

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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| _____                | ) |           |
|                      | ) |           |
| FREDERICK BALL,      | ) |           |
| Plaintiff in Error,  | ) |           |
|                      | ) | IN TORT.  |
| vs.                  | ) | ON WRIT   |
|                      | ) | OF ERROR. |
| RANSOME CONCRETE MA- | ) |           |
| CHINERY COMPANY,     | ) |           |
| Defendant in Error.  | ) |           |
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**BRIEF OF PLAINTIFF IN ERROR.**

The plaintiff, a carpenter in the employ of the contractor engaged in building a storage house for the defendant, was injured by a hoisting-apparatus moved by the defendant's employees. The building was a one-story frame structure, and during its construction was used by the defendant for storing machines which were carried from place to place in the building by a hoisting-apparatus. There was a rail or track about two feet from the roof on the inside of both walls running from the front to the rear of the building; the wheels that ran on these rails were connected by an axle or bar extending across the entire width of the building from which was suspended a chain reaching to the floor. Machines were carried from the entrance by fastening the chain to them, hoisting



them to clear the ground, and then pushing them by hand from the floor, thus causing the wheels to move near the roof.

The carpenters were furnished by Hammerquist, the contractor. The plaintiff was employed by him on Saturday, February 17th, 1906, and was engaged in nailing joist to enclose the building. On Monday, February 19th, about ten A. M., while the plaintiff was grasping the rail with his hand in order to support himself to nail the joist, the employees of the defendant pushed the apparatus toward the plaintiff and without any warning the wheels struck his hand cutting off parts of the first and second fingers.

The evidence shows that the carpenters started to enclose the building near the roof on Saturday, February 17th (Case, p. 30, l. 15; p. 11, l. 38), and therefore no work near the rail was done until that day, since the installation of the apparatus. The apparatus ran noiselessly and was seldom used (p. 30, l. 2; p. 32, l. 25; p. 44, l. 24); it was moved only once before the accident during the time the plaintiff was employed; that was on Saturday to test it when the plaintiff was not at work (p. 22, ll. 8-16; p. 32, l. 31). The plaintiff testified, on page 10, lines 12 to 14, as follows: "I had to hold myself on that rail, so as not to slip, or anything; that was the only thing for me to hold to, because I had to nail right above." Again on page 23, lines 9 to 14, he declared that there was no other way to perform the work and no other way to support himself, except as he had described. Barlow, a carpenter of thirty years' experience, testified that the plaintiff had "hold of that rail" and was in the natural position to nail the joist; that there was no other way to do the work, and nothing by which the plaintiff could support himself, except the rail (p. 44, ll. 13-40). Jones, a carpenter for nineteen years, swore that



the plaintiff was in the right position to nail the joist, and that he (Jones) would have been in the same position to do the work (p. 29, ll. 10-20).

The proofs also show that the apparatus was at rest and no one was near it when the plaintiff grasped the rail for support (p. 21, l. 28; p. 44, ll. 8-11; p. 35, l. 4); and that when the defendant's employees moved the apparatus they could have seen the plaintiff with his hand on the rail if they had looked in his direction, but that it was difficult for the plaintiff to see the apparatus and the men moving it (p. 11, ll. 25-32; p. 30, ll. 35-40; p. 31, ll. 2-6; p. 45, l. 17). All the witnesses swore that no notice was given of the movement or approach of the apparatus.

A non-suit was ordered at the close of the evidence on behalf of the plaintiff.

### **FIRST.**

The use of the building and the operation of the apparatus by the defendant while the carpenters were engaged near the roof in proximity to the rail, rendered it dangerous to the carpenters. The wheels of the apparatus were eighteen inches in diameter, and any injury they might inflict would be serious if not permanent. But the apparatus was not dangerous while at rest; the danger arose solely from the wheels when they approached, and the danger therefore did not become obvious until the apparatus was moved.

The carpenters could only learn of the movement of the apparatus by leaning over between the joist to look, thus seriously interrupting their work (p. 46, l. 6; p. 33, l. 22; p. 21, ll. 12-20), and if the apparatus were seen approaching there would be uncertainty as to how far it would move, and also doubt as to when it became necessary to step down on the scaffold in order to secure their safety.



The plaintiff could not have nailed the joist without supporting himself; the only thing he could grasp for support was the rail, and when he assumed that position the apparatus was at rest and there was no obvious danger. It is apparent that if the plaintiff had been notified of the movement of the apparatus the accident would have been avoided. The duty of the defendant to use reasonable care for the safety of the carpenters, required that notice be given to the plaintiff of the movement or approach of the apparatus. And whether the plaintiff was guilty of contributory negligence in placing his hand on the rail and retaining it there, in the absence of notice of the movement of the apparatus, or whether he assumed an obvious danger, was for the jury.

*D. L. & W. R. R. Co. vs Hardy 30, Vroom, 35, 41. 7562.*

In the case of Michael vs. Roanoke Machine Works, 90 Va., 492, the plaintiff was a helper in the defendant's boiler shop, and in order to perform his work of emptying pans of oil while sitting on a wall of the shop, it was necessary to support himself by grasping a rail on which a crane moved, propelled by an engine. When he started to do the work the crane was stationary. He was engrossed in his work when the crane was set in motion, without warning to him, and passing over his arm, crushed it. The defendant was held liable; the injury being the result of its negligence, without negligence on the part of the plaintiff. Cited in 1 Sherman & Redfield on Negligence (5th Ed.) Secs. 185b and 207a.

## SECOND.

The plaintiff had the right to expect and rely



upon a warning whenever the necessity existed, "whether signals were customarily given or not."

There had been no occasion to adopt a system or custom of warning the carpenters before the accident in this case. The apparatus had not been moved while the men were at work near the rail or in a position of ~~possible~~<sup>probable</sup> danger. The fact that ordinarily the carpenters could "look out for themselves," would not induce a reasonably prudent man to expect that, if he were actually working in such a position as prevented his seeing the approaching apparatus, the men moving it, having him in sight, would fail to warn him.

This case is different from that of *Harmer vs. Reed Apartment Co.*, 39 *Vroom*, 332, for in that case "the person, from whom any warning might be expected, had no means of perceiving the danger of the plaintiff and hence had no reason to give warning unless there was a custom to do so. But no such custom is necessary when the person controlling the cause of danger perceives the peril and has reason to believe it cannot be escaped unless he gives warning." *Albanese vs. Central Railroad Co.*, 41 *Vroom*, 241, 243.

And as the late Mr. Justice Dixon said, in delivering the opinion of this Court in the *Albanese* case: "If there be a right to expect a warning, it makes no difference in principle whether the right springs from custom, as in *Harmer's* case, or from usual conditions, as in *Hardy's* case, or from exceptional conditions, as in the present case, and under such circumstances questions concerning the assumption of risk and contributory negli-



gence cannot be decided by the court against the party injured. They are for the jury."

### THIRD.

The employees of the defendant were not engaged in a common employment with the plaintiff. They were laborers using the apparatus for the convenience of the defendant and there was no occasion to use it for the carpenters (p. 38, 1. 16). They were not hired and paid by, or subject to the orders of the same master. The fact that the profit of the contractor was received from the amount paid to him for each carpenter furnished, instead of from a certain amount for the entire work, did not establish the relationship of fellow-servant between the plaintiff and the laborers of the defendant. *Fisher vs. Minegoux*, 68 *Atl. Rep. (N. J.)* 902 citing *Jansen v. Jersey City*, 32, *Vr.* 243.

And the question whether any person to whom the defendant might have attempted to delegate its duty to give the warning, was a fellow-servant with the plaintiff, is immaterial. *D'Agostino vs. P. R. R.*, 43 *Vr.* 358.

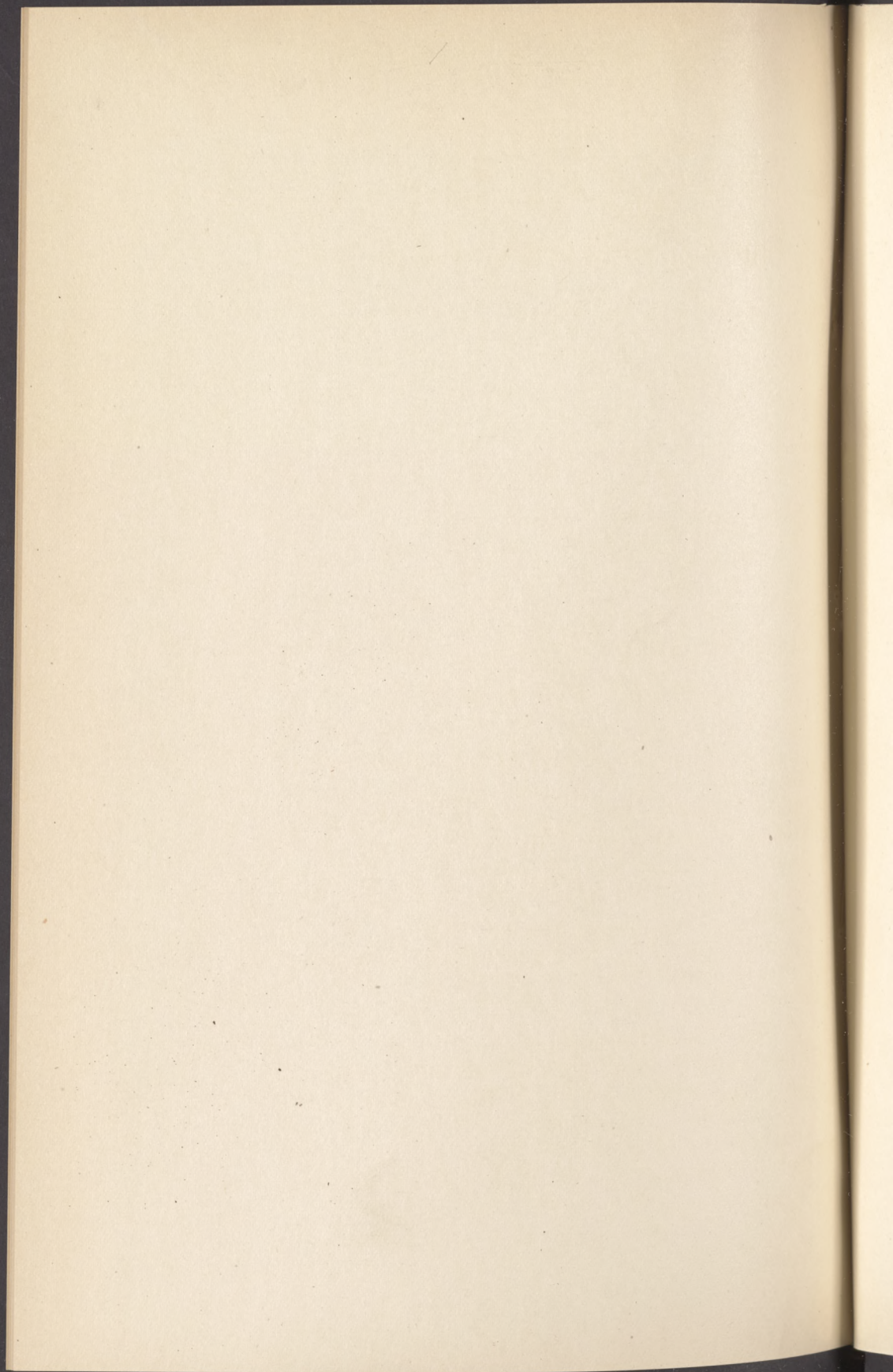
It is respectfully insisted that the questions in this case were for the jury and, therefore, the judgment of non-suit should be reversed and a new trial directed.

HERBERT CLARK GILSON,  
Of Counsel with Plaintiff in Error











NEW JERSEY  
Court of Errors and Appeals.

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| FREDERICK BALL,<br><i>Plaintiff in Error,</i>                        | } | <i>On Error to Supreme Court.</i> |
| <i>vs.</i>                                                           |   |                                   |
| RANSOME CONCRETE MACHINERY<br>COMPANY,<br><i>Defendant in Error.</i> |   |                                   |

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**Brief of Collins & Corbin on behalf of  
Defendant in Error.**

The plaintiff brought suit to recover for personal injuries sustained February 19th, 1906. He alleged in the first count of the declaration that while in the employ of one Hammerquist as a carpenter, and while engaged in carpenter work on a certain building of the defendant, and while his back was turned, "a certain wheel" was "negligently" rolled against his hand by defendant's servants (p. 4, l. 10), and thereby his finger was cut off and he was otherwise injured. There is no specification of defendant's negligence.

In the second count plaintiff alleged that the defendant made a contract with said Hammerquist to furnish the carpenter work and materials for the construction of said building, and it became necessary for the employees of Hammerquist (of whom plaintiff was one) to work in and upon said building,



and near and upon a certain rail or track therein; and while plaintiff was so engaged in the service of Hammerquist, he (plaintiff) was struck on the hand by a certain wheel carelessly run on the said rail by defendant's employees "without any warning or notice to the said plaintiff" (p. 5, l. 18).

The evidence showed that the building in question was about twenty-two feet high by twenty-five feet in width and one hundred feet in length (p. 27, l. 5); just within the side of the building, and two or three feet below the roof was a beam four inches by twelve inches which was bolted or spiked to the studding (p. 36, l. 35). On top, and in the centre of the beam was a rail or track two inches wide and two or three inches high. There was a similar beam and rail on the opposite side of the building and on a level with the first named beam, the distance between them being almost the full width of the building. The building was used for storage purposes by the defendant company; in order to shift heavy material there was a traveling crane, the wheels of which were about eighteen inches high. There were two wheels on either side of the crane and they ran on top of the rail. The crane was moved along the rails by persons on the ground floor of the building by pulling on a endless chain (p. 30, ll. 30-35).

Plaintiff started to work at one o'clock on Saturday afternoon before the accident and put in four hours time; he worked again on the following Monday morning from eight to ten o'clock, at which hour the accident happened. He said that he was holding on to one of the rails with his left hand with a hammer in his right hand and was about to drive a nail into a joist when one of his fellow-workmen, who was holding up the joist saw the crane coming and called, "look out." Plaintiff had



been standing on a scaffold which was about ten feet above the ground, and in order to drive the nail he had stepped up from the scaffold about three feet on to a cross-piece in the side of the building near the window frame (p. 47). The side of the building was partly covered by iron sheathing to a height of six or seven feet from the bottom, the rest of it as far as the roof (including, of course, the portion above the scaffold) being open framework. Plaintiff had both feet on this cross-piece and was facing the joist and holding himself by his left hand placed on the rail, thus bringing the rail directly in front of him (p. 25, l. 10). His head was above the top of the rail (p. 25, l. 30). He says that he knew the "machine" (meaning the traveling crane) was back in the building, but it was standing still when he began work. He had seen it move back and forth on the Saturday afternoon before the accident, and had also observed its operation from the place where he lived, which happened to adjoin this building. He says he had been standing in this position hanging on to the rail for about three minutes. The moment his companion called "look out" he says he dropped his hammer and it fell in between the two wheels of the crane, and the second wheel caught one of his fingers on the left hand and the hammer at the same time, and he dropped down on the scaffold. One of his fellow-workmen, the man nearest to him, says however that the plaintiff put his hand on the track when he was about to step down from the cross-piece to the scaffold (p. 48, l. 1 to 10).

Motion was made for judgment of non-suit on the several grounds mentioned in the case (p. 51). The motion was granted, and thereupon plaintiff sued out this writ of error.



## I.

**There was no proof of negligence.**

The only negligence claimed was the moving of the wheel without warning or notice to the plaintiff (p. 5, l. 18; p. 50, ll. 25 to 35). So far as this phase of the case is concerned, the view of the Justice before whom the case was tried was that it was necessary for the plaintiff to prove some custom or understanding that there should be a warning (page 49, ll. 30 to 40). Plaintiff's attorney, on the other hand, relying on the Hardy case, claimed that it was not necessary to prove any custom of giving warning (p. 50). In that case a non-suit was ordered by the Trial Court. This was reversed by the Supreme Court (28 *Vr.*, p. 505), but in this opinion the only point considered was whether the plaintiff was a fellow-servant with the employee by whose carelessness the accident was caused. This reversal was affirmed by the Court of Errors and Appeals without opinion by a vote of six to four (29 *Vr.*, 205). After a re-trial a verdict for plaintiff was affirmed by the Supreme Court (30 *Vr.*, p. 35), and this judgment was affirmed by the Court of Errors and Appeals, without opinion (except a dissenting opinion by the present Chief Justice) by a vote of eight to four (30 *Vr.*, p. 562).

The Trial Justice, however, thought that the Hardy case was clearly distinguishable by reason of the fact that the plaintiff in that case was working in a dangerous place, to wit, on a railroad track. This point is emphasized in the opinion of the Supreme Court affirming the verdict for plaintiff in that case:

“The railroad company had arranged to build  
“its bridges while using them for the  
“passage of its trains, and in this case



“for drilling a train. This use rendered  
 “the situation of all workmen employed  
 “on the bridge exceedingly perilous.  
 “That there was cast upon the company  
 “a duty to take such reasonable care for  
 “the safety of those workmen as the  
 “extraordinary circumstances made  
 “requisite, and that for the want of  
 “such care by its servants it would be  
 “liable, are propositions not open to dis-  
 “cussion. There was evidence from  
 “which may be inferred the want of  
 “reasonable notice to workmen who  
 “might be exposed to peril thereby of  
 “the movement of this train.” (30 Vr.,  
 “p, 40).

We submit that the Trial Justice was clearly right  
 in thus distinguishing the case in hand from the  
 Hardy case. On the same ground the case is clearly  
 distinguishable from the case of *Albanese vs. Cen-  
 tral Railroad Co.*, 41 Vr., p. 241, in which plaint-  
 iff's intestate was working between the rails of a  
 railroad track, and a train approached without warn-  
 ing and struck and killed him. The ground of the  
 decision in that case was, that a workman was not  
 bound to expect that if he were actually working  
 on the track in such a position as prevented his see-  
 ing an approaching train, the engineer of the train  
 having the workman in sight would fail to sound a  
 warning and so run him down. 41 Vr., p. 243.

The case of *Harmer vs. Reed Apartment Company*,  
 39 Vr., 332, and of *D'Agostino vs. Penn. R. R. Co.*,  
 43 Vr., 358, are also distinguishable, because in both  
 cases there was proof of custom to give warning of  
 an approaching danger.

In the case of *Gill vs. National Storage Company*,



41 *Vr.*, 53, plaintiff was employed by contractors who were working upon defendant's buildings. In order to reach the building, plaintiff started to walk along the plank crossing which passed over several railroad tracks maintained on defendant's premises. There were cars on either side of the crossing, with a space between them of about ten feet. Plaintiff knew that the cars on one side were liable to be backed down over the crossing. He said he saw no engine, heard no signal, started to pass between and suddenly the cars on his right hand were pushed down upon him without warning, and his arm was crushed. It appeared that it was not customary to give warning of the backing of cars over a crossing.

On the authority of the case of *Furey vs. N. Y. C. & H. R. R. Co.*, 38 *Vr.*, 270, the Court held that there should have been a non-suit for direction of verdict for defendant.

Under the circumstances of the present case, the plaintiff had no right to expect a warning "either from custom or from the usual conditions, or from exceptional conditions" (41 *Vr.*, 243). So far as the evidence shows this was the only joist the plaintiff had worked on above the level of the scaffold, and the only one where it was necessary (assuming his evidence to that effect to be true) to put his hand on the rail, and the only occasion when the plaintiff or any other workman had put his hand on the rail. No workman had ever done such a thing before, and defendant had no reason to suppose that any one would be foolish enough to do so.

As one of plaintiff's fellow employees put it:

"Q. You would not put your hand on the rail at that time; is that about it?"



"A. Not if I knew about it; no, sir; not if I "stopped to think, *nor anybody else*" (p. 33, ll. 35 to 40).

It appears that the plaintiff jumped up from the scaffold for about three feet, stood on the cross-piece near the window and grabbed the rail with one hand and hammered a nail with the other, intending to jump down again on to the scaffold as soon as the nail or nails were driven. But the defendant had no cause to reasonably anticipate that one of the workmen would put his hand on top of the rail or would attempt to drive nails in the awkward position assumed by plaintiff. It appears that the plaintiff and the other alleged employees of Hammerquist put up the scaffold. Hammerquist says he had been working on the job about two weeks (p. 39, l. 35); "I also warned them to build the scaffold strong enough" (p. 40, l. 24). If, as the plaintiff claims (and he must claim in order to have any cause of action at all) Hammerquist was an independent contractor, there surely was no duty on the part of the defendant to see that the scaffold was built high enough to enable the carpenters to drive nails into the joists without being obliged to stand on the cross-pieces or the window frames and put their hands on the rail while so doing. The rail was five or six feet above the level of the scaffold, and as long as the workmen remained on the scaffold no possible danger could come to them from the operation of the crane. If it became necessary to nail joists near the roof of the building, it would have been a simple matter to elevate the scaffold. But on plaintiff's theory of the case there could be no duty on the part of the defendant with respect to the height of the scaffold or the method of its construction, and there was no reason why it should have anticipated any necessity for the work-



men of Hammerquist to grab the rail in order to do their work properly.

It further appears that it would take only a few moments to drive the nails into this particular joist. Plaintiff says five or six minutes (p. 23, l. 20). We submit that the defendant was not bound to assume that in the ordinary course of erection of such a building one of a number of the carpenters when driving nails into one particular joist above the level of the scaffold as constructed by the carpenters themselves, would suddenly find it necessary or expedient to jump up several feet from the scaffold, plant his feet on the window-frame or cross-piece and put his hand on the top of the rail just at the moment when the traveling crane was approaching.

Further, it is by no means clear that it was necessary for the plaintiff to do the work in this way; certainly it was not necessary for him to put his hand on top of the rail. It is obvious that he could have taken hold of one of the posts or could have taken hold of the beam below the top of the rail. The beam was four inches wide, and the rail two inches, thus leaving a space on either side of the rail. Plaintiff's witness, Jones, said that he would not put his hand on the rail except he might have done so in getting down (p. 33, l. 35). Another witness, Fagan, says plaintiff put his hand on the rail while he (plaintiff) was stepping down, and did not have his hand there before (p. 47, l. 35, to p. 48, l. 5).

If we are right in our contention that there was no duty on the part of the defendant to give warning of the approach of the crane, there is no need of further argument, but we also claim:



## II.

The plaintiff was not in the employ of an independent contractor, but of the defendant, and the negligence, if any, was that of a fellow servant.

The theory of plaintiff's case was that Hammerquist was an independent contractor and that the negligence was that of employees of the defendant company, and that because of the relationship of independent contractor between Hammerquist and the defendant, the employees of the latter were not the fellow servants of the carpenters employed by Hammerquist. The plaintiff, however, failed in his proof on this point. The Trial Justice said that under the proof the plaintiff "certainly comes very close to being *pro hac vice* a fellow servant with the others, if he is not actually a fellow servant" (p. 50, ll. 35-40). The plaintiff and some of his witnesses stated in a loose sort of way, without giving any details, that they were employed by Hammerquist. Thus plaintiff says that he worked for Hammerquist (p. 9, l. 1). Several of the others, Jones, Barlow and Fagan, say the same thing (p. 26, l. 30; p. 43, l. 30; p. 46, l. 25). It is evident that they said that they were working for H., because it appears that under an arrangement made between H. and the defendant, the former paid the carpenters their wages. The relation between H. and the defendant is fully explained by H., who was called as a witness for the plaintiff. He said he had an arrangement with the defendant to do some work *by the day* (p. 36, l. 8). "We all were the company's men, we were all employed by the company" (p. 40, l. 15). The witness refers to "his own men," but evidently he does not mean by this that he



actually employed them; it was simply a method of distinguishing the carpenters from the men who were working in the shop and who moved the crane. Harmmerquist had no written contract and did not furnish any of the materials; there was no agreement as to the length of the time he was to work; he says he could have been laid off at any time by the boss, that is, Mr. Cullen, the manager of the defendant company. "He (Cullen) told me how many men he wished to have work that day and work another day, &c., and I done after his directions."

"Q. Did Mr. Cullen have anything to do with discharging the men ?

"A. He had; also if he wanted men, &c., he came to me and told me; if he wanted a man discharged, he came to me and told me to discharge him, he did not want him, and I done so" (p. 41, ll. 5 to 15).

It further appears that H. paid over to the men the money due for wages, and the reason for this he thus explains: "The defendant gave me money to pay them with and arranged with me. I arranged with them to furnish the men at so much per day *and myself also*." He said that the company could not go out directly and get men in a hurry; they could not go out and get all the men they wanted to work unless they came to him, and he took some men off his own work and let them have them (p. 41, ll. 30-40). "The company paid the men through me; they gave me the money to pay the men with." He arranged that the carpenters should be paid on Saturday, as it was the custom among carpenters to be paid on that day. The only interest he had in getting the men was that he made a profit on each man, in that he received



four dollars per day from defendant for each man and paid him two dollars and seventy-five cents.

It further appears that Mr. Cullen, manager of defendant, exercised a general oversight over the work of the carpenters.

"Q. He did not give your men any orders about how they should do their carpenter work, did he?

"A. Oh, yes; he came and got the man off some places and put them to work wherever he wanted to?

"Q. I mean, he did not give them their orders, did he?

"Q. Yes, sir; sometimes he did; he could go and suit himself about that" (p. 43, ll. 5-15).

The foregoing is the only testimony in the case as to the relations between H. and the defendant. It is evident that he was not an independent contractor; he furnished no materials; had no contract either verbal or written with defendant to do the carpenter work, and did not assume any responsibility for it. He simply arranged to get carpenters to work for the defendant, and himself also worked in company with them. Suppose an accident happened to a passer-by on the street by reason of plaintiff's negligence in dropping a board on his head, can it be said that the injured person would have a cause of action against H. on the theory that H. was an independent contractor and therefore responsible for the negligence of the carpenters as their master?

H. might possibly be considered the foreman of the carpenters, but nothing more. The mere fact that he received more money from the defendant than he paid over to the carpenters does not alter the legal relation of the parties. As explained by H. it was difficult for the company to get men "in



a hurry" and in consideration of his furnishing the men, the defendant agreed to pay him a certain amount per day for each man he could furnish, letting him make whatever bargain he pleased with the men.

H. did not attempt to direct the work; it is undisputed that it was done under the direction of Mr. Cullen, defendant's manager, who notified H. how many men were wanted each day (p. 41, l. 5), and who changed the men from one place to another whenever he wanted to (p. 43, l. 10).

Under the foregoing testimony it seems to us clear that the relation of fellow servant existed between the plaintiff and the person by whom the crane was operated. In this respect the case is very similar to *Charles v. Taylor*, 3 C. P. Div., 492; 38 L. T. N. S., 773, in which the defendants were brewers, having a wharf upon the Thames, where coals were discharged to be used in their business. The plaintiff was hired by A to assist in unloading a barge at the wharf of the defendants. The plaintiff and A, with other men, formed a gang, the members of which were paid by the defendants, at the rate of one shilling and ninepence for every ton of coals discharged; one of the men was to receive from the defendant the money due for unloading the barge and to distribute payment among them; the defendants alone had power to dismiss the plaintiff. While the plaintiff was engaged in unloading the barge, a servant of the defendants, who was engaged in moving some barrels, negligently let one of them slip upon an upraised flap, which fell and caused injury to the plaintiff. The plaintiff had frequently been at the spot when the barrels were being moved. The Court held that the defendants were not liable to compensate the plaintiff for the injury sustained by him; for A held the position of



a foreman, and not of a contractor, and the plaintiff was a servant to the defendants, and was engaged in a common employment with the servant by whose negligence the injury happened, and there was no concealed danger.

Another case much in point is *Johnson vs. City of Boston*, 118 Mass., 114. In that case the city of Boston was sued for an injury caused by the falling in of a sewer through the negligence of an employee of the city. The plaintiff was employed by one Tinkham, whose business was the blasting of rock for whomsoever employed him. Tinkham sent plaintiff to blast the bottom of a sewer for the defendant; the city employed Tinkham, paying him \$2.45 per day for each man, and Tinkham paid each man \$2.25 per day. The Court held that plaintiff was a fellow servant with the workman who caused the injury, saying:

“If Tinkham, the plaintiff’s immediate employer, had been the person injured, while engaged in the same work, he would clearly have been in the position of a fellow servant with those who excavated the earth. The only point of difference in the position of the plaintiff is that, by virtue of a previous agreement between himself and Tinkham, the latter was entitled to determine whether and how long he should be employed upon any part of the defendant’s work, and to receive from the defendant the compensation due for such service. But while he was so employed he was in the service of the defendant, doing the work of the defendant, of which Tinkham had no control, and in the result of which



“he had no further interest than to receive the stipulated or reasonable rate of wages as for a personal service. The existence of this general relation of master and servant between the plaintiff and Tinkham, does not exclude a like relation with the defendant, to the extent of the special service in which he was actually engaged.”

The case in hand is even stronger than the Johnson case, in that there is no proof of any relation of master and servant between Hammerquist and the plaintiff. All that Hammerquist did was to provide carpenters for the work that the defendant required, and H. himself took part in the same work—acting, perhaps, to some extent as a foreman of the carpenters, but in no respect assuming to control the carpenter work, which was under the sole direction of Mr. Cullen, the manager of the defendant. The mere fact that the carpenters were paid through Hammerquist is of no importance, as it is evident that this arrangement was simply a matter of convenience. The difference between the amount paid Hammerquist by the defendant and the amount paid by him to the carpenters represents no more than a commission to Hammerquist in securing the services of carpenters when they were needed in a hurry by the defendant.

The Johnson case has been approved by the New Jersey Supreme Court, in the case of *Ewan vs. Lippincott*, 18 Vr., p. 192, where that case and others are reviewed at length. In the Ewan case the plaintiff was a machinist. The defendant owned a saw mill and gave an order to D. & W., master machinist by whom plaintiff was employed, to make some alterations in the gearing of the water wheel of the



mill. D. & W. sent the plaintiff and another workman to do the work. It was understood that the mill would run at such time as the workmen were not actually engaged at work upon the wheel. While they were at work upon the wheel the engineer of the defendant, negligently started it and plaintiff was injured. Held that plaintiff was a servant of the defendant, engaged in a common employment with the engineer, the Court saying:

“The owner of the mill had the control of  
 “the workmen to the same degree that  
 “he would have had over the masters of  
 “the workmen, had they done the work  
 “personally. He had the power to direct  
 “the work in regard to the extent  
 “and character of the alterations and in  
 “respect to the time at which and the  
 “circumstances under which it was to  
 “be done. He had the power to change,  
 “terminate or suspend the work at any  
 “moment” (p. 193).

This case is followed in *Rogers Works vs. Hand*, 21 Vr., 464. A was employed in the blacksmith shop of the defendant's locomotive works, and upon the direction of an officer of the company, repaired a chain which had been used in raising locomotive driving-wheels, to be worked on by B, employed by the works for that purpose. When repaired, the chain was again furnished to and used by B for the same purpose, and B was injured by its breaking at the link which had been repaired. Held, that A and B were fellow servants in a common employment. The Court saying:

“The test which will determine what is a  
 “common employment of workmen, to



"which these implied undertakings will  
 "apply, has been fixed in this State.  
 "The Court of Errors has declared a  
 "fellow-servant to be one who serves and  
 "is controlled by the same master, and  
 "common employment to be of such  
 "kind that, in the exercise of ordinary  
 "sagacity, all who engage in it may be  
 "able to foresee, when accepting it, that,  
 "through the negligence of fellow-serv-  
 "ants, they may be exposed to injury  
 "(*McAndrews vs. Burns*, 10 Vr., 117).  
 "This doctrine was so fully discussed  
 "and illustrated in *Ewan vs. Lippincott*,  
 "18 Vr. 192, that further discussion of  
 "it is unnecessary" (p. 466).

"The general rule is that employees of a common  
 master who are engaged in the common employ-  
 ment of erecting a building or other structure are  
 all fellow servants; and the rule is not altered be-  
 cause such employees may be engaged in different  
 departments of the common business."

*Enright vs. Oliver & Burr*, 40 Vr., 357, (cit-  
 ing 12 Am. & Eng. Ency., p. 1015; note 2).

In *Wischam vs. Rickards*, 136 Pa., 109, 20 Atl.,  
 532, 10 L. R. A., 97, defendant was delivering a  
 large fly-wheel at the factory of B, plaintiff's em-  
 ployer, and the servants of both defendant and B  
 were jointly engaged in unloading the wheel. Defen-  
 dant's foreman called for help as the wheel was being  
 lowered, and B's foreman ordered plaintiff to assist,  
 and while executing this order plaintiff was caught  
 under the wheel and injured. Held that plaintiff  
 assumed the relation of servant to the defendant,  
 even though ordered to assist by his employer's



foreman at the request for help from defendant's foreman, and that he could not recover for the negligence of the other servants of defendant.

In *Killea vs. Faxon*, 125 Mass., 485, held that a person in the employ of a contractor putting gutters on a building was a fellow servant of a carpenter in the employ of another contractor having general charge of the erection of the building.

In *Hasty vs. Sears*, 157 Mass., 123, 31 N. E., 759, plaintiff was a carpenter employed by the hour and was sent by his master to repair defendant's elevator under the direction of defendant's superintendent. While executing the repairs he was injured by the carelessness of the elevator boy. Held, that plaintiff for the purpose of making the repairs was defendant's servant and in a common employment with the elevator boy.

In *McMahon vs. Bangs*, 62 Atl., (Del. May, 1904), plaintiff was struck upon the leg by a rock hurled from a blast in a stone quarry while he was driving his brother's horse and cart which were being used in the service of the defendant in connection with the quarry. Plaintiff said he was employed by his brother and the latter had the right to discharge him, but that while plaintiff was at the quarry he was hauling dirt under the direction of defendant's "boss," who told plaintiff where to go with the cart. Plaintiff did just what the "boss" told him to do. Held, that the relation of master and servant existed between the plaintiff and defendant, and also that between the plaintiff and the person whose negligence caused the injury there existed the relation of fellow servant. Because of such relation, verdict was directed for the defendant.

When the necessary facts for determining the question of common employment are undisputed, it



is then a question of law, and the Court should non-suit or direct a verdict for the defendant where the only negligence is that of a fellow servant. 2 *Labb. on M. & S.*, Sec. 494, page 1352.

Plaintiff will no doubt rely on the Hardy case as authority to sustain his position that he was not a fellow servant of the person whose negligence caused the injury; or, at least, that the question of whether he was a fellow servant was for the jury to pass on. This might be a question for the jury if there were any undisputed facts, but there are none. The only testimony on the subject of the relation between Hammerquist and the defendant, is that given by Hammerquist himself. Plaintiff's attorney carefully refrained from asking plaintiff or his other witnesses whether they were subject to the orders of Hammerquist or somebody else, and outside of the testimony of Hammerquist, there is nothing in the case on the subject in regard to the relation between him and the defendant, except the statement of plaintiff that he was working for Hammerquist; but Hammerquist says, "*we were all employed by the company*" (p. 40, l. 15); that he worked under the direction of Mr. Cullen, manager of the defendant (p. 41).

Hammerquist himself was also paid by the day for his personal services (p. 41, l. 24).

These facts obviously differentiate the present case from the facts in the Hardy case. In the latter case the decision of the Court was based upon the theory that in the first instance Hardy was in the employ of the contractor, and it did not clearly appear that he had assented expressly or impliedly to the transfer of his services to another employer.

The Court says: "His assent say be established by "direct proof that he agreed to accept the new



"master and to submit himself to his control, or  
 "by indirect proof of circumstances justifying the  
 "inference of such assent. Such evidence may be  
 "strong enough to justify a court in removing the  
 "question from the jury, or it may require to be  
 "submitted to jury" (30 *Vr.*, p. 38).

The Court then proceeds to discuss the Ewan case, and says that in that case there was clear evidence from which a jury might infer that Ewan had assented to the transfer of his services to Lippincott and submitted therein to his control (30 *Vr.*, p. 39).

In the present case can there be any doubt under the undisputed evidence that plaintiff had at least impliedly assented to the transfer of his services to the defendants? He was working on the defendant's building, under the direction of defendant's manager, and was paid with defendant's money.

A further distinction from the Hardy case may be noted in this that in that case the engineer of the railroad company never assumed or attempted to exercise the authority of a master over the plaintiff. "His inspection related to the results accomplished. The case does not show that he interfered to control the agency by which those results were attained, or that he undertook to supercede the rolling mill in the position which that company occupied as master" (28 *Vr.*, 507). In the case in hand defendants' manager did control the carpenters and exercised supervision over them.

Plaintiff may also rely upon the case of *Norman vs. Middlesex & C. R. R. Co.*, 42 *Vr.*, 652, but in that case there was evidence from which the jury might have found that Lesher & Co., who had the contract for furnishing material and labor for making certain repairs to the company's road-bed on a per centage basis, were independent contractors,



and that plaintiff was exclusively in their employ. It also appeared that the plaintiff was carried on the pay-rolls of Leshner and was paid by him, and the work that he performed was in connection with the carrying out of the contract by Leshner.

In the case in hand, Hammerquist had no contract. He and the other carpenters, including plaintiff, were simply employed by the day.

Moreover, there is a further distinction from both the last cited cases in that in the case in hand Hammerquist was not in fact a contractor, nor did he furnish or contract to furnish the labor. All he did was to arrange to get some carpenters who had formerly worked for him to come and work for the defendant, and he himself took part in the same work with them. The only relation between Hammerquist and the other carpenters, including the plaintiff, was that the defendant paid the carpenters through Hammerquist as a conduit, H. making a profit on each man's labor. But there was no agreement between defendant and H. that the latter should perform any particular part of the work or continue to work for any particular length of time. Hammerquist and the other carpenters were simply employed from day to day, and all of them were subject to be discharged by the manager, who gave the men orders and put them to work wherever he wanted to, according as he saw fit (p. 43, ll. 10-15).

### III.

#### The danger was obvious.

This was the particular ground on which the Trial Justice thought a non-suit should be granted. He says:

"I think this was a perfectly obvious risk.



“Any man with ordinary prudence must  
 “have known that if he put his hand on  
 “that rail and the crane came along his  
 “hand would be cut off; and he knew  
 “it was liable to come along; he had  
 “seen it do so. I think the Hardy case  
 “is entirely different. I do not see how  
 “I can escape the view which I hold in  
 “this case” (p. 50, l. 40 to p. 51, l. 10).

The evidence showed that the rail and the beam on which it was fastened were in plain sight, the sheathing which formed the side of the building being at the time of the accident below the level of the scaffold. Plaintiff's head was higher than the rail (p. 25, l. 30).

The accident happened at ten o'clock on Monday, February 19th. Plaintiff had been at work that day at 8 A. M. He had also worked four hours on the preceding Saturday, beginning at one o'clock (p. 16, l. 22 to p. 17, l. 4). He admits that he knew the “machine” was there (p. 21, l. 20). On Saturday afternoon he had seen the crane moving back and forth from one end of the building to the other (p. 22, ll. 18 to 22). He had lived near this building for four or five months previous (p. 18, l. 28), and had seen the crane moved before he began work (p. 21, l. 35). There was plenty of light (p. 30, l. 35). There was nothing to interfere with the view (p. 31, l. 10; p. 33, l. 9). As one of the witnesses put it, “there was a splendid light; there was nothing but the roof and both sides were open; there was only one course of sheathing iron on the bottom” (p. 45, ll. 10 to 20). A witness who stood about sixteen feet from the plaintiff (p. 43, l. 40) said that he could see the track between the posts for a distance of five or six feet; the posts cut off



a further view, but by leaning over he could see further (p. 45, l. 35, to p. 46, l. 10). By putting his head "in under" one could see all the way to the end (p. 33, l. 20-25).

Moreover, plaintiff had been warned by Hammerquist to look out for the crane (p. 39, l. 20; p. 40 l. 10).

Under these circumstances we respectfully submit that the Trial Justice was right in holding that the danger was obvious. If it was there can be no doubt that under the decisions the risk of injury was assumed by the plaintiff.

"The obvious dangers, the risks which are  
 "assumed by the servant in his master's  
 "employment, are such risks as he be-  
 "comes acquainted with in such em-  
 "ployment. He is bound to use his eyes  
 "to see that which is open and apparent  
 "to any person using his eyes, and if he  
 "fails to do so he cannot charge the con-  
 "sequences upon his master for such a  
 "risk is impliedly assumed by him" *Dil-  
 lenberger v. Weingartner*, 35 Vr., 292.

"An employee assumes all the risks of this em-  
 ployment against which he may protect himself by  
 ordinary observation and ease" (*Durand v. N. Y. &  
 L. B. R. R.*, 36 Vr., 626, 658).

If it appears that the servant is familiar with the  
 whole situation, that in the place in which he was  
 working he was not exposed to any dangers which  
 were not as well known to him as to the master,  
 and that the danger is such that the plaintiff would  
 have discovered same in the proper exercise of his  
 powers of observation, he cannot recover. (*Riddle  
 vs. Alpha Portland Cement Co.*, 64 Atl., 1065, 66),



(Court of Errors and Appeals, November Term, 1906). In that case plaintiff had worked two months as a repair man in a cement mill and was injured by getting into an uncovered conveyor; he knew of the existence of the conveyor and how it ran, that the only covering upon it was movable and the cover was sometimes on and sometimes off, and he could have seen it was uncovered if he had looked. Judgment of non-suit was sustained.

In the cases above cited the parties sustained the relation of master and servant, but we do not understand that any different rule applies if the plaintiff happens to be in the service of an independent contractor. The danger is just as obvious in the one case as in the other.

#### IV.

##### **Plaintiff was guilty of contributory negligence.**

Without repeating in detail the testimony cited under the last preceding point, we desire to emphasize the fact that the plaintiff's eyes were above the top of the rail and that he knew the crane was there and likely to move at any moment. One of the witnesses says that he could see toward Monmouth street (the crane approached from the direction of this street) for a distance of about twenty feet, and if he had looked "in under" he might have seen it all the way to the end (p. 33, ll. 20-25). There was a "splendid light;" both sides were open to observation; the track was in plain sights. The crane was only about sixteen feet away from the plaintiff, as it was standing in the building before the accident (p. 44, l. 9). One of the witnesses says that he saw what he calls the "trolley" (meaning, of course, the crane) coming along and it started from Monmouth street (p. 47, ll. 20-25).



The danger being open and obvious, and in fact known to the plaintiff, we submit it was negligence on his part to put his hand on top of the rail. A. one of the witnesses said, he would not put his hand on the rail—if he stopped to think, nor anybody else (p. 33, ll. 35-40). Moreover, we call attention to the fact that according to the testimony of one of plaintiff's witnesses, who was the one nearest to him at the time of the accident (Fagan), plaintiff put his hand on the track when he was stepping down to the scaffold and did not have his hand on the track before (p. 47, l. 38, to p. 48, l. 6).

Plaintiff says he was looking at the joist with the rail in front of him, his head being above the top of the rail (p. 25). In this position it is apparent that a mere turn of his head, or glance of the eye would show the approaching crane. If it is true, as one of plaintiff's witness says, that he put his hand on the rail to support himself as he was stepping down, then there can be no doubt about the fact of contributory negligence; and if it be true as plaintiff claims that he had his hand on the rail for the purpose of supporting himself while in the act of nailing the joist, such conduct on his part was likewise negligent, as he knew the crane was likely to be moved along the rails at any moment without notice to him and without making any noise (See p. 44, l. 24).

A case somewhat similar to the one in hand is (*McNeil vs. Clairton Steel Company*, 62 Atl., 923, Penna., Jan., 1906). Plaintiff was engaged in putting up structural work at the plant of the defendant. A small car operated by electricity ran upon the track and passed the point where he was at work. In order to permit the car to pass, it was necessary to depress a guy rope temporarily in use,



and this the plaintiff did by standing on it. He steadied himself in this position by reaching out to the girder upon which the rails were laid, and in so doing inadvertently put his hand upon the rail. It appeared that the car had passed once before and that the plaintiff had depressed the rope in the same way and steadied himself by putting his hand on the flange of the girder below the rail. The Trial Judge said in his opinion, refusing to take off a non-suit:

“The rail was laid on a beam which was  
 “wider than the base of the rail, and it  
 “is plain that there was no necessity for  
 “plaintiff putting his finger over the top  
 “of the rail.”

This was sustained by the Supreme Court of Penna., the Court saying:

“The accident was evidently the result of the  
 “carelessness of the plaintiff in putting  
 “his fingers on the track rather than  
 “against the flange below the rail.”

The only difference between that case and the case in hand, is that in the former plaintiff knew that the car was approaching. This, however, is not a material distinction. Although Ball did not have actual knowledge of the approach of the crane, he knew that as there was no custom to give warning the crane was *likely* to approach without any warning.

Another recent case in point is *Bushay vs. Ocean City R. R. Co.*, 64 Atl 968 (N. J. Sept. Ct., Nov., 1906). The plaintiff was employed by a water company, and was engaged with others in connecting a main at night. His duty was to hold a lantern



to show a light to others who were working in a trench, the nearest edge of which was eighteen inches from defendant's trolley tracks. The gang had been working on this job during the latter part of the day, during which time the motormen of defendant sounded the gong upon approaching the point. About five P. M. the men quit work and then resumed at 10 P. M. at night. The trolley company had no notice of the return to work. The plaintiff was holding his lantern eighteen inches from the ground and kneeling on the narrow strip between the trench and the tracks, knowing he would be struck by a car if he did not get out of the way. There was nothing to prevent the free use of his senses, and no obstruction to his vision up or down a straight track in each direction. It was held that a motion of defendant to non-suit the plaintiff because of contributory negligence should have been granted, the Court saying:

“His failure, therefore, to use his senses to  
 “apprise him of a danger of the nature  
 “of which he was fully aware, was neg-  
 “ligence that directly contributed to his  
 “injury, for beyond question the ap-  
 “proach of the car that struck him would  
 “have become known to him if he had  
 “been at all on the lookout for it.”

So in the present case the plaintiff was fully aware of the danger and had an opportunity to see the approach of the crane if he had taken the trouble to turn his head the merest trifle in the direction in which it was approaching; he had no reason to suppose that he would receive warning of its approach, because it did not appear that there was any custom to give such warning. We think this contributory negligence was clear. It may be



argued that plaintiff's attention was directed to driving the nail in the joist, and therefore he forgot for a moment that the crane might approach; but momentary forgetfulness of a known danger will not excuse contributory negligence. See *Baylor v. D., L. & W. R. R.*, 11, *Vr.*, 23; *B. & O. R. Co. v. Stricker*, 31 *Md.*, 47; *L. & N. R. Co. v. Hall*, 87 *Ala.*, 708; 4 *L. R.*, 10, 6 *So.*, 277; *Bengston v. Chicago etc. R. Co.*, 47 *Minn.*, 486; 50 *N. W.*, 531.

COLLINS & CORBIN,

Att'ys Def't in Error.

GILBERT COLLINS,

GEO. S. HOBART,

Of Counsel.



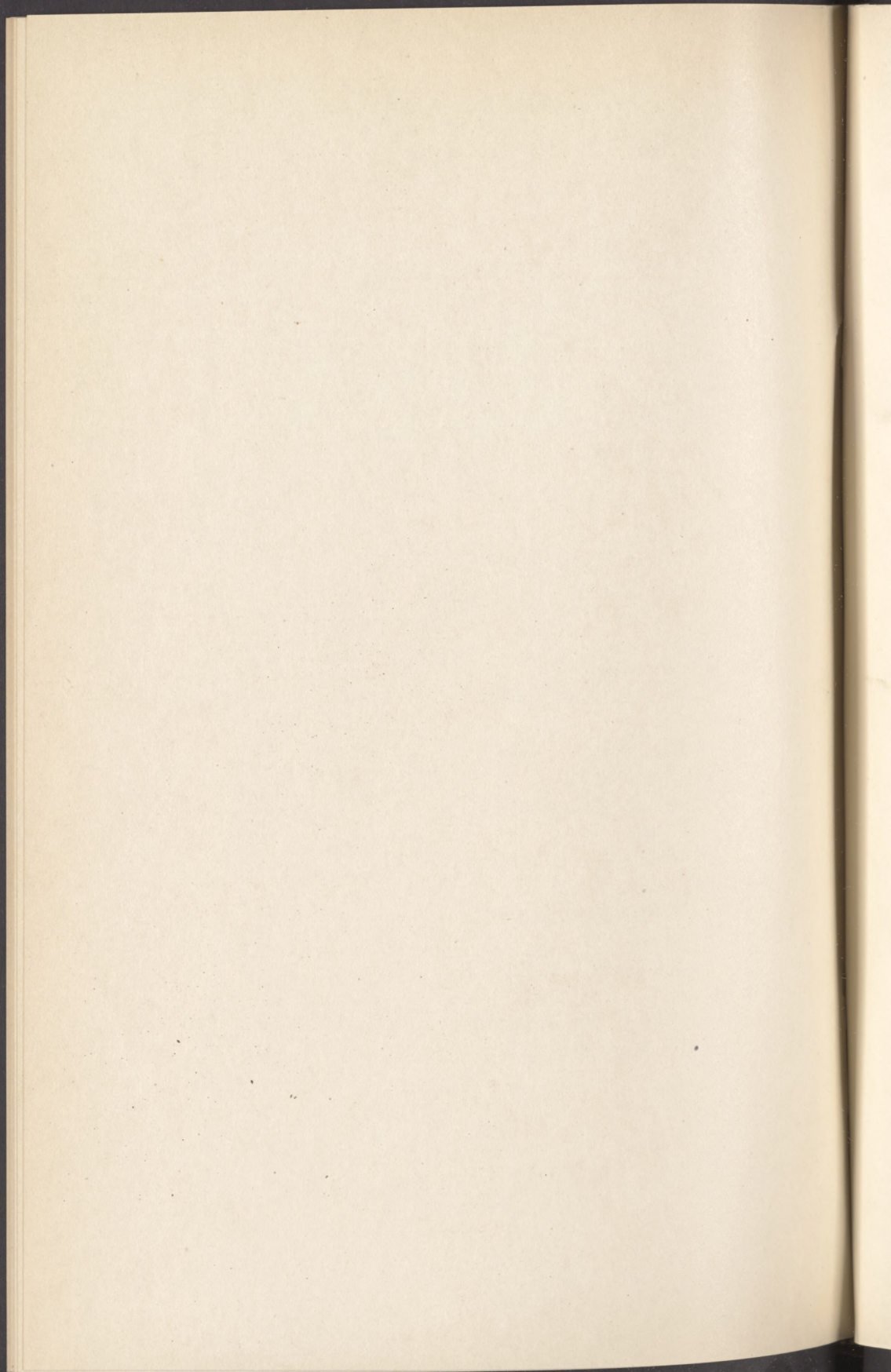
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## INDEX.

|                                |    |
|--------------------------------|----|
| Writ of Error .....            | 1  |
| Answer .....                   | 2  |
| Judgment .....                 | 7  |
| Assignment of Errors . . . . . | 52 |
| Joinder in Error .....         | 53 |
| PLAINTIFF'S WITNESSES.         |    |
| Frederick Ball:                |    |
| Direct Examination .....       | 8  |
| Cross .....                    | 14 |
| Re-direct .....                | 23 |
| Re-cross .....                 | 24 |
| Re-direct .....                | 25 |
| Re-cross .....                 | 25 |
| Re-direct .....                | 26 |
| John J. Jones:                 |    |
| Direct Examination .....       | 26 |
| Cross .....                    | 32 |
| Re-direct .....                | 34 |
| Re-cross .....                 | 35 |
| Otto Hammerquist:              |    |
| Direct Examination .....       | 35 |
| Cross .....                    | 39 |
| Re-direct .....                | 42 |
| Joseph J. Barlow:              |    |
| Direct Examination .....       | 43 |
| Cross .....                    | 45 |
| Re-direct .....                | 46 |
| Patrick Fagan:                 |    |
| Direct Examination .....       | 46 |
| Cross .....                    | 47 |
| Re-direct .....                | 48 |
| Dr. Warren J. Duckett:         |    |
| Direct Examination .....       | 49 |
| Motion for Non-Suit .....      | 49 |







New Jersey, ss:

The State of New Jersey to the  
(L. S.) Chief Justice and other Justices of  
our Supreme Court of Judicature,  
Greeting:

Forasmuch as in the record and proceedings,  
and also in the giving of judgment in a certain  
plaint, which was in our said Supreme Court of<sup>10</sup>  
Judicature, before you, between Frederick Ball,  
plaintiff, and Ransome Concrete Machinery Com-  
pany, defendant, in an action in tort, manifest  
error hath intervened, to the great damage of the  
said plaintiff, as it is said; we being willing that  
the error, if any there be, should, in due manner,  
be corrected, and full and speedy justice done to  
the parties aforesaid in this behalf, do command  
you, that if judgment be thereupon given and af-  
firmed, then you distinctly and openly send, un-<sup>20</sup>  
der your seal, the record and proceedings afore-  
said, with all things touching the same, to our  
Judges of our Court of Errors and Appeals in the  
last resort in all causes, at Trenton, on the twen-  
ty-eighth day of November, instant, together with  
this writ that the record and proceedings afore-  
said 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. <sup>30</sup>

Witness, our Chancellor and President  
Judge of our said Court of Errors and  
Appeals at Trenton aforesaid, the eighth  
day of November, nineteen hundred and  
six.

HERBERT CLARK GILSON,

Attorney.

S. D. DICKINSON,

Clerk. 40



The answer of the Justices of the Supreme Court of the State of New Jersey within made. The record and proceedings whereof mention is made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

W. S. GUMMERE (L. S.)

10

C. J.

20

30

40



## NEW JERSEY SUPREME COURT.

|                     |                    |    |
|---------------------|--------------------|----|
| -----)              | )                  |    |
|                     | )                  |    |
| FREDERICK BALL,     | )                  |    |
| Plaintiff.          | ) In Tort.         | 10 |
|                     | ) On Postea.       |    |
| —vs.—               | ) Judgment for     |    |
|                     | ) Defendant.       |    |
| THE RANSOM CONCRETE | ) Collins & Corbin |    |
| MACHINERY COMPANY,  | ) Attorneys.       |    |
| Defendant.)         | )                  |    |
| -----)              | )                  |    |

As yet of the twenty-first day of April, A. D.,  
 nineteen hundred and six. 20

Witness, WILLIAM S. GUMMERE, Esq.,  
 Chief Justice.

WILLIAM RIKER, Jr.,  
 Clerk.

HUDSON COUNTY, ss:

The Ransome Concrete Machinery Company, a corporation, the defendant in this suit, was summoned to answer unto Frederick Ball, the plain- 30  
 tiff herein, in an action of tort, and thereupon the said plaintiff by Herbert Clark Gilson, his attorney, complains:

For that whereas before and at the time of committing the grievances hereinafter mentioned, the said defendant was and still is the owner and proprietor and occupied a certain building and plant at the corner of Monmouth and Tenth Streets, in the City of Jersey City, in the County aforesaid, and therein stored its machinery. 40



And plaintiff avers that on the nineteenth day of February, nineteen hundred and six, he, the said plaintiff, while in the employ of one O. A. Hammerquist, in the capacity of a carpenter, was lawfully on said building of said defendant, and was then and there engaged in said building as a carpenter for said Hammerquist in constructing and enclosing said building and while the plaintiff was then and there engaged in the said carpenter work and while his back was turned, a certain wheel was carelessly, negligently, improperly and violently moved, rolled and pushed by said defendant, its servants, agents and employees, upon and against the hand of said plaintiff, and the finger of said plaintiff was then and there cut off and his hand was thereby seriously and permanently injured, cut and bruised, and he sustained great nervous shock and has suffered great pain of mind and body; and the said plaintiff thereby became sick, sore and disabled and so remained for a long time, to wit, from thence hitherto, during all which time he was thereby hindered and prevented from transacting and performing his necessary affairs and business by him during that time to be transacted and performed; and was thereby forced and obliged to and did pay, lay out and expend divers large sums of money, in and about endeavoring to be cured of his said injuries occasioned as aforesaid.

And for that whereas the said defendant, to wit, on the nineteenth day of February, nineteen hundred and six, at Jersey City aforesaid, was and still is the owner and did occupy, manage and control a certain building and storage house in the course of erection at Monmouth and Tenth Streets, in Jersey City aforesaid, and while then and there so owning, occupying, managing and controlling said building the said defendant entered into a contract with one A. O. Hammerquist to furnish and supply the carpenter work and ma-



terials to finish the construction, erection and enclosure of said building, and it then and there became and was necessary for part of the work of the employees and servants of the said Hammerquist to work in and upon said building and near and upon a certain rail or track therein; and the plaintiff avers that he, on the day and year aforesaid, was in the employ of the said Hammerquist, as a carpenter in and upon the said building of said defendant, and was then and there engaged in nailing the joist and boards on said building, and while so engaged and employed, he, the said plaintiff, was struck with great force on the hands by a certain wheel then and there carelessly, negligently and improperly run and moved on the rail aforesaid by the said defendant, its servants, agents and employees, without any warning or notice to the said plaintiff and while he, the said plaintiff, was exercising due and proper care; by means whereof the hand of said plaintiff then and there became and was greatly hurt, cut, wounded and bruised and so remained for a long space of time, to wit, from thence hitherto, during all which time said plaintiff thereby suffered and underwent great pain and still suffers and undergoes great pain of mind and body, and said plaintiff was thereby hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be performed and transacted, and was by means of the premises forced and obliged and did pay, lay out and expend divers large sums of money endeavoring to be cured of his said injuries, to wit, at the time and place aforesaid.

Wherefore and by means of the premises, the said plaintiff says that by reason of the said wrongful acts, omissions and negligent conduct of said defendant its servants and agents, he, the said plaintiff, is injured and has sustained damage in the sum of nineteen hundred and ninety-nine



dollars; and, therefore, he brings his suit, etc.

And the said defendant, The Ransome Concrete Machinery Company, by Collins and Corbin, its attorneys, comes and defends the wrong and injury, when, etc., and says that it is not guilty of the said supposed trespasses above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it. And  
10 of this the said defendant puts itself upon the country, etc.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Jersey City in and for the County of Hudson, on the third Tuesday of September, in the year of our Lord, one thousand nine hundred and six, by whom, etc., and the same day is given to the parties afore-  
20 said, there, etc.

And now at this day, to wit, the tenth day of October A. D., nineteen hundred and six, before our said Supreme Court at Trenton, comes the said parties by their attorneys aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:—

Afterwards, to wit, on the first day of October, A. D. nineteen hundred and six, at a Circuit Court held at Jersey City, in and for the County  
30 of Hudson before his Honor, J. Franklin Fort, one of the Justices of the Supreme Court of the State of New Jersey, according to the form of the statute in such case made and provided, comes as well the within named plaintiff as the within named defendant, and the jurors of the jury being summoned also come, who, to speak the truth of the matters within contained, were tried and sworn, and the evidence on behalf of the plaintiff having been given and counsel on be-  
40 half of the defendant having moved the Court for



a non-suit, and it appearing to the court that said motion should be granted, the court thereupon ordered that the plaintiff be non-suited; therefore, etc.

Therefore it is considered that the said Frederick Ball take nothing by his said writ and that the said The Ransome Concrete Machinery Company do go thereof without day, &c. And it is further considered by the Court that the said The Ransome Concrete Machinery Company do<sup>10</sup> recover against the said Frederick Ball the sum of twenty-five dollars and eighty cents, for its costs and charges by it about its defense in this behalf laid out and expended by the Court here adjudged to the said The Ransome Concrete Machinery Company and with its assent according to the form of the statute in such cases made and provided and that the said The Ransome Concrete Machinery Company have execution<sup>20</sup> thereof, etc.

Judgment signed the tenth day of October, A. D., nineteen hundred and six.

WM. S. GUMMERE,

C. J.

I, WILLIAM RIKER, Jr., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.<sup>30</sup>

In testimony whereof I have set my hand and seal of said Court at  
(L. S.) Trenton, this twentieth day of November, A. D., nineteen hundred and six.

WM. RIKER, Jr.,

Clerk.



NEW JERSEY SUPREME COURT.  
HUDSON CIRCUIT.

10 \_\_\_\_\_ )  
FREDERICK BALL, )  
Plaintiff, )  
—vs.— ) Before:  
THE RANSOME CONCRETE ) HON. J. FRANK-  
MACHINERY COMPANY, ) LIN FORT,  
Defendant. ) Justice.  
\_\_\_\_\_ ) and a Jury.

20 JERSEY CITY, N. J., October 1, 1906.

APPEARANCES:

HERBERT CLARK GILSON, ESQ.,  
For the Plaintiff.

MESSRS. COLLINS & CORBIN,  
By G. S. Hobart, Esq.,  
For the Defendant.

(A Jury being empanelled and found satisfac-  
30 tory, they were sworn.)  
(Mr. Gilson opens for the Plaintiff.)

FREDERICK BALL, sworn as a witness on  
behalf of the Plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Gilson:

Q. You are the plaintiff in this case? You  
are the person suing the defendant company, in  
this case? A. Yes sir.

40 Q. On February 19th last, for whom did you



work? A. For Hammercrust.

Q. What is your trade? A. Carpenter.

Q. Where were you working? A. I was working at Ransome's.

Q. That is the defendant's building? A. Yes, sir.

Q. Where is that? A. At Tenth and Monmouth streets.

Q. What were you engaged in doing? A. In nailing in joists. 10

Q. What kind of a building is that, what is it used for? A. For the purpose of hoisting and moving, storage, a kind of a storage building for the boilers for the concrete machines.

Q. What was the condition of the building, so far as the work had progressed was concerned?

A. The framing was up, and the roof was on.

Q. And the studding or siding? A. The siding and studding was being put up.

Q. Inside of the building what was there in 20 the way of apparatus for moving these machines? Just describe that to the jury? A. It was about eighteen inches, I should judge, on the side, was three by eight, and there was a rail on the top of this stud, a little iron rail on which the wheel slid.

Q. About how large was that rail? A. That rail was about two inches, I should think.

Q. Two inches wide? A. Yes, sir.

Q. About how high from the girder? A. It 30 was right on to it.

Q. About how high from the piece, the one that it was nailed to. A. It was nailed right to the wood, that was all, one plank.

Q. How high above that wood did it stick up? A. About three inches.

Q. How far from the ceiling or roof of the building was this rail? A. I should judge about a foot and a half or two feet.

Q. What was the height of the building, ap-40



proximately? A. About twenty feet or twenty-five feet, I should judge.

Q. What part of the building were you engaged in nailing the joists on on the nineteenth of February? A. I was on the east end, and the boss told me to go from the east end to nail on the joists, and I was not there but three minutes, when, just as I was ready to nail, and this happened. That is all I know.

10 Q. How were you standing when this accident happened? A. I was standing like this (indicating). I had to hold myself on that rail, so as not to slip, or anything, that was the only thing for me to hold to, because I had to nail right above.

Q. Which hand were you nailing with? A. I was nailing with my right hand, that is the hand I had the hammer in.

Q. And you got hold of the rail with your left hand? A. Yes, sir; I got hold of the rail with  
20 my left hand.

Q. Just tell the jury what happened as you were doing that work in that position? A. As I wanted to nail, just as I was ready to nail, the man in under me—we had pieces of joists about seven feet or eight feet, where a big window was below, and I was to nail it on top and he was to nail it on the bottom, and he happened to see this, it was too late then, it was right on top of me, he says: "Fred, look out." That is all I could hear,  
30 and the minute I heard that I dropped my hammer, and as I dropped my hammer in between the two wheels, one passed, and the other one took my finger off.

Q. Who moved that apparatus, do you know? A. I don't know who moved it. The minute I seen that, I held my hand like that (indicating) and went on from there and went up to the hospital.

Q. Was any warning given to you before this  
40 other man called out? A. No, sir.



Q. Who is the other man you speak of? A. Paddy Fagan.

Q. What was he engaged in doing; what was his work? A. His work is carpenter.

Q. By whom is he employed, do you know? A. He was at that time employed by Mr. Hammercris.

Q. Was there anyone else working around in that same place with you at that time? A. Yes, there were seven or eight of us. 10

Q. Were they all carpenters? A. They were all carpenters.

Q. Were they up there near the roof? A. Yes, sir, they were all around the building; there was about four on the same side where I was.

Q. Did you notice some Pollocks on the floor of the building? A. I have seen them pick up old iron.

Q. By whom were they employed, do you know? A. They were employed by Ransome. 20

Q. Did you notice whether they were the ones who moved this machine, or apparatus? Or didn't you notice? A. Not that morning. Not the nineteenth.

Q. Was it a light day? A. Yes, sir.

Q. If they had looked, if anybody on the floor of the building had looked up in that direction, could they have seen you and your hand in that position? A. To be sure, they could.

Q. There was not any difficulty on account of 30 the lack of light? A. No, not for them, but for me there was.

Q. How much did you receive from Mr. Hammercris, how much every day, what were your daily wages? A. I hired to him for \$2.75.

Q. What time of the day was this? A. This was on February nineteenth, about eleven o'clock. I went to work that Saturday before, at eleven o'clock, the seventeenth.

Q. You went to work on the seventeenth? A. 40



Yes, sir.

Q. That was Saturday, and when did this happen? A. This happened on the nineteenth.

Q. About what time of the day? A. About half past ten in the morning.

Q. Where were you injured? Where were you hurt? Just tell the jury how many fingers, and what it did? A. I was hurt right in this finger, these fingers (showing the first and second fingers). And I had a part of this finger taken off and sewed up.

Q. After the accident, where did you go? A. I went right to the hospital, St. Francis' Hospital.

Q. What was done to your finger there? A. The first thing they done, they gave me something to drink, and then they sent in to the Doctor, and the Doctor tied it, and then they took me upstairs, and then they started, whatever was done, they started to take it off, and I could not stand it, and then they gave me another drink, and I had to lay down, that is all I remember, and when I woke up out of that, I saw that my finger was all tied up and bandaged up.

Q. That was how long after the accident, immediately afterward? A. No, not immediately. It was half past twelve when I left the hospital, and I came up and went home for my dinner.

Q. Did you go to the hospital since the accident happened? A. Yes, sir.

Q. Did you go back to the hospital after that? A. Not the same day, I did not.

Q. When. A. The next morning, they told me to come, right away.

Q. How many times did you go back to the hospital for that treatment? A. Off and on, I went up to the first of May.

Q. About how many times a week? A. iFirst I went as high as every day, and then every other day, and then I let it go for the third day, so



that would give the pus a chance to work, that is what the doctors told me to do.

Q. Did the doctors cut your finger after that first day when they performed that operation? Did they perform another operation? A. On the tenth day.

Q. What did they do then? A. The tenth day they lanced it. The ninth day, you know, it was like this (indicating). Swollen.

Q. It was swollen up? It was all swollen up. 10

Q. What did they take out, if anything? A. A lot of pus.

Q. Did they cut your hand or your finger after that tenth day? A. After the tenth day they opened it, after the lancing part, and they took out one sliver in along here, they opened her again and took out a piece of bone in a shape like that (indicating).

Q. A little piece of bone? A. A little piece of bone; they cut it out of here. 20

Q. And after that did the doctors cut your finger or hand at all? A. No, sir.

Q. After the first of May, did you have any medical treatment, any doctors attend you for that injury? A. I had Doctor Ray, he took another piece of pus out.

Q. Where was he? A. Out in Hicksville, Long Island; I went out to see my people.

Q. You went out there about when? A. That was about the seventeenth— 30

Q. Was it around the first of May? A. The fifth of May I had another piece of pus taken out, Dr. Ray took it out then.

Q. Were the bandages taken off by the doctors in the hospital when you left on or about the fifth of May? A. I never took the bandages off until about the middle of June, I had to keep it tied up.

Q. And Doctor Ray took them off? A. Yes, sir.

Q. What is the condition of that finger now, 40



that second finger, where the top was cut off? A. I find it is stiff all in the joint here.

Q. Can you close your hand, double your hand up? A. No, sir. Only like that (indicating).

Q. Can you do it any more than that? A. No, sir, it pains right through here.

Q. Did you ever have any pain in since, do you ever have any pain in either that stump of the first finger or the end of the second finger?

10 A. Yes, sir, on the change of the weather.

Q. What about when you touch things? A. I cannot touch anything, the minute this touches there it is.

Q. Have you tried to do any work, have you worked since the accident? A. Yes, sir, I have tried to work.

Q. How many days? A. I worked about two days and a half.

Q. Why didn't you work right along longer?  
20 A. Because I could not work at my work, what I wanted to do.

Q. Why? A. Because it would pain me; I was all the time saving my hand, and a man would not want to work like that.

Q. What was the condition of the wheel and the track, as far as cleanliness was concerned, was it dirty or clean? A. Well, like any machinery, it is rusty and oily, of course.

Q. When you went to the hospital, did you notice any rust or grease on your fingers. A. Right  
30 along here, I seen it (indicating).

Q. Where the wheels hit it? A. Yes, sir.

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CROSS EXAMINATION by Mr. Hobart:

Q. What kind of work have you tried to do since the accident? A. I tried teaming.

40 Q. Driving horses, you mean? A. Yes, sir.



Q. How long did you keep that up? A. Just for one day.

Q. What else have you done? A. And I tried to pitch hay. I could not do that.

Q. Where did you do that? A. On Long Island, Hicksville.

Q. How long did you try that? A. I tried it for a half a day.

Q. And when? A. That was in July.

Q. Of this year? A. Yes, sir. 10

Q. What else have you tried? A. I tried farming, digging up potatoes for my father, I could not get along with them; I cannot use but one hand.

Q. How long did you keep that up? A. I kept that up for a few days.

Q. How many days? A. Three or four.

Q. What else have you tried? A. I have not done anything.

Q. What else have you tried? A. That is all. 20

Q. When did you last have any treatment by a doctor? A. The last time.

Q. Yes? A. That was the first to the middle of June.

Q. Who was the doctor who treated you then? A. Dr. Ray.

Q. What treatment did he give you then? A. He told me to keep—he says: “Now, you take that off, and when you get to the house, get hot water and get this scab off, and let that have fresh 30 air; there is not any pus any more, and it will heal now.”

Q. Well, did you take it off? A. Yes, sir.

Q. That is all he told you? A. That is all.

Q. He did not say anything to you about using the finger, or manipulating it? A. Well, he says: “Keep it in motion as much as you can.”

Q. Have you done that? A. I have.

Q. Show me, on the finger on the right hand, just where the wound was, in the first place? A. 40



Right in here. (Showing).

Q. Just below the first joint? A. It was hit there (indicating). It rolled right over like this.

Q. Where was the wound on the second finger?

A. Right in here (indicating).

Q. Right over the top? A. Right there, and it was off this way.

Q. It cut a little piece off the top. A. Yes, sir.

Q. That seems to look all right now, doesn't it? It is all right so far as that top is concerned?

A. So far as that is concerned, but it is tender like, so that I dasn't touch anything.

Q. The nail is all right? A. Yes, the nail grewed in, the root of the nail was not hurt.

Q. That finger is a little stiff now? A. Yes, sir; it is stiff in the joint along here. I can only shut it down like that.

Q. It is a little stiff in the first joint, is it?

A. Yes, sir.

20 Q. So that you cannot get it together, shut when you close your hand? A. I cannot get it shut (indicating). That is as much as I can do.

Q. Do you remember on what day of the week this accident happened? A. It was on Monday.

Q. About ten o'clock in the morning? A. Yes, sir.

Q. At what time did you start in to work that morning? A. At eight o'clock.

Q. You had been working there before, had you not? A. Yes, sir.

Q. According to the records I have here, you worked two days before that day, is that right?

A. No, sir.

Q. That is not right. A. No, sir. I went there on Saturday afternoon, that was on the seventeenth, and on the nineteenth I got hurt.

Q. How much time did you put in on the Saturday afternoon before? A. I went to work at one o'clock.

40 Q. How much time did you put in? A. I put



in four hours.

Q. Are you quite sure you had not done any work for that week, the week ending February seventeenth? A. I am quite sure of it, yes, sir.

Q. Do you remember how much you were paid for that week? A. Yes, sir.

Q. How much? A. Mr. Hammercris<sup>t</sup> paid me up for my time that I worked that afternoon, and up to ten o'clock, that was two dollars.

Q. That is all you got? A. That is all he <sup>10</sup> gave me.

Q. That is all who gave you. A. Mr. Hammercris<sup>t</sup>.

Q. Were you paid for any of the work that you did during the week beginning February nineteenth and ending February twenty-fourth? A. He told me—

Q. No; answer the question? A. No; I was not paid that Saturday.

Q. I am not speaking of Saturday, but the <sup>20</sup> Monday when you were hurt? A. On Monday afternoon he came and paid me.

Q. How much? A. He paid me two dollars.

Q. For how long time? A. For that much time.

Q. From eight o'clock to ten o'clock that morning? A. Yes, sir.

Q. How much were you paid for your work on the preceding Saturday? A. He ain't paid me any for it. 30

Q. You have not been paid yet for Saturday? A. No, sir.

Q. How is that? A. That is what I don't know.

Q. Will you tell me, about how far above the ground this scaffold was on which you were standing? A. Ten feet.

Q. That is, your feet were about ten feet above the ground as you stood on the scaffold, is that right? A. Yes, sir. 40



Q. You are about how tall? A. I had no scaffold where I was.

Q. I say, how tall are you? A. I am five feet, six.

A. And how old are you? A. I am thirty-six.

Q. Now, as I understand, you were working on a joist? A. Yes, sir.

Q. Had you put in any other joists like that before? A. Not that morning I had not.

10 Q. When had you? A. I put joists across ways to nail the sheet iron to.

Q. That same morning? A. Yes, sir.

Q. What kind of work did you do on Saturday afternoon? A. The same.

Q. And you had to be on a scaffold both times? A. Yes, sir.

Q. All the work you did there, you were on a scaffold, is that right? A. Not the whole, no, sir; because there is one part it is an old building, and Saturday afternoon we were on the roof  
20 on the low part.

Q. This was not the first time you had been on the scaffold, was it? A. No, sir.

Q. You used to live right near this building, didn't you? A. Yes, sir.

Q. You lived there for how long before the accident? A. I lived there four or five months.

Q. And you were there while they were putting the building up, before you started to work?

30 A. Yes, sir.

Q. This crane that you have spoken of runs on a little railroad track, don't it? A. Yes, sir.

Q. How high is the track above the beam on which it rests? A. It is not any more than three inches.

Q. How wide is the beam? A. The beam was from three to four inches.

Q. So that there was a space between the track and the edge of the beam, wasn't there? A.

40 The rail was right in the centre of this beam.



Q. That left a space on each side of the rail, didn't it? A. The rail was pretty near the full of the beam, if you were to place your hand on that beam, you had to place it right on top of that rail to hold yourself, you could not hold yourself no other way on there.

Q. How wide is the rail? A. Two inches.

Q. How wide is the beam? A. The beam was no more than three inches, or four.

Q. That would leave a space on either side, 10 wouldn't it? A. I did not see no space there.

Q. Was not the rail in the middle of the beam?

A. The rail was right in the centre.

Q. What is the name of this man who told you to look out? A. Paddy Fagan.

Q. Is he here? A. Yes, sir.

Q. I wish you would tell me again, just what you were doing when this crane came along? A. I was nailing the joist.

Q. You had hold of the joist, did you? A. 20 Yes, sir.

Q. With one hand? A. We had it placed up like this (indicating). And I was to drive the nail.

Q. Were you holding the joist in place? A. No, sir; the joist we had shoved in the place, and I was to drive the nail, and I had to hold myself like this, and I was standing on the joist, was cross ways, so that I could reach.

Q. You did not have to hold the piece of wood 30 in place while you were driving the nail? A. No, sir, I had to hold myself, I did not have to hold the wood, because the man in under me was holding the wood.

Q. The man in under you was holding the wood? A. Yes, sir.

Q. So that all you had to do was to drive the nail in it? A. Yes, sir.

Q. How high above the scaffold was the place where you were about to drive the nail? A. 40



guess it was about ten feet. More.

Q. You don't mean you were going to reach up ten feet about? A. As I say, I had to step off the scaffold to nail that and I had to hold myself on to this rail.

Q. Where did you step? A. I got off the scaffold on a piece where the window was set on, and I stood on that and held myself on the left hand on the rail.

10 Q. How high up did you step on that piece?

A. About three feet.

Q. How far in from the side of the room was this place where you were about to drive in the nail? Was it right on the side, or inside, or where? A. Right on the long side of the frame, in between the frame.

Q. How high was the sheathing on the side of the room? A. I think it was from six to seven feet, if it was not more. I did not have to put any  
20 on, I was putting in joists.

Q. Is that six or seven feet above the scaffolding? A. The scaffold was built for that purpose, so they could put the sheathing on.

Q. Was the sheathing above or below the scaffold? Don't you understand what I mean?

A. No, sir.

Q. How far had they gone with the work on the sheathing? Had they built up higher than the scaffolding or below it? A. No, sir, they had  
30 just the bottom, the bottom was sheathed up all the way there, and they were coming on this way, with more.

Q. So that above the height of the scaffold was frame work then, is that right? A. Yes, sir.

Q. And the beam on which this little rail ran, that was not covered up or anything like that, was it? A. The top of the roof was on it, and that was no further than that (indicating). Just enough for the walls, and I was nailing right in  
40 where the roof was, I was to fasten my joist.



Q. The rest of it was all open, wasn't it? A. No, sir; there was a house in between.

Q. Between the scaffold and the roof was not the space all open, except for the frame work?

A. Under me, it was.

Q. From the scaffold up to the top of the roof, was there any sheathing? A. There was not any sheathing, but there was a house no further than from here to where I was, putting in the window like, and there was a brick building, and there 10 was another building with a roof on, finished in the back.

Q. Could you see this track from the scaffold where you were standing? A. No, sir.

Q. Why not? A. Because I was looking at my work, I was not looking at their track.

Q. If you had looked at the bottom of the beam you would have seen it, wouldn't you? A. How could I look at what those people were doing, if I was doing my work? 20

Q. If you had looked at the bottom of the beam from the scaffold, couldn't you see it? A. I know that the machine was back there, and I knew that everything was safe where I was.

Q. You knew the machine was there, didn't you? A. Yes, that it was in between the building, but was not moving.

Q. It was standing still? A. Yes, sir.

Q. Did you see it? A. I knew it was there.

Q. How did you know that? A. Because I 30 knew it was there, I seen them when they put it up.

Q. You saw them erecting it and working it, I suppose? A. I seen them working it after they had put it up.

Q. When did you see them working it? A. That was a week before I went to work there.

Q. You saw it from the place where you were living? A. Yes, sir; where I was living.

Q. You would go by it every day, wouldn't 40



you, pretty near? A. Yes.

Q. And they worked it every day, pretty near, didn't they? A. No, sir.

Q. Quite often? A. No, sir.

Q. How often? A. Because they had nothing there to work it with at that time.

Q. How many times did you see it working?

A. I seen it that Saturday afternoon, they were running it through, once, I think they were trying it, from one end to the other.

Q. That is, while you were working there? A. No, sir.

Q. I thought you worked Saturday afternoon?

A. I say I was not working while that was going on. I was working there, yes; but I was not not working at that building, I never was in there until I went to work there.

Q. Saturday afternoon you saw this crane moved back and forth? A. Yes, sir.

20 Q. On the rails? A. Yes, sir.

Q. From one end of the building to the other? A. Yes, sir.

Q. Your hand was cut by the second wheel, was it? A. The first wheel passed.

Q. There were two wheels on each side of the crane, were there not? A. Yes, sir.

Q. And about how wide was the crane? A. About twenty feet.

Q. The entire width of the building, wasn't it? 30 A. Yes, it was the width of the building.

Q. Twenty or twenty-five feet? A. About that, yes, sir.

Q. How high were these wheels? A. I should judge from twelve inches to fourteen inches.

Q. How much were you paid while you were working there? A. Two dollars is all I was paid.

Q. I mean the rate? A. \$2.75 a day, I hired to him for.



## RE-DIRECT EXAMINATION by Mr. Gilson:

Q. Were you standing on the scaffold when you were nailing this particular joist? Were you on the scaffold, or were you on the cross joint, or where? A. I had to stand on the joist, to do my work, I could not reach it, and I was told to go there.

Q. Was there any other way that you could have nailed that joist, without standing in the<sup>10</sup> position that you were in? A. No, sir.

Q. Was there any other way that you could support yourself except the way you have described? A. No, sir.

Q. How long were you there before the wheel came along? A. I was not there, I don't think I was there three minutes, about three minutes.

Q. About three minutes? A. Yes, sir; because it only takes five or six minutes to nail in a<sup>20</sup> joist, the way I worked.

Q. It was less than three minutes? A. It was not less than three minutes I had been there.

Q. How far had you progressed in nailing that joist, had you put the nail partly in? A. Yes, sir.

Q. How long before the wheel actually hit your hand was it that Fagan called "Look out"? A. Everything happened at the same time.

Q. Immediately? A. Immediately, the minute he says: "Fred look out," I dropped. I knew<sup>30</sup> that something was wrong then, and as luck was, it was luck or else I would not have a finger on this hand to-day, because I dropped the hammer in between the wheels and it caught the wheel, the wheel caught the hammer.

Q. Is there anything noticeable on your second finger? Just show it to the jury. The end is cut right off, isn't it? A. Yes, sir; it was right off here.



## RE-CROSS EXAMINATION by Mr. Hobart:

Q. Where was Fagan standing? A. In under me, he was holding the end.

Q. He was on the scaffold, was he? A. Yes, sir.

Q. I did not quite understand you, when you said that he called to you, and you dropped, what did you mean by that? A. When he seen it, of  
10 course, he hollered and I dropped my hammer, instead of going on nailing, and I happened to drop it right in betwen the two wheels and at the same time it hit my finger and caught the hammer.

Q. You dropped the hammer? A. Certainly.

Q. What did you mean to say when you said you dropped, did you mean that you dropped down? A. I dropped sure, I dropped, and Mr. Fagan, he caught me

20 Q. Where did you drop? A. Down on the scaffold, in his arms.

Q. You mean you dropped after it caught your finger, is that what you mean? A. Yes, it struck me and the hammer was cut off with the handle.

Q. Where was this joist, in what position, just show us in what position your body was as you were nailing that joist just before the accident? A. I was just in that position (indicating). Was just ready to nail. This was the rail, the track, say  
30 this was where the wheel came along, and I was nailing right up here, there is where I had the joist.

Q. You were standing straight up on the window, as you are now? A. Yes, I was standing like this, just like this was the piece of joist, three by two.

Q. One foot on the joist? A. Both, and I had to hald myself with this hand after I was ready to nail.



BY MR. GILSON:

Q. Were you facing the building or were you facing the joist? A. I was facing the joist.

Q. Between the two joists, is that right? A. Yes, sir; I was looking up at the joist, just like this.

Q. You stood in that position, and this rail which you have indicated there on the hand rail, was in front of you, wasn't it? A. The railing 10 was like this.

Q. The rail in front of you? A. Certainly, I was right under it.

BY THE COURT:

Q. You were under it? A. The roof came over it; they had the roof on.

Q. Was your eye above or below the rail you had your hand on? A. I had my hand on the 20 top rail.

Q. Were your eyes parallel with the rail or lower than the rail on which you had your hand? A. This was a good deal lower, here is where I had to hold myself and reach.

Q. Then you were above where your hand was, your head was higher than your hand? A. Yes, just a little so I could reach, I could hardly reach it.

Q. You mean that your head was higher than 30 this rail that your finger was cut off on, and the hand which you had on it? Your head was higher than them? A. Yes, sir.

Q. How much higher? A. I could not say.

BY MR. HOBART:

Q. Can you give us some idea? A. I know I could just hold myself and look at what I was doing, that is all.



Q. Were your eyes as much as a board above the rail? A. No., it was not that.

Q. How much? A. I don't remember. I know I could barely see.

BY MR. GILSON:

Q. How far from the roof was this rail? A. That was no farther than that sixteen-inch joist,  
10 low enough so that it would not come in contact with the roof.

Q. How much would you say in inches? A. I don't think that it was eighteen inches. It was not that.

Q. Then how high above your head was the place where you were nailing this joist. A. Right in under that right in under the roof.

Q. Did your head touch the place where you were nailing the joist? A. Well, pretty near it.  
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JOHN J. JONES, sworn as a witness on behalf of the Plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Gilson:

Q. Where do you live? A. No. 348 Eighth Street, Jersey City.

30 Q. For whom do you work? A. For Mr. Hammercris.

Q. How long have you worked for him? A. This last time?

Q. Well, altogether? A. Well, all together about two years and a half, previous.

Q. What is his business? A. Carpenter.

Q. He is in business for himself? A. Yes, sir.

Q. Have you worked on different jobs for him?

A. Yes, sir.

40 Q. During the month of February last were



you working for Mr. Hammercrist? A. Yes, sir.

Q. Where? A. On Ransome's Concrete business, on Monmouth Street, and Tenth, building facing Monmouth Street.

Q. Just describe that building and the apparatus in it? A. Well, the building is about a hundred feet deep and twenty-five feet wide, as near as I can judge, about twenty-two feet high from the ground to the roof, the front may be a little bit higher. 10

Q. Inside is that all one room, or divided into several? A. All in one, after the whole hundred feet were tore down, then it is all in one now at the present time; when I left the thing at that time it was not.

Q. At that time, what was its condition? A. There was a little shed, about seventy feet from the front, but they tore that down. I don't know what they kept there, a kind of rubbish, you know, something. 20

Q. What was that building used for? A. Storage.

Q. On February nineteenth, do you remember how far the building had been erected? A. Yes, sir; the front was on, the side was partly completed, the joists were almost up, we were putting them up on that day.

Q. Do you remember the accident to the plaintiff? A. Yes, sir.

Q. Where were you? A. I was about thirteen 30 to fifteen feet away from him, we were fourteen of us, I will say I was fourteen feet away from him, and we divided it up.

Q. On what part of the building? A. On the Tenth Street side.

Q. That is toward the rear? A. That is northeast.

Q. That is toward the rear of the building? A. That is toward the railroad, toward the Erie Railroad. 40



Q. Toward the back of the building? A. Well if you call the back of the building that way, you know it runs toward Monmouth and that is on the side.

Q. You were on the same side as Ball? A. I was on the same side as Ball; yes, sir.

Q. Were you on this scaffold? A. Yes, sir.

Q. What were you doing? A. I was nailing in the joists, and also putting on the tin.

10 Q. Just describe to the jury what happened to Ball? A. Well, as near as I can understand—

MR. HOBART: I object.

THE COURT: Just what you saw?

THE WITNESS: Well, Mr. Ball was nailing the joist at the window, the frame of the window, the same as that, it was, as near as I can judge, 20 that joist, about six or eight feet long, nailing it in, he was standing on the scaffold nailing it up, the same as I or any other man on the scaffold would do, so the first thing I heard him say, "Oh, my fingers." And he stepped down, or slipped down, or slid down, and away, that is as far as I know.

Q. Did you see the wheel hit him? A. No, sir; I did not see the wheel hit him.

Q. Which way did the wheel come from, did 30 you notice that afterwards? A. It came from Monmouth Street, that is, from the north to the east, the northeast.

Q. It was on the inside of the building? A. It was on the inside of the building, as the track was.

Q. And you and the others were on the outside? A. We were on the outside; yes, sir.

Q. Did you notice how far from the roof this rail on which the wheel ran, was? A. Yes, sir; 40 about four feet, three and a half to four feet from



the rail to the roof, but that trolley is about a foot high, I should judge, with the motor, you know, but it is three and a half feet to four feet from the rail to the roof.

Q. Did you notice how Ball was supporting himself while he was doing that work? A. I went over there to get a sheet of tin a little before, and a little piece of joist, and he was just getting up there to get into position to nail that right straight up, that is as far as I saw, he was in the 10 right position.

Q. That was just before the accident happened? A. Yes, sir; that was just before the accident.

Q. And that was the right position? A. That was the right position.

Q. Was that the position you would have been in if you were doing that? A. I would, sir; yes, sir.

Q. How long have you been a carpenter? A. 20 Oh, I have been working at it on and off for the last nineteen years. I have taken other jobs.

Q. Did you hear anybody call out any warning? A. No, sir; there was nobody warning whatever.

Q. Do you know who moved it? A. Three men there, down below.

Q. By whom were they employed, do you know. A. I suppose they must have been Ransome. 30

Q. They were not carpenters were they? A. No, sir; they were laborers.

Q. Did you know all the employes of Hammercrust at that time on that job? A. Well, there were so many different names I could not mention them all.

Q. You knew them by sight, did you? A. I knew them by sight; yes, sir.

Q. They were not any of these men who moved this crane, were they? A. No, sir; not a one, 40



not a person.

Q. Did the machine make any noise as it came along? A. Not as I ever took particular notice; no, sir.

Q. Did you hear it? A. No, sir; I could not hear it.

Q. How far away from the rail were you? A. We were right outside, on the scaffold.

Q. Right up against it, weren't you? A. No, 10 I was not against it.

Q. I mean, how far from it? A. About two feet.

Q. How many days had the carpenters been working up there over the rail near the roof? A. We went up there, on that side, that morning and Saturday afternoon.

Q. All that morning? A. Yes, sir; all that morning up to ten or half past ten, when that happened.

20 Q. What did you do Saturday? A. We were there part of the time.

Q. What time did you start that mornig? A. At eight o'clock.

Q. Then you were working there in that position for about two hours, is that right? A. Yes, sir; right along that line.

Q. How did they move this machine, from the floor or up above? A. There is not any floor where this thing happened, it was dirt at that 30 time. There was a floor way back.

Q. From the ground? A. From the ground, an endless chain, they pulled it that way (indicating), backward and forward, and then there was another pulley on that to hoist up this other stuff.

Q. Was it light in there? A. It was light in there, yes, sir; as light as it is here.

Q. And could these men who moved the machine have seen Ball or his hand if they had looked up in that direction? A. I should think so;

40 yes, sir.



## CROSS EXAMINATION by Mr. Hobart:

Q. I suppose Ball could have seen these men if he had looked down, couldn't he? A. I don't know, the light came from the building, he probably could have, but the light came in the building on that side and it probably might have shut them off. I could not say.

Q. There was nothing to interfere anywhere on the side of the building, or anything of that sort? 10

A. No, sir.

Q. How long had Ball been working there on the scaffold? A. He came on there on Saturday afternoon, right after dinner and worked until six o'clock and then he worked until this thing happened Monday about half past ten or ten o'clock, a quarter after ten.

Q. How long had you been working there before this accident? A. I think I came there on Monday afternoon of the week previous. 20

Q. The week previous? A. I am not positive whether it was Monday or Tuesday, I am not certain which it was, not over a week at the most.

Q. This crane came from the direction of Monmouth Street? A. Yes, sir.

Q. The building is located at the corner of Monmouth and Tenth streets? A. No, sir; not on the corner, next door.

Q. This building where the crane is, that runs through to Monmouth Street, doesn't it? A. Yes, 30 sir; from Monmouth towards Coles.

Q. Monmouth Street is on the west side of the building? A. This is not west, is it? Is this front west here? There is west, isn't it? Isn't that west and isn't this north?

Q. Well, I am not sure? Well, then, I cannot hold that question.

Q. The front of the building faces toward the Erie Railroad? A. No, sir; it faces Monmouth Street, the front of the building. 40



Q. Is not the main entrance toward the railroad tracks? A. The main entrance of the machine shop, yes, sir; but that is not the building.

Q. And then there was an entrance on Monmouth Street? A. Yes, sir.

Q. And this crane started from Monmouth Street in what direction? A. Towards the machine shop, towards, we will say, from here to New York.

10 Q. Then, as you stood, facing this side of the building, where you were working, the machine would start from here on your right hand side, wouldn't it? A. The machine would start?

Q. And go towards the left? A. The machine would start the same as that way, and go right this way, go towards Monmouth Street, no, from Monmouth Street towards Coles.

#### BY THE COURT:

20

Q. And back again? A. Yes, they could pull it that way the whole length of the building.

Q. How long had they been doing that? A. They had been doing that the whole week I was there, that is, not steady, a couple of times.

Q. Well, off and on? A. Yes, sir.

#### BY MR. HOBART:

30 Q. That is on Saturday afternoon, I suppose it did not work? A. I think it ran once on Saturday afternoon, to my knowledge.

Q. Were you on the scaffold? A. Yes, sir.

Q. You were standing, you say, fourteen feet away, you mean fourteen feet from the point where the accident happened? A. Yes, sir.

Q. You were busy with your work, of course? A. I just had come up there to get a studding and a piece of sheet iron.

40 Q. You were listening for the crane to see



whether it was coming? A. No, sir; I was not.

Q. Did you see these three men who were moving it? A. I did before working there, but did not know they were going to work the crane.

Q. Where were you when you saw them? A. I was right on this scaffold, it was all open.

Q. So that you could look down inside of the building? A. Yes, sir.

BY THE COURT:

10

Q. Were you on the same scaffold that this man, who was hurt, the plaintiff, was on? A. The same height, yes sir; they were level.

Q. But another length? A. Another length, yes, sir; we had it all along the building.

Q. How far could you see that track as you looked in there? A. Well—

Q. The crane track? A. Up this way, toward Monmouth Street I could not see very far, 20 only about half way of the building, twenty feet. Of course, I suppose, if I had looked in personally and looked, I might have seen all the way up to the end.

Q. You mean, if you had put your head in under? A. Yes, sir.

BY MR. HOBART:

Q. You said, in answer to Mr. Gilson, that 30 that was the same way you would have done that same work? A. Yes, sir.

Q. Would you put your hand on the rail? A. I don't know. Probably in getting down I might have done that. I don't say that. I say he is in a position to nail.

Q. You would not put your hand on the rail at that time, is that about it? A. Not if I knew about it, no, sir. Not if I stopped to think, nor anybody else.

40



BY MR. GILSON:

Q. You mean now, that you know that the accident has happened? A. No, sir.

Q. Would you before? A. No, sir; I don't think I would, if I knew it was going to happen, but on the impulse of the moment, I might.

Q. How many times, on Friday, would you say that hat ran, after Friday? A. Well, it did not  
10 run at all that morning, not previous to this.

Q. That was the first time? A. That was the first time, yes, sir.

Q. And some days it ran more? A. Some days it ran may be twenty times, up and down, off and on, forward, moving the machinery further up the platform.

Q. How long had that apparatus been arranged up there? A. I could not tell you, only from that week; as I say, I did not work there previous  
20 to that, and I could not tell you how much longer.

Q. Was Ball on the scaffold or standing up over the scaffold on a joist? A. He was on the scaffold and made a step up, which he could have reached with his hand without. A man can nail anyhow at least six feet or six feet and a half.

Q. How fast did this run? A. Just ordinary pulling it along, just the same as you or I would get hold of anything; it could not go very fast, because it is a heavy structure.

30 Q. Was there any brake to it, or any arrangement to stop it? A. No, sir; there was no brake whatever, I took particular notice of that.

Q. Have you noticed other apparatus of this kind in other buildings? A. I have, yes, sir.

Q. Did they have brakes on? A. Well, some of them—

MR. HOBART: Objected to as not within the declaration.



THE COURT: I do not see how that is material here. Because it is not claimed that this accident happened through the fault of any appliance to stop the crane.

MR. GILSON: I might ask the Court to amend if necessary.

THE COURT: If it becomes necessary, you may make the application. 10

BY MR. HOBART:

Q. What did you mean by saying the scaffold was a little bit higher? A. I did not say anything about the scaffold being a little bit higher.

Q. I misunderstood you then? A. I guess you did, yes, sir.

Q. This crane goes just about as fast as a man walks, walking very slowly? A. Well, as fast 20 as those men want to move it. If you want to move a thing very heavy and fast and want to hurry up, you know how generally a laboring man works, do you?

Q. Yes. A. Well, you know they are not hurrying too much. Now, you can judge that for yourself. I cannot say any more.

30

OTTO HAMMERCRIST, sworn as a witness on behalf of the Plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Gilson:

Q. Where do you live? A. No. 362 Sixth Street, Jersey City.

Q. What is your business? A. Builder; carpenter and builder.

Q. And you have a shop and mill there at that 40



address? A. Yes, sir.

Q. How long have you been in that business?

A. Twenty years.

Q. During the month of February last, did you have any arrangement to work on a building for the defendant, the Ransome Concrete Machinery Company? A. I had an arrangement to do some work for them by the day.

Q. You employed Ball? A. I did, sir.

10 Q. Where was that building? Just describe the building, where it was located, and what the situation was? A. There was twenty-five feet on the south side of Tenth Street, or rather there is twenty-five feet from the corner of Tenth and Monmouth, and it runs back a hundred feet.

Q. Describe the inside on February nineteenth, was it one room? A. In what way do you mean?

Q. Was it divided off by partitions into separate rooms, or was it one big room? A. No,  
20 there was one large room.

Q. What was it used for? A. For storage.

Q. By the Ransome Company. A. Yes, sir.

Q. What did the company store there? A. They stored their machinery and different articles, what they were using for the business.

Q. How did they move the machinery from place to place in the building? A. With a portable crane.

Q. Just describe that crane to the jury? A.  
30 May I look at that plan or drawing?

Q. I would rather have you describe it in your own way?

THE COURT: Just tell us how it ran?

A. The building is about twenty-two feet high, and up below the roof, inside of the building, is a beam four by twelve, that beam is properly spiked and bolted fast to the studding; underneath that beam is a spur, brace, to keep the



building from swaying either one way or another, strengthening it. On top of that four by twelve is a rail and there is a trolley runs on top of that, I should judge there is about eighteen inches wheels as runs on top of that rail.

Q. This four by twelve beam that you speak of, was the rail on the four inch side or the on the twelve inch side? A. It was bolted on the flat ways to the studding, four by four.

Q. The studding are four by four? A. The <sup>10</sup> studding is four by four.

Q. And the four by twelve timber you speak of, the rail was on the four inch side of that? A. How is that?

Q. This iron rail you speak of was on top of the four inch side? A. It was on the four inch side, yes, sir.

BY THE COURT:

20

Q. What do you mean by four by four? A. Well, here is a post running up there, four by four, there is another post right there, two by four, and another post run in between them to nail the sheet iron to, it is a piece that covers the structure here, that little short piece we nail the iron on; we call it the header for over the window.

Q. That has nothing to do with the rail, has it? A. Well, the rail passes right by that.

Q. The counsel is only asking about the rail, <sup>30</sup> the timber that the rail is on; he only wants to know about that? A. All right.

BY MR. GILSON:

Q. You say that rail was on this timber, on the four inch side of the timber? A. Yes, sir.

Q. Not on the twelve inch side. A. No. It was spiked and bolted right fast to it.

Q. You did not see this accident to Ball, did <sup>40</sup>



you? A. I did not see it at the moment, at the second.

Q. You were there right afterward? A. I was there when he stood on the scaffold, after it had happened.

Q. Do you know who moved this crane when the accident happened? A. I don't know who moved it.

Q. Did you see any men around on the floor  
10 near it? A. There were men employed by the Ransome Company.

Q. Did your men have anything to do with it at all? A. The crane? No, sir.

Q. Had you spoken to these men about moving that crane, or the foreman? A. No, sir; they had no occasion to move it for me.

Q. Did you tell them not to move it, or to move it at certain times? A. I never asked them to move it.

20 Q. You never asked them to move it; but did you ask them not to move it? A. I never asked them not to move it, either, because I had nothing to do with that part.

THE COURT: Did you ask them either way, to move it or not to move it?

THE WITNESS: No, I did not.

30 Q. Did you tell them not to move it when your men were working there? A. I told them to give them warning if they should move the crane, to give them warning before they moved it.

Q. Did you hear them give a warning to Ball when he was hurt? A. I did not hear it.

Q. Where were you, in what part of the building? A. I was on the outside of the building.

Q. Does that run fast or slow, that crane? A. I could not tell how fast it went at the present  
40 time, but I know that crane could not go over



twenty miles an hour.

Q. When it gets a heavy machine on it gets momentum, and goes pretty fast, doesn't it? A. Well, sometimes if it gets a jerk, it will go ahead a little bit, and again it will stop and move probably where you want, about how you want it.

Q. Did you see the foreman of this gang of men around the floor with them ust before the accident, or was he away? A. I saw him quite often all day long, and once in a while I saw him. 10

Q. Was he there when the accident happened to Ball? A. I could not tell you if he was there or not.

CROSS EXAMINATION by Mr. Hobart:

Q. Did you say anything to your men about looking out for the crane? A. Yes, sir; I did.

Q. What did you say? A. I told them to look out for this and to be careful so they did not get 20 hurt. I often told them that.

Q. Did you tell Mr. Ball anything about it? A. I did, sir; I told them all.

Q. What part of the building were you on when the accident happened? A. I was on the rear part of the building, on the outside.

Q. How far away from the point of the accident? A. Well, I was about, probably, twenty to twenty-five feet away from it.

Q. On the scaffold? A. On the scaffold. 30

Q. Did the scaffold run the entire length of the building? A. Yes, sir.

Q. How long had you been working on this job before this accident happened? A. Well, I presume about two weeks; I don't think I was there any longer than that.

Q. How long had Mr. Ball been working there? A. He started to work on Saturday afternoon, on account we were one man short, who refused to work on Saturday afternoon, and this man took 40



his place, I think it was on the seventeenth.

Q. You did not work Sundays, I suppose? A. No, sir.

Q. Then he worked again on Monday morning, the day he was hurt? A. He worked till about ten o'clock.

Q. You say that crane moved up and down while you wer working there; you saw that move up and down, didn't you? A. Yes, sir; I warn-  
10 ed them all to be careful and look out for themselves.

#### BY THE COURT:

Q. That is, your own men, now you mean? A. Well, both my men and their own men. We all were the company's men. We were all employed by the company.

Q. I mean, these men, you were speaking of.  
20 you employed the plaintiff and the others, you warned them? A. Yes, sir; I always warned them to be careful and look out for themselves, so they were not hurted. I always warned them to build the scaffold strong enough. I have always done that in my life, and the crane, to look out for the crane so they did not get hurted by the crane. I even told Mr. Cullen to tell his men to be careful when they were moving the crane. I told him and I told my own men the same way.

30

#### BY MR. HOBART:

Q. You were doing this work by the day, weren't you- A. Yes, sir.

Q. And your men were paid by the day, weren't they? A. Yes, sir.

Q. You had no written contract? A. No, sir.

Q. Did you furnish any of the materials? A.

No, sir.

40 Q. Did you have any agreement as to the



length of time you should work there? A. No, sir.

Q. You could have been laid off at any time by the boss? A. Yes, sir; at any time, by Mr. Cullen, he told me how many men he wished to have worked that day and working another day, etc., and I done after his directions.

Q. Did Mr. Cullen have anything to do with discharging the men? A. He had, also if he wanted men, etc., he came to me and told me, if <sup>10</sup> he wanted a man discharged he came to me and told me to discharge him, he did not want him, and I done so.

Q. What position did Mr. Cullen have? A. Why, I think he is next to the head man of the concern.

Q. He is manager, isn't he? A. Yes, sir.

Q. Manager of the Ransome Company? A. Yes, sir.

Q. How did it come about that you paid these <sup>20</sup> men? Some of the men have said that they were paid by you? A. Well, they gave me money to pay them with, and arranged with me, I arranged with them to furnish the men for so much a day and myself also.

Q. How many men were furnished by you in that way? A. Well, some days, first when we started I believe there was only two, then we started four, then up to sometimes we had eleven <sup>30</sup> men on.

Q. Why weren't these men paid direct? Did you know of any reason why they were not paid direct by the company? A. Well, the company could not go directly out and get men in a hurry, they could not go out and get all the men they wanted to work, because, where would they go and get them? Unless they came to me? And I took some men off my own work and let them have them.

Q. And you hired them to the Ransome Com- <sup>40</sup>



pany, is that it? A. Yes, sir; they hired them by the day.

Q. That is, the Ransome Company hired them by the day and paid the men through you, is that it? A. They paid the men through me, they gave me the money to pay the men with.

Q. What was the regular pay day of the Ransome Company, do you know? A. The regular pay day is Saturday at twelve o'clock.

10 Q. Was not he pay day of the laborers of the Ransome Company on Wednesday? A. He did not always pay the laborers the same day, but he paid me, I made arrangements with them that my men should get their money every Saturday at twelve o'clock.

Q. Why was that arrangement made, that is what I want to know? A. Because it is the custom among the carpenters that they shall get paid every Saturday afternoon.

20 Q. And do you happen to know whether, as a matter of fact, the other men of the Ransome Company were paid on Wednesday? A. No, I do not know of it.

Q. The understanding was that your men that were on this job should be paid on Saturday? A.

Yes, sir; at noon.

Q. And the Ransome Company gave you the money to pay the men with? A. Yes, sir.

30 BY MR. GILSON:

Q. You made a profit on each man, didn't you? You got more money from the Ransome Company than you paid your men, didn't you? A. Well, if I did not, I would not let them have the men.

Q. You got four dollars a day from Ransome, didn't you, and you paid your men \$2.75 a day?

A. There was no questions asked by the Ransome Company what I was to pay my men. But I was  
40 not to go over four dollars a day.



Q. You did get four dollars a day from the Ransome Company for each man, isn't that so?

A. Yes, sir.

Q. What did you say this manager's name is?

A. Mr. Cullen.

Q. Is he a carpenter. A. I couldn't tell you; I know he is a mechanic.

Q. He did not give your men any orders about how they should do their carpenter work, did he?

A. Oh, yes; he came and got the men off some 10 places and put them to work wherever he wanted them to.

Q. I mean, he did not give them their orders, did he? A. Yes, sir; sometimes he did, he could go and suit himself about that.

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JOSEPH J. BARLOW, sworn as a witness on behalf of the Plaintiff, testifies as follows: 20

DIRECT EXAMINATION by Mr. Gilson:

Q. Where do you live? A. No. 33 Murray Street.

Q. What is your business? A. I am a carpenter.

Q. How long have you been a carpenter? A. About since I was eighteen years old.

Q. How old are you now? A. Forty-eight 30 years old.

Q. Did you work for Mr. Hammercrist? A. I did.

Q. When and where? A. At Monmouth and Tenth.

Q. When was that? A. Last February.

Q. About how long did you work for him? A. About six or seven weeks.

Q. Were you standing anywhere near Ball when he was hurt? A. I was about sixteen feet 40



away from him.

Q. Just tell the Court and Jury what you saw at that time? A. When we commenced to work the crane was right over to Monmouth Street, between the two buildings, because that building is built between the other two buildings; to the north is a brick building, to the south is a frame building. That is where the crane was standing, about sixteen feet away from him, and nobody in the  
10 building at all, neither foreman nor laboring men, nobody; so he was put to nailing posts over the window, and he could not reach that, so he got hold of that rail—

Q. Was he standing on the scaffold? A. He was on the scaffold, and from the scaffold he put his foot on the joist.

Q. Did you hear anybody call out or give any warning or notice that the thing was coming? A.  
No, sir.

20 Q. How far away did it start? A. About sixteen feet from him.

Q. Did it make any noise as it came down? A. No, sir; it did not.

Q. Was Ball standing in a natural position to do that work? Is there any other way he could have nailed that joist? A. No, sir.

Q. Was there any way in which he could support himself except the way in which you saw  
30 him? A. That was right between the window post and the building post, because one post has to come up this way and he could not get hold any other way, he had to hold on that way.

Q. Was there anything else for him to hold on except the rail. A. No, sir; there was nothing then only to get the frame post.

Q. Could he have held on that? A. No. That was out of his way.



## CROSS EXAMINATION by Mr. Hobart:

Q. Were you on the scaffold? A. Yes, sir.

Q. About how far away from Ball? A. About sixteen feet from him.

Q. Did you have hold of any part of the plank or joist that he was working on? A. I was putting the nails in between the posts, to nail the sheet iron to.

Q. Did you have anything to do with the joist 10 Ball was working on? A. No, sir.

Q. You saw this crane coming, did you? A. No, sir; I did not see it before he hollered: "Oh, my fingers."

Q. What were you doings? A. Nailing.

Q. How was the light? A. Oh, there was a splendid light, there was nothing but the roof, and both sides were open, there was only one course of sheathing iron on the bottom.

Q. How far away were you from this track? 20  
A. The track was inside the post, I was outside the post.

Q. Just a foot or two? A. That is only about four inches difference, I was outside, clear of the track and he was with his hand so he nailed that joist, he could do nothing else but hold on.

Q. You could see the track, couldn't you? A. I saw it, yes.

Q. How much of it could you see? A. Where abouts? From where he was working to in front 30 of me?

Q. Yes? A. It was over my head, about four or five inches from one stud to the other, with posts over four inches square.

Q. How much of the track could you see? A. Oh, I saw about five or six feet between the posts.

Q. The posts cut off your view of the rest of it? A. Sir?

Q. Was it the posts that cut off your view of the rest of the track? A. No, sir. 40



Q. You spoke of seeing the track as far as the post? A. Yes, about, between the two posts, I could see the one post and then between the posts and coming up this way, but the track runs alongside of the building, and we could look this way or that way, but if you did not lean over you could not see anything only between the posts.

Q. The posts would be in the way? A. Yes, sir.

10

BY MR. GILSON:

Q. Who moved this crane? A. Three laboring men, I could see them on the chain.

Q. They were not any of Hammercrist's men, were they? A. No, sir.

20 PATRICK FAGAN, sworn as a witness on behalf of the Plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Gilson:

Q. Where do you live? A. No. 362 Sixth avenue at the present time.

Q. Did you work for Mr. Hammercrist in February last? A. Yes, sir.

Q. Were you working on the defendant's  
30 building at Monmouth and Tenth streets? A. Yes, sir.

Q. Do you remember an accident to Frederick Ball? A. Yes, sir.

Q. How far away from him were you at that time? A. About three feet.

Q. Were you helping him? A. Well, I was after cutting a piece for him, he was nailing it in, I was cutting pieces and he was nailing this one in.

Q. Were you on this scaffold? A. I was  
40 standing on the scaffold.



Q. Where was he? A. He was standing on the cross piece that went off the window frame.

Q. Just tell the ury what happened? A. He was putting a head piece over the frame, that was about six feet from where he was standing and from that scaffold where he was standing was about eighteen inches, as far as I can remember.

Q. What was he holding onto? How did he support himself? A. As near as I saw he had his arm around the posts, one of the side posts that went up on each side of the window, and I started to cut another piece for the next window, and I happened to look up while I was cutting the piece, and I seen the trolley coming, and I called to him to look out and he went to step down and somehow or other he had his hand in the track. 10

CROSS EXAMINATION by Mr. Hobart:

Q. How far away were you from the point where the accident happened? A. Not more than three feet. 20

Q. You say you saw this trolley come along? A. I saw this trolley come along.

Q. Where did it start from? A. It started from Monmouth Street towards Coles.

Q. You saw it when it started, did you. A. I saw it when it was just close onto him wherever it came from, from behind the other brick building. 30

Q. How far away from Ball was it when you first saw it? A. Well, it was within eighteen inches of him, I guess, probably.

Q. How fast was it going? A. Then he went to step down, and in stepping, happened to put his hand on the track, and went to step on the scaffold.

Q. He put his hand on the track when he was stepping down, is that it? A. It seemed so, as far as I saw, yes, sir. 40



Q. He did not have his hand on the track before? A. Not before, before he had his hand up nailing, when I spoke he went to step down and stepping down, it was about eighteen inches, stepping down he put his hand there while he was stepping down.

Q. Which hand did he have the hammer in?

A. The left hand, as far as I know.

Q. He was nailing with the left hand? A. He  
10 was driving with his right hand and the nails would have been in the left hand. I don't know how the hammer got around there, the hammer got on the track; I don't know how that was, the hammer kind of dropped out of his hands, as far as I could see when he was stepping down and then he put the other hand on the track, when he was stepping down, got hold of it again when he was stepping down and I helped, of course.

20 BY MR. GILSON:

Q. You were bending over sawing another piece of joist? A. I was looking down to the scaffold, on the joist and just happened to glance up and saw the trolley come up from behind there.

Q. When you just happened to glance up, how far away from his hand was the trolley? A. It was not more than eighteen inches, I guess.

Q. And before he had time to change his po-  
30 sition, it hit him, is that right? A. Yes, sir; that is as far as I saw.

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DR. WARREN J. DUCKETT, sworn as a witness on behalf of the Plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Gilson:

Q. Where do you live? A. No. 932 Summit  
40 Avenue.



THE COURT: Have you put in all the proof you have to offer as to the occurrence of the accident?

MR. GILSON: Yes, sir.

THE COURT: Of course, the doctor knows nothing of the accident?

MR. GILSON: No, sir.

10

THE COURT: How are you going to sustain your case here?

MR. GILSON: If the Court please, in the case of HARDY vs. D. L. & W. R. R. (Counsel reads case).

The situation here, as I see it, is this, the company was using the building before it was completed, it was the duty of the defendant company to use reasonable care, and that reasonable care was to be measured by the extraordinary conditions of using the building in the way that it did while these carpenters were working there, and the same state of facts, practically, in principle, was presented here as in the Hardy case.

THE COURT: In HARMER vs. REED APARTMENT CO., where the defendant was using the building before it was completed, and a man was killed by the elevator, the case went to the jury; but there it was shown that they never moved the elevator without giving a warning to the employees to "Look out above" or "Look out below." But you have not proven in this case that there was any arrangement or custom or understanding that there should be a warning.

MR. GILSON: I have not proved that because 40



I did not think it necessary. The fact is that there was no custom in this HARDY case to give warning, and that is the case I was relying on, and this case I think is almost on all fours with the statement of the evidence in that case. It seems to me it is a question for the jury as to whether he used reasonable care, whether the plaintiff used reasonable and ordinary care in grasping that rail, just as it was in the HARDY case. The Court held  
 10 in the HARDY case that the company was under a higher degree of care.

THE COURT: I think that is quite a different case. The company in that case put the man to work on a railroad track. That is not the situation here. That was a dangerous place, and it is very different when they put a man to work in a dangerous place. This plaintiff knew if he put his hand on that rail, and the crane came along,  
 20 as he knew it was accustomed to do, he would be injured.

MR. GILSON: He knew that, of course, and admits he knew it, on the stand; but, wasn't he entitled to warning before they moved the crane? He was not working for the company, he was a third person; he was but lately put on the premises, and they were using a dangerous instrument. Now, if they were not under the obligation to give  
 30 warning or some other notice before using that crane, when they could have sent the man in this dangerous position, then they were under no legal obligation at all.

THE COURT: I do not care to pass on the question of whether he was a fellow servant of these other men or not. Under the proof, he certainly comes very close to being pro hac vice a fellow servant with the others, if he is not actually  
 40 a fellow servant. But, I think this was a per-



fectly obvious risk. Any man with ordinary prudence must have known that if he put his hand on that rail, and the crane came along, his hand would be cut off; and he knew that it was liable to come along; he had seen it do so. I think the HARDY case is entirely different. I do not see how I can escape the view which I hold in this case.

MR. HOBART: To keep the record straight, I 10  
will make a formal motion for a nonsuit on the  
ground Your Honor has suggested, that it was an  
obvious danger, also that there was no negligence  
on the part of the defendant, that there was con-  
tributory negligence on the part of the plaintiff,  
and that the proof shows that, if there was any  
negligence at all on the part of the employes of  
the defendant company, the three men referred  
to as using the crane, that they were fellow serv-  
ants of the plaintiff. 20

Motion granted. Plaintiff excepts.

Exception allowed and sealed accordingly.

J. FRANKIN FORT (L.S.),  
J. S. C.



NEW JERSEY COURT OF ERRORS AND  
APPEALS.

|    |                                                                                                 |   |                                                           |
|----|-------------------------------------------------------------------------------------------------|---|-----------------------------------------------------------|
| 10 | <div style="text-align: center;"> FREDERICK BALL,<br/> Plaintiff and Plaintiff in Error. </div> | ) |                                                           |
|    | vs.                                                                                             | ) |                                                           |
|    | RANSOME CONCRETE<br>MACHINERY COMPANY,<br>Defendant and<br>Defendant in Error.                  | ) |                                                           |
| 20 |                                                                                                 | ) | In Error to<br>Supreme Court.<br>Assignment<br>of Errors. |

Afterward, that is to say, on the first Tuesday of March, nineteen hundred and seven, in the New Jersey Court of Errors and Appeals in the last resort in all causes, comes the said Frederick Ball, by Herbert Clark Gilson, his attorney, and says that in the matters recited and contained in the said bill of exceptions and also in the giving of udgment there is manifest error in this, to wit:

30 First: That the said court erred in its decision that on the evidence judgment of non-suit should be entered against the plaintiff and in favor of the defendant.

Second: That said udgment is contrary to law and the evidence because the plaintiff had no knowledge of the danger caused by the negligence of th defendant and did not assume the risk of such danger and because the danger was not ap-  
apparent to the plaintiff.

40 Third: That said judgment is contrary to law



and the evidence because the defendant was guilty of negligence which resulted in an injury to plaintiff and the plaintiff was not guilty of contributory negligence.

Fourth: That the trial Justice decided a judgment of non-suit in said cause in favor of said defendant in error, the defendant below, and against the plaintiff in error, the plaintiff below, and therein erred contrary to the law of the land and to the injury of the plaintiff.

And the said Frederick Ball prays that the judgment aforesaid, by reason of the aforesaid errors and other errors appearing in the record and proceedings, may be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment, etc.

HERBERT CLARK GILSON,

Attorney for and of Counsel with  
Plaintiff in Error.

Served December 5th, 1906.

Common Joinder in Error.

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