New Jersey Court of Errors and Appeals

CLOSTER DEMAREST FARMS, a Corporation, *Plaintiff-Appellee,* *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Defendant-Appellant.*	In Tort. On Appeal from New Jersey Supreme Court.

APPELLANT'S BRIEF.

This suit grows out of an accident which occurred at the Haworth Drive Crossing, Haworth, Bergen County, New Jersey, a public crossing, at 3.30 A. M., April 15, 1915. The photograph exhibits D-1 to D-11, inclusive, clearly depict the place. No repairs have been made at the crossing since the accident (p. 30 L. 14-17, p. 33 L. 5-6). The tracks at this point run North and South. The two westerly rails form the South bound track and the two easterly rails form the North bound track. The distance between the west rail of the North bound track and the east rail of the South bound track is 8 feet (p. 27 L. 25 30). On the morning in question defendant's train, a fast freight of some 50 or 60 cars was proceeding Southerly at a speed of about 35 miles an hour. It was foggy (p. 15 L. 2). The engine bell was automatic (p. 42 L. 9), and had been ringing continuously from Cornwall, New York, until the train was stopped after passing the Haworth Crossing, where the collision occurred (p. 40, L.

27-29). On approaching the crossing the engineer blew the whistle, two long and two short blasts. (p. 41, L. 9-12). When the engine was about 10 car lengths past the Haworth crossing, some one told the engineer that they thought they had hit something and he set all brakes and stopped the train suddenly and shut off the automatic bell. The caboose at the end of the train was then past the crossing. Some of the trainmen went back to see if anything had been struck. They found plaintiff's horse and wagon. The horse apparently had been struck on the right side near the head. Plaintiff's driver testified that he was driving westerly on Haworth Drive as he usually did about this time each morning, and when he was 25 feet east of the tracks he got off and looked up the track but did not see anything. That he then went back and drove on the tracks. When the first wheel of the wagon was on the first track (the east-rail, apparently, of the northbound track), he saw the train approaching, and he then turned the horse around to the south or left hand, and the right rear wheel caught in the space between the plank and rail. The horse then became frightened and twisted around so that it was hit by the engine.

The trial court, sitting without a jury, gave judgment against defendant for $300, which judgment was affirmed by the New Jersey Supreme Court (case pp. III. to IX.), from which judgment of the Supreme Court the defendant appeals.

I.

Negligence in operation of train.

The Supreme Court held that the statutory signals were given in the operation of the train and absolved the defendant from liability so far as

the operation of the train is concerned. The court said: "We are unable to see in the case any evidence of a substantial character which will impose liability on that ground."

This phase of the matter therefore passes out of the case in favor of the railroad company.

II.

Negligence in construction and maintenance of crossing.

The only points, therefore, before this court in the present appeal are so much of the judgment of the Supreme Court as relates to the negligence of the defendant in the construction and maintenance of the crossing, and the contributory negligence of plaintiff's driver.

III.

The driver either failed to take the precautions which he said he took, or else he did so in such a perfunctory manner that he cannot be said to have exercised the care which the law imposes upon him (Case, pp. 9, 10, 13).

Lynch vs. *P. R. R.*, 96 Atl. Rep. 395.

IV.

The Supreme Court erred in affirming the refusal of the Trial Court to direct judgment for defendant at the close of the case, and in holding that there was evidence to support the finding of the Trial Court.

The Supreme Court held that evidence that the edges of the planks were worn; that one plank was higher than another; that the tracks were higher than the planks, that there was a space of four inches between the rails and planks; and that for one year and eight months no new planking had been laid; was evidence that the crossing was out of repair.

There was no evidence in the case to show that any of these things caused the injury except in so far as it appears that the wheel went into one of the spaces between the rails and planks when the wagon was turned around parallel with the tracks.

The space or opening is shown on the photograph exhibits D-1 to D-11, inclusive. No repairs have been made since the accident. The space is necessary for the operation of defendant's trains and such spaces are to be found at all crossings. It is necessary for the flanges of the wheels and the standard flange is 2½ inches and some play room is necessary. Plaintiff fails to show that it was more than was necessary. It is clear from the testimony that had plaintiff's driver been going across in the ordinary manner he would have had no difficulty. Bender, plaintiff's witness, testified that he crosses twenty-five times a day and has never had any trouble, and that it is only when a wagon is turned around at right angles with the roadway that a wheel is apt to go into the opening. The fact that plaintiff's driver was turned around at right angles with the road when the wheel caught, differentiates the case from the Piver and Taylor cases cited by the court (pp. 55-56), for in those cases the travelers were proceeding across in the usual manner.

The space was necessary. All the law requires is that reasonable care be exercised to keep the crossing in good condition for the use of persons going across. Certainly defendant is not liable under the circumstances if plaintiff's wheel was caught when, without defendant's fault, it was turned around parallel with the opening. Defendant could not prevent such a situation.

It is necessary to have the space to allow a part of the train wheels to pass the crossing, and naturally things of less dimensions will go into the space if opportunity be given.

No evidence was introduced to show that the

space was an unusual one nor was any standard introduced to show that it was not a proper space so far as good railroading was concerned, in order to base an inference that defendant was negligent.

No evidence was introduced to show that the accident would not have happened had the edges of the planks not been worn. The inference from the evidence is that it would have happened at any time the wheel was placed in position to fit into the space, and, of course, nothing could possibly happen while the wheel was at right angles as would be the case whenever any wagon went across. The fact, therefore, that the edges were worn does not indicate any negligence and had nothing to do with the injury.

The fact that no new planks were laid in one year and eight months does not predicate negligence. They might not be needed for several years. Plaintiff should have shown that careful railroading required that planks be renewed more frequently. As a matter of fact, the planks were raised to the level of the tracks three months prior to the accident. (Case p. 30 l. 13). And no repairs have been made since the accident, and the crossing was in the same condition on the date of the trial as it was on the date of the accident. (Case p. 30 l. 14 to 17). This testimony was undisputed and the photograph exhibits taken shortly after the accident clearly depict the crossing.

That the rails were higher than the planks or that one plank was higher than another does not bear on the situation as they had nothing to do with the accident.

Plaintiff should have shown that all this was faulty construction, and that because of such faulty construction the wheel was caught in the space between the plank and rail, which would not have resulted except from such faulty construction.

The situation, summed up, is that the tire of the

wagon wheel was considerably narrower than the spaces between the planks and the rails and went into it on that account, when the wagon was at right angles to the highway.

Plaintiff's failure to prove some standard of comparison, or other evidence that the space was too wide by reason of negligence, must result in a reversal. There is nothing in the case on which to base an inference that defendant did not exercise reasonable care. The mere proof of a space, without proof that such a space was more than was essential to the operation of trains, is entirely insufficient. The jury cannot conjecture.

In *Hummer* v. *Lehigh Valley R. R.*, 75 N. J. L., 704, plaintiff's wagon was damaged by being struck by a train of the defendant at a crossing where the wagon had become wedged in between the planking and the rail. The plaintiff based his right to recovery chiefly upon the failure of defendant's engineer to stop the train as soon as he reasonably might have stopped after being warned of the presence of the wagon at the crossing. There was no evidence of any specific omission on the part of the train employees to do anything which could reasonably have been done to have brought the train sooner to a standstill. No evidence was offered that the train, under the existing conditions, could have been sooner stopped. The plaintiff offered no evidence that a train similar to the one in question could be stopped, under similar circumstances, at less than the distance in which this train was stopped. A motion to non suit was denied and then the defendant proved that the planking at the crossing was in good order. The Court of Errors and Appeals held that the motion to non suit should have been granted and said, at page 715: "The plaintiff alleged a negligence on the part of the railroad company. He failed to prove any facts from which the court could say that negligence could be reasonably in-

ferred. In denying the motion for a non suit, the court left it for the jury to say whether any facts were established from which negligence could be reasonably inferred, as well as the question whether, from these facts, negligence ought to be inferred."

And further, quoting from *Metropolitan Railway Co.* v. *Jackson,* L. R., 3 App. Cas. 193: " 'It would place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever.' We do not hesitate to suggest in this case, quite as strongly as did the Lord Chancellor in *Metropolitan Railway Co.* v. *Jackson,* supra, that the only facts upon which the jury could have founded their verdict were that the defendant was a railroad corporation, and that there was an accident.

The jury found against the railroad company, although the company was really blameless."

And in *Feil* v. *West Jersey & S. S. Railroad,* 77 N. J. L. 502, a certain portion of the platform of the railroad company at Millville was depressed so as to form a truckway from the electric road to and across the tracks of the steam road in order, apparently, that baggage might be conveniently and rapidly transferred from one road to the other. The depression in the platform was gradual, its lowest point being on a level with the top of the rails and about ten inches below the ordinary level of the platform. Plaintiff, in crossing the platform, came to the truckway without observing it or being aware of its existence, and, in unconsciously stepping down some eight or ten inches from the higher to the lower level, lost her balance and fell. The trial Court directed a nonsuit. Plaintiff contended that the facts would support a finding by the jury that the defendant had failed to use reasonable care to provide a

safe platform for its passengers. The Court of Errors and Appeals in affirming the non-suit said, at page 503: "The adoption of a method of platform construction which accords with that in general use by well regulated railroad companies, and which is approved by experience, is a due performance of the duty which it owes to its passengers in that regard. * * *

There is nothing in the present case to support the conclusion that the defendant company failed to observe the degree of care indicated in the consturction of its platform at Millville station. There is no proof that it differs in its character from platforms in general use by the defendant and other railroad companies, and no presumption of want of due care arises from the fact that a railroad company, presumably to meet the requirements of its traffic, has constructed its platform in such a way that one portion of it is lower than another, when the difference of level is not greater than the height of an ordinary step. Negligence must be proved, and, in a case like the present, *that can be done only by showing* that the platform is of a design which a reasonably careful judgment would disapprove as being likely to cause accident to persons using it as a way to and from trains. To hold otherwise would be to leave railroad companies to the mere caprice of juries, and subject them to the danger of being found guilty of negligence no matter what plan of construction they might adopt."

And in *Halm* v. *Freeholders of Hudson,* 78 N. J. L., 712, it was held by the Court of Errors and Appeals that: "Proof that a guard rail has been placed at right angles to the sides of a bridge where the highway is broader than the width of the bridge, running from said bridge toward the side of the highway, assuming that such rail was so placed by the board of chosen freeholders, and form a part of said bridge, is

not evidence of wrongful neglect on the part of such board to erect, rebuild or repair the bridge, to sustain a recovery under the Bridge Act for damages resulting from a vehicle running into such guard rail at night."

The Court said that the mere fact that the barrier had been built at a right angle to the side of the bridge, instead of at an acute angle with the creek, could not be considered wrongful construction; and that "no proof has been offered that the construction was different from ordinary construction, or that it was not sufficient for the purpose for which it was intended."

The non-suit granted by the trial Court was affirmed.

In *Kingsley* v. *D. L. & W. R. R. Co.*, 81 N. J. L., 536, plaintiff in leaving the defendant's passenger coach at Hoboken misjudged the distance between the step of the car and the station platform and fell. The theory of her action, *inter alia,* was that defendant "did not maintain its platform in such a manner as to be reasonably safe."

"It will be observed, therefore," said Mr. Justice Minturn, speaking for the Court of Errors and Appeals, at page 537, "that the gravamen of the action is essentially a failure of proper construction of the defendant's transportation facilities." * * * Testimony was offered of an engineer and a lawyer who had made measurements of other cars in terminals of other railroads for the purpose of showing a discrepancy in the equipment of defendant's cars. It was shown, however, not only that there was a difference but also that the cars of the various companies selected for comparison varied with one another and that there was not in use by any one company what might be called a standardization of step or generally accepted type of platform which could be utilized for a basis of comparison. The trial Court overruled the expression of the opin-

ion of this witness as to the proper distance to space a landing platform from the gauge rail of the track, with a view to all conditions of railroad traffic as you have become familiar with them."

The Court of Errors and Appeals sustained the trial Court in this ruling and said at page 539:

"The witness had demonstrated by measurements taken by him in different railroad terminals that no two railroads agreed in the method or form of car step and platform construction, and that the entire method or form of construction apparently was a question of the adaptation of the platform of the stations to the various types of rolling stock which the companies found it necessary to accommodate in their terminals, in an enormous interlocking system of transcontinental travel and commerce. That, under such circumstances, there may be differences of construction must be apparent, even with the same railroad, but that difference of construction does not prove negligent construction, must be equally clear; and therefore the testimony of a witness based entirely upon the former theory, and in the absence of a single factor evidencing negligence of construction, was properly rejected."

And at page 544, the Court referred to several cases in which various distances from the steps of the cars to the platform were complained of as dangerous, and said: "'In all these cases,' says Mr. Justice Sheldon, in the case of *Hilborn* v. *Boston & N. St. Ry. Co.*, 191 Mass., 14, 'it was held that the existence of the space offered no evidence of negligence.'"

Th case of *Laflin* v. *Buffalo & S. W. R. R. Co.*, 106 N. Y., 136, cited in the Kingsley case at page 543, is also specifically in point.

And in *Zebrowski* v. *Warner Sugar Refining Co.*, 83 N. J. L., 558, the Court of Errors and Appeals reaffirmed the doctrine of the preceding cases and cited them with approval at page 563.

In this case Mr. Justice Voorhees, speaking for the Court, said, at page 563:

"What standard was proved by way of system to which it was incumbent upon the defendant to conform? It cannot be asserted that in a case like this each jury may say what they deem to be a proper rule, and thus arbitrarily direct the conduct of each manufacturing plant under regulations not general, but special, in their application. Such a practice was denied with regard to the construction of railway station platforms in *Feil* v. *West Jersey & S. S. R. R. Co.*, 77 N. J. L., 502. * * * Juries may decide whether the ordinary standard has been attained, but they may not impose a standard of their own."

The cases of *Ford* v. *Lake Sh. & M. S. R. Co.*, 124 N. Y., 493, 26 N. E., 1101, 12 L. R. A., 454; *Atchison, T. & S. F. R. Co.* v. *Carruthers*, 56 Kan., 309, 43 Pac., 230; *Berrigan* v. *N. Y. L. E. & W. R. Co.*, 131 N. Y., 582, 30 N. E., 57; and *Morgan* v. *Hudson River Ore &c. Co.*, 133 N. Y., 666, 31 N. E., 234, also express the rule which may be summed up in this respect, that plaintiff has the burden of establishing by affirmative proof that a given condition, which does not speak negligence in itself so as to bring it within the doctrine of *res ipsa loquitur*, is evidence of negligence by comparing it with some standard of admittedly proper action, generally or universally in use by other like concerns, or by the defendant itself in other like situations, and to which proper standard the condition said to be negligent does not conform. Plaintiff must first show a proper standard and then show a failure by defendant to live up to that standard in order to warrant the submission of the case on that point to the jury. Mere proof of a condition which one man in his opinion might think was proper and another man in his opinion might think was not proper, is not sufficient proof of negligence. To submit such

proof to a jury as evidence of negligence is simply to submit whatever a plaintiff may see fit to prove to a jury and then to leave it to them to say whether or not in their opinion defendant was negligent. This is simply imposing a standard of their own and permitting them to determine as a matter of law what ought or ought not to be done without any testimony of proper action under the given circumstances before them as a guide.

V.

It is respectfully submitted, therefore, that the judgment of the Supreme Court affirming the judgment of the District Court of the Third Judicial District of Bergen County should be reversed, set aside and for nothing holden, and judgment in favor of defendant should be directed by this court, or a new trial be granted.

VREDENBURGH, WALL & CAREY,
Of counsel with Defendant-Appellant.

New Jersey Court of Errors and Appeals

CLOSTER DEMAREST FARMS, a corporation, *Appellee,* *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Appellant.*	On Appeal from Supreme Court.

BRIEF FOR APPELLEE.

This action was one for damages to appellee, arising out of a collision between appellant's train and appellee's horse and wagon at a grade crossing. It was tried before Judge Stagg *without a jury,* in the Third Judicial District Court of Bergen County, and resulted in a judgment in favor of the appellee in the sum of $318.76.

The Supreme Court in an opinion by Mr. Justice Minturn, Case, page VI-IX, affirmed this judgment, from which the defendant now appeals.

The State of Demand alleged negligence upon the part of the appellant, as the proximate couse of the accident, in the following respects:

(a) In the operation of the train.

(b) The maintenance of the crossing in a dangerous and defective condition.

Facts.

The appellee's tracks, at the place of the collision, run north and south; appellant's wagon was approaching these tracks from the east, at approxi-

mately a right angle upon a road that runs east and west. It was necessary for appellant to cross northbound track before reaching the southbound one, upon which the train in question was running, bound for New York (page 15, line 4). The weather was foggy.

George Matternicht testified (p. 9) that on April 15, 1915, at about 3:30 o'clock A. M., he approached the railroad track, driving a one-horse milk wagon; before reaching the tracks he stopped, left the wagon, walked ahead to the tracks and looked up and down, but saw no train approaching; he returned and again boarded the wagon (p. 10) and started to cross. When the front wheel reached the first rail of the first track (the easterly rail of the northbound track, Exhibit D-5, 71), he heard the train approaching and saw it 25 feet away; he then endeavored to swing the horse around, and while so doing, the rear wheel caught in the opening between the rail and planking of the crossing, which prevented his turning the horse further; it became frightened by the train and twisted round in the opposite direction; the train then hit the front part of the horse and killed it. He continued, on cross examination (page 12, lines 10-40), the horse became frightened—due to the noise of the train, and the fact that he could not pull out of the tracks—swung around between the northbound and southbound tracks, facing in a southerly direction, and was then hit by the engine. When 25 feet from the track, he stopped his wagon, got off and could see a distance of 250 feet up and down the track, but saw no train. The horse had passed the first track when he saw the train 25 or 30 feet away (p. 14, ll. 36-40). No flagman was stationed at this crossing at night.

(NOTE. Although it does not appear clearly in the testimony, the plaintiff's wagon was caught in the opening between the westerly rail of the north-

bound track and the beams constituting the crossing, as shown on Exhibit D-5, p. 71.)

The testimony of Frederick Bender (pages 20-21) shows that the edges of the planks between the rails were worn off, so that if a wagon were swung sideways upon the crossing, there would be danger of the wheels becoming caught in the opening between the edge of the planks and the rails; so much so, that if while upon the crossing, two wagons attempt to pass, and in doing so, twist sideways, one wagon will be caught in the track. Cross examination (p. 22). One would have to turn at right angles to get caught between the planks and the track; that the planks are not level, one board being higher than the other, *while the rail is higher than the board.*

Martin Katz (p. 19, ll. 10-40) testified that he examined this crossing immediately after the accident, and found that the boards were very badly worn, that for about two inches it had formed a sort of round curve where it was worn, so that the opening from the rail to the higher point on the plank is about two inches wider than it is at other parts of that plank where it has not been worn; that the distance between the plank and the inside of the rail for a distance of six or seven feet on the crossing was four inches wide, and it would become narrower again and then there would be another break where it would be wider; the width of the wheels and the width of the tires of appellee's wagon was from 2¾ to 3 inches.

Peter Maloney, witness for the defendant, testified (p. 28) that he has been the flagman of this crossing for one year and eight months and is on duty from 7 A. M. to 7 P. M.; that he inspected this crossing twice a day, having last inspected it the day previous to the accident; that the planks were in first class condition and were about two inches from the rail; this opening of two inches was in first class condition the same as usual

(l. 36). *During the time of the witness' employment at this crossing, no new planks had been laid; that they raised the planks to a level with the rail about three months before the accident.* Cross examination (p. 32). Witness testified that he could not say whether at any points on said crossing the opening was not three inches or more.

Joseph Morton (page 32), testified that he was section foreman for the defendant; that he was in charge of this particular crossing; that he looked at it after the collision and it was all right (page 34). That the space between the planks and the rails mentioned in this case was necessary on account of the flange of the wheel, as otherwise, the wheels of the car would not stay on the rails as there was no space for the flange.

John W. Gale (page 38) testified that he was engineer of the train in question. That he first knew of the collision after his engine was south of the crossing and applied the brake to stop. The train was going about 35 miles an hour; approaching north the tracks are on an upgrade and straight for a distance of about two miles; that he blew the Haworth crossing whistle at the whistling post and the bell was rung (cross-examination, p. 42). The bell was continuously rung from Cornwall until it reached Haworth. He was first informed of the collision by the fireman and the head brakeman. Although looking out of the window, he did not see the plaintiff's wagon. At the time of the accident, the weather was *hazy, not clear.*

Other testimony was produced, relating to the operations of the train, etc., which for the purpose of this appeal, we submit is immaterial.

POINT I.

Negligence in operation of train.

Appellee concedes as it did in its brief in the Supreme Court that there was not sufficient evidence before the trial court to show that the appellant was guilty of negligence in the operation of its train.

POINT II.

The judgment of the Supreme Court in affirming the judgment of the Trial Court was proper.

The brief of the appellant seems to have been written upon the theory that it was necessary to show that the crossing was improperly constructed, in order to hold the appellant responsible for the damages incurred. We have no quarrel with the appellant upon that score, which we will hereinafter discuss. Appellee's case was predicated, not upon faulty construction, but upon negligence in the maintenance of the crossing, which was the proximate cause of the accident.

The crossing in question being a part of a public road of the Borough of Haworth, was frequently used by the traveling public and it was the duty of the appellant under Section 26 of the Railroad Act, Volume 3, Compiled Statutes, page 4231, to construct and maintain said crossing so that the public travel thereover should not be impeded.

We respectfully submit that it was within the province of the Court, sitting without a jury, to draw an inference from the testimony *supra,* that the edges of the planks between the rails were worn off, so that the width of the opening varied from 2 inches to 4 inches; that for a distance of 6 or 7 feet this opening was 4 inches in width; that the planks were not level, one

plank being higher than the other; that the tracks were higher than the planks; that there was always danger of a wagon in swinging sideways, having its wheels caught in the intervening space; that this condition must have existed for considerable time, owing to the fact that no new planking had been laid during the period of one year, eight months; that although the planking had been raised to a level with the rail, three months before the accident, the appellant had permitted it to deteriorate so that at the time of the accident, the rails were higher than the planks (a minute examination of Exhibit D-5, p. 71, shows this condition to have existed; Exhibits D-1, D-2, D-4 are views of the southbound track, which are not pertinent to the question at issue). *If these facts are true, it is evident that the crossing was out of repair.* The Court could likewise find under the evidence supra, that the appellee was in the act of swinging away from the track when the tire of the wheel, which was from 2¾ to 3 inches in width, caught in this opening and prevented the driver from swinging his horse further to the south and thereby averting the accident. Although it does not directly appear from the evidence that the accident would have been avoided but for the catching of the wagon in the opening—which we submit would have been improper as a conclusion—the inference could be drawn from these facts that but for the existence of the intervening space in question, the accident would not have happened. That the trial court did make this finding and draw this inference, is shown by its opinion, page 55, line 18.

> "First: I find from the evidence that the crossing was out of repair, that is the space between the rails and planks on the crossing, by use and by failure of the defendant to use reasonable care to keep the said cross-

ing in repair, had become so large that a horse and wagon could not be turned around upon that crossing without danger of having the wagon caught between the rails and the planks on the crossing, and from the evidence produced before me I find as a fact that the wagon was so caught that morning just previous to the horse being hit by the train" (p. 58, l. 4).

"* * * I find the fact that not only was the crossing out of repair, which helped to contribute to the accident. * *"

Appellant's obligation extended not only to using reasonable care to construct the said crossing, but also to the maintenance thereof in good repair.

Sonn v. Erie R. R. Co., 37 Vroom, 428 affirmed, 38 Vroom, p. 350;

Piver v. Pennsylvania, R. R. Co. 42 Vroom, 713;

Sankiwicz v. Atlantic City Ry. Co. 82 N. J. L., 478;

Taylor v. Lehigh Valley Ry. Co. 94 Atlantic, 566.

The crossing being the part of a public highway we submit that it was the duty of the appellant to anticipate that the crossing would be used for the same purposes that a reasonable man would use any ordinary highway, which would include the privilege of turning his wagon thereon.

Relative to the question of standard of construction, the appellant proved—inadvertently perhaps—by the testimony of Mahoney, (p. 29, ll. 10-40), that two inches was the standard spacing in such cases when he testified that the opening between the rail and the edge of the plank was "about two inches" which opening was a first class job and the same as usual. It then went further and showed by the same witness (p. 30, ll. 3-5) that the planks had been raised to a level with the rail four months before the accident. We

therefore submit that it necessarily follows that the standard of construction would be that the intervening space should be two inches and the plank should be level with the rails. The Court having found from legitimate evidence that the opening exceeded this space by at least two inches, for a considerable distance of the crossing, and that the planks were lower than the rails, shows that the appellant had not followed its standard of construction in building this crossing.

The width of the tire being in excess of the width of the standard opening of two inches, it was clearly a proper inference that the accident would not have occurred had the standard been maintained.

We concede that the cases cited in appellant's brief correctly expound the law upon the facts as found in each case, but in all of these cases, there was no question raised as to improper maintenance, but merely that the different apparatus had been improperly constructed. The plaintiff in each case, failed to show any standard of construction. They are not applicable to the case at bar, because as above stated, there was evidence not only that the crossing was improperly maintained, but that the appellant had not followed the standard set by itself in having the intervening space two inches wide and the planks level with the rails.

We therefore, respectfully submit that it was permissible for the trial court sitting without a jury, to draw the conclusion from the evidence that the crossing was out of repair, and that this condition was the proximate cause of the accident, and there being legal evidence to support it, the determination of fact is binding in this court.

Upton v. Slater, 83 N. J. L., 372.

POINT III.

The driver was not guilty of contributory negligence as a matter at law. The undisputed testimony was to the effect that the appellee's driver in approaching the crossing stopped at a distance of 25 feet from the first or northbound track, walked to the tracks and looked in both directions to ascertain if a train were approaching. Although on a clear day one could have a view of several thousand yards, up and down the tracks, it was an admitted fact that at this time in the morning, 3:30 o'clock, the weather was foggy and the driver in looking up the track in a northerly direction could see only a distance of 250 feet. He testified that he saw no train approaching and although the record is silent as to whether he heard any, it is apparent that he did not, otherwise under the precautionary steps theretofore taken by him, he would not have attempted to cross in front of the approaching train. Having again boarded the wagon, he then started across and when the horse had reached the northbound track, (the train approaching on the southbound track), he heard the train, looked and saw it 25 feet away and attempted to pull away from the track, when he discovered that the wheel of the wagon was caught between the crossing beams and the rail, and his action was rendered useless by reason of the condition of this crossing. We submit that under this state of affairs, the question of his contributory negligence was one of fact, and the trial court was justified in finding that the driver had exercised the care of a reasonably prudent man, as shown by the Court's finding of fact to that effect.

Napodensky v. W. J. & S. R. R. C., 85 N. J. L., 337.

The case of *Lynch v. Penna. R. R.*, 96 Atl. Rep., 395, cited in appellant's brief, does not lay down any new principle of law on the subject of contributory negligence. The Court was there considering under a rule to show cause, the weight of testimony as distinguished from whether there was any evidence irrespective of its weight to justify the verdict under the rule that on an appeal the court will merely inquire whether there was any evidence to justify the court's finding of fact. This latter question and not the weight of the evidence is to be determined by the court in the case at bar.

The judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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DEFENDANT'S WITNESSES:

EXHIBITS.

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Notice of Appeal.

(*Filed May* 26, 1916).

NEW JERSEY SUPREME COURT.

CLOSTER-DEMAREST FARMS, a corporation, *Plaintiff-Appellee,* vs. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Defendant-Appellant.*	In Tort. Notice of Appeal

To:

MARK TOWNSEND, JR.,
FRANK H. HENNESSY, ESQ.,
Attorney for and of counsel with Plaintiff-Appellee.

TAKE NOTICE:

That the defendant-appellant appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes, from the whole of the judgment entered in the New Jersey Supreme Court in this cause, upon the following grounds:

(1) That the said Supreme Court erred in affirming the refusal of the District Court of the Third Judicial District of the County of Bergen to direct judgment for the defendant at the close of the whole case, because no negligence had been shown on defendant's part, and also on the ground that plaintiff's driver was conclusively shown to have been guilty of contributory negligence.

(2) That the said Supreme Court erred in affirming the judgment of the District Court of the Third Judicial District of the County

of Bergen, and in holding that there was evidence of negligence on the part of the defendant.

(3) That said Supreme Court erred in affirming the judgment of the District Court of the Third Judicial District of the County of Bergen and in not reversing the same.

(4) That said judgment of said Supreme Court is in divers other respects erroneous, illegal and contrary to law.

Dated, May 23, 1916.

Yours respectfully,
VREDENBURGH, WALL & CAREY,
Attorneys for Defendant-Appellant.

(*Endorsement*).

Service of the within notice of appeal is hereby acknowledged this 23rd day of May, 1916, and further recognizance other than that already given on the appeal to the Supreme Court of New Jersey, from the District Court of the Third Judicial District of the County of Bergen, is hereby waived.

MARK TOWNSEND, JR.,
Of Counsel with Pltff-Appellee.

VREDENBURGH, WALL & CAREY,
Attorneys,
1 Exchange Place,
Jersey City, N. J.

Judgment in Supreme Court.

(*Entered May* 22, 1916).

NEW JERSEY SUPREME COURT.

CLOISTER DEMAREST FARMS, *Appellant,* vs. NEW YORK CENTRAL & HUDSON RIVER RAILWAY CO., *Appellee.*	On Appeal Rule On Affirmance.

This cause having been duly argued at the November Nineteen Fifteen term of this Court by Vredenburg, Wall & Carey, of counsel with appellant, and Frank H. Hennessy and Mark Townsend, Jr., of counsel with appellee, and the Court having inspected the record of judgment brought up for review by said appeal; and having duly considered the reasons for reversal filed and finding no error in the record or proceedings of the District Court of the City of Hoboken,—

It is thereupon ordered and adjudged that the judgment of the District Court of the City of Hoboken removed by the appeal in this cause, be affirmed with costs, and that the record be remitted to the District Court of the City of Hoboken to be proceeded with in accordance with this judgment and the practice of said Court.

Entered May 22, 1916,

On motion of Frank H. Hennessy, and Mark Townsend, Jr., of counsel with appellee.

Order Correcting Rule of May 22, 1916.

(*Entered May* 27, 1916.)

NEW JERSEY SUPREME COURT

CLOSTER DEMAREST FARMS, *Appellee,* vs. NEW YORK CENTRAL & HUDSON RIVER RAILWAY CO., *Appellant.*	On Appeal, Rule On Affirmance.

WHEREAS, a rule on affirmance was heretofore entered in the above cause and in said rule it inadvertently named the Closter Demarest Farms as the appellant and the New York Central & Hudson River Railway Company as the appellee, and the said rule affirmed the judgment of the District Court of the City of Hoboken, instead of the District Court of the Third Judicial District of Bergen County,

IT IS THEREUPON ORDERED AND ADJUDGED that the order of May twenty-second, Nineteen hundred Sixteen, heretofore entered herein affirming the judgment of the trial court, be amended so that therein it shall appear that the Closter Demarest Farms is the appellee, and the New York Central & Hudson River Railway Company is the appellant, and that the judgment affirmed is that of the District Court of the Third Judicial District of Bergen County.

Entered, May 27, 1916.

On motion of Frank H. Hennessy,
Attorney for, and Mark Townsend, Jr.,
of counsel with Appellee.

Order Correcting Rule of May 22, 1916

We consent to the entry of the above order for the sole purpose of correcting the errors in the order of May 22, 1916, and without any prejudice of the rights of the appellant to appeal from the judgment entered in the above cause to the Court of Errors and Appeals.

VREDENBURGH, WALL & CAREY,
Attorneys for and of counsel with Appellant.

Opinion in the Supreme Court.

(*Filed April* 20, 1916).

NEW JERSEY SUPREME COURT

November Term, 1915.

CLOSTER DAIRY FARMS,

vs.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

Argued November Term, 1915. Decided February Term, 1916.

Appeal from Third Judicial District Court of Bergen County.

Frank H. Hennessy, for Plaintiff.

Vredenburgh, Wall & Carey, for Defendant.

Argued before Justices Parker, Bergen and Minturn.

The opinion of the Court was delivered by Minturn, J.

While the defendant's train was approaching on the south bound track near the Haworth crossing, the plaintiff's driver was approaching the crossing in a westerly direction, with the intention of crossing the north and south bound tracks about 3.30 o'clock on a foggy morning, on April 15, 1915. He was driving a one horse milk wagon, and before reaching the tracks stopped his horse, went down from the wagon and looked up and down the tracks. Seeing no train and hearing no signal from one, he took his seat on the wagon and proceeded to drive across the tracks. While upon the north bound track he heard and saw the approaching train, which was proceeding at a rate of about thirty-five miles an hour, twenty-five feet away. He attempted to turn his horse, but while en-

gaged in that act the rear wheel of the wagon caught in the space between the rail and the planks of the crossing, and before it could be extricated the horse became frightened and uncontrollable, and turning in the wrong direction was struck by the approaching train and killed.

The suit was predicated upon the two grounds, that the defendant failed to give either of the statutory signals, and that the defective condition of the planking at the crossing was such as to indicate negligence. The trial court found defendant negligent upon both counts, and gave judgment for the plaintiff for the value of the horse and harness. The insistence of the defendant is that it was not guilty of negligence in its operation of the train, and that the plaintiff was guilty of contributory negligence.

These contentions require us to review the findings of fact of the trial court; and in order to warrant a reversal it must be manifest that there was no testimony in the case upon which the judgment can be supported. The defendant's liability to respond in damages must be predicated upon some omission of duty which in the first instance was the failure to give either of the statutory signals.

Hummer v. *Lehigh Valley R. R.*, 75 N. J. L., 704.

We are unable to find in the case any evidence of a substantial character, which will impose liability upon that ground. But the Court having found as a fact that the crossing was out of repair, and that such disrepair was the proximate cause of the damage we are confronted with the trial court's conclusion of fact upon that subject which must be accorded the weight of a verdict if it have substantial proof to support it. One witness testified that he used the crossing over twenty-five

times a day. That the edges of the planks between the rails were worn off, and that there was always danger of a wagon in swinging sideways of having its wheels caught in the intervening space; that the planks were not level, one plank being higher than another; that the tracks were higher than the planks and that there was a space of four inches between the rail and the adjoining plank. Other witnesses testified substantially to the same effect. The flagman at the crossing testified that during a period of one year and eight months no new planking had been laid there.

Upon this testimony we think it was inferable that the crossing was out of repair, and that by reason thereof the wheel of the wagon was caught in the manner stated. The obligation to use reasonable care to construct and maintain in good repair, crossings and grades over the highways is settled by the cases.

Sonn & Erie R. R., 37 V. 428, Affd. in 38 Vr., 350.
Piver v. *P. R. R.*, 42 Vr., 713.
Sankiwicz v. *Atlantic City R. R.*, 82 N. J. L., 478.

The latter case is also authority for the proposition that whether the defendant negligently omitted to maintain a safe crossing, was a question for the jury.

It has been determined by this court, that where a judge is sitting without a jury, and opposite conclusions might have been drawn from the testimony, that conclusion which is essential to support the judgment will be taken as found, and that his determination of a question of fact is final when there is legal evidence to support it.

Upton v. *Slater*, 83 N. J. L., 372.

The only remaining inquiry is whether the acts of the driver under all the circumstances were tantamount to contributory negligence. This inquiry also presented a jury question not unlike in its essential aspects that presented in the case of *Napodensky* v. *West Jersey, etc., R. R. Co.*, 85 N. J. L., 337.

The judgment will be affirmed.

Notice of Appeal.

(Filed Sept. 8-1915)

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE COUNTY OF BERGEN.

CLOSTER DEMAREST FARMS, a corporation, *Plaintiff,* *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Defendant.*	In Tort. Notice of Appeal.

To:

FRANK H. HENNESSY,
Attorney for Plaintiff.

SIR:

PLEASE TAKE NOTICE, that the defendant, the New York Central and Hudson River Railroad Company, hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the Third Judicial District of the County of Bergen, rendered in the above stated cause on the Twenty Seventh day of August, Nineteen Hundred and Fifteen.

Yours respectfully,

Dated, September 2, 1915.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

Service of a copy of the within notice of appeal is hereby acknowledged this third day of September, 1915.

FRANK H. HENNESSY,
Plaintiff's Attorney.

Specifications of Causes of Error.

(Filed Sept. 9-1915)

NEW JERSEY SUPREME COURT.

CLOSTER DEMAREST FARMS, a corporation, *Plaintiff-Appellee,* *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Defendant-Appellant.*	In Tort. On appeal from District Court of the Third Judicial District of the County of Bergen. **Specifications of causes of error.**

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, the above named appellant, specifies the following determinations or directions of the District Court of the Third Judicial District of the County of Bergen in the above entitled cause, with which it is dissatisfied in point of law:

1. Because the trial judge erred in refusing to direct judgment for defendant at the close of the case although duly moved to do so by defendant.

2. Because the judgment of the trial court was contrary to law.

3. Because the judgment of the trial court was contrary to the evidence.

4. Because the evidence in the case disclosed no evidence at all of any negligent act of defendant's on which to base the judgment of the trial court.

5. Because the trial judge erred in appointing Martin Katts, plaintiff's president, to act as interpreter of plaintiff's principal witness George Matternicht, over defendant's objection.

6. Because the trial judge refused to permit defendant's attorney to examine the witness John

W. Gale as to the approximate distance of the whistling post from the Haworth crossing, and ruled that he could not testify as he had not measured the distance.

7. Because the trial judge refused to find as follows, although duly requested so to do by defendant:

> "That the space or opening between the plank and rail at the Haworth crossing, in which the wheel of the plaintiff's wagon is alleged to have been caught, was necessary for the proper operation of the defendant's trains, and as there is no evidence from which the Court can conclude that such space or opening between the plank and the rail was improperly constructed and maintained for ordinary and usual use by persons and vehicles making use of said Haworth crossing over and across the defendant's tracks at said Haworth Drive, the defendant was not negligent and was not responsible for any injury sustained by the plaintiff if one of the wheels of plaintiff's wagon slipped into and was caught in said space or opening when said wagon was turned around at right angles with said Haworth Drive and parallel with said opening or space between said plank and rail."

8. Because the trial judge refused to find as follows; although duly requested so to do by defendant:

> "That the evidence in the case fails to show that the train and locomotive pulling the same which struck the plaintiff's horse were negligently operated by defendant's servants and defendant is not liable."

Specifications of Causes of Error

9. Because the trial judge refused to find as follows, although duly requested so to do by defendant:

> "That the evidence in the case shows that proper warning of the approach of the train which struck plaintiff's horse was given."

10. Because the trial judge refused to find as follows, although duly requested so to do by defendant:

> "That the evidence in the case fails to show that the crossing over defendant's tracks at Haworth Drive where the accident occurred was improperly constructed or maintained for ordinary and customary use by persons and vehicles making use of said tracks over and across defendant's tracks at Haworth Drive."

11. Because the trial judge refused to find as follows, although duly requested so to do by defendant:

> "That the plaintiff's driver was negligent in attempting to cross the defendant's tracks at Haworth Drive without looking and listening."

12. Because the trial judge refused to find as follows, although duly requested so to do by defendant:

> "That if the plaintiff's driver could have seen the train when it was a distance of 250 feet from the crossing, but failed to see it until the train was 25 or 30 feet from him, such failure indicates that he did not look and listen, and such driver's negligence bars the plaintiff from recovering against the defendant in this case for the injuries complained of."

13. Because the trial judge refused to find as follows, although duly requested so to do by defendant:

> "That the evidence in the case does not show that the defendant was guilty of any negligent act which resulted in the killing of the plaintiff's horse and injury to the harness."

14. Because the trial judge refused to find as follows, although duly requested so to do by defendant:

> "That as the injury complained of resulted directly from the actions of the horse, due to his becoming frightened, and as there is no evidence in the case to show that the defendant negligently frightened the horse, the defendant is not liable to the plaintiff on that account because of the killing of the plaintiff's horse and injury to its harness."

15. Because the trial judge refused to find as follows, although duly requested to do so by defendant:

> "That the evidence in the case does not show that the defendant failed to give proper warning of the approach of the train which struck plaintiff's horse."

16. Because the trial judge refused to find as follows, although duly requested so to do by defendant:

> "The burden is on the plaintiff in this case to prove the defendant's negligence, and it has failed to sustain the burden."

VREDENBURGH, WALL & CAREY,

Attorneys and of counsel with defendant-appellant.

State of Demand.

(Filed May 21-1915)

THIRD JUDICIAL DISTRICT COURT OF THE COUNTY OF BERGEN.

THE CLOSTER-DEMAREST FARMS, a corporation, *Plaintiff,* vs. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, a corporation, *Defendant.*	In Tort. State of Demand.

The Plaintiff, a New Jersey Corporation, having its principal office for the transaction of its business in the Borough of Demarest, in the County of Bergen, demands of the Defendant the sum of Five Hundred Dollars ($500.), for that, whereas, on or about the fifteenth day of April, 1915, plaintiff's employee and servant, while engaged in the delivery of merchandise for plaintiff, was driving in a westerly direction on and along the avenue known as Haworth Drive in the Borough of Haworth, Bergen County, a horse owned by the plaintiff attached to a milk delivery wagon also owned by the plaintiff; that in attempting to cross the railroad tracks of a railroad operated by the defendant, where the said railroad tracks cross the said Haworth Drive, a train negligently operated by the defendant, and approaching without warning of any sort, bore down upon the said horse, wagon, and employee; that said employee endeavored to avoid said approaching train, but due to the lack of sufficient warning, and due also to the defective and dangerous condition of the road-bed at such crossing, which caught and held

the wheels of the delivery wagon, the said employee was unable to avoid a collision, and the said train so operated by the defendant struck said horse, the force of the blow causing the death of the horse, the destruction of the harness on the horse, and damaged portions of the wagon, thereby causing damage to the plaintiff to the extent of the value of said horse, the value of the harness, and the cost of repairing the wagon.

WHEREFORE, by reason of defendant's said negligence, plaintiff has sustained damages as above demanded.

The following is a statement of the items of plaintiff's damages:

Value of horse	$325.00
Value of harness	45.00
Damages to wagon	25.00
Total.....	$395.00

FRANK H. HENNESSY,
Attorney for Plaintiff.

Haworth, New Jersey,
May twentieth, 1915.

Testimony.
(Filed Sept. 9-1915)

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE COUNTY OF BERGEN.

CLOSTER DEMAREST FARMS, *Plaintiff*, vs. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Defendant*.	Testimony. In Tort.

Testimony taken at the trial of the above-entitled cause before Peter W. Stagg, Esq., Judge, on June 10th, 1915.

Appearances:

Frank H. Hennessy, Esq., Attorney for Plaintiff.

Vredenburgh, Wall & Carey, by Mr. Patterson, Attorney for Defendant.

Charles Young was duly sworn as stenographer to correctly take and transcribe the testimony in said cause.

It is admitted that the horse that was killed for which this suit is brought belonged to the Plaintiff. It is also admitted that the Defendant was the owner and operator of the railroad and of the locomotive which struck and killed the horse.

George Matternicht, for Plaintiff—Direct

GEORGE MATTERNICHT, a witness called on behalf of the plaintiff, was duly sworn, and testified as follows:

By Mr. Hennessy:

Q. Whom did you work for on April 15th last? A. Closter Demarest Farms.

Q. Do you remember the day the horse was killed on the track? A. Yes, in the morning; 3:30 o'clock in the morning.

Q. What were you doing that morning? A. I came down with a wagon of milk from Closter.

Q. Does the route which you take carry you across the tracks of the railroad? A. Yes, sir.

Q. How long have you been on that route? A. Since January.

Q. Had you used the same horse during that time? A. Two horses.

Q. How long have you had the horse that you were driving on this particular morning? A. So long as I worked for the Closter people.

Q. What kind of a horse was it, was it a quiet horse? A. Yes, sir.

Q. Did the horse know the route?

Question objected to, and objection sustained.

Q. What did you do that morning as you approached the railroad track? A. I stopped every morning as I approached the tracks.

Q. Did you do that this morning? A. Yes, sir.

Q. After you stopped, what did you do? A. Got out of the wagon, and came to the tracks—

Q. What did you do then? A. I looked one side and then the other side of the tracks.

Q. Then what did you do? A. I got back on the wagon.

Q. And then what? A. I drove the horse over the tracks.

Q. Tell everything what happened? A. I got off, and looked up and down the tracks, and then went back to the wagon, and then I started to drive across and I saw no train was coming.

Q. Where was the wagon when you first saw the train? A. The wagon was about on the tracks. The horse was on the track and the first wheel was over the track already.

Q. The track on which the first wheel was on, was that the rail nearest the east side of the track, or the rail nearest the west side of the track? A. The first track.

Q. What did you do then? A. I heard the train and turned the horse around.

Q. Then what happened? A. The rear wheel was caught in the track.

At this point, the plaintiff offered Martin Katts, the president of the Closter Demarest Farms, as an interpreter; the offer was objected to by Mr. Patterson on behalf of the defendant, because of his interest in the suit, and the objection was overruled. Exception allowed.

Martin Katts was duly sworn as an interpreter to correctly interpret the questions and answers put to and given by the witness on the stand.

Q. Then what happened? A. I could not turn the horse around, and the train was coming on.

Q. How far was the train away when you first saw it? A. About twenty-five feet.

Q. After you turned the horse around, and the wagon was caught, what happened? A. The horse became frightened on account of the approaching train, and twisted around in the opposite direction.

Q. Then what happened? A. Then the train came and hit the horse.

Q. What part of the horse did it hit? A. On the side.

Q. In the forward part of the horse, or the hind part of the horse? A. The front part of the horse.

Q. Did the train stop? A. No.

Q. What did you do then? A. I ran to find somebody to help me.

Q. Did you find anybody? A. Yes, I found Mr. Conrad.

Q. How long after the accident happened was it that you found Mr. Conrad? A. After the other train had stopped already, and I went to ask him to watch my horse and wagon for me.

Q. What train was it that stopped; was it the train that hit the horse, or some other train? A. Another train.

Q. From what direction did that train come? A. From New York.

Q. Which way did the train go that hit the horse? A. The other direction.

Q. How did the train coming from New York happen to stop?

Question objected to, and objection sustained.

Q. Was the wagon on the track when the other train stopped? A. Yes, and the people helped me.

Q. Where was the horse? A. Laying across the track.

Q. Was the horse dead? A. Yes.

Q. Did the horse lay across the same track on which the other train stopped? A. Yes.

Q. Before the accident happened, you say you got out of the wagon and got on the tracks and looked up to hear anything? A. No.

Q. Did you hear the bell?

Question objected to and objection sustained.

Cross Examination by Mr. Patterson:

Q. This track where the horse was laying after he was killed, which track was that? A. That was the track that the train came on which stopped.

Q. That was the train coming from New York, the easterly track? A. Yes.

Q. Did the wheel catch in the crossing before you turned the horse around? A. As I turned the horse around, it got caught.

Q. Just what spot in the track was the wheel caught? A. Between the board and the rail.

Q. Which way was the horse facing, north or south? A. Towards the station; towards the south.

Q. Was the horse at the time the wheel was caught, standing between the two rails of the track going north, or was he standing between the rails of the westbound track and the eastbound track? A. Standing between the last eastbound track and the first westbound track.

Q. That was the time when the horse was hit? A. Yes.

Q. Between what tracks was the horse standing when the wheel caught? A. Then I was in between the two tracks.

Q. Between what two tracks? A. The first two tracks.

Q. How did the horse after the wheel got caught get over onto the other two tracks? A. It got frightened and he turned around.

Q. What frightened him? A. The noise, and the fact that he could not pull out of the tracks.

Q. Were you not trying to pull him one way or the other in order to get him out of the track? A. I didn't have so much time. It was only half a minute.

Q. How far could you see up the track after

you got off the wagon? A. Two hundred and fifty feet.

Q. Did you see any train then? A. No.

Q. How far could you look up the track after you got on the wagon and started to drive across the tracks? A. Just as far.

Q. Did you look up the track before you started the horse across to see if a train was coming? A. Yes, I did; I do that every morning?

Q. Did you do that that morning? A. Yes.

Q. Did you see any train coming? A. No.

Q. How far had the horse gotten across the track when you first saw the train? A. It was over the first track.

Q. About how far was the train away then? A. Twenty-five or thirty feet.

Q. You could at that time see up the track two hundred and fifty feet if you had looked? A. I didn't think any more.

Q. After you saw there was no train coming, you didn't look again until the train was almost on you? A. Before I got on the track I looked around yet.

Q. How fast was the horse going, trotting or walking? A. It was going slowly.

Q. How far was the horse away from the track when you got down off the wagon to look up and down the track? A. About twenty-five feet.

Q. So that you drove the horse about twenty-five feet before you reached the track? A. Yes.

Q. And you didn't look at all after that to see if any train was coming? A. Yes, sir.

Q. Did you keep looking till the train came? A. Yes, sir.

Q. Why did you not see the train two hundred and fifty feet up the track? A. I had to drive my horse over.

Q. What did you say to Mr. Conrad? A. I told him my horse was killed.

Q. What else did you say to him? A. I asked him where I could telephone from?

Q. Did you ask him anything else? A. No.

Q. Did you not tell him that you were not on the wagon when the horse was struck? A. It may be possible, I was so nervous that I don't know what I said.

Q. Did you not tell him that you were delivering milk in a house on the east side of the track, and that the horse walked away and walked on the track?A. No, I don't know what I told Mr. Conrad.

Q. Do you remember the men who came up and took the horse off the track? A. Yes, they were from the train.

Q. Do you remember these men (indicating three men in the court-room)? A. I remember that man (indicating Mr. Ryall).

Q. Do you remember this man, Jones? A. No.

Q. Do you remember this man, Tyson? A. I don't recall.

Q. Did you tell Mr. Ryall that you were delivering milk at a house on the eastside of the railroad, and that your horse walked away from you, and walked on the track? A. I don't know, I can't say; I was so upset.

Q. Did you tell that to Mr. Tysen? A. I can't understand very well, and don't know what I said.

Q. Did you tell it to Mr. Jones? A. I don't know who asked me.

Q. How often did you go over this route? A. Every night.

Q. Have they any flagman there at night? A. No, sir.

Q. Did they ever have one at night? A. I never saw one at night.

Redirect by Mr. Hennessy:

Q. What kind of weather was it that morning?
A. It was foggy.

MARTIN KATTS, being duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. Hennessy:

Q. Are you connected with the Closter Demarest Farms? I am its president.

Q. Are you familiar with the value of this horse that was killed? A. I am.

Mr. Patterson: I object, unless the witness is properly qualified to testify as to the value of horses.

Q. What did you pay for the horse? A. Three hundred dollars.

Q. How long had you had the horse when the accident occurred? A. I bought him the year before.

Q. You had him about a year? A. Yes, sir; a year and a couple of weeks. He was eight years old.

Q. What was the habits of the horse?

Question objected to on the ground that it is immaterial, incompetent and irrelevant. Objection sustained.

Q. Did you see much of the horse during that year? A. I saw him a good deal. I drove him a whole lot.

Q. Was the horse familiar with this particular route; how long had he been used on this route? A. For two years before I had him—the man I

bought him from had the same route—and I used him a year on this route; he was three years on that route.

Q. You say you have driven that horse yourself? A. Yes, sir.

Q. What could you say as to the character and habits of the horse? A. He was one of the kindest and gentlest of animals that I ever had of knowing or owning.

Q. Did he ever to your knowledge, run away? A. The horse was never known to be out of the walk.

Q. Did he ever run away? A. No, sir; never.

Q. You say he was a very kind animal? A. Yes, sir.

Q. By the Court: You think you could sit in a wagon with him, and shoot over his back, and he would not run away? A. I never tried anything like that on the horse, I would not want to say, your honor; I think that would be an unusual test; I can't say what he will do under such a circumstance.

Redirect Examination by Mr. Hennessy:

Q. What would you say as to the training of the horse with regard to its actions on the route?

The question is objected to by Mr. Patterson on the ground that it is incompetent, irrelevant and immaterial, and has nothing to do with the issue.

Q. What have you to say as to the training of this horse as used on a milk wagon? A. He was a horse that was peculiarly fitted for that; the horse was never known to step away from a house until he felt the driver's foot on that step, and he would know not to leave one customer until he saw the driver in there and then go to the next.

In all the time that I have had the horse, I have never known him to make one mistake of that kind, and he has a reputation around that section for that among all the people in the milk business.

Q. Suppose the driver forgot to stop at a customer's house, would the horse stop? A. Yes.

Q. So that he knew the customers as well as the driver did? A. Yes.

By the Court:

Q. The horse would not move until the driver had gotten back on the wagon? A. No, sir.

Q. You mean to say that the horse would not move if you told him to go on? A. If you were right alongside of him and talk to him, of course he would.

Q. Was he a horse that could be backed easy? A. He was an all around handy and gentle horse.

Q. Answer my question; would the horse back easy? A. Yes, he would back easy.

By Mr. Hennessy:

Q. In all your experience, did he ever start without being ordered to start?

Question objected to on the ground that the question is incompetent, immaterial and irrelevant, and the witness can not testify as to what the horse would do if he was not with him.

Objection overruled.

A. The horse would not do anything of the kind so far as I know, and I was on the wagon for six months myself.

Q. What was the extent of the damage to the harness? A. The harness was completely wrecked.

Q. What did you pay for the harness? A. Forty-five or forty-six dollars.

Q. How long had you used it? A. I bought it simultaneous with the horse; a week or so later.

By the Court:

Q. Was it new when you bought it? A. It was comparatively new.

Q. But I asked you whether it was new or not? I didn't ask you whether it was comparatively new; you must answer yes or no. A. It was not new.

By Mr. Hennessy:

Q. Was it in good condition at the time of the accident? A. Absolutely perfect, serviceable condition.

Q. What was the damage, if any, to the wagon? A. One of the shafts was broken and the whistletree was cracked.

Q. That was the only damage to the wagon? A. Yes.

Q. Have you had anybody examine that wagon and give you an estimate as to its cost of repair?

Question objected to, and objection overruled.

A. Yes.

Q. Did you get an estimate? A. Yes.

Q. Who gave you that estimate? A. A wheelwright.

Q. What is his name? A. I think he works for Eckerson up there in Closter.

Q. What did he estimate the wagon would cost to repair?

Question objected to and objection sustained.

Q. Has the wagon been repaired? A. No, sir.

Q. Did you examine the track where this accident happened on the day of this accident?

Question objected to on the ground that it is too indefinite.

Objection overruled.

A. Yes.

Q. What time of day was it when you examined the tracks? A. Five o'clock or a quarter to five in the morning.

Q. What did you find was the condition of the crossing? A. I found that at the crossing referred to in this testimony, I didn't examine the other track, that the board that runs parallel with the track was very badly worn; that for about two inches, it has formed a sort of round curve where it is worn so that the opening from the track to the highest point on the plank is about two inches wider than it is at other parts of that plank where it has not been worn; I picked up a number of pieces of wood from the track that lay right in the groove; I think I have some of them here, that I found lay there that morning.

By the Court:

Q. How wide is the groove between the plank that lay at that crossing and the inside of the rail? A. Four inches.

Q. Is that the entire distance of the plank? A. No, sir.

Q. How far? A. It would run for that width for probably six or seven feet, or three or four feet, and then it would run narrower again, and then there would be another break where it would be wider.

Q. Which way was that, near the inside of the rail, or the outside rail? A. That was the westbound rail of the easterly track.

Q. That was the northbound track? A. Yes.

Q. Would that width be continued down to the

tie underneath? A. In some places it would be; it is wider; that is, the plank was more hollow.

Q. Would it continue down to the tie? A. Right down flush with the tie; you mean the tie that crosses under the track.

Cross Examination by Mr. Patterson:

Q. The openings you speak of where are these openings shown here on the photograph? A. I can't locate then on that picture.

Q. How many planks were there at that crossing at the time you speak of? A. I didn't examine the number.

Q. The westward rail of the northbound track?

By the Court:

Q. That opening would be of no danger at all if the wheel was at right angles; what kind of wheels was on this wagon? A. Very wide wheels.

Q. What was the width of the wheels? A. Two and a half inches or three inches; it it a very heavy built wagon.

Q. Had it steel tires? A. Yes.

Q. The tires were how wide? A. About two and three-quarters inches or three inches.

Frederick J. Bender, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Examined by Mr. Hennessy:

Q. Where do you live? A. Haworth.

Q. Are you familiar with this crossing at which this accident happened? A. Yes, sir.

Q. Did you ever see any occurrence there short-

ly after the fifteenth of April, any accident happening there after the fifteenth of April, due to the condition of the tracks?

Question objected to by Mr. Patterson on the ground that it is incompetent, irrelevant and immaterial.

Objection sustained.

Q. Are you familiar with the condition of the track, or the roadway which crosses the track? A. Yes, sir.

Q. What can you say as to the condition of the track? A. The condition of the track is pretty bad.

Mr. Patterson: I object because that is merely a conclusion.

Objection sustained.

Q. What is the condition of this crossing? A. The edges are all worn off, the planks between the rails.

Q. Have you had occasion to see that crossing? A. Yes, I use it over twenty-five times a day.

Q. What is your business? A. Beer bottler.

Q. Did you ever get caught in the track? A. Not myself, no, sir.

Q. Is there any danger of the wheels of your wagon getting caught in the track? A. If I swing sideways.

Q. Is there any danger of your wheels getting caught? A. Yes, going a little sideways you could get caught.

Q. How much sideways. A. Just a trifle.

Q. You mean by that that if you are on the crossing and meet another wagon coming the other way, you would twist sideways, and then get caught in the track? A. Yes, sir.

Cross Examination by Mr. Patterson:

Q. Mr. Bender, could you turn on a slant there with two wagons crossing at the same time? A. I believe you could.

Q. Are you sure? A. Yes, sir.

Q. How far sideways would you turn before the spaces that you speak of would touch the wheel? A. On a slant about three feet.

Q. What do you mean? A. About three feet that way. (witness indicating).

Q. You would have to turn pretty nearly at right angles to get caught? A. Yes, sir.

Q. But if you went right straight across, it would be all right? A. Yes, sir. If you go right across.

Q. It is level with the exception of these spaces right next to the track? A. No, sir.

Q. Do you understand what I mean? A. They are not on a level; one board is higher than the other; the track is higher than the boards.

Q. How much higher? A. A trifle.

By the Court:

Q. How long is this crossing there, the boards that run alongside the track; is it two lengths of board, or one? A. Just one length.

By Mr. Patterson:

Q. You are positive of that? A. I am not positive of that.

PLAINTIFF'S CASE CLOSED.

E. Louis Conrad, for Defendant—Direct

E. Louis Conrad, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Examined by Mr. Patterson:

Q. What is your business, Mr. Conrad? A. Everything in general; the business I got, I don't work at.

Q. You mean you have a trade? A. Yes, sir.

Q. What is that trade? A. Glass blower.

Q. And you are now working at odd jobs? A. Yes, carpenter work, teaming, or anything I can get hold of.

Q. Do you remember this accident to the plaintiff's horse on April 15th, 1915? A. I do.

Q. Do you live near the crossing? A. I do.

Q. About how far away? A. I have not measured it exactly, maybe a thousand feet.

Q. Do you have occasion to go to that crossing very often? A. When I call for my mail.

Q. How long have you lived there? A. Twenty-three years.

Q. Are you familiar with this crossing? A. I am.

Q. Do you recall in the early morning of April 15th, 1915, this man Matternicht, the driver, coming to your house? A. I don't know the date, but I know when the accident happened to the horse.

Q. Do you recall him coming to your house early in the morning? A. I do.

Q. Will you tell us what was said at that time? A. It was about half-past four. He walked up on the lots. I saw him coming up and he knocked on the window and I said "Who is it?" He said, "It is me"; I said "Who is me?" and he mentioned his name, and I heard him by the words and knew him personally and knew who it was. I said "what is the matter with you", and he said

"My horse is killed," I said "Is it; where?" "Up at the station." I said "I got two crutches under my arms; I can't help you." I said "Are you hurt?" He said "No, I was not on the wagon." He was crying and I felt sorry and said "Come in here and see what I can do for you". I hadn't undressed myself for three months on account of my injuries what I received, and I said "Wait a minute until I put my shoes on and coat on". After putting them on, we went out and he explained that he was delivering milk and the horse walked on across the track. I said "What happened to you then". He said "I ran after the wagon but could not catch it. The horse is dead now". I said "What are you going to do". He said "That is what I came here for. Can you help me?" I said "The only thing you can do is to go down to Mr. Bender and telephone down". This was about half past four in the morning when he came to me, and about five o'clock he came with an automobile from Closter and loaded the milk from the wagon into the automobile.

By the Court:

Q. What language did he use in talking to you? A. I don't know that he used any language to me.

Q. Did he talk Italian? A. He spoke in German to me.

Q. Can you speak German? A. I can. I was born in Germany. I am here thirty-two years in this country.

By Mr. Patterson:

Q. Did you see the horse? A. I seen the horse and inspected everything what was down there.

Q. Did you look at the crossing? A. I did.

Q. That was right after the accident? A. About fifteen minues.

Q. What did you notice about that crossing, whether it was in good or bad order? A. You could see where this wagon had been flung between the two tracks, how it smashed the back part in between the two tracks and the push of the engine what the horse got threw the horse over this way, and that push what the horse got, he was killed instantly, I don't doubt for a moment; that straightened his wagon out and broke a piece off the shaft that long and broke a piece off the engine about that big around.

By the Court:

Q. Was the engineer there then? A. No, the train had gone.

Q. Did you see the engine? A. No, I saw the iron laying there that came off some engine.

Q. You don't know whether it came off that engine? A. No, but there was blood on it.

By Mr. Patterson:

Q. You said you were ill at your home, had been sick for some time? A. I have been sick for three months steady.

Q. How about this night when this accident occurred; had you been sick that night? A. I have been sick for seven months this day.

Q. Did you sleep well at night? A. No, not for two months.

Q. Do you recall on this night hearing any trains pass? A. I hear them every night when I am awake.

Q. What kind of a crossing bell have they got up there?

The Court: Can he hear a thousand feet away. He lives a thousand feet away.

Mr. Patterson: I think I have a right to ask him, if your Honor please, whether he

can hear it at four o'clock in the morning, when everything is quiet.

Q. Do you remember hearing this train?

Question objected to, and objections sustained.

By the Court:

Q. How far is your house away from the track? A. A thousand feet.

Q. Which way are you, south or north, towards New York or Hackensack? A. I am this way, towards Hackensack.

Q. Are you west of the railroad; do you know where that bridge runs across? A. I am towards the station and more away from the bridge.

Q. Are you nearer the station than the bridge? A. No, I am over by the pond.

Q. The mill pond? A. Yes, sir. I am this way where the station is, where Mr. Christie lives.

Q. Are you on the east side or west side? A. I am this side.

Q. How near are you to this bridge? A. It should be about the same distance from the station over there than to the crossing over to the bridge that way.

Q. How far are you east of the track towards Christie's? A. On the borderline of the Haworth property on the map.

Q. You know where that road runs through? A. You mean the valley road?

Q. Yes. A. Two of my lots face the valley road and two lots face the valley below.

Cross Examination by Mr. Hennessy:

Q. When this man came to you that morning, he was very much excited? A. He was crying.

Hiram A. Robbins, for Defendant—Direct

HIRAM A. ROBBINS, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. What is your business, Mr. Robbins? A. Photographer for the New York Central.

Q. Did you have any occasion to make some pictures of the Haworth crossing recently? A. Yes, sir.

Q. Are these the pictures taken by you of that crossing? A. Yes, sir.

Photographs were duly admitted in evidence by consent of counsel as correctly representing various views of the Haworth crossing as of the dates marked on the backs of said photographs, and said photographs were marked Exhibits D-1 to D-11, respectively.

Q. Did you take any measurements of the crossing when you took the pictures? A. Yes, sir.

Q. How did you make the measurements? A. With a steel tape.

Q. What is the width between each of the tracks, the west bound track and the east bound track? A. The distance between the west rail of the north bound track and the east rail of the south bound track is eight feet.

Q. That is the distance between the rails? A. From center to center.

Q. What is the distance between the east rail of the north bound track and the west rail of the south bound track? A. I didn't measure the distance.

Q. Did you make measurements of the space between the plank and the rail of the north bound track, the west rail of the north bound track? A.

I didn't make any measurement between the plank and the rail.

By the Court:

Q. You measured the planks at the crossing? A. I measured the width between each track, the north and the south bound tracks.

Q. What is the entire width of the planks? A. The entire width of the north bound track was thirty feet and four inches over all.

Q. I asked you what the lengths of the planks were; they run along the tracks? A. Yes, sir.

Q. What is the length of the planks at that crossing? A. The north bound track is thirty feet and four inches and the south bound track is twenty-eight feet.

PETER MALONEY, a witness called on behalf of the defendant and having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. Where are you employed? A. Haworth crossing of the New York Central Railroad.

Q. What are you there? A. Flagman.

Q. How long have you been the flagman there? A. A year and eight months.

By the Court:

Q. What time do you go on? A. From seven o'clock in the morning until seven o'clock at night.

Q. You are not on at night? A. No, sir.

By Mr. Patterson:

Q. How often do you inspect this crossing a

day? A. Generally twice a day, when I go on in the morning and at night before I leave.

Q. When was the last time you inspected it before the accident? A. A quarter to seven the day before the accident.

Q. What was the condition of that crossing at that time?

Question objected to on the ground that it calls for the conclusion of the witness, and that it is immaterial as to what its condition was the night before the accident.

By the Court:

Q. Did you look to see how far the planks were away from the rail? A. Yes, sir; about two inches from the rail.

Q. Would you call that a first class condition? A. The plank was in first class condition.

Q. But would you call that opening of two inches a first class condition? A. Yes, sir.

By Mr. Patterson:

Q. You mean that it was the same as usual? A. Yes, sir.

Q. You saw nothing unusual at that time? A. Nothing unusual.

The Court: So that if this condition, this space or opening of two inches, is improper, it has been that way for months?

Mr. Patterson: Yes, sir.

By the Court:

Q. How long have you been working there? A. A year and eight months.

Q. During that year and eight months have they put any new planks down at that crossing? A. No, sir.

By Mr. Patterson:

Q. Did they take up the planks to fix them? A. Yes, sir; they raised the planks to a level with the rail.

Q. How long ago was that? A. About four months ago.

Q. Do you mean four months back from the present date? A. Yes, sir.

By the Court:

Q. How long was that before the accident? A. About three months before the accident.

Q. Have they made any repairs since the accident? A. No, sir.

Q. And the crossing is in the same condition today as it was on that day? A. Yes, sir.

Q. What time did you go on duty on the morning of the accident? A. At seven-ten on the morning of the accident.

Cross Examination by Mr. Hennessy:

Q. Did you see Mr. Catts at the crossing on the morning of the accident? A. Yes, sir.

Q. About what time was that? A. Between seven and eight o'clock; I could not exactly swear to the time.

Q. Did you see him pick up a lot of splinters? A. I saw him collect splinters around the crossing.

Q. Do you remember seeing him pick up a piece like that? A. Yes, I have seen him pick up wood like that.

Q. Where did that come from? A. I can't say, but I have seen him pick up wood like that. I am not prepared to say that they came from the Haworth crossing.

Q. But they were pieces like that? A. Yes, sir.

Q. And there were several like that? A. Yes, sir.

Q. Was there another crossing there? A. A small sidewalk crossing a few feet down from that.

Redirect Examination by Mr. Patterson:

Q. Was there anything on the planks to show that they came from this place on the rail? A. No, sir.

Q. You saw that space between the rails? A. That was seemingly in perfect condition; there had been no fresh breakage on it that morning.

By the Court:

Q. It didn't look as if there was a fresh break? A. No, sir.

Q. Did you notice whether there was any piece of old wood that looked as if it had been broken from the plank by reason of rotting and broken off by some wheel that had gotten in there? A. No, sir.

Q. You didn't look at that? A. I looked at the plank. The plank is kind of worn down with the horses' feet.

Q. How much wider is the plank at the top than it is down below? A. Maybe a quarter of an inch.

Q. Is it not more than that? A. I don't think so.

Q. How thick is that plank? A. A three inch plank.

Q. You say it was worn only a quarter of an inch at the top? A. The edge of the plank was worn round a little.

Q. If the edge of this desk was worn a quarter of an inch off here, would you see it? A. You could see whether it was just as square here as there.

Recross Examination by Mr. Hennessy:

Q. Will you swear that at no place at that crossing is the distance between the rail and the plank more than two inches? A. I will not.

Q. Will you say there is any place between the rail and the plank at that crossing less than three inches wide? A. Is less than three inches?

Q. Where it is more than three inches? Will you say that there is no place at that crossing where the distance between the rail and the plank is more than three inches,—an opening of more than three inches? A. I can't do that.

Joseph Martin, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. What is your business? A. Section foreman.

Q. For whom? A. New York Central Railroad.

Q. Do you have anything to do with this crossing at Haworth? A. Yes, sir.

Q. Were you at this crossing shortly after the accident to this horse? A. Yes, sir.

Q. What did you do there, if anything? A. I didn't do anything, only buried the horse.

Q. What were you there for? A. I was called on to take care of the horse; to get him out of there.

Q. Did you see anything about the crossing? A. No, sir.

Q. Did you look at the crossing? A. I looked at the crossing and it was all right.

Q. Are you in charge of that crossing to repair it? A. Yes, sir.

Q. When do you repair it if anything is wrong? A. If anything is wrong, I have to repair it; but I haven't repaired it for six months now.

Q. Will you tell us why there is a space between the plank and the rail?

The Court: I can't permit that question, Mr. Patterson. He is not qualified to testify as to the construction of a railroad. I understand he is only a section foreman and not familiar with the work of constructing a railroad.

Q. How long have you been employed there? A. I have been on that section six years.

Q. How long have you been employed by the railroad? A. Since 1901.

Q. Working on the railroad tracks? A. Yes, sir.

Q. How many crossings have you seen? A. I have seen pretty near all the crossings from New York to Albany.

Q. Do you, as section foreman, in the construction of these crossings and this particular crossing, or in the handling of these crossings, have to know the standards in order to so construct them that they are proper for trains to run over them? A. Yes, sir.

Q. How long have you been doing that? A. All the time since I have been foreman.

By the Court:

Q. Was this crossing on a straight piece of track? A. Yes, sir.

By Mr. Patterson:

Q. With your experience and knowledge of the spaces necessary for the trains to run on, can you

tell us whether the space between the planks and the rails mentioned in this case are necessary or unnecessary?

Question objected to.

The Court: I sustain the objection. This man is not an expert.

Exception allowed.

After a discussion of this point, the objection made to the question was overruled and the question allowed.

Question repeated. A. The space is necessary.

Q. Why? A. For the flange.

Q. What do you mean by that? A. The wheel flange on the train.

Q. You mean then that it is necessary to have a space there so that the flange of the locomotive and the cars can run along the track? A. Yes, sir.

By the Court:

Q. In other words, the locomotive and cars would not stay on the rail if there were no space for the flange? A. That is right.

By Mr. Patterson:

Q. Do you know the width of that flange, the standard width? A. Yes, sir; that is two and a half inches.

Q. On the locomotive? A. That I have never measured.

By the Court:

Q. Do you know the width of the flange on the wheel? A. I never measured it.

ALBERT LEBRETON, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. What is your business? A. Signal maintainer.

Q. Are you familiar with the crossing signal at Haworth, New Jersey? A. Yes, sir.

Q. Where are you signal maintainer? A. I am employed by the New York Central in that capacity from Granton to Orangeburg, a distance of twenty miles.

Q. Does that include the Haworth crossing? A. Yes, sir.

Q. Did you come to this crossing on April 15th last? A. Yes, sir.

Q. For what purpose? A. To test the crossing bell.

Q. Did you test it? A. Yes, sir.

Q. How did you test it? A. By sending out a track relay.

Q. What did you find the condition of that crossing bell to be?

Objected to.

Objection overruled.

A. Good ringing order.

Q. How far was the relay? A. At the post where the bell is located.

Q. How far is that away from the crossing? A. Forty feet.

Q. When does the bell commence to ring giving warning of the approach of a train? A. When the train is about twenty-five hundred feet away on the south bound track and twenty-seven hundred feet on the other track.

By the Court:

Q. Did you experiment there? A. The location I started from; it would have the same effect on the other end.

Q. Did you go this twenty-five or twenty-seven hundred feet and try it from that point? A. No, sir.

By Mr. Patterson:

Q. But from the point where you examined it, the bell rang? A. I tried it where the bell rings from.

Ernest S. Bates, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. What is your business? A. Employed by the New York Central as first assistant signal maintainer.

Q. In your duties do you have anything to do with the automatic signal located at the Haworth station? A. Yes, sir.

Q. What do you have to do there? A. Inspect them daily.

Q. This particular signal? A. That is inspected daily.

Q. By whom? A. By me or Mr. Lebreton.

Q. When did you inspect this prior to April 15th, 1915? A. On the 14th, April 14th.

Q. At what time, if you recall? A. I could not say what time.

By the Court:

Q. Was it in the day time or night time? A. In the morning.

Q. Was it after or before the horse was killed? A. Before it was killed.

By Mr. Patterson:

Q. I show you a slip signed "Bates"—

The Court: I overrule that.

Mr. Patterson: I am asking him what this slip is, and if it is the proper original memorandum I understand it to be, I think it is proper to refresh his recollection as to the exact time.

The Court: No, he testified to the time. He says he went there in the morning. You have tried to show by his evidence that it is absolutely necessary to test this signal every morning. I cannot understand that they should be in such bad shape that they should be tested every day. I don't have to wind up an eight day clock every day, and yet here is a machine that you have to go there to test every day. The railroad company does not spend its money for nothing. They don't send men to test these things if there is no necessity for it.

Q. When was the last time you tested this signal? A. Before the early morning of April 15th, 1915; either the morning before or afternoon.

Mr. Patterson: I have a slip here which is in his own handwriting.

The Court: You may show it to the witness.

Q. I show you, Mr. Bates, a slip; will you tell us what that paper is? A. Daily report for a bell.

Q. In whose handwriting is that? A. My handwriting.

Q. What is that a report of? A. Report of the Haworth crossing.

Q. What date? A. April 14th.

Mr. Patterson: I offer that in evidence.

Admitted in evidence and marked Exhibit D-12.

By the Court:

Q. When did you send that in? A. It goes in the following morning.

Q. Did you make it up? A. Yes, sir; I made it up in the evening and forwarded it on the following morning on the first train.

Q. Is there anything on this to show you what time you made this? A. Yes, sir; it is right there, —1:35 p. m.

Q. That is in the afternoon? A. Yes, sir.

Q. And the one before that was 8:35 a. m.? A. That is the morning of the 15th.

JOHN W. GALE, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. What is your business? A. Locomotive en-

Q. For whom? A. New York Central.

Q. Were you the engineer in charge of the train that was in this accident with this horse? A. Yes, sir.

Mr. Hennessy: I object to the question on the ground that it is leading.

The Court: I overrule the objection. It is unimportant.

Q. When was the fact that your engine had hit the horse and wagon or something on April 15th, 1915, first called to your attention? A. When I

was perhaps ten car-lengths south of the crossing at Haworth; perhaps five, I can't say; in the neighborhood of a few feet.

Q. What did you do? A. I applied the brakes and stopped.

Q. Did you go back? A. No, sir.

Q. Did some of your train crew go back? A. The head brakeman went back. I could not say as to the others.

Q. You were going south? A. Yes, sir.

Q. At what speed were you going? A. I should judge about thirty-five miles an hour; that is the best of my judgment.

Q. How is the track before you reach the Haworth station, is it straight or curved? A. Straight.

Q. For what distance north? A. I should judge perhaps two miles or a trifle over, just west of Harrington Park.

Q. You mean it is straight from Harrington Park to Haworth? A. Yes, sir.

Q. Is there any grade there? A. Up grade going south at Haworth.

By the Court:

Q. From Harrington Park down? A. About half way between Harrington Park and Haworth it is down grade and about half way up grade.

Q. Your train was not to stop at Haworth? A. No, it was a fast freight train.

Q. How many cars did you have on? A. I could not say; we usually have between fifty and sixty. I should say at a rough guess fifty-five.

Q. So that when you were at the Haworth station, part of your train was going down and part up-grade? A. Yes, sir.

By Mr. Patterson:

Q. Did you give any signal on approaching the

Haworth crossing? A. I blew the Haworth crossing whistle and also the bell was ringing.

Q. Where did you blow the whistle? A. At the whistling post; within ten feet of the whistling post.

Q. How far away is that north of the crossing? A. I could not say accurately.

Objected to.

Objection sustained.

Q. Do you know from your experience what the distance is?

The Court: He can't swear to that.

Mr. Patterson: May I ask him, if your Honor please, if it is not more than a certain distance?

The Court: No; he says he does not know. He didn't measure it. What is the use of wasting time?

Exception allowed.

Q. You blew it at the whistling post? A. Approximately at the whistling post. It might be ten feet one way or the other.

Q. With respect to the bell, when did that start ringing? A. I started the bell ringing at Cornwall and it stopped this side of Haworth.

By the Court:

Q. You mean the bell on the engine? A. Yes, sir.

Q. Ringing it all the time? A. Yes, sir.

Q. And the reason for that was that the train was making a great deal of noise? A. Yes, sir.

Cross Examination by Mr. Hennessy:

Q. How long have you been an engineer on this road? A. Sixteen years the thirtieth day of last May.

Q. Most of that has been on this particular section? A. Not the most of it, no.

Q. What part of it has been on this section? A. What do you call section?

Q. The section which takes in Haworth? A. In the neighborhood of six or seven years.

Q. You say you blew the whistle. How long did the blasts last; just one jerk? A. No, sir; two long and two short blasts.

Q. You blew that yourself? A. Yes, sir.

Q. The bell was ringing continuously from Cornwall until you reached Haworth? A. Yes, sir.

Q. Why did you stop as soon as you got past Haworth? A. Because I can't say whether it was the fireman or head brakeman who told me he thought we had hit something there.

Q. That was when you stopped the train? A. Yes, sir.

Q. You hadn't seen anything you hit? A. No, sir.

Q. You were looking out of the window? A. Yes, sir.

Q. Could see the track? A. Yes, sir; could see the track, but with these long engines you can't see over the east side of the track; you could not in the night see anything on the crossing.

Q. Do you mean to tell me that you were running an engine that was so built that in looking ahead, you could not see over on the other side of the track on the crossing? A. Not in the night time far enough to see anything; you can in the day time.

Q. The time of night you were running? A. No, could not.

Q. That was the kind of engine they furnished you? A. Yes, sir.

Q. Do you know what the bell of that engine

weighs? A. I know it is a good lift for an ordinary man; I don't know what it weighs.

Q. Is the engine one of those camel-backs? A. No, sir.

Q. But you don't know what the bell weighs? A. No, sir.

Q. Is the bell automatic? A. Yes, sir.

Q. Do you remember the weather that morning? A. It was hazy; not clear. We struck a bank of fog between Harrington Park and Haworth, but we ran out of it before reaching Haworth, and at Haworth it was not clear or foggy.

Q. Who was it called your attention to the fact that you had hit something? A. I don't know whether it was the head brakeman or fireman.

Q. How long did the train stop? A. Probably thirty or thirty-five minutes.

Q. You didn't leave the cab? A. I got out of the cab, but I didn't go thirty feet from the engine. I got off the engine and inspected it.

GEORGE D. HERRON, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. What is your business? A. Livery and taxicab.

Q. Ever had much to do with horses? A. Yes, sir.

Q. Familiar with them? A. Familiar with their prices, and have bought and sold them.

Q. Did you know this horse belonging to the plaintiff, that was killed? A. Yes, often saw him.

Q. What was he worth, if you know? A. I could not tell off-hand; he was a fine looking horse.

Q. Did you ever look at him carefully? A. No, sir.

Q. Didn't examine him? A. No, sir.

No cross examination.

WILLIAM JONES, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. What is your business? A. Conductor for the New York Central.

Q. How long have you been such conductor? A. Fifteen years, the thirtieth day of this June.

Q. Were you the conductor on this train that Engineer Gale had charge of? A. Yes, sir.

Q. Do you remember this accident? A. Yes, sir.

Q. When the train stopped, what did you do? A. The train stopped very suddenly.

Q. What did you do when the train stopped? A. I got off the car to see what the trouble was.

Q. Who was with you? A. Boyle and the flagman, he got off.

By the Court:

Q. Where were you at the time? A. In the caboose.

Q. At the rear end of the train? A. Yes, sir.

Q. How many cars did you have on? A. I should judge between fifty and sixty.

Q. How near were you to the Harrington Park station? A. The caboose ran past the Haworth station.

Q. You didn't stop until the whole train had gone past the Haworth station? A. No, sir.

Q. You were going pretty fast, were you? A. I should judge in the neighborhood of thirty-five miles an hour.

Q. Is it an up-grade? A. Yes, sir; a little up-grade.

Q. And the engineer put on all the brakes? A. Yes, sir.

By Mr. Patterson:

Q. What did you find when you got back to the place where the accident happened? A. Before I came to the accident, I met this gentleman over here coming up the track and he said, "You killed my horse."

Q. What gentleman do you mean? A. (Witness indicates George Matternicht, the driver.) We went back there and the horse lay between the rails of the west bound track.

By the Court:

Q. Where was the wagon when you got there? A. It stood right on the west bound track, with the forward part turned around between the rails of the west bound track.

Q. And the wheel was down in the crack? A. I didn't notice that there was any wheel in the crack.

By Mr. Patterson:

Q. What was the position of the wagon at that time? A. The forward wheels were turned right under the body; the main body of the wagon stood east and west and the horse was lying dead in between the west bound track.

By the Court:

Q. Was this a platform spring wagon; do you know what a platform spring wagon is? A. I don't know.

William Jones, for Defendant—Cross Redirect—Recross

Q. Were the wheels turned right up against the reach? A. The wheels were turned away under.

Cross Examination by Mr. Hennessy:

Q. Was the body of the wagon running in the same direction as the tracks? A. No, sir.

Q. It was across the tracks at right angles? A. The body of the wagon was at right angles with the tracks.

Q. At right angles? A. Nearly so. Say the tracks run like this and this is the Haworth station, and the body of the wagon came up here and the shafts were turned around this way and the wheels were turned this way.

Redirect Examination by Mr. Patterson:

Q. What did this man say to you about his being in the wagon? A. He told me he had been delivering milk and the horse walked off alone.

Recross Examination by Mr. Hennessy:

Q. What was the mental condition of the man at the time you saw him? A. He spoke broken, but he could tell what his name was.

Q. He was very much excited? A. He didn't seem to be very much excited.

Q. He was very cool, was he not? A. No.

Q. Do you understand German? A. No.

Q. Did he talk English or German? A. He told me his name in German and he said he could not talk English. He said he had been delivering milk, and his horse walked off alone.

Q. He said that in English? A. Yes, sir; he said that before four or five men.

JAMES E. RYALL, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. What is your business? A. Brakeman for the New York Central.

Q. Were you a member of the crew of the train which hit the horse on April 15th? A. I was.

Q. And you went back with Mr. Jones, the conductor, to see the horse? A. Yes, sir.

Q. Did you see that driver over there? A. Yes, sir.

Q. What did he say?

Question objected to.

Objection overruled.

A. He said we killed his horse, and he went on to explain. I asked him if he was injured and if he was in the wagon, and he said no, that he was delivering milk at a house nearby, and that the horse walked off.

By the Court:

Q. What language did he use? A. Broken English.

Q. German or English? A. It was mixed up.

Q. Do you understand German? A. No, sir, I do not; but he spoke in English.

No cross examination.

John J. Tysen, for Defendant—Direct

JOHN J. TYSEN, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. Patterson:

Q. By whom are you employed? A. New York Central.

Q. And as what? A. Brakeman.

Q. Were you a member of this same train crew that was in the accident on April 15th? A. Yes, sir.

Q. Did you go back to this horse that was killed? A. Yes, sir.

Q. And did you see that man Matternicht? A. Yes, sir.

Q. What did he say, if anything, at that time? A. He said, "You killed my horse."

Q. Is that all? A. After that, after he got back to the crossing, he said he had been delivering milk and that the horse had walked away from him.

Cross Examination by Mr. Hennessy:

Q. Will you describe what condition you found the wagon in; what position it was in? A. The body was at right angles to the west bound track.

Q. Where were the wheels of the wagon? The rear wheels were near the rail, on the east side of the track, and the front wheels were turned directly around.

Q. In the crack? A. I didn't notice that; I didn't look. I helped to pull the wagon off the track, but didn't look. We straightened out the wheels and backed it off.

By the Court:

Q. Did this man tell you whether he was in the wagon at the time the horse was struck or not? A. No, sir.

F. J. Bender (recalled), for Plaintiff—Direct

By Mr. Hennessy:

Q. Where was the train when it stopped; how far had it gone?

The Court: I think you ought to leave that alone. You don't want to contradict that. They said they had gone way past the station.

Defendant's case closed.

Mr. Bender recalled in rebuttal.

Examined by Mr. Hennessy:

Q. Do you remember seeing the driver on the morning of this accident? A. Yes, sir.

Q. About what time was it? A. Quarter to five.

Q. Will you tell the Court what conversation you had with him at that time?

Mr. Patterson: I object. How is that rebuttal?

The Court: That is not rebuttal. I sustain your objection.

Mr. Hennessy: I want to show, if your Honor please, the statement of the driver as to why he told these trainmen that the horse was alone; that he was not in the wagon when the horse was hit. They are using a statement against us, and I want to explain that statement.

The Court: Don't you trouble yourself about what has not been sworn to. Nobody swore that he said he was not in the wagon. Nobody has testified that this man has said at any time that he was not in the wagon. There is no evidence to show that.

Case Closed.

Mr. Patterson: I would like to ask the Court to make some findings of law and fact.

The Court: There is no evidence here, as I recollect it, that this driver ever said to anybody that he was not in the wagon at the time it was struck. He said the horse had walked away, but he does not say that he was not in the wagon. He says himself he was in the wagon. Before I go into the matter of findings, I would want to have this testimony struck off.

Mr. Patterson: I object to any testimony being struck off. It should stand as it is.

The Court: I don't mean struck from the record, but transcribed, so that I can go over the testimony before announcing my conclusions. We will adjourn this matter until Friday, June 18th, at ten o'clock, by which time I will have the testimony, and at that time you can take up the matter of findings.

Minutes of the trial of the above entitled cause held on the eighteenth day of June, 1915, to which date the same had been adjourned.

APPEARANCES:

JOHN H. PATTERSON, Esq., representing VREDENBURGH, WALL & CAREY, attorneys for the defendant.

FRANK H. HENNESSY, Esq., attorney for the plaintiff.

Mr. Patterson: "At this time, I want to make a motion for the direction of a verdict for the defendant on the ground that no negligence has been shown on the part of the defendant, and also on the ground that the driver was conclusively shown to have been guilty of contributory negligence."

The Court: "That motion will be denied."

Objection noted.

Mr. Patterson: "I have some findings here as to the evidence as I regard it in the case, which I would request your Honor to find."

After a discussion on the question of the findings, the Court made the following ruling:

The Court: "You may read your findings on the record, and if the other side objects to them, the Court will hold the question as to whether they are proper or not until the whole case is decided."

Mr. Patterson then read the findings as follows:

Finding No. 1. That the space or opening between the plank and rail at the Haworth crossing, in which the wheel of the plaintiff's wagon is alleged to have been caught, was necessary for the proper operation of the defendant's trains, and as there is no evidence from which the Court can conclude that such space or opening between the plank and the rail was improperly constructed and maintained for ordinary and usual use by persons and vehicles making use of said Haworth crossing over and across the defendant's tracks at said Haworth Drive, the defendant was not negligent and was not responsible for any injury sustained by the plaintiff if one of the wheels of the plaintiff's wagon slipped into and was caught in said space or opening when said wagon was turned around at right angles with said Haworth Drive and parallel with said opening or space between said plank and rail.

Mr. Hennessy: "I object to any such finding."

Findings

Finding No. 2. That the evidence in the case fails to show that the train and locomotive pulling the same which struck the plaintiff's horse were negligently operated by defendant's servants, and defendant is not liable.

Objected to on the same ground.

Finding No. 3. That the evidence in the case shows that proper warning of the approach of the train which struck plaintiff's horse was given. (Refused).

Objected to on the same ground.

Finding No. 4. That the evidence in the case fails to show that the crossing over defendant's tracks at Haworth Drive, where the accident occurred, was improperly constructed or maintained for ordinary and customary use by persons and vehicles making use of said tracks over and across defendant's tracks at Haworth Drive.

Objected to.

Finding No. 5. That the plaintiff's driver was negligent in attempting to cross the defendant's tracks at Haworth Drive without looking and listening.

Objected to.

Finding No. 6. That if the plaintiff's driver could have seen the train when it was a distance of 250 feet from the crossing, but failed to see it until the train was 25 or 30 feet from him, such failure indicates that he did not look and listen, and such driver's negligence bars the plaintiff from recovering against the defenant in this case for the injuries complained of.

Objected to.

Findings

Finding No. 7. That the evidence in the case does not show that the defendant was guilty of any negligent act which resulted in the killing of the plaintiff's horse and injury to the harness.

Objected to.

Finding No. 8. That the injury complained of resulted directly from the action of the horse, due to his becoming frightened, and as there is no evidence in the case to show that the defendant negligently frightened the horse, the defendant is not liable to the plaintiff on that account because of the killing of the plaintiff's horse and injury to its harness.

Same objection.

Finding No. 9. That the evidence in the case does not show that the defendant failed to give proper warning of the approach of the train which struck plaintiff's horse.

Objected to.

Finding No. 10. The burden is on the plaintiff in this case to prove the defendant's negligence, and it has failed to sustain the burden.

Same objection.

Mr. Patterson: Those are the findings which I ask your Honor to make, and to rule on them.

The Court: You have stated about two or three of them in two or three ways. You state the same thing first one way and then another way.

Mr. Patterson: Will your Honor give me an opportunity to object to an adverse ruling on these findings?

The Court: You may consider your objection entered.

Findings

The case was then summed up by the respective attorneys, and decision reserved.

To His Honor, Peter W. Stagg,
Judge of the District Court of the Third Judicial District of the County of Bergen:

I, Charles Young, the stenographer sworn in the foregoing case, do certify that the foregoing is a true transcript of the shorthand notes of testimony taken by me on the trial of the cause wherein the Closter Demarest Farms is the plaintiff, and the New York Central and Hudson River Railroad Company is the defendant.

CHARLES YOUNG,
Stenographer.

To His Honor, William S. Gummere,
Chief Justice, and the Associate Justices of the Supreme Court of New Jersey:

I. Peter W. Stagg, Judge of the District Court of the Third Judicial District of the County of Bergen, do certify that the foregoing stenographer's transcript of testimony, made by Charles Young, a stenographer designated by me, is my state of the case between the Closter Demarest Farms, plaintiff, and the New York Central and Hudson River Railroad Company, defendant, as the same was tried before me on the dates therein mentioned.

PETER W. STAGG,
Judge.

Opinion.

(Filed Aug. 27-1915)

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE COUNTY OF BERGEN.

CLOSTER DEMAREST FARMS
Plaintiff,

vs.

NEW YORK CENTRAL and HUDSON RIVER RAILROAD COMPANY,
Defendant.

FRANK H. HENNESSY, Attorney for Plaintiff.
VREDENBURGH, WALL & CAREY, Attorneys for Defendant.

This suit was brought by the plaintiff to recover damages for the killing of a horse owned by the plaintiff on the morning of April fifteenth, nineteen hundred and fifteen, by a train of the defendant on the railroad crossing at Haworth, Bergen County, N. J., and on the trial it was contended by the plaintiff that the plaintiff's servant who had charge of the horse which was being driven before a milk wagon at about three thirty o'clock in the morning used due care and diligence in looking up and down the tracks before he started to drive across the crossing and that the defendant was guilty of negligence, which negligence caused the accident in two particulars; one was that the crossing was out of repair, and that helped to contribute to the accident, and the other was that the train was run in such a careless, negligent manner that the servant of the defendant failing to use the precautions that they ought to

have used in the operation of said train caused the accident, and the same was caused without any contributory negligence of the plaintiff or its servants.

The defendant contending that the horse was allowed to approach and go on the crossing without a driver, and that the crossing itself was in good repair, and that the servants or agents of the defendant who operated the train were not guilty of any negligence and did not in any way contribute to the accident.

After considering the evidence as produced before me and listening to counsel on both sides, I have concluded to find the following facts upon which to base a decision:

First, I find from the evidence that the crossing was out of repair, that is the space between the rails and the planks on the crossing by use and by failure of the defendant to use reasonable care to keep the said crossing in repair, had become so large that a horse and wagon could not be turned around upon the crossing without danger of having the wagon caught between the rail and the planks on the crossing, and from the evidence produced before me, I find as a fact that the wagon was so caught that morning just previous to the horse being hit by the train.

The crossing was at a point where the public road crosses the railroad track, and under the case of Piver vs. Pennsylvania Railroad Company, Court of Errors and appeals, 71 Atlantic Reporter, page 247, it is held that a railroad company is liable for an injury resulting to a traveler from its failure to use reasonable care to keep the passage way over those tracks maintained by it at the street intersection in proper repair. This doctrine as laid down in this case was approved by the Court of Errors in Taylor vs. Lehigh Valley

Railroad Company, 94 Atlantic Reporter, page 566.

The evidence in this case clearly shows that the said crossing was out of repair and that it had not been repaired for at least three months previous to the accident. The evidence also shows to me that the agent and servant of the plaintiff used reasonable care in ascertaining whether there was a train coming before he started with the horse and wagon to cross the track.

The train that killed the horse was a fast freight train with from fifty to sixty cars and was not due to stop at Haworth station, which was a short distance from said crossing where the horse was killed. The locomotive engineer who was in charge of the train that caused the accident testifies that the train was going about thirty-five miles an hour and the engineer testified as to the accident as follows:

Q. Why did you stop as soon as you got past Haworth? A. Because I can't say whether it was the fireman or head brakeman who told me that we had hit something there.

Q. That was when you stopped the train? A. Yes.

Q. You hadn't seen anything you hit? A. No, sir.

Q. You were looking out of the window? A. Yes, sir.

Q. Could you see the track? A. Yes, could see the track, but with these long engines you cannot see over the east side of the track, you could not in the night see anything on the crossing.

He also testifies as follows:

Q. You remember the weather that morning? A. It was hazy, not clear, we struck a bank of fog between Harrington Park and Haworth, but run out of it before reaching Haworth, and at Haworth it was not clear or foggy.

The fireman was not called upon to testify, neither was any other person called upon by the defendant who told the engineer that they had hit something. The train ran its entire length past the crossing, as shown by the testimony of the conductor as follows:

Q. How near were you to the Harrington Park station? A. The caboose ran past the Haworth station.

The crossing at this point was north of the station in the direction from which the train had come from towards Harrington Park.

49 Atlantic Reporter, Page 456.

Rafferty vs. Erie Railroad Company.

In that case on page 458, Justice Hendrickson in speaking for the Supreme Court says that the trial Judge in his charge to the Jury charged it to be the duty of the engineer and fireman if they see that there is possible danger of collision, to exercise reasonable diligence and reasonable care to avoid it. And then the Judge follows and says that such a duty devolves under the law upon the company's servants, there can be no question. The law is that while, at highway crossings, the railroad has the prior right of passage as against the traveler, still both parties must exercise care and diligence in regard to their respective duties, and are charged with the mutual duty of exercising reasonable care to prevent injury. Each must make reasonable and proper efforts in view of the circumstances to foresee and avoid collisions.

Neither the fireman nor the head brakeman whom the engineer spoke of were placed upon the witness stand and there is no evidence in the case to show whether the fireman saw anything or not or what he did see or whether the head brakeman saw anything or not or what he did see, but according to the testimony of the engineer either

the fireman or head brakeman had some information to inform the engineer that they had hit something after they had passed the crossing and from the evidence in the case I find the fact that not only was the crossing out of repair, which helped to contribute to the accident, but the train was approaching the crossing, was driven through a fog, as testified to by the engineer, and that the defendant's servants in approaching said crossing and running over the same failed to exercise reasonable care and diligence in view of the circumstances of the case to foresee and avoid collision with the horse of the plaintiff, and in which collision the plaintiff's horse was killed, and that the servant of the plaintiff was not guilty of any contributory negligence.

I am asked by the defendant's counsel to make some findings.

As to finding No. 1, as I have already stated, I find that the crossing was out of repair and that the evidence in the case warrants that finding.

As to finding No. 2, I find that the evidence in the case shows that the train and locomotive being the same which struck the plaintiff's horse was negligently operated by the defendant's servant.

As to the third finding, the engineer says that he started the bell ringing at Cornwall and stopped this side of Haworth, and the reason for ringing it all the time was that the train was making a great deal of noise. He said he blew the whistle ten feet from the signal post. There is no evidence to show how far the signal post is away from the crossing. There is some evidence to show that when the train is twenty-five hundred feet from the crossing that then the train rings a bell at the crossing, but the witness testifies he did not go and examine this point to see whether the bell would ring or not, and in view of the speed

of the train, the time of night and the fog that the engineer says they were running through, I hold that the evidence of the case does not show that proper warning of the approach of the train which struck the plaintiff's horse was given.

As to finding No. 4, as I have already stated, I hold that the evidence in the case shows that the crossing was out of repair.

As to finding No. 5, I hold that the evidence clearly shows that plaintiff's driver did look and listen before he attempted to cross the track.

As to finding No. 6, I find that even if the train had been two hundred and fifty feet away from the crossing when the driver first saw it, taking in view the speed of the train, position of the horse and wagon on the crossing and the reasonable care of the driver before attempting to cross the track, the accident so far as the driver is concerned could not have been avoided, and he was not guilty of negligence because of that.

As to finding No. 7, I hold that the evidence does show that the defendant was guilty of negligence, which negligence resulted in the killing of the plaintiff's horse and injury to the harness.

As to finding No. 8, I hold that the evidence shows that the injury complained of resulted from the negligence and lack of care of the servants of the defendant, and even if the horse became frightened, he was frightened through the negligence of the defendant's servants.

Finding No. 9 is practically the same as finding No. 3 and therefore is not answered.

As to finding No. 10, I hold that the burden of this case is on the plaintiff to prove the defendant's negligence and the defendant has to sustain the burden.

The result is that judgment must go in favor of the plaintiff against the defendant for the value

of the horse, and it was testified to that the horse was purchased for three hundred dollars and was used about a year. There was no evidence to show that he was of any less value than at the time he was purchased.

Judgment will be given in favor of the plaintiff for three hundred dollars, the value of the horse, with costs. No testimony was given as to the amount of damages to the harness or wagon.

PETER W. STAGG,
Judge.

Aug. 27th, 1915.

Memorandum.

(Filed Sept-9-1915)

THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE COUNTY OF BERGEN.

STATE OF NEW JERSEY } ss.:
County of Bergen, }

CLOSTER DEMAREST FARMS, a corporation,
Plaintiff,

vs.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Defendant.

In Tort.
Damage
$500.00

Before:
PETER W. STAGG, Esq.,
Judge.

FRANK H. HENNESSY,
Plffs. Atty.

VREDENBURGH, WALL & CAREY,
Dfts. Attys.

A summons was issued tested May 13th, A. D. 1915, returnable May 21st, A. D. 1915, at 9.30 o'clock in the forenoon at the Court Room of said Court in Bergen County. The Constable returned the summons as follows, viz.; I served the within summons May 13th, 1915, on New York Central and Hudson River Railroad Co., on Fred E. Howes, Agent at Bogota, the defendant, by reading the same to him and delivering to him a copy thereof.

GARRETT A. DAWSON,
Constable.

Memorandum

Plaintiff's demand was filed May 21st, A. D. 1915.

June 10th, A. D. 1915, the plaintiff appeared and the defendant appeared and the trial of the cause was proceeded with as follows: On the testimony of the following witnesses judgment was rendered:—

Charles Young sworn as stenographer.

Martin Catts sworn as interpreter.

On the part of the Plaintiff:

George Mettineck, Martin Catts, Frederick Bender,—Frederick Bender, recalled.

On the part of the Defendant:

Lewis Conrad, Hiram A. Robbins, Peter Malone, Joseph Martin, Albert LeBritton, Ernest Bates, John W. Gale, George D. Herron, William Jones, James E. Ryle, John J. Tyson.

Photograph marked "D1."

Slip marked "D2."

Case continued for argument June 18th, 1915.

Decision reserved.

Whereupon it is on this twenty-seventh day of August, A. D. 1915, by this Court considered and adjudged that said Closter Demarest Farms, a corporation, have judgment against the defendant as follows:

That the plaintiff recover against the said defendant the sum of Three Hundred dollars damages and costs of suit.

Notice of Appeal filed September, 8th, A. D. 1915.

Bond on Appeal filed September 8th, A. D. 1915.

Memorandum

Item	County	et al.
Summons, copy	$1.50	
Service and return		.60
Mileage		.16
Listing fee	1.50	
	3.00	.76
5% Attorney Fee		15.00
		15.76
Brought down		3.00
Total		$18.76

I hereby certify that the foregoing is a true copy of the record of judgment in the aforesaid entitled matter.

In witness whereof I have hereunto set my hand and the seal of the aforesaid court this third day of September, A. D., 1915.

JUDSON B. SALISBURY,
Clerk.

Exhibit D-12.

FRONT.

THE N. Y. C. R. R. CO.
.....4—14....1915....
To..W. F. W.....
Title.....S. of S.....
at....W'ken, N. J.....
I hereby certify that I personally tested crossing bell No. .....
located at Haworth .....
.....
Time .....1.35..... P. M.
Date .....4-14..... 1915

:	: Operating knife switch.
: x	: Observation.

(Mark "X" in square opposite manner in which test was made.)

I found it .....
.....O. K.....
.....
(Signed) .....Bates.....
(Occupation) 1st Asst.
See Instructions on other side.

Exhibit D-12

BACK.

Instructions.

The employe designated to test crossing bells shall test each bell as early as possible each morning and know that it is in working order. If the bell is inoperative, the crossing must be protected until the bell is repaired and restored to service.

Bells may be tested:

1. By unlocking the box on bell post, and operating, one at a time each knife switch in box. If the bell rings each time a switch is operated it is in working order. Switches must be left in normal position after test is made.

2. By observing the operation of the bell when a train passes on each track protected by the bell; and on single track, by observing the operation of the bell when a train passes in each direction.

One of these forms must be filled out after each inspection and sent to the officer designated to receive it.

Exhibit D-1.

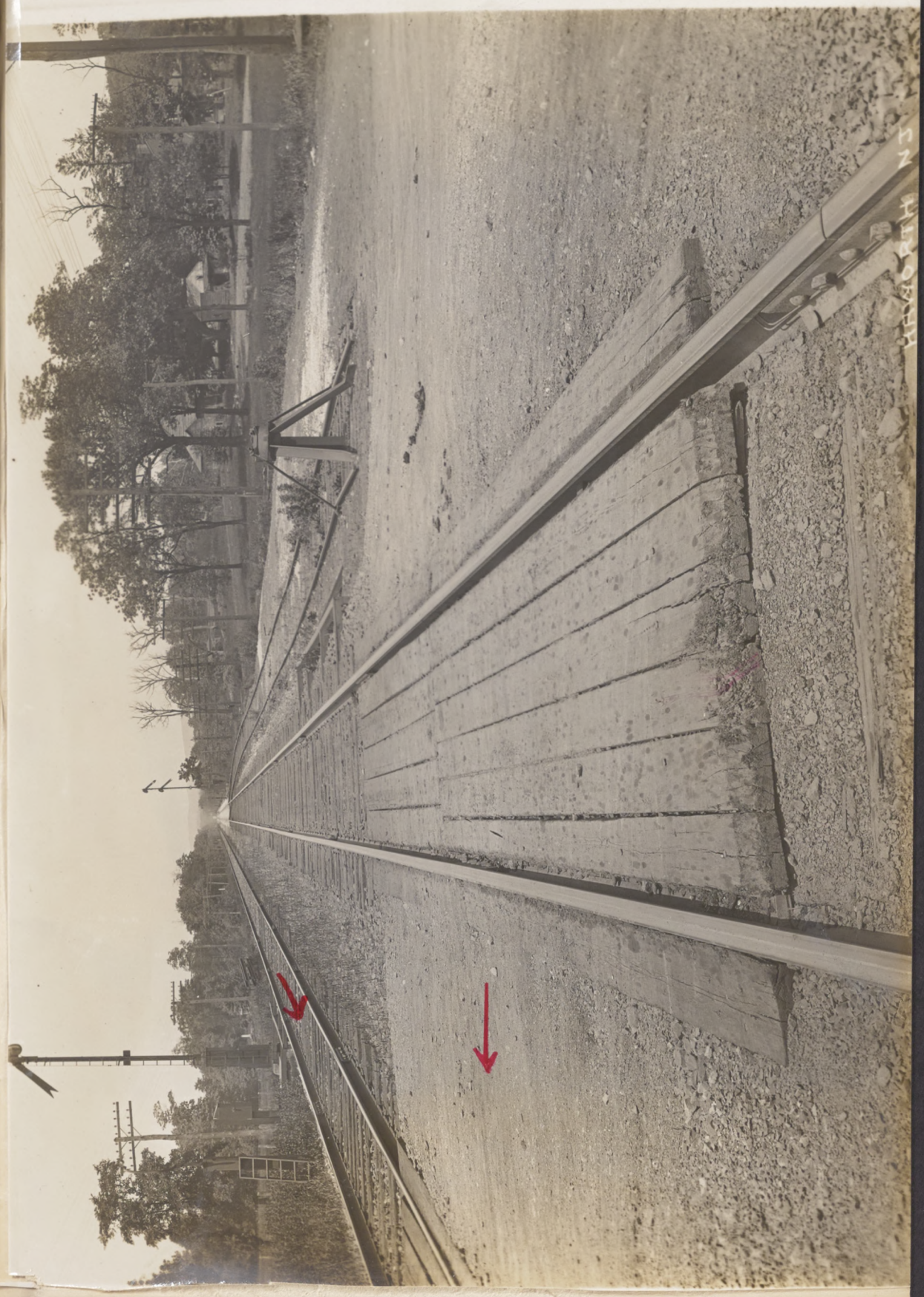
Exhibit D-2.

Exhibit D-3.

Exhibit D-4

Haworth N J 4-15-15. H. A. Robbins.
Case M Cattf Plate No 4498
Detail view of crossing over South bound track looking North.

Exhibit D-5.



Haworth N J 4-15-15. H. A. Robbins.
Case, M Cattf Plate No 4501
Detail view of crossing planks over North bound track looking North.

Exhibit D-6.

Haworth N J 4-15-15. H. A. Robbins.
Case M, Cattf Plate No 4497
Position of camera, 25 Ft East from East rail South bound track looki

Exhibit D-7.

Haworth N J 4-15-15. H. A. Robbins.
Case M Cattf Plate No 4499
Position of camera, 50 Ft East from East rail South bound track looking Nort

Exhibit D-8.

Haworth N J 4-15-15. H. A. Robbins.
Case M Cattf Plate No 4504
Position of camera 100 Ft East from East rail South bound track looking No

Exhibit D-9.

Haworth N J 4-15-15. H. A. Robbins.
Case M Cattf Plate No 4500
Position of camera, 200 Ft East from East rail South bound track looking

Exhibit D-10.

Haworth N J 4-15-15. H. A. Robbins.
Case M Cattf Plate No 4502
Position of camera, 240 Ft East from East rail South bound track looking W
highway.

Exhibit D-11.

Haworth N J 4-15-15. H. A. Robbins.
Case M Cattf Plate No 4503
Detail view of crossing planks over North bound track looking South.