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Complaint.

Hudson County Circuit Court.

HERMAN BRAUER and JOSEPH  
BRAUER, partners trading as  
BRAUER BROTHERS,

*Plaintiffs,*

10

*vs.*

NEW YORK CENTRAL AND HUDSON  
RIVER RAILROAD COMPANY,

*Defendants.*

Plaintiffs, Herman Brauer and Joseph Brauer,  
both residing at the City of Jersey City, in the 20  
County of Hudson and State of New Jersey, part-  
ners trading as Brauer Brothers, say that:

FIRST COUNT.

1. Defendant is a corporation. At the time  
within stated, defendant operated a steam railroad  
upon tracks laid through the City of Jersey City,  
in said County of Hudson.

2. The said railroad, within said city, crossed 30  
a public street or highway the name whereof is  
unknown to plaintiffs but which runs and extends  
from the foot of the wagon elevator or inclined  
railway, in said city of Jersey City, to Paterson  
Street, in the City of Hoboken, in said County,  
upon the same level with said street, and persons  
approaching said railroad on said street in ve-  
hicles drawn by horses were prevented by certain  
large buildings of great height, to wit, of the  
height of fifty feet, and by a certain elevated iron 40

*Complaint*

railway and other buildings then and there being near to the said railroad and the said street, from seeing any locomotive or train which might be approaching said crossing on said railroad soon enough to avoid being struck thereby. At said crossing defendant had provided and stationed a flagman to give warning to persons approaching  
10 or passing thereon by displaying a red flag when a train was approaching said crossing and a white flag when the way over said railroad at said street was safe and clear; and it was the duty of said defendant, by its said flagman or servant, for the protection of all persons crossing said railroad at said street, to give warning as aforesaid or in some reasonable manner of the approach of said locomotives and trains.

20 3. On November 16, 1914, defendant, by its said flagman, negligently failed to give warning or signal of the approach of a train of cars, then being operated by defendant's servants along said railroad in the direction of said crossing; and said defendant negligently failed to give signal of the approach of said train by ringing a bell or blowing a whistle, or by giving a sufficient warning of said approach in any other manner; and instead of displaying a red flag to denote the approach of said train the said flagman negligently  
30 and carelessly displayed a white flag, denoting that the way over said railroad at said street was safe and clear.

4. Because of said negligence and negligent omissions of said defendant, said train collided with a horse and wagon belonging to plaintiffs and then being lawfully driven by the servant of plaintiffs over said crossing and across said railroad; whereby the said horse was killed and the  
40 said wagon and the harness on said horse and the cider and barrels with which said wagon was loaded were destroyed.

*Complaint*

## SECOND COUNT.

1. All the statement of the first paragraph of the first count are made part of this count.

2. The said railroad, within said city, crossed a public street the name whereof is unknown to said plaintiffs but which runs and extends from the foot of the wagon elevator or inclined railway in Jersey City, to Paterson Street, in Hoboken, in said County of Hudson, upon the same level with said street; and on November 16, 1914, a horse and wagon belonging to said plaintiffs was being lawfully driven by the servant of the plaintiffs over said crossing and across said railroad, and an engine and train of cars were then and there being operated by defendant's servants along said railroad in the direction of said crossing at a great speed, to wit, at the speed of thirty miles per hour, and the said defendant then and there so negligently and carelessly drove the said engine and train upon and along said railroad across the said street at the great speed aforesaid, and without giving any warning of the approach of said engine and train, either by ringing any bell or by blowing any steam whistle, or in any other manner whatsoever, that they collided with said horse and wagon, whereby said horse was killed and the said wagon and the harness on said horse and the cider and barrels with which said wagon was loaded were destroyed.

3. At the time of said injury plaintiffs were engaged in the cider, vinegar, birch beer and general bottling business, and by reason of the loss of said horse and wagon plaintiffs suffered great inconvenience and loss in their said business.

## THIRD COUNT.

1. All the statements of the first paragraph of the first count are made part of this count.

*Complaint*

2. The said railroad, within said city, crossed a public street or highway the name whereof is unknown to said plaintiffs but which extends from the foot of the wagon elevator or inclined railway, in said City of Jersey City, to Paterson Street, in the City of Hoboken, in the said County of Hudson, upon the same level with said street; and said de-  
 10 fendant at the time next hereinafter mentioned had placed a flagman at such crossing. On November 16, 1914, a horse and wagon belonging to said plaintiffs was being driven by the servant of plaintiffs along said street in an easterly direction and on approaching said crossing said servant of plaintiffs was entitled to assume, in accordance with the form of the statute in such case made and provided, that said flagman would guard said  
 20 crossing with sufficient care whereby he, the said servant of plaintiffs, would be warned of any danger in passing or driving over said crossing.

3. On approaching said crossing, the said servant of plaintiffs received no warning from said flagman or in any other manner that there was danger in his driving over said crossing and when he attempted to lawfully drive said horse and wagon over said crossing, an engine and train of cars which were then being operated by said de-  
 30 fendant on its said railroad collided with said horse and wagon; whereby said horse was killed and said wagon and the harness on said horse and the cider and barrels with which said wagon was loaded were destroyed.

4. At the time of said injury plaintiffs were engaged in the cider, vinegar, birch beer and general bottling business, and through the loss of said horse and wagon they suffered great inconvenience and loss in their said business.

Plaintiffs demand \$2,000 damages.

40

CLARENCE KELSEY,

Attorney for Plaintiffs.

Filed Clerk's Office, Aug. 1915.

Hudson County, N. J.,

John J. McGovern,

Clerk.

**Answer.**

The defendant, a corporation organized and existing under the laws of the State of New York, says that:

1. It denies the truth of the matters set forth in the complaint.

VREDENBURGH, WALL & CAREY,  
Attorneys of Defendant.

Filed Clerk's Office, Aug. 31, 1915. 10

Hudson County, N. J.,  
John J. McGovern, Clerk.

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit March 14, 1917.

The cause having been heard and submitted to the jury they returned their verdict as follows:

They say they find for the plaintiffs and against the defendants and they assess the damages of the plaintiffs on occasion of the premises at the sum of Six Hundred Forty-six Dollars Ninety Cents (\$646.90). 20

Whereupon it is adjudged that the plaintiffs recover of the defendants the sum of Six Hundred Forty-six Dollars Ninety Cents damages (\$646.90), and his costs, which are taxed at Seventy-two Dollars Forty-seven Cents (\$72.47), making in the whole the sum of Seven Hundred Nineteen Dollars and Thirty-seven Cents (\$719.37). 30

Judgment entered this 14th day of March, 1917.

LUTHER A. CAMPBELL,  
Judge.

Attest:—

John J. McGovern,  
Clerk.

## Notice of Appeal.

## HUDSON COUNTY CIRCUIT COURT.

10	HERMAN BRAUER and JOSEPH BRAUER, partners trading as BRAUER BROTHERS, <i>Plaintiffs,</i>	}	Action at Law
	<i>vs.</i>		
	NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, <i>Defendants.</i>		

20 To Clarence Kelsey, Esq.,  
 Attorney for the Plaintiffs.

Take Notice: That the defendant appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals of the State of New Jersey.

Yours respectfully,

VREDENBURGH, WALL & CAREY,  
 Attorneys for Defendant.

30 Dated, March 20th, 1917.

Service of a copy of within notice of appeal is hereby acknowledged this 20th day of March, 1917.

CLARENCE KELSEY,  
 Attorney for Plaintiffs.

*Notice of Appeal*

The answer of Luther A. Campbell, Esquire, Judge of the Circuit Court, holden in and for the County of Hudson, and within named, the record and proceedings of the Plaint whereof mention is within made with all things touching the same, I send to the Judges of our Court of Errors and Appeals of the last resort of all causes at Trenton, N. J., at the day and year within contained in a certain schedule to this appeal annexed as within I am commanded. 10

LUTHER A. CAMPBELL,  
Judge.

20

30

40

**Grounds of Appeal.**

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10	<p style="text-align: center;">HERMAN BRAUER and JOSEPH BRAUER, partners trading as BRAUER BROTHERS, <i>Plaintiffs-Respondents,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, <i>Defendant-Appellant.</i></p>	<p style="font-size: 3em;">}</p> <p>Action at Law On Appeal.</p>
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20 The Appellant states the following grounds of appeal:

- 20 1. The following questions were admitted:  
(To the witness Herman Brauer):  
 "Q. What was the market value of those barrels at that time?"  
 "Q. What was the market value of these at that time? What was the worth?" (Referring to ten gallons of cider).  
 "Q. What was that worth? What was the market value of that at the time?" (Referring to a horse blanket).

30 2. The Court refused defendant's motion to strike out all evidence in the case respecting the value of the barrels mentioned in the testimony, the value of the cider mentioned in the testimony, and the value of the horse-blanket.

3. The Court refused to direct a verdict for defendant.

40 4. The Court refused the defendant's request to charge the jury as follows:

*Grounds of Appeal*

“There can be no recovery in this action for the value of barrels, or for cider claimed to have been lost, or for the horse-blanket.”

Dated May 29th, 1917.

VREDENBURGH, WALL & CAREY,  
Attorneys of Defendant-Appellant.

Service of a copy of the foregoing grounds of  
appeal is acknowledged this 29th day of May, 1917. 10

CLARENCE KELSEY,  
Attorney of Plaintiff-Respondent.

20

30

40

## Testimony.

## HUDSON COUNTY CIRCUIT COURT,

10	<div style="border: 1px solid black; padding: 10px; display: inline-block;"> <p style="text-align: center;">HERMAN BRAUER, <i>et al.</i>, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">NEW YORK CENTRAL &amp; HUDSON RIVER RAILROAD Co., <i>Defendant.</i></p> </div>	} At Law.
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## APPEARANCES:

Clarence Kelsey, for the plaintiffs.  
20 Vredenburgh, Wall & Carey, for the defendant.

The above-entitled case was tried March 13th, 1917, before Hon. Luther A. Campbell, Judge, and a jury.

Mr. Kelsey opened the plaintiffs' case to the jury.

Mr. Carey opened the defendant's case to the Jury.

30 Mr. Kelsey: I understand it is stipulated that the defendant company is the owner and operator of these—

Mr. Carey: The defendant company operated this railroad track upon which the accident occurred. There is no question about that. We are willing to admit that.

The Court: That is the New York Central & Hudson River Railroad Company.

40 Mr. Carey: The New York Central was at that time.

*Abraham Ruben, for Plaintiff—Direct*

ABRAHAM RUBEN, a witness sworn on behalf of the plaintiffs, testified as follows:

*Direct Examination by Mr. Kelsey:*

Q. Where do you live, Mr. Ruben? A. Secaucus; 333 Secaucus Road, Secaucus, New Jersey.

Q. Did you ever work for these plaintiffs, Brauer Brothers? A. Yes, sir. 10

Q. Were you employed by them in November, 1914? A. Yes, sir.

Q. How long had you been employed by them before that? A. About a year.

Q. Do you remember the afternoon of November 16, 1914? A. Yes.

Q. What sort of work did you do for Brauer Brothers? A. I was delivering birch beer. I was working, driving for them. 20

Q. Did you make any deliveries at that time for them on November 16, 1914? A. Yes.

Q. Did you make any trips to New York that day? A. Yes.

Q. How many? A. I make two trips.

Q. Now, how did you go to New York from the place of business of the plaintiffs? What was your usual road? A. I went Palisade avenue elevator to Hoboken; I was leaving barrels to Catskill Evening Line, New York. 30

Q. That is the way you usually went to New York, is it, driving? A. Yes, sir.

Q. And on this particular afternoon you say you were driving to New York with a load of what? A. With a load of empty barrels.

Q. Were they all empty? A. I had one keg cider and 24 barrels.

Q. How many gallons, could you say? A. Couldn't say how much; five or ten.

Q. What sort of wagon did you have? Was it double or single? A. A single rack wagon. 40

*Abraham Ruben, for Plaintiff—Direct*

Q. Single truck, was it?

The Stenographer: A single rack wagon, I understood him to say.

The Court: Single rack wagon.

Q. What sort of a horse— A. M—m?

Q. Never mind. How far did you get that after-  
10 noon? A. I make two trips, and at the third trip I was hurt in the track.

Q. How far did you go that afternoon when you had this trouble? A. How do you mean how far?

Q. To what point did you go? Had you got down to Hoboken ferry? A. Went down elevator to the track.

Q. And you went down the elevator? A. Yes.

Q. Now, do you recognize that picture of the  
20 elevator that you went down, inclined road? That is the picture of it, isn't it? Inclined road that you went down? A. Yes.

Mr. Kelsey: I ask to have that marked for identification. There is no objection, is there? I offer it in evidence.

(Picture marked P-1 in evidence.)

Q. Now, you went down the incline, did you?  
A. Yes.

30 Q. How did you go from there? A. I come as far as the railroad crossing; I could not see no—

Q. Go slowly, now. You got down to the railroad crossing? A. Yes.

Q. How near to the railroad crossing? A. About fifteen or twenty feet, and I stopped there.

Q. You stopped there? A. Yes.

Q. What did you do then, Mr. Ruben? A. I was looking for a train, see a train coming; I couldn't see nothing, didn't hear a whistle; only  
40 the watchman was standing in the middle of the

*Abraham Ruben, for Plaintiff—Direct*

track there; there is four tracks, and he was standing between the four tracks with a white flag and picking up some lamps there. I don't know what he take them for; and he went into the shanty. He make to me all right; I shall cross; and he went right into the shanty.

Q. You say he was picking up some lamps there, too? A. I don't know what he was doing with 10 the lamps; only picking them up there.

Q. Had the lamps been lighted? A. No; the lamps had not been lighted; this was daylight then.

Q. What time was it about? A. Around between four and five.

Q. Was it a clear day or foggy day? A. It was a clear day; no foggy day at all.

Q. Now, you say he displayed a white flag. What did you do? A. There was a wagon coming 20 across the ferry—across the track—

Q. Oh, the other— A. (Interrupting) Yes; and he was pulling him across when I started to cross.

Q. Which way did he come? A. I come down the elevator to go to New York from Hoboken.

Q. How did the other one come? A. The other one came up on the elevator.

Q. That is, he crossed the tracks towards you? A. Yes, sir.

Q. Did he get all the way across the track before you started to cross? A. When I was on 30 the first track he was pulling off the track.

Q. Did you see any other wagon there that time, too, besides the one that crossed? A. There was before wagons crossed, and after this one crossed, and I started to cross, and by the time I was on the second track the engine gives a whistle and the watchman comes up and takes off his coat and started to wave with his coat the train shall stop and I see the train is near me, about 40

*Abraham Ruben, for Plaintiff—Direct*

two cars from me, and I jump down full speed; I jump off the track and ran away.

Q. How near was the engine to you when it blew the whistle that you have spoken about? A. About two cars long.

Q. Away? A. Yes.

10 Q. What direction did this engine and train come from? A. From Jersey City down to Weehawken somewhere.

Q. It came from south and was going north? A. It came down from Jersey City.

Q. It came from Jersey City? A. Yes, sir.

Q. And was going towards Weehawken? A. Yes, sir.

Q. And it was on the second track? A. The second track; yes, sir.

20 Q. That is, you mean the second track from where you were coming? A. From the elevator the second track; there is four tracks and he was in the second track from the elevator.

Q. Well, now, did they ring any bell on the engine? A. They didn't ring no bell, only they give a whistle when they was about two cars far away from me. As soon as I saw the watchman catch his coat and started to wave his coat the engine should stop, I jump off.

30 Q. How close was the engine to you when you jumped off? A. About two cars far away from me.

Q. Now, how fast was this train coming—this engine? A. It was coming down pretty fast.

Q. About how fast? A. I can't tell you how fast, because I don't know how many miles she runs hour; but she run down pretty fast.

Q. Have you seen express trains running? A. M—m?

40 Q. Have you seen passenger express trains running some time? A. Yes.

*Abraham Ruben, for Plaintiff—Direct*

Q. On the railroads. Well, was she going—  
how fast was she going. A. She was come pretty  
near as fast as a passenger train; coming down  
fast.

Q. Did the engine have any cars? A. Yes; she  
had freight cars.

Q. What? A. He had freight cars.

Q. Now I show you another picture of this 10  
crossing, and I ask you whether or not the second  
track that you have mentioned is the one that is  
marked on this picture with a red arrow. A.—

Mr. Carey. That is the one. We admit  
that is the one.

Q. With the arrow in the center of the track?  
A. Yes?

Q. Yes; that is the second track, isn't it? A. 20  
Yes.

Q. Now, this picture shows a curve of these  
tracks. Do you know how much of a curve these  
tracks make from that crossing south? A. Yes.

Q. What? A. I don't understand what you  
mean by it.

Q. Well, the tracks make a curve, don't they?  
A. Yes.

Q. They curve there, don't they? A. Yes.

Mr. Carey: (Sotto voice) You see, this is 30  
pretty near 300 feet south.

Q. You know where the shanty is— A. Yes.

Q. Just a minute—the watchman's shanty over  
at the New York avenue crossing, the next street  
below, south— A. Yes.

Q. Just a minute; wait till I ask the question—  
the next street south of this crossing where you  
were struck; you know that New York avenue  
crossing? A. Yes.

Q. And you know where that watchman's  
shanty is over on the east side of that crossing 40  
on New York avenue? A. Yes.

*Abraham Ruben, for Plaintiff—Direct*

Q. Now, can you tell what point on this street that leads from the elevator—this street that you passed over— A. Yes.

Q.—what point on that street you have to reach when you are going towards Hoboken before you can see this watchman's shanty over here on the east side of the railroad at the New York  
10 avenue crossing? A. Well, you got to come—you can't see, because the building is in the way; you can't see, only when you come near the track.

Q. How near the track do you have to be before you can see that shanty over here? A. About fifteen or twenty foot.

Q. Now, what buildings do you refer to? Just a minute.

Mr. Kelsey: I ask to have these pictures—  
20 this picture that I last referred to—I offer that in evidence.

Mr. Carey: No objection.  
(Picture marked P-2 in evidence.)

Q. Now I ask you on this picture which has just been offered in evidence, whether you remember this building on the south of the street that you passed over—this one in here? You remember that, do you? A. What is that, the right-hand side?

30 Q. Yes. You remember that? A. Yes.

Q. Is that one of the buildings you mean that obstruct your view of the track? A. Right-hand side there is a black building there; you could not see over this building there; and there is the posts from the elevator, too; you can't see nothing. You have got to come close to the shanty there, to the track.

40 Q. How about the watchman's shanty? I show you that on this exhibit P-1. Does that have anything to do with your view of the track? What

*Abraham Ruben, for Plaintiff—Direct*

I mean is, is that in the way of your view down the track? A. This is right near the track; it is about eight or ten foot from the track; then you are right near the track when you come to the shanty.

Q. Does that have anything to do with your seeing down the track? A. After you come to the shanty, when you come to the track, then you can see something there; but you can't see nothing before, before you come close to the track. 10

Q. Now, what happened after you jumped from the wagon? A. The train caught the wagon in the hind wheel and right to the track; swung around the horse and killed the horse.

Q. Now where were you standing when that happened? A. I ran over there near the ice office, some place near there; the other side of the ice house some place. 20

Q. What happened to the wagon? A. Broke the wagon.

Q. Well, was the wagon left on the track or what became of the wagon? A. I don't know what he was doing afterward with the wagon; I was so excited and nervous I didn't know what was going round about me; I don't know afterward.

Q. You mean you were so excited afterwards— A. I don't know what he was doing with the wagon afterwards. 30

Q. I show you another picture of that crossing with a view toward the east, towards Hoboken, and I ask you whether you know what that piece of woodwork is there, over on the other side of that crossing, over at the northeast side of that crossing. A. (After referring himself to photograph) It looks like the wagon looks.

Q. That is the wagon? A. That like the wagon looks.

Q. That is the very wagon? A. It looks; yes. 40

*Abraham Ruben, for Plaintiff—Direct*

Q. Is that where the wagon was after the accident? A. The wagon was in the track at the time. I suppose they carried it away.

Q. You mean after the accident? A. Yes; after they carried it away there.

Q. They pulled it away? A. I suppose they pulled it away, because the wagon was in the  
10 tracks.

Q. Now, what was the condition of the wagon after the train struck it? A. It was all broken up.

Q. All broke up? A. Yes.

Q. Was it fit for use after that? A. No; it ain't fit.

Q. What sort of horse was this that you drove upon this occasion? A. He was a good, and full-size horse.  
20

Q. What color? A. Black, white spot in front of the face.

Q. Do you know where the Brauers got the horse from? A. I don't know.

Q. Black horse, was it? A. Black horse.

Q. Do you know how old it was? A. I don't know.

Q. How long did you drive it before this? A. I drove him a year.

30 Q. What? A. About a year.

Q. Do you know how high those buildings are that you have described at the south of the track, and shown on this picture P-2? How high they are? How many stories, or how high? A. On the right-hand side there was a building about two or three stories high, a very high building.

Q. That is the one shown here on this exhibit P-2, with the man standing in front of it? Is that the one? That is the one is'nt it? A. That is the building.

40 Q. With the man standing in front of it? A. I didn't see the man standing there.

*Abraham Ruben, for Plaintiff—Direct*

Q. I mean on this picture, with the man standing in front of it. A. Yes.

Mr. Carey: You do not claim that those buildings are on the railroad property?

Mr. Kelsey: No; I claim that that corner is at least 25 feet back from the track.

Q. How far is that building shown on this picture P-2, the building that the man is standing in front of—how far is that from this street that you drove down that day? A. About 100 feet, I guess.

Q. About 100 feet. You helped to measure that, did you? Yes.

The Court: Which side?

Q. That is south of the city? A. Yes.

Q. It was on your right-hand side as you came down? A. Yes.

The Court: I am wondering if there is any great use of our spending much time over the question of buildings. The witness says, I think, that he was within 15 or 20 feet of the first track when he stopped, and there his view was clear of those buildings, as I understand him.

Mr. Kelsey: Well, his view was clear, but he could see from this shanty over on the east side of the track; that is all.

Q. Now, this railroad, does it run straight—when you pass on to this crossing when you drive on to that crossing, can you look right up and down the track all the way down to Jersey City? A. No.

Q. Why not? A. Because it is crooked, around.

Q. It curves around? A. Around, yes.

Q. How far—about how far down this railroad

*Abraham Ruben, for Plaintiff—Direct*

can you see from the first track that you came to? When you drive on to this first track, the first westerly track there, how far can you see down the railroad? How many feet down the railroad can you see that railroad? A. You can't see. On the right-hand side you could see right to the next corner. You can't see no more because it goes around.

10 Q. To New York avenue? A. New York avenue; because that goes around.

Q. Do you know how far it is down to New York avenue, about? A. About 150 or 200 feet.

Q. About 200 feet, do you think? A. 150 or 200; I ain't sure.

Q. Well, New York avenue is about the end of this building that is shown on this picture, P-2, with the man standing in front of it? Isn't it? Eh? A. Yes.

Q. What sort of a crossing was there there? What sort of foundation was there between the tracks at that crossing? A. There was a platform, but the tracks was a little higher than the platform—

Mr. Carey: I object to any evidence in regard to the character of the crossing. We are not charged with any negligence—

30 The Court: I do not see the value or the pertinency of it, Mr. Kelsey.

Mr. Kelsey: All right, sir. I will cut it out.

The Court: You do not charge this negligence consisted in the condition of the crossing, its method of construction or disrepair.

Mr. Kelsey: I just wanted to show how wide it was there, the general condition.

Q. Do you know how long the flagman had been in that place—this flagman, this particular one that waved the white flag that afternoon?

40

*Abraham Ruben, for Plaintiff—Cross*

Mr. Carey: Objected to as immaterial. The question is what he did.

Mr. Kelsey: We want to show he is a new man there, and unused to the conditions.

The Court: Suppose he were a new man you are not charging negligence in respect of that, that the railroad company employed a person who was unskilled in the work he 10 was called upon to do, or incompetent to do the work—

Mr. Kelsey: Not that, but we intend to show he was a new one in that capacity, and this was a mistake on his part, and it will help to show the mistake he made in waving the white flag.

Mr. Carey: What he did, of course, is evidence. We are not charged with negligence in the servants we employed. If he did a 20 negligent act, that is another thing.

The Court: It seems to me you have a way at it, but it does not seem to me this is the right way at it.

Q. When the horse was struck, how far was the horse carried by the engine? A. I can't say that. I don't know how far he was carried there; I don't know.

Q. Do you know what part of the engine it 30 was that first struck the horse? A. What number of the engine?

Q. No, what part of the engine that first struck the horse, A. No; I don't know.

Mr. Kelsey: That is all. Take the witness.

*Cross-examination by Mr. Carey:*

Q. This was your fourth trip with that horse this day, was'nt it? A. This was the third trip. 40

*Abraham Ruben, for Plaintiff—Cross*

Q. Where had you been on the other two trips?

A. I went to New York, the same line.

Q. Same truck? A. Same wagon, the same horse.

Q. Did you go the same way? A. Same way; yes, sir.

Q. What time did you start out on the last  
10 trip? A. About half-past three, quarter to four.

Q. And you were going to New York this time?

A. Yes, sir.

Q. How many barrels did you have on? A. 24, and a keg of cider was 25.

Q. And the 24 barrels were empty? A. Yes, sir.

Q. What kind of barrels were these? A. Cider barrels.

Q. How much did they hold? A. They held  
20 about 40 or 45 gallons a barrel.

Q. This truck which you were driving— A. What did you say?

Q. This truck which you had that day— A. Yes.

Q.—was that a single-horse truck? A. Single-horse truck.

Q. Wasn't it a double-horse truck, and a truck on which they used three horses sometimes? A.  
30 Three horses? No.

Q. Did they use two horses? A. Sometimes if it snowed, yes.

Q. Didn't they usually use two horses on it? A. Not oftly.

Q. What? A. Not often; when the empty barrels we used to carry we always used single horse.

Q. Didn't often use two horses on it? A. What?

Q. Didn't often use two horses on it? A. No; when we had heavy loads we used two horses,  
40 but not empty loads we never used two horses.

*Abraham Ruben, for Plaintiff—Cross*

Q. How much did these barrels weigh? A. About 60 or 65 pounds apiece.

Q. 60 or 65 pounds each. Had you driven this same horse each time that day? A. Yes, sir.

Q. Did you say anything to Mr. Brauer when you started out on the last trip about the horse being tired out? A. No, sir.

Q. Did you say anything to him about the horse being overloaded? A. No, sir. 10

Q. Didn't say anything to him about that at all? A. No, sir.

Q. Didn't you tell him that the load was too heavy? A. No, sir.

Q. The truck and the load were too heavy for the horse? A. No, sir.

Q. Do you know a man by the name of Herman Cohen? A. Yes, sir.

Q. Did you talk with him about this accident? A. Yes, sir. 20

Q. Did you tell him that you started out on the 4th trip that afternoon with this horse? A. The first trip?

Q. The fourth trip; that that was your fourth trip that you started out with this horse on that afternoon? A. This was the third trip.

The Court: The question is did you tell Mr. Cohen this was your fourth trip? 30

The Witness: I did not.

The Court: What?

The Witness: I did not.

Q. You didn't tell him that? A. No, sir.

Q. Didn't you tell Mr. Cohen that you told Mr. Brauer that— A. Yes.

Q. —that the truck was too heavy for one horse? A. No, sir.

Q. Never said anything of that kind to him about it? A. No sir. 40

*Abraham Ruben, for Plaintiff—Cross*

Q. Did you tell Mr. Cohen that Mr. Brauer told you to use the whip on the horse? A. No, sir.

Q. Said nothing to Mr. Cohen of that kind? A. No, sir.

Q. Did you tell Mr. Brauer that? A. No, sir.

Q. Did Mr. Brauer tell you to use the whip on the horse? A. No, sir.

10 Q. Nothing was said— A. No, sir.

Q. —about the load being too heavy or using the whip on the horse? A. No, sir.

Q. Did you tell Mr. Cohen that the horse stopped on the track? A. No.

Q. The horse did stop on the track, didn't it? A. No; he didn't

Q. Kept going all the time? A. He was keeping on going over easy, because the track was—

20 Q. Never mind that, please. You say he did not stop on the track? A. No.

Q. Did you tell Mr. Cohen that the horse stopped on the track and that one or two men who were standing around there tried to get the horse to start? A. No.

Q. Is that the fact? A. No.

Q. Now, as you approached this crossing you say you stopped fifteen feet away from the nearest track? A. Yes, sir.

30 Q. When you stopped there which way did you look? A. I looked both ways: this way to Jersey City, and down to the other.

Q. How far could you see down to that point? A. I was looking as far as I could see. I could not see with away the railroad track. By the time I come near the tracks—

The Court: You are asked, At that time when you stopped fifteen or twenty feet away from the nearest track—

The Witness: Sure.

40 The Court: —how far could you see each

*Abraham Ruben, for Plaintiff—Cross*

way? As I understand that is what the question is. Then how far **could you see toward** Jersey City along the tracks, and how far could you see towards Weehawken.

The Witness: This side of Jersey City you can't see much, because across the street is that ice office, and always stand the cars there.

The Court: The question is, How far could you see? 10

The Witness: About twenty or thirty foot to Jersey City.

Q. About twenty or thirty feet to Jersey City?

A. Yes, sir.

The Court: In the other direction how far could you see?

The Witness: The other way I could see maybe thirty or forty feet. 20

Q. You spoke about cars on the opposite side standing there. A. Yes.

Q. Those were cars on the Erie track, were they not? A. Yes.

Q. Were any cars standing on the New York Central tracks? A. I didn't take notice to that.

Q. You did not see any, did you? A. I didn't take notice there was standing any cars.

Q. You did not drive up closer to the track before you stopped to look? A. I was looking to see a train don't come. I wanted to be safe first. 30

Q. You say you could see only forty feet toward Jersey City down the track? At the place where you stopped— A. Well—

Q. Wait till I ask you a question, will you? Is that true that you could only see forty feet toward Jersey City from the point where you stopped? A. That is all I think. 40

*Abraham Ruben, for Plaintiff—Cross*

Q. What? A. That is what I think. I didn't measure it to see how many foot is there, but I imagine it, anyway.

Q. Could you see down to the next crossing toward Jersey City? A. When I was close to the shanty I could see the crossing.

10 Q. Could you from the point where you stopped see down to the next crossing? A. No; I could not.

Q. But when you got close to the shanty you could see down to the next crossing? A. Yes, sir.

Q. Why didn't you stop when you got closer to the track, fifteen feet, when you had a better view? A. I was stopping there; I kept on slow going; I was looking; I didn't see nothing. By the time a wagon come in front of me I was pretty near

20 crossing the track, and I crossed after him.  
Q. Is the man in Hoboken? A. A man from Hoboken come to the elevator.

Q. And you waited until he got across the tracks and followed across? A. No; he coming up the track. He was in the second track from the elevator when I started to cross.

Q. When you started to cross? A. Yes. By the time I—

30 Q. Now, wait a moment. You say when you started to cross. Do you mean when you started up from that point 15 feet from the track? When you started 15 feet from the track the man who was coming from Hoboken had crossed—how many tracks? A. Crossed about two tracks.

Q. About two tracks. Had he reached the first track of the New York Central? A. Yes.

Q. Had he crossed the first track of the New York Central? A. I don't understand what you mean.

40 Q. When you started from that point fifteen feet away from the track— A. Yes.

*Abraham Ruben, for Plaintiff—Cross*

Q. —had this man from Hoboken— A. Yes.

Q. —crossed the first track of the New York Central tracks? A. Yes; he started to cross it; yes.

Q. He had crossed the first and was starting on the second? A. Yes.

Q. Then you started up? A. Yes.

Q. How fast were you driving your horse from 10 that point on the track? A. I wasn't driving him; he kept going slow all the time.

Q. When you got near to the shanty did you look toward Jersey City? A. Yes, sir.

Q. How far could you see towards Jersey City when you looked just before you drove on to the track? A. Before I come to the track?

Q. Just about the time your horse got to the first track. A. I could see right to the next shanty 20 there.

Q. You could see down to the next crossing below? A. Yes, sir.

Q. Didn't you see the train at that time? A. No; couldn't see nothing; couldn't hear nothing.

Q. Then you drove on and crossed the first track? A. Yes, sir.

Q. Still driving slowly? A. Yes, sir.

Q. Then you drove your horse on to the second track? A. Yes, sir. 30

Q. And the horse got across the second track?

A. He got him right in the second track. I started to cross in the second track, and the engine gives a whistle and he wasn't far from me.

Q. Your horse was on the second track when you heard the whistle. A. He start to cross the second track.

Q. The horse was starting to cross the second track when you heard the whistle? A. Yes, sir.

Q. And when you heard the whistle the train was how far from you? A. About two cars far 40 away from me.

*Abraham Ruben, for Plaintiff—Cross*

Q. That would be about eighty feet away? A. I don't know how much it would be; about two cars away from me.

The Court: Can you show us in this room from where you sit over to the wall across from you, whether it was that distance or twice that distance, or once and a half that distance?

10 The Witness: It was as far like from here to the other corner.

The Court: From where you sit to the other corner over there?

The Witness: Yes.

Q. About that distance, was it? A. Yes.

Q. And you didn't see the train until after you had heard the whistle? A. Yes, sir.

20 Q. Is that right? A. Yes, sir.

Q. Then you looked in that direction, did you? A. Yes, sir.

Q. For the first time; is that right? A. Yes.

Q. And saw the train coming? A. Yes.

Q. How fast was it coming then? A. She come down very fast; she come down very fast that time.

Q. Very fast? A. Yes.

30 Q. When it was forty feet away from you? A. Yes.

Q. Now, you said it was coming as fast as an express train; is that so? A. She come pretty near as fast as an express train.

Q. How many whistles was she giving then? A. She give one whistle.

Q. That was all? A. That was all.

40 Q. What did you do after you heard the whistle and saw the train coming? A. By the time the watchman run out of the shanty and take off his coat and waved the train to stop—

*Abraham Ruben, for Plaintiff—Cross*

The Court: You are asked what you did.

The Witness: I jumped out of the wagon and I run away. I see the train is near me. I didn't want to get killed.

Q. Just as soon as you saw the train you jumped off and ran? A. If I didn't jump off I would be dead. 10

Q. But just as soon as you saw the train you jumped off the wagon and ran? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. How did you come to see the watchman who came out of the shanty when the whistle sounded? A. I heard the whistle. I looked around to see which way the train come; may be I can cross—

Q. Which side did you jump off, the right-hand side or left-hand side? A. I jump off the right-hand side. 20

Q. Toward the engine or away from the engine? A. What do you mean toward the engine?

Q. Did you jump on the side of the engine that was coming toward you, or away from the engine?

A. I jump away from the engine.

Q. Then you jumped off on the left-hand side, didn't you? A. Yes, sir.

Q. The engine was coming from the right-hand side? A. Yes, sir.

Q. You had this wagon which had a crate on 30 the top of it to hold the barrels? A. A crate?

Q. What do you call that thing that holds the barrels on the wagon? A. A rack.

Q. A rack; it had a rack on it, did it? A. Yes, sir.

Q. How high was your seat above the street? How high was the seat of the wagon above the street? A. Five feet, I guess; I ain't sure; I didn't measure it. It was a high seat.

Q. High as your head as you stood beside the wagon? A. Pretty near the same; a little over. 40

*Abraham Ruben, for Plaintiff—Cross*

Q. So it was something over five feet, wasn't it? A. About five feet.

Q. Now, was the rack full of barrels? A. Yes, sir.

Q. And the shanty was then behind you and to your right, wasn't it? A. Yes, sir.

10 Q. You say that the engine struck the hind wheel of the wagon? A. Yes, sir.

Q. Where were you when the engine struck the wagon? A. I jumped off. By the time I jumped off and started to run away the wagon was smashed already.

Q. Had you gotten across the Erie tracks when the wagon was struck? A. Sure.

20 Q. Had you gotten over to that ice plant over there? A. When I was in the Erie tracks that time was the wagon smashed already.

Q. You were running then? A. Sure.

Q. With your back towards the horse and the wagon? A. Sure; the horse and wagon was in back of me; sure.

Q. And you kept on running until you got to the office of that ice plant over there? A. Near the office, yes.

Q. What? A. Yes.

30 Q. You didn't look around until you got there, did you? A. Yes.

Q. What? A. Yes.

Q. Where did you stop and look around? A. I was right by the office; I don't know what I was doing there.

Q. Then the first that you looked around to see what was happening after you jumped off the wagon was when you got over to the office there, across the Erie tracks; is that right? A. I went across the tracks, yes.

Q. And over to the office? A. Yes.

40 Q. About how far was that? A. It is around forty feet, I guess.

*Abraham Ruben, for Plaintiff—Cross*

Q. What? A. Around thirty or forty feet.

Q. Is that all? A. That is all, I think; I don't know. I didn't measure it.

Q. And you fainted away when you got over there, didn't you? A. Yes, sir.

Q. Did you faint away when you saw what happened to the wagon? A. I don't remember that.

Q. Don't remember that? A. No. 10

Q. Now, if your wagon had gone two or three feet further it would have escaped the engine, wouldn't it? A. About—

Q. (Question repeated by the stenographer) A. If it should be only one foot away the engine wasn't able to broken it.

Q. If it had been one foot further it would not have been struck? A. The engine wouldn't catch her.

Q. Did the train stop there? A. She stopped 20  
for a while. I don't know when she stopped at the time.

Q. Didn't it stop just after the engine crossed the street; crossed the street crossing? A. The engine was right in the crossing—I don't know when it stopped.

Q. Did the engine stop right on the crossing? A. Yes; I guess he stopped it; I ain't sure about it. 30

Q. You saw that after you came out, didn't you? A. I seen it after, not right away.

Q. Now, where were you when you saw the flagman come out of the shanty? A. I was started to cross the track when I heard the whistle; he was running; then he was running out of the shanty.

The Court: Where were you? the question was.

The Witness: I was in the second track already; when he heard the whistle he run 40  
out.

*Abraham Ruben, for Plaintiff—Cross*

Q. When the flagman first came out of the shanty, where were you? A. When I started to cross he was outside by the tracks picking up some lamps, and he had a white flag, show me to cross, and he went in the shanty; then I started to cross.

Q. Now, you saw the flagman come out of the shanty and go upon the Erie tracks and the New York Central tracks? A. When I come down there he was standing there; he sees me in the shanty when I started to cross; he ain't standing there; if he standing there I would not start to cross; he stand there so long as the train was coming.

Q. So long as the train was coming the flagman should be standing? A. Yes; so long as he take his lamps into the shanty—I don't know whether he take them in to get them ready or not; but he go in the shanty and I look and see no train coming.

Q. Before you went on the track did you see the flagman come out of the shanty? A. No; he was standing there.

Q. The first you saw he was standing between the Erie tracks and the New York Central tracks? A. Yes.

Q. And facing you? A. He was picking up something from the floor. I didn't see before what it is. And after he pick up some lamps and show me the flag to cross and go right in the shanty.

Q. There were lanterns standing on the crossing there? A. By the crossing was standing two lamps.

Q. How many lamps? A. I guess two were there.

Q. What color? A. I didn't take notice to what color they are. I didn't look what kind they are.

Q. And he was picking those up? A. He picking them up from the floor.

*Abraham Ruben, for Plaintiff—Cross*

Q. When you first saw him? A. Yes, sir.

Q. Did he take them into the shanty? A. Yes; he took them into the shanty.

Q. Did he have both flags and lanterns? A. I saw only one flag, a white flag.

Q. One flag? A. Yes, sir.

Q. And two lanterns? A. Two lanterns.

Q. Were the lanterns lighted? A. Not yet. 10

Q. They were not lighted? A. No, sir.

Q. Then you saw him picking up lanterns from the tracks and the lanterns were not lighted; is that right? A. What?

Q. You saw him picking up some lanterns from the tracks— A. Yes, sir.

Q. —which were not lighted? A. Yes, sir.

Q. The things which cut off your view of the railroad tracks were these high buildings, were they? A. I could not see through the buildings. 20

Q. Yes; they cut off your view of the railroad tracks as you left the elevator— A. Yes.

Q. —and came toward the tracks. Now, did you see this wagon after the accident? A. This wagon?

Q. Yes. A. I cross there now; it is just the same as it was before. I cross there every day.

Q. When did you first see the wagon after the accident? A. About two weeks later.

Q. What were you doing? Did you go there to examine the wagon? A. I didn't go to examine the wagon. I was starting to New York again. I have to make a living. 30

Q. Do you know to what extent the wagon was damaged? A. I saw the axle was broke. The wheels was broke; the spring was broke.

Q. When did you see that? The same night of the accident? A. Not the same night; the same night I couldn't see nothing; about two weeks later. 40

*Abraham Ruben, for Plaintiff—Cross*

Q. About two weeks later? A. Yes; I couldn't see the same night.

Q. You had driven this horse for a year? A. Yes, sir.

Q. Was he a gentle horse? A. He was a good horse; full-size horse.

10 Q. Gentle horse? A. I don't know what it means, that.

Q. Kind? A. Good horse, yes.

Q. Wasn't afraid of the cars? A. No, sir.

Q. Do you remember telling a man who came from the railroad company something about this accident? A. Came to me?

Q. Yes. A. The claim agent?

Q. Yes. A. Yes.

20 Q. Do you remember telling him something about it? A. I remember he was by me; I ain't remember what he was doing.

Q. Do you remember telling him that there was a red flag on the ground there, standing on the ground at the crossing? A. I don't remember that.

Q. You say you did not tell him that? A. I ain't sure; I don't remember that. I don't know I was told him.

30 Q. Wasn't there a red flag standing— A. Not as I know.

Q. —on the ground as you approached the crossing? A. Not as I know.

Q. Not as you know? A. No.

Q. Did this watchman run down the track toward the approaching train? A. When he heard the whistle, yes; he run out of the shanty; he took off his coat and started to wave to stop the train, but he couldn't.

40 Q. How far did go down the track? A. He run only may be four or five feet. He couldn't run no further because the engine come near to him.

*Abraham Ruben, for Plaintiff—Cross*

Q. Didn't you tell this man who came from the railroad company to see you about this accident that the watchman ran down the length of a train to stop the engine—the train? A. He ran in between the track; the track ain't far from him; right he run in the track, but the train come to him further; he couldn't run in the track, otherwise he would be killed. 10

Q. He ran right down the track? A. Right in the first track; he couldn't run further.

Q. What did you mean when you said between the tracks? A. Between the tracks; between the two tracks.

Q. That is between the Erie tracks and the New York Central tracks? A. No; the first track when you come down from the West Shore.

Q. You mean between the rails of the first track? 20  
A. Yes.

Q. Did you tell the man who came from the railroad company that there was a red light standing on the floor? A. I don't remember that.

Q. You say you did not tell him that? A. I don't remember it.

Q. Do not remember about it? A. No, sir.

Q. Do you remember telling him that the lamps were lighted at that time? A. No; they ain't been lights. 30

The Court: No; the question is, Did you tell this man from the railroad company that they were lighted?

The Witness: I don't know.

Q. Didn't the man from the railroad company ask you this question, "Was it dark?" and didn't you answer, "About five o'clock; he lighted his lamps at that time." A. This was between four and five, but he didn't have lighted his lamps yet.

Q. Didn't you tell this man that he lighted his 40 lamps at that time? A. I ain't sure of that.

*Abraham Ruben, for Plaintiff—Redirect*

Q. Not sure. Didn't you tell this man from the railroad company that this truck was a team truck? A. No.

Q. Sure of that, are you? A. Yes; I was driving a team when it was single, but not when it was loaded.

10 Q. You say that the train was about forty feet away from you when you first saw it? A. About two cars long ways; I don't know how many feet it was.

Q. And it was coming very fast? A. Yes, sir.

Q. And yet it stopped with the engine right on the crossing? A. She stopped afterwards, yes, when she hit the wagon.

Mr. Carey: That is all.

*Re-direct Examination by Mr. Kalsey:*

20 Q. Do you know what happened to the harness there? A. The harness was broke up; afterwards I seen it in the place, about two weeks later; the fourteen—

Q. Any good after that? A. No; it was all broke up.

Q. What condition was the harness in before the accident? A. It was pretty near new harness. It was in use may be three or four months; that is what I think it was used.

30 Q. Do you know what became of the blanket that was used for covering the horse? A. I had a blanket and a sheet.

Q. Do you know what happened to that? A. M—m?

Q. Do you know what happened to that? A. I don't know.

Q. This man that came to you from the railroad company— A. Yes.

40 Q. —that Mr. Carey has told you about, did you tell him how this accident happened the same as you have told it here? A. About the same.

*Abraham Ruben, for Plaintiff—Redirect*

Q. You have told it here? A. I guess so.

Q. Did you tell him about the white flag? the man showing the white flag for you to come across.

A. I guess so.

The Court: What does he say? "I guess so"?

Answer repeated by the stenographer: "I guess so."

10

Q. Did you tell him that you had a double horse truck there? A. I told him we had a single-horse truck.

Q. No question about that? A. No.

Q. Now, how far had you got—can you tell how far you had got from the second track, that is the track in which this train came, when the engine hit the wagon? Do you know how many feet you had gotten away from that; how far you were away? A. How many feet I was away? 20

The Court: Yes..

Q. Yes. A. I was near the track; about the end track to cross over the other way, the other track to Hoboken.

Q. You had reached the first Erie track? A. I had crossed the first and was about to cross the other.

Q. You crossed the first Erie track, the one nearest to you? A. Yes. 30

Q. Well, those tracks there are about—those tracks there are about four feet four inches wide, aren't they? In between the tracks of this— A. Yes, sir.

Q. —in between the rails, the lines of rails of the tracks, it is about four feet four inches—well, four feet eight inches, eh? A. Yes.

Q. And between the second track that the engine came on and the nearest Erie track it was about eight feet, wasn't it? A. Yes. 40

*Herman Brauer, for Plaintiff—Direct*

Mr. Kelsey: That is all.

Mr. Carey: That is all.

Mr. Carey: Do you know how much that truck weighed?

The Witness: No; I don't know.

(Witness excused.)

10

HERMAN BRAUER, plaintiff, sworn in his own behalf, testified as follows:

*Direct Examination by Mr. Kelsey:*

Q. Mr. Brauer, where do you live? A. 221 Beacon avenue.

Q. What is your business? A. Birch beer and cider.

20 Q. You have a brother—

Mr. Carey: I admit Joseph is a partner.

Q. —Joseph, who is a partner with you? A. Yes.

Q. Now, you heard this last witness, Mr. Ruben, who was in your employ on this day, November 16, 1914? A. Yes, sir.

Q. What sort of a horse was it you had in that wagon? A. A big black horse.

30 Q. Whom did you buy him from? A. Max Sherry.

Q. What did you pay for him? A. \$340.00.

Q. This is the receipt that you got when you bought him? A. Yes; that is the receipt that I got when I bought him.

Mr. Kelsey: I offer that, if there is no objection.

(Paper marked P-3 in evidence.)

40 Q. Did you buy the horse shown on that receipt at the time shown on that receipt? A. Yes, that is the time I bought him.

*Herman Brauer, for Plaintiff—Direct*

Q. April, 1916? A. That is the time I bought him.

Q. What sort of wagon did he have at that time—the driver? A. A truck; truck.

Q. Did you buy that or did you have it— A. I built that.

Q. Did you have it made for you? A. Yes, sir.

Q. Who made it for you? A. Blacksmith on Newark avenue. 10

Q. What is his name? A. Cohen.

Q. How much did you pay for that truck? A. I don't exactly remember; I think it is about \$320.

Q. Was it under \$300.00 you paid him? Could it be under \$300.00? A. No, no, no; it was \$320.

Q. And how long before this accident of November 16, 1914, did you have that truck made for you? A. Pretty near a year before that.

Q. A year? A. Yes. I bought that nine or ten months; I don't exactly remember. 20

Q. That the truck was made? A. Yes.

Q. I thought it was two years since that truck was made. A. I don't remember.

Q. Well, how long was it? A. I can't tell you exactly. It is about a year or a little over or less.

Q. What sort of truck was it? A. It was a rack truck, to load barrels.

Q. What? 30

The Court: A rack truck?

The Witness: A rack truck, to load barrels.

Q. When you got it from him then was it a new truck? A. New truck.

Q. Did you use it steadily then between that time and the accident? A. Yes, use it off and on; sometimes if we had to have a bigger truck we used him; sometimes—you know, it is according to what we needed, you know.

Q. This day that he had the accident, was the wagon loaded with barrels? A. It was loaded with 24 empty barrels. 40

*Herman Brauer, for Plaintiff—Direct*

Q. What kind of barrels? A. Cider barrels.

Q. What was the market value of those barrels at that time?

Mr. Carey: I object to that. We haven't any evidence that those barrels were destroyed.

10 A. They weighed about—

The Court: One minute.

Mr. Carey: There is no use proving value unless they were destroyed.

The Court: We haven't any exact testimony either as to the total destruction of the truck; still we have a price in.

Mr. Carey: Yes, I understand; but there is evidence that there was damage to the truck.

20 Mr. Kelsey: I will connect that up.

The Court: I will take the testimony subject to your connecting it up.

Mr. Carey: Objection noted.

Q. (Repeated by the stenographer) What was the market value of those barrels at that time? A. \$1.50 each.

Q. The last witness stated there was a keg of cider on there. A. Yes, sir.

30 Q. How many gallons of that? A. Ten; something like that.

Q. Ten-gallon keg? A. Ten-gallon.

Q. What was the market value of them at that time? What was that worth? A. Forty or fifty cents a gallon—

Mr. Carey: Objected—

The Court: It will only be taken subject to the same connection, subject to the same condition. If it is not connected I will strike it out.

40

Mr. Carey: Objection noted.

*Herman Brauer, for Plaintiff—Direct*

Q. (Last question repeated by the stenographer.) A. Cider is worth forty or fifty cents a gallon—

The Court: What was that worth?

The Witness: Fifty cents a gallon.

Q. What kind of harness was on the horse? A. Nearly new set of harness, but it had been used. 10

Q. How old was the harness? A. About two years.

Q. What did it cost you? A. About \$45.00.

Q. What was it worth at the time of this accident? A. I couldn't tell you.

Q. What was it worth to you? How much would it cost you to replace it? A. It is worth to-day sixty-five or seventy dollars a set.

Mr. Carey: I move to strike that out.

The Court: It may be stricken out. 20

Q. At that time what was the market value of that harness? A. New harness at that time was worth \$45.00

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

The Court: It may be stricken out. You were asked what that harness cost you. You said \$45.00. You said that you had used it a year.

The Witness: Yes. 30

The Court: The next question is, having in mind that it cost you \$45.00 and it was used for a year,—then the question is, What was its reasonable market value at the time this accident happened?

The Witness: Ten dollars wear, too.

The Court: You mean to say then it was reasonably worth at the time of that accident \$35.00? Is that what you mean?

The Witness: \$35.00; yes. 40

*Herman Brauer, for Plaintiff—Direct*

Q. Now, did you have a blanket on there? A. Yes, sir.

Q. What was that worth? What was the market value of that at the time? A. New blanket is \$9.00.

10 Mr. Carey: I do not want to repeat this objection all the time.

The Court: That, too, will be taken with the same objection and subject to the condition that you connect it up—that it was lost or destroyed. You might ask him what a blanket such as that did cost, how long it had been used, and then let him give you an existing value of it.

Q. What did that blanket cost you? A. \$9.00.

20 Q. And how long had you had it before the accident? A. That was new blankets, too.

Q. How long before the accident did you buy the blankets? A. Well, we bought them in October. When the weather gets cold we buy a blankets.

Q. A month before the accident? A. Just a month before, October.

Q. What was the reasonable market value of the blanket at the time of the accident, then? A. It was the same price.

30 Q. How much? A. \$9.00.

Q. Now, when did you first hear of this accident having happened? A. They telephoned up to me.

Q. What did you do then? A. Well, I went down there.

Q. What time did you get down there? A. It was a little after five.

Q. Was it dark yet? A. Well, it just begin to go dark.

Q. Now, you mean beginning, or was it dark?

40 A. Well, it begin—you know, just it was getting dark; you could see yet, but it wasn't light.

*Herman Brauer, for Plaintiff—Direct*

Q. Now, what condition did you find there? A. Well, I found the truck smashed up and the horse laying between the track and the sides; and the harness was cut up and some harness was laying under him; and the blanket was gone and the barrels was gone; the blanket was gone.

Q. Was there any evidence around there to show what happened to the barrels; that they were broken? A. When I come there there was no blankets left. 10

Q. What condition was the wagon in? A. All broke up in pieces.

Q. Well, what do you mean, broken up in pieces? A. There was nothing to pick up; everything was gone; the axles was broke down; the springs was broke; the running gear was turned over and bent; the wheels was turned over.

Q. Where did the wagon lie when you first saw it? A. She was laying between the track and the space—you know; there is four tracks there; there is a big space; she was laying between the track? 20

Q. Where was the horse? A. Laying right off the track.

Q. It was the same horse, was it? A. It was the same horse; same black horse.

Q. That you paid \$340.00 for? A. Yes, sir; the same black horse. 30

Q. Where did you find Ruben, the driver? A. They had him in the—there is an ice office there and the ambulance was there. I don't know what they done with him. I know he was kind of shaked up, whatever it was; and they took him home.

Q. Now, do you know how far you could see down that railroad track towards Jersey City when you reached the center of the first westerly track of that crossing? A. Yes.

Q. How far towards the south can you see towards the railroad there? A. You can't see any- 40 thing there.

*Herman Brauer, for Plaintiff—Direct*

Q. No; how many feet down can you see? Not what you can see, but how many feet down— A. Towards Hoboken?

Q. No, towards Jersey City—can you see? How far down? You know where the next crossing is below, don't you? The end of this building here shown on this picture, P-2, with the man in front  
10 of it. A. Yes.

Q. How far beyond the end of that building can you see these tracks? A. Forty or fifty feet.

Q. Beyond it? A. Yes.

Q. That is all? A. That is all you can see.

Q. You mean there is a curve there? A. Yes.

Q. The track curves around the building? A. The track goes this way (indicating a curve).

Q. Now, did you find any of the cider there when you went there? A. No, sir.

20 Q. What happened to that? A. Well, I don't know what happened to it.

Q. Did you inquire around there for those barrels and that cider? A. I did.

Mr. Carey: Objected to.

The Court: Why?

Mr. Carey: Well, all right; I withdraw the objection.

30 Q. Did you find where they were or what happened to them? A. Well, I found from information that people seen—

Q. I don't care what people told you. A. The people seen some boys carting them over the lots.

The Court: Did you see them?

Q. Did you succeed in finding them? A. No; I didn't find it; no.

Q. Now, did you ever remove the wagon from that place? A. I didn't.

40 Q. Have you seen the wagon there right along since that thing happened? A. Yes, sir.

*Herman Brauer, for Plaintiff—Direct*

Mr. Kelsey: I would like to offer this picture, this third picture, Mr. Carey, if there is no objection.

Mr. Carey: All right.  
(Marked P-4 in evidence.)

Q. Do you see that wagon on that picture anywhere? A. That is it; yes, there it is. 10

Q. You point to a spot at the northeast corner of this crossing, do you, as the place where the wagon is? A. Yes; where it lays now.

Q. That is the same wagon, is it? A. That is the same wagon.

Q. Why didn't you remove the wagon. A. There was nothing to remove.

Q. How about the wheels? A. Well, it is gone.

Q. Well, were they on there when you got down there? A. When? 20

Q. That night when you got down there. A. Yes; they was broke.

Q. They were broken? A. Yes.

Q. Well, was the wagon, in your opinion, worth removing for repairing? Was it worth taking away to repair? A. There was nothing left there except the two rails.

Q. What rails do you mean? A. From the truck, you know.

Q. Rails, eh? A. Rails; that is what we call the rack truck. 30

Q. Oh, the two racks. Do you know how far that building which was shown on picture P-2—what they call the cooperage works to the south, where the man is shown standing in front on P-2—  
A. Yes.

Q. Do you know about that building? A. It is a long building.

Q. Do you know about it? A. Yes.

Q. Did you go down and measure around that place? A. Yes, sir. 40

*Herman Brauer, for Plaintiff—Direct*

Q. How high is that building about? A. It must be about—it is a two-story building; about forty feet high, I think.

Q. Do you know how far it is back from the tracks about? This corner here nearest the street that the driver passed down. A. You mean from—

Q. That is, from the corner to the nearest track.

10 A. No.

Q. You don't know, do you? A. No.

Q. You don't remember that, do you? A. I don't know.

Q. As you come down this street what is there to obstruct the view, if anything other than that building, as you passed on that crossing from the elevator? A. Two buildings.

20 Q. But outside of the building that we have been talking about what else is there there? A. There is the post, iron poles that the elevator is on.

Q. What else, if anything? A. There is another little house there.

Q. You mean the watchman's shanty? A. Yes, yes.

Q. Shown on this exhibit P-1, the corner of the crossing there? A. Yes; that is the one; yes.

30 Q. And how far is that building, that cooperage building there with the man shown on this picture standing in front of it—how far is that building from this street that your driver passed down? A. I think it is about 25 feet, isn't it?

Q. No, but from the street over to that building there, how far is it across there? Don't you remember? Well, the last witness said it was 100 feet. A. May be it is that far.

Q. Well, is that right or not? A. It is right.

Q. You measured that, didn't you? A. Yes.

Q. Well, how far is it? A. It is about 100 feet.

40 Q. Did you have any talk with the watchman there that night when you got there? A. No, sir.

*Herman Brauer, for Plaintiff—Direct*

Q. Did you see the watchman there? A. No, sir.

Q. Didn't you inquire of him at all as to how the accident happened—the watchman—or make any inquiry around there? A. Well, I inquired and the people told me—

Q. No, no; I don't care what the people told you. I ask you if you inquired of the watchman. A. No; I didn't. 10

Q. Did you see any of the gentlemen down there that night that are in this front row here and talk with them that night? A. Not as I can remember.

The Court: What time did you get there that night?

The Witness: A little after five.

Q. What time did your man drive away from your place, do you know, about? A. A quarter after three or half-past three. 20

Q. Did you go down just as soon as you got the telephone? A. Yes, sir.

Q. Do you know who telephoned you? A. What?

Q. Do you know who telephoned you? A. No.

Q. How long did it take you to go down there from your place? A. It didn't take very long; I went right down there; I got the horse fixed and went down there. 30

Q. How long, about? A. About fifteen minutes.

Q. Where is your business? A. 150 Beacon avenue.

Q. What street is that? A. Summit.

Q. Near Summit avenue? A. Between Summit and Central.

Mr. Kelsey: That is all.

*Herman Drauer, for Plaintiff—Cross**Cross Examination by Mr. Carey:*

Q. You drove down with the horse and carriage? A. Horse and wagon.

Q. You knew an accident had happened down there? A. What?

Q. You knew an accident had happened down there? A. They telephoned me, yes.

10 Q. Was the horse all hitched up? A. Hitched up?

Q. Yes; was he? A. No, sir.

The Court: The horse that pulled the wagon that you went down in, was it already hitched up?

The Witness: The driver was coming in from the road, and it was hitched; yes.

20 Q. You went down pretty fast? A. Well, I don't know if I drove just accordingly.

Q. I show you paper— A. Yes.

Q. Did you sign that paper? A. Yes, sir.

Q. You signed that when the claim agent from the railroad company came to see you about this, didn't you? A. No; I was down to his office.

Q. You were down to the office? A. Yes, sir.

Q. And made this statement and signed it there? Did you? A. Yes, sir.

30 Mr. Carey: I ask that this be marked for identification.

(Paper marked D-1 for identification.)

Q. You can read and write, can't you? A. Well, yes; a little.

Q. Now, you say that the driver left your place at half-past three? A. About that time, yes; half-past three.

Q. You made this statement four days after the accident, didn't you? A. I didn't.

40 Q. What? A. I didn't.

*Herman Brauer, for Plaintiff—Cross*

Q. You made the statement at the claim agent's office? A. Yes.

Q. Where? A. At the West Shore Railroad.

Q. Where? A. Weehawken.

Q. At Weehawken? A. Yes.

Q. And didn't you make it on the 20th day of November, 1914? A. I don't remember what day it was; but I know it took longer than four days. 10

Q. Longer than four days? A. Yes.

Q. Well, you had a distinct recollection of what took place, did you not? A. Of what?

Q. You had a distinct recollection, then, in regard to the things which had taken place this afternoon when the accident happened? A. That has taken place?

Q. You had a distinct recollection of what had taken place on the afternoon that this accident happened, when you went down to the claim 20 agent's office and made this statement? A. Yes.

Q. Now, in this statement you say that the driver left your factory about 4:30 p. m. A. I did not say so.

Q. What? A. I did not say so.

Q. That is what this statement says. A. I did not read over what he was writing over.

Q. You didn't read it over? A. No; I asked him a copy and he didn't give it to me.

Q. You signed this? A. Yes, because he said 30 he was going to settle with me.

Q. I don't care about that. A. I want to tell you something, too.

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

The Witness: I asked him for a copy and he would not let me have it.

The Court: That portion you asked to have stricken out, "because he said he was going to settle," may be stricken out.

*Herman Brauer, for Plaintiff—Cross*

Q. Now, you say that the barrels were worth how much apiece? A. \$1.50.

Q. Dollar and a half? A. Yes.

Q. Why did you say in that statement that they were worth \$1.35 apiece? A. I didn't say that. I said \$1.50.

10 Q. Didn't say that. And the cider you say was worth how much a gallon? A. About 40 cents.

Q. Why did you say in that statement it was worth 15 cents a gallon? A. I didn't say that.

Q. You did not? A. No.

Q. Now, who made this truck for you? A. Cohen.

Q. What Cohen? A. The blacksmith on Newark avenue.

Q. Cohen on Newark avenue? A. Yes.

20 Q. Is he there now? A. I don't know; don't know.

Q. How did you pay for it? A. How did I pay for it?

Q. Cash? A. No, sir.

Q. Cheque? A. Well, pay him cheques; yes.

Q. Can't you tell us exactly how much you paid for the truck? A. No, I can't tell you; it is \$320.00—you know, I made an agreement with him for the truck.

30 Q. Well, you have your cheques that you paid? A. Well, I got more cheques than I paid him.

Q. What? A. I got more cheques than I paid him. I can show you a thousand dollars' worth of cheques for him.

The Court: You are asked about the cheques for this particular truck.

The Witness: I didn't pay him at one time. I paid him \$50.00, \$25.00, \$15.00, and he done some more work for me.

40 Q. Have you tried to find out exactly how much you paid for this truck? A. I did not.

*Herman Brauer, for Plaintiff—Cross*

Q. Haven't tried to find that out? A. No, because I remember—

The Court: No; the question is, Have you tried to find out? The answer is "No."

Q. You knew you were going to testify as to the amount you paid for the truck, didn't you?

A. Yes. 10

Q. How long was it after you got the truck before you had finished paying for it? A. How long?

Q. Yes. A. I couldn't tell you that.

Q. A year? A. I couldn't tell you, because—

Q. How long did you use this truck? A. How long I used it?

Q. Yes. A. I guess it was about a year in use.

Q. About a year? A. Yes.

Q. Did you begin to use it right off after it was built? A. Yes, sir. 20

Q. Did you go to Cohen to find out how much you paid for the truck? A. Yes, sir.

Q. Did you go to see Cohen to find out when the truck was built? A. No, sir.

Q. Didn't try to find that out at all? A. No, sir.

Q. Isn't it a fact that this truck was built over four years before the accident? A. I couldn't—  
No, sir. 30

Q. What? A. No, sir.

Q. You swear it was not? A. Well, I don't remember, but I would not swear it was not, and I would not swear it was.

Q. And you would not swear it was over four years before the accident? A. No, we didn't build one truck by him.

Q. What? A. I say we didn't build one truck by him; this truck was built a year before.

Q. This truck was built a year before? A. Yes.

Q. Do you swear that was all— A. I will not swear. 40

*Herman Brauer, for Plaintiff—Cross*

Q. —the length of time this truck was built before the accident? A. I will not swear.

Q. You will not? A. No.

Q. In this statement you say "I built the truck about four years ago." A. I didn't tell him that.

Q. Didn't say that? A. No.

Q. You signed that, didn't you? A. Well, I  
10 asked him a copy.

Q. Just answer my question, please. A. Well, I am answering you.

Q. No, you are not answering me. Answer my question. You signed that statement? A. Yes.

Q. "It was built about four years ago"? A. Yes.

Q. "And cost about \$300.00"? A. Yes.

Q. Didn't you get a bill for this truck? A. I don't remember.

20 Q. Don't remember that? A. I suppose I did get a bill.

Q. Yes. You saved the bill for the horse, didn't you? A. Well, I just happened to have it.

Q. What? A. I just happened to have it. might have—

Q. Don't you save the receipted bills that you get after you pay them? A. For all I know I might have it, too.

30 Q. Did you look for the bill for this truck. A. I did not.

Q. The harness, you say, was worth \$35.00? A. Yes.

Q. How much did you pay for it? A. Well, \$45.00; that is a new set of harness.

Q. Did you pay \$45.00 for it? A. Yes.

Q. When? A. I don't remember when.

Q. Wasn't that two years before the accident? A. I could not tell you.

40 Q. Well, do you say it was not two years before the accident? A. Well, it must have been a year then; I didn't buy one harness.

*Herman Brauer, for Plaintiff—Cross*

Q. Wasn't it more than a year? A. I couldn't tell you that.

Q. In the statement you say "I had this harness for a couple of years." A. Well, may be that was this harness; may be it was the other harness; I ain't got one set of harness.

Q. Well, you were telling the truth to the claim agent, weren't you? A. What? 10

Q. You were telling the truth to the claim agent, weren't you? A. Well, I told him—

Q. Didn't you tell the truth to the claim agent? A. I told him what is there, but, of course, I don't know what he put in there—

The Court: Listen to what the stenographer reads you.

Q. (Repeated by the stenographer) Didn't you tell the truth to the claim agent? A. I don't remember I told him the price; if it is the truth or not, I don't remember. I got not one harness; I have seven harnesses now; so I can't have in my mind how much I paid for it. 20

The Court: We are not concerned so much just now as to what is in this statement, but you are asked whatever you did tell to the claim agent, you told him the truth, did you or didn't you?

The Witness: Can I remember now what I told him? 30

The Court: Answer the question. Did you tell him the truth or didn't you tell him the truth?

The Witness: I told him the truth, what I think. I asked him for a copy and he would not give it to me.

The Court: Strike that out, Mr. Victory.

Q. Did you take the harness home with you? A. I took the collar because that was pulled off, off the bridle. 40

*Herman Brauer, for Plaintiff—Cross*

Q. And that is all you saved from the harness?

A. That is all I saved from the harness.

Q. Where was the rest of it? A. Laying under the horse.

Q. Why didn't you take that? A. Because there was nothing left.

Q. The blanket you never saw? A. No, sir.

10 Q. And you didn't see anything of any of the barrels? A. Barrels, no, sir.

Q. No sign of any barrel or any piece of a barrel around there? When you got there? A. All I heard—

The Court: No; if you saw it.

A. I didn't see it, no.

Q. What did this truck weigh? A. It weighed—I couldn't tell you now.

20 Q. Well, tell us about how much it weighed. A. About (laughing)—I suppose about fourteen hundred pounds, twelve hundred pounds. I don't remember. I never weighed it.

Q. It was a truck that you used two horses on sometimes, and three horses on sometimes, was it not? A. Yes, sir.

30 Q. Now, you say this rack that you see in the picture here is the rack that belonged to the wagon? A. Yes.

Q. The rack is not broken at all, is it? A. Sure, it is broken.

Q. Where? A. Well, one side, I think; I didn't take notice to it.

Q. Don't see anything in there that looks like a break, do you? A. All right; if it isn't broken, all right.

Q. Where were the wheels when you got there? A. Eh?

40 Q. Where were the wheels when you got there? A. I don't know; I didn't take them.

*Herman Brauer, for Plaintiff—Cross*

Q. Didn't see them at all? A. No, sir; they were broke when I got there.

Q. Did you see them at all that night when you were there? A. I saw broken wheels that night when I was there.

Q. How many did you see? A. There was one, two—three broken wheels there.

Q. Three broken wheels. Where were they? A. 10  
They were laying just around the wagon, around the truck.

Q. Where was the wagon when you got there?

A. It was laying between the track.

Q. Between what track? A. Between the West Shore railroad tracks.

Q. Between the rails of the West Shore tracks?

A. Yes, between the rails; there is one track, and there is another one, and there was a space there, and she was laying over there after they moved it. 20

Q. That was the space between the Erie tracks and the New York Central tracks; is that where the wagon lay? A. Yes; I think it was.

Q. Where did the horse lie? A. Right against the truck.

Q. You only saw three wheels then? A. What?

Q. You only saw three wheels of the wagon? A. (No answer.) 30

Q. You only saw three wheels of the wagon that night? A. Broke, and one was on top.

Q. On top of the wagon? A. Yes; she was laying overboard, you know; she was laying overboard.

Q. And that was not broken? A. I don't think so; I haven't looked.

Q. How were the other wheels broken? A. The spokes—you know, they were turned over.

Q. How many of the spokes? A. I suppose the three; I didn't take notice to it. 40

*Herman Brauer, for Plaintiff—Redirect*

The Court: How many of the spokes in the three wheels?

The Witness: They were all broken.

Q. Everyone of them? A. Yes.

Q. How about the axles of the wagon? Did you notice these? A. There was one axle that  
10 was absolutely broke in two.

Q. Yes? A. Yes.

Q. Is that all? A. Yes, sir; broke in two.

Q. And there were springs to the wagon? A.  
Broke.

Q. Eh? A. Broke.

Q. How many springs were broken? A. I haven't looked.

Q. You have not looked for that? A. No.

Mr. Carey: That is all.

20

*Redirect Examination by Mr. Kelsey:*

Q. How long after the accident did you make this statement that Mr. Carey has referred to, this statement for the company? A. I don't remember how long it was after that.

Q. You testified you didn't look up the question as to how much you paid for the truck. Why did you do that? Was it necessary to look it up? A. I think it was not necessary; I never thought the  
30 trial would come up.

Q. Did you know without looking it up how much it was? A. I did know; yes.

Q. Who did you say was the man that built the truck? A. Cohen.

Q. Did you ever get any bill from him for the truck? A. I got lots of bill.

Q. Did you get a bill for this wagon from him? A. I don't remember if I did or not, but I suppose I had it.

40 Q. You say you paid him cheques for this and for other work? A. Yes, sir.

*Herman Leme, for Plaintiff—Direct*

Q. In installments? A. Yes.

Q. Have you got those cheques? A. Yes, sir.

Q. Have you got all the cheques you paid him?

A. Yes, sir; I guess I have.

Mr. Kelsey: That is all.

By Mr. Carey:

Q. You didn't see the blanket at all that night? 10  
Did you? A. What?

Q. You didn't see the blanket at all that night,  
did you? A. It was dark.

The Court: Did you see the blanket, or did  
you not see it?

The Witness: No.

By Mr. Kelsey:

Q. Was the blanket there? A. I haven't seen 20  
no blanket.

Q. Did you look for it? A. I looked at the  
truck.

Q. If it had been there would you have seen  
it? A. I didn't see it.

Q. If it had been there would you have seen  
it? A. If it was there I would have seen it; it  
certainly was not there.

(Witness excused.)

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30

HERMAN LEME, sworn on behalf of the plaintiff,  
testified as follows:

*Direct Examination by Mr. Kelsey:*

Q. Mr. Leme, where do you live? A. I was go-  
ing to the elevator—

The Court: No, no. Where do you live?

The Witness: I live 609 First street; but  
my place is a blacksmith shop; I keep on Har- 40  
rison street; 87 Harrison street.

*Herman Leme, for Plaintiff—Direct*

Q. Hoboken? A. Yes, sir.

Q. And you are a blacksmith? A. Yes, sir.

Q. Were you a blacksmith at this time in November, 1914, when this accident happened? A. Yes.

Q. Did you see something of this accident? A. Yes, sir.

10 Q. Where were you going that day? A. I was going to the elevator and then I was coming to the tracks—near the tracks I was—and this driver was going on the tracks. He was by the first tracks when I saw him, and I was before; and I was coming near and he was coming near to me; then comes some noise and the train just comes out and hit him, and at the same time he jump off—I don't know he jump off or fall off—  
20 and let loose of the horse; and I got scared and I stayed there for about half an hour; and that is all I know.

Q. Now let us have that a little slower so we all get it. You say you heard a great noise before the engine hit the wagon? A. Yes.

Q. What noise was that? A. The train was whistling when she come, just right to us.

Q. Now, where were you in regard to this crossing—well, let me show you this picture here and see if you recognize that picture, exhibit P-1.

30 Do you recognize that picture? A. Yes, sir.

Q. That looks like it, doesn't it? A. Yes, sir.

Q. Eh? A. Yes, sir.

Q. And you were coming that time from Hoboken; that is, you were coming up this street here, weren't you? That is the street that runs across this crossing here. A. Yes; but I was on the left side.

Q. You were on the left side, over near the ice house, you mean? A. Yes, sir.

40 Q. Over near the ice house? A. Yes, sir.

*Herman Leme, for Plaintiff—Direct*

Q. Now, the ice house is marked here "Hudson terminal," isn't it, on this exhibit P-4? That is the ice house there, isn't it? A. Yes.

Q. And you were coming that time from the east towards the hill? A. Yes, sir.

Q. How far were you down this street that you talked about—how far were you from the crossing on that street—how far east of the crossing were you on that street when the engine hit the wagon? A. I was about ten or twelve feet; I was just near.

Q. Right near the crossing? A. Yes, sir.

Q. Now, was there any bell or whistle blown—was there any bell rung or whistle blown by that engine before the one you have told about? A. No.

Q. You have told about hearing this whistle. Now, was that the only whistle blown or bell rung by that engine at that time when she was approaching that crossing? A. I think that was the only whistle; yes, sir.

Q. You think it was? A. Yes, sir.

Q. Well, that is all right; that is what I asked you. That is enough. If there had been any other bell, or whistle blown would you have heard it? A. No, sir—

Mr. Carey: I object—

Mr. Kelsey: Well, I consent to it's being stricken out.

Q. How near was that engine to the wagon, then, when it started to blow that whistle, in your opinion? A. Well, to the wagon it was about 40 feet away; 40 or 45; something like that.

Q. Now, did you see this watchman out there on this crossing at that time? A. Yes, sir; I seen him going into the house. He was on the middle of the track and he was going into the house,

*Herman Leme, for Plaintiff—Direct*

and then he turned back and he was running past that way with his hands up; so I didn't see the train that time; and then the train come right in the meantime—[Answer unfinished by the witness]

10 Q. How near the house did he get before he started to run that way? A. What is that?

Q. How near to that shanty did he get before he started? Did he get into it? A. No, he was not near yet; he was near it, but about six or seven feet he was from it.

Q. To the shanty when he started to run toward the train? A. Then he had something in his hands and he put it down, and he started to run that way with his hands up toward the train.

20 Q. Now, you saw this wagon afterwards—the wagon that was hit, you saw it afterwards there? A. Yes, sir.

Q. What was its condition afterwards, Mr. Leme? A. It was all broken; there was nothing left. The two sets racks—that was all that was standing; and, of course, the bottom part.

Q. The bottom part? A. And the axle.

Q. Were the wheels broken? A. The wheels was broken, yes..

30 Q. How about the springs and the axle? A. One axle was broken and the spring was all broke; a few of them was not broken, and a few of them was twisted like, or squeezed.

Q. In your opinion was that condition worth while repairing? Would it have paid to repair that wagon? A. I don't think so, because he needed new springs and all; the axles could be welded.

40 Q. How fast was this train running—that engine and train? A. Well, it was very fast; when I came there, when I was going up from the center the train was right there.

*Herman Leme, for Plaintiff—Direct*

Q. You know how fast forty mile an hour is? A. Yes, I do; I don't know exactly.

Q. Can you tell when a train is running about forty miles an hour? A. I suppose when forty miles an hour is as fast as a train could go; I don't think she went as fast as she could go, but she was very fast.

Q. Did you have any talk with the watchman there after the accident? A. No, sir. 10

Q. Where did the watchman go after the accident, do you know? A. He was there; he just run around the train and came to the front.

Q. Did he talk to anyone about it? A. No; I didn't talk to him.

Q. Did the watchman talk to anyone about it, do you know? A. I don't know.

Q. Did you hear him say how long he had been there at that crossing? A. No. 20

Mr. Carey: I object to that.

The Court: Well, he says no, anyway. It would not be relevant, anyway. Any of this conversation would not be relevant. Over objection I would not admit it.

Q. What time of day did this accident happen about? A. It was after four; about a quarter to five; something like that. 30

Q. Wasn't it dark yet? A. It was about like this time, a little dark, just a little dark; it was not dark yet.

Q. It was starting to get dark? A. Yes; people used wagons without lights, so it was not dark.

Q. It was a clear day, was it, a good clear day? A. Yes.

Mr. Kelsey: I think that is all.

The Court: Cross examine.

*Herman Leme, for Plaintiff—Direct**Cross Examination by Mr. Carey:*

Q. You say the first you noticed of any train was when you heard the big noise? A. Yes.

Q. What was that noise? A. It was whistling.

Q. Noise of the train? A. No, the train was whistling; as she come she started whistling, and the truck, I suppose, was creeping along, and it  
10 started to make a long noise.

Q. How near were you to the Erie tracks at that time? A. Four or five feet I was; just near.

Q. Four or five feet. Now, from that point four or five feet from the Erie tracks how far can you see toward Jersey City, looking down the railroad tracks? A. Well, there was an ice freight standing right in front of it; you couldn't see.

Q. An ice train? A. Yes, there was an ice dock, and there was freights standing there with ice.

20 Q. How near were those cars to the crossing? A. Well, about twenty feet.

Q. About five feet from the crossing? A. More than that; about twenty feet.

The Court: Twenty feet.

Q. Oh, twenty feet from the crossing? A. Yes, sir.

30 Q. So when you were four or five feet away from the Erie track those cars did not obstruct your view down the West Shore track or the New York Central tracks, did they? A. To Jersey City they interfere.

Q. What? A. To Jersey City side.

Q. They were on the Erie tracks, weren't they? These cars were on the Erie tracks? A. No; when I was walking on the left side, and right there was standing tracks—

40 Q. Just a moment. Do you know where the Erie tracks are there? A. I don't know the Erie —which one is first.

*Herman Leme, for Plaintiff—Cross*

Q. From Hoboken, the first and second ones.  
A. The first and second tracks from Hoboken are Erie tracks, yes.

Q. They are on the same side as that ice house. Now, those cars were standing near the ice house, weren't they? A. Yes, sir.

Q. On those tracks right in front of the ice house? A. Yes, sir. 10

Q. And those are the Erie tracks? A. Yes, sir.

Q. Now, when you were four or five feet from the Erie tracks and those cars were twenty feet away from the crossing, they would not cut off your view toward Jersey City along the New York Central tracks, would they? A. That is over next to the hill. Well, they cut off, sure; I could see about thirty or forty feet away; that is all I could see.

Q. That is all you could see? A. Yes. 20

Q. Towards Jersey City? A. Yes.

Q. On this track that the train was coming on? A. Yes, sir.

Q. Now, you heard the engine whistle there? A. Yes, sir.

Q. How many blasts of the whistle? A. One long whistle—"W-h-o-o-o"—like that.

Q. One long whistle? A. Yes.

Q. You had not heard any whistle before that A. No. 30

Q. Do you know what the next crossing is toward Jersey City from this crossing? A. Yes, sir.

Q. Do you know where that is? A. Yes.

Q. Didn't you hear the whistle down below that crossing? A. No, I did not.

Q. When you were four or five feet from the Erie tracks coming up from Hoboken you could see way down to the next crossing toward Jersey City on the New York Central tracks, couldn't you? A. To Jersey City you could see? 40

*Herman Leme, for Plaintiff—Cross*

Q. Towards Jersey City, yes. A. No; you could see towards Hoboken, but not to Jersey City.

Q. You could look towards Jersey City, couldn't you, along the tracks? A. Yes, sir, when I am on the tracks.

Q. And when you got four or five feet from the Erie track looking toward Jersey City, you could see the next crossing? A. No, there was an ice house.

Q. Towards Jersey City, couldn't you? A. No; there was an ice house in the way.

Q. Ice house in the way? A. Yes.

Q. Well, the ice house is not within four or five feet of the railroad tracks? A. Twenty feet—well, of course, when I was there between—

Q. Listen. You say the ice house would cut off your view? A. From seeing Jersey City.

20 Q. From looking toward Jersey City? A. Yes, sir.

Q. Along the New York Central tracks? A. Yes, sir.

Q. But you were nearer to the Erie tracks than the ice house was, weren't you? A. Yes, sir.

Q. Then how could the ice house cut off your view if you were nearer than the ice house? A. How could I see the next tracks? They turn.

30 Q. They were curving away from you? A. Yes; that is why I can't see it.

Q. Not curving towards you; so that you could see better because they curved away from you? A. Yes, but the ice freights was in the way; I couldn't see the tracks.

Q. The ice train? A. Yes.

Q. But that was 25 feet away from the crossing? A. Yes.

Q. And you were nearer to the crossing than the ice train was? A. Yes, sir; but it is this way:  
40 There is a turn, and where the ice freights are

*Herman Leme, for Plaintiff—Cross*

standing it is turned, too; the trains are in the way; I couldn't see it; I didn't see it, anyway; if I could I wouldn't go near it; I came near being killed, too.

Q. Did you look toward Jersey City when you heard the train whistle? A. I just looked a little, so I didn't see nothing there.

Q. Did the train stop? A. If she stops? 10

Q. Did the train stop after the accident? A. Yes, sir.

Q. Where was the engine of the train when it stopped? A. Well, she was about—I should think about thirty cars away from the crossing.

Q. Thirty cars away? A. Yes.

Q. Which way? A. To Hoboken—to Weehawken.

Q. Toward Weehawken? A. Yes, sir.

The Court: How long do you say a car 20 is Mister?

The Witness: About from here to the wall there.

The Court: From you over to the wall is the length of one car?

The Witness: Yes.

The Court: And when the engine stopped it was thirty times that far from the crossing?

The Witness: Well, I don't believe it was thirty—well, about—well, the trains was all 30 across; we couldn't go across; the train was standing there. I mean from the steam engine.

The Court: Mr. Carey asked you if the train stopped after the accident. You said yes. Then he asked you where the locomotive stopped after the accident and you said thirty car-lengths beyond the crossing toward Hoboken, if I remember. Now, do you want to change that? Tell us where the locomotive 40 stood after it stopped after the accident.

*Herman Leme, for Plaintiff—Cross*

The Witness: It was not thirty; it was about half, fifteen; because it was like—well, you could see about 100 feet.

The Court: 100 feet beyond the crossing, towards which way? Towards Hoboken?

The Witness: Yes—toward Weehawken side.

10

Q. And that, you think, was about fifteen cars long? A. I think so.

Q. Now, where was the watchman when you first saw him? A. The first I saw him?

The Court: When you first saw him where was he?

The Witness: He was on the center of the train with his hands up.

20

Q. You didn't see him before that? A. I saw him walking back way.

Q. I ask you now—and listen to the question, will you? When you first saw the watchman where was he? A. He was in the middle of the tracks.

Q. In the middle of the tracks? A. Yes, sir.

Q. Which tracks? A. Between the both tracks; just in the middle, he was.

30 Q. Between the West Shore tracks or the New York Central tracks and the Erie tracks? A. Yes, sir, between; two tracks on this side and two tracks on the other side, he was.

Q. Then, there were two tracks one side of him and two tracks the other side of him? A. Yes, sir.

Q. That is right, is it? A. Yes, sir.

Q. And he was on the crossing? A. Yes, sir.

Q. Where were you at that time? A. Well, I was near—about ten feet away from the crossing.

40 Q. About ten feet away from the crossing? A. Yes, sir.

*Herman Leme, for Plaintiff—Cross*

Q. And you were walking toward the crossing?  
A. Yes, sir.

Q. And he was standing between those two tracks? A. Yes, sir; he was standing and he started to walk right ahead.

The Court: What were you doing? Were you walking or were you driving a horse and wagon? 10

The Witness: I was walking.

The Court: On the sidewalk, were you?

The Witness: Yes—there is no sidewalk; there is just a street; got no sidewalk.

The Court: Where the sidewalk would be if there were one; all right.

Q. You kept right on walking toward the Erie tracks until you heard this big noise, did you? A. What is that? 20

Q. You kept right on walking toward the Erie tracks from the time you first saw the watchman until you first heard that big noise, the whistle?  
A. No, I seen the watchman running all the time with his hands up, and then came the noise.

Q. When you first saw the watchman you were about ten feet away from the tracks? A. Yes, sir.

Q. And he was standing between the Erie and the Central tracks? A. Yes. 30

Q. Was he facing you or the other way? A. To the other way.

Q. And you were walking along? A. Yes.

Q. And you continued to walk until you got within five feet of the Erie tracks? A. Yes.

Q. And at time you heard the great noise? A. Yes, sir.

Q. Now, then, did you see the watchman start toward the shanty before or after you heard this great noise? A. Well, he was walking toward 40

*Herman Leme, for Plaintiff—Cross*

the shanty, and he didn't reach the shanty; and he had something in his hand and he threw it down and he started to run back this way with his hands up.

Q. The Court: You say that you saw the watchman in the center of the tracks?

The Witness: Yes, sir.

10 The Court: Now, the question that was put to you is—

Q. (Repeated by the stenographer) Now, then, did you see the watchman start toward the shanty before or after you heard this great noise?

The Court: Now, the question is, Did you see the watchman start from the center of the tracks toward the shanty before you heard that big noise or after you heard the big noise?

20 The Witness: You ask me if I saw the watchman walking away to the shanty?

The Court: Yes, before the big noise or after?

The Witness: Before.

The Court: Before the big noise?

The Witness: Yes, sir.

30 Q. Now, then, when the time—between the time when you first saw the watchman standing between the tracks and the time when you heard this big noise, you had walked about five feet toward the Erie tracks; is that right? A. Yes, sir, about five or may be ten; I couldn't tell you exactly.

Q. Then did the watchman cross the two tracks of the New York Central, or did he run toward the railroad train? A. The watchman started to walk toward the shanty.

40 Q. How far did he get toward the shanty before he stopped and started toward the train? A. He

*Herman Leme, for Plaintiff—Cross*

crossed the two tracks; he walked over the two tracks and then he put down, and he started to run back.

Q. Who put down? A. Something he put down; he had in his hand something like a lamp or something like that; he was carrying like that in front of him.

Q. He was carrying lamps? A. They was 10 lamps; yes, sir.

Q. And he put them down, did he? A. Yes.

Q. And where did he put those down? A. Alongside of the railroad tracks.

Q. Alongside of the New York Central tracks? A. Yes, near the shanty; near the shanty.

Q. Alongside of which of the New York Central tracks? The one next to the hill or the one next to the Erie tracks? A. At the hill, next to the shanty. 20

Q. Did he set the lanterns down between the rails of that track? A. I don't know exactly in what place; just down.

Q. How many lamps did he have? A. I couldn't tell you.

Q. More than one? A. Yes, sir; because in the two hands he had them. He went down and he started to run back again.

Q. Did he have anything else in his hands besides those two lanterns? A. I didn't notice it. 30

Q. You didn't see anything else in his hands at all? A. No, sir.

Q. Then when he set those down did he run toward the engine? A. Yes, sir; he ran back way to the train.

Q. How far did he run toward the train before he stopped? A. How far he go?

The Court: After he put those lanterns down, or whatever it was, how far did he go towards the train before he stopped? 40

*Herman Leme, for Plaintiff—Cross*

The Witness: One train back way, on one track. He ran back way with his hands up, and then the train come; and then the train cover him and I didn't see him any more. I thought he was killed, too; but after I see he come around.

10 The Court: You saw him put down these lanterns, didn't you?

The Witness: Yes, sir.

The Court: You saw him start to run toward the train, did you?

The Witness: Yes, sir.

The Court: Now, then, how far did he go from where he put the lanterns down to where he stopped, after he ran for the train?

20 The Witness: It was about seven or eight feet; something like that.

Q. And did he stop then when he had gone seven or eight feet? A. The train?

The Court: No, the watchman. Did the watchman stop?

Q. Did the watchman stop? A. I didn't see him any more, because the train come in front of him. I saw the train then.

30 Q. When the train came by was he on the same side of the train as you were or on the opposite side? A. No; he was on the other side.

Q. Toward the shanty? A. Yes, sir; nearer to the shanty.

Q. Now, are you sure about that? A. Yes, sir.

Q. When the watchman was going toward the train was he running or walking? A. To the train or to the shanty?

The Court: To the train.

The Witness: Yes, sir; he was running.

40 Q. He was running? A. Yes, sir.

*Herman Leme, for Plaintiff—Cross*

Q. What did he have in his hand then? A. He didn't have nothing; he had his hands up like that, and he started to make like that (shaking his coat); something like that; and then I didn't have any time to see him; the train was coming right in front.

Q. That is, at the time he set the lanterns down he had nothing in his hands besides the lanterns? 10

A. I didn't see anything else.

Q. What color were the lanterns? A. I didn't see; like kind of gray; something like glass.

Q. Something like red? A. Something like glass or tin.

The Court: What color were they?

The Witness: Gray; the color was gray.

Q. Gray? A. Gray.

Q. Were they red? A. No. 20

Q. Sure about that, are you? A. I am sure about that; yes, sir.

Q. Now, didn't he swing a red lantern at the train? A. No, sir; I would not go myself then; I know that is danger.

Q. When you heard this big noise and saw the train, you turned and went back, did you? A. I just stepped back way, with the face to the train yet; I just stepped back way. 30

Q. You went backwards? A. Yes, sir.

Q. How far did you go? A. How far I go?

Q. Yes. A. Oh, about two or three steps, and then the train come.

Q. Did you see this horse and wagon driving on the track from the elevator? A. Yes.

Q. You saw that, did you? A. Yes.

Q. Did you see the driver jump down from the wagon? A. Yes, sir.

Q. Which way did he go? A. He jump right this way; the horse was walking this way and he 40

*Herman Leme, for Plaintiff—Cross*

jumped right this way, and at the same time he digged and the horse turned around; and just as soon as he come in the front the horse turned around. When the engine hit, the horse just turned around with the head. The truck was right there with the horse, and he was right there, the driver.

10 Q. Did the driver go over to the ice plant? A. He jumped off and start to run and fall down again; a couple of fellows come there and they started to holler, and they took him in the ice house.

Q. Did he walk there or run there? A. They was carrying him in.

Q. The engine came along, and what part of the wagon did it hit? A. The back part.

20 Q. And it just pushed the wagon along in the track, didn't it? A. The wagon just he take and swing him this way, and the horse turn this way.

Q. And the horse was swung around next to the engine? A. Yes, sir.

Q. And the wagon was swung around the same way? A. Yes, sir.

Q. And the engine stopped where it was, just a short distance from the crossing, did it not? A. Yes, sir.

30 Q. Now, it was going, you say, at a very rapid rate of speed, when you first saw it? A. Yes, sir.

Q. And that was about forty feet away from the crossing? A. Yes, sir.

Q. And it was then that the brakes went on, when it was about forty feet away from the crossing? A. What is that?

Q. It was then that the brakes went on, when it was about forty feet away from the crossing? A. I could not answer.

Q. The brakes were put on? A. Oh, the brake?

40 Q. Yes, when it was about forty feet away from

*Herman Leme, for Plaintiff—Cross*

the crossing. A. The noise I heard wasn't forty; it was about twenty then; just about the time I heard the noise I looked and the train was right there.

Q. No more than twenty feet from the crossing? A. About twenty feet the noise come. I saw the train first—the noise and the train at the same time. 10

Q. Up to that time the train had been running, you think, about forty miles an hour? A. I should think forty; may be about thirty-five; I couldn't tell you.

Q. About thirty miles an hour? A. About thirty miles an hour.

Q. This was a long freight train, wasn't it? A. Yes, sir.

Q. Do you know how long? A. I couldn't tell you exactly. 20

Q. Do you know about how many cars there were in it? A. No, sir.

Q. Did you look at the wagon at all that night after the accident? A. Yes, sir; I saw the wagon that time.

Q. That night? A. That day; that evening, yes, sir.

Q. Now where was the wagon lying with respect to the crossing after the accident? A. It pushed him right along there. 30

Q. Was it right on the crossing? A. Yes, sir.

Q. The wagon was? A. What do you mean the crossing? Not on the bridge; the wagon was further in, further that way.

Q. Which way? A. Toward Hoboken.

Q. Toward Hoboken? A. Toward Hoboken; yes, sir.

Q. Not toward Weehawken? A. Yes, toward Weehawken.

Q. Did the horse lie where the road was, where the wagon crossed? A. Yes, part. 40

*Herman Leme (recalled), for Plaintiff—Cross*

Q. Some on the road and some toward Hoboken? A. Yes, sir.

(Recess to 10:00 a. m. the following morning.)

March 14, 1917. 10:00 a. m.

Trial continued.

10

HERMAN LEME, recalled.

*Cross Examination by Mr. Carey Continued:*

Q. Whom did you see at the crossing that night, the time of the accident? A. What time?

The Court: At the time of the accident whom did you see at the crossing?

20 The Witness: After the time.

The Court: At the time of the accident.

The Witness: At the time. This driver was coming down the track from the elevator, and another driver was going up to the elevator, but he was near over the tracks, so I didn't notice what kind horses. The only thing I saw was team of horses.

30 The Court: Did you see anybody else then at the time of the accident than this driver of Brauer's and the driver of a wagon going in the other direction whom you did not recognize? Whom else did you see there at that time, if anybody?

The Witness: Only the watchman was there.

The Court: Anyone else?

The Witness: No, sir.

Q. Did you see any of the trainmen? A. The trainmen?

40 Q. Did you see any of the trainmen? A. Do you mean the watchman?

*Herman Leme (recalled), for Plaintiff—Cross*

The Court: No, the trainmen; the engineer, the fireman, the conductor, the brakemen of the train.

The Witness: No, sir; I didn't see.

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

Q. Where were you— A. I was standing— 10

Q. —when the train stopped? A. I was near the crossing, then I went near it. I was just on this side of the crossing. I was walking back way when the accident happened; then I walked near and I was looking like all. There was a lot of people coming after that.

Q. A lot of people coming after that? A. Yes, sir.

Q. Did you talk to the driver that night? A. 20  
No, sir.

Q. Did you see Mr. Brauer that night? A. Yes, sir.

Q. Did you know Mr. Brauer before the accident? A. Yes, sir; I know him.

Q. Where did you see Mr. Brauer that night? A. I just see him come down with a horse and wagon, but I didn't talk to him nothing, only I tell him, I say, "Your driver is lucky he didn't got killed"; that is all I said to him. 30

Q. Did you talk to the watchman at all? A. No, sir.

Q. How long did you stay there? A. About half an hour; may be little more than a half an hour.

Q. The train moved on when you left? A. No, sir.

Q. Was still standing there? A. Yes, sir; I couldn't recollect, sir—yes, she moved away after; I was standing there longer and she moved away. I walked to the south and I came back again.

Q. Walked to the south? A. To my shop, black- 40  
smith shop.

*Herman Leme (recalled), for Plaintiff—Cross*

Q. Where is your blacksmith shop? A. About two and a half or three blocks away.

Q. On what street? A. Harrison street; 87 Harrison street.

Q. In Hoboken? A. Yes, sir; at that time it was in Paterson street.

Q. Where were you going? A. I was going on  
10 the hill to collect some bills.

Q. Have you seen this picture, Exhibit P-2, which I show you now? Have you seen that before? Was it shown to you yesterday? A. Here yesterday; yes, sir.

Q. You saw it yesterday? A. Yes, sir.

Q. You recognize the picture, do you? A. I couldn't understand it.

Q. Couldn't understand it very well. Did you see this little shanty here? A. What is that, the  
20 ice house?

Q. No; that is the flagman's shanty. A. I see.

Q. You saw that, did you? A. Yes, sir.

Q. You know where that is located? A. Yes, sir.

Q. And this is the crossing right here beside the flagman's shanty? A. Yes, sir.

Q. Now this is the track on which the train was moving at the time of the accident? A. Yes, sir.

Q. Moving up toward Weehawken; and here is  
30 the other New York Central track— A. Yes, sir.

Q. —to the west of that. These two tracks over here and the cars you see in the picture are tracks of what railroad company? A. Who, what railroad company?

Q. Yes. A. It happened on the third track—

The Court: No. He is not answering.

Q. Do you know that some of these tracks are owned by the Erie Railroad Company and some are operated by the New York Central? A. Yes;  
40 I heard that yesterday.

*Herman Leme (recalled), for Plaintiff—Cross*

Q. Now, these two tracks here, do you know what railroad company they belong to? A. They belong—to Jersey City when they come?

Q. No, what railroad company owns them? A. Jersey City Railroad—Central—Jersey Central.

Q. No. Evidently you don't know. Do you know where the ice plant is right over back of these cars? Do you? A. Yes, sir. 10

Q. Now, do you know what crossing this is south, towards Jersey City, from the crossing where the accident happened? What is the next crossing south? A. The accident happened on the—one, two, three—on this here track.

Q. Do you understand that the crossing where the accident happened is up here by this watchman's shanty? A. Yes, sir.

Q. You understand it, do you? A. Yes, sir.

Q. And that this direction is down toward Hoboken? A. Yes, sir. 20

Q. And that you were coming up from Hoboken towards this crossing? A. Yes, sir.

Q. Now, there is another crossing as you come down towards Jersey City, isn't there? A. Oh, yes; there is another crossing.

Q. Now, what is that next crossing towards Jersey City from the crossing where the accident happened? A. You mean the Hoboken avenue crossing? 30

Q. Well, is that the next crossing? A. Yes, sir, to Jersey City—to Hoboken.

Q. The Hoboken avenue crossing is beyond the Erie Railroad bridge, isn't it? Beyond the Lackawanna bridge? A. I couldn't tell you that; I don't know.

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

Q. Now, when do you say you examined this truck? When did you examine this truck? A. I didn't examine him well; I just see him that time: 40

*Herman Leme (recalled), for Plaintiff—Cross*

then I look on him; that is all. I seen him many times after that; he is laying there yet.

Q. You didn't examine it at all? A. Well, I look at it, yes.

Q. Just looked it over? A. Yes; I just looked at it.

10 Q. You were not looking to see whether it was repaired or not, were you? A. No; nobody tell me to look at it.

Q. You didn't make any examination that would give you any idea whether it was worth repairing or not? A. Well, I see that far it was not worth.

Q. You didn't make any examination of the truck, did you? A. Well, I looked at him when I see him.

20 Q. You looked at it that night? A. Yes, sir; I was talking—

Q. Nobody had asked you to look at it? A. Nobody asked me; no, sir.

Q. That was before Mr. Brauer arrived that you looked at it, wasn't it? A. No; Mr. Brauer went away already.

Q. Oh, he had already gone away? A. Yes, sir.

Q. And you just looked it over casually after that? A. Yes, because that is near my place, so I—

30 Q. Now, there was iron work about the truck that could be saved, wasn't there? A. Yes, sir; some pieces.

Q. And some woodwork? A. No, no wood—the racks; yes, sir.

Q. The rack was all right, wasn't it? A. Yes, sir.

Q. Perfectly good? A. Yes; it was all right; it was not broke. In the back I think one side was broke; yes, sir; the left end, was the back already ripped out from the floor.

40 (Witness, excused).

*Herman Brauer (recalled), for Plaintiff—Direct*

Mr. Kelsey: I would like to put Herman Brauer back on the stand to prove this bill.

The Court: All right.

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HERMAN BRAUER, recalled.

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*Direct Examination by Mr. Kelsey:*

Q. Mr. Brauer, you spoke yesterday of a bill you thought you had for this wagon? A. Yes, sir.

Q. I show you a bill. Is that the one in question? A. That is the one.

Q. Who made the entries on there of payments—these payments? A. This here?

Q. These payments here. A. Some is myself and some is my brother's.

20

Q. Have you all the cheques that went to pay that bill? Are all the cheques in this bundle that I show you? A. Yes, sir.

Mr. Kelsey: I will offer the bill and the cheques, Mr. Carey, if there is no objection.

The Witness: Excuse me. There is some cheques there, one hundred and twenty some dollars; this is for repairs I paid at the same time; but 25's and 20's and 30's is all on the one truck.

30

Q. Now, after this accident how long was it before you got a horse and wagon to take the place of the one—of the horse that was killed and the wagon that was demolished in this accident?

Mr. Carey: Objected to as immaterial.

The Court: What is the materiality? Are you seeking to recover the value of the horse and truck?

Mr. Kelsey: I have alleged that by reason

40

*Herman Brauer (recalled), for Plaintiff—Cross*

of the loss of this wagon and the horse, they suffered great inconvenience and loss in their business. It seems to me if they show they were compelled to hire another horse and wagon to take the place of the horse that was killed and the wagon that was demolished, until they were able to purchase one themselves, why, that would be part of the measure of damages to be recovered in this case. If there is any question about it, I shall leave it out.

The Court: Ordinarily, it would be complete satisfaction when you received the reasonable price and value of the article destroyed. Well, do you press it?

Mr. Kelsey: I press the question.

The Court: All right.

Mr. Carey: I object to it as incompetent and immaterial. No damages can be recovered beyond the value of the property which was injured or destroyed.

The Court: I will sustain the objection.

Mr. Kelsey: That is all.

(Bill marked P-5 in evidence; cheques marked P-6 in evidence).

Mr. Kelsey: This bill, gentlemen, is made out by Harry Cohen against Brauer Brothers for one single and double rack truck, \$320.00, marked here "paid", and marked Exhibit P-5 in the case.

*Cross Examination by Mr. Carey:*

Q. Was this truck which was injured the only truck that Cohen made for you? A. Yes, sir; he done some—

Q. He made others? A. He done other work; no new truck.

Q. Made no other truck? A. No; not at that time, you know.

*Herman Brauer (recalled), for Plaintiff—Cross*

Q. What sort? A. I say he didn't make any other truck except that one, not at that time.

Q. Did he ever make any other truck for you except this one? A. Last year he made one.

Q. How many has he made for you? A. I couldn't tell you exactly how many.

Q. What kind of a truck did he make last year for you? A. A difference one altogether. 10

Q. What? A. A difference one.

Q. Well, what kind? A single truck or double truck? A. Single and double.

Q. Well, that was the same as the truck that was injured? A. No; this is a rack truck and the other is a flat truck; you know, you can only put one barrel in.

Q. They were both single and double trucks? A. They were most single.

Q. How many trucks has Cohen made for you altogether? A. Well, I couldn't tell you. He done my work for the last eight years. 20

Q. Yes? A. Yes.

Q. And he has made trucks for you during the past eight years? A. Well, not all the time; he did most repairs—repairs.

Q. Well, not all the time; he does something else but make trucks for you, I assume? A. He made repairs.

Q. Yes, and he has made several trucks for you during the eight years, hasn't he? A. Well, he might have made another one, but a difference one altogether. 30

Q. Has he made several trucks for you during the eight years that he has been working for you? A. He made a wagon for me, a brewery wagon, no truck.

Q. How many trucks has he made for you in the eight years? A. Well, he made one truck and one wagon, what you call brewery wagon with wings on; this is a rack truck here. 40

*Herman Brauer (recalled), for Plaintiff—Cross*

Q. Who made out this bill? A. Who made out this bill? Himself; he has a girl; I don't know who made his bill out. I didn't.

Q. But the endorsements of payments on the bill were made by whom? A. By me—my brother.

Q. How long have you been in business there?

A. Altogether fourteen—fifteen years.

Mr. Carey: That is all.

[The Witness excused.]

Mr. Kelsey: I don't think that it is necessary that I should offer it in evidence. The Court itself will take notice of the law without my offering it in evidence.

The Court: I certainly am expected to, whether I know it or not.

Mr. Kelsey: The law of 1909, I think it is, Sections 35 and 36-b of the Railroad Law; and the other act regarding railroad signals.

The Court: You rest with that?

Mr. Kelsey: And with that our case is complete.

Mr. Carey: If your Honor please, I now move to strike out all evidence in the case with respect to the value of the barrels mentioned in the testimony, the cider mentioned in the testimony, and also the horse blanket.

The Court: On what grounds?

Mr. Carey: On the ground that there is no evidence to show that by this accident this property was either injured or destroyed; that if anything occurred in connection with this property, following the accident, it arose out of the acts of third parties, and that the damage sustained by the plaintiffs with respect to this property, if any, was caused by the intervention of an independent efficient cause; and, furthermore, that such

*Motion to Strike Out Evidence*

cause was the criminal act of third parties. It could not be regarded as a proximate result of any negligence of the railroad company, if any negligence exists.

The Court: What do you say to that, Mr. Kelsey?

Mr. Kelsey: Why, the proximate cause is that cause between which and the injury sustained or the damage done there has been no intervening efficient cause. Now, that is not the case here at all. The proximate cause here, of course, is the collision of this engine with this wagon and the resulting throwing off of these barrels. There is no proof here that these barrels were stolen at all. We have proved here that the driver immediately went across the track and fainted, and, of course he cannot tell us what happened to this property. The next best evidence we produce—the only evidence we have—is the coming to the place of the accident of the owner of the property about three-quarters of an hour afterwards, and he says everything had disappeared. Now, that is all we have to show. We could not control in any way; we could not control the situation. We had no one there to guard it; we could not. With extraordinary care we could not protect the situation or the property. Certainly, if this company struck this wagon in this way and overturned it and threw these barrels out, it is liable. The company is the one to look after that property and protect it. We were not there. They knew that the driver was of no use, for he could not do anything. The company should have looked after it themselves.

The Court: The obligation was upon you that after the accident you should have used

*Motion to Strike Out Evidence*

reasonable care for the protection of your property.

10 Mr. Kelsey: Yes, but if we had no one there, no agent to do anything for us until we arrived on the scene ourselves? And when we got there the property had vanished, why, we couldn't protect it in any way. And there is no proof here that they were stolen. The company itself may have taken them and stored them away somewhere. We don't know that. They are gone and they are part of our damage.

20 The Court: Suppose, Mr. Carey, the merchandise had been such as would have been perishable in case of downfall of rain, and this accident had happened, and the accident was chargeable to your company, and that the merchandise was damaged by the rain, would you say the accident was the proximate cause?

Mr. Carey: If there had been damage, and rain had come on, I admit it might be liable.

30 The Court: Suppose it had been a load of live chickens, crated; that the chickens were not damaged, but the crates were broken and the chickens got away; or mayhap they were birds of flight such as pigeons, and the crates were broken and they got away—would not that be an element of damage, if reasonable care were used on the part of the owner to have recovered them?

40 Mr. Carey: If I may go back to the original proposition which the Court states—damage to the covering of the property, which would deteriorate on account of the elements. Now, damage by the elements would be resulting from quite a different cause from that of independent agents. That would not be an

*Motion to Strike Out Evidence*

intervening cause, but a damage resulting from conditions produced by the defendant company through its negligence, if that were the fact, under weather conditions. Now, as to this, what is the evidence with respect to this? Not that the barrels were scattered around by this accident: there is no evidence to that effect at all. 10

The Court: The only evidence there is in the whole case is that there were 24 empty barrels; there was one keg of cider, of five or ten gallons; the blanket and the thing you contend against which were on the wagon prior to the happening; and afterward when Mr. Brauer got there they were not to be found.

Mr. Carey: They were not to be found, Now, with respect to the live chickens, 20 fowls—

The Court: It is a broad example, but I did it purposely.

Mr. Carey: Their escape would have been accomplished by locomotion, something resulting from the crates being broken, and they then escaped. That is a situation where, so far as the evidence shows, there was no scattering of the barrels; there was **nothing done to the blanket**; but they could 30 not be found. Now, those things do not disappear by their own motive power; they disappear through the action of some other person. Now, we are not chargeable with the **criminal act**—

The Court: Of course, not; but let me interrupt you. Suppose that this occurrence is chargeable to the defendant company, isn't it reasonable to say that that situation, then, —that the driver was not in a position to pro- 40

*Motion to Strike Out Evidence*

10 tect his master's property—and we assume for the moment, for the purpose of this argument, that the owner with all reasonable despatch appeared upon the scene, but too late to protect them,—does that throw or cast upon the tort feisor some liability and responsibility for the protection of property of that sort?

Mr. Carey: Not from the independent wrongful criminal act of some third person.

Mr. Kelsey: Why, yes, if you put them in the position to commit that criminal act; if you throw the barrels over the highway there and you put them in position to do these things; of course, you are liable.

The Court: Do not interrupt the argument.

Mr. Kelsey: I thought he was through.

20 Mr. Carey: Now, in the case of damage to property arising from the action of the elements, or from the motive power of the property itself, that is perhaps something that would be within the reasonable contemplation of the parties as likely to result from—

The Court: Are we concerned with that at all in an action at tort? That would be so in an action on contract, but I do not think the reasonable contemplation has any refer-  
30 ence to an action growing out of tort.

Mr. Carey: But what the tort feisor is liable for are those results which would naturally be presumed to follow—

The Court: Natural and proximate cause.

Mr. Carey: —likely to follow from the negligent act with which he is charged. Now, the stealing in the city of Hoboken of property on a public highway resulting from an accident is not the natural and proximate result of an accident of this kind.  
40

*Herman Cohen, for Defendant—Direct*

The Court: I will not strike it out for the present, Mr. Carey. I will consider it during the balance of the time I have before the close of the case.

Mr. Carey: Objection noted, your Honor.

The Court: You may have it. That only applies to the three items: the 24 barrels, the keg of cider and the horse blanket. 10

Mr. Carey: Yes; leaving only the horse and the truck as the property damage.

The Court: The horse, truck and the harness.

Mr. Carey: Yes, and the harness.

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DEFENDANT'S CASE.

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HERMAN COHEN, sworn on behalf of the defendant, testified as follows:

*Direct Examination by Mr. Carey:*

Q. Mr. Cohen, do you know Mr. Ruben, the driver, who testified yesterday? A. Yes, sir.

Q. He was one time a neighbor of yours in 1914? A. Yes, sir.

Q. Did you see Ruben on the day of this accident? A. Yes, sir. 30

Q. And where did you see him? A. In the night, between seven and eight o'clock, in his house.

Q. In his house? A. In his house.

Q. Did you have any talk with him with regard to the accident? A. Well, they called me in and told me he had an accident; they called me in.

Q. You were called in there? A. Yes, sir.

Q. And did you talk with him about the accident? A. Well, after he told me the accident what happened. 40

*Herman Cohen, for Defendant—Direct*

Q. Yes. Now, at that time did he say anything to you about the truck and the load which he was hauling? A. He told me that it was a double truck and the truck was overloaded; he says was overloaded and the horse stopped on the road—

10 Mr. Kelsey: I object to that. This conversation in absence of this plaintiff would not be binding upon us.

The Court: It is done for the purpose of attacking the credibility of your witness in chief.

Mr. Carey: That is all.

The Court: Of course, it is relevant for that purpose and the foundation was laid for it, as I remember, with the driver, when he said he had no such conversations.

20 Q. What did he say to you about the horse being overloaded? A. He told me that the horse was overloaded and he told Mr. Brauer about that case, and he said "Well, use the whip if he can't move."

Q. Did he say anything to you about the horse not being able to draw the load? A. Yes, he told me that it is too heavy for the horse; the horse was tired out.

30 Q. Did he tell you how many trips he had made that day? A. He told me about four trips.

Q. Did he say anything to you about the horse having stopped on the railroad crossing? A. Yes; he told me he stopped and he went off there.

Q. Who went off? A. The driver, Ruben.

Q. Did he say anything to you about somebody else trying to get the horse to move after it stopped on the crossing? A. No.

Mr. Kelsey: I think that is a little leading. I think you ought to ask him what he said.

40 The Court: No, he has the right; as long

*Herman Cohen, for Defendant—Cross*

as he stays where he laid the foundation, then he has a right to use leading questions; otherwise he would not. I don't know whether any foundation was laid for that question or not.

Mr. Carey: I think there was. I would not ask it unless I thought there was.

The Court: Of course you would not, unless you were mistaken. 10

Mr. Carey: Cross examine.

*Cross Examination by Mr. Kelsey:*

Q. Then you went to see Mr. Ruben again, didn't you? A. When?

Q. After he got some money in settlement of this case? A. After Ruben got money?

Q. Yes. A. Well, the case—

Q. Didn't you go to see him after he got some money? A. Yes, sir. 20

Q. Now, why did you go to see him then? A. Well, I saw him in his house once—

The Court: You are asked why you went to see him again that second time.

The Witness: The man promised me five dollars for services I done.

Q. What? A. The man promised me five dollars for services I did for him.

Q. You went to collect the five dollars? A. Yes. 30

Q. Didn't you say to him that if he didn't give you ten dollars of this money that you were going to tell a different story from what he— A. No, sir.

Q. —knew about the case? A. He promised me the five dollars and I asked for it; that is all. I didn't say anything.

Q. Wasn't there some talk about ten dollars there? A. No, sir.

Q. When was that? How long after he got his 40

*Herman Cohen, for Defendant—Cross*

money was it? Was it before he got his money or after he got his money? A. After.

Q. How long after? A. Well, I guess about two weeks.

Q. What did he owe you five dollars for? A. Well, I did service for him.

Q. What service? A. Well, he called me in I  
10 should be his interpreter.

Q. Interpreter where? A. To the claim agent.

Q. To the claim agent? A. Yes.

Q. You wanted the five dollars for that? A. Well, he promised before he got it.

Q. Well, did he give you the five dollars? A. No.

Q. So you haven't got a very good feeling towards him, have you? You don't feel very good towards him, do you? A. Well, in a business  
20 way.

Q. In a business way you don't feel very pleasant toward him? A. Well, he didn't pay me what he owes me; that is all the feeling I got against him.

Q. Now, didn't he tell you on that occasion when he told you as to how this accident happened—did he tell you there were a lot of holes in that crossing? A. No; he didn't say nothing.

Mr. Carey: I object to that.

30 Mr. Kelsey: I want to show that he did tell him that; that that was one reason why he was slow in riding across that crossing.

The Court: That is not the reason we are concerned with at all.

Mr. Kelsey: We are as much concerned with that as with his conversation.

The Court: Not at all. In the first place, the conversation he is repeating now is for the purpose of contradicting and attacking the credibility of Mr. Ruben, the driver; and  
40

*Herman Cohen, for Defendant—Cross*

it would seem this would be valuable because these facts may be material in the mind of the jury in determining whether or not he was guilty of negligence which might have contributed to the accident.

Mr. Kelsey: I have a right to ask these questions for the purpose of laying a foundation for the purpose of proving—of contradicting. 10

The Court: It is not material.

Mr. Kelsey: It is material in showing what the alleged conversation was; it would throw light on what he did say. He claims all these things about the truck being overloaded and all that.

The Court: I will sustain the objection.

Mr. Kelsey: Your Honor will note my objection, please. 20

The Court: You may have it. Keep in mind, Mr. Kelsey, that we have a certain issue to try here; otherwise we will be trying half a dozen different cases rather than that which is before us.

Mr. Carey: It is unfair that this matter should be injected into this case by questions; because we come here not to defend any such issues as that.

The Court: I will settle it right away. The jury will understand that where an objection is made to a question and the Court so rules that the question is not to be answered, the jury is not in any manner to take into consideration the question that was put, because it is not a question that is in evidence; when I say that the question cannot be answered then the situation is, as far as you are concerned, as if the question had not been propounded. Now, you understand that, do you? 30 40

*Herman Cohen, for Defendant—Cross*

Keep it in mind if it occurs again throughout the case.

Q. Now, you acted as interpreter then between Mr. Ruben and Mr. Freeman, the claim agent?

A. Yes, sir.

Q. Now, when you acted as interpreter did you  
10 tell the claim agent all these things that Ruben had told you—

Mr. Carey: I object to that.

Mr. Kelsey: Just a minute; I haven't finished my question.

Q. —that this was a double track, that the horse was overloaded—did you tell that to Mr. Freeman?

Mr. Carey: I object to that.

20 The Court: That is a very difficult question to answer, and it may be improper. If this man simply acted as an interpreter, then he was only called upon to interpret what Mr. Ruben told him. He says he was not a witness; he says he was an interpreter. The whole duty upon him morally and legally was to truthfully interpret the things Mr. Ruben said.

30 Mr. Kelsey: Your Honor will note my objection.

The Court: Yes.

Q. Now, when did you go to see Mr. Freeman with Mr. Ruben? A. I never went to see—

Mr. Carey: I object to that. This witness was called to contradict certain testimony given by the driver on his crossexamination, and for that purpose only. Now, I have not raised objection to those questions which Mr. Kelsey seems to think.

40 The Court: What is the purpose of this?

*Herman Cohen, for Defendant—Cross*

Mr. Kelsey: He said he was to have five dollars for interpreting this man's case to the claim agent. Now, I have a right to ask him—

The Court: What purpose can it have?

Mr. Kelsey: I want to show that he is not telling the truth.

The Court: He has not yet said that he did do it. 10

Mr. Kelsey: He said he had earned the five dollars; that he was entitled to it; and he was very indignant because he didn't receive it. Now, I want to see whether he did earn it or not.

The Court: I cannot see the purpose of it, Mr. Kelsey, even if I let you do it.

Mr. Kelsey: For the purpose of impeaching the witness, of course; to show he is not telling the truth; that he is not acting in good faith when he says this man owes him five dollars. 20

The Court: I am going to sustain the objection.

Mr. Kelsey: Your Honor will note my objection to the ruling on that.

The Court: You may have it.

Q. Did you ever interpret anything for Ruben? 30

A. No, sir.

Mr. Carey: I object to that.

The Court: Now, that may be stricken out,

Mr. Kelsey, I should certainly think you would have understood my ruling, that I would not permit any testimony of that sort. It goes to the same purpose again.

Q. How many times—how often did you see Ruben about the collection of these five dollars dollars that you are claiming he owes you? 40

*William Knecht, for Defendant—Direct*

Mr. Carey: I object to that as immaterial and incompetent, and not proper cross-examination.

10 The Court: Well, the only purpose that I see that it has, Mr. Carey, is to show the interest that this witness may have had, and it may go to the question of credibility to be given to his testimony as to the conversations with the driver. That is the only value it has, if it reaches that point.

Mr. Carey: This was not brought out on my examination at all.

The Court: Read the question.

Q. [Repeated by the stenographer.] How many times—how often did you see Ruben about the collection of these five dollars that you claim  
20 he owes you?

Mr. Carey: Now, that relates to five dollars which this witness claimed from this man for interpreting.

Mr. Kelsey: I will withdraw the question. There is no use wasting time. I am not going to waste time over it.

The Court: Have you anything further?

Mr. Kelsey: That is all.

Mr. Carey: That is all.

30 [Witness excused.]

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WILLIAM KNECHT, sworn on behalf of the defendant, testified as follows:

*Direct Examination by Mr. Carey:*

Q. Mr. Knecht, in November, 1916, you were employed by the New York Central Railroad Company? A. Yes, sir.  
40

*William Knecht, for Defendant—Direct*

Q. And are still so employed? A. Yes, sir.

Q. In what capacity were you employed at that time? A. Special officer.

Q. And what were the duties of the special officer? A. Watch freight trains lying and going between Jersey City and Weehawken.

Q. Were you on duty the night of this accident? A. I was just going to work. 10

Q. Which way did you come? A. I came up from the Ravine Road, stopped at the elevator crossing.

Q. And that was the place where this accident took place? A. Yes, sir.

Q. Where were you at the time of the accident? A. Standing outside of the shanty; that is, I was on the crossing at the time of the accident—before the accident, at least.

Q. Before the time of the accident where were you standing? A. The time of the accident? 20

Q. Prior to the time of the accident. As I understand you, you reached the shanty and were waiting there to go on duty; is that right? A. Yes.

Q. And where were you standing after you reached the shanty and before the time of the accident? A. Outside of the shanty, about ten or fifteen foot away from the track.

Q. I show you exhibit P-1 and ask you if that is a correct representation of the approach from the elevator to this crossing, also the location of the shanty? A. Yes, sir. 30

Q. And you were standing near this shanty? A. Yes, sir.

Q. How long had you been waiting there before the train appeared? A. About ten minutes.

Q. Tell us what you heard with respect to the approach of the train and when you heard it. A. I heard the engine blow for Hoboken avenue crossing. 40

*William Knecht, for Defendant—Direct*

Q. Where is Hoboken avenue crossing? A. That is two crossings below the crossing of the accident.

Q. Can you give us an idea of about how far away? A. About a thousand feet or so.

The Court: How many?

The Witness: A thousand.

10

Q. Now, you heard the whistle blow at that crossing, did you? A. Yes, sir.

Q. Were you waiting for this train? A. No, not particularly.

Q. Not particularly for this one. And did you hear any whistle blow after that time and between that time and the accident by this train? A. I heard them blow for Ravine Road crossing.

20

Q. And Ravine Road crossing is where with reference to the road where the accident happened? A. South.

Q. First or second crossing? A. First crossing south.

Q. First crossing from the elevator crossing where the accident happened? A. Yes.

Q. And about how far is that crossing from the place where the accident happened? A. That is about six or seven hundred foot; something like that.

30

Q. Where is the Lackawanna bridge with reference to the Ravine Road crossing? A. That is between Hoboken Avenue and Ravine Road; south of Ravine Road.

Q. South of the Ravine Road? A. Yes, sir.

Q. Still further away than the Ravine Road crossing and the place where the accident happened? A. Yes, sir.

40

Q. Did you answer the question whether you had heard any other whistle blown by this train than the whistle for the Hoboken Avenue crossing before the time of the accident?

*William Knecht, for Defendant—Direct*

The Court: He said Ravine Road.

Q. At Ravine Road, yes. So you heard two whistles from this train, did you? A. Yes, sir.

Q. Did you see the watchman do anything—  
A. Yes.

Q. —that night? Who was the watchman there that night? A. A man by the name of Schwartz. 10

Q. Where was he at the time you were standing outside of the shanty? A. He was just going to go on the crossing.

Q. Was he standing there with you? A. Yes, sir.

Q. When did he start to go on the crossing? A. As soon as he heard the whistle blow for Hoboken Avenue.

Q. And what did he have in his hand, if anything, when he went on the crossing? A. Two 20  
lamps; red and white.

Q. State whether or not those were lighted. A. Lighted.

Q. Both of them lighted? A. Yes, sir.

Q. And about what time did this occur? A. About a little after—ten or twelve minutes after.

Q. After what? A. After five.

Q. After five? A. Yes, sir.

Q. And this was the 16th of November? A. 30  
Yes, sir.

Q. Will you state whether or not it was then daylight? A. Yes, sir: beginning to get dusk.

Q. Did you see the engine as it approached the crossing? A. I seen it as it approached Ravine Road crossing coming around the bend.

Q. There is a bend there, is there? A. Yes, sir.

Q. And you saw the train as it came around that bend? The engine? A. Yes, sir.

Q. Can you tell us about how fast the train was going? A. Not exactly; I should judge about 40  
nine mile an hour; nine or ten mile.

*William Knecht, for Defendant—Direct*

Q. I show you this Exhibit P-2, and call your attention to this little shanty up here and ask you if that is the shanty shown in this picture in front of which you were standing— A. Yes, sir.

Q. —as the engine approached? A. That is the shanty.

10 Q. And this crossing out here opposite the shanty is the place where the accident happened, is it? A. Yes, sir.

Q. Now, you see in the foreground in this picture another roadway crossing the tracks. What crossing is that? A. That is Ravine Road; it is called New York Avenue, continuation of New York Avenue.

20 Q. Continuation of New York Avenue, and sometimes called Ravine Road crossing; and that is the first crossing south of the crossing where the accident took place? A. Yes, sir.

Q. You saw the engine, then, as it approached this Ravine Road crossing? A. Yes, sir.

Q. Between that point and the Lackawanna bridge? A. Yes.

Q. Can you see down to the Lackawanna bridge from where you were in front of the shanty? A. At the time I seen the engine I could; yes, sir.

By Mr. Kelsey:

30 Q. What did he say to that? A. (Last answer repeated by the stenographer.)

(Mr. Carey shows and explains the photograph to the jury.)

Q. Did you see what the watchman did after he took his two lighted lamps and went to the crossing? A. Yes; he was standing in the middle of the crossing between the New York Central and the Erie tracks when this wagon was coming off the elevator, held up his red light towards

*William Knecht, for Defendant—Direct*

him; but he kept right on coming until he got on the track, stopped and jumped off and running across the track.

Q. Where did the driver go? A. He went over toward that ice company.

Q. Will you show to the jury how he held up the red lantern as you say? A. He held it up that way (indicating by raising his right hand) against the driver, shouted to him. What he shouted I didn't take notice. 10

Q. What? A. What he shouted I didn't catch.

Q. Where was the wagon at the time the horse stopped on the crossing? A. The rear end of the wagon was on the New York Central track, and the front and the horse was on the Erie.

Q. Now, you say the driver jumped off the wagon and ran? A. Yes, sir.

Q. Where did he go, do you know? A. I don't know; he ran over towards that ice office there. I found out later he ran in the office. 20

Q. You saw him in the office later on? A. Later on.

Q. Now, did the watchman have any flag in his hand at the time he went on the crossing? A. No flag.

Q. Did he have anything except these two lanterns? A. That is all; two lamps.

Q. Did he make any motions with any of the lanterns except the red lantern? A. Only the red one. 30

Q. As the driver approached this crossing did he at any time stop from the time he left the elevator until he was on the second track—until the wagon was on the second track? A. No; he kept right on going from the elevator down.

Q. How fast was he going? A. Very slow.

Q. Wagon loaded with barrels? A. Yes, sir.

Q. After the driver ran from the—strike that out. 40

*William Knecht, for Defendant—Direct*

Q. Can you tell how far the engine was from the wagon at the time the driver jumped off? A. Yes; that is when I first seen the engine; the other side of Ravine Road.

Q. The other side of Ravine Road? And what did the flagman do after the driver jumped off the wagon? A. He was in back of me at the time; I didn't see what he done then. I was trying to get the horse off.

Q. When the driver jumped off of the wagon what did you do? A. I got hold of the horse with the bridle, tried to start him.

Q. Where were you when the driver jumped off the wagon? A. Standing by the shanty.

Q. And you went to the head of the horse, did you? A. Yes.

Q. And what did you do? A. Got him by the bridle and started pulling on him, called to him, and he wouldn't move.

Q. Speak a little louder. A. Got him by the bridle and tried to start him, but he wouldn't move.

Q. Did the horse make any effort to draw the load? A. No.

Q. How close was the engine to you when you stopped trying to get the horse to move? A. Just about to hit it.

Q. What? A. Just about to hit it.

Q. How fast was the train going at the time it struck the wagon? A. Oh, it was going very slow; about seven miles, I guess; six or seven miles.

Q. What did it do to the wagon and the horse? A. It hit the rear end of the wagon and turned the horse and wagon around, and caught the horse under one of the cars.

Q. How far did the engine go after it struck the wagon? A. Just the length of the engine, the tank of the engine was on the crossing.

*William Knecht, for Defendant—Direct*

Q. The tank of the engine on the crossing at the time it stopped? A. Yes, sir.

Q. Now, was the wagon tipped over? A. Yes.

Q. And the horse was thrown down? A. Thrown down.

Q. Where were the horse and wagon with respect to the space between the two tracks after the accident had happened? Were they on the New York Central tracks or between the New York Central and the Erie tracks? A. Between.

Q. Between them? A. Yes, sir.

Q. Now, when did you next see the watchman after you undertook to get the horse off of the— to pull the wagon from the track? A. I seen him standing over toward the Erie there, at the ice dock—on the crossing, toward the ice house.

Q. What was he doing? A. Standing there with his lamps. 20

Q. Standing there with both lamps? A. Yes, sir.

Q. After the watchman went on to the crossing did he at any time start to go back to his shanty before this accident occurred? A. No; he did not.

Q. Did he at any time take his coat off, swing that at the approaching train? A. No, sir.

Q. Did he at any time from the time he left the shanty until after the accident have any flags in his hands at all? A. Not that I seen. 30

Q. Now, in regard to the headlight of the locomotive, do you know whether that was lighted or not? A. Yes, it was lighted.

Q. How about the ringing of the bell? Can you tell us anything about that? A. The bell was ringing.

Q. Did you take notice of it at the time? A. Yes, sir.

Q. When did you take notice of it? A. Of the light? 40

*William Knecht, for Defendant—Cross*

Q. Of the ringing of the bell. A. I noticed it after the engine was stopped; she was still ringing after the accident.

Q. Do you know how the bell is rung, by hand or— A. Air.

Q. By air? A. Yes, sir.

Q. An automatic ring? A. Yes, sir.

10 Q. When did you notice the headlight first? A. When I first seen the engine coming around, around the bend.

Q. Did you see the driver after the accident? A. Yes, I seen him over in the ice house office.

Q. Were you there when the ambulance came down? A. Yes, sir; that is when I seen him.

Q. And the ambulance took him away? A. No, sir.

Mr. Carey: Cross-examine.

20

*Cross Examination by Mr. Kelsey:*

Q. How old is Mr. Schwartz, the watchman, about? A. About 35, I guess; I don't know—

Q. Is he here in court? A. Yes; I don't know the exact age.

Q. Now, by whom were you employed at this time, Mister? A. New York Central.

Mr. Carey: He testified by the New York Central.

30

The Court: He said the first thing that he was a special officer of the New York Central, and he said what his duties were.

Q. What place did you work at this time? What particular part of the road? A. Between Jersey City and Weehawken.

Q. On the entire road? A. Entire road.

Q. Were you inspector on it? A. No; special officer.

40

Q. Well, what were you duties? A. Watch the freights, coal and like o' that is not stolen.

*William Knecht, for Defendant—Cross*

Q. What? A. To watch freight and coal, see it is not stolen.

Q. You went from your home by way of this New York Avenue or Ravine Avenue on this day in question? Did you? A. Yes, sir.

Q. Is that the way you usually go down there? A. Yes, sir.

Q. That is where you start in first? A. Yes, 10  
sir.

Q. Now, you don't mean to say that this Ravine Road—New York Avenue is six hundred feet from this other crossing where this accident happened, do you? A. Yes, sir.

Q. You think it is six hundred feet? Now, you were shown the Ravine Road crossing on this picture P-1, designated as this black mark across here, about the center of the picture; is that Ravine Road? A. Yes, sir. 20

Q. Now, don't you know that the Ravine Avenue is right at the end of this picture—at the end of this building on this picture, where it is shown the man is standing in front of? A. Yes.

Q. Don't you know that that building there is only 167 feet long, and that between the corner of that building nearest this crossing—between that and this other street that this Ruben passed on, that it is only 100 feet, making altogether 267 feet from that street down to Ravine Avenue? 30  
Don't you know that? A. I never measured it.

Q. You don't mean to say that that building there is about five hundred feet long—that building shown on this picture with the man standing in front of it? A. A little more space on the rail there.

Q. Now, don't you know that that is less than three hundred feet from that street where Ruben drove that day, down to Ravine Avenue? Don't you know that as a fact? A. No; I don't. 40

*William Knecht, for Defendant—Cross*

Q. Why, doesn't it show on here that this picture was taken three hundred feet from that crossing? A. I see it there on the picture.

Q. Then the camera from which this picture was taken was south of Ravine Road, wasn't it? A. Yes.

Q. So between the camera and the crossing  
10 there was three hundred feet, about? Now, how do you make that six hundred feet, can you tell us? A. I only judged it. I didn't say it was six hundred; I said about six hundred.

Q. Didn't you testify here in the main or first part of your testimony that it was about six or seven hundred feet south of that crossing? Didn't you so testify? A. I said that, yes.

Q. Then you didn't mean that, did you? A. Well, I made a guess on the feet.  
20

Q. And are you guessing about all the facts in this case? A. No, only on that. I don't know the measurement of the tracks.

Q. Now, right at the end of that building, Mr. Knecht, the road curves, doesn't it? It curves to the west, doesn't it? A. Yes.

Q. Now, can you tell us how you stood there near that shanty and could possibly see that engine at such a distance as you have described, way  
30 down near the D. L. & W. bridge? A. I was standing right there at the outside of the shanty; I could look down.

Q. You could see the D. L. & W. bridge? A. I could see the curve before.

Q. What did you do? Did you look through the building there? A. No; I saw right down here.

Q. Now, there is a shanty over here on the east of the Ravine Avenue crossing, a watchman's shanty? A. Yes, sir.

40 Q. That is put there for the purpose of seeing

*William Knecht, for Defendant—Cross*

down the part of this road beyond the curve, isn't it? A. Yes.

Q. And that is way over on the other side of the road, isn't it? And yet you say you could see from this other shanty—see down that roadway? A. I can.

Q. How far can you see down that roadway from the shanty where you stood? A. Half-way 10 between that road and the Delaware bridge.

Q. How far is that that you can see down that road? A. Oh, if that is three hundred feet, then it must be five hundred.

Q. That you can see—five hundred feet, eh? A. Yes.

Q. Now, there were other engines around there that day, weren't there, besides this one? A. There were what?

Q. Other engines around there? A. No. 20

Q. And you knew—you recognized the blowing of this one a thousand feet away, did you? A. Yes.

Q. How did you know that? By the tone of the whistle or how? How can you tell the difference between that and some other train in the vicinity, if there were any? A. I know by the tone of the whistle.

Q. What was the number of this engine? A. 30 591.

Q. You can tell the engines by the tone, the different engines on the road? A. That is our engines on our road.

Q. What is there about the tone of the engines by which you can differentiate and tell? A. Well, there is a different tone. Our engines have a large steam whistle, and the Erie has something of a small whistle; something like an air whistle.

Q. Well, can you tell between the different whistles on that road? A. They mostly have the same 40 whistle.

*William Knecht, for Defendant—Cross*

Q. They all have the same whistle, don't they?

A. Yes.

Q. You don't mean to say that that was the only engine on that road between there and a thousand feet away on this day in question? A. Yes, sir.

Q. How do you know? A. There were not any more there.

10 Q. Well, did you see? A. Yes.

Q. How did you see? Did you go down there, a thousand feet away down south to see if there were any more there? A. Yes; I walked along my own train. My train went the other side of Hoboken Avenue.

Q. How long did you get to this crossing before this train struck this wagon? A. About ten minutes; ten or twelve minutes.

20 Q. Was this this man Schwartz's first day at this crossing, or had he been there before? A. Been there before.

Mr. Carey: I object to that as immaterial.

Mr. Kelsey: I withdraw the question to save time.

Q. Then you heard the bell ringing a thousand feet away, too, at these different crossings, continuing automatically all the way up to this crossing in question?

30 Mr. Carey: I object to that; he didn't say so.

Q. Well, where did the bell start to ring? A. The bell was ringing when it hit the wagon, and was ringing after.

Q. How far down the road did it start to ring? A. I heard it ring when it was coming along.

Q. What is that? A. I heard it ring when it was coming along.

40 Q. How far down had you noticed her ringing? A. About twenty-five foot—

*William Knecht, for Defendant—Cross*

Q. From the crossing; and you heard her blow for the Hoboken Avenue crossing? A. Yes, sir.

Q. And you heard her blow for the Ravine Avenue crossing? A. Yes, sir.

Q. And Schwartz then was just starting to go on the crossing, m-m? A. When she blew for Hoboken Avenue.

Q. For Hoboken Avenue, not for Ravine Avenue? A. No. 10

Q. Then he started to go on the crossing? A. Yes, sir.

Q. Had he been standing in the shanty there with you, or outside? A. Standing right outside of the shanty.

Q. Now, it was not dark yet, was it? A. No; it was just getting dark.

Q. Where did he have the red and white flag? A. He had no flag. 20

Q. Doesn't he have any flags at that crossing? A. He had flags; they were in the shanty.

Q. That is what I am asking you, if you know. A. They were in the shanty.

Q. In the shanty. Now, the signal for the crossing, that is, for people either driving or walking to pass over the crossing, the signal for them that it is safe, is the white light, isn't it? A. No.

Q. Red light, is it? A. Use red light for the use. 30

Q. For danger? To warn them not to go over? A. I couldn't answer that question. I don't know whether they use white light for that or not.

Q. Don't you know whether they use a red light or white light to indicate whether it is safe to cross or not? A. They use the red light when it is not safe.

Q. What do they use the white light for? A. For the train.

Q. You mean to say to indicate to the train that it is safe to go along? A. Yes, sir. 40

*William Knecht, for Defendant—Cross*

Q. What do they use to indicate to people who are crossing or attempting to cross that it is safe?

A. Red light.

Q. That it is safe to go across? A. Yes.

Q. Well, if they use that to show it is safe to go across, what do they use to show it is dangerous to go across? A. They use red light.

10 Q. For both? A. Yes.

Q. Both, that it is safe and dangerous? A. No, for danger; the man goes across with the red light.

Q. Well, what do they use to indicate that it is safe to go across? A. I suppose they use the white light.

Q. The white light? A. I guess so.

Q. What? A. I guess so.

20 Q. You say when the watchman started out on the crossing you saw him standing out there at the center of the crossing, did you? A. Yes, sir.

Q. How far away was the train then? A. When he was on the center of the crossing?

Q. Yes. A. Just approaching Ravine Road.

Q. Then he walked right up to this wagon where this fellow was driving and he held that red light up to him? A. He had the light held up to him before this man was near the crossing.

30 Q. And he shouted something to him, didn't he? A. Yes.

Q. Do you know why it was this man didn't stop then when he held the light up to him that way and made all that effort to stop him from going across there?

Mr. Carey: I object to that.

The Court: What is the question?

Q. (Last question repeated by the stenographer.)

40 The Court: It might be, Mr. Kelsey, after

*William Knecht, for Defendant—Cross*

you heard the answer you would want it to be stricken out.

Mr. Kelsey: Withdraw the question.

Q. Now, what did you do then? Did you try to stop him, too, from coming across? A. No.

Q. Why didn't you? A. It was not my place to do it; it was the flagman's place. 10

Q. You just stood still, did you, in front of the shanty? A. Yes.

Q. Eh? A. Yes, sir.

Q. How long have you been working for the company, Mr. Knecht? A. Going on six years.

Q. Then at no time after the watchman went out to the center of the crossing did he go back toward the shanty until after this accident happened? A. No, sir.

Q. Eh? A. No, sir; stayed right on the crossing. 20

Q. He didn't carry any lamps, lighted lamps from the center of the crossing about over to this shanty, did he, before or after the accident? A. No, sir.

Q. He didn't shake his hands and run down the track, and shake his coat and try to stop the train from coming? A. No, sir.

Q. Nothing of that sort happened? A. No, sir. 30

Q. The watchman knew the train was coming? So far as you know, he was aware the train was coming all the time? A. Yes, sir.

Q. You saw this other wagon coming across there, didn't you, just before, from Hoboken? A. No, sir.

Q. Didn't see any wagon cross there? A. No wagon crossed there.

Q. Where did the engine start to whistle before it hit the wagon after it left the Ravine Road crossing? A. Didn't blow any whistle then. 40

*William Knecht, for Defendant—Redirect*

Q. It blew for Ravine Avenue? And didn't blow any whistle for the next crossing at all, do I understand you? A. Yes, sir.

Q. That is right; is it? A. Yes, sir.

Q. But it rang the bell when it was within 25 feet of the crossing? A. Yes, sir.

Mr. Kelsey: That is all.

10

*Redirect Examination by Mr. Carey:*

Q. You never acted as a watchman at a crossing, did you? A. No, sir.

Q. And you are not familiar with the rules which govern the signals which the watchman gives at the crossings, are you? A. No, sir.

Q. And what he may use the white light for is a matter of supposition so far as you are concerned? A. Yes, sir.

20

Q. But you did see him do something with the red light? A. Yes, sir; I seen him holding up towards the driver.

Q. And which way was he looking when he held that up? A. West, towards the elevator.

Q. And after you undertook to haul the wagon off the track, as I understand you, the watchman was behind you? A. Yes, sir.

Q. You could not see what he was doing? A. No.

30

Q. Between the time when he went on to the crossing and the time the accident occurred, was he at any time between the shanty and this train? A. No, sir.

Q. Were there any cars standing on the Erie tracks—on the Central tracks between the crossing where the accident happened and the Lackawanna bridge that night? A. No.

40

Q. You say your work was along the railroad between Weehawken and Jersey City? A. Yes, sir.

*Henry Schwartz, for Defendant—Direct*

Q. Where did you go after the accident that night? A. After the accident?

Q. Yes. A. I walked up towards Eighth street.

Q. In Hoboken? A. Yes, sir; along the track.

Q. I show you another picture of this location, looking in a southerly direction. Do you see the bridge down here at the lower extremity, the further extremity of this picture? A. Yes, sir. 10

Q. What bridge is that? A. D. L. & W.

Q. That is the one you have spoken of? A. Yes, sir.

Q. And this crossing in the foreground is the crossing where the accident took place? A. Yes, sir.

Mr. Carey: I offer this in evidence.  
(Marked D-2 in evidence.)

Q. Did you notice the shanty down here on the left-hand side of this picture, between the crossing where the accident happened and this bridge? That shanty is at what crossing? A. Ravine Road or New York avenue. 20

Q. On Ravine Road or New York avenue? A. Yes, sir.

(Witness excused.)

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HENRY SCHWARTZ, sworn on behalf of the defendant, testified as follows: 30

*Direct examination by Mr. Carey:*

Q. In November, 1916, you were in the employ of the New York Central Railroad Company? A. Yes, sir.

Q. And you remember this accident to the Brauer truck? A. Yes, sir.

Q. And horse. Were you the flagman at this 40

*Henry Schwartz, for Defendant—Direct*

crossing at the time of the accident? A. Yes, sir.

Q. About what time did this accident happen?

A. 5:10.

Q. And what was the condition as to light at that time? A. Light? It was just getting dark.

Q. Did you hear any whistle blown by this engine which struck the wagon? A. Yes, sir.

10 Q. Where were you when you heard the whistle blow? A. I was just coming out of the shanty.

Q. Out of the watchman's shanty at the crossing there? A. Yes, sir.

Q. Where was the engine at the time that whistle blew? A. Well, he just hit about—when he blew, he blew for Hoboken avenue crossing.

Q. Hoboken avenue crossing? A. Yes, sir.

Q. Was the engine in sight at that time? A. Well, I couldn't see the engine.

20 Q. You couldn't see it? A. No, not from where I was.

Q. When you heard that whistle blow for the Hoboken avenue crossing, what did you do? A. I walked out, out of the shanty on the crossing.

Q. On to the crossing. A. Yes, sir.

Q. And what did you have with you? A. Two lamps.

Q. What were those lamps? A. Red and white.

30 Q. Were they lighted? A. Yes, sir.

Q. Did you have any flags with you? A. No, sir.

Q. What position did you take on the crossing after you went out? A. I walked away towards the ice dock there, between the ice dock—

Q. With respect to the Erie tracks and the New York Central tracks where were you? A. I was on the Erie.

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

Q. When you first went out? A. Yes, sir.

40 Q. Did you see this driver, Ruben, approach-

*Henry Schwartz, for Defendant—Direct*

ing with the wagon—with the horse and wagon?  
A. Yes, sir.

Q. Where did you first see him? A. Coming out of the elevator.

Q. That is the elevator that is shown in this picture here? A. Yes, sir.

Q. Exhibit P-1? A. Yes, sir; that is the one there (indicating). 10

Q. Where were you when you first saw him? A. Just coming out of the shanty.

Q. What did you do after you got on to the crossing with respect to this man who was approaching? A. I put up my red light to him.

Q. What? I put up my red light to him.

Q. How did you put it up? A. Held it up that way (indicating).

Q. What did he do? A. He still came on crossing. 20

Q. Did he at any time stop from the time he left the elevator until he got to the second track? A. No, sir.

Q. Did you do anything else beside hold up your light to him? A. I told him to stop; I hollered to him.

Q. Where was he when you hollered to him? A. He was still coming. He didn't seem to heed.

Q. What did he do? A. He still kept on coming. 30

Q. When he got on to the second track—

Mr. Carey: Strike that out, please.

Q. Which track was it that the train was coming on? A. On the west-bound track.

Q. On the west-bound track? A. Yes, going towards Weehawken.

Q. And that was which track, the first or second track? A. The second one from the elevator.

Q. The second one from the elevator. What happened when the wagon was on the second track? A. Stopped it. 40

*Henry Schwartz, for Defendant—Direct*

Q. What? A. The horse stopped.

Q. The horse stopped there? A. Yes.

Q. What did the driver do when the horse stopped? A. He got off and ran away.

Q. Which way did he run? A. He ran over towards the ice office.

Q. Had the engine come in sight when the driver—when the horse stopped? A. When the horse stopped?

Q. With the wagon on the track. A. Yes, sir.

Q. About where was the engine at that time?

A. Well, it was just coming from Hoboken avenue as I was walking out.

Q. Had he passed under the Lackawanna bridge at that time? A. No, sir; he was not there yet.

Q. What did you do after the horse stopped?

20 A. Well, I flagged the engine.

Q. What? A. I had to flag the engine.

Q. Will you state where the wagon was and where the horse was at the time the horse stopped? A. It was on the West Shore track.

Q. Where was the wagon? A. It was on the crossing; couldn't go ahead any more; he was stuck; the horse wouldn't pull.

Q. What? A. The horse wouldn't pull the wagon; he stopped right on the crossing.

30 The Court: What is the answer, he "couldn't" or he "wouldn't"?

The Witness: He wouldn't pull the wagon.

Q. Now, when the horse stopped where was the horse with respect to this track? Was he on the track or had he gotten off the track? A. No, sir—he got off the track.

Q. He got off the track? A. Yes, sir; just—

Q. Which wheels of the truck were on the track?

40 A. The hind wheels.

*Henry Schwartz, for Defendant—Direct*

Q. That is all that was on the track? A. Yes, sir.

Q. After the horse stopped you started to flag the engine, did you? A. Yes, sir.

Q. You say you "flagged" it. What did you use? A. Red light.

Q. And where did you go to attempt to flag the engine? A. Went over there where the ice cars 10 are.

Q. Why did you go over there on the Erie tracks? A. Well, because the engineer could see me better.

Q. He couldn't— A. You have to go over there on account of the curve.

Q. When you went out from the shanty that night, and from that time on until the accident happened, did you at any time have any flags in your hands? A. No, sir. 20

Q. Did you at any time start to go back— A. No, sir.

Q. Toward the shanty until after the accident happened? A. No, sir.

Q. Did you take off your coat, wave that at the engineer? A. No, sir.

Q. Do you know whether anybody tried to get the horse to move—to pull the wagon off the track after the horse stopped there? A. Yes, sir.

Q. Who did it? A. Mr. Knecht. 30

Q. The man who just testified? A. Yes, sir.

Q. And what did he do? A. He tried to do his best; he got hold of the horse's head and tried to get him off.

Q. What did the horse do? A. He stood there; we couldn't move him.

Q. Did the horse try at all to move the load? A. No; he was pretty well sweated up.

Q. Pretty well sweated up? A. Yes, sir.

Q. What kind of a day was it, cold or warm? 40  
A. It was a pretty mild day.

*Henry Schwartz, for Defendant—Direct*

Q. Now, you say you heard the whistle of this engine for the Hoboken crossing? A. Yes, sir.

Q. Then you started to go on to the crossing? A. Yes, sir.

Q. Did you hear any other whistle of this engine, blowing for the Hoboken crossing? A. Yes, sir; he blew all right.

10 Q. Where? A. Coming along. He seen my red lantern, as they generally give me a return whistle.

Q. When you went over there with your red lamp what did you do with your red lamp? A. Well, I swung it that way for the engineer to see (indicating).

Q. Did you do anything at all with your white lamp that night in connection with this train? A. No, sir.

20 Q. Did this driver stop at any time—at any point between the elevator and the New York Central tracks— A. No, sir.

Q. —until he got onto the second track? A. No, sir.

Q. When the engine stopped where was it with reference to the crossing? A. It was about two lengths away.

Q. Two lengths of what? A. Car-lengths.

30 Q. Two car-lengths away from the crossing, which way? A. Towards the west.

The Court: It had crossed the crossing and went two car-lengths beyond; that is what you mean?

The Witness: Yes.

Q. After the accident where was the horse and wagon? A. In front of the engine.

Q. In front of the engine? A. Yes, sir.

Q. After the accident? A. Well, yes; it was  
40 laying there.

*Henry Schwartz, for Defendant—Cross*

Q. What? A. It was laying alongside of the engine—the horse.

Q. Alongside of the engine? A. Yes.

Q. Can you tell us whether the bell was ringing as the train approached the crossing? A. The bell?

Q. The bell on the engine. A. I believe it was, yes. 10

Q. It was? A. Yes, sir.

Q. How about the headlight? A. The headlight was lit.

Mr. Carey: Cross-examine.

*Cross Examination by Mr. Kelsey:*

Q. What do you use the white light for, for what purpose? A. To let him know that everything is all right, to come ahead. 20

Mr. Carey: Let who know?

Mr. Kelsey: Just a minute, Mr. Carey.

The Witness: The engineer.

Q. Let who know that it is all right? A. The engineer.

Q. Well, what do you use at night to let foot passengers or people driving know that it is safe for them to cross? A. I hold up my red light to stop them, if they want to come across, and if anything is coming. 30

Q. So that you have no signal then for people who desire to cross the crossing to indicate that it is safe for them to go across at night? A. No, not at all.

Q. The only signal you have at night, then, is the red light to indicate that it is not safe? A. Red and white one.

Q. But to indicate it is not safe, the only light you have—that is, for people who desire to cross— A. Yes. 40

*Henry Schwartz, for Defendant—Cross*

Q.—is the red light? A. Yes, sir.

Q. Now, does the Erie have the same system of signals? A. Yes, sir.

Q. Do you work for the Erie also? A. Yes, sir.

Q. Now, how far down the road about is this Delaware and Lackawanna bridge that you have told about? A. About three hundred feet, I should judge.

Q. About how many feet? A. Three hundred, and probably more.

Q. Three hundred feet? A. Probably more.

Q. Probably more. Well, about how many feet? A. I can't judge.

Q. Well, you are a good judge of distance, aren't you? A. Sometimes.

Q. You have shown on this picture, D-2, where the bridge is located, haven't you? A. Yes, sir.

Q. That is down there where the Lackawanna tunnel is, near the tunnel, isn't it? A. Yes.

Q. Well, how far is it from this crossing down to that Delaware & Lackawanna bridge, about? Down right near Hoboken avenue, isn't it? A. About a quarter of a mile.

Q. About a quarter of a mile? A. Yes.

Q. And you testified—oh, what did you do with your white light that day when you swung the red light? A. I had it alongside of me.

Q. You had them both in your hands? A. No; I had the red one, one in back.

Q. What did you do with the white one? A. I had that back of me.

Q. But you had it in your hand when you swung the red light? A. Yes.

Q. You didn't put them down by the shanty? A. No, sir.

Q. You had both of these lights in your hand during this entire trouble? A. Yes, sir.

*Henry Schwartz, for Defendant—Cross*

Q. Never put them down at all? A. No, sir.

Q. Now, do you mean to say, then, that when the horse stopped on that crossing after it had gone over the second track, that the engine was not yet in sight beyond the Delaware & Lackawanna bridge? A. No, sir; he just blew for Hoboken avenue.

Q. Well, Hoboken avenue is beyond the Delaware & Lackawanna bridge. A. Yes. 10

Q. And you mean to say, then, that this engine was a quarter of a mile down the road there when this horse stopped on that second track, eh? A. He was just coming down the grade.

Q. You mean beyond the Delaware & Lackawanna bridge? A. Yes.

Q. A quarter of a mile down the track when the horse stopped there? A. More than a quarter of a mile he was. 20

Q. More than a quarter of a mile? A. Yes; he was on the other side of Hoboken avenue.

Q. Now, how long did it take for that engine to come that quarter mile up to the crossing where it struck the wagon? A. About five minutes.

Q. Five minutes? A. Yes, sir.

Q. And you mean to say that the driver got off there then and was away five minutes before that wagon was hit by the engine? A. Yes, sir.

Q. Five minutes? A. Yes, sir; probably a little more than that. 30

Q. What did you do all that time in the way of trying to get that horse off that track—during that five minutes? A. Why, as the engine approached I flagged him.

Q. Didn't you do anything at all to try and get the horse off the track? A. How could I? I had all I could do to stop the engine.

Q. And you were out there five minutes on the Erie tracks trying to flag the engine, were you, 40

*Henry Schwartz, for Defendant—Cross*

which was a quarter mile down the road? A. As she was coming along I flagged her, yes.

Q. Was it coming at a pretty good clip? A. No, not very fast.

Q. And you were on there five minutes on the Erie track, flagging her all that time with the red light? A. Yes, sir—five minutes?

10 Q. Yes. A. Yes, about that.

Q. Over on the Erie track, the one nearest the ice house; you had to go over there so she could see you? A. Yes.

Q. She couldn't see you and you couldn't see her until you got over there, could you? A. Until she came to the other side of the bridge.

Q. Why didn't anyone make any effort at all until the engine got on top of that horse, to take her off the track? A. Yes, Mr. Knecht.

20 Q. You heard him testify he didn't start to take him by the bridle until just before the engine struck the wagon?

Mr. Carey: He did not say that.

Mr. Kelsey: I have a note here that he said that very thing.

The Court: The question will be decided by what the record shows, not by what his notes may show.

30 Mr. Kelsey: If there is any question about it, we can refer to the record. That is my understanding; those are my notes on cross-examination.

(The testimony of Mr. Knecht in relation to the matter in question was repeated by the stenographer.)

Mr. Kelsey: I withdraw the question.

Q. Where was he driving when you first called to him to stop? A. He was coming down from the  
40 elevator.

*Henry Schwartz, for Defendant—Cross*

Q. How near the track? A. About fifteen feet, I should judge.

Q. About fifteen feet away. Now, how long was Mr. Knecht out there trying to get the horse off the track? A. About ten minutes.

Q. About ten minutes, eh? A. Yes.

Q. And he couldn't get the horse to move, eh? A. No, sir. 10

Q. And during all that time the driver was away? A. Yes, sir; he run away.

Q. Now, when was the first you went back to the shanty after you went out there to flag the engine? A. Well, after the engine had passed, the train had passed; of course, I couldn't get over to the shanty.

Q. You were on the other side of the train? A. Yes, sir.

Q. You were on the Erie Railroad side of the train? A. Yes. 20

Q. During all this trouble? A. Yes, sir.

Q. Where were the flags? A. In the shanty.

Q. What time of day do you discontinue using flags? A. About five o'clock.

Q. Just ten minutes before this? A. Yes, sir.

Q. How do you know it was ten minutes after five when the accident happened instead of five o'clock? A. I asked Mr. Knecht. 30

Q. What? A. I asked Mr. Knecht the time.

Q. Did you make a note of it at the time? A. Yes, sir.

Q. You gave your statement to the company about how it happened and all about it? A. Yes, sir.

Q. Did you see Mr. Brauer down there afterwards, the owner? A. Mr. Brauer?

Q. Yes. A. I don't know Mr. Brauer.

Q. You didn't see him there at all? A. Somebody was there; I don't know whether it was Mr. Brauer or not. 40

*Henry Schwartz, for Defendant—Cross*

Q. Well, this man in back of me. A. I believe I did.

Q. What time did he get down there? A. This was after the accident.

The Court: What time?

The Witness: I couldn't say at what time; around six or seven.

10 Q. Between six and seven o'clock? A. About that.

Q. And after dark, eh? A. Yes, sir.

Q. Now, in order to make the engine see you with the red light, you went over near the ice house? A. Yes, sir.

Q. They couldn't see you from that Delaware bridge—the engineer couldn't see you if he was at the Delaware bridge if you stood over at your shanty, could he? A. No, sir.

20 Q. When did the engine whistle with regard to this crossing? When did it start to whistle with regard to this crossing? A. Right this side of the bridge, where it comes through the bridge.

Q. And did it continue to whistle all the way up to this crossing, then, where the accident happened? A. No, sir; she gave the signal to the crossing.

30 Q. What? A. Just blowed for the crossing; that's all.

Q. What crossing? A. Both; blows for both crossings.

Q. How many times did it blow between that time and the time it got at this crossing? A. Once.

Q. Only once? A. Yes.

Q. That was down there about a quarter mile? A. Down there; yes, sir.

Q. M—m? A. Yes, sir.

40 Q. It didn't blow when he got up at this cross-

*Henry Schwartz, for Defendant—Cross*

ing at all, did it? A. No, sir; the bell was ringing.

Q. Only the bell ringing; no loud continued blast of the whistle or anything of that sort when it was about to strike the wagon? You didn't hear anything of that sort, did you? A. No, sir.

Q. When did the bell start to ring? Mr. Knecht says it was 25 feet from the crossing; is that correct? 10

Mr. Carey: I object to that.

The Court: I do not think Mr. Knecht said they started to ring at any particular place. He may have said he heard it ringing.

Q. How far down the road did the bell start to ring as regards this crossing where the accident happened? A. It was ringing right along as it came along. 20

Q. It was ringing right along as it came along?

A. Yes, sir.

Q. How far down did you first hear it ringing?

A. This side of the—where the D. L. & W. trestle is.

Q. About a quarter mile down the road? A. Yes, sir.

Q. Now, the driver when he got off, he didn't make any effort to get the horse off the track or anything of that sort? A. No; just ran away. 30

Q. Panic-stricken across to the ice house? A. Yes, sir.

Q. And that was about five minutes—or five or ten minutes before the— A. Yes.

Q. —engine hit the wagon? A. Yes, sir.

Q. And you didn't run down the track towards the engine at all? A. No, sir.

Q. Didn't use your coat in any way? A. No, sir.

Q. And run toward the engine to stop it; you 40

*Henry Schwartz, for Defendant—Cross*

stood right still then? A. Used my red lamp, you mean.

Q. You stood over on the Erie track with a lantern in your hand; that is all you did? A. Only my lantern; that's all.

Q. You didn't try to go down towards the engine to stop it or make any precaution that way?

10 A. No, I couldn't, because I had to stop the other wagons coming across.

Q. There were other wagons coming across?

A. Not just then.

Q. You saw the wagon cross just before that?

A. There was no other wagon there.

Q. Where did you have to stand at? Why did you have to stand there? A. To protect the others in case there was a wagon there.

20 Q. And you say you saw none on the elevator on the other side? A. No.

Q. That is the only street that is there? A. You ain't supposed to go off the crossing.

Q. Not supposed to leave the crossing under any circumstances? A. No, sir.

Q. If you saw a child, a baby in the middle of the track down there, 100 feet, you couldn't go off and take it off the track?

Mr. Carey: I object to that.

30 Q. Are those your orders that you can not leave the track under any circumstances? A. No, sir.

Q. Those are not your orders? A. I can't leave that crossing.

Q. You can't leave the crossing under any circumstances? Where do you stand when you signal the Erie train? A. The side near the shanty.

Q. But coming from the south, if an Erie train is coming from the same direction, do you go out then on the Erie tracks to signal? A. Yes.

40 Q. If they are coming from the north you stand near your shanty? A. Near the shanty.

*Henry Schwartz, for Defendant—Redirect*

Q. For both the Erie and New York Central.

The Court: Mr. Witness you have said that you flagged this train. I think you told us what you meant and what you did by flagging the train, but I want to be sure. Tell us what you did when, you say, you flagged this train. Tell us what you did, how you did it. Show us, if you can. 10

The Witness: I flagged with a red light this way (indicating by swinging his hand); that's all.

The Court: That is what you meant by flagging.

The Witness: Yes, sir.

*Re-direct examination by Mr. Carey:*

Q. You say that you are not permitted to leave the crossing under any circumstances. That refers to the time when a train is approaching the crossing? A. Yes, sir. 20

Q. You are not on the crossing when trains are not approaching? A. No, sir.

Q. Do you use the white light at all to signal people who are crossing the railroad? A. No, sir.

Q. What is the white light for? A. What is the white light for? For wagons; yes, sir. 30

Q. Eh? A. I don't use that unless there is something—that is, flagging the engineers, flagging trains.

Q. You use that for the engineer's information? A. Yes, sir.

Q. Indicating what, when you swing the white light? A. "All right."

Q. That the crossing is clear? A. Crossing is clear.

Q. And that is why you have both the red light 40

*Bartholomew J. Glennon, for Defendant—Direct*

and the white light when you go out on the crossing when you stop using the flags? A. Yes, sir.

Mr. Carey: That is all—

Q. You are not now in the employ of the Central Railroad Company? A. No.

Q. You are employed by whom? A. L. O. Koven.

Q. Foundrymen? A. Metal work, yes.  
(Witness excused.)

BARTHOLOMEW J. GLENNON, sworn on behalf of the defendant, testified as follows:

*Direct examination by Mr. Carey:*

20 Q. You are in the employ of the New York Central Railroad Company? A. Yes.

Q. You were in November, 1914? A. Yes, sir.

Q. Do you know anything about this accident which is the subject of this suit? A. Yes, sir.

Q. Where were you at the time of the accident? A. Ten cars from the engine, about 350 feet.

Q. What was your business? A. My business was to protect the train from being robbed.

30 Q. You were a special officer riding freight trains, were you? A. Yes, sir.

Q. That is a regular thing in transporting freight from Jersey City to Weehawken, is it? A. Yes, sir.

Q. And you were on this train this night of the accident? A. Yes, sir.

Q. And where did you say?

The Court: Ten car-lengths from the engine.

40 Q. Where did you board this train? A. Half-way down the hill, coming down the hill from the junction.

*Bartholomew J. Glennon, for Defendant—Direct*

Q. How far is that from the Hoboken crossing?

A. How far is that from the Hoboken crossing? That must be easily 700, may be 800 feet.

Q. Which way? A. South from the Ferry street crossing, or from New York avenue may be about 300 or 400 feet, on top of a grade down there, half-way down.

Q. How far did you say you were from Hoboken crossing? A. About 700 feet. 10

Q. And was the train moving still—when you boarded, or was it standing still? A. It was moving very slowly, or I could not have got on.

Q. Did you continue to ride the train until the accident happened? A. Yes, sir.

Q. Will you state whether or not the speed of the train increased? A. No, sir; not to my knowledge.

Q. Now, tell us what you saw in regard to the accident, if you saw anything. A. When the train 20  
neared Hoboken avenue, or at least when I got on the train, she blew for Hoboken avenue; and when I got under the D. L. & W. bridge they blew for Ravine Road and New York avenue crossing. Shortly after that I heard the brakes go on, and the next thing the train had stopped. I went up from my position on the train and found that they had hit a wagon and it killed a horse; and I went over. After I seen that I inquired for the 30  
driver in order to get his name. I went over to the ice house and was informed that he was over there, and when I got over there he was in a fit, and after he come to I asked him his name—or at least, I thought he had come to, and he told me he was dead.

Q. He told you he was dead, did he? A. He told me he was dead.

Q. Did you believe it? A. Well, I didn't believe it when he spoke to me. 40

*Bartholomew J. Glennon, for Defendant—Direct*

Q. Didn't you think he ought to know better than you did? A. I thought he ought to. So shortly after that somebody said that they ought to get an ambulance.

Q. Well, never mind about that. A. So I got his name and address.

Q. Which side of the train did you walk up  
10 on? A. Walked up on the east side of the train.

Q. And which side were you riding on? A. On the east side of the train.

Q. Did you see anything of the horse and wagon on the crossing before the accident? A. No, sir.

Q. The first you saw of it was after you walked up? A. Yes, sir.

Q. Now, do you know whether or not the bell was ringing on this engine? A. Well, when I  
20 got up to the crossing I distinctly remember the bell being ringing and the engine laying there.

Q. Where did the engine stop? A. The engine stopped just the other side of the—tank of the engine stopped just other side of the plank walk across the crossing.

Q. That is just north of the— A. No, south; the engineer could get up in the cab off of the crossing.

Q. Off the crossing boards? A. Yes, sir.

Q. And where were the horse and wagon at  
30 that time? A. The wagon laid in front of the tank, and the wagon laid between the Erie and the New York Central tracks, in that position (indicating). It laid in a north and south position.

Q. Do you know whether the headlight was lighted when the engine stopped there? A. Yes, I could see that the headlight was lit.

Q. Do you know whether it was lighted before you got on the train? A. Yes, sir; it was lighted  
40 before I got on the train.

*Bartholomew J. Glennon, for Defendant—Cross*

Q. About what time was it when this accident happened? A. Just about dusk.

Q. Did you see anything of the watchman there?

A. The flagman?

Q. The flagman, yes. A. Yes, sir; when I got up to the crossing he was standing there.

Q. Where was he standing? A. He was standing over on the south-bound track of the Erie. 10

Q. South-bound Erie track? A. Yes, sir.

Q. And that was east of the train? A. Yes, sir.

Q. Did you notice whether he had any lantern or not? A. Yes, sir; he had his two lanterns there.

Q. Did you notice whether they were lighted or not? A. Yes, sir; they were lit.

Q. And what were the colors? A. Red and white. 20

Mr. Carey: Cross-examine.

*Cross-examination by Mr. Kelsey:*

Q. How long did you stay there after the accident? A. Till the train pulled away; I guess that was easily 45 minutes.

Q. Why didn't you, if you were an officer of the company, stop them from stealing the barrels around there? A. Because I considered it my business to get that man's name. 30

Q. Well, you found that he thought he was dead and you didn't take very long about that, did you? A. Well, I knew he was not dead so long I got his name, when he spoke to me.

Q. It didn't take you 45 minutes to do all that, did it? A. Yes, it did; it took me that, because I seen Mr. Brauer himself at the time, and he told me to go over and get his name.

Q. And you saw people running off with the barrels? A. I saw who were taking them, but 40

*Bartholomew J. Glennon, for Defendant—Cross*

I didn't know who they were, or whether they had any authority.

Q. You live over in Hoboken yourself, don't you? A. No, sir.

Q. Well, you didn't try to stop them? A. No, sir.

Q. Did you see some fellow run off with a  
10 blanket? Did you? A. No, sir.

The Court: Did I understand you to say you saw Mr. Brauer there?

The Witness: Yes, sir.

The Court: How long after the accident was that?

The Witness: Well, I couldn't really tell you; probably may be it was an hour, or probably an hour and ten minutes after the accident.

20 The Court: This running off with the barrels, did that take place while he was there or before he came there?

The Witness: It was taking place when he come there.

Q. Now, you say you boarded the train over there at the grade? A. Yes, sir.

Q. That is at a point over a little ways beyond the Dickinson Hight School, north, down the hill  
30 there? A. Yes, sir.

Q. And that point, you know—you say, is about eight or nine hundred feet south of the Hoboken avenue crossing? A. Yes, sir.

Q. And three or four hundred feet north of New York avenue? A. Yes, sir.

Q. Don't you know that between New York avenue and Hoboken avenue it is more than three hundred feet? A. I never measured it.

40 Q. Isn't it a matter of half a mile—more than half a mile? A. I shouldn't judge so.

*Bartholomew J. Glennon, for Defendant—Cross*

Q. What? A. I shouldn't judge so.

Q. From Newark avenue where the junction railroad crosses; that is, near the foot of the hill on Newark avenue over to Hoboken avenue crossing, where the Hoboken tunnel is—that is where it is, isn't it, Hoboken crossing? A. No, sir.

Q. How far this side of Hoboken avenue is it?  
A. Of the Lackawanna tunnel, you mean? 10

Q. Yes; how far this side of the Lackawanna tunnel is Hoboken avenue crossing? A. About three hundred feet.

Q. Then do you mean to say over there from that Hoboken avenue crossing to Newark avenue is only three hundred feet? A. Well, that is all I take it to be.

Q. Then you boarded the train; then she went down the grade there and got over to this place?

A. I boarded the train on the grade as she was going down the grade. 20

Q. And she didn't increase her speed going down the grade at all; went just about the same?

A. Yes.

Q. About how fast was she going? A. I should judge about ten or twelve miles an hour.

Q. And you boarded her when she was going that fast? A. Yes, sir.

Q. And she didn't increase her speed in your estimation? A. No, sir. 30

Q. Now, you didn't see the wagon out in front of the train? You didn't see any signal or anything of that sort? A. No, sir.

Q. You were in between two cars? A. I was riding alongside; ten cars of the engine.

Q. Between the bumpers? A. No, on top of a coal car.

Q. A coal car? A. Yes, sir.

Q. And this engine stopped right on the crossing there? A. Yes, sir. 40

*Bartholomew J. Glennon, for Def't.—Redirect*

Q. It was right on the crossing? A. Yes, sir; the tank was right on the crossing.

Q. Well, when you say the tank you mean the tender? A. Yes, sir.

Q. Then the engine itself was over the crossing, eh? A. Yes, sir.

Q. Well, this particular walk at this crossing is  
10 not very high—very wide, is it? I show you this picture, D-2. A. That is the crossing.

Q. That is the crossing, isn't it? A. Yes, sir.

Q. That board there? A. Yes, sir.

Q. It was the same width at the time this accident happened, wasn't it? About the same? A. About the same, yes.

Q. How do you mean, then—you mean that the engineer could step from that crossing? A. I mean from the end of this crossing here he could  
20 step up into his cab.

Q. And where with respect to that crossing did the wagon lie after the accident? A. The wagon laid—well, I didn't see the wagon laying there; the wagon laid there when I seen it (indicating).

Q. You indicate between the easterly track of the New York Central and the westerly track of the Erie? In between those tracks? A. Yes, sir.

30 Q. And where did the horse lie? A. The horse laid in here somewheres.

Q. Just to the north of the crossing? A. Yes, sir.

*Re-direct examination by Mr. Carey:*

Q. When you speak of Newark avenue, do you refer to Newark avenue, Jersey City, or Newark street, Hoboken? A. Newark avenue, Jersey City.

40 Q. Which side of Newark avenue in Jersey City

*Cleveland H. Moeser, for Defendant—Direct*

did you board the train? A. North, on top of the hill; north of Dickinson High School.

Q. About how far from the high school? A. Well, part of it just got right in under 13th street viaduct.

Q. Under the 13th street viaduct. That is all.

*Re-cross examination by Mr. Kelsey:*

10

Q. You don't mean to say that 13th street viaduct is about three hundred feet north of Newark avenue, Jersey City? A. Don't mean to say anything, because I never measured it.

Q. But you say you boarded the train about three hundred feet north of Newark avenue. A. Yes, sir.

Q. Do you mean that? A. Yes, I mean that.

Q. Near the 13th street viaduct? A. Near the 13th street viaduct.

20

Mr. Kersey: That is all.

(Witness excused.)

CLEVELAND H. MOESER, sworn on behalf of the defendant, testified as follows:

*Direct examination by Mr. Carey:*

Q. You are engineer in charge of a train of the New York Central Railroad Company? A. Yes, sir. 30

Q. You were in 1914? A. Yes, sir.

Q. Engineer on the train that struck this wagon of Mr. Brauer's? A. Yes, sir.

Q. You were riding on which side of the engine that night? A. Right side.

Q. What time did the accident happen? What time of day? A. About 5:05.

Q. And what was the condition as to light? A. Just about dusk; it hadn't got quite dark yet. 40

*Cleveland H. Moeser, for Defendant—Direct*

Q. How many cars did you have on your train that night? A. 47.

Q. Freight cars, all of them? A. All freight cars—coal and freight.

Q. All loaded, or how? A. I don't know as they were all loaded; some empty mixed in with them.

10 Q. You brought the train from what point? A. I should judge from the Pennsylvania trestle. I think we doubled the train up there from the valley; that is where we started out from.

Q. Now, as you approached this place where the accident happened, can you state whether or not you blew the engine whistle, and if so, where you blew it and for what? A. I blowed it just as I was passing under the D. L. & W. bridge. I blowed it first for the Hoboken avenue crossing.

20 Q. Where were you when you blew it for the Hoboken avenue crossing? A. Oh, I should judge about six, seven or eight hundred feet from there, perhaps.

Q. Where did you next blow it? A. Under the D. L. & W. bridge.

Q. Under the D. L. & W. bridge? A. Not under it; just after passing it.

Q. Blowing it then for what? A. For crossings.

30 Q. What? A. For the crossing ahead of me; Ravine Road and Ferry Road crossing, or whatever they call it.

Q. Ferry Road crossing was the place where this accident happened, wasn't it? A. That was where the accident happened.

Q. As you came across Hoboken avenue crossing and under the bridge, about what rate of speed were you going? A. I should judge about fifteen mile an hour.

40 Q. Were you keeping a lookout ahead? A. Yes, sir.

*Cleveland H. Moeser, for Defendant—Direct*

Q. What was the first information you had with regard to anything being wrong with the crossing. A. The fireman told me.

Q. Where were you when he told you what he did? A. I should judge between six and seven hundred feet from the crossing.

Q. Six and seven hundred feet? A. I made a mistake there; between five and six hundred feet. 10

Q. Between five and six hundred feet. Which side of the Lackawanna bridge were you on? A. The north side.

Q. Which side of the Ravine Road crossing were you on? A. On the south side.

Q. What did the fireman say to you? A. He told me there was a wagon stuck on the crossing, the Ferry Road crossing.

Q. Could you at that time see the crossing? A. No, sir. 20

Q. What prevented you from seeing the crossing? A. The curve.

Q. The curve in the road. As you got nearer did you get a view of the crossing? A. I couldn't get a view of the crossing until I got on Ravine Road crossing, just going around Ravine Road crossing.

Q. Just about the Ravine Road crossing. Then what did you see on the crossing at Ferry street? A. I could see the rear end of the wagon standing 30 there.

Q. What part of the wagon was on the track that you were coming on? A. The rear end back wheel.

Q. About how far would it have been necessary for the wagon to move so it would have cleared the engine, or before the engine would have cleared it? A. It didn't seem to me only three or four or five feet.

Q. When the fireman gave you warning as to 40

*Cleveland H. Moeser, for Defendant—Direct*

something being on the track at the Ferry street crossing, what did you do? A. I immediately applied the brakes.

Q. What about the steam? A. I wasn't using any steam; I was rolling through there.

Q. What is that? A. I was rolling through there; I would not use any steam.

10 Q. What is the grade there? A. Down toward the crossing there it is a little down-grade.

Q. Slightly down-grade towards the crossing, and you were not using any steam? A. No, sir.

Q. How did you apply the brakes? A. Emergency application.

Q. And is that the most effective application you can make? A. Yes, sir.

Q. Did you leave anything undone, after you received this warning, to stop the train? A. Not  
20 that I know of.

Q. Well, you know, don't you? A. Yes, sir.

Q. How long have you been an engineer? A. Oh, something over thirty years.

Q. In the employ of the New York Central all that time? A. Yes, sir.

Q. When you struck this wagon what part of the wagon did you strike? A. The rear end; just about the wheel, I guess.

Q. About the rear wheel? A. About the rear  
30 wheel, I should think.

Q. About how fast were you going then? A. Oh, I was just crawling along then; I should say three or four miles an hour; just pushed the wagon aside, pushed it around; that's all.

Q. Where was the engine with respect to the crossing when you brought it to a stop? A. The tank on the crossing and the engine just over the crossing—the engine part.

Q. Will you state whether or not the bell was  
40 ringing as you approached this crossing? A. Yes sir.

*Cleveland H. Moeser, for Defendant—Direct*

Q. How do you know that? A. Well, I suppose having an accident, I took particular notice whether it was.

Q. When did you start the bell ringing? A. When I left Jersey City.

Q. How was the bell rung? A. Automatically.

Q. Had the bell stopped ringing from the time you left Jersey City until you struck this wagon? 10

A. No, sir.

Q. After the engine stopped do you recall whether the bell was still ringing? A. Yes, sir.

Q. Who stopped the bell from ringing? A. I did.

Q. How did you stop it? A. Shut the air off.

Q. This was a bell automatically rung by air, was it? A. Yes, sir.

Q. How about the headlight? A. The headlight was lit. 20

Q. Where was the headlight lighted? A. Where was it lighted?

Q. Yes; where did you light it? A. I think we lighted it at Jersey City; that is before we started, before we started; before we made up the train.

Q. When you started out with the train until this accident happened, did you stop the engine at all? A. No.

Q. About what is the distance from the Ravine Road crossing to the crossing where this accident took place? A. I should say about three hundred feet. 30

Q. About three hundred feet. And from the Ravine Road crossing to the Lackawanna bridge is about how far? A. Oh, it is about seven hundred.

Q. Seven hundred from the Ravine Road crossing to Lackawanna bridge? A. No, from Ravine Road crossing? 40

*Cleveland H. Moeser, for Defendant—Cross*

Q. Yes. Or take it from the other crossing. A. I was figuring from the other crossing about seven hundred feet.

Q. About seven hundred feet? A. That is where I blew the whistle to.

Q. How did you blow the whistle for the Ravine Road crossing and for the crossing where  
10 the accident took place? A. Two long and two short whistles.

Mr. Carey: Cross-examine.

*Cross-examination by Mr. Kelsey:*

Q. Now, did you see this watchman out on the Erie tracks waving his red lantern when you were down near the D. L. & W. bridge? A. No, sir.

Q. Then you didn't blow a whistle down there to indicate that you saw him, did you? A. No,  
20 I did not; I blew a whistle for the crossing.

Q. You didn't blow a whistle for him, to indicate to him that you saw the light, did you? A. I didn't blow the whistle; I didn't see him until I got around.

Q. Well, now, you might have been going a little faster than fifteen miles? A. No.

Q. How fast were you going down the grade there that Mr. Knecht has told about? A. Just starting out; I should say not over ten or twelve  
30 miles an hour, as I said; just starting down there.

Q. You say it is three hundred feet about from the Ravine Road to the Ferry Road where this accident happened? In between there? A. Yes.

Q. Well, and from the Ravine Road then down to the Delaware & Lackawanna bridge, how far is it about? A. It is about four hundred feet.

Q. Only two hundred feet? A. Four hundred, I said.

Q. Four hundred feet? A. I should judge so.

40 Q. How far are the telegraph poles apart down there, do you know? A. I don't know.

*Cleveland H. Moeser, for Defendant—Cross*

Q. Now, I show you this picture, P-2, Mr. Engineer. When you first got sight of this crossing here at Ferry Road where the accident happened, you reached a point at this Ravine Road crossing which is shown on this picture at the south end of the train of cars standing here; is that right?

A. That is right. Just commencing to come around on the street.

10

Q. That is about three or four hundred feet from where the accident happened? A. From where the accident happened.

Q. What time did you start from the Pennsylvania crossing with your train—you say you started from there? A. I said I started from the Pennsylvania trestle. I don't know; I didn't look at the time.

Q. It was long before five o'clock, wasn't it? A. Oh, it was something before five.

20

Q. How long before 4:30? A. Oh, it would not be as early as that.

Q. What? A. It would not be as early as that.

Q. Well, how late was it, about? You have a regular schedule time for leaving there every afternoon, haven't you? A. Oh, no; we have no schedule time. Sometimes I look at the time; sometimes I don't.

Q. If you think it was five minutes after five when you hit this wagon, how is it you don't know when you started from the Pennsylvania crossing? A. Well, it might have been 4:45, 4:50, something like that. I can't tell exactly.

30

Q. It might have been 4:30? A. No, it could not have been.

Q. How do you know? A. It would not take quite as long as that.

Q. How do you know? A. I told you I didn't know. I didn't look at the watch; that is the reason I don't know.

40

*Cleveland H. Moeser, for Defendant—Cross*

Q. You didn't stop your train, then, in between the Pennsylvania crossing and the place where the accident happened? A. Between the Pennsylvania crossing?

Q. Yes, you testified you didn't stop it to light the headlight or for any other purpose; you kept the train going after you started? A. After I  
10 left down there I made no stop.

Q. Made no stop at all? A. Until I struck this wagon; that is what I testified.

Q. That is right, is it? A. Yes, sir.

Q. Then you think you were twenty minutes, perhaps, going from the Pennsylvania crossing over to that place? A. Probably about fifteen; I didn't say twenty minutes.

Q. Well, fifteen minutes, eh— A. About that.

Q. —going over? A. Perhaps about that, I  
20 judge.

Q. As a matter of fact you don't know, do you  
A. I don't know just what time it took me to go over there.

Q. And you don't know? A. I don't know; I know the time I left there; that's all.

Q. You don't know how fast you were going, either, do you? A. I told you as near as I can remember I was going about fifteen miles an hour, that's all.

30 Q. Fifteen miles an hour?

The Court: Mr. Moeser, how do you know that it was 5:05 at the happening of this accident?

The Witness: Because when anything of that kind happens I always look at the watch.

The Court: And did you on that occasion look at your watch?

The Witness: I did.

The Court: And you found it to be 5:05?

40

The Witness: Yes.

*Cleveland H. Moeser, for Defendant—Cross*

Q. Now, when the fireman said to you—told you there was a wagon stuck on the crossing, did you blow a whistle then? A. No, sir; I didn't blow the whistle.

Q. Well, how do you indicate to the trainman on your train that you want to put the brakes on? A. One long blast of the whistle.

Q. How do they put the brakes on if you don't give them a blast? A. They are not supposed to put them on. I handle the brakes myself.

Q. You put the air brakes on? A. Yes, sir.

Q. That is what you did here? A. Yes.

Q. In an emergency, when you see a wagon stuck on the crossing, don't you put all the brakes on that you can? A. Yes.

Q. Why didn't you do that in this case? A. I did.

Q. What is the use of having the brakemen then? A. I don't know.

Q. Don't they use the brakes on the train? A. They do if I can't control them.

Q. How do you indicate that? A. When I want brakes I blow one long blast of the whistle.

Q. Didn't you think you needed brakes at this time? A. He couldn't get them on any stronger than I could.

Q. They couldn't at any time? A. They could not put them on any stronger than I put them on with the air.

Q. What do you have to indicate to them that the brakes don't work? A. When the air doesn't work?

The Court: As I understand you, this was an air-brake train?

The Witness: This was an air-brake train.

The Court: That was handled from your cab?

The Witness: That was handled from my cab.

*Cleveland H. Moeser, for Defendant—Redirect*

The Court: You are not a brakeman. In an emergency of this character if you attempt to put the brakes on by air and you find your air is not working, then you give one long blast of your whistle and that is notice to your brakeman that they are to put the brakes on by hand?

10 The Witness: Yes.

The Court: That is the correct system?

The Witness: Yes.

The Court: And in this particular emergency it was not necessary for you to do that?

The Witness: No, sir.

Q. And you put the brakes on 700 feet from this Ferry crossing? A. Between five and six hundred feet.

20 Q. You mean to say you can't stop in less distance than that? A. It didn't seem to stop. I had a pretty heavy train; I had a lot of coal.

Q. And you were going at— A. 47 cars.

Q. And you were going pretty fast? A. I was not going pretty fast; no, sir. If I had been going pretty fast I don't think I would have stopped at that crossing.

*Redirect examination by Mr. Carey:*

30 Q. Did the air work all right that night? A. Yes, sir.

Q. Now, after you got in sight of the crossing and saw the wagon on the crossing, did you continue to watch that wagon right along until you struck it? A. Yes, sir.

Q. Weren't looking around for anything else at all? A. No, sir; that interested me more than anything else.

Mr. Carey: That is all.

40 (Witness excused.)

*Patrick J. Gleason, for Defendant—Direct*

PATRICK J. GLEASON, sworn on behalf of the defendant, testified as follows:

*Direct examination by Mr. Carey:*

Q. Mr. Gleason, you are a fireman employed by the New York Central Railroad Company, in November, 1914? A. Yes, sir.

Q. And were fireman on this engine that struck Mr. Brauers wagon? A. Yes, sir. 10

Q. You remember the occasion? A. Yes, sir.

Q. You were coming up with engineer Moeser from Jersey City with a train of freight cars? A. Yes, sir.

Q. And do you recall how many cars there were in the train? A. 47 cars, I understood.

Q. Do you recall the blowing of the whistle, and if so, state when and where, and for what. A. Blowed the whistle the other side of Hoboken avenue, and blowed the whistle again this side of D. L. & W. bridge. 20

Q. This side of the D. L. & W. bridge? A. Yes, just this side.

Q. Now, when you blew south of Hoboken avenue, it was for what? A. That was for Hoboken avenue crossing.

Q. When you blew south of Lackawanna bridge, that was for what crossing? A. For Ravine Road and Ferry street. 30

Q. About how fast were you going as you came up over Hoboken crossing? Oh, I should judge about fifteen miles an hour.

Q. What were you doing as you came up the line? A. Sitting on the seat box.

Q. And the fire was all right? A. Yes, sir.

Q. Were you keeping any lookout? A. Yes, sir.

Q. Did you see at any time this wagon on the track? A. Yes, sir.

Q. At the crossing where the accident occurred? A. Yes, sir. 40

*Patrick J. Gleason, for Defendant—Direct*

Q. Where were you when you first saw the wagon on the crossing? A. Oh, about 100 or 200 feet this side of the D. L. & W. bridge.

Q. And how could you see it quicker than the engineer? A. On account of the curve in the track.

Q. You were on the inside of the curve? A.  
10 Yes, sir.

Q. What did you say to the engineer? A. I hollered to the engineer that there was a wagon or something on the track.

Q. Speak a little louder. A. I hollered to the engineer that there was a wagon on the track.

Q. What did the engineer do? A. Applied the air brakes.

Q. By air? A. Yes, sir.

Q. Do you know whether or not the bell was  
20 ringing as you come up from Jersey City that night? Yes, sir.

Q. How was the bell ringing? A. By air.

Q. How was the bell rung? A. By air.

Q. Who sets it ringing? A. The engineer.

Q. When and where did you notice the ringing of the bell? A. Well, I noticed it ringing right along, coming along, and afterwards stopped—after we had stopped, after we hit the wreck it was still ringing.

30 Q. After you had stopped? A. Yes, sir.

Q. Did anyone shut off the air at that time, after the engine stopped? A. In a little while after it stopped somebody shut it off. I don't know just who.

Q. Do you know whether the headlight was lighted or not? A. Yes, sir.

Q. Now, after the application of the air did you see anybody attempt to lead the horse further on, so as to get the wagon off? A. No; I didn't  
40 take notice to that.

*Patrick J. Gleason, for Defendant—Cross*

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

Q. As the engine approached the crossing, your view would be cut off on account of the curve?

A. Yes, sir.

Q. And the engineer would get a view— A. Yes, sir.

Q. —about the time yours was cut off? Where did the engine stop? A. Well, the engine was just off the crossing, the engine part. The tank was— 10

Q. Did you see the horse and wagon after the accident? A. Yes, sir.

Q. Where were they? A. They laid in between the tracks, the Erie—

Q. In between the tracks? A. Yes, sir.

Q. The Erie and the New York Central? About what time was it that this accident happened? A. I should judge around five o'clock; I don't know just exactly the time. 20

Q. Did you look at your watch? A. No, sir.

Q. Did you see the watchman after the accident—the crossing man? A. No, sir.

Q. Did you see him before the accident? A. Well, I couldn't see to see him. I saw the red light, but didn't know who had it.

Q. Saw a red light? Where? A. Over towards the Erie track.

Q. And what was being done with the red light?

A. Why, I seen it moving, swinging. That is all I could see. 30

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

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

Mr. Carey: Cross-examine.

*Cross Examination by Mr. Kelsey:*

Q. Now, you could see this wagon way down this side of the D. L. & W. tracks? A. Yes, sir.

Q. So it was not very dark, was it? A. Well, not very dark; no. 40

*Patrick J. Gleason, for Defendant—Cross*

Q. You didn't see anyone trying to get the horse off the track, did you? A. I didn't take notice; no, I didn't.

Q. Well, if you saw the horse and wagon there, if anyone was trying to get the horse off the track, you would have seen that, wouldn't you? A. I couldn't see that, no.

10 Q. What? A. I couldn't see anyone trying to—

Q. You didn't lose your view of the horse and wagon until you got up close to the Ravine Road? A. Well, no.

Q. He got his view of the Ravine Road and that is just about where you lost your view, wasn't it? A. Yes.

Q. And up to that time you didn't see anyone trying to get the horse off the track? A. I didn't; no, sir.

20 Q. Now, you saw someone, you think, swinging a lantern on the Erie tracks? A. Over by the Erie tracks; yes, sir.

Q. Over by the Erie tracks? A. Yes, sir.

Q. Then you told the engineer, did you, that there was a wagon stuck on there? A. Yes, sir.

Q. Well, now, did you see the red light being swung before or after you noticed the wagon on the track? A. Well, just about the same time that I noticed the wagon on the track I seen the  
30 red light.

Q. Well, was it after or before? A. Well, I couldn't say; just about the same time I saw the two.

Q. How long did the lantern keep swinging then? A. Until it got out of my sight, until the engine got—

Q. After you first saw the wagon did it move any? A. No.

40 Q. Stood in the same position as when you first saw it? A. Yes, sir.

*Patrick J. Gleason, for Defendant—Cross*

Q. Didn't move at all? A. No.

Q. What time did you leave the Pennsylvania crossing? A. Well, I couldn't just say what time; I don't know just what time it was.

Q. How far is it from the Pennsylvania crossing up to the place where this accident happened, about? A. Oh, I should judge it is three-quarters of a mile; may be a little more from where we started out. 10

Q. The Pennsylvania crossing is just south of Newark Avenue, isn't it? A. Yes, sir.

Q. What do they use the white lights for on the railroad? A. For to signal "Go ahead", "clear"; if it is clear, you know; clearness.

Q. Signal for whom? A. The engineer coming along.

Q. Well, isn't it the signal they use for people crossing also? Don't they have them on their gates—white light indicating that it is clear for people to go across? Isn't that so? A. That I don't know. 20

Q. You don't know? How long have you been a fireman? A. Twenty years.

Q. And you don't know whether a white light is not the indication— A. I know it is an indication of—

Q. You don't know whether a white light is an indication of clear passage for people across crossings? A. For safety, yes. 30

Q. That is what it is for, isn't it? A. Yes.

Q. Did you see the white light this fellow had in his hands, too? A. I didn't notice the white light, no.

Q. When did you first see the white light? A. The white light?

Q. That the flagman had in his hand.

Mr. Carey: He says he didn't see it.

*Patrick J. Gleason, for Defendant—Cross*

Q. Didn't you see it at all? A. White light?

Q. Yes. A. No.

The Court: I understood him to say, Mr. Kelsey, all he saw was the red light.

The Witness: That is all.

Q. Did you say anything to the engineer about  
10 a red light on the crossing? A. No; I don't know  
as I did.

Q. You didn't look at your watch to see what  
time it was when the accident happened? A. No.

Q. It might have been a quarter to four—a  
quarter to five? A. I couldn't say.

Q. You couldn't swear it was later than half-  
past four, could you, as a matter of fact? A. No;  
I couldn't.

Q. How long did you stay at the crossing there  
20 after the accident, Mr. Gleason? A. Well, I  
couldn't say just how long; I judge about 45 min-  
utes, I think.

Q. Did you see the fellows running off with the  
barrels? A. No, I did not.

Q. Didn't see that, either? A. No, I did not.

Q. What became of the barrels, do you know?  
A. I don't know.

Q. Do you blow the whistle or does the engi-  
neer? A. Engineer.

30 Q. Well, did he blow the whistle—he blew the  
whistle, you say, this side of the D. L. & W. bridge  
for this crossing where the accident happened?  
A. Yes, sir.

Q. Well, how long did he continue to blow it?  
A. He blowed the regular crossing whistle.

Q. What is that? A. Two long and two short.

Q. And that was all done at one time, was it?  
A. Yes, sir.

40 Q. Now, did he at intervals between that time  
and the time he got to the crossing blow it any  
more? A. No, sir.

*Patrick J. Gleason, for Defendant—Cross*

Q. None at all? A. No, sir.

Q. But the bell was ringing all the time? A. Yes, sir.

Q. And that rang all the time from the time you left the Pennsylvania crossing? A. Yes, sir.

Q. Continuously? A. Yes, sir.

Q. Now, did you ring the bell the night before continuously from the time you left the Pennsylvania crossing? A. I don't know anything about the night before. 10

Q. Well, did you blow it the night before that? The second night before the accident, from the time—

The Court: Do you mean "blow" or "ring"?

Q. Did you ring the bell, I mean, keep it ringing? A. We always keep it ringing. 20

Q. Oh, you do that? A. Yes, sir.

Q. Every night? A. Every night.

Q. Without any exception? A. No.

Q. Always start the bell ringing as you approach the crossing and keep it ringing until you reach what point? A. Until we reach our destination.

Q. Well, your destination is Weehawken end of the line? A. Sometimes; sometimes we stop this side of Weehawken and lay there for a while. 30

Q. Then you keep this bell going all night long? A. Oh, no.

Q. When do you stop? A. When we stop for something like that; then we shut the bell off.

Q. Only when you stop for an accident or something of that sort, then you shut it off? A. After we stop, yes.

Q. Now, did you stop this night in between the Pennsylvania crossing and the place of the accident? A. No, sir. 40

*Patrick J. Gleason, for Defendant—Redirect*  
*James C. Crosson, for Defendant—Direct*

*Redirect Examination by Mr. Carey:*

Q. The fireman reads signals for the engineer when the engineer can't see them, doesn't he? A. Yes, sir.

Q. The white light indicates safety; that the way is clear for the engineer? A. Yes, sir.

10 Q. And that is all you know about the use of the white light, isn't it? A. Yes, sir.

Q. You have never been a crossing man yourself, have you? A. No, sir.

(Witness excused.)

Recess to 2:00 P. M.

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AFTER RECESS.

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JAMES C. CROSSON, sworn on behalf of the defendant, testified as follows:

*Direct Examination by Mr. Carey:*

Q. Mr. Crosson, by whom were you employed in November, 1914? A. B. M. McFeeley.

Q. Jersey City? A. Hoboken.

Q. By whom are you now employed? A. J. J. McFeeley.

30 Q. Were you ever in the employ of the New York Central Railroad Company? A. No, sir.

Q. Did you see this accident to the Brauer horse and wagon in November 16, 1914? A. Yes, sir.

Q. Where were you at the time? A. I was backed into the West Shore station.

Q. Passenger or freight? A. Freight station.

Q. What were you doing? A. I was getting a load of glassware.

40 Q. Before this engine reached the crossing did you hear any whistle? A. I did.

*James C. Crosson, for Defendant—Direct*

Q. Of this engine? A. I presume it was that engine; I heard a whistle; it sounded like the whistle of an engine.

Q. In what direction? A. From the north—or from the south.

Q. Did you see the train when it came up under the Lackawanna bridge? A. Not as far as that. 10

Q. Not so far down as that? A. No.

Q. This freight station where you were is in what direction from the crossing? A. South—or north, rather.

Q. The freight station is north? A. Yes.

Q. About how far north would you say it is from the crossing? A. About 100 or 150 feet.

Q. Did you later on see the engine coming up from the track? A. I did.

Q. With a train of freight cars attached to it? 20  
A. Yes, sir.

Q. About where was the engine when you first saw it, Mr. Crosson? A. Between the Ravine Road crossing and the elevated crossing.

Q. And the elevator crossing is the place where the accident happened, is it? A. Yes, sir.

Q. Now, before you saw the engine did you see this horse and wagon of Brauer's? A. I saw it on the railroad crossing; yes, sir.

Q. Saw it on the railroad crossing. Was it moving or standing still? A. Standing still. 30

Q. Did you see anybody attempting to get the horse off the track? A. There was somebody at the horse's head; I don't know just who it was, but I saw some person at the horse's head, trying to get him off the track.

Q. What were they doing? A. They were trying to get the horse off the track.

Q. How were they trying to do it? A. Had hold of the horse by the bridle, or the lines. 40

*James C. Crosson, for Defendant—Direct*

Q. What did the horse do? A. The horse refused to pull.

Q. Did you see the wagon when the engine struck it? A. I did; yes, sir.

Q. Where did the engine stop? A. About the length of the engine from the crossing.

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

10 Q. Toward Weehawken or Hoboken? A. Towards Weehawken.

Q. How many blasts of the whistle did you hear? A. I only heard one blast.

Q. Do you know where the engine was at the time you heard that? A. I couldn't tell you; I couldn't exactly say where the engine was.

Q. Did you notice anything about the ringing of the bell? A. I couldn't say.

20 Q. Didn't notice that. Headlight—did you notice that? A. I saw the headlight on the engine; yes.

Q. Lighted? A. Lighted; yes, sir.

Q. Did you see the watchman at all? A. I would not be positive whether he was there or not.

Q. You don't recall whether you saw him or not? A. No; I don't.

Q. Did you see any red lights around there? A. I don't recall that.

30 Q. Did you go down there after the accident? A. No; I had a team of my own I had to take care of.

Q. Could you give us any idea about how fast the train was coming after you saw it? A. Well, it was going—I couldn't exactly tell you how fast it was going, but I know it was not going very fast; I could see that.

Q. What time of day was it? A. It was in the neighborhood of five o'clock.

40 Q. And what was the condition as to light? A. Well, it was dusk—just about dusk.

*James C. Crosson, for Defendant—Cross**Cross Examination by Mr. Kelsey:*

Q. Mr. Crosson, you are not certain whether it was some before five or after? A. It was in the neighborhood of five.

Q. Could it have been as early as four-thirty? A. No; it was after four-thirty.

Q. You won't say it was after five? A. No; I won't say that.

Q. Now, this West Shore freight station from which you viewed this engine is south of this Ferry Road crossing where the accident happened? A. No; it is north of it.

Q. North of it? A. North of it.

Q. About how far? A. About 100 or 150 feet; I ain't positive.

Q. Is it on the west side or the east side of the tracks there? A. It is on the east side of the tracks.

Q. On the east side of the tracks, the side toward the hill? A. Yes, sir.

Q. Well, then, it is up beyond this building that is shown here on Exhibit D-1, isn't it? This building that is marked with a sign the "Waverly Refining Company"—the Waverly Company. A. It is in between here, I believe (indicating); yes, it is in between here, back further towards the north.

Q. North of this building that I have just spoken of, the Waverly Refining Company? A. Yes.

Q. Does it sit back further from the tracks than that building, the Waverly Refining Company? A. No.

Q. It sits out? A. To the east.

Q. And there is a platform there? A. There is a platform at the back of it; yes.

Q. You viewed this accident from your wagon not from the platform? A. From the truck.

Q. From the truck? A. Yes.

Q. And you had a view down the track to the

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*James C. Crosson, for Defendant—Cross*

south, down to about Ravine Avenue, didn't you?

A. About to Ravine Avenue; yes.

Q. Pretty good view? A. Pretty good view; yes.

Q. Now, when did you first—did you see the wagon when it started to go across the crossing there? A. No; I did not. The first time I noticed  
10 the truck on the track was—I had come to the station after getting some of my freight and I saw the truck on the track stuck then; he stopped there.

Q. The horse then was across the second track?

A. He was to the west—the east of the track.

Q. To the east? A. Yes.

Q. You mean to the east of the track on which the wagon was struck? That the train was running on? A. Yes.

20 Q. Now, how long about did the horse stand there in that position after you saw it and until the wagon was struck by the train? A. Probably about seven minutes.

Q. Seven minutes? A. Yes.

Q. Well, now, during that time where was the watchman? A. I couldn't tell you.

Q. Well, if he had been out there on the crossing you would have seen him, wouldn't you? A. Not exactly; I was busy getting my own freight  
30 out.

Q. As soon as you saw this horse on that crossing and you heard this train come, you knew there was going to be trouble? A. I thought in my own mind if he didn't get off there pretty soon there would be an accident.

Q. And your attention was immediately centered on that position or that place? A. Upon the horse.

40 Q. Now, if this watchman had been standing down a few feet from this wagon at that time

*James C. Crosson, for Defendant—Cross*

wouldn't you have seen him? A. He could be on the other side of the track and I would not be able to see him. He could be—

Q. But I am asking you in all probabilities wouldn't you have seen him out there if he was out there? You saw everything out there, didn't you?

A. No; he could be out there and I would not have seen him. 10

Q. How could that be? A. He could be on the south side of the track.

Q. Well, if he was on the Erie tracks, not on the south side of the track, but over on the Erie tracks with a red lantern in his hand; wouldn't you have seen him if he was over there waving a red lantern at that time? A. I would; yes.

Q. You certainly would, wouldn't you? He could probably be there and I not see him.

Q. Did you see him? A. No; I can't say that I 20 did.

Q. Now, when did you first see him, with regard to the time when you first saw the wagon? A. I didn't see the watchman at all. I didn't pay any particular attention to the watchman.

Q. Didn't see him at all? A. My—

Q. Did you see anybody trying to take the horse off the crossing? A. Yes; there was some man there.

Q. Was that this Mr. Knecht? A. I couldn't 30 tell you; I was too far away.

Q. How long did he labor at the horse's bridle there, the horse's head, before the train hit the wagon? A. Probably five minutes.

Q. Five minutes? A. Yes.

Q. Do you know what the trouble was, why the horse didn't start that load from there? A. I couldn't exactly tell you that it seems the horse was balky—

Q. You know all about that crossing there, don't 40 you?

*James C. Crosson, for Defendant—Cross*

The Court: Let him finish.

(Last answer of the witness repeated by the stenographer.)

Q. There was a load of empty barrels on there?

A. Yes, but the load wasn't any load.

Q. It wasn't any load? A. I don't consider  
10 it.

Q. Empty barrels? A. Yes.

Q. Now, during all that time, then, that this fellow was pulling at that bridle, the train was not in sight? You had not seen the train yet at all?

A. No.

Q. The first you saw of the train was when it got to the Ravine Road crossing? A. Between Ravine and the elevator crossing.

Q. That is a very short distance then from the  
20 crossing—from the Ferry Road crossing where the accident happened, that you first saw the train? A. Yes.

Q. Now, after you first saw the train, from that time until it struck the wagon, how long did it take? How long a time elapsed? A. I don't think it took a minute; probably thirty seconds.

Q. What? A. Probably thirty seconds.

Q. Thirty seconds? A. Yes.

Q. You mean to say if you took your watch  
30 out and counted thirty seconds on your watch—deliberately counted thirty seconds on your watch, that it took thirty seconds from the time you saw that train until it hit the wagon? A. Probably.

Q. Now, wouldn't it be only a space of about six seconds? A. I don't think so, at the rate the train was going at the time.

Q. Now, if a train is going thirty miles an hour it moves close to three hundred feet in six sec-  
40 onds—six seconds— A. Yes.

*James C. Crosson, for Defendant—Cross*

Q. How long in your opinion do you think it took for that train—how long a time from the time you saw the train until it hit the wagon, if it was less than three hundred feet away at the time you saw it?

The Court: Well, what is the question that the witness has before him?

Mr. Kelsey: I am trying to find how far it was from the crossing he saw the train, and incidentally how fast it was going. 10

Q. You think it took thirty seconds, then, to traverse that space? A. At the rate of speed that the train was going, I imagine it took that long; I wouldn't be positive, but that is the best of my imagination.

Q. Now, when you first saw the engine was it nearer the Ferry Road crossing where the accident happened, or nearer the Ravine Road crossing? A. It was nearer the Ravine Road crossing. 20

Q. Would you say it was 200 feet from the Ferry Road crossing where the accident happened? A. No; I would say it was 250 feet.

Q. You would say it was 250 feet? A. Yes.

Q. Pretty close to Ravine Avenue? A. Nearer to the Ravine Avenue crossing.

Q. Now, you saw the headlight on the train—on the engine? A. That is the first thing I saw. 30

Q. But you didn't hear any bell ringing? A. Didn't hear any bell.

Q. But you heard a whistle blown? A. I heard a whistle blown.

Q. Long before you saw the wagon on the track? A. No; the wagon was on the track before I heard the whistle blowing.

Q. How long was it on there before you heard the whistle blowing? A. Probably five or six minutes. 40

*James C. Crosson, for Defendant—Cross*

Q. So the whistle was blown close up to the Ferry Road then? A. I don't say it could be, no; I don't know exactly where it blew; it might have been at Hoboken Avenue crossing, and it might be at Lackawanna bridge.

The Court: Do I understand you, Mr. Crosson, to say you heard the whistle blown, but at the time you heard the whistle blowing the train was not in your sight?

The Witness: Yes; that is it.

Q. And you didn't hear any more whistles blown— A. No, I didn't.

Q. —at all? A. No.

Q. And you don't know that it was this whistle on this train that you heard? A. I couldn't swear to that.

20 Q. That is the best of your opinion? A. That is the best of my opinion; that it was the whistle of that engine.

The Court: Were there any other trains or locomotives around there at that time?

The Witness: I didn't see any, your Honor.

The Court: Did any pass during the time that you were there, and during the time you described, other than this one?

30 The Witness: I didn't see any, your Honor.

Q. Now, did you see another wagon from Hoboken pass across there just before this one drove on? A. I didn't take notice of any other wagon at all.

Q. You didn't take any notice to that? A. No.

40 Q. Now, as a matter of fact, Mr. Crosson, you can't see down the track south from that West Shore station where you were, further than the

*James C. Crosson, for Defendant—Cross*

Ravine crossing? A. No; that is about as far as you can see.

Q. That is as far as you can see? A. Yes.

Q. Now, did you see the man jump from the wagon? A. There wasn't any man on the wagon at all when I saw it—when I first saw it.

Q. When were you first asked to make a statement to the defendant about this accident? A. It 10  
would be probably two weeks, may be a month after; I wouldn't be positive; I honestly couldn't tell you that. You see, it is two years ago since this accident happened; it is pretty hard to recall. I was trying to recall, but I couldn't recall when I was asked to make the first statement.

Q. Did you give your name in at the time of the accident? A. I gave it to somebody; I won't be positive just who I gave it to.

Q. You came down from your wagon to give 20  
that information? A. After the accident was all over.

Q. Well, the same night? A. Same night; yes.

Q. Then you left your wagon, did you? A. Yes.

Q. When you got down there you gave your name to someone, you don't remember just who? A. I don't remember who; I don't know whether I gave it at the crossing or the man inside at the platform. 30

Q. You know Mr. Brauer, don't you? A. I didn't know Mr. Brauer at the time. I know the gentleman now.

Q. Did you see him there? A. I didn't see him there. I didn't go over there at all.

Q. Did you see anyone running off with the barrels there? A. No, I didn't see that at all.

Q. When you came down right after the accident did you see the watchman there?

Mr. Carey: He has not said he came down 40  
right after the accident.

*William Geiser, for Defendant—Direct*

Q. Did you see the watchman there after the accident? A. When I came there the train had gone; it was quite some time after the accident that I got away from there.

Q. Could it have been as long as a witness testified here, 45 minutes after the accident that the train left there? A. Probably.

10 Q. What were you doing during that time? A. I was backed into the station of the railroad.

The Court: You say you were loading freight?

The Witness: I had finished—after the accident I finished taking on the load, and I was not in any hurry to get away from there; I just lounged around there.

By Mr. Carey:

20 Q. Were you paying any attention to see whether the bell was ringing on the engine or not? A. No; I did not.

(Witness excused.)

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WILLIAM GEISER, sworn on behalf of the defendant, testified as follows:

30 *Direct Examination by Mr. Carey:*

Q. Mr. Geiser, you were a brakeman on this train, the engine of which struck the Brauer wagon, were you? A. Yes, sir.

Q. Where were you located on the train? A. I was eighteen cars from the engine.

Q. You had been on the train since it left Jersey City? A. From the time we started from Jersey City until we stopped in Hoboken.

Q. Do you recall the accident? A. Sir?

40 Q. Do you remember the accident? Do you? A. Yes, sir.

*William Geiser, for Defendant—Direct*

Q. Can you tell us whether or not the whistle was blown as the engine approached the Hoboken Avenue crossing? A. Yes, sir; the whistle was blown; the whistle was blowing. We blowed approaching what is called Hoboken Avenue, and the whistle was blowing after passing through under the D. L. & W. bridge.

Q. You recall that fact, do you? A. Yes, sir. 10

Q. Now, about the ringing of the bell? A. The first that I heard the bell ringing—that is, to be positive that it was ringing—was when the engine went through under the D. L. & W bridge, you know, through the echo back under the train.

Q. Did you go up to the head end of the engine after the accident? A. Yes, sir.

Q. Did you see the accident? A. I saw the remains of it, yes, sir.

Q. Did you see the accident when it happened? 20  
A. No; I couldn't see.

Q. You went up to the head end of the engine after the accident, did you? A. Yes, sir.

Q. Where did the engine stop? A. Just the engine over the crossing; the tender of the engine still remained on the crossing.

Q. Did you notice whether or not the bell was ringing when you got up there? A. The bell was still ringing when I got up there.

Q. Rung how? How was the bell rung? A. 30  
Rung by air, automatically.

Q. Did you notice the headlight on the engine?  
A. I noticed the rear headlight; I also noticed the forward headlight after I arrived up there.

Q. Did you see the watchman that night? A.  
I saw—yes, I saw two watchmen there after my arrival.

Q. After your arrival? A. Yes, sir.

Q. Did you see Mr. Schwartz, the man who testified? A. Mr. Schwartz was the first man that 40  
I spoke to on my arrival.

*William Geiser, for Defendant—Cross*

Q. Where was he at the time you got up there?

A. He was standing, if I remember right, on the south-bound track of the Erie, with two lanterns in his hands.

Q. Were the lanterns lighted? A. Yes, sir.

Q. And what were the colors? A. Red and white.

10 Q. What time did the accident happen? A. Why, the nearest in my judgment, 5:05.

Q. Where were the horse and wagon when you got up there? A. The horse was laying alongside the tender of the engine, and the wagon was slewed around to one side, between the—

Q. Which direction from the horse? A. The—north of the horse.

Q. Towards Weehawken? A. Yes, sir.

Mr. Carey: Cross-examine.

20

*Cross Examination by Mr. Kelsey:*

Q. Now, you are a brakeman? A. Yes, sir.

Q. What are white lights used for by a flagman on the crossing? A. By a flagman on the crossing?

Q. Yes. A. Well, a white light is to indicate, giving you the right of way.

Q. Giving who the right of way? A. Why, the approaching train; or any other instruction that  
30 those people may have I am not familiar with.

Q. Well, does it indicate—doesn't it indicate—doesn't a white light indicate that the crossing is clear for a driver or a foot passenger to cross? A. Well, that I would not swear to.

Q. Aren't they posted on all the gates at night, white lights—I should say on the crossings at night to indicate that it is clear? A. No, sir.

Q. Nothing of that sort? A. No, sir.

Q. Then the white light in your opinion means,  
40 as you understand, that the road is clear for the

*William Geiser, for Defendant—Cross*

train to go on across that crossing, m-m? A. That is so far as my duty is concerned.

Q. And the red light would mean danger? A. That is stopping everything.

Q. That would mean danger both to the traveler who desires to cross and to the engineer running the train? A. Yes, sir, where there is no gates, where there is no gates at a crossing. 10

Q. Now, who was the other watchman that you saw when you got up there, besides Mr. Schwartz?

A. Well, when I mentioned two watchmen, I meant two special officers; Mr. Knecht and Mr.—

Q. Mr. Fleming? A. No.

Mr. Carey: Glennon.

The Witness: Barney Glennon; those are the two I mention; we call those watchmen.

Q. And you are sure that this watchman when you got up there had a white light in his hand as well as a red one? A. Yes, sir. 20

Q. Was he very much excited over this thing?

A. Well, no; I didn't see that he was.

Q. He was not excited? A. He didn't seem to be. As I remember, the first thing I asked for—I asked them—the flagman on the crossing when I arrived there—I asked him where the driver was.

Q. Which side of the train did you go up on, the side towards the east, towards Hoboken, or towards the hill? A. I went up the east side towards Hoboken. 30

Q. And when you got up there on that side did you find Mr. Knecht up there on that same side that you were on? You say you found the watchman there and some special officer. Did you find this special officer, this Mr. Knecht, up there? A. The first I saw of Mr. Knecht was, if I remember right, was in at the ice office; that is, that ice company that is there; in that office. 40

*William Geiser, for Defendant—Cross*

Q. When you got up there Mr. Knecht was across the track and in the ice house office? A. The first I saw Mr. Knecht was when I went in there myself. I went in there to get the name of the driver.

Q. That is the first you saw him? A. After I found out that he was in there.

10 Q. You didn't see him at any time on the west side of the train? A. On the west side?

Q. Yes. A. Toward the hill?

Q. Yes. A. No, sir.

Q. And you remember now—you can remember just as well as though it was yesterday that when you went under that bridge there you could hear the echo of this bell? A. Yes, sir.

20 Q. You can still hear the echo now, can't you? You recollect very well that you heard it at that time? A. I recollect that I heard it at that time, and with those trains going up there we hear it every day under the bridge; that is, if we ran too far back on the train—it is a regular thing with the bell ringing.

Q. So the reason you recollect hearing that day is because you hear it every day? A. No, sir; not exactly.

30 Q. Well, then, you don't hear it every day? A. Yes, sir.

By Mr. Carey:

Q. Was there any special reason why this was fixed in your mind that day? A. Well, as a general rule a man in the railroad business and on a train, he has an accident, he will observe those things, you know; he will remember them; they will be impressed on your mind because they are things we are examined on very close on all sides.

Mr. Carey: That is all.

40 (Witness excused.)

*William Carroll, for Defendant—Direct*

WILLIAM CARROLL, sworn on behalf of the defendant, testified as follows:

*Direct Examination by Mr. Carey:*

Q. Mr. Carroll, you are one of the brakemen on this train the engine of which struck the Brauer wagon? A. Yes, sir.

Q. Do you remember the occasion? Do you? 10  
A. Distinctly.

Q. Where were you located on the train? A. Three cars from the engine.

Q. Do you recall whether or not there was any whistle blown as you came up from Jersey City? A. Yes, sir.

Q. State where. A. South of Hoboken Avenue, and just north of the D. L. & W. bridge.

Q. Was the whistle blown south of Hoboken Avenue—for what crossing? A. Hoboken Avenue 20 crossing.

Q. And the one near the D. L. & W. bridge was for what? A. For Ravine Road and Ferry Street crossing.

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

Q. Tell us what you saw and where you were when you saw it? A. I felt the brakes go on just as the engine had struck Ravine Road, and my attention was attracted towards the head end— 30 towards the engine; that is north; and just as my car, the car I was riding on, got over the crossing, why, I seen a wagon standing on Ferry street crossing, and I observed a man standing at the horse's head trying to start the horse, and the next thing I knew we hit the wagon at the hind end and swerved the horse around and swung the horse into the tank of the engine, knocked the horse down and swung the horse into the tank of the engine.

Q. Your attention was called to the front be- 40

*William Carroll, for Defendant—Direct*

cause of the air brakes being put on? A. By the application of the brakes; yes, sir.

Q. What kind of an application was it? A. Why, it was pretty hard.

Q. What you call the emergency application? A. What you might call the emergency application.

10 Q. About how fast were you going at the time the brakes were put on? A. By the time the brakes were first put on I should judge between eight and ten miles an hour.

Q. You saw this man trying to get the horse to move? A. Yes, sir.

Q. Did the horse make any effort to draw the wagon off the track? A. Not to my appearance; he seemed to be pulling away from the man who was holding him, instead of pulling the wagon.

20 Q. Did you go up to the head end of the engine after the accident? A. Yes, sir.

Q. Before you went up there did you see the flagman at the crossing there? A. Not before I went up there.

Q. Saw him after you went up there? A. Yes.

Q. Where was he? A. He was standing in the south-bound Erie tracks.

Q. What did he have? A. He had a red lamp and a white lamp in his hands.

30 Q. Both lighted? A. Yes, sir.

Q. Where did the engine stop with respect to the crossing? A. Why, the tank of the engine was just on the crossing, and the engine was just over the crossing.

Q. Did you notice whether the bell was ringing or not? A. When I got up there the bell was ringing; yes, sir.

Q. Do you know who stopped the bell from ringing there? A. That I could not say.

*William Carroll, for Defendant—Cross*

Q. How about the headlight? A. Well, I observed the headlight was on when I got to the head end of the engine.

Q. When did you first notice that the bell was ringing? A. Well, the best I can recollect is when I walked up to the engine, got alongside of the engine.

Q. What part of the wagon was on the track? 10

A. Just the rear part of the wagon, just the rear wheel.

Mr. Carey: Cross-examine.

*Cross-examination by Mr. Kelsey:*

Q. Were you on top of the train or car? A. Yes, sir; coal car or gondola.

Q. What? A. The gondola.

Q. And all of the cars ahead of you toward the engine were gondolas? A. Gondolas; yes, sir. 20

Q. Were you in the car or on the bumper, or where? A. On top of the car; the car was loaded with coal.

Q. You were on top of the car—on the top of the coal? A. Yes, sir; sitting; sitting on the edge of the car.

Q. You could see past the engine? A. On straight I could see past the engine.

Q. When it was straight you could see past? A. That is on a straight track. 30

Q. You could see past then? A. Yes, sir.

Q. Did you lean over on either side so that you could get a view of the crossing up there in order to see? A. I was riding to the east side of the car.

Q. On the east side? A. Yes, sir; and then when I heard the air go on I was leaning over like that (indicating), see? And my attention was drawn when I heard the brakes go on, and I noticed the man. 40

*William Carroll, for Defendant—Cross*

Q. You first noticed the horse and wagon when you got to a point where Ravine Road crosses?

A. North of Ravine Road crossing.

Q. You couldn't see until you got north of Ravine Road? A. No.

Q. How many cars were you back of the engine?

A. Three cars.

10 Q. Now, when you looked then it was necessary to draw this horse back on the east side—east of this track? A. Yes, the horse was, and part of the wagon.

Q. They were on the east side? A. On the east side; yes, sir.

Q. You didn't see any watchman there? A. Not just at that time; my attention was attracted to the wagon and the horse.

20 Q. But this watchman was—where did you see him when you got up there? A. Standing on the south-bound Erie tracks.

Q. Well, how was it you didn't see him before that then? A. Because my attention was directed at this horse and wagon.

Q. But he was standing within ten feet of the horse and wagon wasn't he? A. I know; but my vision was first on that horse and wagon, expecting to hit him in a minute.

30 Q. You mean to say you didn't take any steps as far east as ten feet of that horse and wagon?

A. Because my mind was simply centered on that horse and wagon.

Q. Which way did the watchman come when you first got up there? A. He was standing there when I got there.

Q. When you got up there? A. Yes, sir.

Q. You walked all the way up there and you didn't see him until you got up there? A. I don't say I didn't see him until I got up there.

40 Q. If you were going up there with your mind

*Waldo C. Freeman, for Defendant—Direct*

intent on this accident or looking for everything that was going on up there, how was it you didn't see the watchman? A. That is beyond me.

Q. Isn't it a fact that the watchman wasn't there at all; that he was on the other side of the train? A. No, sir; it is not a fact.

Mr. Kelsey: That is all.

Mr. Carey: That is all.

(Witness excused).

10

WALDO C. FREEMAN, SWORN on behalf of the defendant, testified as follows:

*Direct examination by Mr. Carey:*

Q. Mr. Freeman, in November, 1914, you were one of the claim agents of the New York Central Railroad Company? A. Yes, sir. 20

Q. Located at Weehawken, New Jersey? A. Yes, sir.

Q. And you are still employed by the railroad company in that capacity? A. Yes, sir.

Q. Located where? A. Syracuse, New York.

Q. Did you have an interview with Mr. Brauer in regard to the damage done to his property in connection with this accident of November 16, 1914? A. Yes, sir.

Q. Where? A. At my office in the Weehawken terminal. 30

Q. I show you a paper marked D-1 for identification and ask you if that is the statement which you took from Mr. Brauer at that time? A. Yes, sir; it is.

Q. On what date did you take that statement? A. On the 20th day of November, 1914.

Q. Was this statement written up in your office? A. Yes, sir. 40

*Waldo C. Freeman, for Defendant—Cross*

Q. After Mr. Brauer had made his statements to you? A. Yes, sir.

Q. And after the statement was written up did Mr. Brauer have that statement to read? A. Yes, sir; it was handed to him.

Q. And after it was handed to him to read did he sign it? A. Yes, sir.

10 Q. And you are one of the witnesses subscribing the instrument, are you not? A. Yes, sir.

Mr. Carey: I now offer it in evidence.

The Court: It may be marked.

Mr. Kelsey: Just a minute. I think I have a right to see what the statement was before it is offered in evidence.

The Court: All right. Read it.

Mr. Kelsey: I mean to examine on it.

Mr. Carey: Go ahead.

20 The Court: You want to examine him as to it before it is offered. All right; there is no objection.

*Cross-examination by Mr. Kelsey as to the offer:*

The Court: As to its execution, that is all I understand you are entitled to examine on.

Q. Who typewrote this statement? A. I did.

30 Q. Personally? A. Yes, sir.

Q. How long after November 16th was it that Brauer first came there with reference to making this statement? A. About four days; the accident happened on November 16th; the statement was taken on November 20th.

Q. Was this all done while he was there? Did you typewrite it all out while he waited there? A. Yes, sir.

40 Q. Where did you write it out? A. In what way?

*Waldo C. Freeman, for Defendant—Cross*

Q. With a pen? A. It is very much easier to typewrite it.

Q. Well, did you first question him and get all the facts in your head and then sit down and write it? A. No.

Q. Or did you do it as you went along? A. I wrote it up on the machine as he answered the questions that I put to him.

Q. Now, you don't mean to say that he used the exact language that is in that statement there? A. Not word for word, no.

Q. No? A. No.

Q. Why didn't you put it down word for word as he stated to you? A. Why, it is a statement of facts given to me, and the facts that he gave me which were relevant to the accident itself are entered just as he gave them to me.

Q. In your opinion they are, but you didn't put down his exact words as he gave them to you? A. No, not the exact words. The statement is worded in itself.

Q. You put down what you understood him to mean? A. Yes.

Q. Now, did he ask you for a copy of this? A. No.

Q. Didn't ask you for a copy? A. No.

Q. You didn't have him swear to this, did you? A. No, sir.

Q. Don't you usually have them swear to these statements? A. No, sir.

Mr. Kelsey: I object to it as not being the statement of the party himself, but it is only what this witness conceived to be the facts as the plaintiff told them to him.

The Court: I will overrule the objection. It may be marked D-1 in evidence.

Mr. Kelsey: Your Honor will note my objection.

*Waldo C. Freeman, for Defendant—Direct*

The Court: Yes.

(D-1 for identification received in evidence,  
and read to the jury by Mr. Carey.)

*Direct examination by Mr. Carey continued:*

Q. Now, did he state to you the value of the  
cider at 15 cents a gallon? A. He said it was  
10 worth 15 cents a gallon; he didn't figure it out.

Q. He said it was worth 15 cents a gallon? A.  
Yes, sir.

Q. Did he state to you he bought the truck about  
four years ago? A. Yes, sir.

Q. And it cost about three hundred dollars?  
A. Yes, sir.

Q. He didn't make any statement in reference  
to the blanket? A. No.

Q. Did you put in all the items of damage that  
20 he stated to you at the time? A. Yes, sir.

Mr. Carey: Cross-examine.

*Cross examination by Mr. Kelsey:*

Q. Now, you don't mean to say that he told you  
that he bought this truck about three years before  
this time, or three years ago, as Mr. Carey says—  
four years ago? A. Four years prior to the time  
of the accident.

Q. And you are sure he told you that? A. Yes,  
30 sir.

Q. Did he show you the bill dated— A. No,  
he did not.

Q. —July 8, 1913? A. No, sir.

Q. And you are sure he told you he bought the  
truck four years before this accident? A. Cer-  
tainly.

Q. You are just as sure about that statement  
of his as of the other statements you have in  
there, are you? A. Yes, sir.

40 Q. And you got a report of this accident, did

*Herman Brauer (recalled), for Plaintiff—Direct*

you, from someone who was on the ground at the time? A. Yes, sir.

Q. Did they give you the names of the bystanders who saw the accident? A. No, sir.

Q. Gave you no name? A. No, sir.

Mr. Kelsey: I guess that is all.

Mr. Carey: That is all.

(Witness excused.)

10

Mr. Carey: Defendant rests.

HERMAN BRAUER, recalled in rebuttal, testified as follows:

*Direct examination by Mr. Kelsey:*

Q. Mr. Brauer, you went to Mr. Freeman's office to make this statement, did you? A. Yes, 20  
sir.

Q. Did you tell him at that time, or at any time, that you bought this wagon about four years before the time of this accident? A. No, sir; he asked me where the truck was built.

Q. Did you tell him? A. Yes, sir; and he asked me the address; I told him Cohen.

Q. Did you give him Cohen's address, who built the truck? A. Yes; I told him near the Boulevard on Newark avenue. 30

Q. Now, when you got down there to this place, to the scene of this accident, were there any barrels left there? A. There was two, by the time I just come down.

Q. Two left? A. Yes.

Q. And what happened to those? A. I don't know; when I come out they were gone.

Q. You are sure there were only two left there? A. That is all.

Q. Why didn't you try to save those two? A. 40

*Herman Brauer (recalled), for Plaintiff—Cross*

I went to see the man; I want to see the driver if he was alive.

Q. The first thing? A. Yes.

Q. Where did you find him? A. In the ice house office.

Q. Did you ever tell Freeman that these barrels were worth only \$1.35? A. I never told him that.

Q. Did you ever tell him that there were 48 gallons of cider on this wagon? A. No, sir.

Q. Did you ever tell him— A. I told him a small keg.

Q. Did you ever tell him that the cider was worth only 15 cents a gallon? A. No, sir.

Q. How many times did you visit Mr. Freeman? A. About seven weeks times, till about January 1st.

20 Q. But during that seven weeks how many times did you see him? A. Twice altogether.

Q. And when was it that he drew up this statement with reference to the accident? A. That was a couple of days after the accident happened.

Q. That he typewrote the statement? A. Yes, sir.

Q. Did you get a copy? A. No, sir; I asked him for it.

30 Q. Did he give it to you? A. No, sir; he said, "You don't need it."

Q. Was the blanket there when you got there? A. I don't remember.

Q. Well, did you see the blanket when you got there? A. No.

*Cross-examination by Mr. Carey:*

Q. Why did you sign this statement with all these false statements in it? A. What?

40 Q. (Last question repeated by the stenographer.) A. What false?

*Abraham Ruben (recalled), for Plaintiff—Direct*

Q. False in regard to the value of the cider, and false in regard to the value of the barrels, false in regard to the time when the truck was built. A. I didn't sign no false statement. I signed this statement on the account he was going to settle with me, and he promised to settle with me.

Q. What you signed was true, then? A. What? 10

Q. What you signed was true? A. Well, there is things that I didn't tell him. I didn't tell him 15 cents a gallon.

Q. What you signed was true? A. No; what I told him was true. I don't know what he put in there. I asked him for a copy. He says I did not ask him for any copy. He can't say no different. I did ask him for a copy. So he said, "You don't need it."

Q. And you didn't ask him for a copy at the 20 time this was made? A. Yes, as soon as I put the signature on. He told me to come next week, and I asked him for a copy.

Mr. Carey: That is all.

Mr. Kelsey: That is all.

(Witness excused.)

ABRAHAM RUBEN, recalled in rebuttal, testified 30 as follows:

*Direct examination by Mr. Kelsey:*

Q. Mr. Ruben, did this watchman come towards you when you were approaching the crossing, when you were driving down from the foot of the elevator there to the crossing, did he come towards you and hold up a red light to you? A. No.

Mr. Carey: He did not swear that he came 40

*Abraham Ruben (recalled), for Plaintiff—Direct*

towards him. He said he held up the red light.

The Court: He said he stood between the tracks and held up the red light toward him.

Q. Well, did he do that? A. He was standing between the tracks and pick up something and  
10 went back to the shanty.

Q. Did he come towards you and hold up a red light to you? A. No.

Q. Did he at any time call to you that there was a train coming— A. No.

Q. —or warn you by word of mouth? A. No.

Q. Did you tell this man Cohen, who has testified here as a witness for the defendant—did you tell him the night of the accident or at any other time—

20 The Court: If it is to deny what Cohen said on the stand this man said, I think it is entirely unnecessary.

Mr. Kelsey: I should have asked him before.

The Court: No. Counsel asked him the same questions in his cross-examination of him for the purpose of laying a foundation.

Mr. Kelsey: I think that is so, if your Honor please.

30 The Court: And he answered them in the negative, each and every one of them.

Mr. Kelsey: That is so.

Q. Now, did you leave this wagon of yours at any time five minutes before the train struck it? A. No; I didn't.

Q. For any purpose at any time? A. I jumped off the wagon when the engine was two blocks ahead of me; he was about two blocks as far from  
40 me.

*W. C. Freeman (rec'd), for Defendant—Direct*

Q. What? A. About two cars as far from me, and if I didn't jump I should get killed. I had to jump.

Q. Do you know whether anyone took any names there of parties who saw this accident? A. I don't know.

Q. Don't know that. Do you know whether there were other people around that place than the watchman and the people that you have seen in court here today? A. No; I don't know.

Q. Don't know that? A. No, sir.

Mr. Kelsey: That is all.

Mr. Carey: That is all.

(Witness excused.)

WALDO C. FREEMAN, recalled in rebuttal on behalf of the defendant, testified as follows:

*Direct Examination by Mr. Carey:*

Q. Mr. Freeman, at the time you took this statement or at any other time (statement D-1), did Mr. Brauer give to you the name of the person who built the truck? A. I don't think he did. If he did it is in the statement. I would not recall.

Q. You mean in this statement? A. Yes; if he gave it to me I inserted it in the statement, because that was the purpose of the statement, to get those facts when and where the truck was built, how much it cost, etc.

Q. Well, there is no statement as to the name of the builder in this statement. A. Well, then he didn't give it to me.

Q. What is that? A. He didn't give it to me if it is not in there.

(Witness excused.)

*Motion for Verdict*

Plaintiff rests.

Defendant rests.

Mr. Carey: Before summing up, I wish to renew my motion to strike out testimony in regard to the value of the barrels and cider, and blanket, on the grounds stated in my former motion.

10 The Court: What do you say, Mr. Kelsey? Do you insist upon its remaining.

Mr. Kelsey: I do.

The Court: Well, I will refuse to strike it out.

Mr. Carey: Objection noted.

The Court: You may have it.

MOTION FOR A DIRECTION OF VERDICT  
ON BEHALF OF THE DEFENDANT.

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Mr. Carey: I now move for a verdict on behalf of the defendant on the ground that no negligence has been established on the part of the defendant; and that the driver, the servant of the plaintiff, under the evidence, is guilty of contributory negligence.

The Court: I decline to direct a verdict.

Mr. Carey: Objection noted.

The Court: You may have it.

30

(Mr. Carey summed up to the jury.)

(Mr. Kelsey summed up to the jury.)

### Court's Charge to the Jury.

Gentlemen of the Jury:

This is an action upon the part of Brauer Brothers against the New York Central & Hudson River Railroad Company, and it has for its purpose a recovery for damages to personal property, which the plaintiffs allege they met with as the proximate result of negligence upon the part of the defendant company. You will keep in mind, gentlemen, that the right to recover in actions of this character is dependent upon, at least in the first instance, the plaintiff's ability to satisfy you by a fair preponderance of the evidence that the damage accrued to them as the proximate result of some negligent act of the defendant; and that in turn is dependent upon their having in that manner been so able to show you with respect to negligent acts which they allege in their complaint.

Before going into the question of the negligence charged by the plaintiffs let me read to you a section of the statute of our state which applies to a situation of this character. I am reading it to you now, gentlemen, rather than giving you the allegations of the plaintiffs first, because I think you will be in a better position to understand the allegations of negligence after you have had the statute read to you. The statute that I have in mind is this:

“A bell of a weight”—and before reading it, gentlemen, let me say to you that it is very important that you should pay strict attention to its reading—“A bell of a weight of not less than thirty pounds shall be placed on each engine and rung continuously in approaching a crossing of a highway, beginning at a distance of at least 300 yards from the crossing (that is, 900 feet from the crossing), and continue until the engine has crossed such highway; or, a steam whistle shall

*Judge's Charge*

be attached to each engine and be sounded, except in cities, at least 300 yards from the crossing and at intervals until the engine shall have crossed the highway."

Now, if you have paid strict attention to that as I admonished you you should, gentlemen, you will see that the statute does not say that both  
10 of those signals must be given, but it says that one or the other shall be given. Now, then, with that expression to you, let me read it again:

"A bell of a weight of not less than thirty pounds shall be placed on each engine and rung continuously in approaching a crossing of a highway, beginning at a distance of at least 300 yards from the crossing and continuing until the engine has crossed such highway." That is one warning or signal that the statute says is to be  
20 given; then it goes on to say that, "or, a steam whistle shall be attached to each engine and be sounded, except in cities, at least 300 yards from a crossing, and at intervals until the engine shall have crossed the highway."

At this time I am also going to read to you another section of the statute of this state, which will have a bearing and which you may have to consider if you get to that point in the consideration of this case, and I am reading this to you at  
30 this time for the same reason—because, I think it is better that you should have it before you at this time, rather than that I should give it to you in the order in which it would otherwise regularly come to you. That section is this:

"Whenever any railroad whose right of way crosses any public street or highway has or shall install any safety gates, bell or other devices designed to protect the traveling public at any crossing, or has placed at such crossing a flagman, any  
40 person or persons approaching any such crossing

*Judge's Charge*

so protected as aforesaid shall during such hours as posted notice at such crossing shall specify, be entitled to assume that such safety gate or other warning appliances are in good and proper order and will be duly and properly operated, unless a written notice bearing the inscription "out of order" be posted in a conspicuous place at such crossing, or that such flagman will guard such crossing with sufficient care whereby such traveler or travelers will be warned of any danger in passing over said crossing; and in any action brought for injury to person or property, or for death caused at any crossing protected as aforesaid, no plaintiff shall be barred of his action because of the failure of the person injured or killed to stop, look or listen before passing over said crossing."

As was suggested by counsel, those statutes are some of the things that courts are expected to recognize and know, without having their attention especially called to them. There are other things, and it has occurred to the Court that it might be helpful to you to have another matter before you, which courts are also expected to take judicial notice of (it may or may not help you or serve you in your consideration of the case), and that is to know the time when the sun set on November 16, 1914, which is the date when this occurrence took place. The time of the setting of the sun on that day was 4:42 p. m.

Now, to go back to the allegations of negligence which the plaintiffs are depending upon in order to have a recovery: The plaintiff says, first, that the defendant company was negligent in that it did not give a statutory signal by bell or whistle. The statutory signal referred to by "bell" or "whistle" is that which I first read to you from the statutes.

*Judge's Charge*

Second, they say that the flagman at the crossing in question failed in his duty to give warning to persons attempting to pass over the crossing, in that instead of displaying a red flag he displayed a white flag.

10 Third, they say that the flagman failed in his duty in that he gave no warning to the approaching traveler, the servant of the plaintiffs in this action.

Now, let me go back just one step, gentlemen, and possibly repeat to you what I have already said, but the repetition is for the purpose of having the satisfaction in my own mind that you fully understand the situation.

20 If no negligence as charged has been established in the manner which I indicated, then there can not be a recovery, and you are not concerned then about the acts of the servant (Ruben, I think his name is) of these plaintiffs. I have stated at the opening of my charge that a case of this character to be sustained at all must rest upon the proof of negligence and that that negligence was the proximate cause of the happening. If that has not been done, then, as I said to you before, do not go any further, because that must end the case and your verdict must be for the defendant.

30 But if it has been established, and in the manner which I have indicated to you, then you will inquire into the conduct of the plaintiffs servant, Ruben, himself. Putting it in other words, the rule applicable to him is that he must have used that care which a reasonably prudent person would or should have used, time, place, circumstances and conditions considered, so that he would not bring harm to himself. The burden of satisfying you as to his conduct and as to whether or not he transgressed that rule is upon the defendant.

40 It must have satisfied you by a fair preponder-

*Judge's Charge*

ance of all of the evidence that you have before you, upon the question as to whether or not Ruben, under the rule which I have given you, was negligent, and that that negligence contributed to what happened to the property of his masters. If you have been satisfied in that manner, then again the verdict must be for the defendant, because then the law says that the plaintiffs in an action of this character can not have a recovery. If that latter matter has not been established, gentlemen, and in the manner which I have indicated, and you find that the plaintiff has established negligence as charged against the defendant company, and that it was the proximate cause of this happening, then and then only will the plaintiffs be entitled to a verdict; and if they are entitled to a verdict then you will understand this: that this case seeks for a recovery for damages or compensation for the loss or destruction in whole or in part (as you may find the evidence directs you) of personal property.

The plaintiffs' contention is that their loss consisted in the killing of a horse, destruction of the truck, the loss of 24 empty barrels, the loss of a keg of cider, the loss of a set of harness and the loss of a blanket. The burden is upon the plaintiffs to satisfy you, first, that they met with a loss, and in a case of this character that they met with a loss of the articles or things in question. As to the horse, there can be no question excepting in this direction: the plaintiffs' burden is to satisfy you as to what was the reasonable value of the horse at the time of this occurrence. Now, one of the plaintiffs testifies that the horse cost \$340.00; he produces, I believe a receipt showing such a payment. If my recollection serves me properly, it was also that the horse was purchased April 6, 1914; that would

*Judge's Charge*

be April of the same year as the occurrence took place, which was November 16th. The question is not necessarily, gentlemen, what the horse cost him. What he is entitled to recover is the reasonable value, and the burden which the law places upon him is to establish to your satisfaction by a fair preponderance of the evidence what the reasonable value of the horse was at the time of this occurrence. It is that sum, and that sum only that he is entitled to recover for the loss of the horse.

Coming to the truck, all that I have said to you with regard to the burden that rests upon the plaintiffs applies to that. There is this thing further which you may apply to the truck; the plaintiffs must satisfy you by a fair preponderance of the evidence that the condition of this truck, as the proximate, natural result of this happening was such a condition—I may say such a condition of demolition that to a reasonable man it would be unreasonable to undertake to salvage it, or to repair it and place it back in useful condition. Of course, in cases of this character if there is damage done to a chattel or piece of personal property, and the result of the damage is such that reasonably, and by a reasonable, fair expenditure of money that damage can be lessened to a sum lower than what was the reasonable value of the article at the time, then it is the duty of one whose property it is to minimize his loss by the expenditure of that reasonable sum which would place the article back in the condition it was in before the happening; and he is not entitled to have what its value was, then, but he is only entitled to have what it would have cost him reasonably to have put it back in proper condition. The burden is upon the plaintiffs, of course, to satisfy you as to what

*Judge's Charge*

the condition of this truck was immediately after and because of the accident in question. If they have satisfied you that it was in that condition that it was not reasonable to attempt to repair it or restore it, but that it was in such condition that that would not have been a reasonable thing to do, then what they are entitled to recover, as I have tried to indicate to you, is not necessarily the sum of money which they say they paid for it, and about the time of which there is dispute in this action—they say they paid \$320.00 for it; that I say is not the sum that necessarily they are entitled to have; but they are entitled to have just that sum which they may have shown you or satisfied you was the reasonable value of it at the time of the happening. Of course, gentlemen, if the fact is that they have shown you that it was in such condition or it appears from the evidence that it was in such condition that reasonably it could have been repaired or restored, there is no evidence here which would assist you then in finding any sum for the damage to the truck; because there is, as I remember it, no evidence at all before you which would show what the reasonable cost of its restoration would be. If that be the situation, of course, then you are in position where you can not allow for the truck.

As to the harness, the same thing applies, and all that I have said applies to it as what I have said respecting the truck. The plaintiffs say that the harness cost \$45.00. I believe one of the plaintiffs says that it was reasonably worth at the time of the happening, after the use to which it had been put (which length of time I do not now recall. You will.) \$35.00. What they are entitled to recover for the harness, if the harness was in that condition where it could not in reason be restored or repaired, is what the reasonable value of it was at the time of the happening.

*Judge's Charge*

Now, that brings us down, gentlemen, to three other items, namely: the 24 empty barrels, the keg of cider and the blanket. As I have already indicated to you, a part of the burden upon the plaintiffs is to satisfy you by a fair preponderance of the evidence that these things were lost to them. To be more particular, and applying  
 10 it to only one item so as not to unnecessarily tire you, the burden upon them is to show you by a fair preponderance of the evidence that there was a blanket upon or in this wagon at the time of this happening, because, you see, if they have not established that, then they have not established sufficiently before you that which would allow you under any circumstances to allow for the blanket; because until they have done it, and established it by that degree of evidence which I  
 20 have indicated, then so far as you are concerned it is just exactly in the same position as though they made no claim for it. The burden is upon them to show you and to satisfy you by a fair preponderance of the evidence that these things were there at the time of, or immediately before the happening of the occurrence. If they have not, then as to those things which they have not satisfied you were there you need pay no attention, because they can not be the subjects of any  
 30 estimation on your part in a verdict, if they are entitled to have one. That is the first obligation and burden that is upon the plaintiffs as to that.

There is the second one which I have already brought to your attention, indirectly probably, and that is that the damage or the loss, if any, that the plaintiffs are entitled to recover for is just that loss which they have shown you by a fair preponderance of the evidence was the natural, proximate result of this happening, taking into  
 40 consideration all the facts and the circumstances

*Judge's Charge*

as they appear before you. If as to any of these items—any of them at all—the plaintiffs have not satisfied you by a fair preponderance of the evidence that their loss to them or their damage to them was not the proximate and natural result of this happening, then as to those items they are not entitled to have a recovery.

Again and finally I will say to you this, gentlemen, not only appylyng to these three items of which I am speaking, but as to all of them except the horse, there is this obligation which the law places upon such persons as these plaintiffs, and that is that if they have met with a loss or partial destruction of personal property which is chargeable in law or attributable to the negligence of some other, the owners or those in authority under them can not stand idly by and do nothing, and leave that property of theirs which has not been totally destroyed in such condition that it will ultimately become a total loss, and then recover for it against the person whose negligence was the cause of the partial loss. The law will not permit that upon the part of the person who is the owner; but the law says and the law is this: that one in that position must within a reasonable time after the occurrence or after notice or knowledge of such an occurrence, use and exercise reasonable care for the care of such of the personal property as he is the owner of, that has not been totally destroyed, so that a total destruction will not come to it. Of course, if that situation appears in this case as to any of these articles, and you find that under the circumstances and facts of this case these plaintiffs did not live up to and within that rule which I have just indicated, and that, therefore, total destruction came where before there was only partial destruction, or total loss came where before

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*Judge's Charge*

there was no loss or would not have been, then as to those items, if any, they are not entitled to a verdict at your hands.

Now, then, gentlemen, I do not have in mind any other matter to which I can call your attention. It is altogether possible, of course, that there are numerous matters which you will find  
 10 confronting you as you consider this case, upon which you may feel that you ought to have had some instruction upon my part. As I have viewed the case I have given you as best I can, gentlemen, all of the items that occur to me that you will need instruction upon. Keep in mind those principles which I have given you as applicable to this case. Keep in mind the statutory provisions which I have read to you, and keep in mind what I have said as to where the burden rests in  
 20 each and every instance of establishing the essential things necessary to be established. When you have done that, determine what the facts are as you have them in the testimony before you, and apply those rules to those facts, and the result will be your verdict. A verdict thus obtained will be a legal verdict.

Aside from that, gentlemen, I have certain requests which I am asked to charge you, and those I am willing to charge are in this language—

30 Mr. Carey: If the Court please, I withdraw Nos. 1 and 2 because the Court has fully covered those points.

The Court: All right; 1 and 2 are withdrawn.

And I am charging what I am charging in the language in which I do charge them:

First, defendant is not responsible for any obstruction to the view at the crossing in question caused by buildings or structures of any kind not located upon its property.

40 Second, the condition of the crossing is not an

*Judge's Charge*

issue in this case and must not be considered by the jury in reaching their verdict. I may say in addition to it, gentlemen, or, more properly, in explanation of that, go back to what I said to you at the opening of my charge to you: there are certain items of negligence with which the plaintiffs charge the defendant. Those items, and those items only are the ones that are to attract 10 and to have your consideration; no others are in the case; those are the ones they have alleged, those are the ones they must stand upon, those are the ones they must establish. In other words, they must stand or fall upon the allegations which they have made.

(The jury retired.)

Mr. Carey: I note objection to the refusal of the Court to charge as requested in No. 3.

The defendant's request to charge (No. 3 in 20 the defendant's list of requests), which the Court refused to charge, is as follows:

"3. There can be no recovery in this action for the value of barrels or for cider claimed to have been lost, or for the horse blanket."

The first of these is the fact that the  
the second is the fact that the  
the third is the fact that the  
the fourth is the fact that the  
the fifth is the fact that the  
the sixth is the fact that the  
the seventh is the fact that the  
the eighth is the fact that the  
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The first of these is the fact that the  
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12/10

## New Jersey Court of Errors and Appeals

HERMAN BRAUER, *et al.*, partners  
as Brauer Brothers,  
*Plaintiffs-Respondents,*

*vs.*

On Appeal.

10

NEW YORK CENTRAL & HUDSON  
RIVER RAILROAD COMPANY,  
*Defendant-Appellant.*

### **BRIEF FOR DEFENDANT-APPELLANT**

Plaintiffs recovered judgment in this case for damages arising out of an accident at a grade crossing in Jersey City, which happened November 16, 1914. 20

By the accident plaintiffs' horse was killed and their wagon and the harness were badly damaged. Certain barrels and cider also a blanket, contained in the wagon at the time of the accident thereafter disappeared. None of this personal property contained in the wagon was in any way damaged by the accident.

The questions involved in this appeal are:

- (1) Are plaintiffs entitled to recover the value of the contents of the wagon which were in no way injured by the accident? 30
- (2) Was defendant guilty of negligence?
- (3) Was plaintiffs' driver guilty of contributory negligence?

The first question is raised by objections noted to the admission of evidence of the value of the contents of the wagon (p. 40, line 1; p. 40, line 30; p. 42, line 1).

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Also by motion to strike out this evidence. (p. 82, line 25; p. 178, line 5)

Also by defendant's request to charge. (p. 189, line 18)

Questions 2 and 3 were raised by defendant's motion for a verdict in its favor. (p. 178, line 20)

10 Plaintiff's servant in charge of their horse and wagon approached the crossing in question at about 5:05 o'clock P. M. on the day of the accident. It was then just growing dark. Defendants had stationed a flagman at the crossing and he was on duty at the time of the accident.

The tracks at the place of the accident ran substantially north and south, and plaintiffs' driver was approaching the tracks from the westerly side, moving toward the east.

The train which struck the horse and wagon was a north-bound freight train, consisting of 47 cars, most of which were loaded.

20 The appellant specifies and relies upon the following grounds of appeal:

(1) The Court admitted the following testimony over the objection of the defendant:

"Q. What was the market value of those barrels at that time? A. \$1.50 each". (p. 40, l. 2).

"Q. What was the market value of them at that time? What was that worth? A. Forty or fifty cents a gallon." (p. 40, l. 33).

30 "Q. What was that worth? What was the market value of that at the time? A. New blanket is \$9.00." (p. 42, l. 1).

(2) The Court refused to strike out the above testimony, p. 82, l. 25; p. 178, l. 3.

(3) The Court declined to direct a verdict for the defendant, p. 178, l. 20.

(4) The Court declined to charge as follows:

40 "There can be no recovery in this action for the value of barrels or for cider claimed

to have been lost or for the horse blanket".  
(p. 189, l. 18).

Four copies of photographs which were admitted in evidence, are annexed to this brief.

Exhibit "P-1" shows the crossing in question, the approach thereto from the elevator, the crossing sign and the watchman's shanty.

Exhibit "P-2" was taken with the camera located in the northbound track 300 feet south from the crossing in question and some distance south of the Ravine Road crossing,—the next crossing southerly from the place of the accident. 10

Exhibit "P-4" shows the crossing in question, the camera being in the road along which plaintiff's driver was approaching the railroad tracks.

Exhibit "D-1" was taken with the camera in the northbound track, north of the crossing in question and showing the view to the south, the direction from which the train was coming. 20

### I.

**Defendant is not liable to the plaintiffs for the loss of the barrels, the cider or the horse blanket contained in their wagon.**

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The complaint alleges that the cider and the barrels contained in the wagon were destroyed, p. 2, l. 40; p. 3, l. 32; p. 4, l. 32.

No mention of the blanket is contained in the complaint.

The evidence wholly fails to show that the barrels, the cider or the horse blanket were in any way injured by the accident.

Herman Brauer testifies that when he arrived on the scene of the accident, he saw nothing of 40

either the barrels or the blanket, p. 43 l. 1; p. 54, l. 9.

On being recalled in rebuttal he testifies that when he arrived there were two barrels left. He does not know what became of them, p. 173 l. 30.

Glennon, a witness for the defendant, was asked on cross examination about the barrels and testifies that he saw some people taking the barrels, but did not know who they were or  
10 whether they had any authority. He says the people were taking the barrels while Brauer, the plaintiff, was present, p. 129 l. 25.

Objection was noted to the admission of testimony with respect to the value of the barrels, the cider and the blanket, p. 40 l. 1; p. 42 l. 3.

Motions to strike out this evidence were made and overruled by the Court, p. 82 l. 25; p. 178 l. 3.

Objections to the Court's rulings were noted on p. 87 l. 5 and p. 178 l. 15.

20 The defendant also requested the Court to charge as follows:

“There can be no recovery in this action for the value of the barrels or for cider claimed to have been lost or for the horse blanket.”

This request was refused and objection noted, p. 189 l. 18.

30 It is evident from the testimony that the loss of these articles contained in the wagon was not the natural or proximate result of any negligence of the defendant, but on the contrary their loss was due to the intervention of an independent efficient cause, and such cause was the wrongful and criminal act of third parties.

Under such circumstances the defendant is not liable to the plaintiff's for this loss.

40 Even if defendant's negligence gave an opportunity to the thieves to seize plaintiff's property, that would not render defendant liable.

In *Batton v. Public Service Corp. of N. J.*, 75 N. J. L. 857, this Court says:

“The proximate cause is the efficient cause —the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not proximate causes and the responsible ones, though they may be nearer in time to the result.”

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To the same effect see, *Comer v. Meyer*, 78 N. J. L. 464 (at p. 469); *Zellers v. Delany*, 80 N. J. L. 452 (at p. 457).

The cause which resulted in the loss of these articles was the wrongful act of third parties. Certainly the negligence of the defendant, if any, did not necessarily cause or set in operation these wrongful acts.

In *Cuff v. Newark & N. Y. R. R. Co.* 35 N. J. L. 17, the Supreme Court says (p. 30);

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“The general rule is, that the damage to be recovered must be the natural and proximate consequence of the act complained of. It is not enough if it be the natural consequence; it must be both natural and proximate. To maintain an action for special damages, they must be the legal and natural consequence arising from the tort and not from the wrongful act of a third party remotely induced thereby. \* \* \* \* \*

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“Cases may be stated where the wrongful conduct of one person affords the opportunity or occasion for the illegal act of another, or for an injury from other causes. In such case, the injury is too remote to sustain an action for the recovery of damages. Thus the proprietors of a railroad, who negligently delay the transportation of goods, as common carriers, and then transport them safely to their destination, are

40

not responsible for injuries to the goods by a flood while in their depot at that place, although the goods would not have been exposed to such injury but for the delay. *Denny v. The New York Cent. R. R. Co.*, 13 Gray 481; *Morrison v. Davis*, 20 Penn. 171; *Railroad Co. v. Reeves*, 10 Wall 176."

Justice Dixon, speaking for the Supreme Court in *Wiley v. West Jersey R. R. Co.*, 44 N. J. L. 247 at p. 251, defines the terms "natural" and "proximate" as follows:

"The term 'natural' imports that they are such as might reasonably have been foreseen, such as occur in the ordinary state of things. The term 'proximate' indicates that there must have been no other culpable or efficient agency intervening between the defendant's dereliction and the loss."

In this case the culpable agency which intervened between the defendant's negligence and the plaintiff's loss was the wrongful and criminal act of third parties.

## II.

**No negligence warranting a recovery in this action was established against the defendant.**

The negligence charged in the complaint is the failure to signal the approach of the train by ringing a bell or blowing a whistle or by giving sufficient warning in any other manner; driving the engine at great speed and displaying a white flag denoting to plaintiff's driver that the crossing was safe and clear.

The evidence is insufficient to establish a failure to give the statutory warning.

Ruben, plaintiff's driver, testified, first that he did not hear a whistle, p. 12 l. 36, and afterward that the whistle was blown for the first time when the engine was about 2 car lengths from the crossing and that no other whistle was blown, p. 13 l. 32; p. 14 l. 24. He also testifies that his horse was on the second track when he first heard the whistle; that on hearing the whistle he looked in a southerly direction and then for the first time saw the engine coming, p. 27, l. 30; p. 28 l. 18. 10

Plaintiff's witness Leme also testifies that just before the collision he heard a great noise; it was the train whistling, "when she come just right to us", p. 58 l. 22. At first he testifies that the engine was about 40 or 45 feet from the wagon when the whistle sounded, p. 59 l. 32. On cross examination he testifies that when he heard the noise of the whistle the train was right there, not more than 20 feet from the crossing, p. 72 l. 40. That was the first he saw of the train. Questioned further on direct examination as to the whistle which was sounded just before the accident he says: "I think that was the only whistle; Yes sir", p. 59 l. 18. He also testified that no bell was rung, p. 59 l. 15. Asked if there had been any other bell or whistle blown, if he would have heard it he answered "No sir",—p. 59 l. 25. 20

It is thus seen that both these witnesses testified that they neither saw or heard the train until it was practically at the crossing. Ruben had driven across the first track and his horse was on the second track before he either heard or saw the train. Leme was within 5 or 10 feet of the first Erie track on the easterly side of the crossing before he heard or saw the train. 30

This train consisted of 47 freight cars, p. 134 l. 1; p. 142 l. 20; p. 143 l. 15.

According to the witnesses of the defendant, 40

when the train reached a point about 600 or 700 feet from the crossing it was moving at a rate 10 to 15 miles per hour. According to the testimony of Ruben and Leme, for the plaintiff, the train was running at almost the speed of an express train when it was within 20 to 100 feet of the crossing. Even moving at the speed testified to by the defendant's witnesses, the Court will take judicial notice of the fact that the train must  
 10 have made a good deal of noise.

In *Central R. R. Co. v. Smalley*, 61 N. J. L. 277 (bottom p. 278) this Court says:

“There was no express evidence to show how much noise the coal train made or, indeed, that it made any noise, nor under the circumstances was such evidence necessary. The thing spoke for itself. The court will not ignore common experience. There is no  
 20 reason to think that the physical conditions were exceptional or that the phenomenon of an inaudible coal train was the feature of the situation. The conclusion is inevitable that this moving body was accompanied by the usual roar and rumbling, which must have greatly hindered a person in this immediate vicinity from distinguishing other sounds.”

If these witnesses failed to hear the approach of this long, heavy freight train until it was close  
 30 to the crossing, it is clearly evident that they were paying no attention to the sounds which must have been clearly and distinctly audible; hence the reason they heard neither whistle or bell was their inattention and not the fact that the signals were not given.

On the part of the defendant the evidence is clear, direct and positive that both the whistle was sounded and the bell rung.

The witness Knecht was standing outside of  
 40 the flagman's shanty about 10 or 15 feet from the

track, p. 95 l. 25. He heard the whistle blow for the Hoboken Avenue crossing. That was about 1000 feet south of the point where he was standing, p. 95 l. 35. He also heard the whistle blow for the Ravine Road crossing which is the crossing next southerly from the one where the accident happened and about 300 feet distant therefrom, p. 96 l. 15. He also heard the bell ringing as the train approached. He noticed that the bell was still ringing after the accident and after the engine had stopped, p. 101 l. 35; p. 102 l. 1; p. 106 l. 32. 10

Schwartz, defendant's flagman, testifies that he heard the engine whistle for the Hoboken Avenue crossing and then started out to take his place at the crossing to warn travelers on the highway and to give any necessary signals to the engineer p. 112 l. 8. He also says that the bell was ringing as the train approached, p. 117 l. 5; p. 123 l. 17.

Glennon, a special officer of defendant, boarded the train about 700 or 800 feet from the Hoboken Avenue crossing. The train was in motion, p. 126 l. 38. When he boarded the train the whistle was blown for the Hoboken Avenue crossing and when under the D. L. & W. Bridge the whistle was again blown for the Ravine Road crossing, p. 127 l. 20. After the accident this witness walked up to the crossing and then noticed that the bell on the engine was ringing, p. 128 l. 17. 20

Moser, defendant's engineer, testified that he first blew the whistle for the Hoboken Avenue crossing and blew it again as he was passing under the D. L. & W. Bridge, p. 134 l. 15. He says the bell was ringing as the engine approached the crossing. It was rung automatically by air and he started it ringing when they left Jersey City. He remembers stopping the bell from ringing after the accident and after the engine had been brought to a standstill, p. 136 l. 38. 30

Gleason, defendant's fireman testifies that the 40

whistle was blown south of Hoboken Avenue and again just before reaching the D. L. & W. Bridge, p. 143 l. 16. The bell had been ringing all the time after starting from Jersey City. It rang by air. After the accident and after the engine was stopped, he noticed the bell was still ringing, p. 144 l. 19, p. 149 l. 2.

10 Crosson, a non-employe witness was loading some freight at the freight station, about 100 or 150 feet northerly from the crossing, p. 151 l. 10. He heard the engine whistle before it reached the crossing, p. 150 l. 38.

Geiser, defendant's brakeman, heard the whistle blow for the Hoboken Avenue crossing and after it passed the D. L. & W. Bridge. He noticed the bell was ringing as they passed under the Bridge. He went to the crossing after the accident and the bell on the engine was still ringing p. 161, l. 1.

20 Carroll, another brakeman, testifies that he went to the engine after the accident, and the bell was still ringing, p. 166, l. 35.

In view of this positive affirmative evidence of the ringing of the bell and blowing of the whistle and the demonstrated inattention of plaintiff's witnesses as conclusively shown by their failure to hear the approaching train, we submit that the plaintiffs did not establish a failure on the part of the defendant to give the statutory signals.

30 The evidence discloses no reason why the defendant should not run this train at any speed which was consistent with the safety of the train and the employees engaged thereon. Nevertheless the evidence of the plaintiffs' witnesses Rubin and Leme with respect to the speed of this train is conclusively shown to be erroneous. They testified that it was running very fast; almost as fast as an express train and that it was running at this rate when they first saw the train at a distance from 20 to 100 feet from the crossing; Rubin p. 14 l. 32; p. 28 l. 25; Leme p. 60 l. 36; p. 40 73 l. 1.

On the other hand defendant's witness Knecht testifies that when the train came within his view as he was standing in front of the flagman's shanty at the crossing, it was going, he should judge, about 9 or 10 miles an hour, p. 97 l. 38.

Glennon, who boarded the train while in motion, 700 or 800 feet from the Hoboken Avenue crossing testifies that it was moving slowly and that the speed of the train did not increase from that time until the accident, p. 127 l. 1. He thinks the train was moving 10 or 12 miles an hour, p. 131 l. 20.

Moser, the engineer, testifies that at Hoboken Avenue crossing the train was moving about 15 miles per hour, p. 134 l. 35. When he struck the wagon the engine was just crawling along. It just pushed the wagon aside. It was going not more than 3 or 4 miles an hour, p. 136 l. 30.

Gleason, defendant's fireman, says that at the Hoboken Avenue crossing, the train was running, he thinks, at about 15 miles an hour, p. 143 l. 30.

Carroll, another brakeman on the train, says, that at the time the engine was at about the next crossing to the south and when the brakes were put on, the train was moving at about 8 or 10 miles an hour, p. 165 l. 25; p. 166 l. 10.

The testimony of plaintiffs' witnesses as to the speed of the train is disproved and that of defendant's witnesses is corroborated by the undisputed circumstances attending the accident. These circumstances establish conclusively that the train could not have been running at a high rate of speed as it reached the crossing. The train consisted of 47 freight cars nearly all of which were loaded. Moser p. 134 l. 1.

The train started from the Pennsylvania trestle barely a mile distant from the place of the accident, p. 134 l. 10.

The brakes were set at a point 600 or 700 feet from the accident and between the Lackawanna Bridge and the Ravine Road crossing. Moser

p. 135 l. 1, Glennon p. 127 l. 20; Gleason p. 144 l. 1; Carroll p. 165 l. 25.

When the train was brought to a stop the tender was on the crossing, and the horse and wagon were either on the crossing or very close to it. Ruben p. 31 l. 28; p. 36 l. 14; Knecht p. 100 l. 38; Schwartz p. 116 l. 25; Glennon p. 128 l. 20; p. 131 l. 38; Moser p. 136 l. 30; Gleason p. 145 l. 10; Geiser p. 161 l. 24; Carroll p. 166 l. 30.

- 10 Leme, plaintiffs' witness, at first testified that the engine stopped about 30 *car lengths from the crossing* p. 65 l. 12. Later on he states that it was probably 15 car lengths from the crossing and he estimates the distance as 100 feet p. 66 l. 1.

His evidence is so self-contradictory as to be worthless.

From this uncontradicted evidence it is apparent that the train was moving very slowly as it approached the crossing.

- 20 There is a conflict in the testimony with respect to the conduct of the watchman. Plaintiff's testimony, highly improbable though it is, tends to show that as Ruben was approaching the crossing the watchman was standing between the Erie tracks and the defendant's tracks; that he indicated to Ruben that the way was clear and then started toward his shanty. After Ruben had crossed the first track and his horse was on the second track and when the engine was within a  
30 few feet of the crossing the watchman ran toward the engine waving his coat and endeavoring to stop it. Ruben p. 12 l. 38; p. 13 l. 33; p. 14 l. 24; Leme p. 59 l. 36.

- The evidence on behalf of the defendant was to the effect that the watchman left his shanty when the whistle was blown south of Hoboken Avenue crossing; that he took a position between the Erie's tracks and the defendant's tracks and seeing plaintiffs' driver approach the crossing,  
40 he held up a red lantern to indicate that he should

stop; the driver did not heed the warning and the watchman shouted at him. In spite of the efforts of the watchman, the driver continued on his course. He crossed the first track and had cleared the second track within a foot or two when his horse stopped and would go no farther. The train at that time had not passed under the Lackawanna Bridge. Before the engine crossed Ravine Road, the driver jumped from the wagon and ran away. Knecht, p. 97 l. 10; p. 98 l. 34; 10 Schwartz, p. 112 l. 10.

Knecht one of the defendant's witnesses, who was standing in front of the shanty all this time, ran to the horse, took him by the bridle and tried to start him so as to draw the wagon off the track. The horse would not attempt to draw the load. After the horse stopped on the track, the watchman flagged the train with his lantern. Although the brakes were applied at or before the time the engine crossed Ravine Road, it could not be brought to a stop until just after it had struck the wagon. Knecht p. 98 l. 10; p. 98 l. 35; p. 100 l. 1; p. 109 l. 15; Schwartz p. 112 l. 10; p. 114 l. 1; p. 115 l. 25; Crosson p. 151 l. 25; Carroll p. 165 l. 25; p. 166 l. 15. 20

From the time the watchman went on to the crossing to the time of the accident he never went to or toward his shanty. Knecht p. 101 l. 22 Schwartz p. 115 l. 20.

Plaintiffs' driver did not stop from the time he left the elevator until his wagon was on the second railroad track. Knecht p. 99 l. 32; Schwartz p. 113 l. 10. 30

This conflict in the evidence such as it is, is of no value to the plaintiffs' case, because their driver did not rely upon the acts of the flagman. He approached the crossing slowly *and continued looking for trains all the way*. Ruben p. 26 l. 15; p. 27 l. 10.

In *Horant v. Central R. R. Co.*, 78 N. J. L. 190, 40

the evidence showed that the crossing bell was not ringing as the train approached and the court charged the jury that that might be considered an element of negligence on the part of the defendant. The Supreme Court said (at p. 194):

10        “The case for the plaintiffs rested on the theory that they were unaware of the crossing and that no adequate notice of it was given. Hence it is evident that they placed no reliance on the bell to warn them of the approach of the train, in which case only could the failure to ring it be regarded as negligence directly tending to cause the accident. There was error, therefore, in charging the jury that failure to ring the crossing bell to signal the approach of the train might be regarded as such negligence.”

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### III.

#### **Plaintiffs' driver was guilty of contributory negligence.**

On the case made by the plaintiff, the building on the adjoining property was 25 feet back from the westerly track and 100 feet southerly from the street on which plaintiff's driver was approaching the crossing. Ruben p. 19 l. 1 to p. 19 l. 30.

30        The driver testifies that the watchman's shanty was 8 or 10 feet from the westerly track, p. 16 l. 38.

After reaching a point 15 or 20 feet from the track, the driver's view was clear from the obstruction of these buildings p. 19 l. 20. When Ruben got near to the shanty he looked toward Jersey City and from that point he could see down to the next crossing below p. 27 l. 15. He says:

40        “When I was close to the shanty I could see the crossing” p. 26 l. 5; p. 27 l. 10.

He kept looking as he approached the crossing p. 26 l. 10; p. 27 l. 10.

Knecht was standing outside the shanty as the train was approaching and about 10 or 15 feet from the track. p. 95 l. 20. From that point he could see the engine as it was coming around the bend and approaching Ravine Road crossing p. 97 l. 30; p. 98 l. 20. He could see the engine half-way between Ravine Road crossing and the Lackawanna Bridge. He estimates the distance 10 at about 500 feet p. 109 l. 9.

The distance is in fact not less than 500 feet and probably nearer 600 feet.

The photograph, plaintiffs' Exhibit P-2, confirms the testimony of Knecht. It was taken 300 feet south from the crossing on the track on which the train was approaching and looking toward the crossing. It shows a clear open space between the building on the adjoining property and the watchman's shanty. Plaintiffs' driver must 20 have had a clear view through this open space from the point where he testifies he stopped the horse. Evidently there was a clear view for a considerable distance south of where this photograph was taken. The photograph also shows that the view from in front of the shanty was entirely unobstructed down to a point where the photograph was taken and doubtless for a considerable distance beyond.

The photograph, defendant's Exhibit D-2, 30 taken at the crossing in question, shows that the driver must have had a clear view down to the Lackawanna Bridge, a distance more than 700 feet, when he was approaching the westerly track. It is evident that from a point at least 10 feet west of the westerly track, plaintiffs' driver had a clear view to the south of more than 300 feet, and probably at least 500 feet. He testifies that he drove slowly toward and across the tracks, looking as he went, p. 26 l. 12; p. 27 l. 10. We 40

may assume that he was moving at no less than 3 miles per hour and on the evidence it is clear that the train was not moving at a greater rate of speed than 15 miles per hour on the average from the time it passed the Lackawanna Bridge to the time it struck the wagon. On that basis it would move 5 times as fast as the horse and wagon. From a point 10 feet west of the westerly track to the point where the accident happened  
10 was a distance of from 22 to 25 feet. While plaintiffs' horse and wagon was moving a distance of 25 feet the train would move a distance of 125 feet. Hence it must have been in plain view at least from the time the driver had reached a point distant 10 feet from the westerly track.

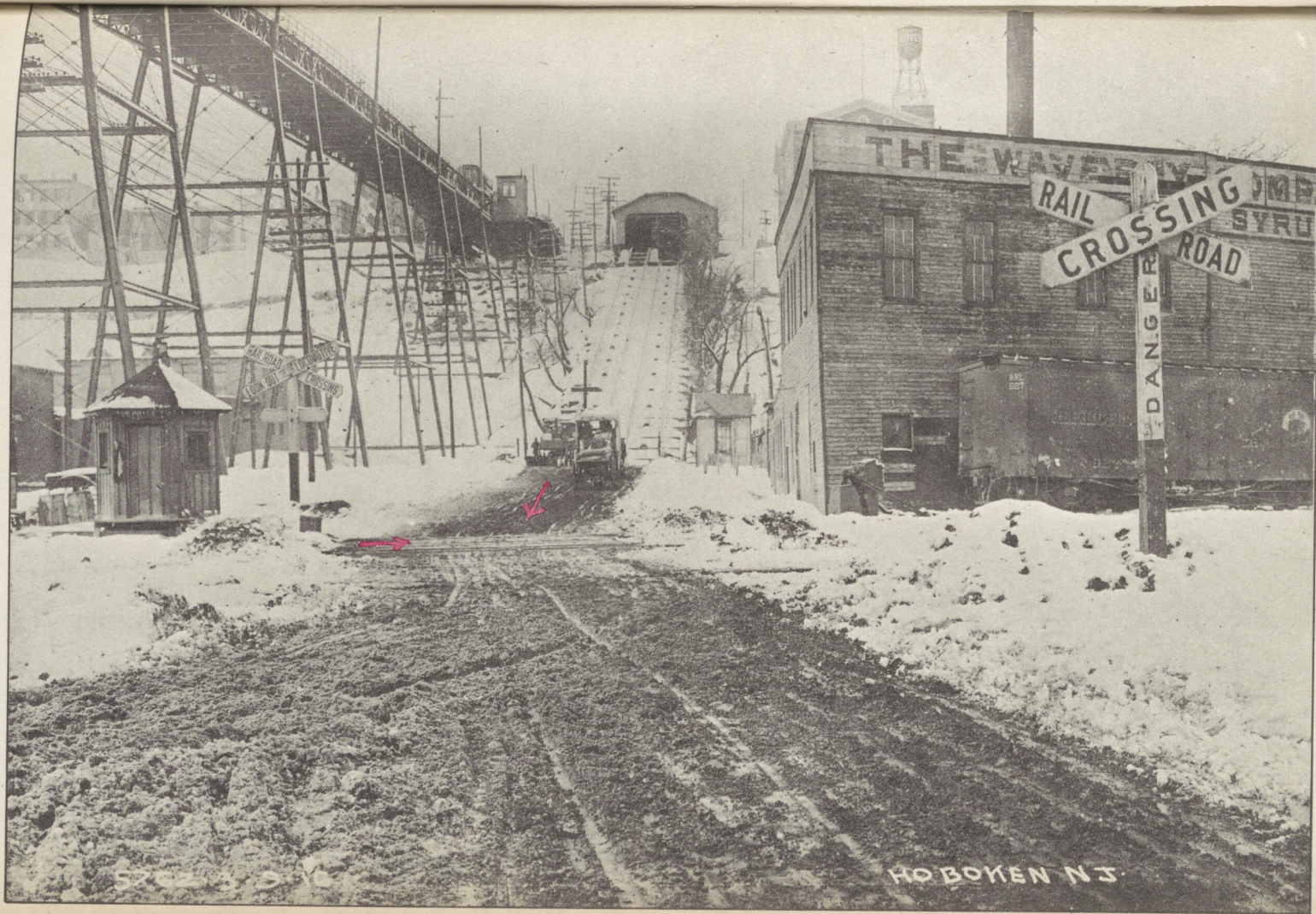
The horse was gentle, and not afraid of the cars, p. 34 l. 5.

In this state of the case the Crossing Act of 1909, relied upon by the plaintiffs is of no benefit  
20 to them. This statute is for the protection of a traveler upon the highway approaching a protected crossing who does not stop, look or listen. If he fails to do so the statute, when applicable, excuses him, but if he looks, instead of relying upon a watchman to give him warning, then he is charged with what his looking should reveal to him. Accepting the driver's statement as true that he continued looking as he approached the crossing and until he reached it he must have seen  
30 the approaching train, and he disregarded what he saw. He doubtless supposed that he could cross before the train reached the crossing. He took the chance and lost and plaintiffs are not entitled to recover for the damages resulting.

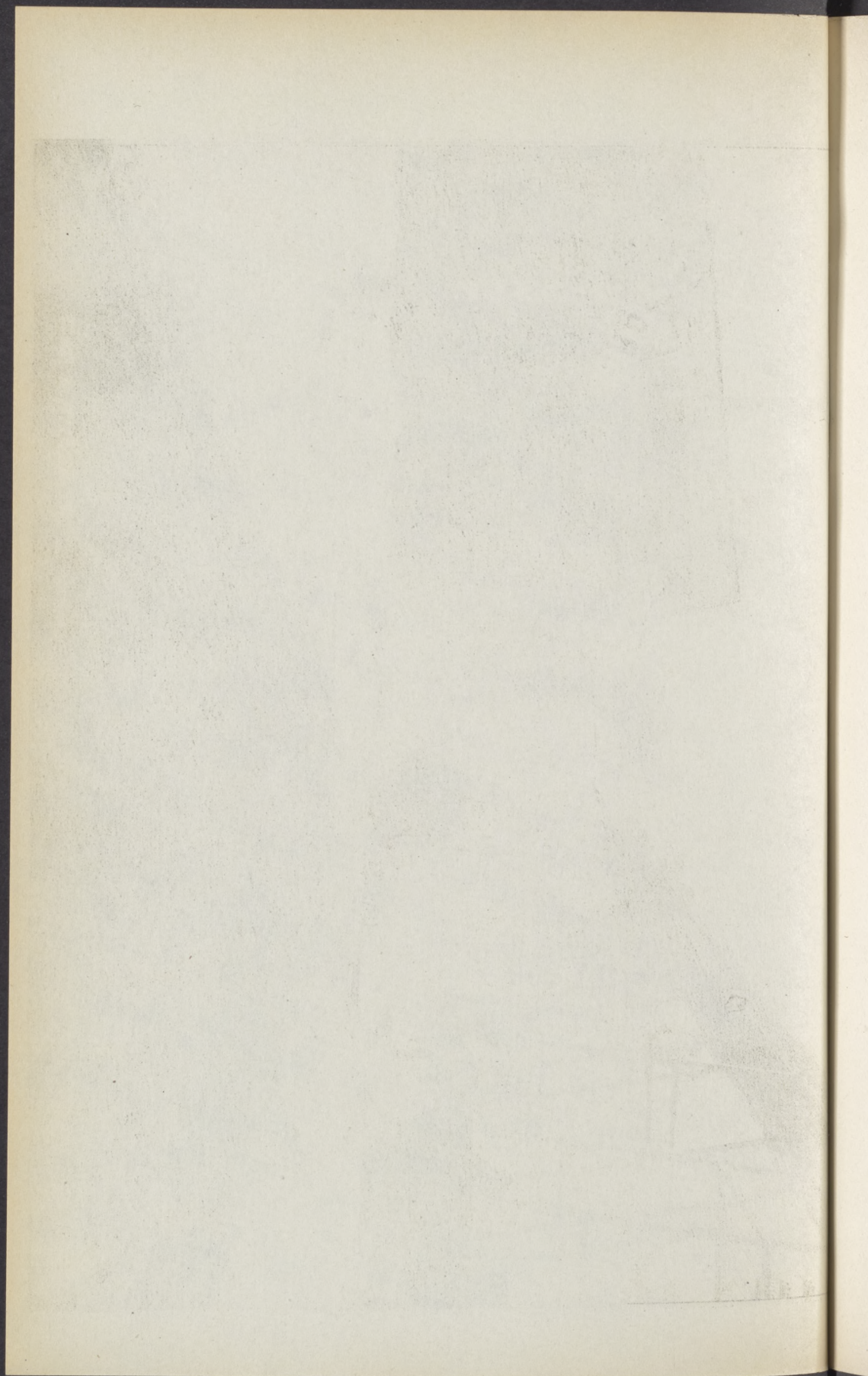
**We respectfully submit that for the reasons stated, the judgment should be reversed.**

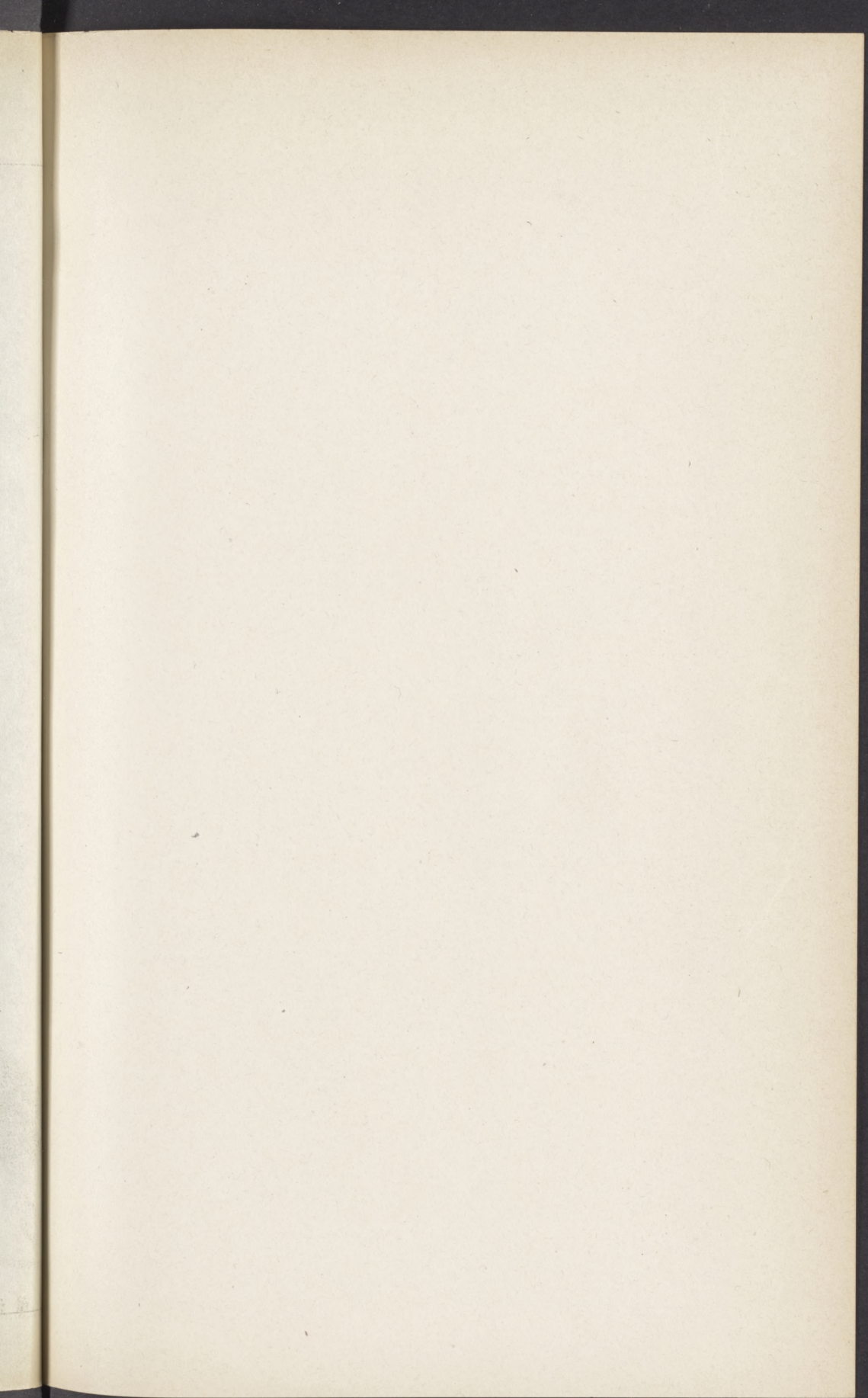
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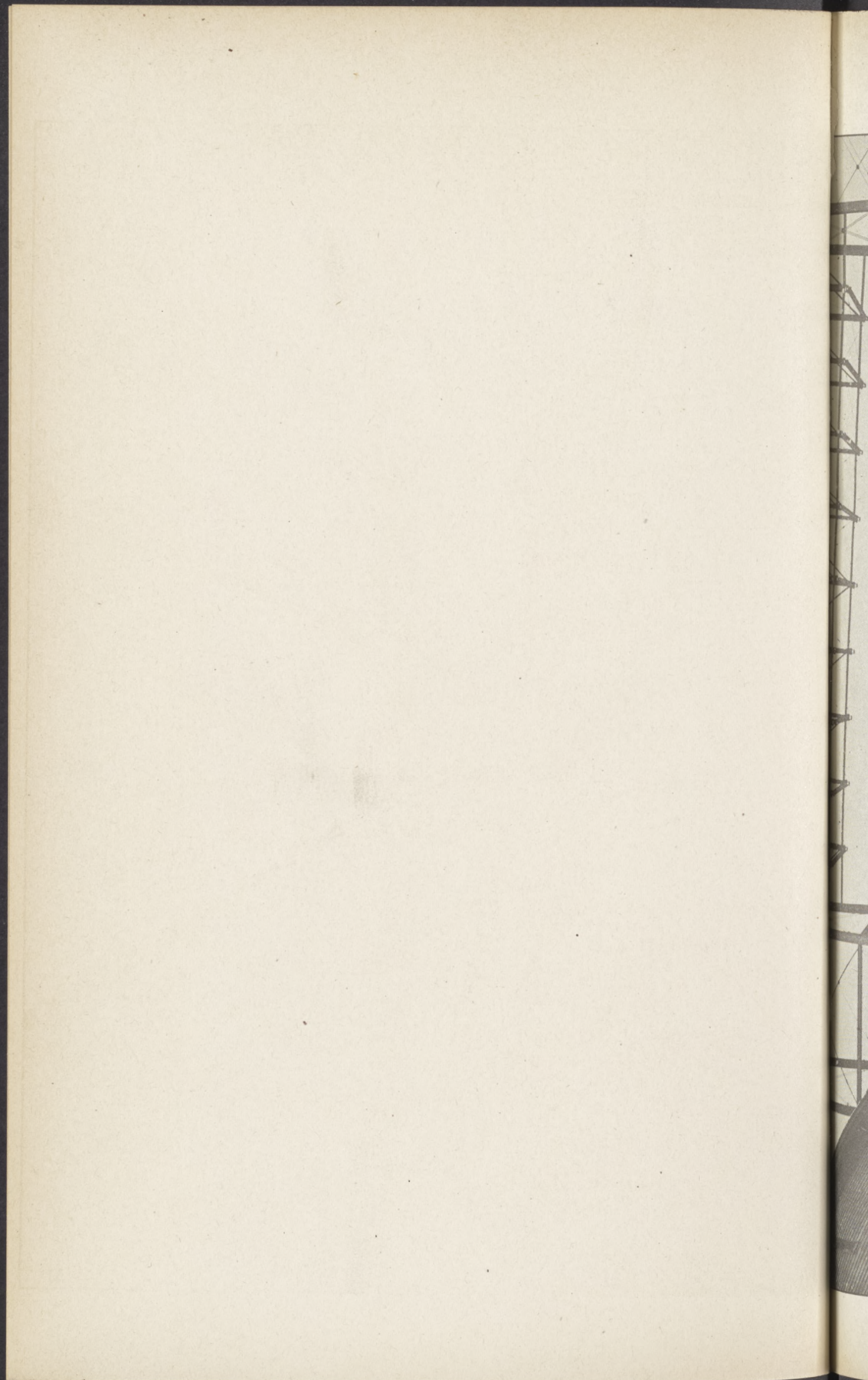
VREDENBURGH, WALL & CAREY,  
*Attorneys for Defendant-Appellant.*



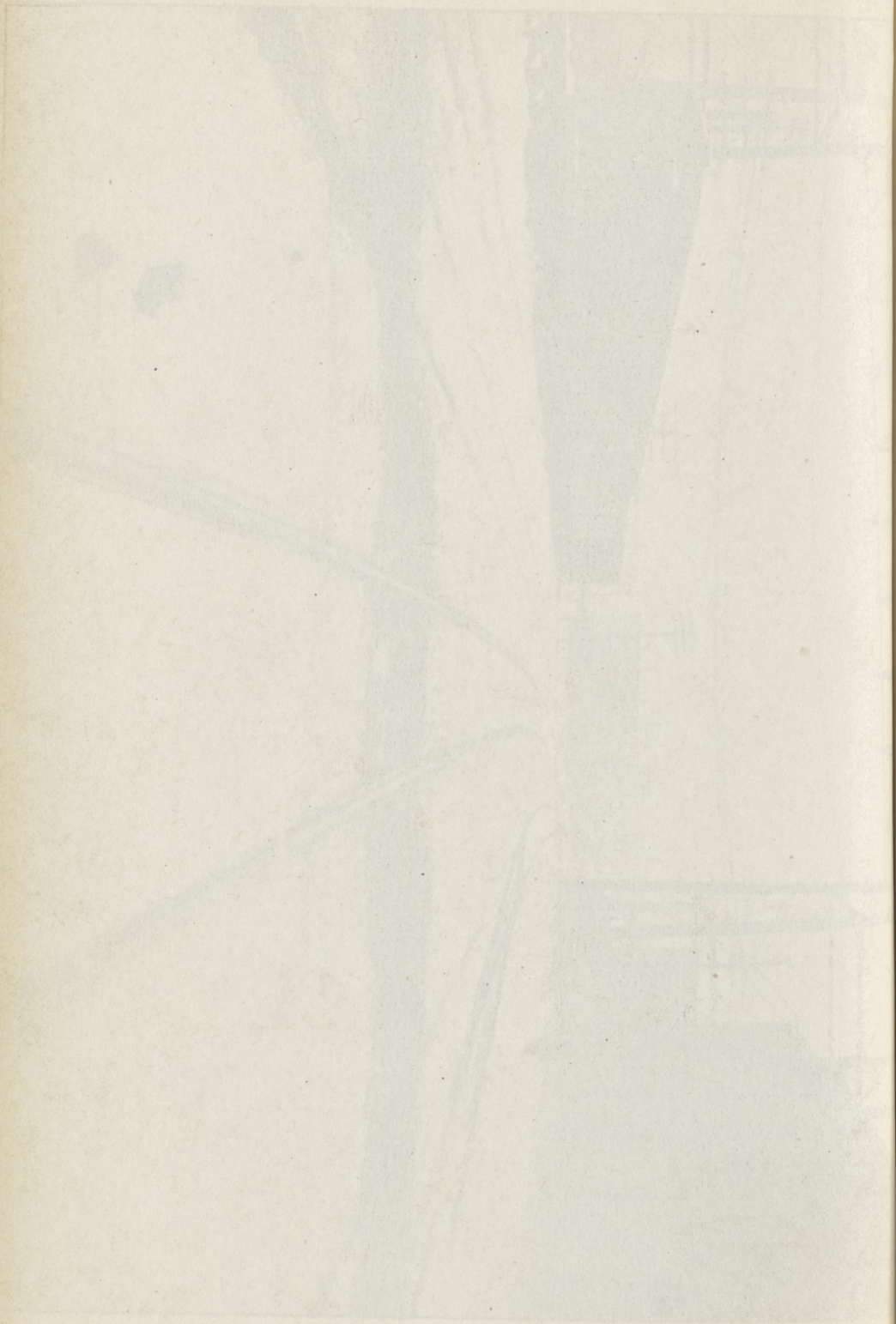
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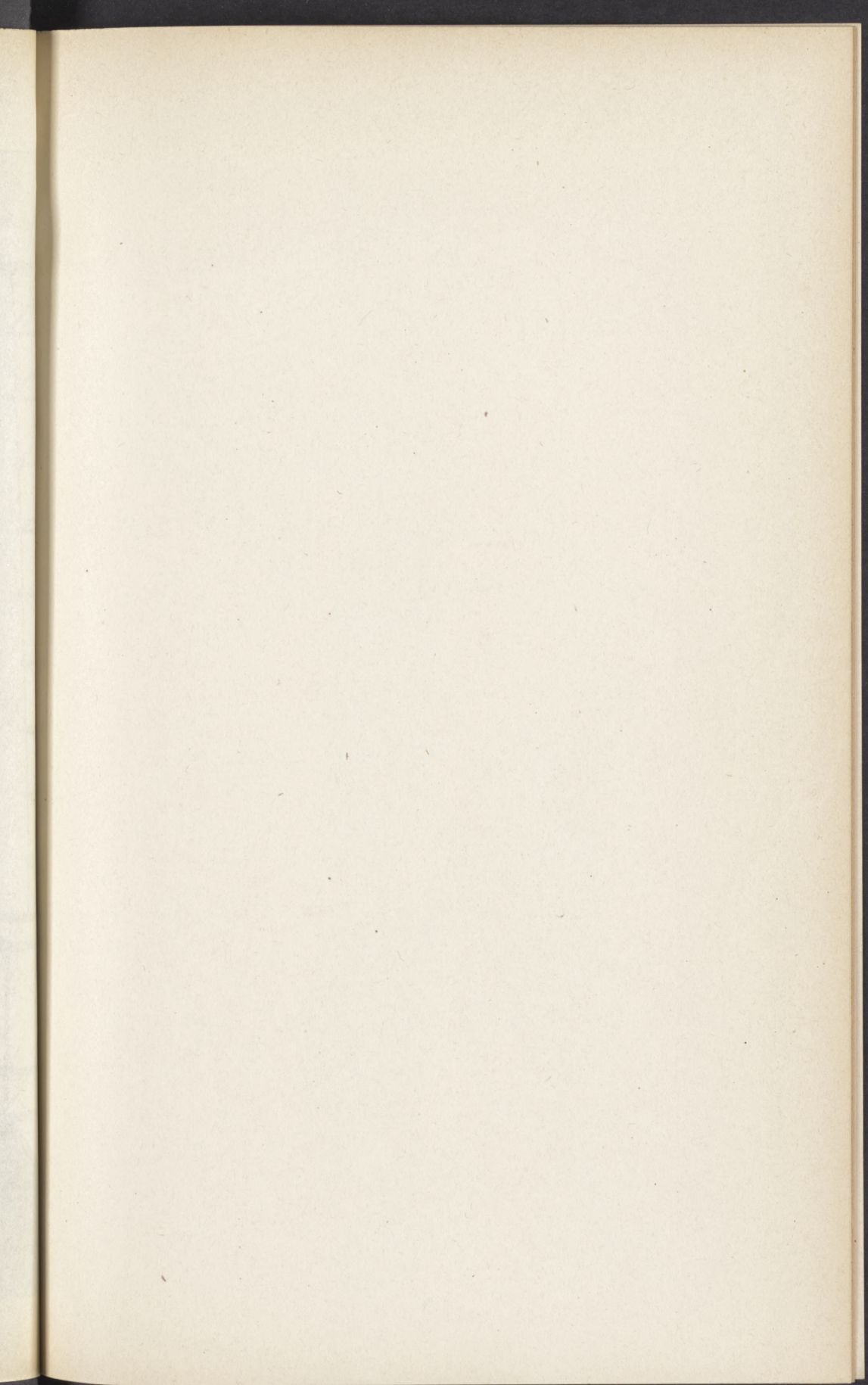


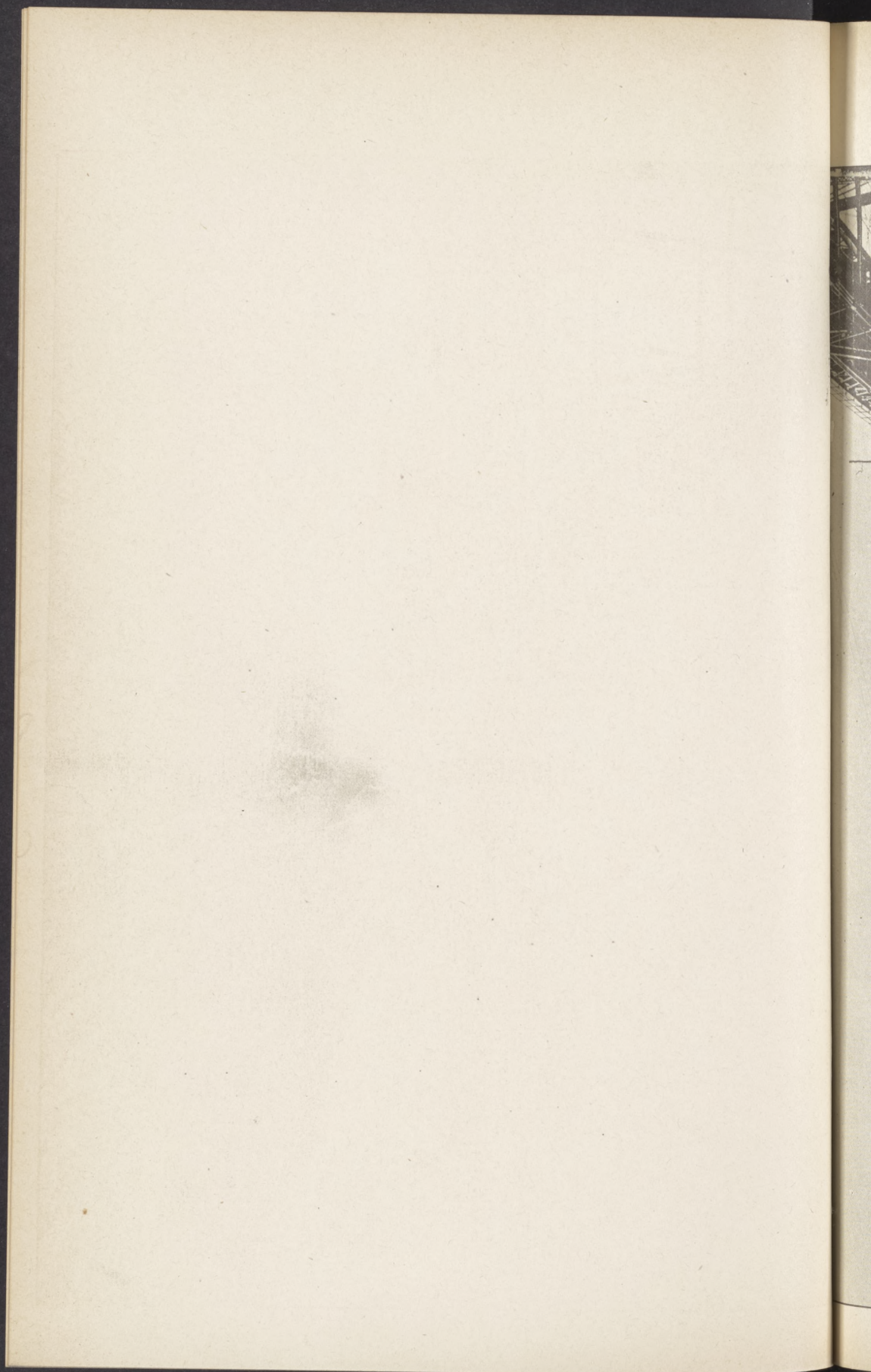








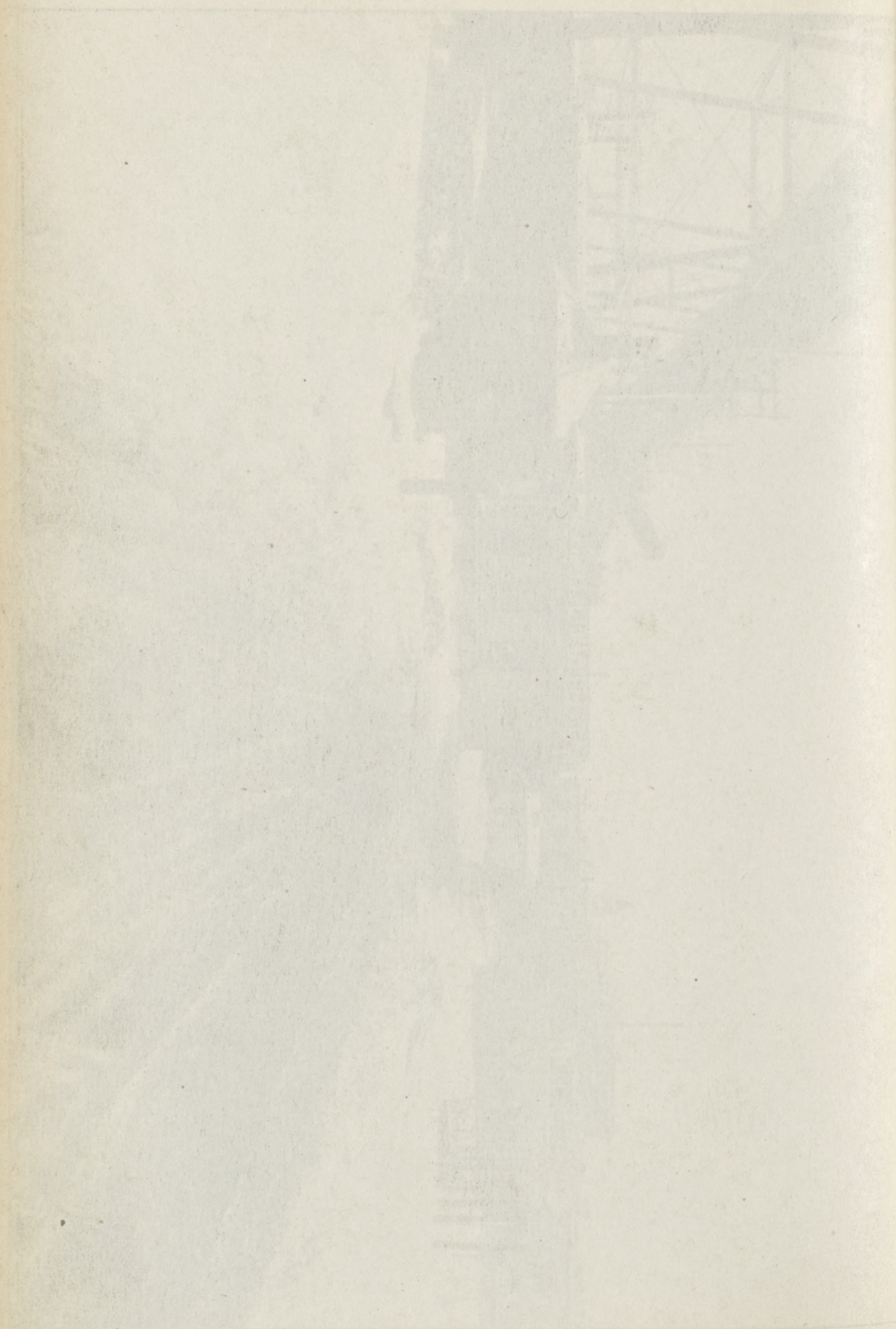


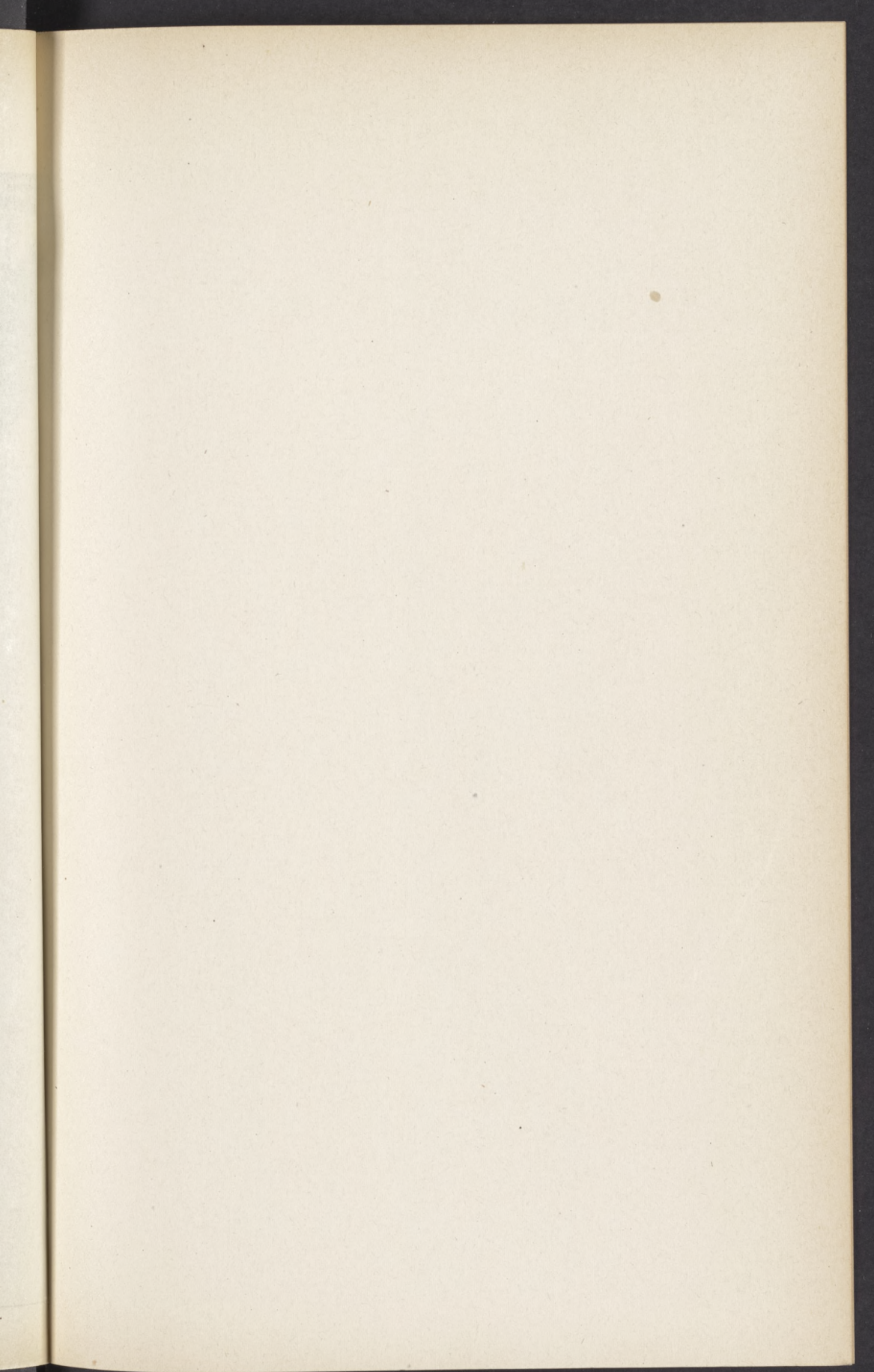


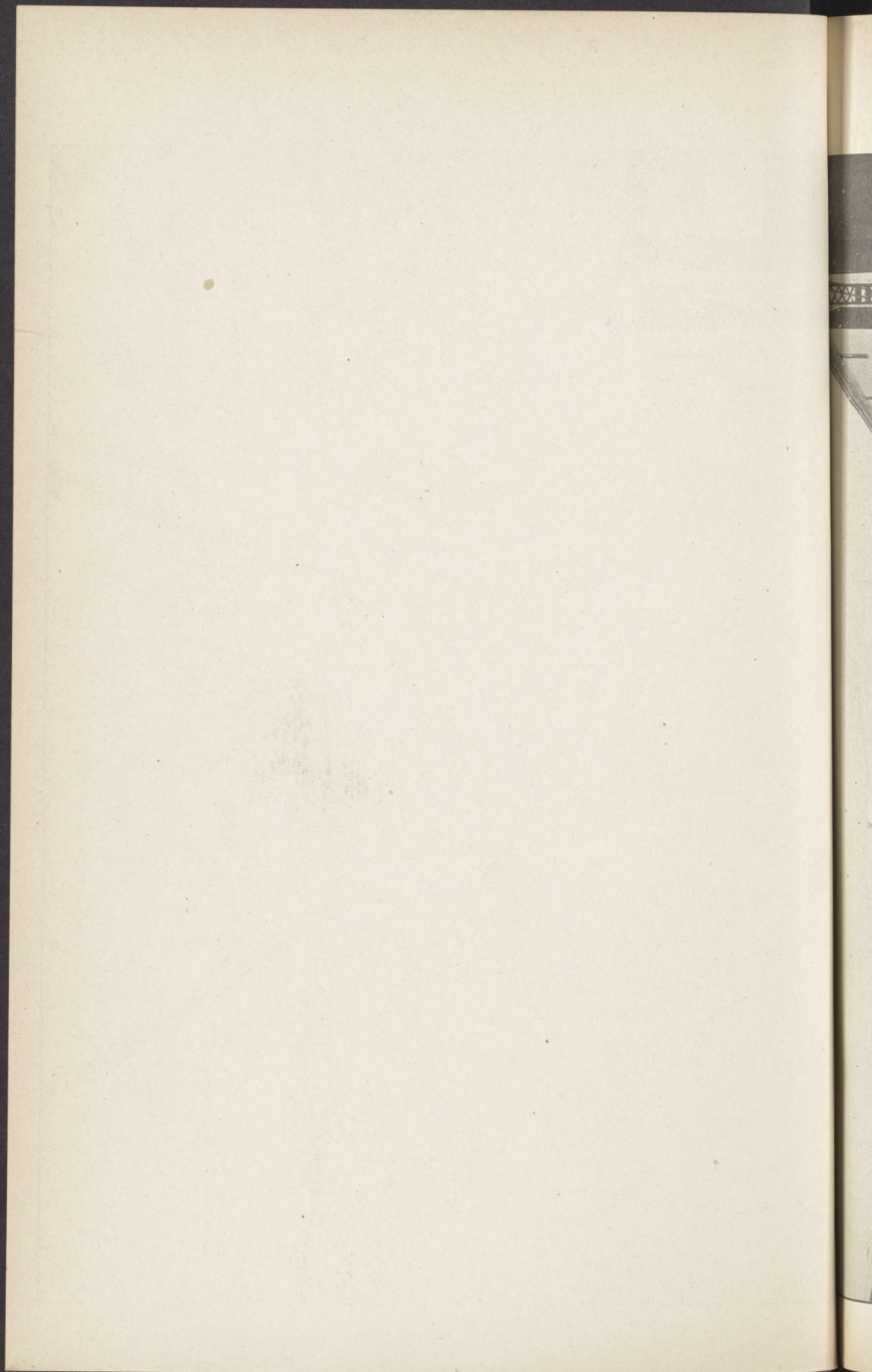


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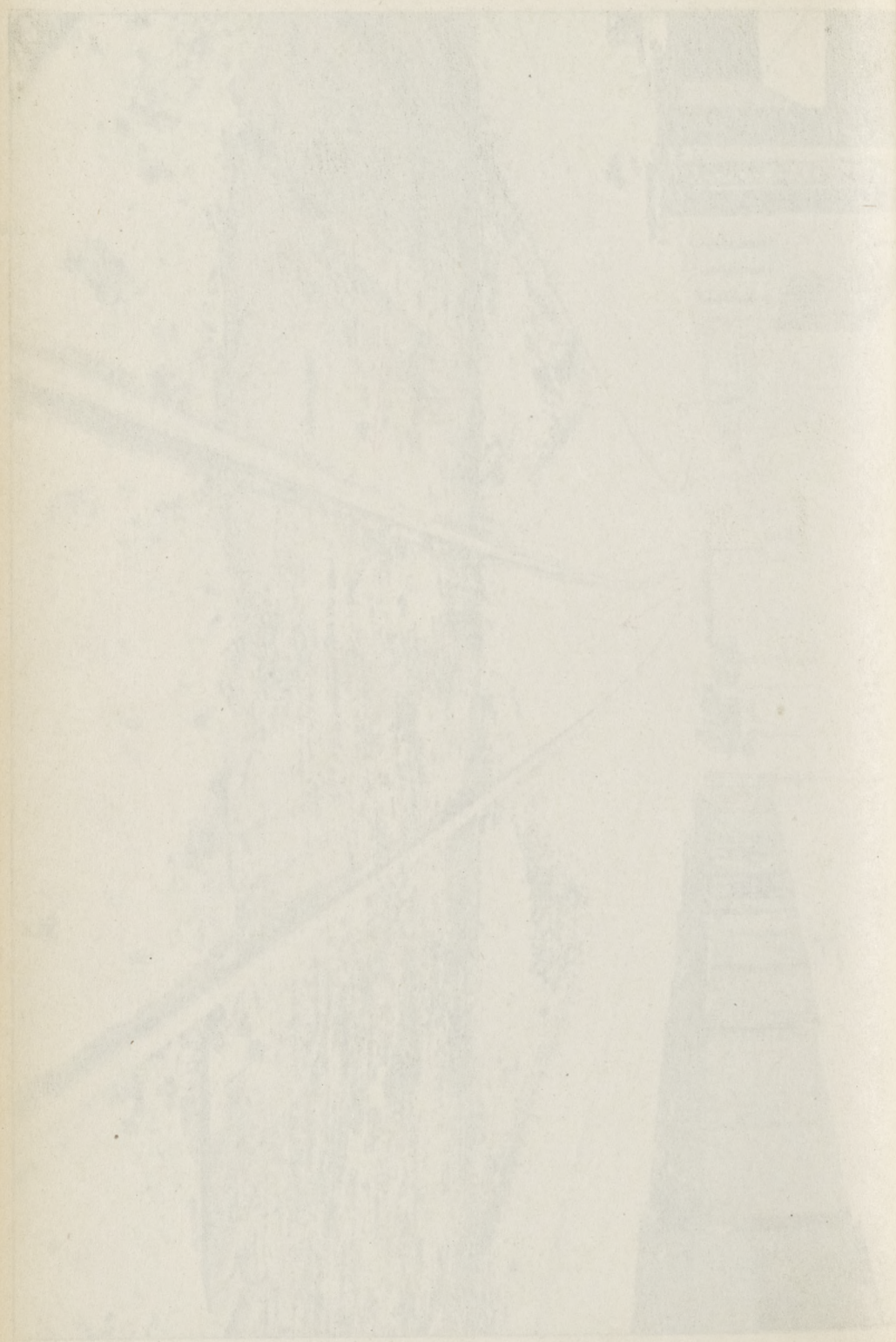
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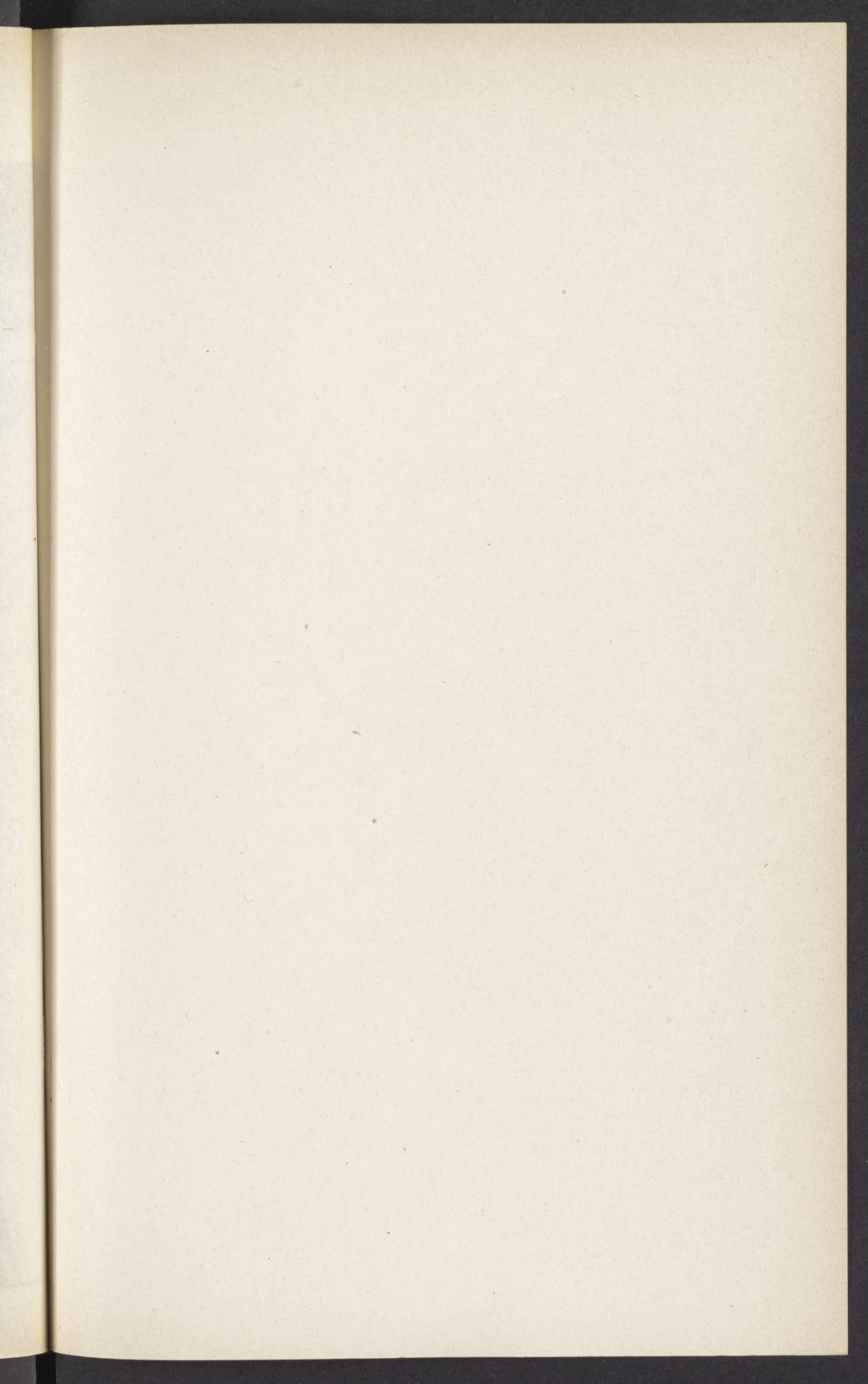














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## New Jersey Court of Errors and Appeals

HERMAN BRAUER *et al.*, partners  
as Brauer Brothers,  
Plaintiffs-Respondents,

vs.

NEW YORK CENTRAL & HUDSON  
RIVER RAILROAD COMPANY,  
Defendant-Appellant.

On Appeal.

### BRIEF FOR PLAINTIFFS-RESPONDENTS.

The matters alleged by the appellant for error, as stated in the grounds of appeal, are that:

1. The Trial Judge permitted a witness for the respondents to testify concerning the market value of some empty barrels, a keg of cider and a horse blanket, and refused to strike out the evidence in the case respecting the values of said articles, and declined to charge the jury that there could be no recovery for the value of said articles.

2. The Trial Judge refused the motion on behalf of the appellant to direct a verdict in its favor, based on the ground that no negligence on the part of the appellant had been established, and that the evidence in the case showed that the driver

of the respondents had been guilty of contributory negligence.

Even if it could be said that the Court erred in the matter of the empty barrels, cider and blanket, this appeal, so far at least as those articles are concerned, would appear to be without merit in view of the fact that their aggregate value, as testified to, did not exceed \$50. And, keeping in mind the recent legislation in this State on the subject of railroad grade crossings and the interpretation put upon it by our Courts, which would seem to require that the questions of negligence and contributory negligence be left to the jury in all actions brought to recover damages for injuries to persons or property caused at any such crossing, it would appear that the Judge of the Circuit Court had no alternative in the present case but to submit those questions to the jury.

The crossing in question within the city limits of Hoboken is known as the "Ferry Street Crossing." Some idea of its dangerous character may be had from an examination of the pictures offered in evidence, duplicates of which are to be found pasted in the back of the copies of the defendant's brief. The tracks of the defendant company curve to such an extent just to the south of this crossing that if one stands on the most westerly track and looks to the south towards Jersey City (see picture, Exhibit D-1), his view of that and the adjoining track will extend no farther than the next crossing, known as the New York Avenue or Ravine Road Crossing (Case, p. 20, lines 10 to 14, and p. 44, lines 10 to 16), less than 300 feet away. This distance between the two crossings is definitely fixed by the printed statement at the foot of picture Exhibit P-2, reading as follows: "Position of camera 300 ft. south from crossing, looking north on north bound track." It will be seen from an exam-

ination of this picture that the camera with which it was taken stood a number of feet south of the New York Avenue or Ravine Road Crossing, showing that the space between that crossing and the Ferry Street crossing is less than 300 feet. Corroboration of this statement of distance is had in the testimony of the respondents' driver and others that the land on the westerly side of the tracks lying between the two crossings, outside of the plot 100 feet long upon which the iron posts and cross-beams of the Public Service Company's elevated railway stand, is covered by a frame building 167 feet long which extends to the Ravine Road crossing (Case, p. 19, lines 10 to 21; p. 103, lines 20 to 31), making the actual distance between the crossings 267 feet. The building here referred to with a man standing in front of it, also both crossings, are shown on picture Exhibit P-2. The engineer of the engine that caused the accident testified that the degree of curve of the tracks south of the Ferry Street crossing was so great that he was unable to see the horse and wagon of the respondents on that crossing until after he had passed the Ravine Road crossing (Case, p. 135, lines 20 to 27).

The flagman of the appellant testified that in order to signal the engineer he was compelled, because of the curve in the railroad, to go away over on the most easterly track of the Erie Railroad Company (Case, p. 115, lines 9 to 15, and p. 120, lines 11 to 13). The track he referred to is shown on picture Exhibit D-1 as next to the track on which the train of cars stands.

The obstructions to the view to the south of drivers of vehicles approaching the Ferry Street crossing from the west consisted of the building above referred to and the iron pillars and cross-beams of the elevated railway, also the watchman's shanty, all shown on said Exhibit P-2. An illus-

tration of the extent of this obstruction of view is given in the testimony of the driver of the respondents. He testified that he could not see the watchman's shanty, located over on the east side of the Ravine Road (also known as New York Avenue) crossing and shown on picture Exhibit D-1 (Case, p. 15, lines 32 to 41; p. 16, lines 1 to 15), until he had reached a point on Ferry Street distant 20 feet west of the most westerly track of the appellant's railroad.

**The appellant was guilty of negligence.**

There was testimony tending to establish that there was neither a whistle blown nor a bell rung by the approaching locomotive engine until immediately before the horse and wagon of the respondents were hit (Case, p. 14, lines 3 to 6 and 24 to 27; p. 27, lines 32 to 41; p. 34, lines 34 to 39; p. 58, lines 25 and 26; p. 59, lines 15 to 36; p. 63, lines 24 to 36; p. 102, lines 1 to 6; p. 106, lines 26 to 40; p. 110, lines 1 to 6; and pp. 112, lines 10 to 16).

The statutory requirements as to ringing of bell or blowing of whistle were not complied with.

Vol. 3, *Comp. Stat. of N. J.*, page 4236,  
Section 35.

"It is for the jury to say whether the testimony 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 ringing of a bell, notwithstanding that he listened, shall or shall not be given equal credit with the testimony of a witness similarly situated, who testified that he did hear."

*McLean v. Erie R. R. Co.*, 69 N. J. L., 57;  
affirmed 70 *id.*, 337.

*Waibel v. W. J. & S. R. R. Co.*, 87 N. J. L.,  
573.

*Ferneti v. W. J. & S. R. R. Co.*, 87 N. J.  
L., 268.

The flagman employed by the appellant to guard its crossing signaled with a white flag to respondents' driver that it was safe for him to drive over the crossing (Case, p. 12, lines 30 to 40, and p. 13, lines 1 to 6), whereas he should have displayed a red flag or warned the driver that the crossing was then dangerous to pass over.

The flagman, on the other hand, testified that at the time of this accident it was getting dark and that he went out on the crossing with a red lamp and white lamp, both lighted, in his hands (Case, p. 112, lines 4 and 5 and 23 to 30); that the white light was to indicate to the engineers of appellant's trains that everything was all right at the crossing and they could come ahead, and that the red light was used to warn pedestrians or drivers of vehicles that the crossing was unsafe for them to pass over (Case, p. 117, lines 17 to 40; p. 118, line 1); that he held both lamps in his hands during the entire trouble, but *kept the white one back of him while he swung the red one* (Case, p. 118, lines 28 to 40); that he held the red light up to the respondents' driver in efforts to stop him from driving over the crossing (Case, p. 113, lines 13 to 18). William Knecht, a witness for the appellant, testified that the flagman *held the red lantern up against the driver, and that he was facing west towards the driver when he held it up* (Case, p. 99, lines 9 to 11; p. 108, lines 26 to 35; p. 110, lines 23 and 24). It is, therefore, only a fair argument to say that in his efforts to make the driver see the red light,

the flagman must have exhibited the white light to the engineer of the train, thus notifying him that the crossing was clear.

The inclination of the flagman to exaggerate the facts is shown by his testimony that it was a full five minutes after the horse stopped on the crossing before the train struck the horse and wagon, and that the driver fled, panic-stricken, from the spot and over across the tracks to the ice house five minutes before the collision (Case, p. 119, lines 23 to 31, and p. 123, lines 30 to 35). If the train was going at the rate of only fifteen miles an hour, as the engineer said it was, and the story of this flagman was true, the driver must have abandoned the horse and wagon on the crossing when the train was still more than a mile away. Such a story seems preposterous. William Knecht, the witness for the appellant, testified, however, that when the driver jumped from the wagon and ran across the tracks the train was at the Ravine Road crossing (Case, p. 100, lines 1 to 4), while the driver himself testified that he did not leave the wagon until the train was about two car lengths away, and that the train was then coming nearly as fast as a passenger train (Case, p. 14, lines 30 to 32; p. 15, lines 1 to 4). Witness Herman Leme corroborated the driver (Case, p. 58, lines 10 to 20). The engineer testified that the distance from the Ferry Street crossing to the Delaware, Lackawanna & Western Railroad crossing is about 1,000 feet (Case, p. 137, lines 29 to 40). The fireman testified that he saw the wagon on the Ferry Street crossing when the engine was 100 or 200 feet south of the Delaware, Lackawanna & Western Railroad crossing (Case, p. 144, lines 1 to 6), and that he hollered to the engineer that the wagon was on the track and the engineer applied the air brakes (Case, p. 144, lines 14 to 17). According to this testimony the engineer

had warning when his engine was 1,200 feet from the wagon that the latter was on the track, and yet he did not succeed in bringing the train to a stop until the engine had struck the horse and wagon and passed beyond the crossing where they had been standing.

**Respondents' servant was not guilty of contributory negligence.**

The respondents' driver testified that when he reached a point on Ferry Street about 15 or 20 feet from the nearest or westerly track of the appellant's railroad, he stopped, looked and listened, and neither saw nor heard any train approaching (Case, p. 12, lines 32 to 40); that it was daylight, and the flagman gave him a signal with a white flag that the crossing was safe and invited him to cross (Case, p. 13, lines 1 to 6); that another wagon, going in the opposite direction, passed the witness on the crossing (Case, p. 13, lines 26 to 32); that the flagman, after he gave the signal to cross, picked up some unlighted lamps from the crossing and went into the flagman's shanty at the side of the track (Case, p. 13, lines 9 to 15); that by the time the witness had reached the second track the engine gave a whistle and the flagman came out of the shanty, and tried to stop the train by waving his coat, and when witness saw that the engine was near him and only about two car lengths away, he jumped from the wagon and ran across the tracks (Case, p. 13, lines 36 to 40; p. 14, lines 1 and 2).

The respondents' driver, in approaching and going onto the crossing and in jumping from the wagon as he did, used the care and prudence that an ordinarily prudent man would have exercised under like circumstances.

In view of the conflicting testimony and evidence in this case, the question of the contributory negligence of the respondents' servant was properly left to the jury for determination.

*Goodwin v. C. R. R. Co. of N. J.*, 73 N. J. L., 576.

*Dickinson v. Erie R. R. Co.* (*supra*).

**The statutes applicable to this case required that the questions of the negligence of the appellant and contributory negligence of the servant of the respondents be submitted to the jury.**

By an Act of the Legislature of New Jersey, entitled "An Act with reference to the degree of care necessary to be used by travellers over railroad crossings protected by flagman or safety appliances or both," approved April 14, 1909 (see Pamph. Laws 1909, p. 137, or Vol. 3, Comp. Stat. of N. J., p. 4238, Sec. 36b), it is provided as follows:

"Wherever any railroad whose right of way crosses any public street or highway, has or shall install any safety gates, bell or other device designed to protect the traveling public at any crossing or has placed at such crossing a flagman, any person or persons approaching any such crossing so protected as aforesaid, shall, during such hours as posted notice at such crossing shall specify, be entitled to assume that such safety gate or other warning appliances are in good and proper order, and will be duly and properly operated unless a written notice bearing the inscription 'out of order' be posted in a conspicuous place at such crossing, or that the said flagman will guard said crossing

with sufficient care whereby such traveler or travelers will be warned of any danger in passing over said crossing, and in any action, brought for injuries to person or property, or for death caused at any crossing protected as aforesaid, no plaintiff shall be barred of the action because of the failure of the person injured or killed to stop, look and listen before passing over said crossing."

By further Act of the Legislature of this State, entitled "An Act concerning the liability of railroads for injury to persons or property caused by running cars across public streets and highways at which crossings no safety gates, bell or other device to give warning to the traveling public have been installed," approved April 12, 1910 (see Pamph. Laws 1910, p. 490, or Vol. 3, Comp. Stat. of N. J., p. 4238, Sec. 36c), it is provided as follows:

"In any action against any steam railroad company brought to recover damages for injuries or death occurring at any crossing of the right of way of such steam railroad company, where such company has not installed any safety gates, bell or device usually employed to warn and protect the traveling public at such crossing, which injuries or death are alleged to be due to the negligence of said railroad company or its agents, the plaintiff in such action shall not be nonsuited on the ground of contributory negligence on his own part or on the part of the person for whom such suit is brought, but in all such cases it shall be left to the jury to determine whether the person injured or killed was exercising due and reasonable care under the conditions existing at such

crossing at the time of such injury or death, and if the jury shall determine that the person injured or killed was not exercising due and reasonable care under the conditions existing at the said crossing at the time of such injury or death, the verdict shall be against the plaintiff and in favor of the defendant."

The former of these statutes applies to the present case and we think the latter does also. The use of the words "device" and "flagman" in the former statute and the presence of the word "device" in the latter statute and absence of the word "flagman" therefrom serve to show that the Legislature did not intend that the word "device" in said latter statute should include "flagman." It can hardly be claimed that the word "device," as used in the statute, was meant to include "flagman."

The former of these two statutes has received consideration in a number of cases in this State, among which are the following:

*Brown v. Erie R. R. Co.*, 87 N. J. L., 495.  
*Fernetti v. W. J. & S. R. R. Co.*, 87 *id.*, 268.  
*Schnackenberg v. D., L. & W. R. Co.*, 98  
*Atl. Rep.*, 266.

The latter of the two statutes was held constitutional in *Waibel v. W. J. & S. R. R. Co.*, 87 N. J. L., 574, and in *Lynch v. P. R. R. Co.*, 88 N. J. L., 412.

In the last-mentioned case it was held that the Trial Court was right because of the statute in refusing to direct a non-suit or verdict in favor of the defendant; but it also holds that where, as in that case, the defendant obtained a rule to show cause why a new trial should not be granted and

alleged as a reason why the verdict should be set aside that it was contrary to the great preponderance of the evidence, the findings of the jury was reviewable on such rule to show cause.

In the present case, however, the defendant did not proceed by rule to show cause, nor has he in any way raised the point that the verdict of the jury was contrary to the great preponderance of the evidence; its only grounds of appeal are that "the Trial Court refused to direct a verdict for the defendant," and its motion for the direction of the verdict was based on the ground that "No negligence had been established on the part of the defendant; and that the driver, the servant of the plaintiffs, under the evidence, is guilty of contributory negligence" (Case, p. 178, lines 21 to 26).

**The plaintiff was entitled to recover the value of the barrels, cider and blanket; and the refusal of the Trial Court to strike out the testimony in reference thereto and to charge the jury that there could be no recovery for those articles was not error.**

The respondents' wagon was loaded with twenty-four empty cider barrels, a blanket and a keg containing ten gallons of cider (Case, p. 11, lines 34 to 39; p. 22, lines 13 to 20; p. 36, lines 30 to 36; p. 39, lines 39 to 41; p. 40, lines 1 and 28 to 33; p. 42, lines 1 to 5), which were of the following market values: Barrels, \$1.50 each; cider, 50 cents per gallon; blanket, \$9 (Case, p. 40, lines 25 to 27; p. 41, line 5; p. 42, lines 18 to 30).

The driver was so badly frightened that when he got over to the ice house, just to the east of the crossing, he fainted, and he was not able even to give his name to the appellant's detective, and had

to be taken home in an ambulance (Case, p. 127, lines 30 to 40; p. 43, line 30; p. 129, lines 35 to 37).

One of the respondents hurried to the scene of the accident upon receiving word of it over the telephone and got there before dark (Case, p. 42, lines 31 to 40; p. 47, lines 28 to 32), and when he arrived, the barrels and cider and blanket were gone (Case, p. 43, lines 5 to 12; p. 44, lines 18 to 21; p. 54, lines 9 to 13), and he was informed that boys had been seen carting them over the lots (Case, p. 44, lines 30 to 34).

The appellant company employed two detectives or special officers, William Knecht and B. J. Glennon, to ride on this very train in question and protect it from being robbed on its trip from Jersey City to Weehawken; and that was the regular thing in transporting freight from Jersey City to Weehawken (Case, p. 126, lines 27 to 34; p. 95, lines 2 to 10). They were both on duty at the time of this accident, the former on the train and the latter at the very crossing in question. Glennon testified, in effect, that he considered it more important for him to get the name of the driver over in the ice house than to stop the thieves from stealing the barrels, and that he spent forty-five minutes of time in the ice house trying to get the name of the driver, and during that time saw the thieves running off with the barrels and made no effort to stop them (Case, p. 129, lines 24 to 40; p. 130, lines 1 to 6).

Besides these special officers, there were present at this crossing from which the barrels, cider and blanket were stolen, the following employees of the appellant corporation, viz.: the engineer, fireman, flagman, a brakeman named Geiser (Case, p. 161, lines 21 to 23), and a second brakeman named Carroll (Case, p. 166, lines 20 and 21), and apparently no effort was made by any of them to prevent these things from being stolen. There was no one pres-

ent representing the respondents, except the driver, and he lay in a state of collapse in the ice house.

We contend that the action of the servants of the appellant in scattering these barrels and this cider and blanket over the crossing from where they were then readily carried off by thieves, and in neglecting to use care to protect them after scattering them broadcast in that manner, was the natural and proximate cause of their loss to the respondents.

The appellant's officers and servants hired special officers to protect their trains from thieves while passing through the section where this accident occurred, and when they scattered the load of barrels from the respondents' wagon over the crossing and neglected to take any measures for their protection, it might reasonably have been expected that the articles would be stolen. The appellant certainly owed some duty to the respondents in this case to protect the property which through the negligence of its servants had been placed in this precarious position.

“Where the independent illegal act of the third person was of a nature which might have been anticipated, and which it was the defendant's duty to provide against, he will be liable for a breach of such duty notwithstanding the production of injuries by the intervention of an act of the character described.”

*McDonald v. Union Pac. R. Co.*, 42 *Fed. Rep.*, 579.

*Am. & Eng. Ency. Law* (New Ed.), Vol. 21, p. 494.

“If the defendant's act or omission supplied the conditions by which a subsequent

act or cause, the occurrence of which might have been expected, was rendered dangerous and hurtful, the defendant is responsible."

*Am. & Eng. Ency. Law* (New Ed.), Vol. 21, p. 495.

The question of whether the acts of the appellant's servants were the natural and proximate cause of the loss of the barrels and other articles was for the jury.

*Batton v. P. S. Rwy. Co.*, 75 *N. J. L.*, 857.  
*Cuff v. N. & N. Y. R. Co.*, 35 *id.*, 17.  
*D., L. & W. R. Co. v. Salmon*, 39 *id.*, 299.

In the case of *Davenport v. McClellan*, 88 *N. J. L.*, page 653, the defendant set fire to some leaves on the street and left the fire unguarded. The plaintiff, a child of about five years of age, in attempting to put other leaves on the fire, was burned. It was held that it was the duty of the defendant to guard such a fire and that the question should have been left to the jury.

In *Quinn v. D. & A. Tel. Co.*, 72 *N. J. L.*, 276, the defendant telephone company maintained a wire across a lot and it broke and fell onto an electric light wire and caused the death of a boy who came in contact with it. It was held that it was permissible for the jury to infer that *the omission of the defendant to guard its wire* after it came in contact with the other wire was the natural and proximate cause of the accident.

Objection is made in the appellant's brief that it cannot be held liable for the loss of the blanket because no mention of it was contained in the complaint, but at no time during the trial of the cause, either in the motion to strike out the testimony con-

cerning the blanket or to charge the jury concerning it, was this specific objection made that the complaint did not contain a demand for damages for its loss. The objection now raised for the first time comes too late.

It is respectfully submitted that the judgment of the Circuit Court should be affirmed, with costs.

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