

NAAR, DAY & NAAR, PRINTERS, TRENTON.

# Court of Errors and Appeals.

THE DELAWARE, LACKAWANNA AND  
WESTERN RAILROAD COMPANY,

vs.

WILLIAM V. TOFFEY and ROBERT  
HERZOG.

## *Writ of Error.*

Returnable Second Tuesday of March, 1875.

Filed December 4, 1874.

The State of New Jersey, ss.:—To the Judge  
[L. s.] of the Circuit Court of the county of Hudson,  
GREETING:

Because in the record and proceedings, and also in the giving of judgment, in a certain plaint which was, in our said Circuit Court, between William V. Toffey and Robert Herzog, plaintiffs, and The Delaware Lackawanna and Western Railroad Company, defendant, of a plea of trespass on the case, as it is said, manifest error hath intervened, to the great damage of The Delaware, Lackawanna and West-<sup>10</sup>ern Railroad Company, as by its complaint we are informed. 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 entered, then, without delay,

you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Court of Errors and Appeals at the next term thereof, on the second Tuesday of March next, at Trenton, together with this writ, that the record and proceedings aforesaid being inspected we may further cause to be done thereupon, what of right and according to the constitution and laws of this State, ought to be done.

Witness, Theodore Runyon, esq., our Chancellor, the  
 10 twenty-third day of November, in the year of our Lord one thousand eight hundred and seventy-four.

HENRY C. KELSEY.

*Clerk.*

JACOB VANATTA, *Att'y.*

WILLIAM V. TOFFEY and ROBERT  
 HERZOG,

*vs.*

DELAWARE, LACKAWANNA AND  
 WESTERN RAILROAD COMPANY.

*In Case.*

Judgment entered Oct. 20th, 1874.

20 Damages, \$295.00; Costs, \$50.66. \$345.66.

M. T. NEWBOLD, *Att'y.*

Hudson Circuit Court of the thirteenth day of February,  
 A. D. eighteen hundred and seventy-two.

State of New Jersey, Hudson County, *ss.* :—The Delaware, Lackawanna and Western Railroad Company, a body corporate under the laws of the State of Pennsylvania, and doing business in the State of New Jersey, under legislative sanction, the defendants in this suit, were summoned to answer William V. Toffey and Robert Herzog, the plaintiffs herein,

of a plea of trespass on the case, and thereupon the said plaintiffs, by M. T. Newbold their attorney, complain, for that whereas the said defendant before and at the time of the committing the grievances hereinafter complained of, to wit, on the eighth day of January, A. D. eighteen hundred and seventy-two, were the possessors, operators and managers of a certain railroad, constructed upon and across a certain public highway commonly known and called by the name of Grove street, in the city of Hoboken, in the county of Hudson aforesaid; and were then and there possessed of, 10 operating and managing certain locomotive engines, propelled by steam, and certain cars drawn by steam upon said railroad, and over and across the said public highway; and the said defendants not regarding their duty, so negligently and carelessly, by their servants and agents, operated, managed and governed said railroad, and the said locomotive engines and cars, then and there propelled and drawn as aforesaid, upon said railroad, over and across the said public highway, that by reason of such careless and negligent operation, management and government, a certain horse, 20 cart and harness of the plaintiffs were then and there, to wit, on the day and year aforesaid, at the city of Hoboken aforesaid, at the crossing of said public highway by said railroad, struck with great force and violence, by a certain locomotive engine and cars of the locomotive engines and cars aforesaid, whereby the said horse was killed, the said cart broken and injured and the said harness greatly damaged.

And for that whereas, before and at the time of committing the grievances hereinafter next complained of, to wit, on the 30 said eighth day of January, A. D. 1872, the said defendants were the possessors, operators and managers of a certain other railroad constructed upon and across and on a level with a certain public highway commonly known and called by the name of Grove street, in the city of Hoboken, in the county of Hudson aforesaid, and were then and there possessed of and operating and managing certain locomotive engines propelled by steam, and certain cars drawn by steam upon said railroad and over and across said public highway, and although said crossing was dangerous by reason of the view 40

- along said railroad, in either direction, to those approaching said crossing along said public highway being obstructed by divers houses, buildings and fences, built upon either side of said highway, and also by reason of the great number of trains passing and repassing at said crossing; and although vast numbers of carriages, carts, wagons and persons on foot daily pass and repass along said public highway over said crossing, yet the said defendants then and there neglected to provide proper and competent watchmen and
- 10 flagmen at the said crossing to warn persons lawfully traveling upon said highway of the approach of said locomotive engine and cars, and then and there neglected to give proper warning and signal of the approach and passage of said locomotive engines and cars over and across the said public highway, and then and there carelessly and negligently crossed the said public highway with their locomotive engines and cars aforesaid without finding proper gates or barriers at the said crossing to prevent persons from passing over the same at the time of the passage of the
- 20 aforesaid locomotive engines and cars; by means whereof a certain horse, cart and harness of the plaintiffs then and there, to wit, on the day and year aforesaid, at the city of Hoboken aforesaid, at the crossing aforesaid of said public highway by said railroad, where the said horse, cart and harness lawfully were at the time, were struck with great force and violence by a certain locomotive engine and cars of the locomotive engines and cars aforesaid, whereby the said horse was killed, the said cart broken and shattered, and the said harness greatly injured.
- 30 And for that whereas before and at the time of committing the grievances hereinafter next complained of, to wit: on the said eighth day of January, A. D. 1872, the said defendants were the possessors, operators and managers of a certain other railroad located partly in the county of Hudson, aforesaid, and constructed upon and across, and on a level with a certain public highway known as and called Grove street, in the city of Hoboken, in the county of Hudson, aforesaid, and were then and there possessed of and operating and managing certain locomotive engines propelled by
- 40 steam and certain cars drawn by steam upon said railroad,

and over and across said public highway, and although the crossing formed by the junction of said public highway with said railroad is within an incorporated city, and dangerous by reason of the view along said railroad in either direction to those approaching said crossing along said public highway, being obstructed by divers houses, buildings and fences, built on either side of said public highway, and by reason of the great number of said locomotive engines and cars passing and repassing said crossing, and although great numbers of vehicles and persons pass daily 10 along said public highway over said crossing, and although the said defendants had provided at the said crossing certain gates and certain flagmen, gate-tenders or watchmen, who had before the time aforesaid been accustomed to warn the persons approaching said crossing along said public highway of the passing and repassing of said locomotive engines and cars, and to lower said gates a short space of time before the passing of said locomotive engines and cars, over and across the said public highway, yet the said defendant then and there, to wit: on the day aforesaid, at the city of 20 Hoboken, aforesaid, by their servants and agents aforesaid, carelessly and negligently omitted to lower said gates, before the passing of a certain locomotive engine and cars, of the locomotive engines and cars aforesaid, over said public highway, and then and there, carelessly and negligently omitted to give warning of the approach of said locomotive, engine and cars to said crossing, and then and there, by their servants and agents, propelled said locomotive engine and cars over and across said public highway, at a reckless and improper rate of speed, and then and there, neglected to 30 give proper signal of the approach of the same to said public highway, by means whereof a certain horse, cart and harness of the plaintiffs, then and there, to wit: on the day and year aforesaid, at the city of Hoboken aforesaid, at the crossing aforesaid, of said railroad over said public highway where the said horse, cart and harness, lawfully were at the time, were struck with great force and violence by the last aforesaid locomotive engine and cars, whereby the said horse was killed, the said cart broken and injured, and the said harness greatly damaged; wherefore, the said plaintiffs say that 40

they are injured and have sustained damage to the amount of eight hundred dollars, and therefore they bring suit, &c.

And the said defendants, by Jacob Vanatta, their attorney, come and defend the wrong and injury, when, &c., and say that they are not guilty of the said supposed grievances above laid to their charge, or any or either of them, or any part thereof, in manner and form as the said plaintiffs hath above thereof complained against them, and of this the said defendants put themselves upon the country.

- 10 Therefore to try the issue above joined, let a jury come before the said Circuit Court at Jersey City aforesaid, on the twentieth day of October, as yet of the term of October, in the year of our Lord one thousand eight hundred and seventy-four, who neither, &c., by whom, &c., to recognize, &c., became as well, &c., the same day is given to the parties aforesaid; at which day before the said Circuit Court, come the said parties by their attorneys aforesaid, and the jurors of the jury above mentioned also come, who to speak the truth of the matters aforesaid being chosen, tried and sworn,
- 2) say upon their oath that the said defendant did undertake and promise in manner and form as the said plaintiff hath above thereof complained against them, and they assess the damages of the plaintiffs by reason of the premises to two hundred and ninety-five dollars over and above their costs and charges by them about their suit in this behalf expended.

- Therefore it is considered that the said plaintiffs do recover against the said defendants, their damages aforesaid in form aforesaid found, and also fifty dollars and sixty-six cents for their costs and
- 30 [L. s.] charges by the Court now here adjudged to the plaintiffs and with their assent which said damages, costs and charges in the whole amount to three hundred and forty-five dollars and sixty-six cents. And the said defendants in mercy, &c.

Judgment signed October 20, A. D. 1874.

J. D. BEDLE,  
*Judge.*

*State of New Jersey, Hudson county, ss.:*—

I, John Kennedy, Clerk of the county of Hudson, and also Clerk of the Circuit Court holden therein, do hereby certify that the foregoing is a true and correct copy of a certain judgment as the same is of record in my office.

In testimony whereof, I have hereunto set my hand  
[L. s.] and affixed the seal of the said Court and county  
this 30th day of November, A. D. 1874.

JOHN KENNEDY,

*Clerk.* 10

By order of the Court, I return the within writ, with a true copy of the judgment annexed as therein mentioned.

Witness my hand and the seal of our said Circuit  
[L. s.] Court at Jersey City, this 30th day of November,  
A. D. 1874.

JOHN KENNEDY,

*Clerk Hudson Co. Circuit Court.*

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*Depositions.*

HUDSON COUNTY CIRCUIT COURT,

OCTOBER TERM, 1874.

20

WILLIAM V. TOFFEY and ROBERT  
HERZOG,

*vs.*

THE DELAWARE, LACKAWANNA AND  
WESTERN RAILROAD CO.

} *In Trespass.*

HON. J. D. BEDLE, S. J., presiding.

With a jury.

M. T. NEWBOLD, Esq., *appearing for Plaintiff.*

JACOB VANATTA and LEON ABBETT, Esqs., *appearing for*  
*defendants.*

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This cause coming on for trial, plaintiffs, through their counsel, stated to the court and jury their cause of complaint, and offered evidence as follows:

*Levi W. Post*, sworn for plaintiffs, testified as follows, on direct examination :

I am a surveyor and engineer, have been such twelve or fifteen years; this map was made by me, it shows the location of the Delaware, Lackawanna and Western Railroad track; (witness points out Grove street and Newark avenue;) it shows the obstructions on the easterly side of Grove street; I made this map to-day; I made it partly from notes I already had in the office, and partly from measurements  
 10 I made this morning; the size of those obstructions I measured to-day; (pointing on map) this is a lager beer saloon with tenements above, next is a dwelling house—they are more than two stories high; a shed with a new roof, about twenty feet high; the flagman's house, the posts that carry the gates; a large building about nine feet high with a board erected in front six or eight feet above the building for the purposes of a sign; a dwelling house about two  
 20 stories high, a shed or barn which has been used as a machine shop or something of that kind, fifteen or twenty feet high; two main tracks of the railroad; there are two more tracks south of these used for coal cars, &c.; the line of Grove street, Newark avenue, Ferry Street, Henderson street and Second street; top of map is north, scale is 25 feet to inch.

Q. Coming into this (pointing on map) street, that would cross here, (pointing) is there any point at which you can see the railroad coming down towards the railroad?

A. There is not now, there is a large building stands on that corner lot, I didn't put that on the map because I un-  
 30 derstood that was not there at the time of the occurrence; west of the house I have spoken of there is another large building two or three stories high.

Q. Is the one represented there the second house from the street?

A. Yes.

Cross-examined by Mr. Vanatta :—

Q. Can you tell us what the actual width of Grove street is where it connects with Newark avenue—I mean here (point-  
 40 ing)—what is the actual unoccupied space?

A. I should say between 45 and 50 feet between the buildings now; on the 8th of January, 1872, it was 25 feet more; that would make 70 or 75 feet.

Q. What is this (pointing) you have represented on the rear of this lot?

A. A shed, an outbuilding; I didn't look to see what it is used for; I should say it was 8 or 9 feet above the railroad track; I don't know whether that was there January 8th 1872; my attention to these surroundings was not specially called till this morning, and I made it partially from the condition of things I saw there and partly from what had been told me as to its previous condition.

Q. You omitted from this the building on the corner lot because you were told it was not there?

A. Yes.

Q. These (pointing) you put on because you were told they were there?

A. Yes.

Q. Then so far as the map pretends to represent the condition of things on the 8th of Jan., 1872, it is substantially from hearsay?

A. I recollect this first building shown on the map; I remember that building was there more than two and a half years ago, or about in that position.

Q. Can you give us the actual distance from the southerly line of Newark avenue to the northerly track of the railroad?

A. From the front of that building as it stands to the northerly rail is 83 3-10 feet.

Q. What's the distance from the southerly line of Newark avenue to the rear of this (pointing)?

A. 74 feet.

Q. Did you make an actual survey of the course of the railroad tracks from Grove street towards the river?

A. No.

Q. In what way did you put down the curve of those tracks?

A. From notes, information, I had in the office. I had made a map of the railroad from a point somewhere west of Henderson street, down towards the ferry for the Hoboken

Land Improvement Company ; I used that ; that was made about two years ago, I should say.

Q. But you at no time undertook to ascertain accurately and precisely the curvature of that line ?

A. No, sir ; not precisely.

Q. And you put that down from general observation from such general data as you had ?

A. I considered that data reliable.

Q. Why did you consider it reliable ?

10 A. From measurements I have made, tests the same as any engineer.

Q. Can you give us the course and radius of this curve from Henderson street westward as it actually is on the ground ?

A. No, I can't precisely, as it is on the ground.

Q. (By Court.) Is its relation to Newark avenue right as it is on the map ?

A. Yes.

20 Re-direct :—

Q. Were those obstructions, the position of them with reference to this street (pointing) and with reference to the railroad bed from actual measurement ?

A. Yes.

Q. From the data you have in your possession and the measurements made there does that correctly represent the position of that railroad as it is to-day ?

A. I think it does within a reasonable degree of accuracy.

Q. Would you call that the line of the railroad ?

30 A. Yes.

Q. With what degree of accuracy does that represent the line of the railroad two years ago ?

A. I don't know whether the track was laid on a true curve or not ; but I have in my office the radius of the curve of the centre line of that track.

Q. (By defence.) Can you give us the distance by actual measurement from the centre line of Henderson street to the centre of Grove street, westward following the railroad tracks ?

40 A. I didn't actually measure it on the ground.

Q. The distance represented on that map 25 feet to the inch obtained, will that give the distance?

A. Yes.

*Henry Lowman*, sworn for plaintiffs, testified as follows :

Direct examination :—

I know Mr. Toffey and Mr. Herzoz. I recollect the accident occurring to me Jan. 8th, 1872.

Q. Tell us what you did and what occurred? 10

A. I come down from the hill down Newark avenue, it was between seven and eight o'clock; I brought a carcass of beef up on the hill; come down Newark avenue going to the slaughter-house, coming down towards Grove street crossing the railroad.

Q. When you got to Grove street?

A. When I was over the sidewalk I stopped the horse a little; the gate was up and there was nobody to be seen; I didn't hear no engine run; I didn't hear no whistle; I didn't hear no noise at all when I was in the middle of the 20 track.

Q. How many feet was that away from the railroad?

A. I think it was about 40 feet I guess; I couldn't say exactly, but I think it was about 40 feet; I stopped the horse a little and I didn't see no danger; the gate was up and so I drove ahead, and then when the horse was in the middle of the track the flagman come alongside of me and said stop, stop, stop, three times after other; then he said go back, go back; at the same time he said stop I stopped the horse, and I made the horse go back. 30

Q. You did what?

A. I pulled the horse back.

Q. Proceed.

A. And I seen I couldn't get so quick back as the train come and they killed the horse and smashed the butcher wagon up in pieces, and I was bruised all over; I was bleeding on the head a couple of places.

Q. The flagman that run to you and hollered stop, stop, where did he come from?

A. He come from the flag-house, from the door of the flag-house.

Q. Had you seen him before ?

A. Yes ; I seen him often when I cross the railroad.

Q. I mean this morning ?

A. No, sir ; I didn't see him.

Q. Was he out there ?

A. When I just was alongside the flag house he come alongside the cart with the flag, and said stop, stop.

10 Q. How far was it from the flag house to the cart ?

A. About a couple of feet, right alongside.

Q. When you stopped there could you hear anything ?

A. No not then ; as soon as he said stop, stop, I seen the locomotive was about one hundred feet away from me on the left hand side.

Q. How fast were they coming ?

A. I couldn't tell how fast they run ; they come like flying.

Q. What became of the horse ?

A. They cut the horse in pieces ; they cut the horse and  
20 the shaft from the cart away ; killed the horse.

Q. How far did they knock him ?

A. I couldn't tell, I jumped and I got throwed out of the cart.

Q. Approaching the railroad, can you see the railroad below towards the river on that street ?

A. No, sir.

Q. You were in the cart ?

A. Yes, I was sitting in the cart.

Q. This was a butcher's cart ?

30 A. Yes, about four or five feet high from the ground to the bottom.

Q. What did you stop for before you got to the railroad ?

A. I stopped because I know it is a dangerous place ; I stopped to see if there was any locomotive coming, and I didn't hear any.

Q. Did you look ?

A. I did, I couldn't see anything.

Q. Did you listen ?

A. Yes.

40 Q. When you were on the track where you were stopped

by the flagman, if this engine had been blowing the whistle could you have heard it?

A. Yes, I could have heard it if they had blowed or rung the bell I would hear it; I didn't hear no bell ringing either.

Q. Before you got to the track could you have heard either?

A. No sir, I didn't hear no noise; I didn't hear no whistle, neither ringing the bell.

Q. The street where the railroad crosses, how is it in point 10 of level?

A. It was lower then than it is now, they have raised the street since; I think that street has been filled up about five feet since and the railroad too.

Q. Do you know what railroad this is?

A. It is the Delaware Lackawanna now.

Cross-examined:

Q. Where were you living at that time? 20

A. I lived in Newark street at that time, this way from Grove street about twelve lots I think.

Q. Where had that horse been kept the night before?

A. In the stable the other side of the railroad between Jersey City and Hoboken, where the coal dock is now, on the right hand side of Grove street as you go from Hoboken to Jersey City, about half a block from the railroad towards Jersey City.

Q. Who hitched up the horse that morning?

A. Smith. 30

Q. What time?

A. I think about five o'clock.

Q. Who first drove the horse that morning?

A. I drove him first.

Q. Where was the horse and cart when you first took charge of him?

A. In front of the slaughter-house.

Q. With a load on?

A. There was no load on; we put a load on and I took it to South Bergen. 40

Q. What time did you start?

A. It was a little after five o'clock.

Q. How far was it from the slaughter house?

A. I couldn't tell, it took me about an hour to go up, and about the same to come back; when I got there the man wasn't up and I had to wait for him; I went up Newark avenue and went back the same way, and went up to cross the railroad driving in towards the slaughter house on my way back; it was then between 7 and 8 o'clock.

10 Q. How long had you worked at that slaughter house, or about it?

A. About six years before that time.

Q. Driving cart every day?

A. No, sir; I didn't drive no cart at all; very seldom I drove him except we had too much something else to do then I drove him; always had Mr. Smith to drive him; I didn't often drive him because we had a driver.

Q. How long before that had you last driven him?

A. I couldn't tell.

20 Q. I understood you to say that as you were going home when you got to Grove street and got to the side of the sidewalk you stopped?

A. I said when I got across the sidewalk I stopped.

Q. Which side of the sidewalk did you stop?

A. The other side of the sidewalk, between the sidewalk and the railroad.

Q. How far from the sidewalk did you stop?

A. I think it was about forty feet; I couldn't exactly say how many feet.

30 Q. Did you stop as soon as you got over the sidewalk?

A. I stopped when I was about a couple of feet over; I stopped about middle ways.

Q. Forty feet from what?

A. Forty feet from the railroad.

Q. How far from the sidewalk?

A. About thirty feet.

Q. What did you mean by saying you stopped at the side of the sidewalk?

A. I didn't stop by the sidewalk.

40 Q. Why did you say so on your principal examination?

A. I didn't say so; I stopped at the other side of the sidewalk.

Q. What sidewalk do you mean?

A. The sidewalk that goes down Newark street.

Q. Was there a sidewalk there at all?

A. Yes.

Q. Did you drive across it?

A. I drove across it; there is a street; the flags is taken up; they took the flags up; there is no flags laying there but it is a sidewalk. 10

Q. You didn't drive across any sidewalk?

A. Sure I drove across the sidewalk.

Q. Whereabouts?

A. From Newark across Grove street.

Q. There was at that time a sidewalk across Grove street?

A. It was the street that comes from Hoboken to Jersey City, Grove street.

Q. What was that sidewalk made of?

A. On both sides there is flags laying.

Q. But not where you drove? 20

A. No, in the middle of the tracks there is no flags laying.

Q. You stopped between where the sidewalk would cross and the railroad?

A. No I stopped the other side about the middle between the sidewalk and the railroad.

Q. What did you do there?

A. I stopped a little.

Q. How long?

A. About a couple of seconds.

Q. Which way did you look? 30

A. I couldn't look both ways because there was fence and buildings on both sides; I look across over the railroad; I couldn't look anywhere else?

Q. Did you look down towards the ferry?

A. I looked down the ferry, but I couldn't look down the ferry because there was houses on the side.

Q. Did you look towards the ferry?

A. No I didn't look to the ferry; I couldn't look to the ferry.

Q. Did you look in that direction, of the ferry? 40

A. No; I looked across but I couldn't look both sides.

Q. You looked straight ahead?

A. I couldn't look anywhere else, because both sides there was buildings.

Q. Did you look towards the ferry?

A. I couldn't look towards the ferry, because there was buildings both sides.

Q. Did you look towards the ferry?

A. No.

10 Q. Did you look towards the tunnel?

A. I looked across the street and seen the gate was up.

Q. Did you know the gentleman?

A. Yes, I know him; I seen him every day when I pass there since I was there.

Q. Before that time had you seen him often?

A. Yes, as often as I cross and he was there I seen him.

Q. You cross there four or five times a day?

A. Yes sometimes, sometimes three or four times a day.

Q. You worked at this slaughter house on Grove street?

20 A. Yes.

Q. When you went from the slaughter house to go home, which way did you go?

A. I went through Grove street across the railroad to Newark street.

Q. And when you went from your house back to the slaughter house you went down Grove street across the railroad?

A. Yes.

30 Q. Then every time you went from the slaughter house to your house, and every time you went from your house to the slaughter house you went by that flaghouse?

A. Yes.

Q. You knew that flagman pretty well?

A. Yes.

Q. What is his name?

A. I don't know.

Q. What nationality was he?

A. He was an old man; I don't know what nationality he was.

Q. When you saw the man on the track there was he the same man you had seen there before as gatekeeper?

A. I seen him before the. Yes.

Q. Tell us where you were when you first saw that man?

A. I was just alongside; the horse was in the middle of the tracks and I was just alongside the flaghouse.

Q. Which tracks?

A. The first tracks.

Q. And you were close by the flaghouse?

A. The horse was in the middle of the track, in the middle of the railroad track, and I was just, with the cart, next to the flaghouse; the horse was in front of the flaghouse and my cart was just alongside the flaghouse a little further up.

Q. About how much space was there between your cart and the flaghouse at that time?

A. I don't know, I didn't measure it.

Q. You said a while ago about two feet, was that about right?

A. I guess it was more, the horse was in the middle of the track and the cart was just alongside the flaghouse.

Q. Were you as far from the flaghouse as you are from that map now?

A. About the same distance.

Q. Where was the flagman when you first got sight of him?

A. He come running from the flaghouse.

Q. Come out of the door?

A. I couldn't say; as I was alongside he came running with a flag in his hand; I think he had both flags, a red flag and a white flag in his hand.

Q. Did he come alongside of you or in front of your horse?

A. He couldn't come in front of the horse because the horse was ahead of him.

Q. You are sure your cart hadn't got past the track at that time?

A. The cart wasn't on the track at all, the horse was inside the track.

Q. When he told you to stop, what did you say?

40

A. I didn't say nothing to him ; I stopped the horse when he said "stop, stop, go back, go back"—I pulled the horse back.

Q. Did he tell you why to stop?

A. No, sir ; he told me to stop where I was.

Q. Did you stop?

A. I did ; the same minute he said "stop, stop," I stopped

Q. Was you hurrying up the horse when the locomotive hit him?

10 A. No sir ; I had the horse in the line to pull him back when he got smashed.

Q. Did you see the locomotive when it struck your horse?

A. I seen that ; the locomotive was 100 feet away from me when the flagman made me stop.

Q. What did you do from the time you saw the locomotive till it came up?

A. I had no time at all ; I pulled the horse back, and the train came so quick I had no time to go back.

Q. Didn't you hear the whistle of the locomotive?

20 A. No I didn't, nor the bell neither ; I didn't hear any whistle nor no sound from the bell.

Q. It was not rung was it?

A. No.

Q. Had the engine been reversed when it struck your horse?

A. I guess not.

Q. When did you first hear the sound of the whistle?

A. I didn't hear no whistle, no bell neither.

30 Q. Did you see any slackening of the speed before it struck you?

A. No sir.

Q. Still kept at the same rate?

A. I couldn't tell how fast it run.

Q. Did it run any slower?

A. No, sir, I couldn't tell.

Q. Did the locomotive stop at all?

A. It didn't stop for me.

Q. Went on without stopping?

A. Yes ; they smashed the horse in pieces ; I couldn't tell

after that; I was nearly killed myself; I couldn't tell whether they stopped or went on.

Q. Where was the flagman when the locomotive struck your horse?

A. He stood right alongside of my cart.

Q. And your cart was which side of the track?

A. On the Newark avenue side outside the tracks.

Q. What did the locomotive strike first?

A. The horse and the shafts.

Q. Did it strike the wheels of your cart? 10

A. I got throwed out; the locomotive hit the horse I think in the belly.

Q. Was the locomotive ahead?

A. There was a derrick ahead.

Q. And the locomotive was pushing it?

A. The locomotive was behind.

Q. Then it was the derrick that hit the horse?

A. Yes.

Q. You were thrown out?

A. Yes. 20

Q. Which side did you land?

A. I was laying alongside of the track on the Newark avenue side; on the right hand side of Grove street; I was laying alongside the tracks when they picked me up.

Q. The cars didn't touch you, or the engine?

A. I got throwed out and I don't know how I got hurted.

Q. How far from the track did you land?

A. Not a foot from the track.

Q. Were you sitting in the seat of the cart?

A. I didn't have no seat board; I was sitting inside the 30 cart on the bottom, flat down.

Q. When you stopped to look, did you keep seated or did you get up to look?

A. I need not rise, I was sitting up.

Q. Did you rise up on your feet?

A. No; I was sitting down in the cart on the bottom of the cart.

Q. Did you never have a seat in that cart?

A. We did have a seat but I think it was broken; there was side boards to the cart, I think about two feet high; 40

there was a front board ; I was sitting in the middle of the cart my feet stretched out in front ; it was a cold morning and I was sitting in the straw.

Re-direct examination :

Q. You had worked there for six years ?

A. Yes.

Q. And crossing every day ?

10 A. No, not every day.

Q. How often ?

A. Very often.

Q. When a train would come, what would the gateman do ?

A. The gateman would lower them down and wind them up again—when the train would come he would lower them, when the train was gone he would wind them up again.

Q. That had been done for six years ?

A. Yes, since I know it.

Q. How often would you drive a cart ?

20 A. Very seldom.

Q. Once a week ?

A. Sometimes I didn't drive him in a month, because we had a driver.

Q. You spoke of the buildings on the east side of Grove street ; did you ever attempt to look down that way ?

A. Yes, you couldn't look down that way.

Q. Had you ever tried to look down that way ?

A. Yes.

Q. And you couldn't look ?

30 A. Yes.

Q. Is that the reason you didn't look that way, because you knew you couldn't look down that way ?

A. Yes.

Q. How high is the front of the cart ?

A. Over a foot high.

Q. You sat up straight ?

A. Yes.

Q. Could you see out over the front and sides ?

A. Yes ; the side-boards is two feet high and the front is  
40 about one foot high.

Q. The horse cars run along that street?

A. Yes.

Q. As you went along Grove street towards the railroad in what part of the street was you?

A. I was in the middle of the track where the horse cars run.

[Adjourned for the day.]

[Second day's proceedings.]

10

OCTOBER 16th, 1874.

*William V. Toffey*, one of the plaintiffs, sworn on behalf of plaintiffs, testified as follows:

Direct examination:—

Q. Are you the owner of the horse spoken of in this case?

A. Yes.

20

Q. In January, 1872, were you in business alone?

A. No; my partner was Robert Herzog.

Q. You were doing business together?

A. Yes; this horse that was killed was the property of Toffey & Herzog.

Q. What was his value, and how long had you had him?

A. From \$225 to \$250; we had had him about six months; I think I gave \$187.50 for him; I bought him very cheap; I could have sold him for more than \$200 at any time.

30

Q. Did you see the horse after he was killed?

A. Yes; I saw him two or three hours after I think.

Q. And the cart spoken of who did that belong to?

A. To the firm of Toffey & Herzog; I saw that after the accident it was all broken but the wheels I think; it laid around around there two or three months, and I sold it for five dollars.

Q. What was the cart worth?

A. It was worth at that time about \$75; the harness was

worth about \$35 or \$40; it was all broke to pieces; I saw the pieces laying around there on the horse.

Q. Have you been around that crossing for a number of years before that time?

A. Yes.

Q. Do you know what their custom was in regard to their gates?

A. The gates were always lowered as the trains approached and hoisted after they pass by.

10 Q. The street crossing at that point how was it in point of level with the railroad?

A. The street was level with the railroad; the street cars run through there.

Cross-examined:

Q. You said the street and track were level; do you mean right where the tracks are that the surface of the street is even with the top of the rails?

20 A. Yes.

Q. Between the railroad track and Newark avenue was Grove street level with the railroad tracks or depressed at that time?

A. It may be a little lower near Newark avenue, but where the railroad crosses it is about level.

Q. After you got over the railroad tracks coming on towards Newark avenue?

A. It may decline a little, not much.

Q. Did it not decline considerable?

30 A. Not much.

Q. What was the age of this horse?

A. I couldn't tell you that; he was a young horse 7 or 8 years old, not older than that.

Q. You stated at the last trial that the horse cost \$175?

A. \$175 or \$180; a man brought him from New York and had him sold for \$250; the man couldn't raise the money, and I bought him of him.

Q. Where were you at the time the collision occurred?

A. At home, not at the place of business.

40 Q. Has your firm dissolved?

A. Yes, about a year and a half ago, I believe.

Q. How long had Lowman worked for you?

A. 7 or 8 years, I believe.

Q. What kind of work had he been doing for you?

[Objected to by plaintiffs, as not cross-examination.]

[Court holds the objection good.]

Q. How long had you had this cart in use? 10

A. About a year and a half; it was a new cart when we bought it, and cost \$115.

Plaintiffs rest.

Defendants' counsel moves to nonsuit the plaintiffs, on the ground that the driver did not exercise reasonable, ordinary care; there was contributory carelessness on the part of the agent of the plaintiffs; the driver swears he did not look to the east nor to the west where, if at all, there 20 might be danger, but that he simply looked straight ahead where there could be no danger.

The Court thinks there is sufficient to let the case go to the jury, and refuses to nonsuit.

Defendant excepts to the refusal to nonsuit, and prays that its exception may be sealed, and it is sealed accordingly.

J. D. BEDLE, [L. s.]  
*Jus. Sup. Ct.* 30

[Defence.]

*Otto Botticher, Jr.*, for defence, sworn, testified:

Direct examination:

I reside in Newark; am a civil engineer employed at the Hoboken office of the Delaware, Lackawanna and Western 40

Railroad Company; have been in their employ about six years.

Q. (Showing witness map.) Who made this map?

A. I did, about January 1874; I got the location of those things indicated there from actual survey and measurements on the ground made the day before the map was made; the street marked Henderson street was formerly called Prospect street; I measured the distance from Henderson street to Grove street, it is four hundred feet; those lines represent  
10 the actual curve of the road; I make the distance from the southerly line of Newark street to the first rail you come to a little over eighty-three feet, by measurement; three or four inches over 83 feet; I haven't got my note book with me; the map is made by a scale of forty feet to the inch.

Q. The lot on the westerly side of Grove street and north of the railroad seems to be vacant on that map?

A. There wasn't any building on the lot at the time this occurred, so I was informed; it was vacant till May, 1873, I  
20 was told.

Q. When you were here, (pointing on map,) on Grove street crossing, did you try to see what distance you could see eastward on the track?

A. I did.

Q. Tell us how far you could see eastward from the northerly rail of the track in the middle of Grove street?

A. You can see fifteen hundred feet or more; I didn't measure it, I estimated the distance; I could see almost to Garden street.

30 Q. Did you ride on the locomotive on the westward bound track going in that direction?

A. I did.

Q. How far could you see when you were on the locomotive?

A. I could see Grove street at a point about six hundred feet east of Grove street going westward; that is out of the cab of the locomotive; that would be about two hundred feet east of Henderson street.

Q. Did you place yourself at the southwest corner of the

building on the second lot east of Grove street north of the railroad ?

A. Yes, I did.

Q. What did you do when you put yourself in that position ?

A. I looked to see whether I could see an engine any distance from there ; I found I could see the top of a smoke-stack of an engine six hundred feet away from there.

Q. (By Court.) From where ?

A. From the southwest corner of the first house corner of 10 Grove street and Newark street, looking eastward I could see the smoke-stack or the top of the engine about six hundred feet away from there.

Q. What were you standing on then ?

A. I was standing elevated about two feet from the ground on the side of a fence.

Q. If you had been up four or six feet could you have seen further ?

A. Possibly could have seen a little further ; I didn't try.

Q. Did you pay any attention to this shed on the southerly 20 end of the first lot ?

A. I don't believe that shed was there at the time I made my survey ; I don't think it was if it is not shown there.

Q. You haven't attested to the height of this shed ?

A. That shed isn't over seven feet high ; I don't believe it was there at the time I made my map ; I have noticed it since ; I see it has a new roof ; I don't think it is over seven feet high.

Cross-examined :—

30

Q. How old are you ?

A. Thirty-four.

Q. How long have you been a surveyor ?

A. About ten years.

Q. You say this map was made from data made upon the ground ; by whom was the data got ?

A. By me and another young man.

Q. Did you call this (pointing) the street line ?

A. It is supposed to be the street line ; I think Grove 40

street on the north side of the railroad is indefinite about lines.

Q. Do those buildings stand parallel with the line of the street?

A. I could not say that.

Q. Do you know whether the corner of that building (pointing) was not upon the line of the street?

A. I could not say.

Q. Do you know enough about that locality to know that  
10 that was not the line of Grove street?

A. I couldn't say.

Q. Do you know any monument in that neighborhood by which you can fix the line of Grove street?

A. No.

Q. You got these points from actual survey; what monuments did you take?

A. I didn't take any monuments; I got the line of Grove street from other maps and other notes we had in the office.

20 Q. Isn't this house, (pointing) the corner of it, on the line of Grove street?

A. I don't know anything about the line north of the railroad track on Grove street.

Q. Haven't you represented Grove street north of the railroad as running at right angles with the railroad?

A. It looks so; I couldn't locate Grove street on the north side.

Q. Didn't you go there to locate Grove street?

A. No sir.

30 Q. You were back of these buildings north of the railroad?

A. Yes.

Q. How high is that shed?

A. About seven feet.

Q. Do you mean to say there was not a building twenty-five feet high at the time you made your measurements?

A. It might be.

Q. Did you at the time you made your map, see whether there were sheds there or not?

A. I don't believe there was at the time.

40 Q. Did you look to see?

A. Yes.

Q. Did you ascertain that as distinctly as you did other particulars of this map?

A. I think so; I may have omitted one shed.

Q. Did you measure the size of this building? (pointing.)

A. No sir.

Q. Do you know whether it was more like *that* building than *this*?

A. I couldn't say.

Q. Then why did you put that sort of a skeleton building <sup>10</sup> there?

A. That building was measured.

Q. Do you mean to say it was longer easterly and westerly, than it was northerly and southerly?

A. That is a correct representation of that building, at the time I measured.

Q. These houses upon Hoboken avenue, do they join?

A. They do.

Q. Isn't there a space between them?

A. I don't believe there is; otherwise, it would have been <sup>20</sup> represented.

Q. At that time did you know whether this building had been moved or not?

A. I think the building had been moved.

Q. Hadn't this building been moved forward towards Newark avenue?

A. I think it had.

Q. That is the corner building at which you took your station?

A. Yes.

30

Q. You say you stood there and looked down that track?

A. Yes.

Q. Looking down that line from the corner of that building, how much of the railroad track could you see?

A. Couldn't see anything of the track; you could see over the track almost to Garden street.

Q. You took your station at this building that has been moved forward; now, the northerly rail of that road looking from that point, how much of that northerly rail and for

what distance could you see it, supposing you could see the rail as well as you could see the intervening space above?

A. You couldn't see anything of the rail; you could see the engine and car on the track.

Q. Could you see over the top of this building?

A. Yes.

Q. Do you mean to say that wasn't more than the height of a man?

A. I think I could see over the top of it; otherwise, I 10 couldn't see so far.

Q. Suppose that building was one you couldn't see over the top of, then how much of the space over the rail could you see, for what distance up and down the track over the rail?

A. Probably, five hundred feet.

Q. If that map is correct, and that building is higher than a man's head, could you see beyond that point? (pointing.)

A. You could from the point where I stood; from that corner?

20 Q. Then that map is not correct.

A. Yes; I was up two feet on a fence.

Q. Suppose that building to have been twenty feet high, then could you have seen any down the rail?

A. You could just about see past the building; it would clear the corner.

Q. Looking either side of it from that point, could you see the road at all?

A. No sir.

Q. You took no note of these sheds here (pointing) and 30 you have got no representation of them?

A. No; I don't think there were any.

Q. There were fences running down here (pointing) at the time you took your survey?

A. Yes.

Q. And there is a high fence along the railroad?

A. A fence about seven feet high.

Q. You got the direction of the tracks accurately?

A. Yes.

Q. What does that black dot represent?

40 A. Gate post. (Witness points out the flag-house.)

Q. How close to that did the fence come when you made that map?

A. The fence running up the railroad track come within two feet of it.

Q. Doesn't the fence run up past the flag-house—isn't the flag-house set inside the fence?

A. No, it wasn't at that time.

Q. Do you know whether these buildings run at right angles with the railroad?

A. I couldn't say; they are built on a line of Newark 10 avenue.

Q. You located those buildings all with the idea that they were at right angles with Newark avenue?

A. Yes; I took the buildings to be on a line of Newark avenue, and I took them to be right angled buildings.

Q. From Henderson street to Grove street is 400 feet?

A. Yes.

Q. When you saw down the track 600 feet you looked down right over the top of this building?

A. I couldn't say; I suppose I did. 20

Q. Do you know how far this building had been moved forward?

A. No, sir.

Re-direct examination:

Q. You say you didn't know where the line of Grove street north of Railroad avenue was—were you able to see lines of the street as it was used?

A. Yes, as it was used north of the railroad. 30

Q. Does your map represent it as it was on the ground?

A. Yes, as it was on the ground.

Q. But you didn't know of any legal line of the street?

A. No, sir.

Q. Does this represent the shape of the road as it was on the ground when you made the map?

A. Yes.

Q. If you continued the line in the same course it would have cut off all of the first and some of the second lot on Newark street? 40

A. Yes.

Q. How did you ascertain the line of Grove street here?  
(Pointing.)

A. I made that from notes we have in the office, and from maps we had made by the City Surveyor of Hoboken, and other memoranda we had.

Q. You spoke about a board fence, on the north side of the railroad—when was that fence put there?

A. That fence has been there as long as I recollect.

10 Q. What part of it do you mean?

A. From that first shed east of Grove street; there is a fence along the railroad from that last shed east of Grove street.

Q. (By Court.) How close to the railroad is that?

A. 5 or 6 feet.

Q. And the bottom of that fence is how, with reference to the track?

A. Lower than the track, I should judge about 2 feet; the fence is about 7 feet high.

20 Q. Point out where that fence was?

A. The fence was from this house along up to Grove street—that has been there as long as I can recollect—it is about 7 feet high and two feet lower than the bottom of the track.

Q. There is only just one spot where you could be interrupted in your view by that shed?

A. That's all.

Re-cross-examined :

Q. You can't see over that building (pointing) can you?

30 A. No sir.

Q. At the corner of this house, (pointing) you can see?

A. Yes.

Q. At that point (pointing) you can only see *that much* of the railroad?

A. You can see that much; you can see different distances at different points on this street.

Q. (By defence.) Can you tell us the ordinary height of the smokestack of an ordinary locomotive?

A. They vary from 15 to 16 feet from the top of the rail.

*George W. Greasley*, for defence, sworn :

I reside in Hoboken; have lived there about 3 years; during that time I have been employed on the Del. Lack. & W. R. R. in Hoboken, as railroad policeman in and about the yards at Hoboken and the depot for about a year; before that I was braking and flagging and switching. 10

Q. Are you acquainted with the railroad crossing at Grove street?

A. Yes.

Q. How long have you been acquainted with that?

A. About 4 years; I was braking on a train running into Hoboken; every day before I went into the yard, I passed that gate twice a day.

Q. After you became employed in the yard, were you there much or little?

A. Every day. 20

Q. When you was first about there what was on that easterly lot on Grove street, north of the railroad?

A. Nothing.

Q. Was it fenced or vacant?

A. There was a small fence, one side of boards about three quarters of a foot apart, run horizontally; the fence went about half way down to Newark street; it was in a dilapidated condition, about 4 or 5 feet high; with boards cross ways, about three quarters of a foot apart.

Q. When were these buildings first put on this lot? 30

A. Last spring I believe it was; 1873.

Q. When was the first shed put on the rear of that lot?

A. Same time of the buildings; I know the shed was put in the rear of this house that was built on the corner; John Corde's house; 3 small sheds; they were put there after the house was built on the corner.

Q. When was the house built?

A. In the spring of 1873.

Q. Up to that time there had been a vacant lot?

A. Yes; only the fence.

Q. Were you with Botticher when he made the measurement for this map?

A. Yes.

Q. Did you go to the corner of the house next to the corner, and see how far you could see down?

A. Yes; you could see down to Garden street.

Q. How far was that?

A. 2000 feet, nearly.

Q. Did you never go near the flag house, and then look  
10 down to see how far you could see a locomotive?

A. Yes; you could see the North river, yard, depots, and everything.

Q. If you go there to-day, and stand at the edge of the north rail and look down, how far could you see a locomotive?

A. From its first starting place; you can see the depot.

Q. In January 1872, was there any obstruction in the way of a man's seeing down the track when he got up near the track, and before he got on to it?

20 A. There was only that one shed, and over the top of that you could see the smoke stack and most of the locomotive; that was on the last lot near to Henderson street; if you stand on the corner of Grove street and Newark street, you can see to Prospect street; and the nearer you get to the railroad track the further you can see.

Q. Was that the condition in January, 1872?

A. Yes.

Q. When you was on the corner of Newark and Grove street, you could see down to Prospect street?

30 A. Yes; and the nearer you come to the railroad the further you can see.

Q. In 1872, when you got to the edge of the rails and look down how far could you see?

A. Then you could see right down the yard.

Q. Can you do it to-day?

A. Yes.

Cross-examined:—

Q. Where was it you stood when you could see down the track a 1,000 feet?

A. On the edge of the track.

Q. Supposing this brown map to be correct, how far down the railroad could you see from this corner? (pointing.)

A. I believe there has been an addition put to that building in the rear of it since that time.

Q. You are familiar with all those houses?

A. Yes.

Q. The house next to Corde's does not in the rear of it run up to the same height?

A. No, sir.

10

Q. What sort of an addition is there on it?

A. I guess it must be 30 feet high; it doesn't run back as far as Corde's house.

Q. Standing here (pointing) you say you could see down how far?

A. Down to Prospect street; could see a locomotive; could see a man standing there on that rail at Prospect street.

Q. Wouldn't you have to look through those houses to do it?

A. Not at that time.

20

Q. Has that second house been moved since that time?

A. I could not tell.

Q. You said in your examination before the commissioner that you could see 2,000 feet down the road from that corner?

A. I don't think I did.

Q. Didn't you say "before that building was put up I could stand at the corner of Grove street and Newark street, and see an engine on the track a thousand feet east of Grove street?"

30

A. Yes.

Q. Prospect street is only 400 feet below Grove street?

A. I can see an engine a long way below Prospect street.

Q. That building; (pointing) do you know what the height of that is?

A. No, sir.

Q. Isn't there a building there? (pointing.)

A. There is a small old shed.

Q. Wouldn't that be in the line of your vision?

A. No, sir; you could turn your head one side and see either side of it.

Q. There were sheds by the railroad at that time?

A. I think not.

Q. You are sure there was no shed on this lot here? (pointing.)

A. I think not.

Q. Coming down towards this crossing if you got to this point, (pointing) *this* building would be in your way?

10 A. No, sir; you could see a locomotive over the top of all of them.

Q. Isn't that building 25 feet high?

A. No; I think not.

Q. Do you swear there is not a building there 25 feet high and at least 20 feet in length?

A. I don't believe there was at that time; I don't recollect one being there.

Q. Don't recollect any building being there at all?

A. No, sir.

20

*John O'Leary*, for defence, sworn, testified as follows:

Direct examination.

I guess I am 55 years old; I reside on Jersey City Heights now; at the time of this occurrence I lived in Hoboken; I am gate-keeper and flagman at the Grove street crossing, for the Del. & Lacka.; I have been gate-keeper there 5 years,  
30 steady; I recollect the time of this occurrence; it was on the morning of the 8th of January, 1872; it was Monday morning, between 7 and 8 o'clock.

Q. Were you using the gates that morning?

A. No sir; they were not in working order; they had been reported some days previous to that; I reported them previous, some days; I could let them down part way, but sufficient to stop a cart or wagon, it could not be done; but they were put into working order the following morning; I had them reported some days before this occurred.

Q. What time were you there that morning?

A. Generally speaking, I am there about 5½ or 20 minutes to 6.

Q. Tell us what happened that morning, in connection with this cart?

A. On that morning I see the engine coming out about a block away; I was standing at the post speaking to a man.

Q. What post?

A. At the gate post next to the flag house; and I see the engine coming out; and as I did, I lifted the flags and went on the centre of the crossing. 10

Q. You saw an engine coming out from where?

A. From Hoboken; on the western bound track, leaving Hoboken; then I went on the crossing that is between the two gates.

Q. You went between the two gates?

A. Yes; on the crossing.

Q. In what part of the crossing?

A. At the centre of the road, I stood between the gate at the Jersey City side and the gate on the Hoboken side; about centre ways between the gates on the centre of the 20 railroad.

Q. Which side of Grove street, did you stand on?

A. I stood between the two gates; I guess I was as much in Hoboken as in Jersey City; I was in the middle of the railroad; I stood on the eastern bound track, because the engine was coming on the western bound track; where I stood on the eastern bound track I was out of danger, and flagging the engine coming out.

Q. How near to the horse car track did you stand?

A. I may stand in the centre of the horse car track for 30 all I know; I don't know whether I did, but generally speaking, I get as much as possible in the middle of the road.

Q. When you got there what did you do?

A. I flagged the engine I saw coming out; I saw Toffey's man driving up, and I halloed out.

Q. Where were you when you first saw him?

A. On the crossing between the gates; I saw Toffey's man driving up, and I halloed out to him at the top of my voice to stop, and as I did, I saw him using the reins with the horse, and he hurried up the horse; and I halloed up the 40

second time and I said "stop man," and he continued; and the more I did the more he hurried up the horse; and there was a man standing by the gate by the name of Brady, and he cried out in a frightened manner, "Och! man, stop;" but this driver appeared to take no notice of him.

Q. Where was you when you first saw him?

A. I saw him first coming out of Newark street into Grove street; when I first saw him I was on the crossing.

Q. Did you make any sign to him?

10 A. I did; I showed him the red flag.

Q. When you showed him the red flag how near the track was he?

A. He was far away enough at the last signal I gave him to stop if he wished to do it; I really thought it was fooling me he was; the impression he made on me when I saw him acting so rash a part, was that he was fooling me, and I thought he was going to drive into the vacant lot; he didn't stop at all; he didn't take no heed of the man that told him nor me.

20 Q. Did you stand still between the eastward and westward bound track?

A. I didn't leave there till after he got struck and all was over; I was on the road; I kept my place; I wasn't going to risk my life to save his when he didn't act by my bidding.

Q. Then you stood still till after he was struck?

A. I did; I stood on the crossing and saw the horse caught.

Q. You made a signal to the train?

A. I showed the white flag.

30 Q. Where was he when you made that signal?

A. He was not in sight when I made the first signal; but he was coming along and I signalled him to stop over and over, but he wouldn't do it; I thought the man was fooling me or that something was the matter with his head.

Q. Did the train stop?

A. Yes; stopped immediately after striking the horse.

Q. How far did it pass on before it stopped?

A. A few yards.

Q. Was the train going fast?

40 A. According to my judgment, I should say 5 or 6, per-

haps 7, miles an hour—generally at the rate that them sort of engines goes—not as fast as a passenger train.

Cross-examined.

Q. Did you know this train was coming?

A. Certainly.

Q. Had you been notified it was coming?

A. Them bobtails they run up and down all the time; I look out to protect everybody that is passing. 10

Q. This was a pretty cold morning?

A. Yes, I guess it was; it was on the eighth of January.

Q. You sometimes go in the flag-house, don't you?

A. No I don't; I keep no fire in the flag-house.

Q. Windy morning?

A. Windy or windy not, as long as I am paid I do the best I can.

Q. Do you sometimes go into the flag-house if you are not expecting a regular train?

A. I eat my meals in the clear air outside—so far from 20 going in.

Q. This was a wrecking train, wasn't it?

A. Yes.

Q. Did you know there was a locomotive off at the tunnel?

A. No, I didn't.

Q. Did you know whether they were in any hurry to get out there or not?

A. No, I knew nothing of it till I saw it a block away.

Q. How many feet away did you see the engine? 30

A. I saw it beyond Prospect street.

Q. What did you mean by saying you saw it a block away?

A. I mean to say I saw it a block away beyond Prospect street, and when I saw it I attended to it so far as to give it the signal that all was right.

Q. That road turns as it leaves Grove street, looking down towards the river?

A. There is a curve but I can see a long way beyond Prospect street. 40

Q. Are there not cars standing there usually on the road—coal cars?

A. There are at times and at times there are not; if there are no cars I can see pretty far to the river, and if there are I have to watch to see the engine.

Q. How was it at that time?

A. I know there were not because I could see too far away.

Q. When they are there the sight is blocked?

10 A. Yes.

Q. You saw this train coming?

A. Yes.

Q. How near was it when you signaled it?

A. When she was at Prospect street—that is a block away.

Q. (By Court.) Where was the man—the driver?

A. When the train got about the middle of the block, I saw the driver turning around into Grove street from Hoboken side.

20 Q. (By Court.) Was he coming then on a walk or on a trot?

A. Coming at a pretty rapid pace, and as he was desired to hold on the more he drove—he used the reins with the horse.

Q. You saw him then—where were you standing?

A. On the railroad crossing between the two gates.

Q. How far from the western bound track?

A. I stood so far that I stood on the road on the track leading to the east; that is the division between the two tracks.

30 Q. You stood on the eastern bound track?

A. Yes, the division between the eastern and western bound track, and then on the eastern till the train passed me by.

Q. Didn't you say when you were sworn before the commissioner, that you stood in the middle between the two tracks?

A. Yes.

Q. Didn't you stand between the eastern and western bound track?

40 A. Yes; the division between the two tracks.

Q. When you saw Lohman coming, where did you stand?

A. On the division between the two tracks?

Q. How much division is there between the two tracks?

A. I couldn't say.

Q. 4 feet?

A. Yes; I should say more.

Q. When Lohman was coming, and just had turned into Grove street, how far were you in feet from the western bound track?

A. I was on the vacant space beyond the western bound 10 track.

Q. Tell us about how many feet that was?

A. About the distance between you and me.

Q. You saw Lohman just turning into Grove street?

A. Yes.

Q. That was about 80 feet away, wasn't it?

A. Yes; he had considerable time to stop.

Q. Did you see him coming towards you?

A. I did.

Q. Did you start towards him?

20

A. No, I didn't; I kept my position; I wasn't going to risk my life for Lohman.

Q. The train was then half a block away?

A. Yes.

Q. And the train, was'nt coming fast?

A. Not very fast; 6 or 7 miles an hour.

Q. You were only about six feet from the track, and the train was about half a block away?

A. Yes.

Q. And you could not pass the train without endangering 30 your life?

A. What would I pass for.

Q. You knew the gates were up?

A. Yes.

Q. Were you ordered to keep them down when a train was coming?

A. Yes, and I would have kept them down if they had been in working order; they had been broke some days before, and I had them reported some days before, and they got fixed up on the 9th, the following morning.

40

Q. You saw this train was coming at the rate of 5 or 6 miles an hour, half a block away, and you only 5 or 6 feet from the track—was there any risk in your going before that train to get on the side the horse was coming?

A. There might and there might not; why didn't he take my signal? I halloeed at him 3 or four times at the top of my voice, and so did the other man; I know one occasion when my foot was caught in the track when I was running across.

10 Q. Didn't you say you didn't think you had time to cross before the engine?

A. I would not risk that I had time.

Q. Do you think you could have crossed from the time you saw Lohman first till the engine come up?

A. I don't know that I could; I won't say that I could.

Q. You said the impression made upon your mind was that he was going to turn into that vacant lot?

A. Yes that crossed my mind; I was under the impression that he was fooling me and that he would turn into  
20 the vacant lot; he could have driven into that vacant lot if he wished.

Q. Was there not a fence along that lot of Corde's four and a half feet high at the same time?

A. I don't know that there was.

Q. Do you know whether there is a fence there to-day or not?

A. I know Corde's house is there, but up to this day there is a space between the flag-house and Corde's house.

Q. Isn't there a fence along there back of the house?

30 A. There is an open space between.

Q. Was it through that open space that you expected him to drive?

A. I didn't know where he would drive; so he drove into any part of that vacant lot I didn't care where he drove; and I thought perhaps his head was not all right from Sunday night; I had quite time enough to know all what was going on, and to see what was going on.

Q. Then you expected him to run into the train?

A. No I didn't; I thought he was only fooling me, when  
40 I saw him hurrying up the horse; I thought he was not

rash enough to do any thing of the sort ; many a man does that to this day to fool me.

Q. You thought his head wasn't all right ?

A. I only just imagined it, it crossed my mind.

Q. If you thought you could get across in front of the train wouldn't you have done so ?

A. I would with safety, without risk.

Q. When you first saw him coming, if you could have gotten across in front of the train with safety, would you have done it ? 10

A. I expected when I gave him the signal that he would abide by it, and act in a prudent manner.

Q. You saw the horse hit ?

A. Yes.

Q. What became of him when he was hit ?

A. Killed ; they dragged him along some and some men come and took him away.

Q. How far did the engine knock him ?

A. Might be 100 yards or something thereabouts.

Q. Did he cut the horse to pieces ? 20

A. Oh, yes.

Q. Which side of the track was the cart ?

A. On the side next to Hoboken.

Q. (By Court.) The question is as to where the cart was when the locomotive hit the horse ?

A. It was on the Hoboken side ?

Q. (By Court.) Was the cart on the track at all ?

A. If it was it must have been very slight on it ; but there was only the shafts damaged.

Q. Did you see the engines stop ? 30

A. Yes ; about a 100 yards away, more or less.

Q. You had in your hand a flag ?

A. I had two flags ; I used one of them for him, that is the red one, and used white one for the engine.

Q. Didn't you say when you were examined before the commissioner that the engine was pretty nigh when you first saw Lohman ?

A. I thought that was pretty nigh to be about the middle of the block ; they take very little time to come from the middle of the block up to the end of the block. 40

Q. Do you know whether the rails were wet that morning or not?

A. It was a dry morning.

Q. Who was the man that stood there with you at that time?

A. Brady, a butcher.

*John Heffermann*, for defence, sworn, testified as follows:

10

Direct examination:—

Q. Where do you live?

A. Hackettstown.

Q. You're employed where?

A. On the Del., Lack. & W. R. R. Co., as conductor.

Q. How long have you been in that capacity?

A. Six years on the same road.

20 Q. Were you at the Grove street crossing on the morning of the 8th of January, 1872, at the time this collision took place?

A. Yes.

Q. Which train were you with that morning?

A. I was on the wrecking car that morning going out.

Q. Had you been in charge of any train that morning?

A. Yes; I brought my own train that morning from Phillipsburg; I got to the west end of the tunnel with my train and there I laid; the track was obstructed.

Q. Did you go down to the yard?

30 A. Yes; I went down to the yard and helped Mr. Quick to hurry up with the derrick; Quick's engine and cars were off at the west end of the tunnel, and I wanted to get him on.

Q. How was this wrecking train made up?

A. The derrick ahead of the engine was all it consisted of.

Q. What sort of a car was ahead of the engine?

A. A derrick car, with a caboose on the rear end of the engine; the derrick was in front of the engine; the caboose was next to the engine; the engine was running towards the  
40 tunnel head foremost.

Q. Were did you get on that platform car ?

A. I got on to it as we come on to the main track just below Prospect street; as we come off a side track just before we got on to the main track; this side track run into the main track into the yard behind the wood sheds.

Q. How far from Prospect street, does that side track run into the main track ?

A. I suppose it is about half way between that street and the street below it.

Q. On what part of the car did you stand ? 10

A. I stood on the left hand side of the car coming west; I was on the front of the car on the clear space; Mr. Quick stood on the right hand side; Mr. Quick had charge of the wrecking train.

Q. Which way was your face ?

A. My face was towards Prospect street, looking westward toward the tunnel.

Q. How was your attention engaged ?

A. My attention was engaged looking ahead to get out there. 20

Q. When you first came in sight of Grove street crossing, what, if anything, did you see there ?

A. I saw the signal for us to come ahead, the white flag; the flagman gave that signal; when he gave that signal I think he stood between the eastward and westward bound track.

Q. Where was your train that you were on when you first saw that flagman give the signal to come on ?

A. It was right after we passed over Henderson street; that is the first street below Grove street; before we come to that, I had to look at that crossing to see if that flag was there, and when I left that, then I was looking for the other one, then I saw the one on Grove street.

Q. And the man was in his place ?

A. Yes; as near as I could tell, the signal was ?

Q. Then did you see him do anything else ?

A. I saw him shake his white flag to us; after I saw that was all right, I was looking on up further, and the first thing I saw of his horse and cart, Mr. Quick halloed to me, says he, "My God, look out there!" 40

Q. What did you then?

A. I stood there; there wasn't anything else to do.

Q. What did you see?

A. I saw the horse and cart, and I saw the man get struck.

Q. How far from the crossing were you when Quick halloed?

A. May be 20 or 25 yards.

Q. Where was the horse when you first saw him?

10 A. He was, I should suppose, may be 15 feet away from the track; may be 20; may be more; I couldn't tell how far.

Q. If he had stopped when you first saw the horse would he have been hurt?

A. There was ample time for him to stop.

Q. Was the engine stopped?

A. The engine was stopped directly after it?

Q. How far beyond the crossing before you stopped?

A. It may be 50 yards.

20 Q. Did you see the horse hit?

A. Yes; the horse was struck, I should suppose, about the shoulders; about the middle of the horse.

Q. Had the cart yet got to the rails?

A. No, sir.

Q. Did you observe how the cart was injured?

A. I don't think there was anything broke but the shafts of the cart.

Q. How was the horse hurt?

30 A. He was cut up badly; he got under the wheels and didn't get away till we took him away; he threw the derrick off the track; we took the horse out when we stopped.

Q. Do you remember whether you heard the bell ring or the whistle blow?

A. I heard the whistle blow.

Q. How long before the collision did you hear the whistle blow? or how far from the place of collision did you first hear it?

A. The whistle was blowing when we crossed Henderson street, I couldn't say how long it continued or how far we 40 got.

Q. Did it blow loud ?

A. Ordinarily.

Q. Do you know whether the bell was rung at that time ?

A. I could not say about that, but I think it was.

Q. What is the practice in passing out from the yard to the tunnel, in regard to ringing the bell or blowing the whistle ?

A. It is always done as a general thing; I don't know of any instance that it is not done; it is supposed to be done before crossing a crossing all along the road anywheres. 10

Q. Was this engine freshly fired or had it been fired up some time before ?

A. I couldn't tell about that.

Q. What kind of fuel was used in it ?

A. Hard coal.

Q. About what was the speed of the engine as you passed from Henderson street up to Grove street ?

A. It may be 6 or 7, may be 8, miles an hour, not over that.

Q. You say that you were looking forward on the track, 20 what led you to do that ?

A. When we went down the westward bound track was obstructed, and I was looking to see whether that obstruction was removed so we could get through.

Q. Where is the engineer that run the wrecker ?

A. I could not say, I had no acquaintance with him.

Cross-examined :—

Q. Do you know whether he left the employ of the com-30 pany immediately or not ?

A. I could not say ; he may be in the employ of the company now for all I know ; I don't know him if I saw him to-day.

Q. You say you were about at Henderson St. when you first saw the Grove street crossing ?

A. Yes.

Q. Is that about the first point you could see it coming up ?

A. No sir.

Q. How much further below could you see it ? 40

A. I suppose I could see it 100 yards below Henderson street.

Q. When you came to Henderson street you saw the flagman standing on the Grove street crossing in the middle of Grove street—could you tell where he was?

A. I could tell he was between the two tracks.

Q. Could you tell that he was in the middle of Grove street?

A. He was not in the middle of Grove street.

10 Q. Could you tell within 20 or 30 feet where he was, up or down the track?

A. I could.

Q. How could you tell that he was at the crossing?

A. Because I seen him there.

Q. In the middle of the street?

A. I couldn't exactly say he was in the middle of the street.

Q. Could you tell whether he was on the street or not?

A. Yes.

20 Q. You say you saw him with a flag in his hand?

A. Yes, a white flag.

Q. Did he have any other?

A. Nothing that I took notice of; he had a red one I suppose rolled up, that I couldn't say; he didn't have it opened as I know of.

Q. You didn't see any red flag in his hand at any time, did you?

A. I don't think I did, that is, we don't take any notice of a red flag if it is rolled up.

30 Q. Did you see him with any other stick in his hand besides the white flag?

A. Yes, it was rolled up; I saw him in the middle of the track.

Q. Where were you when you saw him there?

A. I was coming up, I suppose, nearly half way.

Q. Did you see him till you saw the horse and cart?

A. I was looking further ahead after I saw that that was all right.

Q. Where is there any crossing ahead?

40 A. I was looking for a switch just above.

Q. Where was the 7:19 train lying?

A. Up at this end of the switch.

Q. Where the street passes across the railroad at that crossing can you see, before you get near to the railroad,—can you see on Grove street before you get near to the railroad, coming from Newark street, can you see Grove street, as you come up towards Grove street crossing; can you see any part of Grove street but that near to the railroad?

A. Yes.

Q. What part of it.

10

A. I could see, I suppose, may be 10, 15 or 20 yards.

Q. Was that about all you could see from the crossing?

A. That's all I saw that morning; the first thing I saw was the horse.

Q. You said on your examination before the commissioner that the house and addition at that point run up to within 10 feet of the railroad track?

A. The fence, I suppose, does.

Q. Didn't you also say that you could not see a horse and cart or an object of that kind on Grove street, further than 20 or 20 feet from the railroad coming up from towards the railroad?

A. I could have seen it further if I had been looking for it.

Q. Didn't you say the obstructions prevented your seeing it any further?

A. I don't know that I did.

Q. Would you have seen the flagman if he had made any signal to the driver of the horse and cart; would you have noticed it if he had waved the red flag?

30

A. Yes; if I had been looking out.

Q. Looking up that road would you have noticed a red flag being waved if he had waved it?

A. Yes.

Q. Did you see it till after you saw the horse and cart?

A. I saw him have the flag in his hand; it was not unfurled; I saw him have the stick and flag rolled up.

Q. From the time you saw the horse and cart to the time of the collision how long was it?

A. I couldn't tell anything about it.

40

Q. When you first saw the horse and cart did you know you must come together.

A. I knew if he didn't stop that we must hit him.

Q. Could he have stopped then?

A. He could have stopped but we could not.

Q. Did you offer to stop?

A. Not that I know of.

Q. (By Court.) Did you see the man when you first saw the horse?

10 A. I don't know as I did; my attention was drawn to the horse.

Q. When you first saw the horse how far was he from the track?

A. I suppose, likely, he was 20 feet; may be 15; may be not so much; could'nt say exactly how far.

Q. Were you in a hurry to get out to the tunnel?

A. Not in any particular hurry.

Q. Weren't all the trains of the Del., Lack. & W. Railroad stopped till that was got out of the way?

20 A. No; the other track was clear, the western bound track was obstructed; the 7:10 was the only train to leave; the next train would be 7:30.

Q. Were you in a hurry to get out there and get that engine off?

A. We was'nt going to sleep to get out there, nor we was'nt running reckless; we was going same as if we were going on an ordinary train.

Q. What did you mean by saying you went down to help Quick hurry out there?

30 A. I got down to help him.

Q. If this train in the morning was delayed for an hour or so wouldn't that disarrange the running of the trains all day?

A. No sir, not at all.

Q. For the greater part of the day?

A. No sir, not at all.

Q. You said the rate of speed was 6, 7 or 8 miles an hour?

A. Not over that.

Q. And you carried the horse along under the derrick 50  
40 yards?

A. Yes.

Q. Did it carry the cart along too ?

A. No sir.

Q. Carried the horse with you till you stopped ?

A. It didn't carry him—dragged him along.

Q. You had been accustomed to passing that crossing often ?

A. Yes, for years.

Q. Didn't you know that there were obstructions there—weren't you aware that these obstructions prevented your 10 seeing the street ?

A. I didn't know there was any danger there.

Q. Didn't you know of these obstructions being at Grove street on the easterly side as it approaches the railroad crossing ?

A. No sir.

Q. Do you know what houses were there then ?

A. There was a vacant lot next to Grove street—there has been a house put up there since and there has been an addition to the one below it. 20

Q. Didn't you say in your examination below that you could not have seen the horse and cart more than 10 feet from the railroad crossing ?

A. I don't know as I did.

Q. Do you remember whether you said that or not ?

A. I don't know.

Q. Are you in the employ of the railroad now ?

A. Yes, as conductor.

30

*John R. Quick*, for defence, sworn, testified as follows :

Direct examination :—

Q. Your business ?

A. Railroad conductor on the Central Railroad of New Jersey ; have been in the employ of the Central R. R. about one year ; before that for about 15 months I was in the employ of the New Jersey road—it now belongs to the Pennsylvania Central ; before that I was on the Delaware, Lack-40

awanna and Western Railroad as a conductor; January 8, 1872, I was employed on the Delaware and Lackawanna; I was at the Grove street crossing that morning, on the wrecking train that went out; I was the conductor that had charge of that train; I don't know who the engineer was, he was usually employed in the yard I believe; he was running at that time a drill engine; I don't know where he is now; I wouldn't know him if I should see him; I have asked two or three times where he was and understood he had gone to  
 10 Texas.

Q. Where did you get that train?

A. In the yard at Hoboken.

Q. What part of the car did you ride on?

A. I was on the front end of the derrick, on the right hand side.

Q. Did you stand there till you got to Grove street?

A. Yes.

Q. Which way were you looking as you went from the yard up to Grove street?

20 A. I was looking forward as we most always do.

Q. Looking out for what?

A. For anything that might be on the track or in our way.

Q. When you had come in sight of the Grove street crossing, what did you see there?

A. I saw the flagman there, when I took notice of Grove street—there is another street, I don't recollect the name of it, east of Grove street, after we had got over that first street then I was looking at Grove street; I saw a flagman, he  
 30 stood right in between the eastward bound and westward bound track, right in the centre of the two tracks and he had a white flag in one hand which he gave us a signal with, all was right, and we went on; we were running, I suppose, in the neighborhood of 6 or 8 miles, about an ordinary gait as we generally do run through the yard and such crossings.

Q. Do you know whether the whistle was sounded?

A. The whistle was sounded; yes.

Q. Where?

A. I don't recollect exactly where, but somewheres in the

neighborhood of between the two streets—between Grove street and the one east of it.

Q. Do you know whether the bell was rung or not?

A. The bell was rung, continued ringing; I suppose it was ringing at the time it come to the first crossing below Grove street, and I don't think it stopped ringing at all till we come to Grove street, or on to Grove street rather.

Q. You say when you got to Henderson street crossing you looked on to the Grove street crossing, and you saw the flagman there—what next did you see up towards the Grove 10 street crossing?

A. I suppose about the next thing I saw was the horse and cart.

Q. What was the flagman doing when you first saw the horse and cart?

A. He gave a signal to the driver to stop.

Q. What kind of a signal?

A. With his red flag.

Q. What did the man driving the cart do?

A. He was driving very fast till his horse's head come 20 about on to the railroad track or within a few feet of it, then he tried to stop but he was driving so fast he couldn't stop in time.

Q. When you first saw him how far away from the track was he then?

A. He might have been 30 or 40 feet.

Q. I mean to say as near as your memory will serve—what distance was he away from the west bound track when you first got sight of the horse?

A. I suppose, he was probably, 30 or 40 feet from it. 30

Q. If he had tried to stop his horse at that time, was there any difficulty in his being safe?

A. I think there was not, if he had tried at the time he saw the wrecking car.

Q. He had room enough to stop?

A. Yes.

Q. Did you see him make any effort to stop?

A. I didn't, till it was too late for either one of us to stop.

Q. What did you do when you saw him coming and saw the man signaling him to stop? 40

A. I was standing on the car, and I suppose, in about a second or a few seconds after that, I saw we must come together.

Q. What was done to stop your train, if anything?

A. I don't know; I only had the wrecking car; I gave the engineer the signal to stop with my hat up and down.

Q. Did he give heed to the signal?

A. Of course, he did; he got slower.

Q. Did he blow brakes?

10 A. I think he did.

Q. Do you know whether the engine was reversed or not?

A. I think it was.

Q. What part was struck—the horse or cart?

A. We struck the horse with the right hand corner of the derrick about the shoulder just about where the collar comes; the horse's head, I suppose, was over the track and the right hand corner of the derrick just struck the horse about the shoulder; if he had been, I suppose, 6 or 8 feet further back it wouldn't have touched him.

20 Q. About how far did you pass Grove street before your train stopped?

A. Probably 50 or 60 yards; not over 50.

Q. You say you didn't see the man trying to stop till he got most on to the track?

A. I didn't see him trying to stop till he got towards the track.

Q. Suppose he had looked toward you?

A. If he had looked the way we were coming, of course, he could see far enough to stop.

30 Q. You could see him?

A. Yes.

Q. From the time you saw the horse, was there any trouble if he had stopped then?

A. No, sir.

Q. Was he looking toward you?

A. I could not say which way he was looking.

Q. How long had you been a conductor on that road?

A. I had been running that train for close on to 4 years.

Q. How long had you known this flagman at that station?

40 A. I think he had been there the whole time.

Q. Had you observed what kind of a man he was as to tending to his business?

A. Yes; I always found him there regular, and I thought he always attended to his own business, and nobody elses; because he hardly ever said anything to anybody, and I always found him at his post doing his duty.

Cross-examined.

Q. Where did you first see the horse and cart that morn-10  
ing?

A. On Newark street.

Q. Whereabouts on Newark street?

A. I think between them vacant lots, between Newark street and the railroad.

Q. (Pointing on map.) Is it here you mean?

A. Yes.

Q. Which way was it coming?

A. Coming up from the ferry.

Q. Where were you on this railroad? 20

A. I had crossed the other street; I was between the two streets.

Q. Where did you see him?

A. On Newark street.

Q. About how far from this crossing were you when you saw him there?

A. I don't know how many feet, but I was probably 100 feet or more.

Q. How far from Grove street was he when you saw him?

A. I could not tell how far he was from Grove street. 30

Q. While you were going up to the crossing he came from Newark street up Grove street across to the railroad?

A. Yes.

Q. You are sure it was the same horse and cart?

A. I think it was.

Q. Where were you when you saw the horse and cart first?

A. I had crossed Henderson street, and then I think there is a few houses, and if I am not mistaken I think there is two lots or one large lot; I was between Henderson street 40

and Grove street, when I first saw him ; I supposed he was not far from the corner, may be 100 feet from the corner, of Newark and Grove when I first saw him—a 100 feet towards Hoboken.

Q. Then you were moving on towards the crossing all the time?

A. Yes.

Q. Where did you see him again ?

A. I saw him about half way, I think, between Grove street and the railroad track—that would be between 30 and 40 feet I suppose.

Q. Do you know whether there are any obstructions at that corner or not ?

A. The corner was vacant.

Q. When you first saw the horse and cart how far were you from the Grove street crossing where the accident occurred ?

A. We were probably a 100 yards.

Q. How far were you from it when you first saw the flagman ?

A. I don't know how far it is across Henderson street.

Q. You saw him there, did you ?

A. Yes.

Q. And you saw he had a white flag in his hand ?

A. Yes ; and I think he had a red flag in his hand, grabbed up in his hand this way, (showing;) what I mean by that I didn't take very particular notice of it to see whether it was rolled up or whether he had it in his hands.

Q. Could you tell whether the red flag was rolled up or not ?

A. No, not exactly—it was not a-flying at that time any way.

Q. You kept your eye on the flagman as you moved towards the crossing ;

A. Not all the time, I didn't ; I suppose after I saw his white flag probably I didn't look at him any more.

Q. Did you see him wave the red flag at all ?

A. I think I did.

Q. When was that ?

40 A. That was when the horse come very close to the track.

Q. When you first saw the horse you said he was about midway between Newark street and the railroad, did he pass out of your view at all after you first saw him?

A. Yes, he must have, I couldn't see through the flag shanty to see him there.

Q. You mean that nothing else intervened between you and him except the flag-house after you saw him?

A. I think not.

Q. He was past all other obstructions excepting the flag-house? 10

A. The flag-house and an old fence that was there.

Q. How far were you at that time away from the crossing?

A. That is about the first sight I had of him in Grove street; the first sight I had of him I didn't suppose we were going to do him any harm at all.

Q. Then how far were you from the Grove street crossing?

A. Probably 100 yards.

Q. At the time you saw him on Grove street?

A. No; I don't think we was over 200 feet, probably, if we was that. 20

Q. And he was driving fast?

A. He was driving very fast.

Q. And was 30 feet away from the track?

A. Yes; between 30 and 40 feet.

Q. When you first saw him what did you say?

A. I don't know that I said anything when I first saw him.

Q. Didn't you say "My God, look out?"

A. Yes; when I saw we was going to strike him.

Q. Didn't you say that when you first saw him? 30

A. No, sir.

Q. Didn't you say when you were examined before Mr. Ogden, that when you first saw him you said that?

A. No, sir; not when I first saw him; I did when I first saw him in Grove street.

Q. You spoke about the whistle blowing—wasn't that blown for the Henderson street crossing?

A. I think it was.

Q. Was it blown after crossing Henderson street?

A. Yes. 40

Q. How long did it continue?

A. I don't know; there is regular blows of the whistle; enough for anybody to hear.

Q. Didn't you testify before the commissioner that you thought the bell stopped ringing before you got to Grove street?

A. The bell ringing, I suppose, stopped about the time we got to Grove street.

Q. Didn't you say that it stopped before you got to Grove street?

A. I don't remember that I did.

Q. You knew this engineer didn't you.

A. No, sir.

Q. Hadn't you never seen him before?

A. I would not say.

Q. What were your orders in reference to this train?

A. I had no orders at all; I took it on my own responsibility; it was early in the morning, and there was no head officers up, and I took it on my own responsibility; I took the wrecking car and got my own train on which was off the track.

Q. You were in a hurry to get that on weren't you?

A. We were not in such a hurry as to tear things to pieces.

Q. Weren't you desirous of getting out there at the first possible moment?

A. We wanted to get out there as soon as we could; but we were not hurrying up any more in a hurry than we generally were; I knowed the other trains could not get out of the way till we were off.

Q. These obstructions on Grove street they were there in 1872, weren't they—I mean the houses—didn't you say the extensions on Grove street, remembering them within ten feet of the railroad?

A. The corner lot on Grove street and Newark avenue, there was nothing on it; there was a house next to it.

Q. Didn't you say on your examination below that the house and obstructions come down to within 10 feet of the railroad?

A. I don't remember that I did; there was little sheds and a fence there; still we could look over them.

Q. Isn't there a building there, and wasn't there then on the second lot?

A. I think there was a shed there, probably, not over 6 to 8 feet high.

Q. Isn't there within 150 feet of the railroad crossing an old building 25 feet high and 20 feet long?

A. I think there is, but you can see between that and the other buildings fronting on the streets. 10

Q. That together with the houses as you were coming up midway between the block, wouldn't that prevent you seeing Grove street till the horse and cart got within 10 or 15 feet of the railroad.

A. No sir.

Q. Didn't you say below that these obstructions that prevented you from seeing it were within ten or fifteen feet, and were either there or something in place of them at that time that prevented you from seeing the horse and cart till it got within 15 or 20 feet from the railroad track? 20

A. I think there was none there but what they could be seen over.

Q. Couldn't see over this building, could you? (pointing.)

A. Not over the highest one, but if I am not mistaken, the highest one stands quite up towards Henderson street.

Q. Is that the usual way of running a derrick, before the engine—is it as safe as running the engine before the derrick?

A. I should think it was.

Q. Can the engineer see as well? 30

A. He can by looking out of the side?

Q. Don't the derrick impede the engineer's observation ahead?

A. Yes, if he looked straight ahead, but engineers very seldom look straight ahead, they always look out of the side except in a storm.

Q. Didn't you say in your examination below "I was about 75 or 100 feet away from the Grove street crossing when I first saw the flagman?"

A. Probably I did say it, I can't remember what I did say a year ago or more.

Q. Was it true if you did say it—that you was 75 or 100 feet away from the Grove street crossing when you first saw the flagman?

A. I think I saw the flagman shortly after I got over Henderson street.

Q. Did the engineer whistle for brakes?

A. Yes.

10 Q. Where were the brakes put on?

A. There was a brake on the tank.

Q. At what distance from the Grove street crossing were they put on?

A. I can't tell; I know we slacked up, and that's all I could tell.

Q. When was that?

A. About the time we was coming to the crossing.

Q. When you struck the horse what became of him?

A. He went under the derrick as near as I can tell; I  
20 could not tell whether we run into the horse or the horse run into us.

Q. Did you see him afterwards?

A. I did.

Q. Where was the horse lying after he got loose from the engine?

A. He was under the derrick, he didn't get to the engine at all; we was in the neighborhood of a 100 yards from the crossing.

Q. Did anybody jump off the derrick?

30 A. I don't know; I didn't, I don't think any one did.

Q. Did the flagman move after you first saw him?

A. I don't know, I don't think he moved out of the way for us.

Q. When you came up to the crossing where was he?

A. I think he was where we first saw him, between the two tracks.

Q. Didn't you say in your examination before the commissioner, the flagman was there on the north side of the track of the westward bound train towards Hoboken?

A. I don't remember ; I think he was on the other side of the railroad track.

Q. You think he was on the Hoboken side of the western bound track ?

A. I think he was on the left hand side of the track coming out of Hoboken ferry.

Q. Did you say that the flagman was on the north side of the track of the westward bound train, towards Hoboken, when you came up ?

A. Hoboken is on the right hand side coming out ; I think he was on the left hand side coming out.

Q. Then you didn't say he was on the other side ?

A. I don't remember.

Q. Did you say when you saw the horse and cart were getting too close he run across with his flag ?

A. I don't remember ; I saw him at the time we was coming with his flag.

Q. Did you say that is the way he got on that side ?

A. Probably I did ; I wouldn't say for certain.

Q. Did you know of his being on the Hoboken side then 20 at any time ?

A. I didn't notice him ; I don't know as I saw him till some time afterwards.

Q. (Showing witness deposition.) That is your signature isn't it ?

A. I believe so.

Q. Did you say, "The flagman was there on the north side of the track of the westward bound train towards Hoboken when the flagman saw the horse and cart getting too close he run across with his flag ; that's the way he got on 30 that side ?

A. I think I did ; but it kind of runs in my mind I saw him run across the track towards the horse and cart.

Q. Didn't you say also, that you saw him hold the flagstick up against the horse and cart ?

A. Yes.

Q. On which side was he then ?

A. He was then between the two tracks ; between eastward and westward bound track ; when he held the signal up towards the horse.

- Q. Did he get over on the Hoboken side at all?  
 A. I think he did.
- Q. You said a while ago that he stood still all the time, didn't you?  
 A. No sir.
- Q. Then he did run across?  
 Q. When you first saw the flagman that morning, how far were you away from the crossing?  
 A. Might have been 75 or 100, or 150 feet; I didn't measure the distance at all.
- Q. When you first saw him were you excited?  
 A. No; I wasn't scared.
- Q. Between that time you say the flagman waved the white flag to you to come on?  
 A. Yes.
- Q. You said for a short minute?  
 A. I might have said a short minute; but when I come to think of it, a minute is quite a little while in such a case as that?
- 20 Q. How far is it from here to the other end of the room?  
 A. Between 30 and 40 feet.
- Q. Was it twice that distance when you first saw the flagman?  
 A. Yes.
- Q. Then after that you say he waved the white flag at you; for about how long?  
 A. He might have given it 3 or 4 waves, which would probably take him a second or two seconds.
- 30 Q. Then how near were you when he got through signalling, do you suppose?  
 A. May be a hundred feet from it?  
 Q. How soon did he start to go across the track?  
 A. I went across the track when the horse and cart came right up close to the track.
- Q. Then how near were you when he went across the track?  
 A. Very short distance from it.
- Q. Half the distance you were when you first saw him?  
 A. Yes; less than that.
- 40 Q. Then you were mistaken when you said you 300

feet away from the crossing when you first saw the flagman, were you not?

A. Probably, we were inside of 300 feet.

Re-direct examination :

Q. If you hadn't heard the engineer tell how far it is between Henderson street and Grove street, could you have told what the distance was ?

A. I could probably, if I should take a particular look at 10 it ; it may be five hundred or six hundred feet.

Q. Did you know what the distance was ?

A. No sir.

Q. You say you saw a horse and cart in Newark avenue, was the man in that cart standing up, in Newark street, or sitting down ?

A. I think he was standing up, I wouldn't say for certain.

Re-cross-examined :

20

Q. When you gave the signal for the engineer to stop, where did you go then ?

A. I didn't go anywheres.

Q. Did you say this, "I stood at the end of the derrick and when I saw we were going to strike the cart I gave the engineer the signal to stop with my hat, and I started to the other end of the car?"

A. When I saw we was going to strike the horse I made a few steps back.

30

*George Winne*, for defence, sworn, testified as follows :

Direct examination :

Q. Where do you live?

A. Jersey City Heights.

Q. Where do you work ?

A. In the Morris & Essex shop ; I am a machinist.

Q. Where did you work in January, 1872?

40

A. In the Delaware and Lackawanna shops at Hoboken.

Q. Were you on this wrecking train?

A. I was on the wrecking car on the eighth of January, 1872—the car that run into the butcher cart at Grove street crossing.

Q. Where did you get on the car?

A. I got on the wrecking car a little further up from the shop.

Q. What part of the car did you ride on?

10 A. I was on front of the derrick and it was cold and I went into the caboose when we got to about Henderson street, and I turned around and stood at the window looking through the window, nearest up the track.

Q. When you got in sight of Grove street what did you see?

A. I saw the flagman give the signal for going up, and he had got another stick in his hand and he shook it over Grove street.

20 Q. What kind of a stick was that that he shook towards Grove street?

A. It was the signal for stopping something.

Q. What was on the stick, if anything?

A. There must have been a flag.

Q. What color?

A. It must have been a red flag for stopping?

Q. When you first saw him waving towards Grove street, did you see anything?

A. No.

Q. Did you keep on looking?

30 A. Yes; he kept on shaking for stopping towards Grove street; I didn't see nothing, only the man in front of the derrick, he got his legs in front of the derrick, and he jumped up, and I looked toward Grove street, and I see the horse and wagon strike the car.

Q. When you first saw the horse how far away from the rail was he?

A. I seen him just between the posts of the gate.

Q. Had the horse got in your sight when you first saw the man waving the stick towards Grove street—did you see

40 any horse?

A. No sir.

Q. When you first saw the horse, how far away from the rail was the horse when you first saw him?

A. He stand just between the gate post, that is the moment I seen him.

Q. If the man had stopped his horse when you first saw the flagman waving towards Grove street, would he have been hurt?

A. No, I guess not.

Q. Where was the flagman when you first saw him? 10

A. Just standing between the tracks.

Q. Did he go away from that place?

A. No; he stayed there.

Cross-examined:

Q. This stick you saw in his hand, about what size was it?

A. Its a flagstick; he shook it.

Q. If there had been a flag on it unfurled you could have 20 seen it?

A. I could not say what color it was; I think it was a red flag; he showed the white flag when we were coming up.

Q. Did you see him unfurl a red flag that morning at all?

A. I could not say, I saw the stick.

Q. Did you look to see what he was waving at?

A. No; I didn't look.

Q. When you first looked, did you see anybody coming down Grove street?

A. No; I looked up there when that man jumped up, 30 then I saw the horse between the gate.

Q. Did he come into sight then?

A. The horse was standing in the gate.

Q. Did you say this on your examination below, "When I first noticed him shaking the flag, I could not tell whether there was any cart or horse in sight; when I got about the length of the derrick the horse and cart come in sight?"

A. The length of the derrick; that is the moment I seen the horse, he come up from Newark street.

Q. Come out from behind some obstacle? 40

A. There is a post, that's all.

Q. There were not other obstructions there—sheds, buildings and houses?

A. There is a house on the next lot to it.

Q. Didn't he, when you first saw him, come out from behind some sheds that were there?

A. He come in the gate; I didn't look that way before that man jumped up.

Q. How near to the railroad track was the horse and cart  
10 when you first saw him come in sight?

A. Six or seven feet off the track.

Q. How far were you from the crossing at that time?

A. About the length of the derrick.

*George W. Greesley, re-called for defence.*

Q. Have you measured the distance from the flagman's house to the track of the street railroad in Grove street?

A. Yes; I measured it last night; it is 15 feet from the  
20 flag-house to the nearest rail of the horse car track.

Q. Have you tried to find the engineer of the drill engine?

A. Yes; I enquired in the shops about him; he has been away over two years; he went down South with Mr. Shock, the former superintendent, to the ——— & Texas R. R., and he has not been back since.

Q. What were you looking for him for?

A. I tried to find him in regard to this case.

Cross-examined:—

30

Q. You were the party who had in charge the looking up of the witnesses in this case?

A. No, sir.

Q. You looked after some of them?

A. I served two subpoenas.

Q. Is Mr. Stecker here?

A. I don't know such a man.

Q. You were present at the examination before the commissioner?

40 A. I was; half a day.

Q. He was sworn before the commissioner—don't you know such a man?

A. I may know him by sight; I don't recollect the name.

Q. Do you know how soon the engineer left after the accident?

A. 2 or 3 months.

Q. How do you fix that date?

A. I am only just guessing it; only from hearsay.

Q. Do you know whether he left the next morning after the accident, or not?

A. I don't think he did; I saw him after this accident on the train. 10

Q. (By defence.) Was this man discharged?

A. He was not discharged for this case.

Q. What was his name?

A. I don't know his proper name; we used to call him "Buffalo;" his christian name was George.

Defendants offer their map in evidence.

Defence rest.

*Levi W. Post*, recalled by plaintiff:

20

Q. With reference to this building here (pointing on map,) have you the dimensions of that, if so, what are they?

A. 25 feet long in the direction of the railroad, 12½ feet wide, and is 18 feet above the track in the centre; that is, the peak of the roof.

Q. Do these houses here (pointing) come together?

A. The second and third house from the corner don't come together; there is about 5 feet space between them.

Q. What are the dimensions of this building down here? 30 (pointing.)

A. That is 18 feet in depth, and 15 feet in width.

Q. Did you notice the rear of this building? (pointing.)

A. Yes.

Q. Is there any thing more than one building there at all?

A. I think not.

Q. Standing on Grove street, with those buildings there, as you have represented them, coming from the street, tell us at what point, if any, you could see the railroad track—coming from Newark street to the railroad track?

A. I don't think I could see the track till I got past the flag-house; there is an opening between the flag-house and the first shed there now, where I could see a part of the track east of Grove street, for a short distance.

10 Cross-examined:—

Q. Can you tell us when these houses were put up about which you have been speaking?

A. I can't say.

Q. Do you recollect when this road was first put in use, from the ferry to the tunnel?

A. I do; I think it was about ten years ago.

Q. Were any of these buildings here when that road was built and first used?

20 A. I think every one of those buildings have been put there since.

*John F. Corde*, for defence, sworn, testified as follows:

Q. You own the property on the corner of Grove and Newark street?

A. Yes; that was put up a year ago last May, since this accident.

30 Q. On the rear of these lots here, beginning with this, (pointing) were the same buildings,—the same sheds,—on the rear there at the time of the accident, that there are now?

A. No sir; the house is built a little higher, another story on the top of the house back of mine; the sheds are higher now than they were then.

Q. This first building, has it been moved forward?

A. Yes.

Q. Supposing your house to be away, the house next to the lot on which your house is, is the rear of that now further forward than it was January 8th, 1872?

A. Yes.

Q. How much further ?

A. About  $4\frac{1}{2}$  feet further up towards Newark street.

Q. Do you know whether there is difficulty in seeing the railroad on coming from Newark street to the railroad ?

A. You can't see much.

Cross-examined :—

Q. When did you buy that corner lot ? 10

A. In April, 1873.

Q. There were no buildings on it at the time you bought it ?

A. No, sir ; none at all.

Q. On the rear of your lot was there anything ?

A. There was a little fence and the old shed ; the same shed that is there now.

Q. Before you bought this corner lot where did you live ?

A. In the next house to it, going on six years, and there was a shed on the rear of that lot ; I put a shed on the lot 20 I am on now, where I built the house a year and a half ago ; there was no shed there before.

Q. You said something about one of those sheds having been built higher ?

A. Since last week ; before it was built higher it was from 8 to 10 feet high, in some places it was 14 feet.

*Henry Smith*, for plaintiff sworn, testified as follows :

Direct examination :

Q. Did you see this accident ?

A. Yes. 30

Q. Do you recollect the day ?

A. Yes.

Q. Tell us what occurred ?

A. I was just coming from the slaughter-house ; I was about 10 feet from it, and I seen this horse and cart standing there ; I was looking at it ; it stood the other side of the

railroad towards Hoboken ; I see the horse and cart standing there, and I was going a little further and I seen a locomotive coming, and the derrick in front of it take the horse away and take it right along.

Q. After you saw the horse and cart standing, did the horse and cart move forward ?

A. I was going on afterwards ; there is just a fence there ; you can't see nothing before you're just on the railroad ?

Q. Were you on the opposite side of the road ?

10 A. I was on the Jersey City side.

Q. Did you see the horse and cart start on ?

A. I seen them start on when I was about 15 feet from the railroad ; he just held the horse up again, and then he started on again.

Q. When he started on did you see the engine coming ?

A. No ; as soon as I seen the engine the horse was standing on the track ; the butcher cart stood on the Hoboken side, and the engine took the horse.

Q. Just before the striking of the horse, did you see the 20 flagman ?

A. No, sir ; I didn't.

Q. Did you see the flagman at all ?

A. No, sir ; I was look out that road ten minutes to see that man come with the horse.

Q. You were the driver of the horse ?

A. Yes.

Q. You say you didn't see the flagman at all ?

A. No sir ; I didn't see him.

Q. If he had been between you and the other side of the 30 railroad, would you have seen him standing ?

A. Yes ; just straight in front of me, the sidewalk runs up to the flag-house ; I seen him after it had happened, and the engine had passed.

Q. Which side of the engine was he then ?

A. On the Hoboken side.

Q. In the line of the street ?

A. Yes ; walking around to see how this happened ; then I told him, I didn't see nobody there.

Q. Did you see the horse afterwards ?

40 A. Yes.

Cross-examined.

Q. Did you see Lohman that morning?

A. Yes.

Q. How far is the slaughter house from the railroad track?

A. About 100 yards.

Q. How far out of that slaughter house had you got, when you first saw Lohman in this cart?

A. Not more than 20 feet from it.

Q. When you first saw Lohman, what was he doing? 10

A. I seen him stopped there with the horse; he was sitting down in the cart.

Q. You are sure he was sitting down?

A. Yes.

Q. Had he hold of the horse's reins?

A. Yes.

Q. And the horse was stopped?

A. The horse was stopped.

Q. Was not moving?

A. No sir. 20

Q. The horse and cart were on the railroad track?

A. No it was before he got to the railroad he stopped.

Q. How far was he from the railroad track?

A. Not very far, 5 or 10 feet; he was near to it.

Q. He could not have been more than that?

A. No sir, it could not have been more than that.

Q. How long did he stop there?

A. A couple of seconds, and then he drove on again.

Q. You didn't see the man that Lohman said he saw?

A. I didn't see the gateman there at all. 30

Q. When was the first time you ever saw anybody except Lohman that morning?

A. When I was looking at it—just like lightning it was—when the train passed I seen the flagman on the other side.

Q. How long after the accident was it that you saw the flagman on the other side of the track?

A. When the train passed I walked on looking at it; about a minute, it didn't take a minute, I seen it laying there—Lohman was lying on the track. 40

Q. Was the gateman standing by him ?

A. The gateman was walking up and down ; he said he couldn't help it.

Q. Is it true that the first was after the accident that you saw the gateman walking up and down ?

A. That's the first I seen of the gateman.

Q. (By Court) I want to get the distance exactly that Lohman was from the railroad track when he stopped—supposing that rail at the bar was the north rail of the track, 10 show us how far Lohman was from the track when he stopped the horse ?

(Witness steps down from the stand and points out the distance.)

Q. How long did he stop there ?

A. About a second or two.

*Charles Stiker*, for plaintiffs, sworn.

Q. You were a witness produced here by the Delaware, 20 Lackawanna and Western Railroad Company ?

A. I was.

Case closed.

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### *Defendant's Requests.*

Defendant's counsel requests the Court to charge :

First.—That defendants were not, by law, bound to have or maintain a gate at the crossing in question.

Second.—As a matter of law the flagman's duty was to signal the driver of the cart without moving from his position between tracks to lay hold of the horse to stop him.

30 Third.—It was the duty of the driver of the horse to the cart, before he drove the horse on the track, to look along the track, on each side of the crossing, to see whether any train was approaching, and if any train was approaching the crossing he should have stopped and stood still until the train had passed ; and if he did not do so, the plaintiffs cannot recover in this case.

### *Judge's Charge.*

#### *Gentlemen of the Jury :*

This action is brought by Toffey and Herzog against The Delaware, Lackawanna and Western Railroad Company, to recover damages for an injury to property, alleged to have resulted by carelessness of the railroad company. There is nothing involved in this suit except a property question. A horse was killed belonging to these plaintiffs and a wagon and harness were injured. The question is whether the company is liable to pay damages for that injury; that is all there is involved in this case; it is merely a question of property. In determining that, however, there are some principles of law that the Court will put you in possession of, leaving the facts subject to them to be determined by you.

In the first place, in order to entitle the plaintiffs to recover against the company, the injury must have resulted from the carelessness of the company and without it appearing to have been contributed to by the carelessness of the plaintiffs, or the person in their employ. Now, there are two propositions in that statement, and the Court will call your attention to each; and the first is as to contributory carelessness on the part of the plaintiffs—when I say the plaintiffs I mean on the part of the man who was in their employ driving the horse. It is a well settled rule of law, that if both parties have been careless neither can recover of the other, for the law will not seek to determine which has been the more careless. It is important for the public that railroad companies should exercise reasonable care at crossings, and it is equally important for railroad companies and the public who patronize them that the public at a crossing should exercise, also, reasonable care; there are mutual duties there, and if the company has been guilty of carelessness, and at the same time it appears from the case—if it does, and that is a matter for you—that the plaintiffs have contributed also by their carelessness to the injury, then there can be no recovery. The law is well settled that a person approaching a railroad track must use his eyes and

ears, and exercise the caution of a reasonably prudent man. A passer by has no business to rely entirely upon the gates and flagman of a railroad company; no business, for the reason that flagmen will make mistakes, and men in the management of gates will make mistakes. If these precautionary means are used by a railroad company, they do not diminish at all the care required by the passer by at the crossing, and the law is express, that when a party undertakes to cross a railroad he must use his eyes and ears, and

10 exercise that reasonable care that would be expected of a reasonably prudent and cautious person. You see how important it is to have a rule of law just exactly like that; it is important for the hundreds of people who travel in railroad trains that they should not be subjected to the carelessness of those who pass railroad tracks. I will read you what the law is on this subject :

20 Care being a relative term depends upon circumstances; the more dangerous the circumstances, the greater the caution required.

In the case of the Penn. R. R. Co. vs. Mathews, the Chief Justice in writing the opinion in that case uses this language :

As a mere legal proposition, then, there is no doubt of the law that a party approaching a railroad crossing must

30 exercise reasonable caution to avoid danger; reasonable common prudence, that is the prudence and care of a man reasonably cautious. Pick out a reasonably, prudent and cautious man, and the standard of care would be such as would be required of him, fairly interested in his safety, having a purpose to avoid danger and knowing that it is a dangerous place. The degree of care, although it is reasonable, ordinary care, to be exercised on the part of the person crossing, yet it is relative, depending upon the character of

40 the danger; as already stated by the Courts the greater the danger, the greater the occasion for the exercise of caution. The

law requires of every man in approaching a railroad track before he crosses, that he should listen and that he should look—listen and look both ways; look just as far as it is practicable for him to look so as to avoid danger, and he is not relieved from fault by simply relying upon the means provided by the railroad company to protect the public and themselves, because he must always remember that gatekeepers may make mistakes, that flagmen may make mistakes, and that engineers may make mistakes, and he must be cautious, notwithstanding, these means are provided by 10 the company.

Now your province is to determine what the facts are in regard to the conduct of the man in charge of that wagon and horse. If he approached that railroad track without being as cautious as a reasonably prudent man would have been and, by reason of that, contributed to the injury himself, although there was fault on the part of the company, there can be no recovery by these plaintiffs, because, as already stated, the law don't stop to measure as to who is the more to blame. If the injury has been contributed to 20 in part by the party in charge of the vehicle; if he has been careless himself, and that carelessness has contributed in part to the injury, there can be no recovery. But if you think that man in charge of the horse exercised, or rather didn't fail to exercise, reasonable care and prudence under the circumstances, then you come to the next question which is, was there fault or carelessness on the part of the company? And in order to recover against the company, if the case does not develop this want of care on the part of the man in charge of the horse, then to recover against the 30 company, there must have been carelessness on the part of the company. The plaintiff does not recover as a matter of course, against the railroad company for injuries sustained, there must be fault on the part of the company. The company have the right to run their trains on their tracks, but they are responsible for reasonable care; the same care is required of the railroad company that is required of the individual; it is mutual, and if both have been at fault there can be no recovery. If the case does not show that the

plaintiffs, or their agent, was at fault, then to recover against the company, it must appear that the company was at fault.

Under a recent case in the Court of Errors, this question of the liability of a railroad company to erect gates and to station flagmen at crossings, is left in a state of uncertainty to some extent. The case holds substantially this, that there is no general rule of law requiring, as a matter of course, a railroad company to erect gates or station flagmen at crossings; that case now establishes that doctrine, and it is only  
10 when the construction of the railroad as created, by reason of its peculiarity of construction, or the erection of buildings by the company about the crossing, where there is something extraordinary of that character, it is only under such circumstances that it is absolutely necessary that gates should be erected and flagmen stationed at crossings. I am speaking now as a general proposition. But that question need not give you any difficulty in this case, for this reason: the company for their own protection or otherwise, in this case erected gates, and they had been accustomed to maintain a  
20 flagman at that crossing to open and close the gates, and to act as flagman.

There is a statute, that if the company choose to fence their track and to erect gates, and close them half a minute, I believe it is, before the passing of the train, that they can run as fast as they please through a city, and not be subject to city ordinances. The company in this case for some reason or other, concluded to erect gates there and to station a flagman there, no doubt for the benefit of the public to a considerable extent, but a good deal for the protection of  
30 their own trains from the carelessness of the public; to exercise caution there, in order that accidents might not occur at the crossings.

The Court recognizing the fact that the company had gates there, and that they had a flagman there, the law would require of the company in the use of those gates and on the part of that flagman there, the exercise of such reasonable care as would be proper under the circumstances. If the company use gates, or if they have a flagman, then they are responsible for the reasonable conduct of the flagman at the  
40 gates or at the crossings and for the reasonable use of the

gates, for the exercise of reasonable and proper care in that respect. Because, were that not so, if the company could use a gate one day, or a flagman one day, and not the next, after using them for some length of time, and not with the intention of abandoning the use of the flagman or gate, it might operate as the very means to deceive the public; and, therefore, the law would require of them the exercise of reasonable care in those respects.

Now, the Court don't mean to charge that the mere fact that the gates hadn't been let down for some days, was in 10 itself, evidence of want of reasonable care. I don't mean to charge that, but the Court do charge this, that if the gates got out of order, and they were accustomed to use their gates and a flagman, as they were, that the care to be exercised by the flagman must have been such as would have been proper under the circumstances; that is, in view of the fact that the gates were out of order. You perceive if the gates were out of order, more caution might be required on the part of the flagman, so as to prevent the public from being deceived by the fact that the gates were up; and there 20 might be circumstances where even more than one flagman might be necessary to meet a circumstance of that character.

Reasonable care is so much a relative matter that it requires the exercise of good common sense, and looking over the scope of things, and see what it would be under the peculiar state of circumstances at the time.

Want of care on the part of the company in this case may consist—and you must be the judges of that—either in a want of such care on the part of the flagman under the existing circumstances at the time the gates being out of order, 30 either in a want of proper care on his part, or in an unreasonable speed on the part of the train, or not sounding the whistle properly, or not ringing the bell properly; whether in either, you must judge; you have a right to look into the facts and see whether there has been a want of reasonable care on the part of the company in any of those respects. (Refers to Nixon p. 786, sec. 6, in relation to ringing of bell or blowing of whistle within 300 yards of crossing.) If the locomotive comes a distance within 300 yards, of course, you could not require of them a strict compliance with that statute. 40

But you could require of them a ringing of the bell or blowing of the whistle for the distance they were to come on the line of the track, so as to have the act complied with as far as it is reasonable—for instance, if a train should start one hundred feet from the crossing then you would require of them the ringing of the bell or blowing of the whistle from the time they started. If this engine started less than 300 yards from the crossing you could not require a compliance with this act, but you could so far as practicable. If 10 there has been any breach of those duties it must be shown by the plaintiffs; the plaintiff must show that the whistle was not blown or the bell not rung.

The testimony on one side is negative, on the other side it is affirmative, but you must take each side and determine that question. And if you find that the whistle was not blown or the bell not rung, then the next question is as to whether by reason of that the accident occurred.

The injury must have resulted from carelessness (if there was fault) of the company, and if the injury resulted from 20 it, and if it don't appear that the carelessness of the plaintiff contributed to it, then there can be a recovery. The company would not be responsible provided the carelessness of the plaintiff contributed to the injury.

The first proposition I am asked to charge by defendants' counsel is this, "The defendants were not, by law, bound to "have or maintain a gate at the crossing in question." I charge that, subject to what I have already charged and subject to the explanation given by the Court.

The second, "As a matter of law the flagman's duty was 30 "to signal the driver of the cart without moving from his "position between tracks to lay hold of the horse to stop "him." I decline to charge that, because it assumes a fact which is within the province of the jury.

Third. "It was the duty of the driver of the horse to the "cart, before he drove the horse on the track, to look along "the track, on each side of the crossing, to see whether any "train was approaching."

I charge you that, but it is just what I have charged in substance; that a man who approaches a railroad track 40 must look each way just so far as it is practicable for him to

do. If he can use his eyes he is bound to do it and not rush on without exercising that common prudence. If it is practicable to see up and down the track each way when a man approaches the railroad track before crossing he is bound to look ; if he cannot look, the duty of course, would not be required of him, but if it is practicable for him to do it, he is bound to do it. "And if any train was approaching that crossing he should have stopped and stood still until the train had passed, and if he did not do so the plaintiff cannot recover in this case." The Court charge<sup>10</sup> that subject to this : that if he discovered that there was a train approaching, it was, of course, his duty to stop still till the train passed, but if he didn't discover any train approaching, as perhaps he didn't, then the question you see is still open as to whether he was in the exercise of this common care or not.

Now gentlemen, your verdict will depend upon what you think of these facts under the rules of law, as the Court has given them to you.

If you find in favor of the plaintiff your verdict would<sup>20</sup> only be for the value of the property. As to the value of the horse, the extreme amount sworn to by the plaintiff is \$225 ; he says the horse cost him \$175 or \$180 ; he says the wagon was worth \$75 ; it was sold for \$5 ; he says the harness was worth \$35 or \$40. You can fix the value if you find for the plaintiff at such an amount as you think the price of the horse and harness ought to be, and for such injury as was done to the wagon.

Defendant's counsel prays an exception "in respect to the<sup>30</sup> qualification which the Court attached to the first request," and prayed that its exception might be sealed and it is sealed accordingly.

J. D. BEDLE, [L. s.]  
*Jus. Sup. Ct.*

And also "to the Court's declining to charge the second request."

And also "to the qualification with which the Court charged the third request."

And also "particularly to that part of the Court's reply to that request in which the Court stated in substance that "if he didn't look either up or down the track when he approached it but went on and got hurt, then the jury were to decide whether or not he was exercising common "prudence."

By the Court. You may have exceptions to the language of the court. And thereupon the defendants prayed that these their exceptions might be severally sealed and they are sealed accordingly.

J. D. BEDLE, [L. s.]  
*Jus. Sup. Ct.*

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NEW JERSEY COURT OF ERRORS AND APPEALS.

DELAWARE, LACKAWANNA AND  
WESTERN RAILROAD COMPANY

*vs.*

WILLIAM V. TOFFEY and ROBERT  
HERZOG.

*In Error.*

Afterwards, that is to say on the first day of April, eighteen hundred and seventy-five, in the Court of Errors and Appeals, comes the said The Delaware, Lackawanna and Western Railroad Company, by Jacob Vanatta, its attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bills of exception, and in the verdict and judgment aforesaid, there is manifest error in this to wit: that by the record aforesaid, it appears that judgment in the plea aforesaid, was given for the aforesaid William V. Toffey and Robert Herzog against the said The Delaware, Lackawanna and Western Railroad Company, when by the law of the land judgment in the said plea ought to have been given for the said The Delaware, Lackawanna and Western Railroad Company against the

said William V. Toffey and Robert Herzog, therefore, in this there is manifest error.

There is also manifest error in this, to wit: That after the said plaintiffs had closed the testimony offered by them to prove and maintain the said issue on their part and had rested their case on the said testimony, the said defendant, by its counsel, moved that the plaintiffs be called, on the ground that the driver of said plaintiffs did not exercise reasonable ordinary care—that there was contributory carelessness on the part of the agent of the plaintiffs—that the driver swore that when crossing the defendant's railroad, he did not look to the east nor to the west, where, if at all, there might be danger, but that he simply looked straight ahead where there could be no danger, but the said Justice denied the said motion, and refused to call the said plaintiffs, as is mentioned in the said bill of exceptions in that behalf; whereas, by the law of the land, the said Justice should have granted the said motion, because the evidence of the said plaintiffs showed that the injury of which they complained was caused by the want of care and the negligence of their servant, who then and there had charge of the property injured. 10 20

There is also manifest error in this, to wit: That the testimony having been concluded and the parties having rested the cause, the said defendant by its counsel requested the said Justice to charge the jury, before whom the said issue was then and there being tried, that the defendants were not, by law, bound to have or maintain a gate at the crossing in question. Whereupon the said Justice declined to charge said request as made, but added to and qualified the propositions contained in said request and charged the jury in that behalf as is shown in and by the said charge, whereas, by the law of the land, the said Justice should have charged the said request as made, and without the additions and qualifications in that behalf contained in said charge. 30

There is also manifest error in this, to wit: That after the testimony on both sides was concluded and the cause rested, the said defendant by its counsel requested the said Justice to charge the said jury that "As a matter of law the flag-40

man's duty was to signal the driver of the cart without moving from his position between tracks to lay hold of the horse to stop him," whereupon the said Justice declined to charge said last mentioned request, whereas, by the law of the land, the said Justice should have charged the jury according to said last mentioned request.

There is also manifest error in this, to wit: That after the testimony on both sides was concluded and the cause rested, the said defendant by its counsel requested the said Justice  
 10 to charge the said jury that "it was the duty of the driver of the horse to the cart, before he drove the horse on the track, to look along the track, on each side of the crossing, to see whether any train was approaching, and, if any train was approaching the crossing, he should have stopped and stood still until the train had passed, and if he did not do so, the plaintiffs can not recover in this case," whereupon the said Justice declined to charge pursuant to the last mentioned request except with divers unlawful additions and qualifications, but charged the jury in that behalf as men-  
 20 tioned in the said charge, whereas, by the law of the land, said additions and qualifications were erroneous, and said Justice should have charged pursuant to the last mentioned request without said additions or qualifications.

There is also manifest error in this, to wit: That the testimony having been closed on both sides and the cause rested, the defendant, by its counsel, made to said Justice the request as to charge, last hereinbefore stated, whereupon said Justice, in response to said request, among other things, as appears by his charge, charged said jury as follows:  
 30 "The Court charge that, subject to this: that if he discovered that there was a train approaching, it was, of course, his duty to stop still till the train passed, but if he didn't discover any trains approaching, as perhaps he didn't, then the question, you see, is still open as to whether he was in the exercise of this common care or not," whereas, by the law of the land, the said Justice should not have so charged but should have charged the said jury pursuant to the request last hereinbefore stated. Therefore in this there is manifest error.

40 Therefore the said The Delaware, Lackawanna and West-

ern Railroad Company prays that the judgment aforesaid, by reason of the aforesaid errors and of the errors appearing in the record and proceedings aforesaid, may be reversed, annulled and for nothing holden, and that the said The Delaware, Lackawanna and Western Rail Road Company may be restored to all things it has lost on occasion of the said judgment, and that said William and Robert may rejoin to said errors.

JACOB VANATTA,  
*Attorney of Plaintiff in Error.*