

New Jersey Court of Errors and Appeals.

KOSHER DAIRY COMPANY, <i>Respondent,</i> <i>vs.</i> NEW YORK SUSQUEHANNA AND WESTERN RAILROAD COMPANY, <i>Appellant.</i>	}	On Appeal from Su- preme Court.	10
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BRIEF FOR NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, APPELLANT.

I.

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Statement of Case.

This is an appeal from a judgment of the Supreme Court affirming a judgment of the District Court of the City of Hoboken in favor of the Kosher Dairy Company, the plaintiff in the last-named Court, and against the New York, Susquehanna and Western Railroad Company, defendant therein for \$375 (p. 194).

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The Dairy Company, on July 18, 1909, was the owner of nine cows which on that day were being driven by two drovers, one of whom, Devens, was employed by it, and the other, Harney, by the first drover, from the stock yards in Jersey City to Secaucus (pp. 4-7; p: 19, ll. 12-21). Part of the route taken was along Paterson Avenue which crosses the tracks of the Railroad Company on the boundary line between Jersey City and North Bergen, the street at that point separating the

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two municipalities. The men and the cows reached the crossing about five minutes before eight in the evening as nearly as Devens, one of the drovers, could estimate (p. 10, ll. 30-40). While going over the railroad tracks at the crossing three of the cows were struck by a locomotive drawing a passenger train (p. 17, l. 14) and killed. The case was tried before a jury in the District Court and a verdict found for plaintiff for \$375. An appeal from the judgment on that verdict was taken by the Railroad Company to the Supreme Court, which court affirmed the judgment and it is an appeal from the judgment of affirmance that is now under review.

II.

Grounds of Appeal.

The reasons set forth for reversal are the same as those relied upon in Supreme Court (pp. 183-188, pp. 195, 196), to wit:

- (a) Erroneous refusal of non-suit and of motion for direction of verdict for defendant,
- (b) Erroneous admission of evidence,
- (c) Errors in the Judge's Charge,
- (d) Erroneous refusal of the Trial Judge to charge defendant's requests.

III.

Brief of the Argument.

(a)

Erroneous refusal of motion for non-suit and of motion for direction of verdict for defendant.

There was no competent evidence of any negligence on the part of defendant with respect to the signals on the locomotive. Plaintiff produced three witnesses who attempted to testify as to these signals. Devens, one of the drovers, Miller, who

lived about 250 feet from the crossing (p. 63, ll. 15-18), and Shaffler, who lived about 60 feet from the crossing (p. 75, ll. 26-29). At the time of the accident Devens was busy looking after the cows, and left his companion, Harney, to look out for trains (p. 12, ll. 18-21, ll. 32-34; p. 26, ll. 40-41; p. 29, ll. 34-40; p. 31, ll. 8-15). Miller was walking in the yard back of his house, 250 or 350 feet from the crossing, not listening particularly for trains or signals from trains, and not paying special attention to trains or signals (p. 69, ll. 25-41; p. 70, ll. 1-8). Shaffler was in his barn milking a cow and paying no attention to trains or signals from trains (p. 76, ll. 27-38). Harney, the other drover, was not called as a witness. 10

The state of attention of plaintiff's witnesses, Devens, Miller and Schaffler, to trains and signals, or rather lack of attention to those things at the time of the accident renders their testimony of no probative force. 20

In *Goodwin v. Central Railroad Company*, 73 N. J. L., p. 576, Justice Garrison said:

"The probative weight to be accorded to the fact that the witness did not hear the sound, depends upon his proximity and state of attention or preoccupation, and all those other circumstances that render it more or less probable, that if the sound had been given the witness would have heard it." 30

Thus the evidence stood as to signals from the locomotive at the close of plaintiff's case, three witnesses testifying that they did not hear the signals although we submit their state of attention was clearly such that signals having been given they might not have heard them, and therefore their testimony had no probative effect.

The uncertainty of the testimony of plaintiff's witnesses as to these signals renders that of defendant's witnesses the more forceful and controlling. Potter, the engineer on the locomotive 40

(pp. 142, 143), Anderson, the fireman (pp. 151, 152), Paulison, the conductor (p. 156), Mabie, the baggage man (p. 160) and Ridner, the flagman (p. 163), all of whom were in such a position that their attention was specially attracted to the blowing of the whistle and ringing of the bell, testified that the signals were given. Which testimony is controlling as to these signals, that of Devens, who left his companion to look out for trains and paid no attention to them, or that of Potter, the engineer, who actually gave the signals; that of Miller who was walking in his yard and paying no attention to trains, or that of Anderson, the fireman, who was on the engine, and consequently paying particular attention to all things connected with it and its operation; that of Shaffler who was milking a cow and paying no attention to trains or signals, or that of Mabie, the baggage man on the car next to the engine, whose attention was specially attracted by the blowing of the whistle; to say nothing of the testimony of Paulison, the conductor, and Ridner, the flagman, who were in a state of attention which gives their testimony probative effect. Then there was the testimony of Mrs. Summerville, a disinterested witness, who testified that she heard the locomotive bell (p. 86, ll. 34-37) and whistle (p. 88, ll. 35-38, p. 89, ll. 33-35), and that of Miss Raisch, who was at the crossing, and who heard the whistle (p. 135, ll. 5-6). Both Mrs. Summerville and Miss Raisch were in positions where their attention was such as gives their testimony probative force, Mrs. Summerville because of thought of safety for her children who sometimes wandered on the crossing (p. 90, ll. 16-19) and Miss Raisch because she was actually going over the crossing (p. 135, ll. 31-32; p. 136, ll. 2-3).

It was said in *McLean v. Erie Railroad Company*, 69 N. J. L., p. 57, at p. 60 (italics ours):

“It is for the jury to say whether the testi-

mony of a witness *having an equal opportunity to hear, and whose hearing is equally good*, and who testifies that he did not hear the blowing of a whistle or the ringing of a bell, *notwithstanding he listened*, shall or shall not be given equal credit with the testimony of a witness *similarly situated*, who testifies that he did hear."

In order to make a jury question, it is necessary that the witnesses who say they did not hear the signals, should have an equal opportunity to hear and be similarly situated with those who did hear them, and it should appear affirmatively that they listened. 10

In the case before the Court it affirmatively appears that plaintiff's witnesses, who testified that they did not hear the signals, *had not* an equal opportunity to hear the signals, they did not listen, and that they were not similarly situated with those who did hear them. 20

In *Anspach v. Philadelphia, &c., Railway Co.*, 74 Atl., p. 373 (Penna.), it was said:

"The evidence of the train crew is that the whistle was blown several times, and at three distinct places, as the train slowly approached the station and the crossing. The bell was also rung continuously for quite a distance, and for some time before the collision."

"There was no testimony on the part of the plaintiff that the whistle was not blown, or the bell rung. The witnesses on that point for plaintiff, merely said they did not hear the whistle or bell. Negative testimony of this character by those who did not hear, as against the positive, affirmative testimony of witnesses who did hear, and who were in a position to know, is not enough to make out a charge of negligence." 30

Quoting *Culhane v. New York Central &c., R. Co.*, in *Holmes v. P. R. R. Co.*, 74 N. J. L., p. 469, at p. 471, Chief Justice Gummere said: 40

"As against positive affirmative evidence by

credible witnesses to the ringing of the 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 or 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."

The learned Chief Justice further said:

"We think this principle is sound when applied to the testimony of one who, by reason of his surroundings, would be unlikely to notice the giving of the signal, unless his attention was directed to the passing of the train." * * *

"A person who lives in proximity to a railroad where the passage of trains is frequent becomes so accustomed to the noise of their passage that he no more observes the sound produced by them as they move to and fro, than he does the striking of a clock in a room in which he is accustomed to sit."

The case in hand calls for the application of the rule laid down in *Eissing v. Erie R. R. Co.*, 73 N. J. L., p. 343, and approved by the Court of Errors and Appeals in the Holmes case *supra*, that positive evidence of the giving of the statutory signals entirely destroys the probative force of negative evidence for the plaintiff, from which, if uncontradicted, the absence of such signals might have been inferred.

See also

Weiss v. Central R. R. Co., 76 N. J. L. 348;

Stetson v. Baltimore &c., R. R. Co., 77 N. J. L., 121;

Howe v. Northern R. R. Co., 78 N. J. L.,
683;

Blauvelt v. Erie R. R. 81 N. J. L., 142.

The Supreme Court was of opinion that a jury question was presented by the evidence as to these signals (p. 190), but we submit that plaintiff's negative testimony in that respect is entirely overcome as a matter of law by the positive and affirmative evidence on the part of defendant that the signals were given.

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The verdict was a general one. The trial judge permitted the jury to find the defendant liable by reason of alleged negligence with respect either to the statutory signals, or with respect to the ringing of the crossing bell. Hence if it was error to leave either one of these questions to the jury, the judgment must be reversed, as we cannot tell upon which ground the jury found the defendant liable.

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Likewise, if there was a question of fact for the jury with respect to the crossing bell, the judgment must be reversed, even if there was a question of fact with respect to the engine signals; but we submit that there was no jury question with respect to the crossing bell.

Devens, the drover, said he heard no signal, but as has been said before, he was devoting his attention to the cows and paying no attention to signals. He left Harney, the other drover, to look out for trains, and Harney was not called as a witness. Devens said he does not know whether there was a bell at the crossing or not (p. 43, ll. 18-20) which tends to show how little attention he was paying to surroundings, for there is no doubt the bell was there. The character of Deven's testimony is well disclosed. Following is a question asked of him by counsel for plaintiff, and his answer:

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"Q. Do you know, beside, whether there are

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any crossing bells there at that crossing, of your own knowledge? A. They was there; I saw one up on the post there but it didn't ring." (p. 42, ll. 40, p. 43, ll. 1-3).

Almost immediately after, the following question was asked him by counsel for defendant, and answer given:

10 "Q. Do you know whether there was a crossing bell at that crossing? A. If it was there I don't know; there is a sign." (p. 43, ll. 18-20).

The most that can be said of Devens' testimony is that he may not have heard the bell, evidence purely negative in character, and as we submit, of no probative force.

20 Plaintiff's witness, Minnie Cohen (interested) gave no competent evidence as to the bell at the crossing. The next witness for plaintiff, Churchill, reached the crossing about nine o'clock (p. 55, ll. 17-18), an hour after the accident, and after bodies of three cows had been hurled over the crossing, doing what damage, we do not know, so his testimony is not competent.

30 Miller, for the plaintiff, attempted to testify as to the crossing bell, but his testimony was properly excluded (p. 66, ll. 33-35). He said that the signal bell did not ring when other trains went over the crossing on the night of the accident half an hour after it had happened, under objection of defendant (p. 67, ll. 13-33) to which exception was taken and allowed.

Mr. Shaffler, at the time of the accident, was milking a cow and paying no attention to trains, so his testimony as to signals is worthless as evidence on that subject.

40 But admitting, for the purpose of argument, that the crossing bell did not ring (although we submit there is no evidence of probative weight to prove that), how does that fact alone show negligence on the part of defendant? A railroad com-

pany cannot be said to *insure* the ringing of the bell; and in absence of proof of negligence in inspection or maintenance, the company cannot be found to be *negligent* merely because the bell does not ring.

It appears that the crossing bell was properly inspected and maintained. Mr. Keller, track foreman of defendant, inspected the bell at three o'clock in the afternoon of the day of the accident and found it in proper working condition (p. 125, l. 40; p. 126, ll. 38-40). It may be true that he did not wait until a train went over the crossing, but a reasonable inspection would not require him to do so. If it did, at some points on the road, he might have to wait for hours to hear a single bell, which would be entirely unreasonable. It must be remembered that the object of inspection is to keep the bell in proper condition; that Keller's inspection was sufficient for that purpose is shown by the testimony of the flagman, Scribano Sante, who said that the bell rang when a train went over the crossing at six o'clock in the evening of the day of the accident (p. 132, ll. 17-20) which was *after* Keller's inspection. We submit, therefore, that the inspection was sufficient. Sante said no one examined the bell on the day of the accident, but he was there to watch for trains, and not to see that the bell was examined. What he must have meant is that he saw no one examine the bell, which is not surprising in view of the fact that the day in question was mid-summer, naturally hot, and that he had a shanty to protect him from the sun on just such a day. His testimony does not contradict Keller's.

There is no evidence to show that the bell was out of order, how long it was out of order (if at all); that defendant knew it was out of order, or that it was out or order (if at all) sufficiently long to charge defendant with notice.

No negligence whatever was proved by plain-

tiff as to the crossing bell, and hence there was no negligence for the jury to pass upon. On the contrary the evidence shows that the bell was inspected at three o'clock in the afternoon, and actually in operation at six o'clock in the evening of the day of the accident.

10 Granting that some of plaintiff's witnesses testified that they did not hear the crossing bell, that alone was not evidence of negligence, for they may not have been in a position to have heard the bell, their attention may not have been specially directed to it, and they may not have listened for it.

Devens was paying attention to gathering the cows, and not to signals; Miller was walking in his backyard paying no attention to signals, and Shaffler was milking a cow in his barn and paying no attention to signals.

20 But suppose they had all been in a position to have heard the bell, the attention of all of them had been specially directed to it, and they had all listened for it (which was not the case), and did not hear it, still there would be no evidence of negligence, in the absence of proof of negligence in inspection or maintenance of the bell. The only effect of such evidence might be to put the burden upon the defendant to show that it had used ordinary care in inspection and maintenance of the bell, and if that is proved the effect of any evi-

30 dence that witnesses did not hear the bell is absolutely destroyed. This is exactly what existed in this case. Devens, Miller and Shaffler testified that they did not hear the bell; but Keller's testimony showed that he inspected the bell at three o'clock in the afternoon of the day of the accident, and the testimony of Sante proved that the inspection was sufficient because the bell rang at six o'clock in the evening of that day, which was after Keller's inspection.

40 With this evidence, in order for the jury to find negligence of defendant with respect to the cross-

ing bell there would have to be a conclusive presumption of negligence on the part of defendant merely because of the failure of the bell to ring. If such a conclusion is proper, every railroad company would have to guarantee the operation of crossing bells, mere automatic devices which the laws of physics alone can control.

When such devices are used, all that can be required is ordinary care in maintenance, and if such care is used the company fulfills its duty. 10
To hold otherwise would mean that railroad companies would be compelled to have a man to watch the bell at every minute, day and night, and if it was compelled to have the man, why the bell? The law sanctions the use of automatic devices in place of man, but it does not insure their infallibility, and if they are maintained with ordinary and reasonable care, that is all that can be legally required.

The rule as to automatic devices is that the one 20
maintaining them must use ordinary and reasonable care in maintenance. One cannot be required to guarantee their infallibility in operation.

The rule as to a crossing bell is different from that as to signals of the engine; the mere failure to ring the bell or to blow the whistle on the engine may be proof of negligence because it is a failure to perform a duty imposed by the statute; but there is no such duty with respect to a crossing bell. All that can be required as to them 30
is the exercise of reasonable care in their maintenance and operation.

We submit that there was no evidence of any negligence with respect to the crossing bell, and that it was error to permit the jury to find a verdict on any such ground.

Taking up next the contributory negligence of the drovers which is imputed to plaintiff:

Of the two drovers in charge of the cows, Devens 40
alone testified. He said, on direct examina-

tion, that when they reached the crossing the "light was plain as could be;" that he could see 100 or 200 feet (p. 11, ll. 31-33), and again that he could see "250 feet or something like that" (p. 30, ll. 39-40); that he stopped about 20 feet or so from the first track (the tracks of the Northern Railroad) (p. 12, ll. 27-29); that at that time he could not see down the tracks in a southerly direction, because he was behind the cows (p. 12, ll. 30-35); that he could not see down the track in a southerly direction, because of a little clump of trees (p. 13, ll. 1-2); that these trees were not four feet from the tracks; that "they stood right deliberately against the tracks" (p. 13, ll. 33-36); that he did not notice any other obstructions of any kind at all when he looked (p. 14, ll. 1-3); that he could hardly see "200 feet onto" a bend in the track.

20 On cross-examination, that he could not see at all at the time he stopped (p. 31, ll. 7-8); that he was on the tracks when he looked (p. 32, ll. 17-18); that is on the tracks of defendant (p. 32, ll. 19-22); that the trees were about 20 feet from the tracks (p. 37, ll. 18-20); that the trees referred to were the only ones in that vicinity (p. 38, ll. 17-18); that he does not know anything about the curve in the track (p. 39, ll. 1-2).

30 On re-direct examination, "I looked as soon as I could when I got on the tracks (p. 41, ll. 32-33); that as fast as I got past that clump of bushes I started to look, and kept looking all the time" that he was not on the tracks before he looked, but standing outside the track (p. 42, ll. 18-20); that there were no other obstructions, except the trees, to prevent his seeing in a southerly direction as far as the curve in the tracks, 200 feet away (p. 44, ll. 9-12).

40 Devens' testimony is full of contradictions, but that he was guilty of negligence appears without

dispute, and, of course, if he was negligent, such negligence is chargeable to plaintiff, his employer. He said that he could not see down the tracks in the direction from which the train was approaching at the time he stopped because at that time he was behind the cows (p. 12, ll. 30-35); and because his view was obstructed by a little bunch of trees (p. 13, ll. 1-2) about four feet (p. 13, ll. 33-40) or twenty feet (p. 37, ll. 17-20) from the first track of the crossing which was *not* the track of defendant. It must be remembered that Devens had to cross two tracks of the Northern Railroad parallel to and adjoining the tracks of defendant before he got on the tracks on which the cows were struck. He said that he noticed no other obstructions when he looked than the trees. So far as his testimony is concerned, there was nothing on the right of way of the Northern Railroad that obstructed his view, and as soon as he passed the clump of trees which were four or twenty feet from the tracks of the Northern Railroad, it is plain, from his own testimony, that he had a clear view down the tracks at least as far as the curve 200 or 250 feet away, as he says, but much further, as the photographs and maps show. If he had looked after he passed the clump of trees or bushes, and before he got upon the tracks of the Northern Railroad, he had some view, and certainly his view down the tracks of the defendant was increased greatly by the width of the right of way of the Northern Railroad. The plain truth is that he did not look at all, but left Harney, the other drover who was with him, to do so. Harney was not called as a witness, but Devens said Harney was on the tracks of defendant when he looked for the train (p. 30, ll. 29-31; p. 31, ll. 17-20), so that apparently neither of them looked for a train at a place where they could have seen it before they went on the tracks of defendant, but *looked when they were on the tracks.*

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It appears that at the crossing there are two sets of tracks; those of the Northern Railroad, and those of defendant which are parallel to and adjoin each other. There is nothing between the two sets of tracks but a ditch. Both railroads at that point run through the Hackensack meadows, the road-bed being slightly above meadow. There is no cut or embankment. The only obstructions to view of persons approaching the tracks, is an advertising sign-board "L" shaped, 78 feet long on the railroad side and 26 feet long on Paterson Avenue, at least 25 feet from the nearest rail of the Northern Railroad and about 70 feet or more from the nearest rail of defendant's tracks in the direction the cows were going; a clump of small trees or bushes some distance from the crossing, not along the right of way of defendant, but to the east and outside of the right of way of the Northern Railroad, a curve in the tracks of defendant which began 500 feet from the crossing and which increased rather than diminished the view in that direction.

After Devens had finished his testimony, and had said there was nothing but a clump of small trees or bushes and possibly a curve in the tracks to obstruct his view, and in the course of the testimony of Dr. Churchill, it was discovered that cat-tails grow in the vicinity of the crossing. (p. 54, ll. 5-15; p. 55, ll. 12-13); but the witness said that the cat-tails grew only to the east of the Northern Railroad tracks, and to the west of the Susquehanna tracks (p. 58, ll. 28-31). He did say that cat-tails grew between the tracks of the two railroads (p. 59, ll. 21-22), but subsequently contradicted himself by saying that he was last over the road about two or three days before the accident (p. 59, ll. 33-36); and when asked whether at that time he noticed any cat-tails between the tracks of the two railroads, said, "To tell the truth, I never looked over that track

(p. 60, ll. 18-19).” And again he was asked, “Did you notice two or three days before, whether there were any cat-tails between the railroad tracks?” and answered, “That I wouldn’t swear to positively, that I did notice two or three days before (p. 60, ll. 14-15).” He said cat-tails would be liable to be ten or twelve feet high in the month of July; but when asked whether he ever saw cat-tails that high between the tracks of the two railroads, answered, “No, I wouldn’t swear to the height of it (p. 61, ll. 15-16).” He said that along the road he could just see men standing in the meadow (pp. 61, ll. 18-22). Subsequently he said that he measured fox-tails five feet high in the ditch between the tracks of the two railroads, and that the ditch was about eighteen or twenty inches below the railroads (p. 62, ll. 12-18, 35-36), which would lower the height of even these carefully measured, and considered cat-tails to $3\frac{1}{4}$ or $3\frac{1}{2}$ feet over which any man could see. 10 20

Plaintiff’s witness, Miller, was non-committal about cat-tails, and his testimony as to them amounts to nothing more than that cat-tails grow in the meadows on both sides of the track about as high as a man (p. 65, ll. 20-32). He said he never saw any cat-tails growing between the rails or between the tracks (p. 73, ll. 19-21).

Probably cat-tails do grow in the meadows, for that is not unusual, but if they obstructed the view in any way, why did not Devens say so. He says that the only obstruction was a small clump of trees, the curve, and possibly a sign board. 30

The witnesses attempted to obstruct the view with cat-tails, but the attempt was a failure, for no one of them could say that at the time of the accident, cat-tails obstructed the view of a person approaching the crossing in the direction the cows were going, all the way from the trees and bill posting sign to the tracks. 40

As to the bill posting sign, Dr. Churchill places it on the easterly line of the right of way of the Northern Railroad (p. 57, ll. 31-33). Miller says he does not know how far the sign board was from the most easterly track of the crossing (p. 65, ll. 11-12; p. 71, ll. 18-20), but he admits that after passing the sign board, there is nothing to obstruct the view but the curve in the tracks (p. 72, ll. 1-22).

10 One of the witnesses said that the night of the accident was a "quite hazy night." (Miller, p. 73, ll. 39-40). But not so hazy that he could not see the crossing from his yard over two hundred feet away (p. 74, ll. 2-3). The only "haze" so far as the evidence is concerned, is that which hovered over the witnesses' testimony, and not over the crossing.

20 Where is there anything, anywhere in plaintiff's testimony, to show that the view was obstructed at any point after the tracks of the Northern Railroad were reached, to say nothing of points back of those tracks, except nonsensical references to $3\frac{1}{4}$ or $3\frac{1}{2}$ feet cat-tails which do not obstruct the view at all. Trees and sign board were both at least the width of the Northern Railroad tracks, away from the tracks of the defendant. And so far as the curve in the tracks is concerned, none of the plaintiff's witnesses knew just how far from **30** the crossing it was. What could possibly have obstructed the drovers' view after they passed the sign board and trees and reached the Northern Railroad tracks? Nothing. If they had looked and listened as the law required them to do, they would have seen the train.

The photographs made in winter show the following views measured from the most easterly rail of the Northern Railroad (Exhibits D-3, D-8, **40** pp. 119-121).

No. 1;	distance	10 feet;	view	2846 feet
" 2;	"	20 "	"	2846 "
" 3;	"	30 "	"	526 "
" 4;	"	40 "	"	224 "
" 5;	"	80 "	"	450 "

It must be borne in mind that the tracks of the Northern Railroad immediately adjoin and parallel those of the New York, Susquehanna and Western Railroad, and in the direction the cows were going they had first to cross the tracks of the Northern Railroad before reaching the tracks of the New York, Susquehanna and Western Railroad. 10

The second set of photographs taken in the summer show views as follows measured from the most easterly rail of the New York, Susquehanna and Western Railroad (D-9, D-14, pp. 121-123):

No. 1;	distance	10 feet;	view	2800 feet
" 2;	"	20 "	"	2800 "
" 3;	"	30 "	"	2800 "
" 4;	"	40 "	"	2000 "
" 5;	"	60 "	"	2000 "
" 6;	"	100 "	"	2000 "

The difference between the views measured from the tracks of the Northern Railroad and those measured from the tracks of the N. Y., S. & W. R. R. is accounted for by the width of the right of way of the Northern Railroad which extends the view along the tracks of the N. Y., S. & W. R. R. 30

Views as measured by Loughborough, the civil engineer in January, 1910, from the most easterly rail of the Northern Railroad are as follows (pp. 109-110):

At a distance of	5 feet,	view	2846 feet
" " " " 25 "	"	"	2846 "

And the views measured by Nicholson, another civil engineer, in September, 1910, when conditions were the same as at the time of the accident, from the most easterly rail of the N. Y., S. & W. R. R. were as follows (pp. 113, 114, 115): 40

	At a distance of	10 feet;	view	1851 feet
	" "	" "	21 "	1878 "
	" "	" "	30 "	1898 "
	" "	" "	40 "	1911 "
	" "	" "	50 "	1912 "
	" "	" "	60 "	1933 "
	" "	" "	70 "	1960 "
	" "	" "	80 "	1984 "
	" "	" "	90 "	2022 "
	" "	" "	100 "	2027 "
	" "	" "	110 "	2053 "

10 He measured the distance from the crossing to curve in defendant's tracks and found it 500 feet to the beginning of the curve going from the crossing toward Jersey City, and that the curve is very slight. The cows were traveling from the easterly side of the crossing to the westerly.

20 Heffron, the track foreman, says that the surroundings at the crossing have not changed since the time of the accident; that no trees have been cut down since that time (p. 102, ll. 1-19), and that only little "suckers", as he called them, not quite two feet high, had been cut down to keep "everything neat and nice looking for a prize," so that the views as given above, must have been those of the date of the accident. They considered everything that might obstruct the view.

30 So that at all points between 40 and 110 feet from defendant's tracks, there was a clear view of between 1900 and 2000 feet and between 1800 and 1900 feet within 40 feet of the tracks. Is there any doubt about the negligence of plaintiff's servants under such evidence?

40 And even though the crossing bell did not ring, plaintiff is not entitled to recover if by listening, the drovers could have heard the train, or by looking could have seen it. In *Conkling v. Erie R. R. Co.*, 63 N. J. L., p. 338, it was held that the failure of an automatic gong, erected by the company as an additional warning to travelers, to ring as usual, when the train approached the

crossing, will not relieve the traveler from his duty to look and listen.

And in *Shafer v. L. V. R. R. Co.*, 66 Atl., p. 1072, it was held that while open gates are an invitation to cross, they do not excuse a traveler approaching a railroad crossing, from looking or listening where either would be effective.

In *Nolan v. Central R. R. of N. J.*, 50 Atl., Rep., 348, a herd of twenty-two cows were being driven by a boy, servant of the plaintiff, across the tracks of defendant, and four of them were struck and killed by a train of the defendant. Judgment for the plaintiff was rendered in the District Court, and reversed by this Court, on the ground of contributory negligence of the driver, it appearing that at fifty feet from the track there was a view of the approaching train for sixteen hundred feet. In that case the Court said:

“It is manifest from the testimony that had he (the driver) looked for the train at a point where it became visible, 1,600 feet away, he would have had abundant time to have prevented the cows from getting on the track before the train reached the crossing. It is settled law that where a party approaches a railroad crossing, having opportunity in the exercise of his powers of observation to see an approaching train so far away as to give him time to stop before the train reaches the crossing, he advances at his peril, and in case of accident, is precluded from recovery, such action on his part being contributory negligence.”

In the *Nolan* case the Court found contributory negligence from a view of 1600 feet at a distance of 50 feet and we have only to point out that in the present case at the same distance of 50 feet the view was 1912 feet.

We submit that the negligence of the drovers, which is chargeable to plaintiff, their employer, appears in this case without dispute.

(b)

Erroneous admission of testimony.

At the trial, Max G. Miller, a witness for the plaintiff, testified as follows (p. 66, ll. 33-34):

“Q. Did you hear any crossing bell ring that night?”

This question was objected to by counsel for
 10 the defendant, and the objection sustained. He was then asked the following (p. 67, ll. 13-17):

“Q. Did any train cross over the crossing on the night of the accident while you were there? A. Yes, sir.”

“Q. Did the signal bell ring then?”

To this last question, counsel for defendant objected upon the ground for immateriality. The question was allowed, objection taken and excep-
 20 tion granted (p. 67, ll. 18-27).

The witness answered “No, sir.”

Whether or not the bell rang after the accident happened is plainly immaterial, for such evidence furnishes no proof whatever as to whether or not the bell rang before the accident. Many things may have caused the bell not to ring after the accident occurred. This was a case where a locomotive crashed into a herd of nine cows, tossing three of them. It is not impossible that one or
 30 more of the cows struck the bell post, or in some other way damaged the bell; or some one may have tampered with the bell after the accident—which is not altogether impossible—for Mr. Keller, who inspected the bell at three o'clock in the afternoon of the day of the accident, and found it in proper working order at that time, testified that on the morning after the accident, shortly after seven o'clock, he inspected the bell, and ob-
 40 served that the hammer was bent down so that it could not hit the gong (p. 127, ll. 12-14). He distinctly says that that was not the condition of

the bell when he examined it on the day before the accident, and that the hammer could not be bent in that way by the "ordinary compression" of the bell (p. 127, ll. 20-22). We submit that it is immaterial whether or not the bell rang half an hour after the accident, and that this evidence was improperly admitted and was prejudicial to the defendant.

The Supreme Court found no error in the admission of this testimony, saying that although it was of little weight, it was evidential and citing the case of *Alcott v. Public Service Corporation*, 49 Vroom p. 482. 10

In the *Alcott* case the accident was caused by the catching of plaintiff's wagon wheel in a switching device. Testimony was admitted of other accidents shortly before and shortly after the accident to plaintiff, and the trial Judge charged in effect that this testimony might be considered as throwing light on the question whether the switch was out of order at the time of the plaintiff's accident. The learned Justice who wrote the opinion of the Court of Errors and Appeals in that case, quoted Professor Wigmore as follows: 20

"The natural limitation of this sort of evidence is that the prior or subsequent time must be so near that nothing may be supposed to have occurred to cause a change; and the distance of time will depend entirely on the thing whose existence is in question" 30
 * * * "in evidencing a quality, tendency, capacity, &c., by instances of its effects or exhibitions or operations on other occasions, the natural and logical limitation is that the evidential instances should have occurred under substantially the same circumstances or conditions as at the time in question, because otherwise they might well be attributed to the influence of some other element introduced by the differing circumstances." 40

We submit that the *Alcott* case differs mater-

ially from the one before the Court, and that the objectionable testimony in this case does not come within the limitation stated by Professor Wigmore. The testimony in question relates solely to an alleged condition *after* the accident, without testimony to the condition before the accident, except of a negative character, which is worthless, and furthermore the circumstances and conditions after the accident were not substantially the same as at the time of the accident.

10 Three cows had been hurled over the crossing, people had gathered, a train had stopped, an accident had happened which might have been avoided if attention had been paid to the bell, and upon which the ringing of the bell may have a substantial bearing, and some one may have tampered with the bell. None of these circumstances or conditions existed at the time of the accident. We submit that this case is not within the facts

20 of or the law applied to the *Alcott* case.

(c)

Errors in the Charge.

The Judge charged the jury as follows (p. 172):

30 "Now under the law, that is under our statute, it is incumbent upon the railroad company to have a bell on each engine weighing not less than thirty pounds and rung continuously in approaching a grade crossing of a highway beginning at a distance of at least three hundred yards from the crossing, continuing until the engine has crossed said highway, or a steam whistle shall be attached to each engine, and be sounded at least three hundred yards from the crossing and at intervals until the engine shall have crossed such highway; and the failure, if there was such a failure, on the part of the defendant company in this case to give either

40 of the statutory signals in approaching the crossing, that would constitute negligence on the part of the defendant. Now then, whether the railroad company performed its

duty in that regard is a question for you to determine."

An instruction that the failure of the defendant to give *either* of the statutory signals in approaching the crossing is negligence, is equivalent to saying that *both* signals must be given, and is erroneous. The earlier part of this paragraph of the charge, quotes the statute, but when applying it to the facts in the case, the Court says in effect that both bells must be rung *and* whistle blown. It was said in this very case on the review of a previous judgment (81 N. J. L., p. 145) that

"The Court charged in effect, and must have been so understood by the jury, that the duty prescribed consisted of the blowing of the whistle, and also the ringing of the bell; that if the defendant did both, this is all the law requires, and verdict should be for the defendant.

"The statute prescribes the duty in the alternative, and does not demand the doing of both."

The Supreme Court in its opinion says that the objection to this part of the charge is because of a misapprehension of the language used, as the context indicates. We submit that a jury does not base its verdict upon the context of a charge, but upon any one or more parts of it that will support a verdict. How often do we find a Judge correctly stating the law, and then unconsciously nullifying the effect of the law charged by an explanation of it. The law may be the context of such charge, but the explanation is the charge upon which an erroneous verdict may be based, and it matters not that the law is correctly stated if an explanation of that law is wrong. If the charge in the case before the Court was so ambiguous as to cause objection through misapprehension, that must be cured by reference to the context of the charge, is it not so ambiguous as

to be erroneous? Ambiguity in a charge is easily cured by recalling the jury for correction, but if it is allowed to stand to the prejudice of a party, and who can say the ambiguity did not influence the jury in this case, then we submit it is wrongful.

The Supreme Court further says that the trial Court having been once reversed on that point, was plainly following the language of the opinion on a former review of this case in 83 Atl., p. 499, where it was said:

“The failure on the part of the defendant company to give either of the statutory signals in approaching the crossing would constitute negligence.”

We submit that an opinion of a court and a charge to a jury are essentially different. The former is a conclusion in the light of the law while the latter is a statement of the law itself. An opinion presumes the law to some extent. The word “either” in the opinion referred to, may have been inaptly used, but that does not mean that the law well known to the writer of the opinion and the trial judge, may not have its effect destroyed by a use of the word entirely foreign to the opinion. The question is not what the jury believed the charge to mean, for that, no one can tell, but what it actually meant, and this without reference to context, for context may or may not govern the charge in the mind of the jury.

If there is material error in the statement of the legal principles applicable to a case in one part of the charge, such error is not cured or rendered harmless by reason of the fact that a correct instruction may have been given upon the same point elsewhere in the charge. As was said by Justice Garrison, speaking for the Court of Errors and Appeals in *State v. Erie Railroad*, 87 Atl., 141:

"If a judge makes a mistake in charging the jury, he may undoubtedly cure it by calling attention to it as a mistake and directing the jury to disregard it, or to substitute for it a later statement of the law. Nothing of that sort was done in the present case, where the most that can be said is that two statements of the law were made to the jury, one of which was erroneous. Unless we conceive of our trial system as one in which the jury is clothed with the capacity to decide between two judicial statements of the law and unerringly to select the correct statement and to disregard the incorrect, the error of the charge in the present case was not cured or rendered noninjurious to the defendant who excepted to it."

(d)

Erroneous refusal to charge defendant's requests.

The Trial Judge erred in leaving to the jury any question as to the bell at the crossing. He was requested on behalf of defendant to charge that "there is no evidence to justify a verdict against the defendant by reason of alleged failure of the crossing bell to ring," but refused to charge such request. We submit that there was no evidence whatever of any negligence of defendant with respect to the crossing bell. The most that can be said of plaintiff's testimony was that some of its witnesses did not hear the bell, but any value that such testimony had was destroyed by defendant's evidence of the condition of the bell just prior to the accident, and of proper inspection. This inspection is not disputed in any way and there can be no doubt of its reasonableness. The bell was inspected on the very day of the accident and left in proper condition.

There is no evidence that the crossing was one of extreme danger created and maintained by the Railroad Company. This Supreme Court in its

opinion says that the Company having undertaken to protect the crossing by a bell it must perform the duty of such protection with due care. We submit there was no evidence of any lack of due care in the maintenance of the bell, which was inspected on the very day of the accident and only a few hours before. The testimony of three witnesses that they did not hear the bell ring, when their state of attention was such, that ringing they might not have heard it, is not, we submit, evidence of negligence with respect to the bell. Nor is the testimony of witnesses as to the condition of the bell and whether or not it rang an hour after the accident of any value, for too many things may have happened. The Supreme Court finds that the Company must perform its duty as to the bell with due care and we submit this means nothing more than reasonable inspection and maintenance. The Company proved that it had fulfilled that duty and in the face of such evidence we submit the mere testimony of a few witnesses that they "did not hear" the bell is not evidence of negligence on the part of defendant. Testimony of witnesses that they did not hear the bell may shift the burden upon defendant to prove proper inspection and maintenance, but once it proves those facts it has destroyed the effect of such testimony.

The Supreme Court found no error in the Judge's refusal to charge the above request because defendant requested, in case the Judge refused that request, to charge request No. 4 as follows:

"If crossing bell was ringing in time to give drovers due warning of the approach of the train, defendant was not negligent with respect thereto."

And also because the following requests to charge were made by defendant and charged:

(5) "If crossing bell was not ringing be-

fore train reached crossing in time to give due warning to the drovers of the approach of the train, the plaintiff is not entitled to recover on that ground, unless the evidence shows that the failure of the crossing bell to ring was caused by the defendant's negligence.

(6) "If crossing bell did not ring in time to give due warning to the drovers of the approach of the train, plaintiff cannot recover on that ground, unless the evidence shows that the defendant knew that the bell was out of order, or that the bell was out of order a sufficient length of time before the accident to charge defendant with knowledge that it was out of order."

In the opinion the Supreme Court refers to the rule that where inconsistent requests, presenting different theories of the case, are made, a party cannot complain of the Court's selection. We submit that this rule does not apply to above requests. They are not inconsistent. Request No. 4 was that if the bell rang defendant was not negligent; Request No. 5, that if the bell did not ring, plaintiff cannot recover unless the failure to ring was caused by defendant's negligence, and No. 6 that there was no negligence, even if the bell did not ring, unless defendant knew or should have known that it was out of order. Request No. 3-A, which was refused, was that the evidence did not justify a verdict against defendant because of alleged failure of the bell to ring. These requests were made for the purpose of taking from the jury any question as to negligence because of alleged failure of the crossing bell to ring. Whether or not the bell rang may have been a jury question that was presented by Request No. 4, but whether defendant was negligent with respect to the bell, even though it did not ring, was not a jury question, for there was no evidence of any such negligence, proper inspection having been made. Request No. 6 defined negligence with respect to the crossing

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bell; No. 5 stated that there could be no recovery because of failure of the bell to ring unless defendant was negligent, and No. 3-A stated that there was no such negligence. We submit that Request No. 4 presented a different question from Requests Nos. 3-A, 5 and 6, and that the last three were entirely consistent and should have been charged. Failure to charge No. 3-A left the question as to alleged negligence with respect to the crossing bell to the jury, which we submit was erroneous.

Moreover, the Supreme Court is mistaken in the suggestion in its opinion that Request 3-A is inconsistent with Requests 4, 5 and 6. The defendant had no means of telling in advance which requests, if any, the trial judge would grant, and hence request 3-A was submitted first in order for the very purpose of presenting in the first instance the point as to whether there was any question for the jury as to the ringing or non-ringing of the crossing bell; and request number 4 was submitted *only in the event* that number 3-A was denied—in other words, number four was not presented as a request except in the event that number 3A was denied. The principle referred to by the Supreme Court applies to inconsistent request, but of course has no application to an *alternative* request—as in this case.

We respectfully submit that the judgment should be reversed.

Dated March 3, 1914.

COLLINS & CORBIN.
Attorneys of Appellant.

GEORGE S. HOBART,
ROBERT J. BAIN,
Of Counsel.

New Jersey Court of Errors and Appeals.

KOSHER DAIRY COMPANY,
Plaintiff,
Defendant-in-Error,
vs.
NEW YORK, SUSQUEHANNA & WEST-
ERN RAILROAD COMPANY,
Defendant,
Plaintiff-in-Error.

In Tort.
On Appeal
from
Supreme
Court.

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BRIEF OF DEFENDANT-IN-ERROR.

Facts.

This case was first tried in the Hoboken District Court with a jury on the 24th day of June, 1910, and a verdict returned for the plaintiff for the sum of \$325.00, from which judgment the defendant appealed and which said judgment was reversed by this Court at the November Term 1910, for error appearing in the charge of the Court. The case next came on for trial before the said Hoboken District Court on the 8th day of September, 1911, and the jury rendered a verdict in favor of the plaintiff for the sum of \$350, from which judgment defendant again appealed, and which was reversed by this Honorable Court for failure to allow the introduction of certain evidence on the part of the defendant. The case

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came on for trial again in the Hoboken District Court on the 25th day of October, 1912, and the jury again found for the plaintiff in the sum of \$375.00, from which judgment the defendant again appealed.

10 On the 18th day of July, 1909, at about eight o'clock in the evening, plaintiff, by its agents and servants, was driving nine cows in a westerly direction on Paterson Avenue, which said avenue divides the City of Jersey City from North Ber-
gen, which said cows were being driven at said place upon and across certain railroad tracks of the defendant company, when a passenger train running in a northerly direction on the third track from the east (there being four tracks at said crossing), struck three of the cows with the result that they were killed. It is the contention of the appellee that there was negligence on the
20 part of the defendant company, in that it had failed to give the statutory signals as a warning of the approach of its train to the crossing, and that the said crossing was one of extra danger owing to certain conditions existing along and upon the railroad tracks south of the crossing from which direction the said train approached, there being a curve a short distance south of the crossing and trees, bushes, cat-tails and other ob-
30 structions, obstructing the view of a train approaching from the south of the said crossing, and that the defendant should have used extra precautions and maintained the same properly and carefully for the purpose of giving notice of the approach of its train to the said crossing.

POINT I.**The Trial Judge committed no error as alleged in specification No. 3.**

Because the question referred to therein was withdrawn, (page 18). I contend however, even if the question had not been withdrawn that it would not have been an error to have allowed the witness to state whether or not he saw the man Harney look in both directions, as the same witness testified without objection, on (page 19) in answer to the following question: 10

"Q. What did you see him do? A. He looked "up and down the tracks."

There could certainly be no error in allowing this witness to testify as to what he saw the man Harney, who was in advance of the cows do.

POINT II.

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The Trial Judge committed no error as alleged in specifications Nos. 4 and 5.

Because the question was not answered and could not have possibly done any harm to the defendant (page 47), and on page 49, all questions along the line of the condition south of the Paterson Avenue crossing were withdrawn, and the answers which were not responsive, were stricken out. 30

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POINT III.

The Trial Judge committed no error as alleged in specification No. 6.

10 As the plaintiff had a right to show the conditions of the signal bell at or about the time of the accident and the witness was testifying whether the signal bell rang at the approach of the train to the crossing one half hour after the accident (page 67).

Evidence is admissible for the purpose of showing the conditions at the railroad crossing shortly after the accident and experiments made by witnesses with railroad gates at a crossing shortly after the accident is admissible to show the conditions thereof 33 Cyc. 1288, and I can see no difference or distinction between allowing to be introduced evidence testimony concerning the condition of railroad gates shortly after the accident and evidence tending to show the condition of crossing bell shortly after the accident.

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Where it appears that the conditions of a railroad crossing has not been materially changed since the accident evidence of its conditions immediately after the accident is admissible for the purpose of showing its condition at the time of the accident 33 Cyc. 1077.

30 As bearing upon the railroad company's negligence in the operation of its trains at the time and crossing in question, it is admissible to show what safe guards, if any, it had provided at such crossing to avoid accidents, and when taken together with other circumstances, evidence is admissible for this purpose, that at the time of the accident no automatic signal bell rang at the crossing although the railroad company was under no legal duty to provide such safe guard 33 Cyc. 4081.

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But in this case, the appellee contends that it went one step further and showed by evidence that it was the duty of defendant to provide extra safe guards.

POINT IV.

The Trial Judge committed no error as alleged in specifications Nos. 7, 8, 9, 10, 11, 12, 13 and 14.

If the jury believed the evidence of the plaintiff's witnesses which it evidently did, by their verdict, there was evidence of negligence with respect to the failure to the giving of signals from the engine (page 15, 64 and 76) where the witnesses all testified that they were within hearing distance and that they did not hear any whistle or bell from the locomotive and a witness produced by the defendant, Mrs. Summerville, at (pages 87 and 88) testified that she was within hearing distance and did not hear any whistle or bell from the engine but she testified that what she did hear was escaping steam (page 88).

There was evidence before the jury that this particular crossing was one of extra dangers by reason of a curve in the railroad tracks south of the crossing and the growing in, upon and along defendant's right of way, of trees, bushes and cat-tails and a large bill posting sign situate close to and south of the crossing (pages 13, 52, 53, 54, 55 and 65) and if there was any negligence shown in any respect the Court should not have granted a non-suit, and if the only negligence shown had been the failure of the crossing bell to ring the appellee contends that, that question alone would have been properly submitted to the jury. It is difficult to tell what bell the appellant referred to whether a stationary bell or the crossing bell on the engine, as they refer to the same as a crossing bell.

In the case of *New York, Lake Erie & Western Railroad Company* decided in the Court of Errors and Appeals and reported in 15 L. R. A. at page 429, the Court states as follows: There can be

found in the decided cases considerable judicial sentiment in favor of the view that the prescribed statutory duty is only cumulative. It is meant by this that aside from the statute, the common law imposes a duty upon the managers of any dangerous machine to employ such precautions against harm to others as is commensurate with the danger; that therefore railroad companies were required by the principals of the common law to use all reasonable signals and appliances to warn and protect persons, who would be likely to be injured from such danger; and the sentiment is expressed that where the legislature has required of a company that it should adopt a particular method of protecting the public against injury, such requirement does not mean that conformity to it is the entire measure of the company's duty. It has been held that circumstances may arise where additional warnings or added safeguards become reasonable; and that this question of reasonableness is one to be left to the determination of the jury. Questions touching the duty of extra statutory care have arisen in cases where a crossing has been accused of possessing unusual features of danger.

The appellee contends that the crossing in this case was such a crossing of extra dangers as to require extra precautions and safe guards, and the testimony of Mr. Churchill, the Mayor of Se-caucus, shows in itself standing alone, that this crossing was one of extra dangers (page 52).

"Q. Do you know what the conditions were at the time while you were there? A. Yes.

"Q. Just state to the court and jury? A. Well, the conditions were, there was a signal bell there which was supposed to be operated as a warning to people who cross over the track; this bell was out of condition all along; there was a train approaching while I was there and the signal bell did not ring;

there was another train went through shortly near when I left and I listened and the signal bell did not ring; that was the condition of the signal at the crossing at this time, which of course it has been testified to by others; of course it is a fact about the obstruction of this railroad, and this railroad has been very much interfered with by the growth of shrubbery and such stuff as that along the line of the road approaching it in the way that these cat-tails were driven from this road; coming the other way the view is more open to the public but going this way you practically have to get down almost upon the railroad tracks before you can see a train coming from Jersey City. 10

“Q. Is that from the south? A. Yes, sir; from the south; and it is a curve that approached the track and there is a large signboard there almost, I think, the same as the corner, so that you have to get below the signboard to look to see a train, and it would be impossible to see the train until you pass that signboard; I don't suppose you could see thirty or forty feet if you wanted to just looking going across the corner to look at that; there is a curve in the road.” 20

The railroad company itself must have considered the crossing in question one of extra dangers by reason of the fact that between certain hours a flag-man was stationed there as well as stationary bells erected (pages 131-132).

Where a railroad company assumed the duty of protecting a crossing by a flag-man it was bound to do so with reasonable care. *Wolcott v. Railroad Co.*, 68 Law, 421; *Randel v. Railroad Company*, 47 Law, 144. 30

A Railroad Company may bind itself to maintain extra safe guards when for its own convenience it elects to place them at certain crossings and by establishing a practice of that kind leads the public to rely upon the performance of such duties. 40

8 Am. & Eng. Enc. of Law, 397.

If a Railroad Company has set up a gate at a crossing it becomes the duty of the Company to operate the same in a reasonable and prudent manner and it is liable for injury resulting from a failure to perform its duties in this regard.

8 Am. & Eng. Enc. of Law, 395.

10 I can see no reason why the above rule as to gates should not apply to stationary bell erected by Defendant Company.

Where the view at a railroad crossing is obstructed by any brush a greater degree of care and caution is required on the part of the Railroad Company, 8 Am. & Eng. Enc. of Law, page 392.

20 It is negligence for a railroad company to permit weeds, etc., to grow upon its right of way to such a height as materially to obstruct the view to a highway crossing.

Indianapolis Railroad Co. v. Smith, 78 Ill., 112;

Tilton, 29 Ill., Appeals 95;

Terre Haute etc., Railroad Company v. Baar, 31 Ill., Appeals 57;

Chicago etc., Railroad Company v. Lee, 87 Ill., 454;

30 *Ohio etc., Railroad Company v. Clutter*, 82 Ill., 123.

Cat-tails and fox-tails were growing in and upon the tracks of the defendant company south of the crossing and were from six to ten feet high (page 54).

POINT V.

There was no contributory negligence shown on the part of the plaintiff or its agents or servants, and the question of negligence was properly submitted to the jury. Where the evidence is conflicting or different conclusions might reasonably be drawn therefrom, it is a question for the jury whether the crossing at the intersection of the highway was constructed or maintained by defendant in a safe and proper condition, and whether a railroad company has been negligent, or in other words, has failed to exercise ordinary and reasonable care under the circumstances of the particular case is ordinarily a question of fact for the jury. 10

Issues should be submitted to the jury if there is any evidence reasonably tending to show negligence or where the evidence relating thereto is conflicting or is of such a character that different conclusions or inferences might reasonably be drawn therefrom (33 Cyc., 1304). 20

The duty of those in charge of an approaching train or locomotive to give a signal or warning of its approach to a public crossing and the failure to give which constitutes negligence, exists particularly where the view or hearing of those in charge of the engine or persons approaching along the highway is obstructed by obstructions at or near the crossing, especially when such obstructions are caused or permitted by the railroad itself. A failure to give a signal or warning under such circumstances may constitute negligence, although such signals are not required by statute, (33 Cyc., 966). 30

The fact that the railroad company has given the statutory signal does not absolve it from giving such other or additional signals or warnings as ordinary care and prudence would dictate under 40

the circumstances of the particular case, the number and kinds of signals required depending upon the character of the crossing, the speed of the train and the surrounding circumstances, being a question for the jury. Where the crossing is a dangerous one and where the road is constructed in such a way and place so as to make it more than unusually difficult to see the train and hear the signals which are given, additional signals may be required. (33 Cyc., 970).

10 There were questions for the jury to determine in this particular case, and under the circumstances and conditions existing at the Paterson Avenue crossing, whether or not the driver employed by plaintiff was guilty of contributory negligence in proceeding to drive nine cows over the four tracks at the crossing where the plaintiff contends there was only a view down the railroad tracks to the South, the direction from which the

20 passenger train approached, for a distance of one hundred seventy-five feet (pp. 53-55), by reason of the curve in the tracks and obstructions.

It is sufficient for all useful purposes to say, that the evidence of contributory negligence was open for debate and leaves the mind in a state of some doubt on the question whether the driver exercised or not that degree of care which the

30 legal duty exacted. This being the case the Judge would not have been justified in withdrawing this question from the jury and such a course is proper only when the absence of caution is apparent and is in reason indisputable.

Penn. R. R. Co. v. Mathews, 36 N. J. L.,
page 532;

*Goldsboro v. The Central R. R. Co. of
N. J.*, 60 N. J. L., page 49.

40 It was shown in the case that there were four tracks at the crossing (page 18), and that from

175 to 200 feet South of the crossing and from which the train approached there was a considerable curve in the railroad tracks (pages 12-55), and that between the crossing and curve there were a large number of trees on the Easterly side of the tracks close thereto South of the crossing, and that there was bushes and cat-tails along and between the tracks which would obstruct the view of persons using the crossing and passing over the same in a Westerly direction (pp. 54 and 65), also a large L-shaped bill posting sign alongside of the tracks which obstructed the view of trains approaching from the South (pages 65 and 112), which trees and obstructions existed at the time of the accident.

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The testimony of Devens shows that before crossing the tracks he stopped, listened and looked in both directions in which trains might approach the crossing and that at the time there was no train in sight and that he did not hear any signals and he then proceeded to drive the cows across the crossing and after reaching the tracks the train suddenly approached around the curve from the South and was upon him before he had time to get the cows over the crossing, and that he could not tell which track the train was running on until the same was nearly upon him (page 22).

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This situation was directly in point with the case of *Wollcott v. N. Y. Long Branch R. R. Co.*, 68 N. J. L., page 421, in which case the accident occurred while Wollcott was driving over a crossing consisting of several tracks. The Court in this case, on page 425, states as follows:

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“Assuming that the driver saw the headlight of the approaching locomotive when he entered upon the first track (the accident occurred four tracks from the first), what was

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10 he to do? Could he be at all certain that the train was not coming upon the very track he was then crossing? Was he less prudent in driving over it than over the tracks of the railroad than he would have been had he remained on the first track until the train had passed. And after he crossed this other track and reached the triangular space, did he suppose that all danger had passed, that he had reached a place of safety and could go on his way without further risk? Was he taken by surprise? The solution for this question was clearly for the jury, not for the Court."

Justice Kalisch, speaking for the Court in deciding this case when last here on appeal, states as follows:

20 "There was testimony on the part of the plaintiff that there were trees and cat-tails which obstructed a clear view in the direction from which the locomotive engine was approaching; there was also testimony that other witnesses on the part of the plaintiff, who were in a position to hear if a bell had been rung or a whistle blown, to the effect that they had heard neither the bell rung nor a whistle blown.

30 "The failure on the part of the company to give either of the statutory signals when approaching the crossing constituted negligence. Whether the company performed its duty in that regard was a jury question. Whether plaintiff's servants exercised reasonable care in driving the cows over the tracks of the defendant under the circumstances and conditions which presented themselves to them was also a question for the jury to determine. We find, therefore, no error in the refusal to direct a verdict for the defendant on either ground."

Kosher Dairy Co. v. New York, Susquehanna & Western R. R. Co., 83 At. Rep., 499.

The appellee contends that the evidence produced on behalf of the plaintiff at the last trial was substantially the same as that submitted to the jury on the two previous trials, and that three different juries consisting of thirty-six men after having heard the evidence in this case decided that the plaintiff's servants were free from contributory negligence, and that the defendant company was guilty of negligence.

The appellant may contend that this case is in point with the case of *Nolan v. Central Railroad Co.*, 50 At. Rep., 342, but in the Nolan case the person in charge of the cows was familiar with the crossing where the accident occurred and knew the time of passing trains and knew the distance from the tracks where he would see the train approaching and was also in a position where he could have prevented the cows from going on to the tracks; he also knew there was a stationary bell at the station which was ringing. In the case now before the Court, neither of these elements appear, as the evidence shows that there were obstructions which could and did conceal the approach of the train and that the driver had never been over that particular crossing before (page 11) and did not know whether there was any stationary bell at the crossing and that he was at the rear of the herd of cows (page 12) instead of at the front as in the Nolan case.

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POINT VI.

The Trial Judge committed no error as specified in specification No. 16, as he did not charge the same, but if the Court had so charged it would not have been error.

POINT VII.

10 The Trial Judge committed no error as alleged in specification 17.

As the matter therein charged is substantially the same as appears in Section 35 of the Compiled Statutes at page 4236, the Judge did not however add thereto the words "Except in Cities," but this I contend did no harm to defendant as defendant produced evidence to show that it sounded both the whistle on the locomotive and
20 rang the bell on the locomotive (pages 151-152), and the jury by their verdict for the plaintiff in this action must have believed that the defendant did not either sound the whistle or the bell because if the jury had believed that the defendant had done either one or the other they would not have found in the manner which they did.

It however appears that Paterson Avenue, the crossing in question, was the dividing line between Jersey City and North Bergen (page 78); it also
30 further appears that the cattle which were struck were on the North Bergen side of Paterson Avenue (page 77); I therefore contend that a part of this crossing being in North Bergen and it further appearing that the cattle were struck on the North Bergen side that the Court had a right to leave out the words "Except in Cities," as the intention of the Statutes requiring a signal to be given was for the purpose of giving warning to
40 the public at crossings outside of the City limits

as well as within City limits, and that if part of this crossing was in North Bergen (outside of the City limits), as testified to, it would be just as much entitled to receive the entire benefits of the statute as a crossing entirely outside of City limits.

Independent of statute it is the duty of those in charge of a train to give notice of its approach at all points of known or reasonable apprehended dangers, so where the crossing is dangerous to travelers by reason of the obstructions concealing the approach of the train the duty of the company is more imperative than at other places along its route. 8 Am. Eng. Enc. at Law, page 412. 10

The Court's instructions must be read together and considered with reference to each other, and if when taken as a whole they correctly state the law applicable to the case they are sufficient. And a requested instruction may be refused when the theory upon which it is based is substantially embodied in other instructions given by the Court or where it is incorrect in part.: 33 Cyc., 1130. 20

The law of the case as charged by the trial Judge is well within the doctrine as stated by the Court of Errors and Appeals in the case of *Newark Passenger R'way Co. v. Black*, 26 Vr., 605.

It further appeared by the testimony of the engineer at pages 145-146-147-148, that he blew the whistle of his engine and sounded the bell thereon, which was the custom of the railroad at that crossing, and that there was a whistling post at said crossing, which was for the purpose of directing and requiring the engineer to sound the whistle; this evidence by defendant's own witness shows conclusively that it was the defendant's custom, and that it assumed the duty to not only ring the bell on the engine but to sound the whistle as well for the Paterson Avenue crossing, and the evidence produced by the defendant was 30 40

for the purpose of showing that the defendant company did both, and the jury must by its verdict in favor of the plaintiff have believed the plaintiff's witnesses when they testified that the defendant company did neither one nor the other.

POINT VIII.

The Trial Judge committed no error as alleged in specification 18, as the Court correctly stated
 10 the doctrine of contributory negligence to be applied in this case, and no doubt had in mind the contributory negligence to be applied in the present case then before the jury.

Beach on Contributory Negligence, Sec. 7, 7 Enc. Law, 2 Ed., 371.

POINT IX.

The Trial Judge committed no error as alleged
 20 in specification 19.

Because the questions involved were questions for the jury and it was for the jury to determine which of the witnesses were telling the truth.

POINT X.

The Trial Judge committed no error in refusing to charge as alleged in specification 20.

30 Because there was nothing in the requests which showed which crossing bell the defendant had reference to whether or not it was the crossing bell to be rung on the locomotive for the crossing or whether it had reference to the stationary crossing bell.

The Court was not required to charge the requests of the defendant as requested so long as the law of the case was charged.

40 *Foth v. Thompson*, 29 Vr., 180;
Consolidated Traction Co. v. Behr, 30 Vr., 480.

POINT XI.

The Trial Judge committed no error as alleged in specifications 21 and 22;

As it was clearly a question for the jury to determine whether or not they believed the witnesses for the plaintiff or the defendant and it has been held that the instructions of the Court must not invade the providence of the jury and so must not assume the existence of material facts in issue, which the jury must find from the evidence, draw inferences of fact from the evidence or pass upon the creditability of witnesses or the weight of evidence, 33 Cyc., 1314. 10

POINT XII.

The Trial Judge committed no error as alleged in specification 23.

Because the jury had a right to take into consideration all of the testimony given by the witness Deven and the witness did not testify that he did not look until they were on the tracks of the defendant, but quite on the contrary at page 41, testified at the bottom of said page 41. As fast as I got past that clump of bushes I started to look and kept looking all the time. And on page 42 in response to a question by the Court which was as follows: Were you, yourself already on the track before you looked? A. No, sir; I was not. I was standing outside the track, I held the cattle up outside the tracks. It wouldn't do to drive them on the tracks and then start to look up and down. The witness further testified (p. 15) that when I stopped the cattle 20 feet from the track he could not see on account of the bushes and his testimony when read in full shows clearly that when he started the cows ahead and passed the bushes in a position where he could see, that he looked up and down the track, bottom page 41. 20 30 40

POINT XIII.

The verdict was not contrary to the charge of the Court.

POINT XIV.

10 The verdict or finding of the jury upon matters of fact will not be disturbed by the Appellate Court if there is any evidence reasonably tending to support it, or the evidence relating thereto is conflicting, although the weight of evidence may seem to the Appellate Court to be against the plaintiff, 33 Cyc., 1324.

20 Where witnesses are near at hand and in a position to hear, testify that they did not hear the signals as a train approached a crossing they may be believed as against others who state affirmatively that the signals were given.

Chicago R. R. Co. v. Cuffman, 38 Ill., 424.

The jury is the proper judge of the weight of evidence and circumstance may exist justifying it giving greater weight to negative than to positive negligence, 8 Am. Eng. Enc. of Law, page 419.

There was, however, in this case positive evidence that the signals were not given (pp. 14-15).

30

POINT XV.

40 Defendant was very careful not to offer in evidence a map of the approach of its tracks to the crossing, which would show the curve in its tracks although it was proved conclusively not only by plaintiff but by defendant's witnesses, that such a curve did exist, and I know of no reason why the defendant could not have made a map of smaller scale which would have shown the curve in its tracks, unless the defendant feared to have the true and entire situation at the crossing presented to the jury.

POINT XVI.

There was evidence from which the jury could conclude that the bell placed at the crossing did not ring to indicate the approach of the train in question and other trains near the time of the accident (pp. 20, 33, 35, 52, 53, 64, 67, 76).

The failure of such a bell to ring at the time of the accident is evidence of negligence.

33 Cyc., 942;

Hicks v. Railroad Co., 164 Mass., 424;

41 M. E., 721;

McSweeney v. Erie R. R. Co., 87 N. Y.

Supp., 836.

10

POINT XVII.

When counsel present alternative or inconsistent requests they should not be heard to complain of the Court's selection.

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38 Cyc., 1711.

POINT XVIII.

Testimony was admissible to show that the crossing bell did not ring after the accident.

Olcott v. Public Service Corporation, 49

Vroom, 482.

30

POINT XIX.

The accident occurred when it was getting dark or dusk (p. 66) and I submit that this is the most difficult time to see a railroad train approaching around a curve in the tracks and this train could not be seen according to the engineer's testimony until around the curve.

"Q. You couldn't see the crossing of the Susquehanna tracks until you got straightened out around the curve? A. Until you get just around the curve you can't see" (p. 145).

40

The fireman of the engine testified that the curve was 200 feet from the crossing (p. 154).

I submit that this case has been fully and fairly tried and at great expense considering the amount involved and that the questions were properly submitted to the jury and fairly decided by the jury and that the verdict should not be disturbed.

WILLIAM B. STITES,
Attorney and of Counsel
for Defendant-in-Error.

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Transcript of District Court Record.

(Filed November 9, 1912.)

District Court of the City of Hoboken.

STATE OF NEW JERSEY, }
 Hudson County. } ss.: 10
 No. 5643.

KOSHER DAIRY COMPANY, a corporation, <p style="text-align: right;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, a corporation, <p style="text-align: right;"><i>Defendant.</i></p>	}	Harry W. Lange, Esq., Judge. Harry Bennett, Clerk. In Tort. \$500.00. 20 William B. Stites, Plff's Atty. Collins & Corbin, Deft's Atty.
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COSTS.

	City.	Al.	
Summons, Copy	\$1.70	\$1.20	30
Service and Return60	
Venire	1.25		
Summoning Jury		1.00	
Attending Jury50	
Service of Subpoenas . .			
Witness Fees			
Jury Fee		3.00	
Trial Fee	1.50		
Atty's Fee 5%		18.75	40

Transcript from Record.

A Summons was issued, tested December 10, A. D. 1909. Returnable December 21, A. D. 1909, at ten o'clock in the forenoon at the Court Room of said Court in the City of Hoboken. The Sergeant-at-Arms returned the Summons as follows, viz:

10 I served the within Summons on the within named defendant corporation, on Mr. Curry and Mr. T. De Vere, Chief Clerk, this 15th day of December, A. D. 1909, by reading the same to each of them, and by leaving each of them a true copy thereof.

JOHN SOLFERINO,
Sergeant-at-Arms on July 11, 1912.

20 Parties appeared in Court and had cause placed on list of causes for trial by jury for Friday, October 25, 1912, at 10 o'clock in the forenoon. Venire was issued to John Solferino, October 23, 1912. Venire was issued to John Solferino, Sergeant-at-Arms. The Sergeant-at-Arms returned the Venire as follows:

30 By virtue of the above Venire Facias I have duly summoned the following lawful Jurors to appear before the District Court of the City of Hoboken, at the time designated: John Hannan, Henry Kraemer, William D. Gregory, Arnold Meineker, Leopold Bauman, Henry Cook, Andrew Wintjen, Charles A. Zemp, Charles Hass, Henry Ortlieb, Martin Schindler and Fred Heck, October 25, 1912. Parties appeared and proceeded to trial.

On the part of the plaintiff the following witnesses were sworn and gave their evidence: Joseph Devvens, Minnie Cohen, Max G. Miller and Conrad Schaffner.

40 On the part of the defendant the following wit-

Transcript from Record.

nesses were sworn and gave their evidence: Emma Sommerville, William H. Lowe, Patrick Hefferen, Turner F. Lomferborough, William E. Nicholison, Alfred W. Hunt, John W. Kellett, Sante Siribano, Lizzie Raisch, Judson Potter, Abraham Adorson, Emanuel E. Paulson, Master Maybe and Frank Ridner.

Defendant offered 14 exhibits in evidence and were marked D-1-2-3-4-5-6-7-8-9-10-11-12-13 and 14. 10

Harry Schirmer was sworn as stenographer.

November 1, 1912, Defendant filed Notice of Appeal and Bond.

WHEREUPON it is, on this twenty-fifth day of October, A. D. 1912, by jury considered and adjudged that said Kosher Daily Company, a corporation, Plaintiff, recover against said New York, Susquehanna and Western Railroad Company, a corporation, Defendant, the sum of Three Hundred and Seventy-five Dollars and Cents damages, and Twenty-nine Dollars and Fifty Cents, cost of suit. 20

I, HARRY BENNETT, Clerk of the District Court of the City of Hoboken, HARRY W. LANGE, ESQ., Judge, do hereby certify that the foregoing is a true copy of the record of a judgment of said Court. 30

IN WITNESS WHEREOF, I have hereto set my hand as Clerk of said Court and affixed the seal of said Court this eighth day of November, one thousand nine hundred and twelve.

HARRY BENNETT,
Clerk.

(Seal.)

State of Demand.

(Filed Dec. 20, 1909.)

The New York, Susquehanna and Western Railroad Company, a corporation, and the New Jersey and New York Railroad Company, a corporation, and the Erie Railroad Company, a corporation, were summoned to answer unto the Kosher Dairy
10 Company, a corporation, herein, in an action of tort, and thereupon the said plaintiff, by William B. Stites, its attorney, complains:

For that, whereas, the said defendants at all times hereinafter mentioned, were and still are corporations doing business in the State of New Jersey.

For that the said defendants at the time of the committing of the grievances hereinafter mentioned
20 were the owners, operators, possessors and controllers of certain railroad tracks, road bed, steam locomotives and railroad cars known as a steam railroad running through Jersey City in the County of Hudson, and which said railroad tracks and road bed was laid on and across a certain road or avenue, known as Patterson Avenue, in Jersey City, and were so operated and possessed and
30 maintained by the said defendant companies that they crossed said Patterson avenue at grade and with such curve a short distance therefrom, and with such obstruction to the view of the persons crossing or about to cross the same on the said Patterson avenue, that the said crossing of said railroad track and road bed, became and was unusually dangerous and hazardous to persons using the said Patterson avenue and crossing said railroad tracks and road bed.

40 And for that the said defendants on the 18th day of July, 1909, by means of trees standing and growing along and near to said railroad track and

State of Demand.

said railroad crossing, and by means of other obstructions near the said track, all of which were maintained by the said defendants and by means of the said curve, and of the said road bed and tracks maintained, and operated, and used by the said defendant, made and caused the said railroad crossing at said Patterson avenue to be one of exceptional danger and hazard to persons and their property lawfully crossing said railroad tracks in the use of said Patterson avenue. 10

And for that the said defendants operating, maintaining and controlling the said railroad tracks and road bed, and cars and obstructions as aforesaid, on the day and year last aforesaid were the owners, operators and possessors of a certain steam locomotive with cars attached thereto which they operated, controlled and ran along said tracks and across said Patterson avenue at Jersey City, in the County of Hudson, as aforesaid. 20

And for that, nine cows, the property of the said plaintiff, on the day and year last aforesaid, were lawfully in and upon said public road or avenue, known as Patterson avenue, and were then and there being driven and controlled in a careful and prudent manner, in a westerly direction by the servants and agents of said plaintiff, and were then and there in the act of crossing the said track and a public road, to wit, Patterson avenue. 30

Whereby, it became and was the duty of the said defendant toward the said plaintiff to use due and proper care and diligence in the operating, running and management and control of the said railroad locomotive with cars attached thereto, and to give proper and reasonable warning of the approach of said locomotive engine to said crossing, to persons lawfully using the same and to keep 40

State of Demand.

and maintain due and reasonable guards and signals at and near said public crossing, and to so maintain their said tracks and road bed at and near said public crossing, that the view of persons approaching and about to cross the same should not be unnecessarily and unreasonably obstructed, and to so manage said road bed and tracks, and to
 10 so operate their said railroad cars and locomotive, so that the same should not be unusually and unnecessarily hazardous and dangerous, so as not to negligently injure, damage or kill cows of the said plaintiff while in the act of crossing the same.

Yet the said defendants, disregarding their said several duties in this behalf, wrongfully and unjustly intending to injure, damage and kill the cows of the said plaintiff on the day and year last
 20 aforesaid, through their servants and agents, so negligently and carelessly operated and ran their said locomotive and cars attached thereto along the said track and road bed around said curve, at and up to and across said public crossing and so negligently and unlawfully maintained and operated said road bed and railroad track at and up to said railroad crossing, that the same became and was a place of unnecessary and unusual danger and hazard to persons and their property law-
 30 fully using the same and to the said plaintiff and its property, and so negligently and unlawfully placed and maintained trees and bushes along said tracks at and near to said crossing and maintained other obstructions along and near the said track, and up to and near to the said crossing, so that the same became and was a place of unusual and unnecessary danger and hazard to persons lawfully using the same, and to the said plaintiff and its
 40 property, and so negligently and unlawfully failed and neglected to give, make or provide any signal

State of Demand.

or warning to persons about to cross the said track and to the servants and agents of the said plaintiff in charge of said cows, of the approach of the train to the said public crossing, so that the said cows of the said plaintiff, while in the act of being driven across said tracks, at said crossing, without any negligence on the part of the plaintiff, servants or agents, through the negligence of the defendants, as aforesaid, three of the cows were run into, upon and over by the said locomotive and cars, and so severely injured that the same were killed, and this without any fault or negligence on the part of the agents or servants of the said plaintiff. 10

By means of which wrongs, damages and injuries, the said plaintiff was deprived of the use, value and income of its said three cows, which were so severely damaged and injured that one was killed and the other two others necessarily shot and killed. 20

WHEREFORE, the plaintiff says, that it has been injured and damaged in the sum of Five hundred (\$500) dollars, therefore it brings its suit.

WILLIAM B. STITES,
Plaintiff's Attorney.

30

40

State of Case.

(Filed November 9, 1912.)

Hoboken District Court.

10	KOSHER DAIRY COMPANY, a corporation, Plaintiff, <i>vs.</i> NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, Defendant.	}	In Tort.
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Stenographer's Minutes

20 Of evidence taken at the trial of the above-entitled case before Harry W. Lange, Esquire, Judge, and a jury, this twenty-fifth day of October, nineteen hundred and twelve, at the court room in the City Hall, at eleven o'clock in the forenoon of that day.

APPEARANCES:

30 WILLIAM B. STITES, ESQ., Attorney of Plaintiff.
 COLLINS & CORBIN, ESQRS., Attorneys of Defendant.

On motion of defendant, Harry Schirmer was designated and sworn as stenographer.

A jury of twelve men was thereupon called and sworn.

40 Mr. Stites, on behalf of the plaintiff, makes opening statement to the Court and Jury.

THE COURT: Mr. Stites, in order that

Joseph Devens—Direct.

there may be no confusion, there are three defendants, I believe, alleged in the declaration—

MR. STITES: Why, I believe it is consented by the defendant that the New York, Susquehanna & Western Railroad Company operated the train and railroad tracks, and the plaintiff discontinues as to the other defendants. 10

THE COURT: Is that so?

MR. BAIN: That is so.

THE COURT: Then the only defendant in this case is the New York, Susquehanna & Western Railroad Company, and that is a corporation of this State.

MR. BAIN: That is not denied; and it is admitted on the record. 20

JOSEPH DEVENS, a witness called by and on behalf of the plaintiff, after being duly sworn, on his oath testified as follows:

DIRECT EXAMINATION BY MR. STITES:

Q. Where do you reside? A. 66 Pavonia Avenue, Jersey City. 30

Q. What is your business? A. I have been in the stock business all my life; never worked at anything outside of that.

Q. What does that require you to do in that business? A. Well, I be interested in it every day from one day to the other; from one to the other I do different.

Q. What did you do? A. In cows or anything else or stock I have been interested into them all. 40

Joseph Devens—Direct.

Q. Did you drive cattle in that business? A. Yes, sir.

Q. Were you engaged in that business during July, 1909? A. Yes, sir; I was. After I got done that night I engaged to take these cattle out to Secaucus.

Q. Do you recall the date of that night in July?
10 A. Yes, sir; I do.

Q. Was it July 18, 1909? A. Yes, sir.

Q. And on that night by whom were you employed? A. By the Kosher Dairy Company, by Mrs. Cohen; she asked me to take these nine cattle out to Secaucus and I guaranteed to take them out there after I got done.

Q. Did anyone assist you that night in driving the cattle out? A. Yes, sir; I had a man named
20 Harney take them along; I hired him to go out with me.

Q. Do you recall where he is? A. No, sir; I don't know at present.

Q. Did you try to find him? A. Well, he used to be up here with Mr. Winberry and Winberry says he disappeared from up there; I ain't seen him since; I asked Mr. Winberry yesterday about him.

30 Q. How many times about have you driven cattle over railroad crossings? A. Well, I suppose twenty-five or thirty different times, and it may be a little more, but I can guarantee for twenty-five or thirty times.

Q. Do you recall on the evening of July 18, 1909, at about what time you reached the Paterson Avenue crossing of the defendant company? A. About five minutes to eight, as near as I can get
40 at it, but I wouldn't swear to the minute, but that

Joseph Devens—Direct.

is as near as I can get at it; I looked at my watch.

Q. Had you ever driven cows or cattle over that particular crossing before? A. No, sir; I did not. I never went that road before.

Q. That was the first time? A. Yes.

Q. Is the Paterson Avenue crossing a regular railroad crossing? A. Yes, sir; it is. 10

Q. Is that a public street or highway?

Objected to as incompetent and calling for a conclusion. Objection sustained. To which ruling of the Court counsel for the plaintiff then and there duly prayed an exception.

Q. Is the crossing at that point boarded up with boards and planks so as to prevent wagons from crossing it? A. Yes, sir; it is a public crossing, so far as I can say onto it; it is there for wagons to cross and everything; if anybody wants to take a run down there it is a steep hill and everything but it is a public crossing. 20

Q. Where does the road go to that crosses there? A. Goes to Secaucus, leads to Secaucus; that is where I was going with the cows, and that is where I guaranteed to take them. 30

Q. What was the condition as to light when you reached the crossing that night? A. Well, the light was as plain as could be; I could see for 100 or 200 feet if I want to see it.

Q. Could you see the crossing? A. Yes, sir; I could.

Q. Is your eyesight good? A. As good as anybody's going, I believe.

Q. Is your hearing good? A. Yes, sir. 40

Q. About how far south of the crossing could

Joseph Devens—Direct.

you see? A. Well, there is a bend there and you couldn't see over 200 feet onto that. You couldn't see hardly that.

Q. And why was that? A. Well, there seems to be a curve there or something; I could see clean over the tracks and one thing and another, but I was looking out just for the trains.

10 Q. Was it getting dark? A. Well, it was just getting dusk—what you call dusk.

Q. At about eight o'clock? A. You couldn't call it dark; no.

Q. Just getting dusk. A. Yes; you couldn't call it dark. I could see as far ahead as I wanted to see onto it.

20 Q. When you reached the crossing what did you do? A. I held up the cows and sent Harney ahead to see if everything was clear on the railroad—naturally what a man would do.

Q. Where did you stop the cows? A. I stopped them right on the off side of the crossing on Tonnele Avenue, I stopped the cows on the Pater-son Avenue side of it.

Q. How close to the first track were you when you stopped? A. About twenty feet or so. I naturally wasn't going to stop them on the track.

30 Q. When you stopped the cows before passing over the crossing could you see down the tracks in a southerly direction? A. No, sir; I was behind the cows. I sent Harney ahead to see if the tracks was clear. I had to hold these cows up; there was nine cows there and if there wasn't anybody behind them they would break away again and they would run up the hill.

40 Q. If you stopped the cows twenty feet from the track why couldn't you see in a southerly

Joseph Devens—Direct.

direction? A. I seen as soon as I got on the track. There was a little bunch of trees.

Q. That is what I wanted to find out, why you couldn't see as soon as you stopped. A. I told Harney to go along and tell me when to go ahead.

Q. Why couldn't you see? A. As soon as I got past I seen. 10

Q. Why couldn't you see when you stopped? A. The trees obstructed me view on it.

Q. Where were those trees? A. Well, you couldn't call them trees, they were bushes more than anything else; they stood about as high as what I did, and they obstructed your view at the time when you are coming down.

BY THE COURT:

Q. The question is, Where were they? A. They were on the Tonnele Avenue—Paterson Avenue side of Jersey City as you come down the incline there. 20

BY MR. STITES:

Q. Were they along the road bed of the railroad?

Objected to as leading. Objection sustained. 30

Q. Just state where they were. A. They stood right on the end of the roadbed.

Q. How near the tracks? A. They wasn't four feet from the tracks; you couldn't call it anything like that—they stood right deliberately against the tracks. I didn't measure the thing or anything like that, but they were right deliberately against the track where we held the cows up at the time. 40

Joseph Devens—Direct.

Q. Did you notice any other obstructions of any kind at all when you looked? A. No, sir; I did not.

10 Q. Well, after you started the cows up to cross the crossing what did you do? A. Why, I told Harney—I started to drive as lively as I could. There was a lot of cows there with calves and I was afraid of some of the cows dropping onto me. You know on the cows heavy in calf she might drop right on the road onto you and I wasn't going to drive them to death, so I—if a man knows his business he ain't going to do that; these cows was heavy in calf and if you drive them anyway too hard they are liable to drop down onto you, and they calve onto you—you are going to force the calf out of the cow if she is heavy in calf; you got to use judgment in that, and if a man
20 wants—

Q. When you reached the track what did you do? A. I looked up and down. There is no man more particular than I am on that.

Q. Did you see any train approaching from either direction? A. No, sir; I did not.

30 Q. Did you look for any? A. Yes, sir; I looked up and down that track. Naturally when I am driving cows I ain't going to take chances of getting run over myself.

Q. Did you hear any train approaching at that time? A. No, sir; I did not.

Q. Did you listen for a train? A. Yes, sir; I did.

40 Q. Was that what you stopped for? A. Yes, sir; I told Harney that particularly, to look out for a train. We had cows in heavy calf there and I couldn't endanger—I couldn't drive they as I wanted to drive them.

Joseph Devens—Direct.

Q. Did you hear any locomotive whistle sound at that time? A. No, sir; I did not.

Q. Did you hear any bell ringing from any locomotive at the time? A. Not at all until after this train passed me, after hitting the cows and came near hitting me at the time, too.

Q. Before any trains reached the crossing on the night in question did you hear any locomotive bell sound? A. I did not. And I looked out particularly for that, too, when I crossed that crossing. 10

Q. Now, just state to the Court and jury what occurred after you got the cattle started over the crossing? A. I started off from this place where I held the cattle up and Harney came to me—he hollered out to me, he says, “Everything is clear, Joe.” 20

MR. BAIN: I object to what Harney said.

Objection sustained.

A. Well, Harney says to me—

BY THE COURT:

Q. Don't say what Harney said. Just what took place, what you saw yourself. A. Yes; that's all right, but the man hollered to me to drive these cattle over. 30

BY MR. STITES:

Q. Did he make any motions to you? A. He says, “Come ahead, Joe.”

Objected to. Objection sustained.

BY THE COURT:

Q. Don't state what Harney said. State what you did. A. I started to drive the cattle over. 40

Joseph Devens—Direct.

I got them over as far as the third track; I got them on there and I got them bunched there; Harney called my attention. He says, "Here comes a train, Joe."

Objected to. Objection sustained.

A. Well, you got to say what was going on.

10 THE COURT: I don't want you to say what he said; just what you did.

Q. What you did—what you saw; you can testify to anything that Harney did but not what he said.

THE COURT: All right; you got as far as the third track; go on.

20 A. Yes; and I got them on this third track; I had them bunched there; Harney called my attention—it has got to come in that way. My God It has got to come in, all our conversation came out.

MR. STITES: I will consent that that be stricken out what Harney said.

A. He called my attention, he says, "Here comes the engine; here comes the train, Joe."

30 Objected to.

THE COURT: One minute, Mr. Devens, you are not permitted to say what anyone else told you. Just state to the jury what you did and saw. Don't state what Harney told you. That isn't permitted to go in.

A. But the man was driving cattle with me at the time. What's the use?

BY MR. STITES:

40 Q. Did you see the train? A. Yes; after he called my attention to it.

Joseph Devens—Direct.

Q. Well, what happened? A. Well, I was there and I was trying to get these cattle across—I came near getting cut in half over it, I suppose I made a twenty foot jump onto it, and this engineer, what he says to me; I don't know what—

Q. Never mind what he said. A. He hollered something out of the cab.

Q. How many cows did you get over the third track? A. I got five across over onto the side there; I punched five over, welted them over. 10

Q. Were any of them struck by the locomotive? A. There was three cows struck. Naturally I was in amongst the cows trying to force them over on the side a little, a little too long there for my own health.

Q. Was there any headlight on this engine? A. Not that I seen; I never seen a headlight. 20

Q. How far did the train go beyond the crossing after it struck the cows? A. It might have been a hundred feet and it might have been a little over that.

Q. Did it stop? A. Yes, sir; it stopped after that.

Q. About how long did it take you to get the cows to the point where they were struck, from the time you started them up to the crossing? A. It might have been five minutes or seven minutes. I started out to rush them. Naturally I rushed them over the crossing; you got to do that to get them over the crossing. The cows is heavy in calf and you have to have a little judgment onto it. 30

Q. About how wide is that crossing at that point from the most westerly track to the most easterly track? A. It might be sixty-five feet and it might be a little over. 40

Joseph Devens—Direct.

Q. Is it a very wide crossing? A. Yes, sir; there is four tracks there; there is a split in between the two tracks.

Q. When Harney went down on the tracks after you had stopped the cows, did you see him do anything? A. He looked ahead and everything else, and says, "Everything is clear."

10 Objected to. Objection sustained.

Q. Not what he said. What did you see him do? A. He went ahead—he looked ahead—you can't answer the question any other way than that.

Q. Did you see him look in both directions?

20 Objected to as calling for a conclusion. Question allowed. To which ruling of the Court counsel for the defendant duly prayed an exception, which was granted and signed and sealed accordingly.

H. W. LANGE,
Judge.

(Seal.)

A. Yes, sir; I did. What is his eyes there for if—

30 Question withdrawn.

Q. Just state to the jury what you saw Harney did; not what he said—everything that you saw him do when you went down on the tracks after you had stopped the cows. A. Well, can't I put Harney's name in—can't I mention it?

40 Q. You can mention his name, but nothing that he said; everything that you saw him do. A. Well, Harney—I seen Harney ahead—this fellow was driving these cattle with me—I sent him

Joseph Devens—Direct.

ahead there, gentlemen; I told him to look up and down the tracks; he comes to me—he hollers to me, he says, “All right, Joe.”

Q. No; you told him to look up and down the tracks. What did you see him do? A. He looked up and down the tracks.

Q. You can't testify to what he said. A. Yes.

Q. How long have you known Harney? A. I 10
know him for about twenty odd years.

Q. Can he see? A. Yes, sir.

Objected to.

MR. STILES: I will consent that that be stricken out.

Q. During the time that you have known Mr. Harney have you seen him walk along the street alone? 20

Objected to as immaterial, irrelevant and incompetent. Question allowed.

A. I have often seen him—yes, sir; I seen him pretty near every day for years, going onto twenty years, off and on.

Q. What was his business? A. Well, ne was working for Johnny Winberry over here in Hoboken.

Q. What was his business at that time? A. 30
Driving stock—he took any job he could get outside of Winberry's job; he was working for Johnny Winberry originally over here in Hoboken. That is the man that employed him all along.

Q. In what direction was the train running that struck the cows? A. It was going north from Jersey City.

Q. Did it come from the direction from which 40

Joseph Devens—Direct.

the curve was located in the track? A. Yes; it must have been a curve there.

Q. Did it come from that direction? A. Yes, sir.

Q. Did you know there was a curve there or not? A. Oh, there must be a curve there; you can't see a train at all until it was on top of
10 me.

Objected to. Objection sustained.

Q. Did you ever see a curve there at any other time? A. I know there is a curve there from experience, to see it; yes.

Q. Before you started the cows across the track did you hear any signal of any kind? A. No, sir; I did not.

20 Q. Was there a flagman at that crossing? A. No, sir; there was not; in fact, I could say there was no representative of the railroad there at all.

Q. Was there a flagman's shanty there? A. There was a shanty there, but it was locked up, yes; I took particular notice of that when I went down to see the cows. There was no flagman.

30 Q. Do you know who shot the cows after they were struck? A. Yes; the doctor came from Secaucus there to shoot them. I don't know whether Dr. Churchill shot them or not. I went on with the six cows and we notified Dr. Churchill in Secaucus, too.

Q. Why didn't you take the other two with you? A. Sir?

40 Q. Why didn't you take the other two with you that were living yet and not killed? A. They couldn't walk. Could I carry them?

Joseph Devens—Direct.

Q. Where were they? A. They were laying in the ditch.

Q. Did you try to get them up? A. Yes, sir.

Q. Could you do it? A. No, sir; the only way you can try a cow is to get her by the tail and if she won't answer the tail she won't get up.

Q. What was the matter with them? A. They couldn't get up. 10

Q. That is a tailer, is it? A. Yes, sir; if you can't get a cow up by the tail you can't get her up at all.

Q. What was the matter with them? A. They were hit and they couldn't get up; they laid there on their back; and I can pretty near get a cow up if she is going to walk at all. That is my business all my life, and if I can't make them stand up I can't. You couldn't get them to stand up, that is all there is to it. If cows don't answer the tail she won't get up. 20

Q. Is there much of a space between the tracks at that crossing? A. Yes; quite a space there between the westerly side of it—the Jersey City side and the Secaucus side. Of course, I never measured it.

Q. Counting the tracks, commencing with number one from the Hill side, about how much space is there between track number one and track number two? A. About fifty or sixty feet; it might not be all that—it might be that the crossing is sixty feet. 30

Q. That is between the first and second set of tracks? A. Yes; from the Jersey City side. I never measured the thing; I don't suppose—

BY THE COURT:

Q. I don't think the witness quite understands 40

Joseph Devens—Cross.

your question. Your question is, between the first set of rails and the second set of rails? A. I never measured it; I couldn't say aye, yes or no on that.

BY MR. STITES:

10 Q. Which track was it, number one from the Hill side, that the train was on? A. On the third track coming down on the third track, from Jersey City side of the place—we crossed two tracks and we were on the third tracks towards Secaucus.

Q. When you saw this train approaching could you tell which track it was on? A. No, sir; I could not; not until she got on top of me; then I knew what track it was on.

CROSS EXAMINATION BY MR. BAIN:

20 Q. Mr. Devens, you say that you were hired especially by the Kosher Dairy Company to drive the cows on July 18, 1909? A. Yes, sir.

Q. From where did you get them? A. The Jersey City Stock Yard, foot of Sixth Street.

Q. To what point were you going to take them? A. We were going to Secaucus.

30 Q. What time did you leave the Jersey City Stock Yards? A. At a little after four o'clock.

Q. A little after four o'clock? A. Yes, sir.

Q. What time do you say you got on the railroad crossing? A. At about five minutes to eight or five minutes after eight.

Q. So that it took you about four hours to get from Jersey City to the crossing? A. Yes, sir.

40 Q. On what road did you go from Jersey City to the crossing? A. Well, I went from Henderson Street to Paterson Avenue and through Hoboken.

Q. About what is the distance from the stock

Joseph Devens—Cross.

yards to the railroad crossing? A. I don't know; I couldn't tell you that.

Q. One mile, two miles, three miles or four miles? A. I never measured it for miles; I never looked for miles.

Q. Can you tell us approximately what the distance is? A. No; I couldn't tell you that.

Q. You haven't any idea? A. No. **10**

Q. All that you know is, it took you four hours to go that distance? A. Yes.

Q. From the Jersey City Stock Yards at the foot of Sixth Street, Jersey City? A. Yes, sir.

Q. That is on the Hudson River? A. Yes, sir; bounded by Provost Street, the Erie Railroad and the Berwind White Company and the river on the other.

Q. That is easily answered. You went up Sixth Street to Henderson? A. Yes, sir. **20**

Q. How many blocks is that? A. One up to Ninth and Provost, and through Ninth Street and over Henderson.

Q. You went up Sixth Street to Provost Street; how far is that—how many blocks is that? A. Well, you go up Sixth Street, there is one block along there to Provost Street from the Stock Yards. **30**

Q. Then you went up Provost Street to Ninth Street? A. Up to Ninth Street—that is two more blocks.

Q. That is three blocks that you can up to Ninth Street; then you went up what street? A. To Henderson; that is another block.

Q. That is five blocks; then you went up Henderson Street to what street? A. Where you get onto Hoboken Avenue here. **40**

Joseph Devens—Cross.

Q. How many blocks is that? A. Well, I couldn't tell; I didn't count the blocks.

Q. About how many? A. It might be twenty blocks and it might not. It may be only ten.

Q. Is it ten or is it nearer twenty? A. Well, we call it 15 blocks to Paterson Avenue here.

10 Q. That would make about nineteen blocks to Paterson Avenue? A. Yes, sir.

Q. That is pretty near right, isn't it? A. I don't say it is nineteen blocks to Paterson Avenue.

Q. But you roughly estimate it at about that distance? A. I won't estimate anything.

Q. From what you have just stated that was about the distance? A. I ain't lived in Hoboken for thirty odd years.

20 Q. But you have counted the approximate number of blocks now along the route you have gone; that makes it about nineteen blocks to Paterson Avenue or Paterson Plank Road.

Objected to as not proper cross-examination. Question allowed. Objection withdrawn.

30 Q. It was about nineteen blocks to Paterson Avenue? A. I couldn't say whether it was nine blocks or nineteen blocks.

Q. How far did you go on Paterson Avenue before you reached the crossing? A. I went back over the hill; you know where the hill is there.

Q. Is that a mile or a mile and a half? A. I don't know whether it is a mile or a mile and a half.

40 Q. You couldn't estimate the distance in any way from the Stock Yards to the crossing, could you? A. No.

Joseph Devens—Cross.

Q. You couldn't do that, could you? A. No; I didn't measure it.

Q. Yet you can estimate the slight distance—
A. I can.

Q. Between the two rails of the crossing? A. Yes; that is easy to estimate onto that.

Q. Now, what is your estimate between the outer rails— A. That is for you to find out; I ain't supposed— **10**

THE COURT: Answer the question if you can. If you don't know say you don't know.

A. Between the rails?

Q. There are four tracks? A. You measured it; I didn't.

Q. There are four tracks on the crossing? A. I got no estimate onto it. **20**

Q. Are there four tracks at that point? A. There is four tracks there.

Q. Now, what is the distance between the outermost of these rails at that crossing? A. I can't answer that question. You measured it, didn't you, yourself?

Q. You know. A. You got somebody to measure it. **30**

THE COURT: Just answer the question.

A. I can't answer it.

Q. Then you can't estimate the distance between the rails at that point? A. No; I never take the measurement of it. I ain't going to tell you anything that I didn't do.

Q. Then you don't mean what you said before, that the distance easterly— A. Just on my super- **40**

Joseph Devens—Cross.

stition what I meant onto it; I never measured the thing; I couldn't tell you right up and down what that measures there.

Q. As you reached the crossing where was Harney at that time? A. He was ahead of these cows.

10 Q. That is, when you got to the crossing Harney was ahead? A. Yes; I held them up.

Q. Was Harney ahead all the way from Jersey City? A. He was ahead all the way up and down.

Q. Harney was ahead of the cows from Jersey City? A. Yes.

Q. And when you reached the crossing Harney was ahead? A. Yes, sir; he had to hold them up at the head end.

20 Q. Were the cows going down Paterson Avenue? A. No, sir; you couldn't drive them at a rapid rate. I told you that two or three times; some of them was heavy in calf.

Q. How many of them were heavy in calf? A. Seven of them were what we call springers.

Q. You were going slowly when you approached the crossing? A. Yes, sir.

30 Q. Going very slowly, weren't you? A. Well, naturally the cows would take their own time, wouldn't they? You couldn't force them.

Q. Just going along at a very easy gait; was it slow walking or fast walking for you, following the cows? A. Going a natural walk onto it, no faster.

Q. Just a natural slow and easy walk? A. Yes.

40 Q. Then when you got to the crossing Harney was ahead? A. Yes; it wasn't my business to see; I knew he was ahead.

Joseph Devens—Cross.

Q. You didn't stop the cows before you reached the crossing, did you? A. Yes; we stopped them—held them up there.

Q. You held them up? A. Yes.

Q. How far was the first cow from the track?
A. It was 20 feet off the track.

Q. The first cow was twenty feet off the track?
A. Yes. 10

Q. You had nine cows? A. Yes.

Q. Were they strung out one after the other?
A. No, sir; they were not strung out; we bunched them out; they were held up.

Q. How far were you behind the first cow? A. I was right behind her, the nine cows.

Q. Were the nine cows all in a row across that street? A. No; they weren't.

Q. There were some behind the others? A. 20
They were held up there at the end of the crossing.

Q. About how far away? A. Did you ever see cattle held up?

THE COURT: Strike that out; just answer the question.

Q. About how far were you behind the first cow? A. Well, I was right on top of them. 30

Q. About how far away behind the first cow?
A. I don't know how far they were after we got them held up—after we bunched them together.

Q. Was there another cow between you and the first cow? A. Yes; there were nine cows between me and the first cow.

Q. Nine cows between you and the first cow?
A. Yes.

Q. So that you were nine cows behind the first 40

Joseph Devens—Cross.

cow when you stopped? A. Not at all; there was nine cows there, wasn't they? And they were bunched up.

Q. How far away? A. I was standing right back of the cows, as close as a man could stand on the roadway.

10 Q. That is, behind all the cows? A. Yes; and I had Harney hold them up in front of me.

Q. You were behind all of the cows? A. Yes, sir.

Q. How many cows were there between you and the first cow? A. There was nine cows.

Q. The whole nine of them were between you and the first cow? A. Yes.

20 Q. And the first cow was twenty feet from the crossing? A. Yes; that is what we were driving, nine cows.

Q. And the first cow was twenty feet, you say, from the first track; do you mean that? A. Yes.

Q. That is the track of the Northern Railroad? A. Yes, sir; we were within a radius of ten feet—less than ten feet, where we had these cows bunched.

30 Q. Nine cows were within a circle of ten feet? A. Yes, sir.

Q. So that you were within ten feet of the first cow, about? A. Yes, sir.

BY MR. STITES:

Q. Is that right? A. Yes.

BY MR. BAIN:

40 Q. And the first cow, you say, was about twenty feet from the first track? A. I didn't say the first cow was twenty feet from there at all.

Joseph Devens—Cross.

Q. You don't say that now? A. No.

Q. Then why did you say it was? How far, if you know, was the first cow of the herd, away from the first part of the crossing? A. Do you suppose I measured them cows or anything?

Q. Are you not now going to say, or are you not willing to say that the first cow was twenty feet from the crossing? A. They were within a radius of ten feet, in a bunch, and they was twenty feet from the crossing when I held them up. **10**

BY THE COURT:

Q. Twenty feet from the crossing? A. Yes.

BY MR. BAIN:

Q. The whole herd was twenty feet from the crossing when you quit? A. Yes. **20**

Q. How far were you from the first track when you stopped them? A. Do you suppose I took the time to measure that; you are asking foolish questions.

Answer stricken out.

Q. At that time Harney was ahead of the cows? A. Yes, sir.

Q. You were devoting your attention to punching the cows up, weren't you, in order to get them over the crossing, and you paid no attention to trains at all? A. I didn't? **30**

Q. No. A. Do you suppose I sent Harney there just to look to see if the railroad crossing was there?

Q. You were supposing Harney did that, weren't you? A. I sent Harney to see if there was a train coming or bell rung before I drove over that crossing. **40**

Joseph Devens—Cross.

Q. You left it to Harney to find out whether or not a train was coming, didn't you? A. Yes; and I was listening at the same time.

Q. Yes; but you left it to Harney to find out whether a train was coming? A. Yes; but those cows was in charge of me, not in charge of Harney. I was the one that was responsible for the
 10 cows. I had to get them to Secaucus, not Harney, at all. And naturally I was looking out to see if there was a train coming there. I sent that man ahead and told him to look up and down that track to see if there was a train coming. A man couldn't see along there. He says, "All right, Joe; come ahead."

Objected to. Objection sustained.

THE COURT: You will save time if you
 20 simply answer the questions that are asked of you and nothing more. Just answer the questions and don't go on and tell us a whole lot of other things that you weren't asked for. If you don't understand the questions say so.

A. But he is asking such funny questions that you can't answer.

Q. Was Harney on the track when he looked?

30 A. Yes, sir.

Q. On the Susquehanna track? A. Yes, sir.

Q. From where you stood after you bunched the cows up, and before you went over the crossing, how far down the track could you see? A. Well, I suppose I could see as far as that track or near there.

Q. How far could you see? A. 250 feet or something like that.

40

Joseph Devens—Cross.

BY MR. STITES:

Q. Do you know what he is talking about? A. I couldn't see at the time, being there was a bunch of trees. I was behind the cows at the time.

Q. You couldn't see at all at the time you stopped? A. No; I sent Harney to see. What was he up there for if it wasn't to see if any train was coming?

10

BY MR. BAIN:

Q. You couldn't see at all down the track when you stopped? A. No; naturally I—

Q. You left it to Harney to see whether or not there was a train coming? A. Yes.

Q. And when Harney looked to see whether a train was coming he was on the Susquehanna track? A. Yes, sir; he stepped right onto the track.

20

Q. Did you at any time from the time you approached the crossing to the time you got on the track, look down the tracks toward the south?

A. I naturally did.

Q. When? A. All the time I was driving them down across.

Q. All the time? A. Yes; I ain't waiting for a train to hit me.

30

Q. All the time you went across you were looking south? A. Yes; I looked to the south and west, both, on both sides of it as plain as could be.

Q. All the time you were looking to the south and the north both, were you? A. Oh, I looked to the south and north, sure; that was where I went.

Q. As a matter of fact weren't you looking to the south most of the time? A. I didn't take

40

Joseph Devens—Cross.

notice whether it was the south, southeast or anything else.

Q. Toward Jersey City; weren't you looking toward Jersey City most of the time? A. I don't know whether I looked back toward Jersey City in driving the cows.

10 Q. You didn't look toward Jersey City at all, did you? A. After we got them over we looked over the way we were going. I didn't see the train from Jersey City until the train got on top of me.

Q. You didn't look down towards Jersey City at all? A. I looked both ways.

Q. Where were you when you looked? A. On the tracks.

20 Q. You were on the Susquehanna tracks when you looked? A. I expect so.

Q. That was the time you looked? A. Yes, sir.

Q. How long did it take you to get over the crossing? A. It may have took me five or six or seven minutes the way I was driving.

30 Q. It took you five or six minutes? A. It might; yes. I don't say what time it took. I was driving pretty heavy; I naturally drove over the track heavy, you got to get them clear of the tracks.

Q. You say it took you just four or five minutes to get those nine cows over? A. It may be; it may have took me a few minutes longer.

Q. You don't know how long it took you? A. No; but I drove pretty lively; just as lively as these cows could stand, for these cows were in calf and I wasn't going to force the calves out.

40 Q. You looked when you were on the Susquehanna tracks? A. I did; I looked up and down.

Joseph Devens—Cross.

Q. Did you see the train then? A. I did not; not until it got right on top of us, until Harney called my attention.

Q. Did you see the front of the engine? A. I did not.

Q. You didn't see the front end of the engine? A. Oh, I seen it as soon as it got onto me.

Q. You didn't see any glow at all? A. No. 10

Q. You didn't see any headlight? A. No, sir.

Q. You don't know whether there was any headlight on the engine? A. I didn't know that; I never saw the headlight or anything else.

Q. You couldn't see anything else on the engine? A. I never seen a headlight onto it or anything.

Q. Did you see a bell on it? A. The bell rang after it came near cutting me in two. 20

Q. The bell was ringing after the train went over the crossing? A. Yes.

Q. The bell was ringing after it went over the crossing? A. After it got past me; yes.

Q. When you stopped did you listen for any bell or whistle? A. We were listening for everything agoing.

Q. You say you didn't hear any bell? A. No.

Q. Was there any noise? A. No. 30

Q. At that crossing? A. No; quiet as could be.

Q. That was about five minutes to eight in the evening? A. Yes.

Q. It wasn't yet dark, was it? A. No.

Q. It was daylight? A. I could see clean across the track; I could see fifty feet, or one hundred feet, above the track too, at one time, if I wanted to. 40

Joseph Devens—Cross.

Q. Could you see quite plainly at that time, couldn't you? A. Yes, sir.

Q. You could hear the bell on the locomotive, couldn't you? A. If it was the locomotive gong, I don't know.

Q. You did hear the bell on the locomotive, didn't you? A. After he passed me.

10 Q. When it got past you you say you saw the bell move? A. I heard it but I couldn't swear it was his bell or anything.

Q. You distinctly heard a bell ringing? A. I heard a bell ringing after he got past me.

Q. You knew it was the bell of the locomotive? A. No, sir; I didn't; I don't know where the same came from.

20 Q. What bell was it that you heard? A. Well, that is the thing of it; it might have been the locomotive bell and it might not.

Q. Aren't you sure that it was the locomotive bell? A. Well, I couldn't be sure of it.

Q. You testified differently when this case was tried before, did you not? A. No, sir.

Q. Do you remember that this was asked you, "Are you willing to swear now that you heard the bell ringing?" and you answered "Yes"?

30 A. Yes; I heard the bell ringing after it got past me.

Q. Don't you also remember you were asked, "Where did the sound come from?" and you answered— A. It came from a bell.

40 Q. The question was, "Where did the sound come from?" and you answered, "It came from the bell, as far as I heard"? A. Well, I am answering that again now, ain't I? It came from a bell; I don't know what bell it came from.

Joseph Devens—Cross.

Q. What bell would there be at or near the crossing at that time? A. It might have been the engine bell and it might not.

Q. How many bells were there at the crossing at that time? A. There was no bells on the crossing; you know that yourself; there is no use of asking that question.

BY MR. STITES:

10

Q. You mean by that that there was none that rung or do you mean there was none? A. There was no bell rung on that crossing.

BY MR. BAIN:

Q. What bells were there at the crossing at that time? A. There was no bells on the crossing no more than what was standing there.

Q. But there was a bell on the locomotive? A. 20
It might have been on the locomotive that I heard it; that is what I suppose. I don't think a bell on the crossing sounds the way I heard the bell after they stopped.

Q. That sound of the bell ringing you heard coming from the direction of the locomotive, didn't you? A. Yes. It what?

Q. The sound of the bell that you heard ringing came from the locomotive, didn't it? A. It might 30
have.

Q. It did, didn't it? A. That was my supposition; after this train stopped there; yes; it was a bell ringing.

Q. So far as you know it did come from the locomotive? A. Yes.

Q. Was there any signal bell at the crossing on that evening? A. I don't think so; there was none sounded there, anyhow. 40

Joseph Devens—Cross.

Q. You didn't pay any attention to whether or not there was a signal bell? A. I paid a lot of attention.

Q. To whether or not there was a signal bell at the crossing? A. Yes; that was my business, to see if there was a signal bell sounding there before I drove them cows over.

10 Q. In the former trial do you remember this question being asked you, "At that time you didn't pay any attention to any signal bell at all?" and you answered, "No, sir; I did not." Is that so? A. Did I answer that way?

Q. Yes. A. I don't think so.

Q. You did answer that way. A. Well, you might have it that way, but I didn't answer that way.

20 Q. Was or was not that the fact?

MR. STITES: He has already testified to that.

Q. I am asking now, whether his former statement is right. A. About that former statement or anything else. I didn't answer that question in that business.

30 Q. In the former trial you were asked, "You don't know whether or not there was any signal bell?" and didn't you answer, "I couldn't swear to that." A. I couldn't swear there was a signal bell there; no. I didn't hear none and naturally there was no signal bell there or signal bell answered onto it. I can give you that question right up and down onto that.

Q. You said there were some trees or bushes that obstructed your view? A. Yes, sir.

40 Q. On which side of the tracks were those trees

Joseph Devens—Cross.

and bushes, east or west? A. As you come down Paterson Avenue it lies to the south bend of it.

Q. What lies on the south? A. On your right hand as you come down Paterson Avenue.

Q. As you came down Paterson Avenue, Jersey City lies to the south. Where did the train come from? A. This train was coming from the south; but there was a little clump of bushes there; I don't call them trees or anything; they were as high as my head, though. **10**

Q. How far were they south of the crossing? A. Well, they stood twenty feet outside the crossing as you come down Paterson Avenue.

Q. They were close to the Northern track—that is, the first set of tracks? A. Yes, sir; the first two set of tracks; I don't measure it, but naturally I think it would be about twenty feet. **20**

MR. STITES: I don't know whether the witness knows which is the Northern track.

THE WITNESS: I don't know which one of them, Judge, is the New York, Susquehanna.

THE COURT: You can recall by saying the first set and second set.

Q. Were these trees on the easterly side of the first set of tracks that you come to in approaching the crossing? A. Yes; on the first set of tracks as you come down from Paterson Avenue. **30**

Q. They were on the easterly side of those tracks? A. Yes; what you call the easterly side.

Q. That is the side nearest the Hill? A. Yes.

Q. That is where they were? A. Yes, sir; on the Jersey City side.

Q. Yes. How far away to the south of the cross- **40**

Joseph Devens—Cross.

ing, that is, looking toward Jersey City, were they?
A. Well, I never measured them.

Q. About how far? A. It might be twenty feet; it might be ten feet. I never took the measurement of it.

Q. And it might be twenty-five and it might be fifty feet? A. Yes; you have had the measurement of the whole lot of it there.

10 Q. You don't know, as a matter of fact, how far south of the crossing they were, do you? A. I don't know how much the measurement is there.

Q. Those are the only bushes there were in the neighborhood, weren't they? A. What?

Q. Were those the only trees or bushes in that vicinity? A. Yes, sir.

Q. Just that little clump? A. Yes.

20 Q. How far south of the crossing—that is, looking towards Jersey City—was the curve in the track of the Susquehanna Railroad that you mentioned? A. Well, I never took the measure; about two hundred feet—maybe 250 feet.

Q. You never measured it, did you? A. I never measured it; no, sir.

Q. It might be more than that? A. It might be more than that.

30 Q. The curve is away from you as you approach the crossing, is it not? A. Yes, sir.

Q. Was it a very sharp curve? A. It must have been.

Q. Was it; do you know? A. Well, the train was on top of me in no time; it must have been a very short track.

Q. Was it or was it not a very short, sharp curve? A. It must have been.

40

Joseph Devens—Re-Direct.

Q. Do you know anything about it? A. No; I don't know.

Q. You never went down to the curve and you never looked? A. I never went there to look after it happened, or anythingelse.

RE-DIRECT EXAMINATION BY MR. STITES:

Q. Why did it take you so long to reach this crossing from the Stock Yards? A. Well, on account of these cows being in calf; we couldn't drive them fast in July; it is hot weather and you can't drive these cows and you can't exhaust them going up there; the cows is likely to drop on the street onto you. 10

Q. Did you have to go up any hills? A. Yes.

Q. Where? A. Up Paterson Avenue.

Q. That is quite a steep hill up there? A. That is a good steep hill. 20

Q. How many of these cows were in calf? A. It was about seven of them, springers, what we call springers, heavy in calf.

Q. Would that affect the driving of them? A. Yes, sir; it will. If you drive them too heavy they are liable to drop in the street onto you, throw the calf.

Q. On your way up there did you have to stop the cows to give them a rest? A. Yes. 30

Q. About how many times? A. About three different times I held them up.

Q. I want you to make it clear to the jury what you mean by punching cows; when you stated that what did you mean by punching? A. Well, you get a man ahead and punch them together as close as you can.

Q. That is what you mean, you get these cows 10

Joseph Devens—Re-Direct.

all close together? A. Yes; you punch them, what we call punching cows; if you should drive a lot of cattle you got to drive them together or they will stray.

Q. Counsel in your cross-examination has referred to a first cow; do you know what he meant by first cow? A. No; I did not.

10 Q. These cows were all together, were they? A. Yes, sir; all together as soon as we punched them up.

Q. They weren't strung out? A. No.

Q. And so the bunch of cows were about twenty feet from the first track, is that what you mean? A. When you have them bunched up the cows are three or four feet, altogether.

BY THE COURT:

20 Q. How far was the bunch from the first rail? A. About twenty feet.

BY MR. STITES:

Q. How far were you from the bunch? A. I was behind them standing there, I suppose it would be about thirty feet.

30 Q. I mean from the cows, not the track? A. I stood right behind the cows; naturally I bunched the cows up and if I keep on them I could bunch them; I am pretty near on them; if they don't I am on the jump.

Q. Just show to the Court and jury how far that bunch of cows was from the first track, by designating here in the court room? A. Take the track there about the third bench; we had them bunched up against that between Paterson Avenue and they continued bunched.

40 Q. From the third bench in the court room through to you? A. Yes.

Joseph Devens—Re-Direct.

Q. That was about the distance that the bunch of cows was from the first track? A. Yes; pretty bunched up a bunch of cows.

Q. State to the jury by designating in the court room how far south from you that bunch of trees was which you spoke of? A. Well, they stood right at the left hand—

Q. Show the jury here in the court room by designating a distance here? A. Well, I was standing right against them when I was behind these cows; after we bunched the cows up they were on my left hand side. 10

Q. Are those bushes right along the highway? A. Yes; it stands on the end at Paterson Avenue, these bushes, as you come down Paterson Avenue to the crossing there is a clump of bushes there; you can't tell. 20

Q. Were you as close to those bushes as you are to me? A. Yes.

Q. Was that about the distance? A. Yes.

THE COURT: That would be about 15 feet.

MR. BAIN: I would say that is about 12 or 15 feet.

Q. You said in your cross-examination that Harney went on ahead and looked? A. Yes, sir. 30

Q. Well, did you look, too? A. I looked as soon as I could when I got on the tracks. I told him personally to look out there for going ahead, but I had to stand behind the cattle or they would back up Paterson Avenue, you know.

Q. When did you start to look up and down the tracks, with reference to this clump of bushes; when did you first look? A. As fast as I got past 40

Joseph Devens—Re-Direct.

that clump of bushes I started to look and kept looking all the time.

Q. Do you know which one of those tracks was the New York, Susquehanna and Western track?

A. I do not; no, sir.

BY THE COURT:

10 Q. Did you look up and down before you got on the track or when you got on the track? A. Well, I seen ahead—

Q. Did you look up and down the track before you got on the tracks or after you got on the tracks? A. As soon as I drove the cattle on I looked up and down.

20 Q. Were you, yourself, already on the tracks before you looked? A. No, sir; I was not. I was standing outside the track. I held the cattle up outside the tracks. It wouldn't do to drive them on the tracks and then start to look up and down.

BY MR. STITES:

Q. Are you positive that you did not hear any bell when that train passed where you were standing? A. I didn't hear it until after the train passed me.

30 Q. Do you mean by that that a bell was ringing after it had passed you? A. After the train went past and hit these cows there was a bell ringing; yes. Where that bell was ringing from I couldn't swear.

Q. Are you positive that no bell was ringing when the train hit the cows? A. No, sir.

Q. Are you positive about that? A. I am positive about that.

40 Q. Do you know, beside, whether there are any

Joseph Devens—Re-Cross.

crossing bells there at that crossing, of your own knowledge? A. They was there; I saw one up on the post there but it didn't ring.

Q. What you meant in your cross-examination, as I understand you—if I am wrong you can explain it—is that you did not hear any crossing bell and you don't know what bell you heard?

A. There was no bell rung on the crossing; there was a bell rung after this engine passed. 10

THE COURT: Nothing further has been asked you.

MR. DEVENS: You may strike that out.

RE-CROSS EXAMINATION BY MR. BAIN:

Q. Do you know now whether there was a crossing bell at that crossing? A. If it was there I don't know; there is a sign. 20

Q. After passing the clump of trees you could see on the track? A. Yes, sir.

Q. You could see right down to Jersey City? A. No; you couldn't see to Jersey City this time.

Q. You could see down in the direction of Jersey City? A. Yes.

Q. There is nothing else in the way of your view after you passed the clump of trees? A. There is no obstruction in the view afterwards after you get past them trees. 30

Q. And that clump of trees was on the Jersey City side of the first set of tracks that you came to; is that right? A. What?

Q. That clump of trees that you referred to was on the Jersey City—on the Hill side? A. On the left hand side coming down Paterson Avenue.

Q. That is, on the left hand side of the first 40

Minnie Cohen—Direct.

track looking down in the direction of Jersey City? A. Yes; there is a clump of trees there.

RE-DIRECT EXAMINATION BY MR. STITES:

Q. You say there was no other obstructions except the trees to prevent your seeing south; how far to the south? A. Well, as far as that curve;
 10 I told you that, didn't I? The curve ain't two hundred feet away from there; that blocked my view.

MINNIE COHEN, a witness called by and on behalf of the plaintiff, after being duly sworn, on her oath testified as follows:

20 DIRECT EXAMINATION BY MR. STITES:

Q. Were you employed by the Kosher Dairy Company in July, 1909? A. Yes, sir; at that time.

Q. What was your employment? A. I was manager for the Kosher Dairy Company.

Q. Did the Kosher Dairy Company own these cows which were killed? A. Yes, sir.

30 Q. What business are you engaged in now? A. Now I own the cows; they belong to me.

Q. What business? A. For the present time or for that present time; what time?

BY THE COURT:

Q. What is your business now? A. I was manager for the Kosher Dairy Company.

40 Q. What is your business now? A. Now I am owner; it is turned over to me again.

Minnie Cohen—Direct.

BY MR. STITES:

Q. Are you manager now? A. No, sir; I am owner of it.

Q. Of what; of the Kosher Dairy Company? A. Not of the Kosher Dairy Company.

Q. Of what? A. The Kosher Dairy Company business.

Q. Were you ever in the business of buying and selling cattle? A. Certainly I was until now it is twenty years. 10

Q. For twenty years? A. Over twenty years.

Q. Buying and selling cows? A. Not selling, because I was buying.

Q. Buying cows? A. Buying them for myself; for seven years I was manager.

Q. Did you purchase for the Kosher Dairy Company these nine cows which were being driven on the night of July 18th? A. Yes, sir. 20

Q. Do you know which of those nine cows were killed that night? A. I know these was killed.

Q. Did you see them that night? A. I seen them; I and Dr. Churchill.

Q. What was the market value at that time of those three cows which were killed? A. The market in New York for those cows what I paid for them? 30

Q. Just answer the question; never mind explaining? A. They were worth cheaper the cows what I paid two hundred dollars was worth two hundred and twenty-five and the other what I paid one hundred and twenty-five was worth in New York market one hundred and fifty dollars.

Q. What would that make the total market value of the three cows; how much for the three cows altogether? A. That is \$425 in New York 40

Minnie Cohen—Direct.

market it was worth so much; what I paid for them—

Q. Never mind what you paid for them; that has got nothing to do with them. Are you familiar with the Paterson Avenue crossing of the New York, Susquehanna and Western Railroad?

A. Yes; I used to go to Bergen Junction; it is very dangerous there.

Q. And were you familiar with that crossing during the month of July, 1909? A. Sure; I am afraid of that crossing; it is always dangerous.

Q. Do you ever cross over it? A. Sure; I cross over it a good many times during the year.

Q. Why? A. We were to receive oil in Bergen Junction and I want the cars.

Q. You will have to talk slower and talk louder. A. Sometimes when I get my car of oil freight from Bergen Junction so I must go to the office and trace it they show the place for me at that time; of course the tracks I always find dangerous.

Q. Do you have to go out that road on Paterson Avenue to get to your place in Secaucus? A. Not with the car; with the wagon to Bergen Junction; sometimes I ain't on business, you know; people what lives on my own side they are most people what keep stock.

Q. During the month of July, 1909, what was the condition at that crossing south of the crossing? A. The condition?

Objected to as too indefinite. Objection sustained. To which ruling of the Court counsel for the plaintiff prayed an exception, which was granted and signed and sealed accordingly.

H. W. LANGE,
Judge.

(Seal.)

Minnie Cohen—Direct.

Q. Were you over that crossing during the month of July? A. Yes, sir.

Q. Were you over that crossing about the middle of the month? A. Yes, sir.

Q. What was the condition south of Paterson Avenue crossing along the road tracks about the middle of July, 1909?

Objected to as too indefinite. Question allowed. To which ruling of the Court counsel for the defendant then and there prayed an exception, which was granted. and signed and sealed accordingly. 10

H. W. LANGE,
Judge.

(Seal.)

Q. Were you there the night of the accident?
A. Yes, sir. 20

Q. Were you there the next morning?

THE COURT: Just one moment. A question has been asked and not answered: "What was the condition on the night or about the 15th of July"?

MR. STITES: I am trying to fix it more definitely for counsel.

THE COURT: It has been objected to and an exception granted. Do you want that to stand on the record? 30

MR. STITES: I will withdraw the question.

Q. Were you there at the Paterson Avenue crossing on the night of this accident? A. Yes, sir; an hour later with Dr. Churchill.

Q. What was the condition south along the tracks of the railroad company at that crossing at the time of the accident? 40

Minnie Cohen—Direct.

Objected to on the ground that by the witness's own statement she says she wasn't there at the time of the accident. Objection sustained.

Q. An hour after the accident?

10 Objected on the ground that it does not relate to the time of the accident and give no description to show what conditions were when the accident happened, which everybody agrees was about five minutes to eight.

Objection overruled. To which ruling of the Court counsel for the defendant then and there prayed an exception, which was granted and signed and sealed accordingly.

20 (L. S.)

H. W. LANGE,
Judge.

Q. What was the condition south along the tracks of the railroad company at that crossing an hour after the accident? A. To the south side from Jersey City you know if you stay on the other side there is bushes; it doesn't show the train and we complain that the railroad didn't
30 give the bell in time enough to save these cows; when we heard the bell with the cows they got killed, the drivers was so close after the cows that they pretty near got killed themselves.

MR. STITES: That may be stricken out.

BY THE COURT:

Q. You were asked what was the condition there one hour after the accident; you weren't there
40 at the time of the accident? A. No; but I heard

Minnie Cohen—Cross.

people talking and I seen the cows laying there, one cow dead and two cows I think was dead and one got killed; that is what I seen when I seen my very best cows; I feel bad enough.

MR. STITES: I don't understand it. I will withdraw all my questions along the line of what the conditions were there at the crossing south along the railroad tracks.

10

THE COURT: Very well; then they may be withdrawn and of course, the answers are stricken out in all instances.

CROSS EXAMINATION BY MR. HOBART:

Q. I understand that you bought these cows in New York State? A. In New York.

Q. How long before the accident did you buy them? A. Only couple of days.

20

Q. Did you go up New York State yourself and buy them? A. Yes.

Q. Where did you get them? A. From the farmers in Greene County.

Q. Do you know all the men you bought these dead cows from? A. Dead cows?

Q. The ones that were killed? A. Three was killed.

Q. Did you mention the name of the man that you bought them from? A. I can't remember; we buy them cows with cash.

30

Q. Do you know what you paid for them? A. It was two cows was paid each one, one hundred and twenty-five dollars and one paid one hundred dollars.

Q. When you got to the crossing about an hour after the accident did you see where the cows were then, that had been killed? A. Yes, sir.

40

MinnieCohen—Re-Direct-Re-Cross.

Q. Were they dead? A. Two was dead, I think and one was shot.

Q. What was done with the bodies, do you know? A. I don't know.

Q. You didn't attempt to use the body? A. No.

10 Q. To sell for meat? A. No, sir; we ain't butchers.

RE-DIRECT EXAMINATION BY MR. STITES:

Q. How did you account, Mrs. Cohen for the difference between what you paid for the cows and what you have testified is the market value of the cows? A. Each cow was worth twenty-five dollars more in New York market, you know.

20 Q. Did you buy the cows cheap? A. I bought them cheap, certainly; that is what I was doing.

Q. I suppose it cost something to get the cows to New York? A. Certainly it was an expense for me.

RE-CROSS EXAMINATION BY MR. HOBART:

30 Q. How much did it cost to get them to New York? A. I count it an expense for me, sometimes you got to stay a day and sometimes I spend a week; if you are a business woman it costs, you know.

Q. This time you spent two days? A. Before they come here I spent more than two days.

Q. How long did it take you to buy these two cows that were killed? A. I can't remember.

Q. Did it take you two days, or what? A. I don't remember nothing about that.

40 Q. How much did it cost you to take those cows from Greene County down to Jersey City? A. I bought them nine cows together.

Romeo T. Churchill—Direct.

Q. How much did it cost for the nine of them?

A. I don't know now; we paid cash and that is settled after we get some other business.

Q. Did you buy nine of the cows? A. Certainly.

Q. How much did you pay? A. Sometimes \$37. after we put in all other cows; you got to buy a while train; it cost sometimes thirty-seven and sometimes forty. **10**

Q. Forty dollars for all three cows? A. For the train; yes.

RE-DIRECT EXAMINATION BY MR. STITES:

Q. Do you recall how much these particular cows cost you to get from Green County—these particular nine cows? Do you recall how much it cost to get them here? A. I don't remember it; it upset me much indeed; it was the best cows so now I don't remember; it was paid cash when we settled. **20**

ROMEO T. CHURCHILL, a witness called by and on behalf of the plaintiff, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. STITES: **30**

Q. Where do you reside? A. Seacaucus.

Q. What is your business? A. Well, my profession is veterinary surgeon.

Q. Do you hold any office in Secaucus? A. Yes, sir.

Q. What office? A. Mayor.

Q. How long have you resided in Seacaucus? A. Oh, close onto forty years—thirty-seven or thirty-eight years to that time. **40**

Romeo T. Churchill—Direct.

Q. Do you know the location of the Paterson Avenue crossing over the New York, Susquehanna and Western Railroad Company up in North Bergen there? A. Yes, sir.

Q. How long have you known that crossing? A. Oh, most all the while I have lived there.

Q. And for what has that road been used? A.
10 Do you mean a driving road?

Q. Yes. A. Well, it has been used for a public road from the fact I think it is one of the oldest roads of the State of New Jersey, originally the old Bob Davis Turnpike.

Q. Are you familiar with the conditions that exist at Paterson Avenue crossing on July 18, 1909? A. Well, I can't say on any one particular day, but I can say on any time within a week.

20 MR. HOBART: Then I object to any further testimony on the general condition of the road, unless he knows what the condition was on the day of the 18th of July.

Q. Were you there on the 18th of July, 1909, the date of this accident? A. I was, yes, sir.

Q. Do you know what the conditions were at that time while you were there? A. I was there about nine o'clock the night of the accident.

30 Q. (Last question read.) A. Yes; I did know along that way.

Q. Just state to the court and jury? A. Well, the conditions were, there was a signal bell there which was supposed to be operated as a warning to people who cross over the track; this bell was out of condition all along; there was a train approaching while I was there and the signal bell did not ring; there was another train went through shortly near when I left and I listened and the
40 signal bell did not ring; that was the condition

Romeo T. Churchill—Direct.

of the signal at the crossing at that time, which of course it has been testified to by others; of course it is a fact about the obstruction of this railroad, and this railroad has been very much interfered with by the growth of shrubbery and such stuff as that along the line of the road approaching it in the way that these cat-tails were driven from this road; coming the other way the view is more open to the public but going this way you practically have to get down almost upon the railroad tracks before you can see a train coming from Jersey City. 19

Q. Is that from the south? A. Yes, sir; from the south; and it is a curve that approached the track and there is a large sign board there almost, I think, the same as the corner, so that you have to get below the signboard to look to see a train, and it would be impossible to see the train until you pass that signboard; I don't suppose you could see thirty or forty feet if you wanted to just looking going across the corner to look at that; there is a curve in the road— 20

Q. In the railroad? A. Yes; and to see 175 feet from the railroad crossing you will have to get out on the railroad tracks to see a train on either the Northern Road or the Susquehanna Road. 30

BY THE COURT:

Q. Why? A. You ask me why; because the North Bergen Township Committee has been trying for years to get this thing remedied.

THE COURT: That may be stricken out.

Q. I asked you why you can't see; what is there that stops your view beyond 175 feet? A. Trees, shrubbery and the curve. 40

Romeo T. Churchill—Direct.

BY MR. STITES:

Q. What is the nature of the ground south of the crossing along the track? A. Meadow land, principally.

Q. Does anything grow along the tracks on this meadow land? A. Yes; there is a reed—cat-tail what you call fox-tail, grows on this meadow
10 land.

Q. How high is this cat-tail and fox-tail? A. Probably from six to ten feet; probably maybe more.

Q. Does it grow all along the edge of the track there? A. Yes.

Q. South of the crossing? A. Yes; it does.

Q. Did you see a Mr. Miller there the night that you were there? A. I did.

30 Q. Did you notice any signs at this crossing, "Stop, Look and Listen?" A. Well, to tell the truth I didn't notice that night any sign to that effect, but I wouldn't swear positive there was not; but I do know there was a signal bell there and when I drove over I have often listened for that bell to ring and when that bell rang I let my man hold my horse and walked out to see if the train is going over there.

30 Q. Is that a very wide crossing? A. Yes; it is so a wide crossing—well, about the width, I should judge, of a double-track roadbed, about what you call it, there is four tracks of the Northern and four tracks of the Susquehanna.

Q. Is there much space between the Susquehanna tracks and the Northern tracks? A. No; there is a little more space between those two tracks than there is on those two tracks that run on the roadbed south.

40 Q. How far south of that crossing could you

Romeo T. Churchill—Cross.

see, in reference to the curve? A. 175 feet is about what it was, because I had to measure it for our committee that was trying to have something done.

BY THE COURT:

Q. What stopped your view then after that 175 feet down the track? A. The grass and trees and underbrush. 10

BY MR. STITES:

Q. Do the cat-tail and marsh grass interfere to any extent? A. It always does interfere.

CROSS EXAMINATION BY MR. HOBART:

Q. What time did you get there that evening, Doctor? A. About nine o'clock.

Q. I suppose it was dark when you got there? A. Yes; it was quite dark; in fact it was a little more than the ordinary dark, that night; it was so dark that I didn't drive within the railroad; it was too dark for me to drive; I got out of my carriage and walked quite a distance, I say. 20

Q. You saw the cows? A. I did; yes, sir.

Q. Were you there when Mrs. Cohen came? A. Yes.

Q. She asked you to go? A. Yes, she did.

Q. She asked you to look at the cows? A. Yes. 30

Q. And asked you to put a value on the cows?

Objected to as improper cross examination.

Objection sustained.

Q. You did place a value on the cows, did you not? A. Not at that night.

Q. Did you afterwards place a value on the cows? A. Yes; when I was asked. 40

Romeo T. Churchill—Cross.

Q. By Mrs. Cohen? A. Yes.

Q. Now, you have spoken of a train that went up while you were there? A. Yes, sir.

Q. Do you recall which track that was on? A. Yes, sir.

Q. Which one was it on? A. On the Susquehanna.

10 Q. In which direction did it go? A. Coming south in the same direction as the train came that killed the cattle.

Q. You didn't see the train, did you? A. Yes.

Q. The train that hit the cattle? A. No.

Q. Then how do you know which way that train was coming? A. Because it came from Jersey City with some of the employes of the Susquehanna Railroad to look over these cattle.

20 Q. You didn't see the train that hit the animals, did you? A. No, sir.

Q. Or in which direction it came from? A. No, sir.

Q. The train that you saw came from Jersey City with people of the railroad? A. Yes; and naturally the train came from Jersey City that hit the cattle.

30 Q. Was it a through train that came from Jersey City? A. When?

Q. The one that you saw? A. I couldn't say.

Q. Did it stop at the crossing? A. Yes, sir.

Q. Did it stop before it got to the crossing or after? A. No, sir; it stopped right at the crossing; it came up as far as it could to where the cattle lay.

Q. Was it a passenger train? A. It had passenger cars on it.

40 Q. And freight cars on it? A. I couldn't say.

Romeo T. Churchill—Cross.

Q. Which track was it on? A. Right along on the Susquehanna.

Q. There are two tracks there? A. On the regular north bound track.

Q. That is the third track as you go from Secaucus to Jersey City? A. The third track as you come from Jersey City to Secaucus.

Q. Are you sure of that? A. Yes. 10

Q. Did you observe when you were there that evening, in regard to that signboard; was the signboard there that night? A. I said before, it might have been, but I didn't notice the signboard; it was dark and hazy that night.

Q. You didn't observe that? A. I did not; but I looked for the bell, though, because I know there was a bell there.

Q. Did you at that time see these other signs—I don't mean the railroad signs; you said there was a sign some where upon the track that obstructed your view? A. Yes; an advertising sign. 20

Q. And that signboard was east of the Northern Railroad tracks; is that right? A. Yes.

Q. You don't know how far east, do you? A. Well, it was on the line of the road; on the roadbed.

Q. So far as you can state it was on the line of the right of way of the Northern Railroad; is that correct? A. Just about on the right of way. 30

Q. And the trees that you have spoken of, where were they? A. Along the line of the road.

Q. Of the Northern Railroad? A. Yes; the roadbed of the Northern road and the roadbed of the Susquehanna are practically laid as one roadbed.

Q. Practically alongside of each other? A. Yes. 40

Romeo T. Churchill—Cross.

Q. And when you speak of the trees, do you mean on the same side of the roadbed as the sign was? A. Yes, sir.

Q. That would be on the easterly side toward the Hill? A. Yes.

Q. And those are the only trees that you know of that obstruct the view? A. That is the only trees.

10

Q. You did speak of some cat-tails, I think, and bushes and things of that sort? A. Yes.

Q. They are down in the middle, are they not? A. Some between the Northern and the Erie road; it grows up in sort of a little hollow there at times, and the line of the Susquehanna on the westerly side is composed of cat-tails, reeds, willow trees and underbrush fill.

20

Q. That is on the westerly side of the Susquehanna tracks? A. Yes; on the westerly side; and the easterly side, both.

Q. You mean by the easterly side the Northern Railroad tracks? A. It is all one roadbed.

Q. On each side some cat-tails grow; I wanted to make sure. A. They are on both.

Q. Some east to the Northern track and some west of the Susquehanna track? A. Yes, sir.

30

Q. That is the only place you know where there are cat-tails? A. Yes, sir.

Q. Is that correct, Doctor? A. Yes.

Q. Do you know what the distance is between the railroad tracks of the two companies? A. Well, no; I couldn't swear to the exact foot.

Q. You never measured it, did you? A. I never measured it.

40

Q. You spoke of a curve you mean the curve of the Susquehanna track, do you not? A. Yes, sir.

Minnie Cohen—Re-Direct-Re-Cross.

Q. Do you know where that begins? A. I never measured how far you have up there.

Q. Have you answered that? A. You asked me where the curve begins; I couldn't say.

Q. Do you know where it begins? A. I couldn't say.

Q. You never measured it? A. I never measured the full extent of the curve. **10**

RE-DIRECT EXAMINATION BY MR. STITES:

Q. Doctor, between those two spaces of tracks, that is, between the Northern tracks and the Susquehanna and Western, which I presume you referred to as the Erie? A. Yes.

Q. That is in the large space between the two sets of tracks all these cat-tails and underbrush grow in there, too. A. Yes, sir; there is cat-tails **20** growing there; there is no trees growing there.

Q. Is there any underbrush? A. No; just cat-tails growing there.

Q. Did you hear the testimony in the previous trial of the witnesses as to which direction the car came from which struck the cows? A. Yes.

RE-CROSS EXAMINATION BY MR. HOBART:

Q. Did you notice any cat-tails when you were **30** there at nine o'clock that night? A. No; I did not at nine o'clock that night.

Q. When was the last time you had been over the road before that night? A. Probably two or three days; but I did go over the road the next morning.

Q. I am asking you about when you were there before. A. No; but I was there the day after.

Q. Limit yourself to the day before. A. Pos- **40**

Romeo T. Churchill—Re-Direct-Re-Cross.

sibly I might have been there two or three days previous to that.

Q. In the daylight? A. Yes, sir.

Q. Did you take any notice at that time, whether there were any cat-tails whatever between the railroad tracks? A. To tell the truth, I never looked over that track—

10 Q. Please answer the question. A. As I say, yes; I don't remember when I went over there.

Q. Did you notice two or three days before, whether there were any cat-tails between the railroad tracks? A. That I wouldn't swear to positively, that I did notice two or three days before.

Q. The fact is, is it not, Doctor, that the space of ground between the two railroad tracks, is somewhat below the level of the roadbed proper on which the railroad ties and rails are placed? A.
20 Yes, sir.

Q. A little lower? A. Yes.

Q. Several feet lower? A. No; I wouldn't say that.

Q. Well, how many? A. I would say a distance of about eighteen inches.

Q. What is the cat-tail season out there, Doctor? The ripe and full season. A. Now, if the wind happens to blow when you are there.
30

Q. They are highest there now? A. Yes, sir; this is the time that it opens their foliage.

Q. I wanted to know when they got their full growth. A. Right now; not at this time at all—

Q. In the fall? A. Not in the fall.

Q. When? A. The most I noticed the time when we wanted to get them just about the month of July for the boys get them for punk.

40 Q. That is when they get them for punk? A. For the Fourth of July; yes.

Romeo T. Churchill—Re-Cross.

BY THE COURT:

Q. How high would they be in the month of July? A. Oh, well, they are liable to be ten feet high or about twelve feet.

Q. What is your answer? A. They are liable to be ten or twelve feet high; I can show you some higher than that.

BY MR. HOBART:

10

Q. Can you state whether or not you ever saw a cat-tail ten or twelve feet between the tracks of the Northern Railroad and the Susquehanna Railroad? A. No; I wouldn't swear to the height of it.

Q. You never saw that at that particular place. A. I saw them quite a height there once; but I wouldn't swear to the number of feet there was; when I say a number of feet I remember seeing men along the road standing in there and I could just see the men there.

20

Q. Those were out in the meadow? A. Right along the line of that road.

Q. But they weren't between the tracks, were they? A. No; I don't say so.

Q. They were outside the line of both tracks is that right? A. Yes.

BY MR. STITES:

30

Q. Were there some cat-tails between the tracks? A. Oh, yes; there has been.

BY MR. HOBART:

Q. You are not ready to swear, Doctor, that there were any cat-tails between the tracks, so far as say on the 18th of July, 1909? A. I will swear within five days previous to that or the next day after.

40

Romeo T. Churchill—Re-Cross.

Q. I am asking about that particular day. A. No.

BY MR. STITES:

Q. You are basing your testimony on five days before the accident and the day after? A. Yes.

BY THE COURT:

10 Q. You say you were there the day after? A. Yes.

Q. Did you see cat-tails between those two sets of tracks the day after? A. Yes.

Q. How high would you say they were, the fox-tails? A. I should judge about that high (indicating).

Q. About? A. Five feet; I did measure them.

BY MR. HOBART:

20 Q. How many were that five feet? A. Right by that—which were growing into the ditch, which I suppose was used to drain the tracks.

Q. They grow in the ditch? A. In the ditch in the center.

30 Q. How far was the ditch below the level of the roadbed of the tracks? A. Well,, on the outside the ditch was very deep—on the outside of the track—but in the roadbed the ditch was merely sort of grooved out; it was just about what you call a cut in to drain the water off the roadbed.

Q. A couple of feet below the level of the road? A. Hardly.

Q. About eighteen or twenty inches? A. That is about right.

Max G. Miller—Direct.

MAX G. MILLER, a witness called by and on behalf of the plaintiff, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. STITES:

Q. Mr. Miller, where do you reside? A. At the present time?

Q. Yes; at the present time. A. 3703 Boulevard. 10

Q. Where did you live on July 18, 1909? A. 142 Secaucus Road.

Q. How near is that to the Paterson Avenue crossing of the New York, Susquehanna and Western Railroad Company? A. About two hundred and fifty feet.

Q. Is it along the railroad tracks there? A. Well, it is west of the railroad tracks. 20

Q. West? A. Yes.

Q. This side of the crossing? A. Yes.

Q. Within hearing distance of the crossing? A. Yes.

Q. Is your hearing good? A. Yes.

Q. How long had you resided there at 142 Secaucus Road, about? A. Before the accident?

Q. Yes. A. About sixteen years.

Q. Is Secaucus Road a continuation of Paterson Avenue? A. Yes. 30

Q. It is all the same road, is it? A. Yes, sir.

Q. Did you cross this crossing frequently during the month of July, 1909? A. Yes, sir.

Q. How often do you suppose? A. Oh, most every day.

Q. Do you have to cross it in going to and from your home? A. Well, now I don't. Then I had 40

Max G. Miller—Direct.

been living north of it but I had to every time I went out.

Q. Were you home on the night of the accident?

A. Yes, sir.

Q. What were you doing there that night? A. I was walking through the yard.

Q. Do you recall what time the accident occurred? A. It must have been around eight o'clock.

10 Q. Did you see the cows that were struck? A. Yes, sir.

Q. And did you see the train standing there? A. Yes, sir.

Q. Where was the train that you saw, in reference to the crossing? A. It was toward the north standing past the crossing.

Q. Over the crossing, the entire train? A. Yes, 20 sir.

Q. What called your attention to the train? A. I heard the steam blowing.

Q. Did you hear that distinctly? A. Yes.

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

Q. Before the train came to a stop and before you heard the steam escape, had you heard any railroad locomotive whistle? A. No, sir.

Q. Or had you heard any railroad locomotive 30 bell? A. No, sir.

Q. Were you where you could hear if such a thing sounded? A. Yes, sir.

Q. What kind of a train was this? A. Passenger train.

Q. Do you know whether the headlight of the engine was lighted? A. No, sir.

Q. You don't know that? A. I don't know.

Q. What were the conditions at the time of this 40 accident, as to the view down the railroad tracks

Max G. Miller—Direct.

toward the south from the crossing? A. There was some shall shrubs and trees, also a bill post and sign.

Q. Where was this bill posting sign, on which side of the tracks? A. That was on the east side of the track.

Q. Close to the crossing? A. Well, about, I should judge about twenty feet. 10

Q. How far back from the most easterly track? A. I don't know; I never took any measurements.

Q. Did that obstruct your view down the tracks when you were crossing Paterson Avenue, crossing from the east to the west? A. Yes, sir.

Q. Could you see in a southerly direction down the tracks until after you had passed this sign-board? A. Not until after you had passed.

Q. Did you observe any cat-tails growing along the tracks? A. Yes. 20

Q. To the south? A. Yes, and to the west, also.

Q. In both directions? A. Yes, sir.

Q. How high are those cat-tails? A. I thing that depends on the time of the year.

Q. How high would they be during the month of July? A. I couldn't really tell you; I didn't take any measurement of them; some are higher than others. 30

Q. Are they as high as a man? A. About that.

Q. Is the track straight there at the crossing? A. Right at the crossing it seems to me straighter than further on, where it bends.

Q. In which direction from the crossing is that bend or curve? A. Well, the curve—

Q. South or north? A. It curves southwest.

BY THE COURT:

Q. Mr. Stites means in crossing the road going 40

Max G. Miller—Direct.

from east to west, is the curve on the south or north of it? A. South.

BY MR. STITES:

Q. Is it toward Jersey City? A. Yes.

Q. About how far is that curve from the crossing? A. I could not tell exactly.

10 Q. What was the condition at the time of this accident as to light? A. It was getting dusk.

Q. How many tracks are there there at the crossing? A. There is—What do you mean, one for one train or counting each separate track?

Q. How many tracks altogether? A. Four tracks of trains, that is eight rails.

Q. Is it a wide crossing? A. Quite wide.

20 Q. Are there any signal bells at the crossing? A. Yes.

Q. At the time of the accident, of course. A. Yes.

Q. Did those bells ring?

Objected to because witness wasn't at the crossing at the time of the accident.

Q. Could you hear these crossing bells if they ring from your back yard? A. Yes, sir.

30 Q. Were you at the crossing after the accident? A. Yes, sir.

Q. How soon? A. Oh, shortly after.

Q. Did you hear any crossing bell ring that night?

Objected to.

Objection sustained.

To which ruling of the Court counsel for the plaintiff then and there prayed an ex-

Max G. Miller—Direct.

ception, which was granted and signed and sealed accordingly.

Q. How many signal posts were there there at the crossing? A. Two.

Q. Where were they? A. One was as you come down on the right hand side and one on the right hand side crossing the track on the east side of the track.

10

Q. Where there any gates at this crossing? A. No, sir.

Q. Did any train cross over the crossing on the night of the accident while you were there? A. Yes, sir.

Q. Did the signal bell ring then?

Objected to as immaterial.

Question allowed.

20

To which ruling of the Court counsel for the defendant then and there duly prayed an exception, which was granted and signed and sealed accordingly.

H. W. LANGE, Judge.

(L. S.)

A. No, sir.

Q. How long after the accident was that? A. I couldn't tell you a matter of time.

30

Q. Well, about how long after the accident?

A. About half an hour, I think.

Q. How high is that signboard, Mr. Miller? A. I don't know exactly; quite high.

Q. As high as this ceiling in the court room?

A. No; I don't think so.

Q. Half as high? A. It might have been half as high.

Q. About twelve or fifteen feet? A. I couldn't tell you exactly; it might have been around that.

40

Max G. Miller—Cross.

Q. Was it so high you couldn't see over it?

A. Yes.

Q. How long had that bill post sign been there prior to the accident, do you know? A. I don't know.

CROSS EXAMINATION BY MR. HOBART:

10 Q. At the time of this accident you were living on the northwest side of the crossing? A. Yes, sir.

Q. That is towards North Bergen, is it not?

A. In North Bergen.

Q. What is the name of the street where you lived? A. Seacaucus Road.

Q. That is a continuation of Paterson Avenue, is it not? A. Yes, sir; Paterson Avenue from the Boulevard down it is Seacaucus Road; from the Boulevard down.

Q. It is all the same street, only one part of it is called Paterson Avenue and the other part is called Seacaucus Road? A. It is all the same; yes.

Q. Then coming from Jersey City toward this crossing in the direction of this crossing, would your house be on the right of the crossing? A. I don't understand what you mean.

30 Q. Coming from Jersey City towards the crossing, on which side of the crossing would your house be, on the right or the left? A. Well, it is northwest of the railroad so it must be on the right.

Q. And how close is your house to the railroad tracks? A. About three hundred and fifty feet.

40 Q. Do you mean that it is three hundred and fifty feet back in the meadows along back on the road? A. Right at the road.

Max G. Miller—Cross.

Q. How far from the crossing is your house, if you go directly from your house to the crossing? A. Straight.

Q. Right straight? A. It wouldn't make much difference.

Q. It would make about four hundred feet? A. No, sir.

Q. About three hundred and fifty feet? A. 10
About that.

BY THE COURT:

Q. Do I understand that your house is about three hundred and fifty feet west of the most westerly track and it stands back off the road about two hundred and fifty feet north? A. No; it is right on the road.

Q. Right on that road? A. Yes, sir. 20

Q. And a distance of how far west of the most westerly track? A. About two hundred and fifty feet.

BY MR. HOBART:

Q. Now, I understand you were in the back yard this night. A. Walking through the yard.

Q. Taking a walk? A. Yes, sir.

Q. You couldn't see the crossing from your back yard, could you? A. No, sir. 30

Q. You can't see any trains coming from your back yard? A. Not from the back yard; no.

Q. And you didn't see any train coming along that night from your back yard, did you? A. No; I did not.

Q. You weren't listening for trains or signals from trains that night, were you? A. Not particularly.

Q. You weren't paying any special attention to that, were you? A. No, sir. 40

Max G. Miller—Cross.

Q. You were thinking about your own affairs, letting the railroad take care of its own affairs; that is the idea, isn't it? A. Exactly.

Q. You hadn't any interest in the trains, whether they were ringing or blowing or anything of that sort, did you? A. No, sir.

10 Q. Was anyone else at home with you that evening? A. There was supposed to be someone in the house.

Q. Do you know if there was anyone? A. Mother was there.

Q. Her name is Mrs. Augusta Miller, I believe? A. Yes, sir.

Q. Where does she live now? A. 43 Seacaucus Road.

Q. In the same place? A. Yes, sir.

20 Q. As I understand it, Mr. Miller, when your attention was first attracted by some unusual noise like steam blowing, is that right? A. Yes.

Q. Trains don't usually stop along there, do they? A. No.

Q. There are no stops anywhere near there, is there? A. No; there is no station; the next station is Homestead.

30 Q. When you heard this steam blowing off you went down to the crossing? A. Yes, sir.

Q. Had the train passed over the crossing at the time you got there? A. Yes, sir.

Q. How long did it take you to get over to the crossing? A. I couldn't tell you that exactly.

Q. Did you run or walk? A. I don't think I ran.

Q. Did you walk fast? A. I don't know.

Q. Did anyone go with you? A. No, sir.

40 Q. Referring to this signboard which you say

Max G. Miller—Cross.

you can't see over, am I correct in understanding that the one you mean is the board that is alongside of the Northern tracks? A. Alongside of the Erie track.

Q. Well, the Erie runs it. A. Yes.

Q. But you know what I mean; you know which are the Susquehanna tracks? A. Yes.

Q. You know that there is another set of tracks besides the Susquehanna? A. Yes, sir. 10

Q. Which are sometimes called the Erie and sometimes called the Northern? A. Yes, sir.

BY THE COURT:

Q. These tracks which you referred to last are the tracks most easterly? A. Yes.

Q. The signboard which you had in mind was the one beside the most easterly tracks? A. Yes, sir. 20

BY MR. HOBART:

Q. And that is the only advertising board there is around there, so far as you know? A. Except there is a sign there, "Flagman from 7 A. M. to 7 P. M."

Q. That is the railroad sign; I wasn't speaking about that? A. That is the only sign I know of.

Q. Was there a railroad signboard there at the time of this accident? A. Yes, sir. 30

Q. Do you know what it said on it? A. Yes, sir; it says, "Flagman there from 7 A. M. to 7 P. M."

Q. Do you know where that sign was with reference to the Erie or Northern tracks? A. In between them.

Q. In between the two tracks? A. Yes, sir.

Q. That is, in between the two sets of tracks? A. Yes, sir. 40

Max G. Miller—Cross.

Q. After you got past the signboard and turned to look south towards Jersey City, there is nothing to interfere with your seeing a train coming, is there? A. Well; I think that depends on the kind of a night.

Q. Well, suppose it was in daylight? A. I think you could see your way then.

10 Q. You could see a long way then, could you not? A. Not so very long.

Q. Why not? A. Because the tracks bend out of your view.

Q. Do the Northern tracks bend? A. The Susquehanna bends more than once.

Q. But the only thing then that you think of that would prevent a man from seeing a train is the curve in the Susquehanna tracks? A. And
20 the billboard sign.

Q. After you passed the billboard sign there is nothing left but the curve; is that right? A. I think so; except a little cat-tails that might be in between the tracks.

Q. Do you know if there were some in between the tracks? A. Yes.

Q. Where? A. In between the tracks and alongside the two tracks.

30 Q. Take those between the tracks, do you know how high they were? A. No; I didn't measure them.

Q. How far were they from the crossing? A. They were scattered right in along it.

Q. Were there any within ten feet of the crossing? A. I wouldn't say within ten feet.

Q. Would you say within twenty feet? A. I couldn't say exactly.

40 Q. You don't know about them? A. I know

Max G. Miller—Re-Direct.

there was some there; I didn't take measurements how far it was.

Q. You don't want these gentlemen to understand that a cat-tail would interfere with the view of the track? A. Not one.

Q. How many would there have to be? A. I don't know at all.

Q. You didn't measure the curve, did you? A. **10**
No, sir.

Q. You haven't any idea how far it is from the crossing, have you? A. No, sir.

Q. The fact is, is it not, Mr. Miller, that the tracks of the Susquehanna and the Northern tracks both are on a slight elevation, something like they are towards Jersey City? A. Yes, sir.

Q. There weren't any cat-tails growing in between the rails were there, or in between the tracks? A. **20** No; I never seen any there.

RE-DIRECT EXAMINATION BY MR. STITES:

Q. And were these cat-tails between the crossing and the curve? A. (No answer).

Q. Were they north of the crossing or south of the crossing? A. I don't understand what you mean.

Q. Counsel has asked you how close to the crossing these cat-tails were; now were they between the crossing and the curve in the tracks? **30**
A. They were between the two tracks; now there is a space between the tracks; one is the Northern and one is the Susquehanna, and I suppose—

Q. Was that space before you reached where the tracks curve? A. Yes.

Q. Was this a quiet night? A. Well, it was kind of a quiet hazy night. **40**

Max G. Miller—Re-Cross.

Q. A hazy night? A. Yes.

Q. Could you see the crossing from your front yard? A. Yes.

Q. Why couldn't you see it from your back yard? A. Because we had some sheds there that obstructed the view.

Q. Where was your mother, in the house? A.
10 I think so.

Q. She wasn't out in the yard with you? A.
No.

Q. As soon as you got out of the back yard and got in the front yard could you see the train? A. Yes.

Q. You could see it plainly, see the lights? A. I didn't take any particular notice of lights.

Q. You did see the train from your front yard?
20 A. Yes, sir.

RE-CROSS EXAMINATION BY MR. HOBART:

Q. Was the train lighted? A. I didn't pay any attention.

BY THE COURT:

Q. This signboard that you speak about, crosses over on the tracks on the left hand side—the signboard which you said was probably half as high as the room? A. I think the left hand side
30 going down.

Q. How long is that signboard? A. I never looked.

Q. Well, about? A. I couldn't tell.

Q. Was it from where you were going up to about where would this signboard be? A. I think it would be hardly any use to answer that, because I couldn't tell you exact.
40

Conrad Shaffler—Direct.

Q. Did this board face the road or did it face the track? A. It was a sign board that looked something like that and ran along the track.

Q. It had an "L" shape and faced the track?
A. And also faced the road.

Q. It had an "L" shape? A. Yes.

10

A RECESS WAS THEREUPON HAD UNTIL
TWO O'CLOCK.

AFTER RECESS.

CONRAD SHAFFLER, a witness called by and on behalf of the plaintiff, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. STITES:

20

Q. Where do you reside? A. Seacaucus Road, Jersey City.

Q. Did you reside there during July, 1909? A. Yes, sir.

Q. How close to the Paterson Avenue railroad crossing in North Bergen did you live at that time? A. Why, I lived in Jersey City about sixty feet from the crossing.

30

Q. About sixty feet? A. Yes.

Q. Is that east or west of the railroad tracks?
A. It is west.

Q. The same side as Mr. Miller's house? A. Yes; but Mr. Miller lives in the North Bergen side and I am on the Jersey City side.

Q. You live on the south side? A. Yes, sir.

Q. Were you home the night of the accident, July 18, 1909? A. Yes, sir.

40

Conrad Shaffler—Cross.

Q. What were you doing? A. I was in the barn milking the cow.

Q. Did you ever see this train that ran through the cows? A. No, sir; after I got out I heard the women all scream and I seen two cows laying there dead, and one had a broken leg.

Q. What attracted your attention to the train?

10 A. Steam blowing off.

Q. Was the train coming to a stop when you went out? A. Yes; the train was coming to a stop when I got there.

Q. Before the train came to a stop had you heard any locomotive whistle sounded? A. No, sir.

Q. Before the train came to a stop had you head any locomotive bell ringing? A. No, sir.

30 Q. Did you hear any signal of any kind before the train came to a stop. A. No.

Q. Is your hearing good? A. Yes, sir.

CROSS EXAMINATION BY MR. HOBART:

Q. You were out milking your cows, Mr. Shaffler? A. Yes, sir.

30 Q. I suppose then you yere paying attention to your own cows? A. I certainly were.

Q. You weren't watching for trains or listening for signals or bells or whistles or anything like that, were you? A. No, sir.

Q. You had to look after your own affairs, which at that time was the milking of the cows; is that right? A. Yes.

Q. Is that right? A. Yes.

40 Q. You didn't see these other cows until after the accident? A. After the accident.

Conrad Shaffler—Re-Direct.

Q. Did you go down to the crossing after the accident? A. Yes, sir.

Q. How many of the cows were killed, did you notice? A. There was two of them killed and one with a broken leg.

Q. Killed two and one died when you got there? A. I don't know; I was there only a few seconds.

Q. The other had a broken leg? A. Yes, sir. 10

Q. Do you know if the one with the broken leg was afterwards killed? A. I didn't stay there that long; the cow was alive when I went to bed.

Q. You spoke of living on the Jersey City side of the crossing? A. Yes, sir.

Q. Do you know whether the crossing was in Jersey City or outside of Jersey City? A. Well; the both tracks is in Jersey City.

Q. Both Susquehanna tracks are in the City limits of Jersey City? A. Yes, sir. 20

RE-DIRECT EXAMINATION BY MR. STITES:

Q. How do you know that is Jersey City? A. Well, of course I own property near there and pay taxes in Jersey City and I vote in Jersey City.

Q. Isn't one side of the road Jersey City and one side North Bergen? A. Mr. Miller lives in North Bergen but I am living in Jersey City right across from North Bergen. 30

Q. On which side of the road were the cattle? A. Knocked over on the North Bergen side.

Q. Paterson Avenue is the dividing line, is it not? A. Yes, sir.

Q. And the cattle when you saw them were on the North Bergen side? A. They were on the North Bergen side when I got out.

Q. Then all those tracks run through both 40

Conrad Shaffler—Re-Cross.

Jersey City and North Bergen, don't they? A. Yes, sir.

Q. Which side was the train on when you saw it stopped? A. It was on the North Bergen side when it stopped.

Q. What is your business? A. Stock farmer.

10 RE-CROSS EXAMINATION BY MR. HOBART:

Q. Do you know where the dividing line is between Jersey City and North Bergen? A. Well, I am just living there; this is Seacaucus Road, this here in Jersey City and this is North Bergen (indicating).

Q. I know Seacaucus Road or Paterson Avenue is between them, but do you know where that line runs? A. The line runs through Jersey City and runs out.

Q. Do you know where the dividing line is between Jersey City and North Bergen? A. The centre of the road.

Q. The centre of Paterson Avenue? A. Yes; Paterson Avenue.

BY THE COURT:

Q. How do you know that, Mr. Shaffler? A. Well, it is a county road; North Bergen has to fix half and Jersey City has to fix half.

Q. Is it for that reason that you say that is the dividing line? A. Yes, sir; that was.

Q. That is the reason you say that is the dividing line? A. That is all.

Q. Have you any other reason for saying that this is the dividing line? A. That is the only reason I ever heard.

40 BY MR. HOBART:

Q. And as a train comes from the Jersey City

Motion for Non-Suit.

station approaching this crossing it passes through Jersey City, does it not? A. Yes, sir.

Q. And is in Jersey City until it gets to the middle of this road? A. The Susquehanna and Paterson Avenue.

Q. And so on until it gets to the middle of that road it is within the limits of Jersey City? A. Yes, sir.

10

MR. DEVENS: I wanted to recall Mr. Devens; he isn't here yet. I can't find him so I will have to close my case without him.

PLAINTIFF RESTS.

MOTION FOR NON-SUIT.

20

MR. HOBART: If your Honor please, I ask for a non-suit on the following grounds:

There is no evidence of negligence on the part of the defendant with respect to the giving of the signals on the engine.

There is no evidence to go to the jury to show any negligence with respect to the crossing bell.

30

There is nothing under the evidence for the jury to pass on with respect to the alleged extra dangerous character of the crossing.

Also, on the ground that contributory negligence on the part of the plaintiff's servants appears without dispute.

THE COURT: I will deny your motion

40

Emma Summerville—Direct.

and you may have an exception, which is sealed accordingly.

H. W. LANGE, Judge.

(L. S.)

MR. HOBART: I don't know whether I ought to take an exception.

10 THE COURT: If you are entitled to it you shall have it.

MR. HOBART: Whatever I am entitled to I would like to have. I call it an objection in the nature of an exception.

Mr. Bain, on behalf of the defendant, opens his case to the jury.

20 EMMA SUMMERVILLE, a witness called by and on behalf of the defendant, after being duly sworn on her oath, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. Where do you live, Mrs. Summerville? A. 17 Grand Street, Weehawken.

30 Q. In 1909 where did you live? A. In Tonnele Avenue, Jersey City.

Q. Tonnele Avenue, Jersey City? A. Yes, sir.

Q. That is near Seacaucus? A. Yes, sir.

Q. Were you near the Paterson Avenue crossing on the night when these cows were struck at that crossing? A. I was on the Paterson Avenue crossing.

Q. How far away from the crossing were you? A. A block.

40 Q. What were you doing? A. Sitting on a rock.

Emma Summerville—Direct.

Q. Waiting for anyone, or resting, or what? A. No; just after supper I sat down at the door.

Q. Was it near your home? A. Yes, sir.

Q. About how far would that be from the crossing? You said a block; how far in feet or yards?

A. I couldn't just exactly judge.

Q. Is the crossing in sight from where you were sitting? A. Yes, sir. 10

Q. Did you see the cows as they came along? A. Yes, sir.

Q. Did they go past your house? A. Well, I lived on Tonnele Avenue; this was on the side street like.

Q. They didn't have to go past you? A. No.

Q. But did you see them as they came near the crossing? A. Coming down the road.

Q. Did you watch them at all? A. Yes, sir. 20

Q. What did you observe about the cows and the man in charge of them?

Objected to unless it is shown that they were the cows in question.

Q. About what time of the evening was this? A. That was after supper; about seven or more.

Q. Did you hear anything of an accident that evening? A. Yes. 30

Q. Did you see any cows that had been killed or hurt? A. Yes.

Q. Where were the cows that you saw that had been killed or hurt? A. On the tracks.

Q. About what time was it as near you can remember? A. Well it was around half past seven to my knowledge.

Q. Now state what you saw the cows do before they got to the crossing and what you saw the men in charge of them do? 40

Emma Summerville—Direct.

Objected to unless it is shown that the cows this witness saw were the cows of the plaintiff.

Question allowed.

To which ruling of the Court counsel for the plaintiff then and there prayed an exception, which was granted and signed and sealed accordingly.

10

Q. (Last question read). A. Well, I saw one man taking a drink from the saloon on the corner; what he drank I couldn't tell you; the cows were going along; there was nobody at the time taking care of the cows.

Q. Did you watch the cows? A. Yes, sir.

Q. Did you see them go on the crossing? A. Yes, sir.

20

Q. Did you see them hit? A. Yes, sir.

Q. Did you see what hit them? A. The train, of course.

Q. The Susquehanna train? A. That I couldn't tell you; I wouldn't swear to that.

Q. All you know is it was an engine? A. It was a train.

Q. Were any other cows hit on that crossing that night? A. No.

30

Q. Had you heard that train coming before it hit the cows? A. Yes, sir.

Q. What did you hear? A. I heard the bell ringing on the track.

Q. Which bell do you mean? A. Well, I only heard the bell on the track; I couldn't tell you what one it was.

Q. When you say "on the track" where do you mean? A. The track at the crossing.

40

Emma Summerville—Direct.

Q. What kind of a noise did that bell make that you heard? A. An ordinary bell.

Q. Did you hear any signal from the train? A. Yes, sir.

Q. What did you hear? A. I heard a toot.

Q. Do you mean whistle? A. I mean a whistle; you call it a toot.

Q. What do you call it; I call it a toot; what do you call it? A. A toot. **10**

Q. Do you know where the train was when it made that toot? A. No, sir.

Q. You couldn't see it at that time, could you? A. No, sir.

Q. How close to the crossing was the train when you saw the cows? A. That I couldn't tell you.

Q. Did you notice whether the train stopped? A. After the cows were hit; yes. **20**

Q. Did you go down there. A. Yes, sir.

Q. You spoke of seeing one of these men take a drink of something and you don't know what it was. A. Yes, sir.

Q. Was there any other man outside of this one man that you saw? A. Not to my knowledge.

Q. What did this man do after he had taken this drink? A. Well, the cows were hit while he was taking the drink; then I saw another with a stick chasing the cows back after he had heard the train coming. **30**

Q. In which direction? A. Back towards Jersey City.

Q. Do you know which man that was? A. No, sir; I don't know.

Q. You don't know any of the men that were in charge, personally? A. No, sir; I do not.

Q. This man that had the stick, what did he **40**

Emma Summerville—Cross.

do that you observed? A. I know he had the stick in this hand (indicating) and was chasing them back with both hands; it was in this hand he had it (indicating).

Q. Did he hit the cows? A. No, sir; he just chased them.

Q. Was that before or after the train got there?

10 A. Before.

Q. Now, the man that had the stick, did you observe while you were looking at him, if he turned to look for the train at any time? A. No, sir; I don't remember that.

CROSS EXAMINATION BY MR. STITES:

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

Q. And live with your husband? A. Yes, sir.

20 Q. Is he here in court? A. No, sir.

Q. Was he home this night? A. Yes, sir.

Q. Was he sitting on the rock, too? A. No, sir.

Q. Tonnele Avenue intersects Paterson Avenue, does it not? A. Yes, sir.

Q. How far from the corner of Paterson Avenue do you live? A. Well, just one door, one house from the corner.

30 Q. What is in front of your house? A. Nothing at all, only the stoop.

Q. Just an open lot across the street or a house? A. No; an open lot.

Q. And you could see the railroad crossing from your house? A. Yes, sir; from the back of the house.

Q. But you were in front of the house. A. I know; that was after supper; I came down and sat on a rock.

40 Q. In front of the house. A. Yes; it was on the corner.

Emma Summerville—Cross.

Q. You couldn't see the railroad from the front of the house? A. No, sir; not from the front.

Q. And that is where you were sitting? A. Yes, sir.

Q. How did you see these cows going across the crossing? A. Well, I was sitting on the corner on the rock after supper.

Q. In front of your house? A. That is in front of the house. 10

Q. You say you couldn't see the railroad from in front of your house. A. Well, I was sitting on the corner on the rock; I have to go to the corner to see it.

Q. Did you go to the corner? A. Yes, sir.

Q. This rock was on the corner, was it? A. Yes, sir.

Q. You could see the railroad crossing from there? A. Yes, sir. 20

Q. Could you see the train? A. Yes, sir.

Q. Did you see the train stop? A. Yes, sir.

Q. You testified in this case on the other trial, didn't you? A. Yes, sir.

Q. Do you recall being asked this question by your counsel, "Could you see the train from where you were? A. No, sir." A. I could see the train from where I was, no, sir; why it is impossible. I could see it after the cows were hit; yes; but not coming. 30

Q. Well, now, the counsel asked you this question on the trial, "Did you keep looking all the time from the time you first saw them from the corner? A. I did.

Q. And you said, "Yes, sir." A. Yes, sir.

Q. Answer the question; could you see the train from where you were? A. No, sir; after the cows 40

Emma Summerville—Cross.

were hit I could, but not before that. I couldn't tell which way they came.

Q. You stayed in the same position? A. No; I couldn't; that would be impossible.

Q. Did you change your position? A. I stayed the same way.

Q. You stayed the same way? A. Certainly.

10 Q. I don't quite understand you. A. You asked me did I see the train coming; I didn't see the train coming. I could not see the train coming.

Q. You could see it when it got to the crossing, couldn't you? A. I could see it when it passed the crossing.

Q. Could you see it until after it got past the crossing? A. Yes, sir.

20 Q. Could you see it before it got to the crossing? A. No, sir this house was shading that off, the empty store on the corner.

Q. There are several railroads there? A. Yes, sir.

Q. You don't know from what locomotive you heard the bell, do you? A. No, sir; I do not.

Q. You say you heard an ordinary bell? A. Yes, sir.

30 Q. When did you first hear that? A. I always heard it. I am always warning my children to be careful when they hear that bell.

Q. You always heard it? A. Yes, sir.

Q. Was it the locomotive bell? A. No; the bell on the track.

Q. Oh; you didn't hear any locomotive bell? A. I did.

40 Q. Didn't you testify when your counsel examined you that you only heard one bell, an ordinary bell. A. I testified I heard a toot and a bell.

Emma Summerville—Cross.

Q. Yes; the question was asked you, "What kind of a bell," and you said, "an ordinary bell."

A. On the track; yes.

Q. On the track? A. Yes.

Q. That is right. Now you say you also heard a locomotive bell? A. I ain't saying that at all; I say I heard a toot.

Q. That is what I understood; you heard the toot. A. Yes. 10

Q. And you heard the bell on the track; but you didn't hear any locomotive bell? A. No; I did not.

Q. The signal bell along the crossing is much smaller than the locomotive bell, is it not? A. I couldn't tell you that; I don't know.

Q. It doesn't make as much noise, does it? A. Well, it made quite a bit of noise; I could hear it in my window. 20

Q. I know; but those signal bells do not make near as much noise as one of those locomotive bells, do they? A. No, sir.

Q. Was there only one man driving these cows? A. I only saw the one; that was the man that took the drink.

Q. Were you here this morning? A. Yes, sir.

Q. Did you see the first witness on the stand for the plaintiff? A. A big stout man? 30

Q. Yes; the first witness. Was he the man? A. I couldn't swear whether it was or not. I didn't really look at the man; it was the cows I was looking at.

Q. You only saw one man with those cows? A. Yes, sir.

Q. How many times did you hear this whistle? A. What whistle? 40

Emma Summerville—Re-Direct.

Q. This toot? A. Well, I heard it quite some time; I heard it at least three minutes.

Q. Was this thing that you call a toot, the whistle that you heard? A. No; it wasn't; it was the—

Q. What was it then? A. The noise of the engine; that is all I can make it.

Q. Just the noise coming from the engine? A.
10 From the engine.

Q. Did you hear this toot after the engine had crossed over the crossing? A. Yes, sir.

Q. You didn't hear it before? A. Yes, sir; I did.

Q. Was it like escaping steam? A. Well, yes.

Q. Did you ever hear any air pump on an engine? A. Yes, sir; I did.

Q. Do you know how that goes? A. Yes, sir.
20

Q. Was it that that you heard? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. When did you hear an air pump? A. I heard them on the fire engines, that is all I can judge from; I don't know on anything else.

Q. You never heard them on the locomotive? A. Yes; I did.

Q. Can't you describe that sound in some way, that we can tell what it was? A. I couldn't do that; I would have to be an engine to do that.
30

Q. Have you ever heard whistles on a locomotive? A. Yes, sir.

Q. The toot that you have spoken of, can you tell us whether that was a locomotive whistle or not? A. Yes, sir; it was.

Q. It was a locomotive whistle? A. Yes, sir; it was.

Q. Was there any other train around there at that time? A. Not to my knowledge; no.
40

Emma Summerville—Re-Cross-Re-Direct.

RE-CROSS EXAMINATION BY MR. STITES:

Q. You couldn't tell whether there were any other trains passing there or not, could you? A. I could if I saw them.

Q. You didn't see them? A. No, sir; I did not.

Q. You couldn't see either side of them? A. No.

Q. You don't know how many trains there were down on the track or up the track? A. No, sir.

Q. You know nothing about that? A. No.

Q. You couldn't say which one of those engines you heard toot? A. No.

Q. You only heard that after it got to the crossing? A. I heard it before it got to the crossing.

Q. Did you say before it got to the crossing? A. I heard it before it got to the crossing.

Q. Did you hear the whistle? A. What do you mean by the whistle?

Q. The locomotive whistle, or was it the toot that you heard? A. The toot, as I call it.

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. Let me ask you, you say you heard the locomotive whistle? A. Yes, sir.

Q. You know the difference between a locomotive whistle and the choo-choo of the steam, do you not? A. Oh, yes.

Q. What we all want to know it, whether you heard any locomotive whistle before the train passed over the crossing? A. Yes, sir; I did.

Q. Had you been at that crossing or near the crossing any other time during that day, the same day of the accident? A. I was.

Q. Did you see any other train during that day pass over that crossing? A. I saw that but not while I was on the track.

Emma Summerville—Re-Cross.

Q. When you were near the track? A. Yes.

Q. Did you hear the crossing bell sounded at other times? A. Yes, sir.

Q. After other trains? A. Yes, sir.

Q. What was the last time on that day before the accident that you heard the crossing bell ring?

A. Just before the cows were hit.

10 Q. That was probably for that train; but I mean before that time during the day, during the afternoon or any other time? A. I couldn't tell you that; I don't keep tabs.

RE-CROSS EXAMINATION BY MR. STITES:

Q. How did you happen to take any particular notice of these bells? A. Why, simply for the reason of my children; they were always out there and I had to warn the children to keep away.

20 Q. You were looking after your children? A. Yes; they were always playing around there.

Q. Were they playing around there this day? A. Always; yes, sir.

Q. You were watching the crossing for your children? A. I was watching my children.

Q. Weren't you more interested in your children than in this crossing? A. What is that?

30 Q. You were more interested in the children than the crossing or the bell? A. I certainly was; they had a habit of going there all the time and I always warned them to keep away from there.

Q. How many signal bells are there at that crossing? A. I couldn't tell you; I don't know.

Q. Did you ever cross over it? A. Twice.

Q. Do you recall seeing a train pass there when this signal bell didn't ring? A. It never did; I never took notice of it.

Emma Summerville—Re-Cross.

Q. What is your answer? A. I say I never did.

THE COURT: You never took notice of it,
that is what she said.

A. Yes.

Q. You never took notice of that? A. No, sir.

Q. Did you ever see any trains pass there without the bell on the engine ringing? A. I don't know. 10

Q. Did you ever take any notice of that? A. I always could tell when there was a train coming because the bell would be ringing on the track.

Q. That is the only bell that would be ringing?
A. To my knowledge, that is the only one when I would know a train was coming.

Q. That is the only way you have to know? A. Yes, sir. 20

BY THE COURT:

Q. Did you go down to the scene of the accident? A. Yes, sir.

Q. After it happened? A. Yes, sir.

Q. How long were you there? A. I wasn't there five minutes.

Q. Was a train passing while you were there after the accident? A. No.

Q. You didn't see any? A. No; I did not. 30

Q. When this train that you speak of came down there you say you heard a bell, an ordinary bell? A. Yes, sir.

Q. Is that the bell that is at the crossing, the stationary bell? A. Yes, sir.

Q. You said you have heard the toot of the engine or the locomotive; did you hear any bell other than the one that is stationary? A. No, sir; I did not. 40

William H. Lowe—Direct.

Q. How far away from this crossing do you live? A. I don't live there now.

Q. Where you lived at that time? A. Block.

Q. A city block about? A. I don't know; a pretty good block.

Q. Larger than a city block? A. Yes; it is about the size of First and Second Street; it is
10 pretty good.

Q. First and Second Street, Hoboken? A. Yes.

Q. On this night you sat on a rock on this—
A. Tonnele Avenue.

Q. And Tonnele Avenue is in line with Paterson Avenue? A. Yes, sir.

Q. Or Paterson Plank Road? A. No; Paterson Avenue.

Q. From where you were could you look right
20 down at the crossing? A. Yes, sir.

Q. You stated a moment ago that you saw but one man, that is the man that went in to get a drink. A. That is all I did see.

Q. Who is the other man that you saw with a stick in his hands? A. That I don't know.

Q. There is another man that you saw? A. I saw him after chasing them with the stick. Where he came from I could not tell you.

30

WILLIAM H. LOWE, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. What is your profession, Doctor? A. Veterinary profession.

40

Q. You have been engaged in that for how long?

William H. Lowe—Direct.

A. Well, I have to study that out to tell how long; over a quarter of a century, ever since my graduation.

Q. You are familiar with cows, I suppose? A. I am.

Q. And the value of them, generally? A. I am.

Q. Did you see these cows that were hurt and killed on the crossing on the night of July 18, 1909? A. I did. 10

Q. How soon after the accident did you see them? A. Immediately.

Q. Taking first the two cows that were killed, could you give the jury an idea of what the value was, in your opinion?

Objected to because the witness isn't qualified to testify to the value of cows.

THE COURT: You may cross examine him. 20

BY MR. STITES:

Q. Did you ever buy any cows, Mr. Lowe? A. No—or rather I think not; I might have bought a cow or two. I say just generally speaking I haven't bought any.

Q. Did you ever sell any cows? A. I never bought or sold any.

Q. Have you ever bought any? A. I might possibly have sold a cow. 30

Q. That is for your own use. A. Yes; in that way; I would not know about that, but I think not.

Q. Your profession really calls upon you to treat diseases of animals, does it not? A. It calls for more.

Q. What else? A. I am competent to give testimony in regard to valuation of cows. 40

William H. Lowe—Direct.

Q. That is a question for the Court to determine.

A. If you ask me the necessary questions I can demonstrate to you that I am specialized in that line among other things.

Q. When did you buy or sell these cows that you are speaking of? A. I didn't buy and sell.

10 Q. You never bought or sold? A. I don't know, but I think I had experience in the capacity of appraising animals.

20 Q. What did you base your judgment and opinion upon, in acting as appraiser? A. Upon my knowledge and experience with cattle. I have examined and appraised cattle for almost all of the practice and for particularly during the last ten years. If you like to know, so as to get the thing properly, I am veterinary inspector and inspector for the Commission on Tuberculosis in Cattle in charge of the First District of New Jersey; all the cattle that come in this state, which comprises Essex, Hudson, Bergen, Passaic and Union Counties, are appraised by me in behalf of the State of New Jersey, so I have a little experience in regard to the valuation of cows, or cattle or horses.

Q. Why did you have to appraise those cattle? A. Because it is part of my duties in the office I hold in the state.

30 Q. They don't sell them, do they? A. When they are condemned the state makes an appraisal upon them as to their value.

Q. Yes; but your examination relates entirely to diseased cattle in regard to their valuation? A. Diseased and healthy; you got to consider them from a standpoint of what the animal is worth in health to know what she is if it is condemned with disease.

40 Q. How long have you been acting in that capacity for the state? A. In my present position

William H. Louçe—Direct.

something over a year, a year ago last August, I was appointed to my present position, but I have been in the service of the state in some function—

Q. You don't know anything about the market value of these cattle in July, 1909, do you, Doctor? A. These particular cattle that you are speaking of?

Q. Yes. A. Only in a general way from my observation. 10

Q. You don't know anything about the market value at that time, do you? A. The market value?

Q. Yes; in July, 1909, Doctor, did you know anything about the market value of cows? A. I certainly did, sir.

Q. How did you know? A. I knew the market value of horses or cows; I have served with the Public Service in appraising horses and I have served the state in appraising cattle for the Federal Government; I was in the service of the United States Government for many, many years, in charge of the importing into New York of horses and cattle and I know about cattle very well if you would like to know. 20

Q. Where did you get your information? A. Experience.

Q. As to knowing the market value of cows? A. In dealing with them all my life, ever since I have been in the profession. 30

Q. But you say you don't know anything by buying and selling. A. No; for myself I may have bought a cow or cows in a general way but I never bought and sold. If I bought a horse or hired a horse I am not a dealer, neither am I a cattle dealer; I am a professional man and I have been employed by the Federal Government in the District of New Jersey— 40

William H. Lowe—Direct.

Q. You told us that five or six times. A. I don't know anything about it, then.

MR. STITES: I don't think this witness is competent to testify.

BY MR. HOBART:

Q. How many cows would you say that you have appraised since you have been in the profession?
 10 A. Hundreds and thousands, thousands of them; I appraised last, within a month, I guess, valuations running to three or four thousands, I might say.

BY THE COURT:

Q. Doctor, say for instance you were to appraise a cow that was about to be slaughtered. A. Yes, sir.

20 Q. You would know what amount to place upon it, appraising it for that purpose? A. Approximately, very near.

Q. For that purpose? A. Approximately; yes.

Q. Suppose a cow was to be used for just milking purposes, would there be any difference then between that cow and the cow that was supposed to be butchered? A. There certainly would.

30 Q. You would be guided accordingly? A. I would be governed by that in my judgment, whether it was a milking or a meat proposition.

THE COURT: I think he is qualified.

Q. Assuming these cows that were killed that night were intended for milking purposes, assuming they were in calf or about to be in calf, what would you say of the value of them before they were killed? A. Value as dairy cows, you mean? I must qualify my answer so that my observation
 40 was just a general observation of these cows. I

William H. Lowe—Direct.

saw the animals; they were all the Holstein type, large cows. If they were nearing calf, animals of that sort ought to be worth, well, I should say, along about from eight to one hundred dollars, provided they were near the time of calf and they were good milkers; of course, each animal I would have to examine individually.

Q. That is an estimate? A. Yes; I would have to examine as to her milking qualities; but assuming she was a good dairy cow pretty near time for calving she ought to be worth from eighty to one hundred dollars, a cow of that type; but for beef, of course, no such valuation. 10

Q. I understand your valuation is for the cattle for milking purposes? A. Yes; from a dairy standpoint.

Q. You saw those cows that night, did you not? A. Yes. 20

Q. Was that right after the accident? A. Yes, sir.

Q. There was one that was not killed? A. Yes.

Q. Was that one that was not killed worth anything for any other purpose? A. Yes; I suggested to the conductor at the time——

THE COURT: Never mind what you suggested. Just state for what purpose the other cow that was not killed could be used? 30

A. If she has been assorted and properly bled and dressed she would be good for beef.

Q. What would be its value as beef? A. Well, I don't just know how the market was then, but approximately——

Objected to on the ground that the witness doesn't know the valuation. 40

A. I don't know the exact value of the market,

William H. Lowe—Cross.

but in a general way thirty or forty dollars, I should say.

MR. STITES: I object to that and move that it be stricken out.

A. I don't know what the market was; the condition of the market goes up and down dollars per ton and so on.

10

MR. STITES: Oh, I won't object to that.

CROSS EXAMINATION BY MR. STITES:

Q. Did you not mention, Doctor, that this cow, if it had been properly dressed and the blood drawn off it would have been all right for eating purposes? A. If the animal was healthy, and it is easy to assume that she was.

20

Q. How about after the animal had laid there bleeding? A. Well, I say if she was slaughtered immediately or within a reasonable time; and I said to the conductor at the time, to get a butcher, "Telephone and get a butcher and have it slaughtered and there would be something saved, she would be good for meat." I suppose there was some difficulty in accomplishing it.

Q. Wasn't that cow in calf? A. I understand she was.

30

Q. That wouldn't be any use then, would it? A. Yes.

Q. It would? A. Yes.

Q. Would you like to eat that meat? A. Cows are slaughtered within ten days of calving and passed on for food ten days before or after.

Q. These cows were heavy with calf, just think; and do you mean to say that they would be fit to eat? A. Yes; if the cow was not within ten days of calving or it had been ten days since she had a calf the meat would be considered by a Federal or

40

William H. Lowe—Cross.

Municipal inspector—one that knew his business—would be passed for human consumption provided the animal was in good health.

Q. Was that the way you passed them? A. Within ten days?

Q. Yes. A. If the other conditions are right the United States Government does and the State of New Jersey does. 10

Q. You are employed by the government? A. I was, for many years for the United States Government; I am for the State of New Jersey; I had some little experience in this line.

BY THE COURT:

Q. Just a minute. You say then if that cow would have been bled and dressed, that the value would have been placed on it of about forty dollars? A. Approximately from thirty to thirty-five dollars. 20

Q. Was that cow heavily in calf? A. I should judge so.

Q. Did you give it sufficient inspection, or make examination sufficiently to know whether or not that cow would have calved within ten days? A. No; I did not make careful examination of any of the animals, just a general inspection; this here is my general impression. As I was impressed at the moment; I saw the cow just the same as I see these gentlemen here. 30

Q. And the cow that is calving, and is killed less than ten days wouldn't be good to eat, would it? A. Well, that would be a matter of opinion.

Q. But would they pass it? A. The Bureau of Animal Industry office established the rule that there is ten days.

Q. But if this cow was to deliver calf in less 40

Patrick Heffron—Direct.

than ten days would you say that the meat would be good to eat, if the cow had been dressed and bled? A. She would normally within ten days but I would like to have the ten days limit. You might as well be on the safe side.

BY JUROR No. 3:

10 Q. What would be the weight of the cow when it was dressed? A. I don't know, approximately; as I said, I saw the cow the same as I see you gentlemen here.

Q. In your judgment what would it weigh after it was dressed? A. That cow would weigh, I should say, six hundred or six hundred and fifty pounds.

Q. What would be the live weight? A. In the neighborhood of a thousand pounds.

20 Q. What would be the weight of the cow when it was there and what percentage would remain after dressing, did you say eight or nine hundred? A. About a thousand alive—I think that is normal; and dressed about six hundred and fifty.

30 PATRICK HEFFRON, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. Mr. Heffron, where do you live? A. Jersey City.

Q. What is your business? A. Foreman.

Q. For whom? A. For the Susquehanna.

40 Q. How long have you been the foreman? A. Twenty-three years last August, the first of August.

Patrick Heffron—Direct.

Q. What are you foreman of? A. Of tracks.

Q. What part of the track? A. The roadbed.

Q. Between what points? A. Between Newark Avenue and Homestead.

Q. Does that cover the crossing at Paterson Avenue? A. Yes, sir.

Q. How long have you had charge of that section which includes Paterson Avenue? A. Well, 10 I have it going on twenty-four years.

Q. Did you hear of this accident on the night that it happened? A. Yes; I was called out.

Q. You weren't at the crossing at the time? A. No, sir.

Q. What time did you get there? A. I got there about half past *seven*, as near as I can tell. I wasn't on that train there; I went out later on.

Q. What time did you get there? A. Some- 20 where about half past ten o'clock. I couldn't say exactly; I came on the next train after that.

Q. Did you see the cows? A. I saw three of them.

Q. How often do you go over that section? A. Oh, I go over it every day.

Q. Have you done that for the last twenty-three years? A. Well, maybe I wouldn't go over the whole point every day, but generally I go over it; 30 If I don't go over it my track walker does; I might work on the east end and I might work on the west end; generally I go over it pretty near every day.

Q. Fixing your mind on the date of this accident, which was on July 18, 1909, I wish you would tell these gentlemen if there has been any change in the location of the tracks during that time on we will say down to the present time? A. 40 Not a bit; not a particle.

Patrick Heffron—Direct.

Q. Is the crossing the same width? A. The width of the crossing is the same and the roadbed is the same.

Q. Has there been any change from the date of the accident we will say, on down to the present time? A. Not a bit.

10 Q. Not a bit? A. All the change was a new switch put in for Mr. Miller; this wouldn't make any difference.

Q. When was that done, do you remember? A. That was done about a month or two ago; I haven't got the date exactly.

Q. Now, from the 18th of July, 1909, when this accident happened, on down to the month of May, 1911, about two years after the accident, were there any trees cut down on the right of way? A. No, sir.

20 Q. Were there any bushes or anything of that sort cut down? A. We might take a scythe and mow them down a trifle, anything on the side of the roadbed the same as you would if you had a lawn to cut; we do that every year.

Q. Maybe you can tell us something about the cat-tail. A. Well, around the meadow side there was cat-tail; there is hardly any grass there.

30 Q. Were there any in July, 1909? A. There may be an odd one or something like that, but no cat-tails grows because it had been cut down every year as far as the right of way goes; anyhow they are not large cat-tails that grows there anyway.

Q. How high do they grow? A. Oh, away down in the meadow they might grow four or five feet high, what they call foxtails; they grow maybe ten feet; but not close to the roadbed.

40 Q. You know the space of ground between the Susquehanna tracks and the Erie, or the Northern, tracks; you know that space? A. Yes.

Patrick Heffron—Cross.

Q. Is that part of the roadbed level with the rails? A. It is a little below; it is on an average of two or three feet; this ditch that runs between where the telegraph poles are.

Q. Did any cat-tails grow in that space between the tracks? A. My men mow them down when anything grows on this side and generally the Northern people cuts there to keep the right of way open. 10

Q. Were there ever any trees between the tracks of the two railroads? A. Not in my time; not in twenty-four years; there might have been a little sucker but they would be cut down.

CROSS EXAMINATION BY MR. STITES:

Q. You say there are no trees along those tracks during your experience there? A. No, sir; not out between the Northern and Susquehanna. 20

Q. Any bushes? A. No bushes; for we would cut them down, only as I say, suckers that grow year after year that we cut down.

Q. How high? A. They grow so high (indicating).

Q. About two feet high? A. No; I don't think they would, because every fall and spring I couldn't see them. You might if you want to raise it up, a sucker grows up and up, well— 30

Q. Did you ever see this billposting sign right at the crossing? A. Certainly I seen the bill post there.

Q. How long has that been there? A. That is there quite a while.

Q. How large is that? A. Oh, it must be there eight or nine or ten years; I wouldn't be positive to a day that the bill post is there.

Q. That is on railroad property, is it not? A. 40

Patrick Heffron—Cross.

That is on railroad property; yes. There is one on the Northern and one on the Susquehanna.

Q. You say these cat-tails along there grow four or five feet high? A. No; I told you there is nothing that grows in between the tracks; there is no cat-tails at all.

10 Q. I understood there was a little between the tracks. A. Out in the meadow I said.

Q. They grow four or five feet high? A. Out in the meadow.

Q. Don't you know that they grow as high as ten feet? A. I said what they call fox-tails, that grows high.

Q. Don't you know that cat-tails grow higher than four feet? A. I know cat-tails from fox-tails, certainly.

20 Q. Don't they grow higher than four feet? A. Four, five or six feet; I never measured them.

Q. How often do they mow down the roadbed along there? A. Well, generally once a year; sometimes twice; it is according to how the grass grows.

Q. How often did they mow it down in 1909? A. Well, we generally cut it down once a year; sometimes twice; provided it is wet weather.

30 Q. How often did they mow it down in 1909? A. Well, now, that I couldn't tell you, how often; we might have done it twice or three times.

Q. They did it at least twice, did they? A. Yes.

Q. How often did they mow it down in 1910, the roadbed? A. Well, it is according to just where the stuff would grow; if the stuff grows high around the whistling post or around the mile post or around the crossing, we cut it down maybe twice a year, maybe three times a year.

40 Q. Do you recall when they cut it down during

Patrick Heffron—Cross.

1910? A. January we might have done it the same as we do every other year.

Q. Do they do it in the winter? A. Nothing grows in the winter.

Q. In the fall? A. No; everything is done that should be cut.

Q. What month of the year do you do that, generally? A. Well, about the end of June, generally in July or August, then along in the fall if it happens to grow afterwards high around the whistling post or the mile post or around the road crossing; all like that we cut up and break it up and burn it; we ain't supposed to have anything big to interfere on the roadway. 10

Q. Did they mow down this roadbed south of the Paterson Avenue crossing between July, 1909 and May, 1910? A. We cut it down in August or in July and maybe later on. I don't want to say May because it ain't very high at that time; I got it in my book when we do the mowing. 20

Q. Just listen to me a minute. A. Yes, sir; certainly.

Q. They mowed down the roadbed in August, 1910, didn't they? A. I wouldn't be positive; no, ain't it on the office paper?

Q. You are the foreman there? 30

THE COURT: He says he has it in a book.

Q. Where is your book? A. Mr. Corbin has it there.

Q. Will that tell you? A. My book tells me; I can take the book here and swear to it; I am swearing to the truth. There it is for you to look at (indicating paper) right there.

Q. That is from where; that is taken from what? A. That is off my book. 40

Patrick Heffron—Cross.

Q. Where is your book? A. I left it at my office, I think. I say, ain't I swearing to it?

Q. We won't use it. A. I say, ain't I swearing to it?

10 Q. From your own knowledge, without referring to any papers, how many times was the roadbed mowed down south of the Paterson Avenue crossing between July, 1909, and May, 1911? You don't need any book for that. A. Well, it might be mowed down twice; not all the ways, I say, only just around those certain places.

Q. Is there a curve south of that crossing on the track? A. Curve? Yes.

Q. How far south? A. Well, the curve is about 300 feet; that is from where the time the curve starts in. I never measured it and it might be more.

20 Q. That is what you think it is? A. Yes.

Q. There are no trees along the railroad at all south of the Paterson Avenue crossing? A. There is a straight track.

Q. No trees along the railroad? A. Not a bit dangerous; no change was ever made in there.

Q. Are there any trees there—or were there any trees there? A. Where?

30 Q. There are no trees along the railroad at all south of the Paterson Avenue crossing? A. Not between the Susquehanna and the Northern; never any trees to cut down, for they never grow that quick. I don't know what was there before my time.

Q. Are there any trees to the east of the Northern track? A. That I couldn't tell you, nothing you would call anything.

40 Q. Any during your time? A. Not to amount to anything; that couldn't be.

Patrick Heffron—Cross.

Q. Are there any trees? A. They might grow suckers, those little things that linemen come along and cut off with their clippers.

Q. Are there any trees on the west side of the tracks south of the crossing? A. On the Susquehanna?

Q. All of them? A. No.

Q. What do they mow these bushes for? A. There was some trees on the south meadow land; that is some distance from where the railroad crossing is. We do that to keep it nice the same as we generally do a lawn if we had it. **10**

Q. Was that done so that the people can see from the trains as they go along? A. To give a good view for engineers and the public all along.

Q. That is what it is for? A. And for safety, I suppose; it is done on the Pennsylvania where they have everything looking nice and neat. **20**

Q. You take pride in taking care of it, don't you? A. Oh, I look out for interest; that is what we try, to have everything neat and nice looking for a prize. Some railroads is giving a prize for the best management.

Q. Didn't you ever see any cat-tails growing between the tracks? A. Oh, I might some little, you know.

Q. Just a mere trifle? A. Just little suckers, as you see. **30**

Q. About four or five inches high? A. Yes; it might grow that high.

Q. Not over that? A. Well, now; that is a mystery for a man to say.

Turner Loughborough—Direct.

TURNER LOUGHBOROUGH, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. Where do you live, Mr. Loughborough? A. Why, at Huntington, West Virginia, now.

10 Q. And what is your business? A. Engineer.

Q. And surveyor? A. Yes, sir.

Q. Were you at any time in the employ of the Susquehanna Railroad? A. No; not in the employ.

Q. Did you at one time make maps for that company? A. Yes, sir; I made maps.

Q. Did you make a plan of the crossing at Paterson Avenue? A. I did.

20 Q. Have you it with you? A. Yes, sir.

Q. The original? A. Yes, sir.

Q. What is the date that you made that plan? A. Why, the date it was made was on January 3, 1910; that is the date that the map was made, and the survey, I think, was made probably three or four days before that time.

Q. Was the survey made by you and the map by you? A. Yes, sir.

30 Q. Is this survey that you have before you a result of your own measurements made at that time? A. Yes, sir.

Q. When you made that survey did you make any observations to see how far you could see towards Jersey City? A. I did.

Q. And have you a record of those observations? A. Yes, sir.

40 Q. Where are they? A. They are on the map here.

Q. Did you put them on yourself? A. Yes, sir.

Turner Loughborough—Direct.

Q. At the time? A. Yes, sir.

Map offered in evidence. Objected to on the ground that it isn't shown that the conditions were the same at the time the map was made as at the time of the accident. Objection overruled. To which ruling of the Court counsel for the plaintiff then and there prayed an exception, which was granted and signed and sealed accordingly. 10

Map marked Exhibit D-1 on the part of the defendant.

Q. Do you recall whether there was anybody with you when you made this survey and took these observations? A. Yes, sir.

Q. Who was it? A. A fellow by the name of Cadmus from Rutherford, New Jersey, just beyond. 20

Q. Was Mr. Hunter with you at that time? A. No; not at that time.

Q. I call your attention to this map, Exhibit D-1 in which you stated you had a memorandum of the views; and I will ask you to look at your notes on this map for the purpose of refreshing your recollection. State first where the first point of observation was in the roadway? A. The first point was five feet from the rail of the west bound track of the Northern Railroad—not from the Susquehanna but the Northern; and that gave a view of 2,846 feet along the track; and at 25 feet you had the same view, 2,846 feet. 30

Q. Now, tell me, if you will, how far that view was from the Susquehanna tracks; you gave a measurement of five feet from the west bound rail of the Northern; how far would that same point be from the west bound rail of the Susquehanna? A. Well, I would have to scale that off. 40

Turner Loughborough—Direct.

Q. Have you got one with you? A. No; I will get one.

Q. I want to get the distance of this five foot point of your first observation from the nearest rail of the west bound Susquehanna track? A. That is about eight feet; that scale makes it about eighty-five, from the Susquehanna track.

10 Q. You have some other observations here; take the next one; you say at 35 feet; was your view at that time obstructed by the signboard? A. No, sir; it was just the same at the time.

Q. When you got to 35 is there an obstruction? A. Then we have that obstruction.

Q. Is that the advertising sign that has been referred to? A. That is the bill posting sign.

20 Q. After one goes past the advertising sign-board was there anything to interfere with the view of a west bound train either on the Northern or Susquehanna tracks? A. Why, I don't remember about that; there was an obstruction away down in here (indicating) I think a space of about 150 feet. At 75 feet you had a view of 451 feet along the track and 100 feet you had 461 feet.

30 Q. That is because of the same obstruction down here? A. There were trees down there, as I remember; it has been so long I don't remember precisely about that.

Q. But going in the other direction after going past the signboard on the way across the tracks? A. There is no obstruction whatever then.

Q. As soon as you clear the signboard? A. As soon as you get within 25 feet of the first rail of the Northern you had a clear sight of 2,846 feet until you came to the New York, Susquehanna and Western Railroad.

Turner Loughborough—Cross.

BY THE COURT:

Q. Looking in what direction? A. Looking south.

BY MR. HOBART:

Q. That would be toward Jersey City? A. Yes, sir.

Q. Do you recall or have you any record of any kind where the curve on the Susquehanna track begins? A. No; not as I remember it. 10

CROSS EXAMINATION BY MR. STITES:

Q. When did you take these observations to which you have testified from Exhibit D-1? A. They were taken probably two or three days before January 3rd, 1910; I made the map on January 3rd and the survey probably three or four days before that. 20

Q. So you got this survey in the winter time and these observations, didn't you? A. Yes, sir.

Q. And the snow was on the ground? A. Six inches of snow, as I remember it.

Q. Of course, there was no foliage south at that time? A. None at all.

Q. No cat-tails? A. No, sir.

Q. And no bushes? A. No, sir. 30

Q. But you do recall some trees? A. I recall the trees; yes, they were down in here (indicating).

Q. Did those trees, which you saw at that time obstruct your view in some instances? A. They did after you got farther out here (indicating) after you come on up they obstruct the view.

Q. Yet there was no foliage on those trees at that time of the year? A. No; not at all.

Q. How long is that bill posting sign that you have testified about; can you tell? A. 78 feet. 40

William E. Nicholson—Direct.

Q. 78 feet long? A. That is, about 78 feet.

Q. Do you know how high it was? A. No; I do not.

Q. Was it so high you couldn't see over the top of it? A. It was.

Q. Did it face the railroad? A. Yes; it did.

10 Q. And was it a "V" shaped sign so that part of it faced Paterson Avenue? A. It was "L" shaped.

BY THE COURT:

Q. How much of it was facing on the road? A. On the road there is 78 feet on the railroad, and on the road there was——

Q. 78 feet in length on the railroad? A. Yes, sir; along the railroad, parallel with the railroad.

20 Q. How many feet does it face on the Paterson Avenue side? A. 26 feet.

Q. What is the distance between the bill post there and the first rail—that is, the bill posting fence or board facing on the railroad? A. 20 feet.

30 WILLIAM E. NICHOLSON, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. Mr. Nicholson, you are a civil engineer? A. Yes, sir.

Q. Where are you working now? A. Waterbury, Connecticut.

Q. For what company? A. New York, New Haven & Hartford.

40 Q. Did you at one time work for the Erie and Susquehanna? A. Yes.

William E. Nicholson—Direct.

Q. Did you make a map of the Paterson Avenue crossing? A. I made a survey.

Q. Is this the map of it, dated May 12, 1911?
A. Yes, sir; that is made from survey I made September 8, 1910.

Q. And the plan was prepared in May of 1911?
A. Yes, sir.

Q. And does this plan that I show you, based on that survey made at that time by you? A. Yes, sir; made in September, 1910. 10

Q. When you made this survey did you make any observations of the extent of the view that you had at that time? A. Yes, sir.

Q. Did you make a record of the view that you could see, a memorandum of them? A. I did.

Q. On your note book? A. Yes, sir.

Q. And afterwards put them on the map? A. On the plan. 20

Q. And the view that you had in September, 1910, are they indicated on this map dated May 12, 1911? A. Yes, sir.

Q. Where did you stand when you made these observations? A. I stood in the center of the road called Paterson Avenue on the south side of the New York, Susquehanna and Western Railroad tracks; the first view I took at five feet from the southerly rail of the west bound track. 30

Q. There is one here marked ten feet that you took? A. I mean ten feet.

Q. Now, how far could you see when you stood ten feet from the nearest rail of the west bound Susquehanna track, looking toward Jersey City?
A. I had a view of 1,851 feet.

Q. And how far was it at 21 feet? A. 1,878 feet.

Q. And at 30? A. 1,898 feet. 40

William E. Nicholson—Direct.

Q. And at 40? A. 1,911 feet.

Q. At 50? A. 1,912.

Q. And at 60? A. 1,933 feet.

Q. Right there; did sixty feet bring you to the rail of the Northern track? A. That is near the northerly rail of the east bound track of the Northern Railroad of New Jersey.

10 Q. So the distance between the two nearest rails of those two railroads is about sixty feet? A. No; you see it is diagonal.

Q. You measured it diagonally the same as the road? A. Yes; about sixty feet.

Q. Next have you taken at seventy feet? A. Seventy feet.

Q. And what was it? A. 1,960 feet view.

Q. And at eighty? A. 1,984.

20 Q. And at ninety? A. 2,022 feet.

Q. And at 100? A. 2,027 feet.

Q. And at 110? A. 2,053 feet.

Q. Down to a point 110 feet from the nearest rail of the west bound track was there anything to interfere with your view of the train coming from Jersey City on the west bound Susquehanna track? A. Nothing to that view.

30 Q. Something has been said about a signboard; did that interfere with a view at a point 110 feet from the Susquehanna? A. You would if behind the signboard; yes.

Q. But up to that point did the signboard interfere? A. No.

Q. Something has been said about the curve in the Susquehanna tracks; did you measure where that curve was? A. Yes.

Map offered in evidence.

40 Objected to on the ground that the de-

William E. Nicholson—Direct.

defendant has not shown that the conditions were the same as on the day of the accident. Objection overruled. To which ruling of the Court counsel for the plaintiff then and there prayed an exception, which was granted and signed and sealed accordingly.

Map marked Exhibit D-2 on the part of the defendant. 10

Q. With reference to the curve in the Susquehanna tracks, did you make a survey to show the measurement to show where that curve was? A. Yes, sir.

Q. Where was it? A. 500 feet from the center of the crossing; 500 feet toward the Jersey City station.

Q. Is that the beginning of the curve? A. Yes, sir; in that direction. 20

Q. What was the radius of the curve, if you have got that, the degree? A. Perhaps a two degree curve.

Q. What kind of a curve is a two degree curve; just describe it in a general way, whether it is a sharp curve or otherwise? A. A two degree curve is a curve with a radius of 2,865 feet; that is, if you had a train sufficiently long that you could hold it at one point, the distance from that point to any point on the curve would be 2,865 feet. 30

Q. Would you call that a slight curve or sharp curve? A. That is a slight curve.

Q. In which direction is that curve? Take it this way, taking a man who is crossing over the Susquehanna tracks from Jersey City toward Seacucus, and looking towards Jersey City; do the Susquehanna tracks curve to the right or to his left? A. Taking Jersey City station the curve is to the right. 40

William E. Nicholson—Direct.

BY THE COURT:

Q. That is looking south? A. Yes—well, south.

Q. In a southerly direction? A. Yes.

Q. The track curves to the right? A. Curves to the right.

BY MR. HOBART:

10 Q. To what extent, if any, did that curve interfere with the observations that you made, other than which you have already testified to? A. The curve didn't interfere with the observation or the view.

Q. Why not? A. Why, it bettered it; I could see further out from the billboard over that sign.

20 Q. In other words it curved away from the billboard? A. Yes, sir; as I went further up the road, up Paterson Avenue toward the Northern Railroad, I got a better view down between those tracks here; they are curved out down there.

Q. This curve was further away from you all the time as you walked toward the Northern track? A. Yes, sir.

Q. That made a slight difference in the extent of the view as you have indicated? A. Yes.

30 Q. Now, when you were there and made these observations in September, 1910, did you see any of these cat-tails? A. I don't know what they were; they were high weeds on the Secaucus side of the tracks.

Q. Were there any of them between the two sets of railroad tracks? A. I saw no cat-tails; that is—

Q. Did you see some weeds? A. Weeds; yes.

Q. How high were they; were they high enough to interfere with your view? A. No; they weren't over five feet, because my eye is five feet high.

40 Q. You saw over them? A. Yes, sir.

William E. Nicholson—Cross.

CROSS EXAMINATION BY MR. STITES:

Q. You know what cat-tails are, don't you? A. Yes, sir.

Q. You could distinguish between cat-tails and weeds, can't you? A. Yes, sir.

Q. Then you didn't see any cat-tails, did you? A. No, sir; I didn't see the seed as you called it.

10

BY MR. HOBART:

Q. Punk, as one of the witnesses called it. A. Punk; yes.

BY MR. STITES:

Q. Were there any bushes growing between the two tracks? A. No, sir.

Q. Just weeds? A. Yes, sir.

Q. Did you make any memorandum of the weeds in your book? A. I made a memorandum of trees.

20

Q. Let us see how many trees that you found there? A. Why, I saw several trees; they were growing thicker right along there (indicating behind billboard).

Q. Did you look at any trees down along the tracks on the easterly side of the tracks beyond the billboard? A. Do you mean indicate on the map?

Q. I am asking you did you find any? A. Yes; they were willow trees, I think. 30

Q. You put them in here (indicating on map), didn't you? Are they the trees? A. Yes, sir.

Q. Didn't you find any trees in between here? A. Not between the two tracks.

Q. None there? A. No, sir.

Q. Found no bushes in there? A. No, sir.

Q. There were no cat-tails in there at the time you made your observations? A. No mature cat- 40

William E. Nicholson—Re-Direct.

tails. I mean by that, that with the seed on top or punk.

Q. Of course, you don't know whether the road-bed had been mowed or not, do you? A. No, sir.

Q. You don't know whether any trees had been chopped down, do you? A. No, sir; I never saw a tree chopped down.

10 Q. Is there anything wrong with your eyesight? A. No, sir.

Q. It is good, is it? A. Yes, sir.

Q. You can't see quite as far as the other gentleman? A. No, sir; there were woods; I took mine in September.

Q. That makes a great deal of difference in your view, does it? A. It does.

20 Q. And the time of year that you take the observations there as to your view southerly along the track would make considerable difference, wouldn't it, as to how far you could see? A. It did.

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. The willow trees that you refer to are those that you have indicated on the easterly side of the Northern Railroad tracks? A. Yes, sir; right here (indicating).

30 Q. And those are about in line with the sign-board? A. They are in the same line as the sign-board.

Q. When you made your observations, of course, there was foliage on the trees around there? A. Yes, sir.

Q. Which made some difference in your view? A. Yes, sir.

Alfred W. Hunt—Direct.

ALFRED W. HUNT, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. Mr. Hunt, you are a photographer? A. Yes, sir.

Q. You made two sets of view of this crossing, I believe. A. I did. 10

Q. Indicating on the back of each one the date when they were made? A. Each one.

Q. I show you some pictures here that you have dated on the back, December 30, 1909; did you make those pictures? A. I did.

Q. Have you indicated on the back of each picture the distance that your camera stood from the railroad tracks? A. I have. 20

Q. This memoranda on the back was made by you? A. Yes, sir.

Q. Based on your own observations and records? A. They were.

Q. We will take the one that is marked on the back No. 1, can you tell by looking at your memorandum where your camera stood? A. Yes.

Q. Where did it stand? A. The camera placed ten feet from the near west bound rail. 30

Q. Of what track? A. The west bound rail.

Q. Of the Northern or Susquehanna? A. The Northern Railroad; view on that 2,846 feet; height of lens from the ground five feet.

Q. Where did your camera stand with reference to the street called Paterson Avenue? A. The center of the road.

Q. And as we look at this photograph which is marked No. 1, which way did your camera face? 40

A. Looking towards Jersey City.

Alfred W. Hunt—Direct.

Q. Take the photograph marked No. 2; where did your camera stand when that was taken? A. Camera was placed 20 feet from the near west bound rail.

Q. Of the Northern tracks again? A. Of the Northern tracks.

10 Q. Generally speaking were all of those views taken facing Jersey City? A. All of them, with the exception of one general view of the crossing.

Q. How far could you see from photograph No. 2? A. 2,846 feet.

BY MR. STITES:

Q. That is the same as No. 1? A. Yes.

BY MR. HOBART:

20 Q. Take photograph No. 3; how far back was your camera? A. The camera was placed 30 feet from the near rail; view down the track 526 feet.

Q. Again the Northern Railroad track? A. Northern Railroad track.

Q. What was your view at that point? A. 526 feet.

Q. Take No. 4; how far back did you go that time? A. 40 feet from the near west bound rail; view down the track 224 feet.

30 Q. This photograph No. 4 shows this sign that has been mentioned? A. Yes; that is it.

Q. Take No. 5; how far down was that? A. 80 feet from the west bound track, a distance of 450 feet.

Q. And that seems to be a view looking almost directly behind the signboard? A. Behind the sign; yes, sir.

40 Q. And No. 6? A. That is a general view of the crossing.

Alfred W. Hunt—Direct.

Q. Looking directly at the crossing? A. Directly at it from the center of the road.

Six photographs offered in evidence. Objected to on the ground that they were taken a considerable time after the alleged accident and it wasn't shown that the conditions were the same as at the time of the accident, and further that the accident took place when it was dark and the photographs must have been taken when it was light. **10**
Objection overruled.

Photographs marked Exhibits D-3 to D-8, respectively, on the part of the defendant.

Q. Did you make another set of the same crossing, when there was foliage on the trees? A. Yes, sir.

Q. I show you another set and ask you if you have a record on the back when they were taken? **20**
A. Yes, sir.

Q. What is the date when they were taken? A. June 23rd.

Q. What year? A. 1910.

Q. When this second set of photographs were taken did you stand in the middle of the road? A. Yes, sir.

Q. Looking toward Jersey City? A. Towards Jersey City. **30**

Q. Have you got on the back of each photograph a statement of where your camera was placed? A. I have.

Q. Take picture No. 1 of the second set; by reference to your memorandum state where your camera stood? A. Camera was placed ten feet from the near west bound rail of the New York, Susquehanna & Western.

Alfred W. Hunt—Direct.

Q. Were all of this second set taken with reference to the Susquehanna tracks? A. These were this last set. The view up the track was 2,800 feet.

10 Q. Now, take No. 2; where did the camera stand? A. Camera was placed 20 feet from the near west bound rail of the New York, Susquehanna & Western; view up the track 2,800 feet.

Q. And No. 3? A. Camera was placed 30 feet from the near west bound rail of the New York, Susquehanna & Western Railroad; view up the track 2,800 feet.

Q. And No. 4? A. Camera was placed 40 feet from the near west bound track of the New York, Susquehanna & Western; view up the track 2,000 feet.

20 Q. And No. 5? A. No. 5 was placed 60 feet from the near west bound rail of the New York, Susquehanna & Western tracks; view up the track 2,000 feet.

Q. And No. 6? A. Camera was placed 100 feet from the near west bound rail of the New York, Susquehanna & Western; view up the track 2,000 feet.

Q. All of this second set, how high was the camera above the ground? A. Five feet.

30 Q. The same height as in the first set? A. Same height.

Q. In all of them do I understand the camera stood in the center of the roadway? A. The center of the roadway.

Q. Looking towards Jersey City? A. Yes, sir; except one general view.

40 Second set of photographs offered in evidence. Objected to on the same ground as for other photographs. Objection overruled.

Alfred W. Hunt—Cross.

To which ruling of the Court counsel for the plaintiff then and there duly prayed an exception, which was granted and signed and sealed accordingly.

Photographs marked Exhibits D-9 to D-14, respectively, on the part of the defendant.

CROSS EXAMINATION BY MR. STITES:

10

Q. At the time you took the photographs were there any cat-tails growing between the tracks?

A. Well, I really couldn't answer that, because I didn't see any; in fact I wasn't looking for any.

Q. You weren't looking for cat-tails? A. No, sir.

Q. Is your eyesight good, too? A. Very good.

Q. I show you Exhibit D-6 and ask you what that is growing between the tracks there? A. Along here (indicating)?

20

Q. Between the tracks? A. Well, that is what I would call sort of a brush, or rather a thick brush, I should judge about a foot and a half high.

Q. Is that all that is, about a foot and a half high? A. That is about all; it might be a little more, too.

Q. Was there a haze laying over there at the time you took that picture? A. No.

30

Q. What is that fog? A. At a distance from me there might have been a haze but the photograph is perfectly clear for at least probably 1,000 feet.

Q. You look at all of these photographs and see if they don't all have that same hazy appearance. A. All photographs at a distance you see the same thing.

40

Alfred W. Hunt—Cross.

BY MR. HOBART:

Q. That is in the background of the photograph?

A. The background.

BY MR. STITES:

10 Q. In Exhibit D-3, that shows several trees along the right of way, doesn't it, of the railroad, on both sides? A. No; that is on the left side of the Northern Railroad; it isn't between the tracks.

Q. Do these trees grow down here on each side of the track? A. No; on the north side.

Q. Don't they down on the west side of the tracks? A. Down here (indicating)?

Q. Yes. A. I couldn't say about that.

20 Q. You can't tell? A. No; not two thousand feet below; those trees are here.

Q. What kind of land is that in between the tracks; is that marsh land? A. Well, no; I shouldn't call that marsh land.

Q. What would you call it? A. Because it has got a few rocks there; in some parts is a little hilly; you will find the notes there.

30 Q. It doesn't sink down, does it between the two tracks, according to your photographs? A. Not altogether, no; there is a hill here (indicating), for instance, and here (indicating) it sinks.

Q. It is inclined to be on a level with the tracks, instead of sinking down in a valley. A. Comparatively on a level.

Q. Are you employed by the railroad company?

A. No, sir; and never have been.

Q. Who got you to make these photographs?

A. The Erie Railroad.

40 Q. Then you were employed by them? A. Not

John T. Keller—Direct.

altogether; only at times; I am not a regular employee and never was.

BY MR. HOBART:

Q. You have your own photograph gallery in Passaic, New Jersey? A. Yes, sir.

BY MR. STITES:

Q. For how many years past? A. 25 years 10

Q. How long have you been taking photographs for the Erie Railroad Company? A. About six years, off and on.

JOHN T. KELLER, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows: 20

DIRECT EXAMINATION BY MR. HOBART:

Q. Mr. Keller, what is your business? A. Subforeman at the present time.

Q. In July, 1909, what was your business? A. I was track foreman on the Northern Railroad.

Q. Did you have any occasion to receive word of an accident that happened on Paterson Avenue crossing on the night of July 18, 1909? A. I got that on the morning following. 30

Q. You heard of it the next day? A. Yes, sir.

Q. About some cows that were killed? A. Yes, sir.

Q. Had you been at the Paterson Avenue crossing of the Susquehanna tracks at any time during the day of July 18th the day when this accident took place? A. Yes, sir; I was there at three o'clock.

Q. What time? A. Three o'clock. 40

John T. Keller—Direct.

Q. In the afternoon? A. Yes, sir.

Q. What occasion did you have to be there at that time? A. Well, I took a walk over the section, working over the section examining bells and I examined the crossing bell.

Q. How many bells were there at that time? A. Two bells.

10 Q. Where were they located? A. One on the Northern and one on the Susquehanna.

Q. How were they operated, do you know? A. They were operated all right.

Q. What makes them go? A. The train coming from the east and one from the west, operates them on the Northern and the same on the Susquehanna.

20 Q. Are those two bells connected with each other in any way, or are they operated separately? A. Separate.

Q. Entirely separate? A. Yes, sir.

Q. Taking the Susquehanna tracks, are the same bells used for trains in both directions? A. No, sir; only for the east or west bound on the Susquehanna.

Q. That is what I mean; did a train coming west ring the same bell as the train coming east? A. Yes.

30 Q. What did you observe about the bell for the Susquehanna trains when you were there that afternoon? A. Well, I didn't; there was no train coming there in that time, but I heard this one coming on the Northern and the bell worked all right on the Northern; and I supposed the Susquehanna bell was, but I didn't wait to see.

40 Q. Did you look at the Susquehanna bell? A. I certainly did; I found it to be all right, but I didn't wait to hear it ring.

John T. Keller—Cross.

Q. Can you tell by looking at it whether it is all right? A. It looked all right, but you can't tell unless you wait for a train to hear it ring.

Q. Was there anything the matter with it so far as you could see? A. No, sir; not so far as I know.

Q. When did you next see the Susquehanna bell? A. The next morning. 10

Q. What time? A. About 7:10.

Q. What did you observe about it then? A. I observed the hammer on the bell; the hammer was bent down so that it couldn't hit the gong.

Q. Was it in that condition when you saw it before? A. No, sir.

Q. How was it then? A. It was straight right up against the gong.

Q. Could the hammer be bent in that way by the ordinary compression of the bell? A. No, sir; it could not. 20

CROSS EXAMINATION BY MR. STITES:

Q. How was it you happened to go there on the very day of this accident to examine that bell? A. I am supposed to go over that section on Sunday morning and examine that bell.

Q. Was it on Sunday? A. On Sunday; I am supposed to be on that section walking up. 30

Q. Did you examine them every Sunday? A. Yes, sir; every Sunday.

Q. How do you account for that hammer being bent? A. The only thing I can tell is by somebody going up and bending it; it never could be bent by itself.

Q. Well, are those bells exposed so that anyone could climb up there and bend it? A. He could 40

John T. Keller—Cross.

get up by climbing it; there is nothing to stop him from bending it.

Q. It is all open so that anyone could climb up and bend the hammer? A. Yes, sir; they are all open.

Q. What did you go back there for the next day, to examine them again? A. I had to go
 10 down that morning to find out about the accident; I thought at first it was on the Northern instead of on the Susquehanna.

Q. Then it was the Susquehanna bell that was out of order? A. Yes, sir.

Q. Although you had examined it the day previous—A. The day previous.

Q. The following day after the accident you found it out of order? A. I found it out of order.

20 Q. It wouldn't ring? A. No, sir; it couldn't ring; it was impossible to ring because the hammer was pulled down.

Q. Did you wait for a train to pass to see if it would ring? A. Certainly, I did; I waited for it to pass and found the hammer shaking but it couldn't get near the bell.

Q. How high was this bell post? A. I should judge about twelve feet.

30 Q. How did you get up to that bell? A. I climb it.

Q. With a ladder? A. If I can get a ladder I do.

Q. How did you get up that day? A. All I have to do is to stand there and look at it.

Q. How did you get up to fix it? A. I didn't fix it; I don't say I fixed it; I don't have to fix it; I send to the office and I had a repair man to
 40 fix it.

John T. Keller—Re-Direct.

Q. How long did it remain in that condition?

A. Until about four o'clock that afternoon, the repair man came there.

Q. Did the man have to get a ladder to fix it?

A. He certainly would.

Q. Do you suppose anyone would go to the trouble to climb that bell post and put that hammer out of business? A. I don't know whether he would or not; I can't say that. 10

Q. But you saw it on the day of the accident?

A. I saw it on the day of the accident. It was all right.

Q. The hammer wasn't bent? A. The hammer was all right then; the next morning the hammer was bent down.

BY THE COURT:

Q. This was the Susquehanna bell? A. Yes, sir. 20

Q. The Northern bell was all right? A. Yes, sir.

Q. On both days? A. Yes, sir.

BY MR. STITES:

Q. You didn't wait there on the day of the accident for a train to pass on the New York, Susquehanna & Western? A. No, sir; I did not. 30

Q. And in order to properly determine whether that bell was in proper condition you would have to wait there to see if it rang when a train passed, wouldn't you? A. Yes, sir.

Q. Although you went there for that purpose you didn't do it? A. I didn't do it; no.

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. When you saw the bell the next morning 40

John T. Keller—Re-Direct.

after the accident did you see the hammer move when a train came? A. I saw the hammer move but it couldn't touch the gong, on account of being bent.

Q. Was it all right except for that fact? A. All right except for the hammer being bent.

10 Q. Do I understand the Susquehanna train would ring the Northern bell? A. No, sir.

Q. Or the Northern train ring the Susquehanna bell? A. No.

BY THE COURT:

Q. Why were you there on this Sunday? A. I had to go over there every Sunday.

Q. For what purpose? A. Because there was no track walker there on Sundays.

30 Q. To find out about the bells? A. About the bells and everything else along the section, to see that everything was all right.

Q. What do you mean by all right? A. To see if there was no broken rails, switched or things like that.

Q. And to find out about the bells? A. About the bells; to make reports.

30 Q. Did you report everything all right when you saw the bell on that day? A. Yes, sir.

Q. How did you know that the bell was all right if you didn't stay there to find out? A. I put it down that way.

Q. You couldn't tell whether that bell was in proper condition unless a train passed? A. No, sir; I thought the Susquehanna bell was all right but I knew the Northern was.

BY MR. STITES:

40 Q. You put them all in that they were all right that day? A. Yes, sir.

Scribano Sante—Direct.

Q. You "O. K'd." them all? A. Yes, sir.

Q. Were you in the employ of the railroad company at the time this case was tried before? A. No, sir; I was not; this is the first time I have been called on.

Q. How long have you been employed by them? A. I was only employed about nine months, altogether, in the year 1909. 10

Q. In 1909? A. Yes, sir.

Q. You were employed by them in 1909, weren't you? A. Yes, sir, I was; I was nine months; the first time I was called in this case.

Q. This is the first time you testified; you didn't testify at the other two trials? A. No, sir.

Q. Where are you working now? A. Working for the Public Service Railway. 20

SCRIBANO SANTE, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. In July, 1909, did you work for the Susquehanna Railroad? A. Yes, sir. 30

Q. Where are you working now? A. I work in New York, truckman, driving and trucking.

Q. What position did you have in July, 1909? A. Flagman at the crossing.

Q. At the Paterson Avenue crossing? A. Yes, sir.

Q. What time of day were you on duty? A. Seven in the morning and seven at night.

Q. Were you there on the day when some cows 40

Scribano Sante—Cross.

were killed? A. I left before at seven o'clock but in the morning I heard the cows were killed.

Q. Part of the cows were killed when you went back the next morning? A. Yes, sir.

Q. What time did you leave that evening? A. Seven o'clock.

10 Q. You were there all day long from seven in the morning of that day? A. Yes.

Q. During the time that you were there did you notice anything about the crossing bell on the Susquehanna? A. Yes; sure.

Q. Did you hear it ringing or not? A. They did all right.

Q. What was the time the last train went through before you left? A. Six o'clock.

20 Q. Did you notice if the bell rang for that train? A. Yes, sir, I know.

CROSS EXAMINATION BY MR. STITES:

Q. On the day of the accident the bell was ringing all right? A. Yes, sir; in the morning, I find some broken and he can't ring the bell.

Q. How did you happen to find it was broken? A. I find in the morning when the cows got killed.

30 Q. Was there anybody there examining the bell on the 18th? A. Night time?

Q. Any time during the day of the 18th? A. No.

Q. No one was there? A. No.

Q. Was anyone there examining the bell on the 19th? A. The bell is all right all day except when they killed the cows—the day after—it was fixed about twelve o'clock a man came over there to fix it.

Scribano Sante—Cross.

Q. There was no one examining it on the day of the accident? A. No.

Q. It was all right then? A. Yes, sir.

Q. You didn't know of any examination? A. No, sir.

Q. Is there a curve there? A. Yes, sir.

Q. How far south of the crossing? A. About 10
15 rail lengths.

Q. Is that a wide crossing? A. Yes, sir.

Q. What did they have you there for? A. Working.

Q. To do what? A. Flagman to watch the trains.

Q. You were there from seven in the morning until seven at night? A. From seven in the morning till seven at night, yes; I work fifteen months there. 20

Q. Were there any cat-tails there? A. (No answer).

BY THE COURT:

Q. The lawyer asked you whether there were any cat-tails there. Do you know what cat-tails are? A. No.

Q. Do you know what punk is? A. No; I don't know about that. 30

Q. You don't know what a cat-tail is? A. No.
BY MR. STITES:

Q. Any tall grass south of the crossing? A. Yes, sir.

Q. There was? A. Sure.

Q. How high? A. That high (indicating).

Q. Do you call that tall grass? Do you call six inches tall grass? A. I don't know what you mean. 40

Lizzie Raisch—Direct.

Q. Would you know a train if you saw it coming toward you? A. Yes, sure; I saw.

Q. You would? A. Yes, sir.

Q. What did they have to have you there for if they had these crossing bells? A. To watch the trains.

Q. Did they have both watchmen and bells?

10 A. Bells I got to make report somebody got to fix.

Q. Every train that came along did you have to go out with your flag? A. Yes, sir.

Q. Did the bells ring, too? A. Yes, sir.

Q. Both of them? A. Yes, sir.

Q. When a train came from either direction you saw that bell ring? A. Yes, sir.

20 LIZZIE RAISCH, a witness called by and on behalf of the defendant, after being duly sworn on her oath, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. Where do you live? A. Charles Street, Se-caucus.

Q. Did you live there on the 18th of July, 1909?
A. Yes, sir.

30 Q. That is your home, is it? A. Yes, sir.

Q. Did you see anything of the cows that were hit on that evening? A. Yes, sir.

Q. Where were you when they were struck? A. I was on the tracks.

Q. Down near the tracks? A. By the shack—the watchman's shack.

Q. Were you in the shanty or outside? A. Well, I was standing outside of it.

40 Q. Did you see the cows coming? A. Yes, sir.

Lizzie Raisch—Cross.

Q. And did you hear any train coming? A. Yes, sir.

Q. What did you hear? A. I heard the engine.

Q. I mean in the way of signals or anything of that sort? A. I heard it at the post, whistling at its post.

Q. Could you see the train from where you were? A. Yes, sir. 10

Q. Did you watch it and did you see it come up towards the crossing? A. No; I didn't watch when it came up towards the crossing.

Q. Did you see the train when it got to the crossing? A. No.

Q. Did you see the train strike the cows? A. No; I didn't watch that.

Q. Why not? A. Because I knew there were going to get hit and I didn't want to see it. 20

Q. You turned your head away? A. Turned my head; yes.

Q. Did you see anybody in charge of the cows? A. No, sir; I didn't take notice.

Q. Did you see anybody trying to stop the cows from getting over the tracks? A. No, sir.

CROSS EXAMINATION BY MR. STITES:

Q. What were you doing there, Miss Raisch? 30

A. I was going up towards Jersey City.

Q. What attracted your attention to the train; it was dark was it not? A. No; it wasn't dark.

Q. Wasn't it getting dark? What time was it?

A. About half past seven or something like that; around half past seven.

Q. What attracted your attention to this train?

A. (No answer).

Lizzie Raisch—Cross.

BY THE COURT :

Q. Do you understand the question? A. No.

Q. What was it make you look at the train? A. Well, I had to cross it.

Q. Did you see the train coming? A. Yes, sir.

Q. Is that what attracted your attention to it?

A. Yes, sir.

10

BY MR. STITES :

Q. When you started to go over the crossing, did the crossing bell ring? A. No; I didn't take notice to that.

Q. You didn't hear that bell?

MR. HOBART: She said she didn't take notice to that.

Q. You walked right by it, didn't you? A. Yes, sir.

20

Q. If it had been ringing could you have heard it? A. Oh, I heard a bell ringing but I don't know whether it was that.

Q. You walked right by and heard a bell ringing but you are not sure it was that bell? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. What else was there that sounded like a bell? A. Well, I don't suppose—

30

Q. Well, this bell would ring before a train got to the crossing, wouldn't it? A. I don't know.

Q. You don't know? Don't you know what those signal post bells are for? A. Yes, sir.

Q. Don't you know they ring before a train gets to the crossing? A. I know that; yes.

Q. Well, when you started to cross was that bell ringing? A. I didn't take notice to it.

40

Lizzie Raisch—Cross.

- Q. Did you hear a whistle from that engine?
A. Yes, sir.
- Q. You noticed that, didn't you? A. Yes, sir; I did.
- Q. But you didn't notice this crossing bell that you walked right by? A. No; I can't remember because it has been so long ago.
- Q. Who told you to remember about the locomotive whistle? A. That is all I know of. 10
- Q. What? A. That is all I know of; I didn't think of those bells.
- Q. You didn't think of those bells? A. No.
- Q. You didn't hear any bells, did you? A. No.
- Q. There was no bell ringing on the locomotive?
A. I didn't take notice of that.
- Q. You just heard the whistle? A. Yes, sir. 20
- Q. What kind of train was it? A. Passenger train.
- Q. How many cars? A. I didn't take notice.
- Q. Was the train lighted up? A. I didn't take notice of that either.
- Q. No one was in charge of the cows? A. No.
- Q. No man there at all? A. I didn't see any.
- Q. Didn't you see a man there with a stick chasing them back? A. No, sir. 30
- Q. You were right there? A. I didn't see it.
- Q. You were right there, weren't you? A. I was standing right at the shack.
- Q. That was right close to the tracks? A. Yes.
- Q. And you didn't see this man with the stick chasing those cows back? A. No, sir.
- Q. There was no such man there, was there?
A. No, sir. 40

Lizzie Raisch—Re-Direct, Re-Cross.

RE-DIRECT EXAMINATION BY MR. HOBART:

Q. Did you see the train as you were by the watchman's shanty? A. Yes, sir.

Q. That was the time you saw the train coming? A. Yes.

10 Q. Is that the shanty that is between the Northern tracks and the Susquehanna tracks? A. (No answer).

Q. Do you know where the shanty was, whether it was between the tracks or one side or the other of the tracks? A. It was between the Susquehanna and the other tracks.

Q. And that is where you were when you saw the train coming; is that correct? A. Yes, sir.

RE-CROSS EXAMINATION BY MR. STITES:

20 Q. How far were you from the train when you saw it first? A. Well, it was about say about a block away.

Q. Could you see it away any further than that? A. No, sir.

BY THE COURT:

Q. Just a moment. How long were you at the shanty? A. About ten or fifteen minutes.

30 Q. Was anybody with you? A. Yes, sir, a young girl and a young man down there.

Q. They are here now? A. Yes, sir.

Q. You had been coming from Secaucus? A. Yes, sir.

Q. Coming to Jersey City? A. Yes, sir.

Q. How far away was the train when you first saw it? A. I forget now.

40 Q. About how far away from you was the train when you first saw it? A. Quite a distance away.

Lizzie Raisch—Re-Cross.

Q. What do you mean by quite a distance? A. About half a mile.

Q. It was about half a mile away when you first saw it; are you sure about that? A. Yes, sir.

Q. How long have you been living out there? A. A couple of years.

Q. How far was the train away from you when you heard it whistle? A. About a block away. **10**

Q. How many times did it whistle—more than once? A. Well, I didn't take notice of that.

Q. How many times did you hear it? A. Once.

Q. You saw it about half a mile away? A. Yes, sir.

Q. About the time when you heard the whistle was when it was a block away? A. Yes, sir.

Q. And that is the only time you heard the whistle? A. Yes, sir. **20**

BY MR. HOBART:

Q. Did you hear a bell ring that was on the locomotive? A. No; I didn't take notice of that.

Q. Did you hear any bell ring there? A. I did hear a bell but I didn't notice which one it was.

BY MR. STITES:

Q. You testified in the other two trials, didn't you? A. No. **30**

Q. Who got you to come here today? A. I got a subpoena to come here.

Q. Who did you tell about this accident? A. The detective.

Q. The detective? A. Mr. Brown.

Q. Mr. Brown, for the railroad company? A. Yes, sir.

Q. When did you see him? A. On Tuesday he brought out the subpoena. **40**

Judson Potter—Direct.

Q. Didn't you tell him you didn't know anything about this accident? A. No, sir.

Q. You did not? A. No, sir.

Q. Did he ask you if you heard a whistle? A. Yes, sir.

Q. What did you tell him? A. I told him I did.

10 Q. Are you getting paid anything for coming here today? A. I don't know.

Q. You don't know? A. I am supposed to; I am not sure.

Q. How much are you to get? A. \$2.50.

Q. \$2.50? A. Yes, sir.

Q. Is that all you are to get? A. Yes, sir.

BY MR. HOBART:

20 Q. Did you get a subpoena to come? A. I did get it.

JUDSON POTTER, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

30 Q. Mr. Potter, you are employed as engineer on the Susquehanna Railroad? A. Yes, sir.

Q. How long have you been in their employ? A. As engineer?

Q. As engineer? A. Near ten years.

Q. Were you a fireman before that? A. Yes, sir.

Q. For how long? A. Pretty near ten years.

Q. You had about eighteen years experience in running engines? A. Yes, sir.

Judson Potter—Direct.

Q. I believe you were in charge of the train that struck the cows? A. Yes, sir.

Q. What kind of train was it? A. Passenger train.

Q. Going in which direction? A. West.

Q. From Jersey City? A. From Jersey City.

Q. Was there any stop between Jersey City and this crossing where the accident happened? A. 10
No, sir.

Q. What time did you leave Jersey City? A. 7:19.

Q. And were you on time? A. Yes, sir.

Q. At that time the Susquehanna trains used the Pennsylvania station, did they not, in Jersey City? A. Yes, sir.

Q. Where did they turn off from the Pennsylvania tracks in order to get off on their own line? 20
A. Marion.

Q. Sometimes called West End? A. Yes, sir.

Q. Do you know how far Paterson Avenue crossing is from the West End junction? A. No; I couldn't tell you exactly. I suppose it is a mile and a half; something like that.

Q. Did you have a bell on the engine that night? A. Yes, sir.

Q. What kind of bell? A. Automatic. 30

Q. Have you any idea how much it weighed? A. I don't know the weight.

Q. Can you give us an idea? A. I can guess; I suppose fifty or sixty pounds.

Q. You speak of it as an automatic bell; what do you mean by that? Explain it? A. It moves by air automatically.

Q. How do you turn it on? A. By opening a valve. 40

Judson Potter—Direct.

Q. With your hand? A. Yes, sir.

Q. How do you turn it off? A. Just turn it the other way.

Q. How long does it take you to turn it on? A. You can do it in a jiffy.

Q. When you turn it on how long will it keep ringing? A. Until you turn it off.

10 Q. Is that under your control, that bell? A. Yes, sir.

Q. How close to where you sit in the cab is the valve? A. Right alongside of me.

Q. Referring now to the night of the accident, did you turn the bell on that night after you left Jersey City? A. I turned it on leaving Jersey City.

20 Q. You mean when the train started from the Pennsylvania station? A. From the Jersey City sheds, the terminal.

Q. When did you shut it off? A. Sometime after we stopped, after we struck the cows, after we got stopped there.

Q. Did it ring continuously from the time you started up until the time you shut it off after the accident? A. Yes, sir.

30 Q. Why did you shut it off then? A. I stopped; I intended to go back to see what damage had been done to the cows, how many were killed.

Q. At that time you had come to a full stop, had you? A. Yes.

Q. How far beyond the crossing did you go? A. A train length.

Q. You sit on the right hand side of the cab? A. Yes, sir.

40 Q. Did you see those cows before you struck them? A. Yes, sir.

Judson Potter—Direct.

Q. What were they doing when you first caught sight of them? A. Standing still.

Q. How close to the track where you were running? A. I could not tell that until just before I struck them; I supposed they were fifteen or twenty feet away from us.

Q. How far were you from the crossing when you first saw the cows? A. Oh, I was quite a distance; I don't know the distance. 10

Q. Could you state where you were with respect to this curve? A. Around the curve there.

Q. You mean— A. Around about the center of the curve when I seen them.

Q. Can you see the crossing from that point as you sit in the cab? A. You can see right around the crossing here east of the crossing and a little bit of the crossing; it goes straight about around the Northern Railroad crossing. 20

Q. What were the cows doing as you came toward the crossing? A. Standing still there and a man was keeping them back.

Q. Then what happened? A. Just before I got to the crossing they broke by him and ran right before the engine.

Q. Did you strike some of them? A. I don't remember whether I killed two or one; if I killed one I hurt two very bad. 30

Q. When you saw the cows coming what did you do? A. I blew the whistle and tried to stop.

Q. What kind of whistle did you blow at that time? A. A steam whistle.

Q. How loud? A. Loud as it will blow, the warning whistle.

Q. How far were you from the crossing when you blew the warning whistle? A. I don't believe I was over thirty or forty feet. 40

Judson Potter—Direct.

Q. You were almost on it? A. Yes, sir.

Q. Had you blown any other whistle that night?

A. Yes, sir.

Q. Where was the other whistle, the one next before the warning whistle? A. The warning whistle and the crossing whistle.

10 Q. You said you blew a warning whistle when you were near the crossing? A. After I seen the cows was going to go on the track; that is when I blew the warning whistle.

Q. Was there any whistle blown before that? A. Yes, sir.

Q. Where? A. At the whistling post.

Q. How far away is that? A. I don't know what the distance is; maybe fifteen hundred feet.

20 Q. What kind of whistle did you blow at the whistling post? A. A steam whistle.

Q. When you struck the cows how fast were you going? A. About eighteen miles an hour.

Q. Had you slowed up? A. Yes, sir.

Q. How fast were you going say from the time you passed the whistling post up to the time you slowed up? A. Oh, I suppose maybe thirty miles an hour.

30 Q. That is the regular rate along there? A. It is when we are on time; and we were on time.

Q. Your next stop was where? A. Homestead.

Q. How far beyond the crossing was that? A. It must be about a mile and a half or two miles.

Q. Where was your train when you began to slow up? A. When it began to slow up?

Q. Yes; how far from the crossing? A. When I first seen the cows, and the cows broke away.

40 Q. You speak of slowing up; can you tell us about how far from the crossing you were when

Judson Potter—Cross.

you began to slow up? A. Around the curve I was going slow around there; I was going to slow up anyhow until I seen I was going to hit the cow and I—

Q. Did you go around the curve slowly because it was a curve or what? A. I was coming around the curve thirty miles an hour, I suppose.

CROSS EXAMINATION BY MR. STITES:

10

Q. What kind of engine was it? A. A double cab engine.

Q. With the cab set in the center of the engine? A. Yes, sir.

Q. And the bell is on the back of the cab, is it not? A. The bell is between the two cabs.

Q. Between the fireman's cab and your cab? A. Yes, sir.

20

Q. You couldn't see this crossing until you got straightened out around the curve, could you? A. You can just about see on the crossing; you can see on the northern tracks the crossing.

Q. You were sitting on the right hand side of the engine and would not be able to see it? A. The curve goes around to the left; you can see right straight just enough to see on the Northern tracks.

30

Q. You couldn't see the crossing of the Susquehanna tracks until you got straightened out around the curve? A. Until you get just around the curve you can't see; you can see right alongside.

Q. Where is Lundy's Lane in reference to this curve? A. That is this side of another crossing; this side of the place where we hit the cows.

Q. Did you blow for that crossing? A. About the center of the curve.

40

Judson Potter—Cross.

Q. Did you blow for that crossing? A. Yes, sir.

Q. What did you want to keep your bell continuously ringing passing out through the meadows? A. To warn the people out there.

Q. Do you always do that? A. Yes, sir; until we get by that crossing then we shut it off until we get to Homestead.

10 Q. You always keep it ringing until you pass the Paterson Avenue crossing? A. I do most generally always; yes, sir.

Q. You turned it on on this particular night, did you? A. Yes, sir; leaving Jersey City.

Q. You recall hearing it ringing? A. Yes, sir.

Q. You noticed that particularly, did you? A. Yes, sir.

BY THE COURT:

20 Q. Which bell do you mean? A. I was talking about the engine bell.

Q. The reason you say you whistled at the whistling post is because it was the custom to whistle there? A. That is what I was there for, to give you an idea of where the crossing is; that is the place that you are compelled to blow the whistle.

30 Q. That is the reason you say you were whistling, because the whistling post was there? A. Yes, sir.

Q. After you left the whistling post how many times did you whistle before you struck the crossing? A. I didn't whistle at all until I see we are going to hit the cows and then I blew the warning whistle.

40 Q. You said you gave some whistle? A. When I see they were going on the track, I blew the warning whistle.

Judson Potter—Cross.

Q. Well, it was thirty feet from them, weren't you? A. Somewhere around that; I couldn't say.

Q. It didn't do any good then, did it? A. It may do a little good.

Q. Could you have stopped within that thirty feet? A. A person might jump; lots of times I blow the whistle when we are ten feet from them and they would get off the track.

10

Q. Did you think cows would? A. Well, I blew the whistle, anyhow.

Q. Couldn't you stop? A. No; I only could slow down.

Q. You couldn't stand still? A. No; they were standing awhile there and I thought they were twenty feet away; you couldn't tell whether they were on the fields or on the crossing or what.

Q. You couldn't tell? A. No.

20

Q. Do you mean to say that you couldn't tell whether these nine cows were in the fields or at the railroad crossing? A. Not until you got on the straight line; you can see the cows but there were fields right alongside of that road and cows were passing there all the while.

Q. It is a rather dangerous crossing, is it not? A. Well.

Q. What? A. There is a bell there.

30

Q. And there is a bell there, isn't there? A. Yes, sir.

Q. Do you generally slow up for that crossing? A. Yes, sir.

Q. You don't know how many times you blew that whistle after you left Jersey City, do you? A. Yes.

Q. You do? A. Yes.

Q. How many times? A. I don't know; I be- 40

Judson Potter—Re-Direct.

lieve five or six times I believe in coming from West End.

Q. You were really on the whistling post by that time when you blew the whistle? A. That is why we got the whistling post.

Q. You say that because it is your custom to blow at the whistling post? A. Yes, sir.

10 Q. When did you turn the bell on next after you started up from the Paterson Avenue crossing? A. Going in to Homestead.

Q. You started to ring at Homestead? A. Yes.

Q. Where did you stop after that? A. Leaving New Durham.

Q. Is it not a fact that you get so accustomed to hearing that bell ringing continuously that you wouldn't pay any particular attention to it? A. 20 You would know very soon when it has stopped, too.

Q. Doesn't the mere effect that that bell was ringing continuously all the time, have the effect upon you as not paying any particular attention to it? A. It draws your attention if it stops ringing and you would know it right away.

Q. It does? A. Yes, sir; it is the custom to hear it and if it stops you would know it.

30 Q. How large a bell is it? A. An ordinary bell; I don't know what the weight of it is; I can't tell you what it weighs.

Q. You can't tell what it weighs? A. No.

Q. It hangs in back of the engineer's cab, does it not? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. HOBART:

40 Q. How far from you as you sit in that cab is that bell located? A. From the cab?

Judson Potter—Re-Direct.

Q. As you sit in your place in the cab, how far is the bell from you? A. About eight feet.

BY THE COURT:

Q. Do you do anything to cause the bell to ring at the crossing to ring, the bell—that is, do you do anything in your engine? A. Call to ring?

Q. To cause the one that is stationary on the crossing to ring; do you operate that bell in any way? A. I operate the bell on that engine; that is all. 10

Q. Do I understand that you were about in the middle of the curve when you first saw the cows? A. I seen the cows standing still.

Q. That is the first time? A. Yes, sir.

Q. You were going at about thirty miles an hour? A. As near as I can say.

Q. Did you slacken your speed when you were just coming around the curve? A. Yes; I was going easy on time. 20

Q. When you slackened up how many miles an hour would you say you were going? A. We dropped gradually along from thirty until I got about twenty feet from the crossing, I suppose, then when I got to about the tracks I was about fifteen miles an hour; I can't exactly judge the speed of the train. 30

Q. When you saw the cows first where were you? A. Fifteen or twenty feet from the tracks, I should judge.

Q. When you saw the cows first you were in the middle of the curve? A. Yes, sir.

Q. Where were the cows then? A. Standing on the Northern tracks.

Q. Were they on your track? A. No.

Q. How far about were they from your track? A. About fifteen or twenty feet. 40

William E. Nicholson—Recalled.
Abraham Anderson—Direct.

WILLIAM E. NICHOLSON (Recalled):

DIRECT EXAMINATION BY MR. HOBART:

Q. Have you got the measurement of the distance of the whistling post from the Paterson Avenue crossing? A. Yes.

10 Q. What is it? A. The distance from the west bound whistling post to the center of Paterson Avenue is 1326 feet.

BY THE COURT:

Q. What is the distance from the cross road to that curve, looking south? A. From the center of Paterson Avenue?

Q. Looking south? A. Or is that north?

20 Q. Looking south? A. South towards Jersey City station the distance is five hundred feet.

BY MR. HOBART:

Q. How far would it be to the center of the curve, approximately? A. Why, I don't know how far it was.

30 ABRAHAM ANDERSON, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. You were the fireman? A. Yes, sir.

Q. How long have you been fireman? A. Six years.

Q. Did you see the accident that night? A. I did.

40 Q. Tell the jury whether or not the engine bell

Abraham Anderson—Direct.

was ringing before you got to the crossing? A. Yes, sir; the bell was ringing.

Q. Where did it start? A. From the depot—the Pennsylvania.

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

Q. How far back of you is the bell on the engine? A. About six feet.

Q. Is that the ordinary bell that you see every day on a locomotive? A. Yes, sir. 10

Q. Do you know how much it weighs?

Objected to unless the witness knows or has weighed it.

Q. What is the bell made of? A. It weighs just about 250 pounds.

Q. It is made of bronze or brass? A. Yes, sir.

Q. Did you say 250? A. Yes, sir; about 250. 20

Q. On what do you base your estimate? A. If you looked at it you would know it was about 250 pounds.

Q. I know; how do you know? A. I had hold of one; it took four of us all we could do to lift it.

Q. You had hold of one? A. Yes; four men couldn't lift it.

Q. Four men couldn't lift it? A. No, sir; not that bell. 30

Q. You know how the bell is operated, of course? A. Yes, sir.

Q. By air? A. Yes, sir; automatic.

Q. When did your bell stop ringing? A. After the stop at the railroad crossing when we hit the crossing he took it off.

Q. Up to that time had the bell stopped at all after it had started at Jersey City? A. No, sir; the bell was ringing all the time. 40

Abraham Anderson—Direct.

Q. Did you have a whistle on your engine that night? A. Yes.

Q. Do you recall anything about the whistle on the engine? A. Yes, sir.

Q. Where was it blowing? A. By the mile post blowing for the crossing.

Q. Blowing for what? A. The road crossing.

10 Q. The Paterson Avenue crossing? A. Yes, sir.

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

Q. What kind of whistle? A. Four blasts.

Q. Do you know about whether there was any other whistle? A. Yes, sir; the warning whistle was given, one loud blast.

Q. Did you hear that? A. Yes, sir; I did.

Q. Did you see these cows before the engine struck them? A. I did.

30 Q. Where were they when you first saw them?
A. On the Northern track.

Q. How far from the crossing was your engine when you first saw them? A. Oh, about—well, when I seen them it was about 250 feet away from the crossing.

Q. That is, you mean your engine was? A. Yes, sir.

30 Q. What were they doing at the time you were slackening the engine? A. They weren't moving; a man tried to stop them and another man on the rear end of the cows tried to run the cows the other way; one was driving them and the other was stopping them.

Q. You saw two men there, did you? A. Yes, sir; two men, one on the rear and the other on the head.

40 Q. Were the cows themselves walking or running or what? A. They were running and jump-

Abraham Anderson—Cross.

ing, the fellow behind driving ahead and the one in front of them stopping the cows; the cows got excited and the fellow in the rear drove them right up to the road in front of the engine.

Q. How fast did they come when they were driven in front of the engine? A. One rushed right through the others and through the bunch of them; you know the fellow was driving them. | 10

CROSS EXAMINATION BY MR. STITES:

Q. Did you see everyone there at the crossing that night? A. What; the cows?

Q. You saw everyone there at the crossing before your engine? A. The cows? yes, sir.

Q. Did you look? A. Yes, sir; I was on the tank of the engine looking ahead.

Q. You only saw these two men and the cows? 20
A. Two men and the cows.

Q. Is that all you saw? A. I seen a couple of more but I don't remember who they were.

Q. A couple of other men? A. Yes, sir.

Q. It isn't part of your duty to blow the whistle, is it? A. No.

Q. And it is no part of your duty to ring the bell? A. No.

Q. How did you happen to take particular notice that the whistle was blowing? A. Why, it is my duty to hear it. 30

Q. Oh; you have something to do with that, have you? A. I always listen to hear the whistle blow.

Q. Why? A. Because if I don't hear the whistle blow it might be there is something the matter with the engineer.

Q. If you don't hear the whistle blow you climb 40

Abraham Anderson—Cross.

over to the engineer? A. Yes, sir; to see what the trouble it; it might be broke if I don't hear it.

Q. You don't have to listen to hear the bell?

A. Yes, sir.

Q. If it wasn't ringing all the time you would know it? A. I might go up and ring myself if it broke, or put a rope around it.

10 Q. You say it would take four men to lift one of those bells? A. Yes, sir.

Q. How many men would it take to lift the whistle? A. One man could lift the whistle.

Q. Mr. Potter said this bell weighed fifty pounds? A. Well, Potter, I don't think understands it; he never had hold of one; but I have had hold of one with four men and I think it averaged about 250 pounds.

20 Q. You know where this curve is, don't you? A. Yes, sir; a little bit.

Q. Are you sure about that? A. What do you mean, where we hit the cows?

Q. South of the Paterson Avenue crossing? A. Yes; a little curve.

Q. You couldn't see this crossing until you got around it, could you? A. Well, you could see the crossing when you got about the middle of the curve.

30 Q. How far away is that about? A. About two hundred feet.

Q. Are there any trees or bushes along the tracks there? A. There are trees on the other side of the Northern up by that house.

Q. Are there any cat-tails along the tracks? A. Well, there are some; yes.

40 Q. Quite a few; isn't that so? A. Yes; not between—some are between the Northern track and

Abraham Anderson—Cross.

the Susquehanna track, but there is a gutter there or ditch and the track is up about two feet higher.

Q. There are cat-tails between the Northern track and the Susquehanna track? A. Yes; there is a ditch between the two tracks—

Q. And that is filled with cat-tails? A. Why, they grow about four feet high, so while that ditch is two feet deep them cat-tails would come out just a foot and a half out of the ditch; but you can see the tracks over the cat-tails. 10

Q. You just spoke of a ditch; it don't show up in the ditch between the tracks? A. Well, I don't mean right here by the flagman's shanty.

Q. You don't mean where that photograph expresses it, in other words? A. Well, see, there is quite a little bit in there.

Q. What? A. There is a little pitch in here (indicating). 20

Q. Just tell us where it is? A. That is the Susquehanna.

Q. That is what you call "here"? A. Yes; you see it is down two feet below the rail, you see; what I mean is, down in the hollow, swamp.

Q. You never saw that and never took notice of it? A. It don't look like up any two feet to me.

Q. Well—A. I took notice of it. 30

Q. That isn't on your track at all; you were on the Susquehanna track? A. That is where I mean, on the Susquehanna.

Q. Did you hear the crossing bell ringing that night? A. I didn't take notice of the crossing bell.

Q. You didn't see any women there at all at the crossing? A. No.

Q. There wasn't any there, was there? A. 40

Lemuel E. Paulson—Direct.

There wasn't any on this side; there might have been on the other side.

Q. There weren't any around the flagman's shanty? A. There was a couple of men; I don't know who they were.

Q. Any women? A. No; I didn't see any women.

10

LEMUEL E. PAULSON, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. You are the conductor on this train? A. Yes, sir.

20 Q. And you have been conductor how long? A. About twenty-six or twenty-seven years.

Q. What time did you get to the crossing on the night of the accident? A. 7:30.

Q. How do you fix the time? A. On account of looking at my watch.

Q. How did you happen to look at your watch just at that time? A. It is my duty to make out a report of an accident.

30 Q. So you wanted to see what time this happened? A. Yes, sir.

Q. Do you recall whether there were any signals given by the engineer as he approached that crossing? A. The alarm signal was given.

Q. Did you hear him give that? A. Yes, sir.

Q. Did you hear him blow for the crossing? A. Yes, sir.

40 Q. Was that before the alarm whistle? A. That was before the alarm whistle.

Lemuel E. Paulson—Cross.

Q. Did you notice the train coming to a stop?

A. I noticed the application of air, when it went on.

Q. How far from the end of the crossing did the train go? A. Why, I should judge probably two car lengths.

Q. How fast were you going as you passed the crossing? A. Why about eighteen or twenty miles 10
an hour.

Q. Had the engineer slowed down before he reached the crossing? A. He had slowed down the same time I heard the application of the air.

CROSS EXAMINATION BY MR. STITES:

Q. How did you begin to take notice of the whistle? A. At the crossing there?

Q. Yes. A. On account of it being an alarm 20
whistle; that signifies trouble ahead.

Q. That is the only whistle you heard? A. No,
no.

Q. Did you hear another whistle beside that?
A. I heard two whistles after we left West End
and before that, one at Lundy's Lane and one at
the—just before we approached that crossing.

Q. And is that all you heard after you left Jer-
sey City, the two whistles? A. That is after we 30
left West End.

Q. Did you hear any before West End? A. Not
West End.

Q. You didn't hear any whistles between Jersey
City and West End? A. No; he doesn't blow the
whistle at the Jersey City station.

Q. You heard two after West End? A. Two
crossing whistles.

Q. And the alarm whistle? A. Yes, sir. 40

Lemuel E. Paulson—Cross.

Q. Mr. Potter says after he left Jersey City—he is the engineer—he blew five or six times before he gave the alarm whistle.

Objected to as not a correct statement of the evidence. Question withdrawn.

10 Q. What time did you leave Jersey City? A. 7:19.

Q. Did it only take you eleven minutes to reach the crossing? A. Yes, sir.

Q. Out of Jersey City? A. Yes, sir.

Q. You must have been hitting it up pretty lively? A. At the usual rate of speed; we were running on schedule time.

20 Q. About how fast were you running? A. We were scheduled between forty and forty-five miles an hour.

Q. You distinctly heard the whistle? A. Yes, sir.

Q. You listened for it? A. Well, I don't know that I just listened for it, but I heard the whistle.

Q. Weren't you taking up tickets in that train? A. I was taking up tickets up to the time I got to Lundy's Lane.

30 Q. All the time that you were taking up tickets were you listening attentively for that whistle? A. When I am taking up tickets I generally heard the signals given by the engineer at the crossings.

Q. Did you listen for them? A. As a general thing.

Q. You always listen for them? A. Yes; so I can keep track of where I am at.

40 Q. At every crossing? A. Where I worked my train; yes; after I get through working my train I can see for myself.

Lemuel E. Paulson—Cross.

BY MR. HOBART:

Q. Had you been on that same run for some time before this accident? A. Oh, I ran that run four or five years.

Q. Are you familiar with that crossing? A. Yes, sir.

Q. Which one is before West End? A. Lundy's Lane. 10

Q. Then? A. Tyler Park or Paterson Avenue as you call it.

Q. The one we call Paterson Avenue you understand by the name of Tyler Park? A. Yes, sir.

BY THE COURT:

Q. How many blasts on the warning whistle did you hear? A. Oh, it was a succession of short blasts; I wouldn't like to say whether it was one or a dozen; it was a succession of short blasts. 20

Q. How many blasts of the other whistle? A. Four at each crossing.

Q. Did you hear the bell on the engine ringing? A. I could not say I heard it.

BY MR. STITES:

Q. Did you say there were four blasts for each crossing? A. There were four blasts for each crossing; yes, sir. Two long and two short blasts. 30

Martin Mabie—Direct.

MARTIN MABIE, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. HOBART:

Q. Where do you live now? A. North Paterson.

10 Q. What is your business? A. Hotel.

Q. At the time of this accident were you employed by the railroad company? A. Yes, sir.

Q. Baggage man, I believe? A. Yes, sir.

Q. Were you on this train on the night of the accident? A. Yes, sir.

Q. What part of the train were you riding in?
A. The baggage car.

20 Q. Where was that in reference to the engine?
A. Next to the engine.

Q. Did you have a view of the accident that evening? A. Yes.

Q. What called your attention to it? A. Well, the long whistle; their whistles called my attention to it first.

30 Q. What kind of whistle was it that you heard?
A. Well, when he blew the whistle I pulled the door open as we went over the crossing and struck the cattle.

Q. Did you hear any other whistle before that blown? A. He blew for the crossing.

Q. What kind of whistle was that? A. Two long and two short ones.

Q. Did you see the cows before the train got to the crossing? A. No; just after; I just opened the baggage door when he struck them.

40 Q. You opened that because of the whistle? A. Yes, sir.

Martin Mabie—Cross.

Q. And you looked out? A. Yes, sir.

Q. What did you see? A. I saw the cattle men there waving their hands.

CROSS EXAMINATION BY MR. STITES:

Q. Did you see any women there? A. Well, it was women there when we stopped; I didn't take any notice just before we stopped, but there was two or three women when I jumped off the train then. 10

Q. Were the doors of the baggage car closed? A. Yes, sir; at the time when he blew the whistle; I opened the doors then.

Q. What were you doing when the baggage car left West End? A. I was in my place.

Q. What work were you doing? A. I don't know as I was doing anything just at that time; I might have been checking up my baggage; I don't know. 20

Q. You don't remember what you were doing? A. No.

Q. But you remember hearing the whistle blow for the crossing? A. Yes, sir.

Q. But you don't remember what you were doing at the time? A. No, sir; I couldn't just remember. 30

Q. I suppose it is more important for you to remember a whistle than what you were doing? A. Not particularly; no, sir.

Q. No? A. No, sir.

Q. Two long toots and two short ones was blown for the Paterson Avenue crossing? A. Yes, sir.

Q. You heard them distinctly? A. Yes, sir. I wouldn't say so if I didn't.

Q. How close to the crossing were you when 40

Martin Mabie—Cross.

you heard the danger signal? A. I was probably one hundred feet when I got the door open; maybe not quite so far; maybe fifty or sixty feet.

Q. There is nothing unusual in your hearing a crossing whistle, is there? A. I hear them every time we got to a crossing.

Q. You hear that several times don't you? A. **10** Yes, sir; I hear them every time we go to a crossing.

Q. How many crossings were there between Jersey City and the Paterson Avenue crossing? A. How many?

Q. Yes. A. Railway crossings?

Q. Approximately? A. This was the fifth crossing, I believe.

Q. Did you hear the whistle blowing for all **20** those crossings? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. You listened for it? A. Not particularly; no, sir.

Q. You weren't listening for it especially? A. No, sir.

Q. You just happened to hear it? A. No; but when your attention is drawn to it you can remember it took place.

Q. Do you mean to say the crossing whistle **30** would draw your attention to anything particular? A. Yes; it certainly would.

Q. How long had you been working on the road? A. Thirty-six years pretty near.

Q. Riding in the baggage car? A. Thirty-one years in the baggage car.

Q. And the blowing of a crossing whistle would attract your attention every time a crossing whistle is blown you took notice of it, didn't you? A. **40**

Frank Rinder—Direct, Cross.

Well, I take notice of anything happening there and it would draw your attention if you did hear that whistle.

Q. After something happened then your attention would be attracted to the whistle? A. Yes.

Q. And that is what drew your attention to that? A. No, sir; not the crossing whistle; but the danger whistle; that showed something was wrong ahead. **10**

Q. The danger whistle made you remember that you had heard the crossing whistle? A. You couldn't get it out of my mind then nohow.

FRANK RIDNER, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

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DIRECT EXAMINATION BY MR. HOBART:

Q. You are the flagman, I believe, on this train? A. Yes, sir.

Q. What part of the train were you riding in as you approached the crossing? A. The rear car.

Q. Do you recall anything about the whistle being blown? A. Yes, sir. **30**

Q. What whistle did you hear? A. The crossing whistle; and I heard the danger whistle.

Q. Which one did you hear first? A. The crossing whistle.

CROSS EXAMINATION BY MR. STITES:

Q. Did you testify in court before? A. Yes, sir.

Q. In this case? A. Yes, sir.

Q. How many times? A. Once. **40**

Frank Rinder—Cross.

Q. Twice? A. No; once.

Q. Where were you the first time? A. I think it was the last time.

Q. What drew your attention particularly to this whistle on the night in question? A. The danger whistle.

10 Q. When you heard the danger whistle you recall that you heard the whistle blow for the crossing? A. No.

Q. Well, how do you recall the crossing whistle? A. I heard that first.

Q. How do you recall that particular whistle? A. Well, it is part of my duty to know it, to know what whistle is blown.

20 Q. What are you employed to do? A. I am employed partly to look out for whistles and part of my duty is brakeman to assist the passengers and to notice what signals is given.

Q. And how does the blowing of a crossing signal affect the duties of a brakeman? A. I have got to know what whistles are given.

Q. What for? A. He is apt to blow for brakes, his air pump might fail him.

Q. How many whistles would he give for that? A. One.

30 Q. How many whistles for a crossing? A. Two long and two short.

Q. Mr. Anderson testified that one long blast was given for the crossing; is that right? A. No, sir; one long is your station.

Q. For the station; there is no station in that locality, is there? A. Not that I know of.

DEFENDANT RESTS.

Romeo Churchill—Direct.

ROMEO T. CHURCHILL (Recalled in rebuttal):

DIRECT EXAMINATION BY MR. STITES:

Q. Doctor, are you familiar with the crossing bell of the New York, Susquehanna & Western Railroad at the point in question? A. Yes, sir.

Q. Have you seen that bell? A. Yes, sir.

Q. Had you seen that bell before the accident? 10
A. Yes, sir.

Q. How long before? A. Probably on the Friday previous I seen it.

Q. Was that bell in working condition that day?

Objected to as not rebuttal evidence.
Objection sustained.

CASE CLOSED.

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Motion for Direction of Verdict for Defendant.

MR. HOBART: If your Honor please, I ask that the jury be directed to return a verdict in favor of the defendant on the same grounds mentioned in the motion for nonsuit, which I will not repeat unless your Honor desires me to repeat it. And on the further ground, that the evidence is now so clear and so overwhelmingly in favor of the defendant, both as to the crossing bell, if that be a point at issue in the case, and also as to the signals by the locomotive, that any verdict that the jury might return against the weight of the evidence would have to be set aside by the Court, and therefore the case calls for the application by the Court and he should take the responsibility of directing the jury to return a verdict for the defendant.

Motion denied. To which ruling of the Court counsel for the defendant then and there prayed an exception, which was granted and signed and sealed accordingly.

H. W. LANGE,
Judge.

(L.S.)

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Order to File Defendant's Requests to Charge.

(Entered, November 22, 1912.)

New Jersey Supreme Court.

KOSHER DAIRY COMPANY, a corporation,

Appellee,

vs.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY,

Appellant.

On Appeal from District Court of Hoboken. 10

It appearing that the case on appeal in above action has been duly filed, and that defendant's requests to charge duly made at the trial of said action in the District Court of the City of Hoboken were not included in said case on appeal, and said requests to charge having been duly certified by the Judge of said District Court of the City of Hoboken, and being hereto annexed, it is, on this 20th day of November, Nineteen hundred and twelve, 20

ORDERED that said requests to charge, certified as hereto annexed, be filed with said case on appeal, and made a part thereof. 30

F. J. SWAYZE,
J. S. C.

Entered November 22nd, 1912.

On motion of

COLLINS & CORBIN,
Attys. of New York, Susquehanna &
Western Railroad Company,
Appellant. 40

Defendant's Requests to Charge.
District Court of the City of Hoboken.

	KOSHER DAIRY COMPANY, a corporation,	}	
	<i>Plaintiff,</i>		
	<i>vs.</i>		} In Tort.
10	NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY,		
	<i>Defendant.</i>		

1. If the plaintiff is entitled to recover anything, it can be only for the market value of the cows at the time of the accident, less the value of the several carcasses based upon the most profitable use or uses to which the same might have been put by the plaintiff, making due allowance for reasonable time and expense in disposing of the carcasses.

2. If the bell on the locomotive which struck the cows weighed not less than thirty pounds, and was rung continuously in approaching the crossing, beginning at a distance of at least three hundred yards from the crossing and continuing until the engine had crossed the highway, the defendant has complied with the statutory requirements, and unless defendant was otherwise negligent the plaintiff cannot recover.

3. If the bell on the engine weighed not less than thirty pounds, and was rung continuously in approaching the crossing, beginning at a distance of at least three hundred yards from the crossing and continuing until the engine crossed the highway, defendant was not negligent in that respect, and plaintiff cannot recover on that ground.

3-a. There is no evidence to justify a verdict

Defendant's Requests to Charge.

against the defendant by reason of alleged failure of the crossing bell to ring.

If 3-a is refused then No. 4.

4. If crossing bell was ringing in time to give drovers due warning of the approach of the train, defendant was not negligent with respect thereto.

5. If crossing bell was not ringing before train reached crossing in time to give due warning to the drovers of the approach of the train, the plaintiff is not entitled to recover on that ground, unless the evidence shows that the failure of the crossing bell to ring was caused by the defendant's negligence. 10

6. If crossing bell did not ring in time to give due warning to the drovers of the approach of the train, plaintiff cannot recover on that ground unless the evidence shows that the defendant knew that the bell was out of order, or that the bell was out of order a sufficient length of time before the accident to charge defendant with knowledge that it was out of order. 20

7. Greater weight is to be given to the testimony of those persons who were in possession of special knowledge as to the ringing of the bell on locomotive, than to the testimony of those whose attention was not specially called to such ringing of bell before or at the time of the accident. 30

8. Greater weight is to be given to the testimony of engineer and fireman as to the ringing of the bell than to the testimony of the other witnesses, except the drovers because engineer and fireman were in a position where their attention was specially called to that fact.

9. In weighing the testimony of the witnesses, attention must be given to the situation of the witnesses at the time when, it is alleged, the bell on the locomotive was or was not rung or blown. 40

Defendant's Requests to Charge.

10. If plaintiff, or its servants, did anything which contributed to the accident, or failed to do anything which might have prevented the accident, plaintiff is guilty of contributory negligence, and cannot recover.

11. If the drovers were negligent in driving the cows over the crossing, plaintiff cannot recover.

12. It was the duty of the drovers to approach the crossing with reasonable care.

13. It was the duty of the drovers to stop the cows, and look for the approach of the train, at a point, where, if they had stopped and looked, they could have seen the train in time to have avoided the accident.

14. If the drovers stopped and looked for the approach of the train, at a point from which they could not have seen the approach of the train, and failed to stop and look at a point from which they could have seen the train before going over the crossing, they were negligent, and plaintiff cannot recover.

15. Plaintiff cannot recover unless the jury are satisfied that the evidence fairly preponderates in the plaintiff's favor.

16. If the jury find that the drovers did not look until they were on the tracks of the defendant (as testified to by Devon) they were chargeable with contributory negligence, and plaintiff cannot recover.

17. If the whistle on the locomotive was blown at a point at least 900 feet from the crossing and at intervals from that point until the engine passed over the crossing the defendant was not negligent in that respect.

Certificate to Defendant's Requests to Charge.

District Court of the City of Hoboken.

KOSHER DAIRY COMPANY, a corporation,

vs.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, a corporation.

Certificate. **10**

I do hereby certify that annexed hereto is a true copy of requests to charge duly made by defendant at the trial of above case, in the above Court on October 25, 1912.

Dated, November 16th, 1912. **20**

H. W. LANGE,

Judge of the District Court of the City of Hoboken.

Mr. Hobart in behalf of the defendant sums up to jury.

Mr. Stites in behalf of plaintiff sums up to jury.

The Court thereupon charged the jury as follows:

Charge of the Court. **30**

THE COURT: Gentlemen of the jury: You are to be congratulated on your patience in this matter, having sat here practically all day, and it is now twenty minutes to six. I shall be brief; I don't think it is necessary for me to go over the entire testimony. It is admitted by the defendant that it is a corporation of the State of New Jersey and that it operated the tracks and locomotive in question at the time of this accident, and it had a right to operate them. **40**

Certificate to Defendant's Requests.

This action is brought by the Kasher Dairy Company against New York, Susquehanna and Western Railroad Company to recover damages for the loss of three cows, as the result of the defendant's servant's negligence, in failing to give either of the prescribed statutory signals for the crossing at which the accident is alleged by the plaintiff to have taken place.

10

Now, under the law—that is, under our statute—it is incumbent upon the railroad company to have a bell on each engine weighing not less than thirty pounds and rung continuously in approaching a grade crossing of a highway beginning at a distance of at least three hundred yards from the crossing and continuing until the engine has crossed such highway, or a steam whistle shall be attached to each engine and be sounded at least

20 three hundred yards from the crossing and at intervals until the engine shall have crossed such highway, and the failure, if there was such failure, on the part of the defendant company in this case, to give either of the statutory signals in approaching the crossing, that would constitute negligence on the part of the defendant. Now, then, whether the railroad company performed its duty in that regard is a question for you to determine.

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30 Whether the plaintiff's servants exercised reasonable care in driving the cows over the tracks of the defendant company under the circumstances and conditions which presented themselves to them is also a question for you to determine.

30

According to the testimony here adduced, it appears that the plaintiff's servants were driving nine cows across the Paterson Avenue railroad crossing at about eight o'clock in the evening of July 18, 1909, when a locomotive engine of the

40 defendant company ran into the cows, with the result that three of them were killed.

40

Certificate to Defendant's Requests.

The testimony offered on the part of the plaintiff was that the cows were in charge of two servants, one of them as you recall by the testimony of the first witness, was in the rear and one of them in front or in the lead, so to speak. You have heard his testimony, and you have heard all the testimony of all the witnesses produced on the part of the plaintiff; you have heard the witnesses—and there were a number of them—on the part of the defendant. 10

So far as the whistle or the ringing of the bell on the locomotive are concerned; there has also been evidence adduced here so far as the ringing of what I suppose you would call the stationary bell or the bell at the crossing is concerned.

One of the witnesses, I believe, on the part of the defendant, said—and I believe it was Mrs. Summerwell—nevertheless one of the witnesses—said she heard the bell ringing. She couldn't recall whether it was the bell on the locomotive or whether it was this stationary bell. You, gentlemen, will probably recall that. The Court feels that it is unnecessary at this time to go over the entire testimony. The Court does, however, desire to say, that you should carefully consider all of the testimony in this case, and before you can render a verdict in favor of the plaintiff, you must be satisfied that its servants exercised reasonable care in driving the cows over the tracks of the defendant company, and were not guilty of contributory negligence. 20 30

Contributory negligence arises when the plaintiff, as well as the defendant, has done some act negligently or has omitted through negligence to do some act which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury. So if you find 10

Certificate to Defendant's Requests.

that the plaintiff's servants did not use such reasonable care and that the cows were killed as the result of contributory negligence on their part, then your verdict should be for the defendant. But if you find that the plaintiff's servants were not guilty of contributory negligence, and that the defendant company did not give either of the
 10 statutory signals in approaching the crossing in question, then your verdict should be for the plaintiff.

It is for you to consider and determine which of the witnesses was telling the true story; for instance, on the question of giving these signals as required by the statute—that is, the ringing of the bell or the sounding of the whistle. This part of the testimony, as you recall it, was contradicted.
 20 Witnesses on the part of the plaintiff say no signals were given, while witnesses on the part of the defendant say signals were given, either ringing the bell or sounding of the whistle. This, as I said before, is for you to consider. It is for you, gentlemen, to say which story is the true story.

If, after you have referred to and determined all the evidence in this case, you conclude that the plaintiff is entitled to your verdict, then it be-
 30 comes your duty to determine what damage the plaintiff is entitled to. You will recall that on the part of the plaintiff, Mrs. Cohen, who was the manager of this Kosher Dairy Company at the time of the accident. She says she bought these cows; she says she paid one hundred dollars for one and one for one hundred and twenty-five dol-
 40 lars—for the two other ones; she says that the market value of those cows would be one hundred and twenty-five dollars for one and one hundred and fifty dollars for each of the other two. Now

Certificate to Defendant's Requests.

the testimony on the part of the veterinary surgeon produced by the defendant, Doctor Lowe—you recall his testimony—I don't think it is necessary for me to go into the entirety—but so far as the value of these cows is concerned, you will recall that he said from eighty to one hundred dollars, and that he saw the cows— I think he said immediately after the accident, and that he placed a value, I think, of from eighty to one hundred dollars. That is as to the two cows, I believe. As to the one cow which he said I believe had a broken leg, he said that that cow if it was bled and dressed and the carcass sold, it would bring about forty dollars. You recall that on his part he said that while he did not give this cow a thorough examination, he said that to sell the meat or the carcass, if the cow were about to calf within those days—ten days before they have a calf—that he would much rather have the cow where the cow had the calf ten days before. You recall the Court asking whether he knew just whether this cow was going to have calf within the ten days and he said he didn't believe he made enough examination to consider that. You are to consider that in making up your mind, if you find there should be a verdict for the plaintiff. You are to consider that testimony on his part as to what the value of that cow should be, taking into consideration the testimony upon the part of the plaintiff.

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I don't think, as I said before, it is necessary for me to rehearse the testimony of all the witnesses in this matter. You have listened very attentively to it and I will leave the matter for you to consider.

I have been requested to charge the following:
1. If the plaintiff is entitled to recover anything,

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Certificate to Defendant's Requests.

it can be only for the market value of the cows at the time of the accident, less the value of the several carcasses based upon the most profitable use or uses to which the same might have been put by the plaintiff, making due allowance for reasonable time and expense in disposing of the carcasses. I do charge that, taking into consideration, as I said before, the testimony adduced upon
 10 the part of the witness for the plaintiff, as to the value of the cows, and the testimony on the part of Doctor Lowe for the defendant.

Request No. 2. If the bell on the locomotive which struck the cows weighed not less than thirty pounds, and was rung continuously in approaching the crossing, beginning at a distance of at least three hundred yards from the crossing and continuing until the engine had crossed the high-
 20 way, the defendant has complied with the statutory requirements and unless defendant was otherwise negligent the plaintiff cannot recover. That is so.

Request No. 3 I charged. If the bell on the engine weighed not less than thirty pounds, and was rung continuously in approaching the crossing, beginning at a distance of at least three hundred yards from the crossing and continuing until
 30 the engine crossed the highway, defendant was not negligent in that respect and plaintiff cannot recover on that ground.

Request No. 3-a I refuse to charge.

Request No. 4. If crossing bell was ringing in time to give drovers due warning of the approach of the train, defendant was not negligent with respect thereto.

Request No. 5. If crossing bell was not ringing
 40 before train reached crossing in time to give due

Certificate to Defendant's Requests.

warning to the drovers of the approach of the train, the plaintiff is not entitled to recover on that ground, unless the evidence shows that the failure of the crossing bell to ring was caused by the defendant's negligence.

Request No. 6. If crossing bell did not ring in time to give due warning to the drovers of the approach of the train, plaintiff cannot recover on that ground unless the evidence shows that the defendant knew that the bell was out of order, or that the bell was out of order a sufficient length of time before the accident to charge defendant with knowledge that it was out of order. With regard to that you recall what the testimony was on the part of the defendant and plaintiff as to this crossing bell. 10

Request No. 8 is next in place of No. 7. Request No. 8. Greater weight is to be given to the testimony of those persons who were in possession of special knowledge as to the ringing of the bell on locomotive than to the testimony of those whose attention was not specially called to such ringing of bells before or at the time of the accident. That is so, provided you considered it to be so in whatever credence you are to give to witnesses who have testified with respect to that. 20

Request No. 9. Greater weight is to be given to the testimony of engineer and fireman as to the ringing of the bell than to the testimony of the other witnesses, except the drovers because engineer and fireman were in a position where their attention was specially called to that fact. With regard to that request I say that is so, if you consider it in weighing the evidence of the witnesses adduced here who testified on that point, in regard to the bell or the signals. 30

Certificate to Defendant's Requests.

Request No. 10. In weighing the testimony of the witnesses, attention must be given to the situation of the witnesses at the time when, it is alleged, the bell on the locomotive was or was not rung or blown.

10 Request No. 11. If plaintiff, or its servants, did anything which contributed to the accident, or failed to do anything which might have prevented the accident, plaintiff is guilty of contributory negligence, and cannot recover.

No. 12. If the drovers were negligent in driving the cows over the crossing, plaintiff cannot recover.

Request No. 13. It was the duty of the drovers to approach the crossing with reasonable care.

20 Request No. 14. It was the duty of the drovers to stop the cows, and look for the approach of the train at a point, where, if they had stopped and looked, they could have seen the train in time to have avoided the accident.

30 Request No. 15. If the drovers stopped and looked for the approach of the train, at a point from which they could not have seen the approach of the train, and failed to stop and look at a point from which they could have seen the train before going over the crossing, they were negligent, and plaintiff cannot recover.

Request No. 16. Plaintiff cannot recover unless the jury are satisfied that the evidence fairly preponderates in the plaintiff's favor.

40 Request No. 17 I cannot charge, because it embodies something which is supposed to have been testified to which I am not positive about. I will, however, charge it in part. If the jury find that the drovers did not look until they were on the tracks of the defendant, they were chargeable with

Certificate to Defendant's Requests.

contributory negligence and plaintiff cannot recover.

Request No. 18. If the whistle on the locomotive was blown at a point at least nine hundred feet from the crossing at intervals from that point until the engine passed over the crossing, the defendant was not negligent in that respect.

I believe I have covered the entire matter, and you, gentlemen, have all the facts before you, I believe, so much so that you can determine the matter now. 10

MR. STITES: Am I to understand that you charged all the requests you read?

THE COURT: I do so charge all of the requests, with the exception of 3-a, and I would not have read them if I didn't. With regard to Request No. 17, I charged that with the exception of the part about testifying. 20

I might say all the plans and photographs have been offered in evidence and you may use them.

MR. HOBART: If your Honor please, may I note some exceptions? I object to certain parts of the charge and ask that exceptions be noted to the same, as follows: 30

1. To that part of the charge which stated that the jury might find the defendant guilty of negligence if there was failure to give either of the statutory signals, or whatever the Court said on that point. I think that would be sufficient to identify it, in connection with which the court charged, that it is for you to determine if the company did do its duty in that regard.

Exception allowed and signed and sealed ac- 40

Certificate to Defendant's Requests.

cordingly.

H. W. LANGE,
Judge.

(L.S.)

2. Also to that part of the charge which said that the jury could find negligence against the company by reason of any alleged failure of the stationary bell to ring or by reason of any negligence of the company with regard thereto.

Exception allowed and signed and sealed accordingly.

H. W. LANGE,
Judge.

(L.S.)

3. That the negligence was the combined negligence, or whatever was said on that question of reasonable care on the part of the defendant's servants.

Exception allowed and signed and sealed accordingly.

H. W. LANGE,
Judge.

(L.S.)

4. There was another part of the charge later on, where the Court referred to the duty of the defendant to sound a whistle or ring a bell. With respect to that part of the charge we desire to raise the point that this accident happened within the City limits and the supposed sounding of the whistle would have to be within the city limits and the statutes, we claim, do not require that.

Exception allowed and signed and sealed accordingly.

H. W. LANGE,
Judge.

(L.S.)

Certificate to Defendant's Requests.

5. We also ask exception to that part of the Court's charge concerning Request No. 17 as modified and also as to 8 and 9 as modified, and also to the Court's refusal to charge Request No. 3-a.

Exception allowed and signed and sealed accordingly.

H. W. LANGE,
Judge. 10

(L.S.)

I, Harry Schirmer, a stenographer designated by the Court and sworn, do hereby certify that the foregoing is a true copy of the testimony of the proceedings on the trial of the suit of Kosher Dairy Company, a corporation plaintiff, against New York, Susquehanna and Western Railroad Company, a corporation, defendant, in the Hoboken District Court. 20

Dated, October 25, 1912.

HARRY SCHIRMER,
Stenographer.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE
SUPREME COURT OF NEW JERSEY:

I hereby certify the foregoing transcript of the testimony and of the proceedings in the above-stated case, made by the stenographer designated by me and sworn, to be used on the hearing of the appeal herein. 30

Dated, October 25, 1912.

H. W. LANGE,
Judge.

Notice of Appeal.

(Served October 31, 1912.)

Filed, November 1, 1912.)

District Court of the City of Hoboken.

10	KOSHER DAIRY COMPANY, a corporation,	}	In Tort.
	<i>vs.</i>		
	NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, a corporation.		

To Kasher Dairy Company, a corporation, Plaintiff, or William B. Stites, Esquire, Attorney for Plaintiff.

20 TAKE NOTICE that the defendant, New York, Susquehanna & Western Railroad Company, a corporation, hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the City of Hoboken, rendered in the above stated action on the 25th day of October, 1912.

COLLINS & CORBIN,
Attys. for Defendant.

30 (Endorsed.)

“Service of a copy of within Notice of Appeal acknowledged this 31st day of October, 1912.

WM. B. STITES,
Atty. for Plaintiff.”

40

Specifications.

(Filed and served, November 14, 1912.)

Supreme Court of New Jersey.

KOSHER DAIRY COMPANY, a corporation,

Appellee,

vs.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, a corporation.

Appellant.

On Appeal
from the District Court
of the City
of Hoboken.

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The New York, Susquehanna and Western Railroad Company, the defendant below and the appellant herein, herewith files the following specification of determinations and directions of the District Court of the City of Hoboken with respect to which it is dissatisfied in point of law:

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1. The said District Court erred in entering judgment in favor of the plaintiff.

2. The said District Court erred in failing to enter judgment in favor of the defendant, New York, Susquehanna & Western Railroad Company.

3. The Judge of said District Court erred in allowing a certain witness, Joseph Devon, over the objection of defendant's counsel, to answer the following question:

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"Q. Did you see him (referring to William Harney, who was assisting said Joseph Devon in driving the cows) look in both directions?"

4. The Judge of said District Court erred in allowing a certain witness, Minnie Cohen, called on behalf of the plaintiff, over the objection of the defendant's counsel, to answer the following question:

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Specifications.

“What was the condition south of Paterson Avenue crossing along the road tracks about the middle of July, 1909?”

5. The Judge of said District Court erred in allowing a certain witness, Minnie Cohen, called on behalf of the plaintiff, over the objection of defendant’s counsel, to answer the following question:

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“What was the condition south along the tracks of the railroad at that crossing an hour after the accident?”

6. The Judge of said District Court erred in allowing a certain witness, Max G. Miller, called on behalf of the plaintiff, over the objection of defendant’s counsel, to answer the following question:

20

“Did the signal bell ring then (referring to any train going over the crossing on the night of the accident)?”

7. The Judge of said District Court erred in denying motion for non suit made by counsel for defendant, on the ground that there was no evidence of negligence on the part of the defendant with respect to the giving of the signals on the engine.

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8. The Judge of said District Court erred in denying motion for non suit made by counsel for defendant on the ground that there was no evidence to go to the jury to show any negligence with respect to the crossing bell.

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9. The Judge of said District Court erred in denying motion for non-suit made by counsel on behalf of defendant on the ground that there was nothing under the evidence for the jury to pass on with respect to the alleged extra dangerous grade crossing.

10. The Judge of said District Court erred in

Specifications.

denying the motion for non-suit made by counsel on behalf of defendant on the ground that contributory negligence on the part of plaintiff's servants appeared without dispute.

11. The Judge of said District Court erred in denying the motion of counsel for defendant for a direction of verdict for the defendant, on the ground that there was no evidence of negligence on the part of the defendant with respect to the giving of the signals on the engine. **10**

12. The Judge of said District Court erred in denying the motion of counsel for defendant for a direction of verdict for the defendant, on the ground that there was no evidence to go to the jury to show any negligence with respect to the crossing bell.

13. The Judge of said District Court erred in denying the motion of counsel for defendant for a direction of verdict for the defendant, on the ground that there was nothing under the evidence for the jury to pass on with respect to the alleged extra dangerous grade crossing. **20**

14. The Judge of said District Court erred in denying the motion of counsel for defendant for a direction of verdict for the defendant on the ground that contributory negligence on the part of plaintiff's servants appeared without dispute. **30**

15. The Judge of said District Court erred in denying the motion of counsel for defendant for a direction of verdict for the defendant on the ground that the evidence was so clear and overwhelmingly in favor of the defendant, both as to the crossing bell, if that be a point at issue in the case, and also as to the signals by the locomotive, that any verdict that the jury might return against the weight of evidence would have to be set aside by the Court. **40**

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16. The Judge of said District Court erred in charging the jury that the jury could find negligence against the Company by reason of any alleged failure of the stationary bell to ring, or by reason of any negligence of the Company with regard thereto.

17. The Judge of said District Court erred in
10 charging the jury as follows:

20 “Now, under the law—that is, under our statute—it is incumbent upon the railroad company to have a bell on each engine weighing not less than thirty pounds and rung continuously in approaching a grade crossing of a highway beginning at a distance of at least three hundred yards from the crossing, continuing until the engine has crossed such highway, or a steam whistle shall be attached to each engine and be sounded at least three hundred yards from the crossing and at intervals until the engine shall have crossed such highway, and the failure, if there was such failure, on the part of the defendant company in this case, to give either of the statutory signals in approaching the crossing, that would constitute negligence on the part of the defendant. Now, then, whether the railroad company performed its duty in that regard is a question for you to determine.”

18. The Judge of said District Court erred in
30 charging the jury as follows:

“Contributory negligence arises when the plaintiff, as well as the defendant, has done some act negligently or has omitted through negligence to do some act which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury.”

19. The Judge of said District Court erred in
40 charging the jury as follows:

“It is for you to consider and determine

Specifications.

which of the witnesses was telling the true story; for instance, on the question of giving these signals as required by the statute—that is, the ringing of the bell or the sounding of the whistle. This part of the testimony, as you recall it, was contradicted. Witnesses on the part of the plaintiff say no signals were given, while witnesses on the part of the defendant say signals were given, either ringing the bell or sounding the whistle. This, as I said before, is for you to consider. It is for you, gentlemen, to say which story is the true story.” 10

20. The Judge of said District Court erred in refusing to charge defendant's request No. 3-a as follows:

“There is no evidence to justify a verdict against the defendant by reason of alleged failure of the crossing bell to ring.” 20

21. The Judge of said District Court erred in adding to the following request to charge (No. 8) made by counsel for defendant:

“Greater weight is to be given to the testimony of those persons who were in position of special knowledge as to the ringing of the bell on locomotive than to the testimony of those whose attention was not specially called to such ringing of bell before or at the time of the accident”— 30

The following words:

“That is so, provided you consider it to be so in whatever credence you are to give to witnesses who have testified with respect to that.”

22. The Judge of said District Court erred in adding to defendant's request to charge (No. 9) as follows,

“Greater weight is to be given to the testimony of engineer and fireman as to the ringing of the bell than to the testimony of the 40

Specifications.

other witnesses, except the drovers, because engineer and fireman were in a position where their attention was specially called to that fact", the following words:

"With regard to that request, I say that is so, if you consider it in weighing the evidence of the witnesses adduced here who testified on that point in regard to the bell or the signals."

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23. The Judge of said District Court erred in omitting from defendant's request, No. 17, to charge—

"If the jury find that the drovers did not look until they were on the tracks of the defendant (as testified to by Devon), they were chargeable with contributory negligence, and plaintiff cannot recover", the words, "As testified to by Devon."

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24. The verdict of the jury was contrary to the law charged by the Judge of the District Court as follows:

"If crossing bell was not ringing before train reached crossing in time to give due warning to the drovers of the approach of the train, the plaintiff is not entitled to recover on that ground, unless the evidence shows that the failure of the crossing bell to ring was caused by the defendant's negligence."

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25. The verdict of the jury was contrary to the law charged by the Judge of the District Court as follows:

"If crossing bell did not ring in time to give due warning to the drovers of the approach of the train, plaintiff cannot recover on that ground, unless the evidence shows that the defendant knew that the bell was out of order, or that the bell was out of order a sufficient length of time before the accident to charge defendant with knowledge that it was out of order."

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Dated, November 13, 1912.

COLLINS & CORBIN,
Attorneys for Appellant.

Opinion.

(Filed June 13, 1913.)

New Jersey Supreme Court,

FEBRUARY TERM 1913

KOSHER DAIRY Co., <div style="text-align: right;"><i>Appellee,</i></div> <div style="text-align: center;"><i>vs</i></div> NEW YORK, SUSQUEHANNA & WESTERN RAILROAD Co., <div style="text-align: right;"><i>Appellant.</i></div>	}	10
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Submitted March 20, 1913; decided June ,
1913.

Appeal from District Court.

Before:

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JUSTICES TRENCHARD, PARKER AND VOORHEES.

For the Appellant, COLLINS & CORBIN.

For the Appellee, WILLIAM B. STITES.

The Opinion of the Court was delivered by
PARKER, J.

This is the third appeal in this case. The suit is for damages for the loss of several cows belonging to the plaintiff corporation, which were part of a drove that was being driven upon a highway across the defendant's tracks. On the first appeal a judgment for the plaintiff was reversed for error in the charge. *Kosher Dairy Co. v. New York, Susquehanna & Western R. R. Co.*, 52 Vroom, 145. On the second appeal a similar judgment was reversed for error in rulings on evidence, S. C. 83 Atl. 498. A third judgment for plaintiff, supported by a third verdict of a jury, is now before us.

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Opinion.

The first point made is that the Court erred in leaving to the jury the question whether the statutory signals by bell or whistle were not given. Our examination of the evidence leads us to the conclusion that a jury question was presented.

10 The next point is that the Court erred in denying a motion to non-suit, and a motion to direct a verdict for defendant on the ground that there was no evidence to go to the jury to show any negligence with respect to the crossing bell. There being a jury question on the other branch of the case, a non-suit or a direction would have been improper.

20 The next point is that the trial judge refused to charge as requested, that "there is no evidence to justify a verdict against the defendant by reason of the alleged failure of the crossing bell to ring."

30 The situation at the time this request was refused was substantially as follows: the state of demand charged negligence not only in failing to give the statutory signals, but in failing to take special precautions on account of alleged obstructions to the view which, as claimed, were created or maintained by the railroad company. Of such obstructions there was some evidence. Moreover, the company had undertaken to protect the crossing by an electric crossing bell, and having assumed this duty, was bound to perform it with due care. *Wolcott v. N. Y. & Long Branch R. R. Co.* 39 Vroom, 421. There was evidence from which the jury could conclude that this bell did not ring to indicate the approach of the train in question. The failure of such a bell to ring at the time of the accident is some evidence of negligence. 33 Cyc., 942, citing *Hicks v. R. R. Co.* 164 Mass, 424 41 N. E., 721; *McSweeney v. Erie*

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Opinion.

R. R. Co. 87 N. Y. Supp. 836. We think no error was committed in refusing to charge specifically as requested. Moreover, this broad request was preferred in connection with three other alternative requests on the same point which were charged. Under such circumstances the rule appears to be that when counsel present alternative or inconsistent requests, they should not be heard to complain of the Court's selection. 38 Cyc. 1711. Hence the defendant is not entitled to press this refusal for error. 10

There is still another reason why the refusal should not be held for error. The judge delivered a complete charge on his own theory of the case, basing the right of recovery solely on the omission of statutory signals and saying nothing about the crossing bell. If he had stopped there the crossing bell would have been out of the case, for the submission to the jury was on the other theory alone, and a judgment for negligence in omitting the crossing bell would not have been supported. *Barnes v. Wallington*, 49 Vroom, 490. Hence, if the Court had refused all four requests relating to the crossing bell, and thus eliminated that question entirely, there would have been no error. But the Judge, following a practice which is unfortunate, and condemned by eminent judicial authority ("*Hints about Trials*", 28 N. J. L. J. 150, pl. 10), after finishing his own charge, proceeded to charge seriatim such requests as he approved, and among others the alternative requests relative to the crossing bell. 20

If defendant had no right to complain of his ignoring them all, it could not complain of his adoption of those of its own presentation, with which the one that was rejected would have been inconsistent. 30 40

Opinion.

The question of contributory negligence was for the jury, and a direction on that ground was properly refused.

There was no error in admitting testimony that the crossing bell did not ring after the accident. This, though of little weight, was evidential. *Alcott v. Public Service Corporation*, 49 Vroom, 482.

10 Next it is claimed that the judge erred in charging as to the signals by bell or whistle. The charge on this point was as follows:

20 "Now, under the law—that is, under our statute—it is incumbent upon the railroad company to have a bell on each engine weighing not less than thirty pounds and rung continuously in approaching a grade crossing of a highway beginning at a distance of at least three hundred yards from the crossing and continuing until the engine has crossed such highway, or a steam whistle shall be attached to each engine and be sounded at least three hundred yards from the crossing and at intervals until the engine shall have crossed such highway, and the failure, if there was such failure, on the part of the defendant company in this case, to give either of the statutory signals in approaching the crossing, that would constitute negligence on the part of the defendant. Now, then, whether the

30 railroad company performed its duty in that regard is a question for you to determine."

The claim is that in saying that if there was failure to give either of the statutory signals, the company was negligent, the Court in effect said that if there was failure to give both of them, the company was negligent. But this is a misapprehension of the language used, as the context clearly indicates. A failure to give either means

40 the omission of both; and the Court, having once been reverred on that point, was plainly following

Opinion.

the language of the opinion in this case, at 83 Atl. 499, where it was said:

“The failure on the part of the defendant company to give either of the statutory signals in approaching the crossing would constitute negligence.”

Finally it is urged that the Court erred in defining contributory negligence. We quote from the brief: 10

“The Judge charged that ‘contributory negligence arises when the plaintiff, as well as the defendant, has done some act negligently or has omitted through negligence to do some act which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury.’”

“We submit that contributory negligence does not depend upon any combination of a negligence on the part of the one injured and the one causing the injury, but solely upon the negligence of the one injured. From the Judge’s charge, the jury were directed that contributory negligence could be found only if it appeared that the defendant as well as the plaintiff was negligent.” 20

We fail to see how negligence can be called contributory when it is the only negligence causing the accident. And in fact the definition of the text writers supports that of the trial judge. In Beach on Contributory Negligence, Sec. 7, the definition is this: 30

“Contributory negligence in its legal signification is such an act or omission on the part of a plaintiff amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant is a proximate cause or occasion of the injury complained of.” 40

See also 7 Enc. Law, 2d Ed., 371.

We find no injurious error in the record, and the judgment will be affirmed.

Rule for Judgment.

(Entered October 9, 1913.)

New Jersey Supreme Court,

KOSHER DAIRY Co., <i>vs.</i> 10 NEW YORK, SUSQUEHANNA & WESTERN RAILROAD Co.,	}	On Appeal Affirmance.
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This cause having been argued at the last February term of this Court on the Specifications filed, and the Court having duly considered the same and being of opinion that there is no error in the judgment and proceedings of the Court below,

20 It is ordered that said judgment be in all things affirmed with costs to the appellee to be taxed; and it is further ordered that execution issue out of this Court therefor.

Entered October 9, 1913,

On motion of

WILLIAM B. STITES, Atty.

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**Notice of Appeal to Court of Errors
and Appeals.**

(Served Nov. 28, 1913, and Filed Nov. 30, 1913.)

New Jersey Supreme Court.

KOSHER DAIRY COMPANY, a cor-
poration,

Respondent,

vs

NEW YORK, SUSQUEHANNA &
WESTERN RAILROAD COMPANY, a
corporation,

Appellant.

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Action at
Law.

To

WILLIAM B. STITES, ESQ.,
Attorney of Kosher Dairy
Company, Respondent.

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TAKE NOTICE that the appellant, New York, Sus-
quehanna & Western Railroad Company, appeals
to the New Jersey Court of Errors and Appeals
from the whole of the judgment entered in this
cause on the ninth day of October, 1913, on the
ground that the Supreme Court of the State of
New Jersey affirmed the judgment entered in
favor of the plaintiff, Kosher Dairy Company,
and against the defendant, New York, Susque-
hanna & Western Railroad Company, in the Dis-
trict Court of the City of Hoboken, whereas said
Supreme Court should have reversed said judg-
ment of said District Court of the City of Hobo-
ken, because of one or more of the erroneous
determinations and directions of said District
Court of the City of Hoboken, stated in the speci-

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Notice of Appeal to Court of Errors and Appeals.

fications filed by said appellant, New York, Susquehanna & Western Railroad Company in said Supreme Court.

Dated November 28th, 1913.

COLLINS & CORBIN,
Attorneys of Appellant,
New York, Susquehanna &
Western Railroad Company.

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