

# N. J. COURT OF ERRORS & APPEALS

IN THE LAST RESORT IN ALL CAUSES.

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TIMOTHY DWYER (who sues by AN-  
THONY DWYER, his next friend).

vs.

THE NEW YORK, LAKE ERIE, AND  
WESTERN RAILROAD COMPANY.

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*In Error to  
Supreme Court.*

## Brief For Plaintiff.

Mr. Justice Knapp (case, p. 30) non-suited the plaintiff because as he thought the case made did not vary materially from that stated in the opinion reported in 18th Vroom, page 9.

The Supreme Court there set aside a verdict obtained by the plaintiff in this action and ordered a new trial. Whether Justices Dixon, Reed and Magie, who sat with the Chief Justice on that occasion, concurred in his *opinion* or only in the *result*, we have no means of knowing, as there was an affirmative defence before the Court, and they may have thought the verdict against evidence.

### I

*The rule laid down by the Chief Justice in the opinion referred to is far too stringent.*

As summarized in the head note of the report, the case is thus stated:

“A person who in passing from a ferry-boat to the dock puts himself in so dense a crowd that he cannot see to his

footing, and in that situation gets his foot crushed between the boat and the dock, has no cause of action against the ferry company, as his own negligence has been contributory to the injury."

(a.) The opinion is inconsistent with the case of *N. J. R. R. Co. vs. Palmer*, 4 *Vroom*, 94. We ask the Court to give the opinion of Mr. Justice Vredenburg in that case a careful reading. It is practical and in accord with every day experience. The Chief Justice himself too gave to it a qualified assent, which he does not now in terms retract, but we submit that his opinion in the case now before us cannot be reconciled with that of Judge Vredenburg, and that this Court will prefer the broader view.

(b.) But it is said: The plaintiff "put himself in the thick of a crowd," and thereby prevented himself from seeing, and this was contributory negligence which did not exist in the *Palmer* case. We submit that the case shows the following conditions ignored by the Supreme Court (or not proved on the former trial).

1. The landing-bridge was faulty in construction (Woolsey's testimony) unknown to plaintiff (case, p. 23).

2. There were iron lattice-gates across the whole front of the boat, expressly placed there to restrain passengers and guarded by a deck-hand, whose business it was to see that they were not opened until safe passage was offered. The opening of the gates was the signal to pass off, and in the present case the gates had been opened and a great number of people had safely passed from boat to bridge.

Under these conditions it was presumably safe and prudent to pass off with the crowd.

The only danger to be anticipated was of boat and bridge not being on a level, or possibly not being close together when fastened (though Mr. Woolsey says this could not happen if everything was properly constructed.) For a fall caused by such a state of things defendant might well be held blameless, but to throw open the gates before the boat was in and fast, was to invite the passen-

gers into a trap. The very precaution a prudent man would take of feeling forward with his foot to find out whether the bridge was up or down would be likely to lead to crushing the foot if the boat was not in.

To say that a crowd of passengers on one of our city ferry-boats, many of them intending to take outgoing trains must pass off one by one would be to establish a rule which the ferry companies themselves would be the last to wish for. To say that a passenger must not get in a crowd on a ferry-boat is to prohibit his crossing the ferry at all at certain hours of the day. To say that each member of a crowd must wait till the crowd has gone off is *reductio ad absurdum*. It will hardly do to say that it is negligence, *per se*, to be in the crowd, and if not it is self-evident that it is not negligence to be unavoidably swept along when the crowd (invited by the company's agents) pass off the boats.

## II

*The case on the second trial did vary materially from that stated in the opinion.*

None of the facts relating to the construction of the boats, bridges and racks, the management of the ferry, the custom as to disembarking, the guarding and opening of the gates, and the surrounding circumstances are stated in the opinion. Some only were proved on the first trial; all are fully shown in the present record, and we submit they must modify the Chief Justice's rule. We ask the Court to read the whole case, and will call attention only to one important element developed in the second trial.

From the plaintiff's testimony at the first trial, as recited in the report, the Chief Justice inferred that the plaintiff "placed himself in the midst of a jostling crowd of persons, and voluntarily attempted to pass off the boat in that situation" (18 Vroom, p. 11) and he concludes his

opinion thus: "In the present case there is no pretence that if the plaintiff had not put himself in the thick of the crowd of persons who were rushing and pushing their way off the boat, that he would not have been easily able to avoid the accident in question. Under such conditions I think he should have been non-suited, and a *venire de novo* should consequently be awarded."

It was rather a strained inference from the mere expression "I got amongst the crowd," that plaintiff purposely did what the Chief Justice condemns. On the second trial this expression is explained, and it fully appears that he was forced into the crowd. He had left the forward cabin among the last of the passengers and stood on the string-piece between the side and middle gang-ways. What followed is shown at page 23 of the printed case: "Q. You were not in a crowd as you stood up on the string-piece? A. No; when I stepped down the crowd was in front of me and then the crowd came behind me. \* \* \* \* \*

Q. Did you mix up in the crowd voluntarily that night?

A. No, sir. Q. How did you come to get in a crowd?

A. Standing on the string-piece I happened to step down and the first I knew the crowd came all around me, so I went right in among the crowd, I stood right by the chain, between the gate and the chain. Q. What did the people who came behind you, as you stepped down from the string piece, do? A. They came right after me (and at page 28) "I stepped off the string-piece and stepped down, I was pushed and the crowd got around me and I moved a little away, kind of. I could not get out of the crowd, though."

If it be suggested that the plaintiff could have worked his way through to the rear of the crowd, we answer that that surely was a question for the jury.

The judgment should be reversed and a *venire de novo* ordered.

COLLINS & CORBIN,

*Counsel for Plaintiff in Error.*

# N. J. COURT OF ERRORS & APPEALS

IN THE LAST RESORT IN ALL CAUSES.

TIMOTHY DWYER, an infant (who sues by ANTHONY DWYER, his next friend), <i>Plaintiff in Error,</i> <i>vs.</i>	10
THE NEW YORK, LAKE ERIE & WEST- ERN RAILROAD COMPANY, <i>Defendant in Error.</i>	20

*Writ of Error* tested November 4th, A. D. 1885;  
returnable December 1st, A. D. 1885.

*Return*, sets out judgment of non-suit at the trial upon  
the following pleadings and bill of exemption:

NEW JERSEY SUPREME COURT,

OF THE TWENTY-FOURTH DAY 30  
OF SEPTEMBER, A. D. EIGH-  
TEEN HUNDRED AND EIGHTY-  
THREE.

HUDSON COUNTY, ss.:

The New York, Lake Erie & Western Railroad  
Company, the defendant in this suit, was summoned to  
answer unto Timothy Dwyer, the plaintiff therein, of a  
plea of trespass on the case; and thereupon the said 40

Timothy Dwyer by Anthony Dwyer, who is admitted by this Court to prosecute for the said Timothy Dwyer (who is an infant within the age of twenty-one years), as the next friend of the said Timothy Dwyer, complains for that whereas, the said defendant, before and at the time of the committing of the grievances hereinafter mentioned, was a corporation recognized by the laws of this State and was the proprietor of a certain ferry between Jersey City, in the county of Hudson aforesaid, and the

10 city of New York, in the State of New York, across and over the Hudson River, and a certain ferry-boat plying on said ferry and of a certain ferry slip with a movable float—commonly called a bridge—hung therein to which said boat was accustomed to be fastened when receiving and discharging passengers, and over which such passengers had to pass in disembarking from said ferry-boat, and was operating said ferry and thereon transporting passengers for hire and reward to the said defendant in that behalf across and over the said river, to wit, at Jersey

20 City aforesaid; and whereas the said ferry boat was provided with iron gates across the bow thereof, to prevent passengers from leaving said boat until it was securely fastened to said bridge, which gates were in charge of servants and agents of the said defendant whose duty it was not to raise or open the same until the passengers upon said boat could disembark therefrom with safety.

And whereas, heretofore to wit, on the twenty-fourth day of November, A. D. eighteen hundred and eighty-two, at New York city, to wit, at Jersey City aforesaid,

30 the said plaintiff, at the special instance and request of the said defendant, became and was a passenger upon said ferry to be afforded safe and secure means of embarking on said ferry-boat, and to be safely and securely carried thereby from the city of New York aforesaid to the city of Jersey City aforesaid, and to be afforded safe and secure means of disembarking from said ferry-boat and reaching said bridge (and thence the public highway) for certain fare and reward to the said defendant in that behalf.

40 And whereas, the said defendant then and there re-

ceived the said plaintiff as such passenger, and thereupon it then and there became, and was the duty of said defendant, by its servants and agents, to use all necessary and proper means to protect the said plaintiff in disembarking from said ferry-boat, and to so conduct the disembarking of passengers therefrom as to enable the said plaintiff to reach said bridge in safety, and not to permit the said gates to be raised or opened until said boat was securely fastened to said bridge. Yet the said defendant, not regarding its duty in that behalf, did not use due and 10 proper care in conducting the disembarking of passengers from said ferry-boat but, through the negligence and carelessness of its servants and agents, permitted said gates to be raised and opened before said ferry-boat had reached the said bridge and while it was yet in motion, by means whereof the said plaintiff supposing, by means of said gates having been raised and opened, that the said ferry-boat was at rest and fastened to said bridge, and that he might safely pass therefrom to the said bridge, passing forward with that intent among other 20 passengers, and in so doing placed his foot between the said incoming ferry-boat and the said bridge, and his foot was thereupon crushed between the same and he was greatly bruised, wounded and injured and by means of the premises, became and was sore, sick, lame and disordered, and so continued for a long time, to wit, hitherto, during all which time he suffered and underwent great pain and was hindered and prevented from carrying on, transacting and attending to his lawful affairs by him during all that time to be transacted, and thereby lost 30 and was deprived of divers gains and profits, which had been accustomed to arise and accrue, and otherwise would have continued to arise and accrue to the said plaintiff from the transacting and carrying on of the same, and thereby was also forced and obliged, and did then and there pay, lay out and expend divers sums of money, amounting in the whole to the sum of five hundred dollars (\$500) in and about the curing and endeavoring to be cured of the bruises, wounds and injuries so received as aforesaid, and thereby the said plaintiff received per- 40

manent injuries and was crippled for life and deprived in a great measure of the means of earning and acquiring maintenance and support throughout his whole life.

Wherefore the said plaintiff complains that he is injured and has sustained damage to the amount of five thousand dollars (\$5,000) and therefore he brings his suit, etc.

COLLINS & CORBIN, *Attorneys.*

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Plea—General issue, not guilty.

C. & R. W. PARKER,

*Attorneys.*

NEW JERSEY SUPREME COURT.

HUDSON CIRCUIT, SEPTEMBER TERM, 1885.

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TIMOTHY DWYER, by next friend,

*vs.*

THE NEW YORK, LAKE ERIE & WEST-  
ERN RAILROAD COMPANY.

*In Case.*

*Bill of Excep-  
tions.*

Mr. Justice KNAPP, presiding.

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This case coming on to be heard on the 14th day of September, 1885, a jury was summoned and sworn, and the case proceeded with in the presence of GILBERT COLLINS, Esq., counsel of the plaintiff, and CORTLANDT PARKER, Esq., counsel of defendant, testimony was offered and proceedings had as follows:

Mr. Collins opens on the part of the plaintiff.

40 It is admitted that the defendant operated the ferry, and did so up to and at the time of the injury.

CHARLES W. WOOLSEY, sworn on the part of the plaintiff, testifies as follows.

*Direct examination by Mr. Collins:*

I live at 62 Highland avenue, Jersey City; I am Superintendent of Hoboken ferries; have been in that position since April, 1883; before that I was Superintendent of the Pennsylvania Railroad ferries; before that I was Assistant Superintendent under my father, who was Superintendent of the Pennsylvania Railroad ferries, and I succeeded him in his office; I have had about seventeen years' experience in the management of ferries; the Pennsylvania Railroad Company operate two ferries, the Courtlandt street and the Desbrosses street ferry; at one time they had another one to Thirty-fourth street.

Q. How many bridges were there at both the New York and Jersey City sides under your charge for the Pennsylvania Railroad Company?

A. Ten bridges and ten boats; that is the most extensive ferry on these waters. I have eight bridges under my charge at the Hoboken ferry; I have two ferries—the Christopher street and Barclay street; I have nine boats under my charge.

Q. Are you familiar with the construction of ferry slips, and bridges and of boats, with regard to slips and bridges?

A. Yes, sir.

Q. What is understood by a ferry bridge?

A. The bridge is the platform at which the boat lands, hinged at one end and supported by floats at the other end.

Q. Is the end of the bridge concave or convex?

A. It is concave, to fit the convex end of the boat.

Q. In a properly constructed bridge and slip, with proper boats, how should the boat and the bridge fit together?

A. Should be tight at all points where passage off and on is made.

Q. What is the method of securing the boat to the bridge for the receiving and discharging of passengers and teams ?

A. Customarily by a chain revolving over a drum and gearing—by a hand-wheel.

Q. Are there large eye-bolts on a boat on either side ?

A. Yes, on some boats, and on others straps of iron with eyes in them, to which a hook is fitted in, the hook fastened on the end of the chain or ropes, and those revolve round an iron drum which is made to revolve by  
10 gearing, that gearing is worked by a hand-wheel about four feet in diameter ; it has spokes something similar to the wheel of a vessel that they steer by.

Q. When the chains or ropes are fastened by means of these hooks and the eye-bolts, what is the next step with reference to getting the boat fastened to the bridge ?

A. The wheels are revolved to tighten up the boat; the object of that is to secure the boat firmly to the  
20 bridge; it should be screwed as tight as the ropes or chain can be made by the aid of the gearing.

Q. Is it a desideratum that the boats should be very tight to the bridge ?

A. So tight that there can be no movement between the two ; as little as possible.

Q. Is it possible to have the boat so tight against the bridge that there will be no substantial movement ?

A. There may be times of a severe wind or a considerable sea when the boat will strain and work in the water  
30 to some extent, and there will be more or less of a pulling on the chains or ropes, but the object of the chains or ropes is to bind the two so firmly together that there can be practically no separation of the two.

Q. What is the ordinary crew of a ferry-boat in our waters, all told ?

A. A captain, a wheelsman, an engineer and a fireman, and two deck-hands, making six in all.

Q. What do the deck-hands do with regard to the running of a boat and the passage and landing of a boat ?

A. You are asking me in general, or of any particular  
40 ferry ?

Q. In general.

A. I am not familiar with the customs of all the ferries; I only know those with which I have had personal connection.

Q. Do you know the general rule in that regard?

A. Yes; I presume them to be about the same in all ferries; in fact, I have that general understanding without any positive knowledge to the contrary.

Q. State what it is with regard to deck-hands across the river and at the landing?

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A. The rule is that one deck-hand shall be always at the forward end of the boat while under way; that he shall act as look-out; that is required by United States law as assisting in the navigation of the vessel. His duty is at that point and under no circumstances should he leave that point except for some extraordinary occurrence, such as collision, fire or anything of that nature. He is placed in general command of the ferry deck, to see that everything is in proper order, and upon the approach of the boat into the slip to stand by the gates and guard them properly until such time as it is proper to open them. The other deck-hand's duty is on the after end of the boat to perform such duties as may be necessary there at the time, perhaps to go through the cabin and see that everything is in order—the principal object being that both ends of the boat shall be covered by the employees in authority.

Q. Has he special duty with regard to the rudder?

A. That is attended to by the wheelsman. The wheelsman comes down from the upper deck when the boat gets in and pins the rudder.

Q. Does the deck-hand or wheelsman then come forward?

A. The after deck-hand always comes forward as soon as the boat approaches the slip, so that brings two deck-hands on deck at the landing.

Q. It might be possible that in some ferries the dropping of the pin might be committed to the after deck-hand?

A. Yes; sometimes; it is sometimes done as a matter of convenience.

40

Q. What does the after deck-hand do when he comes forward after the boat comes into the slip?

A. Sometimes the man who is at the gate during the passage of the boat across the river steps out and chains up the boat on one side and delivers the care of the boat to the other man who relieves him, or it may be that the after deck-hand comes out forward and leaves the original man still in charge of the gate.

Q. The other side of the boat is made fast by the  
10 bridge man?

A. Yes; the man that stands on the bridge.

Q. Have you observed, in the course of your business, the condition of the ferry slips and the boats with regard to their fitting into the slips of the Erie ferry at Long Dock?

A. Not very carefully; I have occasionally crossed over it.

Q. In crossing, have you observed those particulars?

20 A. It is rather customary for me, whenever I go to any other ferry than my own, to take a look around for the purposes of comparison, to see whether I can learn anything new.

Q. Can you tell us, from your observation, the condition in the respects I have indicated of the slips and boats of the Erie at Long Dock?

By Mr. PARKER: On the 24th of November,  
1882.

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A. I can make no accurate statement in regard to their condition; my only observation in regard to it would be comparatively, as comparing it with something else.

Q. Give us that?

A. It is impossible for me to speak accurately in regard to any one particular thing; my observation of it, as I have passed on the premises, is that they are less  
40 the point of what I deem perfection than the other ferries around?

Q. In what regard?

A. I think that the particular point is in the failure of the racks themselves to hold the boat in position.

Q. What are racks?

A. The piles, with the sheathing, running out which support the boats on either side, and into which they run.

Q. This insufficiency to do that leads to what result, with respect to the fitting of the boat to the bridge?

A. Angular position of the boat in that place whereby 10 the exact fit of the convex into the concave cannot be produced. In order to have perfect fit the boat must be held in a position straight with the bridge. If it is allowed to swing one way or the other it has a tendency to throw the point of contact out of true lines; it is necessary to hold it firmly.

Q. And that divergence will increase as you go away from the point of contact?

A. It is very apt to produce an opening on the ends; I have had experience of that kind myself where mis- 20 takes have been made in the construction of the whole structure.

Q. Should you suppose, from what you observe on these ferries, that it would be possible for a boat to come into a slip so that interstices would be left into which a man might slip his foot, or part of his foot?

A. I cannot state as to that.

Q. You have told us with respect to the fitting of the convex into the concave, how is it with regard to the comparative level of the bridge and the boat. I do not 30 speak now of the Erie ferry, but as to the construction of ferries generally in that regard, as to how they are constructed and as to how they may be constructed, and are in some cases within your knowledge, and how they should be in your judgment?

A. They vary under different conditions. The tides have a great deal to do with it, also the weight of the load upon the boat is a large factor. The bridge is supposed to be balanced as nearly as possible at a mean height which may be controlled to a certain extent by 40

the use of wheels and chains, or it may be raised and then lowered by its own weight. At different ferries different systems are employed. Some have one kind of rigging and others another. The majority of ferries have their floats so arranged that they will occupy just about one mean position, and in most of those cases the bridge cannot be lowered—although it may be raised. Then, there are others which have this mean position determined at a point lower than the ordinary height of the boat, 10 and in order to produce the fit when the boat arrives, the bridge is hoisted, raised up to a point a little above; then with the aid of toggles, the wheels are let go and the bridge is allowed by its own weight to descend, and the toggles catching on to the deck of the boat bring the two to a perfect level. That, it is not always possible to regulate. There may be extreme high-tides so that it will not be possible to make the level; there may be extraordinary weight upon the boat, so that the bridge cannot come down by its own weight, and in such cases 20 great diligence has to be exercised to see that the passage of passengers and teams from the boat to the bridge is done with safety, and of course it stands to reason that as soon as the bulk of the load gets off the boat the boat rises by being lightened and the bridge and boat become nearly level.

Q. By the improved method of which you speak, in the great majority of cases, the bridge and boat would be on a level except in cases of extraordinary tides?

A. The system that I am at present operating is more 30 nearly correct in that regard than that which I had charge of before.

Q. Under the former system and the system that is quite common, varying according to the tide and the weight upon the boat, the bridge and boat might not be on the same level?

A. They might not be on the same level.

Q. In that case they are connected by planks?

A. Yes.

Q. That, however, this fact of not being on the same 40 level, does not effect the other fact of the fitting in so as to leave no interstices?

A. No.

*Cross-examination by Mr. Parker :*

Q. Do I understand that you speak of the Erie ferries as of the date of November 24, 1882?

A. No, sir; of general observation.

Q. Can you name any time since that when you made any such observation?

A. Not accurately; I have been there, however, within the last two or three months. 10

Q. Then you make no comparison that you are willing to say is accurate between the condition of things on November 24, 1882, and the condition of things on your own ferry?

A. No, sir; I made no attempt at comparison that way.

Q. You say you did notice that things were less perfectly arranged on the Erie than on your own ferries; did you ever speak of that before? 20

A. Yes.

Q. To whom?

A. I could not remember now.

Q. Did you ever tell the officers of the Erie Company anything of this sort?

A. No, sir.

Q. Why not, if there was anything there to speak of?

A. Because I don't assume to bother with other people's business; I don't go to a Superintendent of another ferry and tell him what ought to be done. 30

Q. But if this has something to do with loss of life or injury to limb, might it not have occurred to you that you had better mention that to the person who had charge?

A. I perhaps can hardly lay claim to being so much of a philanthropist as that.

Q. Is this, then, of any appreciable account?

A. No more than this: that in matters of that kind I have found in my experience that it is important to have 40

them as nearly perfect as it is possible to make them, and it has been one of my aims and duties to make them over which I had control as nearly right as my own light and experience would permit me to have them.

Q. Have you attained the result of being entirely free from accident?

A. No, sir.

Q. Have you had persons aboard your ferry boats injured as they came on shore?

10 A. Since I have been there I don't know of one.

Q. How long is that?

A. Two years ago last April.

Q. Where you were before?

A. Yes; where I was before I had a great many.

Q. So that the defect that you suggest is in the strength of the sheathing and piles?

A. I suggested that that would have a tendency to make a difference in the fit of the boat and the bridge, and that as I had remembered there had been some such angularity at that place observable at different times, not  
20 always so.

Q. Those piles are stationary, are they not?

A. Yes.

Q. You say it is observable sometimes—not always  
so?

A. Wind and tide is the controlling element there.

Q. Your idea is that these piles, if differently placed,  
would have prevented a little more the action of wind  
and tide?  
30

A. Yes; my idea is that the position of the racks should be such as to hold that part of the boat firmly in position, and to prevent the wind and tide from slewing the boat one way or the other after she was once in. They should be so placed that she would be held firmly there after she has been once made fast to the bridge.

Q. You don't indicate any particular way in which that defect, as you call it, could be remedied?

A. Yes, I do; if I had a slip under my control defect-  
40 ive in that particular I should take steps to have it re-

moved and redriven in such a way as that it would be right.

Q. It would be necessary to take out the piles and drive them over again ?

A. It might be ; the end might be accomplished by building out upon them without removal ; there might be something added.

Q. How did you remedy what you found when you went to the place you have now made perfect ?

A. I have made one alteration in just the particular I 10 speak of.

Q. Took out the piles ?

A. No ; I built on to them.

Q. I understand you that in the matter of the float and its being secured as it falls, so as to be of equal height with the approaching boat, that that greatly depends upon the load at that end ?

A. Yes.

Q. If a boat approaches a float and at that moment the passengers from the cabins and everywhere, rush forward 20 to the edge of the boat, then that very difficulty would be produced, wouldn't it ?

A. It would be very apt to be ; yes.

Q. Now, suppose a person was injured on the side of his foot and not at the end, and the side too, nearest the heel, what would be your idea, if you are an expert in such matters, as to the way in which that injury occurred ?

A. Please state the precise point as to where the foot was hurt. 30

Q. On the side, and nearest the heel, while the front of the foot, toes, up to the instep, were all safe ?

A. It seems to me that might be a question more for a doctor than for me to decide.

Q. (By Mr. COLLINS) : When is the proper time to open the gates ?

A. After the boat is secured to the bridge, she should be thoroughly secured so as to guard against all danger.

Q. (By Mr. COLLINS) : You are here under subpoena ?

A. Yes, sir. 40

THOMAS MORRIS, sworn on the part of the plaintiff, testifies as follows.

*Direct examination by Mr. Collins:*

I live at 196 Pavonia avenue, Jersey City; am a shoe cutter; have lived in Jersey City 19 or 20 years. My business is at 48 Warren street, New York. All those years I have crossed the ferries, the Erie ferry at Long Dock; I remember when the lattice-work iron gates crossing the front of the boats were introduced, but I cannot positively say just the year, I know it has been over ten years.

Q. State the custom on the boats of the defendant at the ferry from Chambers street to Long Dock with regard to the passage across the river and the landing of the boat, if you have observed it?

A. I should say there is a man comes to the gate, goes through it, and after that there is another man comes along and stands in the centre where the gates meet; I should imagine it is his duty to stand there and protect those gates to see that no one goes over or goes by them in any shape or form. If they attempt it they are pushed back. These two men are deck-hands. The other one is there to secure the boat to the bridge on one side. When they are secured this man at the gate opens the gate. There is a bridge man there to help secure the boat to the bridge. When both sides of the boat are secure, this other man opens the gate and then the passengers all go through. They go through at all parts of the boat. The principal outlet is the central, that is the horse passage-way. When the bulk of the passengers are off, then, of course, the horses go off the same gang-plank after the chain is dropped. The passengers are not obliged to go over the chain, they can go between the posts.

Q. What do the men do in order to let the horses off before the chain is lowered?

A. They pull the gang-plank over and then lower the chain and then the horses go off.

Q. Where do the passengers stand during the passage over the river when there is a full boat ?

A. The majority go over the centre-board, what I would call the horses' gang-plank. Passengers stand up to the gates as the boat approaches the slip.

Q. How far back is the gate from the extreme point of the bow in the centre ?

A. I should think about ten feet.

Q. Behind the gates, how far is the chain ?

A. I should say about ten feet. The chain only crosses 10 the centre portion of the boat. The gate goes entirely across the boat. A man pushes the gate up, and another man opens the side passage-way at the same time.

Q. What divides the two passage ways leading into the cabins from the horse passage-way ?

A. A little raised piece of wood or beam, divides the team passage from the cabin on each side the boat, there is also a row of short posts ; no chain between the posts.

Q. Were you a passenger on the ferry boat from Chamber street to Long Dock, Jersey City, November 20 24, 1882, when the plaintiff met with this accident ?

A. Yes ; I was in the cabin. As I passed off I saw a crowd around young Dwyer. I didn't know it was him and I passed along, thinking I would make one less in the crowd. I thought there was somebody hurt or sick.

Q. As you came out where were the most of the passengers ?

A. Quite a good majority had gone out already.

*Cross-examination by Mr. Parker :*

30

Q. You saw the model that we had at the last trial ?

A. Yes, sir.

Q. As you come out of the cabin you are in a passage-way about five or six feet wide ?

A. Yes, sir.

Q. Between the railing of the boat on one side and the string-piece you speak of on the other ?

A. Yes, sir ; on the string-piece are posts, and those posts run within a few feet of the bow of the boat. Be- 40

hind the gates, which extend across the bow, is a chain that goes from a post on one side to a post on the other side.

Q. Now, then, as the boat comes up a man who is in front of the gates goes forward, gets across, picks up the chain, hooks it on to the boat, takes hold of the wheel, and makes the boat fast on that end?

A. Yes, sir.

Q. And while he is doing that, another man on the  
10 other side of the boat who is on the bridge and not on the boat, is busy in the same way making it fast at that end?

A. Yes.

Q. Then the next operation takes place, which I think you have not mentioned, that the man on either side throws the gang-plank aboard the boat and fixes it nicely?

A. Yes.

Q. So that every man who is aboard those boats and  
20 comes out of those cabins, when he comes forward, finds a plank ready for his passage ashore, doesn't he?

A. There is a plank there, but if all the men waited to get over that plank, they would get left.

Q. Is it not true that every man who comes from the cabin finds there a plank ready for him to walk over?

A. Yes, sir.

Q. And if there be a crowd, if he will wait he will have his turn?

A. Yes; I don't believe they will take him back  
30 again.

Q. The man having gone ashore first, and then come aboard and put that plank there, his next step is to open the gates, is it not?

A. The man in the centre opens the gate.

Q. You think it is a man whose duty it is to stay there and do it?

A. Yes, sir.

Q. Don't you know that that is a man who, while  
40 these operations in front are going on, has gone down to the other end of the boat and dropped the rudder-pin, and come back again to that point?

A. Yes, sir.

Q. So that there are times, and must be a time, when that gate is standing there without a man standing by it to open it?

A. I don't know that I ever saw or noticed it.

Q. Did you ever notice it at all?

A. Yes; I am a general observer, and I always notice that that deck-hand is always on his post.

Q. Did you notice it the night in question?

A. No; I was in the cabin and could not notice it. 10

Q. Do they throw both gates open by the one movement?

A. It may be done, but it is generally first one side and then the other; sometimes the bridge man comes and takes one side, and the man that stood at the gate takes it on the other.

Q. All this while there lays on the float a heavy horse-plank?

A. Yes—eight or ten feet wide.

Q. And the next duty of these men is to haul that 20 plank aboard?

A. Yes, sir; and they do it. When they do that people have to get out of its way, and they do get out of its way. After that plank is aboard the chain is dropped; that is the next business. People come out of the cabins and cross over the string-pieces and get into this front centre place, and go through that way; sometimes they crowd over it; sometimes there are great crowds going over.

Q. It was so that night, wasn't it, when you came out 30 of the cabin?

A. About that time of night there is always a crowd; there was a crowd that night; a great many of the crowd had already gotten away and were going away; I saw a crowd around the front where young Dwyer was; there was probably fifteen or twenty around him.

Q. How did you go off the boat?

A. I went over the centre plank—not the one that was before the cabin; there was too much of a crowd to wait for that. 40

Q. It was dark?

A. Yes; just lighted up, I believe.

Q. I will read what you said on your former trial. I asked you this: "Did you say it was dark?" and you answered, "Yes." "Q. Were the lights up?" and you said, "Yes, sir; I think so. Q. Ten minutes of six o'clock? A. Ten minutes of six o'clock." Is that true?

A. I think I said "ten minutes past six." I think I  
10 was working up to six o'clock; sometimes I worked up to half-past five, sometimes up to six.

Q. Do I understand you to say that you didn't know anything about this man who fixed the pin on the rudder?

A. I don't know that I said anything of the kind; I know there is a man that fixes the pin of the rudder.

Q. On the other trial you were asked this question:  
20 "Q. Do you know anything of the duties of a man whose first duty is to go and fix the pin of the rudder behind and then come forward, whose coming there must occur before the gates are opened," and you answered, "A. I know there is a man generally fixes the rudder, and there is one man comes along and goes through—that is when the boat approaches—and secures the chain to the boat, and that this other man comes directly after him and takes his station at the gate," and you were asked, "Q. The man that fixes the rudder?" and you  
30 answered, "A. I suppose it is." You were asked: "Q. Is he the man you call the guard at the gate?" and you answered, "A. The second one that comes." Is that right?

A. Yes; I think so.

Q. I read again: "Q. Then you don't mean to say that from the time the boat leaves the wharf on the New York side until she crosses there is always a man standing there? A. No, sir. Q. You only mean to say that the man that comes from another place takes his stand  
40 there. A. That is what I mean. Q. And prevents

the gates being opened until things are safe? A. That is what I mean."

A. That is correct.

*Re-direct examination :*

Q. Does the man who is at the gate on the passage—and who steps ashore to fasten the boat—does he leave his place at the gate until there is somebody to relieve him? 10

A. There is a man at the gate and there is another man in the front of the boat, and he steps ashore and secures the boat, and the man that is at the gate holds this position until the gate is secure.

Q. But the man who is at the gate, and who you call the guard, he has come from aft to get there?

A. Yes, sir.

Q. But before he got there the other man was already in front of the gate?

A. Yes; he stops there generally until the other man 20 approaches.

Q. In the course of your observation, in the management of those gates, is the gate ever left unguarded after the boat approaches the slip?

A. No, sir.

Q. (By Mr. PARKER): That is, when you looked, you saw, you think, a man there looking after it?

A. Always; I noticed a man at his post at the gate.

30

TIMOTHY DWYER, the plaintiff, sworn, testified as follows:

I am the plaintiff; I live with my father in Jersey City; he is a painter; I work for him at house and sign painting; I am 20 years old next March. I started out with the intention of learning the machinist trade and worked about six months at that.

Q. Why didn't you follow it up? 40

A. My foot was too weak ; I could not stand and lift heavy weights. My foot was hurt by the accident for which this suit was brought. I worked at the machinist trade then in New York. my wages were \$3 a week at the time I got hurted. I have always lived in Jersey City. I had to cross the ferry. I generally crossed the Cortland street ferry ; I sometimes crossed the Long Dock ferry.

Q. Did you cross the Long Dock enough to be familiar  
10 with their management of it ?

A. Yes, sir ; I lived at 34½ Erie street, near Second ; about mid-way between the two ferries.

Q. State what your observation in crossing the Long Dock ferry was as to the landing of the boats, making them fast to the bridge, the opening of the gates, during your crossing of that ferry ?

A. As the boats came up the deck-hands come forward and one goes nearer the gate ; as it advances nearer and nearer, the man gets outside and the other deck-  
20 hand comes and takes his place.

Q. At that time are they both together ?

A. One is outside the gate, but both by the gate ; when the boat gets up the first man steps one side and on to the dock, and puts the chain-hook into the eye-bolt and winds up the wheel ; the bridge man does the same thing on the other side ; the other man opens the gates ; the gates are opened when the hooks are in the eyes.

Q. Do they open the gates just the minute they put the hooks in the eyes ?

30 A. No ; they wind the wheel up.

Q. After they wind the wheels do the men do anything with foot-planks ?

A. They chuck them on board between the bridge and the side passage-ways ; then one of the gates are opened by the deck-hands ; that makes three passage-ways open—two side ones and the middle one.

Q. When the passage-ways are open, through which passage-way do the people walk ?

A. Generally at night, when there is a crowd, they go  
40 through the centre passage-way.

Q. At any time do they use them all?

A. Yes.

Q. Where are the people on a crowded boat—those who are on the front part?

A. Right back of the gates, between the chain and the gates, in the middle passage-way; when the gates are opened they walk right off.

Q. Did you ever know them to be stopped or attempted to be stopped?

A. No, sir.

10

Q. Is the custom you have spoken of about the same on the Pennsylvania ferry also?

A. Yes.

Q. On the evening of November 24, 1882, had you been at work that day?

A. Yes.

Q. How did you come home?

A. By Chambers street ferry; I got on the ferry boat of the Erie, leaving Chambers street and landing at Long Dock; I paid my fare, three cents, to the ticket man; then I went on the boat; as soon as I got aboard I went into the gentlemen's cabin; that is on the left hand side as you come from New York; I commenced to read a paper; I sat there until the first gong rang; I was in the forward cabin; then all the people folded up their papers and stood up and walked out; I put my paper in my pocket and walked out with the crowd; they all went up on the centre gang-way; I stepped up on the string-piece that divides the gentlemen's cabin from the horse passage-way; I stood there until I thought the boat was in; they all crowded after me as I stepped down; the first thing I knew the gates were opened and in I went, a crowd in front of me and a crowd behind me.

30

Q. You were on the string-piece, and you stepped down to the right hand into the horse passage-way place?

A. Yes.

Q. At that time was there a crowd behind you?

A. Yes, and a crowd in front of me; so I was in the middle of a crowd; and the gates were then opened.

40

Q. Who did you suppose had opened them ?

A. I supposed the deck-hand ; I could not see ; there was too much of a crowd.

Q. Had you any reason to suppose that any one besides a deck-hand had opened them ?

A. No, sir.

Q. What did you understand when the gates were opened ?

A. I understand that the boat was fastened safely enough  
10 to let passengers off.

Q. You so understood it that night ?

A. Yes, sir.

Q. Go on ?

A. As soon as the gate was open I walked off slowly with the passengers ; the first thing I knew my foot was down between the boat and the bridge and I fell back and somebody come and picked me up.

Q. Did you feel a pain right away as soon as your foot went in ?

20 A. Yes.

Q. Crushed your foot ?

A. Yes.

Q. Then ?

A. I went on the dock then and was carried into the waiting-room and bandaged my foot up, somebody wanted me to go to the hospital. I said, no. A policeman came there and took my name and address and sent me home in an express wagon.

Q. Were you in pain ?

30 A. Yes.

Q. How severe ?

A. I could not stand ; my foot was sore ; I could not move ; it was great pain.

Q. Did you lose your senses ?

A. No.

Q. Did it bleed much ?

A. Not much at the time of the accident, it did when I got home, they took the shoe off in the waiting-room, then it bled a little.

40 Q. What boat did you take ?

A. I should judge about ten minutes past six ; six o'clock or ten minutes past six from New York.

Q. It was not earlier than ten minutes to six ?

A. No ; it was dark ; I could not say for sure if they had lighted the lamps.

Q. In crossing the Pavonia ferry, had you ever observed that that boat did not fit into the bridge ?

A. No ; I always thought it fitted in.

Q. Do the boats fit into the bridges at the Pennsylvania ferry ?

10

A. Yes.

Q. Had you any reason to suppose that the boat was not in and fixed to the bridge ?

A. No.

Q. Had you any reason to suppose that it did not fit tightly to the bridge ?

A. No, sir.

Q. What precautions did you take for your own safety as you went ashore, as to the use of your eyes and ears ?

A. I went straight down the gang-way ; I had my eyes about me, looking where I was going—trying to look any way.

Q. You were not in a crowd as you stood up on the string-piece ?

A. No ; when I stepped down the crowd was in front of me, and then the crowd came behind me.

Q. In the forward part of the cabin where you sat, you say the men folded up their papers and started and went out ?

A. Yes, sir ; I sat down and continued reading a little while, and then went out.

Q. When you left the forward cabin, had most of the passengers gone out ahead of you or not ?

A. There was a good crowd of passengers went out ahead of me, and there was quite a number left behind me in the cabin ; I was among the last that left that part of the cabin.

Q. When you went out of the forward part of the cabin did you know whether there were many people in the after part of the cabin ?

40

A. I didn't know anything about it.

Q. Did you mix up in the crowd voluntarily that night?

A. No, sir.

Q. How did you come to get in a crowd?

A. Standing on the string-piece, I happened to step down and the first I knew the crowd came all around me, so I went right in among the crowd. I stood right by the chain, between the gate and the chain.

10 Q. What did the people who came behind you, as you stepped down from the string-piece, do?

A. They came right after me.

*Cross-examination by Mr. Parker :*

Q. You were sworn in this case before?

A. Yes.

Q. I understand that you were in the cabin?

A. Yes.

20 Q. That there were many people there?

A. Yes.

Q. That many went out before you?

A. Yes.

Q. And that when they went out of the cabin you followed them?

A. Yes.

Q. That you stood at one time with your back against one of the posts standing on the string piece?

A. Yes, sir.

30 Q. Now, when the boat came to the dock you were asked on the other trial: "Q. Did you see whether the gang-planks to the cabins were down?" and you answered, "Well, you couldn't see," and you were asked, "Did you look?" and you answered, "You couldn't, there was too much of a crowd ahead of you." That was all so?

A. Yes.

Q. You were then asked this question: "You could look, although you could not see; did you look?" and 40 you answered, "No, sir; I did not." "Q. You did

not look? A. No, sir." Did you say that, and is it true?

A. I could not say; I forget now, exactly.

(By Mr. COLLINS): Forget what?

A. He says I could not look to see if the planks were down.

Q. (By Mr. COLLINS): Which do you forget?

A. I forget whether it was so or not.

Q. You can't remember?

A. No.

10

Q. Now I will read it again. (Reads from printed book of last trial.) "Q. You could look, although you could not see; did you look?" and you answered, "No, sir; I did not." "Q. You didn't look?" and you answered, "No, sir." Now I understand you to say what; was that true or not?

A. I know what I meant; I must have meant by that that the crowd was so dense in front of me that I could not look.

Q. "Don't you know that they were down before you attempted to go through?" you were asked again, meaning the planks, and you said, "I don't know; they may have been." What do you say to that now?

20

A. Certainly, I could not see with the crowd in front of me.

Q. You were again asked, "Who opened those gates?" and you said, "I don't know." You were asked, "Are you sure you don't know?" and you said, "Yes, I am sure." You were asked, "Didn't you do it yourself?" 30 and you said, "No; I was nowhere near the gates." Is that true?

A. Yes.

Q. Are you sure you don't know who opened the gates?

A. Yes; I am sure I don't know.

Q. That is true, now?

A. Yes, sir.

Q. And it was true then?

A. Yes, sir.

40

Q. Now I understand you that when you came out you found a crowd ahead of you?

A. Yes, sir.

Q. That then you went away from the gang-way, that led by the cabin gang-plank, across the string-piece into the crowd, did you not?

A. Yes; I stood on the string-piece for a few minutes and then went into the crowd, and then a crowd came behind me.

10 Q. You knew that a crowd would come up behind you, didn't you?

A. I knew the crowd would be around some place.

Q. You knew you were going into a crowd?

A. I didn't know it exactly, because I stood on the string-piece.

Q. Didn't you see the people coming up when you stood on the string-piece?

A. Yes.

Q. You knew they were coming and crowding forward?

20 ward?

A. Yes.

Q. That was the time of day when the crowds going over were largest?

A. Yes.

Q. And you had been there often?

A. Yes.

Q. And at that time of night?

A. Yes.

Q. You knew crowds were in the habit of going

30 there?

A. Yes.

Q. Then you went off with the crowd, did you?

A. Yes.

Q. Now, then, I ask you again—you say you kept your eyes about you—what did you look at?

A. I couldn't look at nothing—only the men in front of me.

Q. You mean you couldn't see anything but the men in front of you?

40 A. That is all; I could not see the deck.

Q. You were looking that way?

A. Yes, sir.

Q. As you approached the dock it was the same way, was it?

A. Yes; but I could not see with the crowd in front of me.

Q. Did you look?

A. I tried to look; the crowd was in front of me.

Q. Did you haul out of the crowd?

A. No, sir.

10

Q. Did you try to haul out of the crowd?

A. Well, I moved away a little.

Q. That is your answer to that question?

A. Yes.

Q. What made you unable to see your footing when you went ashore?

A. The crowd in front of me and the crowd that I was in; I tried to look, but it was no use, I could not.

Q. Didn't you say on the other trial that you didn't look?

20

A. Didn't look.

Q. Were you not asked this question directly: "You didn't look?" and didn't you answer to it, "No, sir?"

A. Didn't I say there when you asked me if I tried to look—(Interrupted).

Q. Yes; there is something which I have already asked you about as to whether you tried to look, but didn't you say in answer to my question put in that way: "You didn't look," and didn't you answer, "No, sir?"

A. Yes; I suppose I said it.

30

Q. Now I will ask you, were you not asked on the other trial the questions that I will read to you, and did you not give the answers that I will read to you? (Reading): "Q. When the boat came to the dock, did you see whether the gang-planks to the cabins were down?"

A. Well, you couldn't see. Q. Did you look? A.

You couldn't; there was too much of a crowd ahead of you. Q. You could look, although you could not see; did you look? A. No, sir; I did not. Q. You didn't

look? A. No, sir. Q. Don't you know that they were 40

down before you attempted to go ashore? A. I don't know; they might have been." Now, I ask you, have you any alteration to make in those answers?

A. No, sir; only in the crowd there, where I didn't look; of course, I tried to look, it was no use when I couldn't see where I was going.

Q. Now, you were again asked: "Q. Now, I understood you to say this last time, that you were forced by the crowd; what did you do to resist any force of the crowd?" and did you not answer, "A. I didn't do anything." And again: "Q. Why didn't you stay in the rear of the crowd? A. Well, I was partly in the rear of the crowd. Q. Why didn't you stay fully in the rear of the crowd and go out by the passengers' gang-way? A. I don't know." Now you remember those questions and answers?

A. Yes, sir.

Q. Have you any alteration to make there?

A. Yes—that I stepped off the string-piece and stepped  
20 down; I was pushed, and the crowd got around me, and I moved a little away kind of; I could not get out of the crowd, though.

Q. That is the only alteration you wish to make?

A. Yes, sir.

Q. You were asked: "Q. Which foot was hurt?" and you answered the left foot. "Q. Well, how did it go in, sideways or squarely—the whole foot go in? A. I couldn't say; I believe it went in sideways; I couldn't say. Q. Left foot—you were going this way, then?"  
30 "A. Yes, sir. Q. Going ashore? A. Yes, sir. Q. And your left foot got in? A. Yes, sir. Q. Now, can't you give us some idea how it got in? A. No, sir; I couldn't say where I was walking, in that case. Q. But you say you didn't look where you were walking? A. I couldn't look. Q. But I understand you to say, likewise, that you didn't look? A. No, I don't see how I could look. Q. Now I ask you, anyhow, did you look at your footing before you when you went ashore? A. Well, I couldn't see where I was walking;  
40 "the crowd was in front of me and back of me. Q. Did

"you attempt to? A. I don't know; certainly, I must  
 "have attempted to look. Q. I don't want to know what  
 "you must have done—I want to know what you remem-  
 "ber you did—did you attempt to look? A. Yes, sir; I  
 "think I did. Q. You think you did? A. Yes, sir.  
 "Q. What makes you think you did? A. Because I  
 "knewed I was near the edge of the boat, and I thought  
 "the boat was in, and the boat might be lower than the  
 "bridge. Q. But if you had looked, and the boat was  
 "lower than the bridge, would you not have seen it? A. 10  
 "Certainly. Q. Well, then, did you see it? A. No,  
 "sir; I couldn't. Q. You could not? A. No, sir. Q.  
 "Again I ask you what makes you say you did attempt  
 "to look? A. Because I wanted to see where I was  
 "walking—where I was going. Q. But that don't  
 "answer my question as to what makes you think you  
 "attempted it? A. I attempted to look, and couldn't;  
 "the crowd was pushing, and if I stopped and got down to  
 "look I would be pushed forward. Q. Must you not  
 "have turned around in some way to get your foot in 20  
 "that way, into that opening? A. Not as I know of.  
 "Q. You don't know? A. No, sir." Have you any  
 alterations to make in that testimony?

A. No, sir.

(By the Court): When you answer, you understand  
and remember all that is read to you?

A. Yes.

*Re-direct examination by Mr. Collins:*

30

Q. Take off your shoe and stocking and show your in-  
jured foot to the jury?

Witness shows his foot to the jury and says:

Here it is swollen, when I touch it it feels like some-  
thing running up and down all the time, that is the little  
toe, and the second one from it is about the same. That  
is the foot that was hurted; the inside scar is where my  
foot bursted; the outside ones is where the doctor cut; 40

he cut three times. This instep is higher than on the other foot, and I always have had to have my shoes made since the accident, because across the instep a ready-made shoe cuts me.

Q. Does your foot pain you any now ?

A. Once in a while, if I walk much.

Q. The only cut visible at the time of the accident was the one on the inside ?

A. Yes.

10 Q. Does it hurt you to walk ?

A. No.

Q. Do you limp ?

A. No.

The testimony of Dr. Thomas C. O'Callaghan, by agreement, is read from the printed book of the former case, as it appears in the book, the entire examination. It relates only to the nature and extent of the injury.

20

The shoe is offered in evidence.

Plaintiff rests.

Defendant moves that the plaintiff be called and a non-suit entered, on the opinion of the Supreme Court, because this case does not vary materially from the case as presented to that Court.

30 The Court grants the motion to non-suit, and allows plaintiff an exception, and the plaintiff prays that this, his bill of exceptions, be sealed, and it is sealed accordingly.

M M. KNAPP,

[L.S.]

J. S. C.

N. J. COURT OF ERRORS AND APPEALS,  
IN THE LAST RESORT IN ALL CAUSES.

TIMOTHY DWYER, an infant (by AN-  
THONY DWYER, his next friend),  
*Pltff. in Error,*

vs.

THE NEW YORK, LAKE ERIE & WEST-  
ERN RAILROAD COMPANY,  
*Def't. in Error.*

*On Error to  
Supreme Ct. 10*  
—  
*Assignment of  
Errors.*

Afterwards, that is to say, on the twenty-third day of November, in the year of our Lord one thousand eight hundred and eighty-five, comes the said Timothy Dwyer, by Anthony Dwyer, who is admitted to prosecute for the said Timothy Dwyer (who is an infant within the age of twenty-one years), as the next friend of the said Timothy Dwyer, by Collins & Corbin, his attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the judgment aforesaid, there is manifest error in this, to wit :

That the Justice of the Supreme Court before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, refused to permit the case to go to the jury, and ordered that the plaintiff be called and a non-suit entered against him ; whereas, by the law of the land, the plaintiff had sufficiently supported his cause of action to permit the case to go to the jury for their verdict ; to which ruling and order of the said justice the plaintiff thereupon excepted and his bill of exceptions was sealed accordingly. Therefore in this there is manifest error.

There is also manifest error in this, that the said Supreme Court gave a judgment of non-suit against the said plaintiff in favor of the said defendant, with costs, whereas, by the law of the land they should have refused to give such judgment, but ordered a *venire de novo*. Therefore in this there is manifest error.

Wherefore the said defendant prays that the judgment aforesaid, by reason of the aforesaid errors and of other errors appearing in the records and proceedings aforesaid, be reversed, annulled and held for nothing, and that the said plaintiff may be restored to all things he has lost on occasion of the said judgment, etc.

COLLINS & CORBIN,

*Attys. for and of Counsel  
with Pltff. in Error.*

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30

40