q. And you left it right there? A. Yes, and also called the attention of the fore—

Q. Never mind that. You say you afterwards spoke to a fellow named Pat or Bach, in elevator 22? A. Yes.

Q. That was a man employed by the Marc Eidlitz Company? A. I don't know.

Q. Elevator 22 was running? A. Yes, that brought me up and down.

Q. After you came downstairs, after the time you say you had placed the sign there, then you and Mr. Catterall built this scaffold? A. Yes.

Q. You made it of two jacks? A. We had four, what you call a false shape, like a triangle, but one leg rests against the floor and the other against the rail.

Q. Where the track runs? A. Yes; and it can't move of itself; there is a joist holding it on the side.

Q. Like a triangle, with a hypothenuse, with one leg or side against the wall and the other against the rail? A. Yes; it is in a groove.

Q. And on that jack—did you put the jack

over here (indicating). A. No, the jack goes right across the wall and a board going to the jack.

Q. And you put the boards on the jack? A. Yes.

Q. Did you see where the loops of the cable were? A. The cable loops?

Q. Yes; could you see where they were? A. You could only see one strand hanging down; there was no evidence of any loop.

Q. You know there are cables on elevators? A. There is always plenty of them.

Q. Where was the loop of the cable when you built your scaffold? A. It was down below there.

Q. Did your scaffold come within the loop? A. Well, not as far as we could see, not when we put up any scaffold.

Q. Did you make any observation to see? A. Well, as far as I recollect, all precautions in that line were taken.

Q. I did not ask that. A. All precautions were taken, as far as I know.

MR. SMITH: I did not ask that, I ask to have it stricken out.

THE COURT: Strike it out.

Q. What I am trying to find out is this; you knew the loop was down below, didn't you, below you? A. No, I did not.

Q. Couldn't you see that as you looked in? A. There was about six cables hanging down.

Q. You knew that? A. Surely, they are there all the time; three or four are stationary, I guess.

Q. Have you ever seen one operated? A. I have.

Q. You know there is a loop fastened to the elevator, and another to the side? A. Yes.

Q. And you know as the elevator goes up one goes up with it and the other comes down? A. Yes.

Q. What I want to find out is, when you were here on this scaffold did you observe whether or not the rope was down below you or up above you? A. It must have been down below.

Q. Did you look to see? A. I saw it coming up when he started the elevator.

Q. I asked you did you look before you built it? A. I don't remember seeing the loop, and I don't remember whether I personally looked down or not.

Q. But you just built the scaffolding? A. Yes; we were satisfied that everything was safe to build it.

MR. SMITH: I object to that and move to strike it out.

THE COURT: Strike it out.

Q. You did build the scaffold? A. We did build it.

Q. Now, you say you and Mr. Catterall got on the planks and started the work? A. Yes.

Q. Hanging these doors and tracks? A. Hood and tracks?

Q. And you were standing on the planks? A. Yes.

Q. And you say the first thing you knew you saw the elevator commence to move? A. Yes.

Q. You saw the loops move? A. Yes.

Q. And did they move up or down? A. They were moving up.

Q. Was there anything between you and the open space, or the floor? A. Yes.

Q. What? A. The scaffolding; the scaffolding covers about three and a half or four feet from the floor, and the door comes around seven feet or six feet, and we would be up to here (indicating) about two feet beyond the door yes two feet beyond the door, and the rest of our body was up in the shaft, but these shafts were incomplete.

Q. There wasn't any railing up from the floor along the shafts, was there? A. There was approximately six feet seven, six or seven feet over the tile built all around 21 on that floor.

Q. On the ninth floor? A. No, on the fifth floor.

Q. You are sure of that, are you? A. I am sure there was fully about six feet.

Q. Wasn't there only a little piece just on the corner? A. Maybe on one side toward the 34th side there might not have had them that high, but they were just enough for us to go ahead; the tracks must have been about six feet on the front, but where we were facing we had to get out that way.

Q. Does that show (showing Exhibit D-1 for identification to witness)? A. There was some tile here on this side.

Q. You think there was some tile on that? A. Yes. Is that the fifth floor?

Q. I don't know. A. I don't know either.

Q. I am asking you if that is the front of it? A. Yes.

Q. Was there anything across the front of it, any railing that went up? A. No, there was no railing going up here.

Q. The door would open into the elevator,

wouldn't it? A. There was no door; our scaffold comes—that is the opening you don't see. Here is the tile you can see on the edges. Now, the tile came on this side, away up here (indicating); that does not show on the photo at all. That is the opening; our jack went from here—if that is the fifth floor—against that, and that is nailed into that work (indicating). That is why we had so much work to do; our planks went from here over to here (indicating). The tile was built to the same height, if not higher than it is here, and our body went right above this door.

Q. Then, as I understand you, this top piece is the height of the door? A. Yes.

Q. The front, as you look into this picture here, is looking from the floor into the elevator? A. Yes, sir.

Q. And this line which you put on as showing tile, from that line to the other line is the other door? A. Yes.

Q. And your plank ran across the picture, that way (indicating)? A. Exactly.

Q. So when you stood up there was not anything between your body and the open space of the floor? A. Yes, there was; we were half way up above that, our knees came about here (indicating).

Q. Your idea is that standing on the jack you were half way above the front? A. So our arms came here (indicating).

Q. What was the distance between the planks and the top of the door, as you call it? A. From the top of our planks to the head of the door?

Q. Yes, the distance from the plank you stood upon to the door, as you call it? A. Approximately three feet.

Q. And above the doorway, as you call it, there was nothing there, was there, no gate or anything of that kind, it was all open into the shaft? A. Yes. Here is your wall that comes here (indicating), built right up, only a few feet between. That thing you see there (indicating), is the cover of our hood, and the track goes underneath our hood.

Q. And from there you carry the wall to the top of the ceiling? A. Yes, from here (indicating).

Q. You mean from the top of your door? A. Yes.

Q. Now, when you saw the loops move, did they move quickly? A. They certainly did.

Q. They came right up? A. They sure did.

Q. Did you have time to holler? A. We did holler.

Q. How many times did you holler? A. I could not say. In a thing of that kind I guess no man could remember whether he hollered more than once or a dozen times.

Q. Was it any length of time or suddenly? A. Well, the moment we had to yell out, I heard the crash and found I was up in the air.

Q. How near was Mr. Catterall to you? A. About five or six feet apart.

Q. Now, after the accident, and after you had gone down, as you said, to the pit, and sat around on the sand pile, you went upstairs? A. Yes sir.

Q. And you looked for this sign? A. I first returned to the shanty.

Q. And after you returned from the shanty you went upstairs? A. Yes, sir.

Q. How long was that after the accident? A. I don't quite understand.

Q. How long was it after the accident, after you had gone downstairs to the pit, what time elaspsed from the time you went down stairs to the pit, and the time you went up to look for the sign? A. I should judge twenty minutes or half an hour, it is hard to say.

Q. And when you got up to the ninth floor or the eleventh floor, whichever it was, you say you saw the sign on the floor? A. Yes.

Q. How far from the edge of the elevator was it? A. Just the same as if a fellow threw a brick down.

MR. SMITH: I move to strike that out.

THE COURT: Strike it out.

THE WITNESS: Three to five feet away.

Q. That sign you say, you gave to Moberg? A. Yes.

Q. He was your foreman? A. Yes.

Q. Did you see it after you gave it to Moberg? A. I did.

Q. Where did you see it? A. In our shanty.

Q. When was that? A. I saw it daily for a week, I guess; not daily, but I saw it anyway for a week's time two or three times.

Q. And then after that? A. I never was returned to the job.

Q. You left the job; you were hurt in this trouble over there, somewhere? A. Yes.

Q. (Picture shown witness.) Mr. Augusteen, I show you a picture and call your attention to the triangle in there: is that what you call your jack? A. That is what we call a jack, that is not on the fifth floor.

Q. I don't know what floor it is on. A. That is not on the fifth floor. It is away down below.

Q. Well, whether it is on the first or second, or wherever it is, is that the jack? A. That is the form of jack used, yes.

Q. Could you mark that for me; put "jack" on it? A. There should be loops over from here to there also on that picture (indicating); there is a wedge behind there, reaching against it, and in addition to that, that goes down here and the cleats go down to the door jamb.

MR. SMITH: I would like that marked for identification.

Photograph marked D-2 for identification.

RE-DIRECT EXAMINATION BY MR. TIFFANY:

Q. Mr. Augusteen, you say these injuries that you incurred, did they have anything to do with this accident? A. No, sir.

Q. Nothing to do with the Otis Elevator Company? A. No, sir.

Q. They were entirely out of this situation? A. Yes, sir.

Q. Now, you said to Mr. Smith that the Otis people were careless, what did you mean by that?

MR. SMITH: I object to that.

THE COURT: How is that competent here as an opinion in this case?

MR. TIFFANY: Mr. Smith had been examining him on the reasons why he knew this elevator shaft was not in use, when he went upstairs and put this card on, and he said Otis was too careless.

THE COURT: That has nothing to do with this. He volunteered that.

MR. TIFFANY: My point is this, the other

answer should be thrown out, if your Honor takes that view; there was no motion to strike it out.

THE COURT: Suppose we struck it out now; that has nothing to do with the case.

MR. TIFFANY: There was no motion to strike it out.

THE COURT: If you seek to cross examine him on that account I will strike it out, if you think it does you any harm.

MR. TIFFANY: I do not think it does us any harm.

Q. Why did you take the added precaution, as you say you did, of going up and putting this sign up, if you knew that the elevator was not going to be run that day? A. As an extra precaution for ourselves.

Q. Why did you take the extra precaution? A. It was due to the carelessness, to the careless way the Otis people worked there; I can't explain it any way different.

MR. SMITH: I move to strike that out.

THE COURT: Strike it out.

Q. Let me see if I can suggest a way. Had anything else happened in these elevator shafts that led you to take added precautions?

MR. SMITH: I object to that as absolutely irrelevant.

THE COURT: What difference does it make? He took the precaution and put the sign up there.

MR. TIFFANY: But my friend, when he comes to address the jury, will say to them,

"Why did he put that sign up there"? I will accept the court's ruling on it, however, but mark my words, that is what he is going to do tomorrow.

Q. Mr. Smith asked some questions as to specific orders as to going into the elevator shaft on each occasion. Would you get your specific orders every time you went in, or for the day or half a day? A. Well, half a day or a day, whatever it might be.

Q. And did you have specific orders on this day? A. We did.

AXEL MOBERG, sworn.

DIRECT EXAMINATION BY MR. TIFFANY:

Q. Your full name is what? A. Axel Moberg.

Q. For whom do you work? A. Norman & Seton.

Q. And on June 4, 1923, were you working for the same concern? A. I was.

Q. On the Macy extension job? A. Yes.

Q. Do you know George Catterall, or did you know him in his lifetime? A. Yes.

Q. And did you know the gentleman who was just on the stand? A. I do.

Q. Were they working on that job? A. They were.

Q. What position did you hold there? A. I was foreman.

Q. Had you anything to do with the battery or shafts these two men Augusteen and Catterall were working on? A. Yes.

Q. What batteries were they? A. 21 to 27.

Q. Under whose orders were they working? A. Mine.

Q. Before you put them to work in that shaft, what did you do towards assuring yourself the elevators would not be running in the shaft while they were working? A. I went to the general superintendent or one of his assistants and got my orders, to see that the shaft was clear for them to go in.

Q. Did you get orders that day that the shaft was clear? A. I did.

Q. How many times that day did you get those orders? A. I went there first thing in the morning before eight o'clock, and got my orders, and last time in the afternoon before I sent two men there.

Q. What time in the afternoon? A. About half past twelve.

Q. And were those orders to the effect that the shaft was clear or would be used? A. Yes, that they were clear and we could go in.

Q. Did that include the shaft in which Catterall was working? A. It did.

Q. You did not see the accident happen? A. No.

CROSS EXAMINATION BY MR. SMITH:

Q. Whom did you get those orders from? A. I don't exactly recollect, but I think it was Mr. Bader.

Q. Did you go and see Mr. Coward? A. No, I did not.

Q. Where did you see George Bader? A. In the shanty of Marc-Eidlitz Company.

Q. In the shanty of Marc-Eidlitz? A. Yes, where we had Marc-Eidlitz's office.

Q. So you went to the shanty and there you saw Bader? A. Yes.

Q. And there you and Bader talked about going into the shaft? A. I did.

Q. Did you say what shaft? A. 21 or 22, I think it was; no, 21 and 23.

Q. How about 24, 25, 26 and 27? A. No, I don't think we did just at that time.

Q. Are you sure you went there in the morning of June 4th? A. I did, yes.

Q. You went to Mr. Bader? A. Well, in the morning I think it was Bader or McGarry.

Q. McGary was a time-keeper. A. He was also Mr. Anderson's assistant.

Q. Don't you know that McGarry was time-keeper for Eidlitz, and that is all? A. I do.

Q. Did you get orders from McGarry? A. Yes; that is on that morning.

Q. And that is June 4th? A. Yes.

Q. Where did you find McGarry? A. He does work in the office, too.

Q. You often met him in the office? A. Yes.

Q. Whom did you get orders from in the afternoon? A. I think it was Mr. Bader.

Q. Are you sure? A. Am I sure?

Q. Yes. A. Well, I am telling you so.

Q. You say probably; what I want to know is this, there were three men that you say you took orders from, Anderson, the Superintendent, Bader, who was his assistant, and McGarry, who was timekeeper, and you say on the morning of June 4th you talked to Mr. McGarry? A. I think I did.

Q. And in the afternoon of that day, you say you talked to Mr. Bader? A. Yes.

Q. Are you sure you talked to Bader in the afternoon of that day, and in the morning with McGarry? A. I am.

Q. How many times did you take orders from McGarry? A. I couldn't recollect just how many times they were in those shafts, probably four or five months or more they were in there.

Q. Were you working on those shafts all the time for four or five months? A. Off and on, yes.

Q. You went there at certain specified times to work, didn't you? A. Yes.

Q. And you went to the shanty—that is the superintendent's shanty—to find out if it was safe for them to go in the shaft? A. Yes, sir.

Q. And on this morning you saw McGarry, and did McGarry on that morning give you any orders to work in those shafts? A. He did.

Q. Written orders? A. No, not written orders.

Q. Verbal orders? And did you have a time fixed when you were to go in? A. No, no particular time; we were there at eight o'clock in the morning.

Q. And you had no time fixed; you just walked over to the shaft? A. We started to work at eight o'clock, yes.

Q. What shaft did you start in at eight o'clock on June 4th? A. Well, we got orders to go over to the shaft and see if it was in good condition.

Q. Was that the whole battery of shafts? A. Yes.

Q. From 27 all the way down? A. No, there was one car running temporarily.

Q. You knew that 22 had been turned over to Eidlitz, didn't you? A. I didn't know that; it was running temporarily for the men working in the building.

Q. Did you know that 22 had been taken over by Mr. Eidlitz? A. No, I didn't know that, I didn't have that information.

Q. You had been working around those shafts how long? A. Well, I don't recollect exactly, but I know four or five months, off and on, in there.

Q. Had you been working in the battery of shafts from 21 to 27, within a week prior to June 4th? A. We had, yes.

Q. Had you seen McGarry in there taking the time of your men? A. Yes, he generally came to me.

Q. And you knew his position was timekeeper? A. Yes; he also gave me orders sometimes what to do.

Q. Now, at any time on June 4th, did you go to Coward, of the Otis Elevator Company? A. No.

Q. You did not go into Coward? A. No.

Q. On this day you did not get any orders from Anderson, did you? A. No, I did not.

Q. It was McGarry in the morning and Bader in the afternoon? A. Yes.

RE-DIRECT EXAMINATION BY MR. TIFFANY:

Q. After the accident, did Mr. Augusteen bring to you a sign? A. He did.

Q. Will you describe the sign to the jury, as you recall it. A. The sign was written on a rough piece of board picked up from the floor, 16 or 18 inches in length, and 6 or 7 inches in width, written in crayon "Working below".

Q. How long after the accident did you see that sign? A. Probably about an hour or so after the accident.

RE-CROSS EXAMINATION BY MR. SMITH:

Q. You had not seen it before the accident? A. No, I had not.

Q. Who brought it to you, Mr. Augusteen? A. Yes.

Q. And you kept it? A. I did.

T. F. McGARRY, sworn.

DIRECT EXAMINATION BY MR. TIFFANY:

Q. Mr. McGarry, you are employed by the Marc Eidlitz Company? A. Yes, sir.

Q. And were in June 1923? A. Yes, sir.

Q. With them, what was your position? A. As timekeeper.

Q. Who was the superintendent of your company? A. Mr. Anderson.

Q. As timekeeper is that all you did, keeping time? A. No sir; on numerous occasions I acted as a sort of clearing house for orders to be transmitted to Mr. Anderson, when he could be located.

Q. Did you do that on more than one occasion? A. Hundreds of times, sir.

Q. You remember the day of this accident? A. I do, sir.

Q. How long after the accident did you get to know of the accident? A. Within about ten minutes.

Q. Do you recall that day having talked to Mr. Moberg about operations that were going on in the shaft? A. I talked to him on numerous occasions, and I believe I can state definitely on that particular day I remarked on the fact that he was working in shaft 21, because I had done it on numerous occasions when I was asking Anderson if they could get in the shaft.

Q. On this day of the accident did you notify any one of the Otis Elevator Company as to the right of the men to work in the shaft? A. That is generally done by a superior of mine; I simply asked permission when Mr. Moberg said he wanted to get into a particular shaft and could not find Mr. Anderson, and asked me, and I simply transmitted that request to Mr. Anderson, and he, in turn, either himself or through Mr. Bader, obtained the necessary clearance from the Otis Elevator Company to use that shaft.

Q. In the absence of Mr. Bader of Mr. Anderson how would you get clearances? A. Why, through Mr. Coward.

Q. On this day did you speak to Mr. Coward, on the day of the accident about their working in the shaft? A. Well, I can't state definitely, for the simple reason that the accident is two years ago, and at the time of the accident none of us realized the details that were going to be asked of every one if some one else was in that shaft. If Otis had been asked permission, if they went in, then I can definitely state.

MR. TIFFANY: I move to strike that out.

THE COURT: Yes, as a conclusion, strike it out.

Q. Do you recall talking to Mr. Moberg on the day of the accident? A. I do, sir.

Q. In connection with 21 shaft? A. Immediately after the accident, yes sir, in connection with 21 shaft.

Q. What were you going to say? A. Immediately after the accident I asked him——

THE COURT: Asked who?

THE WITNESS: Moberg.

MR. SMITH: I object to what he asked Moberg immediately after the accident.

Q. Well, do you recall in your conversation with—you mention Mr. Coward? A. Yes.

Q. What was that conversation you had with him? A. I think you asked where Mr. Coward was on that day.

Q. No, I said, "Do you recall a conversation with Mr. Coward that day concerning the working in 21 shaft? A. I can't say definitely that I recall it, because if I did get permission for them to go in, without speaking to Mr. Anderson—of course I must have gone in to Mr. Coward to get it.

MR. SMITH: I move to strike that out.

THE COURT: Strike it out.

Q. After Mr. Moberg spoke to you June 4, 1923, about working in that shaft what did you do as to finding out whether or not 21 shaft was clear?

MR. SMITH: I object.

Q. Well, do you recall Mr. Moberg speaking to you on the day of the acident, prior to the accident, about working his men in that shaft 21?

A. Undoubtedly, because I, as timekeeper, kept the time of the men working in there.

MR. SMITH: I move to strike that out.

MR. TIFFANY: Yes. Repeat the question.

(Last question repeated by the stenographer.)

A. Yes, sir.

Q. After he had spoken do you recall speaking to any one about clearing the shaft for the men to work in? A. I can't say that I definitely recall it, but in every instance where it was ever asked of me to work in the shaft——

MR. SMITH: I object to that.

THE COURT: That is not answering the question.

THE WITNESS: I can't state definitely that I spoke to any one.

Q. Well, after a request had been made to you, in the course of your work, as to whether or not men could work in these various shafts, what was the custom of your work as to getting a clearance? A. Through the Otis elevator.

Q. What steps would you take to do that? A. Communicated with my superior, Mr. Bader, or some officer, who obtained the clearance. On this occasion I did it myself, probably.

Q. Have you any recollection of doing it yourself on this day? A. I have not, sir; it would be too great a feat of memory.

Q. Now, after you had arrived at the scene of the accident, did you see anything of a sign? A. When I arrived at the scene of the accident I distinctly recall Mr. Moberg stating to me——

MR. SMITH: I object to any conversation.

Q. Not what Mr. Moberg said, but did you see the sign? A. No sir; we endeavored to find it and could not find it.

Q. Is Mr. Bader with Marc Eidlitz & Company any longer? A. Not at the present time, sir.

CROSS EXAMINATION BY MR. SMITH:

Q. You kept what is called a "Workers' Report", didn't you? A. Yes, sir.

Q. Have you got it with you? A. No, sir.

Q. Have you by means of your workers' report any way of determining what dates the contractors worked in a particular shaft? A. As a general rule we laid it down for the battery and shaft because they frequently skipped from one to another.

Q. You testified before trial in reference to your workers' report? A. Yes, I think so.

Q. And those are what your examination here refers to? A. Yes.

Q. And at that time you had your workers' reports with you? A. Yes.

Q. And you testified from those reports did you not? A. Yes.

Q. What time of day on June 4th, did you talk to Mr. Moberg? A. I talked to him on numerous occasions during the day.

Q. What was the first occasion? A. Probbably 8:15 in the morning.

Q. Where? A. In the morning, in my office.

Q. In your office? A. Yes.

Q. Is that what he calls the shanty? A. Yes.

Q. At that time you were timekeeper, weren't you? A. Yes.

Q. You were not assistant timekeeper? A. No sir.

Q. And you were not assistant foreman? A. No sir.

Q. Mr. Anderson was the foreman? A. Superintendent.

Q. And Mr. Bader was assistant superintendent? A. Yes.

Q. And you were a timekeeper? A. Yes, sir.

Q. You had no authority to give any orders for contractors to work in any place, had you? A. I don't think I have ever claimed it here, sir.

Q. I did not say you had, I asked you if you had any such authority? A. None whatsoever.

Q. What you mean is, that if you could not reach Mr. Bader or Mr. Anderson, and if somebody wanted to go to work in the shaft, you would go and talk with Coward yourself? A. Yes.

Q. And see if you could make arrangements with Mr. Coward and see if you could find out what time some other workmen could go in? A. I would, if I could not locate my superintendent somewheres.

Q. And you only did that to expedite matters? A. Yes.

Q. And it was really a request on your part of Coward, to see if he could not fix a time for some other contractor to get in there? A. All had to dovetail in together.

Q. And that was your usual practice, wasn't it, if some contractor wanted to go in, for you to go and make a request of Coward? A. We had to You could not turn one man out of a place without knowing who is to go in there.

Q. So if this foreman had sent his men into the shaft without making arrangements it would be pretty bad? A. No experienced man ever would.

Q. I say if a foreman had sent his men into the shaft without making arrangements it would be pretty bad?

MR. TIFFANY: I object to it as calling for a conclusion and as improper.

MR. SMITH: I guess that is a conclusion.

RE-DIRECT EXAMINATION BY MR. TIFFANY:

Q. Did you ever issue a clearance to any one to work in the shaft until you had received a clearance from the Otis Elevator Company?

MR. SMITH: Objected to as improper.

THE COURT: Objection sustained.

Q. Did you ever inform the foreman of other workmen that they could work in the elevator shaft, without having first notified the Otis people and obtained their permission? A. No.

RE-CROSS EXAMINATION BY MR. SMITH:

Q. Do you sit there and say that on this day you spoke to Mr. Coward? A. I have never stated that, have I?

Q. Well, I am just asking you that? A. I have never stated it.

Q. You have not, have you? A. No. I did say it would be a feat of memory to so state.

BY MR. TIFFANY:

Q. Do you say you did not go to Coward on that day, or that you don't remember? A. I don't remember.

Q. Would you say you did not go on that day? A. No.

JAMES COWARD, sworn.

DIRECT EXAMINATION BY MR. TIFFANY:

Q. Where do you live? A. Freeport, Long Island.

Q. Mr. Coward, were you formerly with the Otis Elevator Company, on the Macy Extension job on the 4th of June, 1923? A. Yes.

Q. You ran that elevator No. 21, on that day, did you not?

MR. SMITH: I object to that as leading.

Q. Well, did you run elevator number 21 on June 4, 1923? A. I did not.

Q. Did you direct a man named Bach to run it? A. I did not.

Q. Did you ride in the elevator? A. Yes.

Q. Who ran it? A. A fellow by the name of Otto Sampson.

Q. Was that in the morning or afternoon? A. That was in the afternoon.

Q. Were the control switches in place on that elevator on that day, or part of the elevator? A. I don't know what you mean by control switches, there are so many control switches.

Q. How did you control the elevator on that day? A. In what way?

Q. To make it run or stop? A. By the lever in the car.

Q. Was there a master lever anywhere else so they could control the car from outside? A. No sir.

Q. Did you have a switch above and outside of the elevator itself that turned the power on and off in the shaft? A. Yes.

Q. Where was that? A. In the penhouse.

Q. Was there another one outside of the penhouse down in the basement? A. Yes, one in the basement and one in the penhouse.

Q. Would it have been possible to have run that car if the switch had been turned off in the basement or in the penhouse? A. No.

CROSS-EXAMINATION BY MR. SMITH:

Q. Who was this Otto Sampson employed by on June 4, 1923?

MR. TIFFANY: I object to that as calling for a conclusion on the part of the witness, unless he has personal knowledge.

MR. SMITH: He was foreman.

MR. TIFFANY: I do not think that it follows that he knows.

THE COURT: Suppose you find out how he knows.

(Question withdrawn.)

Q. Was Otto Sampson employed by the Otis Elevator Company on June 4, 1923? A. No, sir.

Q. Do you know who he was employed by on that day? A. Yes, sir.

Q. Who was he employed by? A. By Marc Eidlitz.

Q. He was the general contractor in the building? A. Yes, sir.

Q. This control switch you speak of, there was a switch up in what you call the penhouse—that is where the elevators are governed? A. Yes, sir.

Q. And the penhouse is on what floor? A. It was on the roof level.

Q. Who had charge of that up there, if you know? A. I suppose I had.

Q. And there was a switch there which would govern the running of the elevator correctly? A. Yes, sir, of each elevator.

Q. In other words, a separate switch for each elevator? A. Yes.

Q. And you say there was one in the basement too? A. Yes.

Q. Was that the same kind of switch that was up in the penhouse? A. No, sir.

Q. What kind of switch was that? A. That was an emergency switch.

Q. Does that stop all elevators, or just one? A. Just the one.

Q. In other words you have a switch there for each elevator? A. Yes.

Q. And also in the car you have a switch, what do you call that? A. Baby switch.

Q. And does that stop the running of the car? A. That went on all cars.

Q. You don't mean that you handled that, that you used to operate it? A. No sir.

RE-DIRECT EXAMINATION BY MR. TIFFANY:

Q. (Paper shown witness.) I show you a statement and ask you if that is your signature at the bottom of it? A. Yes sir.

Q. Sampson was running that elevator, was he not, under your direction? A. No sir.

Q. Didn't you ask him to start and take you down on the elevator, or take you up, one way or the other? A. Yes.

Q. You know he was running the elevator, you saw him? A. Yes sir.

Q. And you got in and rode with him? A. Yes, sir.

RE-CROSS EXAMINATION BY MR. SMITH:

Q. That was on one trip going down? A. Yes, sir.

Q. Did you ride on any other trip going up with him? A. No sir.

Q. Did you say anything to him about running that elevator at the time you got in? A. Yes, when I got off I said to him that he hadn't ought to be running it.

MR. TIFFANY: I move to strike out what he said.

THE COURT: Yes, how can he say what he said to somebody else.

MR. SMITH: That is what he said to Sampson, Sampson is a man not in our employ.

MR. TIFFANY: I withdraw the objection.

Q. That was when you got off the elevator downstairs? A. On the third floor.

Q. After that did you see him run any elevator? A. No sir, I did not.

Q. Did you know Sampson presumed after that trip to run an elevator? A. No sir, I did not.

BY MR. TIFFANY:

Q. Sampson was an employee of the Otis Elevator Company, was he not, prior to June 4th? A. He was.

Q. And he was on the payroll on the Marc Eidlitz Company, pursuant to an agreement, wasn't he? A. Yes sir.

Q. He was placed on the payroll of the Marc Eidlitz Company by the Otis Elevator Company, wasn't he? A. No sir.

Q. Are you familiar with the terms of the agreement between the Elevator Construction Association and the Otis Elevator Company? A. I don't know anything about that.

Q. You know, however, that when a certain number of elevators are completed in a building, an elevator instructor must be turned over to the payroll of the general contractor? A. Yes sir.

Q. And that is why Sampson was on the payroll of Marc-Eidlitz? A. Yes, and I did that.

Q. And on the morning of June 4th, did Sampson ask you if he could run 21 elevator to accommodate some friends, and you said yes? A. No sir.

Q. You did not? A. No sir.

Q. I show you a statement—— A. I will make that statement in a different way.

Q. Well, make it your way. A. I gave permission to Dick Longworth to have the elevator for use, and I told Otto Sampson to put the switch in and bring it to Dick Longsworth.

Q. Bring what, the elevator? A. Yes sir.

By Mr. Smith:

Q. When was that? A. Eight o'clock.

Q. Around eight o'clock? A. Yes, in the morning.

Q. In that talk had you given Sampson any permission to run that elevator? A. No sir.

Q. Now, when you say Sampson was turned over to Eidlitz it is true that Sampson had been working for the Otis Elevator Company some time prior to May 17th, is it not? A. Yes, sir.

Q. And isn't it also true that on May 17th Sampson went to work for Eidlitz & Company? A. Yes.

Q. And was paid by them? A. Yes.

Q. He was on their payroll? A. Yes.

Q. You had nothing to do with him afterwards? A. No sir.

Q. When did he come back, if at all, to your company? Did he ever come to work with you again? A. Not for me.

Q. I mean for the Otis Elevator Company? A. I don't know.

By Mr. Tiffany:

Q. You designated from time to time a man who would be on the payroll of Marc Eidlitz didn't you?

Mr. Smith: I object to the tern "designated a man".

Mr. Tiffany: Question withdrawn.

Q. From time to time, as you completed elevators you would indicate and send to the Marc Eidlitz Company a man who was to take care of the elevators that had been turned over to them, and who was to be placed on their payroll, is that right? A. Yes.

Q. And you could change that man and put another one in his place? A. No sir.

Q. You could not? A. No sir.

Q. You did not do that on any job? A. No sir.

Q. You are sure about that, are you? A. Yes.

Q. Do you want to change that in your own way anywhere? A. Yes.

Q. Let us hear your version of it? A. Outside of a complaint of the man that he was not giving results, then I would do so.

Q. Then I understand, on complaint of the Marc Eidlitz Company of the work of this man, you would take him back and put another man in his place? A. Yes sir.

Q. So you reserved the right to supply or withdraw this man if he did not give satisfaction to the Marc Eidlitz Company? A. Marc Eidlitz would let him go.

Q. They would complain to you? A. They would let him off and I would give him another man. I could not lay him off.

Q. Didn't you just say he would complain to you and you would take him off and give him another man? A. Naturally, but they would have to lay him off.

Q. They would complain to you first? A. Sure.

Q. Then you would designate another man?

MR. SMITH: I object to the word "designate".

Q. Well, you would turn over another man to their payroll? A. If they wished to do so, they could go to the rooms and get another man.

Q. Don't you know Sampson is now employed by the Otis Elevator Company? A. I do not.

Q. You do not? A. No sir.

Q. You say you objected to Sampson running this elevator? A. Yes.

Q. I show you your statement, (reading): "While Sampson had no right to operate the car, I assumed he was formerly in the employ of the Otis Elevator Company and was qualified to

operate; I saw no reason to object to him at that time." Did you make that statement? A. I might have.

Q. Don't you know whether you made it or not? A. Sure.

Q. Did you make it? A. Yes.

Q. It speaks the truth? A. Of course, he was an instructor and had a right to operate the elevator.

Q. You think he had a right to? A. That particular elevator he did not.

Q. Well, why didn't you object and say you did object in your statement? A. Because he did not run the elevator satisfactory?

Q. "I saw no objection to his operating it at the time." I ask you if that is true, when you say you objected and told him not to run it. Just remember your testimony here today and look at the statement taken three days after the accident.

(No response.)

Q. Well, will you answer it?

THE COURT: Can you answer it? If you can't say so.

Q. Which is the truth, this statement or the statement you have just made under oath; this statement is under oath too; can't you answer it; one is wrong, isn't it? A. At the time that I made that statement I didn't see that he had no right to run that elevator.

Q. You didn't see that? A. No sir.

Q. But since you have made that statement,

you have made other statements to other people, haven't you? A. No sir.

Q. You have not made other statements besides this? A. Yes, I have.

Q. How many other statements have you made and signed? A. One or two, I think.

Q. Whom did you make them for? A. I don't know, the Travellers' or something.

Q. Who else did you make them for? A. I don't know.

Q. Do you know who they represented? A. One represented the Otis Elevator Company.

Q. You made a statement for them? A. Yes.

MR. TIFFANY: I call on counsel to produce it.

MR. SMITH: Delighted. (Produces paper.)

MR. TIFFANY: I ask for the original statement, not the copy made in your office.

MR. SMITH: That is the original statement.

(Statement produced and shown witness.)

Q. Is that your statement? A. Yes sir.

Q. Made on July 29th. Do you say anything in that statement about your objection to Sampson riding in the elevator? Read it. A. (Reads statement.) No sir, I don't think so.

Q. You say so in this statement produced by counsel, "That at three o'clock I rode down with Sampson to the third floor". From what floor? A. From the 12th.

Q. And was it upon that down trip that you objected to his using the elevator? A. When I stepped off the car I just passed comment to him about using that elevator.

Q. What were the comments you passed? A. That he had no right to use the elevator.

Q. What did you do then? A. I just stepped off and went about my business.

Q. Where did he go? A. I don't know.

Q. Didn't you see he kept on the elevator? A. No sir.

Q. Don't you know he stopped on the elevator? A. No sir.

Q. Didn't you pay any attention to that? A. No sir.

Q. You left him on the elevator? A. Yes.

Q. To run it again? A. No sir, I didn't know.

Q. And yet you say now you did not think he ought to, that he ought not to run it? A. Yes.

Q. Why didn't you put that in either one of these statements then? A. Because at that time I did not see that he was not capable of running an elevator, that he was a capable man to operate the elevator, and I overlooked the fact at the time I made those statements that I should have seen he should not have run the elevator.

Q. How long had you known Sampson? A. Oh, I don't know, about two years or three years.

Q. Do you think now that he was not capable to run the elevator on June 4, 1923? A. He was capable of running it but he had no right to.

Q. Isn't that the word you used a few minutes ago—that is, that you did not know at that time that he was not capable? What did you mean by "not capable"? A. Because he had no right to. He was employed by the Marc Eidlitz people.

Q. You are sure that is the statement you want to stand to, is it, you are sure now you have the reason on the record as you want it? A. I suppose so.

Q. I don't want what you suppose, is that what you want to say now. Is that what you want to be your reason? A. That he had no right to run it.

Q. Then I ask you now what you meant when you said in your statement, made three days after the accident: "While Sampson had no right to operate the car, I assumed, as he was formerly in the employ of the Otis Elevator Company, and was qualified to operate an elevator, I saw no objection to him operating it at the time." A. I overlooked the responsibility of turning the elevator over; that it was not turned over to Marc Eidlitz & Company.

Q. That was the only reason? A. Yes, it was.

Q. You were in charge there of these elevators? A. Yes.

Q. You were in charge of the operation of them and who should operate them? A. Of the elevators that were not turned over to Marc Eidlitz?

Q. Yes; this was not turned over to Marc Eidlitz, was it? A. No sir.

Q. And you saw no objection that day and made no objection on that day to Sampson running this elevator, did you? A. Yes, I did. When I got off the elevator I told him.

Q. Then why didn't you say so in these statements, and why do you say now that it was not until after that that you came to the conclusion that it was not proper for him to do it? A. Because I overlooked it, as I testified.

Q. But you tell us now you permitted him to do it, and afterwards made objection. You did not overlook it that day, did you? A. No.

Q. What did you mean a minute ago when you

said you did overlook it, and now you say you did not? A. I overlooked it, yes.

Q. Overlooked what? A. That he had no right to run the elevator.

Q. When did you overlook it on that day? A. On the day I made the statement.

Q. Did you overlook it on the day he ran the elevator? A. No sir; I told him he had no right to run the elevator.

Q. Then you overlooked it when you made your statement of July 29th, and you overlooked it at this time, three days after the accident? A. Yes.

Q. And you overlooked it every time until you made this statement supplementing this other statement some months afterwards? A. It appears to be a fact.

Q. Who called your attention to the fact that he had no right to operate the elevator and asked you to put it in your statement? A. Nobody, I knew it.

Q. How did you come to put it in your statement then?

MR. SMITH: I object.

Q. Did you put it in your statement? A. Not that I know of.

Q. Then you did not put it in any statement, did you, that this man was not a proper person to run this elevator and had no right to run it? A. No sir, none that I signed.

MR. TIFFANY: I offer that statement of July 29, in evidence.

Received and marked Exhibit P-3.

Q. Right after this accident you went down in

the basement and pulled this switch out and shut the door of that elevator so nobody could run it? A. I did; I did that so they could get the body out of the pit.

Q. You do not mean that, do you? A. Yes sir.

Q. Where was the elevator? A. It was on the 12th floor.

Q. Was that the only reason you had, to get the body out of the pit? A. Yes sir.

Q. The elevator was not in the pit. A. The elevator was on the fifth floor, but the body was in the pit.

Q. You did not have to touch the elevator, did you? A. I wanted to take precautions.

Q. Did I understand you a few moments ago, that you did not take Sampson from the payroll of Marc Eidlitz and Company and put him on the payroll of the Otis Elevator Company not only on this job, but several times? A. Not that I remember.

Q. Will you say that you did not? A. Not that I remember.

Q. You know from the records, don't you? A. Yes sir.

Q. Will you say you did not take Sampson from the Marc Eidlitz payroll on June 4, 1923, and put him back on the Otis Elevator payroll? A. I don't remember.

Q. Will you say you did not change men from the Otis Elevator Company to the Marc Eidlitz Company several times, back and forth? A. Yes, where there was overtime I did.

Q. And where there was not overtime, you did? A. No sir, I don't remember.

Q. Well, will you say that you may have? A. I don't remember.

Q. That is the best you can say, that you don't remember? A. Yes.

By Mr. Smith:

Q. What do you mean when you say that you would take a man when there was over time and put him back and forth? A. So that Mr. Sampson wouldn't draw so much money on the payroll of Marc Eidlitz, so some of our other men should work in the gang and would get a possible share in the overtime.

Q. I confess I don't understand that; what do you mean; you said to Mr. Tiffany a little while ago that sometimes you would take a man of Eidlitz and put him on the payroll of the Otis Company, where there was overtime; what did you mean by that? A. That is what I meant; if there were cars to be run at night, I would take one of my men out of the gang and put him in the place of Mr. Sampson, to take care of the elevators while they were being operated or men working on them. Wherever they wished to have them.

Q. You mean when there was overtime work to be done, is that what you mean? A. Yes.

Q. You would take one of your men and give him the overtime work? A. Yes.

Q. That had nothing to do with the employment of Sampson by Eidlitz or Otis? A. No sir.

Q. My understanding is that Mr. Sampson went on the payroll of Marc Eidlitz & Company on May 17th? A. Yes sir.

Q. Wasn't it some time in January of the next year that he came back again to the payroll of

the Otis Elevator Company, or had you gone when he came back? A. I believe that I can recollect he quit the Marc Eidlitz people and went to work somewhere else, I don't know for certain.

MR. TIFFANY: I ask that that be stricken out, if he did not know.

MR. SMITH: He said he did not know.

MR. TIFFANY: I submit it is improper and should not be in there if he does not know, but I do not care.

THE COURT: I do not see anything improper in that.

BY MR. TIFFANY:

Q. So that you controlled at all times who was on the payroll of Marc Eidlitz & Company, and when there was overtime to be made to send other men there?

MR. SMITH: I object to the question as leading, and as stating an unwarranted assumption of fact.

Q. Well, isn't it a fact that you did control who was on the payroll of Marc Eidlitz?

MR. SMITH: Objected to as leading.

MR. TIFFANY: Answer yes or no.

THE COURT: The question is leading. He is your witness.

Q. Who controlled who was on the payroll of Marc Eidlitz & Company? A. Mr. Anderson.

Q. How did he control it? A. He controlled it of his own will.

Q. Who assigned the men to him? A. Who assigned the men to him?

Q. Yes. A. Well, in this case I did.

Q. Didn't you in every case? A. No sir.

Q. Well, who else? A. Well, he might have telephoned to the rooms, which he has, for men.

Q. In the case of Sampson, you say you did it? A. Yes, in the case of Sampson.

By Mr. Smith:

Q. As I understand it, he wanted a man? A. Yes.

Q. And you said he could have Sampson? A. Yes.

Q. And Sampson went on the payroll? A. Yes.

Q. And he stayed on his payroll, as far as you know, for a length of time? A. Yes sir.

Q. And then you say that he went somewhere else afterwards? A. Yes sir.

Q. Now, during the time Sampson was on Eidlitz's payroll, did you have anything to say as to his work or his hours, or his pay? A. No sir.

By Mr. Tiffany:

Q. Isn't it a fact that he was placed on that payroll, pursuant to the terms of an agreement between the Elevator Construction Union No. 1, and the Elevator Manufacturers' Association? A. Yes sir.

Q. That is, an agreement between the manufacturers of elevators and their employees? A. Yes sir.

Q. It has nothing to do with general contractors, has it? A. Of course it has.

Q. Are they parties to it?

Mr. Smith: Objected to as being no way to prove a contract or agreement.

MR. TIFFANY: I am not trying to prove a contract or agreement, he knows that. I asked Counsel to produce a certain contract or agreement between the Otis Elevator Company the defendant in this case, or the Elevator Manufacturers' Association, and the Elevator Construction Union, which agreement was in force and effect on June 4, 1923.

MR. SMITH: Objected to as not a proper notice to call for an agreement, and as having nothing to do with this case.

MR. TIFFANY: If the court please, the notice was served March 21, acknowledged by the attorney of record, and and has to do with the defendant, and it shows that the man was placed on the payroll of Marc Eidlitz in pursuance of that agreement.

MR. SMITH: I say no such agreement could be relevant in this case.

THE COURT: I cannot see so far how it has any bearing.

MR. TIFFANY: It has this bearing: Mr. Smith will contend that Sampson was in the employment of Marc Eidlitz, if that makes any difference; we say we have a right to put in our case and show an agreement between the Union to which Sampson belonged, and the Otis Elevator Company, through an association to which it belonged, under which Sampson was put upon the payroll of the Marc Eidlitz Company, and that there was not any hiring by the Marc Edlitz Company; it was a rule that the Otis Elevator Company made with their employees; and we have a right, when they have

that agreement, to have it produced, and when we offer it, with the suggestion of the purpose for which we offer it, he can make his objection.

MR. SMITH: The testimony in this case is that this man was an employee of the Marc Eidlitz Company. My friend says there may be some agreement between the Union requiring the Otis Elevator Company to furnish a man to Marc Eidlitz Company. That has nothing to do with this case. The question is, was Sampson an employee of Otis or an employee of Marc Eidlitz Company? He calls on me to produce an agreement made between some organization with some elevator construction company.

THE COURT: If you have that agreement, you should produce it. Whether or not it should go in evidence is another thing.

MR. SMITH: I have not got it.

MR. TIFFANY: It is directed to his client to produce it.

MR. SMITH: I have not produced it. You have your remedy. Go ahead and produce your secondary evidence, if you want it.

MR. TIFFANY: I have another remedy, if they want to stop our getting the evidence.

ANDREW ANDERSON, recalled.

DIRECT EXAMINATION BY MR. TIFFANY:

Q. Mr. Anderson, did you have any control of the hiring or the designation or discharge of any of the men of the Otis Elevator Company based upon the payroll of Marc Eidlitz & Company, and especially Otto Sampson?

MR. SMITH: I object.

MR. TIFFANY: Question withdrawn.

Q. What control did you have of Sampson after he was placed on the payroll of the Marc Eidlitz Company by the Otis Elevator Company, on June 17th?

MR. SMITH: Objected to. There is no proof that he was placed on the payroll of Marc Eidlitz & Company by the Otis Elevator Company.

Q. Where did you get Otto Sampson from? A. He was sent to us from the Otis gang.

Q. From the Otis Elevator Company? A. Yes, when we took the car over.

Q. Why was he sent to you? A. That is the only place we could get him under the agreement.

Q. What agreement? A. The agreement between the Elevator Construction and the Union, that we must hire an elevator apprentice or instructor for that car, and also to work on the car and machinery.

Q. Where did you get Sampson from? A. From Mr. Coward.

Q. What control, if any, did you have, over Sampson after you put him on the payroll? A. Why, we didn't have much control, didn't bother much, he was in the machinery room all the time to attend to the machine.

CROSS EXAMINATION BY MR. SMITH:

Q. Were you the superintendent there? A. Yes.

Q. Did you have the right to hire and fire? A. Why, if I wanted to fire him I could have notified Mr. Coward that we didn't want him, and get another man.

Q. That you did not want him? A. Yes.

Q. While he was there he was on your payroll? A. Yes.

Q. And he was working for you at this time? A. On that day, yes.

Q. He was working for you? A. Not all the time.

Q. But on June 4th he was working for you? A. Yes.

Q. He was on the payroll? A. Yes.

Q. You paid him his wages? A. He was paid by us.

Q. And he was doing work for you? A. Yes. He was attending to the machinery.

Q. For you? A. Yes, for us, if you put it that way.

MR. TIFFANY: That is all. That is the plaintiff's case.

RECESS.

Tuesday, April 14, 1925.

Case resumed pursuant to adjournment.

MR. SMITH: If the court please, I make an application for a non-suit on the following grounds:

That there is no proof that the defendant owed any duty to the decedent when he was injured; there is no proof of any negligence on the part of the defendant or any of its servants; that the proof is that neither the decedent nor any of his fellow employees had the right to work in shaft 21; that there is no proof that decedent's foreman had obtained permission from the defendant to work in the shaft, or that any one had obtained permission for him; and another point is, that decedent was guilty of contributory negligence.

MR. TIFFANY: I think there is enough matter in this case to go to the jury. It is obligatory, however, on the plaintiff, to show negligence on the part of this defendant, and the mere fact that this man was injured does not entitle him to recover unless the jury is satisfied from legal evidence on the part of the plaintiff of the negligence of the defendant.

Does the jury believe that it has been established that the defendant operated this car at the time of the accident, and that they were negligent in so doing? That is not discussing the question of contributory negligence.

THE COURT: I refuse your application.

MR. SMITH: And your Honor will grant me an exception?

THE COURT: Certainly.

JAMES COWARD, recalled by the defendant, testifies:

DIRECT EXAMINATION BY MR. SMITH:

Q. Mr. Coward, on June 4, 1923, any time during that day, did Mr. McGarey request you or make arrangements with you for permission for the men of Norman & Seton to work in shaft 21? A. No, sir.

Q. Did Mr. Anderson make any such arrangement? A. No, sir.

Q. Did Mr. Moberg make any such arrangement? A. No, sir.

Q. Did Mr. Bader make any such arrangement? A. No, sir.

Q. Did you on that day know that the Seton men were working on shaft 21? A. No, sir.

CROSS EXAMINATION BY MR. TIFFANY:

Q. You were on the job that day? A. Yes.

Q. And did your duties take you about this battery of shafts that were in course of erection? A. Yes.

Q. You saw the Seton people working in the battery, didn't you? A. No, sir.

Q. You did not see anybody working in the battery of elevators that day, any of the Seton people?

MR. SMITH: That is objected to; I asked him only about shaft 21.

MR. TIFFANY: I have a right to go on and attack his credibility, and show if he did not see them on that day, he ought to have seen them.

MR. SMITH: If he limits it to shaft 21, I have no objection; otherwise I object.

THE COURT: Objection sustained.

MR. TIFFANY: I take an exception.

Q. Were you in the vicinity of shaft 21 that day, all the day? A. No, sir, not all day.

Q. Where were you? A. Round the escalators, round the old part of the building and different places in the building.

Q. You did not know, as I understand your testimony, that the Seton people were working in shaft 21 that day? A. No, sir.

Q. At any time? A. No, sir.

Q. When was the first time you found out they were working in that shaft? A. When a man was killed.

Q. Have you in mind the general location and situation of those various elevators of which 21 was a part? A. Yes, sir.

Q. Were they alongside of each other? A. Yes, sir.

Q. How many of them? A. Seven.

Q. Were they complete, in place, that day?

MR. SMITH: I object.

A. No, sir.

Q. Was 21 complete on that day? A. No, sir.

Q. What work had to be done on the shaft? A. A temporary cab was ready to be

installed by Marc Eidlitz & Company, for temporary use.

Q. You knew, did you not, that when the Otis Elevator Company was not using shaft 21, other men were working in and about the shaft? A. No, sir.

Q. You did not know that? A. No, sir.

Q. Isn't it a fact that you, as the foreman of the Otis Elevator Company, were co-operating with the general contractors in so far as shaft 21 was concerned, in that when you were not using that shaft, they could put their labor men to do various other work in and about that shaft that had to be done in order to complete the construction of the shaft itself?

MR. SMITH: I object to that as not proper cross examination.

THE COURT: Sustained.

MR. TIFFANY: I take an exception.

Q. You knew, did you not, that there was additional work to be done on the outside part of the shaft on that day, June 4, 1923?

MR. SMITH: Objected to as not proper cross examination.

THE COURT: I think that is proper.

MR. SMITH: I take an exception.

MR. TIFFANY: Question withdrawn.

Q. Was elevator 21 under your—when I say your, I mean the Otis Elevator Company's—absolute control on June 4, 1923? A. Yes, sir.

Q. Did you take any precaution to so control that elevator or so leave it that when your men were not working about it, no other person could go upon it and use it?

MR. SMITH: Objected to as not proper

cross examination; I asked no questions as to that at all.

MR. TIFFANY: I will make him my own witness for the purpose of that question.

MR. SMITH: Not until you finish your cross first.

THE COURT: Yes, you had better finish your cross examination first, if you want to do that.

Q. You knew, did you not, on June 4, 1923 that shaft 21 was ready for work by the Seton people?

MR. SMITH: Objected to.

A. No, sir.

Q. What was your business around there as foreman, with respect to shaft 21?

MR. SMITH: I object to that as not cross examination.

MR. TIFFANY: Question withdrawn. I will make him my own witness and ask the question.

MR. SMITH: I think he should wait until I finish, and then he can place this man on the stand. I may want to withdraw this witness now, I may not want to go any further, but I think I am entitled to conduct my case in an orderly manner.

MR. TIFFANY: That seems ridiculous. I have a right to ask that question of the man on the stand.

THE COURT: Do you want to go further, Mr. Smith?

MR. SMITH: I do not.

THE COURT: Then you may ask such question as you desire of him.

MR. SMITH: I object to your Honor's permitting that.

MR. TIFFANY: Now repeat that question that I asked before.

Q. (Repeated by stenographer) Did you take any precaution to so control that elevator or so leave it that when your men were not working in it, no other person could go upon it and use it?

MR. TIFFANY: That refers to shaft 21.

MR. SMITH: I contend that is part of the plaintiff's case.

THE COURT: Yes. What time do you refer to?

MR. TIFFANY: June 4, 1923. That refers to shaft 21 on June 4, 1923 prior to, say, four o'clock in the afternoon.

A. No, sir.

MR. TIFFANY: That is all.

MR. SMITH: No further examination.

TOBIAS GREEN, sworn as a witness, testifies:

DIRECT EXAMINATION BY MR. SMITH:

Q. Mr. Green, are you employed by the Traveller's Insurance Company? A. Yes.

Q. You have been sitting here with Mr. Tiffany, helping him on this case? A. Yes.

Q. You insure Marc Eidlitz & Company, don't you?

MR. TIFFANY: I object to that as not a fair question.

MR. SMITH: I thought you wanted the evidence. I want to show, and I have a perfect right to show that the man who is sitting helping try the case is a man who is employed by the insurance company that insures Marc Eidlitz & Company, to show the bias of our friend McGarey on the witness stand.

MR. TIFFANY: If you assert the right now, if I was not sure no juror would be swayed by such evidence, I would press my objection.

MR. SMITH: I am pressing the question.

MR. TIFFANY: I withdraw the objection.

A. We do.

MR. SMITH: Defendant rests.

MRS. CATTERALL, recalled:

DIRECT EXAMINATION BY MR. TIFFANY:

Q. I just want to ask you, Mrs. Catterall, did you have any income other than that which was coming to you or which was given to you by your husband, at the time of his death and prior to his death? A. No, sir.

MR. TIFFANY: That is all. Plaintiff rests.

Motion for Direction of Verdict.

MR. SMITH: Now, your Honor, I move for the direction of a verdict in favor of the defendant, on the grounds stated in the motion for a non-suit, and on the further ground that it appears now that no person, neither Mr. Anderson, nor Mr. Bader, Mr. McGarey or anybody else, secured permission on June 4, 1923 to work in shaft 21, from Mr. Coward. That shaft 21 was in his control, and I say that the evidence shows without any question that there was no right on the part of the Norman Seton foreman to put his men in the shaft without the permission of Mr. Coward; and the evidence now shows, without any question and without dispute, that no such permission was granted, and that he did not know Seton's men were working in the shaft.

MR. TIFFANY: Your Honor has already ruled on that question.

THE COURT: Motion refused.

MR. SMITH: Your Honor will grant me an exception, of course?

THE COURT: Yes.

Mr. Smith sums up for the defendant.

Mr. Tiffany sums up for the plaintiff.

Charge.

The court thereupon charged the jury as follows:

THE COURT: Members of the jury, there was a motion in this case for a non-suit and another motion to direct a verdict. Both those motions have been decided adversely to the defendant, but that is no indication of what you should do in this case; it is no indication of what the court thinks the rights of these parties are. The decisions of those motions were simply directed to the legal standing of a case of this character, and where there are any facts in dispute the court cannot, under our law, decide them itself but is obliged to leave them to the jury. So in this case the court had to apply the rules of law applicable to this case, and leave it to you to determine whether or not the plaintiff has established by a preponderance of the evidence that the accident which resulted in the death of this man was the result of negligence on the part of the defendant company.

It appears from the evidence that, adjoining a building occupied by R. H. Macy & Company, on 34th Street, New York, there was being erected in the month of June, 1923, an extension, and in that extension was a battery of seven elevators. The work was being done by a general contractor, as I understand the evidence, Marc Eidlitz & Company. The Otis Elevator Company had a sub-contract to install these seven elevators.

On the fourth day of June, this extension was

nearing completion. One of the elevators, No. 22 I think, was being operated by the general contractor; the other elevators were still unfinished, and it is contended they were still under the control and management of the Otis Elevator Company. While the Otis Elevator Company was installing these elevators, the carpenter work connected with the shafts in which the elevators were being operated was being done by another firm, who had a sub-contract for carpenter work.

It appears that the work was progressing in charge of a Mr. Anderson, who had an assistant and a timekeeper, and Mr. Anderson and his assistant and timekeeper were not employees or servants of the Otis Elevator Company. They were not the servants or employees of Norman Seton & Co., who had the sub-contract for the carpenter work, but were the employees of the general contractor, Marc Eidlitz & Company. Now, you want to keep that fact in mind, that Mr. Anderson and his assistant, who has not been produced, and his timekeeper, were in no way connected with the Otis Elevator Company, as their employees or as their agents, and nothing that they said or did in any way bound the Otis Elevator Company or its employees.

There is evidence in this case that when carpenter work was to be done in or about these elevator shafts, notice was given to the Otis Elevator Company, so that they could control their work accordingly, or if the Otis Elevator Company was not working in these shafts, then, upon notice, other contractors were in the habit

of working there; but the evidence appears to be that no one was to work in those shafts while the Otis Elevator Company was in charge, without notice to that company.

Now, you are the sole judges, members of the jury, of what the evidence has been on this particular subject as well as on all other subjects that have been dealt with in this case, so far as the actual evidence is concerned.

On the fourth day of June, George Catterall, the young man who was killed in this accident, was working, not for the Otis Elevator Company, not for Marc Eidlitz & Company, the general contractor, but for Norman Seton & Company, the contractor who was doing the carpenter work around that building—and he was set to work, on the afternoon of that day, fixing some of the carpenter work on shaft 21, on the fifth floor. In order to do this work, the carpenters had to enter the shaft, place a plank on a jack, as has been described, and then standing in the inside of that shaft do the work which was required. There was an elevator in that shaft. It was not completed; there was no permanent cab on the elevator as yet, but it was an elevator that was being used, and had been used in the morning of that day; and when these men entered that shaft to do the work, this elevator was somewhere above them. They commenced, you see, to do their work on the fifth floor, and the elevator was on the ninth floor or the twelfth floor.

The man who assisted the deceased went upstairs and there took a board, which he described as a board of about eighteen inches or sixteen inches in width and six inches in length—or

either way, eighteen inches in length and six inches in width—a rough board and put on that some sort of a sign, "Working below", and put that sign on a gate which he found at the front of the elevator entrance, on this upper floor. He did not notify anybody on this elevator, or he found no one in charge of that elevator, and then he went back downstairs, and he and Catterall were working on this elevator shaft. Looking up some time afterwards, he saw either this elevator or the cable connected with the elevator moving, and this man swung himself, as he says, out on the main floor. Catterall was not so fortunate; the plank on which he was standing tilted, and he fell from that fifth floor to the bottom of the shaft, and was injured and died shortly after this accident, leaving a widow and three minor children surviving him.

Letters of administration were granted on his estate, and the Administratrix ad prosequendum brings this suit to recover the pecuniary injury resulting to this widow and next of kin—who would be his children—by reason of this young man's death.

Now, the mere fact that this man was killed while at work in this building will not of itself entitle him to recover in this suit. It is not a question of sympathy for the widow and next of kin; this is a question of the liability of this defendant. You see, the action is not brought against the sub-contractor, whose employee he was; it is not brought against the general contractor, who had the whole control of the building; but it is brought against the Otis Elevator Company. They had a right to select the person

or the firm against whom the action should be brought, but this Administratrix must establish by a preponderance of the evidence that the particular defendant that she has selected to bring this suit against was negligent, and that such negligence was the proximate cause of the injury which resulted in this man's death; and in addition to that, if the plaintiff can recover, it must also appear that this deceased was not guilty of contributory negligence.

Now, members of the jury, you see the very first question which you have to decide is, was this accident due to the negligence of the Otis Elevator Company? He was not an employee of that company, so in case you find that the accident was caused by improper apparatus and that was the cause of his death, or cause of his fall, that could not be charged up against this defendant, because this defendant did not put him to work there. The question is, was this defendant negligent. It is contended that the elevator was not operated by this defendant company. If you find that this elevator was not being operated by the defendant company, or was not being operated at that time by consent of that company, of course, there would be no liability because the elevator was being operated at this time this man was injured, and if its operation was by somebody else, some one over whom the Otis Elevator Company had no control or power, there could be no liability on the part of that company. But if you find that the Otis Elevator Company was operating this elevator and that this elevator caused this accident, that would not of itself entitle the plaintiff in

this case to recover, because this action is based on negligence, and unless there was negligence on the part of this company they would not be responsible or liable for the result caused by the operation of this elevator.

Now, here you have another situation which you must consider. It was the duty of this company, in the operation of this elevator, to use reasonable care and caution—that is, the care and caution that a reasonably prudent person would have used under the conditions that then existed.

What were the conditions that then existed? If you find that the elevator shaft was under the control and authority of the Otis Elevator Company and no one had a right to be in that shaft or do anything about that shaft while they were working there, then you are to say what negligence there was on the part of this company. If they had given authority to the employers of these two men to enter that shaft, that would be another situation; but if they were in sole control of that shaft and they had given no authority to anyone to enter that shaft, and they had no knowledge that these men were working in the shaft, where is there any negligence on their part if they operated this elevator, which they had a right to do?

Now, it is contended that on this day in question, the Otis Elevator Company had consented, or had been informed that these men were to work in that shaft. It would be obligatory on the plaintiff to establish that fact not by guess, not by inference, but by evidence, legal evidence. The mere fact that the employer, or the superintendent of the firm that employed Mr. Catterall says that he notified Mr. Anderson, or Mr. An-

derson's assistant, or the timekeeper, that he wanted to work in that shaft and that somebody told him it would be all right, would not be sufficient. You see that has no binding force on the Otis Elevator Company. They had not any authority to speak for the Otis Elevator Company—and you had the superintendent and manager of the Otis Elevator Company here, and he said that he did not know on that day that those men were working there. As I understand the testimony, no request was made on that day by any of these parties for permission to have these carpenters work in that shaft. The timekeeper has been on the stand, and he does not recall specifically what he did on that day, and the mere fact that he says he never told them to work in that shaft, or any of those shafts, without first consulting the man in charge of the Otis Elevator Company work, would not be legal testimony. The question is, did he on that day notify the Otis Elevator Company that these men were to work there, so that they had reason to know that the men were there.

Now, if Mr. Anderson or his assistant, or this timekeeper, were notified that the carpenters wanted to work there, and did not notify the Elevator Company, that would be no negligence on the part of this elevator company, if they did not know that the men were there.

So you see the question is, if the elevator company were running that elevator, were they negligent in working it in the way and manner in which they did? Did they use the care and caution that an ordinarily prudent man would have used under the conditions that then existed?

If you find that the plaintiff has established

by a preponderance of the evidence, that this accident was caused by the negligence of this Elevator Company, then there can be a recovery, unless you find that the deceased was guilty of contributory negligence.

Here was the shaft with an elevator in it. According to the testimony of the deceased's assistant, they had been working near that elevator, on it and in the shaft or somewhere in that neighborhood. The elevator had been in operation. Did he use the care and caution that a reasonably prudent person would have used in working in the way and manner he did? He was obliged, under the law, to use the care and caution that an ordinarily prudent person would have used. If you find he was negligent and that negligence on his part contributed to the accident, then there can be no recovery, because if this man now deceased contributed to the injury by his own negligence, then even if you find that the Otis Elevator Company was negligent, there can be no recovery.

If you find that there is a liability, then it is a question of the amount of recovery. Of course, if you find that the plaintiff has failed to establish that the accident was due to the negligence of the Otis Elevator Company, or if you find that the deceased was guilty of contributory negligence, you need not consider the question of damages. But if you find that there can be a recovery, then you have to determine the amount of recovery. This is a statutory action. There can be no recovery for pain and sorrow which has been brought upon his family by the sudden death of the husband and father. The statute

limits the recovery to pecuniary injury resulting from this man's death to his widow and his children, and this means deprivation of a reasonable expectation of pecuniary advantage which would have resulted to his widow and next of kin, had he lived. Now you see, members of the jury, that is an uncertain proposition. Out of his earnings he had to be supported himself. His earnings depended, of course, largely upon his own state of health; he might have been injured in some other way; he might have contracted disease, so instead of being an asset to his family he would have been a liability. You have to take all those matters into consideration. You are to say what sum, in your opinion as reasonable, sensible men, would be a sum that would represent the pecuniary advantage which these people would have received had he lived.

But there is another question to be determined in arriving at this amount. You see, if this man had lived and had continued to earn money and bring it into the family, that sum would have been brought in weekly, bi-weekly or monthly, or whatever way his wages were earned and received by him; but in case you find a verdict for the plaintiff, this sum would be a lump sum—that is to say, the Administratrix would receive for this widow and children a sum in gross, a lump sum at once, to use it, to invest it or do what they please with it. So the law says you must discount what the value would be, what you feel would be the amount of the loss to these people of the husband's and father's death; you must discount it so it will represent not the amount they would receive during his whole

lifetime but what that sum would be worth at the present time. In other words, discount it because they would receive the money at once. That is not a sum, members of the jury, that would bring in interest for the amount this widow and children would receive from their husband and father, but a sum which you say would represent the present loss of those people by reason of the death of this man.

Now, members of the jury, you are the sole judges of what the evidence has been. It is not what counsel contend the witnesses have testified to, or the recollection of the court as to the evidence, which should govern you. You should be the sole judges of what the evidence has been and the weight and credibility which you will give to the testimony. You are to take this evidence and consider it carefully. If you find that the plaintiff has failed to establish that this accident was caused by the negligence of this defendant, then, of course, the plaintiff is not entitled to your verdict.

If, on the contrary, you find that the plaintiff has established the fact that the accident was due to the negligence of this defendant, but if you find that the defendant has established by a preponderance of the evidence, that the plaintiff was guilty of contributory negligence, then the defendant is entitled to your verdict.

But if you find that the accident was due to the negligence of this defendant, and that the plaintiff was not guilty of contributory negligence—by that I mean the deceased was not guilty of negligence—then your verdict will be for the plaintiff, and you will find a verdict and

assess the damages in the way and manner which I have now given you.

(The jury thereupon retired.)

MR. TIFFANY: I desire to except to the portion of your Honor's charge where you said Anderson was not an employee of the Otis Elevator Company, and nothing that he or Bader or McGarey said or did was binding on the Otis Elevator Company.

Second, I except to that portion of your Honor's charge where you said that if this accident happened through any improper apparatus they could not find for the plaintiff against the defendant, because the defendant did not put him to work.

Third, I except to that part of your Honor's charge where you said the elevator was not being operated by this company or an agent of the Otis Elevator Company, on the ground, as it seems to me, that they should have had knowledge of its operation.

THE COURT: To whatever I said on that subject you may take exception.

MR. TIFFANY: I further except to your Honor's charge where you say if the elevator was operated by someone over whom they had no control or authority, because it seems to me they were bound to protect it so it could not be used.

THE COURT: That is not in your complaint.

MR. TIFFANY: I think it is broad enough to cover that.

I further except to your Honor's charge where you say that the plaintiff must establish the facts not by guess, not by inference. My objection is to "not by inference". If we establish

any fact from which inference can be drawn, they may take that into consideration.

MR. SMITH: I desire to except to your Honor's charge as follows:

I except to that part of the charge where your Honor said where carpenter work was to be done notice was to be given to the defendant so they could control their own car.

And to that part of the charge where you said no one could work in the shafts while the Otis Company was in charge, without notice to the defendant.

And I further except to your Honor's leaving it to the jury to say whether permission had been granted.

THE COURT: You may take exception to what I have said on those points.

Exhibit P-3.

New York, N. Y., July 29, 1924.

This is to state that I did not run Elevator #21 at any time during June 4, 1923, but I was on it at times when it was run by others. I gave *R. Longworth* privilege to use the car Monday. He used it from 9:30 A. M. till 10: A. M. from the 1st to 12th floor. I gave A. Lawrence privilege to use it at 11: A. M. to make a trip with material up to 3rd floor. At *3: P. M. I rode down with O. Saiupson* to the 3rd floor. A. Lawrence and J. Maixner were working on Elevator #44 from 2: P. M. till 4:15 P. M. R. McLaughlin and H. Henderson were working on Elevator #42 all day. J. Bergerson and W. Hurley were working on Elevator #43 all day. E.

Exhibit P-3.

Golder and T. Lawson were working on Elevator #40 all day. J. Newheller and N. Billstein were working on Elevator #37 all day. A. Lockwood was on the 3rd floor by the locker, making out the time from 3: P. M. until 5: P. M.

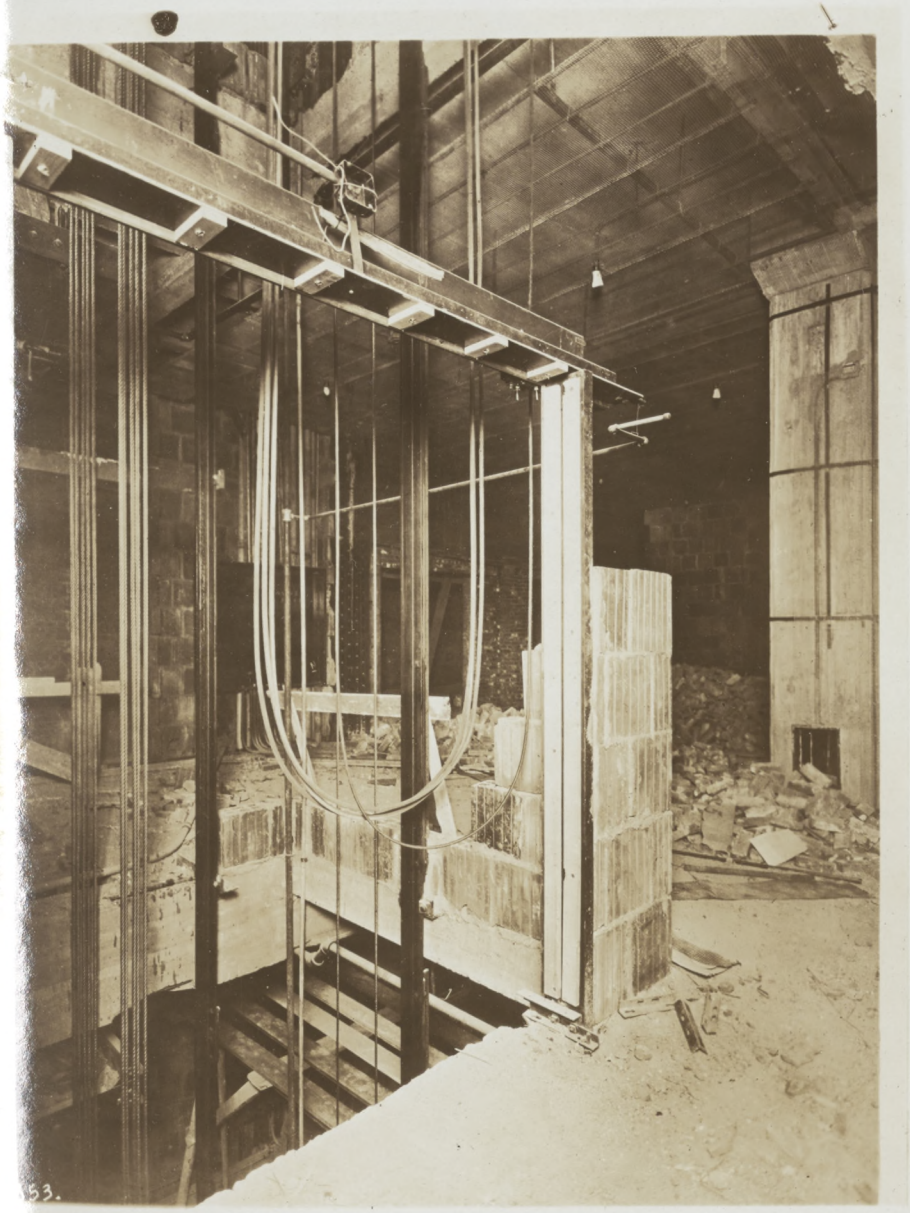
After getting off the car at 3: P. M., I went over to the locker to give A. Lockwood instructions about the time and I left there at 3:30 P. M. to go down on the 1st floor by the conveyors. I was not there long when I saw a man running about. I asked him what he wanted and he said a ladder to get down into the Elevator pit because a man had fallen down the shaft. I then went over to the scene of the accident. A policeman came up to the locker about 5: P. M. to question me about the accident and I told him I knew nothing about it except that I had gone over by the accident after it had happened. I learned from the policeman that the man who saved himself said that the car came down on them. I know this to be impossible. I also heard from B. Augestenseu at 4:06 P. M., the man on the scaffold with Catterall, that he had put a note on the car.

It is understood that if any workmen such as carpenters or plumbers want to in one of the elevator shafts they must first ask permission of the elevator foreman. No carpenter or anyone connected with Norman Seton, Inc. asked me if men might work in this shaft #21 on June 4th.

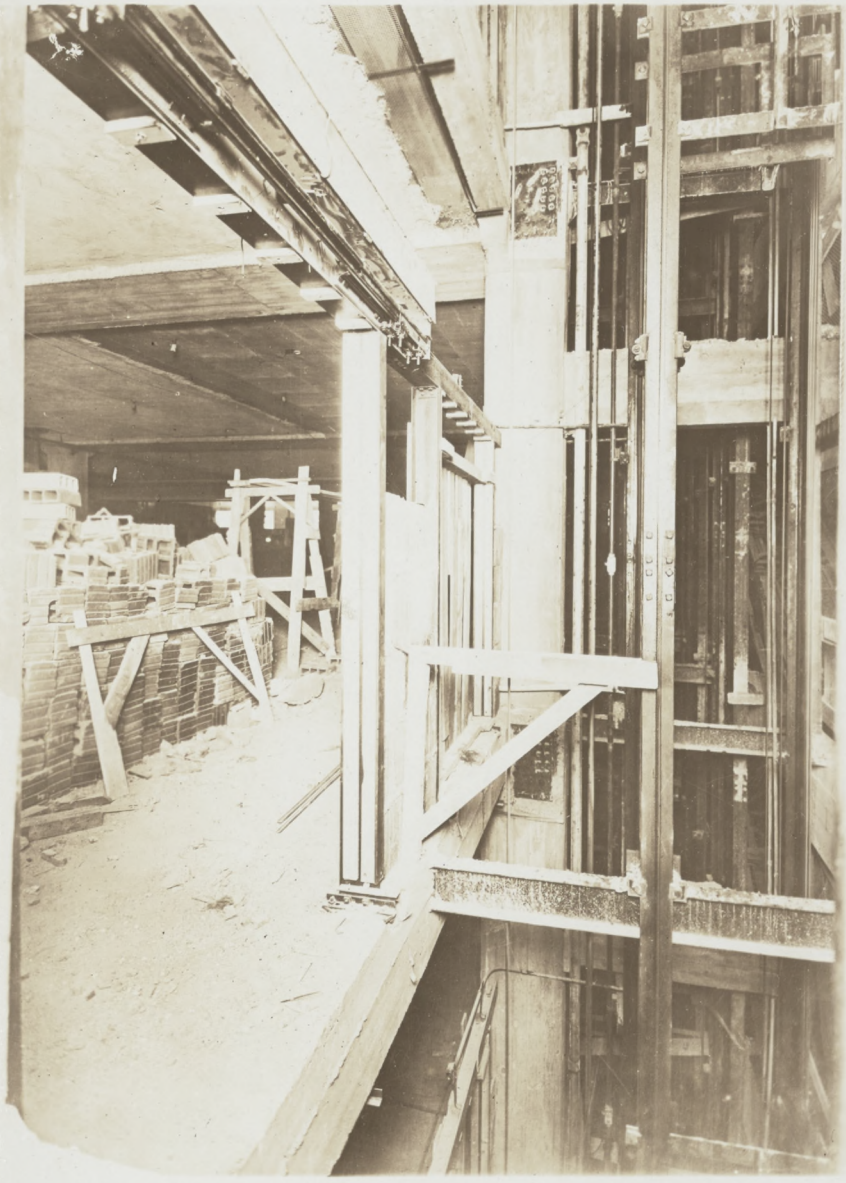
JAMES COWARD.

Witnessed by
Raymond H. Hoyt.

Exibit D-1 for Identification.



Exibit D-2 for Identification.



Opinion.

NEW JERSEY SUPREME COURT.

No. 85 October Term, 1925.

JESSIE CATTERALL, Administratrix ad Prosequendum,

Plaintiff,

vs.

OTIS ELEVATOR COMPANY,

Defendant.

On Defendant's Rule to Show Cause.

Before GUMMERE, Chief Justice, and Justices KALISCH and CAMPBELL.

For the rule WALTER F. GLENNEY,
EDWIN F. SMITH of counsel.
J. RAYMOND TIFFANY.

PER CURIAM:

A verdict was rendered in the Hudson Circuit in favor of the plaintiff and against the defendant for $22,500.00. Defendant was allowed a rule to show cause why the verdict should not be set aside and a new trial granted.

Of the four reasons assigned for a new trial under the rule to show cause only two of them are relied on and argued in the brief of defendant's counsel. 1. That the verdict of the jury was contrary to the weight of the evidence. 2. That the verdict of the jury was contrary to the charge of the Court.

The plaintiff bronght her action under the Death Act (2 Comp. St. 1910, p. 1901) against the defendant company to recover the pecuniary loss sustained by her, in the death of her husband, alleged to have been caused by the negligence of the defendant company's servants. The facts are these: In June, 1923, Macy & Company was causing to be erected a new addition of many floors to its store at 34th Street, in the City of New York. The general contractor was Eidlitz & Company. There were several sub-contractors, among whom was the Otis Elevator Company, the defendant.

The latter had charge of installing the elevators and escalators in the building. Norman Seton & Company, another sub-contractor, had charge of the installation of doors and tracks leading into the elevator shafts at the several floors of the building. At the time of the accident, in which plaintiff's decedent lost his life, there was a battery of seven elevators designated, as Numbers 21 to 27 inclusive, in the course of construction. The deceeased was in the employ of the Norman Seton Company and one of the duties of his employment was to hang elevator doors and to do track work in the various shafts in the above-mentioned seven elevators, all of which were under the control of the defendant company. The only shaft in temporary operation at the time of the happening of the accident was number twenty-two, the elevator having an operator in the employ of the defendant, to run it. No work was permitted to be done in any of the elevator shafts without first having obtained permission from the defendant company. The practice was for the foreman to apply for permission,

to the general superintendent or his representative of the general contractor, who in turn would obtain permission of the representative of the defendant company. Its representative was James Coward. There is testimony to the effect that such permission was given. The character of the work to be done was of such a nature as to expose the employee to great hazards of life and limb, unless the person in control of the elevator shaft had notice that work was contemplated to be done in such shafts. This was clearly so where the car was kept stationary on an upper floor and the work was done in the shaft of one of the lower floors. There were three switches which controlled the operation of the car in shaft twenty-one where the accident happened. The baby switch which was contained in the car itself operated by the person running it. A control switch in the "Pent-house" on the roof level, and an emergency switch in the pit. It was not disputed that if the switches in the "Pent house" and in the pit were properly set the car in shaft 21, with which the mischief was done could not have been stirred. This circumstance is an important feature in the case, since it was clearly established by the testimony that these switches were under the control of the defendant company.

Now, there was testimony of the foreman of the Norman Seton & Company, under whose orders the decedent was working, on the day of the accident, that he, the foreman was instructed to see to it that shaft 21 was clear for his men to go to work and that he complied with the instructions, both in the morning before eight o'clock and in the afternoon at 12:30. There was also proof

that the elevator in shaft No. 21 and been used for several days before the accident to hoist materials, but when this was done notice was given to the workmen. The witness Augusteen testified that he worked with the deceased and that they were directed by the foreman to do work in shaft 21; that he had worked within fifteen feet of the shaft and that it had not been running all day; that the witness and deceased had received orders from the foreman to go into the shaft at about three o'clock in the afternoon; that before erecting a scaffold therein for the purpose of doing the work required both he and the deceased looked up the shaft and saw the elevator at the ninth or eleventh floor; that the work to be done by them in the shaft was on the fifth floor; that he went to the ninth or eleventh floor, and placed a sign on the gate in front of elevator 21, which sign consisted of a board 18 inches long by 6 or 8 inches wide and on it he wrote with bue crayon "Working below" in letters of an inch or an inch and a half in size.

Mr. Coward, who was the reperesentative of the defendant Company, testified that he was in charge of its elevators; that he was in charge of the operation of them and who could operate them; that elevator 21 was not turned over to Marc Eidlitz & Company, the general contractor. He was asked: "Was Elevator 21 under your—when I say your I mean the Otis Elevator Company's—absolute control on June 4, 1923?" "A. Yes, sir." "Did you take any precaution to so control that elevator or so leave it that when your men were not working in it, no other person could go upon it and use it?" A. "No sir."

The situation in the shaft, at the time the deceased and his companion started to construct the scaffold was that the elevator in shaft No. 21 was at rest several floors above the fifth floor on which they were preparing to work. The loops of the cable extended below the fifth floor. The scaffold consisted of two planks and were two by twelve. It was while standing on these planks, at work, when the accident happened. As has been already observed a notice was placed on the gate leading to the elevator on the upper floor, containing the warning "Working below".

According to the testimony of the witness, Augusteen, he and the deceased had been working in the shaft about thirty minutes, when they both perceived the loops of the cable moving upwards, and almost momentarily there came a crash, a loop of the cable catching one end of the planks and tilted them thereby causing the deceased to be precipitated to the bottom of the shaft and to his death. The witness saved himself by catching hold of the hood on the fifth floor into which he swung himself. Mr. Coward, the representative of the defendant, testified that he rode down on the elevator from the 12th floor to the third where he got out and that one Sampson operated the elevator, who though he had been an employee of the defendant company was not such at the time but was an emplopee of the Eidlitz Company; that the witness told Sampson he had no right to run the elevator, and the witness gave as his reason for saying so, that the elevators had not been turned over to the Eidlitz Company. Whether Sampson was in the employ of the Eidlitz Company or in the employ of the defendant

company, under the evidence in the cause, was a factual question. We think there was proof of circumstances which tended to establish that whoever operated elevator 21, at or before the accident could only properly have done so by permission of the defendant company's representative, Mr. Coward. Coward expressly states that elevator 21 had not been turned over to the Eidlitz Company and therefore no one was authorized to run it without his permission. According to his testimony, he himself used it shortly before the happening of the accident. Sampson operated it for him.

As elevator 21 was in the possession of the defendant company and under its control and management, by its representative, Mr. Coward, the jury was warranted to infer that he consented that Sampson should operate the car. There was no proof that any one else was carried on that car, on that day other than Mr. Coward. It is further to be observed that according to Coward's testimony it was three o'clock in the afternoon when he made the trip. He left the car when it reached the third floor. The accident happened at 3:30. The car was seen by the men who went to work in the shaft a few minutes after three o'clock, standing motionless, at the ninth floor. As a matter of precaution Augusteen went up to the ninth floor and placed the sign of warning on the gate in front of the elevator. Sampson was not a witness. There was also proof that if the defendant company was not using the shaft, the employees of the other sub-contractors would have men working there; that men were working on the shaft all the time. That Mr. Coward

was aware of the situation which existed in shaft 21, cannot be successfully controverted. He made no pretence that the defendant company had the use of the shaft on that day, for if it had the other workmen occupied about the shaft could not have used it. If the defendant company was using the shaft on that day the single instance of its use in evidence is the carrying of Mr. Coward from one of the upper floors to the third floor. Moreover, according to the testimony, elevator No. 22 was running and in charge of an employee of the Eidlitz Company. It was for the jury to say whether under the testimony and circumstances in the case. Mr. Coward knew or might have known that the shaft 21 was to be used by the Seton workmen on June 4th, 1923 and of the peril threatening the laborers working in the shaft unless the shaft was kept free from the movement of the elevator, and if so, whether the defendant company exercised that degree of reasonable care commensurate with the degree of danger to be reasonably anticipated from leaving the elevator in a condition to be used or operated while the workmen were at work in the shaft. The elevator being under the exclusive control of the defendant company the law cast upon it a duty to use reasonable care to guard against the elevator being operated or used while the workmen were in the shaft.

A fair reading of the testimony leads us to the conclusion that the verdict of the jury was not against the weight of the evidence nor contrary to the charge of the court.

The rule to show cause is discharged, with costs.

Order Discharging Rule to Show Cause.

NEW JERSEY SUPREME COURT.

JESSIE CATTERALL Administratrix ad Prosequendum, *Plaintiff,* *vs.* OTIS ELEVATOR COMPANY, *Defendant.*	Action at Law.

A rule to show cause having been allowed in the above entitled action on the 15th day of April, 1925, why the verdict rendered in favor of the plaintiff against the defendant should not be set aside and a new trial granted; and the court having duly considered the testimony and the arguments of counsel of the respective parties, and being of the opinion that a new trial should be denied:

It is thereupon, on this 14th day of June, 1926, ORDERED that said rule to show cause be and the same is hereby discharged with costs, and that judgment final be entered nunc pro tunc as of the time when judgment nisi was taken, to wit: April 16, 1925.

Entered this 14th day of June, 1926, on motion of

TIFFANY, BRUGLER & WITTREICH,
Attorneys for Plaintiff.

Notice and Grounds of Appeal.

NEW JERSEY SUPREME COURT.

JESSIE CATTERALL, as Administrator ad prosequendum of the Estate of GEORGE CATTERALL, deceased,

Plaintiff,

vs.

OTIS ELEVATOR COMPANY, a Corporation,

Defendant.

TO J. RAYMOND TIFFANY, ESQ.,
Attorney of Plaintiff:

TAKE NOTICE that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above-entitled matter, upon the following grounds:

FIRST: The Court refused to non-suit the plaintiff when requested so to do.

SECOND: The Court refused to direct a verdict for defendant when requested so to do.

THIRD: The Court erred in charging the jury as follows:

> "There is evidence in this case that when carpenter work was to be done in or about these elevator shafts, notice was given to the Otis Elevator Company so that they could control their work accordingly, or if the Otis Elevator Company was not working in these shafts, then, upon notice, other contractors were in the habit of working there; but the evidence appears to be that no one was to work in those shafts while the Otis Elevator Company was in charge, without notice to that company."

WALTER L. GLENNEY,
Attorney of Defendant.

Appeal Bond.

Appeal bond dated July 13, 1926, approved as to form and sufficiency of surety by Pierre F. Cook, Supreme Court Commissioner of New Jersey, properly filed. Otis Elevator Company, principal; American Employers' Insurance Company a corporation, organized and existing under the laws of Massachusetts, with an office and place of business at No. 130 William Street, New York City, surety. Amount $45,000.

New Jersey Court of Errors and Appeals

JESSIE CATTERALL, as Administratrix ad prosequendum, *Plaintiff-Appellee,* *vs.* OTIS ELEVATOR COMPANY, *Defendant-Appellant.*	Action at Law. On Appeal.

BRIEF FOR DEFENDANT-APPELLANT.

Statement.

This case was tried before the Hon. Willard W. Cutler, Judge of the Hudson Circuit Court (to whom it had been referred for trial) and a jury. It resulted in a verdict for plaintiff in the sum of Twenty-two Thousand Five Hundred ($22,500) Dollars. Rule to show cause was obtained by defendant and argued, and resulted in a discharge thereof. The case now comes up on exceptions reserved in the rule.

Facts.

In June, 1923, R. H. Macy & Co. was erecting a new addition of many floors to its store situated at 34th Street, New York City, N. Y. The general contractor was Marc Eidlitz & Co. There were various subcontractors, among them being the Otis Elevator Company (defendant herein) which had charge of installing the elevators and escalators in said building, and Norman Seton & Co.

which had charge of the installation of doors and tracks leading into the elevator shafts at the several floors of the building. Plaintiff's intestate was an employee of Norman Seton & Co. One Moberg was his foreman.

On June 4, 1923, decedent and a fellow employee, one Augusteen, both being servants of Norman Seton & Co., went to the fifth floor of the building and there erected, in the shaft of elevator No. 21, a scaffold. This scaffold consisted of two jacks placed some distance apart and two planks laid thereon, forming a platform. The jacks were in the form of a right angle and were braced against the elevator tracks in the shaft so as to be secure, and the planks ran across the face of the shaft in such position that the men could stand thereon and work upon the tracks of the door which were about 12 feet or so above the level of the floor.

There was in shaft No. 21 an elevator which had been in operation for some considerable number of days prior to that date, and which was in operation that day. It had not, however, been turned over to the general contracor nor had it been accepted by it. It was being used by the defendant herein and was under its control.

In the elevator shaft there was a cable, or cables, which ran from the top of shaft to the bottom of the elevator. The cable or cables, hung in a loop in the shaft, the extent of the loop being dependent upon the position of the elevator in the shaft. When it was at the bottom, the loop was small; the higher it ascended, the larger the loop.

When decedent and his fellow employee entered the elevator shaft at the fifth floor, the elevator was at the 9th floor, and the loop or loops of the cable hung down below the fifth floor. Decedent knew of the position of the elevator at the time he entered the shaft and erected the scaffold.

While decendent was working on the scaffold, the elevator moved upward, the loop caught one end of the planks and tilted them, and decedent was precipitated down the shaft and was killed. His fellow workman was not injured.

Defendant had control of the elevator shafts and no sub-contractor had the right to send his men to work therein without first obtaining the permission of defendant.

Defendant had given no permission to decedent's foreman, nor to anyone, for decedent or any other workman to work in the shaft, nor had defendant any knowledge that decedent, or any other workmen, were at work in the shaft.

There was no proof that defendant, or any of its employees, operated the elevator at the time of the accident. There was no proof as to who operated the elevator at the time of this accident.

Pleadings.

The complaint alleges that on or about June 4th, 1923, the plaintiff's intestate was employed at work in and about a building in the course of construction adjoining and adjacent to the building occupied by R. H. Macy & Co. on 34th Street, New York City, N. Y. known as the R. H. Macy Extension; that the defendant was at said time and place installing and operating a newly insttalled elevator in said building. It then continues:

> "4. On said day and while plaintiff's intestate was working in and about said building in accordance with the instructions of his employers, the defendant company, by its agents and servants, without warning to plaintiff's intestate and with utter disregard for his safety, wantonly and with gross negligence and carelessness, deliberately and willfully operated one of its said elevators, in such a careless and negligent manner so

as to cause plaintiff's intestate to sustain numerous and serious bodily injuries of such a nature as to cause the immediate death of said George Catterall.

"5. At the time defendant company operated the said elevator by its agents and servants as aforesaid, it knew or should have known from the warning given to it of the presence thereabout of the said George Catterall and that the operation of said elevator without warning to the plantiff's intestate would rseult in injuries to him that would cause his death."

It alleges that decedent left him surviving certain next of kin, and demands damages in the sum of Fifty Thousand ($50.000.00) Dollars.

The defendant denies the allegations of negligence set forth in the complaint and sets up contibutory negligence on the part of decedent.

ARGUMENT.

POINT I.

The Court should have directed a verdict in favor of defendant and against plaintiff.

A.

No sub-contactor had a right to work in, or send his men to work in, the elevator shaft without the permission of defendant's foreman.

This important point is established beyond question (Anderson, Superintendent of General Contractor, pp. 19, 20, 21, 28; Moberg, decedent's foreman, p. 54; McGarry, timekeeper of General Contractor, p. 59.)

Anderson (19) "The Otis Elevator Company had first call in the shaft; if we wanted to get any other trade to work in that shaft, *we had to find out from them* when it would be available to get in the shaft, and notify them how they could get in the shaft, and when.

(p. 21) "Q. And if you wanted any other sub-contractor to work in the shaft, you would just have to notify the foreman of the Otis Elevator Company as to the time the sub-contractor could go in? A. I would ask him when it was possible for us to get into a certain shaft, and he would say when, and I would notify the sub-contractor that it would be possible for him to get into that shaft at that time; possibly they might not get in for two days afterwards, or it might be a day or half a day later.

(Italics ours.)

"Q. But there would be a time fixed? A. No, not definitely, but possibly the Otis people would be through at that time.

"Q. How would you then arrange for the sub-contractor to get in? A. I would tell them the probabilities were that they would be able to use the shaft at that time, and then the sub-contractor would go and find out if it was ready or not, and, if not, he would make arrangements with the Elevator Company as to the time when he could get in for sure.

"Q. So there would have to be arrangements made between you or the foreman of the sub-contractor and the foreman of the Elevator Company? A. Yes, naturally.

* * * * *

(p. 28) "Q. And in order to ascertain when it would be safe for the men to get in, arrangements would have to be made with the Otis Company as to time? A. Positively, yes."

Moberg (p. 54) says, before sending his men into the shafts he "went to the general superintendent, or one of his assistants, and got my orders, to see that the shaft was clear for them to go in."

McGarry (p. 59) "Q. On this day of the accident did you notify anyone of the Otis Elevator Company as to the right of the men to work in the shaft? A. That is generally done by a superior of mine; I simply asked permission when Mr. Moberg said he wanted to get into a particular shaft and could not find Mr. Anderson and asked me, and I simply transmitted that request to Mr. Anderson, and he, in turn, either himself, or through Mr. Bader, obtained the necessary clearance from the Otis Elevator Company to use that shaft."

* * * * *

B.

Defendant's foreman gave no permission to the general contractor nor to decedent's foreman, nor to decedent, to work in the shaft on June 4th, 1923.

The methods of obtaining such permission were as follows:

The foreman of the sub-contractor desiring to work in the shaft would go to the superintendent of the General Contractor (Anderson) or his assistant (Bader) and ask when he could get in the shaft to work, and Anderson (or Bader, as the case might be) would go to the foreman of defendant and make arrangements for a time when the sub-contractor could get in the shaft to work or the foreman of the sub-contractor could go to the foreman of defendant and make his own arrangements without first going to the superintendent of the general contractor (Anderson pp. 21-26).

Mr. Anderson, the General Superintendent, states positively that Seton's men made no arrangements with him to get into the shaft, nor did he obtain permission from, nor make arrangements with, defendant's foreman, for employees of Seton to work in the shaft on June 4th (p. 22).

Mr. Bader, the Assistant Superintendent of the General Contractor, was not called as a witness.

Seton's foreman (Moberg) admits he did not, on June 4th, 1923, go to see defendant's foreman, nor obtain permission from him for his men to work in the shaft on that day (54). He claims, however, to have gotten such permission from McGarry, a timekeeper of the General Contractor, about 8 o'clock A. M. of June 4th, and from Mr. Bader, Assistant General Superintendent, about 3:10 o'clock in the afternoon of that day, for his men to go in the shaft to work.

Anderson says McGarry was a timekeeper and had no authority to make arrangements for such contractors to work in elevator shaft (25).

> "Q. Mr. Anderson, were you the only person that made arrangements, or was there a man named McGarry who also made arrangements with Otis Elevator Company? A. No, there was one of my assistants, named Bader, who used to make some arrangements?

McGarry states that he had no authority to give orders for sub-contractors to work in any place (p. 63) and that, should Moberg (decedent's foreman) ask him for a time to get in the shaft, he would transmit such request to Mr. Anderson, and that Anderson, or Bader, would obtain the necessary clearance from defendant's foreman to use the shaft (61); that in the absence of Anderson and Bader, and in case he could not

reach them, he might, in order to facilitate the work, go to see defendant's foreman himself (63); *that he has no recollection of having obtained permission for Seton's men to work in the shaft on June 4th* (61) *and will not say that he did obtain such permission* (64), *and, in fact, never has stated that he did* (64).

Point was raised in the brief of plaintiff on the rule that McGarry testified as follows:

> "Q. Well, after a request had been made to you, in the course of your work, as to whether or not men could work in these various shafts, what was the custom of your work as to getting a clearance?
>
> A. Through the Otis Elevator.
>
> "Q. What steps would you take to do that?
>
> A. Communicated with my superior, Mr. Bader or some officer who obtained the clearance. *On this occasion I did it myself probably.*"

and that such was evidence of the fact that McGarry *actually did* obtain a clearance (or permission) from the defendant's foreman. This is not so because, to say that one *"probably"* did something is not to assert a fact, but to state that there is in his mind a doubt that he actually did that thing, and is not proof that he *actually did it*, especially when he, almost in the same breath, states that he has no recollection of having done so and that he *will not now* state, *and never has*, stated that he did it (pp. 61, 64).

Coward, defendant's foreman, states (p. 86):

> "Q. Mr. Coward, on June 4, 1923, any time during that day, did Mr. McGarry request you or make arrangements with you for permission for the men of Norman Seton to work in shaft 21? A. No sir.
>
> "Q. Did Mr. Anderson make any such arrangement? A. No sir.

"Q. Did Mr. Moberg make any such arrangement? A. No sir.

"Q. Did Mr. Bader make any such arrangement? A. No sir.

"Q. Did you on that day know that the Seton men were working on shaft 21? A. No sir."

C.

Neither the general contractor nor any of his employees, had the right or authority to give permission to a sub-contractor to work in the shaft. The permission of defendant's foreman must first be obtained.

The fact that Moberg, decedent's foreman, had applied to Bader, Assistant Superintendent of the General Contractor, and McGarry, timekeeper of the General Contractor, and was told by them, or either of them, that the shaft would be clear for him is not sufficient. *Permission must be obtained from defendant's foreman.*

D.

Decedent, at the time of his injury, was a trespasser, and defendant owed him only the duty of abstaining from willful and wanton injury.

Since it is established beyond dispute (a) that no one had obtained the right to work in the shaft without first having obtained permission from defendant's foreman, and (b) that decedent's employer had not, nor had the General Contractor, obtained such permission from defendant's foreman, it follows that *decedent*, so far as defendant is concerned, *was working in the shaft without right*, and was, therefore, a trespasser, and defendant owed him only the duty of abstaining from willful and wanton injury.

It is evident that plaintiff realized the fact that decedent was working in the shaft *without right,* and that, under the circumstances, defendant owed him only such duties as one owes to a trespasser, to wit, *to abstain from wiliful and wanton injury,* because *the complaint in this action is one alleging willful and wanton injury on the part of defendant,* and it is apparent that, had decedent been in the shaft *of right, so that defendant owed him the duty of anticipating his presence therein* or of making observation to ascertain whether he was there or not before operating the elevator, or permitting it to be operated (if it did so operate it or permit it to be operated) plaintiff would not have declared upon a count of willful and wanton injury.

The complaint alleges:

> "4. On said day, while plaintiff's intestate was working in and about said building in accordance with the instructions of his employers, the defendant company, by its agents and servants, without warning to plaintiff's intestate, and with utter disregard for his safety, deliberately and willfully operated one of its said elevators, in such a careless and negligent manner so as to cause plaintiff's intestate to sustain numerous and serious bodily injuries of such a nature as to cause the immediate death of said George Catterall.
>
> "5. At the time defendant company operated the said elevator by its agents and servants as aforesaid, it knew or should have known from the warnings given to it of the presence thereabout of the said George Catterall and that the operation of said elevator without warning to the plaintiff's intestate would result in injuries to him that would cause his death."

It is, therefore, clearly a count alleging willful and wanton injury on the part of defendant.

E.

No willful or wanton injury was proven.

If, in order to establish a case of willful and wanton injury, it is necessary to show an "intention to do injury", as was held by the Court of Errors and Appeals in Hoberg vs. Collins, Lavery & Co., 80 N. J. L. 425, or "a positive intent to do injury", as was held by the Supreme Court in Rose vs. Squires, 126 Atl. Rep. 880, it is clear that plaintifff has not made out a case of willful and wanton injury in accordance with her complaint.

Clearly she has shown no positive intent to kill or injure decedent on the part of defendant.

If, however, in order to establish a case of willful and wanton injury, it is not necessary to get so far as to show "a positive intent to do injury", but to establish only the elements of the rule set out in the case of Staub vs. Public Service Railway Co., 97 N. J. L. 297, to wit,

> "that one, with knowledge of existing conditions, and conscious form such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrougful act or omits to discharge some duty which produces the injurious result."

still, we submit, the has not made out a case coming within the terms of the complaint.

It must be conceded after a reading of the testimony, (a) that shaft No. 21 was under the control and management of defendant; (b) that no one had a right to be in that shaft without first obtaining the permission of defendant, or defendant's foreman; (c) that no such permission had been obtained.

It may be asserted, however, that even though

the above be conceded, yet, if defendant actually knew that other workmen were working in shaft No. 21, (even though they were there without right, and as trespassers), and that to operate the elevator therein must of necessity, (or would likely, or probably) inflict injury upon them (or him, as the case might be), and with such knowledge, and with reckless indifference to the consequences, willfully and intentionally operated, or caused to be operated, the elevator, to the injury of the person so working in the shaft, a case of willful and wanton injury has been made out.

F.

Defendant had no knowledge of the presence of decedent or other workmen in the shaft.

In order to come within the rule last above set, forth, it must first be shown that the defendant actually had knowledge that decedent was working in shaft No. 21.

Coward denies that he had such knowledge.

(P. 86). "Q. Did you know on that day that the Seton men were working in shaft 21? A. No, sir."

(P. 87.) "Q. You did not know, as I understand your testimony, that the Seton people were working in shaft 21 on that day? A. No,sir.

"Q. At any time? A. No, sir."

No witness gave direct testimony that Coward did have such knowledge, nor that any employee of defendant had such knowledge.

Lacking such direct testimony, it was sought inferentially to ascribe knowledge to him. This

was attempted by seeking to establish such fact by certain statements made by the witness Anderson, to wit:

> (P. 26.) "Do you know whether or not the Otis Elevator representative knew that these shafts were in the course of construction and work was being done on them constantly? A. Surely."

It is evident that when the Supreme Court said in its opinion,

> "There was also proof that if the defendant company was not using the shaft, the employees of the other sub-contractors would have men working there; that men were working in the shaft all the time" (p. 114).

it referred to the above question and answer, and to the following question and answer:

> "Q. You do not mean to say, do you, that the Otis people knew the Seton men were working in the shaft on June 4, 1923, in shaft 21? A. I could not say positively, but men weer working in the shaft all the time; if they were not there, somebody else would be."

Immediately thereafter, however, the witness says:

> "Q. What you mean is, if the Otis people were not using the shaft, there must have been somebody else ready to use it?
> A. Surely.
> * * * * *
> (P. 27) "Q. How quickly after the Otis Company is through running the elevator would you have men working in this shaft, this 21 shaft? A. As soon as possible after.
> Q. What do you mean by as soon as possiple after?
> A. We have to keep the work going all the time in the shaft in order to have it

completed; some or other of the trades.

Q. Would it be simply a matter of the trade?

A. We couldn't lose a day on it, possibly an hour or so, a couple of hours.

Q. What do you mean by possibly an hour or a couple of hours?

A. As soon as the arrangement could be made to transfer another gang in there, they would go in.

Q. So that when you say the Otis Elevator Company was not using the shaft, you mean another trade would go in even for a period of an hour or two?

A. They wouldn't go in for an hour or two.

Q. For what length of time would they go in?

A. For a day or a day or two, whatever they could get.

Q. When you say that—the fact is, I understand you to say, that arrangements would have to be made as to when another trade could go in the shaft?

A. Yes, between the various trades and the Otis Company, and us.

Q. And you would have to have arrangements made with the Otis Company?

A. Naturally; no sub-contractor would go in this shaft if the car was running.

Q. You mean if the car was in operation?

A. Naturlly, no.

Q. And in order to ascertain when it would be safe for the men to get in, arrangements would have to be made with the Otis Company as to time?

A. Positively, yes.

This testimony establishes beyond dispute that what the witness meant was that the work was to be carried on as speedily as possible, and that when the *defendant was* not *working in* or *using* the shafts it would permit other trades to work therein, *but only upon arrangements having been*

previously *made with it.* The witness admits he cannot say Coward had knowledge that decedent was working in shaft 21, and reiterates his previous statements that arrangements would have to be made with the Otis people before another trade could go into the shaft. No such arrangements had been made.

Until such arrangements were made, the shaft was under the control of defendant, and it could, and had the right to, operate the elevator when and as it pleased, continuously or at intervals during the day.

In addition to the testimony of Anderson as above set out, it is further sought to impute knowledge to Coward that men (other than defendant's men) were working in the shaft, from the fact that Augusteen, the companion of decedent, testified that he had worked in Shaft 21 every day since he came on the job in April or May, not all day, but for some part of the day,—at times even for a few minutes, and that, therefore, defendant's foreman must have known that Seton's men were using the shaft. The testimony of this witness was such that it must be plain to the casual reader that it is entirely unreliable, for it is filled with inconsistencies and discrepancies.

Of course, we appreciate that the credibility of the witness and the truthfulness of his statements are questions addressed to the decision of a jury, but we insist that, even though such be so, there is nothing in the testimony of Augusteen that, in any manner, could be said to set forth facts and circumstances which could impute knowledge to defendant that decedent was working in the shaft on *June 4th, 1923,* at the time of the accident. The fact is that no one had the right to work in the shaft without permission of

defendant's foreman, and it is evident that such permission must be a daily permission, and even a *half daily permission,* for Moberg, decedent's foreman, testified that he asked permission of the General Contractor about 8:30 o'clock in the morning of June 4th (54) and again at 12:30 o'clock in the afternoon of that day (54), and Augusteen testified that he was told by Moberg that the shaft was clear at eight o'clock in the morning of June 4th, and again at 12:30 in the afternoon of that day (41), and, *in fact, he received such instruction every day; he states* (41):

"A. I had orders to go and work on the whole battery from 27 to 21 and that there was absolutely going to be nothing running.

"Q. Who told you that?

A. My foreman.

"Q. What is his name, is his name Moberg?

A. It was.

"Q. When did he tell you that?

A. At eight o'clock in the morning and again at 12:30 in the afternoon.

"Q. On what day?

A. *On Monday, June 4 1923, and every other day.*

"Q. Every other day?

A. *Every day we went to work, after and before lunch.*

"Q. So your foreman told you in the morning at eight o'clock, every time you went there, to go to work in the shaft?

A. Yes.

"Q. And then again after lunch your foreman would again tell you to go to work in the shaft?

A. Exactly.

"Q. By the shaft, you mean the whole battery of shafts?

A. Yes.

"Q. That would be from 27 to 21?

A. Yes.

"Q. And those were the orders you say your foreman gave you?

A. That is it, exactly.
"Q. And your foreman was Moberg?
A. Yes, sir."

(Italics ours.)

Clearly, therefore, under the evidence, the permission to work in the shafts must be a *daily permission*, obtained twice every day, and it may very well be true that Seton's men were working in the battery of shafts on *Friday* (the accident happening on the following Monday), and yet, we submit, such fact would not in any manner impute knowledge to defendant's foreman that they were working there on *Monday*. No permission had been obtained from him for them to work there on Monday, and he states he did not know they were there.

The burden is on the plaintiff to prove knowledge upon the part of defendant that Seton's men were working in Shaft 21 on Monday, in the afternoon, and unless he bears such burden he must fail. It is not sufficient for him to prove that defendant *could have had such* knowledge by investigating to ascertain if men were working in the shaft, (a) because without the permission of its foreman, they would have no right there and he had given no permission; (b) because under such circumstances, defendant was under no duty to anticipate their presence in the shaft, and consequently under no duty to investigate in order to ascertain if they were there; and (c) because even if defendant might have had reason to believe men might be working in the shaft, and was under a duty to investigate in order to ascertain if they actually were there, its failure to do so would be a negligent act and not a willful and intentional act, and under the case presented there could be no recovery for a negligent act.

Stress was also laid by plaintiff in his brief on the rule, and also was laid by the Supreme Court, in its opinion, upon the statement by the witness Augusteen that before going to work in the shaft he observed the elevator standing at the Ninth Floor and went up and placed a sign on a temporary gate composed of boards made into a frame like a fence which had been placed in front of the shaft (44), reading, "Working Below," and that such constituted a warning that the shaft was occupied.

There is nothing in the testimony showing that defendant's foreman ever saw such sign, or knew of its existence, nor, as a matter of fact, is there any evidence to the effect that *any of defendant's employees* ever saw such sign.

It is our contention that there must be proof that *defendant* had knowledge of the presence of decedent in the shaft at the time the elevator was operated (assuming it to have been operated by it or with its permission) before it can be charged with a willful or wanton act, for no one had a right in the shaft *without its permission;* and further, that knowledge in any other person (not an employee of defendant) permitted by defendant's foreman to operate the elevator, that decedent was working in the shaft, *not communicated to defendant,* would not suffice; *knowledge* must be brought home to the *defendant.*

The testimony, therefore, that the elevator was operated, notwithstanding the placing by Augusteen of such warning on the gate, would not charge defendant, even assuming its foreman permitted the elevator to be operated by an outsider, with having knowledge of the warning, or knowledge that some one was working in the shaft.

G.

There was no proof that defendant operated the elevator at the time decedent was injured.

Admittedly, no employee of defendant was seen to operate the elevator at the time of the accident. No proof was offered that *any* employee of defendant did so. The shaft was under the control of defendant, and admittedly, no one would *have the right* to operate the elevator without the permission of defendant's foreman, but such does not, under the circumstances of the case, justify the conclusion that it *was* operated by defendant. In the construction of this large building, there were many men employed by the General Contractor, by Seton, and by other subcontractors, all engaged in work, and *any one of them may have operated the elevator.*

H.

There was no proof as to who operated the elevator at the time of the accident.

No one saw who operated the elevator at the time of the accident. It seems to be assumed by the Supreme Court in its opinion that one Sampson, an employee of the General Contractor, operated the elevator at the time of the accident. There was no proof of this. It is true, he was the last *known* person to have operated it, but

that was at three o'clock in the afternoon (p. 104), and the accident did not happen until *around a quarter to four.* Augusteen states decedent went into the shaft between 3:10 and 3:15 o'clock in the afternoon to work (p. 42) and worked for about half an hour before the accident occurred (p. 34), which would bring the happening thereof to about a quarter to four. When Augusteen last saw the elevator (before the accident) it was at the Ninth Floor and *no one was on it*—it was parked there (31). No one saw Sampson near it at that time. This was between 3:10 and 3:15 (p. 33). No one *says Sampson then* operated it. It was not established that he did.

I.

Operation of the elevator by Sampson, even with permission of defendant's foreman, would not impose liability upon defendant.

Even if Sampson *did* operate the elevator at the time decedent was injured, and did so with the permission of defendant's foreman, and even if Sampson had knowledge of the warning placed upon the gate by Augusteen, *such would not constitute a willful and wanton injury* inflicted upon decedent *by defendant.*

The knowledge of Sampson would not be the knowledge of defendant. The foreman *knew* no one had a right in the shaft without *his* permission and he would have a legal right to assume no one *was* in the shaft without such permission, and under such circumstances, he would be justified, and not even negligent, in giving another permission to run the elevator. Certainly, under such circumstances, he would not be guilty of a willful and wanton injury.

J.

Sampson was not an employee of defendant.

There is no evidence that Sampson was an employee of defendant on June 4, 1923. On the contrary, the testimony clearly shows that he was an employee of the General Contractor.

Defendant's foreman testified that Sampson was on June 4, 1923, an employee of the General Contractor (p. 66); that he was on the payroll of the General Contractor (66), and was paid by it (66); that defendant had nothing to do with him afterwards (66); had nothing to say as to his hours or his pay while he was on the payroll of the General Contractor (80).

The General Contractor's Superintendent, Mr. Anderson, testified (84) that Sampson was on his payroll and was working for him on June 4, 1923, attending to the machinery, was paid wages by him, and that if he wanted to do so, could have discharged him (84).

It seems to us, therefore, that plaintiff had failed to make out a case of willful and wanton injury against defendant, as he was required to do under his pleadings, and failing so to do, he must fail to recover, and the Court should have directed a verdict for defendant.

POINT II.

Plaintiff had not made out a case of negligence against defendant.

We have contended under Point 1, that under the pleadings it was necessary for plaintiff, in order to recover, to make out a case of willful and wanton injury, and that she had failed so to do. Under Point II it is our intention to demonstrate that plaintiff had not even made out a case of simple negligence, which, had such been properly pleaded, would permit a recovery against defendant.

In order for plaintiff to make out even a case of simple negligence against defendant it was necessary that he show that defendant omitted to perform some duty it owed to decedent, or that it failed to use care in the performance of some duty owed by it to decedent. In the case *sub judice*, in view of the fact that it is proven beyond dispute that defendant had no actual or imputed knowledge that decedent was in the shaft, the real complaint of plaintiff is that defendant omitted to perform a duty to decedent. That is, that defendant owed decedent the duty of investigating to ascertain if decedent was in the shaft, and that it neglected to perform such duty and operated the elevator, to the injury of decedent.

It seems to us to be clear that, failing to prove actual or imputed knowledge in defendant of the presence of decedent in the shaft, and it being proved, beyond dispute, that decedent had no right in the shaft without permission of the foreman, and that the foreman did not give such permission, it follows that defendant was under no duty to anticipate the presence of decedent in the shaft, and being under no such duty, it was

not necessary for, nor incumbent upon, it to investigate in order to ascertain if decedent *was* in the shaft, and further, that if it was not necessary for, nor incumbent upon, it so to do, its failure so to do was not the omission to perform a duty owed to decedent.

That we have established the facts above stated is clear from the argument under Point I, which argument it is not necessary to repeat.

It further appears to us that the Supreme Court, in its opinion, places too much importance upon the testimony that the switches which control the elevator were under the charge of defendant's foreman and that he did not so set the switches that the Elevator No. 21 could not be run (p. 111). Unless he had knowledge of the presence of decedent in the shaft, or should have had such knowledge (and we have shown he had not, nor should he have had, such knowledge), he had a perfect right to operate the elevator which he could not have done had he set the switches so that it could not have been run, and inasmuch as he had given no permission for any one to be in, or work in, the shaft, he had the right to assume that no one was therein, and under such circumstances it was not negligent on his part not to set the switches so as to prevent operation of the car.

Comment.

It will be observed that we have printed in the state of the case the opinion of the Supreme Court upon the rule to show cause. A reading of such opinion would probably have some influence upon the mind of this Court, and we, therefore, desire to call the Court's attention to various errors in the statement of facts upon which the Court bases its opinion—errors which undoubtedly arose because of too much reliance upon the accuracy of statements of Counsel of plaintiff in his brief and a not too careful reading of the testimony.

(a) The statement, in the opinion (p. 114), that "There was no proof that anyone else was carried on that car that day other than Coward", is erroneous; for the proof is that one Longworth, and one Lawrence, and Sampson, operated the elevator that day; Longworth from 9:30 A. M. to 10 A. M.; Lawrence at 11 A. M., and Sampson at 3 P. M. (p. 104).

(b) The statement, in the opinion (p. 115), "If the defendant was using the shaft on that day the single instance of its use in evidence is the carrying of Mr. Coward from one of the upper floors to the third floor" is erroneous, for the reason stated in (a) above.

(c) The statement, in the opinion (p. 115), that "He" (referring to defendant's foreman, Coward) "made no pretence that the defendant Company had the use of the shaft on that day", is erroneous for the reasons set forth in (a) above, and the reason advanced by the Court for the "the other workmen occupied about the shaft

could not have used it," does not establish non-use by defendant. Decedent and his companion could well have been working *about* the shaft and yet statement, to wit, if the elevator had been in use, not *in* the shaft, and the elevator could, under such circumstances have been used. Further, there is no proof that Seton's men entered the shaft of elevator 21 *prior to 3:10 P. M.,* nor even that they were working about the shaft prior to that time. The proof is to the contrary. The evidence of Augusteen is that decedent and Augusteen did not go into Shaft 21 until between 3:10 and 3:15 P. M. (42) and there is no proof that any other workmen (except defendant's men) used Shaft 21 that day.

(d) The statement, in the opinion (p. 111), referring to the necessity of decedent's foreman obtaining, or having obtained for him, permission to work in the shaft, that "There is testimony to the effect that such permission was given", is erroneous, and is not based on any testimony in the case, but is probably taken from the brief of plaintiff's counsel on the rule, wherein the same erroneous statement is made. We have shown under Point I. that no one obtained permission from Coward for Seton's men to work in the shaft, nor did he give any such permission. No witness claims to have obtained permission from Coward.

For the reasons hereinbefore stated, the judgment herein should be reversed and set aside.

For the reasons hereinabove stated, the judgment herein should be reversed and set aside.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

JESSIE CATTERALL, as administratrix *ad prosequendum*, Plaintiff-Appellee, *vs.* OTIS ELEVATOR COMPANY, Defendant-Appellant.	At Law. On Appeal.

BRIEF OF PLAINTIFF-APPELLEE.

Statement.

This cause was tried before a jury at the Hudson Circuit and resulted in a verdict for the plaintiff.

Defendant obtained a Rule to Show Cause setting forth four reasons, viz.:

(1) Verdict was contrary to the weight of the evidence;

(2) Contributory negligence and due care by the defendant;

(3) Verdict was contrary to charge of the Court;

(4) Verdict was excessive.

The defendant practically confined its argument to the question of the weight of the evidence.

The Supreme Court, in a carefully written opinion, ordered the Rule dismissed.

We quote from the opinion of the Supreme Court (Gummere, C. J., and Kalisch and Campbell, J. J.):

> "The plaintiff brought her action under the Death Act against the defendant company to recover the pecuniary loss sustained by her, in the death of her husband, alleged to have been caused by the negligence of the defendant company's servants. The facts are these: In June, 1923, Macy & Company was causing to be erected a new addition of many floors to its store at 34th Street, in the City of New York. The general contractor was Eidlitz & Company. There were several subcontractors, among whom was the Otis Elevator Company, the defendant.
>
> The latter had charge of installing the elevators and escalators in the building. Norman Seaton & Company, another sub-contractor, had charge of the installation of doors and tracks leading into the elevator shafts at the several floors of the building. At the time of the accident, in which the plaintiff's decedent lost his life, there was a battery of seven elevators designated as Numbers 21-27 inclusive, in the course of construction. The deceased was in the employ of the Norman Seaton Company and one of the duties of his employment was to hang elevator doors and to do track work in the various shafts in the above mentioned seven elevators, all of which were under the control of the defendant company. The only shaft in temporary operation at the time of the happening of the accident was number twenty-two, the elevator having an operator in the employ of the defendant, to run it. No work was permitted to be done in any of the elevator shafts without first having obtained permission from the defendant company. The practice was for the foreman to apply for permission, to the general superintendent or his representative of the general contractor, who in turn would ob-

tain permission of the representative of the defendant company. Its representative was James Coward. There is testimony to the effect that such permission was given. The character of the work to be done was of such a nature as to expose the employee to great hazard of life and limb, unless the person in control of the elevator shafts had notice that work was contemplated to be done in such shafts. This was clearly so where the car was kept stationary on an upper floor and the work was done in the shaft on one of the lower floors. There were three switches which controlled the operation of the car in shaft twenty-one where the accident happened. The baby switch which was contained in the car itself operated by the person running it. A control switch in the "Pent House" on the roof level, and an emergency switch in the pit. It was not disputed that if the switches in the "Pent House" and in the pit were properly set the car in shaft No. 21, with which the mischief was done could not have been stirred. This circumstance is an important feature in the case, since it was clearly established by the testimony that these switches were under the control of the defendant company.

Now, there was testimony of the foreman of the Norman Seaton & Company, under whose orders the decedent was working, on the day of the accident, that he, the foreman, was instructed to see to it that shaft No. 21 was clear for his men to go to work, and that he complied with the instructions, both in the morning before eight o'clock and in the afternoon at 12:30. There was also proof that the elevator in shaft No. 21 had been used for several days before the accident to hoist materials, but when this was done notice was given to the workmen. The witness Augusteen testified that he worked with the deceased and that they were directed by the foreman to do work in shaft 21; that he had worked within fifteen feet of the shaft and that it had not been running all day; that the

witness and deceased had received orders from the foreman to go into the shaft at about three o'clock in the afternoon; that before erecting a scaffold therein for the purpose of doing the work required both he and the deceased looked up the shaft and saw the elevator at the ninth or eleventh floor; that the work to be done by them in the shaft was on the fifth floor; that he went to the ninth or eleventh floor, and placed a sign on the gate in front of the elevator 21, which sign consisted of a board 18 inches long by 6 or 8 inches wide and on it he wrote with blue crayon 'Working below' in letters of an inch and a half in size.

Mr. Coward, who was the representative of the defendant company, testified that he was in charge of its elevators; that he was in charge of the operation of them and who would operate them; that elevator 21 was not turned over to Marc Eidlitz & Company, the general contractor. He was asked: 'Was elevator 21 under your—when I say your I mean the Otis Elevator Company's—absolute control on June 4, 1923? A. Yes, sir. Q. Did you take any precaution to so control that elevator or so leave it that when your men were not working in it, no other person could go upon it and use it? A. No, sir.'

The situation in the shaft, at the time the deceased and his companion started to construct the scaffold was that the elevator in shaft No. 21 was at rest several floors above the fifth floor on which they were preparing to work. The loops of the cable extended below the fifth floor. The scaffold consisted of two planks and were two by twelve. It was while standing on these planks, at work, when the accident happened. As has been already observed a notice was placed on the gate leading to the elevator, on the upper floor, containing the warning 'Working below'.

According to the testimony of the witness, Augusteen, he and the deceased had been

working in the shaft about thirty minutes, when they both perceived the loops of the cable moving upwards, and almost momentarily there came a crash, a loop of the cable catching one end of the planks and tilted them, thereby causing the deceased to be precipitated to the bottom of the shaft and to his death. The witness saved himself by catching hold of the hood on the fifth floor into which he swung himself. Mr. Coward, the representative of the defendant, testified that he rode down on the elevator from the 12th floor to the third where he got out and that one Sampson operated the elevator, who though he had been an employee of the defendant company he was not such at the time but was an employee of the Eidlitz Company; that the witness told Sampson he had no right to run the elevator, and the witness gave as his reason for saying so, that the elevators had not been turned over to the Eidlitz Company. Whether Sampson was in the employ of the Eidlitz Company or in the employ of the defendant company, under the evidence in the cause, was a factual question. We think there was proof of circumstances which tended to establish that whoever operated elevator 21, at or before the accident could only properly have done so by permission of the defendant company's representative, Mr. Coward. Coward expressly states that elevator 21 had not been turned over to the Eidlitz Company and therefore no one was authorized to run it without his permission. According to his testimony, he himself used it shortly before the happening of the accident. Sampson operated it for him.

As elevator 21 was in the possession of the defendant company and under its control and management, by its representative, Mr. Coward, the jury was warranted to infer that he consented that Sampson should operate the car. There was no proof that any one else was carried on that car, on that day other than Mr. Coward. It is further to be observed

that according to Coward's testimony it was three o'clock in the afternoon when he made the trip. He left the car when it reached the third floor. The accident happened at 3:30. The car was seen by the men who went to work in the shaft a few minutes after three o'clock, standing motionless, at the ninth floor. As a matter of precaution Augusteen went up to the ninth floor and placed the sign of warning on the gate in front of the elevator. Sampson was not a witness. There was also proof that if the defendant company was not using the shaft, the employees of the other sub-contractors would have men working there; that men were working on the shaft all the time. That Mr. Coward was aware of the situation which existed in shaft 21, cannot be successfully controverted. He made no pretense that the defendant company had the use of the shaft on that day, for if it had the other workmen occupied about the shaft could not have used it. If the defendant company was using the shaft on the day the single instance of its use in evidence is the carrying of Mr. Coward from one of the upper floors to the third floor. Moreover, according to the testimony, elevator No. 22 was running and in charge of an employee of the Eidlitz Company. It was for the jury to say whether, under the testimony and circumstances in the case, Mr. Coward knew or might have known that the shaft 21 was to be used by the Seaton workmen on June 4th, 1923, and of the peril threatening the laborers working in the shaft unless the shaft was kept free from the movement of the elevator, and if so, whether the defendant company exercised that degree of reasonable care commensurate with the degree of danger to be reasonably anticipated from leaving the elevator in a condition to be used or operated while the workmen were at work in the shaft. The elevator being under the exclusive control of the defendant company the law cast upon it a duty to use reasonable care to guard against

the elevator being operated or used while the workmen were in the shaft.

A fair reading of the testimony leads us to the conclusion that the verdict of the jury was not against the weight of the evidence nor contrary to the charge of the court."

The Evidence.

For the convenience of the court we have extracted some of the pertinent parts of evidence at length.

Bert Augusteen, a fellow worker with the decedent at the time of the accident, but who escaped without injury, was produced by the plaintiff and testified that his foreman was Aleck Moberg (p. 29, l. 10); that Moberg instructed them (the deceased and Augusteen) both on the morning and at noon on June 4, 1923 to work in the shaft number 21 on the hoods and tracks at the fifth floor (p. 29, ll. 20-40; p. 40, ll. 1-3).

In the Record, at p. 41, ll. 29-42; p. 42, ll. 1-14, we find the following:

"Q. Who told you that? A. My foreman.

Q. What is his name, is his name Moberg? A. It was.

Q. When did he tell you that? A. At eight o'clock in the morning, and again at 12:30 in the afternoon.

Q. On what day? A. On Monday, June 4, 1923, and every other day.

Q. Every other day? A. Every day we went to work, after and before lunch.

Q. So your foreman told you in the morning at eight o'clock, every time you went there, to go to work in the shaft? A. Yes.

Q. And then again after lunch your foreman would again tell you to go to work in the shaft? A. Exactly.

Q. By the shaft, you mean the whole battery of shafts? A. Yes.

Q. That would be from 27 to 21? A. Yes.

Q. And those were the orders you say your foreman gave you? A. That is it, exactly.

Q. And your foreman was Moberg? A. Yes, sir."

That as a further precaution and to insure their safety, they looked up and down the shaft and on seeing the car parked at the ninth floor (they were to work at the fifth floor) Augusteen went to the ninth floor and made inquiries of the elevator man running the temporary elevator in shaft number 22 as to the use of number 21.

"Q. After you made this inquiry what did you do? A. I placed a sign on the gate which was standing in front of the elevator.

Q. Which elevator? A. 21" (R., p. 31, ll. 32-37).

This sign was of board approximately eighteen inches or so long and six or eight inches wide and contained the words *"Working Below"* in letters an inch or inch and a half high; the sign was placed in the center of the gate and in such a position that it would have to be removed before anyone could enter this particular car; the sign was placed at about 3:15 P. M.; they then went to work at the fifth floor opening on a scaffold erected in the shaft. Suddenly and without warning the cables in the shaft began to move, throwing the scaffolding up and precipitating Catterall to the pit, killing him.

Carpenters—including the deceased and Augusteen—had been working on that particular battery of elevators for days previously and in shaft number 21 previously and on that very day (R., p. 36, ll. 40-1-10, p. 37; also ll. 37-42).

"Q. You don't remember how long prior to the date of the accident, you, or anyone else of Seaton's men, had worked there on shaft 21? A. We worked on track 21 every day" (R., p. 38, ll. 19-22).

"Q. But you had not worked there inside of that shaft, had you? A. I had.

Q. Shaft 21? A. I had.

Q. You had worked there? A. Yes, sir." (R. p. 37, ll. 39-41).

"Q. You worked in shaft 23? A. I did.

Q. And shaft 24? A. I did.

Q. And shaft 25? A. I did.

Q. And shaft 26? A. I did.

Q. And shaft 27? A. I did.

Q. So you worked on each shaft every day? A. Not every day all day, but some part of that day" (R., p. 39, ll. 12-22).

"Q. What floor were you working on? A. From the ninth floor down.

Q. On all the floors? A. Yes, sir.

Q. How much time did you work on each floor? A. As much as it took us; we were putting it on in sections" (R., p. 39, ll. 30-36).

This witness further testified (R., p. 40, ll. 12-18):

"*By Mr. Smith*:

Q. *I did not ask that. How long prior to June 4th, 1923, did you know that elevator number 21 was being used in the job?* A. *It was never used, to my knowledge, only to hoist the material.*

Q. *Then it was used?* A. *By specific orders and then we were notified they were going up.*"

This testimony, which is of the greatest importance, clearly demonstrates the negligence of the defendant company.

The defendant company quite evidently had a reputation for carelessness for the record discloses at p. 43, ll. 13-21, the following testimony that remains uncontradicted and in the record:

> "Q. Well, Mr. Augusteen, you knew, didn't you that that elevator, according to your foreman, was not to be run that day at all? A. Exactly.
>
> Q. Why did you put the sign up then? A. Because Otis was too careless, that foreman was, and life is dear to us all.
>
> Q. And you thought the elevator might be run? A. Well, I would take precaution for my life, if I didn't take precaution for my life nobody would."

Axel Moberg who was the foreman for the deceased and the preceding witness testified that he was the foreman in charge of the carpenters, including the deceased, who were engaged in working in the shafts known as number 21-27 and that before he put his men to work in the shaft he went to the general superintendent (Anderson) or one of his assistants (Bader or McGarry) to be sure that the shaft was clear for his men to work in (R., p. 54, ll. 14-28). He testified:

> "Q. Did you get orders that day that the shaft was clear? A. I did.
>
> Q. How many times that day did you get these orders? A. I went there first thing in the morning before eight o'clock, and got my orders, and last time in the afternoon before I sent two men there.
>
> Q. What time in the afternoon? A. About half past twelve.
>
> Q. And were those orders to the effect that the shaft was clear or would be used? A. Yes, that they were clear and we could go in.
>
> Q. Did that include the shaft in which Catterall was working? A. It did."

He received his information that the shafts numbers 21 and 23 were clear on the morning of June 4th, the day of the accident, and testified as follows:

"Q. Are you sure you went there in the morning of June 4th? A. I did, yes.

Q. *You went to Mr. Bader?*.. A. *Well, in the morning I think it was Bader or McGarry.*

Q. McGarry was a time-keeper? A. He was also Mr. Anderson's assistant.

Q. Don't you know that McGarry was the time-keeper for Eidlitz, and that is all? A. I do.

Q. *Did you get orders from McGarry?* A. *Yes; that is on that morning.*

Q. *And that is June 4th?* A. *Yes.*

Q. *Where did you find McGarry?* A. *He does work in the office, too.*

Q. *You often met him in the office?* A. *Yes.*

Q. Whom did you get orders from in the afternoon? A. I think it was Mr. Bader.

Q. Are you sure? A. Am I sure?

Q. Yes. A. Well, I am telling you so.

Q. You say probably; what I want to know is this, there were three men that you say you took orders from, Anderson, the Superintendent, Bader, who was his assistant, and McGarry, who was the timekeeper, and you say on the morning of June 4th you talked to Mr. McGarry? A. I think I did" (R., p. 55, ll. 15-41).

"Q. And in the afternoon of that day, you say you talked to Mr. Bader? A. Yes.

Q. *Are you sure you talked to Bader in the afternoon of that day, and in the morning with McGarry?* A. *I am.*

Q. *How many times did you take orders from McGarry?* A. *I couldn't recollect just how many times they were in those shafts, probably four or five months or more they were in there.*

Q. *Were you working in those shafts all the time for four or five months?* A. *Off and on, yes.*

Q. And you went to the shanty—that is the superintendent's shanty—to find out if it was safe for them to go in the shaft? A. Yes, sir.

Q. *And on this morning you saw McGarry, and did McGarry on that morning give you any orders to work in those shafts?* A. *He did.*

Q. Written orders? A. No, not written orders.

Q. Verbal orders And? did you have a time fixed when you were to go in? A. *No, no particular time; we were there at eight o'clock in the morning.*

Q. And you had no time fixed; you just walked over to the shaft? A. We started to work at eight o'clock, yes.

Q. What shaft did you start in at eight o'clock on June 4th? A. Well, we got orders to go over to the shaft and see if it was in good condition.

Q. *Was that the whole battery of shafts?* A. *Yes.*

Q. *From 27 all the way down?* A. *No, there was one car running temporarily''* (R., p. 56, ll. 1-41; p. 57, ll. 14-23).

"Q. Had you been working in the battery of shafts from 21-27, within a week prior to June 4th? A. We had, yes.

Q. Had you seen McGarry in there taking the time of your men? A. Yes, he generally came to me.

Q. *And you knew his position was time-keeper?* A. *Yes; he also gave me orders sometimes what to do.''*

Moberg further testified that after the accident he saw the sign which Augusteen says he placed upon the elevator door; that it was written on a board sixteen or eighteen inches in length by six or seven inches in width and had thereon the words *"Working Below."*

Andrew Anderson testified that he was the superintendent of construction on the job in question and that the Otis Elevator Co. were the contractors having to do with the elevators; that Norman Seaton & Co. were engaged as subcontractors hanging elevator doors and track work; that elevator number 21 of the shaft was, on June 4, 1923, in the custody and control of the defendant, Otis Elevator Co.; that it was in the course of completion in that the platform was set and the ropes hung; that the elevator, number 21, was one of a battery of seven elevators in this new nineteen story addition to the R. H. Macy Co. building, New York City (R., p. 18); that only one of the elevators was being used for emergency work and that this elevator was known as number 22; that James Coward was the representative of the defendant company on the particular job where Norman Seaton Company's employees, including the deceased, were working in the shaft of elevator number 21, hanging overhead tracks and putting on the door slides and that their work made it necessary for them to go into the shaft; that there was no arrangement or working agreement between the general contracting company and the defendant herein as to the use of the shafts by the carpenters when fixing the tracks except that they had the right to use them *when wanted* (R., p. 19, ll. 27-32).

> "Q. And if you wanted any other sub-contractor to work in the shaft, you would first have to notify the foreman of the Otis Company as to the time the sub-contractor could go in? A. *I would ask him when it was possible for us to get into a certain shaft, and he would say when, and I would notify the sub-contractor that it would be possible for him to get into the shaft at that time; pos-*

sibly they might not get in for two days afterwards, or it might be a day or half a day later.

Q. *But there would be a time fixed.* A. *No, not definitely but possibly the Otis people would be through at that time.*

Q. How would you then arrange for the sub-contractors to get in? A. *I would tell them the probabilities were that they would be able to use the shaft at that time, and then the sub-contractor would go and find out if it was ready or not, and, if not, he would make arrangements with the Elevator Company as to the time when he could get in for sure''* (R., p. 21, ll. 1-28).

This witness further testified as follows:

"Q. So, as far as you know, no arrangements had been made with you by the foreman of the sub-contractor, for them to be in the elevator then? A. *No, I may have made arrangements or told Mr. Seaton when it was possible for him to get in, but no definite time''* (R., p. 22, ll. 18-24).

It is undenied, in fact it is admitted, that there is a custom in construction work of this character existing over twenty-five years to the knowledge of the superintendent, that no sub-contractor would go into the elevator without notifying the foreman or the elevator people and that the men did not work in these shafts until after arrangements had been made for them to go therein; that as soon as arrangements could be made to transfer another gang into the shaft, they would go in (R., p. 27, ll. 8-18).

"Q. How quickly after the Otis Company is through running the elevator would you have men working in this shaft, this 21 shaft? A. As soon as possible after.

Q. What do you mean by as soon as possible after? A. We have to keep the work going all the time in the shaft in order to have it completed; some or other of the trades.

Q. Would it be simply a matter of the trade? A. We couldn't lose a day on it, possibly an hour or so, a couple of hours."

That on the day of the accident the Otis Elevator representative knew that these particular shafts were in the course of construction and that work was being done on them constantly by other subcontractors; that men were working in the shaft all of the time and that if Norman Seaton's men were not in the shaft, somebody else would be (R., p. 26, ll. 10-25).

By Mr. Anderson, general superintendent:

"Q. Do you know whether or not the Otis Elevator Company's representative knew that these shafts were in the course of construction and work was being done on them constantly? A. Surely."

This is also of extreme importance, for a careful reading of the entire record will show beyond any doubt and in fact the argument of counsel for the defendant, in his brief filed in this matter, directly maintains that this shaft was not being used by the Otis Elevator people on the afternoon in question nor by anybody with their permission and we argue most strenuously that if this is so, *then it was the absolute duty of the defendant, in view of the fact that it knew that the shafts were being used by others when not by its men and that immediately upon the Otis Elevator Compnay's employees ceasing to work in the shaft or on the car, employees of other subcontractors would enter the shafts, either through the control switch in the Pent House or the emergency*

switch in the pit to have so cut off the current that this car could not be used by any other person with a possible loss of life to the workmen in the shaft.

Mr. McGarry, an assistant to Mr. Anderson, the general contractor, testified that on numerous occasions he acted as a sort of clearing house for orders to be transmitted to Mr. Anderson, when he could be located and that when he could not locate Mr. Anderson, he communicated with Mr. Bader or some officer, *or he personally obtained the clearance* (R., p. 61, ll. 29-31); and when asked if he had talked to Mr. Moberg, the foreman of the deceased, on June 4th, 1923, as to operations in this particular shaft, he said, *"I talked with him on numerous occasions and I believe I can state definitely on that particular day I remarked on the fact that he was working in shaft number 21 because I had done it on numerous occasions when I was asking Anderson if they could get into the shaft* (R., p. 59, ll. 1-11); and that prior to the accident Moberg had spoken to him about working his men in the shaft (R., p. 61, ll. 1-11); that after a request had been made to him in the course of his work as to whether or not men could work in these various shafts, the custom of getting a clearance was through the Otis Elevator and when asked at p. 61, l. 29, the question, "What steps would you take to do that?", he answered, "Communicated with my superior, Mr. Bader, or some officer who obtained the clearance. ON THIS OCCASION I DID IT MYSELF PROBABLY."

That he had talked with Mr. Moberg on June 4th on numerous occasions during that day beginning probably at 8:15 o'clock in the morning; when he could not find Anderson *or Bader and someone wanted to work in the shaft, he would go and talk to the Otis superintendent or foreman*

himself and make arrangements for the men to go in and that he did this to expedite matters (R., p. 63, ll. 15-32); he further testified that no experienced foreman would permit his men to go into a shaft without first making arrangements and clinched the plaintiff's case in this respect by testifying without objection, at p. 64, ll. 20-24, as follows:

> "Q. *Did you ever inform the foreman of other workmen that they could work in the elevator shaft, without having first notified the Otis people and obtained their permission?* A. *No.*"

The only witness produced by the defendant concerning the happening of the accident was James Coward, the foreman of the Otis Elevator Co. on the job in question. A careful reading of his testimony, especially by one who witnessed the miserable spectacle that he made of himself upon the witness stand as he gave his testimony demonstrates his entire disregard as to the truth of his statements. He testified as to the construction of the elevators, location of the baby switch in the car; the location of the power switch in the Pent House, and another in the basement or pit from which latter two switches or either of them it was possible to prevent the returning of this particular car; that he was in charge of the Pent House; that there were separate switches for each car; that the switch in the pit was an emergency switch and that there was one for each car; *that the defendant company did not take any precaution to control that elevator or so leave it when its men were not working it, that no other person could go upon it and use it* (R., p. 90, ll. 2-24).

ARGUMENT.

POINT I.

The Court properly refused to direct a verdict for the defendant.

The subject matter of this appeal has, in substance, been argued by the defendant-appellant, in its motion for a new trial, and the matter was there determined adversely to it, the Court finding that there was evidence sufficient to send the case to the jury.

There is no new question here presented.

We respectfully submit that that portion of the defendant-appellant's brief, under the subhead of "d" and "e" as to the wantonness of the negligence should not be considered as it was not properly raised in the trial court.

The defendant company was under a legal obligation to so carry on its work in the battery of elevators in question that it would not cause injury or death to other persons working in or about the shaft either by an act of commission or omission.

Admittedly, where such a tremendous undertaking, as the erection of a nine-story addition to a building such as the one in question is in progress, it is almost inconceivable to believe that a sub-contractor engaged in the installation of a battery of elevators would not know, even without the custom or usage to that effect as testified to, that other workmen would be engaged in and about the same battery of elevators, especially where the elevator company was not itself installing or hanging the elevator doors and track work about that very shaft.

Appellant, on its rule, to show cause, sought a new trial, on the ground the verdict of the jury was against the weight of the evidence; which means, in other words, that the trial court should have granted the motion to non-suit and for a direction of a verdict in its favor.

The rule to show cause reserved to the defendant its exceptions taken at the trial. The defendant's present arguments on its exceptions to the denial of the motion to non-suit and for a direction involve the identical matter argued on its rule. The only point of law on appeal involved in such motion was whether there was any evidence whatsoever, warranting the submission of the case to the jury. This question necessarily was included in defendant's argument on the rule that the verdict was against the weight of the evidence. We submit that defendant is consequently precluded from the re-argument of the same question here and a dismissal should be ordered.

Faragasso vs. Introcaso, 98 N.J. Law 583
Also
El Mara Realty Company vs. Griffin, 126 Atlantic, 639.

We say it is beyond reason to ask any one to so believe, especially where the evidence is undisputed that this work had been going on over a period of weeks, yes, months and that for days before the happening of the accident, men of other sub-contractors were working in this very shaft, engaged in such work as made it absolutely necessary that they go into the shaft.

True, the Otis Elevator Co. had the first call on the shaft but the testimony clearly shows that they knew or should have known that when they were not using the shaft, other workmen would be (Anderson, p. 19).

As a matter of fact, Augusteen testified, and he was corroborated by McGarry, that he had been working in this particular battery of shafts for days previous to the accident on and off at different times.

It is not a fact, as set forth in the defendant's brief, under sections A and B, Point I, that arrangements *were only* made for men to go into the shaft through *Mr. Anderson or Mr. Bader, for Mr. McGarry, a disinterested witness, testified without contradiction by Coward, that on numerous times he* (McGarry) *personally made arrangements when he could not locate either Mr. Anderson or Mr. Bader and says distinctly that on the day in question, Moberg, the foreman of the deceased, spoke to him about going into the shaft* and that when asked as to who obtained the clearance from Otis Elevator Company for the day of the accident, said, *"On this occasion I did it myself, probably,"* and further backs his statement by saying that he had never given permission for a foreman to take his men into the shaft *without first having obtained a clearance from the Otis Elevator Company.*

The use of the word "probably" by this witness does not nullify his statement when read with all of his testimony. He says he often obtained clearances (p. 61-29-31); that he never sent men into a shaft without first getting the consent of the Otis foreman (p. 64, ll. 20-24); that on this day he did give a clearance to the decedent's foreman (pp. 61-38; p. 61, l. 11); that no foreman would work in the shaft, without first having obtained a clearance (p. 63, l. 38-41), and says about the day in question, "On this occasion I did it myself, *probably*".

He does not use the phrase, "maybe", "perhaps", or "possibly", but says that he does distinctly remember Moberg coming to him asking for the clearance and distinctly remembers telling Moberg to go into the shaft and then follows it with the statement that he never sent anyone into the shaft without being sure of the clearance.

The use of the word "probably" merely affected the probative force of the statement and it became a question for the jury as to the weight to be given to it.

> *White* vs. *Van Horn,* 159 U. S. 3; 40 Law Ed. 55.

There was no objection to the statement made by defendants' counsel at the trial.

That use of similar words such as "I think", "I believe", and the like merely goes to the probative force of the testimony has been repeatedly held in many jurisdictions throughout the country.

> *Abbott* v. *Church,* 288 Ill. 91; 123 N. E. 306.

Annotation to above case, 4 A. L. R. 979, citing numerous cases in many jurisdictions in support of doctrine.

Counsel for the defendant unwarrantedly and without any justification attempts to mislead the court when he says that Anderson stated that McGarry had no authority to make arrangements for sub-contractors to work in the elevator, and the citation of p. 25 as authority for this clearly demonstrates that in his zeal to serve his clients he is trying to take greater liberties with the evidence than the meaning of plain English words warrant, for his question on p. 25 was as to whether Mr. Anderson was the *only* person that made any arrangements and the answer was, "No, there was one of my assistants named Bader who used to make arrangements", and on p. 26 we find that the foreman could make his own arrangements; Mr. Coward, the Otis Elevator Co. representative, did not deny the statement that McGarry had frequently made such arrangements in order to expedite matters:

> "Q. What you mean is, that if you could not reach Mr. Bader or Mr. Anderson, and if somebody wanted to go to work in the shaft, you would go and talk with Coward yourself? A. Yes.
>
> Q. And see if you could make arrangements with Mr. Coward and see if you could find out what time some other workmen could go in? A. I would, if I could not locate my superintendent somewheres."

The reason that Mr. Bader, the assistant superintendent, did not testify was because he was no longer in the employ of the company and could not be found.

Under the heading of "Comment" the appellant proceeds to disparage the Supreme Court, and we will take up its remarks in accordance with the paragraph notations in its brief.

(a) (b) and (c). We repeat that there is no evidence in the case that anyone else was carried on that car that day other than Coward. True, James Coward, an employee of the Otis Elevator Company, in an *ex-parte* statement says that he was on the car in the afternoon and that he gave the privilege to use the car to another who he says used it. This statement was not offered in evidence in connection with this phase of the matter and the only purpose of the exhibit was as to the right of one, Sampson, to run the car in the afternoon.

And furthermore, in this respect, we call the Court's attention to the testimony of Augusteen that they had been working all day in and about shaft #21:

> "Q. Had you seen the elevator in shaft #21 used at all that day? A. No, sir.
>
> Q. How near to it had you been working? A. About fifteen feet, I guess.
>
> Q. About fifteen feet away? A. Yes.
>
> Q. And you had not seen it used at all that day from 8 o'clock in the morning? A. No, sir.
>
> Q. Until the time you went in there? A. No, sir.
>
> Q. Is that right? A. Positively.
>
> Q. So you say your foreman said to you that the elevator was not to be run that day? A. That was our orders.
>
> Q. Was that what your foreman said? A. Exactly." (p. 42, ll. 19-36).

As to "d", wherein counsel for the appellant flatters the appellee's counsel, by assuming that certain statements in the opinion were taken from the brief of appellee, we quote the testimony, verbatim, in support of the statement made by the Supreme Court and with which appellant finds fault, to wit:

(d) "The statement in the opinion referring to the necessity of decedent's foreman obtaining or having obtained for him, permission to work in the shaft, that "there is testimony to the effect that such permission was given," is erroneous and is not based on any testimony in the case."

The Supreme Court said in its opinion,

"Now, there was the testimony of the foreman of Norman Seaton & Company, (Moberg) under whose orders the decedent was working on the day of the accident, that he, the foreman, was instructed to see to it that shaft #21 was clear for his men to go to work and that he complied with the instructions, both in the morning before 8 o'clock and in the afternoon at 12:30 P. M."

This is a correct statement of the testimony by the Supreme Court.

Moberg testified as follows (p. 54, 4-14):

"Q. Before you put them to work in that shaft, what did you do toward assuring yourself the elevator would not be running in the shaft while they were working? A. I WENT TO THE GENERAL SUPERINTENDENT, OR ONE OF HIS ASSISTANTS, AND GOT MY ORDERS TO SEE THAT THE SHAFT WAS CLEAR FOR THEM TO GO INTO.

Q. Did you get orders that day that the shaft was clear? A. I did.

Q. How many times that day did you get those orders? A. I WENT THERE FIRST IN THE MORNING BEFORE 8 O'CLOCK AND GOT MY ORDERS AND LAST TIME IN THE AFTERNOON BEFORE I SENT TWO MEN THERE.

Q. What time in the afternoon? A. About half past twelve.

Q. And were these orders to the effect that the shaft was clear or would be used? A. Yes, that they were clear and that we could go in.

Q. Did that include the shaft in which Catterall was working? A. It did.'

The Court was warranted in refusing to direct a verdict upon at least either of two theories:

First:—The defendant by reason of the very nature of the business it carried on and the attendant circumstances present knew or should have known, that inasmuch as it was not using this particular shaft, that employees of other contractors would be using it and it became the legal duty of the defendant company to so control and safeguard the use of the elevator car that it could not be used to the injury of others. Such a duty would have been fulfilled merely by the defendant company shutting off the power of this particular elevator, through the switch in the Pent House or the one in the pit or basement.

An unattended elevator car, with the power turned on, standing in a shaft, is a dangerous machine under any circumstances and for the defendant company to leave such a car standing in the shaft where many people could use it, with the power turned on, when it knew, or should have known, because of the usage or custom of the trade, that employees of other subcontractors, by the very nature of the work in which the defendant and such other contractors were engaged, would be working in the shaft and that the use of the elevator would cause their injury, constituted negligence of the highest degree.

It was the duty of the defendant company to shut off the power so that the car could not be run by unauthorized workmen or others.

Anderson testified on p. 19, l. 32, that there was no agreement between the companies of any kind concerning the shafts, only to use them *when*

wanted, and at p. 26, *he said that surely the Otis Elevator Company's representative knew that the shafts were in the course of construction and work was being done on them constantly* (l. 15) *and that someone was always working in the shafts when the Otis Elevator Company was not* (R., p. 26, ll. 20-25).

Second:—The defendant company had direct knowledge that the decedent was working in the shaft as a clearance had been obtained by the deceased's foreman, Moberg, through McGarry and from McGarry to Coward.

Moberg testified that he instructed his men to go into the shaft after having talked to Bader and McGarry in the morning and in the afternoon, requesting and obtaining a clearance, and that he would not send his men into the shaft without such a clearance as it was too dangerous. Bader did not testify as he could not be located. McGarry said that when he could not find Anderson or Bader, he obtained the clearance himself, directly from the Otis foreman; and that he distinctly *remembered Moberg speaking to him on the day of the accident, asking for the clearance and that he obtained such clearance himself* (R., p. 61, l. 29). *He further testified that under no circumstance would he permit a subcontractor to go into the shaft without having first obtained a clearance and he distinctly says, that he did tell Moberg to go into the shaft.*

True, Coward denies he gave a clearance, but his testimony, when read in the light of the pitiful spectacle he made of himself on the stand, was unworthy of belief because he frequently contradicted himself and his attitude in answering questions showed very plainly that he had no regard

for the evidence but was trying to please his employer.

The elevator car should have been so locked or the power so shut off that it could not be moved, and the failure of the defendant company to so guard against just such an accident was negligence.

Catterall and other employees of Norman Seaton & Company had been working in the battery of shafts for weeks previous to the date of the accident, it was a usage in construction work, of long standing, to have one sub-contractor's men follow another so as to dovetail the work with the least possible delay.

> "Q. How quickly after the Otis Elevator Company is through running the elevator would you have men working in this shaft, this #21 shaft? A. As soon as possible after.
>
> Q. What do you mean by, as soon as possible thereafter? A. We have to keep the work going all the time in the shaft in order to have it completed; some or other of the trades" (Anderson, p. 21, l. 30).

This had been a custom of many years and the Otis Elevator Company foreman knew that when his men were not in the shaft others would be:—

> "Q. Do you know whether or not the Otis Elevator Company's representative knew that these shafts were in the course of construction and work being done on them constantly? A. Surely.
>
> Q. You do not mean to say do you, that the Otis people knew the Seaton men were working in the shaft, on June 4, 1923, on shaft #21? A. I could not say positively, but men were working on the shaft all of the time; if they were not there somebody else would be.
>
> Q. What you mean is if the Otis people were not using the shaft, there must have

been somebody else ready to use it? A. surely'' (Anderson, p. 26, ll. 10-30).

A careful reading of Coward's testimony, the Otis Elevator Company's foreman, clearly demonstrates that the Otis Elevator Company was not working in shaft #21 on the day of the accident and this is borne out by the testimony of Augusteen, above referred to.

Yet, the appellant left this elevator car, a dangerous instrument, unguarded, the power on and capable of easy access by anyone when, merely by pulling the ''Pent House'' or ''Pit'' switch it could have protected other men working on the shaft.

Otis was not using the shaft.

Otis knew other men would be working in and about that shaft because Otis was not.

Otis left the elevator unguarded, open, and the power on.

Otis made the shaft unsafe.

Otis controlled the means of making it safe and did not take any precaution to do so.

Otis killed the decedent by its carelessness.

Otis could have prevented the accident by turning a switch under its control.

Otis should pay for its negligence.

Finally, if there is any evidence in the record, or any legal inferences which the jury would be justified in drawing from the evidence showing the duty and neglect thereof by the defendant, then the verdict must stand and we are confident that the record discloses abundant proof to justify the dismissal of the appeal and we so ask.

Respectfully submitted,

J. Raymond Tiffany,
Attorney and of Counsel
with the Plaintiff.

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