J. J. Griffiths, Printer, 38 Montgomery Street, Jersey City.

N. J. Court of Errors and Appeals

The Hoboken Land and Improvement Company, vs. Michael Lally.	In Error. Brief.

The Hoboken Land and Improvement Company is the owner and operator of a ferry boat plying between the City of New York at Christopher street, and the City of Hoboken, for the purpose of carrying passengers, horses, wagons, &c.

The said Company is in possession of a ferry house and drive way in New York which constitute the means of approach to said ferry boat.

From the entrance of the drive way to the boat landing, the distance is about 184 feet.

A person entering with a horse and wagon, buys a ticket at the entrance gate.

The ticket is delivered to a ticket collector before the team is driven onto the boat. Each driver continues in charge of his own team.

When there is no boat in the slip, at a point about 100 feet from the entrance of the driveway there is usually a chain stretched across about 18 inches above the surface of the driveway.

On the left hand side of the driveway and about 74 feet from the entrance is a urinal for the accommodation of patrons of the ferry.

On the 12th day of October, A. D. 1884, Lally, the plaintiff below, with his mare and buggy, entered the driveway to the ferry, bought his ferry-ticket at the

entrance gate, drove down to the point nearly opposite the urinal, left his mare unattended and went into the urinal. The mare was left standing from eight to ten feet from the urinal.

At this time there was no boat in the slip, the chain was not up.

While the plaintiff below was in the urinal another team entered, his mare started, ran into the river and was drowned.

The plaintiff had not delivered his ticket to the company. (Page 12, line 25).

The mare was spirited. (Page 15, line 33).

There was nothing in the way to have prevented the plaintiff below from driving or leading his mare to the urinal, so that he might have held her by the rein while he was in there. (Page 11, lines 30 to 40.

The defendant moved for a non-suit upon the ground of—

1. Contributory negligence.
2. That the property lost had not been delivered to the defendant.

The motion was overruled.

Exception allowed, and. sealed Error is assigned upon said ruling of the Court.

I.

In case a passenger by negligence in the care of property of which he retains control contributes to its loss or injury he cannot recover of the ferryman through negligence.

Dudley v. Camden & Phila. Ferry Co., 16 Vr. p. 368.

Leaving a spirited horse standing unattended without tying is negligence.

A driver who leaves his horses unsecured and unattended in the street is responsible for the consequences.

W. U. Tel. Co. v. Quinn, 56 Ill. 320.

Even though the horses are started by a third person wilfully striking them.

Illidge v. Goodwin, 5 C. & P. 190.

II.

A common carrier is not liable for the safety of property until the same is delivered to him.

2 Parsons on Contracts, p. 175.

JOHN C. BESSON,
Counsel for Plaintiff in Error.

N. J. Court of Errors and Appeals.

MICHAEL LALLY, ads. THE HOBOKEN LAND AND IMPROVEMENT COMPANY.	Error to Hudson Circuit—Brief.

I.

The non-suit was rightly denied, because the motion was made after the defendant below had partly entered upon his defence by going beyond a strict cross-examination of plaintiff,s witnesses, to prove matters of defence, thereby waiving the right to move for non-suit upon the plaintiff resting.

Abbott's Trial Brief p. 120, 5 and 6 and cases there cited.

See examination of Lally, p. 10, l. 21, to p. 11, l. 20.

See examination of Kilkenny, p. 26, l. 12 to p. 27, l. 15.

II.

The refusal to non-suit cannot now be alleged for error, because the defendant below had witnesses sworn and evidence given for the defence, after the motion, thereby waiving the motion he had made.

In McGregory vs. Prescott, 5 Cush. 67, the Court say: "If a defendant moves for a non-suit and afterwards offers evidence in defence, this is a waiver of the motion."

Defendant below should have renewed his motion at the end of the whole case.

III.

The denial of the motion cannot be made the basis for error, because it does not appear but that the Judge in submitting the case to the jury corrected the error, if it were one, nor but that the defect, if there were one, upon which the motion was based, was supplied by the evidence taken after the motion.

IV.

The motion for non-suit was rightly denied, because the evidence given in the cause, upon plaintiff resting his case, did not show that the plaintiff's own negligence contributed to the injury complained of.

The burden of establishing contributory negligence is upon the defendant.

Express Co. vs. Nichols, 4 Vr. 434.
Moore vs. Central R. R. Co., 4 Zab. 268.

Which rule therefore requires, that if the plaintiff has established defendant's negligence, then for the defendant to establish the defence of contributory negligence out of the plaintiff's own case, it must appear just as strong and clear, as evidence to the same point offered by the defendant, would have to be, to warrant the taking of the case from the consideration of the jury, to wit, *indisputable*.

In R. R. Co. vs. Matthews, 7 Vr. 531, Ch. J. Beasley says: "This being the case, the Judge would not have been justified in taking the question from the jury. Such a course is proper only when the absence of caution is apparent and in reason indisputable."

In McDonough vs. R. R. Co., 137 Mass., 210, W. Allen, J., says: "The Court would not be authorized to take the case from the jury, unless the act, as proved by undisputed testimony, is seen to be such that the common judgment of men immediately pronounces it to be negligent."

In Fleck vs. Union R. R. Co., 134 Mass., 480, C. Allen, J., says: "Nor do these facts, when combined show a case where common experience and the general sense of all prudent persons, at once stamp the act as one of carelessness and reckless disregard of personal safety."

In Hart vs. The Hudson River Bridge Company, 80 N. Y. 622, where the plaintiff had been non-suited, the Court, in granting a new trial, says: "What we have to arrive at is this, that there were facts in this case which were not so weak as to give no support in some fair and sound minds, to such legal probabilities, so weak as that the law will not tolerate that a verdict should be founded upon them. We are not to be able to say that the facts and the inferences to be had from them, are enough to convince our own minds that the intestate died there without negligence on her part, and by the negligence of the defendant. What we are to be able to say is this, that the case is not so clear against the plaintiff, as that there is no room for doubt, that there are facts and circumstances which are proper to be submitted to the consideration of the triers of fact."

In New York the plaintiff must aver and prove due care on his part.

In Ross vs. Providence & W. R. R. Co., 1 E. R. 490, the Court say "It is only in those cases where the question of fact is entirely free from doubt, and where only one conclusion can be fairly arrived at therefrom, that the Court has the right to thus apply the law without the action of the jury."

In R. R. Co. vs. Van Stemburg, 17 Mich. 99, Cooley, C. J., says: "When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined till one or other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and uncontrovertible or they cannot be decided by the Court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ."

Under these decisions was there in this case a proper basis for non-suiting the plaintiff when the motion was made?

Not to be negligent was to exercise only that degree of care that persons of ordinary prudence would have observed under like circumstances.

It is not required that he should have guared against every danger, or have had in mind every contingency that might arise. Men of ordinary prudence are ordinary mortals.

The plaintiff had a right to assume that the chains were up, the company had provided them and had always put them up. They did not supply sufficient light to show whether they were up or not, from where passengers would be located. The plaintiff did not think he could have seen whether they were up or not from his position. He drove into the ferry house, paid his fare, took a position seventy-five feet from the entrance in a drive-way twenty-five feet wide. He was twenty feet from the chains, and one hundred and ten feet from the outer edge of the

bridge. There was no other carriage in the ferry house. He had a "very great occasion" he says to use the urinal. He drove to one side towards it, turning the mare's head that way, and about 10 or 12 feet from the spot he designed to go to (p. 17, line 13 to 30). He knew the mare to be perfectly gentle; had left her standing time and again without hitching and she had never started up. He blanketed her and stepped into the box and up to the urinal. Another wagon came to the entrance way 75 feet away and for some reason the mare started up. Plaintiff started after her. She passed where the chains ought to have been, on to the bridge, and down the incline, and into the river. One bridge tender had gone over on the last boat, to collect a 12 cent. ticket supposed to have been carried over. The other bridge tender was groping along the carriage way, up by the entrance, trying to find the lost 12 cent ticket, by order of the ticket seller. The two had left the chains down, and the bridge unguarded, without the knowledge of the plaintiff—was the conduct of the plaintiff "*indisputably*" negligent?

Was it such that the *common judgment of men immediately* pronounce it to be negligent?

Would the *common experience and general sense of all prudent persons at once stamp the act as one of carelessness and reckless disregard of personal safety?*

Could it be said that his conduct was such, that fair-minded men, *could not have a doubt about it being negligent?*

To arrive at a judgment in the matter must involve a consideration of many facts; the situation of the ferry-house relative to safety; the position of plaintiff's carriage; the gentleness and disposition of the mare; the habits and trustworthiness of such a mare, and which involves knowledge of other horses; the habits among prudent men in using such a horse; the effect that a "very great occasion," such as plaintiff had, would be likely to exert upon the caution of

an ordinarily prudent man; the starting of the mare, whether by something that would not have been likely to be foreseen, such as hearing a command, and at the same time seeing the chains down, (seeing in the dark better than her owner), and thinking the road open to the boat, or by other causes; all these and many more circumstances are involved in a correct judgment in the matter.

Was it not the duty of the judge, to leave the determination of the question to the judgment of the twelve sworn triers of fact, under proper instructions rather than undertake to determine, himself, a question involving so many facts and inferences and depending upon so many matters of experience, habit, &c.

The fact that the Judge at Circuit left the matter to the jury, unless he did not fully understand the rule that should govern him in such a case, is almost conclusive that the plaintiff was not *indisputably* negligent; that it was not the *common* judgment of men that he was negligent; that fair-minded men might have a *doubt* about the conduct of plaintiff being negligent.

That the Judge did understand the rule is shown by his very clear exposition of the Judge's duty in such a case, in his opinion in Orange and Newark Horse R. R. Co. vs. Ward, 18 Vr. 560, where the rule laid down as expressed in the syllabus, is: "Where the evidence leaves the fact in uncertainty whether the plaintiff by his own negligence caused the injury of which he complains, or contributed to it in such a way that but for it the plaintiff would not have received harm from defendant's negligence, it is the duty of the Judge to submit the evidence, under proper instruction, to the jury for their decision."

The effect of the "very great occasion," to use the urinal, mentioned by plaintiff, upon the conduct of an ordinarily prudent man, in a similar situation, was especially a question for the jury. A prudent man

under such pressure, might not stop to take every precaution against injury, that he might otherwise take. The right to regard such a circumstance, and to have the jury consider it, is well illustrated by Lord Chancellor Cairns in R. R. Co. vs. Slattery, 3 L. R., Appeal Cases 1155 (1878). He says, in speaking of the conduct of the plaintiff in that case: "When he reached the six-foot way he might, no doubt, have seen the advancing train, had he stopped and looked to his left. But then he appears to have been in an anxious, and perhaps flurried, state of mind, desiring to bring his friend across in time to obtain a ticket for the train, which was in the station and about to leave. He might, therefore, be supposed, when he got to the six-foot way, to have omitted in his haste the precaution of stopping and looking up the line to his left; while on the other hand, had the advancing train whistled, as on this hypothesis it failed to do, his attention would have been called to the danger, and his movements across the line might have been arrested. Now I cannot say that these circumstances ought to have been withdrawn from the jury. I think they should have been submitted to the jury, in order that the jury might say whether the absence of whistling on the part of the train, or the want of reasonable care on the part of the deceased, was the *causa causans* of this accident.

Were the question one of a new trial on the ground of the verdict being against the evidence, just as I should have thought the evidence showed that the whistle had not been neglected, I should probably have also thought, that even had there been no whistling, the evidence failed to satisfy me, that it was the want of whistling which occasioned the death. But that, I repeat, is not the question; the question is, whether the evidence being such as I described, the Judge ought to have taken the case out of the hands of the jury in the first instance. I am not aware of any authority for this being done, and none of the cases cited in the course of the argument can in my

opinion be looked on as authority for such a course."

A plaintiff can take apparent risks and yet not be necessarily non-suited.

In Thomas vs. Telegraph Co. 100 Mass. 156' where the case had been taken from the jury, Judge Hoar in granting a new trial says: "Whether the plaintiff in the case at bar, finding a wire across the road, which interfered with his going on, but finding also that with slight pressure it could be made to lie flat on the ground across the whole width of the travelled way, was justified in supposing that he could pass over it with safety, and whether he used due care in attempting to do so, were in our judgment questions of fact for the jury, to be decided by them upon the whole evidence. We cannot say that as matter of law the evidence shows beyond all controversy that he was negligent."

To same effect see Mahoney vs. R. R. Co., 104 Mass. 73, and many other cases there cited. Also Orange & Newark R. R. Co. vs. Ward, 18 Vr. 560.

Naar, Day & Naar, Printers and Stationers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals.

The Hoboken Land and Improvement Company vs. Michael Lally.	In Error to Hudson Circuit Court.

[Filed August 22, 1885.]

SCHEDULE.

Hudson County Circuit Court,
of the Eighth Day of January, A. D. 1885.

Hudson County, *ss.*—The Hoboken and Land Improvement Company, the defendants in this suit, were summoned to answer Michael Lally, the plaintiff therein, of a plea of trespass on the case, and thereupon the said plaintiff, by M. T. Newbold, his attorney, complains:

For that whereas before and at the time of committing 10
the grievances hereinafter mentioned, the said defendants, a corporation existing and incorporated under the laws of the State of New Jersey, were possessed of operating and managing certain steam ferry boats for the transportation of passengers, horses, carriages, etc., from a point in the city and State of New York, at or near the foot of Christopher street, in said city, across the

Hudson river, to a point in the city of Hoboken, in the county of Hudson, aforesaid, at or near the foot of Newark street, in said last named city, for certain fare and reward in that behalf charged and received, and were then and there possessed of operating and managing at or near the foot of Christopher street, aforesaid, a certain ferry house with entrance gates, driveways, bridge chains, bridges, slips and other appliances for embarking and disembarking passengers, horses, carriages, etc., upon and from said steam ferry boats, and the said defendants being such possessors, operators and managers of the said steam ferry boats and of the said ferry house, with its entrance gates, driveways, bridge chains, bridges, slips and other appliances aforesaid, heretofore, to wit, on the thirteenth day of October, A. D. eighteen hundred and eighty-four, the said plaintiff driving a chestnut colored mare of great value, to wit, of the value of fifteen hundred dollars, harnessed to a top buggy wagon of great value, to wit, of the value of four hundred dollars, both belonging to the said plaintiff, at the special instance and request of the said defendants, and after the said plaintiff had paid at the entrance gates, aforesaid, the usual fare and reward to the said defendants in that behalf, was by the said defendants received into the said ferry house as a passenger, to be, with the said mare and wagon safely transported by one of the steam ferry boats, aforesaid, from the said ferry house to the city of Hoboken, aforesaid, at a point, at or near the foot of Newark street, aforesaid; and it then and there became the duty of the said defendants to use due and proper care in the operation and management of the said ferry house and its entrance gates, driveways, bridge chains, bridges, slips and other appliances aforesaid, for the proper safety of the said plaintiff and his said mare and wagon while necessarily waiting in the said ferry house to be transported as aforesaid.

Yet the said defendants not regarding their duty in that behalf, did not use due and proper care in the operation and management of the said ferry house entrance gates, driveways, bridge chains, bridges, slips and

other appliances aforesaid, for the proper safety of the said plaintiff, and of his said mare and wagon, while the same were necessarily waiting in the said ferry house to be transported as aforesaid, but on the contrary, the said defendants, by their servants and agents so carelessly and negligently operated and managed the same that while the said plaintiff with the said mare and wagon, under his care and that of the said defendants, were necessarily waiting in the said ferry house upon the usual driveway provided by the said defendants for such purpose, for the arrival of a boat of the steam ferry boats aforesaid, upon which to be transported as aforesaid, the said mare by reason of such careless and negligent operation and management was caused and enabled to and did break away from the care and control of the said plaintiff, and also, by reason thereof was caused and enabled to, and did, run upon one of the bridges aforesaid, and from thence into the Hudson river, dragging with her the said wagon, and having upon her the harness with which she was harnessed to said wagon, and thereby the said mare was drowned and the said wagon was greatly injured and damaged, the said harness destroyed, and a lap robe and blanket then and there in said wagon were lost out and never regained, to wit, at the city of Hoboken, in the county of Hudson, aforesaid.

Wherefore the said plaintiff says he is injured and has sustained damage to the amount of three thousand dollars, and therefore he brings his suit, &c.

And the said defendants, by their attorneys J. C. & S. A. Besson, come and defend the wrong and injury when, &c., and say that they are not guilty of the said supposed grievances above laid to their charge, or any or either of them in manner and form as the said plaintiff hath above thereof complained against them, and of this the said defendants put themselves upon the country, &c.

Therefore, to try the issue above joined, let a jury come before the said Circuit Court at Jersey City, aforesaid, on the twenty-first day of May, as yet of the term of April, in the year of our Lord one thousand eight

hundred and eighty-five, who neither, &c., by whom, &c., to recognize, &c., because as well, &c., the same day is given to the parties aforesaid, at which day before the said Circuit Court come the said parties by their attorneys aforesaid, and the jurors of the jury above mentioned also came, who to speak the truth of the matters aforesaid, being chosen, tried and sworn say upon their oath, that the said defendant is guilty of the premises above laid to its charge in manner and form as the said plaintiff hath above thereof complained against it, and they assess the damages of the plaintiff by reason of the premises, to six hundred and twenty-five dollars over and above his costs and charges by him about his suit in this behalf expended.

Therefore, it is considered, that the said plaintiff do recover against the said defendants his damages aforesaid, in form aforesaid found, and also fifty-three dollars and seven cents for his costs and charges by the said court nowhere adjudged to the plaintiff and with his assent, which said damages, costs and charges in the whole amount to six hundred and seventy-eight dollars and seven cents.

And the said defendants in mercy, &c.

Judgment entered and signed May twenty-third, eighteen hundred and eighty-five.

M. M. KNAPP,
Judge.

HUDSON COUNTY CIRCUIT COURT.

Michael Lally,
vs.
The Hoboken Land and Improvement Company. } In Case.

Michael T. Newbold, attorney for plaintiff.

J. C. & S. A. Besson, attorneys for defendant.

Be it remembered, that on the fourth day of May, A. D. eighteen hundred and eighty-five, at a Circuit Court

holden at Jersey City, in and for the county of Hudson, before his Honor Manning W. Knapp, Esquire, one of the Justices of the Supreme Court of the State of New Jersey and judge of said Circuit Court, the issue joined in the above stated cause between the said parties (pro ut the pleadings), came on to be tried by a jury for that purpose, duly empaneled, at which said day before the said judge, as well the said Michael Lally vs. the said The Hoboken Land and Improvement Company, by their respective attorneys aforesaid, and jurors of the jury aforesaid, whereof mention is above made, being called, likewise came and were sworn to try the said issue joined between the said parties in manner aforesaid.

And thereupon to maintain the issue above joined on his part, the said Michael Lally then and there gave in evidence to the jury so empaneled and sworn as aforesaid, the following evidence, viz.:

Michael Lally, the plaintiff, sworn in his own behalf, testified as follows:

Direct examination—

I reside at No. 56 Grand street, Hoboken; I have lived there fifteen or sixteen years; I have business at the abbatoir, Jersey City; have been in business there about nine years; my mare was drowned on the 12th day of October last, I think it was; it occurred in the Hoboken ferry, on the New York side, at Christopher street; that ferry is managed by the Hoboken Land and Improvement Company; I entered the ferry on the southerly slip; by "slip" I mean the place where teams go in—that is south of the entrance place for passengers.

Q. Now, then, which of the driveways were you admitted to there?

A. The driveway that comes into the ferry.

Q. There seems by this map (referring to map marked *Exhibit 1*,) to be two?

A. There is one for teams to go out and the other to come in; I was admitted to the one to come in—the southerly entrance.

Q. As represented on that map, Mr. Lally, you entered as indicated on this map at this gate?

A. Yes, sir.

Q. Now, then, go on and state what happened?

A. I came right here to the gate—the gate was open—there is a little box inside the gate where you pay your fare; I stayed in my wagon and paid my fare and got my ticket in return, which I have got here in my pocket; I drove my mare down opposite that little place where they urinate.

Q. Does that little place represent the urinal? (Referring to map.)

A. Yes, sir.

Q. Along the southerly side of the driveway?

A. Yes, sir.

Q. Where did you drive down?

A. Opposite that place I got off my wagon and blanketed my mare and drove up as near as I could to that place, and went in there to urinate, which I had very great occasion to do.

Q. How near was your mare to that urinal?

A. My mare was from eight to ten feet from the urinal.

Q. Was that place open?

A. It had an entrance toward the street—that end was open; there was no door there, to my knowledge.

Q. At which side did you stand—towards the petition when you were there?

A. There is a little place there where you urinate, right in the corner.

Q. Were you where you could see your mare, then?

A. I was where I could see her by just turning around one or two steps.

Q. Now, then, you say you blanketed her?

A. Yes, sir.

Q. What occurred after you stepped in?

A. I was in there and was about half through, and I heard a noise of a wagon coming up to the gate; I turned around and looked out and heard somebody; I couldn't tell whether it was the man in the wagon after paying

his fare said get up to his horse; I looked around and saw my mare start and I ran for her, and she got by that place where the chain was supposed to be, and she doubled her speed, and I could not get to her and there was nobody there.

Q. Was there a grade at this place?

A. It was down hill to this place to the best of my opinion.

Q. You say you found that the chain had not been up?

A. The chain was not up.

Q. You had been through that ferry house before?

A. Yes, sir, more than a hundred times.

Q. Had you noticed at those times whether the chain was up or not?

A. Every time I ever noticed them they were always up.

Q. And in regard to that which started your mare up —you said some on said "get up?"

A. Yes, sir.

Q. Did she start up at that?

A. I turned right around and seen my mare start; I ran after her and hollered to her, and she got by that place where the chain ought to be, and she quickened her pace and got to the top of the bridge, and I got there almost as soon as she did, and I seen the mare, and she tried to get back and couldn't, and went into the river.

Q. Did you see anybody there in charge of the place at that time?

A. The man that had charge of the place had vacated his place and went over on the boat—I heard that afterwards; I didn't see anybody there until my mare got into the river, as soon as she did there was a little fellow came along and I said, "ain't you supposed to have those chains up?"

Q. Now, when you left your mare there, Mr. Lally, you say you drove her up; I want to get the exact position with reference to this urinal; did you drive up here near this entrance where you went in?

A. I left her head a little, but towards the opening of the urinal.

Q. How long had you owned that mare?

A. I owned her two years and a half, perhaps a little more.

Q. Had you driven her often during that period?

A. I drove her very often.

Q. As to her gentleness?

A. She was as gentle a mare as I ever seen; I drove her hundreds of times, and left her time and again standing outside of a place I had business to go into and she would not start.

Q. Now, then, you say you owned her two years and a half; where did you buy her?

A. In New York.

A. How much did you pay for her?

A. I gave $500 for her.

Q. What was she as to speed?

A. She was very speedy.

Q. Did you know what her record was?

A. Well, no, I did not.

Q. Well, give us some idea of her speed—you have owned a good many horses, have you?

A. Oh, yes; I owned quite a good many horses, but I never owned anything like this one; I never had one so fast as this one was; I have persons here who know the mare and can speak as to her speed.

Q. Now what did you value her at?

[Objected to.]

Q. Was she sound?

A. Sound as a dollar, as far as I know.

Q. And as to her looks?

A. She was a very good looker.

Q. And you are capable of judging whether the mare was sound or not from your knowledge of horses?

A. Well, I could tell.

Q. Now, then, what was that mare worth?

[Objected to on the ground that the witness was not shown sufficient foundation for valuing the mare.]

By the Court—

Q. Are you acquainted with buying horses?

A. Not very much.

Q. You have bought and sold a good many horses?

A. Yes, sir.

Q. And have owned a good many?

A. Yes, sir.

Q. And you know the prices of horses, don't you; you are familiar with the prices that horses bring in the market; it is not what she was worth to you, but what she was worth as a horse in the market?

A. As far as I am concerned, I am not very familiar with horses in regard to the value of them, but this mare I wouldn't take—(interrupted.)

By the Court—Stop.

Further direct—

Q. Have you had offers for her before?

A. I never had individual offers for her, but men have told me they would give $1,500 for her.

Q. Is there any one in court who said they would give you—

A. Yes, sir.

Q. And that was before this loss, of course; the talk about that was before this loss occurred?

A.

Q. You refer to Mr. Cooper?

A. I do not; Mr. Cooper never said anything to me before this loss; I prided on the mare, and for me to put a valuation on her, I would not want to do that; but if a man came to buy her of me, he could not buy at all.

Q. You claim to recover for this mare and wagon; you cannot say?

A. I wouldn't like to do it.

Q. Do you know what the injury done to the wagon, the wagon was recovered afterwards?

A. Yes, sir.

Q. What injury was done to the wagon?

A. The company had it for a couple of days, and I

thought they would put in repair; I took the wagon and gave it to the gentleman that built it, and he repaired it, and his bill was $110.

Q. How about the harness?

A. The harness was a total loss.

Q. What was the harness worth?

A. I paid $50 for it when I bought it.

Q. This wagon, had it recently been put in good shape; after it was repaired, was it any better than it was previous?

A. The man told me it was not as good as the time he turned it out to me.

Q. Can't you tell from your own knowledge?

A. In my estimation it wasn't as good as when I got it on the previous 20th of July; it had been put in repair by Mr. Farley.

Q. You got it on the 20th of July from his shop?

A. Yes, sir.

Q. And this was on the 12th of October?

A. The 12th of October.

Cross examination by defendants' counsel—

Q. Can you tell, Mr. Lally, the distance from the entrance gate to the ferry master's box?

A. It is a very short distance, sir, in my opinion.

Q. And what is the distance from the ferry master's box down to the urinal?

A. A pretty good distance.

Q. [Exhibiting a map to witness.] It is marked here as about 184 feet, do you think that is about right?

A. I could not say, sir.

By plaintiff's counsel—The distance from the urinal to the ferry master's box is 74 feet.

Q. Oh, yes; the distance stated here from the ferry master's box to the urinal is marked at 74 feet; is that about correct, do you think?

A. I don't know; it is a pretty good distance.

Q. As near as you can tell?

A. About that, I suppose.

Q. And the width of this passageway; what is the width of it from this bar here—combing, they call it—there is a beam laid there to keep the wagons in their place?

A. Yes.

Q. Now, then, from the combing to the southerly side of the entranceway, that is said to be 24 feet 6 inches; would you think that is about right?

A. I don't know; perhaps it is.

Q. What is your judgment?

A. I have never measured it.

Q. You have seen it?

A. I have seen it.

Q. Do you think that is about right?

A. Very likely it is.

Q. Is there any obstruction on that passageway from the ferry master's box down to the urinal, or is it a plain open surface?

A. A plain open surface, in my opinion.

Q. You were the first man to enter after that former boat had left?

A. Yes, sir.

Q. You say you drove down to nearly opposite the urinal?

A. Yes, sir.

Q. And how many feet from the urinal to where your horse was left standing, was it?

A. I should judge about 10 or 12 feet, to the best of my opinion.

Q. There was nothing to have prevented your driving your horse, or leading your horse right there to the urinal, was there?

A. No, sir, not as I know of.

Q. And you might have led your horse over there and held the rein while you went in?

A. That I could have done if I had taken the rein out of the saddle.

Q. You could have done that and gone in there and relieved yourself, and your horse have been safe?

A. Yes, sir.

Q. But you didn't do that?

A. A drove my horse up within, as far as I could judge, 10 or 12 feet of the urinal, and nearly opposite, and put the blanket on her and stepped right into the urinal.

Q. And that must have been within about twenty feet of the chain?

A. I couldn't exactly say.

Q. Well, it was in the neighborhood of that?

A. I suppose so.

Q. If your horse had been brought down here close to the urinal, even if you hadn't held her, you could have stepped out and caught her?

A. I did my best to catch her.

Q. Well, from where you left her; but you left her ten or twelve feet from the urinal?

A. Ten or twelve, to the best of my opinion.

Q. When you got out and blanketed your horse, did you look to see whether the chain was up or not?

A. I didn't look to see whether the chain was there or not; I supposed it was there; I know the chain was there for that purpose.

Q. You paid your fare at the box and got your ticket?

A. Yes, sir.

Q. And what did you do with your ticket?

A. I have got it right here.

Q. You never delivered that to the company?

A. No, sir, I didn't; after my mare ran into the river and drowned, there was a young fellow came up to me and demanded the ticket, and I said, "What will I give you the ticket for and my mare drowned."

Q. You thought you would not go across with her, then?

A. No, sir; I thought I never would go across with her, then, sure.

Q. And so the ticket has never been delivered?

A. No, sir; I have got it in my possession.

Q. You recovered the harness, didn't you?

A. Yes, sir.

Q. What did you mean by saying the harness was a total loss?

A. I couldn't use it afterwards; it was in the salt water all night to the next morning, and I never used them since.

Q. You never used them, but they are fit to be used, aren't they?

A. I don't know as a man would be very safe with them.

Q. Have you ever tested them?

A. I have tested them; I believe we had them on once.

Q.

A. You can chip them off.

Q. What did you do with them after you got them; you got them within a few days after they were taken out of the water?

A. Seven or eight days—maybe five or six.

Q. You didn't go for them, then?

A. I believe it was two or three days before I went for anything.

Q. When you went for them you got them?

A. Yes, sir.

Q. Did you do anything with them to clean them up and oil them?

A. I did; yes, sir.

Q. Who did it?

A. My man.

Q. And what was the result?

A. The result was that I don't believe it is very safe for any one to ride with them.

Q. That is your opinion?

A. That is my opinion.

Q. But, then, you don't know that they are injured?

A. I know that they are injured.

Q. I suppose you know they don't look as well as they did?

A. No.

Q. But you don't know that the strength is gone, and

you don't know that they might be cleaned by a harness maker?

A. My own man washed them and cleaned them, and I think it is very dangerous to ride with them.

Q. That is only your opinion; but you haven't tested them to find out what the strength is?

A. Not thoroughly; no, sir.

Q. Do you know what it would cost for a harness maker to dress them up and put new polish on them?

A. I don't.

Q. Well, not very much, would it?

A. I suppose not.

By the Court—They cost $50.

By defendants' counsel—He used them a year and a-half or two years.

Q. How old was your mare?

A. I think, to the best of my opinion, she was about nine years old; maybe more, maybe less; as far I can judge her.

Q. (By a juror.) Do you know how long the harness was in the salt water?

A. Yes, sir; as near as I can judge, from about seven or eight o'clook at night until the next morning, as far as I can judge.

Q. What time in the day was it this accident occurred?

A. I couldn't exactly tell what time of day it was, but I know it was dark.

Q. Dark or dusk?

A. It was dark.

Q. As dark as it would get that night?

A. That I don't know.

Q. Were lights lit in the ferry house?

A. It was dark right there when I came in there; I think, to the best of my opinion, that all the lights were not lit; I couldn't state that for a positive fact.

Q. When you came out of the urinal and saw your mare going down, could you see whether the chain was up or not?

A. I seen after my mare had passed it, where the chain was, that the chain wasn't up.

Q. You say you have seen this chain up?

A. Yes, sir.

Q. What is the height of it when it is up?

A. It would be high enough to keep my mare from going overboard.

Q. I didn't ask you that—I asked you how how high it was?

A. To the best of my opinion—I think if the chain was up it would be 2 feet or 2½—I couldn't exactly tell, because I never measured them, and don't know much about that business.

Q. Isn't it about 18 inches?

A. I couldn't tell whether it way 18 inches or 3 feet.

Q. Then you don't know much about it?

A. No, sir, only when I have noticed the chains; I have always seen them up when I came in that ferry.

Q. Are you sure you have seen them up?

A. I am positive.

Q. Did you look every time?

A. No, sir.

Q. Did you look this time?

A. I did not, I supposed it was there.

Q. You had your eyes to use them?

A. Yes, sir.

Q. You say your mare was quite a fast traveler?

A. Yes, sir, a pretty speedy mare.

Q. And good spirit?

A. She was very quiet and gentle.

Q. Quiet and gentle but a spirited mare?

A. She was spirited, of course.

Q. A lively driver?

A. A very nice, gentle, good mare.

Re-direct examination by plaintiff's counsel—

Q. How high was your mare?

A. I think she was about 15½ hands high.

Q. What color?

A. I always called her a sorrel.

Q. She was what they call a chestnut, was she?

A. Chestnut.

Q. Mr. Lally, you say it was dark then where you were?

A. Yes, sir.

Q. Do you know whether you could have seen the chains or not if you had looked for them?

A. If I had looked for them I could have seen them.

Q. I mean from where you were could you have seen them in the condition of darkness?

A. I don't think I could.

Q. Do you know whether there were any lights lit except down there by the jumping off place of the ferry at the slip?

A. All I can state of the light, it was dark right there where I was.

Q. You say you didn't go immediately to get the wagon or harness—were you debating with the company about whether they should take it and pay you for it?

A. Yes, sir, I was.

Q. The ticket you kept—for what purpose did you keep that?

A. For the purpose of showing I paid my fare.

By the Court—

Q. Had you bought a ticket on this side to go over and return?

A. No, sir; I bought this ticket on the other side.

Q. At the time you came in there?

A. Yes, your honor.

Further re-direct—

Q. Cannot you give us some idea about the speed of this mare as actually tested by you?

A. Well, all the idea I can give you, when I went out for my own pleasure, and when I tackled any horse I never got beat; whenever I tackled anybody I never got beat—of course there are lots that could beat me, but I never got beat.

Q. Could you give an idea of how fast she could go in minutes and seconds?

A. I never tested her in that way; I know she was a pretty fast mare; I think, to the best of my opinion, if this mare was properly handled she would trot very fast.

Q. What do you mean by "very fast," the jury want to know something about it?

A. I should think she would trot in thirty, somewhere around there?

Q. Now this diagram here where the urinal is indicated, shows that the end of the urinal towards the street is all open the width of the box?

A. Yes, sir.

Q. It shows to be entirely open the whole width?

A. Yes, sir.

Q. And the place that is to be used is in the rear of that, is it, nearest the water?

A. Yes, sir.

Q. Now, Mr. Lally, just looking at that point there indicated as urinal, there is a little cross at what you might call the inside river end?

A. Yes, sir.

Q. That is the place to be used, is it?

A. Yes, sir.

Q. And could you designate on that diagram by a pencil mark where the head of your horse was?

A. 10 or 12 feet about.

Q. Indicate that?

A. It was just about there, I think—(Witness indicated on map.)

By the Court—That is entirely on his own idea and not by the scale; let him give the distance and you put it on the map.

By plaintiff's counsel—I want to get the direction the head of his horse was from the urinal.

Q. Do you say that indicated is the direction?

A. That indicated about the direction.

By the Court—

Q. You mean that to be about 12 feet, do you?

A. 10 or 12 feet.

Q. That is about the direction from the urinal where the head of your horse was, that pencil mark?

A. Yes, sir.

Q. What was the name of the man that came on the bridge after your mare got in?

A. Alexander Mittin.

Q. Is he here?

A. Yes, sir.

Re-cross-examination by defendants' counsel—

Q. You say you frequently traveled across this ferry?

A. Yes, sir.

Q. And when you are in New York you buy your ticket there at the gate?

A. Yes, sir.

Q. And then you drive in?

A. Yes, sir.

Q. And that ticket entitles you to a passage on the boat?

A. Yes, sir.

Q. And before you go on the boat what do you do with the ticket?

A. Deliver it up to the man when he comes for it.

Q. And after delivering your ticket you drive on to the boat?

A. Yes, sir.

Alexander Mittin, sworn for the plaintiff—

Direct examination by plaintiff's counsel—

Q. Where did you work in October last?

A. I can't remember, sir; I havn't been working for three months after I got off the ferry.

Q. When did you work at the ferry?

A. The last I worked at the ferry was when the horse got drowned; I don't remember the month.

Q. Do you remember when the horse got drowned?

A. Yes, sir.

Q. How soon after that did you quit work there?

A. I quit work there the next day; they discharged me the next morning.

Q. Tell us now, who there was there when the horse was drowned?

A. There wasn't nobody, exactly there, when the horse was drowned; when the wagon was coming in just as Mr. Lally's horse was getting over, and as this man came in he said, "whoa" to his horse, as he was going to pay his fare, and that scared Mr. Lally's horse.

Q. Where was the gateman at this time?

A. The gateman left me there.

Q. How did he leave you?

A. He told me to lookout for the next boat.

Q. Where did he go?

A. He went over to Hoboken.

Q. What did he go over there for?

A. He said he went over to collect a ticket.

Q. A ticket that had been carried over?

A. Yes, sir.

Q. Now what did you do, where did you put yourself there?

A. I was going up to the ticket box and ask this man why he went over to Hoboken; well, he says, "he went over for a ticket," and he says "you look alongside of the wall and see if you can't find that ticket."

Q. What do you mean by "wall;" here is the street, do you mean along here? [indicating on map.]

A. On the right-hand side; there is the ticket box, and up here is where the urinal was, and there is where Mr. Lally stopped his horse, and along here I went to look for the ticket, and I couldn't find the ticket, and went to tell the ticket man I couldn't find the ticket, and I just started away again as Mr. Lally's horse started.

Q. So you were looking along the south side of the teamway for the ticket?

A. Yes, sir.

Q. Behind where Mr. Lally's wagon was standing?

A. Yes, sir.

Q. So there was nobody in front of him?

A. No, sir.

Q. Were the lights lit there?

A. All the lights were lit, except the one over the urinal.

Q. That wasn't lit, eh?

A. No, sir.

Q. Where are the other lights towards the end?

A. The other lights are right here in the centre.

Q. Back of where Mr. Lally was, eh?

A. There is one about in this direction. (Indicating.)

Q. Towards the street from where Mr. Lally was?

A. About in the centre—three lights.

Q. Of what is indicated on that map as combing?

A. Yes, sir; there is three lights right overhead of that.

Q. Overhead the combing?

A. Yes, sir.

Q. Now, did you see the horse in the river?

A. I seen the horse in the river.

Q. Did you see her start up?

A. I did not.

Q. You simply say you saw her standing there by the urinal?

A. Yes, sir.

Q. In about what direction from the urinal?

A. Here is about the horse's head. (Indicating.)

Q. Now, when you were stooping down looking for the ticket the horse had started up?

A. No, sir: the horse was standing still when I got down to that place, and when I got back to tell the man that I couldn't find the ticket, there was another man just coming in; I was just telling him I couldn't find the ticket and the mare went off.

Q. And at this time this chain was down, was it?

A. Yes, sir.

Q. And nobody here at this bridge at all?

A. No, sir.

Cross-examination by defendants' counsel—

Q. What hour in the day was it?

A. About 7 o'clock.

Q. Do you remember which boat it was?

A. I don't remember the boat; I remember the Lackawanna was the following boat—the one Mr. Lally went over on.

Q. I mean as to time, they go at 6.40, 6 50; do you remember the time the boat went out; the one that was just gone?

A. No, sir; I can't recollect.

Q. Was it the 6.50 boat?

A. Somewhere around there, I couldn't recollect; 6.55 I think it was.

Q. It wasn't dark yet?

A. Not so black dark as it would be, about fifteen minutes more it would be dark.

Q. It was twilight?

A. About ten minutes more it would be dark.

William E. Cooper, called for the plaintiff, affirms according to law—

Direct examination by plaintiff's counsel—

Q. You live in Jersey City, I believe?

A. Yes, sir.

Q. How long have you lived there?

A. About 33 years.

Q. And you have been the owner of horses?

A. Yes, sir.

Q. Have you owned fast horses?

A. Yes, sir; quite a number of them.

Q. What ones, give us some; do you own any now?

A. Yes, sir.

Q. What one?

A. Westover.

Q. Is that a fast horse?

A. Yes, sir.

Q. You knew this mare of Lally's?

A. Yes, sir.

Q. Do you know what she was worth?

[Objected to on the ground that the witness has not shown any knowledge as an expert.]

Q. You have bought and sold a good many horses?

A. Yes, sir; a good many.

Q. And fast horses?

A. Yes, sir.

Q. And you know the value of them?

A. I ought to, I have paid enough for them.

Q. And do you know what that mare was worth?

[Objected to on the ground that the witness has not shown that he knows anything about the quality of this horse.]

By the Court—He said he knows the horse.

By the Court—

Q. Had you knowledge enough of this horse to speak of her market value?

A. I think I had; I have seen him speed this mare up and down the yard there, and I can tell pretty near whether she can go or not.

Further direct—

Q. As to her soundness?

A. I believe she was perfectly sound.

Q. And as to her looks?

A. A nice looking mare.

By the Court—

Q. Do you know anything about her age?

A. That I don't know; I should judge she was about seven or eight years old; I couldn't swear as to her age at all, only from the looks of her.

Q. How can you say as to what she was worth?

A. I would have given $1,500.

Q. (By the Court.) That is not the question; the question is, what she was worth in the market where horses were bought and sold?

A. I think she would have brought that from her parents and her qualities; she was gentle and sound, and would go fast.

Cross-examination by defendants' counsel.

Q. Are you a horse dealer?

A. No, sir, not altogether; I would sell them any time I got them.

Q. How long have you been dealing in horses?

A. About twenty years I have owned them; I have had trotters, though, since 1874 or 1875, I think.

Q. You have bought and sold during that?

A. I have bought and sold and swapped.

Q. Do you generally sell at a profit?

A. I try to, but sometimes I don't do it, though.

Q. Sometimes you give a pretty big price and don't get a very big one?

A. Yes, sir.

Q. That has been your experience occasionally?

A. Yes, sir; I bought them and sold them for less than they cost me; swapped them away for less, to get rid of them.

Q. What do you know about the speed of the horse?

A. I don't know, for a positive fact, only I can form an opinion; I couldn't go and say this mare could trot a mile in 2:20, but I should judge from the way he speeded her up and down the yards that she could beat 2:30; if I had wanted to pay a big price for the mare I would want to go to the course and speed her.

Re-direct examination—

Q. You went to see Mr. Lally several times about buying this mare?

A. I went to him several times and said, "I want to buy this mare," and he said, "You haven't got money enough to buy her;" that is all the answer I got from him

John Tyrrell, sworn for the plaintiff.

Direct examination by plaintiff's counsel—

Q. You have teams and carts, I believe?

A. Yes, sir.

Q. Did you have occasion to go across the Christopher street and Hoboken ferry often?

A. Yes; but not with teams, myself; I go alone.

Q. How often have you been in the habit of going over that ferry?

A. I have been in the habit of going over every week twice and sometimes three times.

Q. Do you know the southerly entrance to the ferry at the foot of Christopher street?

A. Yes, sir.

Q. Do you know whether the company, when you have been coming across there, have kept that chain up from the post to the side of the ferry house when boats were not in the slip?

A. I have never gone over yet, but I have seen the chain up until the boats land; sometimes I would be on the front of the boat landing and would see the chain up until the boat would be made fast; when the boat would be made fast they would throw the chain to one side and let the team pass.

Not cross-examined.

Thomas Good, sworn for the plaintiff—

Direct examination by plaintiff's counsel—

Q. Did you know this mare of Mr. Lally's?

A. Yes, sir; I seen her.

Q. Did you know whether she was gentle or not?

A. I know she was a very gentle mare.

Q Did you know anything about her speed?

A. No, sir; I know she was a pretty fast mare; I have seen her speed; I have seen her going very fast.

Q. What were her qualities?

A. Her qualities I could not tell about, only she was a good, gentle mare.

Q. Have you seen her speed?

A. Yes, sir; one day I seen her trace come out, and he pulled her up in about 30 yards, and put the trace up himself in the wagon.

Not cross-examined.

John Broderick, sworn for the plaintiff—

Direct examination by plaintiff's counsel—
Q. Did you know this mare of Mr. Lally's?
A. Yes, sir.
Q. How long have you known her?
A. About five years.
Q. As to her gentleness?
A. Very gentle.
Q. Was she gentle about standing?
A. She would stand anywhere; I have seen her stand by the road where several horses would be driving, as gentle as a lamb, without hitching.
Q. Do you know anything about what she could trot in?
A. I have been informed by the man that drove this mare——
Q. Don't tell what you have been told by some one else?
A. I have seen her speed on the road myself, and she trotted very fast; I think the mare could trot better than thirty at any time.

Cross-examination by defendants' counsel—
Q. What is your business?
A. Butcher.
Q. Do you drive fast horses?
A. Yes, sir.
Q. Do you ever time them?
A. Yes; I have had a horse that would trot in thirty-two, and this mare could pass me on the road just as easy.
Q. How do you know you were going in thirty-two?
A. I had a man drive me in thirty-two.

Q. How do you know your horse would go in thirty-two?

A. I have seen him trot in thirty-two.

Q. Did you time the one that you say trotted in thirty-two?

A. No; I didn't time her.

Q. Then you don't know it?

A. Well, she was driven by a man—(interrupted.)

Re-direct examination—

Q. Were you present?

A. No, sir; I wasn't present; it was in a race.

Michael Kilkenny, sworn for the plaintiff—

Direct examination by plaintiff's counsel—

Q. Do you know this mare of Mr. Lally's?

A. Yes, sir.

Q. How did you know her?

A. I have taken care of her for the last two years and a half.

Q. Do you know whether she was gentle or not?

A. As gentle as ever I seen.

Q. And during that time you have been handling her?

A. Yes, sir.

Q. Stand without hitching, would she?

A. Yes, sir; when I was hitching her up she would stand any place.

Q. I mean, would she stand without being hitched to a post or tied?

A. Oh, yes.

Q. You have often seen her standing that way?

A. Yes, sir.

Cross-examination by defendants' counsel—

Q. Are you the man that takes care of the horses in the stable?

A. Yes, sir.

Q. Where are the harness that was on the mare when she was drowned?

A. In the stable.

Q. Did you clean them?

A. I cleaned them; they are all cut up; coming out of the river they cut them off—the men taking them out of the river.

Q. What is cut?

A. Some of the harness.

Q. What part?

A. The britching is cut.

Q. Anything else?

A. Yes, a couple more places are cut.

Q. Where?

A. Well, it is the harness.

By the Court—

Q. What part of the harness is cut?

A. Where the shaft goes in the , that was lost.

Q. It has never been mended?

A. That was lost.

Further cross-examined—

Q. Did you have them mended?

A. Yes.

Q. Have you used them?

A. We haven't used them — put them on once, I think, that is all; they were all crippled up, they were no good.

Re-direct examination—

Q. Were they cracked?

A. They were cracked.

Q. By the water?

A. By the water.

Michael Lally, Jr., sworn for the plaintiff—

Direct examination plaintiff's counsel—

Q. You are the son of Mr. Lally, the plaintiff?

A. I am.
Q. Have you driven this mare?
A. I have.
Q. Do you know whether she was gentle or not?
A. I know we could leave her stand any place and go into the house and not mind her at all.
Q. Without being tied?
A. Yes, sir.
Q. Gentle was she?
A. Yes, sir, very gentle.
Q. Have you often speeded her?
A. Yes, sir.
Q. Was she a fast trotter?
A. I know I never got beat.

Cross-examination by defendants' counsel—
Q. Who did you trot against?
A. I don't know who they were.
Q. Where did you trot?
A. I trotted up in Centrl Park Boulevard nearly every second day.
Q. I had a horse couldn't go in four minutes and beat everything there was on that road?
A. I guess there are some pretty good horses there.
Q. Anywhere else?
A. No.
Q. She was a good lively mare to drive?
A. Yes, sir.

John Logan, sworn for the plaintiff—

Direct examination by plaintiff's counsel—
Q. You insured this mare for Mr. Lally, did you?
A. Yes, sir.
Q. When was that?
A. On September 1, 1883.
Q. The policies were not in existence at the time of her loss, were they?
A. Yes, sir; they were renewed.
Q. That was an insurance against fire, was it?

A. Only.
Q. How much did you insure her for?
[Objected to.]

By the Court—It is incompetent.
Whereupon the plaintiff rested his cause.
Which being done, the defendant, by its attorney, moved that the plaintiff be called, on the ground—
1. That the evidence given in the cause on the part of the plaintiff, shows that the plaintiff's own negligence contributed to the injury complained of.
2. That the property injured and destroyed was retained by the plaintiff in his own possession and under his own control, and had not, in any sense, been delivered to the defendant.
Which motion his honor, the judge, denied; to which ruling of the court the defendant prayed a bill of exceptions, and the said judge sealed the exception accordingly.

M. M. KNAPP, [L. S.]
J. S. C.

[ENDORSEMENT.]

HUDSON CIRCUIT COURT.

Michael Lally,
v.
The Hoboken Land and Improvement Co. } In Case.

Bill of Exception. J. C. & S. A. Besson, attorneys for defendant. Filed July 18, 1885. Dennis McLaughlin, clerk.

State of New Jersey, Hudson county, *ss.*—I, Dennis McLaughlin, clerk of the county of Hudson aforesaid, also clerk of the Circuit Court holden therein, do hereby certify that the foregoing is a true and correct transcript of the proceedings and the judgment entered therein in a certain cause wherein Michael Lally was plaintiff and

the Hoboken Land and Improvement Company was defendant, as the same is of record and filed in my office.

In witness whereof I have hereunto set
[L. S.] my hand and affixed the seal of the said court this 18th day of August, A. D. 1885.

DENNIS McLAUGHLIN, *Clerk.*

New Jersey, *ss.*—The State of New Jersey, to
[L. S.] Manning M. Knapp, Esquire, Judge of our Circuit Court, at Jersey City, in and for the County of Hudson, or such Justice of the Supreme Court of the State of New Jersey as shall hold such Circuit Court, greeting—

Because, in the record and proceedings, and also in the giving of judgment in a plaint, which was in our Circuit Court holden at Jersey City, in and for the said county of Hudson, between Michael Lally, plaintiff, and The Hoboken Land and Improvement Company, defendants, of a plea of trespass on the case, manifest error hath intervened to the great damage of the said The Hoboken Land and Improvement Company as by their complaint we are informed, we being willing that speedy justice should be done to the parties aforesaid in this behalf, do command you distinctly and openly, to send under your seal, the record and proceedings aforesaid, with all things touching and concerning the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the first Tuesday of August next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey, ought to be done.

Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the eighteenth day of July, in the year of our Lord one thousand eight hundred and eighty-five.

HENRY C. KELSEY,
Clerk.

J. C. & S. A. BESSON,
Attorneys.

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The answer of Manning M. Knapp, Esquire, Judge of the Circuit Court within named, the record and proceedings of the plaint whereof mention is within named, with all things touching the same, to the Court of Errors and Appeals in the last resort in all causes, at Trenton, at the day and year within contained, I certify in a certain schedule to this writ annexed, as I am within commanded.

M. M. KNAPP, [L. S.]
Judge.

Assignment of Errors.

[Filed August 22, 1885.]

NEW JERSEY COURT OF ERRORS AND APPEALS.

The Hoboken Land and Improvement Company, vs. Michael Lally. } In Error. Assignment of Errors.

Afterwards, that is to say, on the fourth Tuesday of August, in the year of our Lord one thousand eight hundred and eighty-five, in the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey, comes the said The Hoboken Land and Improvement Company by J. C. & S. A. Besson, its 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 verdict and judgment there is manifest error in this, to wit: That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said Michael Lally to have his said action against said The Hoboken Land and Improvement Company. There is also error in this, for that by the record and bill of exceptions aforesaid, it appears that the said Michael Lally, the

plaintiff below, having submitted his evidence and proofs to the said court and jury, and having rested his cause; and it appearing by the evidence aforesaid given in the cause on the part of the said Michael Lally, plaintiff below, that said plaintiff's own negligence contributed to the injury complained of.

And that the property injured and destroyed had been retained in the possession of said plaintiff and under his own control, and had not, in any sense, been delivered to the Hoboken Land and Improvement Company, the defendant below, the said defendant, by its attorneys and counsel, moved that the said plaintiff below be called, on the ground—

1. That the evidence given in the cause on the part of the plaintiff, shows that the plaintiff's own negligence contributed to the injury complained of.

2. That the property injured and destroyed was retained by the plaintiff in his own possession and under his own control, and had not, in any sense, been delivered to the said defendant, which motion his honor, the said judge, overruled and denied, and submitted the case to the jury aforesaid; whereas, by the law of the land, the said motion should have been granted, and the said plaintiff below should have been non-suited and judgment rendered for said The Hoboken Land und Improvement Company against the said Michael Lally.

There is also error in this, that by the record aforesaid it appears that the judgment in form aforesaid was given for the said Michael Lally against the Hoboken Land and Improvement Company, whereas, by the law of the land, judgment ought to have been given for said The Hoboken Land and Improvement Company against the said Michael Lally.

Therefore said The Hoboken Land and Improvement Company prays that the judgment aforesaid, by reason of the aforesaid errors and of other errors appearing in the record and proceedings aforesaid, be reversed, annulled and held for nothing, and that the said The Hoboken Land and Improvement Company may be restored to all things it has lost on occasion of the said judgment,

and that said Michael Lally may rejoin to the said errors, &c.

J. C. & S. A. BESSON,
Attorneys for and of Counsel with Plaintiffs in Error.

Joinder in Error.

[Filed September 4, 1885.]

And the said Michael Lally, by M. T. Newbold, his attorney, comes into court and says that there is no error in the record and proceedings aforesaid, or in the matters recited and contained in the said bill of exceptions or in the giving of the verdict and judgment aforesaid, and he prays here that the court may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid in manner aforesaid given, may, in all things, be affirmed, &c.

M. T. NEWBOLD,
Attorney for and of Counsel with said Defendant in Error.