INDEX

	Page
Notice of Appeal, filed March 17, 1913	1
Judgment, signed February 7, 1913	4
Declaration	4
Plea and Postea	20
Judgment	21
Previous Verdict	22
Opinion of Supreme Court	22
Testimony	25
Direction of Verdict	118

WITNESSES

Plaintiff's:

Edward Fisher,		
	Direct	25
	Cross	26
	Re-direct	30
Wm. Chambers, Re-called:		
	Direct	62
	Cross	63
Wm. Chambers,		
	Direct	31
	Cross	35
Ira Johnson,		
	Direct	38
	Cross	40
	Re-direct	42
Conover Brower,		
	Direct	42
	Cross	45
	Re-direct	46

Page

Nicholas Brokaw,
Direct 46
Cross 49
Harry Bishop,
Direct 51
Alvin B. Cliver,
Direct 52
Cross 52
Walter Pittenger,
Direct 53
Cross 54
David Conover,
Direct 55
Cross 57
Re-cross 57
Daniel Ayres,
Direct 57
Cross 58
Chas. Wood,
Direct 59
Cross 61
George Martin,
Cross 62
Re-direct 62

Defendant's:

Horace B. Bannard,
Direct 63
Henry J. Garrity,
Direct 65
Cross 67
John Kneirum,
Direct 69
Cross 70

	Page
Frank M. Jones,	
Direct	71
Cross	76
Wm. H. Dunbar,	
Direct	77
Cross	79
Re-direct	83, 85
Re-cross	84
Howard M. Horner,	
Direct	86
Cross	87
Re-direct	89
Re-cross	89
Charles F. Walker,	
Direct	89
Cross	90
Harry E. Laird,	
Direct	91
Cross	93
Thomas Broderick,	
Direct	93
Frank H. Boland,	
Direct	95
Cross	96
Re-direct	96
Matthew D. Tucker,	
Direct	96
Cross	98
Re-direct	100, 101
Re-cross	100
Clinton H. Compton,	
Direct	102
Cross	104
Arthur Chanoweth,	
Direct	105
Cross	107

Michael Ballerino,
Direct 107
Cross 111
Frank Massesso,
Direct 111
Cross 113
Bert Murray,
Direct 114
Cross 116

EXHIBITS

Defendant's:

	Admitted Folio
Exhibits 1, 2 and 3—Photographs of *locus in quo*	189

New Jersey
Court of Errors and Appeals

CARRIE A. TILTON, Administratrix, etc., Plaintiff, vs. PENNSYLVANIA RAILROAD COMPANY, impleaded, Defendant.	In Tort. Notice of Appeal.

Notice of Appeal

(*Filed, March 17, 1913*)

To John S. Applegate & Son, Attorneys of Defendant:

TAKE NOTICE, that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

The following questions were overruled:

1. To the witness, William Chambers: "What is the matter with her?"

2. To the witness, Conover Brower: "But during the year 1911, wasn't there one?"

3. To the witness, David Conover: "I will ask this question; whether a gateman is not maintained there in the summer time since this accident?"

4. To the witness, George Martin: "As you approach this crossing with your wagon loaded with vegetables, this wagon similar to his now and your horses upon a walk, did your wagon make any noise to drown the sound of an approaching train?"

5. To the witness, William Chambers: "Was there any rattling noise or any noise that would drown the sound of an approaching train from the south on that track?"

6. To the plaintiff: "Do you know how much you received in a year?"

7. To the witness, Frank Jones: "You must have formed quite an experience then in viewing how far you could see in all this number of years?"

The following questions were admitted:

8. To plaintiff: "Did your husband have any personal estate at the time of his death, other than the $150 in bank?"

9. To the witness, Henry J. Garrity: "Was the bell ringing at that time?"

10. To the witness, Thomas Broderick: "Did you see him there on that morning?"

11. To the witness, Thomas Broderick: "Did you see him there that morning at the scene of the accident?"

12. To the witness, Chester Haines: "Were you given a subpoena for Officer Cross?"

13. The witness, Horace B. Bannard, was permitted to testify as to observations taken in the daytime concerning various distances at which trains approaching on defendant's tracks could be seen from Springwood Avenue.

14. The witness, George K. Allen, was permitted to testify as to observations taken in the daytime concerning various distances at which trains approaching on defendant's tracks could be seen from Springwood Avenue.

15. The witness, Andrew Coleman, was permitted to testify as to observations taken in the daytime concerning various distances at which trains approaching on defendant's tracks could be seen from Springwood Avenue.

16. Defendant's photographs marked Exhibits D-2 and D-3 were admitted in evidence.

17. The following question to the witness, Andrew Coleman, was admitted: "And do they correctly portray the objects which you took and the conditions at that spot represented by them, at that time?"

18. The Court declined to strike out of the answer of the witness, Michael Ballerino, to the question: "No, how long after you had talked with Mr. Tilton or hallooed at him?" the words "he was asleep" and the words "he was asleep or he would have answered me."

19. The Court decided that on the facts submitted the decedent was clearly negligent in not observing the approach of the train when he was sufficiently far from the tracks to be entirely out of danger, and directed the jury to find a verdict in favor of the defendant; whereas, the Court should have decided that the question of decedent's negligence was a fairly debatable question, and should have submitted the same to the jury.

JOHNSTON & CONOVER,
Attorneys of Plaintiff-Appellant.

Judgment

(*Signed, February 7, 1913*)

CARRIE A. TILTON, Admrx, etc., of John E. Tilton, deceased, vs. THE PENNSYLVANIA RAILROAD COMPANY.	In Tort. On Postea. Judgment for Defendant. Alan H. Strong Attorney.

As yet of the twenty-ninth day of September, A. D., nineteen hundred and ten.

Witness, William S. Gummere, Esquire, Chief Justice.

William Riker, Jr., Clerk.

Declaration

Monmouth County, ss:

The New York and Long Branch Railroad Company, body corporate, and The Pennsylvania Railroad Company, body corporate, the defendants in this suit, were summoned to answer unto Carrie A. Tilton, administratrix of the goods, chattels and effects which were of John E. Tilton, deceased, the plaintiff herein, in an action of tort; and thereupon the said plaintiff by Johnston & Conover, her attorneys, complains for that whereas the said defendant The New York and Long Branch Railroad Company, body corporate, on the fifth day of July, A. D. nineteen hundred and ten, was the owner and possessor and in control of a certain railroad and railroad tracks extending from Point Pleasant in the County of Ocean and State of New Jersey, northerly through the County of Monmouth, and through the City of Asbury Park, in said County

of Monmouth, to Perth Amboy in the County of Middlesex, in the State of New Jersey, together with the passenger stations, freight stations, switches and side tracks, among which were certain side tracks running parallel with the main railroad tracks of said railroad, and in a northerly and southerly direction, which main tracks, together with one of said side tracks, crossed a certain public road or street known as Springwood Avenue, in said City of Asbury Park, at grade.

And the defendant The Pennsylvania Railroad Company, was then and there operating a steam railroad between the City of Jersey City in the County of Hudson and State of New Jersey, through the Cities of Jersey City and Newark, to the City of Perth Amboy, in the County of Middlesex, and thence to Point Pleasant in the County of Ocean, passing through Red Bank, Long Branch, Asbury Park, and other places in the County of Monmouth, for the carriage of passengers and freight, and used said railroad tracks of The New York and Long Branch Railroad Company, and operated thereon a steam railroad for the carriage of its said passengers and freight from said City of Perth Amboy to Point Pleasant, through Asbury Park aforesaid, and back from Point Pleasant to Perth Amboy, and thence over its own tracks aforesaid, to Jersey City. And plaintiff avers that there then and there was an an agreement between said Railroad Companies, by virtue of which the defendant, The Pennsylvania Railroad Company, ran its trains and cars over the said tracks of the said The New York and Long Branch Railroad Company between Point Pleasant and Perth Amboy, including the portions of said main tracks and side tracks crossing said Springwood Avenue in the City of Asbury Park,

aforesaid. And plaintiff avers that said Springwood Avenue extends across said main tracks and side tracks at grade, in a general easterly and westerly direction, and that the most easterly of said main tracks is the north bound main track, and that the next track west of said north bound main track, is the south bound main track, and that west of said south bound main track is a side track or siding, all of which said tracks at their intersection with said Springwood Avenue, run in a northerly and southerly direction, and all are parallel or nearly so. And plaintiff avers, that said crossing at the place aforesaid, to wit, on the day and year aforesaid, was extremely dangerous during the night time to persons and vehicles, then and there passing along said public street or highway, in an easterly direction, from trains going north upon the most easterly main track of said railroad, to wit, the north bound main track.

That at the time aforesaid there were certain lights near to said railroad tracks, and several hundred feet south of Springwood Avenue, similar in appearance to the headlights on the locomotive engines of the defendant, The Pennsylvania Railroad Company, used by it upon said tracks, one of which said lights was a large electric arc light near to said tracks, and over Corliss Avenue, Neptune Township, about one thousand feet south of said Springwood Avenue, where the same crossed said railroad tracks in Asbury Park aforesaid, which said lights, because of similarity to headlights on the locomotive engines of the defendant, The Pennsylvania Railroad Company, tended to confuse, and would confuse the mind of a person crossing said tracks upon said Springwood Avenue from a westerly direction, as to whether such

light was the headlight of an engine, or whether the headlight of an engine was such light.

Also, on the day and year aforesaid, and for several months prior thereto, there existed and was being conducted, a market in said Springwood Avenue, just east of said railroad tracks, and along said railroad tracks, northerly from said Springwood Avenue, some two hundred feet to Cookman Avenue, in Asbury Park, aforesaid, where large numbers of wagons and horses and persons congregated each morning, commencing about one o'clock A. M., and continuing until about nine o'clock A. M., for the sale of vegetables and produce, in large quantities, almost all of which said wagons passed over said Springwood Avenue from a westerly direction, and crossed said railroad tracks, and caused commotion and confusion, and tended to divert the minds of persons driving upon said Springwood Avenue at that place.

And plaintiff avers that it then and there became and was the duty of the defendants to make said crossing safe at night to any person approaching the same from a westerly direction in a vehicle pulled by horses over said Avenue, and that this could only have been done by the establishment and maintenance there during both day and night of a flagman, gates or some device for giving warning to such person so approaching, of the approach of a train or engine upon said tracks from a southerly direction, in addition to the signals prescribed by statute, and further that it was the duty of the defendant, The Pennsylvania Railroad Company, to maintain a head light and proper light or lights upon such approaching engine or cars at night.

Yet, the defendant, The New York and Long Branch Railroad Company, disregarding its said

duty in that behalf, did not establish and maintain there, gates, a flagman or other device, both during the day and night, to give warning to a person approaching said crossing in a vehicle over said avenue from a westerly direction, of the approach of a train or engine upon said railroad from a southerly direction.

And the defendant, The Pennsylvania Railroad Company, disregarding its said duty in that behalf, did not establish and maintain there, gates, or a flagman or other device, both during the day and night, to give warning to any person approaching said crossing in a vehicle over said avenue from a westerly direction, of the approach of a train upon said railroad tracks from a southerly direction, in addition to the signals prescribed by statute, nor did it maintain a headlight and proper light or lights upon its engine or cars so approaching said crossing, at night, as hereinafter set forth.

And the deceased, the said John E. Tilton, whose administratrix the plaintiff is, was then and there the owner and possessor of a certain team of horses, of the value of five hundred dollars, his own property, and of a certain truck or market wagon, of the value of one hundred and fifty dollars, which said wagon was then and there loaded with vegetables, produce and fruit, of the value of fifty dollars, all of the value of seven hundred dollars, the property of the deceased, and which wagon, so loaded, was then and there being pulled by said horses, under the guidance and control of said deceased in an easterly direction towards said railroad and market, over and upon said avenue, in the night time when it was dark, and the plaintiff avers that on the day and year aforesaid, at Asbury Park, aforesaid, to wit, at

Trenton aforesaid, and within the jurisdiction of this Court, The Pennsylvania Railroad Company, in the night time and while dark by its servants and employees, so carelessly and recklessly, negligently and improperly, drove, governed, controlled and directed one of its said locomotive engines and train of cars over and upon said tracks, from a southerly direction, and at so fast a rate of speed, and without a headlight and proper lights upon said engine or cars, and without ringing a bell or blowing a whistle or giving other warning, upon and over said crossing, that by and through, the carelessness, negligence and improper conduct of the said defendant, The Pennsylvania Railroad Company, by its servants in that behalf, said locomotive engine of said defendant, without warning, ran against said horses and wagon of said deceased, which was then and there being driven carefully over said street, from a westerly direction by said deceased, and struck with great force and violence against said wagon and horses, and crushed, mangled, bruised and injured said horses, and rendered the same valueless and totally unfit for use, and smashed and destroyed said wagon and said load of vegetables, produce and fruit, and then and there struck with great force and violence against the body of the said John E. Tilton, and thereby crushed, injured and mangled him, so that by reason of said wounds and injuries he then and there died.

And for that whereas the said defendant, The New York and Long Branch Railroad Company, body corporate, on the fifth day of July, A. D. nineteen hundred and ten, was the owner and possessor and in control of a certain railroad and tracks extending from Point Pleasant, in the County of Ocean and State of New Jersey, north-

erly through the County of Monmouth, and through the City of Asbury Park, in said County of Monmouth, to Perth Amboy in the County of Middlesex, in the State of New Jersey, together with the passenger stations, freight stations, switches and side tracks, among which were certain side tracks running parallel with said main railroad tracks of said railroad, and in a northerly and southerly direction, which main tracks, together with one of said side tracks, crossed a certain public road or street known as Springwood Avenue, in said City of Asbury Park, at grade

And the defendant, The Pennsylvania Railroad Company, was then and there operating a steam railroad between the City of Jersey City in the County of Hudson, and State of New Jersey, through the Cities of Jersey City and Newark, to the City of Perth Amboy, in the County of Middlesex, and thence to Point Pleasant in the County of Ocean, passing through Red Bank, Long Branch, Asbury Park, and other places in the County of Monmouth, for the carriage of passengers and freight, and used said railroad tracks of The New York and Long Branch Railroad Company, and operated thereon a steam railroad for the carriage of its said passengers and freight from said City of Perth Amboy to Point Pleasant through Asbury Park, aforesaid, and back from Point Pleasant to Perth Amboy, and thence over its own tracks aforesaid, to Jersey City. And plaintiff avers that there then and there was an agreement and arrangement between said railroad companies, by virtue of which the defendant, The Pennsylvania Railroad Company, ran its trains and cars over the said tracks of the said The New York and Long Branch Railroad Company between Point Pleasant and Perth Amboy, including

the portions of said main tracks and side tracks crossing said Springwood Avenue in the City of Asbury Park, aforesaid. And plaintiff avers that said Springwood Avenue extends across said main tracks and side tracks, at grade in a general easterly and westerly direction, and that the most easterly of said main tracks is the north bound main track and that the next track west of said north bound main track is the south bound main track, and that west of said south bound main track is a side track or siding, all of which said tracks at their intersection with said Springwood Avenue, run in a northerly and southerly direction, and all are parallel or nearly so. And plaintiff avers that said crossing at the place aforesaid, to wit, on the day and year aforesaid, was extremely dangerous to persons and vehicles then and there passing along said public street or highway in an easterly direction, from trains going north upon the most easterly main track of said railroad, to wit, the north bound main track. That at the time aforesaid there were certain lights near to said railroad tracks, and several hundred feet south of said Springwood Avenue, similar in appearance to the headlights on the locomotive engines of the defendant, The Pennsylvania Railroad Company, used by it upon said tracks, one of which said lights was a large electric arc light near to said tracks, and over Corlies Avenue, Neptune Township, about one thousand feet south of said Springwood Avenue, where the same crossed said railroad tracks in Asbury Park aforesaid, which said lights, because of similarity to headlights on the locomotive engines of the defendant, The Pennsylvania Railroad Company, tended to confuse and would confuse the mind of a person crossing said tracks at night upon said Springwood Avenue

from a westerly direction, as to whether such light was the headlight of an engine, or whether the headlight of an engine, was such light.

Also, on the day and year aforesaid, and for several months prior thereto, there existed and was being conducted a market in said Springwood Avenue, just east of said railroad tracks, and along said railroad tracks, northerly from said Springwood Avenue, some two hundred feet to Cookman Avenue, in Asbury Park, aforesaid, where large numbers of wagons and horses and persons congregated each morning, commencing about one o'clock A. M., and continuing until about nine o'clock A. M., for the sale of vegetables and produce in large quantities, almost all of which said wagons passed over said Springwood Avenue from a westerly direction during the night time, after one o'clock A. M., and crossed said railroad tracks, and caused commotion and confusion, and tended to divert the minds of persons driving upon said Springwood Avenue at that place, during the night time after one o'clock A. M.

And plaintiff avers that it then and there became and was the duty of the defendants to make said crossing safe to any person approaching the same during the night time from a westerly direction in a vehicle pulled by a horse or horses over said Avenue, and that this could only have been done by the establishment and maintenance there, during both day and night, of a flagman, gates or some other device for giving warning to such person so approaching, of the approach of a train or engine upon said tracks from a southerly direction, in addition to the signals prescribed by statute.

Yet, the defendant, The New York and Long Branch Railroad Company, disregarding its said

duty in that behalf, did not establish and maintain there, gates, a flagman or other device, both during the day and night, for giving warning to a person approaching said crossing in a vehicle over said Avenue from a westerly direction, of the approach of a train or engine upon said railroad from a southerly direction.

And the said defendant, The Pennsylvania Railroad Company, disregarding its said duty in that behalf, did not establish and maintain there gates or a flagman, or other device, both during the day and night, for giving warning to any person approaching said crossing in a vehicle over said Avenue from a westerly direction, of the approach of a train or engine upon said railroad tracks from a southerly direction, in addition to the signals prescribed by statute.

And the deceased, the said John E. Tilton, whose administratrix the plaintiff is, was then and there the owner and possessor of a certain team of horses, of the value of five hundred dollars, his own property, and of a certain truck or market wagon, of the value of one hundred and fifty dollars, which said wagon was then and there loaded with vegetables, produce and fruit, of the value of fifty dollars, the whole the property of said deceased, of the value of seven hundred dollars, and which wagon, so loaded, was then and there being pulled by said horses during the night time after one o'clock A. M., under the guidance and control of said deceased, in an easterly direction towards said railroad, and said market, over and upon said Avenue. And plaintiff avers that on the day and year aforesaid, at Asbury Park aforesaid, to wit, at Trenton, aforesaid, the defendant, The Pennsylvania Railroad Company, by its servants and employees, during said night time after one

o'clock A. M., so carelessly and recklessly, negligently and improperly drove, governed, controlled and directed one of its said locomotive engines and train of cars over and upon said tracks, from a southerly direction and at so fast a rate of speed, and without a headlight and proper lights upon said engine or cars and without ringing a bell or blowing a whistle, or giving other warning, upon and over said crossing, that, by and through the carelessness, negligence and improper conduct of the said defendant The Pennsylvania Railroad Company, by its servants in that behalf, said locomotive engine of said defendant, without warning, ran against said horses and wagon of said deceased, which were then and there being driven carefully over said street from a westerly direction by said deceased, and struck with great force and violence against said wagon and horses, and crushed, mangled, bruised and injured said horses, and rendered the same valueless and totally unfit for use, and smashed and destroyed said wagon of said load of vegetables, produce and fruit, and then and there struck with great force and violence against the body of the said John E. Tilton, and thereby crushed, injured and mangled him, so that by reason of said wounds and injuries he then and there died.

And for that whereas the said defendant, The New York and Long Branch Railroad Company, body corporate, on the fifth day of July, A. D. nineteen hundred and ten, was the owner and possessor and in control of a certain railroad and railroad tracks, extending from Point Pleasant, in the County of Ocean and State of New Jersey, northerly through the County of Monmouth, and through the City of Asbury Park, in the County of Monmouth, to Perth Amboy, in the County of

Middlesex, and State aforesaid, together with the passenger stations, freight stations, switches and side tracks, among which were certain side tracks running parallel with the main railroad tracks of said railroad, and in a northerly and southerly direction, which said main tracks, together with one of said side tracks, crossed a certain public road or street, known as Springwood Avenue, in said City of Asbury Park, at grade.

And the defendant, The Pennsylvania Railroad Company, was then and there operating a steam railroad between the City of Jersey City, in the County of Hudson, and State of New Jersey, through the Cities of Jersey City and Newark, to the City of Perth Amboy, in the County of Middlesex, and thence to Point Pleasant, in the County of Ocean, passing through Red Bank, Long Branch, Asbury Park and other places in the County of Monmouth, for the carriage of passengers and freight, and used the said railroad tracks of the New York and Long Branch Railroad Company, and operated thereon, a steam railroad, for the carriage of its said passengers and freight from said City of Perth Amboy to Point Pleasant, through Asbury Park, aforesaid, and back from Point Pleasant to Perth Amboy, and thence, over its own tracks to Jersey City. And plaintiff avers that there then and there was an agreement or arrangement between said railroad companies, by virtue of which the defendant, The Pennsylvania Railroad Company, ran its trains and cars over the said tracks of the said The New York and Long Branch Railroad Company, between Point Pleasant and Perth Amboy, including the portions of said track crossing said Springwood Avenue, in said City of Asbury Park. And plaintiff avers that said Springwood Avenue extends across said

tracks of said railroad at grade in a general easterly and westerly direction, and that the most easterly of said main tracks is the north bound main track, and that the next track west of said north bound main track is the south bound main track, which said tracks, at their intersection with Springwood Avenue, run in a northerly and southerly direction, and are parallel, or nearly so. And plaintiff avers that said crossing at the place aforesaid, was extremely dangerous during the night time to persons and vehicles then and there passing along said public street or highway, in an easterly direction, from trains going north upon the most easterly main track of said railroad, to wit, the north bound main track. That on the day and year aforesaid, and for several months prior thereto, there existed and was being conducted a market in Springwood Avenue aforesaid, just east of said railroad tracks, and along said railroad tracks, in a northerly direction from Springwood Avenue, to Cookman Avenue, in Asbury Park, where large numbers of wagons and horses and persons congregated each morning, commencing about one o'clock A. M., and continuing until about nine o'clock A. M., for the sale of vegetables and produce in large quantities, almost all of which said wagons and horses and persons passed over said Springwood Avenue and said railroad tracks, from a westerly direction during the night time after one o'clock A. M., and caused commotion and confusion, and tended to divert the minds of persons driving upon said Springwood Avenue at that place, at that time.

And plaintiff avers, that it then and there became and was the duty of the defendants to make said crossing safe both by day and night, to any person approaching the same from a westerly

direction in a vehicle pulled by a horse or horses, over said avenue, and that this could only have been done by the establishment and maintenance there, both during the day and night, of a flagman, gates or some device to give warning to such person or persons so approaching said tracks upon said avenue, of the approach of a train or engine from a southerly direction, in addition to the signals prescribed by statute.

And plaintiff avers that it was the further duty of the defendant, The Pennsylvania Railroad Company, when operating and running any of its trains at night in a northerly direction over said railroad tracks, and approaching said crossing, to blow a whistle or ring a bell, as required by statute, and upon failure to do so, to maintain upon its said engine or train, as approaching said crossing, a headlight and proper light or lights.

Yet, the defendant, The New York and Long Branch Railroad Company, disregarding its said duty in that behalf, did not establish and maintain there, gates, a flagman or other device, both during the day and night, for giving warning to a person approaching in a vehicle over said vendee from a westerly direction, of the approach of a train or engine upon said railroad, from a southerly direction.

And the said defendant, The Pennsylvania Railroad Company, disregarding its said duty in that behalf, did not establish and maintain there, gates, a flagman or other device, both during the day and night, for giving warning to any person or persons approaching said crossing in a vehicle over said avenue from a westerly direction, of the approach of a train upon said railroad tracks, from a southerly direction, in addition to the signals prescribed by statute, nor did it maintain a headlight and

proper light or lights upon one of its engines and trains at night, as hereinafter set forth.

And the deceased, the said John E. Tilton, whose administratrix the plaintiff is, was then and there the owner and possessor of a certain team of horses, of the value of five hundred dollars, his own property, and of a certain truck or market wagon, of the value of one hundred and fifty dollars, which said wagon was then and there loaded with vegetables, produce and fruit, of the value of fifty dollars, all the property of the deceased, and of the value of seven hundred dollars, and which said wagon, so loaded as aforesaid, was then and there being pulled by said horses, in a careful manner, under the guidance and control of said deceased, in an easterly direction, towards said railroad and market, over and upon said avenue, in the night time after one o'clock A. M. And plaintiff avers that on the day and year aforesaid, at Asbury Park, aforesaid, to wit, at Trenton, aforesaid, the defendant, The Pennsylvania Railroad Company, in the night time, and while it was very dark, by its servants and employees, so carelessly, recklessly, negligently and improperly drove, governed, controlled and directed its said locomotive engine and train of cars over and upon said north bound main track, from a southerly direction, and at so fast a rate of speed, and with a headlight and proper lights upon said engine or cars, and without ringing a bell or blowing a whistle, as required by statute, or giving other warning, while approaching and crossing over said crossing, that by and through the carelessness, negligence and improper conduct of the said defendant, The Pennsylvania Railroad Company, by its servants and employees, in that behalf, said locomotive engine, without warning, ran against said horses and wagon of

said deceased, which were then and there being carefully driven by him over said street approaching said crossing from a westerly direction, and struck with great force and violence against said horses and wagon, and crushed, mangled, bruised and injured said horses, and rendered the same valueless and unfit for use, and smashed and destroyed said wagon, and said load of vegetables, produce and fruit, and also then and there ran against, and struck with great force and violence against the body of the said John E. Tilton, and thereby crushed, injured and mangled him, so that by reason of said wounds and injuries, he then and there died, leaving him surviving, the plaintiff, who was before, and at the time of his death, his wife, and Alma M. Tilton, a daughter, of the age of seventeen years, Helan A. Tilton, a daughter, of the age of fifteen years, Gladys A. Tilton, a daughter, of the age of twelve years, Hannah Margaret Tilton, a daughter, of the age of five years, and Amos Tilton, a son, of the age of two years, who before, and at the time of his death, were his children and next of kin; and the plaintiff says, that by reason of the premises aforesaid, she, as such administratrix, is injured, and has sustained damages to the amount of twenty thousand dollars.

Wherefore, the plaintiff, as administratrix, as aforesaid, and for the benefit of herself, and of the children and next of kin of the said John E. Tilton, and according to the statute in such case made and provided, brings this suit, etc.

And the said plaintiff brings here into court letters of administration granted to her on the estate of the said John E. Tilton, deceased, of a certain day therein named, whereby it fully ap-

pears to said court, that said plaintiff is administratrix of the said John E. Tilton, deceased, etc.

Plea and Postea

And the said defendant, The Pennsylvania Railroad Company, by Alan H. Strong, its attorney, comes and defends the wrong and injury when etc., and says that it is not guilty of the grievances above laid to its charge, or any of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it.

And of this the said defendant puts itself upon the country, etc.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Freehold, in and for the County of Monmouth, on the first Tuesday of January, in the year of our Lord, one thousand nine hundred and thirteen by whom, etc., and the same day is given to the parties aforesaid, there etc.

And now at this day, to wit, the seventh day of February, A. D., Nineteen hundred and thirteen, before our said Supreme Court at Trenton, come the said parties by their attorneys aforesaid, and the Justice before whom etc., having first sent hither his record had before him in these words, to wit:

Afterwards, that is to say on the twenty-eighth day of January, in the year of our Lord, one thousand nine hundred and thirteen, at a Circuit Court held at Freehold, in and for the County of Monmouth, before his Honor Nelson Y. Dungan, a Circuit Court Judge holding the Court Circuit in

and for the said County of Monmouth, to whom said cause was referred for trial by the Justice of the Supreme Court presiding in said county, according to the form of the statute in such case made and provided, comes as well the said plaintiff Carrie A. Tilton, Administratrix of the estate of John E. Tilton, deceased, as the said defendant Pennsylvania Railroad Company, by their respective attorneys within named, and the jurors of the jury whereof mention is within made being summoned also come, who to speak the truth of the matters within contained being chosen, tried and sworn upon their oath, and evidence having been given and the cause having been rested on the part of the said plaintiff and the said defendant, and it appearing to the said Judge that the said evidence given as aforesaid was not sufficient in law for the said plaintiff to have or maintain her said action against the said defendant, the said Judge did direct the jury to return a verdict in favor of the said defendant according to the practice of said Court. And accordingly the said jury say that the defendant, the Pennsylvania Railroad Company is not guilty in manner and form as the plaintiff has within complained against it.

Therefore it is considered that the said plaintiff, Carrie A. Tilton, Admrx., etc., of John E. Tilton, deceased, take nothing by her said writ, and that the said defendant, The Pennsylvania Railroad Company, do go thereof without day, etc.

Judgment signed this seventh day of February, A. D., nineteen hundred and thirteen.

WILLIAM S. GUMMERE,
C. J.

Previous Verdict

NOTE: Upon a previous trial of this cause at Circuit, a verdict was rendered in favor of the plaintiff. A rule to show cause why the verdict should not be set aside, was granted and made absolute in the following opinion.

Opinion of Supreme Court

NEW JERSEY SUPREME COURT

FEBRUARY TERM, 1912

CATHERINE A. TILTON, Adm'x.,
vs.
PENNSYLVANIA RAILROAD COMPANY.
Defendant's Rule to show cause.

Argued before GUMMERE, Chief Justice, and Justices GARRISON and SWAYZE.

For the Rule, John S. Applegate & Son.
Contra, Johnston & Conover. Per Curiam.

This suit was brought to recover for the pecuniary loss sustained by the widow and next of kin of J. Ely Tilton, who was killed at the Springwood Avenue crossing of the New York & Long Branch Railroad at Asbury Park, shortly after 3 o'clock in the morning of July 5, 1910. Plaintiff had a verdict. The deceased, while driving over the crossing from west to east, was struck by a special Pennsylvania Railroad train going north.

The plaintiff claimed, and offered evidence to prove, that no whistle was blown or bell rung upon the engine of the defendant's train as it approached the Springwood Avenue crossing, and contends that the failure of the defendant company in this regard rendered it liable for the happening of the accident to the decedent. Considerable testimony was taken by the defendants in contradiction of this claim; but we do not think it so far outweighed the testimony offered by the plaintiff as to justify a setting of the verdict aside upon this ground.

The undisputed testimony in the case shows that a person travelling along Springwood Avenue, and approaching the railroad tracks, would have an unobstructed view for a considerable distance down the tracks to the south when fifty or sixty feet from the crossing, and that this view opened up as the person proceeded towards the track. To avoid the conclusion that the decedent was guilty of contributory negligence in failing to observe the approaching train, the plaintiff called a number of witnesses who testified that they saw no headlight burning upon the engine at the time of the accident. Witnesses called by the defendant testified positively to the contrary. Not only do they outnumber the witnesses called by the plaintiff upon this point, but their testimony is positive that they saw the light burning. Four of them appear to be entirely unprejudiced. The finding of the jury in favor of the plaintiff must have rested upon the conclusion that the headlight was not burning, for if it was, no explanation is found in the proofs of the failure of the decedent to observe it, unless (as the defendant claims) he was asleep upon his wagon. The resolving of this

question by the jury in favor of the plaintiff was, we think, against the great preponderance of the evidence. That being so, the verdict can not be supported, for, on the facts submitted, the decedent was clearly negligent in not observing the approaching train when he was sufficiently far from the tracks to be entirely out of danger.

The deceased owned a truck farm upon which he raised vegetables, and other market produce. His whole income resulted from the cultivation of this farm, and the selling of what he raised on it. By his death the farm went to his widow and children. The pecuniary loss which they suffered, therefore, was, to a very great extent, the deprivation of his services in cultivating the farm; or, stated in another way, the cost of employing another man of equal ability to do this work. This phase of the case seems to have been overlooked by the Trial Judge in his charge to the jury upon the question of damages. We call attention to it now in order that it may be borne in mind upon the retrial of the case.

The rule to show cause will be made absolute.

A true copy.

WM. C. GEBHARDT,
Clerk.

NOTE: The case being remanded for trial to the Monmouth Circuit Court, the only evidence offered on the new trial, was the printed book used in the Supreme Court on the return of the rule to show cause, and the Trial Judge at the Circuit, directed a verdict against the plaintiff, and in favor of the defendant.

The following is all of the evidence taken by both sides upon the question desired to be presented on this apepal, *viz.:* the nineteenth reason assigned in the notice of appeal.

Testimony

EDWARD FISHER, sworn for plaintiff:

Direct-examination by Mr. Johnston:

Q. Where were you on the morning of July 5, 1910? A. Asbury Park.

Q. What were you doing there, Mr. Fisher? What was your business there? A. Well, I was a huckster, had a load of berries there that morning.

Q. And where were you with your berries? A. Well, I was right up close to the track. The horse's head stood just as close to the track as I could get it.

Q. That is, a switch track? A. Yes.

Q. Did you see an accident occur that morning? A. Yes, sir.

Q. About what time? A. Well, I don't exactly know. I think it was sometime about 3 o'clock.

Q. How close were you to the center of Springwood Avenue where it crossed the north-bound track from the center of the track? A. It was about 35 feet from where he got hit, 30 or 35 feet.

By Mr. Appelegate: Q. Did you hear this train before the actual accident? A. Well, I heard the train, heard it just for a second. It was running down. I heard a sound and the horse was kind of a little nervous, and I had a boy with me and I says, "Get to the horse's head." By the time he got to the horse's head the train was there and I was right alongside of the horse then, unloading a crate of berries there was sitting along the edge of the walk.

Q. Was there any bell ringing or whistle blowing? A. There was no bell and no whistle.

Q. Had there been any? A. No, none whatever.

Q. Were you looking for the train that morning? A. Well, I was kind of looking out for a train because the horse was a little nervous, you know, and I tried to be around the horse's head when a train came in.

Q. As you heard, you say, a little noise a moment before the accident did you look? A. I looked right down the track. I looked where I could see right down the track.

Q. Did you see any headlight or any light? A. 'I didn't notice any headlight.' I was looking for the headlight.

Q. When did you see Mr. Tilton, the party that was killed, or his wagon? A. Well, I seen the wagon just as it was coming on the track.

Q. Did you notice the gait of the horses? A. The horses was on a walk when I seen him.

Q. As the train went by did you notice whether the cars were lighted up or not? A. The cars were all dark.

Q. What sort of a morning was it, Mr. Fisher; I mean what kind of a morning was it at the time of the accident? A. Well, it was dark. It was real dark.

Q. Had you before the accident and have you since the accident observed what sort of a background there is and was to the north-bound track on the east? A. There is lots of buildings there.

Q. What do you say about the speed of the train? Did you notice whether it was fast or slow? A. Well, I should think about thirty-five or forty miles.

CROSS-EXAMINATION by Mr. Applegate:

Q. And where was that stand, Mr. Fisher? A. Up along the north side of Springwood Avenue.

Q. The right side looking west? A. Yes.

Q. Then you were somewhere near the electric light designated on that map? A. Yes, right near.

Q. Almost under it? A. Yes.

Q. Except that the light is over the center of the street? A. About right over the center of the street.

Q. Upon the morning in question what was there located along the southerly line of Springwood Avenue directly opposite the market place? A. Why, there is buildings there all along there.

Q. And these buildings run out to the easterly line of the right of way, don't they? A. Yes.

Q. Is there a flag-house located on the southerly side of Springwood at a point right directly opposite the point where you say your horses stood? A. Yes, that is about directly opposite.

Q. And there were some bushes and trees there also? A. Them bushes, they begin right near the flag-house and run back 100 feet or so, probably not that far; say about three or four feet high.

Q. And is there a fence along the southerly side of Springwood Avenue? A. Yes, a high board fence extending mostly out to the flag-house there.

Q. And as you stood there that morning preparing to unload your wagon you heard the train coming? A. Yes, sir.

Q. And when you heard the train coming you told your boy or a boy to take hold of the horse's head? A. Yes.

Q. You were afraid that he would be frightened by the noise of the train? A. Yes.

Q. And then in a few moments the train came along, did it? A. Yes; not in a few moments; it was right there at the same time I heard the noise. There wasn't any time.

Q. The boy had time to run to the horse's head? A. The boy was right up within a couple feet of the horse's head. I was taking out berries and I would walk along out alongside and string them out alongside of the sidewalk in crates.

Q. And the train came along, did it? A. Yes, sir.

Q. Your horse's head was pointed towards the railroad tracks? A. The horse's head was pointed towards the railroad tracks, right up to the edge of the right of way, just as close as she could get there, and I was right up near the horse's head.

Q. You heard the noise of the train approaching? A. I heard the noise of the train approaching.

Q. You say you heard no whistle? A. Heard no whistle.

Q. You heard no bell? A. Heard no bell, and I looked down the track for the train. I could see down the track quite a ways. When I stood here by this right of way I could see down quite a ways.

Q. Did you look down the tracks before you directed the boy to go to the horse's head? A. I told the boy to go to the horse's head as soon as I heard the noise.

Q. Then you told the boy to go to the horse's head before you looked down the track? A. Well, I done both at once; I looked down the track and said, "Get to the horse's head," both at once.

Q. Did you see the train? A. I didn't see the train whatever until it came under the light.

Q. What light do you mean? A. Under the light at the crossing.

Q. Springwood Avenue? A. Yes, sir.

Q. And that light was almost over your head? A. Well, it is over my head lacking say 30 feet, something like that.

Q. Diagonally? A. Yes.

Q. And you didn't see the train until it came under the light? A. Until it came out in that light.

Q. What do you mean, under the light or in the glare of that light? A. I mean in the glare of the light.

Q. And how far away was the train when you first saw it? A. Well, we will say about 30 feet or so from the wagon it hit.

Q. How far away was it when you heard the noise of it? A. Well, I don't know exactly how far; I couldn't say. I should say about 100 or 200 feet, something like that. The train was running very still. I couldn't hear it very far.

Q. And you say that there were no lights on the train at all? A. Well, I say I was looking for the train and I was looking for lights but I heard the train and I couldn't see no lights whatever when it came up there, didn't see any lights.

Q. Didn't see any lights? A. Didn't see any lights whatever in the cars there.

Q. Didn't see any headlight? A. Didn't see any headlight.

Q. Didn't see any white lights whatever in the front of the engine? A. Didn't see any white lights.

Q. Didn't see any lights on the side? A. Didn't see any lights on the side.

Q. Didn't see any lights whatever about that train? A. Didn't see any lights whatever.

Q. A perfectly black mass as it ran down the track, was it? A. A perfectly black mass. Prob-

ably I could have seen the light from the firebox when it passed me, but I had something else on my mind then.

Q. Did you see Tilton's wagon as it approached the crossing? A. I seen the team just as it was going on and within a few feet from the main track.

Q. Did you see that before you heard the noise of the train? A. No.

Q. You saw it after you heard the noise? A. Saw them both about at once.

Q. Both about the same time? A. Both about the same time. I was busy there and that was what caused me to look up and cast my eye to the train.

Q. Let us see a minute. You heard the noise of the train, at the same time you heard the noise you looked— A. It was there right on the track.

Q. Wait a minute. At the same time you heard the noise you looked and at the same time you looked you told the boy to stand at the head of the horse and at the same time you saw and did those things you also saw Tilton's wagon approaching the crossing, is that so? A. Sure that is so.

Q. Did the train stop after it had passed Springwood Avenue? A. Yes, sir; about 400 or 500 feet, something like that.

Q. When Tilton's wagon was on the crossing was there any other wagon on the crossing? A. I didn't see any other wagon.

RE-DIRECT-EXAMINATION by Mr. Johnston:

Q. Did you notice then whether or not the train was lighted up—the cars, I mean? A. The train wasn't lighted up.

Q. The cars, I am talking about. A. No.

WILLIAM CHAMBERS, sworn for plaintiff:

Direct-examination by Mr. Johnston:

Q. What is your business? A. Huckster in Asbury Park, carting produce in the summer time.

Q. Where were you on the 5th day of July, 1910? A. Springwood Avenue.

Q. Did you know John Ely Tilton? A. Yes, sir.

Q. Where did you first see him that morning, if at all? A. About a mile, I should judge, from his own home.

Q. About how far from this Springwood Avenue crossing? A. Well, I should think fully two miles.

Q. Did you get upon Springwood Avenue before you came to the market? A. Yes, sir.

Q. Now how close were you upon Springwood Avenue? I mean how close did you keep together in coming down to Springwood Avenue? A. Well, there was times that we was apart and then was together again, for Mr. Tilton stopped and seen some parties and I let my horse walk along all the time, and when we was on Springwood the wagons was right near together once and another time it was just so he passed my wagon, drove by it.

Q. Now where was the last time that he passed your wagon or you his? A. The last time he passed my wagon was right by the last building that is on the left-hand side of Springwood Avenue that is close to the street.

Q. And the last house before you got where? A. To the railroad, nearly.

Q. The last house west of the railroad? A. Yes, sir.

Q. Is that what you mean? A. Yes, on the north side of Springwood as near as I can tell.

Q. How far is it off from Springwood or how far off from the railroad? A. Well, it is considered a block in there but it is a wide block.

Q. Well, this house. A. Is right close to the corner of the street that goes out along the railroad.

Q. Along the railroad? A. No, sir; up here (indicating).

Q. You can't tell us how far, eh? A. No, I can't tell exactly how far. It was in this street about a block there.

Q. About a block in? A. Yes.

Q. Now you say he passed you there? A. Yes.

Q. Was he awake at that time, do you know? A. Yes, sir; spoke to me; had to be awake or he wouldn't talk.

Q. Do you remember what he said? A. Yes, sir; he said, "I guess I will go on."

Q. And go on in what direction, did he go on? A. East.

Q. That is towards where? A. Towards the market.

Q. And towards the market and towards the track? A. Yes, sir.

Q. And how close were you to him? A. I should judge that my horse was about 40 feet, 30 or 40 feet, something like that, as near as I can tell, from the track when Mr. Tilton was struck.

Q. Behind Mr. Tilton? A. Yes.

Q. Do you remember what kind of horses Mr.

Tilton had? A. Yes, sir; he had a pair of bay horses.

Q. Did you see the accident? A. Yes, sir.

Q. At the time or just before the accident what was the gait of Mr. Tilton's horses? A. On a walk.

Q. Horses on a walk? A. Yes, sir.

Q. Did you hear any train coming? A. No, sir.

Q. Were you looking for a train? A. Yes, sir.

Q. Why were you looking for the train? A. Well, because I had my mother with me and she was very nervous and I was paying more attention that morning than common, because I didn't want to be too close to the track if the train happened to go by with her.

Q. Your mother, is she affected in any way? A. Yes, sir.

Q. Well, which direction did you look? A. I looked both north and south.

Q. And how carefully did you make your observations? A. Well, I just kept a steady watch and I listened to hear the trains.

Q. Was there any whistle blown or bell rung? A. Nothing that I heard at all.

Q. Could you hear? Were you in a position to hear? A. Yes, I was sitting right in front of the carryall.

Q. And was there anything to obstruct your hearing in any way? A. No, sir.

Q. Or to obstruct the sound if there had been a noise? A. No, sir; not that I know of.

Q. Can you see, Mr. Chambers? Can you see? Have you got good eyesight? A. Yes, sir.

Q. Could you see down the track there? A. To where—

Q. I mean could you see over to the track? A. Yes, sir; plainly.

Q. Did you look there before the engine which caused the accident crossed the crossing? A. Yes, sir.

Q. Did that engine have any headlight? A. Not that I seen; no, sir.

Q. Were you looking that way? A. Yes, sir.

Q. What was your purpose in looking? A. Well, on account of the train, for I didn't want to be too close there with mother if the train went along; more so than common.

Q. Well, in looking for the train at night what did you look for? A. What?

Q. I say in looking down there that night for the train, or this morning, what did you look for? A. I looked for the light and to hear the sound.

Q. Did you see or hear either? A. No, sir.

Q. Now to the east of this north-bound track, south of Springwood Avenue, what sort of structures are there in there if any? A. Well, there is buildings along there, there is an ice-house and a coal yard and different kinds.

Mr. Applegate: Which side?

Mr. Johnston: The east side and south of Springwood Avenue.

Q. Is there any clear space on the east side of the track between there and Main Street? A. No, sir; I don't think there is.

Q. Whether or not it was dark along there where that engine came that morning, came from? A. Yes, sir.

Q. What kind of a morning was it, or night? A. To the best of my knowledge it was a starlight night, no moon, but quite dark.

Q. How long did you see the engine before it struck him? A. Not at all. I just seen the crash.

Q. Did you see it at the time it struck him? A. At the time that it struck him; yes, sir.

Q. Was that train going slow or fast? A. To the best of my knowledge that train was going at the rate of forty-five miles an hour when it hit him.

Q. Was there any lights in the cars? A. No, sir; not that I seen at all.

Q. You remember that there were a couple of signal lights or semaphores, I believe they call them, away down the track somewhere; do you remember those high signal lights away down towards Corlies Avenue ? A. Yes, sir.

Q. Did they light the track up in any way? A. No, sir.

Q. And did the light that was away down there at Corlies Avenue light the track up so you could see anything? A. Not so you could see anything, to the best of my knowledge.

CROSS-EXAMINATION by Mr. Applegate:

Q. Mr. Tilton and you were good friends? A. Yes, sir.

Q. Did you have a lantern on your wagon? A. Yes, sir.

Q. Mr. Tilton had one on his, didn't he? A. Yes, sir.

Q. What kind of a wagon did Mr. Tilton have? A. A spring wagon.

Q. Well, was it a covered wagon? A. Yes, sir.

Q. And did it have a hood down in front that came down a little ways? A. A little ways; yes, sir.

Q. And had side curtains on and a covered top, didn't it? A. Yes, sir.

Q. And the seat in Mr. Tilton's wagon was about how far, would you say, back from the dashboard? A. Right over the dashboard.

Q. So that it was about a foot then, he would be sitting back of the dashboard? A. No, sir; for I would judge he would be sitting right over the dashboard.

Q. With his feet hanging out, do you mean? A. With his feet hanging out on the swivel-trees.

Q. You don't know what the wagon was loaded with? A. The wagon was loaded with potatoes and cabbage and rhubarb and stuff of that kind.

Q. Can you say whether the curtains extended out to the front opposite the dashboard or not? A. Yes.

Q. They did? A. They did.

Q. Now about a block from the railroad crossing Mr. Tilton passed you, did he? A. Yes, sir.

Q. About two or three hundred feet, was it? A. I should judge so; yes, sir.

Q. Then his horse was on a walk? A. Yes, sir.

Q. Now when the smash came how far were you from the crossing? A. I should judge thirty or forty feet.

Q. Then Mr. Tilton's wagon was about thirty or forty feet ahead of yours? A. Yes, sir.

Q. Now about how far from the track were you when you first commenced to look down the track? A. Well, I kept watch of that as soon as we was past the house, building on Springwood Avenue, three or four hundred feet away from it.

Q. And you can get a pretty good view down the track clear from that corner, can't you? A. Yes, sir; there is nothing to hinder you from seeing over very near to Corlies Avenue.

Q. And Corlies Avenue is what, some fifteen or sixteen hundred feet? A. Yes, sir; I should think so.

Q. Perhaps more than that? A. Perhaps more than that; yes, sir.

Q. You remember the light over Corlies Avenue? A. Yes, sir.

Q. The electric arc light? A. Yes, sir.

Q. Could you see that light that night? A. No, sir.

Q. Couldn't see that at all? A. For I didn't look for that light.

Q. So you didn't see it, don't remember seeing it? A. I don't remember seeing it. I don't know whether it was lit or not.

Q. And did you look to see whether the signal lanterns were lighted? A. No, sir.

Q. You didn't look to see that? A. I didn't see that. That was not concerning me, to see whether the railroad lit up or not.

Q. And you don't know whether they were lighted or not, do you? A. No, sir.

Q. Do you remember the arc light over Springwood Avenue? A. No, sir; not at that time.

Q. You don't remember whether that was lighted or not, do you? A. No, sir; but I don't think it was there at that time.

Q. You don't think it was there? A. I don't think it was there, to the best of my knowledge, at that time.

Q. Did you hear the train before the crash came, Mr. Chambers? A. No, sir.

Q. You were thirty or forty feet away from the crossing when the crash came? A. Yes, sir.

Q. And you din't hear any noise up to the time of the crash? A. No, sir; not till the time of the crash.

Q. And yet you were listening? A. Yes, sir.

Q. And looking? A. Listening and looking.

Q. Was there anything there, Mr. Chambers, in your wagon or about the wagon that would interfere with your hearing? A. No, sir.

Q. Your wagon made no noise? A. My wagon made no more noise than a slight noise that a horse would make on that road.

Q. What kind of a road is it, a gravel or sandy road? A. No, sir; it is a brick street.

Q. A brick street? A. Yes, sir.

Q. So there is no reason that you know of why you could not have heard the train? A. No, sir.

Q. All that you know is that you didn't hear it? A. All that I know I didn't hear it.

Q. Until the crash came? A. Yes, sir.

Q. No side lights? A. No, sir, not that I seen.

Q. And you saw no light on the train whatever, I think you said, didn't you? A. No, sir, no light whatever.

Q. You didn't, in fact, of I recollect your testimony correctly know that the rtain was there until the crash came? A. I didn't know the—

Q. Until the crash came? A. I didn't know the train was there until the crash came.

Q. No front lights? A. No, sir; not that I seen.

Q. No rear lights? A. No, sir; not that I seen.

Q. You didn't see any lights at all? A. Didn't see no lights at all.

Q. And the wagon that Mr. Tilton was in did not stop at any time while he was ahead of you until the crash came, did it? A. No, sir; not after he left Springwood, where he passed me on Springwood.

IRA JOHNSON, sworn for plaintiff:

Direct-examination by Mr. Johnston:

Q. How old are you? A. Fourteen.

Q. Where were you on the morning of July 5, 1910? A. At Asbury Park.

Q. And who did you go to Asbury Park with that morning? A. Mr. Fisher. Do you know him.

Q. And you are the boy he referred to as holding his horse's head? A. Yes, sir.

Q. Do you remember the accident that happened to Mr. Tilton there at the Springwood Avenue crossing? A. Yes, sir.

Q. Where were you when that accident happened? A. To the horse's head.

Q. Well, now, how near the railroad track were you? A. About fifteen feet from the north-bound tracks.

Q. What first called your attention to the fact that a train was coming, if anything? A. I heard this noise.

Q. Did any one say anything to you? A. Mr. Fisher there told me to get to the horse's head.

Q. And what did you do? A. I got to the horse's head then.

Q. How close were you to the horse's head before that? A. Right down by her side.

Q. After you took hold of the horse's head did you look in any direction or what did you do? A. I looked to see the train coming.

Q. You looked, what direction was that? Well, was it towards the station or from the station? A. From the station.

Q. And did you see the train? A. I seen it just about a second before it hit the man, the wagon.

Q. Did you see the wagon and man? A. I didn't see the man but I seen the wagon.

Q. And where did the train come from, I mean before you saw it; do you know? What was there right there when you first saw it to make it so you could see it? A. Pretty near under the light.

Q. What light was that? A. There was a light right there by the post.

Q. Before it came in the clear or in the light of that electric light could you see it when you looked out? A. No, sir.

Q. You say you looked down and saw this coming. Was there any headlight on that train as it came up in the light? A. Not as I saw it there wasn't.

Q. Were you looking at it? A. Looking right at it.

Q. Had you been there right in that position for how long, right there where you were for how long prior to this? Right near, right there by your wagon, how long had you been there? A. Why, as soon as we got there I went alongside the horse and stayed alongside the horse and to her head.

Q. Well, was there anything to hinder you looking down the track south, where this engine came from? A. No, sir.

Q. Did the whistle blow or the bell ring? A. Not as I heard.

Q. Were you in a place where you could hear it? A. Yes, sir.

Q. Do you remember the train going on by you, going on up north, crossing the avenue? A. Well, I watched it till it got across the crossing and then I didn't notice it any more.

Q. Well, after it got across the crossing, yes. Well, were the cars lit up? A. No, not as I seen.

CROSS-EXAMINATION by Mr. Applegate:

Q. You were standing by the horse's side then? A. Yes, sir.

Q. What did he say to you? A. Told me to get to the horse's head.

Q. Well, had you heard the train then at that time? A. I heard it just about the time he spoke.

Q. Did you look down the track before you went to the horse's head? A. I don't remember now whether I did or not.

Q. You say you didn't hear any noise at all until Mr. Fisher told you to go to the horse? A. Yes, sir.

Q. Well, do you remember looking down the track at all after Mr. Fisher told you that? A. Yes, sir.

Q. Well, did you look down before you got to the horse's head? A. Well, I got there and took hold of her and then looked down the track.

Q. Where was the train then when you looked? A. I didn't see it then.

Q. You didn't see it then? A. No, sir.

Q. So that you stood to the horse's head a little while before the train got to the crossing, do you? A. About a second or so.

Q. How long? A. I mean a minute or so.

Q. And when did you first see the train? How far was it from the crossing when you first saw it? A. I don't know how far it was.

Q. You didn't see any light at all, I think you said? A. I did not.

Q. Not a bit? A. No, sir.

Q. You didn't even see any sparks flying in the air from the smoke-stack, did you? A. No, sir; not as I seen.

Q. Not a thing? A. No, sir.

Q. Do you remember seeing any lights on the signal posts of the railroad company along the railroad tracks south of Springwood Avenue? A. I never noticed.

Q. Never noticed those? A. I never noticed.

DIRECT-EXAMINATION by Mr. Johnson:

Q. Ira, you have answered a question now two ways. You said you heard the noise a second before and then you said a minute before it struck the wagon. Now what do you mean, a second or a minute? A. About a minute, I meant.

CONOVER BROWER, sworn for plaintiff:

Direct-examination by Mr. Johnston:

Q. Where were you located in the market with your berries at the time of the accident? A. Right alongside of where Mr. Fisher stood.

Q. Were you the second wagon from the curb? A. Yes, sir.

Q. I mean from the sidewalk, rather, and how far were you from the sidewalk, the north sidewalk of Springwood Avenue? A. Just a little over the width of a wagon.

Q. How far from the railroad right of way? A. About fifteen feet, fifteen or twenty feet, not over that.

Q. Well, what do you mean by that now? What do you mean? Just tell us what you mean? A. From the track the train came down on, I mean, from where we stood.

Q. Did you hear the train coming? A. I never heard it till just about the wink of your eye before it struck the wagon.

Q. When you heard it what did you do? A. I looked right away.

Q. Well, where did you look, in what direction? A. Looked right at the train, right on the crossing, for I was right by it.

Q. Did you see it when you first looked there? A. Yes, sir.

Q. Well, where was it coming from? A. Coming from the south, going north.

Q. Was there any headlight on it? A. I never seen none. I looked and I never seen no headlight and no light of any kind.

Q. Did you see the wagon when you looked up? A. Yes, sir.

Q. Where was Mr. Tilton's wagon? A. Coming right on the track, right ahead; both there right together.

Q. How were his horses? A. On a walk.

Q. Did you see him? A. Yes, sir; he sat up on the seat board, right over the foreboard, sitting right up there driving.

Q. You saw the train go on up north, did you, past you? A. Yes, sir.

Q. As it passed you were there any lights in the cars? A. None in the cars. I seen the light in the firebox as she went by, shining out of the firebox door.

Q. Did you see any other lights on that train except from the firebox? A. That is the only light I seen.

Q. Now was there any whistle blown or bell rung? A. No, sir; I never heard any.

Q. Were you in a position where you could hear it? A. I certainly was, yes, sir.

Q. How long had you been out in this position where you could hear them before the accident? A. Oh, quite a while. I must have been there a half hour, standing right around there.

Q. Was there anything to prevent you from hearing it? A. No, sir.

Q. Were you trying to hear it? A. Yes, sir;

we would always be listening for the train when we have our horses headed up next to that side track there.

Q. Were you that morning? A. Yes, sir.

Q. Before this accident, I should say before the train came up, were you listening? A. Yes, sir.

Q. And this market at the time of the accident, do you know whether there were many wagons in the market at that time? A. Quite a few, quite a few wagons in there.

Q. Have you any idea of the number or can you give us any idea? A. I should judge there was somewhere around fifty wagons in there.

Q. As the train went by was she running quiet or did she make a noise when she went by? A. Very still, very still.

Q. How fast would you say, Mr. Brower, that a horse walked at an ordinary gait? A. He would walk, well, about three and a half miles, four miles.

Q. This territory along the track, along the railroad right of way south of Springwood Avenue east of the railroad track, what is there in there? A. It is all filled up.

Q. Did you ever notice—did you notice that morning whether it was dark or not about this time? A. A dark morning, very dark.

Q. If a headlight had been on that train would you have seen it, Mr. Brower? A. I certainly would when it was coming right like that.

Q. Did the train back down? A. Yes.

Q. Were there any lights in the cars when they backed down? A. No lights, no, sir.

Q. Did you go to the front of it to see whether it had any headlight or not? A. I was right up against it, right close to it.

Q. Did it have any headlight then? A. Never saw any.

Q. You didn't go up in front of it, though? A. Not right exactly in front, no.

CROSS-EXAMINATION by Mr. Applegate:

Q. When you saw the wagon it was coming on the track? A. Coming right on the track; yes, sir.

Q. Did you see the wagon stop at any point? A. No, sir.

Q. You saw the horses coming on a walk? A. Coming on a walk, yes, sir.

Q. That they were walking? A. The common gait, you know, of a horse.

Q. You saw them coming on the track? A. Just walking up on the track; yes.

Q. And they were then walking? A. Yes, sir. They didn't stop from that time on they walked until the train struck them.

Q. You hadn't seen them stop prior to that time? A. No, sir.

Q. Mr. Tilton was familiar with that crossing, was he not, Mr. Brower? A. Yes, he has crossed it several times.

Q. In the nighttime? A. Yes.

Q. And when you approach Springwood Avenue crossing, Mr. Brower, from the west, the same direction that Mr. Tilton was approaching the crossing, you can see pretty well down the track, can't you? A. Yes, sir; down around on the other side.

Q. It is all open, is it? A. Yes, sir.

Q. And about how far back from the track do you think that you can see down, a block? A. Oh, yes.

Q. You can see down to Corlies Avenue, can't you? A. Yes, sir; very near.

Q. Did you see any lights along the track? A. Nothing only these little signal lights.

Q. You saw no sparks coming from the locomotive smokestack? A. No, sir.

Q. Saw nothing in the way of a light on the train? A. Saw nothing in the way of a light.

Q. And didn't see two white lights on the front of the engine, on either side? A. No, sir.

Q. And you say you saw no headlight? A. Never saw no headlight.

Q. There has never been a flagman there at night that you can remember? A. No, sir.

Q. And the gates have never been operated at night that you know of? A. No, sir.

Q. And you go across that way frequently at night? A. Oh, yes, yes; crossed that way lots of times.

RE-DIRECT-EXAMINATION by Mr. Johnston:

Q. Did you notice how far that light from the arc light went down the track? A. Not very far, just the light around; didn't go very far down, shoot a light very far off.

NICHOLAS BROKAW, sworn for plaintiff:

Direct-examination by Mr. Johnston:

Q. Were you down at Asbury Park on July 5, 1910? A. Yes, sir.

Q. What were you doing down there? A. Selling berries.

Q. How near Springwood Avenue? A. I was the second wagon from Fisher.

Q. To the north? A. Towards the depot.

Q. And how near the track were you? A. Why, about seven or eight feet, eight or ten, something like that.

Q. Did you see the accident? A. I didn't see it just at the moment that it made the noise, but right as soon as I could step to the track I saw it, that is all. My wagon top—or Fisher's wagon top, I couldn't see it just at the moment, but saw it right away quick afterwards just as soon as I took a few steps.

Q. What did you see? A. Just saw the locomotive and the train as it went by.

Q. Did the train have any headlight on it? A. I didn't see any, no, sir.

Q. Did the cars have any lights in them? A. No lights.

Q. Were you where you could see? A. Yes, sir; I stepped right out to the track and looked right at it.

Q. Now, before this, Mr. Brokaw, had there any whistle blown or bell run? A. I never heard nothing; no, sir.

Q. Was there anything to prevent you from hearing? A. Nothing that I know of; always had heard them when they came.

Q. I mean from this same direction? A. Yes, sir.

Q. Were you listening for a bell or whistle that morning? A. Well, we always listen for trains, because our horses stand in a bad place and it mostly scares them, runs right up in front of them, you know; always paying attention to trains when they come down.

Q. Were you that morning? A. Yes, sir.

Q. What kind of a morning was it, Mr. Brokaw? A. It was still and dark, pretty dark.

Q. Did this train make much noise? A. I didn't hear nothing till I heard it strike this wagon and made this noise like an explosion.

Q. Did you go up there by it? A. Backed right up near, up in front of us again.

Q. Did it have any lights in the cars then? A. No lights, no, sir.

Q. Were you up to the front of it? A. I didn't step around to the front of the engine, no. I saw the engine as she went by, and the rest of the train, the cars.

Q. Did you see any reflection from the headlight? A. Didn't see no light at all, only just a little light on the bottom from the firebox or something like that.

Q. You know the territory south of Springwood Avenue, do you not? A. Yes.

Q. And east of the tracks, between there and Main Street? A. Yes, sir.

Q. What is that filled with? A. On the east side?

Q. Yes? A. Why, it is all buildings and board fences, as far as Corlies Avenue, I think it is, the name of the avenue.

Q. What effect does that have as to darkness? A. Makes it dark.

Q. Was there anything after you left the light of the arc light or anywhere on the south of it until you got up to the track so you could see an engine coming up? A. No, I didn't look. I couldn't see by my wagon up the track just then until I stepped out and after the train went by I didn't look.

Q. I was talking about the condition of the track, if there were any lights down the track? A. Why, there is little switch lights or something up somewheres about that high (indicating).

Q. Do they make any light on a train, light up the engine? A. Don't make much of a light, no. They are a little small light. You could walk out and see them all right, that is all, see little lights there down low.

Q. When did you see this engine and train, how long before the accident?

The Court: He said he didn't see it before the accident.

A. Saw it a moment afterwards, probably about three seconds from the time it made the explosion, or two seconds; just while I could take a couple of steps.

CROSS-EXAMINATION by Mr. Applegate:

Q. Mr. Brokaw, you were the third wagon from Springwood Avenue, weren't you? A. The second.

Q. Mr. Fisher's was the first wagon? A. Mine was next; yes, sir.

Q. How close were those wagons together, Mr. Fisher's and yours? A. Oh, maybe four or five feet, something like that.

Q. And would all the wagons stand about four or five feet apart? A. Somewhere about; yes, sir.

Q. Do you mean that you were between Fisher's wagon and yours? A. Yes, sir.

Q. You stood in between, did you? A. Stood in between; yes, sir.

Q. What were you doing in there, Mr. Brokaw? A. Well, I was unloading my berries, and this five foot opening we have, we set out berries there

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through. So I was in between, a little ways from the track so I could see.

Q. Where was Brower? A. He was on that street somewheres by the wagon.

Q. But you were busily engaged in unloading the wagon? A. Unloading the wagon. When the crash came I stepped out.

Q. You didn't hear the train coming ? A. No, sir.

Q. The first thing you heard was the crash? A. The crash, yes, sir.

Q. And while you were unloading the wagon you were not listening for trains, were you? You were busy unloading the wagon? A. We are always listening for trains, because we have to attend to the horse; it is so close to their heads, you know; always listening for trains.

Q. So that the locomotive really went by you before you saw it? A. Oh, no.

Q. That is, it was just going by you, you have said? A. It was going a little slanting when I stepped out, but hadn't got by. It was going towards me a little when I stepped out and saw it.

Q. Your view of the approaching train, I think you said, was obscured somewhat by Fisher's wagon top? A. About the time it struck I couldn't see it just then for the corner of his wagon.

Q. But when you threw your eyes up, having heard the crash, you looked almost straight out, didn't you? A. I took kind of one step and saw it coming. It hadn't got past me or got even with me yet. She was going a little this way (indicating).

Q. How far back did the train back after it had run across the crossing? A. Well, she came back about even with the market.

Q. How many cars were there in this train? A. Why, I think it was either three or four, something like that.

Q. Did you see any sparks from the locomotive stack? A. Didn't see nothing, no, sir.

Q. Didn't see any light at all? A. No light at all.

HARRY BISHOP, sworn for plaintiff:

Direct-examination by Mr. Johnston:

Q. Mr. Bishop, what is your business? A. Night watchman for the merchants of Asbury Park.

Q. Do you remember an accident that happened at Springwood Avenue on July 5, 1910? A. Yes, sir.

Q. Where were you when you heard it? A. I was at Cookman Avenue and Main Street. About two blocks from the accident.

Q. What did you first hear, Mr. Bishop? A. I first heard the crash, something being broken.

Q. Had you heard the train before that? A. No, sir; I just come up Cookman Avenue.

Q. Had you heard a whistle or a bell ringing? A. No, sir.

Q. Were you where you could have heard it if it had blown? A. I think I could have heard it; yes, sir.

Q. Did you see that train afterwards? A. Yes, sir.

Q. Were there any lights in the train? A. Not that I saw.

Q. Did you see the engine? A. No, sir.

Q. You didn't go up to the engine? A. I did not.

Q. When you saw that train did you see any lights anywhere about it on the train itself? A. No, sir; not in that position I was in I didn't.

ALVIN B. CLIVER, sworn for plaintiff:

Direct-examination by Mr. Johnston:

Q. What is your business? A. Reporter for Asbury Park Press.

Q. Where were you at that time of the accident? A. We were walking across Liberty Square, where the postoffice is now, and we noticed an engine stop at the station, and it was a peculiar wreckage on the front of it that called our attention to it.

Q. This Liberty Square is one of the squares up there near the station, isn't it? A. It is the square north next to the station; yes, sir.

Q. Did you notice any lights on the engine? A. I did not; no, sir.

Q. Or anywhere in the cars? A. There were no lights in any of the cars.

CROSS-EXAMINATION by Mr. Applegate:

Q. You didn't see a white light on either side of the front of the engine, a small white light? A. I think the wreckage would have obscured it.

Q. No, but did you? A. I did not; no, sir.

Q. But the wreckage might have obscured it if it had been there? A. Yes, sir.

Q. So that you won't say they were not there? A. No, sir.

Q. Did you say that you saw no headlight? A. I saw no headlight; no, sir.

Q. Did you look? A. I looked; not purposely to see whether there was a headlight or not.

Q. And when you say now that you saw no headlight you are speaking now from your recollection? A. Recollection; yes, sir.

Q. Your attention was not called specifically to it at that time? A. No, sir; I walked from there back to where the man was on the track. I saw him lying there.

WALTER PITTENGER, sworn for plaintiff:

Direct-examination by Mr. Johnston:

Q. What is your business? A. Huckster at the shore in the summer time.

Q. Did you see this accident to Mr. Tilton on Springwood Avenue? A. Yes, sir.

Q. Where were you at that time, Mr. Pittenger? A. Why, my horse stood about the third rig down, I think, on the east side. I was over back of Mr. Conover's wagon.

Q. Where did you say you stood, in the rear of your wagon? A. No, sir; I was over by Mr. Conover's wagon.

Q. Where was Mr. Conover's wagon? A. It was, I think, about the third one down on the west side, his horse standing towards the railroad.

Q. Did you see the accident itself? A. No, sir; I heard the crash and I started up by the side of his wagon and just about that time I saw the body fall off the engine.

Q. Did the engine go by you? A. Yes, sir; the engine was going by and I saw this body fall off.

Q. This body was Mr. Tilton was it not? A. Yes, sir.

Q. Now did the engine have any headlights on it or any lights that you could see? A. Not that I noticed at all.

Q. Did you look right directly at it? A. Yes, sir; it was, because I saw him fall from the front of the engine.

Q. As the cars went by did they have any lights? A. No, sir.

Q. Did you see this train after it had stopped? Did you go up there? A. Well, I didn't go to the head of it, I was alongside of it.

Q. Did it have any lights in the cars? A. No, sir.

Q. Now before that, Mr. Pittenger, was there any whistle blown or bell rung? A. No, sir.

Q. Were you in a position to hear it if it had been? A. Yes, sir.

Q. Did you hear the train at all before it struck? A. No, sir.

Q. Didn't hear it before it struck? A. No, sir.

Q. And as it came by was it a loud or was it a quiet train? A. Going along quietly.

CROSS-EXAMINATION by Mr. Applegate:

Q. Mr. Pittenger, you say the train was running along quietly; you mean after the crash? A. Yes, sir.

Q. You didn't hear the brakes being put on, on the result of the brakes being put on the train? You didn't hear the train coming to a standstill grinding along the tracks? A. Didn't hear it at all.

Q. Didn't particularly notice it? A. Didn't notice it; no, sir.

Q. But it might have been? A. Might have been.

Q. And you didn't hear the whistle or bell, you say? A. No, sir.

Q. And that is all you mean to say? A. Yes, sir.

Q. That you didn't hear it? A. No, sir; I did not.

Q. You are not willing to swear that it was not blown or rung, are you? A. I didn't hear it.

Q. You didn't hear it; that is all? A. No, sir.

Q. And you were over by where, Conover's? A. Yes, over the opposite side.

Q. To help hold the horse? A. Yes, sir.

Q. What was the horse frightened at? A. The train.

Q. The approaching train? A. Yes, sir.

Q. You didn't hear the train? A. No, sir; I didn't hear it until the crash.

Q. The horse evidently did? A. Yes, sir.

DAVID CONOVER, sworn for plaintiff:

Direct-examination by Mr. Johnston:

Q. Were you down to the scene of this accident on July 5, 1910? A. I don't remember the date. I was down there the date of the accident.

Q. What were you doing down there? A. Had a load of produce.

Q. Now did you see the train at all before the accident? A. No, sir.

Q. Did you hear it at all? A. No, sir.

Q. Where were you at the time of the accident? A. I was at my horse's head, right along the railroad track.

Q. And about how near was that to this track where the train went by? A. I suppose twenty feet.

Q. Did you hear any sound before the crash? A. No, sir; I never heard a thing until I heard the crash.

Q. Well, when you heard the crash what did you do? A. Well, I looked. I just seen this dark object going by, seen no light, everything was dark; it was a very dark night, anyhow.

Q. You looked down and saw this engine? A. I seen this dark object. I couldn't tell whether it was a passenger train or what train.

Q. Was there any light on the engine? A. Everything was all dark after the crash.

Q. No light? A. No light.

Q. And as the cars went by was there any light in the cars? A. I didn't see any light at all.

Q. Now when you stood there along the track just before the accident was there anything to prevent your hearing any sound from where this train came from south? A. No, sir.

Q. Was there any obstruction between you and the south where the train came up? A. Nothing at all.

Q. How far could you have looked down that track where you were in the daytime? A. Well, I should think I could see down nearly to Corlies Avenue.

Q. Was there any bell rung or whistle blown? A. I didn't hear any.

Q. Were you listening for anything, for noises or trains? A. No, sir; I wasn't listening for any.

CROSS-EXAMINATION by Mr. Applegate:

Q. Mr. Conover, you didn't hear anything then until you heard the crash? A. I did not.

Q. Not hearing anything until you heard the crash, you didn't look down the track before the crash, did you? A. I did not.

Q. And you are not able then to say whether or not there was a headlight on the locomotive before the crash or not, are you? A. No, sir.

Q. And if there was no light on the locomotive as to the headlight after the crash the light might have been put out as the result of the collision, might it not, for all you know? A. Well, I don't know about that.

RE-CROSS-EXAMINATION by Mr. Applegate:

Q. Do you remember a sign-board there with a notice as to when the flagman is on duty? A. Yes, sir.

Q. And that sign-board specifies the hours when there is no flagman there, doesn't it? A. Yes, sir.

Q. And the time at which the accident occurred was within the time noticed on the sign-board as being no flagman there? A. Yes, sir.

Q. And the same as to the gates being not operated; that is so, isn't it? A. Yes, sir.

DANIEL AYRES, sworn for plaintiff:

Direct-examination by Mr. Applegate:

Q. Were you down there near Springwood Avenue at this market at the time of the accident? A. Yes, sir.

Q. What were you doing there, Mr. Ayres? A. Huckstering, had a load down there.

Q. Did you see the accident? A. No, sir.

Q. Heard it, did you? A. Yes, sir.

Q. Where were you at the time, Mr. Ayres? A. I was about the fourth or fifth wagon on the opposite side.

Q. That is on the westerly side of the market? A. Yes, sir.

Q. What did you hear first? A. Heard the crash.

Q. Did you see the train before it came? A. No, sir.

Q. Did you hear any bell or whistle? A. No, sir.

Q. Were you in a position to hear a bell or whistle or train if it had made a noise coming up from the south? A. Yes, sir. I was standing right back of my wagon.

Q. Had you heard it before? A. Lots of times; yes, sir.

Q. When you heard the crash what did you do? A. I looked up and saw the train go by.

Q. Did you see the engine? A. Yes, sir.

Q. Any light on it? A. No, sir; I didn't see any light.

Q. Any light in the cars? A. I didn't see any.

Q. But before the crash you were not paying any attention? A. No, sir; I was not paying any attention.

CROSS-EXAMINATION by Mr. Applegate:

Q. You didn't look down the track before the crash came? A. No, sir.

Q. And therefore you are unable to say positively whether there was a bell rung or a whistle

blown or not? A. Well, if there had been I could hear it.

Q. But your attention was not called to the fact, was it? A. No, sir.

Q. You were not listening for a bell? A. No.

Q. And you were not listening for a whistle? A. No, sir.

Q. And you say that you saw no light after the crash? A. I never saw no light after the crash.

Q. Did you look for a light particularly? A. Well, I looked right up and saw it go by.

Q. Saw the train go by? A. Yes, sir.

Q. But the engine was by before you saw the front of the engine? A. No, just as it got alongside of me I saw it, right in front of me.

Q. You didn't see the front of the engine, you just saw the side of the engine? A. The side; yes, sir.

CHARLES WOOD, sworn for plaintiff:

Direct-examination by Mr. Johnston:

Q. What is your business? A. Produce dealer.

Q. Were you up to Springwood Avenue or near there at the time of the accident? A. I was about 65 feet east of the crossing.

Q. Did you see the accident, Mr. Wood? A. No, sir; I did not.

Q. Where were you? A. I was with my back to the crossing. I was just straightening my wagon a bit preparing to put a load in it.

Q. Did you hear the accident? A. I did; yes, sir.

Q. What did it cause you to do? A. It caused me to tell my boy to jump to the horse's head, for fear he might get scared.

Q. What else did you do? A. Well, I just simply waited to see what the trouble was. There was about a second's time, the train came down back of my wagon and they were stopped close to my wagon.

Q. Did you see the train going up? A. When I turned around I seen the train going on.

Q. Was that a light train or a dark train? A. It was a dark train.

Q. You saw no lights at all? A. I saw no lights at all.

Q. Have you looked up and down that crossing? Do you know how the space is filled in from the east of the railroad over towards Main street south of Springwood Avenue, whether that is open or— A. Well, that is filled in pretty well. In fact, it is filled in, you might say, solid, from that on up to Corlies Avenue.

Q. And do you know what effect that has as to light or darkness, shadow or not on trains running from the south on a dark night? A. Why, it would be dark. It would cause a person going down from Springwood Avenue, going towards Main Street, it would cause them to see if there was a light, to cause them to see the light there distinctly.

Q. You have seen those semaphore lights, haven't you? You saw those semaphore lights down there? A. Switch lights, you mean?

Q. Yes. A. Yes, sir.

Q. Do you know whether or not they light up the track any? A. Oh, no; they don't light the track up but very little.

Q. And is there anything that lights that track after you get out of the range of the light at Springwood Avenue? A. There certainly is not. I should judge that light would go about one hundred feet from the arc light, would throw about from one hundred to one hundred and fifty feet.

Q. You have examined that, have you? A. I have.

Q. With the particular view of stating that? A. Yes.

Q. And outside of the rays of that light all the way down the track is there anything that lights up the track? A. There is not.

Q. Did you hear any whistle or bell that night? A. I certainly did not, and I had good reason for knowing that.

Objected to.

Q. Were you listening for it, I mean? A. I certainly was.

Q. Could you have heard it? A. I certainly could.

Q. As the train came up and went by I want to ask you whether that was a quiet train or a train that made a noise? A. It surely must have been a quiet train for I didn't hear it.

CROSS-EXAMINATION by Mr. Applegate:

Q. What were you doing before the crash? A. As I said before, I was getting ready to put my load off.

Q. You were attending to your wagon, weren't you? A. Yes sir.

Q. You don't know whether there was any light on the train before the crash or not, do you? A. I couldn't say.

GEORGE MARTIN, sworn for plaintiff:

CROSS-EXAMINATION by Mr. Applegate:

Q. You know there was an arc light at Springwood Avenue? A. Yes, sir.

Q. And the obstructions that you refer to as existing on the easterly side of the right of way of the railroad company and south of Springfield Avenue, they fill in the entire space, do they, from Springfield Avenue down to Main Street? A. Yes, sir.

Q. They run out, do they, flush with the right of way of the railroad company? A. Yes, sir.

Q. So that a person in order to see beyond those obstructions has to get beyond the line of the obstructions themselves? A. Well, yes.

RE-DIRECT-EXAMINATION by Mr. Johnston:

Q. Well, Mr. Martin, those obstructions do not run out to this north-bound track all the way, do they? A. No, sir.

Q. I ask you whether or not there is not a switch between any obstructions and the north-bound track? A. There is.

Q. I ask you whether or not a person standing here on this platform, right here along the platform of the right of way, could see down the north-bound track? A. Oh, yes.

Q. How far distant, do you think? A. Oh, quite some distance. I should imagine one hundred or two hundred feet.

WILLIAM CHAMBERS, re-called for plaintiff:

Direct-examination by Mr. Johnston:

Q. Was there anything about that load of vegetables of Mr. Tilton's that night that made an extra noise or rattling noise? A. No, sir.

CROSS-EXAMINATION by Mr. Applegate:

Q. This wagon of Mr. Tilton's, the wheels had iron tires, did they not? A. I don't know whether they were iron or steel. That I couldn't answer.

Q. Well, a hard substance, iron or steel? A. Yes, sir.

ADMISSION

It is admitted that the ~~admission~~ width of the railroad right of way at the Springwood Avenue crossing is 66 feet; that Springwood Avenue is 50 feet wide; and the roadbed of the crossing is planking; that the distance between the west rail of the south-bound track to the east rail of the north-bound track is 17 feet; that it is 30 feet from the beginning of the plank crossing on the west to the east rail of the north-bound track; that the distance between Springwood Avenue and Corlies Avenue is 1765 feet.

Photographs of *locus in quo* admitted in evidence and marked Exhibits 1, 2 and 3, respectively for defendant.

HORACE B. BANNARD, re-called for defendant:

Direct-examination by Mr. Applegate:

Q. Mr. Bannard, you are in the employ of the

New York & Long Branch Railroad Company? A. I am.

Q. As engineer of maintenance of way? A. Yes, sir.

Map of *locus in quo* made by witness admitted in evidence.

Q. What lights are there, Mr. Bannard, along the right of way of the New York & Long Branch Railroad looking south towards Corlies Avenue, if any, or were the night of the accident? A. The light in two semaphore automatic signal stands, one to the right of the north-bound track and one to the left of the south-bound track, about midway between Springwood and Corlies Avenues; the lamps attached to the various switch stands which were opposite the points of the switch on Springwood Avenue.

Q. What is the width of the so-called marketplace? A. It would be about 60 feet from the easterly right of way line.

Q. 219 feet west of Springwood Avenue, as one approaches the crossing. How far can one see south? A. To the pile of lumber of Mr. Lewis, about 1,000 or 1,200 feet.

Q. And as you get to the westerly line of the right of way of the railroad company, looking south, how far can one see? A. At a point 32 feet, measured along the center of Springwood Avenue, from the west rail of the south-bound track, a clear view of a north-bound approaching train can be had for 3,425 feet.

Q. At a distance of 16 feet 2 inches from the west rail of the south-bound track a clear view of the north-bound approaching train can be had at what distance? A. 4,310 feet, 8 inches.

HENRY J. GARRITY, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. What is your business? A. Sign writer and theatrical.

Q. Were you in Asbury Park the morning of July 5, 1910? A. Yes, sir.

Q. Between 3 and 4 o'clock that morning where were you? A. I was coming from Allenhurst and walked the railroad track to where Park Hall is in Asbury Park. That is Summerfield Avenue.

Q. How near is that to Springwood Avenue crossing? A. Well, it is four blocks.

Q. And did you see the train that caused the accident to Mr. Tilton? A. Yes, sir. I heard it blow at Corlies Avenue. That is why I stepped off the track at Summerfield.

Q. And how many times did she blow? A. The regular blasts. Three blasts. She goes mm-mm-mm-mm (indicating four blasts) like that.

Q. Did you hear her blow more than once? A. Yes, sir; after I was off the track.

Q. How long after you heard the first series of blasts did you hear it blow again, if you did hear it? A. Half way up the block.

Q. Did you see the locomotive? A. Yes, sir.

Q. Did it have a headlight? A. The headlight and two little white lights in front.

Q. Where were they on this locomotive? A. Below the headlight.

Q. On which side? A. One on each side of it.

Q. Was your attention at that time called to the accident? A. Yes, they had a funny thing on the front of it. There was a top of a wagon and a bunch of beets there all loaded with beets.

Q. Did you see any other lights about the train,

other than the ones that you have mentioned? A. Not from the front of the train I didn't.

Q. Well, at any other point? A. Well, that is after I got down to the other end, when they backed down. I saw their pilot lights on the train.

Q. What color lights were they? A. They were red and on the side they were green, and look at them from behind they were red. That is when they backed down.

Q. And after the train stopped did it move in either direction, while you were there? A. First they picked that stuff off, the top of the wagon, and put it against that flaghouse, and then backed down.

Q. How far did it back down? A. Well, I walked. The train crew ran back and I walked back before the train pushed back.

Q. How far did the train back down? A. Cookman Avenue.

Q. And the rest of the train that you saw was there after it had backed down? A. South of Cookman Avenue.

Q. Now you say you heard a whistle, did you hear any bell? A. Yes, sir.

Q. Which did you hear first, the whistle or the bell? A. The whistle at Corlies Avenue first.

Q. When did you hear the bell? A. When the train—well, when it stopped at the north end, where I looked at the load that was on the front of it.

Q. Was the bell ringing at that time? A. Yes, sir; at that time it was.

Q. Did you hear the bell ringing prior to the time the train stopped? A. Oh, yes. I had heard it, because that is why I stepped off the track.

Q. Did you step off the track on account of the whistle or on account of the bell? A. On account of both.

CROSS-EXAMINATION by Mr. Johnston:

Q. Well, you say you heard what first? A. I heard the three toots of the whistle down there and saw the headlight.

Q. You didn't hear the train? A. I couldn't help but hear the train when I heard that toot.

Q. What did you say, you saw the headlight? A. Of the locomotive, yes, sir.

Q. After you first heard the whistle? A. I first heard the whistle and looked down the track and then saw the headlight.

Q. Did you say that on your direct-examination that you saw the headlight? A. I certainly did.

Q. You certainly did, that you saw the headlight first off when you heard the whistle, did you say that? A. Saw the headlight when I heard the whistle.

Q. When you first heard the whistle, that you looked down the track and saw the headlight first? A. The question has never been asked me. No, sir; I heard the whistle and looked down the track. The question was never asked me.

Q. Didn't you say it was all dark down the track? A. I didn't ever say anything about darkness.

Q. Didn't you say you got off the track now because you heard the whistle? A. You bet your life that is what I said.

Q. You got off the track because you heard the whistle? A. That is why I said I got off the track.

Q. You didn't get off because you saw the headlight, did you? A. I got off because I heard the whistle and saw the headlight.

Q. You say you went down here and saw this engine with something on it? A. Yes, sir.

Q. You saw some lights shining? A. I didn't see no lights shining. There was three lights on the engine.

Q. You saw some lights on the front of the engine, you say? A. Yes, sir.

Q. Well, whatever there was on the front of that engine didn't cover up the lights on the front of the engine at all? A. No, because when I saw that thing, this thing lying doubled over this way, it was the top of a wagon all right, the top of a body, and it was all full of beets, and it had me guessing for a minute whether I was seeing things.

Q. How did you come to take account of stock of the lights? A. I railroaded for years with the News Company an d I thought it peculiar that a train should stop there when it was not scheduled, and I saw the white lights and I knew it was a special, that is why.

Q. Did you see all the lights right away? A. Certainly. That is what I first looked for.

Q. All three lights? A. Yes, sir.

Q. Where was this wagon cover at that time? A. I didn't see the wagon cover. There was a hedge there. I was walking up behind the hedge and I wondered why the train should stop there, because the bell was ringing just as an ordinary train would.

Q. But you told us about the wagon cover falling off when I asked you about the lights. A. That was when I came down to the end of the hedge there, and when he started to pull back his train there and it fell over there, it was loaded with beets.

Q. That showed you those two lights? A. Showed what two lights?

Q. On the train. A. I saw them first, because it must have been leaning over. The hedge is about that high (indicating) and I didn't pay much attention to what was in front until I came down to the flaghouse from around the hedge and then I saw what it was.

Q. Then the cover didn't obscure any of the lights at all, wasn't over any of the lights on the engine? A. There was three lights that I saw.

Q. I say the cover didn't interfere with any of the lights there at all on that engine? A. Not when I seen it; no, sir.

Q. It hadn't been removed when it first came up there, had it? A. It couldn't be removed, because it wasn't removed until it got there.

JOHN KNEIRUM, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Mr. Knierum, whereabouts do you live? A. Asbury Park.

Q. And what is your business? A. Butcher.

Q. Were you in Asbury Park July 5, 1910? A. Yes, sir.

Q. And whereabout in Asbury Park were you about 3 or 4 o'clock in the morning of that day? A. Well, we generally get to work about 2 o'clock between 2 and 3 o'clock in the morning, and I was on Farley's corner.

Q. Is it south or north of Springwood Avenue? A. North is Cookman Avenue, you know and the other way is Main Street, and this is the corner of Main and Cookman. I was sitting there waiting for the store to open.

Q. Do you recall an accident that occurred at Springwood Avenue crossing that morning? A. Yes, sir.

Q. You called attention to the accident. A. We were sitting right there in the corner and we heard a whistle.

Q. And you heard the crash that distance? A. Yes, sir; that is pretty near three blocks away, big, long blocks.

Q. How many times did you hear this whistle blow? A. WellI I must have heard it a couple of times anyhow.

Q. Did you hear it more than once? A. Yes, sir; I did. I heard it more than once.

Q. How many times did you hear the whistle blow? A. Two times.

Q. Well, about how long to the best of your judgment? A. Well, we heard it away down the line. It must have been two or three seconds.

Q. Did you hear any bell that night? A. Yes, sir.

Q. Did you hear a whistle? A. Yes, sir.

Q. And how long did you hear a bell ringing? A. We heard it till she stopped.

Q. Which did you hear first, the bell or the whistle? A. The whistle first.

Q. How long after you heard the whistle did you hear the bell? A. I don't know. It seemed to me it kept ringing right along.

CROSS-EXAMINATION by Mr. Johnston:

Q. Did you see Mr. Bishop there? A. Mr. Bishop was a little below there, by the restaurant somewheres—by the restaurant, that is right.

Q. He was in a position to hear then better than you were, wasn't he? A. Well, I don't know

that his hearing is better than mine. I couldn't tell that.

Q. I say he was in a position to hear even better than you? A. I guess so. I don't know.

FRANK JONES, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Mr. Jones, what is your business? A. Engineer on the Pennsylvania Railroad.

Q. And were you the engineer on the train that struck Mr. Tilton, who is the nominal plaintiff in this suit? A. Yes, sir.

Q. What sort of a train were you running that morning? Was it a regular or extra or special or what? A. An extra passenger train.

Q. Were the coaches empty or occupied? A. Empty.

Q. Where did you come from, Mr. Jones? Where did your train make up? A. Broad Street station, Philadelphia.

Q. And you were bound for where? A. Long Branch, New Jersey.

Q. What time did you leave Philadelphia? A. 12:59 p. m., July 5th.

Q. Are you familiar with the crossings along the New York & Long Branch Road? A. Yes, sir.

Q. Do you know where Corlies Avenue is? A. Yes, sir.

Q. Do you know where Springwood Avenue is, Springwood Avenue crossing? A. Yes, sir.

Q. As you ran your engine that night over the New York & Long Branch Railroad Company's tracks and prior to the accident did you have a headlight? A. Yes, sir; and it was burning.

Q. Where did you light the headlight? A. In the yard at Philadelphia before we moved the engine.

Q. Which side of the cab were you on? A. The right side.

Q. Are you able to tell from your position, or were you that morning able to tell from your position in the cab whether your light went out or not? A. Yes, sir.

Q. Did it go out? A. No, sir.

Q. Was your headlight lighted at the time of the accident? A. Yes, sir.

Q. Did you have any other lights on the engine than the headlight? A. Yes, sir.

Q. Whereabouts? A. On the left side front of the engine.

Q. Well, what did you have there? A. Classification light, which denotes we are an extra train.

Q. What color light is it? A. White.

Q. What sort of a light is it, what sort of a lantern? A. A bull's eye lantern, that is, glass in it, at a distance enlarges the light.

By the Court: Q. Where did you say that was? A. On the left side front of the engine, below the headlight.

By Mr. Applegate: Q. Does that light throw any light ahead? A. No, sir; not to throw any light on the track, but it can be plainly seen from the front of the engine.

Q. Was there any other light on the engine? A. Not on the front of it; no, sir. In the cab we have a gauge lamp, a very small one, only shows on the gauges.

Q. Well, any other light about the engine? A. A red lamp and white lamp in the cab that we use in case we need it.

Q. A lantern is that? A. Two, a red one and a white one.

Q. Two lamps? A. Yes, sir.

Q. Whereabouts in the cab are they placed? A. They are placed on the left side, we usually carry them. At that time they were carried in front of the fireman's box. They can not be seen outside.

Q. Can not be seen? A. No, sir.

Q. At what rate of speed were you running just prior to the accident or at the time of the accident? A. Thirty miles an hour, as near as I can judge.

Q. Thirty? A. Yes, sir.

Q. Did you see the wagon and team before you struck it? A. No, sir.

Q. Did you see any light upon that wagon or team before you struck it? A. No, sir.

Q. If there had been a light on the right-hand side of the wagon, would that light have been towards your engine as that wagon was crossing from the west to the east? A. Yes, sir, it would.

Q. Would you have been able to see it? A. No, sir; I would not.

Q. Why? A. Because the engine cuts off my view.

Q. What sort of a bell did you have on your engine that morning? A. The regulation bell.

Q. And was your bell ringing prior to the accident? A. Yes, sir.

Q. How long prior to the accident was it ringing? A. Well, there is a road crossing before we come to that road crossing where this accident happened, and it was ringing before we came to that and didn't stop ringing until after we passed the road crossing where the accident happened.

Q. And whose duty is it to ring the bell? A. It is my duty to ring it if the fireman is not in a position to ring it.

Q. Who rang it that morning? A. I rang it before. I rang it while the fireman was working until the time when he was not busy, and then he rang it after that.

Q. I mean prior to the accident. You said a moment ago that the bell was ringing from about the crossing, the first crossing before you reached Springwood Avenue crossing? A. Yes, sir.

Q. Now who was ringing it at that time? A. The fireman was ringing it at that time.

Q. Did you ring it at any time between that crossing and the crossing where the accident occurred? A. No, the fireman was ringing it all the time.

Q. How is that bell rung, by a rope? A. Yes, one on each side of the engine.

Q. How do you know that bell was ringing at that time? A. Well, I seen the fireman sitting on the left side. I seen him ringing the bell.

Q. You saw him ringing it? A. And I heard the bell ringing.

Q. Now was there a whistle blown before you reached the Springwood Avenue crossing, prior to the accident? A. Yes, sir.

Q. Who blew the whistle? A. I did.

Q. Where did you blow it? A. After I passed Corlies Avenue, before I came to that avenue there, Springwood Avenue.

Q. Did you blow for that crossing before reaching it? A. Yes, sir; I blew for this crossing at the whistlepost before I come to this.

Q. And how far is the whistle-post from the crossing? A. I suppose it is a thousand feet.

Q. How many blows did you give it? A. Four blasts of the whistle, two long ones followed by two short. That is the signal that we use at every road crossing.

Q. Now, after passing Corlies Avenue, where did you again blow, if you did? A. I blew the whistle after passing Corlies for that Springwood Avenue.

Q. Can't you indicate so that the jury will have some comprehension about how far you were from Springwood Avenue crossing, whether you were a hundred feet or a thousand feet or two thousand feet or what? A. Oh, I should say about nine hundred feet or a thousand feet, in that neighborhood. You see that is a hard thing for me to tell exactly, how many feet I am.

Q. And how many times did you blow it? A. Blowed the whistle four times.

Q. And what did you do as soon as you felt the jar and heard the noise? A. I applied the emergency brakes on the train instantly.

Q. Did you blow any whistle? A. No, sir.

Q. Just before the crash or at the crash? A. No, sir.

Q. What did you do after you brought your engine to a standstill? A. I got off and went to the front of the engine and looked at it.

Q. Was this headlight lighted? A. Yes, sir.

Q. Was the white light that you have referred to lighted? A. Yes, sir.

Q. Then what did you do after looking at your engine? A. Removed the stuff from the front of it.

Q. Anybody there at that time? A. The fireman.

Q. Anybody else? A. The conductor, as soon as I stopped.

Q. Didn't you back down? A. Not an inch.

Q. Wouldn't you have stopped at Asbury Park if it had not been for the accident? A. No, sir.

Q. Do you know what sort of coaches you had on the train that morning? A. Four Pullman cars ahead and seven coaches, wooden.

Q. Do you know the length of the Pullman cars? A. 70 feet.

Q. And what is the length of the coaches, if you know? A. 60.

By the Court: Q. What is the length of your engine? A. About 40 feet. I am not exact on that. I never measured it.

Q. Engine and tender? A. Yes, sir.

CROSS-EXAMINATION by Mr. Johnston:

Q. You were not on a regular train then? A. This was an extra.

Q. Did you shut off the steam from this train before you reached this crossing? A. Yes, I shut the steam off about probably a mile, three-quarters of a mile, maybe, before I came to this crossing.

Q. Shutting off the steam produces a quiet train, doesn't it? A. No, the rumble of the train is just the same.

Q. But I mean there is no puffing or sparks, is there? A. The engine is not puffing when the steam is shut off.

Q. And doesn't it make and don't you know that it makes a quieter train with the steam shut off than with it on? A. Yes, the train runs quieter with the steam shut off.

Q. Can you give me any particular time that you blew four whistles before that road crossing? A. Any particular time?

Q. Yes. A. At the road crossing before I came to the road crossing in question I blew the whistle.

Q. Well, I mean other days. A. I blow the whistle at the road crossings every day that I am on the train, at the road crossings.

Q. That is why you say that you do it all the time, that is your practice; is that it? A. That is our business, that is all; we are supposed to do it and we do it.

By Mr. Applegate: Q. Who lighted the headlight on the locomotive? A. I lit it.

Q. And who lighted the side light that you referred to as the classification light? A. I lit that.

WILLIAM H. DUNBAR, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. What is your business? A. Fireman.

Q. And were you a fireman upon the 5th day of July, 1910? A. Yes, sir.

Q. Were you in the cab with Mr. Jones that morning? A. Yes, sir.

Q. Do you remember whether or not the headlight on the engine was lighted when you left Philadelphia? A. Yes, sir.

Q. Who lighted it? A. The engineer.

Q. And was there any other light on the engine? A. Yes, sir.

Q. Outside? A. Yes, sir.

Q. Where? A. Classification light.

Q. Whereabouts is that located? A. Left side.

Q. Left side, did you say? A. Yes, sir.

Q. What sort of a light is that? A. Well, it is a small light with two round glasses into it.

Q. What color light? A. Two white and two green.

Q. Do you remember the accident that occurred that morning? A. Yes, sir.

Q. Whereabouts did it occur? A. Well, I didn't know at the time. Since I have been here I learned it was Springwood Avenue.

Q. And as you approached Springwood Avenue that morning just prior to the accident was your headlight lighted? A. Yes, sir.

Q. How do you know it was? A. Because I got off to see it the first thing as soon as we stopped.

Q. Was it lighted when you looked at it? A. Yes, sir; also one classification light.

Q. As you approached the crossing in question that morning, Mr. Dunbar, was there a bell rung? A. Yes, sir.

Q. Who rang the bell? A. I did.

Q. And where did you commence to ring the bell for the Springwood Avenue crossing? A. I should judge right away after we left this avenue here (indicating).

Q. You mean the avenue just before Springwood Avenue crossing? A. Yes, sir.

Q. Was the bell rung intermittently or constantly from that time? A. Constantly until we stopped.

Q. Was it ringing at the time of the collision? A. Yes, sir.

Q. Was there a whistle blown that night prior to the accident? A. Yes, sir.

Q. Who blew the whistle? A. The engineer.

Q. And where was the whistle blown? A. I

couldn't say exactly, but somewhere after we passed Corlies Avenue.

Q. And how about before Corlies Avenue? A. It was blowing also.

Q. How many blasts? A. Four times, two long and two short.

Q. And after passing Corlies Avenue how many times was it blown? A. Four times.

Q. Two long and two short, the same way? A. Yes, sir.

Q. Do you remember how many cars there were in the train that night? A. Yes, sir; four Pullmans and seven coaches.

Q. Did you see this wagon with which your engine collided before the accident? A. No, I didn't see it, owing to the fact that I had just got up from the bright fire-box and my eyes had not got accustomed to the darkness yet.

Q. Were you aware that there was a wagon on the crossing before you felt the jar of the collision? A. No, sir.

Q. How fast was your train running at the time of the collision? A. I judge about thirty miles an hour.

Q. After the train stopped did the train back down towards Springwood Avenue crossing? A. No, sir.

Q. Do you know whether there were any lights on the rear car of the train? A. I couldn't say.. I was not back there.

CROSS-EXAMINATION by Mr. Johnston:

Q. You know the effect of your headlight, don't you, on the track? What effect does the headlight have on the track? A. Very little.

Q. Doesn't reflect down on the track in front of you? A. Very little.

Q. Well, as a matter of fact it does light up the track in front of you some, doesn't it? A. Not very much; very little, oftentimes.

Q. Don't the rails gleam ahead of the engine so that you can see the gleam of the rails ahead of the engine on a dark night A. Not from the headlight; no, sir.

Q. Where does the gleam of the rail come from as you ride in an engine? A. You can see the gleam of the rail from one coming opposite but not going with you.

Q. Then you say that the headlight does not reflect downward at all on the track; is that it? A. It does to a certain extent but not so that we can see it behind.

Q. Can't you look up ahead of your engine and know that the headlight is lit because of the reflection you see going ahead of you, the same as a bicycle lamp or an automobile lamp; do you say that? A. The way I generally find out, I see the number plate on the side.

Q. What do you mean? A. The number of the engine.

Q. Oh, on the side of the lantern, the light? A. Yes, see the reflection of the light on those glasses.

Q. I am going to ask you now whether or not the reflecting of the headlight of the engine does not reflect out some laterally and ahead of that engine through the darkness. A. Not unless you are in a place where it has something very close to shine on.

Q. And then on a dark night do you tell me that you can not look ahead of you, looking up ahead of the track and know whether you have got a

headlight on or not on your engine? A. Oftentimes I have found it the case that you couldn't.

Q. A dark night, now, understand. A. Yes, a dark night.

Q. It has no effect then upon the darkness of the air ahead of you, the atmosphere ahead of you, the space ahead of you? A. No, sir; because you haven't anything for it to shine on except darkness.

Q. Yes, except darkness, of course; and that is the reason I ask you. It does have the darkness to shine on, doesn't it? A. Yes, but it doesn't have any background to shine on.

Q. Have you ever ridden in an automobile at night? A. No, sir.

Q. Or have you ever had a lantern on a bicycle at night? A. Not one that would show any light, not very far, no.

By the Court: Q. What kind of a light do you use in the headlight, what kind of a lamp? A. There are some polished and others that have been polished that have got very dark, a tin reflector.

Q. I mean gas or oil lamps. A. Oil burners.

By Mr. Johnston: Q. But the reflector is behind so as to throw the light forward, isn't it? A. Providing the reflector has a bright finish it may; yes, sir.

Q. Well, didn't you have a reflector on this light? Did he have any reflector on this light to throw this light forward, have a reflector behind it? A. He has a reflector, yes, but it was not polished.

Q. Then what do you mean, that this was a dull light? A. No, it shone all right but it didn't—

Q. Do you mean the reflector was dull, it was a

dull reflector? Is that what you mean? A. It was to a certain extent.

Q. It was a dull reflector to a certain extent on that light that night so that you didn't know that you had a light on until you got off after the accident and looked up to see whether you had a light on or not? A. Yes, I could see the light by the number plates on the side, see those very plain.

Q. If you knew you had a light by the number plates on the sides, as you say, why did you say a few minutes ago that you went around the first thing you did, to look up and see if the light was lit? A. Because it is customary to see that all lights are lit.

Q. Yes, Mr. Dunbar, but if you already knew it and had known it all the time up the track why did you have to walk around to see to prove what you already knew? A. Well, I didn't exactly have to walk there.

Q. Why did you say that the first thing you did was to walk around and look up to see whether that light was lit? A. Because I couldn't see on both sides at the same time, to see whether all the lights were lit or not.

Q. Do you want that to stand for your answer, that the first thing you did was to look up to that headlight to see if it was lit? Is that the answer you want to stand?

Mr Applegate: He has answered it.

Q. Now, Dr. Dunbar, the numbers were on your side so you could look out of your window and see the numbers, see whether it was lit or not; that is so, isn't it? A. Yes, on both sides.

Q. You say that you had been on the fire-box just prior to coming to this crossing. What do you mean you had been doing in the fire-box? A. Putting coal in.

Q. The engine was running quiet that night, was it not, through that neighborhood? A. No more so than any other train shut off.

Q. No, that is true, no more than any other train shut off; but I ask you this question, whether a train shut off, a light train shut off, does not run quiet. A. There is lots of noise on an engine. I couldn't say how it is outside.

Q. Don't you know that it runs more quiet now than one that is not shut off? A. I suppose it does.

Q. Why don't you say so?

RE-DIRECT-EXAMINATION by Mr. Applegate:

Q. One question, please. Won't you explain what you mean so that we will understand when you say that the headlight furnishes no light? What do you mean by that? A. Well, what I mean that out in front, where there isn't anything excepting the black mass, it does not show any reflection on the darkness, not so that you can notice it very much. I never took very much notice of it, being behind the fire-box.

Q. Does the light thrown from the headlight enable you to see an object on the track ahead of the light? A. It would have to be very close and a very bright headlight to do so.

Q. Why is a headlight put on a train, for the assistance of the people in the engine or as a warning to people on the tracks? A. Well, for a warning on the track and to designate whether it is a regular or extra train, with the addition of classification lights.

Q. When you open the door of the boiler to put in your coal is there any glare or light that comes from that? A. Yes, sir.

Q. To any great extent? A. Yes, to a great extent when the fire is bright.

RE-CROSS-EXAMINATION by Mr. Johnston:

Q. The glare of the fire-box, that was behind the cab, the glare that came from the fire-box; isn't that so? A. Yes, that is behind the cab.

Q. That is behind? The glare comes from behind, doesn't it? It doesn't reflect ahead, does it? A. No, sir.

By Mr. Applegate: Q. Does it reflect up towards the heavens? A. Yes, sir.

By Mr. Johnston: Q. What do you mean by reflecting up? A. I have often noticed it at nighttime when I have been running along, the smoke and steam that comes from the cab that you can see very brightly from the fire-box door.

Q. Yes, at times when the door is open? A. At the times the door is open, yes.

Q. Your door was not open after you left Corlies Avenue, was it? A. No, sir.

Q. And you didn't see anything especially—you couldn't see anything from that door after you left Corlies Avenue either behind or in front of the engine, could you? A. No.

Q. And do you pretend to say that you could see for sixteen or seventeen hundred feet any glare that would go up from the fire-box from the front? A. I have oftentimes saw it at least a mile away.

Q. What would? Did the engine burn up at that time? A. No, sir; didn't require it to.

Q. You have seen a mile away the glare of the fire-box from the front, have you? A. Yes, sir; when the smoke and steam goes back it shines on it.

Q. The smoke and steam goes back? Where did any smoke and steam go from this engine? A. From the blower.

Q. It was shut off, wasn't it? A. The throttle was but the blower wasn't.

Q. Wasn't the steam shut off? A. No, there was plenty of steam going through the blower, also from the air dome.

Q. Well, Dunbar, can you say that there was a bit of reflection from the fire-box in front of that engine that night? A. Not in front of the engine, no.

Q. So that it could be seen up at Springwood Avenue anywhere? A. There wasn't any in front of the engine, couldn't be.

Q. Well, I mean so that it could be seen up on Springwood Avenue anywhere. Do you say that? A. I don't know whether it could or not.

Q. Do you say that it could? A. I don't know whether it could or not.

RE-DIRECT-EXAMINATION by Mr. Applegate:

Q. Just one question that I overlooked, Mr. Dunbar. How far, if you know, how far away could the headlight of your locomotive be seen by a person in front? A. Well, the headlight we had on the engine that night I think could be seen at least a mile away.

By Mr. Johnston: Q. You think, but do you know? A. Yes, I know it could.

Q. Well, being a dull light it was not a strong light, was it? You wouldn't say it was a strong light, would you? A. It wasn't a highly polished light, no.

Q. When you say highly polished you mean a strong light don't you? A. Yes, sir.

By Mr. Applegate: Q. But it could be seen a mile? A. Yes, easy.

HOWARD M. HORNER, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Mr. Horner, what is your business? A. Passenger brakeman of the Pennsylvania Railroad.

Q. And were you a passenger brakeman upon the morning of July 5, 1910? A. Yes, sir.

Q. Were you a brakeman upon this extra train that ran from Philadelphia to Long Branch? A. Yes, sir.

Q. And what were your duties upon that train? A. Why, my duties were to watch out for the hind end, see that my markers were lighted, and I had two lights in the rear car.

Q. Were there any red lights on the rear of your train? A. Yes, sir.

Q. Whereabouts on the rear? A. There are two markers under our rear hood and they shine right out back, and any one coming up would see the green on each side and red in the rear.

Q. The red was toward the rear? A. Yes, there would be green on each side and red in the rear.

Q. And could the green lights be seen from the side? A. Yes, sir.

Q. Who put those lights there that night? A. I did.

Q. Do you remember the accident that occurred at Springwood Avenue crossing? A. I didn't know the name of the street at that time

but afterwards I heard that it was called Springwood Avenue. I remember the accident, yes.

Q. Do you remember whether or not your lights were lit on the rear of the train as the rear of the train crossed the crossing that night? A. Yes, sir; I do.

Q. How do you know it? A. Because every once in a while I would go to my rear door and see that my lights were burning all right.

Q. And when did you go to the rear door to see that the lights were burning before the accident occurred, how long before? A. I can't tell you exactly where it was.

Q. Well, how long before, whether it was minutes or hours or what? A. If I remember right we made a stop at Jamesburg Junction for orders. I was out flagging there; and then at the time—

Q. Were the lights lit then? A. Yes, sir; and at the time of the accident I went right out flagging and of course I could see my hind end they were burning very bright there.

Q. They were burning just after the accident then? A. Yes, sir.

CROSS-EXAMINATION by Mr. Johnston:

Q. Now, Mr. Horner, the lights that you had were red and green lights? A. Yes, sir.

Q. And white lights? A. No, sir; only what I would use a white light to go out flagging with, my red light.

Q. They were not fastened on the car? A. No, sir; I had no white lights at all.

Q. They could not be seen from the front? A. Only the green that would shine on the rear end marker. Any one coming down alongside the train could see the green, any one walking right close to the track.

Q. You mean walking down alongside of the train, but you would not notice it 700 or 800 feet up the track, near the front? A. I don't know as you would.

Q. And you didn't go around to see the other lights at all? A. No.

Q. You don't know whether they were lit or not or whether the bell or whistle was blown or rung? A. I know there were two lights burning in the rear car, because I lit them myself.

Q. That is away back in the rear car? A. Yes, sir.

Q. But that would not light up the car outside to any extent? A. Well, you could see that there was a light in there. I don't know that it would light it up to any extent, but you could see it was there.

Q. Anybody passing by? A. Anybody passing by could see there was a light in it.

Q. But they were not up for the sake of lighting up the car in any way, were they? A. Well, only in running over the New York Division you are supposed to have your light in your rear car and I lit two lights.

Q. But that would have no effect upon anybody 700 or 800 feet up on the street in front of the train? A. Not in front of the train, no.

Q. Or near the front of the train, I mean. A. No.

Q. They were not turned up particularly so as to make a bright light? A. They were turned on as full as I would turn them if I had all the lights lit; what I mean is, as far as we turned on the light in lighting a train up.

Q. But you mean a very dim light, don't you? A. Of course it would not make it as bright as if the whole car was lit up.

Q. You have quite a number of lights in the car when the car is lit up? A. Yes.

Q. And only two, you say, were used, and that naturally must have produced a dim light, didn't it? A. Yes, sir.

RE-DIRECT-EXAMINATION by Mr. Applegate:

Q. Did you see the headlight? A. No, sir; I didn't see the front part of the train at all.

Q. Now the green light that you have spoken of as being on the rear of the car and the two lights in the car that were lighted may be seen by one standing on the side of the track as the train was passing? A. Yes, sir.

RE-CROSS-EXAMINATION by Mr. Johnston:

Q. But, Mr. Horner, how many lights are there generally in a car? A. Well, I can't tell you. Some of these cars will have five lights and some will have six. How many lights there were in that car I can't tell you.

Q. Your light, these two that you lit, did produce a dim light, you say? A. Well, of course it would be a dim light too when the train was lit up full.

Q. And if any one had been looking for those lights they could have seen them but would not have noticed them casually going by, that dim light? A. Well, I don't know as they would.

CHARLES F. WALKER, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Were you baggage master on the train that caused the collision at Springwood Avenue crossing? A. I was.

Q. Whereabouts were you at the time of the collision? A. I stood in the rear end of the rear car looking out the rear door.

Q. Were there any lights on the rear end of that car? A. Two mark lights.

Q. What were they? Describe them, please. A. Red lights to the rear, green to the sides and green to the front.

Q. You saw them, did you? A. Yes sir.

Q. Were there any lights in the car? A. Two lights lit in the car, two of the lights that you light the car up with.

Q. Where were those lights located in the car? A. Towards the rear end of the car.

Q. Did the last car have ordinary car windows in the side? A. Yes, sir.

Q. Are you able to say whether or not the headlight of the locomotive was lighted? A. I am not able to say. I was not up to the front end of the train at all.

CROSS-EXAMINATION by Mr. Johnston:

Q. And you don't say that there were any lights on the front? A. No, sir; I didn't see the front of the engine.

Q. Mr. Walker, there were only two lights lit in that car, were there? A. Two lights lit in the car.

Q. And it was one of these iron cars? A. Ordinary coach, a sixty-foot coach.

Q. A sixty-foot coach? A. Yes.

Q. And that made a dim lighted car, did it not?

A. The rear end of the car would be as light as if it had all been lit up.

Q. What do you mean by that? A. Well, two lights would light up the end of the car as much as—the rear end of the car would be as light where the two lights were, would be as light as if all five were lit. The front end would be dark but the rear end would be as light as if all the five were lit.

Q. You say the two in the rear end of the car? A. The two rear lights; yes, sir.

Q. That would be 700 feet off of something from the front end of the car, wouldn't it? A. It would be the length of the train from the front end, the two last lights in the train; yes, sir.

HARRY E. LAIRD, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Mr. Laird, what was your business upon July 5, 1910? A. Conductor of extra 1984.

Q. Of the Pennsylvania Railroad? A. Yes, sir.

Q. Do you remember a collision that occurred that night? A. Yes, sir.

Q. Whereabouts did it occur? A. On the avenue at Asbury Park.

Q. Will you state if you can what lights there were on your train that morning if any? A. There was the headlight.

Q. Did you see the headlight? A. Yes, sir.

Q. When did you see it? A. After the train had stopped and I went forward; and one classification light on the left side of the engine. We had four Pullman cars ahead which had two lights lit in each car, and the seventh car of the

train was also lit up by two lights, and I also noticed coming around the curve at Manasquan, looking to see if there was light on the rear end of the train, I noticed that the rear car had some lights into it; coming around the Manasquan curve, going on to the New York & Long Branch Railroad off from the Pennsylvania Railroad.

Q. You mean you could see the swing of the train? A. Yes, sir; that is on the left side, on the fireman's side.

Q. What car were you in? A. I was in the seventh car.

Q. You mean—A. The seventh car from the engine.

Q. The last car then? A. No, sir; we had eleven cars on the train.

Q. Could you see whether the markers were lighted or not? A. I could see one marker on that side; yes, sir.

Q. Which side of the train was that? A. That was on the fireman's side, which is the left side of the train.

Q. Did you hear any whistle just prior to the accident? A. No, sir; I can't say I did.

Q. Or any bell? A. No, sir; I was too far back.

Q. And after the accident did you get off the train and view the wreckage? A. After the accident I got off and walked right up to the engine. I didn't know what had occurred on account of this seventh car being beyond this crossing. I walked up to the engine and there was part of a wagon on the pilot of the engine. I looked to see if the headlight was lit on the engine?

Q. Was it? A. Yes, sir; and one classification lamp on the left side.

Q. Whereabouts was the engine standing? A.

The engine was standing at the north end of the Asbury Park baggage room.

Q. Did the train back down after it had stopped? A. No, sir; it did not.

Q. In regard to the whistle and bell of which you have spoken, Mr. Laird, is it possible that either might have been sounded and you not heard it? A. Yes, sir.

CROSS-EXAMINATION by Mr. Johnston:

Q. You have said that the Pullman cars were lit up? A. Yes, sir.

Q. And were they dull lights? A. Well, there were two lights. They were burning bright, which they always have in dead-heading cars, so the conductor can see in going through to the engine and also in getting his orders at telegraph offices.

Q. That is for the convenience of the conductor? A. It certainly is.

Q. But do they not produce, those lights, a dull outside light that would not be noticed? A. They can notice them; yes, sir; from the outside.

Q. I know, close up; from any distance, a dark night? A. Yes, a clear night.

Q. Do you mean to say they are lighted up for the outside at all? A. You can see the light; yes, sir; from the outside, you can see the light shine from the outside, you can see it quite a distance.

THOMAS BRODERICK, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Mr. Broderick, what is your business? A. Police officer in Asbury Park.

Q. And what were you doing the morning of July 5, 1910? A. Patrol duty.

Q. Do you recollect the collision that occurred upon that crossing upon that morning? A. Yes, sir.

Q. And where were you at the time the accident occurred A. Sylvan Avenue; that is two blocks from the railroad, about two good blocks.

Q. And how far from Springwood Avenue crossing? A. About 100 feet.

Q. Did you see any lights about the train? A. Saw two red lights in the back, that is all I noticed.

Q. Were you up in front of the train? A. I didn't go forward; no, sir.

Q. You don't know then whether there was a headlight on the front of the train or not? A. I do not.

Q. Do you know the man Garrity that testified here yesterday? A. Yes, sir.

Q. Did you see him there on that morning? A. I saw Henry Garrity.

Q. Did you see any lights in the train, did you notice? A. I don't recall it.

Q. What do you mean, that you didn't notice or didn't see it or what? A. I didn't notice it. I might have noticed it but I can't remember seeing it.

Q. Do you recollect whether or not the light at Springwood Avenue crossing was burning, the arc light? A. It was.

Q. Do you know whether or not the arc light at Corlies Avenue was burning ? A. I do.

Q. Was it? A. It was.

Q. Are you able to say whether or not there were any other lights along the railroad at that time? A. The switch lights and like that.

Q. Could you see those from Springwood Avenue crossing? A. I did.

FRANK H. ROLAND, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Mr. Roland, what is your business? A. Policeman of the City of Asbury Park.

Q. Were you a policeman in that city upon the morning of July 5, 1910? A. I was.

Q. Did you know that morning that there was a collision? A. Not until after it occurred.

Q. How long after it occurred? A. Well, I should judge about twenty-five minutes, twenty or twenty-five minutes.

Q. And did you hear a train come in that morning between three and half-past three? A. I heard a whistle blown to the southward.

Q. Where were you when you heard the whistle blowing? A. On the corner of Cookman Avenue and Emory Street.

Q. What time was that? A. Well, that was apt to be about—I allow myself fifteen or twenty minutes to get up to the box—I should judge about 3:15—3:15 to 3:18, according to my watch.

Q. And what sort of a whistle was it? Did it blow more than once? A. Oh, yes.

Q. Well, how many times did you hear it? A. Four blasts, toot, toot, toot, toot (illustrating).

Q. Did you hear any bell? A. Well, I heard the bell when the train pulled in the station. There was a bell ringing then.

Q. Did you see the train as it passed? A. I didn't see all of it.

Q. Did you see the engine? A. I seen the front of the engine.

Q. Did it have a headlight? A. Yes.

CROSS-EXAMINATION by Mr. Johnston:

Q. You say the whistle you did hear was a good ways south somewhere? A. Yes, sir.

Q. You don't know exactly where? A. Well, I couldn't place it, no, not exactly. I know it was south, in that direction.

Q. And you were not called over there until some twenty or thirty minutes after that? A. Well, no. Let's see. Fifteen to twenty minutes, because I allowed myself fifteen minutes to get up to the box, cut across to Main Street, walking slow, and meeting a milkman and he notified me there was an accident.

Q. You didn't hear the bell until when the train was pulling in? A. Yes, the bell was ringing when the train pulled into the station. I remember that distinctly.

RE-DIRECT-EXAMINATION by Mr. Applegate:

Q. Was there any train that went through there that morning about that time other than this train that caused the accident? A. No, sir; because I went to the headquarters, the half-past three box.

Q. None before that? A. No, sir.

MATTHEW D. TUCKER, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Mr. Tucker, what is your business? A. Police officer.

Q. And whereabouts? A. City of Asbury Park.

Q. And were you a police officer on July 5, 1910? A. Yes, sir.

Q. Where was your beat that morning early? A. On Springwood Avenue, east of Springwood Avenue.

Q. Now where were you about 3:20 a. m. that morning A. I was on Springwood Avenue, right in front of Applegate's Alley.

Q. Do you remember a collision that occurred on that crossing that morning? A. Yes, sir; I do.

Q. Now prior to hearing the crash, just prior to hearing the crash, did you hear a whistle blow? A. According to my judgment, as near as I can get at it, it was about one minute the whistle blew before the crash.

Q. And what sort of a sound was it that you heard in the way of a whistle? A. Well, it blew twice as if the regular crossing blow, you know.

Q. What do you mean when you say it blew twice? A. Well, I simply mean I heard the reports of the whistle twice.

Q. Well, two long whistles or two short whistles? A. Well, I must say that one was long and seemingly the second was short.

Q. Did you hear any bell ringing? A. I did not.

Q. Did you go down to the scene of the accident? A. Yes, sir.

Q. Do you remember the lights on the rear coach? A. I do remember one.

Q. What color was that? A. Red.

Q. Did you know Mr. J. Ely Tilton? A. I did.

Q. And did you know what kind of a team he drove A. Seemingly they were a couple of bay horses, one bay, sure.

Q. Now did you see Mr. Tilton the morning of the accident? A. I did.

Q. And whereabouts did you see him? A. Sitting on his wagon.

Q. Well, about where in reference to the street, I mean? A. On the right-hand side of Springwood Avenue going east.

Q. And how far from Springwood Avenue crossing? A About one square and a half.

Q. And where was Mr. Tilton sitting on his wagon? A. On the right-hand side of his wagon.

Q. And can you show us the position that he was in when you saw him? A. Well, I can.

Q. Do it, please. A. As near as my recollection, he was sitting in this position. He was to the right side of the wagon, leaning to the right side of the wagon in his position (illustrating).

Q. Was he sitting erect or leaning over? A. He was leaning over.

Q. With his head up or down? A. His head was down in this position.

Q. Did you speak to him? A. I did.

Q. Did he answer you? A. No, sir.

Q. How near were you when you spoke to him? A. I don't know exactly, but about ten feet.

By the Court: Q. I did not hear whether you said he did or did not answer. A. He did not answer.

By Mr. Applegate: Q. Was there any light on his wagon? A. I didn't see it.

CROSS-EXAMINATION by Mr. Johnston:

Q. You say you saw this gentleman, his team walking along at a fair gait? A. Yes, sir.

Q. Or slowly? A. A fair gait, good walking.

Q. Did you think that he was asleep? A. Well,

from the position that he was sitting I did think that he was asleep.

Q. You knew he had to go 450 feet, you say, about, before he came to the center of this railroad crossing? A. Well, that is as near as my judgment goes.

Q. But you knew that he was aiming for that railroad crossing, didn't you? A. Yes.

Q. And you saw that he had what, a load of vegetables on? A. Yes, sir.

Q. And you knew that crossing well, didn't you? A. Pretty well acquainted with it.

Q. Did you try to wake him up? A. I simply spoke to him once.

Q. Did you try to wake him up? A. No, sir; only speaking once.

Q. Why didn't you try to wake him up, knowing he was going right to the railroad crossing 400 feet or 450? A. Well, that would have been unusual. I don't usually do that. I simply speak to the farmers and that is all.

Q. Don't you think it is part of your official duty to keep men out of danger? A. Yes, providing my attention was called otherwise at that time. That was the position I was standing.

Q. What had that to do with waking the man up if you thought he was asleep? A. Well, I simply spoke to him as usual.

Q. When did you say the whistle blew? A. About four or five minutes after he had passed.

Q. The whistle was away down the track, wasn't it? A. The whistle that I spoke of did sound down the track, but how far I don't know.

Q. That is the only sound that you heard? A. No, sir; that was not the only sound that I heard.

Q. Well, I say except the crash. A. I heard the crash and the rumbling of the train.

Q. Well, when did you hear the rumbling of the train, how soon before the crash? A. Well, as near as I can judge probably near the same time I heard the whistle.

Q. Well, did you think about this man asleep going toward that track at that time? A. Well, I did after I heard the crash, not before.

Q. Oh, after you heard the crash? A. Yes, sir.

RE-DIRECT-EXAMINATION by Mr. Applegate:

Q. And after Mr. Tilton passed you was there any other wagon that passed you? A. Yes; there was.

Q. And how long after Mr. Tilton passed you? A. About six or seven minutes after Mr. Tilton passed there was another wagon that passed me, that is going east.

RE-CROSS-EXAMINATION by Mr. Johnston:

Q. At the time of the accident; did you make any memorandum? A. Yes, sir; I did so.

Q. Where is it? A. At the time. I made any memorandum, I turned it in to the police headquarters.

Q. But that doesn't contain anything about this. We have got hold of that. That doesn't contain anything about this wagon, does it? A. I didn't make any reference, sure, concerning the wagons, any more than that in my remembrance.

Q. Nothing about the man being asleep, did it? A. I didn't say that he was asleep.

Q. Well, if you knew this man was asleep and thought that the same man was asleep or knew

that the same man was asleep that got killed shortly afterwards, why didn't you report it? Why didn't you put it on your report that he was asleep? A. I don't understand the question.

Q. I say why didn't you put on there that the man was asleep that passed you? A. I couldn't put down that he was asleep, because I didn't say he was asleep. I did put on my report from suspectation that he was asleep.

Q. Do you say that that is on your report? A. Yes, sir.

Q. It was on there when you filed it in the office? A. Yes, sir; I say that.

Q. You have got the report here, have you? A. No, sir.

Mr. Applegate: You have it. You produce it.

Mr. Johnston: We have examined it. It was not there. I say that.

Q. I say where is your report? A. I haven't got it here. I am not supposed to keep them.

Q. You say that is on, do you? A. Yes, sir.

Q. About the man being asleep? A. No, sir; I didn't say he was asleep.

Q. But about your suspecting he was asleep? A. Yes, sir.

Q. You are sure that is on? A. I am pretty sure it is.

RE-DIRECT-EXAMINATION by Mr. Applegate:

Q. Who put it on? A. I put it on myself.

Q. And when did you make up your record? A. On the 5th night of July, I think, if I am not mistaken.

CLINTON H. COMPTON, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Where were you living July 5, 1910? A. Asbury Park.

Q. And what was your business at that time? A. Lunch room business.

Q. And where was your lunch room located? A. 816 Lake Avenue.

Q. And is Lake Avenue the name that is given to Springwood Avenue on the east of the railroad? A. East of the railroad; yes, sir.

Q. And how near to Springwood Avenue crossing was your restaurant? A. Within 100 feet.

Q. Where were you on the morning of July 5th between three and half-past three o'clock? A. In my lunch room.

Q. Did you have any knowledge of the accident in question at the time it happened? A. I seen the accident; yes, sir.

Q. Where were you when you saw the accident? A. Standing in my front door.

Q. Have you a clear view from your front door of Springwood Avenue crossing? A. Yes, sir.

Q. Did you see the train that morning that caused the accident? A. I did.

Q. And did you see the train that caused the accident before the collision occurred? A. At a space I should judge twenty feet.

Q. Twenty feet between what? A. Between the wagon and where I first seen the train.

Q. You saw the train then twenty feet from the wagon? A. Yes, sir.

Q. Was there anything to interfere with your view of the train before you first saw it that twenty feet? A. Yes, sir.

Q. What? A. I was inside of my lunch room.

Q. What did you first hear that called your attention to the train? A. I heard the blow of the whistle.

Q. And how many blows did you hear? A. I couldn't state the number of blows. I just simply recognized the blowing and that was all.

Q. When you heard the whistle blow where were you? A. Behind my bar, lunch bar.

Q. What did you do, if anything, when you heard the whistle? A. Well, being an unusual hour to hear a train coming from that direction, I stepped to the front door shortly, probably a quarter of a minute or half a minute after, to see her pass by.

Q. And did you hear any bell? A. Not while I was in the lunch bar, no.

Q. Well, after you got out did you hear a bell? A. I did after I stepped to the front door.

Q. Did you see any lights on the train? A. I was not in a position that I could see lights, because the train was on an angle. I was looking sideways to the train.

Q. After the accident occurred did you go down to the crossing? A. I did.

Q. Did you observe any lights on the train then? A. It appears to me I seen lights on the rear car.

Q. What sort of lights did you see on the rear of the car? A. They were red, according to my sight.

Q. Did you see Mr. Tilton before the accident? A. Well, just that two seconds before, is all.

Q. Where was he when you saw him? A. Sitting in his wagon.

Q. And whereabouts was his wagon at that time with reference to the crossing? A. His

wagon was to the right-hand side of Springwood going east.

Q. Was he on the crossing or hadn't he reached the crossing? A. He was just at the crossing.

Q. Were his horses on a walk or on a trot? A. They were on a walk.

Q. Do you recollect which side of the wagon Mr. Tilton was sitting on? A. He was sitting on the right side.

Q. Could you see him plainly? A. I could.

Q. What lights if any were at the crossing that enabled you to see him plainly? A. There was an electric light.

Q. Will you describe if you can the position in which Mr. Tilton was sitting when you saw him? A. I simply seen him sitting in the wagon. I couldn't state what position he was in. I didn't have time to notice what position he was in. I just noticed the man sitting there, that is all.

Q. Had the wagon stopped at any time when you were looking at it? A. Only when the train hit it.

CROSS-EXAMINATION by Mr. Johnston:

Q. Now you say you looked up towards this crossing and you saw Mr. Tilton sitting in his wagon driving on the crossing. Where was he when you first saw him? A. Where was he? He was right at the bar, just at the bars, just about to cross the north-bound track.

Q. That was on the other side of the crossing? A. Not the other side of the crossing, right on the crossing.

Q. I mean on the crossing but on the other side, the north-bound side. A. I should judge,

I should say his horses's heads were just on the north-bound track.

ARTHUR CHANOWETH, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Where do you live, Mr. Chanoweth? A. Asbury Park.

Q. Do you remember the accident that occurred at Springwood Avenue that morning? A. I do.

Q. Whereabouts were you just before the accident? A. Just before the accident?

Q. Yes. A. Turning the corner of Springwood Avenue from Main Street.

Q. And going in what direction? A. West.

Q. Were you on Springwood Avenue? A. I was; yes, sir.

Q. How far were you from the crossing at the time the accident occurred? A. Probably three hundred feet.

Q. And did you see the train that caused the accident? A. I did; yes, sir.

Q. How long before the accident did you see the train? A. I didn't see the train before the crash.

Q. Was there anything to interfere with your seeing the train in the way of an obstruction? A. Well, a few wagons lined along Springwood Avenue there was in the way, yes.

Q. And did you hear any whistle blown? A. I did; yes, sir.

Q. On that train that caused the accident? A. Yes, sir.

Q. Where were you when you heard the whistle blow? A. About 25 or 30 feet around the corner from Main Street.

Q. And how far from Springwood Avenue crossing? A. Probably 250 or 300 feet, in that neighborhood.

Q. How many times did you hear the whistle blow? A. As near as I can recall I heard her three times.

Q. And how long before the crash did you hear the whistle? A. Probably a minute and a half, two minutes.

Q. Did you hear any bell on that train that morning? A. I did; yes, sir.

Q. Did you hear the bell before or after you heard the whistle? A. After I heard the whistle; heard the whistle first and then the bell.

Q. Did you see any headlight on the locomotive? A. I did; yes, sir.

Q. And where were you when you saw the headlight? A. I walked down the track.

Q. After the accident? A. After the accident; yes, sir.

Q. Did you see any other light on the engine besides the headlight? A. I did; yes, sir.

Q. Where? A. Saw a white light on the engine.

Q. Which side of the engine? A. The left side.

Q. Did you notice any lights in the cars? A. I did; yes, sir.

Q. Did you see the horses of Mr. Tilton after the accident A. I did; yes, sir.

Q. Where did you see them, what were they doing? A. They were running up Springwood Avenue and I got there just in time to see Mr. Murray grab the team.

CROSS-EXAMINATION by Mr. Johnston:

Q. Was that whistle away down the track somewhere? A. It was a pretty fair distance down; I should judge about Lewis' lumber yard.

MICHAEL BALLERINO, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Michael, whereabouts were you living the morning of July 5, 1910? A. Springwood Avenue.

Q. And how far from Springwood Avenue crossing? A. Not quite a couple blocks; about a couple hundred feet, a little more, I guess.

Q. How far? A. About a couple hundred feet; a little more, I guess.

Q. Do you live between Prospect Avenue and the Springwood Avenue crossing? A. Yes, sir.

Q. And what was your business that morning? A. Quick lunch and fruit stand outside.

Q. And is that lunch place open all the night? A. Yes, sir.

Q. And was it open all the night of the 4th and the morning of the 5th? A. Yes, sir.

Q. Were you there? A. Yes, sir.

Q. Whereabouts were you the morning of the 5th of Jnly, 1910, about a quarter-past three or twenty minutes past three? A. In the same place.

Q. And whereabouts in the same place were you? A. Right back of the counter on the front of the store door on the porch.

By the Court: Q. Is this place west or east of the crossing? A. That is on the west side.

By Mr. Applegate: Q. Where were you, Michael? Were you outside or inside of the building? A. Outside.

Q. What were you doing? Were you standing or sitting? A. I was standing.

Q. What were you doing? A. Why, I keep open all night and wait for that colored ball to go out.

Q. Wait for what? A. The colored ball, the dancing hall. They all go out about 2 or 3 o'clock, you know, in the morning.

Q. Do you remember the fact that an accident occurred that morning? A. Yes, sir.

Q. And do you remember about what time it was? A. Why, after 3 o'clock.

Q. Did you know Mr. Tilton? A. Yes, sir.

Q. You knew him at that time, did you? A. No, not at that time.

Q. And did you know Mr. Tilton's rig or wagon? A. Yes, sir; I knew Mr. Tilton in the market too. I bought a lot of stuff off of him when I used to go in the market.

Q. I understood you to say you didn't know Mr. Tilton at that time? A. I didn't know him by his name, you know. I didn't know him by his name but I know if I go to the market by his face.

Q. Did you know who Mr. Tilton was? A. Yes, sir.

Q. You knew him when you saw him? A. Yes, sir.

Q. But you didn't know him to talk with; is that what you mean? A. I had a talk with him before, before the accident. I had a talk to him many a time.

Q. Did you see Mr. Tilton the morning of the accident? A. Yes, sir.

Q. And whereabouts did you see him? A. I seen him right going up on Springwood Avenue and I stopped him, I tried to stop him, I hallooed at him.

Q. What did you halloo at him? A. I hallooed if he had any beets.

Q. Did he make any reply? A. No, sir; no answer. I hallooed twice.

Q. How near was he to you when you hallooed at him? A. About from here to the second window, between the first and second window. This was my porch and just right from here to that upper box there.

Q. About how many feet would you say that was? A. I don't know. I guess about twelve or fifteen feet, something like that.

Q. Could you see Tilton himself? A. I saw him on the seat.

Q. Whereabouts? What side of the seat was he on, the right or left side? A. He was on the south side. He was this way (illustrating).

Q. And how was he sitting? A. He was all this way sitting, lying down like that (illustrating).

Q. With his head on his hand, you mean? A. He was just like that on the seat of the wagon, high seat. I hallooed at him twice. (Remainder of answer ordered stricken out.)

Q. Did you hear the crash of the accident that morning? A. After I hallooed at Mr. Tilton it was just about two or three minutes. I tried to talk to him to buy some beets and I heard the crash.

Q. Just before you heard the crash did you hear any whistle blow or bell ring? A. Yes, sir; hear them about the same time when I was trying to buy some beets off of him.

Q. What did you hear? A. I hear the whistle.

Q. How many times? A. Why, between Lewis' lumber yard, coming from the west, till it got to the crossing, about four times I hear the whistle blow; some short whistles and some long.

Q. Did you hear the bell ring? A. Yes, sir.

Q. Which did you hear first, the bell or the whistle? A. I heard the whistle first.

Q. How long after you heard the whistle did you hear the bell? A. Well, just pretty near the same time; the train coming this way, coming to the Springwood Avenue crossing, going north.

Q. How long after you had talked with Tilton did you hear the whistle or the bell? A. Twice.

Q. No, how long after you had talked with Mr. Tilton or hallooed at him? A. I hallooed twice and he didn't answer. (Remainder of answer ordered stricken out.)

The Witness: He was asleep. He was lying just that way (illustrating).

Mr. Johnston: I move that be stricken out, the reference to his being asleep.

The Court: I will decline to do that. That is a positive statement.

Mr. Johnston: He was asleep?

The Court: Yes, that is a positive statement.

The Witness: He was asleep or he would have answered me.

Mr. Johnston: I object to this witness going on talking this way.

Mr. Applegate: Don't talk unless there is a question.

Exception noted for plaintiff.

Q. Now, Mr. Ballerino, I ask you the question, how soon after you had talked with Mr. Tilton did you hear the whistle? A. Yes.

Q. How soon after you had talked with Mr. Tilton? A. About the same time I talked to him, the train was coming from Corlies Avenue and the whistle was blowing and about the same time I hallooed at Mr. Tilton.

Q. How long after you were talking with Tilton did you hear the crash? A. About two minutes.

CROSS-EXAMINATION by Mr. Johnston:

Q. Now the only reason that you know or say he was asleep was because he didn't answer you? A. He was asleep and I hallooed twice.

Q. I say the only reason is because he didn't answer you? A. Certainly.

Q. That is the only way you knew, wasn't it? A. Well, that is what I know, that is what I say.

Q. I mean that is the only way you knew he was asleep, was because he didn't answer you but went right on? A. He must have been asleep, because why he didn't sell me some beets?

Q. Isn't that the only way that you know he was asleep, because he didn't answer you? A. I don't know. I halloed at him twice and he didn't answer.

Q. Do you know any other way? A. No other way at all, only in attending to my business there.

By Mr. Applegate: Q. Was the wagon making any noise as it passed you? A. Yes, pretty well noise. It was going pretty fast.

FRANK MASSESSO, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Frank, for whom are you working, the New York & Long Branch Railroad? A. Yes, sir.

Q. And were you working for that company upon July 5, 1910? A. Corlies Avenue.

Q. What were you doing there? A. Flagging.

Q. And were you on duty all night? A. All night, yes, sir; keep two men, daytime and night. I was in the night.

Q. Do you remember the accident that occurred that morning at Springwood Avenue crossing? A. Yes, sir.

Q. Were you at the flaghouse at Corlies Avenue on duty when the train that caused the accident passed through? A. Yes, sir.

Q. Did you flag the crossing when the train went through? A. That is what I do, certainly.

Q. Did the engine have a headlight on? A. Yes, sir.

Q. Did you see any other lights about the train? A. Only the light on the engine.

Q. Well, any other lights besides the headlight? A. Yes.

Q. Where? A. On the engine.

Q. Yes, but whereabouts on the engine, Frank? A. On the head.

Q. That is the headlight, you mean? A. Headlight, and had two little lights there, one each way.

Q. Did you see any other lights in the cars? A. Light on the car? A. I don't think—

Q. Don't remember? A. No.

Q. Did you hear that train blow a whistle? A. Blow for Corlies Avenue right through to Springwood Avenue, blow, blow.

Q. Now, did it blow for Corlies Avenue? A. To Springwood Avenue.

Q. Now after it passed Corlies Avenue did it blow again? A. Blow again.

Q. Did you hear any bell ring? A. Yes.

Q. Did you hear any bell ring after the train passed Corlies Avenue? A. Yes, sir.

Q. Was there an arc light at Corlies Avenue that morning? A. Yes, sir.

Q. Whereabouts at Corlies Avenue was that light? A. The west side.

Q. On the west side? A. West side.

CROSS-EXAMINATION by Mr. Johnston:

Q. Frank, you remember, you say, seeing this engine come by? You remember seeing that engine that morning? You saw it? A. I saw it, yes.

Q. You saw it had a headlight on it, you say? A. Yes.

Q. And then it had two lights? A. Two little lights, one each way.

Q. One each side? A. Yes.

Q. Little round red lights? A. One side green and the other white.

Q. Green and white? A. Green and white.

Q. On each side? A. On each side.

Q. Every train has them doesn't it? A. Yes, sir.

Q. And you remember seeing them that night? A. Yes, sir.

Q. Then you say that it blew before it got to Corlies Avenue and then after it got over Corlies Avenue it blew all the way up to Springwood Avenue? A. It blew for Corlies Avenue right through for Springwood Avenue before it got to Springwood Avenue, blow, blow, all the way to Springwood Avenue.

Q. And rang a bell all the way up? A. Yes.

Q. Blow, blow, dozens of times? A. Blow, blow, all the way.

BERT MURRAY, sworn for defendant:

Direct-examination by Mr. Applegate:

Q. Where were you living July 5, 1910, Mr. Murray? A. Asbury Park.

Q. What was your business? A. Hacking.

Q. What were you doing between three and half-past three o'clock the morning of July 5, 1910? A. I was driving down South Main Street, turning around the corner of Springwood Avenue.

Q. Did you see the collision, the subject-matter of this suit? A. No, sir; I didn't see it but I heard it.

Q. How far away were you from Springwood Avenue crossing when you heard it? A. About 150 feet, I judge; I am not sure.

Q. Whereabouts were you when you heard it? A. I was about ten feet from the corner when I heard it.

Q. Corner of what? A. Springwood Avenue and South Main Street.

Q. Was there an arc light at Springwood Avenue? A. Yes, sir.

Q. As you crossed the crossing from the west going east that night was there anything to interfere with your looking south? A. No, sir.

Q. Take 200 feet from the crossing, going from the east on Springwood Avenue and looking south, how far could you see? A. Going east.

Q. Going east. A. Well, you could see down there quite a ways. I couldn't tell you just exactly how far you could see. You could see far enough to get out of the way of the train. You had lots of time.

Q. Could you see to Lewis' lumber yard? A. Yes, sir; you could see down there.

Q. Did you see any lights on the track that night as you passed to the east, looking south? A. I seen these little switch lights, yes, sir.

Q. Referring to the time just before the accident when you were about 150 feet away, did you see the train at that time? A. I didn't see them till they come together.

Q. Did you hear the train? A. I heard the whistle blow just before I turned on Springwood Avenue.

Q. How many times did you hear the whistle? A. Well, I can't say just exactly how many times I did hear it but I think I heard one good long blow.

Q. Did you hear any bell? A. Yes, sir.

Q. Which did you hear first, the bell or the whistle? A. Heard the whistle.

Q. How long after you heard the whistle did you hear the bell? A. Well, I heard the bell about just before they struck the crossing.

Q. Did you notice whether there was any headlight on the engine? A. Yes, sir.

Q. And when did you notice that, before the accident or afterwards? A. I looked up at that just as I heard the crash when they came together.

Q. And did you see the headlight at that time? A. I did, yes, sir.

Q. What did you do after the crash? A. And when I heard the crash I pulled up to the curbstone and jumped out of my wagon and seen this

team of horses coming and ran and grabbed one of them by the side of the rein and pulled them away from the curb.

Q. Did you see any lights on the train other than the headlight? A. I seen the two rear lights on the car, what they call the tail lights.

CROSS-EXAMINATION by Mr. Johnston:

Q. Did you notice the headlight through the side? A. Through the side?

Q. Of the tin, of the lamp. A. Up on top of the lamp?

Q. I say did you notice the headlight through the side, the number on the side? A. I did, yes, and the front too.

Q. To tell the number of the train? A. No, I couldn't tell the number.

Q. No, I say but as the train went by you saw the number on the headlight? A. Oh, I saw the light showing through the number, yes.

Q. The headlight? A. Yes, sir.

Q. What number? A. I knew the number at the time but I don't know the number now.

Q. I say that is the way you tell, is it, by seeing it shine through? A. No, sir; it is not.

Q. Now tell us how you knew the headlight then if you didn't see it through the number on the side. A. I said I seen it on the front.

Q. Oh, you saw it on the front? You were not in front of it? A. No, sir; I was not in front of it.

Q. How did you see it? A. With the naked eye.

Q. You were not in front of it? A. No, sir; I was not in front of it.

Q. Right at that place and between you and that was the arc light, wasn't it? A. No, sir; I don't think so. I think the arc light was on the other side of the track; I wouldn't say sure.

Q. You think so? A. Yes, sir.

Q. And you think from 200 to 250 feet, almost at right angles with the engine, coming right up to that arc light, you could see that it had a headlight on, do you? A. Yes, sir.

Q. Were there any wagons in that street, Mr. Murray? A. I think there was, but I won't say sure how many.

Q. Were there not several wagons in that street? A. Well, I will tell you, Mr. Johnston, them lights on the engine are higher than a wagon. They ain't down underneath the engine; those headlights sits up on those engines, over the front.

Q. Now you have volunteered a whole lot. Wait till I ask it over again. The wagon tops were higher than you sitting in the wagon too, weren't they? A. Yes, but I wasn't on top of the wagon. The wagons was up the street further from me.

Q. They were up towards the railroad? A. Yes, sir.

Q. The tops higher than where you sat? A. I wasn't sitting in the wagon when I saw the light.

Q. Were you standing? A. Yes, sir.

Q. Out of the wagon? A. Yes, sir.

Q. Then you were lower yet? A. I was, yes, sir.

Q. So you could see right through the tops of those wagons, could you, and see this headlight? A. No, sir.

Direction of Verdict

Freehold, N. J., January 28, 1913.

The Court: Gentlemen, in this case, which is the case of Carrie A. Tilton, Administratrix, vs. the Pennsylvania Railroad Company, it appeared that the plaintiff's intestate, who was her husband, was killed at the Springwood Avenue Crossing at Asbury Park by a train approaching from the south, I think. The case was tried in this Court and resulted in a verdict in favor of the plaintiff. Upon a rule to show cause being allowed and argued in the Supreme Court the verdict was set aside. In the preparation for the argument in the Supreme Court it was necessary for the testimony which was taken on the previous trial to be printed and counsel in this case have agreed that the evidence of all the witnesses as it appears in the printed book, which I now hold in my hand, and used in the argument of this case in the New Jersey Supreme Court upon the rule to show cause, shall be offered in evidence in this case and accepted with the same force and effect as if these witnesses were personally present and sworn and testified. Upon this testimony counsel for the defendant now moves for the direction of a verdict in favor of the defendant.

Mr. Applegate: Yes, sir.

The Court: And upon that motion this Court at this time is bound by the decision of the Supreme Court, which holds, "That the resolving of the question of the preponderance of the evidence and the weight of the evidence by the jury in favor of the plaintiff was, we think, against the great preponderance of the evidence." They say, "That being so the verdict can not be sup-

ported; for on the facts submitted the decedent was clearly negligent in not observing the approach of the train when he was sufficiently far from the tracks to be entirely out of danger."

This Court at this time and upon this evidence is bound by that opinion and decision of the Supreme Court and therefore I will grant the motion of the defendant and direct you to find a verdict in this case in favor of the defendant.

Mr. Johnston: I simply wished to say the reading of the testimony being waived by counsel.

The Court: Yes, the reading of the testimony is waived by the counsel and it is consented that the Court deal with it as if it had all been read to the jury.

Printed book of evidence of previous trial offered in evidence and marked Exhibit P-1.

Whereupon the plaintiff by her counsel objects to the ruling of the Court and gives as reasons therefor that the evidence presented a fairly debatable question, as to the negligence of the plaintiff's intestate and should have been submitted to the jury; and that the direction of a verdict in favor of the defendant was illegal and improper; and prays a bill of exceptions, which is hereby allowed and sealed accordingly.

NELSON Y. DUNGAN,
Judge (Seal).

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

CARRIE A. TILTON, Administratrix,
Plaintiff-Appellant,
vs.
PENNSYLVANIA RAILROAD COMPANY, Impleaded,
Defendant-Appellee.

On Appeal from Supreme Court.

Points for the Plaintiff.

This matter comes before the court on an appeal from a judgment of the Supreme Court upon a directed verdict at the Monmouth Circuit.

This action was brought by the plaintiff as administratrix of her husband who was killed at 3 A. M., July 5th, 1910, in a collision between a train of the defendant and the horses and wagon in his charge, while driving on Springwood avenue, at Asbury Park, where the same crosses the tracks of the New York and Long Branch Railroad Company.

Defendant alleged contributory negligence by Decedent in not seeing the train.

The direction of a verdict for the defendant was solely on the ground of plaintiff's alleged contributory negligence in not seeing the train. See direction on p. 118 of printed case; also lines 5 to 10 of Supreme Court's opinion on p. 24.

The direction of a verdict being made on precisely the same evidence considered by the Supreme Court, and because of the judgment of that court, the reasoning of the Supreme Court must be considered.

THE SUPREME COURT DECIDED—

1st (p. 23, l. 15)—"That a person traveling along Springwood avenue * * * would have an unobstructed view for a considerable distance down the tracks to the south, when fifty or sixty feet from the crossing."

2nd—"To avoid the conclusion that the decedent was guilty of contributory neglect in failing to observe the approaching train, the plaintiff called a number of witnesses who testified that they saw no headlight * * *." Witnesses called by the defendant testified positively to the contrary. Not only do they outnumber the witnesses called by the plaintiff * * * but their testimony is positive * * *. Four of them appear to be entirely unprejudiced."

3rd—"No explanation is found of failure of decedent to observe it, unless (as the defendant claims) he was asleep upon his wagon."

IT IS RESPECTFULLY URGED THAT THE SUPREME COURT ERRED IN ITS REASONING, BECAUSE—

1st—The "unobstructed view" would exist in the *day* time, but not at night, *unless the engine was sufficiently lighted.* This collision occurred in the night.

The question, therefore, to be answered by this court is whether the Supreme Court was justified in saying the great weight of evidence showed that the train was properly lighted, and thereby made visible to such an extent that the decedent, if exercising proper care, would have observed it while in a place of safety.

The court may not say, *as a matter of law,* how far a dark object, on a dark night, is visible.

The view point of the decedent was in the glare of an electric street light, see p. 27, lines 4 to 6, and he was required to look from a lighted spot into the dark-

ness, a very difficult task, although it is easy to look from the darkness into the light.

The probable effect of this situation, under such circumstances, upon the decedent's powers of observation, was peculiarly, if not exclusively, for the jury to consider in determining decedent's alleged contributory negligence, and we most respectfully suggest that upon such a situation, and its attending circumstances, under our constitution and practice, a plaintiff is entitled to the opinion of twelve jurymen, rather than the opinion of any court, no matter how learned it may be, or how greatly we respect it.

2nd—We respectfully urge that there was no justification for the learned Supreme Court practically describing the evidence of plaintiff's witnesses as negative, and characterizing the evidence of the defendant's witnesses as positive. The court says they "*saw* no headlight"; it should have said they *looked* and saw no headlight."

Defendant sought to maintain its charge by two classes of witnesses, viz, employees and non-employees.

And we will consider their evidence in that order:—

FRANK JONES, engineer, p. 72, lines 13 and 14, testifies positively, and at lines 15 to 20, says there was *one* white classification light.

W. H. DUNBAR, fireman, p. 78, lines 15 to 17, says there was a headlight, "because I got off to see it the first thing as soon as we stopped." (It may be observed in passing that it must have been a very brilliant light to have required this effort on his part.) At p. 81, lines from 20 to 40, he speaks of reflectors.

HOWARD M. HORNER, rear brakeman, "did not see front of engine at all," p. 89, line 10.

CHAS. F. WALKER, baggage man, testifies to the same effect, p. 90, lines 23 to 26.

HARRY E. LAIRD, conductor, says he saw the headlight, p. 9, lines 30 to 37.

FRANK MASSESSO, flagman, saw headlight and two little lights, one on each side, p. 112, lines 2 to 30; p. 113, lines 20 to 30.

WHAT NON-EMPLOYEES SAY:

HENRY J. GARRITY saw headlight and two little white lights in front; see p. 65, lines 29 to 33. On p. 68, line 6, "there were three lights" on the engine. On p. 56, lines 30 to 33, and on p. 57, lines 4 to 18, says the train backed down after the collision.

ARTHUR CHANOWETH, on p. 106, saw the headlight after he had walked from the corner of Springwood avenue and Main street, to the track, and then down the track.

BERT MURRAY, p. 116, lines 10 to 25, when distant about 150 feet, says, see p. 61, line 30, "Oh, I saw the light showing through the number, yes," and subsequently says he saw it in front.

CLINTON H. COMPTON, p. 102, line 22, saw the collision.

THOMAS BRODERICK, at bottom of p. 64, noticed lights *on car only*. P. 94 confesses he does not know whether there was a headlight. P. 94, lines 18 to 20.

MATTHEW D. TUCKER, at p. 98, line 10, says he was about a square and a half away. P. 97, line 35, remembers *one red light on car*.

PLAINTIFF'S WITNESSES.

EDWARD FISHER, wholly disinterested, on p. 26, line 13, says, *"I was looking for the headlight."* Beginning with line 36, also top p. 27, describes his position. Also p. 28, line 10 to 36; p. 29, lines 20 to 24.

IRA JOHNSON, disinterested, was with Fisher, p. 39, top; also line 10 to line 13 on p. 40.

CONOVER BROWER, p. 42, line 12, describes his position, p. 43, lines 20 to 24, saw light from fire box. Looked and saw no headlight, p. 43, line 6.

NICHOLAS BROKAW, p. 47, first 23 lines; p. 48, line 18, saw light from fire box.

ALVIN B. CLIVER, simply says, p. 52, lines 25 and 26, that he did not notice any light, and on p. 53, lines 3 and 4, was asked: "Q Did you look?" "A I looked; not purposely to see whether there was a headlight or not."

WALTER PITTINGER, p. 53, lines 33 to 36, says he heard the crash and saw the body fall off the engine, and on p. 54, lines 6 to 9, he did not notice any lights. At line 11, was asked, "Q Did you look directly at it?" "A Yes, sir; it was because I saw him fall from the front of the engine."

DAVID CONOVER, p. 56, top, describes his position, and saw dark object pass.

DANIEL AYRES, p. 58, lines 20 to 30; p. 59, lines 10 to 20, saw no light.

CHARLES WOOD, p. 60, line 10, saw no light; dark train; line 17; line 18; line 23; line 24, "I saw no light at all."

WILLIAM CHAMBERS:—We ask the court's most careful consideration of this witness's evidence, beginning at p. 31 and ending at p. 38. He had his old mother in the wagon; she was nervous, and he swears in the most positive way that he looked continuously for a light and saw none. It is difficult to conceive of evidence more disinterested and more positive.

Summary of all the Evidence as to Headlight.

ON THE PART OF THE DEFENDANT.

Of employees—the engineer, fireman, conductor and flagman, total	4
On non-employees—only Garrity and Murray	2
A total	6

The other witnesses of the defendant, viz., Chanoweth, Compton, Broderick and Tucker, did not testify as to a headlight.

Compton, Broderick and Tucker, when asked as to the presence of lights, simply say they saw lights on the rear car, but not one of them testify to a light *on the engine.* They were all around this train, and is it not strange that they noticed a light on the car, and yet noticed none on the engine?

But what credence would a jury give to the evidence of Masseso, the flagman, and Garrity and Murray, as to proving a headlight?

Masseso says there were "two little lights, one on each side."

Garrity says "two little white lights in front."

These men are both impeached, because the engineer says there was only *one* white classification light.

The conductor, p. 91, line 35, says there was *one* light.

The fireman, p. 77, bottom of page, says there was *one* light located on left side.

Arthur Chanoweth, p. 106, saw *one* light on the left side.

These men were just as positive that there were two little lights, as they were that there was a headlight. If they were wrong, as they were, about the little lights, why wouldn't the jury be justified in saying they were wrong about the headlight?

Garrity says, p. 66, lines 21 to 25, that after the accident, the train backed down "south of Cookman

avenue." This is positively denied by the engineer, top of p. 76, saying he did not back "an inch." By the fireman, on p. 79, lines 26 to 28. By the conductor, p. 93, lines 3 and 4.

But Garrity was no more positive that he saw the headlight, than that the train backed down. Was his evidence not impeached?

The other witness, Murray, makes a preposterous statement, p. 116, line 20, that he saw the headlight shining through the letter cut in the headlight box, and he even says at line 25, that he knew the "number at the time." What sensible man would believe that in a train moving at twenty-five or thirty miles an hour, a wayfarer from the highway would notice the little numbers of the engine on the headlight?

So, the evidence of these three was sadly discredited, and leaving as the only positive witnesses as to a headlight, the engineer, fireman and conductor.

We have been unable, in what has been a careful diagnosis of this evidence, to find the *four* disinterested witnesses referred to by the Supreme Court, as having seen the headlight.

FOR THE PLAINTIFF.

The evidence of Fisher, Johnson, Brower, David Conover and of Chambers, is most positive and disinterested—a total of five positive witnesses, to which is to be added the testimony of Cliver and of Pittinger, of a negative character.

Each looked at the engine, and each characterizes it as a *dark* object. An object cannot be dark if bearing a lighted lamp. It was not necessary for them to say they *looked* for a light, because if the jury believed these witnesses when they said the engine was *dark,* it must also believe they *looked,* for looking was the only way to determine whether it was light or dark. It is not like a witness merely saying he did not hear a bell or whistle, admitting that he was not listening. These witnesses *looked and saw no light.* Upon what

theory, therefore, was the Supreme Court justified in holding, in effect, that if the decedent had looked, he would have seen a light which others testified they could not see when they looked?

Was Decedent Asleep?

The only evidence offered in support of this contention, by the defendant, is that of the witnesses Bellerino, p. 111, and Tucker, p. 99, the former concluding that because he called to decedent and received no response, that he was asleep, while Tucker flatly refuses to say that decedent was asleep, admitting that in his report at the police station he did not so allege. Strange that he spoke to a sleeping man.

On the other hand, Mr. Chambers swears decedent drove by his wagon, opposite the first house west of the railroad, and that *decedent spoke* to Chambers as he did so. See pp. 31 and 32.

Conover Brower says that as decedent's horse came on the track, decedent was on the seat, "sitting right up and driving."

Burden of Proof is on Defendant.

But let it be not forgotten that contributory negligence is asserted by the defendant, and it must prove its assertion by the greater weight of evidence. It is not for the plaintiff to disprove it.

Plaintiff was entitled to go to the Jury if the evidence she offered on this subject raised only a fairly debatable proposition.

Did not the evidence of her five positive and disinterested witnesses raise a fair question as against the evidence of the six witnesses of the defendant, four of whom were employees and two non-employees, Garrity and Murray, of doubtful value?

Respectfully submitted,

JOSEPH S. CONOVER,
Asbury Park, N. J.,

WILBUR A. HEISLEY,
Newark, N. J.,
Counsel for Plaintiff.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CARRIE A. TILTON, Admrx.,
Plaintiff-Appellant,
vs.
PENNSYLVANIA RAILROAD COMPANY (Impleaded)
Defendant.

On Appeal from Supreme Court.

Brief of Defendant.

This suit was brought in the Supreme Court, Monmouth Circuit to recover damages for killing of plaintiff's husband at Springwood Avenue Crossing, City of Asbury Park, in the early morning of July 5th, 1910. Plaintiff recovered a verdict of nine thousand dollars. Upon a Rule to Show Cause why that verdict should not be set aside the rule was made absolute. (See opinion of Supreme Court, page 22 printed case.) Subsequently at the retrial the case was submitted upon the printed record of the previous trial. The reading of the testimony was waived by Counsel who consented that the Court deal with the testimony as if it had all been read to the Jury. (Printed case, page 119). The Court upon motion of the defendant, directed a verdict for the defendant on the ground of contributory negligence on part of decendent. From this judgment the present appeal to this Court has been taken.

The only ground of appeal relied on by appellant is the following:

> No. 19. "The Court decided that on the facts submitted the decedent was clearly negligent in not observing the approach of the train when he was sufficiently far from the tracks to be entirely out of danger, and directed the Jury to find a verdict in favor of the defendant; Whereas the Court should have decided that the question of decedent's negligence was a fairly debatable question, and should have submitted the same to the Jury."

I.

The trial judge properly directed a verdict in favor of defendant on the ground of decedent's negligence in not observing the approach of the train in time to avoid the accident.

Assuming there was evidence to go to the Jury on the question of giving statutory signals, yet if it clearly appears from the evidence as practically uncontradicted that decedent should have been aware of the approaching train in time to avoid the accident, either through hearing it or seeing it, even though the statutory signals were not given, he was guilty of contributory negligence and the direction of a verdict in favor of defendant was proper.

The failure to give the statutory signals will not relieve a person from using his senses.

Righter v. P. R. R. 13 Vroom 180.
Swanson v. C. R. R. of N. J., 34 Vroom 606.
Conklin v. Erie R. R., 34 Vroom 339.
Cantrell v. Erie R. Co., 35 Vr. 277.
Smalley v. C. R. R of N. J., 32 Vr. 277.
D. L. & W. R. Co. v. Hefferan, 28 Vr. 151.

Hanson v. P. R. R., 33 Vr. 391.
VanRiper v. N. Y. &c. R. Co., 42 Vr. 345.

CONTRIBUTORY NEGLIGENCE.

(A) **The noise made by the approaching train was clearly audible** and should have been heard by decedent if he had exercised ordinary care.

The undisputed testimony in the case shows that a person travelling eastwardly along Springwood Avenue and approaching the railroad tracks would have an unobstructed view south of over 1,200 feet when 100 or 150 feet from the crossing, and that this view was extended as one proceeded towards the tracks. (Case 23, line 15). (Case 28, line 18). (Case 36, line 30). (Case 115, lines 1-15). (Case 64, lines 24-40).

The train consisted of a locomotive and tender, four Pullman cars and seven coaches. (Case 79, line 12). It was running 30 miles an hour according to testimony of engineer and fireman. (Case 73, line 15. Case 79, line 25). Forty-five miles per hour according to plaintiff's witnesses. Tilton in a large truck wagon, drawn by two horses walking at a rate of three and a half miles per hour, upon a brick road, approached and entered upon the crossing without stopping his team.

In the case of Smalley v. C. R. R. of N. J., 32 Vroom 278, the Court says:—"There was no express evidence to show how much noise the coal train made, or indeed that it made any noise, nor under the cirsumstances was such evidence necessary. The thing spoke for itself. The Court will not ignore common experience. There is no reason to think that the physical conditions were exceptional, or that the phenomenon of an inaudible coal train was a feature of the situation. The conclusion is inevitable that this moving body was accompanied by the usual roar and rumble.

See also Cantrell v. Erie R. R. Co., 35 Vroom

278: "If when the plaintiff looked toward the north the train was not upon the visible stretch of 1,600 feet or was so far away that an attentive look would not perceive it, then it must have travelled at a very high rate of speed to reach the point of collision when the plaintiff did, and at such speed the rumble of the train would surely have been loud enough to be heard by him, if he had listened, in time for him to keep off the track."

In the present case according to the evidence and from the mouths of plaintiff's witnesses as well as of defendant's, it expressly appears that the noise of the approaching train was plainly audible to persons at a distance more remote from the crossing than the decedent.

Edward Fisher, witness for plaintiff, says, "I heard the train, heard it just for a second. It was running down. I heard a sound and the horse was kind of a little nervous and I had a boy with me and I says 'get to the horse's head'. By the time he got to the horse's head the train was there and I was right along side of the horse then, unloading a crate of berries there, was sitting along the edge of the walk." (Case 25, line 30.)

Fisher was 30 feet north of the crossing. (Case 25, line 21.)

"How far away was it (train) when you heard the noise of it? A. Well, I don't know exactly how far; I couldn't say. I should say about 100 or 200 feet, something like that. The train was running very still. I couldn't hear it very far." (Case 29, line 15).

Fisher also says, "I seen the team just as it was going on and within a few feet from the main track". (Case 30, line 5). He saw that at the same time he heard the noise. (Case 30, line 15). "Q. At the same time you heard the noise you looked, and at the same time you looked you told the boy to stand at the head of the horses, and at the same time you saw and did those things you

also saw Tilton's wagon approaching the crossing is that so? A. Sure that is so." (Case 30, line 21).

Fisher was farther from the approaching train than Tilton. He heard it when it was 100 or 200 feet away, had time to look and see where Tilton's wagon was and tell the boy to stand at the horse's head, before the collision, and when he heard the train coming Tilton was just approaching the crossing.

Chambers, another witness for plaintiff, testified he was behind Tilton on their way along Springwood Avenue and that Tilton did not stop as he approached the crossing. (Case 38, line 28). That Tilton was driving a team of horses drawing a wagon loaded with garden truck. It had a covered top with a hood extending down and slightly over the dash and side curtains, extending to the front opposite the dash. Tilton sat over the dash with his feet resting on the whiffletrees. The road bed was of brick. The wagon wheels were shod with iron. (Case 35, lines 27-40.) (Case 63, line 5).

Chambers says he didn't hear the train, although listening for it. But he also says he didn't see the arc light at Springwood Avenue, and the signal lights. That the lights were plainly evident was undisputed by any other witness.

Tilton was familiar with the crossing. Crossed it many times at night. (Case 45, line 25).

Ira Johnson for the plaintiff, the boy referred to by Fisher, testified:

"Q. What first called your attention to the fact that a train was coming? A. I heard this noise. (Case 39, line 15).

"Q. You say you didn't hear any noise at all until Mr. Fisher told you to go to the horse? A. Yes, sir.

"Q. Do you remember looking down the track after Mr. Fisher told you that? A. Yes, sir. A.

Well, I got there and took hold of her and then looked down the track.

"Q. Where was the train then when you looked? A. **I didn't see it then.**

"Q. So that you stood at the horse's head a little while before the train got to the crossing? A. About a second or so.

"Q. How long? A. About a minute or so.

By Plaintiff's attorney: "Ira, you have answered a question now two ways. You said you heard the noise a second before and then you said a minute before it struck the wagon. Now what do you mean, a second or a minute? A. About a minute, I meant. (Case 41, lines 1-40. Case 42, line 1).

Conover Brower for the plaintiff, says:

"Q. Did you hear the train coming? A. I never heard it till just about the wink of your eye before it struck the wagon.

"Q. When you heard it what did you do? A. I looked right away. (Case 42, line 31).

On cross examination he said when he saw the wagon it was coming on the track.

"Q. Did you see the wagon stop at any point? A. No, sir.

"Q. You saw the horses coming on a walk? A. Yes, sir. The common gait, you know, of a horse.

"Q. You saw them coming on the track? A. Just walking up on the track, yes.

"Q. And they were then walking? A. Yes, sir. They didn't stop, from that time on they walked until the train struck them.

"Q. You hadn't seen them stop prior to that time? A. No, sir. (Case 45, lines 10-20).

It must be clear that Brower heard the train an appreciable time before the collision, because he

says when he heard the train he looked and the horses were "walking up on the track" and "they didn't stop, from that time on they walked until the train struck them." So that the time from the moment he heard the sound of the approaching train and looked, to the moment of collision was more than "the wink of an eye," as witness termed it. It was the time required for the horses walking at an "ordinary gait" to travel from the commencement of the crossing to the north bound track where the collision occurred, a distance of at least twenty-five feet. It is thirty feet from the beginning of the plank crossing on the west to the east rail of the north bound track. (Case 63, line 25).

Nicholas Brokaw, sworn for plaintiff, testified he stood between his own wagon and Fisher's. Fisher's was first, his second. (Case 49, line 30). He was unloading berries from his wagon. When the crash came he stepped out. (Case 50, line 10). He didn't hear the train coming.

Walter Pittenger testified for plaintiff that he was back of Mr. Conover's wagon on the west side of the market (near the tracks) but the horse and wagon of witness was on the east side. (Case 63, lines 10-40). Witness crossed over to help hold Conover's horse which was frightened at the approaching train, (Case 55, line 20), clearly showing the noise of the train was plainly audible. Witness says he didn't hear it until the crash, but in the same breath he says the horse was frightened at the train and witness crossed over to hold it. He also says he didn't hear the noise of the train coming to a stand still, although he was then only eight or ten feet away from it, but he generously concedes it might have made a noise but he didn't particularly notice it. (Case 55, line 1).

David Conover for the plaintiff says he didn't hear any train before the crash, but that he wasn't listening for any.

"Q. Were you listening for anything, for noises or trains? A. No, sir; I wasn't listening for any." (Case 56, line 39).

Daniel Ayres testified for plaintiff that the first he heard was the crash.

"Q. But before the crash you were not paying any attention? A. No, sir. I was not paying any attention." (Case 58, line 30).

Charles Wood for plaintiff was 65 feet from the crossing. Didn't see the accident. Had his back to the crossing fixing his wagon. Heard the crash.

"Q. As the train came up and went by I want to ask you whether that was a quiet train or a train that made a noise? A. It surely must have been a quiet train for I didn't hear it." (Case 61, line 25).

He was 65 feet east of the crossing, between him and the approaching train were solid obstructions, houses and board fences.

For the defendant, Garrity, a disinterested witness, was walking down the track. Heard the train and saw it, (Case 67, line 10), and got off the track in consequence.

Frank Jones, the engineer of the train, says in answer to the question, "Q. Shutting off the steam produces a quiet train, doesn't it. A. No, the rumble of the train is just the same." (Case 76, line 25) .

William H. Dunbar, the fireman: "Q. The engine was running quiet that night, was it not, through that neighborhood? A. No more so than any other train shut off. * * * * A. There is lots of noise on any engine. I couldn't say how it is outside." (Case 83, line 1).

Matthew D. Tucker, the police officer, a block away from Springwood Avenue crossing heard the rumbling of the train. (Case 99, line 35). Heard it about the same time he heard the whistle. Sound came from down the track. (Case 99, line 32. Case 100, line 1.) Saw Tilton in his wagon ap-

parently asleep. (Case 98, line 10). Ballerino says Tilton was asleep. (Case 110, line 21).

Considering the evidence it clearly appears that plaintiff was guilty of contributory negligence, because he could have heard the approaching train if he had been exercising ordinary care, even though the train was unlighted and no statutory signals were given. The noise was plainly evident to many of the witnesses including those of plaintiff. Tilton but a moment before the accident was seen asleep in his wagon.

The road bed of Springwood Avenue was of brick. Tilton was driving two horses, iron shod, drawing a market wagon, the largest of its kind, with metal tires, steel or iron, loaded with barrels and garden truck, a tin lantern fastened opposite his head. There were side curtains on the wagon extending beyond the seat upon which Tilton was sitting so that to see to the side he would have to move his body or head forward. The arc lights at Springwood Avenue Crossing threw its rays down the track one hundred or one hundred and fifty feet, so testified Charles Woods. Along the tracks were the two semaphore lights and low switch lights. The wagon made some noise, and the horses made a noise. Tilton didn't stop his wagon before endeavoring to cross the tracks. His horses moving three and a half to four miles an hour. Fisher, plaintiff's witness, heard the sound of the train a second or more before the crash, even though busy unloading his wagon and only "kind of looking for a train." He heard it when it was one hundred or two hundred feet from the crossing and at the same time saw Tilton coming on the crossing. Fisher had time to tell his boy to stand at his horse's head and to observe Tilton approaching before the crash came. Conover Brower, a witness for plaintiff, heard it a second before the crash. The boy heard the sound about a minute before the crash and stood at the

horse's head that length of time before the accident. Walter Pittinger for plaintiff was on the opposite side of the market from the railroad track one hundred feet away and went over to the track to hold Conover's horse which was frightened at the approaching train, and the accident occurred after he had traversed that one hundred feet. Daniel Ayres wasn't listening for a train. Wasn't paying any attention. Nicholas Brokaw was busy unloading his wagon, as were all plaintiff's witnesses, who were at the market. Harry Bishop, the night watchman, was not listening for the train. He was two blocks from the accident. Alvin B. Cliver, the same. Frank Jones the engineer of the train stated the rumble of the train was just the same with the steam shut off as on. Clinton H. Compton heard the rumble of the approaching train, while in his restaurant one hundred feet from the crossing. Matthew D. Tucker, police officer, heard the rumble of train a block and a half away from the crossing.

When Fisher first heard the sound of the train it was one hundred or two hundred feet away, he says, and Tilton just approaching the crossing. Tilton still had twenty-five feet to travel before reaching the north bound track. The boy heard it a minute before the crash. If Fisher and the boy and others heard the train why couldn't Tilton? Tilton was nearer the train than were the witnesses. Tilton still had twenty-five feet to travel before reaching the north bound track, when plaintiff's witness Conover Brower heard the train coming. Tilton was traveling four and four-tenths feet per second, at the rate of three miles per hour, therefore six seconds distant from the north bound track. The train moving at forty-five miles per hour or sixty-six feet per second, was 396 feet distant at the time. If going thirty miles an hour or forty-four feet a second it was 264 feet distant. Tilton could have heard the

train if he had been alert. But he had been seen by two persons, Tucker and Ballerino, only a moment previous, and some three hundred feet from the crossing in a sleepy attitude, his head in his hand, apparently asleep, did not answer when spoken to. There were no noises around the market place to interfere with Tilton's hearing. The only noise was that made by his wagon and horses and the train.

The train was rushing northward at a speed varying according to the testimony, between thirty and forty-five miles an hour, consisting of eleven coaches, four Pullmans and seven ordinary passenger cars. It must have made considerable noise. There is no such phenomenon as a quiet train. All trains are noisy and easily heard. It is contrary to human experience to assert that an alert person approaching a railroad crossing in the dead quietness of night, no obstructions to interfere with free hearing, cannot hear a rapidly approaching train of eleven cars in time to avoid an accident. It was Tilton's duty, knowing as he did that a railroad crossing was located at the point in question, to look and listen, to be on the alert, to use his senses. If he had made any effort at all to listen he could have heard the train approaching. But he was asleep.

For the reasons above given the direction of a verdict was proper on the ground of decedent's failure to hear the train while in a position of safety.

(B.) The headlight of the engine and other lights were lighted and clearly visible and should have been observed by decedent.

The plaintiff, in view of the undisputed fact that decedent as he approached the crossing had an unobstructed view for a considerable distance south, the direction from which the train was approaching, and realizing that if by looking or listening the accident could have been avoided, and

that decedent's failure so to do would constitute contributory negligence and defeat the action, even though no statutory signals were given by the approaching train, was compelled to assume the burden of proving such facts as would relieve decedent from the charge of contributory negligence, although ordinarily the defendant would have had that burden. Plaintiff, therefore, through necessity called a number of witnesses who testified they saw no headlight burning upon the engine at the time of the accident. The testimony was of a negative character and unconvincing as the following review of the testimony clearly shows.

Fisher says he didn't notice any headlight or other lights on the train although looking for them. (Case 26, line 12). An arc light over Springwood Avenue Crossing burning at the time but thirty feet distant from Fisher and between him and the approaching train, is a sufficient explanation for his failure to notice the headlight.

Chambers said in answer to the question "Did that engine have any headlight? A. Not that I seen, no, sir." (Case 34, line 5).

Chambers' testimony cannot be relied on for he said on direct examination as to the switch and semaphore lights south of Springwood Avenue, they were there but didn't light up the tracks any. (Case 35, line 10). On cross examination he stated he didn't look to see whether they were lighted or not. "I didn't see that. That was not concerning me to see whether the railroad lit up or not." (Case 37, line 15). As to arc light at Springwood Avenue Crossing, concerning which there was no dispute, he denied absolutely the presence of such light. (Case 37, line 20). So Chambers' recollection of lights is not dependable.

Ira Johnson, the boy, stated as to whether the headlight was lighted, "Not as I saw it, it was-

n't." (Case 40, line 12). This witness held Fisher's horse at Fisher's command when he heard the train coming and like Fisher had the arc light between him and the train.

Conover Brower stood along side of Fisher. His view was obstructed by Fisher's wagon. "Q. Was there any headlight on it? A. I never seen none. I looked and I never seen no headlight and no light of any kind." (Case 43, line 5).

Nicholas Brokaw, asked if the train had a headlight said, "I didn't see any, no sir." He also said he was busily engaged in unloading his wagon. "When the crash came I stepped out." (Case 50, line 9). His view was obscured by Fisher's wagon. "At the time it struck I couldn't see it just then for the corner of his wagon." Case 50, line 26).

Harry Bishop—"Q. Were there any lights in the train? A. Not that I saw. Q. Did you see the engine? A. No, sir." (Case 51, line 38).

"Q. When you saw that train did you see any lights anywhere about it, on the train itself? A. No, sir, not in that position I was in, I didn't. (Case 52, line 1).

Alvin B. Cliver says he didn't see any light. As to the pilot lights he says the wreckage might have obscured them and he would not say they were not there. As to the headlight he says he didn't look purposely to see if there was one, that his attention wasn't specifically called to it. (Case 53, line 1).

Walter Pittinger testified he didn't see the accident. "Q. Did the engine have any headlights on it or any lights that you could see? A. Not that I noticed at all. (Case 54, line 9). Didn't go to the head of the train, was alongside of it. (Case 54, line 15).

David Conover says he saw no light. On cross examination he stated—"Q. Not hearing anything uutil you heard the crash, you didn't look

down the track before the crash did you? A. I did not. Q. And you are not able then to say whether or not there was a headlight on the locomotive before the crash, are you? A. No, sir." (Case 57, line 10).

Daniel Ayres testified when he heard the crash he looked up and saw the train go by. Saw the engine. "Didn't see any light. Q. But before the crash you were not paying any attention? A. No, sir. I was not paying any attention. Q. You didn't see the front of the engine, you just saw the side of the engine? A. The side, yes, sir. (Case 59, lines 10-20).

Charles Wood testified he was 65 feet east of the crossing with his back to it working on his wagon. "When I turned around I seen the train going on. I saw no lights at all." (Case 60, line 10-15).

"Q. You don't know whether there was any light on the train before the crash or not, do you? A. I couldn't say." (Case 61, line 40).

It will be observed that the testimony of all the plaintiff's witnesses as to lights is negative. Some weren't looking, others were not in a position where they could see. All were busy unloading their wagons. There is an absence of certainty and positiveness.

On the part of defendant we have the witness Garrity who was walking down the track. He saw the locomotive, its headlight and pilot lights and stepped off the track to avoid it. (Case 65, line 30). He first heard the whistle, looked down the track and saw the headlight. (Case 67, line 5). He says, "I got off (the track) because I heard the whistle and saw the headlight. (Case 67, line 40). This witness as the result of what he saw did something.

Frank Jones, the engineer, lighted the headlight himself, was part of his duty. Saw it lighted. Saw that it didn't go out. "Q. Was your headlight lighted at the time of the accident? A. Yes,

sir. Q. Did you have any other lights on the engine than the headlight? A. Yes, sir, on the left side front of the engine. A. A classification light which denotes we are an extra train. A. A bull's eye lantern, that is, glass in it, at a distance enlarges the light, it can be plainly seen from the front of the engine. (Case 72, lines 1-40).

After the accident "I got off and went to the front of the engine and looked at it. Q. Was this headlight lighted? A. Yes, sir, also the white light." (Case 75, lines 25-40).

William H. Dunbar, the fireman, says the engineer lighted the headlight and classification. That they were still lighted after the accident. "Q. How do you know it was? A. Because I got off to see it the first thing as soon as we stopped." (Case 78, line 15).

"Q. How far away could the headlight of your locomotive be seen by a person in front? A. Well the headlight we had on the engine that night I think could be seen at least a mile away.

"Q. Do you know? A. Yes, I know it could. (Case 85, lines 25-40).

Howard M. Horner, brakeman, testified it was part of his duty to light and see that the markers on the rear end of the last car were lighted and kept lighted. That they were lighted at the time of the accident and there were two lights lighted in the car. (Case 86, lines 20-40. The lights could be seen by one standing at the side of the track as the train passed. (Case 89, line 12).

Charles F. Walker, baggage master, testified there were two lights on rear end of train and two inside rear car. (Case 90, line 10).

Harry E. Laird, conductor, testified he saw the headlight lighted. Went to the front of the engine immediately after the accident. Also saw the classification light. Four Pullman cars had two lights in each car, and the switch car had two lights in it. Also saw the lights on rear of last

car. The lights in Pullman cars were burning bright, so the conductor could see to read his orders. One could see the lights from the outside at quite a distance. (Case 91, line 35. Case 93, lines 10-30).

Thomas Broderick, police officer, wasn't at front of train, but saw the lights at rear end. (Case 94).

Frank H. Roland, police officer, on his beat saw the headlight. (Case 96, line 1).

Matthew Tucker, police officer, on duty, saw witness asleep a moment before the collision and so stated in his report to headquarters of the accident. Saw the lights on rear of train. Didn't see the front of the train. (Case 97, line 35. Case 98, line 15).

Arthur Chanoweth three hundred feet from crossing at time of accident. Saw the headlight on locomotive. (Case 106, line 20). Saw classification light and lights in the cars. (Case 106, lines 20-35).

Michael Ballerino saw Tilton asleep as he passed witness' store a moment before the accident. (Case 110, line 20).

Frank Massesso, flagman for New York & Long Branch Railroad Company at Corlies Avenue Crossing, one block south of Springwood Avenue flagged the crossing as the train approached. Saw the headlight and classification light. (Case 112, lines 10-30).

Bert Murray, hackman, heard the collision, about 150 feet away. Looked up, saw the headlight. Saw the two lights on rear of train. Caught Tilton's horses as they were running away. (Case 115, line 40. Case 117, line 10).

Eight witnesses testify absolutely, without any qualification, that they saw the headlight. Three of them, the engineer, fireman and conductor, respectively, whose duty it was to see that the train was properly lighted; two who did something as

the result of seeing the headlight, Massesso who flagged the crossing and Garrity who stepped off the track to avoid the train; Frank Roland, a police officer, and Chanoweth and Murray. Garrity, Roland, Chanoweth and Murray entirely disinterested and unprejudiced. In addition, the witnesses Horner and Walker and Laird saw the train lighted inside; Tucker, Chanoweth, Murray, Laird, Walker and Horner saw the rear lights. This evidence was positive, substantial and conclusive, and rendered null the already negative evidence on the part of the plaintiff. The plaintiff failed absolutely to establish the fact necessary to relieve decedent from the charge of contributory negligence, namely, that he could not see the approaching train, and as already stated in this case that burden was on the plaintiff. The contrary was conclusively proved by defendant's evidence.

The evidence on the question of lights at the close of the case was not open to debate; fair minded men could not differ. The proof on the part of defendant was overpowering. It left the fact that there was a headlight substantially undisputed. The evidence so greatly preponderated as to make it the duty of the trial court to direct a verdict. Nothing remained but a question of law.

See case of Baldwin v. Shannon, 14 Vroom 602. "The power of a court to order a non-suit or direct a verdict does not depend upon the absence of all testimony in opposition to the case in favor of which the direction is given. The view that a mere scintilla of evidence was sufficient to carry a case to the Jury is completely exploded in the English courts. * * * A course of recent decisions * * * has established a more reasonable rule, namely, that in every case, before the evidence is left to the Jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon

which a Jury can properly proceed to find a verdict for the party producing it, upon whom the proof is imposed. The rule laid down in these cases is adopted by the Supreme Court of the United States in the following cases: Improvement Co. v. Munson, 14 Wall. 442; Pleasants v. Font, 22 Wall. 116. And in the Courts of New York and Maryland in the following cases: Dego v. N. Y. Central R. R. Co., 34 N. Y. 9, and Davis v. Davis, T. Harr & J. 36. This rule is the equivalent as I undertsand it of the statement in the opinion in the case of Hartman v. Alden's Exrs., 5 Vroom 518, that the test is, whether the verdict, if rendered otherwise than as ordered, would have been set aside, or the more specific and probably more accurate statement in the case of Denny v. Williams, 5 Allen, that if the case is such that the court would set aside any number of verdicts then the Court should instruct."

The Supreme Court when this case was before it, set aside the verdict, because by a great preponderance of the evidence it appeared that there was a headlight and therefore decedent in failing to observe the approaching train was guilty of contributory negligence. We have not overlooked the fact that the question before that Court was whether the verdict should be set aside as contrary to the evidence and that the question before this Court is whether the evidence was such as to constitute a jury question. The reviewing Court on a rule to show cause may set aside a verdict because contrary to the great weight of the evidence and the trial Court upon a retrial even upon the identical evidence as before, is not necessarily bound by the decision of the former Court to direct a verdict. But when the preponderance of the evidence is so very great as to completely strip the case of any substantial contradiction, then the trial Court is bound to direct a verdict. Such was the situation in the present case. There was no

substantial conflict of evidence. As the Supreme Court says in its opinion, "That being so, the verdict cannot be supported, for, on the facts submitted, the decedent was clearly negligent in not observing the approaching train when he was sufficiently far from the tracks to be entirely out of danger.

It is not the law that a trial court is justified in directing a verdict only where there is no conflicting material evidence. If there is no substantial contradiction of facts or inferences, a direction may be justifiable. It is our contention that at the close of the entire case the evidence was such as to present no substantial conflict as to the presence of a headlight and therefore only a court question remained, namely, the contributory negligence of decedent who if the headlight was lighted must have observed the approaching train if he used his senses at all.

In the cases of Eissing v. Erie R. Co., 44 Vroom 343; Holmes v. P. R. R. Co., 45 Id. 469; and Blauvelt v. Erie R. Co., 79 Atl. Rep. 1048; this Court sustained a direction of verdict for defendant on the ground that the positive evidence of statutory signals entirely destroyed the probative force of negative evidence for the plaintiff, **from which if uncontradicted the absence of such signals might have been inferred.**

The rule that even a scintilla of evidence would carry a case to the jury has long been abandoned.

When this case was before the Supreme Court on defendant's rule to show cause, the rule was made absolute. Upon the retrial the case was submitted on the same evidence taken at the first trial. The printed record used before the Supreme Court was offered in evidence, and it was stipulated that the same should be accepted with the same force and effect as if the witnesses were personally present, sworn and had testified. The evidence now before this Court is identical with

that before the Supreme Court on the rule to show cause, except such immaterial evidence omitted from the present record by consent as having no bearing on the qestion presented by this appeal. If the evidence had been presented to the Jury and a verdict found for the plaintiff, we submit the Supreme Court would have again set it aside, the evidence being identical; and such disposition of the case would have been practically mandatory upon that Court, notwithstanding the rule laid down in case of Brown vs. Paterson Paper Co., 40 Vroom 474. "The verdict upon a second trial should not be set aside because against the weight of evidence, unless the court is satisfied from the evidence in the cause that it must have been the result of (1) the disregarding of the force of the whole range of the unimpeached testimony, or (2) the palpable failure to give proper force to the unimpeached evidence in the cause offered by the party against whom the verdict is found, or (3) the giving to the testimony of the prevailing party a force to which, under the law and the facts, it was not entitled, or (4) the verdict must have been controlled by prejudice, partiality or passion, and not based upon the weighing of the conflicting testimony in the cause."

The verdict assumed would have clearly indicated a total disregard of the evidence.

In the case of Dickinson v. Erie R. Co., 90 Atl. Rep. 305, the Court says: "But by the rule laid down in Brown v. Paterson Paper Co. * * * a second concurring verdict upon the same state of facts or slightly varying evidence would cause the Court to hesitate before granting a third trial. The circuit judge was not however confronted with the proposition of granting a rule to show cause why a verdict should not be set aside and a new trial granted. What he was asked to do and what he did do was to take away from the jury a jury question and that was error."

"A trial judge is only justified in granting a nonsuit or directing a verdict upon a court question arising from the admitted or uncontroverted facts of a case. The weight of conflicting testimony should always be submitted to a jury for their consideration and determination."

We contend the court would not hesitate to set aside a second concurring verdict or any number, if it plainly appeared as ruled in Brown v. Paterson, Id., and as we submit appears in the present case, that the jury had utterly disregarded the force of the evidence offered by the party against whom the verdict was found, whether or not that evidence was contradicted.

But we submit the cases of Brown v. Paterson Paper Co., Supra, and Dickinson v. Erie R. Co., Supra, are to be distinguished from the present case.

In view of the fact that the case was submitted on the previous record without oral testimony, there is eliminated any consideration of the credibility of witnesses to the extent of any impressions the jury might have received from the demeanor of the witnesses and their general conduct, while testifying. When the motion to direct a verdict for defendant was made, the identical record passed upon by the Supreme Court was before the trial Court. Nothing else. If that record had been submitted to the jury its verdict would have been based not on oral testimony with the opportunity of judging of the credibility of the witnesses, but on the mere printed words of the record, and if the jury under such circumstances had found a verdict for the plaintiff, a verdict based on the identical record passed upon by the Supreme Court, but minus the force of oral testimony which the previous jury had the advantage of, and in spite of which the Supreme Court set aside its verdict, surely the Supreme Court would

have again set it aside, although a concurring verdict.

That was the situation confronting the trial Court. The conclusion that under such circumstances the Supreme Court would set aside any number of verdicts for the plaintiff was unavoidable, and a direction for the defendant was the inevitable and logical conclusion. It is not for plaintiff's counsel to complain. By submitting the case on the printed record he is responsible for the present situation. And so we submit that the peculiar circumstances of this case take it out of the rule declared in Dickinson v. Erie R. Co., Supra, if the rule therein enunciated has any application to the present case.

It is respectfuly submitted that the ruling of the trial court in directing a verdict for defendant was justified, the contributory negligence of decedent being so clearly indisputable as to constitute a court question.

JOHN S. APPLEGATE & SON,
Attorneys for Defendant.