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Hunterdon County Circuit Court.

FRANK R. TITUS,

Plaintiff,

v.

PENNSYLVANIA RAILROAD COM-
PANY,

Defendant.

Action at Law.

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Notice of

Appeal.

To H. B. Herr, Esq., Attorney for Plaintiff:

Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

1. The Court refused the motion made on behalf of the defendant at the conclusion of the plaintiff's case, to order a judgment of non-suit. 20

2. The Court refused the motion made on behalf of the defendant upon the conclusion of the evidence on both sides, to direct a verdict in favor of the defendant.

3. The Court permitted the plaintiff to be asked on direct examination, the following question against objection of the defendant, to wit: "In your judgment, what would they be worth in market to a man that was not compelled to buy but wanted to buy cattle, buying from a man who wanted to sell it but was not compelled to?" 30

4. The Court allowed the plaintiff to testify against objection of the defendant: "Ran into the sheep and killed two or three, and hurt some two or three lambs. I seen Mr. Dilley there; he came up and looked at them, went back and Mr. Andrew sent me word to come down to the office."

5. The Court allowed the plaintiff to testify against

the objection of the defendant: "J. A. Andrews, superintendent; and he gave me a check for the money."

6. The Court refused the motion on behalf of the defendant to strike out the following answer of the witness John J. Barber on cross-examination: "Yes, and on the fence and on the bridges—they had a big bridge right by my property and they were working there for weeks; one man Mr. P——— was employed at that time by the Camden Railroad Company."

7. The Court refused the motion on behalf of the defendant to strike out the following answer of the plaintiff: "One of the railroad men; I went through the pasture and met him down the road and said he had run into the cows."

8. The Court permitted plaintiff to answer as follows, against the objection of the defendant: "He notified me that he had run into the cows and asked me to come down."

9. The Court refused to allow the witness A. P. Gest to be asked on behalf of the defendant: "How far back had the officers of the company been writing to him calling his attention to the defects in his fence and need of repair and notifying him of his obligation to do so?"

10. The Court refused to allow the witness A. P. Gest to be asked on behalf of the defendant: "To what effect had the Company written him before that?"

11. The Court refused to allow the witness A. P. Gest to be asked on behalf of the defendant: "You said those letters had been written to him by the Company?"

12. The Court struck out the following testimony of the witness Albert W. Preston, on motion of plaintiff: "For the safety of trains."

13. The Court refused to allow the witness Edward Coll to answer the question, on behalf of the defendant: "And who was it told you to tell Mr. Titus that?"

14. The Court refused to charge the following request to charge, presented on behalf of the defendant: "2. That if the fence was in a reasonably safe condi-

tion and the cows broke through because of some unusual circumstance such as fright or unreasonable driving, or because they were vicious or headstrong, the defendant is not liable."

15. The Court refused to charge as requested on behalf of defendant, the following request to charge: "5. That every man at his own peril is bound to keep his cattle on his own property, and prevent them from going on that of the adjoining owner."

16. The Court refused to charge the following request to charge, presented on behalf of the defendant: "6. That the defendant was under no obligation to the plaintiff to erect or maintain the fence between them." 10

17. The Court refused to charge the following request to charge, presented on behalf of defendant: "8. That if the plaintiff was aware that the fence was not in a secure condition but nevertheless pastured his cattle in the field bounded by it, he is guilty of contributory negligence and cannot recover."

18. The Court charged the jury that if they found that the defendant did for a period of over twenty years, continuously, without interruption, and as a duty, repair and maintain the whole of the fence along plaintiff's property, then the law would infer an agreement on the part of the company to perpetually make and maintain the fence, and if it failed to do so and by reason of such failure the plaintiff's cattle passed through the breaches in the fence upon the company's right of way and were killed or injured thereon by defendant's engine, then the defendant is liable in damages for the injury or destruction of such cattle. 20 30

19. The Court charged the jury that the plaintiff had testified: "that he has lived upon the property for forty-two years, and that during that entire period, in fact he says for fifty years,—the company has built and maintained this fence and that during that period, although when he first went there, there was a board fence, they twice took down the old fence and built new fences."

20. The Court charged the jury that it was for them

* to say whether the testimony given by Mr. Barber upon re-direct examination referred to the first fence that was built or to the subsequent fence which Mr. Barber said he actually saw being built.

10 21. The Court charged the jury: "after the full period of twenty years has run, during which the company has continuously, uninterruptedly and as a duty repaired and maintained the whole of this fence, if you find from the evidence the defendant did, during such period so maintain this fence, protests and remonstrances on the part of the Company after the expiration of that period would be unavailing and even protests and remonstrances during that period would be unavailing unless they were accompanied by acts amounting to a disturbance of the right in a legal sense, that is, by some act which placed the plaintiff in a position to have his right settled by suit or otherwise."

20 22. The Court charged the jury that they would have a right to find that the cows did pass through the fence and from the evidence of the plaintiff they would also have a right to find that they were injured so badly by the locomotive of the defendant that they subsequently died.

23. The Court charged the jury: "There is no serious controversy about the damages in this case."

30 24. The Court charged the jury: "Upon cross-examination Mr. Barber said that the men who were building this fence were building it for Solomon Holcomb, this first board fence. Now, upon re-direct examination, he gave testimony again with reference to who were building the fence and stated that he knew they were employees of the railroad company, because he saw them working down the track and saw them building bridges."

25. The existence of a former and lost agreement to do so may be inferred; and that, gentlemen, is the crucial question in this case for you to decide, whether, notwithstanding the fact that defendant was not obliged to maintain this fence under any statute or under its

charter, it did, as a matter of fact, for a period of over twenty years, continuously, without interruption, and as a duty repair and maintain the whole of the fence along plaintiff's property."

THEODORE STRONG,
Attorney for Appellant.

The State of New Jersey to the Pennsylv-
(Seal) ania Railroad Company.

You are summoned to answer the annexed complaint of Frank R. Titus, in an action at law, in the Hunterdon County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Hunterdon County Circuit Court at Flemington, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

10

Witness, Nelson Y. Dungan, Judge of the Hunterdon County Circuit Court, at Flemington, this thirtieth day of August, nineteen hundred and twelve.

20

OLIVER R. KUGLER, Clerk.

H. B. HERR, Attorney.

30

HUNTERDON COUNTY CIRCUIT COURT.

FRANK R. TITUS,

Plaintiff,

v.

PENNSYLVANIA RAILROAD COM-
PANY,*Defendant.*

} Complaint.

10

Plaintiff Frank R. Titus of the Township of Delaware in the County of Hunterdon and State of New Jersey, says:

1. On the 31st day of August, 1911, at the Township of Delaware, two cows the property of plaintiff were run over and killed by a locomotive engine of the defendant operated by the servants of defendants.

20 2. Said cattle had strayed from the lands of plaintiff upon the track of defendants railroad because of a defective fence which the defendant was bound to keep in lawful condition to turn cattle.

3. Said cattle were killed by reason of the careless operation of the engine of the defendant.

4. Plaintiff demands as damages the sum of \$150 with interest from August 31st, 1910.

H. B. HERR,

Attorney.

30

HUNTERDON CIRCUIT COURT.

FRANK R. TITUS,

Plaintiff,

v.

PENNSYLVANIA RAILROAD COM-
PANY,

Defendant.

Answer.

10

Defendant says that it is a corporation of the State of Pennsylvania.

1. It denies the truth of the matters alleged in the first paragraph of the complaint.

2. It denies the truth of the matters alleged in the second paragraph of the complaint.

3. It denies the truth of the matters contained in the third paragraph of the complaint.

ALAN H. STRONG,
Attorney for Defendant.

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HUNTERDON CIRCUIT COURT.

FRANK R. TITUS,

Plaintiff,

v.

PENNSYLVANIA RAILROAD COM-
PANY,*Defendant.*

} Action at Law.

10

The above stated cause having been moved, the Court ordered on the trial of the same and that the Sheriff return a panel. Whereupon the following named persons were empaneled and sworn, to wit:

Howard S. Apgar.

Chs. Johnson, Jr.

Hugh W. Laire.

John Carling.

20

Harry Van Pelt.

Absolom Apgar.

Theo. K. Stryker.

Robert M. Conover.

Frank H. Servis.

James Kugler, Jr.

William M. Schomp.

Alfred R. Johnson.

H. B. HERR,

Atty. of Plaintiff.

ALAN H. STRONG,

Atty of Defts

Witnesses:

Frank R. Titus.

George H. Titus.

Alfred Lambert.

Hugh Joyce.

30

Martin Smith.

John B. Barber.

O. R. Kugler.

Witnesses:

A. P. Gest.

Patrick Ganie.

Albert Preston.

After hearing the evidence and the argument of Counsel and the Charge of the Court, the Jury retired in charge of George Vogel, Constable duly sworn to attend them and after being out a short time they returned into Court and being called all appeared and said that they had agreed upon their verdict and by their

foreman further say that they find for the plaintiff the sum of one hundred and forty dollars and so say they all.

Whereupon it is ordered that judgment final be entered in favor of Frank Titus, plaintiff and against the Pennsylvania Railroad Company defendants for the sum of One hundred and forty dollars besides cost of suit to be taxed.

Judgment entered, April 9, 1913, at 5.15 o'clock P. M.

Amt. Judg. \$140.00.

Costs Taxed 58.26.

On motion of H. B. HERR,

Atty of Pltff.

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20

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HUNTERDON CIRCUIT COURT.

April Term, 1913.

H. B. HERR, Attorney.

FRANK R. TITUS,		} Action at Law.
	<i>Plaintiff,</i>	
	v.	
10 PENNSYLVANIA RAILROAD COM- PANY,	<i>Defendant.</i>	

Judgment on verdict in an action at Law was rendered in favor of Frank R. Titus, plaintiff and against The Pennsylvania Railroad Company, defendants for the sum of one hundred and forty dollars. . . . \$140.00
and the sum of fifty-eight dollars and twenty

20 six cents cost 58.26

Whole amount of Judgment and costs, one hundred ninety-eight dollars and twenty-six cents. \$198.26

Judgment entered and signed this ninth day of April, nineteen hundred and thirteen at five o'clock and fifteen minutes in the afternoon.

30 *State of New Jersey,*
County of Hunterdon, ss.

I, O. R. Kugler, Clerk of said County and of the Circuit Court thereof, the same being a Court of Record, Do hereby certify that the foregoing are true copies of the Rule entered and pleadings filed and judgment entered in the within stated case.

Witness my hand and seal of said County
(Seal) and Court at Flemington, this 16th day of
October, 1913.

O. R. KUGLER, Clerk.

HUNTERDON COUNTY CIRCUIT COURT.

FRANK R. TITUS,

Plaintiff,

v.

PENNSYLVANIA RAILROAD COM-
PANY,

Defendant.

} Action at Law.

10

Transcript of shorthand notes of testimony, etc.,
taken in the above entitled case, at the Court House,
Flemington, Hunterdon County, N. J., on Wednesday,
April 9th, 1913, at 10.30 A. M., before Hon NELSON Y.
DUNGAN, Judge and a Jury.

Appearances :

For Plaintiff, Judge H. B. HERR.

For Defendant, THEODORE STRONG.

20

30

JUDGE HERR OPENED FOR PLAINTIFF.

Frank R. Titus, the plaintiff, sworn:

Direct Examination, by Judge Herr.

Mr. Strong: Before this witness begins his testimony I would remind Judge Herr that there are some matters he and I were mutually to admit yesterday in order to save time.

10

The incorporation originally of the Flemington Railroad Company; lease of the Railroad Company to the United Railroads of New Jersey; lease of the whole United Railroads of New Jersey, including lease to the Pennsylvania Railroad in 1871; all appears upon the statutes, and the ownership of Mr. Titus. The incorporation of these different companies and their combination by agreement in lease, those detail matters are admitted, and Judge Herr admits on his part that the Pennsylvania Railroad at the time of this accident is said to have occurred was in maintenance and enjoyment of franchises granted by those charters and any other so operating thereunder.

20

The Court: The road itself was not constructed under the general railroad law?

Mr. Strong: No, long prior to that; charter granted in 1839 or 1849.

The Court: Then I understand, Judge Herr, you are willing to admit that this land was originally obtained by the railroad under condemnation proceedings?

30

Mr. Strong: Right of way through what is now the plaintiff's land. That was in 1853.

Judge Herr: I admit that for the purpose of saving getting his papers here from Philadelphia. As a matter of law I don't believe it would be relevant if he had his papers here. I don't see how it affects this case in one way or the other. He says condemnation proceedings don't say anything

about fencing at all. I am taking Mr. Strong's word for it. I would like to save time in this case. There is no doubt about the effect. I have a memorandum—there is no doubt about the fact that the condemnation proceedings say nothing about the fencing; that is what Mr. Strong told me this morning and I admit that fact with that understanding, because I haven't seen them at all.

The Court: Do you know how many feet of that railroad runs along your property?

10

Mr. Herr: Six hundred and fifty-four feet of fence.

Mr. Herr: I don't know that we need go into that; all that you want is to admit that the land occupied by the railroad company was condemned and that nothing appears in the condemnation proceedings about fences, in the condemnation proceedings in 1853, when the road was put through. I will admit that, and of course, I challenge the relevancy of the evidence. Of course we shall claim that the offer covered the fencing, but not specifically mentioned.

20

By Mr. Herr.

Q. Where do you reside? A. Delaware Township.

Q. You reside in Delaware Township?

A. Hunterdon county.

Q. And you own a farm there? A. Yes.

Q. Where is it situated with regard to the Pennsylvania Railroad, now occupied by the Pennsylvania?

A. Runs right through it.

30

Q. That is, you own on both sides of the railroad?

A. Yes.

Q. How long have you owned that property?

A. Thirty-three years. I have lived there forty-four year since I went there.

Q. Well, I will make a formal record of the deed from E. O. Barber to Frank A. Titus, volume 182, page 255, dated 1879, about first of April. And you have occupied the farm ever since that time? A. Yes.

Q. How long have you known the farm before that?

A. I had lived there ten years before; ran that farm on shares with Solomon Holcomb, lived there forty-four years this March.

Q. Were you the owner of some cattle on the thirty-first of August, 1911? *A.* Yes.

Q. Where were they pasturing on that day?

A. Next to the railroad.

Q. Is there anything between the railroad and your
10 lands? *A.* Fences.

Q. What was the condition of the fence? *A.* Well, it was down in some places; they had fired in a place or two, burned the fence, had it repaired down on what was called Fox's Hollow; the cattle went down and got down in a corner where the fence was down.

Q. Do you know where they got there? *A.* I do.

Q. How do you know? *A.* I saw the tracks.

Q. State what happened to the cattle.

A. Well, the train ran into them, broke the jaws on
20 one; the other, threw her down the bank; she laid there, she was hurt internally, I guess, she bloated up.

Q. Well, what did you do with them? *A.* The section boss came up there to bury them; it was terrible stormy. It had rained hard, and he says "I come to bury the cattle." He says "Have you had them appraised?" I said "I have." He said "Fish them up and we will bury them."

Q. You have owned cattle for all this time? *A.* Yes.

Q. Bought and sold? *A.* Yes.

30 *Q.* Thoroughly acquainted with market prices?
A. Yes.

Q. State what kind of cows they were? *A.* One was
a Guernsey six-year old, a good one; the other an Alderney, five-years old, with the promise of making an extra good one.

Q. Had you raised them yourself? *A.* Yes.

Q. What was their condition as to milking?

A. They were not milking, they were due to freshen in about a month or six weeks.

Q. In your judgment, what was the value of those cattle?

Mr. Strong: I object. He hasn't qualified as an expert to state their value. He hasn't shown that he is qualified to put a value upon them.

The Court: You haven't asked him the one question necessary.

Q. How long have you been buying and selling cattle and about how many? A. I couldn't tell you how many; I have been at it for years. 10

Cross Examination, by Mr. Strong.

Q. How many cattle did you buy or sell in August, 1911? A. I didn't buy any; not in 1911, not to the best of my recollection, because I didn't need any.

Mr. Strong: Well, I think it is shown to be incompetent to speak of it.

By the Court.

Q. How near to the time had you bought cattle and sold? A. A year or two previous to that. 20

By Judge Herr.

Q. Had you sold any cattle in 1911? A. I had not.

By the Court.

Q. Did you know the value of cattle in 1911?

A. I think I did when I went to buy them I used my own judgment; I always thought I was capable of doing business.

30

By Judge Herr.

Q. How many public sales did you attend in 1911?

A. I couldn't remember.

Q. Did you see cattle sold at that time? A. Yes.

Q. And was thoroughly conversant with the price of cattle at that time? A. I think so.

Mr. Strong: I object to those questions,—leading questions.

The Court: Objection will be noted.

Q. What, in your judgment, were they worth?

A. Those cows?

Q. Yes. A. Well, one cow I would not have liked to have taken one hundred dollars for.

Q. What were they worth in market? A. Well, one would have brought \$75.00.

Q. In amount to anyone, do you know her value?

A. They would have brought that apiece—

10

Mr. Strong: I object.

The Court: It isn't what they would have brought; what they were worth.

Judge Herr: Well. I will put the question in a technical way.

Q. In your judgment, what would they be worth in market to a man that was not compelled to buy but wanted to buy cattle buying from a man who wanted to sell it but was not compelled to?

20

Mr. Strong: I object as not being a proper question.

Objection overruled.

The Court: An objection will be noted.

A. I think they were worth one hundred and fifty dollars.

Q. That is, you mean both of them together?

A. Yes.

30 Q. During the time you occupied that farm, I think you said since 1869, who built the fence between you and the railroad company? A. The company always built it and maintained it for over half a century, ever since the fence was built; took old fences away and put new ones down.

Q. When did they put the last one down?

A. I don't remember; probably fifteen years ago.

Q. What kind of a fence did they put up there?

A. Post and rail. There was a board fence there. Mr. Preston asked me if a good rail fence would be satisfactory, and I said it would.

Q. Previous to this accident when did they last repair the fence? *A.* I don't think they had done a great deal to it.

Q. I asked you previous to the accident which was in August, 1911? *A.* Previous to that?

Q. When did they repair the fence? *A.* I don't remember about that; they done it several times; I don't remember, but I seen they had fenced it.

Q. Now do you know,—you say it was done about fifteen years ago when they put this changed fence. 10
About how long before that did they put up a new fence? *A.* I don't remember that. They done it twice in my time, since I lived on the farm.

Q. What kind of a fence was there when you came there? *A.* Board fence; they took that away and put a new fence there.

Q. Did you ever have any trouble about stock getting on the track before? *A.* When Mr. Andrews was ther they ran into my sheep.

Q. How long ago was that? *A.* Well, I judge some- 20
thing like twenty years ago.

Q. Well, what was the result of it?

A. Ran into the sheep and killed two or three, and hurt some two or three lambs. I seen Mr. Dilley there; he came up and looked at them, went back and Mr. Andrews sent me word to come down to the office.

Mr. Strong: I object.

Q. Who was Mr. Andrews? *A.* J. A. Andrews, superintendent; and he gave me a check for the money. 30

Mr. Strong: I object to this.

Judge Herr: I understand the question to have been interrupted. I thought your objection was with regard to this sheep transaction.

Mr. Strong: This sheep transaction is entirely irrelevant and I move to strike that answer out.

The Court: It may be stricken out.

Judge Herr: I propose to show they got through

this fence and the company paid for them without any demurrer and acknowledged their liability.

The Court: The last answer will be stricken out.

Judge Herr: I thought it was competent, in view of the fact that they got through this fence and no question was raised about it. Of course, I am anticipating, probably, rebuttal. Mr. Titus is on the stand and Mr. Strong has stated what his defense is going to be, I thought the quickest way
10 would be to get through with Mr. Titus—

Cross Examination, by Mr. Strong.

Q. You have never sold that property or any part of it since you bought it? A. No, sir.

Q. You had a bull, as well as cows at the time these cows were killed? A. Yes.

Q. Wasn't that bull what you call a breechy bull?

A. No, sir.

Q. And didn't that bull break down the fence?

20 A. No, sir; never knew him to.

Q. How long before this accident happened had this fence been down so those cattle could get on the track?

A. For several months, probably a year.

Q. Have they been fixed since? A. Well, I think temporarily, some places, I am not positive. Since the accident you mean? No, not since the accident.

Q. Well, could the cows have gotten through that day when you said they were killed, when you claim they were killed by the cars? A. Yes, nothing to hinder
30 them, the fence was down.

Q. That fence was never a legal fence, was it?

A. A legal fence? A. Yes, when it was built it was a legal fence.

Q. The old fence that was there was never legal fences, was it? A. They were when they were put up.

Q. You mean to say those fences there in the first were legal fences since you went on the property?

A. They were until they went down; they were while they stood.

Q. They were while they stood, legal fences?

A. Yes.

Q. Is that your signature to that letter (Handing witness paper)? A. Yes.

Mr. Strong: I ask to have it marked for identification.

(Marked Exhibit D 1 for identification.)

Q. And you have had considerable difficulty with the Pennsylvania, first and last? A. No, sir.

10

Q. Haven't you been repeatedly notified by the railroad to repair this fence? A. Repair them?

Q. Yes. A. They are not mine to repair.

Mr. Strong: I move that be stricken out.

The Court: Yes, that may be stricken out.

(Question repeated.) Haven't you been repeatedly notified by the railroad to repair that fence? A. I don't know why I should.

Q. Haven't you been repeatedly notified by the railroad to repair that fence? A. No, not to my recollection.

20

Q. Did you not receive a letter from Mr. Guest, written on August 8th, 1911, notifying you that the obligation of maintaining the fence on your property was upon you and you would be held responsible for any accident that might occur on account of the stock getting on the company's tracks?

A. I don't remember of any, no, sir.

30

Judge Herr: I think we have a letter of that kind. I will see if there isn't one here.

Q. This letter, I suppose is admitted to have been received. A. I don't remember I had it in the papers; I presume it has.

Letter is produced from amongst the plaintiff's counsel's papers and counsel for defendant asked to have it marked for identification.

Judge Herr: Let the witness see it. (Marked Exhibit D 2 for identification.)

Witness: I don't remember seeing it, I must have it, though, I don't remember it.

Q. Now, hadn't you been repeatedly notified before that that the company insisted that you should fence your field there? A. How's that?

10 Q. (Question repeated: Now, hadn't you been repeatedly notified before that that the Company insisted that you should fence your field there?)

Q. Please answer that "yes" or "no."

A. I don't remember that.

Q. That's the best you can say now, is it? A. Yes.

Q. Mr. Paul A. Queen formerly represented you, did he not, in this matter? A. Yes.

Q. And on the twenty-first day of June, 1911, did you have Mr. Queen write a letter to Mr. Guest in your behalf? A. I don't remember what date it was I did.

20 Q. For how long a time did Mr. Queen represent you? A. Why, from the time the cattle was killed.

Q. And before that too, did he not? A. Yes.

Q. For how long before? A. Oh, I can't remember.

Q. About? A. I don't remember.

Q. Did you authorize Mr. Queen to write that letter for you? A. I did.

(Marked Exhibit 3 for identification.)

30 Q. Now, way back, before 1890, weren't you continually notified by the company to keep this fence in repair?

A. When?

Q. Way back in 1890? A. I don't remember it; no, sir. Why by?

Q. By the Pennsylvania Railroad Company.

A. Was that after Mr. Guest and Mr. Preston was in?

Q. What was the date of your deed, Judge Herr?

Judge Herr: 1879.

Q. Just answer that question, if you can.

A. No, I don't think so.

Q. Hadn't you been notified by the railroad from time to time ever since you were the owner of the property, to repair those fences?

A. No, sir. No, sir; I have not.

Q. Nor to build those fences?

A. No, sir. I have a letter there—

Q. Never mind, just answer the question.

Q. You said that you saw the tracks where these cows got through. That was the only way of your knowing that they got through on the Company's tracks? A. Yes.

Q. Well, wasn't the ground about there a great deal tracked up? A. No; no, sir.

Q. You could identify the tracks of your own cattle, could you? A. Yes, there was no other cattle there but mine.

Q. You were out there to watch that all the time?

A. No, sir.

Q. Cattle could not have come down the railroad track and gone into your field and gone out again?

A. No, sir.

Q. Why couldn't they, if the fences were down? There were several places, you said, where the fences were down. A. Along my farm.

Q. And they could have gone in where the fences were down and gone out again?

A. What cows there were there—

Q. But you watched for that day and night, did you? A. No, sir; I did not.

Q. And was that dry or wet weather at the time this accident happened?

A. Wet, terrible stormy, it had rained in torrents.

Q. Now, do you remember Mr. Preston sending you a notice to repair those fences? A. Mr. Preston? I don't know of any, I don't have any recollection of him only the one I see there, that is the only one I have any recollection of.

Q. Just look at it. (Handing witness paper.)

A. I don't remember it now.

Q. Mr. Preston was the Assistant Engineer at the time? A. I remember getting a letter from Mr. Preston saying that they kept a legal fence.

Mr. Strong: I ask that that be stricken out.

The Court: That may be stricken out.

Q. I ask you if you received this letter, which I again
10 show you, from the Assistant Engineer of the Pennsylvania Railroad, Mr. Preston, dated June 4th, 1908.

A. I don't remember it, I see it is there.

Q. Will you swear—don't you know perfectly well when it is produced from your counsel's possession that you received it? A. I must have.

(Letter dated June 4th, 1908, marked Exhibit P 5 for identification.)

Q. Did Mr. Gaynor, foreman of the defendant company, notify you over eight years ago on more than one
20 occasion that the company expected you to repair those fences? A. I don't remember it now; I don't remember anything of the kind.

Q. You don't remember it? A. I don't know why they should.

Q. Did not Mr. Reilly, Track Foreman of the Pennsylvania Railroad, notify you that the company wished you to repair those fences? A. I don't remember it.

Re-Direct Examination, by Mr. Herr.

30 Q. Mr. Titus, did you ever have any talk with any of these people about the repairing of that fence?

A. Yes, sir.

Q. Did you ever have any talk with Mr. Guest?

A. Mr. Guest? Mr. Preston; Mr. Guest never said much to me. Mr. Preston is the one who approached me about the fence.

Q. When was that first? A. They were going to put a wire fence up there.

Q. When was this?

A. Some twenty years ago. I saw the posts down there and I protested against it, asked for a legal fence and Mr. Preston said: "On what grounds?" I says, I have colts down in the meadows and the trains will scare them and injure them." He says: "What do you want, a picket fence." I said: "That would not be suitable to the farm." He turned around and said: "Titus, how would a good post and rail fence suit you" and I said all right, and they built it all new.

Q. Since that time have you ever given them any notification regarding this fence? A. I notified them when it was down. 10

Q. How frequently? A. Well several different times.

Q. What was the result of your notifications?

A. Well, then, Mr. Preston said that they found the land was taken by condemnation proceedings and those proceedings covered the fences and everything. I don't know what price they paid for the land—

Q. Never mind. What did they do?

A. Well, they built the fence after that,—repaired it —also they sent Mr. Dilly and he told me after the cows was killed, he said: "I have had orders, the stuff is ordered to repair the fence. 20

Mr. Strong: I don't think this seems to—

Q. Who is Mr. Dilly?

A. Foreman on the road. Mr. Dilly asked me if I was going to use the wood; he says, "The stuff has been ordered to repair the fence" and he says: "When we get time we will build it" and then some time after it he said "I have had orders not to build it." Now that's all I know. 30

By the Court.

Q. When did he tell you that? A. Mr. Dilly told me about, some time after the cows was killed, probably six months afterwards.

(Witness is shown letter dated December 29, 1911, signed by John M. Dilly, and is asked whether he received that letter about the time it is dated.

By Judge Herr.

A. Yes, I received it.

Q. Was that before or after your conversation with Mr. Dilly? *A.* I don't remember about that.

Q. Mr. Titus, have you ever built that fence since you lived in the property? *A.* Never, except when I saw a rail down; I never broke any ground to put in any posts in any way, shape nor form.

Re-Cross Examination, by Mr. Strong.

10 *Q.* And what date was it you said a new fence was built by the company? *A.* I don't remember.

Q. About how long ago? *A.* I should judge fifteen years since the last fence.

Q. You mean to say that the fence that is there now has been there for over fifteen years? *A.* Something like that, I think they built it all new then, new post and rail fence.

20 *Q.* Do you mean to say that the new post and rail fence was built the whole distance between your property and the railroad at that time? *A.* No; some places they repaired it, most of the way they built it new.

Q. When was that old fence that they repaired in some places built? *A.* That I don't remember; I don't remember any thing about the old fence. The old fence was on the farm when I went on it, that is part of it.

Q. Also a fence on the farm when you went there?

A. Yes, that was a board fence,—board fence all the way there.

30 *Q.* And that fence was on the farm when you went there? *A.* Yes, the board fence.

Q. Now then, this fence that is there now has been there fifteen years, is that right?

A. Something like that; they built it twice since I have been there.

Q. I am speaking of this last fence.

A. I can't recall. Of course, they rebuilt it.

By the Court.

Q. You say the fence has been twice rebuilt?

A. In thirty-three years, yes.

Q. Just what do you mean by that?

A. New fence set in different places.

Q. You say there was a board fence there when you went there? A. Yes, hemlock boards.

Q. You mean forty-four years ago? A. Yes.

Q. What kind of a fence was built next?

A. Post and rail.

Q. What kind was built next? A. Post and rail.

Q. So there has been two post and rail fences put up there? A. Yes, take the old away, repair the other and put new there. Every time they repaired they—

Q. So that there is some of the fence there that was there forty-four years ago?

A. I don't think there is much of it there.

Re-Direct Examination, by Judge Herr.

Q. Is there any of the old boards there at all?

A. Oh, yes, there is a little down along the woods. They put new at that time.

Q. New boards? A. They renewed the old board fence. 20

A. Yes.

Q. At the same time they put up a new post and rail fence? A. I don't recollect about that.

George H. Titus, sworn for the Plaintiff.

Direct Examination, by Judge Herr.

30

Q. Mr. Titus, you are the son of the plaintiff?

A. Yes.

Q. How long do you remember this fence?

A. Well, about thirty years.

Q. And during that time where have you lived?

A. On the farm where we now reside.

Q. How many fences have been put between your father's property and the railroad property since you remember? A. Well, there has been two new fences

but it has been repaired several times. I don't just remember how many.

Q. Well what was the first fence you remember?

A. Well, there was some board fence first when I can remember; then they got poor and was taken away and they put a new post and rail.

Q. During the whole distance or part?

A. Well, where this board fence was; I can't remember a board fence being along all of the farm but
10 I can remember a portion of it on the meadow side.

Q. What was done with the board fence? *A.* It was taken away and they put posts and rail.

Q. Do you remember how long ago the last fence was built? *A.* Well right around fifteen years, something like that; I can't remember just exactly. I was plowing down there at the time the men were building it.

Q. Who repaired the last fence? *A.* Well, Mr. Cordey, I think, was first.

20 *Q.* Who was he? *A.* Worked for the railroad company.

Q. When was that?

A. It was in August or September.

Q. After the cows—

A. No, it was before that; it was a—you asked me who repaired it? Mr. Condit, I think is the man.

Mr. Strong: Unless the witness knows, that should be stricken out.

30 *Q.* Do you know whether it was Mr. Condit or the other men? *A.* I know Mr. Condit was the boss of the men.

Mr. Strong: I still submit that that answer should be stricken out.

The Court: The former answer may be stricken out.

Q. And do you know the men that were making the repairs? *A.* Some of them.

Q. Who were they employed by at that time?

A. The Pennsylvania Railroad Company.

Q. Do you know—are you acquainted with the price of the cows? A. I have seen cows sold at sales.

Q. Did you see any sold about 1911? A. Yes, and I have seen them sold since that.

Q. Did you ever buy or sell any yourself?

A. Yes, I have; I have cows at my home.

Q. Well, about the year 1911, did you sell or buy?

A. Cows have been awful high—meats have been 10 high and so has butter, that made cows high.

Q. In 1911, were you acquainted with the market price of cows in that region? A. I attended a few sales.

Q. In 1911, when these cows were killed? A. Yes.

Q. In your judgment, what was the cow—you saw these cows and knew which ones they were?

A. Yes, we raised them on the farm.

Q. In your judgment, what was their value?

A. Well, they was worth one hundred and fifty 20 dollars, if they was worth a dollar.

Q. Were any other cattle hurt on this occasion?

A. The bull was scratched a little but he wasn't hurt of any account, skinned a little on one hind leg.

Q. And he recovered? A. Yes.

Q. Mr. Titus, did you help get the cattle off the track that day? A. No, sir; the cattle were off the track when I got down there; they had slid down the bank and laid there in the water.

Q. You mean the injured ones? A. Yes.

30

Q. Where were the rest? A. Up in the field.

Q. Do you know who drove them off?

A. I don't know, I wasn't there.

Cross Examination, by Mr. Strong.

Q. These two fences that you state were built in your recollection, post and rail fences? A. Yes.

Q. Did some sheep go through them on one occasion?

A. Yes.

Q. How did they get through?

A. They got through in the washout in the fence, under the fence where it wasn't protected.

Q. How high is the bottom rail of that fence from the ground, where the water ran under the fence?

A. There are places high, it wasn't high enough for sheep to get through it, it wasn't at that time but it is now.

10 Q. Didn't the sheep at that time come through where it hadn't been washed out? A. No, sir, they couldn't get through anywhere else.

Alfred Lambert, sworn for Plaintiff.

Direct Examination, by Judge Herr.

Q. Where do you live, Mr. Lambert?

A. West Amwell Township.

20 Q. How near the property of Mr. Titus and the Railroad Company? A. A short distance between.

Q. What do you call a short distance?

A. There is one farm between us.

Q. Have you ever—do you know anything about the building of a fence on the land between the railroad Company and Mr. Titus?

A. I have lived in the neighborhood twenty-two years.

30 Q. Have you seen the railroad company's men build fences and how often?

A. I saw them build some new and repair several times.

Q. When did you see them build new fence last, if you recollect? A. Well, it has been several years ago, fifteen years perhaps.

Q. Have you seen them do any repairing since?

A. Yes, I saw them repair at different times as I traveled around.

Q. Were you called on to appraise these cattle that were injured August 31st, 1911? A. Yes.

Q. Where did you find them?

Mr. Strong: I object.

Q. Mr. Lambert where did you find the cattle?

A. They were lying on the bank, side of the railroad.

Q. What were their injuries? A. The jaws were broken on one cow and both cows were bloated up terribly, it was some three hours after they had been struck I saw them; they were both bloated and could scarcely move, couldn't move. 10

Q. You have been a farmer how long?

A. About twenty-five years.

Q. Bought and sold cattle?

A. Yes, a great many of them.

Q. During the year 1911, did you buy and sell any?

A. Well, I don't just remember about that, but I have most every year.

Q. Did you attend any sales during that time? 20

A. Yes.

Q. Are you thoroughly conversant with the prices of cattle? A. Yes.

Q. What kind of cattle were these?

A. Two very nice young cows, the largest one was a Guernsey cow, very fine cow, and the other was a dark, what I would call a Jersey.

Q. In your judgment, what were they worth?

A. We appraised them at Seventy dollars.

Q. What is your judgment as to their value? 30

A. Seventy dollars each was our mark at that time.

Cross Examination, by Mr. Strong.

Q. Seventy dollars each? A. Yes.

Q. Then, in your judgment they were one hundred and forty dollars? A. Yes.

E. C. Grammes, sworn in behalf of the Plaintiff.

Direct Examination, by Judge Herr.

Q. Where do you live, Mr. Grammes?

A. In Delaware Township.

Q. How near to Mr. Titus?

A. The next farm adjoining him.

Q. How long have you lived there?

A. Six years—eight years ago I bought

10 Q. Were you acquainted with this fence between Mr. Titus's farm and the railroad company?

A. Well, not much. I seen it down sometimes.

Q. Have you ever seen anybody repair it?

A. I don't think I have.

Q. Did you see these cows after they were injured?

A. Yes.

Q. In your judgment, what were they worth?

A. Why, worth at that time One hundred and forty dollars, two of them, seventy dollars apiece.

20

30

Hugh Joyce, sworn in behalf of Plaintiff.

Direct Examination, by Judge Herr.

Q. Where do you live Mr. Joyce?

A. Up with Mr. Titus.

Q. How long have you lived with him?

A. Thirty-five years.

Q. Were you acquainted with the fence between him and the railroad company? A. I should think I was.

Q. During the time you have lived there how often 10
has that fence been rebuilt?

A. It has been rebuilt twice and repaired at different times.

Q. What was the fence you recollect there?

A. An old board fence.

Q. And what was that succeeded by, if anything?

A. Hemlock fence, they took that away and put up a new chestnut fence.

Q. And how long did that last? A. I cannot tell how long, but they put up the first fence thirty-five 20
years ago.

Q. What kind of material did they use the second time? A. Chestnut.

Q. How frequently have you seen railroad men repairing it? A. Well, I cannot tell that, they repaired it several times.

Q. Did you help get the cattle off the track the day they were injured? A. No, sir.

Cross Examination, by Mr. Strong.

Q. Are you prepared to say now that that fence was 30
twice entirely rebuilt at one and the same time from end to end where it extended along the railroad?

A. I can't say it was built all the way through with new material at one time.

Q. You can't say that? And you have seen it repaired from time to time, you say?

A. I have seen it repaired from time to time.

Re-Direct Examination, by Judge Herr.

Q. Explain to the Jury why you cannot say it was built of new material all the way through. How was it done? A. Took the best of the other rails and make it up with the old rails that came out of the fence.

Q. Where they didn't use new ones did they build it from end to end? A. Yes.

Q. And used new and old material together?

A. Yes.

10

Martin Smith, sworn in behalf of the Plaintiff.

Direct Examination, by Judge Herr.

Q. Mr. Smith, how long have you been acquainted with the fence between Mr. Titus's property and the railroad company? A. Well, I think about thirty-five years altogether.

20 Q. Were you at one time in the employ of the Pennsylvania Railroad Company? A. Yes.

Q. How long? A. Forty years and four months.

Q. As an employe of the company did you ever assist in doing anything with the fence? A. I had it repaired by my men.

Q. You were the foreman? A. I was, yes.

Q. And when did you cease being foreman?

A. Eight years ago.

Q. Did you use any new material in repairing it?

30 A. Yes, used some new material.

Q. When did you repair it last?

A. Now, I cannot tell you that; that's something I can't tell.

(Cross Examination waived.)

John J. Barber, sworn in behalf of the Plaintiff.

Direct Examination, by Judge Herr.

Q. How old are you, Mr. Barber?

A. I was born in February, 1841.

Q. And how long have you—where have you resided since your birth? A. Most of the time near the Alexander station, I judge, near the Flemington Railroad, formerly at Bound Station.

Q. How long have you been acquainted with the property of the Railroad Company and Mr. F. R. Titus? 10

A. Well, since the railroad was built, before it was built.

Q. Can you tell what year the railroad was built?

A. I think it was '53 or '54.

Q. Did you ever live on the Titus property or adjoining it? A. No, sir.

Q. How near to it? A. About a mile and a half, I suppose, rough guess.

Q. Did you have anything to do with the building of the railroad? A. Yes. 20

Q. What? A. Well, I drove a cart to make the fill below the farm that I lived on. I drove—my grandfather had two carts and I was the driver.

Q. Do you remember the fence that was first built between the Titus property or what is now the Titus property and the railroad company?

A. Yes, I remember all the fence that was built along there.

Q. With regard to this particular place, who built that fence? A. The railroad company. That is, through their instruction, I suppose. 30

Mr. Strong: I move that be stricken out.

The Court: That may be stricken out.

Q. Do you know who built the fence, did you see it built? A. No, I don't think I saw it built.

Q. Did you see any part of it built?

Mr. Strong: He has answered that.

The Court: I will overrule the question.

A. I don't remember.

Q. Why do you say it was built by the railroad company?

Mr. Strong: That is not a fair question. I object.

Objection sustained.

10 Q. At the time it was built, how near were you working to the place? How near there were you working at the time this fence was built? A. Solomon Holcomb?

Q. Yes. A. Why, I lived at Bound Station, one mile and a half away.

Q. Do you know when the fence was built?

A. Not exactly; shortly after the road was built.

Q. Do you know how often that fence has been rebuilt? A. Yes.

20 Q. How often? A. Well, it has been built three or four times.

Q. What was the first fence? A. It was a board fence, six inch rails, rail fence.

Q. And the next fence? A. It seems to me—

Mr. Strong: Unless he knows, I object.

A. It seems to me—

Mr. Strong: Unless he has a recollection he should not guess about it.

30 The Court: How material is this, that it was a board fence, that a portion of that board fence was made new and after that there was a post and rail chestnut fence made?

Q. Do you know when the last fence was built? The last new fence? A. Yes, somewhere in the neighborhood of fifteen years, perhaps a little longer, maybe a little less. I know it was built.

Q. Did you see any part of it built? A. Yes.

Q. Who was that built by? A. I was by there when

they was building; I knew the men but I couldn't tell you who they were.

Q. Don't you know whether they were employed by the railroad company at that time? A. Yes, I do. They went through my property every day where I reside now and have for years.

Q. Did you see the fence before that?

A. I saw the rails and things go up on the trains for the purpose of the fence.

Q. You say the board fence was repaired; did you see that repaired, any part of it? A. Why, I think so. 10

Mr. Strong: Unless he knows—

Q. Do you remember? A. I remember its being repaired, certainly I do.

Q. Who was that repaired by? A. I suppose by, by the Camden, Amboy—

Mr. Strong: I ask that that be stricken out.

The Court: That may be stricken out.

Q. Did you see men repairing it? A. Yes, I was by there frequently there on that place. 20

Q. Do you know whether they were men employed by the Railroad Company? A. Yes.

Cross Examination, by Mr. Strong.

Q. How do you know they were employed by the Railroad Company? A. I knew they were working for the company.

Q. How did you know that? A. I saw it. 30

Q. Saw what? A. Saw the men.

Q. Saw them building the fence? A. Saw them working at it, yes; I was up and down there frequently; I was over on Mr. Titus's Holcomb's place.

Q. How did you know they were building the fence for the railroad or Mr. Titus? A. I knew they were building it for Solomon Holcomb.

Q. He was the former owner of the property?

A. He owned the property at that time.

Q. Which fence did you say that was?

A. The railroad fence.

Q. Which fence, the first one? A. The first fence.

Q. The board fence? A. Yes.

Q. Did you say a man named Barber formerly owned this property?

Judge Herr: No, he didn't say that.

Q. What did you say about Mr. Barber?

10 A. I said that I lived on the farm at Barber Station, it was called then—my grandfather owned it and I lived there at the time this railroad was built.

Q. That was this property? A. No, sir.

Q. Anywhere near it? A. About a mile.

Q. And one of the reasons that you think the railroad built one of those fences was because you saw the lumber go up on the train, is that right? A. No, I didn't say that. I saw the lumber go up.

20 Q. Did you ever see anybody else's lumber go up on the train? A. Surely.

Q. And you saw these men go through your property? A. Yes, the railroad goes right through.

Q. Did you ever see anybody go through your property that was not employed by the railroad?

A. I think so; mostly all go through there that are working for the Camden, Amboy and Pennsylvania Railroad; I used to be familiar with a good many of them.

30 *Re-Direct Examination, by Judge Herr.*

Q. You knew these men you saw building—were under the employment of the railroad company?

Mr. Strong: I object to that as leading.

Objection sustained.

Q. Who were these men in the employ of that built this fence; whose men were they that built this fence?

A. I think George Ely, Squire Holcomb—

Mr. Strong: I ask that the answer be stricken out.

The Court: That may be stricken out.

Q. Do you know whether Ely was boss of them or not? A. Yes, he was boss of the men in the canal, railroad and at the erection of the fence and everything through there. I had dealings with him.

Q. And these were the men that were employed by him? A. Yes, I suppose they were.

Mr. Strong: I object, and ask that the answer be stricken out.

10

The Court: The answer will be stricken out.

Q. Mr. Barber, did you have personal acquaintance with a great many of these men you saw working there? A. Yes.

Q. And did you know who they were working for?

A. Yes.

Q. Who were they working for? A. Working for the Railroad Company.

Q. That you know, and you don't think anything about it? A. Natural thing, if I saw it.

20

Q. How did you happen to say that you supposed they were? A. I say suppose,—I knew the men.

Re-Cross Examination, by Mr. Strong.

Q. How did you know these men were working for the Railroad Company? A. Because they were working on the railroad, employed by the Company.

Q. Doing what? A. Why, their regular routine of business—railroading, working, fencing, repairing bridges.

30

Q. At the time you saw them they were working on the railroad? A. I saw them there times when they weren't on the railroad.

Q. You didn't know who they were hired by the railroad company? A. It is presumable.

Q. You say "It is presumable."

A. It is known,—I know they worked for the railroad company.

Q. Why did you say "presumable"?

A. Well, I and everybody, I suppose, did know they worked for the Railroad Company.

Q. How did you know? A. Because I did.

Q. How? A. Seen them work.

Q. Saw them work on the track? A. Yes, and on the fence and on the bridges—they had a big bridge right by my property and they were working there for weeks; one man, Mr. P—— was employed at that time by the Camden Railroad Company.

10 Q. How do you know he was? A. I had conversation with him.

Mr. Strong: I object, and ask that the testimony as to the conversation with this man be stricken out.

The Court: The motion will be denied. An objection will be noted.

Re-Direct Examination, by Judge Herr.

Q. Mr. Barber, do you know who bought the rights
20 of way and made arrangements along the rights of way when the railroad was constructed in 1893?

Mr. Strong: I object.

The Court: I don't think that is proper.

Re-Cross Examination, by Mr. Strong.

Q. Did you not have the same trouble with the Railroad Company that Mr. Titus did? Weren't you told to repair your fence by the company over and over again? A. The company has always built the fence
30 through the property that I live on.

Q. I am asking you whether you were notified by the company repeatedly to rebuild your fence?

A. The company—

Q. I am not asking you that; weren't you—you weren't on good terms with the Railroad Company, were you? A. Yes, always have been on good terms.

Q. Weren't you repeatedly notified by them to repair your fences? A. I don't think so.

Q. You don't think so. Are you prepared to say

on your oath that you were not? A. I don't remember.

Re-Direct Examination, by Judge Herr.

Q. Mr. Barber, you have said, in answer to Mr. Strong's question, that they had always repaired your fences.

Mr. Strong: That was not responsive to my question.

The Court: One moment; that isn't competent.

10

Q. You have your recollection—don't you know that there were a number of fences along that road that the Railroad Company had built, a number that have been repaired by the land owners ever since the railroad was through?

Judge Herr: I object.

Objection sustained.

Plaintiff Rests.

20

Mr. Strong: If the Court please, I move to nonsuit the plaintiff in this action. In the first place, there is not sufficient evidence that any engine or trains operated by the defendant killed these cows. In the next place, there is no prescriptive right shown upon which the plaintiff can claim that this Company was bound to fence between his property and that of the Railroad Company. There is no obligation on the part of the Railroad Company to maintain that fence shown. And there is no obligation shown to repair that fence. I have watched the testimony with a good deal of care, if the Court please, and there is no evidence as to who put up the original fence except that, I think it was the witness Barber stated that it was built by Solomon Holcomb, the former owner of the property; that distinctly negatives any obliga-

30

tion on the part of the Railroad Company, and some subsequent prescriptive right or obligation arising subsequently must be shown.

10 Your Honor will recall that there is no evidence whatever ~~that~~ either one of those subsequent fences were put up there twenty years ago. Witnesses have testified that within their memory of thirty-five years two fences have been put up, but they have not fixed the time when those two fences were put up, but that both of them have been put up within the last twenty years; but in the next place, there is, of course, no agreement shown here between the company and the plaintiff to repair and there is no sufficient evidence from which lost agreement or obligation of that sort can be assumed; and then, besides, finally, I may say that plaintiff has admitted on the stand that he was notified by the company that they made these repairs under protest, notifying him that the obligation rested upon him and not the Railroad Company, they expected that he should make the repairs.

20

The Court: How does that admission appear?

Mr. Strong: In his testimony, I think he stated that he had been told to repair the fences; that's my recollection of it.

The Court: Before this action?

30

Mr. Strong: I think so. I have letters, they could be offered at this stage of the case that would show that that was the fact—if they could be admitted and offered at this stage of the case. He said he had not been notified but he acknowledged the receipt of letters.

The Court: He said he does not remember seeing letters but he must have gotten them because they were among his papers.

Mr. Strong: If I may offer them at this stage, they show that the company protested against any obligation on their part, therefore he received that protest.

The Court: Is there any objection to admitting them now?

Judge Herr: No, I have no objection to admitting them, they will be admitted anyway.

The Court: They may be admitted and read.

Judge Herr: I want to introduce the answers to them if the letters are admitted.

The Court: If it is admitted that they are answers to that correspondence, they may go in.

Mr. Strong: We will pass over these letters for 10 the moment. Now, even assuming—

Judge Herr: Mr. Strong, do you seriously insist on your part that your trains did not kill those cattle?

Mr. Strong: Well, I don't know why I shouldn't.

The Court: I don't remember any proof.

Judge Herr: I will put it in, then, with the permission of the Court, of course.

The Court: There seems to be other matters 20 that would make that necessary.

(After argument.)

Mr. Strong: (Continuing.) As to Mr. Titus, did the fact that the defendant in this case, being a Railroad Company, make it owe any other duty to Titus than if the company had been an individual? Did it make it owe any greater duty to Mr. Titus, but it owed to the public the duty of keeping its right of way safe, and I presume if through those broken down fences cattle should 30 now escape upon the track and wreck a train, that not only Mr. Titus but the company itself might be held liable for the resulting accident, but where they are bound as a matter of protection to the public and incidentally protection to themselves against damages or prosecution to maintain that fence there so that in a case of that kind it is quite different, they are kept to a higher degree of care toward its passengers; in a case of that kind

no such presumption of a prescriptive right arises as there would in a case of two individuals, adjoining owners; so the case of *Kastner vs. Regall* does not apply to this situation at all; there they were individuals, here it a corporation which is bound to protect its passengers at all hazards, and even if that whole fence was down there they would be under obligations, as far as the public was concerned, to repair it.

10 Now, it is then those repairs are referable as well to the public duty which they owed as to any duty which they might owe to Mr. Titus as an adjoining owner, and in the absence of some specific proof showing the existence of an agreement, Mr. Titus cannot maintain this action.

Again, this property was obtained by condemnation under the General Railroad Act of 1903, and railroads are bound to maintain fences—

20 The Court: That is under the law of 1873?

Mr. Strong: But this was long back of 1873. Now, those condemnation proceedings taken back in 1853, in the award there rendered those damages must be assumed to have been not only for the land but for the ordinary operating expenses of the road and for the ordinary damages that the land owner would sustain in maintaining this fence; there was no obligation whatever upon the Railroad Company to maintain a fence on that track and the land owner was supposed to be compensated—not only a legal supposition but a legal rule—so was compensated for all damages which would result by reason of the operation of the road and the railroad is being obliged to fence as the result of that road being in operation, so that under that original award—

30 The Court: There is no proof of that. It is a question of law which must be presumed. In other words, the obligation to build fences prior to the act of 1873 along a railroad's right of way was no

different from the obligation to build fences as to any other adjoining owner, was there?

Prior to 1873 the regular fence act, as to the obligation of adjoining fences one against the other applied and each of them, in the absence of any special agreement were obliged to maintain an equal portion of the division fence.

Mr. Strong: Not as between the railroad and adjoining owners, if the Court please. Not the same obligation that existed between individuals. That obligation was imposed by the act of 1903, and back of that was 1873. 10

(After argument.)

Mr. Strong: I might put it this way, that these railroads are both the holders of charters and there is no obligation to fence contained in any of those charters.

The Court: If that is so, it leaves it just as I say, the same as between any other owners.

Mr. Strong: No, there would be an absolute freedom from any obligation to fence. 20

The Court: That is what I was asking you about.

Mr. Strong: That is the fact and I have the charters here in court. The charters don't say a word about fences. They authorize the construction of this road and fencing is not among those obligations, therefore they are not under obligation to fence. Those charters are here in court for inspection. I will admit that they don't say a word about fencing one way or the other and and there was no general law until 1873. In other words, there could be no obligation resting upon the company, except those that the charter imposed, and the present law as to railroad fencing came into existence long before; these companies were never incorporated under it and never been subject to its obligations. 30

Then, there is no evidence of the negligent oper-

aiton of this engine. There is no evidence that it killed these cows.

10 In the next place, this plaintiff has been guilty of contributory negligence and it has been repeatedly held in different decisions that where a plaintiff allows his cattle to stray upon a railroad track, through fences which he knew were down, he has himself contributed to the injury and cannot recover. I can refer you to those cases. I think it has been an open question in this State and it must be upon reasoning, all the reasoning which applies to contributory negligence in any form applies to the facts in this case. Here is this plaintiff and he made it as strong as he knew how that this fence was down in a number of different places; that it had been so for several months before this accident occurred, and that knowing such he pastured his cows in that field and that they strayed upon the Company's tracks. That being
20 so, even presuming there was an obligation to fence, even assuming that the gross negligence in the operation of the company's engine, still there was this contributory negligence on the part of the plaintiff, which bars his right to recover in this case.

So I submit, your Honor, that on those grounds, any one of which is sufficient at this state of the case, that there should be a non-suit granted for the defendant.

30 Judge Herr: If the gentleman insists that I should prove the actual killing of these cattle it would only take a little time—

The Court: I think you had better complete the case. I might call your attention to another feature of this case, which Mr. Strong has mentioned: You allege that these cattle strayed through the fence and this defendant was obliged to keep in in a lawful manner, but there is no question about the careless operation of the defendant's train.

Judge Herr: I haven't made any claim of that kind. I mentioned that fact a moment ago and stated that it was included in what I said before.

The Court: It didn't impress itself upon me and the reason I called attention to it—

The Court: You may open the case to apply additional proof.

10

Frank R. Titus, resumes the stand:

Direct Examination, by Judge Herr.

Q. How did you ascertain these cattle had been injured? A. They stopped the train and notified me.

Q. Who notified you? A. Mr. Philpott came up there.

Q. Who is he? A. One of the railroad men; I went through the pasture and met him down the road, and said he had run into the cows.

20

Q. Where did you go? A. Down to the railroad.

Q. Went there then? A. Yes, sir.

Q. Was it a passenger train? A. Passenger train.

Q. And what was said by the conductor, anything?

A. I had no words with the conductor at all.

Mr. Strong: I ask that that be stricken out, as not being binding on the company as to what Mr. Philpott said.

Judge Herr: I asked him what the man said.

30

Q. Do you know what position Mr. Philpott held?

The Court: As to what the man said would not be competent. I will decline to strike it out unless it appears that Mr. Philpott is a man not having any connection with the company.

A. He is a Baggage Master on the road.

Q. Do you know what position Mr. Philpott occupied? A. Baggage Master or Brakeman, I don't know.

Q. You went down with him?

Mr. Strong: I submit that no admission of either of these men that called upon the plaintiff may be in any way binding on the company.

The Court: It was a matter immediately after.

Judge Herr: I think that's especially held, that what the conductor may say immediately after the accident may be binding.

Mr. Strong: I ask that it be stricken out.

(Motion denied.) An objection will be noted.

10 A. He notified me that he had run into the cows and asked me to come down.

Q. What did you do then? A. I found the cows still laying there.

Q. The train still there? A. The train was still there, but it started on as soon as I went down.

Q. Well, they waited for Philpott and you to get there before they started? A. Yes.

20

Oliver R. Kugler, sworn in behalf of plaintiff:

Direct Examination, by Judge Herr.

Q. Mr. Kugler, were you on the train, in August, 1911, when some cattle were run into just this side of Lambertville? A. Yes.

Q. State what was done—how many cows did you see? A. Three.

30 Q. And where were they? A. Laying on the side of the track.

Q. What was done with the train? A. The train stopped.

Q. And how long did it wait? A. I don't know.

Q. Was it five or ten minutes? A. Probably ten or fifteen minutes.

Q. Did you see Mr. Titus that day? A. I did not.

Q. Do you know what was done after the cows were run into in the way of giving notice, or anything?

A. I only know what they told me.

Q. Who told you? A. I don't know, someone said they had sent trainmen to notify a Mr. Titus they had run into his cows.

Cross Examination Waived.

Judge Herr: Does the Court care to hear me on that question?

The Court: Yes.

Judge Herr: It is true that the original charter of the Flemington Railroad does not say anything 10
about fencing by anybody; it does not say whether the railroad shall put up the fence or whether the landowner shall put up the fence. That, in my judgment, leaves the matter in the same situation as a fence between any private individuals. It may be said that if it was the intention of the charter that the land owners should build the fences it would just as likely have said that as it would have said that the railroad should build it, unless 20
the railroad was required to build it. The only assumption we can draw from the manner in which the charter is drawn is that it leaves them in the same situation as other people.

The Court: Supposing it did not, and ignores them entirely from building the fence?

Judge Herr: I don't think it would make any difference, I don't think everybody is excused in the building of a fence. No farmer in this country can be required to put up a fence. He can make an arrangement by which he can join fences, 30
all those things can be done by agreement, but the law don't require it unless an agreement has been made, therefore, these parties stand in the same situation that your Honor and I would stand if we owned adjoining lands and never divided fences. Neither Mr. Titus or his predecessors were bound to keep fences there or the railroad company unless some agreement was made at that time by which either one or the other were required to

keep the fence. A very strong presumption is that there was an arrangement made between the original land owners, by the railroad company, by which somebody was to maintain that fence. Now, who was it? The railroad company put up the fence almost immediately, no question about that.

Mr. Strong: That wasn't the testimony at all.

Judge Herr: That was the testimony of Mr. Barber.

10 Mr. Strong: No, sir.

The Court: Mr. Barber said they were building that fence for Solomon Holcomb.

Judge Herr: That was merely a slip of the tongue; it was Solomon Holcomb's fence, but he didn't mean to say that the railroad men were there and constructing that fence for Solomon Holcomb.

The Court: He did say that.

Judge Herr: It is a slip of the tongue and nothing else.

20 The Court: I cannot assume that, I must assume that he meant what he said.

Judge Herr: He hadn't any right to say that, except this, that it was being put up along Solomon Holcomb's line. He did say specifically that the railroad people built that fence, that he saw the railroad men there building the fence.

The Court: I am not going to assume that at all, in dealing with this motion.

30 Judge Herr: His subsequent testimony was exceedingly explicit on that subject, that he saw—

The Court: Yes, but in view of his previous explicit testimony, that they were building the fence for Solomon Holcomb. He had better be recalled.

Judge Herr: I will recall him.

Mr. Strong: Now, the witness has had the benefit of Judge Herr's argument to indicate what his answer is framed, it seems to me that ought not to be permitted to have a second opportunity of that sort, especially as the witness sees now what he is supposed to supply.

Judge Herr: He testified in the first place distinctly that the railroad built the fence. He said Solomon Holcomb, that is he meant that it was put a division fence between Solomon Holcomb's and the Railroad Company.

Mr. Strong: Of course, that's your—

Judge Herr: I would like to call Mr. Barber, if the Court or Mr. Strong understand it the other way.

Mr. Strong: The record shows it the other way 10
and I certainly object to that testimony being supplied now and afterward as to what the testimony should be.

Judge Herr: Afterward, I asked him particularly whether he was along there when that board fence was being built there—

Mr. Strong: You didn't say that board fence.

Judge Herr: I thought I did.

The Court: I was paying very careful attention to that testimony because of that particular state- 20
ment upon cross-examination.

Judge Herr: And that's the reason I called his attention to it in Re-Direct Examination. I think he said, in answer to my question and also in answer to the further Cross-Examination of Mr. Strong that he had passed there when they were building the board fence and he thoroughly knew it and they were the railroad men of Mr. Ely. That is what he did know about it and it fully explains the statement he made before 30
that they were building the fence for Mr. Ely. The Court can readily see how he would take that. He had no knowledge that Solomon Holcomb had ever had anything to do with the building of the fence.

Mr. Strong: I think Judge Herr is stating very favorably to himself.

The Court: I think after this argument I ought not call Mr. Barber back, and I think it will be a

question for the jury as to what he did mean by what he said.

The motion for non-suit will be denied.

An objection will be noted.

MR. STRONG OPENED FOR DEFENDANT.

10 *A. P. Guest, sworn for defendant:*

Direct Examination, by Mr. Strong.

Q. Mr. Guest, what position do you occupy with the Pennsylvania Railroad Company? A. At present, I am special agent.

Q. And in the month of August, 1911, what position did you occupy? A. I was Superintendent of the Belvidere Division.

Q. And had been for how long?

20 A. Since January 1st, 1893.

Q. At the time of the accident and since January 1, 1893? A. I was superintendent of the Belvidere Division of the Pennsylvania Railroad, which includes the branch railroad on which this occurred.

Q. That includes the branch railroad known as the Flemington Branch? A. It does.

Q. Upon which the property of the plaintiff abutts? A. Yes.

Q. And do you know the plaintiff personally?

30 A. I do not recall ever meeting Mr. Titus.

Q. Do you know where the property is situated?

A. I know its location, approximately.

Q. Did you ever have any correspondence with the plaintiff? A. I think that I have.

Q. Respecting his obligation to repair the fence at that portion of the railroad where this accident occurred? Just look at that letter (Handing witness paper)

A. This letter is our office copy.

Judge Herr: We notified you to produce the original.

A. This is our office copy of a letter written by me on the eighth of August, 1911, addressed to Mr. Frank Titus.

Q. Yes, and that letter was sent by you to Mr. Titus? How does that letter read, if you please?

Judge Herr: Let me see that letter first, please. (After reading letter). I object to that, on the ground that it is not relevant. The Railroad Company cannot make evidence against Mr. Titus by writing him a letter. Besides that, it will have no bearing upon the decision of the question at issue in this case. It is about the time the accident occurred and it really don't prove anything except that the company denied at that time that there was a prescriptive right against them or any other kind of a right. 10

The Court: The letter will be admitted.

An objection will be noted.

(Witness reads letter as follows:)

20

At this point the Court took a recess of one hours.

AFTER RECESS.

Mr. Guest resumes the stand.

Cross Examination, by Judge Herr.

Q. Mr. Guest, was any reply made to this letter of August 8th, 1911? *A.* That I do not recall, I don't remember whether any reply was received or not. 30

Q. Had you ever taken up this matter before to your recollection? *A.* Yes, several times, I believe.

Q. Before 1911? *A.* Oh, yes.

Q. With Mr. Titus, I mean?

A. Yes. When I say that, I do not recall whether I had written any personal letters to him, but letters had been written to him on the subject, but whether I signed them myself I do not now recall.

Q. Was this the first communication you had with him concerning his fence being in bad repair?

A. So far as I can remember, it was the first letter I personally wrote to him.

Re-Direct Examination, by Mr. Strong.

Q. How far back had the officers of the company been writing to him, calling his attention to the defects in his fence and need of repair and notifying him of
10 his obligation to do so?

Judge Herr: I object.

Objection sustained.

Q. To what effect had the Company written him before that?

Judge Herr: I object to that.

Q. You said those letters had been written to him by the company?

20

Judge Herr: I object to that.

Mr. Strong: You brought that out.

Judge Herr: But he hadn't written any.

The Court: I will sustain the objection.

Albert W. Preston, declared and affirmed, for defendant:

30 *Direct Examination, by Mr. Strong.*

Q. Mr. Preston, what is your position with the Pennsylvania Railroad? A. Assistant Engineer.

Q. And were you formerly Assistant Engineer on this branch? A. I was.

Q. For how long? A. From 1883 to about 1908, I think I commenced in 1883.

Q. And during that period of time was there any controversy between the Pennsylvania Railroad Company and Mr. Titus as to who should maintain this fence? A. There was.

Q. And that controversy commenced how far back, can you recollect?

A. I think it commenced about the time I came there; I can't speak positively, but it seemed to extend through my term of office.

A. And in what way was that controversy manifested?

Judge Herr: I object to that, on the ground that the question is too general.

Objection overruled.

10

Q. (Question repeated: And in what was that controversy manifested.)

A. The fence, from time to time, got in bad condition, cattle, sheep, and so forth, got out on the track and we notified Mr. Titus to repair his fence. He would deny the responsibility and we would go and fix it up for the safety of trains.

Judge Herr: I object to the last part of the answer "For the safety of trains."

20

The Court: That part may be stricken out.

Q. Why did you fix it up?

Judge Herr: I object to that.

Mr. Strong: I don't see why that isn't—

The Court: Give your reasons.

Judge Herr: I object to it because it is a conclusion and we would not be responsible for the company's conclusions, and it does not make any difference what their reasons were or what they might think, if they went right on building the fence there was no interruption to the prescription.

30

(After argument.)

Objection overruled.

The Court: An objection will be noted.

Q. Why did you fix it up? A. It was necessary for the safety of the road that somebody fix it.

Q. For the safety of the road, what do you mean by that? A. Safety of trains.

Cross Examination, by Judge Herr.

Q. Mr. Titus always insisted that it was the duty of the Railroad Company to build the fence, didn't he?

A. He did.

Q. I guess that is all your hand writing, isn't it, Mr. Preston (handing witness paper)?

A. Nothing mine except the signature.

Q. Now, previous to the time you signed that letter, Mr. Preston, had there been any controversy between
10 you and Mr. Titus about that fence, and as a matter of fact, wasn't it long after that that the controversy arose? A. What is the date of the letter, August 8th, 1889? My recollection is there was controversy after 1883, when I went there.

Q. And you still seem to think so, after reading this letter? A. I do.

Letter dated August 8th, 1889, signed by Albert W. Preston to Frank Titus, received in evidence
20 and marked Exhibit D. 1 for indentification.

(Witness is shown letter dated November 16th, 1894, and is asked whether that is his signature.

A. It is.

Q. Will you read that, Mr. Preston.

(Witness reads letter as follows:)

Q. Now, Mr. Preston, wasn't that the first that any objection or at least any question had been raised by the Railroad Company as to whose duty it was to build that fence? A. I can't answer that; I think no. That's
30 in 1894. Oh, no; there was trouble before that, I am very sure.

Q. Do you recollect an occasion on which Mr. Titus objected to your putting up a wire fence? A. No, I don't recall that; I haven't any doubt if he said so it is correct. I cannot recall any conversation with Mr. Titus on the subject.

Q. Do you recall the fact that a new fence was built there by either your order or order of the superintendent about that time? A. No, I do not.

Q. Can you recall any new fence having been built there? *A.* Not in my personal knowledge of those things. I wasn't on the ground.

Q. But I thought you might recollect giving orders too—*A.* I am very positive that the new fence was put in spots, where the posts had rotted down.

Q. Is that your own knowledge or is that a conclusion? *A.* I guess that you would call it a conclusion.

Q. Well, I will call your attention to the conversation which Mr. Titus was asked about this morning. I 10
don't know whether you were here and heard it, in which when you proposed to put up a wire fence that he had said he objected to the wire fence and you replied if he objected to that you would put up a post and rail. *A.* No, I don't recall.

Edward Coll, sworn on behalf of defendant:

Direct Examination, by *Mr. Strong*.

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Q. Mr. Coll, are you employed by the Pennsylvania Railroad? *A.* Sir?

Q. Are you employed by the Pennsylvania Railroad?

A. Yes.

Q. And have been for how long?

A. Forty-seven years.

Q. And what was the nature of your employment by them in the month of August, 1911?

A. Foreman—track foreman.

30

Q. And for how long before that had you been track foreman? *A.* Track foreman for thirty-two years.

Q. And did you ever have any talk with Mr. Titus, the plaintiff here? *A.* Yes, I had.

Q. About his fences? *A.* Yes.

Q. When was that? *A.* That was before this summer of 1911. The fence got broken down, the cattle and sheep got on the track and I told Mr. Titus—

Judge Herr: Just a moment.

Q. Did you have a conversation before the time when these cows were killed? A. Yes.

Q. About how long? A. About three months; all that summer before that.

Q. Now, what did you say to him?

Judge Herr: I object to that. My objection is that this conversation was not subsequently called to Mr. Titus's attention.

10 The Court: The objection is overruled.

Judge Herr: Mr. Titus is a party to the suit and I don't understand that ruling applies.

Q. (Question repeated: Now, what did you say to him.)

A. I told Mr. Titus that his cattle got on the track and that his fence was down, and Mr. Titus told me it was the company's fence and that he wouldn't touch it.

20 Q. What did you tell him? A. Well, I told him I didn't know anything further about it, that the company wasn't going to maintain the fence, and I said somebody should see that the cattle should not get on the track, that's all.

Q. And who was it told you to tell Mr. Titus that?

Judge Herr: I object to that.

Mr. Strong: That's competent, I think.

Objection sustained.

The Court: An objection will be noted.

30 Q. How many times did you have conversation of that sort with him? A. I think about three times before the cattle was killed.

Q. It was within how short a time before they were killed? A. Well, about a month before that.

Q. Did he do anything to repair his fence then?

A. No, sir; there was no repairing done.

Cross Examination, by Judge Herr.

Q. How many conversations did you have with him that summer? A. Three, I think.

Felix Reilly, sworn in behalf of the defendant:

Direct Examination, by *Mr. Strong*.

Q. You were formerly employed by the Pennsylvania Railroad Company?

A. I did work for them; I am retired.

Q. How long ago did you retire? A. Four years ago, I think it is, this February last.

Q. What position did you hold at the time of your retirement? A. Foreman.

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Q. And had been for how long? A. I was foreman for thirty-eight years or more.

Q. Did you know Mr. Frank Titus? A. Oh, yes.

Q. Did you ever have any talks with him about his fence? A. No, sir, I had no talks with him about his fence; I was foreman on that road; I had no talk.

Q. Did you ever have any talks with him of any sort? A. No, sir.

Q. Did you give him any notice of any kind at any time about his fence? A. No, sir.

20

Cross Examination waived.

Patrick Gaynor, sworn in behalf of defendant:

Direct Examination, by *Mr Strong*.

Q. Mr. Gaynor, are you employed by the Pennsylvania Railroad Company? A. Yes.

Q. And have been for how long? A. Twenty-five years.

30

Q. And do you know the defendant, Frank Titus?

A. Yes.

Q. In what capacity were you employed by the railroad during those twenty-five years?

A. I was laborer—from eighteen years foreman, and then was track laborer.

Q. And did you have any talk at any time with him respecting his fence? A. No, sir, nothing that I can

remember, unless when I was notified to notify Mr. Titus to build his fence.

Q. When was that? A. Well, I don't just remember now.

Q. About? A. Probably twelve years ago.

Q. When you notified him to build his fence what did you do?

10 A. I told Mr. Titus that the fence was down and that Mr. Preston said—told me to notify Mr. Titus to build his fence, and I notified Mr. Titus to build his fence, and I notified Mr. Titus and he said that the fence didn't belong to him at all.

Q. Mr. Titus said that? A. Yes, that it was the Company's fence and he had nothing to do with it.

Cross Examination, by Judge Herr.

20 Q. How do you fix the time as twelve years ago, Mr. Gaynor? A. I am away from there eight years now and I went there as foreman in 1895 and left there 1905.

Q. You were there only ten years and how you remember is that it was some time during those ten years? A. Yes.

Q. But you can't remember when? A. No, sir.

Defendant rests.

Mr. Strong: I would just like to refresh Mr. Gaynor's recollection a bit, and I think I can change the date when that notice was given to Mr. Titus. I couldn't find the letter at the time.

30 The Court: Mr. Gaynor may return to the stand.

Q. I show you a letter dated 5—8—1897 and ask you if that refreshes your recollection as to the time when you gave that notice to Mr. Titus?

Judge Herr: Is that a letter he wrote himself?

Mr. Strong: It will refresh his recollection, I think.

Judge Herr: I object to that.

The Court: A letter which he wrote himself?

Mr. Strong: He wrote to the Pennsylvania Railroad, but it will refresh his recollection.

The Court: He may read it and say whether it refreshes his recollection.

Q. Is your recollection refreshed by that letter?

A. Yes.

Q. Then, as far back as what year was it that you gave that notice that you have spoken of to Mr. Titus?

A. That would be sixteen years.

Q. That is dated 1897? A. Yes, Mr. Preston was supervisor on sections.

Q. Mr. Preston was supervisor how long during your term? A. I would not be positive, but I think three years.

Q. The last or the first part of your ten years' term there? A. The first. Probably it might be four years.

Q. Did you write the whole of this letter yourself?

A. Yes, I wrote that myself.

Q. Well, just tell us what the date of the letter is.

A. Fifth month, 8th, 1897.

Q. Did you put that date on there? A. Yes.

Defendant rests.

Judge Herr: I offer this Preston letter.

The Court: 1889 letter?

Judge Herr: August 8th, 1889.

The Court: It may be received; you may read it to the jury.

(Read to the jury as follows:)

(Marked Exhibit P 1.)

Mr. Strong: If the Court please, I move for a direction of a verdict in favor of the defendant, on the grounds, first that there is no obligation whatever shown to rest upon the Railroad Company to maintain this fence through which the cattle were alleged to have strayed; that there is no evidence to go to the jury of the cattle having come through that fence upon the tracks; that

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there is no evidence of any negligent operation of the locomotive; that the cows were mere trespassers at the time they were struck, and therefore the defendant is not liable; that the plaintiff was bound, at his own peril, to keep his cattle on his own property and prevent their going on that of the adjoining owner; that the defendant was under no obligation to erect or maintain the fence between them; that the plaintiff was guilty of contributory negligence in placing his cattle or allowing his cattle to pasture in that lot, with the knowledge that the fence was not in proper condition,—knowledge of this condition of the fences. It has been shown that he received notice of the condition of these fences for months, I think, prior to the accident, and furthermore, he has shown he was especially notified of trespasses by his cattle for a period of a month or three months preceding the date when they were killed and he made no effort whatever to get his cattle from the track.

Now, by a letter introduced here by the plaintiff himself, with a date as far back as 1894, it is shown that the company contended that it was under no obligation to build this fence or repair this fence.

The Court: The 1894 letter was not offered in evidence.

Mr. Strong: I understood it was.

The Court: It is marked for identification but it was not offered.

Mr. Strong: Then I will offer it myself.

The Court: It will be received.

(Marked Exhibit D 2.)

Mr. Strong: It reads this way: (reads) So there was a question raised in 1894 which destroys the continuity of any prescriptive right of twenty years. The testimony on the part of the plaintiff was that there were two fences built there within thirty-five years. It didn't fix either one

as having been built over twenty years ago, but assuming that it was, still, that letter written nineteen years ago, deducting nineteen from thirty-five, your Honor, declared that they hadn't at that time when that controversy was under way, they hadn't obtained any prescriptive right to have that fence built or repaired by the defendant.

So that they have shown no prescriptive right whatever, and then, according to the testimony already offered here, the fence was built for one 10 of their grantors in chain of title from Holcomb, so that the case, as it now stands is even stronger as against the plaintiff. It is not conceivable that a verdict founded on such testimony could stand, and I submit that on the grounds mentioned, there should be direction of a verdict in favor of the defendant.

The Court: The motion will be denied. An objection will be noted.

Defendant's counsel requests the Court to 20 charge:

1. The Court is respectfully requested to charge that the maintenance of the fence may be referable to the duty owed by the defendant to the public and does not necessarily raise the presumption of a lost agreement with the plaintiff to maintain the fence.

2. That if the fence was in a reasonably safe condition and the cows broke through because of some unusual circumstance such as fright or unreasonable driving, or because they were vicious or headstrong, 30 the defendant is not liable.

3. That there is no evidence of any negligence in the operating of the train which killed the cows.

4. That if the cows were mere trespassers at the time when they were struck, the defendant is not liable.

5. That every man at his own peril is bound to keep his cattle on his own property, and prevent them from going on that of the adjoining owner.

6. That the defendant was under no obligation to the plaintiff to erect or maintain the fence between them.

7. That the burden of proof is upon the plaintiff.

8. That if the plaintiff was aware that the fence was not in a secure condition but nevertheless pastured his cattle in the field bounded by it, he is guilty of contributory negligence and cannot recover.

9. By the condemnation proceedings no obligation
10 was imposed upon the defendant to build or maintain the fence through which the cows are claimed to have entered on defendant's right of way.

10. That the expense of fencing must be assumed to have been included in the award to the then owner of this property when it was condemned.

THEODORE STRONG,

Attorney for Defendant.

CHARGE.

20 The Court (Dungan, J.): Gentlemen, this action is brought against the Pennsylvania Railroad Company by Frank R. Titus, to recover the value of two cows which he says were killed, or injured so badly that they died,—on the thirty-first day of August, 1911, in Delaware Township, in this county, by straying through a fence which, it is claimed it was the defendant's duty to build and maintain.

30 Under a law known as the General Railroad law of this State which has been in force since the year 1873, railroad companies are obliged to build and maintain legal fences along their right of way, but that is not so as to railroad companies incorporated under special charters granted by the Legislature. The railroad running through the plaintiff's land is owned or controlled now by the Pennsylvania Railroad Company, which is a successor of a railroad company which was incorporated under a special charter of the legislature of this State, and it is admitted that there is nothing whatever said in that charter about the maintenance of

fences, or indeed, nothing at all is said about fences, as to whether they shall be maintained by the railroad company or by the adjoining owner, so that you may assume for the purpose of this case that the defendant was and is under no legal obligation, under its charter or any statute law, to build and maintain the fence in question; but we have in this State—indeed, in all states, I assume—what is known as the Common Law, some of which is evidenced by the decisions of our higher courts, and one of our highest courts has decided that it is the law in this State that when for a period of over twenty years the owner of one or two adjoining tracts has continuously, without interruption and as of duty, repaired and maintained the whole of the division fence, a presumption would arise that he or those under whom he derived the title were, as owners of a servient tenement, bound to perpetually make and maintain the fence. The existence of a former and lost agreement to do so may be inferred; and that, gentlemen, is the crucial question in this case for you to decide, whether, notwithstanding the fact that the defendant was not obliged to maintain this fence under any statute or under its charter, it did, as a matter of fact, for a period of over twenty years, continuously, without interruption, and as a duty repair and maintain the whole of the fence along plaintiff's property. If you find from the evidence that it did, then the law would infer an agreement on the part of the company to perpetually make and maintain the fence, and if it failed to do so and by reason of such failure the plaintiff's cattle passed through the breaches in the fence upon the company's right of way and were killed or injured thereon by defendant's engine, then the defendant is liable in damages for the injury or destruction of such cattle.

Mr. Titus, the plaintiff, says that he owned this place for thirty-three years and that before his ownership of it he rented it, or worked it on shares, I think

he said, and that he has lived upon the property for forty-four years, and that during that entire period, in fact he says for fifty years,—the company has built and maintained this fence and that during that period, although when he first went there there was a board fence, they twice took down the old fence and built new fences.

Mr. George H. Titus, his son, says that he remembers for thirty years, and that during that period two
10 new fences were built and the fence that was there was repaired several times.

Hugh Joyce, who worked for Mr. Titus thirty-five years, gave similar testimony, and Mr. Barber says that he has been acquainted with this property since the railroad was built—which was in 1853 or 1854—that he assisted in the construction of the road in the manner in which he stated to you. He says he remembers the first fence and that it was built by the railroad company; he makes that statement. Subsequently, he
20 said upon his direct examination that he does not think he saw it built but that the fence was built shortly after the road was built, so that he negatived his testimony as to what he said with reference to his knowledge upon direct examination as to who built the fence.

Upon cross examination, Mr. Barber said that the men who were building this fence were building it for Solomon Holcomb, this first board fence. Now, upon Re-direct examination, he gave testimony again with
30 reference to who were building the fence and stated that he knew they were employees of the railroad company, because he saw them working down the track and saw them building bridges. It is insisted by the counsel for the plaintiff that this testimony referred to this first fence, and it is with equal insistence charged by the counsel for the defendant that that testimony related to some other fence—the rebuilding of these fences.

Now, gentlemen, the testimony is for you, and

it is for you to say to what this testimony given upon re-direct examination referred; did it refer to the first fence that was built or did it refer to the subsequent fence which Mr. Barber said he actually saw being built?

On the other hand, the defendant has introduced testimony which is largely in the nature of letters, one of which was written by Mr. Guest and is dated August 8th, 1911, which was a few days prior to this accident, in which he calls the attention of Mr. Titus to the condition of these fences and said: "I presume that you understand the obligation of maintaining the fence of your property is upon you and that you will be responsible for any accident that may occur on account of your stock getting on the track." 10

There are three letters introduced in evidence, written by Mr. Preston, Assistant Engineer, the first of which is dated August 8th, 1889. Mr. Preston says that he assumed his position of Assistant Engineer in 1883, and he thinks that almost immediately controversies arose between Mr. Titus and the company with reference to which party was obliged to maintain this fence. This letter of August 8th, 1889, refers to Mr. Titus's letter of June 15th, and then said: "I would like to recommend what is right in the case of the lambs, but our foreman thinks the lambs got through between the rails of the fence. We try to keep a legal fence, but such a fence, etc. . . . and even in that case, it was a case we could not well foresee." From which letter you will see that nothing is said by Mr. Preston as to any obligation on the part of Mr. Titus to maintain this fence. 20 30

The next letter is June 4th, 1908, from Mr. Preston, in which he quotes from a letter of Mr. Guest, as follows: "I think you should notify Mr. Titus, . . . any repairs that we have made in the past or may make in future are not on account of any duty resting on us toward him and that if he . . . and restrain his stock any of his stock from coming on the railroad

are injured or killed, he will have no recourse to us for damages."

10 I should have read first the letter of November 16, 1894, from Mr. Preston, in which he refers to the fact that "the title to this land was acquired by condemnation and says that when the road was built, the railroad company put the fences back to the line and in this way the men have continued in many such cases to keep the fence in repair. I have an opinion from our counsel as to this case "These are the letters of Mr. Preston to which I refer.

20 In addition to these letters, Mr. Coll, a section foreman, says that in the summer of 1911, he talked with Mr. Titus about a month or three or four months previous, at one time, before the injury to the cattle occurred and told him his fence was down and that he said it was the company's fence and he would do nothing about it, and Mr. Gaynor, who was also section foreman said in the first place it was about twelve years ago when he spoke to Mr. Titus about this fence and notified him about his fence. He doesn't say just what he did say to him, but that he notified him about his fence and subsequently, upon his recollection being refreshed, he said that was sixteen years ago. I think he didn't say exactly what he told Mr. Titus; if he did, you will remember and give it its due weight. I do not find that upon my notes. However, the testimony is before you and whatever he said upon that subject you will remember. At least, he said it was twelve years ago, and upon direct examination, and as I said, upon being refreshed he said it was sixteen years ago when he had this conversation with him.

30

Mr. Preston says that although they notified Mr. Titus to repair this fence, nevertheless they went ahead and repaired the fence themselves, but he says that was necessary for the safety of the trains, the intimation being that such repairs were for the protection of the company and its employees, and the passengers on its trains and not as of duty to Mr. Titus, and I charge

you that such was one of the essential elements of the acquiring of a right by Mr. Titus to have this fence perpetually maintained by the company, that is, that it should have maintained it as a duty. After the full period of twenty years has run, during which the company has continuously, uninterruptedly and as a duty repaired and maintained the whole of this fence, if you find from the evidence the defendant did, during such period so maintain this fence, protests and remonstrances on the part of the company after the expiration of that and would be unavailing, and even protests and remonstrances during that period would be unavailing unless they were accompanied by acts amounting to a disturbance of the right in a legal sense, that is, by some act which placed the plaintiff in a position to have his right settled by suit or otherwise; but if during such twenty years the defendant wrote letters protesting that it was the duty of the plaintiff to repair and caused verbal notice to be given, if they still continued as of duty to build and maintain the fence, Mr. Titus was never placed in a position where he had an opportunity to legally settle the right which he might claim, to have the defendant maintain the fence. If, however, you find from the evidence that these protests and remonstrances were made while the twenty-year period was running and that they were accompanied by acts which amounted to a disturbance or interruption of the maintenance of the fence, then plaintiff cannot recover in this case and your verdict must be for the defendant. Of course, gentlemen, before you can render a verdict in favor of the plaintiff, you must first find that the cows went through the defective fence, if you find from the evidence that it was defective, and that does not seem to be contradicted. No one saw the cows pass through this fence, but the plaintiff says that it was a wet, rainy time and that almost immediately after the cows were injured, while the train was still standing there, he went down to the track to the right of way and saw the cows

there and that he then examined the ground and saw the tracks where the cows had passed through the fence.

Now, you are entitled to make reasonable deductions from the evidence, and if a reasonable deduction from that evidence is that the cows passed through this defective fence, then you would have a right to find that they did pass through it, and from the evidence of the plaintiff you would also have a right to find that they
10 were injured so badly by the locomotive of the defendant that they subsequently died. The burden of proof is upon the plaintiff; it is necessary for Mr. Titus to establish these facts under the law as I have given it to you, by a preponderance of the evidence—that is, by the greater weight of the evidence of those facts. The evidence in favor of the plaintiff's right to recover must outweigh that of the defendant before he can be entitled to your verdict.

There is no serious controversy about the damages
20 in this case. The plaintiff and his son say that the cows were worth one hundred and fifty dollars, these two cows, and the two gentlemen who subsequently saw these cows shortly after they were injured, Mr. Lambert and Mr. Grammes, say in their opinion they were worth one hundred and forty dollars—seventy dollars each. Therefore, if you find that the plaintiff is entitled to recover, you will take into consideration this testimony given by the plaintiff and his son, estimating the value of the cows at one hundred and fifty dol-
30 lars, and of Mr. Lambert and Mr. Grammes estimating their value at one hundred and forty dollars, and say what, in your judgment, the cows were worth, and render your verdict accordingly.

I am requested by the defendant to charge: "That the maintenance of the fence may be referable to the duty owed by the defendant to the public and does not necessarily raise the presumption of a lost agreement with the plaintiff to maintain the fence."

I charge you that.

"2. That if the fence was in a reasonably safe condition and the cows broke through because of some unusual circumstance such as fright or unreasonable driving, or because they were vicious or headstrong, the defendant is not liable."

I decline to charge you that.

"3. That there is no evidence of any negligence in the operating of the train which killed the cows."

I charge you that.

10

"4. That if the cows were mere trespassers at the time when they were struck, the defendant is not liable."

I charge you that.

"5. That every man at his own peril is bound to keep his cattle on his own property, and prevent them from going on that of the adjoining owner."

I decline to charge you that, except as I have charged.

"6. That the defendant was under no obligation to the plaintiff to erect or maintain the fence between them." 20

I decline to charge you that.

"7. That the burden of proof is upon the plaintiff."

I charge you that.

"8. That if the plaintiff was aware that the fence was not in a secure condition but nevertheless pastured his cattle in the field bounded by it, he is guilty of contributory negligence and cannot recover." 30

I decline to charge you that.

"9. By the condemnation proceedings no obligation was imposed upon the defendant to build or maintain the fence through which the cows are claimed to have entered on defendant's right of way."

I charge you that.

"10. That the expense of fencing must be assumed

to have been included in the award to the then owner of this property when it was condemned."

I charge you that.

The Court: Objections will be noted as follows on behalf of the defendant:

10 Mr. Strong: I except to your Honor's failure to charge each of the following requests to charge, as requested,—that is to say, Numbers Two, Five, Six and Eight, or any other requests to charge which your Honor may have failed to charge.

The Court: Objections will be noted.

Mr. Strong: I object to so much of your Honor's charge as dealt with the Common Law as to prescription.

The Court: Objection will be noted to what the Court did say.

20 Mr. Strong: I object to so much of your Honor's charge as left it to the jury to decide whether continuously and without interruption for over twenty years the defendant maintained this fence, and then charged that if it did that it would be liable.

The Court: To what the Court did say, an objection will be noted.

Mr. Strong: I except to your Honor's statement of what the witness Barber testified to—your Honor's recitation of his testimony.

The Court: You mean that it was mis-recited?

Mr. Strong: I think so.

30 The Court: Of course, that is inexcusable. I would not hesitate to note an objection to a matter of misquoted testimony to which my attention has been called.

Mr. Strong: I except to so much of your Honor's charge as stated that upon Barber's Re-Direct testimony he said that he knew that the men he saw working were employes of the Railroad Company.

The Court: Objection to that will be noted. You think that is a misrecitation?

Mr. Strong: I think so.

The Court: Objection will be noted.

Mr. Strong: I except to so much of your Honor's charge as left it to the jury to say to which fence Barber, the witness, referred when he said that the men who were building it were building it for the Railroad Company.

The Court: Objection will be noted.

Mr. Strong: I except to so much of your Honor's charge with respect to the Preston letter of 1889, its legal effect. 10

The Court: Objection will be noted.

Mr. Strong: I object to your Honor's statement in your charge to the effect that protests and remonstrances during the period in which this prescription is alleged to have been acquired would be unavailable unless accompanied by disturbing acts.

The Court: Objection will be noted.

Mr. Strong: I object to so much of your Honor's charge as stated that Mr. Titus was never placed in a position where he could settle the right as between himself and the Company to maintain this fence. 20

The Court: You misunderstood what I said there. I have * * * * that part written. What I did say was— "but if during such twenty years defendant wrote letters protesting that it was the duty of the plaintiff to repair and caused verbal notice to be given, if they still continued, as of duty, to build and maintain the fence, Mr. Titus was never placed in a position where he had an opportunity to legally settle the right which he might claim, to have the defendant maintain the fence." To what I said an objection will be noted. 30

Mr. Strong: I also object to your Honor's statement that it did not seem to be contradicted that the cows went through the defective fence.

The Court: An objection will be noted.

Mr. Strong: I object to so much of your Hon-

or's charge as relates to the statement that the jury had a right to find that the cows did go through the defective fence.

The Court: An objection will be noted.

Mr. Strong: I object to so much of your Honor's charge as relates to the statement that the jury had the right to find that the cows were injured by the locomotive.

The Court: An objection will be noted.

10

Mr. Strong: I object to so much of your Honor's charge as relates to the statement that no serious controversy as to the damages existed.

The Court: An objection will be noted.

Judge Herr: I object to so much of your Honor's charge which relates to the statement that the damages in the condemnation proceedings included the building of the fence.

The Court: An objection will be noted.

20

30

NEW JERSEY
Court of Errors and Appeals

FRANK R. TITUS,

Appellee,

vs.

PENNSYLVANIA RAILROAD COMPANY

Appellant.

} On Appeal.

BRIEF FOR APPELLANT.

This appeal brings up for review a judgment recovered in the Hunterdon Circuit Court in an action at law for damages for the alleged killing of two cows of plaintiff by a locomotive engine of the defendant on August 31, 1911. The cows were alleged to have strayed upon defendant's right-of-way through a defective fence.

Plaintiff sought to show that it was the duty of the defendant to maintain this fence. The defendant denied that any such obligation rested upon it, and further insisted that the plaintiff was guilty of negligence in having pastured the cows in a field bounded by the defective fence, with full knowledge of the defect.

It was admitted (*p. 13, lines 4, 19; p. 70, top*) that the damages awarded to plaintiff when the right of way was condemned, covered the expenses which plaintiff would be put to for the making and repairing of this fence.

To prove that the obligation to maintain this fence had been shifted from plaintiff to defendant by prescription, numerous witnesses were produced by plaintiff who swore that within a period of thirty-three years or more this fence had been built or rebuilt, but it will be observed that they did not fix the dates. To testify that a fence built and rebuilt within ten years was built and rebuilt within one hundred years is strictly accurate, but it is not evidence that either the building or rebuilding was

done one hundred years ago. And so the proofs here do not show that this fence was built or rebuilt by the railroad company more than twenty years ago.

At page 24, line 12, plaintiff admits that he does not remember when the new fence was built. Page 24, line 24, he admits that he does not remember when the old fence was built.

A witness, named Barber (*p. 35, third line from bottom*), stated that he knew the fence was being built for Solomon Holcombe, a former owner.

The evidence showed that there had been a dispute between plaintiff and defendant, dating back many years, as to the obligation to repair this fence, and that defendant had frequently notified plaintiff that it was *his* duty to repair. For instance (*pages 58, 59*), Patrick Gaynor testified that as far back as 1897 he notified Mr. Titus, on behalf of the railroad, to repair the fence, and the witness, Albert W. Preston, testified (*p. 53, line 3*) that he thought the controversy commenced about the time that he came there as assistant engineer, which was in 1883. This witness also testified (*p. 53, lines 22, etc.*), that the fences were repaired for the safety of trains.

Edward Coll (*p. 55, 56*) testified that in 1911 he had notified plaintiff that the company was not going to maintain the fence, and that somebody should see that the cattle did not get on the track.

A. P. Gest, a witness for the defendant, testified similarly (*p. 51*).

The plaintiff insisted that under the authority of *McFarland vs. Lehigh Valley R. R. Co.*, 14 *Vroom*, *p.* , and *Castner vs. Riegel*, 25 *Vroom* 498, that these protests were of no avail for the reason that they were unaccompanied by acts amounting to a disturbance.

The defendant on the other hand, contended that such repair as it had made to this fence, was under the higher obligation to the traveling public to maintain this fencing along this right of way when plaintiff failed to do it, to prevent the straying of ani-

mals upon the track with the resulting danger of derailment and death. The court adopted plaintiff's view, and left it to the jury to say whether the defendant had maintained this fence under an obligation on its part to the plaintiff to do so. The defendant also contended that the plaintiff was guilty of contributory negligence in pasturing his cattle in this field when he was well aware of the defects in the fence, and the danger of their straying through it. Defendant also contended that the plaintiff had not in strictness proved the killing of the cows by its engine. No one testified to having seen them struck, and the testimony relied upon was the admissions of employees of defendant. Those, however are not sufficient. *King vs. Atlantic City Gas, Etc., Co.*, 70 N. J. L. 679 681.

Motions to nonsuit (p. 39) and to direct a verdict (p. 61) based on these contentions among others, were made and denied and advantage was also preserved by way of exception to the charge.

I.

NO PRESCRIPTIVE OBLIGATION UPON DEFENDANT TO MAINTAIN THIS FENCE WAS PROVED.

As before stated the testimony of plaintiff and his witnesses is not sufficiently definite as to the time when this fence was built or repaired.

Moreover, this fence so far as built or repaired by defendant, was so built or repaired under protest that it was plaintiff's duty to maintain it, and that defendant was under no obligation to do so.

To protest, it is submitted, was all that defendant could safely do. It could not allow this fence to remain in a defective position without courting damage and indictment through resulting loss of life.

The reasoning in *McFarland vs. Lehigh Valley Railroad Company* and *Castner vs. Riegel, supra*, is

to the effect that if the party to whom the prescriptive obligation attached had not been performing the prescriptive acts under an obligation to do so, he would have manifested his objection by something more than mere verbal protest. That the *natural* conclusion from his conduct was that he knew he was under obligation to perform the prescriptive acts.

No natural inference can be drawn in this case from the failure of defendant to allow these fences to remain prostrate that thereby it admitted its liability to repair or to rebuild. The danger to the traveling public from neglect to rebuild or to repair is palpable, and in the absence even of protest the acts claimed to be prescriptive would be referable to this paramount obligation to insure the safety of passengers. But the defendant went even further than this, and at times sufficiently remote to destroy every vestige of a prescriptive period, protested that it was the duty of plaintiff to maintain this fence.

It is submitted that it would be most unfair and unreasonable to hold that when the defendant merely performed its higher duty on the failure of the plaintiff to do as he or his grantors had been paid to do in a condemnation award, that thereby an unfair obligation was fastened upon the defendant. For the attitude of plaintiff certainly is unfair from whatever angle it is viewed. He says in effect: "Yes, I was paid to build and repair this fence, but you did it yourself, and now you're bound to do it. You helped me out by reducing my burden of expense, and because you did I propose to reward your kindness by making you help me out in the same manner for all time."

Surely there is nothing in such an attitude that commends the plaintiff to the tender consideration of the court.

If plaintiff's contention is sound, then all that is necessary for adjoining owners, bound to build and repair their fences, to do is to flatly refuse to per-

form that obligation, and unless the plaintiff is willing for a period of twenty years to imperil human lives, inviting disaster and indictment, the obligation of adjoining owners will be transferred to *its* shoulders. It cannot be that a proposition so monstrous is founded in good law.

But again, if any duty rested upon the railroad with regard to these fences which it failed to perform, the plaintiff needed no disturbance other than such failure to perform to give him a standing in court. He could, by appropriate proceeding, have compelled the company to build the fence. In other words, there was no need of any additional disturbance to afford the plaintiff his opportunity to test his legal rights. In this respect the case differs from the *McFarland* and *Castner* cases cited.

So far as presumptions are involved, the reasoning is analogous to that line of cases where it has been held that circumstances must exclude the idea that the injury was due to a cause for which defendant was not responsible.

Kennedy vs. Notherlands American Co.,
47 Vr. 618, 622.

Suburban Electric Co. vs. Nugent, 29 Vr.
658.

Houston vs. Traphagen, 18 Vr. 23, 27.

Hummer vs. Lehigh Valley R. R. Co., 46
Vr. 703, 706.

Stumpf vs. D., L. & W. R. R. Co., 47 Vr.
153, 155, 156, 157.

Chester vs. Cape May Real Estate Co., 49
Vr. 131.

Waller vs. McCormick, 18 Vr. 397-399.

Where the failure to maintain the fence might be referable either to a duty to plaintiff or a duty to the public it must be shown that it was not referable to the latter duty.

II.

PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN DELIBERATELY PASTURING HIS COWS IN A FIELD WHERE HE KNEW THE FENCING WAS DEFECTIVE.

That the fencing was defective he made to appear as strongly as possible, and also his knowledge of it (*p. 14, line 11; p. 18, line 23*).

So the question is plainly presented, whether one who pastures his cattle in a place from which he knows they are likely to stray to their death, is barred from a recovery by his own negligence.

The reasoning is all with the defendant.

This question will be found discussed in *Beech on Negligence*, section 228, and note.

III.

THE COURT ERRED IN LEAVING TO THE JURY THE INTERPRETATION OF THE PLAIN TESTIMONY OF THE WITNESS

BARBER (*p. 25*), who stated, third line from bottom:

A. I knew they were building it for Solomon Holcombe. (*Charge, page 65, top*).

Here was an entire disregard of the plain meaning of the words, and it was left to the jury to assume, for no other reason than that the witness could hardly have been supposed to intend such a blunder, that he must have meant something different from what he actually said.

Even assuming that the witness knew that the men building the fence were employees of the railroad company, he could not know in pursuance of what agreements or duty, whether to plaintiff or the

public, or under what terms they were building or repairing the fences.

The shuffling answers of this witness, under the most palpable leading of plaintiffs' counsel, indicate his insufficient knowledge of the facts.

IV.

THE COURT ERRED IN REFUSING TO CHARGE REQUEST No. 2, VIZ.:

"That if the fence was in a reasonably safe condition, and the cows broke through because of some unusual circumstance, such as fright or unreasonable driving, or because they were vicious or headstrong, the defendant is not liable."

There was no proof of the circumstances under which these cows passed through the breach in the fence (*p. 14, line 17; p. 21, line 11*), and even the fact that they passed through there at all was not sufficiently proved. It is manifest that mere footmarks could have been made by other cattle, or could have been made by the same cattle at some other time. But, however that may be, the defendant plainly was entitled to the benefit of the instructions sought in this its second request.

"If animals are breachy or become restive because of lack of food furnished them by the owner and go on the track and are injured because of such disposition to be breachy or because of such restiveness, the company will not be liable." 3 *Elliott Railroads*, p. 1815.

The jury were not bound to accept plaintiff's statement of the defective condition of the fence merely because he or his witnesses swore to it. If then the fence was in a reasonably safe condition where they entered, and the cows broke through because they were vicious or headstrong, or because of some unusual circumstance for which defendant was not responsible, as for instance, fright or unreason-

able driving, clearly defendant was not liable, and clearly, therefore, it was entitled to have the jury so instructed.

V.

THERE WAS NO NEGLIGENT OPERATION OF THE ENGINE.

The complaint alleges (*p. 6, paragraph 3*) that the cattle were killed by reason of the careless operation of defendant's engine. Nowhere in the case does this appear. Inferentially, even if the cattle were on the track because of a defective fence, still that was not the cause of the accident, but the negligent driving of the engine was the cause.

VI.

THE COURT ERRED IN DECLINING TO CHARGE DEFENDANT'S SIXTH REQUEST (*Case, p. 69, line 20*), viz.:

"That the defendant was under no obligation to the plaintiff to erect or maintain the fence between them."

What was said *supra* as to the failure to show a prescriptive obligation resting upon defendant, of course applies here.

VII.

THE COURT ERRED IN REFUSING TO STRIKE OUT THE FOLLOWING ANSWER OF THE PLAINTIFF (*Case, p. 45, line 18*):

"One of the railroad men. I went through the pasture and met him down the road, and said he had run into the cows."

This statement was mere hearsay.

King vs. Atlantic City Gas Co., 70 N. J. Law, 679, 681.

Cosgrove vs. Franklin, 87 Atl. 544.

VIII.

THE COURT ERRED IN PERMITTING PLAINTIFF TO ANSWER (*Case*, p. 46, line 10) against the objection of the defendant:

"He notified me that he had run into the cows and asked me to come down."

This was mere hearsay.

Cosgrove vs. Franklin, *supra*.

King vs. Atlantic City Gas Co., 70 N. J. Law, *supra*.

IX.

THE COURT ERRED IN REFUSING TO ALLOW THE WITNESS, EDWARD COLL, TO ANSWER THE QUESTION ON BEHALF OF THE DEFENDANT (*p. 56, line 23*):

"And who was it told you to tell Mr. Titus that?"

This was for the purpose of showing that Mr. Coll was instructed by the defendant to make these protests to the plaintiff, and it was certainly competent for him to show his authority.

X.

THE COURT CHARGED THE JURY (*p. 3*):

"That if they found that the defendant did, for a period of over twenty years, continuously, without interruption, and as a duty, repair and maintain the whole of the fence along plaintiff's property, then the law would infer an agreement on the part of the company to perpetually make and main-

tain the fence, and if it failed to do so and by reason of such failure the plaintiff's cattle passed through the breaches in the fence upon the company's right of way and were killed or injured thereon by defendant's engine, then the defendant is liable in damages for the injury or destruction of such cattle."

This question has already been discussed under a previous subdivision.

His honor begged the question in submitting it to the jury. There was no evidence in the case from which they could find legally that for a period of over twenty years, continuously, without interruption, and as a duty, defendant had repaired and maintained the whole of the fence along plaintiff's property.

A careful perusal of the testimony will disclose, moreover, that there is no testimony that the *whole* of the fence had been repaired or rebuilt by defendant.

It seems hardly necessary to make numerous other requests to charge, refusal of which were excepted to, and other portions of the charge which were excepted to, the subject of additional subdivisions, as they have been already covered in the previous discussion in this brief.

I am bound to say that the stenographer's notes in this case are in many respects inaccurate. For instance, considerable that is attributed to me by way of statement or argument, I certainly never uttered. For example—(*page 42*)—I am quoted as saying (*line 16*), that this property was obtained by condemnation under the general railroad act of 1903.

The notes are sufficient to show, however, that error was committed in the trial court.

The judgment in favor of the plaintiff should be reversed.

THEODORE STRONG,
Of Counsel With Appellant.

New Jersey Court of Errors and Appeals

Frank R. Titus,

Appellee,

vs.

Pennsylvania Railroad Co.,

Appellant.

BRIEF FOR APPELLEE.

Facts admitted:

In 1853 a right of way across the lands of the predecessor in title of plaintiff, was secured by condemnation proceedings by the Railroad Company. There is no record of the condemnation proceedings in Hunterdon County. It was admitted at the trial that the right of way had been condemned in 1853 and that the condemnation proceedings did not mention fences.

Facts not admitted and submitted to the jury:

1. That the cattle of plaintiff were killed by the train of the defendant.
2. The value of the cattle killed.
3. The time during which the Railroad Company built and maintained the fence on the line between the plaintiff's land and the defendant's right of way.

There are two questions of law in this case:

First. By practically maintaining this fence from 1853 until 1910 or thereabouts, did plaintiff obtain a right by prescription against the defendant, compelling it to continue to maintain the fence?

Second. If, to the knowledge of the plaintiff, the fence was defective at the time he turned his cattle on his lands adjoining the lands of the Railroad Company, was he guilty of such negligence that would preclude him from recovering for the damage resulting, by reason of the cattle crossing the fence and straying upon the lands of the defendant?

In the case of *Casner vs. Reyel*, 25 *Vroom* 498, the Court decided where an adjoining land owner constructed and maintained for twenty years or more a division fence, the adjoining owner thereby acquired a prescriptive right which required the party who had built and maintained the fence, to continue to maintain it. "The right in the nature of an easement may be created in favor of the owners of one of two adjoining tracts and a correlative duty may be imposed upon the owners of the other tract to have the latter perpetually maintain the whole or a part of the division fence. The continuous maintenance of the whole of a division fence for the full period of twenty years by the owners of one tract as of duty, will raise a presumption of grant or agreement for its perpetual maintenance."

The question was fairly submitted to the jury by the Court and determined against the defendant. It appeared quite clearly that for at least fifty years or thereabouts, from 1853 until 1894, the Railroad Company had maintained this fence and had paid damages for injuries occasioned by reason of stock breaking through it, without question.

The mere fact that after 1894 they had occasionally

disputed their liability to perform that duty, would not be an interruption of the right of the plaintiff.

McFarlan vs. Lehigh Valley Railroad Company, 14 *Vroom*, page 605.

“Mere denials of the right, compliance, remonstrance, or prohibition of user, unaccompanied by any act which in law would amount to a disturbance, and be actionable as such, will not prevent the acquisition of the right by prescription.”

As to the second question, that of contributory negligence. In the case of *Grooch vs. Bouyer*, 62 *Missouri, Appeals* 206,

“The Court held where it was the duty of one adjoining land owner to build a fence and a barbed-wire was used on the fence to the knowledge of the plaintiff, and the cattle were turned in and injured, it was held not to be contributory negligence on the part of the owner of the cattle, although he had knowledge of the fact that the wire was there and that it was dangerous to cattle.”

If it was the duty of the defendant to maintain the fence and they failed to do so, they could deprive the plaintiff of the use of his land by allowing the fence to be out of repair. If it was their duty to build a fence and the injury occurred from a failure to perform that duty, then the Railroad Company would be responsible for all damages that occurred by reason of such failure. The plaintiff had a right to use the property and had a right to expect the defendant to maintain the fence. There was no certainty that any injuries would result to the cattle of the plaintiff by reason of his pasture land or that the cattle would break through.

In the case of *Butler vs. Lehigh Valley Railroad Company*, where an engine was standing within the limits of the highway, and was seen by the plaintiff before he passed, it was held that he was entitled to travel the public highway. To hold otherwise would permit the railroad to exclude such travelers from the highway; that if they could not anticipate the fright of the horse, neither could the plaintiff. They were the original wrongdoers and were bound to anticipate any results that might reasonably be anticipated. 71 *Atl. P.* 278.

As to the question that was raised in the defendant's brief concerning the facts, the jury were the judges of the facts and the Court committed no error in submitting questions of fact to them, and this Court, of course, will not consider the facts.

The question as to whether the fence had been maintained by the Railroad Company for more than twenty years was quite conclusively proved.

As to the question that the Court erred in permitting the plaintiff to answer, (Case, page 46, line 10), the testimony asked for was clearly part of *res gestae* and the question was entirely competent; even if incompetent, there is sufficient testimony to show that the cattle were killed by the engine of the Railroad Company at the time stated, and if an error, did no injury to the defendant.

As to the question, (page 56, line 23), "And who was it told you to tell Mr. Titus that?", the question was clearly incompetent, as the witness had already stated he was track master and had given Mr. Titus warning that the fence was down and that they would not repair it.

The judgment in favor of the plaintiff should be sustained.

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