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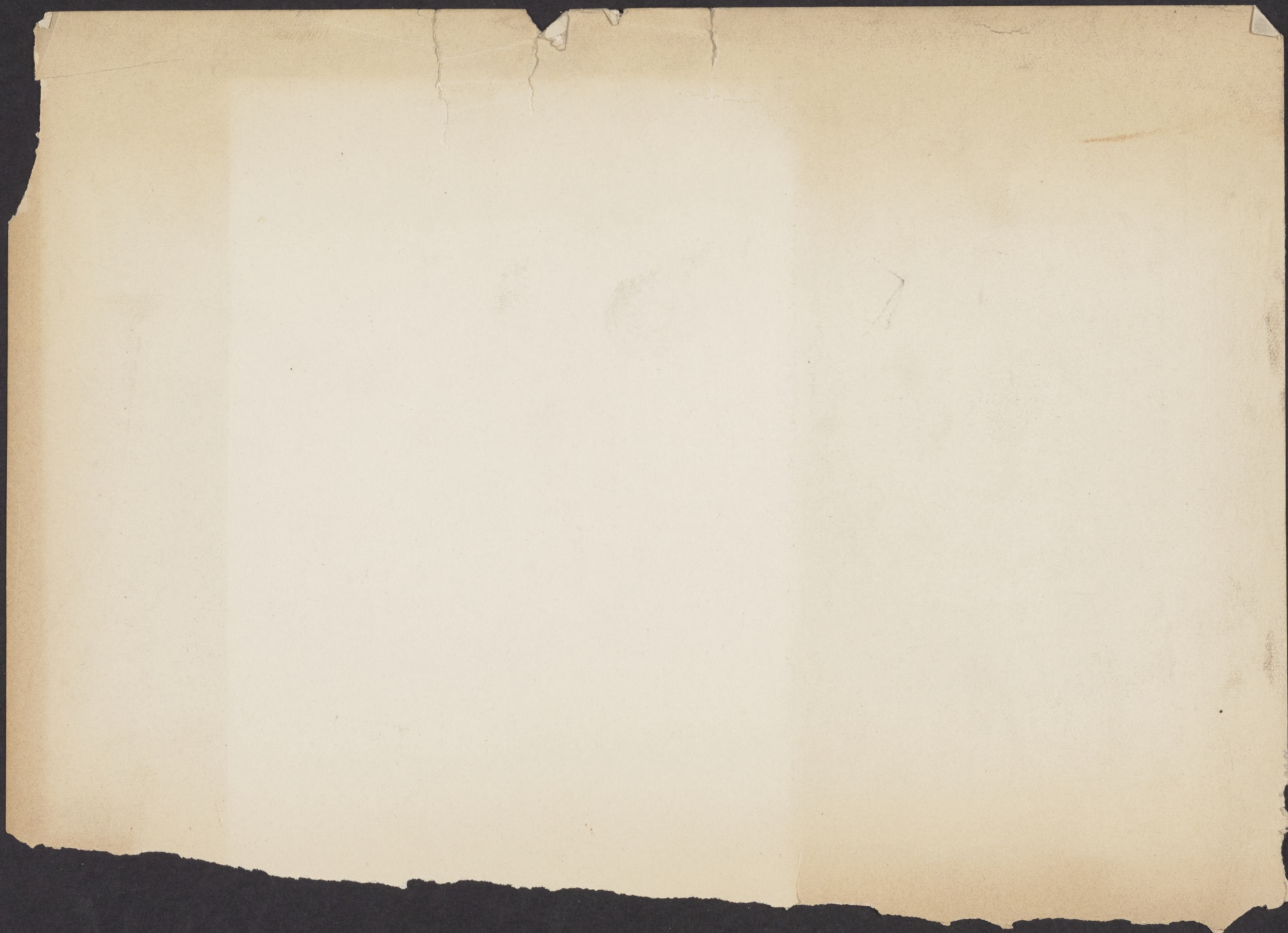
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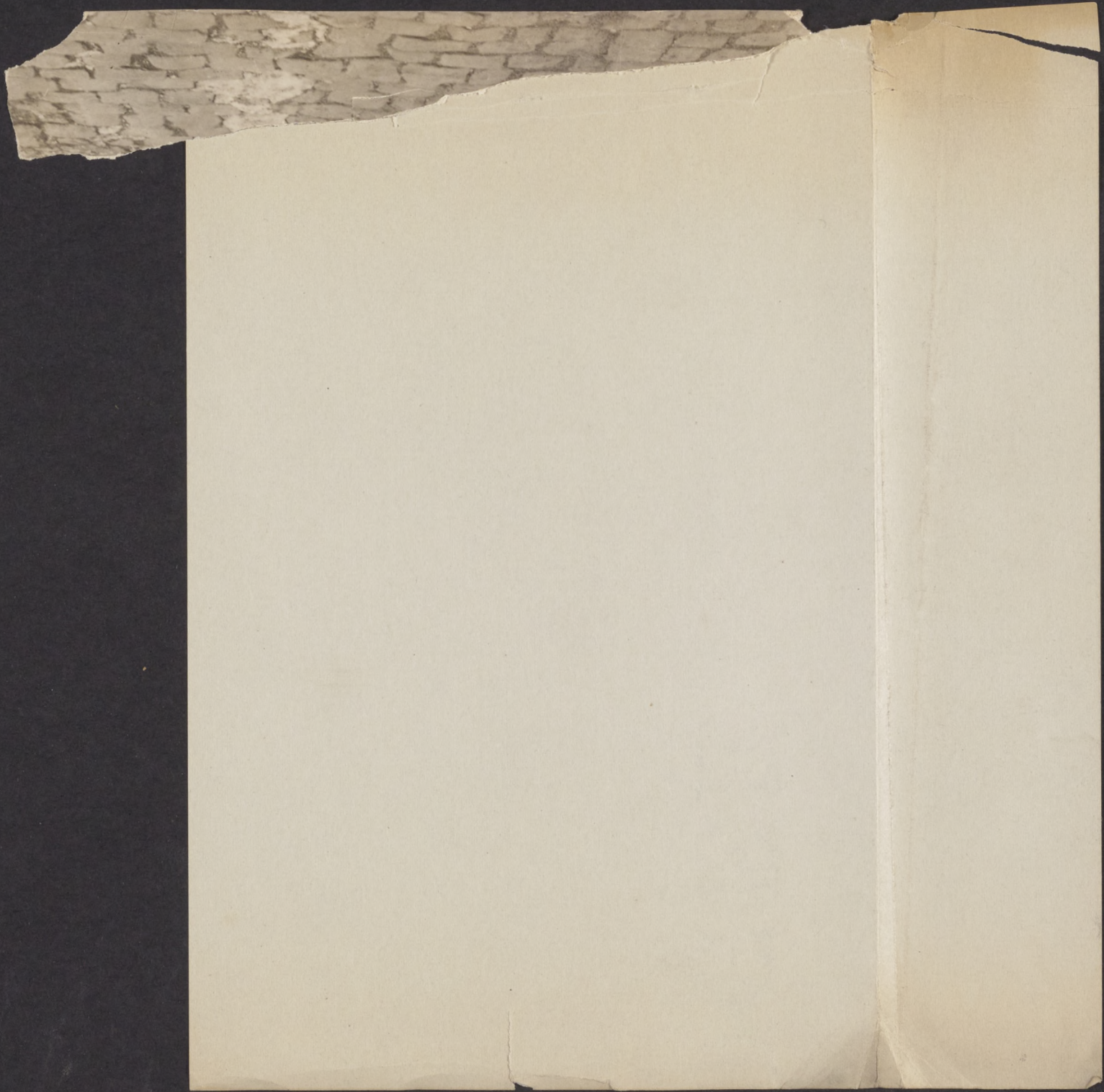
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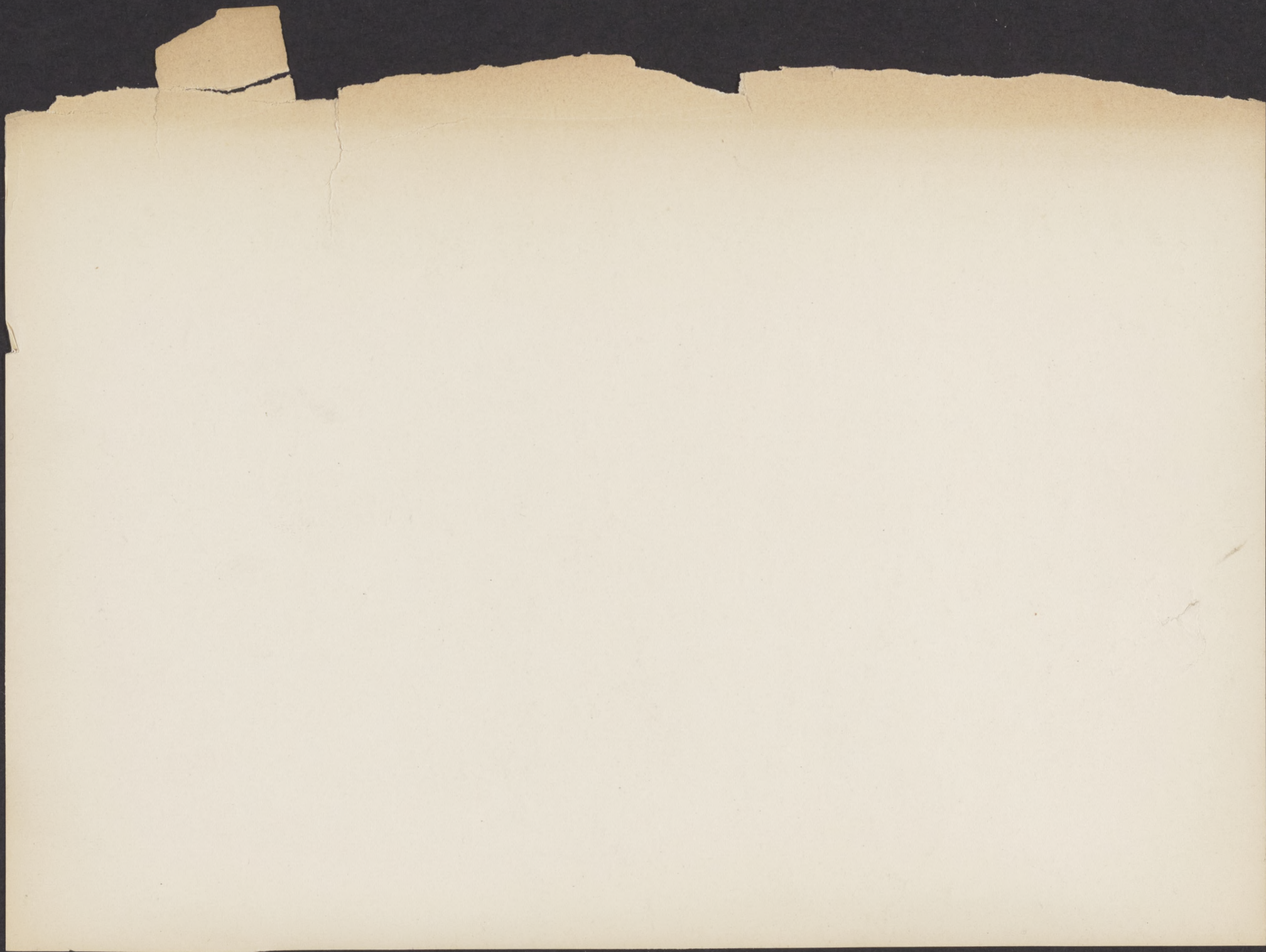


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**Notice of Appeal and Grounds.**

(Filed October 28, 1924.)

## NEW JERSEY SUPREME COURT.

MARGARET M. COWELL, Administra-  
trix *ad prosequendum* of WIL-  
LIAM COWELL, deceased,  
Plaintiff-Respondent,

v.

THE PENNSYLVANIA RAILROAD  
COMPANY,  
Defendant-Appellant.

On Appeal from  
Supreme Court.  
Notice of Appeal,  
Etc.

10

To

Alexander Simpson, Esquire,  
Attorney for Plaintiff-Respondent.

20

TAKE NOTICE, that the above named defend-  
ant-appellant appeals to the New Jersey Court of  
Errors and Appeals from the whole of the judg-  
ment entered in this cause, on the following  
ground:

Said New Jersey Supreme Court erred in giving  
judgment for the plaintiff-respondent, MARGARET  
M. COWELL, Administratrix *ad prosequendum* of  
WILLIAM COWELL, deceased, instead of for the  
defendant-appellant, THE PENNSYLVANIA RAIL-  
ROAD COMPANY.

30

WALL, HAIGHT, CAREY & HARTPENCE,  
Attorneys for Defendant-Appellant.

Service of a copy of the within Notice  
of Appeal, Etc., is hereby acknowl-  
edged this 24th day of October, 1924.

ALEXANDER SIMPSON

40

**Judgment.**

(Entered October 8, 1924.)

## NEW JERSEY SUPREME COURT.

MARGARET COWELL, Admx., etc., of  
WILLIAM COWELL, deceased,  
Appellee,

10

*v.*

THE PENNSYLVANIA RAILROAD  
COMPANY,  
Appellant.

On Appeal.

Rule of Affirm-  
ance and Remit-  
titur.

This cause coming on to be heard before the  
Court at the May Term, 1924, and the Court having  
considered the same and being of the opinion that  
the judgment of the Hudson Circuit Court removed  
by appeal in the above cause should be affirmed.

20

It is ORDERED that the judgment of the Hudson  
Circuit Court removed by appeal in this cause be  
and the same is hereby affirmed with costs, and the  
record remitted to the court below to be proceeded  
with according to law and the practice of said  
court.

Entered October 8, 1924.

30

On motion of

ALEXANDER SIMPSON,  
Attorney of Appellee.

40

**Opinion of Supreme Court.**

(Filed October 7, 1924.)

NEW JERSEY SUPREME COURT,

MAY TERM, 1924.

MARGARET M. COWELL, Administra-  
trix of WILLIAM COWELL, de-  
ceased,

Plaintiff-Appellee,

*v.*

THE PENNSYLVANIA RAILROAD  
COMPANY,  
Defendant-Appellant.

10

Submitted June 5, 1924; Decided September 29,  
1924.

20

On appeal from Hudson County Circuit Court.

Before Justices BLACK and CAMPBELL.

For appellant, WALL, HAIGHT, CAREY and HART-  
PENCE.

For Appellee, ALEXANDER SIMPSON.

*Per Curiam:*

Plaintiff's intestate was the driver of a truck en-  
gaged in delivering timber at the Waldo Avenue  
yard of the appellant at Jersey City and while so  
engaged on February 6, 1923, as he was in the act  
of driving his truck out of the yard after a delivery  
to the defendant company he was killed. His  
truck was struck by an engine running reversed  
at a speed of two or three miles an hour. The  
truck was overturned and pushed along several  
feet.

30

Plaintiff has a verdict and judgment thereon for  
\$9,250 and defendant appeals.

40

The grounds of appeal assigned and urged are:

1. Refusal of Trial Court to grant a nonsuit.
2. Refusal of the Trial Court to direct a verdict.

10 At the trial the grounds urged for a direction of verdict were the same as those urged for a nonsuit. The reasons urged at the trial for a nonsuit were "that there is no negligence shown in the case attributable to the defendant upon which liability may be predicated as charged in the complaint, and on the further ground that from the evidence now in it must be perfectly apparent that the decedent's contributory negligence was the producing cause of the injury and death of the deceased." That decedent was in a portion of the yard to which his invitation did not require him to be; that he exceeded the bounds and limits of his invitation is suggested in the brief of the appellant but this was nowhere urged at the trial and cannot be urged here.

20 We think it would clearly have been error to nonsuit or direct a verdict upon either of the grounds urged. There was evidence from which it could have been found that due care upon the part of the engine driver would have caused him to observe the presence of decedent's truck upon the crossing in time to bring his slowly moving engine to a standstill before reaching the truck. Again, there was evidence of a practice or custom of giving a signal of moving locomotives by bell or whistle and from the fact that decedent had been in the yard on many occasions during a period of eight months, the jury could have found that he had knowledge of such custom and practice, and under such circumstances he would be justified in relying upon the giving of such signals.

*Coyne v. Pennsylvania R. R. Co.*, 87 N. J. L., 257;

*McNally v. Pennsylvania R. R. Co.*, 88 N. J. L., 277.

It could, from the evidence, have been found that such signals were not given.

Again, the engine was backing and scarcely moving, a fact from which the jury might be justified in finding that decedent did not know it was in motion.

10

Under all the facts and circumstances it was not error to refuse to nonsuit or direct a verdict.

3. The Court permitted the following question of the witness McLevy to be answered over objection:

Q. What was the custom you became aware of in reference to passing locomotives over this crossing?

20

The witness had been in the habit of going into this yard every day for six or seven months before the happening in question, therefore he was qualified and competent to testify. The question was directed to a subject relevant and material, that is, to a practice or custom in the yard.

There was no error in overruling the objection.

4. The overruling of the objection to the question to witness Watson as being immaterial and irrelevant:

30

Q. Did you swear that it was customary to keep on ringing the bell until you got completely over the crossing?

The evident purpose was to get from the witness an admission that he had so testified at a previous trial or if he denied it, then to lay a foundation to contradict him by proving that he did so previously testify. Of course, the proper method was to

40

place before the witness the question and answer as it appeared of record from the minutes of the previous trial or hearing. This, however, was not the ground of objection stated.

The answer, however, was entirely harmless:

“A. I do not remember that.”

10 There was no effort later to prove that the witness had so testified. There was no error therein.

5. The overruling of the objection to the question to the witness, Watson, as immaterial and irrelevant:

“Q. Do you remember this being asked: ‘Q. What was the customary thing you did going over this crossing to attract the people using it?’ And did you answer ‘A. I stated before to ring the bell and blow the whistle?’”

20 The answer thereto was: “I must have, if it is there.”

We are unable to discover any error in this ruling. The purpose of the question was to secure an admission from the witness that he had so testified upon a previous trial, hearing or examination and the method of doing so was proper; by presenting to the witness the question and answer, the admission as to which was sought.

30 6. The remaining reasons are numbers 7, 8, 10 and 11 of the grounds of appeal attacking as erroneous certain portions of the charge of the Court below and number 12 of the grounds of appeal which charges error generally.

We find no error in the charge, as attacked. It correctly charges the principles and rules applicable to the case.

40 Finding no error the judgment below is affirmed, with costs.

**Notice of Appeal.**

(Filed April 19, 1924.)

**Hudson County Circuit Court**

MARGARET M. COWELL, Adminis-  
tratrix *ad prosequendum* of the  
Estate of WILLIAM COWELL,  
deceased,

Plaintiff-Appellee,

*v.*

THE PENNSYLVANIA RAILROAD COM-  
PANY, Impleaded, etc.,  
Defendant-Appellant.

Action at  
Law.

10

20

To

Alexander Simpson, Esq.,  
Attorney for Plaintiff.

TAKE NOTICE that the defendant appeals to  
the Supreme Court of the State of New Jersey from  
the whole of the judgment entered in this cause.

Dated April 4th, 1924.

30

WALL, HAIGHT, CAREY & HARTPENCE,  
Attorneys of Appellant.

Service acknowledged April 4, 1924.

40

**Grounds of Appeal.**

(Filed May 2, 1924.)

## NEW JERSEY SUPREME COURT.

10

MARGARET COWELL, Admrx., etc.,  
of WILLIAM COWELL, deceased,  
Plaintiff-Appellee,

*v.*

THE PENNSYLVANIA RAILROAD  
COMPANY,  
Defendant-Appellant.

Action at Law On  
Appeal from  
Hudson Circuit  
Court.

20

Defendant-appellant, The Pennsylvania Railroad Company, by Wall, Haight, Carey & Hartpence, its attorneys, set down the following Grounds of Appeal from the judgment of the Hudson County Circuit Court, in above-stated cause:

1. The Court below refused to grant a non-suit at the close of plaintiff's case.

2. The Court below refused to direct a verdict in favor of defendant at the close of the whole case.

30

The Court below permitted the following questions, over the objection of the defendant:

3. of the witness, Charles McLevy:

"Q. What was the custom you became aware of in reference to passing locomotives over this crossing?"

4. of the witness, Benjamin F. Watson:

"Q. And, on this engine, was there any-

40

*Grounds of Appeal.*

one sitting on the rear of the tender as you backed her?"

5. of the witness, Benjamin F. Watson:

"Q. Didn't you swear there that it was customary to keep on ringing the bell until you got completely over the crossing?" 10

6. of the witness, Benjamin F. Watson:

"Q. Do you remember this being asked: 'Q. What was the customary thing you did going over this crossing to attract the people using it?' And did you answer: 'A. I stated before, to ring the bell and blow the whistle.'"

The Court below charged the jury as follows:

7. "Plaintiff claims that there was a custom existing in this yard that a whistle or a bell would be blown by any engine using this crossing, and the plaintiff then says that on this day in question, which was a clear day, that no such signal was given, but that the truck which the deceased was driving was struck as he was going over this crossing by an engine backing up towards the crossing with the tender preceding the engine. 20

"Also, as I understand it, the defendant denies that there was any custom in the yard to blow a whistle or ring a bell." 30

8. "Now, in arriving at whether or not this reasonable care was exercised on this occasion, you must take into consideration whether or not there was a custom to ring the bell and blow the whistle. Because, if there was such a custom and the deceased 40

*Grounds of Appeal.*

10 knew of that custom, of course, he was not obliged to assume under the circumstances, that the engine driver would disobey that custom or rule. But, whether there was a custom or not, this defendant company must have exercised such a degree of care in approaching that crossing as a reasonably prudent person would have exercised under the same circumstances and conditions."

20 9. "Another question is, did this defendant company have sufficient men upon this engine and tender to properly manage it; and then you will ask yourselves whether or not the company in providing men to operate this engine, had put sufficient men there to bring it within this rule that they must have used reasonable care under the circumstances."

30 10. "Now, if you find under the evidence in the case and by a preponderance of that evidence, that this defendant company by its agent on that occasion did not exercise the degree of care that a reasonably prudent person would have exercised under the same circumstances, and you find that by a preponderance of the evidence, and you find that the negligence of the defendant company was the proximate cause of the accident, then the plaintiff can recover in this case, unless the deceased person at that time was guilty of contributory negligence, of which I will speak in a moment.

40 "But, even if you find that this company did not exercise the reasonable degree of

*Grounds of Appeal.*

care that a reasonably prudent person would have done under the same circumstances, and that its negligence was the proximate cause of the injury sustained, that will not be enough, because in this case it will be required of you to consider whether or not the decedent was himself guilty of contributory negligence, and you will then want to know what is the degree of care that he should have exercised on that occasion." 10

11. "If you come to that point in your deliberations where you have found by a preponderance of the evidence that the defendant was negligent and that that negligence was the proximate cause of this injury and that the deceased at the same time was not in any degree guilty of contributory negligence, it will be necessary for you then to take up and consider the question of damages, and this act which I have designated as the 'Death Act' sets forth what you are to take into consideration." 20

12. The Court below erred in other respects, and the judgment under review should be reversed, set aside, and for nothing holden, and judgment directed to be entered in favor of defendant and against plaintiff. 30

WALL, HAIGHT, CAREY & HARTPENCE,  
Attorneys for Defendant-Appellant.

(INDORSED)

Service acknowledged May 1, 1924.

ALEX. SIMPSON,  
Atty. for Pltff.-Appellee. 40

**Recognizance.**

(Filed in usual form.)

**Complaint.**

(Filed March 28, 1923.)

## HUDSON CIRCUIT COURT.

10

MARGARET M. COWELL, Adminis-  
tratrix *ad prosequendum* of the  
Estate of WILLIAM COWELL,  
deceased,

Plaintiff,

v.

PENNSYLVANIA RAILROAD COMPANY  
and BENJAMIN T. WATSON,  
Defendants.

20

} Action at Law

The plaintiff who resides at No. 626 Elm Street,  
Arlington, in the County of Hudson, says that:

1. Plaintiff is administratrix *ad prosequendum*  
of the Estate of William Cowell, deceased, and  
brings into Court letters of administration *ad*  
*prosequendum* granted to her upon the said es-  
tate by the Surrogate of the County of Hudson.

30

2. Defendant, Pennsylvania Railroad Com-  
pany, is now and was at all times hereinafter  
mentioned, a corporation of the state of Penn-  
sylvania, engaged in the operation of a steam rail-  
road, at Jersey City, in the County of Hudson, and  
defendant Benjamin T. Watson, was an employee  
of said defendant Pennsylvania Railroad Com-  
pany, at all times hereinafter mentioned, engaged  
in assisting it in its business.

40

*Complaint.*

3. Intestate of the plaintiff, on the 6th day of February, 1923, was lawfully upon the premises of said Pennsylvania Railroad Company, known as the Waldo Avenue Yards, at Jersey City, as an invitee of said defendant, driving an automobile truck.

10

4. Intestate of plaintiff, at the time and place aforesaid, was killed by reason of the negligence of the defendants.

5. The negligence of the defendants consisted in this:

They did not use reasonable care in the operation of the engines in said yard to give warning or notice of the approach thereof and to have sufficient men in charge thereof to properly operate same, but on the contrary backed one of said engines through said yard, across a crossing therein, without giving notice or warning thereof and without sufficient men in charge thereof.

20

6. By reason of the aforesaid negligence, the automobile which intestate of plaintiff was driving, was struck by said engine and intestate of plaintiff was killed.

7. Intestate of plaintiff was at all times in the exercise of due care for his safety and did not in anywise contribute to the said accident.

30

8. Intestate of plaintiff left him surviving next of kin who have suffered pecuniary injury by reason of his death.

9. The within action is commenced within twenty-four months after date of death of plaintiff's intestate.

Plaintiff demands \$25,000.

40

ALEX. SIMPSON,  
Attorney for Plaintiff.

**Answer of the Pennsylvania Railroad  
Company.**

(Filed April 24, 1923.)

HUDSON COUNTY CIRCUIT COURT.

10	<p>MARGARET M. COWELL, Adminis- tratrix <i>ad prosequendum</i> of the Estate of WILLIAM COWELL, deceased,</p>	} Plaintiff,	Action at Law
	<i>v.</i>		
	<p>THE PENNSYLVANIA RAILROAD COM- PANY and BENJAMIN T. WATSON, Defendants.</p>		

20 Defendant, The Pennsylvania Railroad Com-  
pany, having a place of business at No. 26 Ex-  
change Place, Jersey City, New Jersey, says that—

1. It neither admits nor denies Paragraphs 1,  
8 and 9 of the Complaint, not having sufficient  
knowledge thereof to form a belief.

30 2. It admits so much of Paragraph 2 of the  
Complaint as alleges that the defendant, The  
Pennsylvania Railroad Company, is a corporation  
of the State of Pennsylvania, engaged in the  
operation of a steam railroad, at Jersey City, in  
the County of Hudson, and that defendant Ben-  
jamin T. Watson was an employee of said de-  
fendant The Pennsylvania Railroad Company,  
engaged in assisting it in its business; it denies all  
the rest and remainder of said Paragraph 2.

*Answer of Pennsylvania Railroad Co.*

3. It denies Paragraphs 3, 4, 5 and 6 of the Complaint.

4. It denies Paragraph 7 of the Complaint, and avers that the death complained of resulted from the contributory negligence of plaintiff's intestate, who did not exercise reasonable care and precaution for his safety while approaching and passing over the crossing mentioned in the complaint, and who did not look or listen for approaching engines, or take other reasonable precautions to observe and avoid being struck by the same.

10

WALL, HAIGHT, CAREY & HARTPENCE,  
Attorneys for Defendant.  
The Pennsylvania Railroad Company.

(INDORSED)

20

Consent is hereby given to file within Answer as of time.

ALEX. SIMPSON,  
Attorney for Plaintiff.

30

40

**Discontinuance as to Benjamin T. Watson.**

(Filed May 29, 1923.)

## HUDSON COUNTY CIRCUIT COURT.

10

MARGARET M. COWELL, Adminis-  
tratrix *ad prosequendum* of the  
Estate of WILLIAM COWELL,  
deceased,

Plaintiff,

*v.*

THE PENNSYLVANIA RAILROAD COM-  
PANY and BENJAMIN T. WATSON,  
Defendants.

} Action at Law.

20

Upon consent of the attorneys for the respective  
parties hereto,—

IT IS ORDERED that the above cause be and  
hereby is discontinued as to the defendant, Ben-  
jamin T. Watson only, without costs to either party  
as against the other.

Signed May 29, 1923.

WILLARD W. CUTLER,  
Judge.

30

On motion of  
WALL, HAIGHT, CAREY & HARTPENCE,  
Attorneys for Defendants.

We consent to the above order.

ALEX SIMPSON,  
Attorney for Plaintiff.

WALL, HAIGHT, CAREY & HARTPENCE,  
Attorneys for Defendants.

40

**Rule for Final Judgment.**

(Entered March 4, 1924.)

HUDSON COUNTY CIRCUIT COURT.

MARGARET M. COWELL, Adminis-  
tratrix *ad prosequendum* of the  
Estate of WILLIAM COWELL,  
deceased,

Plaintiff

*v.*

PENNSYLVANIA RAILROAD Co.,  
Defendant.

Action at Law.

10

The above entitled cause having duly come on for trial before Hon. Henry E. Ackerson, Judge and a Jury on the 3rd day of March, 1924, and the Jury returned a verdict in favor of the Plaintiff and against the defendant, and assessed damages in the sum of Nine thousand two hundred and fifty dollars (\$9250.00).

20

It is hereby Ordered and Adjudged that the Plaintiff have and recover against the defendant, the sum of Nine thousand two hundred and fifty Dollars (\$9250.00) with costs to be taxed, and that judgment may be entered accordingly,

HENRY E. ACKERSON,

Judge.

30

On Motion of

ALEX SIMPSON,

Atty. for Plaintiff.

Rule actually entered March 4, 1924.

40

*Appearances.*

## HUDSON COUNTY CIRCUIT COURT.

Before—Hon. HENRY E. ACKERSON, JR., J. and a  
jury.

10

<p style="text-align: center;">MARGARET COWELL, etc., Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">PENNSYLVANIA RAILROAD COMPANY, Defendant.</p>	}
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Jersey City, New Jersey,  
March 3, 1924.

## APPEARANCES :

20

Hon. ALEXANDER SIMPSON, for the Plaintiff.  
Messrs. WALL, HAIGHT, CAREY & HARTPENCE,  
by Mr. HARTPENCE, for the Defendant.

(A jury being empanelled and found satisfactory  
they were sworn.)

(Mr. Simpson opens for the Plaintiff.)

30

Mr. Simpson: The plaintiff offers in evidence  
a slip produced by the defendant, from the chief  
mechanic of the Waldo Avenue yards showing that  
this deceased was in charge of a truck owned by  
Redner and was moving from the Hackensack  
River approach to the Waldo Avenue yards with  
a truck carrying lumber.

(Admitted and marked "Plaintiff's Exhibit  
P1" of this date.)

40

Walter A. Fetzer, direct.

WALTER A. FETZER, sworn for the Plaintiff.

*Direct examination by Mr. Simpson:*

Q. Where do you live? A. Number 338 Whiton Street, Jersey City.

Q. On the sixth day of February, 1923, where did you live? A. At number 338 Whiton Street, Jersey City.

10

Q. On that day were you in the Waldo Avenue yards of the Pennsylvania Railroad in this city? A. Yes.

Q. What were you doing there? A. I was going to deliver some plumbing material there.

Q. When you got in the yard did you see the man who was killed? Did you see his truck? A. Yes, sir.

Q. Where was it? A. In the driveway.

20

Q. What was he doing? A. They were unloading timber.

Q. From his truck? A. Yes, sir.

Q. What did you do? Did you wait until he had unloaded? A. I had to wait until he unloaded it.

Q. Why? A. Because he was in the middle of the road and they were unloading limber from both sides.

Q. When he unloaded where did he go with his truck? A. He continued down into the Waldo Avenue yards and I followed him.

30

Q. Did you see him cross this crossing? A. Yes, sir, and I crossed right after him.

Q. What was the situation there in the yard? Why did you go that way? Was there anything in the physical situation of the yard? A. It was customary to go that way to the best of my knowledge.

40

*Walter A. Fetzer, direct.*

Mr. Hartpence: We move to strike out the answer on the ground that it states a conclusion.

(Motion granted.)

10 Q. Will you state whether there was any way to get out or retire from the yard except by going over the crossing and turning around and coming back again?

Mr. Hartpence: That is objected to as calling for a conclusion.

(Objection sustained.)

Q. Is there any other way out of this yard except the way this man was taking?

20 Mr. Hartpence: Objected to as leading.  
(Objection overruled.)

A. No, sir; to my knowledge that is the one way, to go down past the crossing and turning around and taking the road to come out.

30 Q. When did you next see him? When did you next see the truck? A. The next time I seen the truck was while I was unloading. He had went down further into the yard and he was ready to come out of the yard and he could not come out of the yard until I was unloaded, to leave him out, on account of the road being very narrow at that particular point.

Q. Did you get unloaded? A. Yes, sir, finally I got unloaded.

Q. Then what? A. Then after I got unloaded I jumped in my truck and pulled down, I would say ten feet and while I was running down, as the road gradually gets a little wider, he passed me.

Q. He did pass you? A. Yes, sir.

*Walter A. Fetzer, direct.*

Q. What is the next thing that attracted your attention? A. I continued down the road till I pulled in close to the building, being I had to go in the building, to tell the plumbers something, something I had to deliver there, and as I was pulling down a little bit there I happened to see a locomotive backing up.

10

Q. Where was that locomotive with reference to the crossing when you saw it? A. The first time I saw it?

Q. Yes? A. I would say about sixty feet.

Q. Was it in motion or stationary? A. No, sir, it was moving, it was in motion.

Q. Will you state whether or not you heard any whistle or bell from that locomotive? A. No, sir, I did not.

Q. You were how close to it? A. I was about—

20

Q. About sixty feet away from it? A. No, I was only about eight feet away from it.

Q. And the locomotive was sixty feet from the crossing? A. Yes, sir.

Q. What was the next thing you knew? A. The next thing I heard was a crash.

Q. What did you do? A. Then I looked back through my cabin window.

Q. What did you see? A. I saw the locomotive shoving the truck.

30

Q. Where was the truck when you saw it? A. When I first saw it?

Q. Where was the truck when you first saw it? A. I would say it was partly over the crossing.

Q. What part of the truck did the locomotive come in contact with? A. Right between the wheels.

Q. Between the first set and the second set of

40

*Walter A. Fetzer, direct*

wheels? A. Yes, sir, right in the back of the driver's seat.

Q. And after you looked and saw this locomotive pushing this truck what was the next thing you saw? A. I pulled up my truck and ran up.

10 Q. Did the locomotive stop then? A. No, sir; it continued shoving this truck.

Q. How far did it shove the truck from the scene of the crash after you turned? A. Oh, I would say it shoved it about ten feet.

Q. Then what happened? A. Then it shoved it off the planking that they have there to make this driveway, shoved it off of that and as it was being shoved off of that the wheels broke down off the planking and the rear wheel got caught in the track and as it was being shoved off it completely  
20 turned the truck and it fell down.

Q. Did it do anything to the shanty there? A. Yes, there was about six feet anyway of the truck sticking over on this side and as the locomotive shoved the truck it picked the corner of the shanty with the wheel and the corner of the shanty came down and the house collapsed.

Q. When you say "this" side, you mean the side, you mean the side you were on? A. The side I was on, yes, sir.

30 Q. What was the next thing? A. After the truck had been upset, I would say that the truck after being turned over was shoved ten to fifteen feet, then right after that they stopped the locomotive and I looked around the other side and got down on my knees to see if the lad had jumped or what happened to him and I see him down underneath, this way (indicating), face down.

Q. With the truck on top of him? A. Yes, sir.

40 Q. Was the truck in contact with his body or

*Walter A. Fetzer, direct.*

anything in contact with his body? A. The truck was completely on it.

Q. Was he taken out while you were there? A. Yes, he was taken out.

Q. And was he dead or alive? A. To my knowledge he was dead.

Q. How did they get the truck off? A. There was assistance there, I don't know whether it was a gang foreman there or who was there, but I know they called for help and they must have come from the trestle, there was about fifty or sixty laborers there, and we tried to lift the truck up so that we could pull the man from under, but we could not, so they got a crane over and hooked onto this truck with the crane and hoisted the truck up, and after they had it up they got the man out, and I helped them and we put the man on a stretcher and by that time the ambulance surgeon was there and he took him down toward the round house, but just where they took him I could not say.

Q. How wide is that crossing where he was killed? A. I would say about sixteen or eighteen feet.

Q. Planking? A. Yes, sir, planking.

Q. Sixteen or eighteen feet in length? A. Yes, sir.

Q. Did it have any particular name? A. No, sir, not to my knowledge. I don't know.

The Court: How long was it?

The Witness: I said, sixteen to eighteen feet.

Q. What is the yard used for at that point? A. Well, it looks to me—I really don't know, but—

Mr. Hartpence: If he don't know then we object to his stating.

*Walter A. Fetzer, direct.*

Q. Had you been in that yard before that day?

A. Yes, sir.

10 Q. Over what period of time? A. I had been in there for the last three or four years off and on, but just before that accident we had quite a lot of work in that yard and I had been going in there for a month before that accident practically every day.

Q. Will you state whether or not in the time that you were there, there was any signal given by a locomotive approaching this crossing where you were? A. At times there was.

Mr. Hartpence: We object to that as immaterial, and irrelevant.

20 Mr. Simpson: Part of our allegation of negligence is it was the custom that had been adopted as a signal system at this crossing, and he knows it because he was there every day for a month before and I want to find out what his knowledge is, because the negligence is made up of their failure to warn.

The Court: If there was a custom that he knew of he may state it.

30 Q. Do you know from the knowledge gained by you in the thirty days before the accident, from your observation, whether there was a custom concerning the giving of any signal on the approach of locomotives to this crossing?

Mr. Hartpence: Objected to as immaterial and irrelevant and incompetent and not the proper method of proving the custom.

(Question allowed; defendant excepts.)

*Walter A. Fetzer, direct.*

A. Why, yes, at times.

Q. What was the custom? A. They would ring the bell.

Q. Anything about a whistle? A. I cannot say I heard a whistle, no, sir.

Q. You heard the bell? A. Yes, sir.

Q. And that was the way you protected yourself? A. Yes, sir. 10

Q. You say you had been going in this yard for three or four years, off and on? A. Yes, sir.

Q. How did you get into the yard? How did you make your entrance? A. From Mill Road.

Q. How far is the Mill Road from this accident?

A. I would say about three or four blocks.

Q. So you had to go three or four blocks in the yard before you got to the point where it was proper for you to discharge your material? A. Yes, sir. 20

Q. Do you know how fast this engine was going? A. I could say about four or five miles an hour.

Q. Was it going forwards or backwards? A. It was going backwards.

Q. It was backing down? A. Yes, sir.

Q. Was there any noise of escaping steam? A. I could not say that I seen or heard any noise, it was very quiet. 30

Q. When you got down to the place where the engine was stopping did you see anybody on the engine? A. No, sir, I did not.

Q. And, as I understand your testimony, from the point of the crash it pushed him how far altogether? A. You mean at the time I first heard the crash?

Q. From the time you first heard the crash and looked there, from that time, until he stopped, how

*Walter A. Fetzer, cross.*

far did he push it? A. I would say twenty to twenty-five feet.

*Cross examination by Mr. Hartpence:*

10 Q. You did not see the engine at the time you heard the crash did you? A. I did not see the engine?

Q. At the time you heard the crash you did not see the engine at that moment? A. Not until I looked back out of my rear window.

Q. I understood you to say on your direct examination that you looked and saw the engine until it stopped shove the truck about ten feet, is that correct? A. About ten feet.

20 Q. Yes? A. No. I should say twenty-five feet. That is, all told. From the time it shoved it, it shoved it about ten feet before the truck upset.

Q. About twenty to twenty-five feet? A. About twenty to twenty-five feet, I would say.

Q. All told? A. Yes, sir.

Q. What kind of a cover did you have on the seat of your automobile? A. I have a closed in cab.

Q. And is there glass in the cab anywhere? A. There is glass in the windows.

30 Q. It was when you turned to look out through that glass window toward the crossing that you saw the engine and the truck, is that correct? A. After I heard the crash I turned back and I saw the locomotive shove the truck, yes, sir.

The Court: When you pulled up to go over that crossing yourself, how far was the engine away? How far in the rear of your truck was this other truck that was damaged?

40

The Witness: How far?

*Walter A. Fetzer, cross.*

The Court: When you went over the crossing, how far in the rear of you was this truck?

The Witness: I did not follow him over this, I followed him coming into the yard. You see we had already come into the yard and he was delivering some material and I wanted to get into the yard and I could not get in there until he had unloaded, then, after he was unloaded he swung down across this track and I was about twelve feet behind and I followed him until I got to my destination where I wanted to go and I stopped to unload my plumbing material and as I did he continued down into the yard, which I figured to turn around, and before I had been unloaded he had to stop, he could not get out until I was unloaded, and as soon as I was unloaded I pulled my truck up and down to where the road widens and he passed me.

10

20

The Court: You had to pass that truck before you could get out?

The Witness: No, I followed him first. But naturally he was ahead all the way back.

Mr. Simpson: He had gone over to make his turn and he was recrossing when he was struck.

30

Q. Do you recognize the photograph which I show you? A. Yes, sir.

Q. Can you state what it portrays? A. Why, this is the road I was coming from, the Mill Road, this way and here is whereabouts he was delivering his timber, and they were doing work on the trestle.

40

*Walter A. Fetzer, cross.*

Q. That is to say, when you first came into the yard they were working on this trestle over here?

A. Yes, sir, to the best of my knowledge.

Q. And Cowell was right in this roadway ahead of you? A. Yes, sir, right in the center of the road.

10 Q. Will you indicate the spot where you say he was? A. I would say he was about right here. (The witness indicates by marking an "X.")

Q. What would you say as to that photograph showing substantially the condition that existed there that morning when the accident took place? Would you say that it does? A. Yes, sir.

Mr. Hartpence: I will have this photograph marked for identification.

20 (The said photograph is marked "Defendant's D-1" for Identification, of this date.)

Q. I show you another photograph and ask you if you can state whether you recognize that situation? A. Why, I don't know what that situation is, but that is down there in the yard.

Q. Is not this the crossing over which you went? Is this the building where you discharged your load? A. I cannot just recall it by that picture.

30 Q. You cannot recall it from that picture? A. No, sir.

Q. I show you another photograph and ask you if you recognize that? A. No, sir.

Q. Don't you recognize the crossing and the building there? A. I cannot just recall it from that picture.

Q. Omitting those two points, would you say that was a view of the crossing and the building where you were delivering your load? A. I cannot say that, no, sir.

40

*Walter A. Fetzer, cross.*

Q. What time of the day was it when the accident occurred? A. Oh, it was early in the morning probably a quarter to nine or twenty minutes to nine. I cannot just recall the exact time.

Q. Was it daylight? A. Yes, sir.

Q. And it was a clear day? A. Yes, sir.

Q. Was there anything between you and the track on which this engine was moving at the time you saw it moving? A. When I first saw it, no, sir.

10

Q. The track is right alongside of the roadway? A. The roadway is right here and this was the track, yes, sir.

Q. The roadway and the tracks approach each other at an angle and come together at the crossing? A. At the crossing, yes, sir, that is the single track.

Q. There is only one track there at that crossing? A. Yes, sir, till after she crossed the path, after she crossed the path I could not say just how many there are.

20

Q. At the point where the accident took place? A. Just one track, yes, sir.

The Court: Did the truck which the decedent was driving run along this road parallel with the track to the point of the crossing? Or was it going in the opposite direction?

30

The Witness: The locomotive I would say was backing down and the truck was going in practically the same direction. They were going parallel with one another only the locomotive was backing down.

Q. The truck was moving front first, wasn't it? A. Yes, sir.

Q. And the engine was moving in the same direc-

40

*Walter A. Fetzer, cross*

tion but with the tender ahead, is that correct?

A. That is right.

Q. They were both coming together at that point, running in the same direction? A. Yes, sir, that is where they must have met, yes, sir.

10 Q. Where was this truck that Cowell was on at the time you first saw the locomotive move by? A. He had just barely passed me.

Q. And you say that up until the time you moved your truck a little closer to the building there was not room enough for him to pass you? A. Not until after I had moved, no, sir.

20 Q. That is, there was not room enough between your truck and the track to permit him to pass until you swung your truck ahead? A. Until I was unloaded and moved my truck ahead, yes, sir, closer to the building.

Q. And your truck stood at that time about how many feet from this crossing? A. About how many feet from the crossing? That is, before I pulled out?

Q. Yes? A. Oh, I would say thirty-five to forty feet.

30 Q. Then, as I understand it, you pulled up closer to the building and that gave Cowell room enough to get by your car, between the car and the track and just about the time he went by you you saw this engine moving in the same direction, is that right? A. Right after he passed me, yes, sir, that is right.

Q. Then you know nothing about what took place until you heard the crash? A. Not until I heard the crash.

40 Q. Did you notice whether there were any other locomotives there in that immediate vicinity at that time? A. Well, you see where I was there

*Walter A. Fetzer, cross.*

was only tracks to the right of me at that particular time. I had not seen any after that.

Q. That was the only engine you saw? A. That was the only engine I saw, yes, sir.

Q. Did you hear the noises of other engines, whistles or bells? A. Well, there is always more or less noise in the yard, hammering, something of that kind. I did not hear a locomotive whistle at that particular time; no, sir. 10

Q. You did not hear the bell or the whistle of another locomotive? A. No, sir.

Q. The building that you were delivering your materials to was what kind of a building? A. They call that the toilet rooms.

Q. Was it a store house? A. No, sir, toilet rooms.

Q. Your material was going there for the purpose of being used then in the construction? A. Yes, sir, they were putting in new fixtures. 20

Q. And this shed or building that you have referred to that collapsed when the truck was thrown up against it, was that between the point where you stood and the crossing? A. From where I stood and the crossing, yes, sir.

Q. Was it between this building where you were delivering your supplies and the crossing? A. Yes, sir.

Q. So that between this building where you were delivering your supplies and the crossing was also this wooden shed that you say collapsed? A. Yes, sir, it was right on the same line. 30

Q. On the same line with the building that you were delivering your material to? A. Yes, sir, only it was nearer the crossing.

Q. But on the same side of the track? A. Yes, sir.

The Court (illustrating on photograph in 40

*Walter A. Fetzer, redirect.*

evidence): The rear of your truck is towards this crossing?

The Witness: Yes, sir, I was facing so (illustrating). He was facing going in the other direction. He had to pass me, of course, and was going in the opposite direction.

10

The Court: And the crossing was in the rear of you?

The Witness: The crossing was in the rear of me.

The Court: How far away was that crossing from the place where your car stood at the time the decedent's car passed you?

The Witness: At the time he passed me, I would say about sixty feet.

20

*Redirect examination by Mr. Simpson:*

Q. This picture, does this show the condition of the crossing and the collapsed shed accurately as it was immediately after the accident? A. Yes, sir.

Mr. Simpson: I offer this picture in evidence.

(Admitted and marked "Plaintiff's Exhibit P-1" of this date.)

30

Q. Can you mark on this where you were with reference to the crossing when this man passed you? A. Where I was?

Q. Yes. A. Where I was?

Q. Yes. How far out? A. I was not here, I was on the other side. I could not mark it.

The Court: Indicate the crossing there.

The Witness: Here is the crossing (indicating).

40

*Walter A. Fetzer, redirect.*

Mr. Simpson: I will mark the crossing "C."

Q. You say you were on the other side of the crossing? A. Yes, sir.

Q. You were facing in which direction? A. Going east.

Q. How was the dead man going when he passed you? A. I would say west. 10

Q. And the locomotive was also going west, is that right? A. They were both going in the same direction, yes, sir.

Q. At that time when you passed the locomotive it was only about eight feet away from you? A. Yes, sir.

Q. How far had he got down there, from you, had he crossed over the crossing at the time you became aware of the fact that there was a locomotive within eight feet of you? Where was he? A. I couldn't say. He had passed me then. 20

Q. How long before had he gone? A. He just about passed me, passed my cabin when I happened to see the locomotive backing down.

Q. The locomotive was then within eight feet of you, you say? A. Yes, sir.

Q. When you became aware of the presence of a locomotive backing down to the crossing going in the opposite direction from you, you could not see the man, could you? A. No, sir. 30

Q. And you don't know where he was? A. That I could not say.

Q. How fast was he going when he passed you? I don't mean the locomotive, I mean the truck?

A. Well, I just could not say how fast he was going. He could not be going very fast because he had only been about ten feet away from me while 40

*Walter A. Fetzer, redirect.*

I was unloading and he had to shift so he could not be going hardly out of his first, I don't think.

Q. He had to shift his gear? A. Yes, sir.

Q. I want to get your judgment about the speed of the locomotive. A. I would say about four to five miles an hour.

10 Q. Do you know how long his truck was, the defendant's truck? A. Yes, sir, I seen his truck. You mean, from wheel base to wheel base?

Q. Yes, sir, the entire length? A. The full length of it?

Q. Take it from the radiator to the rear end, how long? A. Well, I don't know now, judging from mine, mine is twelve feet inside, nine, about eighteen feet, his, a five-ton truck, and mine only a three, so I would say about twenty to twenty-two feet, that is, all over, from radiator to rear end.

20

Q. What is the wheel base of it? A. I would say about sixteen feet.

Q. Is it a covered truck, or what? A. No, sir, a flat truck, an open truck.

Q. A flat open truck? A. Yes, sir.

Q. He had no cab? A. He had a cab but not a closed in cab.

Q. There is a curve isn't there at that crossing? A. Yes, sir.

30

Q. From the direction that he was going, is that the direction the curve was in or what direction was the curve in? A. The direction he was going.

Q. So that the curve was in the same way as he was going, is that it? The curve was in the same direction? A. Yes, sir, he was going that way and she curved that way, the same direction.

Q. How much curve was it? A. That I could not say.

40 Q. Was it a pronounced curve or a slight curve? A. I would say a slight curve.

*Walter A. Fetzer, redirect.*

The Court: Does this curve that you speak of curve in towards the passageway over this crossing?

The Witness: Yes, sir, it turns towards the crossing.

The Court: You are speaking of this building that collapsed, a shanty I think you called it, was that upon the side of the crossing which the decedent was approaching from? 10

The Witness: Yes, sir.

The Court: Or on the opposite side of the crossing?

The Witness: On the side he was on, that is crossing over.

The Court: Would that building be between you and the engine in making the passage over the track or not? 20

The Witness: No, sir.

Q. How could that be? If the shanty is on the same side that you were on and that he was on, why would not the shanty hide the approaching locomotive? You had to pass that shanty didn't you, he had to pass that shanty to get to the crossing? A. Yes, sir.

Q. In which direction was the shanty from the crossing, east or west? A. East. 30

Q. In what direction was the locomotive, east or west? A. East.

Q. So that the shanty and the locomotive were in the same direction? A. They were both in the same direction, yes, sir.

Q. How high was the shanty? About how high? A. About a story and a half.

Q. Do you mean fifteen feet, twenty feet, twenty-five feet? A. I would say about twenty feet. 40

*Walter A. Fetzer, recross.*

Q. Twenty or twenty-five feet high. How long was it? A. About fifteen feet.

Q. You don't know what it was used for do you?  
A. Why, they had pipe fittings in there to the best of my knowledge.

10 *Recross examination by Mr. Hartpence:*

Q. Is this the shanty shown on this photograph Exhibit P-1? A. That is the shanty.

Q. Mark that with an "S"? A. (The witness does so.)

The Court: Will you indicate by an arrow from which direction the decedent's truck was coming towards or crossing over this crossing?

20 The Witness: He was coming this way (indicating).

The Court: Toward the point marked there, draw a pen mark right through there where he was coming and make an arrow. (The witness does so.)

*By Mr. Simpson:*

Q. He was coming towards this stone here? A. Yes, sir, he was coming this way.

30 *By Mr. Hartpence:*

Q. He was following the line that you have marked there with the pen, is that right? A. Yes, sir.

Q. Can you indicate there which way the engine was travelling? A. The engine was coming up this way, in the same direction, around this curve.

Q. The engine was coming around this curve in the same direction toward the crossing? A. Yes, sir.

40

*Walter A. Fetzer, recross.*

Q. Draw a line showing the direction the engine went around the curve right around the track?

A. (The witness does so.)

Q. Make a point there? A. (The witness does so.)

Q. So that there was absolutely nothing between the track and this roadway as he approached the crossing, was there? A. Not to my knowledge, no, sir. 10

Q. The shanty was on the other side of the roadway? A. It was on the same side as he was.

Q. But on the other side of the roadway from the tracks? A. Yes, sir. To the east of the tracks.

Q. And this, what appears to be a little platform in here, that was there, was it, at that time? A. Well, that I could not just say.

Q. You cannot recall? A. I could not recall on that, no sir. 20

Q. As I understand it, when you first went in you and Cowell, you followed his truck in this direction, beginning here at the bottom of the picture and going on towards the crossing and on over to where those two men are standing, that is right is it not? A. That is the way we went, yes, sir.

Q. And then he turned around, and was on his way back at the time that the accident occurred? A. Yes, sir. 30

*By Mr. Simpson:*

Q. So that, as I understand you, if he had safely got over that crossing he would then have been on the same side as the shanty? A. If he had got over.

Q. Over across the crossing, if he had crossed the crossing without being killed, would he be on 40

*Walter A. Fetzer, recross.*

the same side that the shanty was, on the other side? A. No, sir.

Q. The shanty was on the side he was approaching? A. The shanty was on the side he was on the first time.

10 Q. Was the shanty on the side of the crossing he approached to get over the crossing when he was struck? A. Yes, sir.

Q. Then he had to pass that shanty? A. He had to pass the shanty.

Q. Then, if he had to pass it, why is it the shanty was not between him and the locomotive? A. Because the locomotive was going practically in the same direction as he was. If the locomotive had not hit the truck he would have had to pass the shanty also.

20 Q. But if this shanty was on the same side he approached from, you say, and he was going over the crossing, why would not the shanty be between him and the locomotive when he was crossing? A. The shanty was between him and the locomotive?

Q. Yes? The approaching locomotive? Let us see if we can do it this way? Was the shanty on his left hand or right hand as he came across? As he came to the crossing? A. As he came to the crossing it was on the right-hand side of him.

30 Q. Before he was hit? A. Before he was hit.

Q. Was the locomotive on his right hand or left hand? A. On his left hand.

Q. If there was a shanty here, would you say that was a picture of the crossing, if there was a shanty here? A. I could not say I would, no, sir.

Q. I show you a picture, is that a picture of the crossing as it was immediately after the accident?

A. Yes, sir.

40

*Walter A. Fetzer, recross.*

Q. With the shanty collapsed? A. Yes, sir.

Q. As I understand you then he came from the shanty with the locomotive coming this way? A. Yes, sir, the locomotive was coming this way, in the same direction and he was coming from here.

Q. The locomotive was coming here? A. The locomotive was coming down this way and he was coming this way. 10

Q. The locomotive was coming to the left of the picture? A. The locomotive was coming right around here.

Q. It was coming to the left? A. It was coming to the left but going to the right.

Q. It was going that way, is that right? A. It was going to the right of this shanty.

Q. It was coming towards the shanty? A. It was going towards the right of the shanty. 20

Q. It was coming towards the shanty? A. It was coming towards the shanty.

Q. What part of the engine did you see hit the car? A. I don't know what they call it. The coupling link, that is the best I can call it.

Q. That thing that protrudes out to fasten on cars? A. Yes, sir. That is the way it looked to me.

Mr. Simpson: We offer this photograph in evidence. 30

(Admitted and marked "Plaintiff's Exhibit P-2" of this date.)

*By Mr. Hartpence:*

Q. Can you point out on this picture Senator Simpson just showed you where your truck stood at the time you were discharging its contents? A. Yes, sir.

*Walter A. Fetzer, recross.*

Q. Will you do it? A. That is, when I was delivering my material?

Q. Yes. When you were delivering your material. Mark it with a "T"? A. (The witness does so.)

10 Q. Where was the engine when you first saw it? A. Here (indicating.)

Q. Mark it with an "E." A. (The witness does so.)

Q. Where was Mr. Cowell's truck when he passed you on his way? A. When I had to pull out from here to allow him to pass?

Q. Yes. About where was he when he passed you? A. I would say he was about here (indicating).

20 Q. Mark that with an "X"? A. (The witness does so.)

Q. And, then, as I understand it, he came from that point to get to the crossing where he was hit in the direction of that line, is that right? A. Yes, sir.

Q. And this "C" marked there is the crossing where the accident occurred? A. That is the crossing.

30 Q. And the engine was coming around this curve in that direction toward the crossing, is that right? A. Yes, sir.

The Court: On the photograph P-2, is there anything between the place where you indicate that the Cowell truck passed you and the railroad track upon which the engine was coming.

The Witness: No, sir.

The Court: Any platform or anything?

The Witness: No, sir.

40 The Court: For how long a distance did

*Benjamin F. Watson, direct.*

that condition exist where there was nothing between him and the railroad track?

The Witness: I don't get you?

The Court: You said there was nothing between the place where Cowell passed you and the railroad track upon which the engine was proceeding?

10

The Witness: Yes, sir.

The Court: For how long a distance did that continue to be like that? Down to the point of the crossing?

The Witness: Oh, I would say about seventy-five feet.

*By Mr. Hartpence:*

Q. Was that roadway on which your truck and Cowell's truck were running, that morning, was that paved? A. It was paved with cobbles, yes, sir.

20

Q. On both sides of the crossing? A. On both sides of the crossing.

BENJAMIN F. WATSON, sworn for the Plaintiff.

*Direct examination by Mr. Simpson:*

Q. You were the engineer in charge of this engine weren't you, that killed this man? A. Yes, sir.

30

Q. Can you tell us about how fast you were going at the time you became aware there was trouble? A. Well, it would be hard to calculate, very, very slow; the wheels were just turning over.

Q. Within what distance could you have stopped that engine at that speed? A. Well, that speed, two or three feet.

Mr. Simpson: Will you admit he was in your employ?

40

*Harvey G. Redner, direct.*

Mr. Hartpence: If your Honor please, we are not admitting it on the record.

Q. You were working for the Pennsylvania Railroad? A. Yes, sir.

10 The Court: And for the Company?  
The Witness: Yes, sir.

No Cross Examination.

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HARVEY G. REDNER, sworn for the Plaintiff.

*Direct examination by Mr. Simpson:*

Q. On the sixth of February, 1923, what was your business? A. Truckman.

20 Q. Did you have a contract with the Pennsylvania Railroad on that day for trucking in the Waldo Avenue yard? A. Yes, sir.

Q. Was this dead man in your employ on that day? A. Yes, sir.

Q. Driving a truck for you in that yard? A. Yes, sir.

Q. What wages did he earn? A. Thirty dollars a week.

Q. How long had he been in your employ? A. About eight months.

30 The Court: You had a contract with whom?

The Witness: With the Pennsylvania Railroad.

Q. A trucking contract wasn't it? A. Yes, sir.

The Court: Was he driving the truck for that purpose at that time?

The Witness: Yes, sir.

*Margaret Cowell, direct.*

The Court: For the purpose of this contract?

The Witness: Yes, sir.

No Cross Examination.

MARGARET COWELL, sworn for the Plaintiff.

10

*Direct examination by Mr. Simpson:*

Q. You are the Margaret M. Cowell named in these letters of administration *ad prosequendam*?

A. Yes, sir.

Mr. Simpson: I offer the letters in evidence.

(Admitted and marked "Plaintiff's Exhibit P-3" of this date.)

20

Q. How old are you? A. Fifty-one.

Q. How old was the man now dead, your son?

A. Twenty-two.

Q. Was he married or unmarried? A. Unmarried.

Q. What, if anything, did he contribute to your support? A. He contributed twenty dollars to the support of myself and my daughter.

Q. That is, he gave twenty dollars a week into the house, is that right? A. Yes, sir.

30

Q. Out of that twenty dollars you boarded him, did you? A. Yes, sir.

Q. And yourself and your daughter? A. Yes, sir.

Q. How old was your daughter? A. Seventeen.

Q. What is her name? A. Margaret.

Q. Are there any other brothers or sister? A. Married.

Q. Are they all married? A. I have one single son.

Q. What is his name? A. John Cowell.

40

*Margaret Cowell, direct.*

Q. How old is he? A. Thirty-four.

Q. What other children did you have that are married? A. I have four children married.

Q. What are the names of those? A. Florence, thirty-three, Mrs. McChord; Harry, twenty-six; Arthur, twenty-two; Helen, twenty-seven.

10 Q. So that you had how many children altogether? A. I had seven.

Q. Out of those twenty dollars, did he get any of it back? A. No, sir.

Q. Or did you simply pay the rent and run the house on it? A. Yes, sir.

Q. He simply came in every week and handed you twenty dollars? A. Yes, sir.

Q. And he lived in the home with you? A. Yes, sir.

20 Q. Out of that twenty dollars you paid the rent, did you, and managed the table? A. Yes, sir.

The Court: This daughter who lives with you, what is her name?

The Witness: Margaret.

The Court: How old is she?

The Witness: Seventeen.

The Court: And you say the son John is thirty-four?

30 The Witness: Yes, sir.

The Court: And does he live with you?

The Witness: He did at one time; he is living now boarding; I am boarding with my daughter.

The Court: Did he live with you at the time this accident happened?

The Witness: Yes, sir.

The Court: Was he in any way dependent on this son who was killed?

40 The Witness: No, sir.

*Harvey G. Redner, direct.*

*Cross examination by Mr. Hartpence:*

Q. How long had your son William worked with Mr. Redner? A. Between eight and nine months.

Q. What did he do prior to that? A. He was chauffeur for Mr. Hammond.

Q. How long had he worked at that? A. About two or three years.

10

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HARVEY G. REDNER, recalled for the Plaintiff:

*Direct examination by Mr. Simpson:*

Q. How long had that contract existed at the time of his death, between you and the Pennsylvania Railroad? A. Not quite a year.

Q. Had this dead man been sent by you on other occasions into the yard? A. Yes, sir.

20

Q. Covering what period of time? A. All the time he had been working for me.

Q. All the eight months? A. Yes, sir.

Q. Can you tell about how often, once a week, twice a week? A. I cannot tell, no, sir.

No Cross Examination.

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CHARLES McLEVY, sworn for the Plaintiff.

*Direct examination by Mr. Simpson:*

30

Q. Where do you live? A. Number thirty Howard Place, Arlington.

Q. Are you employed by the same people who employed the man now dead? A. Yes, sir.

Q. And you were working in the Pennsylvania Railroad yards driving a truck there for a period before his death? A. Yes, sir.

Q. How long were you going there? A. I worked there about six or seven months.

40

*Charles McLevy, direct.*

Q. How often would you go in the yard with a truck in those six or seven months? A. Maybe once a day, maybe three times a day.

Q. Were you there every day? A. Yes, sir.

10 Q. Did you become familiar with any custom as to warning persons using this crossing? A. Yes, sir.

Mr. Hartpence: We object to this as immaterial.

Q. Did you become familiar with the custom as to warning people using this crossing where this accident happened, as to an approaching locomotive?

20 Mr. Hartpence: Objected to on the ground that it is immaterial and incompetent and on the further ground that it is leading in that form.

Mr. Simpson: I am not asking what the custom was; I am asking whether he became familiar with the fact that there was a custom.

The Court: He may answer "Yes" or "No."

The Witness: Yes, sir.

30 Q. What was the custom you became aware of in reference to passing locomotives over this crossing?

Mr. Hartpence: Objected to as incompetent, immaterial and irrelevant.

Objection overruled; defendant excepts.

A. When I went in the yard I always heard a whistle blow.

*Case.*

Q. Before the locomotive came over the crossing? A. Yes, sir.

Q. Anything about a bell? Do you know anything about a bell? A. Well, both bells and whistles. Every time I happened to be in the yard.

No Cross Examination.

10

Plaintiff Rests.

Mr. Hartpence: I move for a nonsuit on the ground that there is no negligence shown in the case attributable to the defendant upon which liability may be predicated, as charged in the complaint, and on the further ground that from the evidence now in, it must be perfectly apparent that the decedent's contributory negligence was the producing cause of the injury and death of the deceased. It seems to me irrefutable from the exhibits produced by the plaintiff that the decedent was moving with this truck in the same direction with the engine, was close to the track; that there was not room enough between them; as a matter of fact, when at one time the truck of the other man was standing there, there was not room enough for the decedent to get by, and as they continued on, bound in the direction of those two converging angles to the point where the crossing is located, there the occurrence took place.

20

30

Now, Cowell was driving this car, an open truck, not a closed cover over it, nothing to interfere with his view, nothing whatsoever to interfere with his vision or to know that the engine was there and approaching. If

40

*Case.*

10 he had used his eyesight and used his ears in the way that the law says he must do, he would have learned it. It seems to me the case is exactly the same as the case of Reynolds *v.* Penna. R. R., where the Court has said that if the man looked when he said he looked, and looked in a perfunctory sort of a way, he did not satisfy the injunction of the law, and if he did not look he was guilty of contributory negligence.

20 That is the way it is here. It is incomprehensible to me how Cowell could have avoided seeing the approaching engine if he had looked. If he did look and saw the engine and took the chance of getting over ahead of the engine, of course, that is his own chance.

Those facts appear so clear from the plaintiff's case that it seems to me the defendant is entitled to a nonsuit on that ground.

30 The Court: On the first ground of your motion, the lack of proof of negligence on the part of the defendant company, assuming as I must, for the purposes of this motion, that the facts testified to on the part of the plaintiff are true, and drawing all the reasonable inferences from those facts, what have you to say about the testimony that there was a custom to give an alarm on the approach of a locomotive to a crossing and there was no alarm given on this day?

40 Mr. Hartpence: There is no evidence that it was not done. The only evidence on that point is that the witness said he did not hear anything.

*Case.*

Mr. Simpson: There was no possible way he could have heard if there was none.

Mr. Hartpence: That is not necessarily so. The man was going in the opposite direction. The engine was moving very slowly and had about seventy-five feet to go and he was moving away, in the other direction, with a closed cab around him where he sat, so that he might well never have heard the bell. At best, all he said is he did not hear it.

10

The Court: It was been held that where a witness had a fair opportunity to hear and he did not hear that the fair inference is that no warning was given.

Upon the question of contributory negligence I would like to hear the defendant.

20

Mr. Simpson: That is purely a question for the jury. It has been repeatedly so held by the Court of Appeals. This man was driving over a crossing in a yard where there was a slowly moving engine behind him. Assume that he saw the engine, he did not know that the engine was going over the crossing if it did not give him a signal, because before that time he was in the yard and he saw that if an engine wanted to cross the crossing it was usual to give a signal. So, let us assume that he must have seen it—I do not think that is a fair assumption—but, what did he see, he saw an engine with the back to him, he saw an engine moving so slowly that he was going three miles an hour, he saw an engine going at such a speed that it could be stopped within three or four feet. Was he there-

30

40

*Case.*

10 fore obliged to assume that it was going over the crossing, and, can your Honor assume in proceeding towards the crossing that he was guilty of contributory negligence? We are dealing here with a yard, a situation in which there is an engine practically standing still, with its back to him, if he saw it; so that, assuming he saw it, can we say, as a matter of fact that he was guilty of contributory negligence producing the accident when he kept on his way?

20 But, we are not bound to assume that he saw it, because this engine was coming behind him and the engine never passed him, because it was going on a parallel track, as he was going; the engine never passed him, or never got near enough to be observable until he was almost over the crossing. So how can we say that he must have seen it? He was not obliged to look behind him. He knew that if the engine was going to use that crossing it was going to give a signal and he got no signal, so how could it be said that he was guilty of contributory negligence as a matter of law?

30 The Court thereupon ordered a recess until two o'clock this day.

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 AFTER RECESS.

The Court: With reference to the motion for a nonsuit, I have given this some study during the noon recess, and, mindful of the testimony in the record to the effect that there was a custom to blow a whistle or ring a bell on the part of any engine us-

*Benjamin F. Watson, direct.*

ing this crossing, and the further testimony of the engineer that this engine was barely turning its wheels over and going at a very slow rate of speed, it has seemed to me that the case has most of the elements that are found in this case of *Coyne v. Penn. R. R.* (93 Atl.), and, while I am perfectly frank to concede that the case may be a close one (as must be apparent to counsel on both sides) nevertheless, I feel that there is sufficient testimony in the case to warrant me in submitting it to the jury and, therefore, the motion for a nonsuit will be denied.

10

Motion denied; defendant excepts.

Mr. Hartpence: We now offer in evidence the photograph which has already been markd D-1 for identification.

20

(Admitted and marked "In evidence, Defendant's Exhibit D-1" of this date.)

BENJAMIN F. WATSON, recalled for the Defendant.

*Direct examination by Mr. Hartpence:*

Q. You have testified that you were running the engine that collided with Cowell's car on February sixth, 1923, that is correct, is it? A. Yes, sir.

30

Q. How far had your engine moved from the time that it started up until it came in collision, about how far? A. Why, approximately the length of three locomotives.

Q. That would be about how many feet, would you say? A. Well, about a hundred and twenty to a hundred and fifty feet. Something like that.

Q. In what direction was your engine moving? Forward or backward? A. Backwards.

40

*Benjamin F. Watson, direct.*

Q. That is to say, that the tender proceeded first, is that right? A. Yes, sir.

Q. Did you see this truck Cowell was driving before the collision took place? A. No, sir.

10 Q. Will you just describe what did take place from the time you started up your engine until you learned that a collision had occurred? A. Well, the engine was lying—I had just taken one engine over to the coal wharf for coal and I had left that locomotive—

Q. And bear in mind that all the gentlemen of this jury as well as we want to hear what you say. A. Well, before I got on that locomotive—

20 Q. Never mind what you did before you got on that engine. Will you kindly answer my question and tell the jury what you did from the time you started up your engine until the collision occurred? A. I rang the bell and blew the whistle and rang the bell again, and, seeing no one, I started to back, in backward motion, very slow, just as slow as possibly could go and keep the engine going, I should judge about two or three or four miles per hour—

The Court: Did you say you gave a signal?

30 The Witness: Yes, sir, positively.

The Court: What did you do?

The Witness: I rang the bell and blew three blasts of the whistle, which means backward motion, back up, and I rang the bell again before moving the engine.

Q. How long did the bell continue to ring as you moved back? How close did you get to this crossing? A. Very nearly to the crossing, as near as I can judge, to the crossing.

40

*Benjamin F. Watson, direct.*

Q. Then what happened? What brought it to your attention that something had happened? A. Why, the roof of this building had started to collapse down as I was over the top.

Q. What did you do then? A. I stopped immediately.

Q. After that what did you do? A. I got down and looked to see what was the matter and I saw the truck behind my tender. 10

Q. Didn't you notice any impact when you came in contact with it? A. I never felt a thing, no, sir.

Q. How close was this driveway to the track that your engine came down on? A. Where I started from?

Q. Well, as you proceeded along this track, say at the speed you indicated, was the driveway alongside of the track? A. Yes, sir. 20

Q. How close was it along there? A. I should judge six or eight feet.

Q. So that, was there anything between the rails your engine was on and the roadway itself? A. No, sir.

Q. Which side of the engine were you on? A. On the opposite side.

Q. From the roadway? A. Yes, sir.

Q. Standing up or sitting down? A. Standing up. 30

Q. Looking in which direction? A. Backward, back. Over the tank.

Q. Towards the crossing, or away from it? A. Across the crossing, yes, sir.

Q. Then you stopped your engine and got out and saw the truck, and what did you do then? A. I looked under to see if there was anyone around, and discovered this young man underneath.

Q. What did you do then? A. I got up on the 40

*Benjamin F. Watson, cross.*

engine and moved her away from the truck as soon as possible.

Q. How far? A. I should judge about ten feet.

Q. Did you clear the crossing? A. No, sir. On the crossing yet.

10 Q. What took place after that? A. Then people came around and tried to turn the truck over to get the young fellow out and finally the gang raised the truck and we could not get enough help there and we got the derrick to lift the truck off of him.

*Cross examination by Mr. Simpson:*

Q. You had not been in the railroad business for about twelve years, had you, before this accident?

20 A. About, yes, approximately.

Q. Then you came back in the railroad business about when? A. The twenty-sixth of January.

Q. Then you went to work at once in the Waldo Avenue yards? A. I did not hear that.

Q. Did you go to work at once in the Waldo Avenue yard? A. Yes, sir.

Q. Somebody broke you in? A. Yes, sir.

Q. Who was the man who broke you in? A. A man by the name of Decker, Henry Decker.

30 Q. How long was he breaking you in? From the twenty-sixth of January to what date? A. About thirteen days if I remember right; half of one week and one solid week.

Q. So that up to shortly before the day of the accident you had never been alone on the engine in the yard, had you? A. Not before the accident, well, before this, yes.

Q. Only a couple of days, was the first you had been alone on the engine? A. Yes, sir.

40 Q. And, on this engine, was there anyone sitting

*Benjamin F. Watson, cross.*

on the rear of the tender as you backed her? A. No, sir.

Mr. Hartpence: I object to that as immaterial.

Mr. Simpson: I want to find out what was the condition.

10

(Question allowed; Defendant excepts.)

Q. Was there anybody on the back keeping a lookout? A. No, sir.

Q. Is there any rule with which you are familiar, of the railroad company, in the yard, about backing engines, which requires a lookout on the back?

Mr. Hartpence: Objected to as irrelevant and incompetent.

Mr. Simpson: If they had a rule then he broke their own rule. That certainly would be competent, it seems to me under the case of *Godwin v. Atlantic City Railroad Co.*

20

The Court: Confine yourself to the fact whether or not he knew of any rule.

Q. Did you know of any rule in reference to backing engines, in that way? A. No, sir.

Q. You did not know of any? A. No, sir.

Q. What time did you get on the engine? What time of the day did you get on this engine? A. Well, this one engine—well, I could not tell exactly, somewhere around nine o'clock.

30

Q. In the morning? A. In the morning.

Q. Where were you taking it? A. I was taking it back to the coal wharf.

Q. Those three blasts of the whistle, that was when you started to move her? A. Yes, sir.

Q. That was the signal that you were going to back her? A. Yes, sir.

40

*Benjamin F. Watson, cross.*

Q. That would tell the other railroad men that you were going to back her? A. Yes, sir.

Q. Then you say you started her up slowly? A. Yes, sir.

Q. And you say the bell rang about up to the crossing? A. Yes, sir.

10 Q. What was it shut the bell off? A. I let go of the bell rope.

Q. When did you let go of that? Was that before you saw the roof collapse? A. Just before.

Q. Just before you saw the roof collapse you took your hand off the bell rope? A. Yes, sir.

Q. And stopped the bell from ringing? A. Yes, sir.

Q. Then what was it first attracted your attention to the fact that there was something wrong?

20 A. Why, this roof on this building sagging, collapsing, coming down.

Q. You had not seen this truck at all? A. No, sir.

Q. Had you seen any trucks in that vicinity? A. Yes, sir.

Q. Did you know when you started your backward movement that there were trucks down in the neighborhood of this crossing? A. One had been standing there all the morning.

30 Q. Was that the truck you afterwards found you hit? A. No, sir.

Q. But you had seen a truck standing there? A. Yes, sir.

Q. As you came to the crossing, did you have a clear view of the crossing? A. Yes, sir, when I started back.

Q. Both sides of it? A. Yes, sir, when I started back.

*Benjamin F. Watson, cross.*

Q. And you did not see any truck approaching the crossing on either side? A. No, sir.

Q. You did not see any truck in a position where you thought it was going to cross? A. No, sir.

Q. Then, as I understand, you started the engine slowly in motion backward? A. Yes, sir.

Q. And you kept watch of the crossing all the time? A. Yes, sir. 10

Q. What was your purpose in watching the crossing? To see if there was anybody near the crossing? A. Near the crossing or going across, yes, sir.

Q. Then you went ahead, I understand, and never saw this truck and knew nothing was wrong until you saw the roof collapse? A. No, sir.

Q. You did not feel a jar when you hit the truck. A. No, sir. 20

Q. Do you know how far you pushed the truck? A. Well, I should judge the rear of the truck was on the crossing yet when I stopped, just on the edge of it, so that it could not have been over ten feet I should think at the furthest.

Q. When you say the rear of the truck you mean it was almost clear of the crossing? A. Yes, sir.

Q. It had almost gotten across? A. It had almost cleared the crossing, yes, sir.

Q. And you could have stopped that engine within three feet couldn't you? A. If I saw her. 30

Q. You could have? A. Yes.

Q. You could have stopped within three feet? A. Yes, sir.

Q. Then if you saw this truck at the time you hit it, and pushed it ten or fifteen or twenty-five feet, if you could have seen the truck you could have stopped without travelling that distance couldn't you? A. Yes, sir. 40

*Benjamin F. Watson, cross.*

Q. When you got out and saw the condition, what was it you saw? A. I saw the truck upside down and I looked further and saw this young fellow lying under it upon his face.

Q. Where was the truck with reference to the planks of the crossing? Had it cleared the planks?

10 A. No, sir, just the rear wheels was on the planks.

Q. Where were the front wheels? A. The front wheels was beyond it.

Q. On the road? A. On the road, yes, sir.

Q. There is a slight curve as you approach this crossing? A. Yes, sir.

Q. Did that shut off your view of the crossing? A. No, sir.

Q. You could see it all the time? A. Yes, sir.

20 Q. What distance on each side of the crossing could you see? I mean, as you approached this crossing, how much of the roadway on each side was under your observation? Ten feet? Fifteen feet? I mean, as you came down the track to the crossing, you not only saw the planks, but you could see on each side of the tracks at the crossing, couldn't you? A. No, sir.

Q. Why not? A. The engine was too close to the crossing then.

30 Q. When you started, a hundred and twenty feet away? A. Why, all the vision was clear to me, the crossing and the planks and both sides.

Q. Each side? A. Both sides.

Q. You could see from that point when you was approaching the crossing? A. Yes, sir, that distance.

Q. When you gave your three blasts, I understand then you started up? A. Yes, sir.

Q. And you did not whistle again while you were in motion? A. No, sir.

40

*Benjamin F. Watson, cross.*

Q. You say you kept ringing the bell until you got near to the crossing? A. Yes, sir.

Q. Then you took your hand off? A. Yes, sir.

Q. What was the occasion of your taking your hand off the rope? A. Supposing everything was all clear at that distance.

Q. When you took your hand off the rope how far were you from the crossing? If the engine had remained in the position you stood, how far were you from the crossing? A. Well, we were the length of the tank, I should judge, a little closer, between twenty and thirty feet. 10

Q. Twenty to thirty feet away from the crossing? A. Yes; that is me myself, the tank not, but myself was there.

Q. How far was the nearest point of your engine to the crossing when you took your hand off the bell rope? A. The nearest part was very near to it, was about to it. 20

Q. What is your best judgment? That it was to it, or about to it, or what? What is your best judgment about that? That your rear was on it or away from it or what? A. The automobile?

Q. Yes? A. When I stopped?

Q. Yes? A. Just against the back of the tank.

Q. The automobile was against the back of the tank? A. Yes, sir. 30

Q. And do you know how far you went before you came to a full stop, after you took your hand off the bell rope? A. No, I could not tell exactly. It could not have been very far. Not much further than the length of the crossing.

Q. Not much further than the length of the crossing? A. No, sir.

Q. Which side of your engine were you on? 40

*Benjamin F. Watson, cross.*

Were you on the right-hand side as you backed it or the left-hand side? A. The left-hand side.

Q. Which side did this truck approach the crossing from? A. The left-hand side or the right-hand side? A. The right-hand side.

10 Q. You were on the opposite side? A. Yes, sir.  
Q. You were left on the engine? A. Yes, sir.

Q. Is that crossing very much used? A. Well, I could not say. Some days it is and other days it is not so much.

Q. They were building, weren't they? A. Trestle or something? A. Yes, sir.

Q. Do you remember being sworn at the last trial as a witness, in the other room? A. Yes, sir.

20 Q. Didn't you swear there that it was customary to keep on ringing the bell until you got completely over the crossing?

Mr. Hartpence: Objected to as immaterial and irrelevant.

Mr. Simpson: This is cross examination and I am attacking his credibility.

The Court: He said he kept his hand on the bell rope until he got about where the rear reached the crossing.

30 Mr. Simpson: What I want to know is if he did not say at the last trial on page 66—

The Court: In other words, you are trying to contradict the witness?

Mr. Simpson: I am trying to lay the foundation, yes.

(Question allowed; defendant excepts.)

A. I don't remember that.

40 Q. Do you remember this being asked: "Q. What was the customary thing you did going over this crossing to attract the people using it?" And

*Benjamin F. Watson, cross.*

did you answer: "A. I stated before, to ring the bell and blow the whistle"?

Mr. Hartpence: We object to that as immaterial and irrelevant.

(Question allowed; defendant excepts.)

A. I must have, if it is there. 10

Q. What is the distance from the inspection pit where you took out this engine, to the crossing?

A. I should judge about three hundred feet.

Q. Do you remember being asked at the last trial: "What was the distance from the inspection pit where you took out this engine to the crossing?" And you answered: "About a block and a half, I should judge, or a block"? Do you remember that? A. Well, yes, that is only a rough estimate. I could not tell you how many feet. 20

Q. Do you still say three hundred feet? A. Yes, sir.

Q. Don't you think a block or a block and a half is more than three hundred feet? A. I should judge it was a block or a block and a half in it, yes, sir.

The Court: Was that where you had been standing with this engine, at this inspection pit?

The Witness: Yes, sir. 30

Q. How far did you go after you saw the shed collapse? A. Well, I should judge about the length of the tank, about thirty feet as near as I could judge onto it.

Q. After you saw the shed collapse? A. Yes, sir.

Q. When you saw this roof collapse you could have stopped in three feet, why didn't you stop in 40

*Benjamin F. Watson, cross.*

three feet instead of going on to thirty feet? A. That is a question I could not answer why I did not. I did just as quick as I possibly thought it was right to stop.

10 Q. You saw that house falling down? That made you think there was something wrong, and yet, instead of stopping within three feet you went on for thirty feet more, didn't you? A. I could not say how that was on that.

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

Q. When you got down was the truck smashed up at all? A. I could not see correctly, but the cab was broken off of it, and the dash.

Q. Was the truck upset? A. Yes, sir.

20 Q. And, as I understand you, only the rear wheels were on the crossing? A. Yes, sir.

Q. The rest of it seemed to have got off? A. Yes, sir.

Q. Could you see what made the shanty collapse? Was it pushing the truck against the shanty or what? A. As near as I could judge, yes, sir.

Q. That was a good big place, that shanty, about a story and a half? A. No, not over a story. If it was that. It was low.

30 Q. You don't know the minute of the impact? You don't know when it was you hit the motor? A. No, sir.

Q. All you know is when you saw the thing collapse? A. Yes, sir.

Q. Can you tell us whether the house collapsed just as soon as you got to the crossing? Or, had you got half way on the crossing, or all the way over when you saw it, when you saw the house collapse? A. That I could not answer.

40

*Benjamin F. Watson, redirect.*

Q. You don't know? A. No, sir.

Q. It was a clear day? A. Yes, sir.

Q. Were there any other engines in the vicinity of this engine? A. No, sir.

Q. That is the only one? A. Yes, sir.

Q. There was nothing to obstruct your view?  
A. No, sir.

10

*Redirect examination by Mr. Hartpence:*

Q. There was nothing to obstruct the view of the persons on this driveway alongside of your engine? A. No, sir.

Q. And there was nothing to obstruct your view?  
A. Nothing at all.

Q. You don't know where the truck was at the moment your engine came in contact with it, do you? A. Positively not, I could not say, no.

20

Q. All you know is after you stopped your engine and got off then you found it in the position you have described? A. Yes, sir, that is it.

Q. Was it lying crosswise on the tracks, on the rails then, or lengthwise? A. Lengthwise.

Q. The truck pointing what way? A. The east, the same direction I was going.

Q. The rear portion of the truck then was right in contact with the back of your engine? A. Yes, sir.

30

Q. When you say it was just about off of the planking, you mean just about off the planking running lengthwise with the track? A. Running lengthwise with the track, yes, sir.

Q. Where was the throttle on that engine? On which side? A. On the left-hand side.

Q. That is the side you were standing on? A. Yes, sir.

Q. It had to be operated, did it, from that side?  
A. Yes, sir.

40

*Benjamin F. Watson, recross.*

10 Q. You spoke something about the view of the crossing when your tender got close to the crossing. What did you mean by that? What was the effect of that? A. Why, seeing over the back of the tank, on the opposite side, the tank was high, so high that it obstructs the vision from my standing up in the cab.

Q. After you got to a certain point? A. Yes, sir.

Q. And up to the time you got to that point where the height of the tender obscured your view of the crossing did you see any automobile or any person approaching the crossing? A. Not a thing, no, sir.

20 Q. How far was that point from the crossing, the point where you could no longer see the crossing because of the tank? A. That would be very near to the crossing, maybe, say, five or ten feet of the crossing, as near as I can judge.

*Recross examination by Mr. Simpson:*

Q. The steam cocks were closed, were they not, and steam flying? A. No, there was no steam flying.

*By Mr. Hartpence:*

30 Q. You testified that you gave three blasts of the whistle before you started, which indicated something; what was it you said that indicated? A. To back up in the opposite direction. Two whistles to proceed forward and three whistles means to back up.

Q. Is that the usual rule with regard to whistles when you move your engine? A. Yes, sir.

Q. And when you moved your engine this time just prior to the collision you followed your usual rule then in that respect? A. Yes, sir.

*Morris Glassman, direct.*

Q. And also with regard to ringing the bell? A. Yes, sir.

MORRIS GLASSMAN, sworn for the defendant.

*Direct examination by Mr. Hartpence:*

Q. Where do you work? A. At the Waldo Avenue yard. 10

Q. How long have you worked there? A. Eight years.

Q. For what railroad? A. The Pennsylvania.

Q. What is your business? What is your job?  
A. Locomotive inspector.

Q. Were you there the day of this accident which occurred to Cowell? A. Yes, sir.

Q. What did you see about it? A. Well, I took the engine off the pit a little ways and Watson got on and he rang the bell and blowed the whistle and went on. 20

Q. What is the pit that you refer to, you took it off the pit? A. Well, because we have got to have a place for another engine.

Q. What is the pit? A. The inspection pit.

Q. You had inspected the engine there, had you?  
A. Yes, sir, the engine was inspected; so when it is inspected we take her off and put another one in place. 30

Q. What did you do with the engine after it was inspected? A. I took her off the inspection pit a little ways and stopped her and I got off the engine and the hostler got on the engine.

Q. What is that? Watson? A. Mr. Watson, yes, sir.

Q. How far was it then about from the crossing where the accident took place? A. Well, I should

*Morris Glassman, direct.*

say about a hundred and forty or a hundred and forty-five feet, something like that.

Q. Did you see the engine move on down toward the crossing? A. No, sir, I did not see it move down toward the crossing, but I see when he got the engine and moved away.

10 Q. Did you see it start to move away when Watson got on? A. Yes, sir.

Q. Then where did you go? A. I went back to my job.

Q. What first called your attention to the fact that something had happened? A. Well, I heard people talking about it, that is all.

Q. Did you go down then afterwards, to the crossing? A. A good while after, it was all over.

20 Q. You are familiar with the crossing there, are you? A. Yes, sir.

Q. Are there any signs there at the crossing? A. Yes, sir.

Q. What are they? A. Well, just the regular railway crossing sign, "Look out for the locomotive."

Q. On which side of the crossing? A. On the west side, just right in front, you cannot miss it, it is right both ways.

Q. On each side of the crossing? A. Yes, sir.

30 Q. How long have those signs been there? A. As long as I can remember.

Q. Ever since you have been there? A. Yes, sir.

Q. And how long have you been there in the yard, did you say? A. Eight years.

Q. Did you see any automobile or automobile truck standing in the driveway at the time you put this engine where Watson took it? A. Well, I saw it before the accident happened but I did not see it at the time, when I got out there.

*Morris Glassman, cross.*

*Cross examination by Mr. Simpson:*

Q. There were trucks going over this crossing all the time with materials? A. Yes, sir.

Q. And it is a common thing for this crossing to be used by trucks taking material? A. I beg your pardon?

10

Q. It is a common thing for this crossing to be used by trucks? A. Well, they are always, all the time, taking material in and out of there.

Q. Over this crossing? A. Over this crossing, yes, sir.

Q. As I understand you, you brought the engine to the pit? A. Off the pit. I took it off the pit.

Q. Where did you take it to? A. A little ways from the pit.

Q. Then did she stop? A. Yes, sir.

20

The Court: A little ways, between what point?

The Witness: Well, that is between the crossing and the inspection pit.

Q. And before you moved it you blew the whistle and rang the bell did you? A. Yes, sir.

Q. Then you stopped? A. Yes, sir.

Q. And got off? A. Yes, sir.

Q. Then the hostler got on? A. Yes, sir.

30

Q. And you went away and paid no more attention to it, is that right? A. Well, I went to my work, yes, sir.

Q. Where was your work? A. I should say about fifteen feet from the place where I left the engine standing.

Q. What was your work? What did you do? A. Locomotive Inspector.

Q. And did you go to inspect another locomotive? A. Yes, sir.

40

*Morris Glassman, redirect.*

Q. You did not see the accident? A. No, sir.

Q. You don't know how long after you left the engine the accident happened? A. No. Well, I do know.

10 Q. Of your own knowledge, do you know? A. Well, a little while. It is not a long distance, you know, and I heard the right of way people say about an accident happened.

Q. You did not see the accident? A. No, sir.

Q. You don't know how long a time it was then, of your own knowledge, from the time he started to move the engine until he hit the truck do you? A. Well, I could not say that, it could be about ten or maybe eight minutes, something like that.

*Redirect examination by Mr. Hartpence:*

20 Q. Do you recognize that photograph? A. Sure.

Q. Do you? A. Yes. I recognize it.

Q. What is it a photograph of? A. That is of engine 1408.

Q. What is the photograph of the surrounding parts there? A. Well, this is to show the machine, that is before she comes to the crossing, for showing that engine and this crossing right as she goes through.

30 Q. Down where those two men are standing? A. Yes, sir.

Q. Is that the crossing where this accident actually took place? A. Yes, sir.

Q. Where those two men are standing? A. Where those two men are standing.

Q. And is this the driveway off to the right here where the automobiles went? A. Yes, sir.

Mr. Hartpence: Indicating to the right of the picture.

40 The Witness: Right here.

*Morris Glassman, recross.*

Q. And these two scaffolds or structures down here? A. That is for the wipers when they are cleaning the engine. The engine goes in one of those two trestles here and they are standing up and cleaning the engine.

Q. How long have they been there; do you know? A. What? 10

Q. Those two trestles where the wipers stand? A. Those two trestles, I think, were up two years.

Q. Were they there at the time this accident to Cowell took place? A. Yes, those trestles were there.

Q. You think they were there? A. I think they were. I will tell you. They were really repairing, probably they were taking in the material to repair that.

Q. In general, does that photograph show the condition just as it existed at the time Cowell was hurt? A. Yes, sir, just as they existed. 20

Q. This engine that is standing here, how near is that engine to the position in which you say you left the engine you took off the pit? A. Well, it is about a hundred feet headways.

Q. A hundred feet ahead of where you left the engine? A. Yes, sir.

*Recross examination by Mr. Simpson:* 30

Q. Do you know how long this engine was that we are talking about? A. No. I really never measured them. But I think they run around eighty feet or eighty-five feet, I don't know.

Q. How long was the tender? A. The tender could be about twenty-five feet—something like that. I never took the measurement.

*Thomas Burke, direct.*

*By Mr. Hartpence:*

Q. When you say eighty-five feet, you mean the engine and tender together? A. The whole length.

Mr. Hartpence: I offer in evidence the photograph which the witness saw.

10 (Admitted and marked "Defendant's Exhibit D-2" of this date.)

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THOMAS BURKE sworn for the defendant.

*Direct examination by Mr. Hartpence:*

Q. Where do you work? A. In the Waldo Avenue yard.

Q. How long have you worked there? A. Thirty-three years last Christmas.

20 Q. And you work for the Pennsylvania Railroad? A. Yes, sir.

Q. What is your job there? A. Hostler.

Q. Were you there the day Cowell met with this accident? A. Yes, sir.

Q. Did you see the accident happen to him? A. After the accident had happened.

30 Q. What brought it to your attention? A. I was picking coal on the locomotive at the coal wharf about two hundred yards away from where the accident had happened, at the time, and I heard a whistle, a bell ring and three whistles blow.

Q. What do you mean, three whistles? What kind of whistles? A. The signal to back down, as we generally do. That is our orders for to blow the whistle three times when we back down with our engine, and ring the bell.

Q. You mean the engine whistle? A. Yes, sir.

Q. And the engine bell? A. Yes, sir.

40 Q. What happened then when you heard the

*Thomas Burke, direct.*

whistle and the blow? A. I could not see who it was blowed the whistle and rang the bell at the time, because I just turned to step down.

Q. What did you do after you heard the whistle?

A. I stepped down off the engine, the engine I was on, and as I stepped down on the ground off the engine I looked ahead and I saw somebody back down.

10

Q. Regardless of that, what did you see? A. As I stepped to the ground I heard a crash, and when I turned around I saw a part of the carpet shed, for cleaning carpets, the roof coming down.

Q. Where was that carpet shed located with regard to the crossing? A. Just about a hundred feet from the engine I saw on the road crossing.

Q. Did you go down there, then, right away? A. Yes, sir.

20

Q. What did you see when you got there? A. I saw engine 186 against the truck and the truck was upside down and half of the carpet cleaning shanty was down also, one corner of it.

Q. Was the truck up against the carpet cleaning shed when you got there? A. No, sir, it was about, I should judge about six or seven feet on the other end.

Q. You know Watson, do you? A. Yes, sir.

Q. Did you see him there? A. Yes, sir.

30

Q. What did he do when you got there? A. We decided—

Q. Regardless of what you decided? A. To go ahead with the engine.

Q. What did you see Watson do? A. Watson got out the engine and saw the truck and then he got on the engine that he was off, got up again and moved the engine ahead.

Q. How far did he move it about? A. Well,

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*Thomas Burke, cross.*

about, I should judge, about ten feet or more, I could not exactly say.

Q. After that what did they do with the truck?

A. We looked around the truck—

10 Q. Will you please tell us what they did with the truck regardless of what you looked around and saw? A. We lifted the truck off with a derrick and took the young man that was under the truck out.

Q. Then what happened after that to the truck?

A. The derrick picks up the truck and put the truck across the road and left it there.

Q. That is all you know about the accident? A. That is all I know.

*Cross examination by Mr. Simpson:*

20 Q. Which did you hear first, three blasts of the whistle or the bell? A. I heard the bell ring and about the same time the whistle blow three times.

Q. That is the bell— A. And one whistle right after.

Q. Now, just listen to me. You heard the bell and the whistle, three blasts, at the same time, is that right? A. I did not say that. I said I heard the bell before and then the whistle right after that.

30 Q. You heard the bell first? A. Yes, sir.

Q. Then the bell stopped and you heard three blasts of the whistle? A. The bell was ringing still.

Q. You heard the bell ring and it continued to ring and you heard three blasts of the whistle? A. Yes, sir.

Q. What were you doing when you heard that? A. I was picking coal, as I said, about a hundred feet away right across the road.

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*Thomas Burke, cross.*

Q. Did you pay attention to picking coal or did you still continue to listen to this bell? A. I was looking out of the window, I was in and out of the window while picking up the coal on the tank.

Q. You were where? A. I was looking out of the window while they were putting coal on the tank.

10

Q. Did you watch this engine that killed this man until it got down to the crossing? A. I did not.

Q. How far away from the crossing was it the last time you saw it? A. When I saw it that is the time he struck that truck.

Q. You say you did not see him hit the truck? A. Well, no. I heard the crash and I stepped down and I turned around to look and see a part of the carpet shed went down.

20

Q. Now, before you heard the crash, which nobody asked you anything about, I am asking you, after you heard the signal, where was the engine the last time you saw it before it reached the crossing? A. I did not see the engine at all.

Q. You did not follow it at all? A. No, sir.

Q. Did you see the engine at the time you heard the three blasts and heard the bell ring? A. No, sir.

Q. How do you know it was this engine was blowing? A. I did not say I knew. I heard the bell, I said, and the whistle.

30

Q. How do you know it was this engine that you heard, if you did not see it? A. I don't know if that engine was blowing or some other engine.

Q. You don't know whether it was this or another engine? A. No, sir.

Q. How long was it before the crash that you heard this whistle that you describe, or bell? A.

40

*Thomas Burke, redirect.*

About a minute or perhaps a minute and a half or something.

*Redirect examination by Mr. Hartpence:*

10 Q. This crossing that you say you saw the truck and the engine on, will you look at this photograph which has been marked Exhibit D-2, and see whether you recognize that as the crossing; and also Exhibit D-1, look at them both, look at P-1 and P-2 and tell us whether you recognize the crossing where this accident took place on any of them? Do you recognize the crossing where the accident took place on any of those photographs? A. Yes, sir.

Q. On which one? A. This here one (indicating Exhibit P-2).

20 Q. What is this building over here? A. That is the carpet cleaning shed.

Q. The one all down in a heap? A. Yes, sir.

Q. This sign in there, in front of the carpet cleaning shed, with cross marks, what was that, do you know? A. That is the sign to look out for the locomotive.

Q. How long has that been there, do you know? A. I should judge about ten or twelve years at least.

30 Q. On this picture, Exhibit D-2, what are those two signs you see there with those cross pieces? A. That is the same thing.

Q. That is the crossing where the accident happened is it not, where those two men are? A. Yes, sir.

Q. And those signs have been there how long do you say? A. I should judge ten years anyway, to my knowledge.

40 The Court: And they are on each side of the crossing?

*Thomas Burke, redirect.*

The Witness: Yes, sir.

Q. At the time you heard this whistle and bell ring, from what direction did it come? Can you tell from your experience there? A. Well, the engine was backing down close to the truck, I saw the truck, I believe, but I did not see the track. It appears to me they both came in the same direction.

10

Mr. Simpson: I object to that and move to strike it out, what he believes.

Mr. Hartpence: We will consent to strike it out.

The Witness: According to that—

Mr. Simpson: We object.

The Court: Just pay attention to the questions and answer them. Only answer what is asked.

20

Q. I am asking you if you can tell from your long experience there in the yard, from what direction you heard this whistle and bell? A. Well, it sounded to me as though they came from the locomotive that had struck that truck.

Q. Where was the inspection pit? A. Oh, it is way out. Let me see, about, well, I should judge over three hundred feet from where the accident happened.

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Q. Was that the direction from which this bell and whistle came? A. Yes, sir, it was.

Q. Were there any other engines working around there at that time? A. Not that I seen.

The Court: Is there any contention that this was a public crossing?

Mr. Simpson: I don't think so. It is in their property and their yard.

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*Frank H. Lewis, direct.*

Mr. Hartpence: It is just what is called a yard crossing.

The Court: Is there any pretence that the statute as to giving the statutory signals, applies?

10 Mr. Hartpence: No, sir. We have no claim on that.

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FRANK H. LEWIS, sworn for the defendant.

*Direct examination by Mr. Hartpence:*

Q. What is your business? A. Assistant supervisor of the Pennsylvania Railroad.

Q. Supervising the tracks? A. Assistant supervisor of the track.

20 Q. Are you familiar with the Waldo Avenue yard at Jersey City of the Pennsylvania Railroad?  
A. Yes, sir.

Q. Did you make some measurements and a blueprint of the crossing there in the yard where this accident occurred to Cowell? A. Yes, sir. I made them I think on the seventeenth of December.

Q. Is this the blueprint that you prepared? A. Yes, that is the print that I made.

30 Q. Did you make the measurements indicated there? A. Yes, sir.

Q. Are they accurately stated on the blueprint? A. They are accurately stated, yes, sir.

Q. What is this detail up here at the top of the picture? A. This is a sketch of the crossing signs which are on each side of the crossing and shows the lettering and wording on the sign.

Mr. Hartpence: I offer the blueprint in evidence.

40 (Admitted and marked "Defendant's Exhibit D-3" of this date.)

*Charge.**Cross examination by Mr. Simpson:*

Q. You are familiar with the yard? A. Yes, sir.

Defendant Rests.

Testimony Closed.

Mr. Hartpence: If it please the Court I  
move for the direction of a verdict in favor  
of the defendant on the same grounds urged  
in the motion for a nonsuit.

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Motion denied; Defendant excepts.

Mr. Hartpence sums up for the Defendant.

Mr. Simpson sums up for the Plaintiff.

**Charge.**

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The Court then charged the jury as follows:

The Court: Gentlemen of the Jury, this action  
is brought under what is known in this State as  
the "Death Act," and the plaintiff is Margaret  
Cowell, administratrix *ad prosequendum* of the  
estate of William Cowell, deceased, and it is  
brought against the Pennsylvania Railroad Com-  
pany and Benjamin F. Watson, defendants.

Mr. Hartpence: If the Court please, the suit has  
been discontinued as to Watson, so that it is only  
against the Pennsylvania Railroad.

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The Court: Upon the statement of counsel, the  
suit has been discontinued as to the defendant  
Benjamin F. Watson, and he is eliminated from  
this case, so that the only defendant now remain-  
ing is the Pennsylvania Railroad Company.

The plaintiff claims that on the sixth day of  
February, 1923, the deceased was driving a motor  
truck for a concern for which he worked and that  
that concern had a contract with the defendant

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*Charge.*

10 company to deliver certain materials in its yard known as the Waldo Avenue yard of the defendant company; that while delivering those materials it became necessary for the deceased to drive into this yard, and, in going in and coming out, to pass over a railroad crossing in the yard, and, as I understand from both counsel, it is not contended that this is a public crossing, but it is a crossing that was used by persons having business with the railroad company in that yard.

20 It is further claimed that the decedent, having unloaded his load, proceeded down towards the end of this driveway to turn around; having turned around he came back over the course which he had previously taken, and he was compelled to stop until another truck which was unloading materials had pulled out of the way, and that, then, proceeding on, he approached this crossing where the accident occurred, and the plaintiff claims that there was a custom existing in this yard that a whistle or a bell would be blown by any engine using this crossing, and the plaintiff then says that on this day in question, which was a clear day, that no such signal was given, but that the truck which the deceased was driving was struck as he was going over this crossing by an engine backing up towards the crossing with the tender preceding the engine.

30 Now, the allegations of negligence in the complaint are that the railroad company did not use reasonable care in the operation of the engine in the said yard to give warning or notice of the approach thereof, and to have sufficient men in charge thereof to properly operate the same; but, on the contrary, backed one of said engines through said yard across a crossing therein with-

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*Charge.*

out giving notice or warning thereof and without sufficient men in charge thereof.

The defendant, on the other hand, says that it was not negligent, that it gave signals, both by whistles and bell, and that the decedent was himself guilty of contributory negligence by driving his truck in the manner in which he did without making suitable and proper observations, and in crossing the track under such circumstances as would indicate that he had not made those observations that a reasonable and prudent person would make.

10

Also, as I understand it, the defendant denies that there was any custom in the yard to blow a whistle or ring a bell.

So that the case is one purely of negligence, and, as you see, there is a conflict in the evidence, and you are the sole judges, gentlemen of the jury, of the facts and of the weight which you will give to the testimony that has been presented before you.

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The burden rests upon the plaintiff in this case, to satisfy you, by a preponderance of the evidence, that the defendant company was negligent, and, further, that its negligence was the proximate cause of the injury complained of.

Now, in order to decide whether or not this defendant company was negligent, you would want to know how the rule of law which applies in such cases.

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This is not such a case as where there is an accident at a public railroad crossing, because there certain statutory signals are required to be given, and I understand that that is not the contention in this case. So that the rule of care in this case is, that the defendant company must use reasonable care to warn persons using this crossing and

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*Charge.*

10 to use such a degree of care as a reasonably prudent person would use under such circumstances in propelling an engine across that crossing. And, as to what would be a reasonably prudent person, you cannot say that it is such a person as we ordinarily speak of as one who has no care for the rights of others, nor, on the other hand, can you say that it is a person who is over-scrupulous and over-painstaking; but the ordinarily prudent person is one who measures up to what an ordinary man would exercise as a degree of prudence in any given situation.

20 Now, in arriving at whether or not this reasonable care was exercised on this occasion, you must take into consideration whether or not there was a custom to ring the bell and blow the whistle. Because, if there was such a custom and the deceased knew of that custom, of course, he was not obliged to assume under the circumstances, that the engine driver would disobey that custom or rule. But, whether there was a custom or not, this defendant company must have exercised such a degree of care in approaching that crossing as a reasonably prudent person would have exercised under the same circumstances and conditions.

30 Another question is, did this defendant company have sufficient men upon this engine and tender to properly manage it; and then you will ask yourselves whether or not the company in providing men to operate this engine, had put sufficient men there to bring it within this rule that they must have used reasonable care under the circumstances.

Now, if you find under the evidence in the case and by a preponderance of that evidence, that this defendant company by its agent on that occasion

*Charge.*

did not exercise the degree of care that a reasonably prudent person would have exercised under the same circumstances, and you find that by a preponderance of the evidence, and you find that the negligence of the defendant company was the proximate cause of the accident, then the plaintiff can recover in this case, unless the deceased person at that time was guilty of contributory negligence, of which I will speak in a moment.

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On the other hand, if you find that this defendant company, by its engineer, was not negligent, or that, even if negligent, its negligence was not the proximate cause of this accident, then you need go no further, because you would find in favor of the defendant.

But, even if you find that this company did not exercise the reasonable degree of care that a reasonably prudent person would have done under the same circumstances, and that its negligence was the proximate cause of the injury sustained, that will not be enough, because in this case it will be required of you to consider whether or not the decedent was himself guilty of contributory negligence, and you will then want to know what is the degree of care that he should have exercised on that occasion. He should have taken such care and precaution as an ordinarily prudent person would have done under the same circumstances and conditions. In other words, he must have used that degree of care which an ordinarily prudent person would have exercised in making proper observation before crossing over that crossing. The mere fact that this man was injured on this crossing does not entitle this plaintiff to recover. The plaintiff has got to show that the defendant company was negligent, that its negligence was

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*Charge.*

10 the proximate cause of the injury to the plaintiff, and, in this case, the decedent must be free from contributory negligence; and, I am obliged to say to you that upon the question of contributory negligence the burden is on the defendant to show that the decedent was guilty of contributory negligence.

20 If the deceased person at the time of this accident, was in any degree guilty of contributory negligence, if his failure to exercise such a degree of care as an ordinarily prudent person would have exercised under the same circumstances, was a contributing cause of this accident, he would be guilty of contribution negligence, and if in any degree that entered into this accident you would have to stop right there and your verdict would be for the defendant.

30 Now, certain motions were made; one at the close of the plaintiff's case for a nonsuit and the other at the close if the whole case for the direction of a verdict. The Court's denial of those motions must not in any way enter into your decision of this case. You have nothing to do with that matter. That was simply the Court's determination that under its conception of the evidence there was conflicting questions of fact which should be submitted to you for your determination; so that you are to eliminate from your minds the question of the ruling of the Court on those two motions and you are not to take that as indicating in any manner or degree what the Court's opinion is as to what your verdict should be.

40 If you come to that point in your deliberations where you have found by a preponderance of the evidence that the defendant was negligent and that that negligence was the proximate cause of

*Charge.*

this injury and that the deceased at the same time was not in any degree guilty of contributory negligence, it will be necessary for you then to take up and consider the question of damages, and this act which I have designated as the "Death Act" sets forth what you are to take into consideration.

The statute is as follows:

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In every such action—that is an action such as this—the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person.

Of course, in this case, there is no wife, and those referred to, the next of kin, were, in this case, the mother and brothers and sisters of this deceased person.

Our Court of Errors and Appeals has amplified the rule laid down in the statute and uses this language:

20

What the plaintiff is entitled to recover—and you see, the plaintiff here is the administratrix *ad prosequendum*, that is, an administratrix appointed for the purpose of this suit—what she is entitled to recover, is a capital fund which shall represent the present value of all the pecuniary loss which will fall upon the next of kin by the premature taking off of the intestate. That fund is to be ascertained by taking into account all the possibilities; the intestate might have died in the course of nature, shortly after the accident, he might, had he lived, have suffered financial reverses, his next of kin might have pre-deceased him. Nothing is to be added for loss of society or wounded feelings or anything else which cannot be measured by money and satisfied by a pecuniary recompense. They—the damages—

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*Charge.*

are to be determined exclusively by reference to the pecuniary injury resulting to the next of kin of the deceased by his death. The injury to be thus recovered for has been defined by this Court to be the deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of the deceased. Compensation for such deprivation is, therefore, the sole measure of damages in such a case.

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Now, gentlemen, if you find for the plaintiff, in the application of the evidence to that rule of law, I do not want you to go astray. This deceased was twenty-two years of age. You gentlemen will remember what the facts are and if the Court's recollection of what the facts are is incorrect, your recollection of the facts is to govern you always. The only evidence of pecuniary loss, as I recall it, in the case—and again your recollection will govern you—was, that he was making thirty dollars a week, of which twenty dollars was contributed to the mother for the support of the family who were then living at home, and, I recall that to be the mother and one sister and a brother. And the deceased had his living out of the contribution thus made. That is the evidence in the case as to his earning capacity.

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You must find from the evidence, the pecuniary loss that he was to these next of kin, and, under the rule which I have given you for your guidance, the Court of Errors and Appeals lays down the injunction to juries that they must consider all the circumstances in the case, and it is none of your concern as to whether the law is wise or unwise, you are bound in your deliberations and findings to take the law as it is given to you by this Court, and this Court in turn is bound to give you

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*Charge.*

the law as it is declared by the highest court of this estate.

So that, if you find for the plaintiff, if you arrive at that point, where you find that a verdict should be given for the plaintiff, you will consider all the possibilities that might intervene as elements in making up the sum of the pecuniary loss, you will consider the probability of the next of kin dying before him; you will consider all the circumstances as expressed by the Court of Errors and Appeals in the opinion that I have just read from. And, if you give the plaintiff a verdict, you will award only that sum which will repay the pecuniary loss shown by the evidence in the case.

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Now, it is hardly necessary for me to say to you, that you must consider this evidence fairly, and if you find for the plaintiff, find a verdict that will only represent the pecuniary loss and nothing more. Do not be carried away by sympathy or by consideration that a life has been extinguished and that this defendant is a railroad corporation. These two parties stand before you upon terms of absolute equality, and it is your duty to conscientiously weigh the evidence and administer justice between them fairly. It is not for you to reach a conclusion on a sort of an imaginary idea as to what the law ought to be. You are to be governed by the law as it is and as it is laid down for you by the Court, and if you administer justice to these parties according to that rule then you will have done your whole duty.

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Now, gentlemen, you may take the case and bring in your verdict.

(The jury then retire.)

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*Charge.*

10 Mr. Hartpence: The defendant excepts to that portion of the Court's charge wherein the Court stated that the plaintiff claimed that there was a custom to ring the bell and blow the whistle, and that that custom was not followed on this day, and that the jury must take into consideration whether there was such a custom to ring the bell and blow the whistle.

(Exception allowed.)

Also to that portion of the charge in which the Court stated that the deceased knew of that custom and that he was not obliged to assume that the engineer would fail to follow that custom.

The Court: I did not say it quite that way but an exception may be entered to what was said by the Court.

20 Mr. Hartpence: Also to that portion of the Court's charge wherein the Court submitted to the jury the question as to whether or not the defendant company had sufficient men on the engine and tender to bring the operation of the train within the rule that they must use reasonable care.

30 Also to that portion of the Court's charge where the Court charged the jury that if they found the defendant did not exercise reasonable care and that negligence was the proximate cause of the injury to the plaintiff, then the plaintiff can recover, unless the deceased was guilty of contributory negligence. That is to say, that is in line with the exception taken to the Court's refusal to nonsuit or direct a verdict, on the ground that it ought not to be submitted to the jury to find negligence.

Also to that portion of the Court's charge wherein the Court stated that whether the proper degree of care was used or not was a question which should be determined by the jury; our point

*Charge.*

being that it should not have been submitted to the jury.

Also to that portion of the Court's charge in relation to the assessment of damages, wherein the Court submitted to the jury the question that the action is brought for the benefit of the mother, brother and sisters, and that in determining the pecuniary loss they could take into consideration the persons of the mother and sister and brother in the family to which he contributed. My recollection of the testimony is that the mother stated the deceased paid her twenty dollars a week as board, and my own idea of the evidence is that there would not be under those facts sufficient to extend it to the sister and brother and that there was no evidence that it was actually carried beyond the mother.

10

20

The Court: That is a question of fact. I think the evidence went a little further than you state.

Mr. Hartpence: Particularly in regard to the brother who was thirty-four years old and able to earn his own living and he apparently was paying his board to the mother also.

The Court: I will recall the jury on that.

(The jury were then recalled before the Court.)

The Court: Gentlemen of the Jury, I have called you back because counsel for the defence has called my attention to a portion of the charge respecting the rule of law governing damages which may be, in my application of it, misunderstood by you.

30

It is claimed that I said that in arriving at the pecuniary loss you might consider the mother and sister and a brother who was living at home. I wish now to instruct you that you are to be governed by the evidence referring to this sister and brother as to whether they received any pecuniary

40

*Exhibits.*

10 advantage or benefit from this deceased brother's contribution to the mother. If not, then, of course, that would have no bearing upon the question of the pecuniary loss sustained. You are to recall the facts testified to respecting the pecuniary loss sustained by his family and in doing so you are to remember this, too, that the evidence was by the mother that the twenty dollars which was contributed weekly into the family purse was used in providing for the table and maintaining the home, and, of course, the deceased got some advantage out of that also; so that, so far as the advantage accrued to him that should not enter into your determination of the amount of damages, because that accrued to him himself. Just that which the next of kin under all the facts in the case have 20 sustained by way of pecuniary loss, and you arrive at that from the evidence.

The Court: Does that cover the point?

Mr. Hartpence: I think that covers it.

(The jury then retire.)

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**Exhibit P-1.**

No. 542

Date Feb. 5, 1923

Received from — McDowell at Hackensack River  
30 Bridge

In good order the following articles:

10 foot timber.

(to be done first thing Feb. 6, 1923)

Addressed to Waldo Avenue coal trestle

Authority B. F. Stidfole

s

Received by — J. McDowell

40 Above form was made out by George J. Schroll, Clerk, Master Mechanic's department, Storeroom,



*Exhibits.*

## DISTRIBUTION OF CHARGE

	Hrs.	Min.
10	2	

Carting timber from  
Hackensack River  
Bridge to WALDO AVE.  
COAL TRESTLE.

REPRS. B & S

**Exhibit P-1.—Duplicate.**

(See photograph opposite.)

**Exhibit P-2.**

(See photograph opposite.)

20

**Exhibit P-3.**

Letters of Administration of plaintiff.

**Exhibit D-1.**

(See photograph opposite.)

30

**Exhibit D-2.**

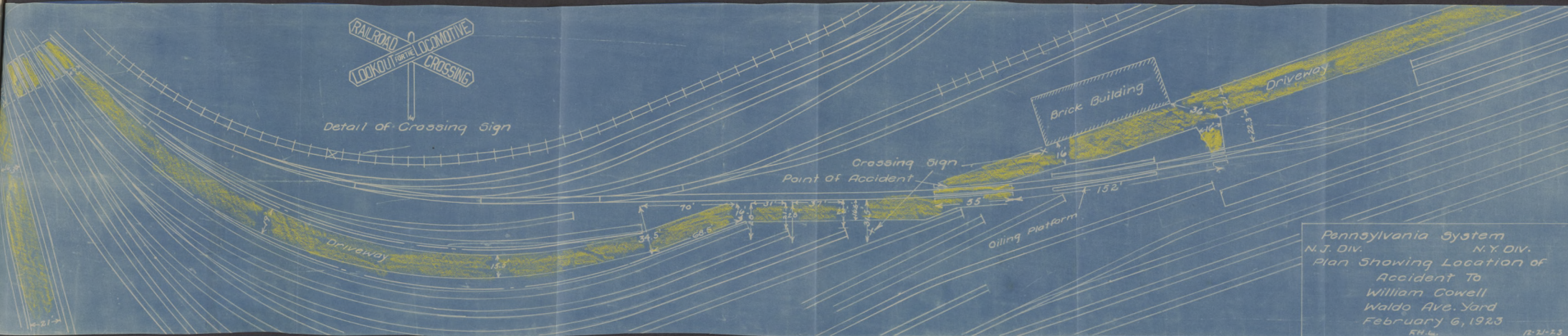
(See photograph opposite.)

**Exhibit D-3.**

(See blue print opposite.)

40

[1500]



Pennsylvania System  
 N.J. DIV. N.Y. DIV.  
 Plan Showing Location of  
 Accident To  
 William Cowell  
 Waldo Ave. Yard  
 February 6, 1923  
 F.H. L. 12-21-23

D-3

Blueprints  
in

Cornell

Case

21 MAR.T.1925

COURT OF ERRORS AND APPEALS

New Jersey ~~Supreme Court~~

MARGARET COWELL, Administra-  
trix of the Estate of William  
Cowell, deceased,

Plaintiff-Appellee,

v.

THE PENNSYLVANIA RAILROAD  
COMPANY,  
Defendant-Appellant.

Action at Law

On Appeal  
from Hudson  
Circuit.

**BRIEF FOR PLAINTIFF-APPELLEE.**

**Statement of Facts.**

The statement in defendant's brief, in the first part of the Statement of Facts, that the intestate of the plaintiff unnecessarily crossed the tracks to get out of the yard when he could have left the yard without crossing the tracks is a mistake. The testimony was directly to the contrary (see State of Case, p. 14). This statement is probably made to try and bring this case within the law laid down by the case of *Diebold v. Penn. R. R.*, 50 N. J. L., 478, where the decedent was killed in a portion of the yard where it was not necessary for him to be or go in his business, held to be without cause of action for this reason. This decedent was a truck

driver who was taking a load of lumber into the premises of the defendant, which premises was not a regular railroad yard where switching was done, but simply a place where locomotives were kept and watered and prepared to be taken out on runs. He delivered his load of lumber and then to get out of the yard was compelled, notwithstanding the appearance of the photographs which may be deceiving as to the width of the road, to cross the tracks to get out of the yard. He did this; made his turn and was leaving the yard when his truck was struck and he was killed as he was about half way over the single track of the defendant. It is not a case of rapidly moving locomotive which was within his vision. The locomotive that struck him was hardly moving; the wheels were hardly turning over, and if seen by him, in the position he was in, it does not necessarily follow that he knew it was in motion so as to charge him with that fact. It proceeded backwards, which was another deceiving circumstance, and without ringing the bell for some distance before it reached the crossing (S. C., pp. 66-67, testimony of the holster in charge). It struck and killed him when he was, as has been said before, about half way over the track. After striking him, although he was in full vision, the locomotive still continued and pushed his truck against a house and knocking the house down and shoving his truck some 10 to 15 feet before it stopped (P. C., p. 16, ls. 30-40). The holster in charge of the locomotive was an inexperienced man and had only been at his work a few days. Although intestate's truck was in full sight while he was crossing or before he started to make the crossing with the locomotive, yet he testified he didn't know anything about the accident until he saw the house fall down. There was evidence by one who was in

position to hear, that no bell was ringing or whistle sounded for sometime before the accident. Cowell had been in the yard before, from which the jury could find that he knew of the custom to ring bell or blow a whistle before a locomotive would be passed over this crossing. He had been going there for about 8 months (P. C., p. 39, l. 24).

### POINT I.

#### **Contributory negligence was for the jury.**

It will be noted that this accident occurred not on a public crossing where trains approached at great speed, but at a yard the locomotive was moving so slowly as hardly to be perceptible and where it was the custom to warn persons in the yard of the intention of the locomotive to keep on proceeding until it had crossed the crossing. Under these circumstances, can it be said as a matter of law, that the plaintiff's intestate who knew of the custom to warn—who had no warning—who saw the locomotive with back or rear-portion pointing to him and the front away from him, moving so slowly as to be hardly discernible, was guilty of negligence as a matter of law in making this crossing. Unless his negligence is plain, the question was for the jury and properly submitted to the jury.

All the cases cited by the appellant are cases where train was running at great speed at public crossing. Take the case of *Brenner v. Penn. R. R.* for instance, which is cited, 73 L., which is attempted to be applied in this case. There the plaintiff drove directly on public railway crossing, although he knew train was coming at speed to endanger him. There it was held he was guilty of

negligence as a matter of law. But it cannot be applied to this case where the man saw the practically motionless locomotive with back toward him and received no warning of the intended movement thereof, although warning was customary in the yard. All of these cases if run down, will show that they were not parallel to the case being argued, being cases where persons crossed regular railway crossings where trains were in habit of passing at great speed, without using care to look to see whether there was danger.

Bonnel v. Paterson, 10 Vr., 189;  
*Smith v. Atlantic City R. R.*, 66 L., 307.

A case resembling the instant case is *Coyne v. Penn. R. R.*, 87 N. J. Law, 93 Atl., page 595, where the Court said:

“So it has been held that one who goes upon the vehicles or premises of a carrier to transact business with it, or its agents, or to transact business in the operation of the road, or who is there by invitation of the carrier, express or implied, is lawfully there, and the carrier owes him the duty at least of using reasonable or ordinary care for his safety.”

## POINT II.

Of course, it is conceded that failure to give statutory signal or negligence on the part of the defendant does not relieve plaintiff of his duty, but in the cases cited before, they were crossings of public railways where there was unobstructed view and train was approaching at great speed. The mere failure to give statutory signals would not

absolve the plaintiff, but in this case there was no duty to give statutory signal. The defendant had instituted a custom of warning persons in the yard on business that it was about to move locomotives over this crossing. It was not a common or usual movement. There were repairs going on in the yard; building material was being delivered and plaintiff's intestate had a right to assume if he saw the locomotive in the position it was and no signal was given to him that there was no movement intended, such as was always preceded by warning, so that the cases in Point II of appellant's brief, are inapplicable, because the facts are not the same.

BAER v LEHIGH & HUDSON RIVER R.WY. CO.  
93 L. 85; 106 Atl. 421; aff. 108 Atl. 253; cases cit

### POINT III.

The testimony of a witness who was in a position to hear if signal was given and testifies that he heard no such signal, is enough to send the case to the jury, even if contradicted by the evidence of numerous witnesses that signal was given. It might be argued on rule to show cause that the verdict was against the weight of the evidence, but surely it was not error to send this case to the jury if evidence of customary warning was necessary to determine the case. See the following cases:

*Goodman v. Central R. R.*, 73 Law, 576;  
*McLean v. Erie*, 40 Vr., 50;  
*Rogers v. West Jersey*, 75 L., 568;  
*Tisman v. Erie*, 81 Law, 270; aff. 83 L.,  
793.

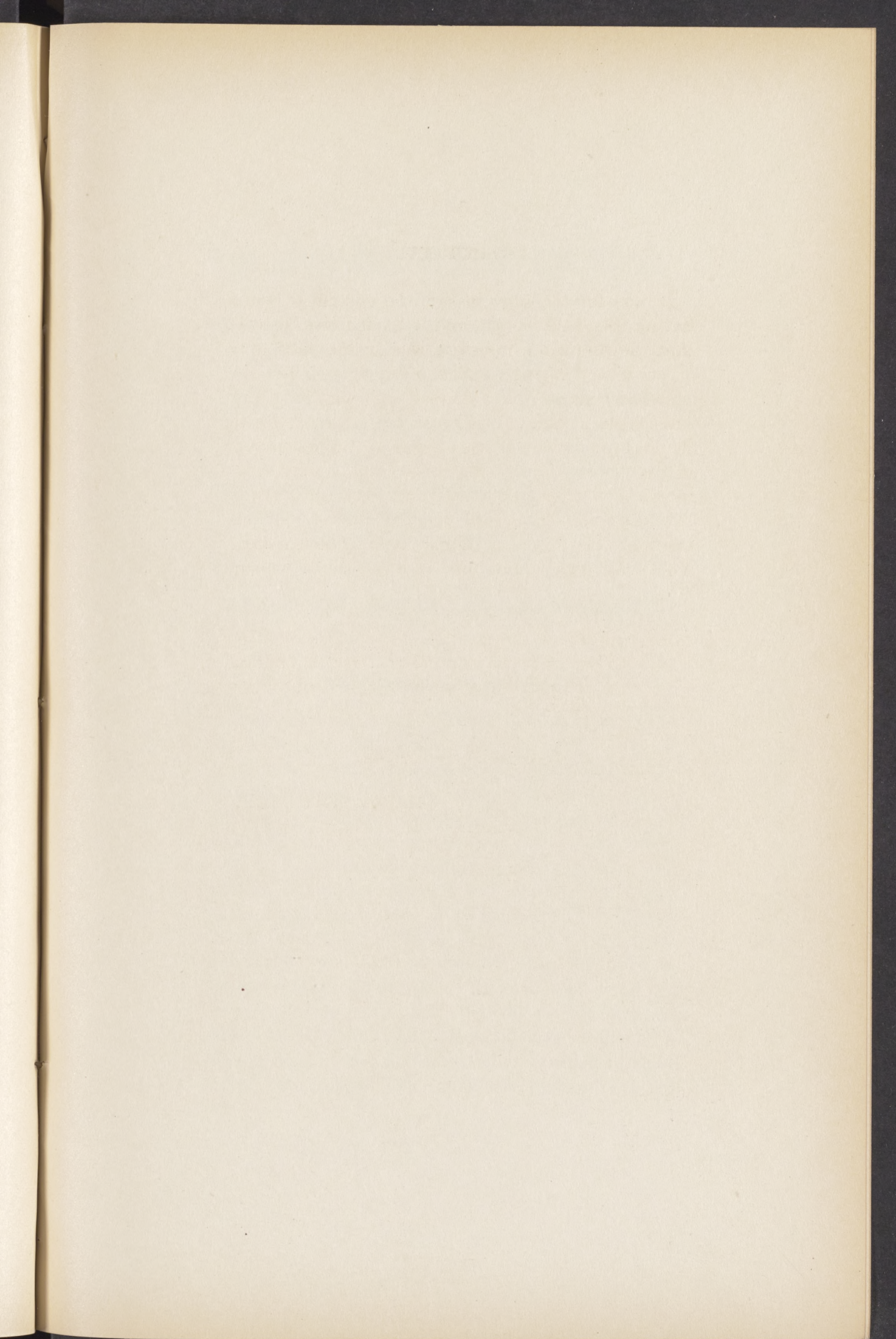
**POINT IV.**

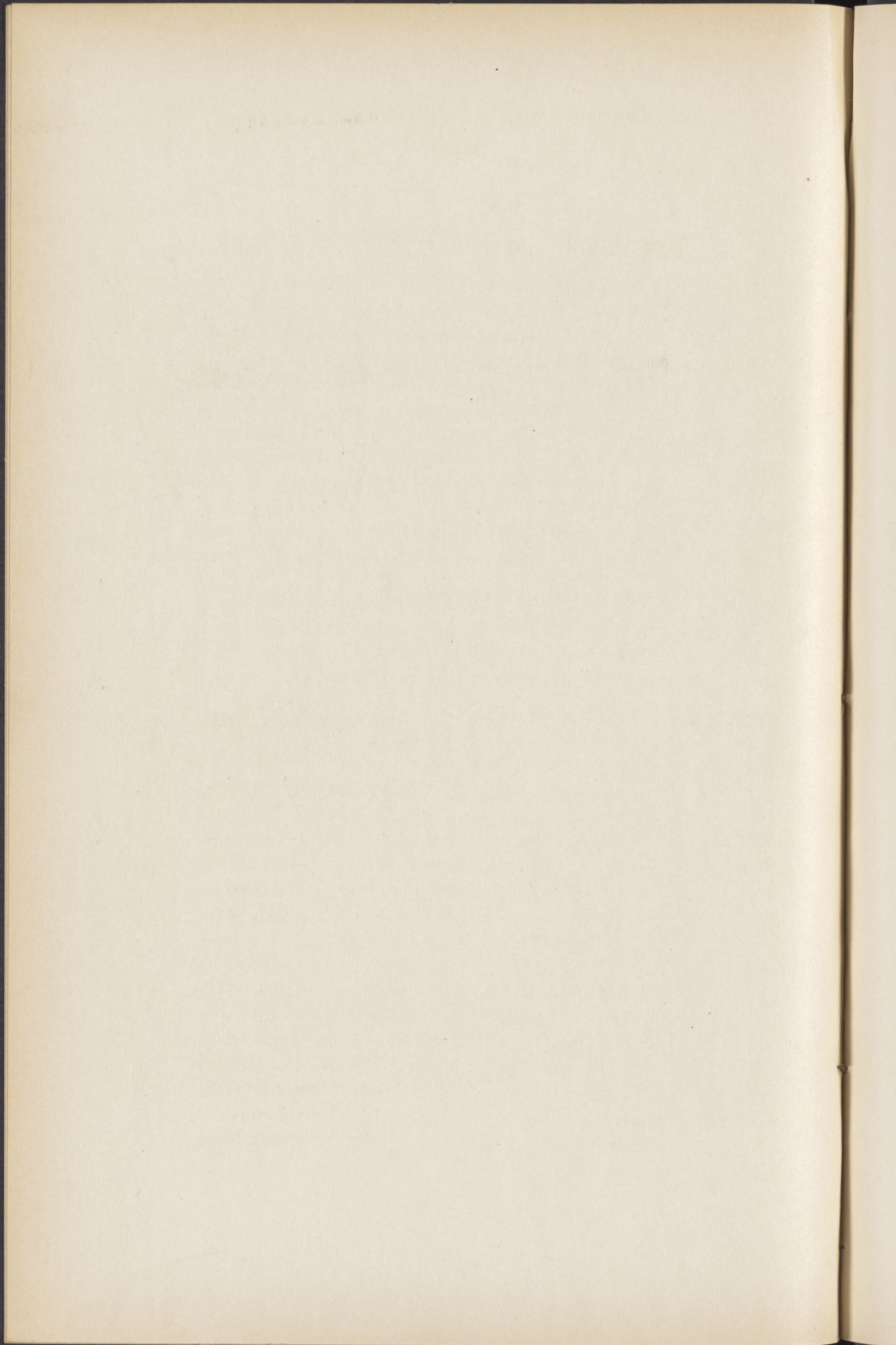
It was for the jury to say, the custom to warn having been established, and it having been proved that the plaintiff's intestate was in the yard over a period of 8 months, and it being proved that the customary signal was always given, whether under these facts, he being in the yard and in proximity to the crossing, knew of the custom of the defendant to give the signal. All the cases cited, simply show that where it is demonstrated that the custom was not known to the party or could not have been known to the party, or there was no evidence from which the jury might infer that it was so known.

*Smith v. Scudder*, 4 Zab., 96;  
*Parker's Digest*, Vol. 2, col. 3260, Sec. 14;  
*Corpus Juris*, Vol. 17, 525; Sec. 93 holding  
competency of witness to testify for the  
Court.

Respectfully submitted,

ALEX. SIMPSON,  
Attorney for Plaintiff-Appellee.





21 MAR.T.1925

## New Jersey Court of Errors and Appeals

MARGARET M. COWELL, Adminis-  
tratrix *ad prosequendum* of  
the Estate of William Cowell,  
deceased,

Plaintiff-Respondent,

*v.*

THE PENNSYLVANIA RAILROAD  
COMPANY, Impleaded, etc.,  
Defendant-Appellant.

Action at Law.

On Appeal from  
New Jersey  
Supreme Court.

### **BRIEF OF DEFENDANT-APPELLANT.**

#### **I.**

##### **Statement of the Case.**

Plaintiff's intestate, William Cowell, was killed on February 6th, 1923, while driving a motor truck over a yard crossing of the defendant in the Waldo Avenue Yard, at Jersey City, New Jersey. He had previously delivered a load of building material at a point in another part of the yard, and then, instead of turning his truck around and driving out of the yard without crossing the tracks, as he might have done (Exhibits "P-1," "P-2" and "P-2" [Duplicate]; "D-1," "D-2" and "D-3," Case, pp. 84-85), he, as was usually done by drivers, drove farther down into the yard and over the crossing to turn around. He was on his way out after turning his truck, when he was struck by a locomotive of the defendant at the crossing indicated, and killed. The truck was pushed forward

by the locomotive, and the rear portion came into contact with a small building near the track, causing it to collapse.

Nobody witnessed the accident. Several persons heard the crash of the collision and saw the locomotive and truck in contact almost immediately thereafter, but there is no evidence to show just how the accident occurred or just what Cowell's actions were at the time of this occurrence.

The locomotive and the truck were seen moving slowly in the same direction, side by side, with but a few feet between them, at a point about 60 feet from the crossing, and nothing intervened to interfere with the view of either by the persons on them (Exhibits "P-1, "P-2" and "D-3," Case, p. 85). The track upon which the locomotive was moving curved slightly toward the driveway along which the motor truck was being driven, and the track and the driveway crossed at an angle at the point of the accident. But it is to be noted that the driveway at the point of contact with the track makes an "S" turn, so that vehicles passing over it would turn and cross at right angles to the rails instead of at an obtuse angle, and the planking was so arranged. The crossing was protected by the standard crossing signs, "Railroad Crossing, Look Out for the Locomotive," on both sides of the tracks (Case, p. 60; Exhibits "D-2" and "D-3," Case, p. 85).

The accident occurred at about nine o'clock in the morning, on a clear day (Case, p. 23). There were no other engines or trains moving in the immediate vicinity at that time, and there were no unusual noises (Case, p. 25).

The hostler in charge of the engine was operating it on the opposite side of the engine from the driveway, and testified that he did not see the truck at

all until after the accident had occurred. Cowell was driving a flat open truck with a non-enclosed seat, and there was nothing to interfere with his view of the moving locomotive (Case, p. 28). He had been obliged to wait in the narrow driveway until the witness Fetzter finished unloading his truck, which stood in the driveway, because the space between Fetzter's truck and the track over which the locomotive passed was too narrow to permit Cowell's truck to pass through it. Fetzter moved his truck ahead a few feet to allow Cowell to pass, and Cowell changed his gear as he passed by Fetzter (Case, pp. 24, 28). It was just at that moment that Fetzter saw the locomotive moving slowly down the track in the same direction taken by Cowell, and directly opposite Fetzter's truck, about sixty feet from the crossing where the collision took place. He did not see either again until he heard the crash. The locomotive was moving backward, tender first (Case, p. 24, 26, 27, 15).

The engine driver testified that at the time he started the locomotive on its backward movement toward the crossing he blew the engine whistle and rang the bell, and that he continued to ring the bell until the first part of the tender had just about reached the crossing (Case, p. 46). The engine was moving very slowly (Case, p. 27, 35, 46). The witness Glassman, who had taken the engine from the inspection pit to the point where the hostler took it up, testified that he heard the hostler blow the whistle and ring the bell as he started off with the engine (Case, p. 59). The witness Burke testified that he was a short distance away from the crossing, about opposite it, engaged in other work, but that he heard the crash of the collision and looked up in time to see the building alongside of the crossing collapse, and that he had heard a whistle

and bell ring just before the crash, which in his judgment came from the locomotive that collided with the truck (Case, pp. 64, 65, 66). There were no other engines in that vicinity at that time (Case, pp. 57, 69).

The only other evidence regarding the bell and whistle was that given by the witness Fetzner, as follows:

“Q. Will you state whether or not you heard any whistle or bell from that locomotive? A. No, sir, I did not” (Case, p. 15).

“Q. That was the only engine you saw? A. That was the only engine I saw, yes, sir.

“Q. Did you hear the noises of other engines, whistles or bells? A. Well, there is always more or less noise in the yard, hammering, something of that kind. I did not hear a locomotive whistle at that particular time; no sir.

“Q. You did not hear the bell or the whistle of another locomotive? A. No, sir” (Case, p. 25).

The Trial Court, over the objection of the defendant, admitted testimony of a custom in the yard to blow the whistle and ring the bell as a locomotive was about to pass over this crossing (Case, pp. 18, 19, 40, 54, 55), but there is no evidence whatever in the case to show that Cowell had knowledge of or relied upon such a practice.

A motion to nonsuit and a motion to direct a verdict in favor of the defendant were denied, and the Court submitted the case to the jury, and particularly based its action upon the element of the alleged customary warning signals and the alleged absence thereof upon the occasion of the fatality to Cowell.

The jury rendered a verdict in favor of the plaintiff for \$9,250.00, and judgment was entered thereon in the Hudson Circuit Court accordingly

(Case, p. 11). From the whole of that judgment an appeal was taken to the Supreme Court (Case, p. 1), where the judgment was affirmed (Case, p. VI). The present appeal is from the judgment of the Supreme Court (Case, p. V).

## II.

### Questions Involved.

The appellant will rely upon its grounds of appeal numbered 1, 2, 3 and 5 to 8, inclusive, and 10 to 12, inclusive in the Supreme Court (Case, pp. 2, 3, 4, 5), and will contend that the judgment under review should be reversed because of the affirmance of the action of the Trial Court in (1) permitting questions, over objections of defendant, to be directed to the witnesses Charles McLevy and Benjamin F. Watson, covered by grounds of appeal 3, 5, and 6; (2) in submitting to the jury for determination the question of whether or not a custom to ring a bell and blow a whistle existed in the yards of defendant company, as covered by grounds of appeal 7 and 8; (3) in refusing to grant motions for nonsuit and to direct a verdict in favor of the defendant as covered by grounds of appeal 1 and 2; and (4) in submitting to the jury for determination the negligence of the defendant and the contributory negligence of plaintiff, covered by grounds of appeal 10 to 12, inclusive.

**III.****Argument.****POINT I.**

**The negligence of the defendant alleged by plaintiff was not established, and the negligence of plaintiff's intestate was the proximate cause of his death.**

Under the facts and circumstances of the accident plaintiff ought not to recover in this action. There is no competent proof to establish the allegations of negligence imputed to defendant. But regardless of any act of the defendant in the operation and management of the locomotive, or of the manning or equipment of it, if Cowell had looked for approaching engines, cars or trains before he crossed the track, he could not possibly have failed to see the engine which collided with his truck. He had a clear and unobstructed view for over a hundred feet in the direction from which the engine came, all the way to the point from which it started (Case, pp. 55, 59, 60); and the course of the two was side by side, with but a few feet intervening. The fact that the engine struck the forepart of the truck (Case, pp. 15, 16) demonstrates that it must have been close upon him when he started over the crossing. If he did look, and, seeing the engine close upon him, as he must have, then attempted to cross in front of it, he took the chance of injury and invited the disaster which followed. If he did not see the engine thus close upon him, it must indubitably be because he did not look; and if he crossed over the track without looking, he again took the chance of injury and invited the disaster. In either event he failed to take that de-

gree of care for his own safety which the law exacts of every person under such circumstances, and his negligence in that respect, no matter how slight, and regardless of any negligence on the part of the defendant, bars the plaintiff's right to recover in this action.

*Moore v. C. R. R. Co.*, 24 N. J. Law, 268, 276, 283; affirmed, on new trial, *Id.*, 824;  
*Brennan v. P. R. R. Co.*, 73 N. J. Law, 147;  
*P. R. R. Co. v. Righter*, 42 N. J. Law, 180;  
*Swanson v. C. R. R. Co.*, 63 N. J. Law, 605, 608;  
*Lynch v. P. R. R. Co.*, 88 N. J. Law, 408;  
*Conkling v. Erie R. R.*, 63 N. J. Law, 338;  
*Cantrell v. Erie R. R.*, 64 N. J. Law, 277;  
*Dwojakowski v. C. R. R. Co.*, 69 N. J. Law, 601;  
*Cranbuck v. D., L. & W. R. R. Co.*, 74 N. J. Law, 473;  
*P. R. R. Co. v. Pfuelb*, 60 N. J. Law, 278.

In *Lynch v. P. R. R. Co.*, 88 N. J. Law, 408, *supra*, at pages 409 and 413 of the report, Mr. Chief Justice Gummere, speaking for the Supreme Court, said:

"The plaintiff was struck by an engine, which was traveling west, as he attempted to cross over the track, after having passed through the opening in the picket fence. He testified that as he was walking along he stopped and listened but heard no whistle blowing or bell ringing; and that after he had left the sidewalk and just before he got to the track he looked both ways but saw nothing; that he then stepped on the track and was struck by something; but that he only knew what it was that hit him from information received by him after the accident.

"\* \* \* As has already been stated, from the point where the plaintiff says he stood

when he made his observation, the view along the track in the direction from which the engine was approaching was practically unobstructed for a distance of approximately two hundred and fifty feet. That the engine was well within this distance when the plaintiff made his observation is demonstrated by the fact that at once after doing so he stepped upon the track and was immediately struck. It follows, therefore, either that he was mistaken in his statement that he looked or else that he looked in such a perfunctory manner that he was not conscious of what was immediately before his eyes. In either event he failed to use that reasonable care for his own safety which the law requires of all persons when approaching these places of known danger."

And in *Dwojakowski v. Central R. R. Co.*, 69 N. J. Law, 601, *supra*, it was held:

"If plaintiff failed to see this engine approaching, it was because he failed to look before stepping upon the track, and such failure was clearly negligence on his part. If he did see it, and took the risk of attempting to cross in front of it, he has no one but himself to blame for the injury which resulted."

To like effect see *Cranbuck v. D., L. & W. R. R. Co.*, 74 N. J. Law, 473, *supra*, where the Court of Errors and Appeals held that plaintiff's failure to make any observation as to the safety of the track he was about to cross was negligence which barred his right to recover. Mr. Justice Garrison, speaking for the Court, at page 473, said:

"Plaintiff crossed this track without making any observation to ascertain whether it was safe to do so and was struck by the car which he would have seen if he had looked. At the close of the plaintiff's case a motion to nonsuit upon the ground of contributory negligence was denied. We think it should have been granted."

And again, at page 475:

“What the law requires of one who is about to cross a steam railroad track is observation, not inference, and observation would have apprised the plaintiff of a danger that was perfectly patent to the sense of sight.”

In *Penna. R. R. Co. v. Pfuelb*, 60 N. J. Law, 278, *supra*, Mr. Justice Van Syckel, in speaking for the Supreme Court, at page 281, said:

“If he had stopped there for an instant and looked to the northeast, he could not have failed to see the train which struck him. If he had looked—he was in a place of safety—and would not have walked into a position where death was almost certain.”

It seems clear, therefore, that had decedent exercised the care for his own safety which the law exacts of all persons, as a salutary rule for their own welfare, the accident complained of could not have occurred. And his failure to exercise that care bars plaintiff's right of recovery.

## POINT II.

**Failure to give the statutory or customary warning does not absolve a person from the exercise of that due care and caution which is required of one going into a place of danger.**

*Conkling v. Erie R. R. Co.*, 63 N. J. Law, 338;

*Swanson v. C. R. R. Co.*, 63 N. J. Law, 605;

*P. R. R. Co. v. Righter*, 42 N. J. Law, 180;

*P. R. R. Co. v. Pfuelb*, 60 N. J. Law, 278;

*Berry v. P. R. R. Co.*, 48 N. J. Law, 141;

*Lindsay v. P. R. R. Co.*, 78 N. J. Law, 704;

*Smith v. Ewing*, 23 Fed., 741;

*Van Riper v. N. Y., Susq. and W. R. R. Co.*, 71 N. J. Law, 345.

In *Lindsay v. P. R. R. Co.*, 78 N. J. Law, 704, *supra*, at page 707 of the report, Mr. Justice Bergen, speaking for the Court of Errors and Appeals, said:

“As the uncontradicted testimony shows that the deceased, by the exercise of ordinary prudence and reasonable observation at a time when it would have been effective, could have seen the train before he went upon the track, and there being no proof that he exercised ordinary care and prudence, or made any attempt to ascertain whether it was safe to go upon the track when he did, it seems to be a plain case of contributory negligence, the result, perhaps, of the constant use of this crossing by deceased, and a familiarity with the situation which lulled his appreciation of the danger and made him careless about exercising the prudence required in such a case. \* \* \*

“That the failure to give a warning or to lower crossing gates does not absolve one attempting to cross a railway track from the exercise of care and prudence, is too well settled in this state to require the citation of authorities.”

And in *Smith v. Ewing*, 23 Fed., 741, *supra*, Circuit Judge Woods, in speaking for the Court at page 741, said:

“It would not be correct, I think, to say on this subject that citizens have an unqualified right to act upon the presumption that railroad trains and other dangerous agencies will always be operated with the care and vigilance required by law or custom. Experience too often proves the contrary; and ordinarily prudent men will not, and without negligence do not, go upon railroad and highway crossings, or into like dangerous situations, without precautions against negligence on the part of those in charge of the dangerous agencies.”

In *Van Riper v. N. Y., Susq., and W. R. R. Co.*,

71 N. J. Law, 345, *supra*, at page 349, Mr. Chief Justice Gummere, speaking for the Supreme Court, said:

“A similar contention was urged in the case of *Swanson v. Central Railroad Co.*, 34 Vroom, 605, but it was there held that the failure of a flagman, or gateman, to perform the duty which his position required, like the failure of an engineer to blow his whistle, or of a fireman to ring his bell, does not absolve the passenger on the highway from the use of independent observation for his own protection, and that, notwithstanding that such non-action on the part of the railroad company's employe is in effect a declaration that the way is clear, the failure of the traveler on the highway to make independent observation is ordinarily a failure to exercise that reasonable degree of prudence which the law requires of all persons approaching these known places of danger.”

And so, also, like failure to give a customary signal or warning as an engine was about to pass over the private crossing, would not absolve decedent from his duty in the law to exercise the care and prudence above indicated.

### POINT III.

**The negative testimony of a witness who simply testified that he did not hear a whistle blown or bell rung is not in conflict with the affirmative testimony of credible witnesses whose testimony that the whistle was blown and the bell rung stands unchallenged.**

*Eissing v. Erie R. R. Co.*, 73 N. J. Law, 343;

*Weiss v. Central Railroad Co.*, 76 N. J. Law, 348;

*Holmes v. P. R. R. Co.*, 74 N. J. Law, 469;

- Hummer v. Lehigh Valley R. R. Co.*, 75 N. J. Law, 703;  
*Blauvelt v. Erie R. R. Co.*, 81 N. J. Law, 142;  
*Still v. Huidekoper*, 84 U. S., 384; 21 L. Ed., 644;  
*Horn v. Baltimore & O. R. Co.*, 54 Fed., 301;  
*Rich v. Chicago, M. & St. P. Ry. Co.*, 149 Fed., 79;  
*Culhane v. New York Central & H. R. R. Co.*, 60 N. Y., 133;  
*Chicago & N. W. Ry. Co. v. Andrews*, 130 Fed., 65.

The Trial Court denied the motion of the defendant for a nonsuit and for a directed verdict, and submitted the case to the jury upon the theory that the case had most of the elements that are found in the case of *Coyne v. Pennsylvania Railroad Company*, 87 N. J. Law, 257 (Case, p. 45), and charged the jury in part as indicated at pages 72 and 73 of the State of the Case.

The case at bar is to be distinguished, however, from the case of *Coyne v. P. R. R. Co.*, *supra*, referred to by the Trial Court, in that the evidence in the latter case was to the effect that no signal had been given; whereas in this case, assuming that there was such a custom, and that that custom is a relevant and material factor to bind defendant, there is no evidence that the signal was not given. It is quite to the contrary.

In *Stitt v. Huidekoper*, 84 U. S., 384, *supra*, Mr. Justice Miller, speaking for the United States Supreme Court, at page 394, said:

“On this subject the court charged the jury that it is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a

negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed.

"We are of opinion that the charge was a sound exposition of a recognized rule of evidence \* \* \*."

In *Horn v. Baltimore & O. R. Co.*, 54 Fed., 301, *supra*, District Judge Swan, speaking for the Court, at page 305, said:

"These are the plaintiff's witnesses, and there is nothing in the record to discredit them. In the very nature of things, their affirmative testimony that the warning was given must be accepted as proof of that fact, notwithstanding an equal or greater number of witnesses failed to notice it, from whatever cause. There is in such cases no conflict of evidence as to the matter in question. The observation of the fact by some is entirely consistent with the failure of others to observe it, or their forgetfulness of its occurrence. *Stitt v. Huidekoper*, 17 Wall., 393."

This case is similar to the base at bar, in that while some of the witnesses testified that they did not hear the whistle of the train, none denied that it was blown (*Horn v. Baltimore & O. R. Co.*, 54 Fed., 301, *supra*, at p. 304).

In *Rich v. Chicago, M. & St. P. Ry. Co.*, 149 Fed., 79, *supra*, at page 82 of the report, Circuit Judge Adams, speaking for the Court, said:

"The only other witness who testified for plaintiff on this subject was Ed Wilson, who stated that after decedent left his home he started and followed about half a block behind him. He testified that his attention was not called to any of the circumstances attending the accident until after he heard a cry or loud groan \* \* \*; that on hearing the cry, he ran and got to the decedent about two minutes after the accident occurred. \* \* \*

This witness also said he did not hear any bell ring or whistle sound. Like the other two witnesses, he did not give any reasons why he would likely have noticed either if it had occurred, and his occupation at the time was such as afforded him neither interest in what was going on nor favorable opportunity to observe it.

“As against this kind of evidence there is the positive testimony, unchallenged as to credibility, of the engineer and fireman who were at work on the engine in question, and two others who stood near by and in front of it as it was moving eastwardly, that the bell on the engine was constantly ringing as it was being backed eastwardly that night. This evidence afforded by the two men whose duty it was to ring the bell, and by two others who actually saw the engine and noted its operations, is positive and unequivocal in its character. The testimony of plaintiff’s witnesses, on the other hand, was of such a character, and attended by such circumstances as to be entirely true without affording any evidence of the fact sought to be established. This court has heretofore decided that in circumstances of the kind just disclosed there is no real conflict of evidence.”

And again, at page 83, Circuit Judge Adams quoted from *Culhane v. New York Central & H. R. R. Co.*, 60 N. Y., 133, 137, as follows:

“\* \* \* the evidence is that the bell was rung. It is proved by the positive oath of the two individuals on the engine, one of whom rang it, and by two others who witnessed the occurrence and heard the ringing of the bell. The two witnesses for the plaintiff merely say they did not hear the bell, but they do not say that they listened or gave heed to the presence or absence of that signal. \* \* \* As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more

than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere 'I did not hear' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact."

In *Chicago & N. W. Ry. Co. v. Andrews*, 130 Fed., 65, *supra*, the Circuit Judge, now Mr. Justice Van Devanter, speaking for the Court at page 70, said:

"But where the attention of those testifying to a negative was not attracted to the occurrence which they say they did not see or hear, and where their situation was not such that they probably would have observed it, their testimony is not inconsistent with that of credible witnesses who were in a situation favorable for observation, and who testify affirmatively and positively to the occurrence. There is then no conflict."

In *Holmes v. P. R. R. Co.*, 74 N. J. Law, 469, *supra*, it was held by the Court of Errors and Appeals (Mr. Chief Justice Gummere delivering the opinion of the Court), that:

"As against positive affirmative evidence, by credible witnesses, of the giving of warning of the approach of a railroad train to a highway crossing, by the ringing of a bell or the blowing of a whistle, there must be something more than the testimony of witnesses, who, by reason of their surroundings, would be unlikely to notice the giving of such warning, that they neither heard a bell rung nor a whistle blown, in order to justify the submission to the jury of the question whether or not such warning was given."

In *Weiss v. Central Railroad Co.*, 76 N. J. Law, 348, *supra*, at page 351 of the report, Mr. Justice Reed, speaking for the Supreme Court, said:

“So the affirmative testimony is of the most convincing kind that the bell rang automatically during the statutory period, and there is nothing to contradict this testimony except the ‘I did not hear it’ of the three witnesses for the plaintiff. As against positive affirmative evidence of credible witnesses to the ringing of the bell, there must be something more than the testimony of one or more that they did not hear it. It must appear that their attention was called to the fact. *Culhane v. New York Central Railroad Co.*, 60 N. Y., 133.”

In *Blauvelt v. Erie R. R. Co.*, 81 N. J. Law, 142, *supra*, it was held:

“Where proof of the negligence of a railway in failing to blow a highway crossing signal consisted solely in the testimony of a witness who said that he did not hear it, coupled with a statement that on account of a strong wind one could scarcely hear any sound, and there being positive testimony of both engineer and fireman that the whistle was blown \* \* \* that there was no conflict of evidence requiring the submission of that fact to the jury.”

In *Eissing v. Erie R. R. Co.*, 73 N. J. Law, 343, *supra*, at pages 345 and 346 of the report, Mr. Chief Justice Gummere, speaking for the Supreme Court, said:

“The third witness called by the plaintiff to prove the failure of the defendant company to perform its statutory duty was one Jacob Dunkirk. \* \* \*

“On his cross examination, being asked this question, ‘When you were in the same window, lots of trains go by and you don’t hear the bell?’ he answered, ‘That night I couldn’t swear if they did ring the bell or not.’ Even

in the absence of proof that the bell was rung, the testimony of this witness would hardly justify the conclusion that it was not. True, he was so situated that he could have heard it (if it was being rung), provided he was listening for the sound of it, but his statement that he could not swear whether it was rung or not shows very clearly that his attention was entirely taken up with the impending accident which he saw was about to occur, and that he gave no thought and paid no heed to whether or not the bell was ringing. \* \* \*

“\* \* \* As against this positive affirmative evidence of witnesses, all of whom, except the engineer, and perhaps the fireman, seem to have been disinterested, there should have been something more than the testimony of two witnesses who were, presumably, too far away from the scene of the collision to have heard the sound of the bell, even if they had been listening for it, that they did not hear it ring, and the testimony of a third witness, who was not listening for it, that he did not hear it, but could not say whether it was ringing or not, to justify the submission of the question to the jury.”

And so, in the case at bar, there was no affirmative evidence that the whistle was not blown or the bell not rung. Fetzer merely said that he did not hear them. He was intent on his own business, and there is not even a scintilla of evidence to show that his attention was directed to them, or that he was listening for them. The truck driver was shifting his gear and started his car from a stand-still right alongside of Fetzer,—operations bound to involve more or less noise, which might well have prevented either from hearing the bell or whistle. Whereas, the engine-driver testified positively that the whistle was blown and the bell rung, and Glassman and Burke said that they heard them. This evidence stands unchal-

lenged. There was no conflict in the evidence, therefore, and nothing to submit to the jury. The Court should have directed the verdict for the defendant.

#### POINT IV.

**A particular usage or custom will not be binding unless shown to have been known by the party to be affected by it.**

- 17 Corpus Juris*, 458;  
*M'Donough v. Evans Marble Co.*, 112 Fed.,  
 634;  
*Isaksson v. Williams*, 26 Fed., 642;  
*Chilberg v. Lyng*, 128 Fed., 899;  
*Great Western Elevator Co. v. White*, 118  
 Fed., 406;  
*Southern Ry. Co. v. Simpson*, 131 Fed.,  
 705;  
*Horandt v. Central R. R. Co.*, 78 N. J. Law,  
 190, 194;  
*Atlantic Reporter Digest*, Volume 5, 96-  
 110, Sec. 12.

In the case at bar plaintiff was permitted over objection of defendant to introduce evidence of a custom of the defendant company to ring a bell and blow a whistle, and attempted to prove such custom by the testimony of witness for the plaintiff, Fetzer, that he knew of such custom (Case, pp. 18, 19), and by questions directed to witnesses Watson and McLevy. Plaintiff however, has failed to show in any way that the plaintiff's intestate himself had any knowledge of the existence of such custom, and by the great weight of authority, before a custom could be availed of, it must be shown that the decedent himself had knowledge of such custom. Furthermore, such evidence was

not competent to establish a custom to the effect claimed by plaintiff.

In 17 *Corpus Juris, supra*, at page 458, it is stated:

“Particular usages and customs of trade or business must be shown to have been known by the party to be affected by them or they will not be binding.”

In *Chilberg v. Lyng*, 128 Fed., 899, *supra*, Circuit Judge Ross, speaking for the Court at page 901, said:

“Nothing was given in evidence tending to show any such knowledge on the part of the plaintiff or Dexter. The court below rightly excluded proof of any such custom on that ground.”

In *Great Western Elevator Co. v. White*, 118 Fed., 406, *supra*, District Judge Riner, speaking for the Court at page 410, said:

“\* \* \* Knowledge of the custom sought to be proved, being peculiar to particular business, must be first brought home to the party sought to be charged \* \* \*.”

And so it has been held that:

“Testimony of a secretary of a local union of a mutual benefit society as to the union’s custom in paying funeral benefits, where *no knowledge of the custom by deceased is shown*, is properly excluded, as varying the contract. *Estes v. Local Union, No. 43 United Brotherhood of Carpenters and Joiners of America*, 97 A., 326, 90 Conn., 426.”

*Atl. Rep. Dig., supra*, Vol. 5, 96-110, Sec. 12.

In *Southern Ry. Co. v. Simpson*, 131 Fed., 705, *supra*, at page 711 of the report, Circuit Judge Lurton, speaking for the Court, said:

"The evidence admitted tending to show a settled custom to blow at this crossing, *if known to the plaintiff*, would have some bearing upon the degree of plaintiff's negligence if he undertook to cross without stopping or looking before crossing the track at grade, and under proper instruction guarding against other use was admissible."

In *Horandt v. Central Railroad Co.*, 78 N. J. Law, 190, *supra*, at page 194 of the report, Mr. Justice Parker, speaking for the Supreme Court, said:

"\* \* \* The court charged that as the evidence showed that the crossing bell was not sounded as the train approached, the jury might consider that fact as bearing not only upon the question of defendant's negligence, but also upon the question of notice to the plaintiff driving the automobile, as he approached the crossing. The case for the plaintiffs rested on the theory that they were unaware of the crossing and that no adequate notice of it was given. Hence it is evident that they placed no reliance on the bell to warn them of the approach of the train, in which case only could the failure to ring it be regarded as negligence directly tending to cause the accident. There was error, therefore, in charging the jury that failure to ring the crossing bell to signal the approach of the train might be regarded as such negligence."

There was no basis, therefore, for the admission of the evidence respecting the custom objected to, or for the submission thereof to the jury.

#### IV.

It is respectfully submitted, therefore, that the plaintiff failed to establish the negligence of defendant alleged, and decedent was guilty of contributory negligence in the manner indicated by the foregoing authorities; evidence of alleged cus-

tomary signals was erroneously admitted and submitted to the jury; there was no competent evidence to submit to the jury upon which liability of the defendant could be predicated; and the proximate cause of the death of plaintiff's intestate was his own acts of negligence. And for these reasons it is urged that the judgment under review, affirming the judgment of the Hudson Circuit Court should be reversed, set aside, and for nothing holden, and judgment directed to be entered in favor of the defendant and against the plaintiff.

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