injury. The learned judge of the court below, in his opinion on the reserved point, has very clearly distinguished this from the cases cited, and claimed to establish the blowing of the whistle as the proximate cause. The assignments of error are overruled; the judgment affirmed.

(165 Pa. St. 377)

STOLTENBURG v. PITTSBURGH & L. E. R. CO.

(Supreme Court of Pennsylvania. Jan. 7, 1895.)

RAILROAD COMPANY — ACTION FOR INJURIES TO EMPLOYE — NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY — INSTRUCTIONS.

1. Plaintiff, a tinner in defendant's employ, was directed to repair the roof of a passenger car which was standing on a side track. Soon after he began work, an engine was attached to the car, and it was drawn rapidly forward. He walked forward on the upper deck of the roof, to learn the cause of the movement. As he neared the front end he turned his head to one side, to avoid the smoke and cinders, which came directly against his face, and was struck on the neck by a guy wire stretched across the track. The wire was 57 inches higher than such upper deck, and 74 inches higher than the main roof of the car, and plaintiff did not know of its existence. *Held*, that the questions of negligence and contributory negligence were for the jury.

2. Where the negligence charged was in maintaining such wire, if it could be reasonably anticipated by defendant that at some time a passenger car might pass under the wire while an employé was on the roof, it was its duty to place the wire high enough to avoid striking such person.

Appeal from court of common pleas, Allegheny county.

Action by John A. Stoltenburg against the Pittsburgh & Lake Erie Railroad Company for personal injuries caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Affirmed.

The assignments of error are as follows: "(1) The court erred in its charge to the jury, as follows: 'If it could be reasonably anticipated by the defendant company that at some time a passenger car might pass under the wire while an employé of the company might be on the top, or a mechanic be making repairs on the roof, it would then be the duty of the company to place the wire high enough to avoid striking such a person, and a failure to place it that high would be a neglect of duty, which would be negligence.' (2) The court erred in its answer to the defendant's point, which point and answer are as follows: 'That, under all the evidence in the case, the verdict must be for the defendant. Refused.'"

Knox & Reed and Edwin W. Smith, for appellant. A. M. Brown and John D. Brown, for appellee.

FELL, J. At the time of his injury, the plaintiff was in the employ of the defendant, as a tinner. He had been working for several months at the company's shops, and on the morning of the accident was sent to a station some miles distant, to make repairs on the roof of a passenger car. The car was standing on a side track, and he was told that it would remain there until noon, and that he would have ample time to do the required work. He had been on the top of the car but a short time, when an engine was attached to it. It was drawn rapidly forward, and he was struck by a wire stretched across the tracks, and seriously injured. When the car moved, he arose from his work, and walked forward on the upper deck, to learn the cause of the movement. As he approached the front of the car, the smoke and cinders from the engine came directly against his face, and, to avoid them, he turned his head to one side, and was struck by the wire almost immediately afterwards. The wire, which was used as a guy to support a pole, was stretched across the track at a height of 19 feet and 1 inch, and the top of the upper deck of the car was 14 feet and 4 inches above the tracks. The main roof was some 17 inches lower. The plaintiff was not employed in the movement of trains, and he had no knowledge of the existence of the wire. There was nothing to call for unusual vigilance, upon his part, to avoid such a danger, nor was there anything to warn him of it. His only opportunity to avoid it was during the few moments after the car had started, when he was in a position of danger, without neglect on his part, and when he was bewildered by smoke and cinders from the engine. He was held by the charge to the full measure of duty in this respect, and the case could not have been taken from the jury, either upon the ground of contributory negligence, or of the negligence of an employé in moving the car.

The remaining assignment relates to the portion of the charge excepted to, and we are of opinion that, under the facts of the case, it cannot be sustained. The negligence charged against the defendant was in maintaining a wire improperly and negligently strung across the tracks. While this might not have been dangerous to men employed in the movement of freight trains, because of the smaller size of the cars, or to those engaged in the ordinary operation of the road, it was still a fair question for the jury whether, in the use of the siding for passenger cars, and their repair thereon, the wire was not a source of manifest danger to the company's employés. If the use was probable, and the danger was one to have been reasonably anticipated, the defendant was held to the duty of guarding against it. The case, as was said by the learned judge before whom it was tried, is a close one; but we think it could not have been taken from the jury, and it was submitted in a charge which clearly and adequately stated the law applicable to the testimony. The judgment is affirmed.