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Record No. 1594

In the
Supreme Court of Appeals of Virginia
at Richmond

**THE CHESAPEAKE AND OHIO RAILWAY
COMPANY, Plaintiff in Error,**

v.

**VINCENT O. JACOBS, ADM'R, ETC.,
Defendant in Error.**

FROM THE CIRCUIT COURT OF THE COUNTY OF FAUQUIER

“The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

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IN THE
Supreme Court of Appeals of Virginia
AT RICHMOND.

Record No. 1594

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Plaintiff in Error,

versus

VINCENT O. JACOBS, ADMINISTRATOR OF MARY
CATHERINE ENNIS, deceased, Defendant in Error.

PETITION FOR WRIT OF ERROR AND *SUPERSEDEAS*

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of Appeals of Virginia:*

Your petitioner, The Chesapeake and Ohio Railway Company, respectfully represents that it is aggrieved by a judgment of the Circuit Court of Fauquier County, Virginia, entered on the 26th day of March, 1934, in a certain action at law pending in said court, in which Vincent O. Jacobs, Administrator of Mary Catherine Ennis, deceased, was plaintiff, and your petitioner was defendant.

A transcript of the record of said judgment is herewith presented, together with certain original exhibits consisting of a plat or blue print marked Exhibit A and fourteen photographs marked Exhibits 1 to 6, both inclusive, 6-A, 6-B, 7 and 7-A, and 8 to 11 both inclusive.

For convenience your petitioner will hereinafter be desig-

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nated as the defendant, and Vincent O. Jacobs, Administrator of Mary Catherine Ennis, will be referred to as plaintiff, according to the positions respectfully occupied by them in the court below.

STATEMENT OF THE CASE.

Mary Catherine Ennis, the plaintiff's decedent, a young girl fourteen years of age, was killed in broad daylight on June 21, 1932, at Calverton Station in Fauquier County, Virginia, when an automobile in which she was a passenger was suddenly stalled in front of a C. & O. southbound passenger train. The collision occurred at 3:26 P. M. in the afternoon of a clear bright day at a road crossing in the village of Calverton. The Chevrolet coupe in which plaintiff's intestate was riding was being operated at the time by her sister-in-law, Mrs. Norma Ennis, a young lady nineteen years of age. The only other occupant of the car was the three year old daughter of Mrs. Ennis. The physical and other facts at the time of the collision were as follows: The Chevrolet coupe in which plaintiff's decedent was riding was approaching the crossing from the west. The first railroad track reached by a traveler from the west was what was known in the testimony as the Warrenton Wye. Just before reaching this track there is a 5% ascending grade (Tr. R., p. 90). The next track reached is the southbound main track of the Southern Railway Company over which the C. & O. passenger train in question was being operated in a southerly direction. The distance between the centre of the southbound main line track and the Warrenton track is between 20 and 25 feet, depending upon whether the distance is measured from the north edge of the crossing or the south edge (Tr. R., pp. 89, 90). From a point 47 feet west of the southbound track a traveler on the highway has an unobstructed view of that track for a distance of 200 feet north of the crossing (Tr. R., p. 235). From a point 44 feet west of said track there is a view of 250 feet (Tr. R., p. 236). From a point 40½ feet west of said track the view is 300 feet (Tr. R., p. 236). 35 feet from said track there is a view of 1,409 feet, and from a point 26 feet from said track the view is unobstructed for five miles (Tr. R., p. 238). It appeared from the evidence that Mrs. Norma Ennis, who lived about a half a mile from the crossing, left home with the intention of going to the post office, which was on the west side of the tracks, for the purpose of purchasing a money order for a pair of shoes for her baby (Tr. R., p. 50).

She apparently intended to cross all of the tracks, turn around and come back to the post office (Tr. R., p. 51). The plaintiff's decedent was of average intelligence, apparently a very bright child (Tr. R., p. 18), weighing 145 pounds, with good eyesight and good hearing (Tr. R., p. 46). The C. & O. passenger train known as No. 5 consisted of nine coaches approximately 72 feet in length and an engine between 80 feet and 86 feet long (Tr. R., p. 96), and was on time. When the train came to a standstill after the engineer had applied the emergency brakes, 7½ coaches or cars had passed over the crossing, the eighth or dining car was half across the crossing, and the ninth car was to the north, towards Washington (Tr. R., p. 98). The whistling post is 1,519 feet from the crossing to the north, and a body of woods referred to in the testimony as Shumate's woods, is 2,000 feet north of the crossing (Tr. R., p. 234). The point where the Warrenton Wye branches off from the southbound main line track is 100 yards north of the crossing as shown by Exhibit A. Mrs. Norma Ennis, the driver of the Chevrolet automobile, lived at the home of her father-in-law which was half a mile from the crossing, for two years prior to the accident (Tr. R., p. 52). Prior to that she lived 15 or 18 miles away. From the home of her father-in-law a view could be had of the trains passing up and down and the smoke thereof could be seen (Tr. R., p. 52). Plaintiff's decedent had been going to school about three years (Tr. R., p. 25) and this school was on the east side of the tracks, so that it was necessary for her to cross the tracks daily during the time school was in session. At the time of the collision the C. & O. train was practically on time, and when it reached a point 1,800 feet or 2,000 feet north of the crossing it was traveling at about 50 miles an hour (Tr. R., p. 128). Calverton being a flag stop, the engineer reduced the speed of the train so that when it reached a point just north of the Warrenton Wye it was traveling at about 30 miles an hour (Tr. R., p. 128). The engineer first saw the automobile in which plaintiff's decedent was riding when he was about 350 yards away. At that time the automobile was between the Warrenton Wye and the southbound main line track (Tr. R., p. 125), and was traveling about as fast as a person could walk. It was not in the line of vision of the engineer at any time after it stalled (Tr. R., p. 126). When the train reached the Warrenton Wye which is 100 yards north of the crossing, his fireman, who was on the left side of the locomotive, hollered "hold them", and he immediately ap-

plied his emergency brakes (Tr. R., p. 126). On cross examination the engineer stated that the automobile had no apparent intention of stopping at any time while it was in his line of vision (Tr. R., p. 133). The fireman first saw the automobile when it was going over to the rail on his side (Tr. R., p. 155). It was barely moving and it stopped before it was struck by the train (Tr. R., p. 156). As soon as he realized this had happened he called to the engineer to "hold them" (Tr. R., p. 157) and the engineer applied the emergency brakes. Just before the train struck the automobile the driver was looking up the track in the direction from which the train was approaching (Tr. R., p. 55).

The foregoing constitutes a condensed statement of the material facts except that no reference has been made to the signals which were given as the train approached the crossing. The testimony in this connection will be discussed at length under assignment of error No. 1.

The negligence complained of was that the engineer of defendant's train failed to give the statutory signals, and it was also contended that he had a last clear chance within which to avoid the collision. At the conclusion of the plaintiff's testimony the defendant moved the court to strike out all of plaintiff's evidence, which motion was denied (Tr. R., p. 86). After the jury brought in a verdict against the defendant in the sum of \$3,000.00 (Tr. R., p. 8), a motion was made to set this verdict aside and enter up final judgment for the defendant, which was also denied (Tr. R., p. 9) and judgment was entered on the verdict.

ASSIGNMENTS OF ERROR.

The defendant makes the following assignments of error:

1. (a) The court erred in refusing to strike out plaintiff's evidence; and

(b) In refusing to set aside the verdict of the jury and to enter final judgment in favor of the defendant.

2. The court erred in permitting over the objection of defendant, testimony to be introduced by the plaintiff showing that the driver of the Chevrolet automobile was a careful driver (Tr. R., p. 49).

3. The court erred in granting instructions Nos. 1, 2, 3, 4, 5 and 8, and in refusing to grant instructions E, J, and N, and in refusing to grant instruction J in a modified form.

These assignments of error will now be discussed in the order above stated.

FIRST ASSIGNMENT OF ERROR.

It was incumbent upon the plaintiff to establish by a preponderance of the evidence that the defendant was guilty of some negligence which was the proximate cause of the death of plaintiff's decedent. In an effort to carry this burden the plaintiff undertook to show that the engineer of defendant's train failed to give the statutory signals. A careful examination of the testimony introduced by the plaintiff on this point will conclusively show that there was no failure to sound these signals. It is a striking fact that not a single witness testified that the signals were not given. In fact they were not asked by counsel for the plaintiff whether the signals were given. The question propounded to them was "did you hear any signals", and on cross examination the witnesses who said they did not hear any signals all admitted that they were not paying any particular attention to the train. The plaintiff produced six witnesses on this question whose testimony with respect to the signals will now be analyzed.

1. *Mrs. Everett M. Smith.*

This witness was living in what is referred to in the testimony as the little red house which is 120 feet from the center of the crossing (Tr. R., pp. 54, 234). She was an eye witness to the accident. When she first looked she saw the car on the crossing; and about that time she heard the train blow as it came out of the woods 2,000 feet from the crossing, and she heard another blow when it passed the tool house 510 feet from the crossing (Tr. R., pp. 55, 234), but she did not hear any bell ringing.

2. *Hugh Beach.*

This witness was a quarter of a mile from the crossing at the time of the collision looking for blackberries, in an automobile containing his wife, his mother-in-law and three children (Tr. R., p. 58). The pertinent portion of his examination in chief is as follows:

"Q. Now tell the jury what signals did that train give, either by blowing the whistle or ringing a bell?

"A. I did not hear any at all" (Tr. R., p. 59).

3. *John A. McConchie.*

He very frankly stated on his direct examination that he was not paying any attention to anything until the train blew real sharp just a few seconds before the crash. He said he lived beside a railroad track and did not pay much attention to the trains (Tr. R., p. 66).

4. *Elmer Tyler.*

He was 100 yards from the crossing at the time of the collision and was engaged in his work (Tr. R., p. 70). His testimony regarding the signals was as follows:

"Q. Did you hear—or, state what signals you heard given by the train before, at the time of, and before approaching that crossing.

"A. Well, as close as I can get to it, there was a toot, toot, and it struck.

"Q. Did you hear any signals given before then?

"A. No, sir.

"Q. Did you hear any bell ringing before approaching the crossing?

"A. No, sir.

"Q. So your attention—why did you hear those two sounds; why was your attention attracted to it?

"A. Because it was a short blow" (Tr. R., pp. 70, 71).

5. *Stewart Eustis.*

He was 70 feet from the crossing and testified in part as follows:

"Q. Did you hear any whistle sound before reaching the crossing where she was killed?

"A. I did.

"Q. What did you hear?

"A. Well I heard one long blast and several short ones.

* * *

"Q. Did you hear the bell ringing up to that time?

"A. I did not.

"Q. Or any blowing of the whistle other than what you have mentioned?

"A. No" (Tr. R., p. 75).

On cross-examination he was asked:

"Q. And before that time (referring to the time when he heard the short blasts) you had not been paying any particular attention, one way or another, until your attention was attracted that way?

"A. No" (Tr. R., p. 78).

6. *Arnold Grinnan.*

At the time of the collision he was riding in a truck and was about 200 yards or 250 yards from the crossing which he could not see (Tr. R., p. 81). He testified in part as follows:

"Q. While the train was in your sight, did you hear any signals given?

"A. No, sir.

"Q. Did you hear any bell ringing?

"A. No, sir" (Tr. R., p. 82).

On cross-examination he was asked:

"Q. And you did not watch it or pay any particular attention to it after that?

"A. No, we did not; we did not watch it on down. We could not have seen it all the way down. * * *

"Q. Were you paying enough attention to hear it blow right there at the crossing just before this accident?

"A. No, sir, we never heard it blow at all" (Tr. R., p. 85).

The foregoing constitutes the substance of all of the testimony offered by the plaintiff tending to show that the signals were not given, except that some of the witnesses were asked if the signals had been given could they have heard them, to which they replied either that they could or they thought they could. It is respectfully submitted that this testimony is purely negative in character and of the kind condemned in *White v. Southern Railway Company*, 151 Va. 302, and cases cited therein. In fact, when the testimony of all of the

plaintiff's witnesses is pieced together, it will be found that the whistle was blowing from the time the train came out of the Shumate woods until the collision. On this state of the evidence the court should have granted the defendant's motion to strike, especially in view of the fact that it further appeared from the evidence at this point that the proximate cause of the collision was the sudden stopping of the automobile on the track. Not only did the plaintiff fail to prove that the statutory signals were not given, but no attempt was made to establish any causal connection between the alleged failure to give the signals and the collision. It has been repeatedly held by this court that where the plaintiff has knowledge of the approaching train the failure to give the signals does not constitute actionable negligence. *White v. Southern Railway Co.*, *supra*; *C. & O. Railway Co. v. Barlow*, 155 Va. 863; *Southern Railway Co. v. Whetzel*, 159 Va. 796; *Virginia Railway Co. v. Green*, 160 Va. 838; *Virginia Railway Co. v. Haley*, 156 Va. 350; *N. & W. Ry. Co. v. Eley*, 157 Va. 568; *Johnson v. R., F. & P.*, 160 Va. 766.

All of the facts and circumstances in this case show that the plaintiff's decedent and the driver of the automobile in which she was riding had knowledge of the approaching train. Both of them lived in the vicinity of the crossing and presumably knew the time when this C. & O. passenger train No. 5 would pass through Calverton. While all of the occupants of the car were dead and therefore could not testify, the fact that the automobile approached the crossing at a slow and cautious speed justifies the inference that the occupants knew that it was train time and were exercising their senses of sight and hearing in an effort to cross the tracks in safety. This inference is strengthened by the testimony of Mrs. Everett M. Smith who testified (Tr. R., p. 55):

"Q. Did you see her turn her head at any time, or when?

"A. Just before the train struck it, she was looking up toward the track toward us."

The photographs and the plat show that the crossing was indicated by the usual danger signs, and as has so often been stated by this court, the track itself was a proclamation of danger. It is inconceivable that plaintiff's decedent and the driver of the automobile were desirous of committing suicide, and the only reasonable inference which can be drawn from the testimony offered in behalf of plaintiff is that the driver of the car and plaintiff's decedent were

fully aware of the approaching train and believed sufficient time was available within which to cross the track in safety, but due to the sudden stalling of the automobile on the track, which was probably occasioned by the ascending grade, the proximity of the train and the resulting fright on the part of the driver, the motor was choked and the automobile stalled at a time when neither the driver thereof nor the engineer had it in their power to prevent the collision from taking place. At best the evidence on this point is so incomplete that what actually occurred is a matter of speculation. Therefore it was error to submit the question to the jury because the plaintiff had failed to carry the burden imposed upon him by law and there was no solid evidence upon which the verdict of the jury could rest. In effect, the court in submitting the question to the jury allowed the jury to supply by its verdict fatal deficiencies in the proof. As was said by this court in the case of *Virginia Railway Co. v. Haley*, 156 Va. 350, at page 381:

“It is not sufficient to support a recovery that the evidence merely fails to show that the accident could or would have been averted by giving the signals, or that the evidence shows merely a *possibility* that had the signals been given the accident would not have happened. If it had stopped there, the causal connection between the failure to give the signals and the injury would be left merely *conjectural*; and the burden in these cases, as in all other negligence cases, rests upon the plaintiff to establish the causal connection between the negligence of the defendant and the damage to the plaintiff beyond a *mere conjecture*. [The evidence tending to show causal connection must be sufficient to take the question out of the realm of *mere conjecture*, or *speculation*, and into the realm of legitimate inference, before a question of fact for submission to the jury has been made out.” (Italics supplied.)

The question before the trial court at the conclusion of the plaintiff's evidence was simply this: Did the evidence show,

1. That the defendant had failed to give the statutory signals, and

2. That there was causal connection between such failure and the injury.

To again quote from the Haley case:

“A causal connection between the failure to give the sig-

nals and the injury will no more be presumed than that the defendant failed to give the signals. * * * Proof of the failure to give the prescribed signals and proof of injury and nothing more are not of themselves sufficient to support a recovery."

As hereinbefore pointed out, the testimony offered to establish that the defendant had failed to give the signals was entirely negative in character, and in fact a reasonable inference to be drawn from the testimony was that the signals were actually given. Section 3958 of the Code provides that:

A whistle signal shall be sharply sounded outside of incorporated cities and towns at least twice at a distance of not less than 300 yards nor more than 600 yards from a road crossing and such whistle sounded continuously until the engine has reached such crossing.

Mrs. Smith, the first witness on this point for the plaintiff, testified (Tr. R., p. 55) that she heard

"one short blow of the train out of the woods * * * and it blew another short blow about the tool house."

Mr. Beach, the next witness for the plaintiff, said he watched the train from the time it passed Shumate's woods until it passed the tool house and did not hear any signals at all (Tr. R., p. 59).

Mr. John A. McConchie the next witness, said (Tr. R., p. 66):

"the train blew real sharp"; that (Tr. R., p. 68) "it seemed like it was either one or two right together."

The witness Elmer Tyler (Tr. R., pp. 70, 71) said there was

"toot, toot, and its struck," and that (Tr. R., p. 72) he could not say that there were three toots as well as two.

The next witness, Stewart Eustis, said (Tr. R., p. 75)

"I heard one long blast and several short ones."

The last witness on this point in behalf of the plaintiff was

Arnold Grinnan who simply testified that he did not hear any signals at all (Tr. R., p. 82).

It therefore appears from the testimony of the several witnesses who testified for the plaintiff that the whistle was blowing from the time the train passed Shumate's woods until it reached the crossing and that the statute was complied with.

Up to this point nothing has been said as to the testimony offered by the defendant showing that the whistle was sounded and that the bell was ringing because this evidence was not before the court of course when the motion to strike was made. It is appropriate to say, however, that after this testimony was introduced the court should have set aside the verdict of the jury and entered up a final judgment in favor of the defendant because the testimony of these witnesses was not in conflict with the plaintiff's evidence and both could have been true. We will now briefly review the defendant's evidence as to the giving of the signals.

The first witness for the defendant was U. G. Turner, the conductor on C. & O. train No. 5 at the time of the collision (Tr. R., p. 95). He was in the rear end of the fifth car from the engine and testified that it was his practice

"before reaching a station, at a distance of probably 500 or 600 yards from the station to go out, and upon this particular occasion he went out on the rear end and opened the side door (Tr. R., p. 99), at which time the engineer blew for the station one long blast of the whistle, 'and after he blew the station whistle, he blew two long blasts, and then there was a little stop and he blew one short and blew two more, the last long blast just about the time he got to the switch that goes off up the Warrenton branch, and the time he stopped the whistle, stopped blowing, the brakes went down.' " (Tr. R., p. 99.)

The next witness was M. E. Lane who was the engineer of C. & O. freight train No. 98 which had broken down just south of Calverton on the morning of the accident, and at the time of the collision was on the northbound side track at Calverton (Tr. R., p. 109). He was paying particular attention when No. 5 came in because

"it was his duty to observe all signals and watch trains as they passed by to see that there was nothing wrong with the passing trains and that markers were on the rear end

of such trains to indicate that the passing engineer has the complete train with him. (Tr. R., pp. 112, 113.)

He was asked (Tr. R., p. 114):

“Now, will you tell the jury what if any signals train No. 5 gave?

A. The first signals I heard No. 5 give was two short blasts of the whistle, a pause followed by two more, followed by another blast of the whistle and a continuation.”

He further said that he was particularly attracted to the giving of these signals because they were a new type of signal. (Tr. R., p. 115.)

The engineer of C. & O. train No. 5 was A. F. Oliver who testified as follows (Tr. R., p. 124):

“Now, from a point along up there about the whistle post, until you got down to the crossing, tell the jury what, if any, signals you gave.

“A. I first gave one long blast for the station; that is about a mile away, and the whistling post about five hundred yards, is where I started with my whistle for my crossing.

“Q. What whistle did you give? What signals?

“A. I gave two blasts of the whistle with intermission; then two blasts short; then a long. The long you can blow, the last blow you can continue that until you get to the crossing.

“Q. Did you actually blow that last long all the way to the crossing or not?

“A. No, sir.

“Q. What did you do?

“A. I gave warning signals.

“Q. What is a warning signal?

“A. A short blast of the whistle.”

The fireman on C. & O. train No. 5 was R. E. Davis who said the engineer

“started to blow at the whistling post and continued until he hollered to hold the train. (Tr. R., p. 154.) He also said the bell was ringing; that the bell was an automatic one and that he turned it on himself as he approached the crossing (Tr. R., p. 155). He also said that the bell was ringing when

the train came to a stop and continued to ring until he shut it off."

Another witness was J. H. Roberts who was fireman on the freight train which was on the north passing track at Calverton at the time of the collision. (Tr. R., p. 181.) His testimony in part was as follows:

"Q. Up there about the whistle post, the road-crossing whistle post, and from that point on down to the crossing, will you tell the jury when No. 5 came in, if it came in with the bell sounding and the whistles?

"A. Yes, sir. He was supposed to whistle crossing the signal: there was two blasts of the whistle given with a pause followed by two more which would be given as the train passed on to where he was standing, with a continuation of the signal on up to the crossing. (Tr. R., p. 182.) * * *

"Q. Do you know whether when the train passed you did you notice or know whether the bell was ringing?

"A. Yes, sir, the bell was ringing." (Tr. R., p. 183.)

R. W. Wilkinson was a brakeman on C. & O. freight train No. 98 and his testimony in part is as follows:

"Q. Do you remember when No. 5 came in?

"A. Yes, sir. * * *

"Q. Did you notice that train when it came in?

"A. Yes, sir. We were required to notice it, all trains passing. (Tr. R., p. 189.) * * *

"Q. Are you able to tell the jury what, if any, signals were sounded by the whistle of No. 5 from a point up about the road-crossing signal board as it went on down to the crossing?

"A. A signal was sounded.

"Q. What was the whistle doing? Was the whistle sounded or not when it passed you?

"A. It was blowing." (Tr. R., p. 190.)

The flagman on No. 5 was J. W. Lane who was on the rear platform. He was asked:

"Q. Did you before the crash, before the crash came, hear the signals of the whistle?

"A. I could hear the whistle blowing. I could not tell what they were; I was too far away from the engine, nine

cars, you see, from the engine and that made quite a distance. I could not tell what they were. * * *

“Q. How about the bell on the engine?

“A. I could not hear that.” (Tr. R., p. 196.)

It has already been demonstrated that the proof failed to show that the signals were not given and also failed to show that the absence of signals was the proximate cause of the collision. The question naturally arises, what was the proximate cause of the collision, and we think it is apparent from the evidence that the sole proximate cause of the death of plaintiff's decedent was the sudden stalling of the automobile.

Plaintiff's witness John A. McConchie said he heard the train blow real sharp, turned his head and saw the automobile standing on the track, and in a few seconds the crash occurred. (Tr. R., p. 66.)

“Q. Now, it had apparently stalled on the track?

“A. It looked like to me, from the position it was in, it stalled; because it was struck right where I saw it.” (Tr. R., p. 68.)

R. E. Davis, the fireman on No. 5 saw the automobile moving slowly on his side of the track, which was the left side, and it stopped. (Tr. R., p. 156.)

It has been held in a number of cases that the stopping of an automobile on a railroad track in front of an approaching train is the proximate cause of the resulting collision, and we shall now refer to some of these cases.

The case of *Louisville & N. R. Co. v. Harrison*, decided August 18, 1919, by the Supreme Court of Florida, and reported in 83 Southern Reporter at page 89, is very much in point. The unanimous opinion of the court by Browne, C. J., is as follows:

“The defendant in error recovered damages from the Louisville & Nashville Railroad Company for the destruction of his automobile by the plaintiff in error's train. He undertook to cross the railroad track about a quarter of a mile from a curve. When he got on the track his engine choked and his car stopped. He testified in part as follows:

“ ‘As I drove up my wheels jumped down in the crossing, my car choked down, I looked around, and the train was approaching. At the moment my engine choked the train

wasn't quite a quarter ($\frac{1}{4}$) of a mile from me; it was turning the curve when I noticed it. In approaching the railroad with my car I was looking around; yes, sir. I was noticing. I did not see any car approaching, and the whistle did not blow at all. Just as it hit the car it blowed, maybe a minute before it hit it, 'Toot, toot'. When I looked around and seen there was a young lady in the car, I said, 'Look out; get out of here; yonder comes the train'. I jumped out on one side, she one the other. We run and tried to shove the car off of the crossing. We shoved it a time or two. I said, 'We can't do nothing with it'. About that time I looked around, and Mr. Strickland gave me this (witness indicated with his hand). I said, 'Look out! They are going to hit anyhow'. We both ran out of the way. It wasn't hardly a minute from the time he tooted after we got out the way that he hit it'.

"The immediate cause of the injury was the choking down of the plaintiff's engine, causing his car to stop on the railroad track. With that the railroad had nothing to do, and in no way contributed to it. The evidence is uncontradicted that the railroad employees saw the automobile when it stopped on the track, and at once did everything in their power to stop the train, but it was too late to avoid the collision, although they made every effort with the utmost promptness to prevent it.

"If the engine of the automobile had not choked down when it got on the track, the accident would not have occurred. This was not a contingency that the railroad employees were called upon to anticipate.

"They saw the automobile approaching the crossing, and it had ample time to cross if its engine had not choked down. This was the proximate cause of the accident, and the railroad was not guilty of negligence in not guarding against the possibility of the automobile breaking down when on its track.

"The engineer in charge of the locomotive had the right to presume that an automobile crossing the railroad track a quarter of a mile ahead of his train would be over and away in ample time before his train could reach the crossing. He was not called upon to presume that the engine would choke and cause the automobile to stop on the track. The obligation of the railroad began only at the instant that its employees knew that the auto had stopped on the railroad track. At that instant it became its duty to stop the train if possible. This the testimony discloses was done, but it was

impossible to stop the train in time to prevent the collision. *Florida Cent. & P. R. Co. v. Williams*, 37 Fla. 406, 20 South. 558; *Atlantic Coast Line R. Co. v. Miller*, 53 Fla. 246, 44 South. 247.

"Evidence offered by the plaintiff below to show the condition of the crossing where his engine choked down was properly excluded by the trial judge, as there was no allegation in the declaration that the condition of the crossing contributed to or caused the stopping of the engine. If such was the case, he should have alleged it in his declaration.

"It is well settled that there can be no recovery except on the case made by the declaration.

"As the evidence fails to disclose any negligence on the part of the railroad company, the judgment is reversed."

Vernon v. Illinois Central R. Co. and *Boutrie v. Director General of Railroads*, Supreme Court of Louisiana, decided October 30, 1922, and affirmed on rehearing July 11, 1923; 97 Southern Reporter 493. Both suits are by the same plaintiff who was a widow when the first was filed and had remarried when she filed the second.

In the first suit she claimed damages for the death of her minor son killed through the alleged negligence of the defendant corporation on August 9, 1918, at a time when the railroad was under control of and operated by the United States Director General of Railroads.

In the second suit she claimed damages against the Director General for the same death.

The court held that no judgment could be rendered against the Railroad Company, but that the second suit against the Director General was filed in time and not barred by the statute of limitations. The following is the full opinion of the court on the merits of the case:

"On the merits, however, we think the case is with the defendant. The deceased was killed by being run over by one of the defendant's trains whilst he was riding in an automobile driven by a young friend. The alleged negligence of the defendant was that it failed to maintain a proper lookout on the far end of the train whilst backing over the crossing on which the automobile was struck.

"There is much testimony taken, but we think that the affirmative testimony of the flagman, the fireman, and the engineer must prevail over the negative testimony of the other witnesses. According to their testimony the flagman

was stationed at the far end of the train, and saw the automobile when it was some distance away from the crossing, but approaching it rapidly; he whistled and signaled to the automobile to stop, and at the same time signaled the engineer to slow down, and immediately thereafter to stop; which, however, he was unable to do within the distance to the crossing.

"The flagman testifies (and the physical fact seems to corroborate him) that the automobile would have cleared the crossing but for the fact that it stopped upon the middle of the track in front of the oncoming train; which latter fact is also shown by testimony of many other witnesses, although the record is barren of any evidence tending to show whether this was the result of the automobile engine 'going dead' or of the driver becoming panic-stricken. At any rate, it is certain that this sudden stopping of the automobile upon the track was the direct and only cause of the accident, which then became inevitable.

"We do not think plaintiff has shown any negligence on the part of the defendant.

"DECREE.

"The judgments appealed from are therefore reversed, and it is now ordered that plaintiff's demand in both these cases be rejected at her cost in both courts."

George v. Kansas City Southern Ry. Co., Missouri Court of Appeals, July 17, 1926, 286 S. W. 130. Plaintiff's truck was struck on a crossing and damaged. The Jury's verdict for the plaintiff, from which judgment defendant appealed.

The petition alleged that while plaintiff's son was endeavoring to drive plaintiff's Ford truck over the Beaver Street crossing, the defendant's agents negligently and carelessly so conducted the engine and train of cars that a box car became loose and ran down said track without defendant having anyone posted at said crossing to give warning of its approach, without having any bell, whistle or other instrument of alarm on said box car, and without defendant having on said car an employee to control the same, and that by reason of such negligent acts the car struck and destroyed plaintiff's truck; also that because of the negligent failure of the Company to have safe and sufficient couplings on its cars one of them became loose from the engine and other cars and ran down the track without having thereon any employee to

control the same, and without having on said car any means by which warning could be given, by reason of which it struck and demolished the plaintiff's truck. The answer was a general denial and plea of contributory negligence. At the close of the plaintiff's evidence the defendant demurred and offered no evidence. The demurrer was overruled and the defendant appealed.

The evidence shows that as the plaintiff's son, driving the truck, got on the crossing, his engine for some reason not explained, died and a loose box car approaching from the north struck and damaged the truck; that Esther Martin who was riding with plaintiff's son, got out of the truck and walked out of danger, before it was struck by the box car. Plaintiff's son remained in the truck, endeavoring to drive it off the track, but was not injured.

The court in its opinion says, on page 131, that

"The demurrer raises two questions, viz., the alleged contributory negligence of plaintiff's son, and the *proximate cause of the collision*.

The plaintiff's son testified as follows:

"I drove up to the crossing, and not being able to see a train, I ventured to cross the track. As far as I could see the track was clear, and just as I got on the track the motor died, and at the same time some gentlemen began to *hollow* and shout that the train was coming, and I endeavored to get across the track and I couldn't do that, and I kept trying to get across the track by using the starter, and I didn't get it accomplished and the box car hit me. My cousin Ester Martin was in the car with me when I drove on the track. She jumped out when the men *hollowed*. When I first saw the car coming I was squarely on top of the track. Now this crossing is at the south end of the berry shed. Before I drove on the track I couldn't see up the track at all for the berry shed. The first thing that attracted my attention to a car coming was the gentlemen who shouted to me. I didn't see any one else on the track. I don't know exactly how close the car was when I first saw it. I could estimate not over 100 feet. I wasn't personally injured. I couldn't say whether the car was a loose car or whether there was an engine attached to it. I couldn't say whether it was a refrigerator car or a box car. I heard no whistle blow, and didn't hear an engine bell ringing. When the car struck

me I saw that it was loose, but I did not see that it was before it struck me. It practically demolished the truck. I couldn't say how far from the place where the car struck my automobile that it stopped."

The court held that the question of contributory negligence was one for the jury, and then says, page 131:

"But under the facts as presented by this record we think that the question on the *proximate cause* is decisive, and such being the case it is not necessary to rule on the assignment based on the alleged contributory negligence of plaintiff's son."

There would seem to be no question whatever about the fact that the defendant was negligent in permitting its box car to pass unattended over the crossing, without lookout and without signal, and as above indicated whether or not the plaintiff's son was guilty of contributory negligence in going upon the crossing would be a jury question. But the court says:

"Still plaintiff was not entitled to go to the jury and cannot recover unless there was some substantial evidence tending to establish that the alleged negligence of the defendant was the proximate cause of the collision. The proximate cause in the law of negligence is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred. * * * Under the record before us these is no escape from the conclusion that the proximate cause of the injury complained of was the fact that the engine died on the crossing.

The judgment of the lower court was reversed.

In the course of its opinion the court refers to the case of *DeMoss v. Kansas City Railways Co.*, 296 Mo. 526, 246 S. W. 566, and says the facts and rulings are briefly and well stated in the second head note in 296 Mo. 526, as follows:

"A street car, coming from the south, stopped on the south side of a cross street to discharge and receive passengers. Then the motorman, without sounding the gong and without looking westward for an oncoming automobile in which plaintiff was riding, but looking backwards towards the place

where passengers were being received, turned quickly westward around the curve into the intersecting street, and just then the automobile crashed into the side of the car. It was broad day, and the street was wet and slippery from rain. The automobile, driven by plaintiff's husband, its owner, at a speed of from eight to ten miles an hour, was equipped with chains, but they were not on the wheels. Plaintiff saw the street car when it was seventy-five feet away, saw it suddenly start forward when the automobile was thirty-five or forty feet away, immediately cried out to her husband, who applied the brakes to the automobile, and continued to look at the street car until the automobile crashed into it. She testified that if the automobile had not skidded it would have stopped. *Held*, that assuming that the motorman was negligent in not sounding the gong and in not looking westward before starting the street car, his negligence was not the proximate cause of plaintiff's injuries, but the accident was the result of an independent, intervening and efficient cause, which the motorman had no reason to anticipate, namely, the skidding of the automobile on the wet and slippery street, the general rule being that, although a defendant may be negligent in the performance of some duty owed to the person injured, no liability attaches unless such negligent act was the proximate cause of the injury."

Butcher v. West Virginia & P. R. Co., (W. Va. case decided December 3, 1892,) S. E. 457. Action by William T. Butcher against the Railroad Company to recover damages for an injury by a train of cars of the defendant running against a wagon and team of three horses at Dodson's crossing. The plaintiff was riding in the wagon and a boy was riding a saddle horse in the team. The declaration contained the usual averments of negligence as to failure to give crossing signals, etc.

The evidence showed that when the team was about 200 yards from Dodson's crossing traveling a highway which paralleled the track, the train came up from behind and scared the horses, and they ran off with the result that the team and train collided at the crossing. The court in its opinion says:

"Was the injury complained of caused by the failure of the trainmen to give the statutory signal by blowing the whistle or ringing the bell? Can we say that, if the whistle had been blown for Dodson's crossing at a point 330 yards

therefrom, as required by statute, the injury would not have occurred?"

The court then refers to certain evidence tending to show that William T. Butcher, owner of the team, and Ralph Butcher, the boy 17 or 18 years of age who was riding the saddle horse and driving the team, had been drinking and were probably intoxicated.

Held, that the failure to give the statutory signal was not the proximate cause of the injury and that the trial court erred in refusing to set aside the verdict of the jury in favor of the plaintiff.

The following is from the opinion of the court, page 461:

"Lawson on Rights, Remedies, and Practice, (Volume 3, Sec. 1183) states the law as follows: 'Where, by statute or municipal ordinance, the railroad is required on approaching a crossing to ring a bell or sound a whistle, the omission to do so is negligence rendering the company liable, provided the failure of duty is the proximate cause of the injury, and they are not able to show that the omission was reasonable and prudent.' Shearman & Redfield on Negligence (Volume 1, Sec. 25), under the heading 'Proximate Cause', says: 'We now come to the most important and difficult part of the general definition of a right of action upon negligence, — the connection between the negligent act or omission and the damage. No action can be maintained upon an act of negligence unless the breach of duty has been the cause of the damage. The fact that the defendant has been guilty of negligence followed by an accident does not make him liable for the resulting injury unless that was occasioned by the negligence. The connection of cause and effect must be established; and the defendant's breach of duty, and not merely his act, must be the cause of the plaintiff's damage.' And in section 26 it is said: 'Breach of duty must be the proximate cause. The breach of duty upon which an action is brought must be not only the cause, but the proximate cause, of the damage to the plaintiff. * * * The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. * * * That is the proximate cause which is most proximate in the order of responsible causation.' 'If it cannot be said that the result would have inevitably occurred by reason of the defendant's negligence, it cannot be

found that it did so occur, and plaintiff has not made out his case.' See Bigelow, Torts, 608-626.

"Now, the question is, did the failure to whistle for Dodson's crossing, if such failure was clearly proven, have anything whatever to do with frightening the plaintiff's horses? What witness in the case testifies that such failure, if it existed, had any effect whatever in causing the plaintiff's injury? If the horses were frightened at the train, and the evidence is that they were 200 yards from the crossing, can any one say that a whistle sounded near them would have had a tendency to quiet them and allay their fears? Surely not. It is, however, too evident that this injury was not caused by any negligence on the part of the defendant. The injury resulted from the fact that the plaintiff went onto this turnpike road, which he knew ran parallel with and very near to the railroad track, and in so doing he intrusted his team to a driver who, by reason of his intoxication, was incapable of controlling it. The horses became frightened at the train passing along without unusual noise. The fright of the horses was the proximate cause of the injury, and not the failure to give the statutory signal."

VIRGINIA CASES ON THE QUESTION OF PROXIMATE CAUSE AND CAUSAL CONNECTION IN CROSSING ACCIDENTS WHERE THE NEGLIGENCE RELIED ON IS FAILURE TO GIVE STATUTORY SIGNALS.

We respectfully insist, as we did in the oral argument on the motion to set aside the verdict, that the plaintiff's evidence utterly fails to carry the burden (under the negative evidence rule) of showing by a preponderance of the evidence that these signals were not given. But in discussing proximate cause and causal relation we shall assume, for the purpose of discussion merely, that these signals were not given.

In the case of *N. & W. Ry. Co. v. Wellon's Admr.*, 155 Va. 218, Mrs. Wellon was the guest of her son-in-law Mr. Forhand who was driving the automobile over the crossing and both were killed as the result of a collision with a train. He was driving the automobile or truck and she was seated by him on the front seat. Holt, J., said, page 224:

"In order for the plaintiff to recover it is necessary for him to prove, first, that the defendant was negligent, and, second, that this negligence contributed to the hurt. There

must have been some causal connection between the negligence of the defendant and the injuries suffered by the plaintiff."

The principal negligence there charged against the railroad Company was the failure to maintain and operate stop gates at the crossing, which had been required by an order of the State Corporation Commission and the use of which had been abandoned by the Railroad without permission of the Commission and substitution therefor of a signal and electric gong. The gates were open at the time of the accident.

The court holds that notwithstanding the admitted negligence of the Company in abandoning the use of the gates without permission and in leaving them open, the sole proximate cause of the accident was the negligence of Forhand, the driver of the truck, and Mrs. Wellon, seated by him on the front seat, in failing to take proper precautions for their safety by detecting the approach of the train before going on the track; that there was no causal connection between the admitted negligence of the Company in leaving the gates open and the collision. In that case, as in the instant case, the plaintiff's decedent was a passenger, to whom the negligence of the driver was not imputable. But Holt, J., quoting *Southern Railway Company v. Jones' Admr.*, 118 Va. 685, said:

"By the side of the driver sat the plaintiff's intestate. All that was visible to the one was equally so to the other, and there is no proof nor even a suggestion that he, more than the driver, by word or act, took any precaution for his own safety. Upon this record they were both equally guilty of negligence which caused the accident."

So, in this case there is no causal relation between the failure to give statutory signals (if such a failure existed) and the collision, because the sole proximate cause of the collision, the efficient cause without which it would not have happened, was the stopping of the automobile on the track. The giving or failure to give signals certainly could not have influenced the action of the automobile in stopping unexpectedly.

The point we now seek to emphasize is that it is not sufficient for the plaintiff to show by a preponderance of the evidence that the defendant has been negligent, but that the defendant must also show by a like preponderance that there is a *causal* relation between the negligence and the injury,

that is, a proximate cause of the particular injury complained of. If it bears no such relation, it is not actionable even though but for it the injury might not have happened. The conclusion of Holt, J., in the Wellon's case that the Railway Company's admitted failure to have the gates closed bore no causal relation to the injury suffered by a passenger in an automobile driven by a third party immediately in front of an approaching train, seems equally controlling in the situation shown to have existed at the time of the accident in this Ennis case, even if the crossing signals had not been given.

This causal connection between the alleged negligence and the injury must be shown by the evidence. It cannot be presumed. See *Southern Railway Company v. Whetzel*, 167 S. E. 427. On page 427, Hudgins, Jr., refers to the case of *Atlantic, Etc., Ry. Co. v. Reiger*, 95 Va. 418, that being among the first cases decided after the statute was passed requiring a railway company to give certain signals on approaching a grade crossing, and shows that the Reiger case held that when it has been shown the signals had not been given "some presumption arises that the injury was caused by" the failure to give these signals. He next refers to the case of *Simons' Admr. v. Southern Railway Company*, 96 Va. 152, in which that holding in the Reiger case was overruled. He then refers to the *Johnson* case, 143 S. E. 887, and the *Mace* case, 151 Va. 458, and the *Haley* case 156 Va. 350, and says that in the latter case it was definitely held that

"proof of the failure to give the prescribed signals and proof of injury, and nothing more, are not of themselves sufficient to support a recovery."

In the case at bar, there is no proof whatever that failure to give the statutory signals, if such failure existed, was the cause of the accident — no proof of causal connection. All that the plaintiff has attempted to prove is that the signals were not given and that the collision occurred; and in the teeth of the law clearly stated in the *Haley* case, 156 Va. 350, the court is asked to presume that the failure to give the signals caused the injury. That cannot be done, especially in the case at bar where all the facts and circumstances strongly tend to negative such presumption. It is clearly shown by the evidence that although the automobile was moving slowly it had plenty of time to cross ahead of the train if it had not stalled on the track. Whether the signals were

given or not could not possibly have influenced the conduct of the driver of the automobile, because when she started across the engine was 350 yards from the crossing. (Tr. R., pp. 55, 125.) It was far enough up the track for the automobile to cross in perfect safety (Tr. R., p. 125), and if the bell had been ringing and the whistle sounding every moment that would not have led the occupants of the automobile to believe they could not cross in safety, as they certainly could have done according to the undisputed evidence if the automobile had not stalled on the track.

In the *Whetzel* case, 167 S. E. 427, Hudgins, J., says at page 431, that prior to the adoption of the comparative negligence statute, Section 3959, a plaintiff, relying upon negligence in failing to give crossing signals, was required to prove—

1. That the Company failed to give the signals;
2. That this failure was the proximate cause of the collision;
3. Amount of the damage.

He then quotes the comparative negligence statute and says:

“The plaintiff must still prove the three essentials before he can recover.”

That is the law in Virginia today. Essential No. 2, namely, that the failure to give the statutory signals was the proximate cause of the collision, must be proved like any other fact in the case. If it cannot be proved by direct evidence, it must be proved by circumstantial evidence. The facts and circumstances which led Hudgins, J., to the conclusion that the failure to give signals in the *Whetzel* case was the proximate cause of the collision, are

1. The plaintiff's decedent was seated on the left rear seat, with the curtains of the touring car up, so that he had little opportunity to see or hear the approaching train. But in this *Ennis* case plaintiff's decedent was on the front seat with the driver in a car with glass windows.

2. The automatic electric gong and signal light at the crossing, intended for the protection of travelers on the highway, was out of order and the gong was not ringing and the signal light was showing green instead of red. But in this *Ennis* case there was no automatic gong or signal light.

3. When the automobile went on the crossing the undisputed evidence in the *Whetzel* case showed that the train was only 25 or 30 yards from the crossing (see page 432).

whereas in this case the train was something more than 350 yards from the crossing when the automobile went on the track where it was struck and was actually 300 feet from the crossing when the automobile stopped.

There is a great difference between driving an automobile on a crossing ahead of an approaching train when this difference in distance is considered. The court said in the Whetzel case that it might be a possible inference to assume that the driver of the Whetzel car was aware of the presence of the approaching train before going on the crossing, but that such would not be a just inference, because such an inference would indicate that the driver of the automobile was intending to commit suicide. The court therefore concluded that the driver of the Whetzel car did not know of the approaching train, and although the failure on his part to detect its approach was negligence, it was negligence which could be considered only in mitigation of damages and not as a bar to the action.

But it cannot be denied, we think, that the occupants of the Ennis automobile were in a much different situation, with the train several hundred yards away when they went on the crossing. It is just as consistent to believe that they saw the train and deliberately went on the track feeling that they could cross ahead of it in safety as it is that they did not see the train and went on the track in ignorance of its approach. And if this be true, under the law as stated in the Whetzel case, which is the most unfavorable statement of the law from the standpoint of the railroad company to be found in any Virginia case, then there can be no recovery. This is true because the burden is upon the plaintiff to show a causal connection between the failure to give the signals and the collision, that is, that such failure was the proximate cause. That such failure was the proximate cause cannot be *presumed*. But it must be shown by the facts and circumstances established in the case.

The following is from the opinion of the court in the case of *Virginia Railway Company v. Haley*, 156 Va. 350. See page 379:

“The establishment of a causal connection between the failure to give the signals and the injury is *as essential an element* and as much a part of the plaintiff’s case as the establishment of the fact that the defendant failed to give the statutory signals, or that he was injured. All three elements must be established by the evidence. A causal connection

between the failure to give the signals and the injury *will no more be presumed than that the defendant failed to give the signals*, or that the plaintiff was injured. Proof of the failure to give the prescribed signals and proof of injury and nothing more, are not of themselves sufficient to support a recovery."

And again, on page 381, it is said:

"It is not sufficient to support a recovery that the evidence does not show affirmatively that there was no causal connection between them. The evidence *must affirmatively establish that there was a causal connection* between the failure to give the signals and the injury which follows in point of time. * * * It is not sufficient * * * that the evidence merely fails to show that the accident *could, or would have been averted by giving the signals*, or that the evidence shows merely a possibility that had the signals been given the accident would not have happened. If it is stopped there the causal connection between the failure to give the signals and the injury would have been left merely conjectural and the burden in these cases, as in all other negligence cases, rests upon the plaintiff to establish the causal connection between the negligence of the defendant and the damage to the plaintiff beyond a mere conjecture. The evidence tending to show causal connection must be sufficient to take the question out of the realm of mere conjecture or speculation and into the realm of legitimate inference before a question of fact for submission to the jury has been made out."

We respectfully submit that any judgment against the C. & O. Railway Company in this Ennis case must necessarily be based upon conjecture, speculation and presumption which the law does not permit; that it has not been shown either by direct or circumstantial evidence that the failure to give statutory signals is the proximate cause of the injury, and that it affirmatively appears from the undisputed evidence that such proximate cause was the unexpected stalling of the automobile on the track, a circumstance which the defendant Company could not anticipate and is not responsible for, and that the verdict of the jury should be set aside and a final judgment entered for the defendant Company.

There is direct proof that the driver of the automobile in the instant case was looking at the approaching train before the crash. Furthermore, the presumption is that the occu-

pants of the automobile exercised ordinary care. *Southern Railway Co. v. Abee's Admr.*, 124 Va. 379. See also *Southern Railway Co. v. Bryant*, 95 Va. 212, and *Kimball v. Friend*, 95 Va. 138, to the effect that where a traveler is killed at a railroad crossing and the negligence of the railroad company is established, in the absence of evidence to the contrary, the presumption is, though perhaps slight, that the traveler did his duty in approaching the crossing.

The authorities in Virginia and elsewhere are uniform in holding that ordinary care and due performance of duty on the part of the traveler requires that before going on a railroad track he take the precaution of looking and listening for approaching trains, at a point where looking and listening will be effective. Therefore, in the absence of evidence to the contrary, (and there has been none in this case) the presumption is that the occupants of the Ennis automobile did look and see the approaching train before going on the track and concluded that they could pass over in safety before the train reached the crossing, and this presumption is strengthened by the fact that the driver was looking at the train before the collision occurred, and the cautious manner in which she approached the crossing.

The case of *White v. Southern Railway Co.*, 151 Va. 302, where the negligence relied on was failure to give the statutory crossing signals, there was a verdict of the jury for the plaintiff. But the trial court set aside this verdict and entered judgment for the defendant on two grounds, first, because the evidence adduced to show that the signals were not given was of a negative and unsatisfying character, second, because the wet and slippery condition of the highway was the proximate cause of the plaintiff's injury. The court of appeals affirmed the action of the lower court and rested its decision mainly on the first ground assigned by the trial court and found it unnecessary to pass upon the second ground.

LAST CLEAR CHANCE DOCTRINE.

In the court below some reliance was placed by the plaintiff upon the last clear chance doctrine, but it is rather noteworthy that this was an after-thought and it was not until just before the case was submitted to the jury that an instruction was offered by the plaintiff on this theory of the case. It is respectfully submitted that the last clear chance doc-

trine has no application to the facts in the instant case for the following reasons:

1. The engineer had no last clear chance to avert the collision.

2. Plaintiff's decedent did have a last clear chance.

3. There was no superadded fact or circumstances to the presence of plaintiff's decedent on the track sufficient to put the engineer and fireman on notice that she was unconscious of her peril or was unable to protect herself.

4. There was no appreciable interval of time within which to avert the accident after the peril of plaintiff's decedent was discovered or ought to have been discovered.

At the outset it may be said that the last clear chance doctrine is one involving nice distinctions often of a technical nature, and courts should be wary in extending its application. *Van Sickler v. W. & O. D. Ry. Co.*, 142 Va. 857.

The evidence shows beyond contradiction that when the train passed Shumate's woods 2,000 feet from the crossing it was traveling at from 50 to 57 miles per hour and that this speed had been reduced to 30 miles per hour when the engine crossed the Warrenton Wye 100 yards from the crossing. Assuming that the average speed of the train from Shumate's woods to the crossing was 30 miles an hour, and it must have been more, less than 50 seconds elapsed while it was traveling this distance. It was not until the engine was from 300 to 350 yards from the crossing (Tr. R., p. 125) that the automobile was observed by the engineer, at which time it was between the Warrenton Wye and the main line south-bound track. If the train was then traveling at 30 miles an hour or 44 feet per second, approximately 22 seconds elapsed between the time that the automobile continued on across the track, passed beyond the vision of the engineer, was observed by the fireman, and was finally struck by the engine. During this interval of 22 seconds many things had to occur. First, the automobile had to appear in the range of vision of the fireman, the fireman had to realize that it had stalled, or for some reason was not clearing the track, and it was then necessary for the fireman to apprise the engineer of what was happening, and lastly the engineer had to sound the series of warning whistles and apply the brakes in emergency. All of this was done and the train made such a good stop that the two rear cars or coaches did not pass over the crossing. In the light of these facts, it is hard to understand how it could be seriously contended that the engineer had a last clear chance within which to avoid the collision and failed

to do so. These calculations are based upon the assumption that the train was traveling at an average rate of 30 miles per hour, while it is highly probable under the evidence that the average speed was greater, thereby lessening the time elapsing between the moment when the automobile appeared in view and the collision. When the automobile first appeared there was nothing to indicate that it would not clear the crossing or that the occupants were ignorant of the approach of the train. It was not the duty of the engineer to slacken the speed of his train when he first saw the automobile, nor was it his duty to anticipate that the motor would stall. In *Gunter's Admr. v. Southern Railway Co.*, 126 Va. 565, on page 595, this court in speaking of the duty of an engineer towards a person walking on the track said:

“ * * * We are of opinion that when the engineman or other person in charge of a moving engine or car sees a person in apparent possession of his faculties on the track, or so near thereto that he will probably be injured or killed unless he changes his position, he has the right to assume that he will change his position in time for his own safety until the approach is so close that an engineman of ordinary care and prudence would be admonished of his peril, and if he then gives no evidence of consciousness of his peril it is the duty of such engineman or person in charge to give timely and suitable warning of the approach of such engine or car, and if the warning appears to be unheeded to use all other means within his power, *consistent with his higher duty to other persons*, to avoid injury to one who has thus exposed himself. (Italics supplied.)

There is not a scintilla of evidence in this record even remotely tending to show the existence of any superadded fact or circumstance sufficient to put the engineer or fireman on notice that the occupants of the car were ignorant of the approach of the train or were unable to protect themselves until the fireman realized that the automobile had stalled. Thereafter everything which it was humanly possible to do was done in order to avert the collision. The occupants of the car were apparently in full possession of their faculties, and before the collision occurred the driver was looking at the train, showing conclusively that she had knowledge of its approach. In this connection it must be remembered that only two alternatives were open to the engineer after he discovered the peril of the plaintiff's decedent. These were to

signal his approach and to endeavor to stop the train. He did both of these things with great promptness. A number of the plaintiff's own witnesses testified to the giving of the warning signals prior to the collision and the position of the train after it had stopped is conclusive evidence of the immediate application of the emergency brakes. In sharp contrast with the opportunities which the engineer had to avoid the collision are the alternatives enjoyed by the occupants of the automobile. If the motor had stalled the driver could have stepped on the self-starting motor which, so far as we know, was in working order, and by this means could have cleared the far rail of the southbound track, and the plaintiff's decedent could have gotten out of the automobile when she realized her peril. If it be true that the engineer had time enough within which to stop his heavy train traveling at 30 miles an hour and thus avoid the collision, it is certainly true that plaintiff's decedent had ample time within which to save her life by getting out of the automobile. Considering for the purpose of argument that the fireman saw the automobile in a position of peril at a time when the collision could have been avoided, it does not follow that plaintiff's decedent is entitled to recover in this case. As an illustration of this proposition attention is directed to the two cases of *Hunter's Admr. v. C. & O. Ry. Co.* One action was brought by Hunter's Administrator to recover for the destruction of his automobile, and in this case it was held that the plaintiff could recover because the engineer saw the automobile stalled on the crossing half a mile away and therefore had a last clear chance to avoid the collision. This case is reported in 120 Va. 699. The other case was brought by Hunter's Administrator for his death, and in an able opinion by Mr. Justice Helt, who presided at the trial, a recovery was denied on the ground that there was no superadded fact or circumstance sufficient to charge the engineer with notice that plaintiff's decedent who was apparently in full possession of his faculties, would not protect himself, and it was stated in the opinion that the engineer had the right to assume that the plaintiff's decedent would take this course. This case is reported in IV Virginia Law Register, New Series, page 253, and it was affirmed without opinion by divided court in 120 Va. 425.

Concluding our discussion of the proposition that the last clear chance doctrine has no application to the facts in this case, we emphasize the fact that the plaintiff offered no testimony tending to show that the engineer or fireman could

have avoided the collision after they discovered the peril of plaintiff's decedent, or by the exercise of reasonable care should have discovered it. The only evidence on this point is that of the engineer and the fireman, and it is not contradicted either directly or indirectly, and therefore the court should have granted the defendant's motion to strike and also should have granted the motion to set aside the verdict and enter up final judgment for the defendant, and it was error to instruct the jury on the last clear chance doctrine when there was no evidence in the case upon which to base the instruction.

SECOND ASSIGNMENT OF ERROR.

"THE COURT ERRED IN PERMITTING OVER THE OBJECTION OF DEFENDANT, TESTIMONY TO BE INTRODUCED BY THE PLAINTIFF SHOWING THAT THE DRIVER OF THE CHEVROLET AUTOMOBILE WAS A CAREFUL DRIVER."

The father of plaintiff's decedent, Mr. W. R. Ennis, in his direct examination was asked whether his daughter-in-law, Mrs. Norma Ennis, the driver of the Chevrolet automobile, was a careful or a careless driver (Tr. R., p. 48). Objection was made to this question on the ground that the question under consideration was how she drove on the day of the collision—not her usual reputation for driving, and on the further ground that the question called for an opinion. The court overruled the objection and permitted the question to be answered. The answer was as follows:

"Why, she was always a very careful driver. I rode with her a good many times, with her and my son; she drove the cars awfully nice; she was an awful nice driver; I always thought that I always rather for her to drive the car when I was riding than my son."

The admission of this evidence was highly prejudicial to the defendant. It justified the jury in believing that the driver of the Chevrolet was driving carefully on the day in question and that the collision was not due to any fault of hers. In *Berry on Automobiles*, 6th Edition, Sec. 175, it is stated:

"In determining whether a chauffeur was in the exercise of due care at a given time it has been said to be immaterial

whether he was educated or uneducated in the business. *Latham v. Cleveland, etc.*, 179 Ill. Rep. 324. So, testimony as to the skill and care usually exercised by a chauffeur is inadmissible to disprove negligence on his part in a given instance. *Gannon v. Sisk*, 95 Conn. 639, 112 Atl. 697; *Carr v. Stern*, 17 Cal. App. 397; *Young v. Avery Co.*, 141 Minn. 483, 170 N. W. 693.

"A chauffeur's reputation for carefulness, competency or skillfulness cannot be shown on the question of his negligence unless in the absence of direct evidence on such question. *Shaw v. Carrington*, 170 Ill. App. 232; *Slack v. Joyce*, 163 Wis. 567, 158 N. W. 310."

The defendant under well recognized rules of evidence would not have been permitted to introduce evidence showing that the driver of the automobile had been involved in other accidents, and the converse of this proposition is equally true. Thus in 22 C. J. 744, the rule is laid down as follows:

"Accordingly it cannot be shown as bearing on the question of negligence on a particular occasion that the person whose conduct is involved has met with a number of similar accidents, or has been guilty of negligence on other occasions, especially where such other occurrences are remote in point of time, and conversely, one cannot show that he was careful and prudent on other occasions. *Lauffer v. Bridgeport Traction Co.*, 37 L. R. A. 533."

While we have not been able to find a Virginia case on the precise question, it does appear to be the settled law of this state that when the issue is whether a person did a particular thing it is inadmissible to put in evidence the fact that he did a similar thing at some other time. *Travelers Insurance Co. v. Harvey*, 82 Va. 949; *Wilson v. Carpenter*, 91 Va. 183; *Cole v. Commonwealth*, 5 Gratt. 696; *Brighthope R. Co. v. Rogers*, 76 Va. 443; *Brock v. Brock*, 92 Va. 173. One of the issues in the instant case was whether the driver of the automobile was driving carefully at the time of the collision, and it was error to admit evidence showing that she was a careful driver on other occasions.

THIRD ASSIGNMENT OF ERROR.

“THE COURT ERRED IN GRANTING INSTRUCTIONS NOS. 1, 2 3, 4, 5 and 8, AND IN REFUSING TO GRANT INSTRUCTIONS E, J, and N, AND IN REFUSING TO GRANT INSTRUCTION J IN A MODIFIED FORM.”

Instruction No. 1 told the jury that if they believed from the evidence that the statutory signals were not given the defendant was guilty of negligence (Tr. R., pp. 246, 147). While this instruction is a correct abstract statement of the law it was not supported by any evidence as was pointed out under Assignment of Error No. 1. The testimony offered to show that the signals were not given was negative in character, and some of the plaintiff's witnesses who said they did not hear the signals were so inattentive that they did not hear the warning signals which the uncontradicted evidence shows were given. Furthermore, plaintiff's own witness, Mrs. Everett M. Smith, an eye witness, testified (Tr. R., p. 55) that she heard the train blow out of the woods and again at the tool house. Plaintiff's witness, Elmer Tyler, heard two blows of the whistle (Tr. R., pp. 70, 71), while plaintiff's witness, Stewart Eustis, heard one long blast and several short ones, (Tr. R., p. 75). There was absolutely no evidence before the jury on which they could base a finding that the signals were not given, because the testimony of defendant's witnesses that the signals were given was uncontradicted and therefore the undisputed evidence in the case was that the signals were given. The action of the trial court in granting this instruction was therefore clearly reversible error.

Instruction No. 2 assumed that the defendant was guilty of negligence and directs the jury to find a verdict for the plaintiff if they believed that such assumed negligence was the proximate cause of the death of plaintiff's decedent (Tr. R., p. 247). This instruction refers to the definition of proximate cause found in Instruction No. 3 and it is therefore necessary to discuss both instructions together. Taking both instructions together the jury were directed to find a verdict for the plaintiff if they believed from the evidence that the defendant had failed to give the statutory signals and that such failure was the proximate cause of the collision. These instructions were finding instructions and were based upon a partial review of the evidence and entirely ignored the defendant's contention that the collision occurred by reason of

the intervening efficient cause of the collision which was the sudden stalling of the automobile. The jury may have believed under these instructions that it was the duty of the train crew to anticipate that the automobile would stall and that therefore the resulting collision was one which in the ordinary experience of mankind would not have occurred if the signals had been given.

Instruction No. 4 is not supported by the evidence. It told the jury that if they believed that Norma Ennis the driver of the Chevrolet automobile was ignorant of the approach of the train and would not have gone upon the track with knowledge of the approach thereof, and that if they further believed that the statutory signals were not given and because of such failure she drove her automobile on the track, the jury should consider the failure to give such signals the cause proximately contributing to the death of plaintiff's decedent. (Tr. R., p. 248.)

There is not a scintilla of evidence direct or circumstantial from which the jury could draw the inference that Norma Ennis was ignorant of the approach of the train. Her mere presence on the track would not justify such an inference and all of the surrounding facts and circumstances strongly point to the conclusion that both she and plaintiff's decedent had actual knowledge of the approach of the train. They were both familiar with the crossing and of the time when trains were expected to pass. The defendant's train was on time. The automobile approached the crossing at a slow and cautious speed and before the collision occurred Norma Ennis, the driver, was looking in the direction of the train. The grade as it approached the crossing was an ascending 5% grade, and the natural and reasonable explanation of the collision is that both the occupants of the automobile approached the crossing carefully in order that they might look and listen for approaching trains; that they saw C. & O. train No. 5 and believed they could cross in safety, and that thereafter through inexperience or fright the motor of the automobile was stalled at a time when nothing could be done to avert the collision, and that therefore the alleged failure to give the statutory signals did not in any way contribute to the collision.

Furthermore, this instruction completely ignores the fact that plaintiff's decedent might have had actual knowledge of the approach of the train, and it tells the jury in effect that if Norma Ennis did not know the train was approaching, the alleged failure to give the statutory signals was the

proximate cause of the death of plaintiff's decedent even though the latter might have been looking at the train or might have heard it before the automobile went on the crossing. Under such circumstances it is obvious that the failure to give signals would not have been the proximate cause of the death of plaintiff's decedent under the doctrine laid down by this court in *Virginian R. Co. v. Haley*, 156 Va. 250; *Virginian R. Co. v. Green*, 160 Va. 838, and other cases.

Instruction No. 5 was extremely unfair and prejudicial to the defendant because under this instruction the jury might have believed that plaintiff's decedent was aware of the approaching train and went upon the track, and that such conduct amounted to negligence, but that it was their duty to find a verdict for the plaintiff which, of course, is not the law, because under such circumstances the failure to give the signals would be immaterial (Tr. R., p. 248).

Instruction No. 8 directed the jury to find a verdict for the plaintiff under the last clear chance doctrine which has already discussed. (Tr. R., p. 250.) Suffice it to say that there was no evidence in the case upon which to base this instruction.

We now come to the instructions E, J and N (Tr. R., pp. 258, 259) which were asked for by the defendant and which were refused by the court.

Instruction E reads as follows:

"The jury are instructed that if, after considering and weighing all the evidence in the case as to the giving of statutory signals, or the failure to give such signals, they are of the opinion that the signals were given, their verdict should be for the defendant."

This instruction certainly contains a correct statement of the law as applicable to the facts in the instant case excluding only the last clear chance doctrine which should have been excluded because, as previously pointed out, there was no evidence even remotely tending to show that the defendant's employees had a last clear chance within which to avoid the collision. The defendant was entitled to this instruction on the evidence.

Instruction J as originally offered reads as follows:

"The court instructs the jury that the question to be determined by them in respect to the sounding of the statutory signals by the engineman is not whether a given witness failed

to hear them, but is whether or not the signals were given at the time and place required by the statute. The presumption is they were given. The burden of proving they were not given is on the plaintiff. This burden requires the greater weight of the evidence to support it. If the evidence is evenly balanced, it will not suffice. Many witnesses have testified that they heard the signals, while others testified either that they did not hear them or did not remember hearing them. In determining whether the signals were given you are instructed that you are the sole judges of the credibility of all the witnesses, but in weighing the testimony of equally credible witnesses it is your duty to reconcile conflicting statements, if possible, and under such circumstances more significance should be attached to the statement of a given witness that he recalls hearing a given warning on a given occasion than to a mere negative statement of another equally credible witness that he did not hear or does not recall hearing. The reason for this is that the statement of both sets of witnesses may be true."

After the court had refused to grant it in its original form it was amended by striking out the second sentence reading "The presumption is they were given", and it was reoffered in its amended form and again refused. This instruction should have been granted in order to aid the jury in determining the weight to be given to negative and positive testimony. This instruction is the substance of what this court has said on many occasions respecting negative and positive testimony and the jury should have had the benefit of an instruction on this point.

Instruction N, refused, read as follows:

"The court instructs the jury that if they believe from the evidence that had the automobile in which plaintiff was riding continued on across the south bound track it would have cleared the track and reached a place of safety before the engine reached the crossing, and that the collision occurred by reason of the fact that the automobile stalled or stopped on the track, then such stalling or stopping was the proximate cause of the collision, and their verdict should be for the defendant, and this is true whether or not the statutory signals were given".

This instruction correctly propounded the law, but it was objected to on the ground that it ignored the last clear chance

doctrine. As previously pointed out this doctrine had no application to the facts in the case.

It affirmatively appears from what has been said that the trial judge consistently ruled that the last clear chance doctrine did have an application. The defendant's motion to strike was denied for this reason and instructions E, J, and N which were otherwise unobjectionable were refused for the same reason, and despite the fact that there was no evidence to support it the jury was instructed by instruction No. 8 that they could find a verdict for the plaintiff if they believed from the evidence that the defendant's employees could have averted the collision after the peril of plaintiff's decedent was discovered. Lastly, the trial judge refused to set aside the verdict and enter up judgment for the defendant, and this ruling was no doubt made on the belief that the last clear chance doctrine supported the verdict.

From what has been heretofore said, we think it is plain that the court erred in the various rulings which are now under review and that the jury were evidently influenced in arriving at their verdict by sympathy for the family of plaintiff's decedent. It is earnestly submitted that there was no evidence to support the verdict and that this court should exercise its power by setting aside the verdict and entering up a final judgment for the defendant.

Petitioner adopts the foregoing petition as its brief in this case and respectfully requests that its counsel may be permitted to state orally the reasons for asking a review of the judgment complained of herein.

Your petitioner alleges that a copy of the foregoing petition was mailed to Burnett Miller and to Robert E. Scott, counsel for plaintiff, on the 21st day of September, 1934.

For the reasons set forth in the foregoing petition, petitioner prays that it may be awarded a writ of error and *supersedeas* to the judgment herein complained of; that said judgment may be reviewed and reversed, and that a final judgment may be entered in favor of the defendant.

Respectfully submitted,

THE CHESAPEAKE AND OHIO RAILWAY
COMPANY,

By Counsel.

JOHN S. BARBOUR,
CHARLES PICKETT,
Counsel for Petitioner.

The undersigned counsel, practicing in the Supreme Court of Appeals of Virginia, does hereby certify that in his opinion it is proper that the judgment complained of in the above entitled case should be reviewed by the Supreme Court of Appeals of Virginia.

CHARLES PICKETT.

November 13, 1934.

Writ of Error and *Supersedeas* awarded by the Court.
Bond \$4,000.

M. B. W.

RECORD

VIRGINIA:

In the Circuit Court of Fauquier County.

Pleas, before the Circuit Court of Fauquier County, Virginia, at the Court House of said County, on 26 March 1934.

BE IT REMEMBERED, that heretofore, to-wit: On the 8 September 1932, there was filed in the Clerk's Office of said Court, a notice of motion, wherein Vincent O. Jacobs, Administrator of Mary Catherine Ennis, deceased, was plaintiff and the Chesapeake & Ohio Railway Company a corporation, was defendant, in the following word and figures:

You are hereby notified that I the undersigned Vincent O. Jacobs duly appointed and qualified administrator of Mary Catherine Ennis, deceased, will on the 1st day of the next term of the Circuit Court of the County of Fauquier which will be the 26th day of September 1932, at 11 o'clock A. M. of that day or as soon thereafter as I can be heard, move said court for a judgment against you, the said Chesapeake & Ohio Railway Company in the sum of ten thousand dollars, which you owe to and unjustly detain from me as administrator as aforesaid, damages for the death of said

Mary Catherine Ennis, of the age of fourteen years, pursuant to the statute in such cases made and provided, the death of said Mary Catherine Ennis, having heretofore to-wit: on the 21st. day of June 1932, been caused by your wrongful act, neglect and default; in the manner and form following to-wit:

That heretofore; to-wit, on June 21, 1932 and for a long time previously, the Southern Railway Company, a railroad company chartered and doing business under the laws of Virginia maintained and operated a certain line of railroad extending in part from the city of Alexandria, Virginia to and past a certain station on said line in the county of Fauquier Virginia, known as Calverton, to and past a certain other station known as Orange, Virginia, where a connection was made with a certain other line of railroad, maintained and operated by you The Chesapeake & Ohio Railway Company; over said line of railroad you the said Chesapeake & Ohio Railway Company were accustomed to and did at the time herein referred to operate sundry passenger and freight trains drawn by engines or locomotives with steam as a motive power.

The said line of railroad between the points aforesaid, so far as pertinent to be herein stated, consisted of two main tracks running generally north and south, on the westerly of said tracks moved among others passenger trains operated thereon going south. Connected with the said tracks at various points and especially at said station of Calverton were two or more side or storage tracks, at a point immediately north of said station alongside of said south bound track were two side tracks and alongside of the north bound track were other side tracks. And at said point the said system of tracks was crossed by a county road, a public highway, at grade and at practically a right angle.

The said highway so located had been in existence and general use by the public in large numbers for a long time to-wit a great many years.

Approaching said crossing from the north the said main line tracks on a substantially level grade extended for a great distance to-wit for more than one thousand yards in a straight line the view being unobstructed, so that for that distance persons and vehicles crossing said tracks on and along said highway were easily and readily discernible in sufficient time for the person in charge of any train approach-

ing said crossing keeping a proper lookout and using due care, to slacken the speed of such train, or stop it if need be to avoid injury to any person or vehicle thereon.

On the other hand the view of travelers on said highway approaching said tracks from the west was obstructed first by a building on the north side of said highway and the west side of the right of way of said Southern Railway; secondly by another building located within said right of way and immediately west of said south bound track at a point to-wit: about two hundred yards north of said highway, and the view of approaching trains on said south bound track was further obstructed by a line of telegraph poles located along the right of way of said Southern Railway Company, and running practically parallel with said south bound track, the

situation being such as that a traveler on said highway 3 } way going from west to east, to cross said tracks could not see a train moving south on said south bound track until within about fifty feet of the west rail of said south bound track.

For many years prior to June 21st, 1932, you the said Chesapeake & Ohio Railway Company had been accustomed to operate many trains daily on said track and over said crossing and the situation aforesaid was well known to you the said Chesapeake & Ohio Railway Company, your agents and servants.

That heretofore: to-wit, on June 21, 1932, the said Chesapeake & Ohio Railway Company operated and for a long time prior thereto was accustomed to operate on said tracks and over said crossing trains of cars drawn by engines or locomotives propelled by steam under a license from or an agreement with the said Southern Railway Company, among the trains so operated by you, the said Chesapeake & Ohio Railway Company, was, a certain daily fast passenger train not stopping at said station of Calverton and due to pass there at to-wit between the hours of three and four o'clock P. M., commonly known or designated as the Chesapeake & Ohio train #5.

And I the undersigned aver that it there and then became and was the duty of you the said Chesapeake and Ohio Railway Company:

1. to put and have in charge of each of the engines drawing said trains a skilled and competent locomotive engineer and a skilled and competent fireman and to equip the same with a proper whistle and a proper bell.

2. at all times when approaching said crossing through your said agents and servants.

(a). to operate said trains at a reasonable rate of speed so that the speed thereof might be slackened, or the train stopped if need be to avoid injury to travelers on said highway while on said crossing.

(b). to keep a constant lookout ahead, using great care and caution to discover any traveler on said highway who might happen to be on said crossing and to slacken the speed of said train, or stop the same if need be in time to avoid injury to any person discovered on said crossing, or whose presence thereon ought to have been discovered by said engineer and fireman or one of them.

page 4 } (c). to give due and timely warning through whistle or bell of the approach of said trains.

(d). and especially to give the warning signals prescribed by the statute in such cases made and provided.

That heretofore to-wit on June 21, 1932 the decedent Mary Catherine Ennis, while traveling on said highway in an automobile and while on said crossing having reached a point thereon to-wit where the rails of said south bound track pass over said crossing was run upon and struck down by the engine drawing one of the trains operated by you over said crossing on said south bound track to-wit your passenger train #5 moving south over said crossing and past said station of Calverton, whereby she was then and there killed, she the said Mary Catherine Ennis, then and there lawfully traveling on said highway and then and there on said crossing where she had a right to be.

And I the undersigned aver that the death of the said decedent was directly and proximately due to the acts, negligence and default of you the said Chesapeake & Ohio Railway Company in this to-wit that you, through your said agents and servants negligently and wrongfully failed to observe and perform the several duties imposed upon you as above stated and which you were then and there bound to observe and perform among others especially the following:

1. in approaching the said crossing your agents and servants in charge of said train negligently and wrongfully and improperly ran the same recklessly and at an excessively high rate of speed.

2. Your said agents and servants then and there failed to keep a constant lookout ahead and then and there failed to use proper and reasonable efforts to stop said train, or slacken the speed thereof after they saw or ought to have seen the decedent, or the vehicle aforesaid on said crossing in a position of peril. Had such lookout been kept by your said agents and servants, the collision resulting in the death of said decedent could by the use of ordinary care by them after they saw or ought to have seen the decedent in a position of peril, been avoided.

3. as said train approached said crossing, then and there outside of an incorporated city or town, your agents and servants in charge thereof failed and neglected to give the warning signals of the approach thereof required page 5 } by the statute in such cases made and provided:

Among other things they failed and neglected,

(a) to sound the engine whistle at a point not less than six hundred yards from said crossing.

(b) to continuously sound the whistle of said engine, or ring the bell thereof, alternately, at a point not less than three hundred yards from said crossing and until the said crossing was passed.

And I the undersigned aver that because of the death of the said Mary Catherine Ennis, occasioned by your act, neglect and default in manner and form as heretofore set out, I as her administrator am entitled to have and recover of you the said Chesapeake & Ohio Railway Company as damages therefor the sum of ten thousand dollars and will move the said Circuit Court of the County of Fauquier for judgment against you accordingly.

VINCENT O. JACOBS,
Administrator of Mary Catherine Ennis, dec'd.

page 6 } And on 26 September 1932, the following orders were entered:

This day came the plaintiff by his attorney and likewise came the defendant by its attorney; and the said defendant demurred to the notice of motion, which motion is docketed, and continued to the 4th day of October, 1932, at which time the Court will hear argument on said demurrer.

And

On motion of the plaintiff for leave to amend his notice of motion by substituting the following language: "Among other things they failed and neglected: (a) To sound the engine whistle as required by the said statute at a distance of not less than 300 yards nor more than 600 yards from the place where the said railroad crossed said highway, the said highway and the said railroad then and there upon the same level; (b) within the limits prescribed by said statute to continuously sound said whistle or ring said bell, alternately, until the said engine reached said highway crossing." for the language used under headings (a) and (b) on the 5th page of the notice, which language as now appears in the notice follows: "Among other things they failed and neglected, (a) to sound the engine whistle at a point not less than six hundred yards from said crossing, (b) to continuously sound the whistle of said engine, or ring the bell thereof, alternately, at a point not less than three hundred yards from said crossing and until the said crossing was passed." such leave was accordingly granted and the notice of motion amended accordingly.

page 7 } And on 5 April 1933, the following order was entered:

This day came again the parties by their attorneys, and the defendant pleaded not guilty and filed affidavit claiming contributory negligence on the part of the plaintiff, to which plea the plaintiff replied generally, and issue was joined; and thereupon came a special jury, regularly summoned under writ of *venire facias*, to-wit: J. Chilton Gray, Julian P. Kelly, Richard T. Moffett, Carroll C. Risdon, Lila B. Jeffries, John Anderson, Horace T. Burgess, Miles T. Hart, Floyd C. Kane, Addison F. Fletcher, L. L. Hutchison, and Fred A. Luke, who being elected tried and sworn, the truth to say upon the issue joined, having partly heard the evidence, were adjourned over until tomorrow morning at 10 o'clock.

Which affidavit is in the following words:

Now comes the defendant, by counsel, pursuant to Section 6092 of the Code and states in writing that it will rely upon the contributory negligence of Mary Catherine Ennis and

her companion, in going upon the crossing without taking reasonable precautions for her safety and in failing to look and listen for the approaching train and the signals given by said train as it approached the crossing, and in failing to warn the driver of the automobile of the train's approach, and in failing to exercise ordinary care to detect the train's approach, and in permitting herself to be and remain upon the track where she was struck at the time of the accident, and in undertaking to pass over said crossing ahead of said approaching train.

BARBOUR, KEITH, McCANDLISH & GARNETT
p. d.

page 8 } And on 6 April 1933, the following order was entered:

This day came again the parties by their attorneys, and came the same jury sworn in this case on yesterday pursuant to their adjournment, and having heard all the evidence adduced are adjourned over until tomorrow morning at 10 o'clock.

And on 7 April 1933, the following order was entered:

This day came again the parties by their attorneys, and came the same jury sworn in this case pursuant to their adjournment from yesterday, and having heard the argument of counsel and received the instructions of the Court, were sent out of Court to consult of their verdict and after some time returned into Court and upon their oaths do say: We the jury, upon the issues joined find for the plaintiff, and fix his damages at three thousand dollars; and they are discharged; and thereupon the defendant by counsel moved the Court to set aside the verdict of the jury and to enter final judgment in its favor, upon the ground that the verdict is unsupported by the evidence and is contrary to the law and the evidence, and failing that, the Court set aside the verdict and grant it a new trial on the grounds that the same is contrary to the law and the evidence, and is excessive, and that the Court committed errors in admitting certain evidence over the objection of the defendant and in excluding certain evidence offered by the defendant, and in granting

certain instructions to the jury over the objection of the defendant, in failing to grant certain instructions requested by the defendant, and amending certain instructions offered by the defendant, and this motion is continued and set for hearing on the 19 day of April 1933.

page 9 } And on 26 March 1934, the following order was entered:

This day came again the parties by their attorneys, and the Court having maturely considered the motion of defendant made at a former term of this Court, on to-wit: 7 April 1933, to set aside the verdict of the jury returned herein for the reasons set out in the order then entered, and being now fully advised of its judgment on said motion, doth overrule the same. Wherefore it is considered by the Court that the plaintiff Vincent O. Jacobs administrator of Mary Catherine Ennis do have and recover of the defendant, the Chesapeake and Ohio Railway Company a corporation, the sum of three thousand Dollars (\$3,000) the amount of the damages assessed by the jury in their said verdict, with lawful interest thereon from the 7 April 1933 until paid, together with his costs in this behalf expended. To which several actions of the Court, the defendant by counsel excepted. And the defendant indicating its intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to said judgment, on its motion it is ordered that execution on said judgment be suspended for a period of ninety days from this date on execution by the defendant or some one for it, of a bond in the penalty of one hundred dollars before the Clerk of this Court with good security to be approved by said Clerk conditioned according to law.

And on the 21 May 1934, the defendant filed his Bills of Exception in the following words and figures:

page 10 } Virginia:

In the Circuit Court of Fauquier County.

Vincent O. Jacobs, Admr, of Mary Catherine Ennis, Deceased, Plaintiff,

v.

The Chesapeake and Ohio Railway Company Defendant.

AUTHENTICATED COPY OR REPORT OF TESTIMONY
AND OTHER INCIDENTS OF THE TRIAL IN
THE ABOVE ENTITLED CAUSE.

PROCEEDINGS AND TRANSACTIONS HAD, AND TESTIMONY ADDUCED, BEFORE THE COURT AND JURY ON THE MOTION FOR JUDGMENT, APRIL 5, 6 AND 7, 1933

page 11 } Warrenton, Fauquier County, Virginia,
Wednesday, April 5, 1933.

Pursuant to notice theretofore given to all known interested parties, the above-entitled cause came on for hearing on Motion of the Plaintiff for Judgment against the Defendant at 10 o'clock a. m., Wednesday, April 5, 1933, in the Circuit Court for Fauquier County, in the Court House, at Warrenton, Virginia,

Before: Honorable J. R. H. Alexander, Judge of the Circuit Court in and for said County; and the following named:

Jurors: Messrs. J. Chilton Gray, J. Sidney Hutton, Julian P. Kelly, Richard T. Moffett, Carroll C. Risdon, Lila B. Jeffries, John Anderson, J. Edward Barker, Horace
page 12 } T. Burgess, Miles T. Hart, Floyd C. Kane, Addison F. Fletcher, L. L. Hutchison, and Fred J. Luke; there being

Present: Messrs. Robert E. Scott, Burnett Miller, and Clarence W. Carter, on behalf of the Plaintiff;

Messrs. Barbour, Keith, McCandlish and Garnett; and J. D. Richards, Esquire, on behalf of the Defendant.

Thereupon the following proceedings and transactions were had and testimony was adduced:

PROCEEDINGS AND TRANSACTIONS HAD AND TESTIMONY ADDUCED

(The Jury was called, sworn, examined on its *voir dire*, chosen, empaneled, and sworn to try the issues herein, all according to the form of the statute in such case made and provided;

Counsel for the respective parties made their opening statements to the Jury;

A plat descriptive of the scene of the happenings here under consideration was, by stipulation of Counsel for the par-

ties and with the approval of the Court, received in evidence as were fourteen photographs; and, similarly a

Stipulation as to various distances involved in the matter under respective parties, the text whereof is appended hereto as "Appendix A" and, by this reference, made a part hereof; Whereupon the following occurred:)

The Court: If that is all the agreed testimony, I think we had better take a recess for lunch.

I want to caution you gentlemen of the Jury page 13 } that while you are out you are not to discuss this case with anybody; do not permit any outsiders to discuss it with you.

(Thereupon at 12:45 o'clock p. M., recess was taken until 1:45 o'clock p. m. this date.)

page 14 }

AFTER RECESS

(The consideration of the above-entitled cause was resumed, pursuant to recess theretofore taken, at 1:45 o'clock p. m., Wednesday, April 5, 1933, whereupon the following proceedings and transactions were had and testimony was adduced:)

PROCEEDINGS, TRANSACTIONS AND TESTIMONY

The Clerk of the Court: The Juror will answer to their names as called.

Mr. Miller: Both sides waive the poll of the Jury. Is that right?

Mr. McCandlish: Yes.

The Court: Very well. Proceed, gentlemen.

Mr. Miller: Mr. Sheriff, call Mr. Jacobs.

Thereupon

VINCENT O. JACOBS,
was called as a witness for and on behalf of the Plaintiff herein, and having been previously duly sworn by the Clerk of the court, assumed the witness stand and, upon examination testified as follows:

DIRECT EXAMINATION.

By Mr. Miller:

Q. What is your full name?

A. Vincent O. Jacobs.

Q. Where do you live?

A. Calverton, Virginia.

Q. What business are you engaged in?

A. In the mercantile business.

Q. You don't mind telling the Jury how old you are, do you?

page 15 } A. No, sir.

Q. How old are you?

A. Thirty-three.

Q. How long have you been living at Calverton?

A. My home has been there for about twenty-five years.

Q. Have you been in the mercantile business; for how long?

A. Since February 1, 1927.

Q. Since 1927?

A. Yes, sir.

Mr. Miller: Where are the photographs?

Mr. McCandlish: The Jury is looking at them.

Mr. Miller: Pardon me, gentlemen.

By Mr. Miller:

Q. I am handing you a photograph which has been formally introduced in evidence, marked for identification by the stenographer "Exhibit 7-A" (handing the photograph in question to the witness). Will you point to the Jury where your store building is located, on that photograph, if it is there at all?

A. (After examining the photograph in question) This (Indicating) is the store building in which I am engaged in the general mercantile business. It is about fifty feet from the center of the south bound main line track and just a few feet off of the railroad crossing.

Q. With reference to that building, where is Warrenton located; in what direction? Just tell the Jury.

A. Warrenton is west from this building (indicating).

page 16 } Mr. McCandlish: Mr. Miller, do you wish that to stand in the record, rather than the measured distance as stipulated?

Mr. Miller: No, other than that I would like to have it exactly in the record. I call attention to it because we have agreed to that and there is no use to destroy some evidence already agreed to.

Mr. McCandlish: And that is the measured distance?

Mr. Miller: The measured distance; that is absolutely correct.

By Mr. Miller:

Q. But on the opposite side of what is known as the Bristersburg Road. Is that right?

A. Yes.

Q. I see a building referred to in the testimony as the red building; what building is that?

A. That is the building owned by me and used as a warehouse.

Q. Did you know at the time of this accident or do you know at the time of this accident who occupied that house?

A. Yes.

Q. Who?

A. A man and his wife; Mr. and Mrs. Everett Smith rented the upstairs of this building and lived there.

Q. Now, holding that picture up in front of the Jury, and you being now on the witness stand and east of the Jury, in what direction is Washington from your store; just indicate that to the Jury.

A. We call it north from the store.

Q. What direction is the passenger depot from page 17 } your store? Point that out to the Jury.

A. Well, it is across from the store and west; west, we call it from the store.

Q. On the opposite side?

Mr. McCandlish: Is not that shown with exactness on the plat we have here?

Mr. Miller: Yes, the distance is. We are not contradicting that, anything there.

By Mr. Miller:

Q. The depot is on the west side of the main Washington track from your store?

A. It is.

Q. That is right.

Now, the distance, the actual distance, Mr. McCandlish, we will leave it, of course, as the measurements show.

Mr. McCandlish: Yes.

By Mr. Miller:

Q. Now, the case we are investigating now is the case of Catherine Ennis against the Chesapeake and Ohio Railway Company. What have you, if anything, to do with that case in a representative capacity?

A. I am the Administrator for Mary Catherine Ennis.

Q. You are the Administrator for Mary Catherine Ennis?

A. Yes.

Q. How far did Mary Catherine Ennis, in her lifetime, live from your home town of Calverton?

A. Prior to the time she came to Calverton, I do not know exactly how far she lived from Calverton; it must page 18 } have been fifteen or twenty miles.

Q. How far was she living from Calverton at the time she was killed in June of this year?

Mr. McCandlish: Of this year, Mr. Miller?

By Mr. Miller:

Q. In June of last year?

A. I would say it was a little more than a half a mile.

Q. A little more than a half a mile?

A. Yes.

Q. In what direction from Calverton?

A. Well, in the terms that we are using here as to direction, it would be about west.

Q. About a half a mile west?

A. Yes.

Q. Were you personally acquainted with Mary Catherine Ennis in her lifetime?

A. I was.

Q. How well did you know her?

A. Well, I knew her very well; she was a child who went to school at Calverton and came in the store frequently on her way to school and from school, and Mr. Ennis was living on the farm which was owned by my former partner, Mr. Simpson. I was naturally interested in the family and knew them all.

Q. Knowing her as well as you did, sir, I imagine you know something about her intelligence. What about her intelligence?

A. The child was of average intelligence; apparently a very bright child.

page 19 } Q. Do you know to what extent she had advanced in educational lines at the public school?

A. No, I do not.

Q. You do not know the grade?

A. I do not.

Q. In which she was at that time?

A. No, sir, I do not.

Q. Well, were your conversations and associations with her of such frequency as would enable you to pass upon her intellect?

A. Well, she was a customer, like most children, whose

parents deal with me, they come in the store and buy things for school and sometimes for the home, and I would say that she was an average child of average intelligence.

Q. Do you know about what her age was at the time her life was destroyed?

A. Yes.

Mr. Miller: Of course, that is not proper.

By Mr. Miller:

Q. Do you know her age at the time she was killed?

A. I was told by her father that she was fourteen.

Q. Fourteen years?

A. Yes.

Q. Do you know anything about the character of this girl—do you know anything about the character of the girl—that is off the record; Was she of good or bad character?

Mr. McCandlish: I think everything ought to go in the record.

page 20 } Mr. Miller: Then you will object to it as being leading?

Mr. McCandlish: I won't object.

Mr. Miller: If you don't object to anything being leading, I promise I won't, but I won't say that I will stand by my promise in any way.

By Mr. Miller:

Q. Will you go ahead and answer the question?

A. She was a girl of very good character.

Q. Very good character?

A. Yes.

Q. You were personally acquainted with the general reputation she had in the community as a girl of character, were you?

A. I was.

Mr. McCandlish: I don't think that you ought to go in to too much of that.

Mr. Miller: We have to prove our damages. Now, if she were a girl of low character we would not be allowed to recover as much as if she were a girl of high character.

Mr. McCandlish: I am willing to admit that she was a girl of good character.

Mr. Miller: That is the first time you have done it. How did I know you would do it? You have done it now and I am glad to hear you.

By Mr. Miller:

Q. Now, Mr. Jacobs, you would say then that she was so regarded in the neighborhood?

A. I would.

page 21 } Q. All right, now. In regard to that road between your store and the red building that you have spoken of as being your property and occupied by the Smiths in June, 1932, over the crossing to the west, state to the Jury to what extent that road was traveled if you know.

A. It is traveled a great deal; most of the cars going to Bristersburg and further, even to Morrisville and Fredericksburg, all down the low end of Fauquier County, use that crossing, all the people from the lower end coming up to Warrenton, Casanova Meetze and Midland use the crossing. The school bus travels over the crossing filled with children twice each day that school is in session, bringing the children from near Warrenton to Calverton and carrying them back in the afternoon. I would say this crossing is traveled a good deal.

Q. Day or night, do you mean?

A. Traveled more, of course, in the day; but some at night.

Q. Looking from here, from Warrenton, in the direction of Calverton, where is the school building there located? I do not mean the distance. Is it this side of the railroad or the other side of the railroad?

A. It is on the east side of the railroad.

Q. From here?

A. From here.

Q. Well, if it is from here it must be from there. How much would you say from the railroad, the main line from the southern track to the school building, approximately? The reason I do that, the children went there.

page 22 }

A. I would say five or six hundred yards.

Q. Five or six hundred yards? You mean to tell the Jury that the school truck came from this direction and went over that crossing or did the school truck come from the other direction?

A. The school truck came from this direction, picking up the children from near Meetze and Casanova, down, and taking them to the school building east of the railroad track on this side. There is also a school bus that comes up from the lower end and I think brings some children down there up to the school.

Q. The one that comes from the lower end never reaches the railroad track at all?

A. Not to my knowledge.

Q. And the other one that comes in the direction of War-

renton, crosses over, as I understand, at the same crossing where Mary Catherine Ennis was killed?

A. It does.

Q. And crosses over there four times, don't it, a day?

A. Usually; but loaded only twice.

Q. Loaded only twice?

A. Yes.

Q. But usually crosses four times?

A. Yes.

Mr. Miller: Just one moment.

Mr. McCandlish: We admit it is a public highway, Mr. Miller. We admit that.

page 23 } Mr. Miller: It is admitted, for the benefit of the record, that the road he is speaking of now, at the crossing, is a public highway.

Mr. McCandlish: Yes.

Mr. Miller: That is all right.

By Mr. Miller:

Q. How long has that road been used as a public highway, if you know?

A. I don't know how long, but ever since I can remember, and it must have been used as a public highway when the store building which I am now using was built: that was about fifty years this October.

Q. All the evidence I have is that my Associate, Mr. Scott, says that it has been there from the time the memory of man runneth not to the contrary. I do not know how long your memory runs. It is agreed, now, that is a public highway and has been used as a public highway, as far as you recollect?

A. As far as I can remember.

Q. Assuming that the tracks run north and south, what companies, if you know, run trains over those tracks north and south?

A. The Southern, the C. & O. and the Norfolk and Western.

Q. Do you know, or would you say, how many trains cross a day; that is, went over the crossing, either way, north or south?

A. I don't know.

Q. Do you know of your own knowledge how long the Chesapeake & Ohio Railway Company has been using that track or running trains, rather, running the trains over the Southern Railway track?

A. Ever since I can remember, they have.

Q. Do you know how many trains the Chesapeake & Ohio Railway Company runs over that track a day?

A. I do not know that.

Q. You can tell about how many passenger trains go over there, can you, a day?

A. Well, I could make a guess, but it would not answer it.

Mr. Miller: Don't guess. If you cannot state facts, don't say anything.

By Mr. Miller:

Q. Is Calverton, the village you live in, incorporated or unincorporated as a town?

A. Unincorporated.

Q. It was never incorporated, was it?

A. Not as far as I know.

Q. Well, you have no Mayor and Council down there? You know that, don't you?

A. That is right.

Mr. Miller: Gentlemen, you all can take the witness.

CROSS EXAMINATION.

By Mr. McCandlish:

Q. You say this young girl was of average intelligence and mentality?

A. From my opinion, she was.

Q. Yes. And you said in response to a question from Mr. Miller that she was a very bright child?

page 25 } A. Why, she seemed a bright child.

Q. Did she have good vision and good eyesight?

A. As far as I know.

Q. And good hearing?

A. As far as I know.

Q. And Mrs. Norma Ennis, who was in the automobile with her at the time of the accident: You do know her too, or did you know her?

A. Yes.

Q. Did she have good vision and eyesight and hearing?

A. So far as I know she had.

Q. And a healthy woman?

A. Well, I imagine so; she was small and probably — I don't know much about her health.

Q. As I understand you to say, the school was on the east side of the track?

A. It is from here.

Q. And this young woman lived on the west side of the track?

A. That is correct.

Q. Did she go to school?

A. Yes, sir.

Q. How long had she been going to school before she was killed; to that particular school?

A. I do not know exactly how long.

Q. Well, one or two, or three years? Can you give any idea?

A. I think perhaps she was going possibly three years.

Q. Possibly three years?

page 26 } A. Yes.

Q. You do not know what grade she was in?

A. No, sir, I do not.

Q. And for some time preceding the accident she had lived within a half of a mile of the crossing?

A. I think it is just a little more than a half a mile.

Q. A little more than a half a mile?

A. Yes.

Q. How long had she lived there?

A. Well, to the best of my knowledge, about four years.

Q. About four years?

A. Maybe a little longer; not quite that long, perhaps.

Q. Was she accustomed to walk to and from school?

A. Yes.

Q. Are you related to either of the ladies who were killed?

A. I am not.

Q. You are not connected with them in any way?

A. Not in any way.

Mr. Miller: Mr. Jacobs, speak a little louder so that these gentlemen can hear you.

By Mr. McCandlish:

Q. On the west side of the track and extending north from the highway, the plate here shows a hedge indicated by these little round circles (indicating). That hedge is private property and not on the railroad property. Is that so?

A. I think it is on private property.

page 27 } Q. Clear of the railroad right-of-way?

A. I do not know about that.

Q. You think it is on private property?

A. Yes.

Q. That is so?

A. Yes.

Mr. McCandlish: Mr. Miller, what is the fact? Have you any definite information so that we can get that in the record?

Mr. Miller: I have not, but as the witness says I think it is over the fence, in the yard. I do not imagine the Railroad Company owns any part of the yard. That is all I can say about it.

By Mr. McCandlish:

Q. And the Post Office Building that is shown on the plat is not on the railroad right-of-way?

A. Not that I know of. That is also said to be private property.

Q. That little building marked "P. O." was used as a post office at the time of the accident?

A. It was.

Q. And is so used now?

A. Yes.

Mr. McCandlish: That is all, thank you.

Mr. Scott: May I ask the witness a question along this line?

The Court: Is there any question about that, Mr. McCandlish?

page 28 } Mr. McCandlish: I think we would be better served if one Counsel examined the witness.

The Court: Let Mr. Miller ask the question.

Mr. Miller: We will extend the same courtesy—

The Court (interposing): I do not feel disposed to encourage that.

RE-DIRECT EXAMINATION.

By Mr. Miller:

Q. The condition, that is the physical and geographical conditions, already shown down there, I would like for you to explain to the Jury in going down that road from Warrenton, now approaching the crossing over which the trucks traveled in carrying the children to school, state the conditions along there; that is, if there is anything to obstruct the view of approaching trains from the north to the crossing and, if so, for how long a distance before reaching the crossing is the view of persons traveling along that highway, going east, obstructed?

A. For quite some distance from the crossing it is impossible to see the railroad tracks or an approaching train because of a building up on the hill, north of the crossing and,

in approaching the crossing a little nearer the main line, there is a post office and a hedge, and the line of telegraph poles, and in order to see a distance of, I would say a hundred yards north of the railroad crossing, it would be necessary, if you were driving a car, to be on the Warrenton Branch track; then, after being on the Warrenton Branch track, looking north for an approaching train, you proceed to go over the crossing and after reaching nearly the south

bound track, looking for a train coming from the
 page 29 { north, you look south and you can see whether there is a train coming north, coming from the south, but at a point on the Warrenton Branch track you cannot see a train coming from the south, going north, until after you pass over the Warrenton Branch track, so it makes it almost impossible to see a train going away from the crossing if you are a distance of fifty feet west of the track.

Q. Of what track of the crossing?

A. The main track.

Q. The main track?

A. The main line.

Q. The main line?

A. Yes.

Q. Now, there are how many lines there, north and south?

A. Going east?

Q. I mean at the crossing; how many tracks do you find there?

A. Well, there are two side tracks; the Warrenton Branch track; and two main lines.

Q. Five tracks, then?

A. Five. Of course from the east side, the two side tracks are running in to one another at that point and are not two distinct tracks; the switch is just above the store and naturally the one line is on one rail, all one track, practically; it is all one instead of on the other track.

Q. Do I understand you to say that the line, the Warrenton Branch line, runs down from Warrenton and goes over the crossing?

page 30 { A. It does.

Q. Then, what is the distance between the eastern rail of the Warrenton Branch line to the western rail—

Mr. McCandlish (interposing): That is shown here with accuracy.

By Mr. Miller:

Q. Well, what is that?

The Court: You have agreed on all that.

Mr. Miller: I know. I know we have. That is all true.

The Court: Why go all over it again?

Mr. McCandlish: And, in this connection, I say for the record that according to our stipulations, Mr. Miller, so much of the witness's statements as are in conflict with the agreed facts will be eliminated.

Mr. Miller: Of course, of course. But that don't show what the obstructions were to the vision of all that distance—Don't write this all down; that is all right, about the distances, but — well, never mind that. Now, we will go back and I will ask this question:

By Mr. Miller:

Q. We will go back, say, three hundred yards in the direction of Warrenton from that main south bound track: Do you mean to tell the Jury that in going down there to the track that the trains coming from the north approaching that crossing, that the view thereof is obstructed all that way?

A. I believe it is.

Q. Yes, sir. Then, what distance do I hear you tell the Jury now that the view of trains from the north are obstructed from the north as you approach the page 31 } track? I am having reference now to the south bound track where this injury occurred.

A. I do not get the question exactly.

Q. I mean this: Assuming now that the train is on that south bound track going south. At what distance on this Warrenton road, after leaving the track, and going in the *distance* of Warrenton, is this view of that train obstructed or, say, three hundred yards before it gets to the crossing?

A. Well, coming this way from the main line of the south bound track, the crossing is unobstructed to a distance of about forty feet. After going forty feet further, it is obstructed, as far as I know, up to what we call West End, a distance of three or four hundred yards.

By Mr. McCandlish:

Q. You are now talking about on the west side of the track, or the east?

Mr. Miller: I am talking about the west side of the track.

The Court: Going toward Warrenton.

Mr. Miller: If I said going to Warrenton—

Mr. McCandlish (interposing): He has it exactly backwards.

Mr. Miller: It is not asked backwards. I mean coming from off on the side, going up, I mean going from the—Well, he already answered it.

Mr. McCandlish: He answered it, but it is backwards.

Mr. Miller: It is not asked that way. I mean going towards Warrenton.

page 32 } The Witness: The distances would be the same going from either direction, as to the obstruction.

By Mr. Miller:

Q. What did you understand me to say?

The Court: His answer was responsive to your question. He said after it got forty feet across the track in this way you could not see the train three hundred yards.

Mr. Miller: That is it exactly. That is what I thought. However, Mr. McCandlish said it was asked backwards and if it was asked backwards I wanted it straight.

By Mr. Miller:

Q. What size building would you say that this Post Office Building was?

Mr. McCandlish: It is drawn to scale here.

Mr. Miller: Not as to distance.

Mr. McCandlish: This is the side of the building (indicating). It is on the scale. The engineer can tell you just what it is.

Mr. Miller: All right. I will reserve that until the engineer comes on the stand. Mr. McCandlish, I have one further question, then I will turn the witness over to you further.

By Mr. Miller:

Q. You testified, Mr. Jacobs, about certain shrubbery that obstructed the vision, that is when you were going from, now, going from Warrenton in the direction of Calverton. The bushes and the shrubbery on this picture (indicating the photograph marked as Exhibit No. 6), are they the bushes you referred to?

page 33 } A. (After examining the photograph) They are.

Q. Is that over in the yard? Who owns that yard up there?

A. Winfield Kahn.

Q. That is over in his yard?

A. As far as I know, and I think it is.

Mr. Miller: Go ahead.

Mr. Scott: Stand aside.

Mr. Miller: You can—

RE-CROSS EXAMINATION.

By Mr. McCandlish:

Q. I neglected to ask you, Mr.— Are you gentlemen finished?

Mr. Miller: Mr. Scott told him to stand aside and I told him that you wanted to ask him more questions. You are indebted to me and my courtesy for keeping him on the stand.

By Mr. McCandlish:

Q. With what frequency, Mr. Jacobs, has Mrs. Norma Ennis passed over that crossing?

A. I do not believe she passed over it so very often.

Q. Whenever she came to your store she passed over it?

A. It was necessary for her to pass over the crossing in order to get to my store.

Q. Yes; and did the road that ran over the crossing also run by her house?

A. No; it is to the south of her house. The entrance to the farm is right at the west end where you make the turn to go to Warrenton. By going straight you go
page 34 } right into the farm in which they live.

Q. So the road then which goes over the crossing runs up to the farm where she lives?

A. Up to the gate of the farm where she lives.

Q. Up to the gate of that farm?

A. Yes.

Q. It was her road; I mean you refer to it as the road on which she lives; it was a public road she used when she came out of her place and went in?

A. It is the road she used when she came out of the place.

Q. And, of course, she had been over that crossing a great many times?

A. I don't think she had been over it a great many times because I saw her in the store very little.

Q. Did she come down to Calverton right often?

A. Not often, no, sir.

Q. How long had she lived up there where she was living at the time the accident occurred?

A. I really don't know, as she did not come there when Mr. Ennis came. His son married some time after they moved on the farm. I just don't know how long she has been living there.

Q. Two years, three years, or one year?

A. I really don't know how long she lived there.

Q. You could not give us any idea about it?

A. Well, it would be just a guess.

Mr. Miller: You can get that from the next witness.

Mr. McCandlish: All right, that is all.

page 35 } By Mr. McCandlish:

Q. If you took an air line from the crossing to Mrs. Ennis', Mrs. Norma Ennis' place, where she lived, it would not be a half mile, would it?

A. To my judgment it would be about a half a mile.

Q. You think it would?

A. It would not be any closer by air line than it is by road.

Q. It would not be any closer by the air line than by road; and you can see her house from the crossing, can you?

A. I don't think so.

Q. It was in sight of the crossing?

A. I don't think so.

Q. It was in sight of the railroad?

A. I doubt if you could see the railroad crossing from the house.

Q. Maybe you can't see the rails, but could you see the engine standing on the crossing from her house?

A. I doubt it very much.

Q. Well, after the train got south of the station you would be able to see it from her house, would you not?

A. Some time after it got south of the railroad station, I imagine you could see it from her house.

Mr. McCandlish: That is all.

Mr. Miller: Stand aside.

(The witness thereupon was excused and retired from the witness stand.)

Mr. Miller: Mr. Sheriff, call Mr. W. R. Ennis.

page 36 } Thereupon

W. R. ENNIS,
was called as a witness for and on behalf of the Plaintiff, and having been previously duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. Miller

Q. Mr. Ennis, give your full name, sir.

A. W. R. Ennis.

Q. How old are you?

A. I will be forty-seven years old.

Q. When?

A. The fifteenth day of this April.

Q. Where are you living at present?

A. I am living at Calverton.

Q. Where were you living in June, 1932?

A. Calverton.

Q. The same house you live in now?

A. Yes.

Q. How long have you been living at your present place, your abode?

A. I have been there, I was there five years this Christmas.

Q. Five years this Christmas?

A. Yes.

Q. Who owns the property upon which you live?

A. Mr. Sam W. Simpson owned it.

Q. He is dead and his estate owns it now?

A. Yes.

page 37 } Q. How far is that from the depot at Calverton?

A. Why, it is just a fraction over a half a mile, I guess.

Q. You were acquainted with the crossing where your daughter was killed?

A. Yes.

Q. How far is that crossing from the front door of your house, if you know, or about approximately? Approximate it if you can.

A. It is about a half a mile or a fraction over.

Q. A half a mile or a fraction over?

A. Yes, sir.

Q. How were you related to Mary Catherine Ennis, the Plaintiff's intestate?

A. I was—

Q. (Interposing) The Plaintiff's decedent here?

A. I was her father.

Q. Her father?

A. Yes.

Q. How old was she at the time she was killed?

A. Fourteen years old.

Q. Give the members of your family now living.

A. Well, I have five girls living and three boys.

Q. Mrs. Ennis, your wife, is living?

A. Yes.

Q. Will you give, as nearly as you can, the ages of your respective children, the respective ages?

A. That is kind of hard on account of I have so much to think about. The oldest one is about twenty-five page 38 } years.

Q. How many are under twenty-one?

A. How many?

Q. Yes.

A. Six of those, I guess, are under twenty-one.

Q. Can you give the names of those children?

A. Well, the oldest one is Edna Ennis; then Dixie Ennis; then Myrtle Ennis; then Catherine Ennis—

Q. (Interposing) She is the one that is dead?

A. No, I am too fast. It is Doris, and then Catherine, and then Lois Ennis—

By Mr. McCandlish:

Q. Is that a girl or a boy?

A. A girl.

Q. That L-o-i-s?

A. Yes. Then Douglas Ennis, and Douglic E. Ennie, and Geneva Ennis.

By Mr. Miller:

Q. How old is Mrs. Ennis, your wife, at the present time?

A. She is forty-three.

Q. Forty-three?

A. Yes.

Q. Where were you, Mr. Ennis, when your daughter, Mary Catherine Ennis, was killed?

A. Why, I was there on the farm.

Q. Did you see them leave home that morning?

A. Why, I had Mr. Jacobs, and Mr. Eustis had just come in there to get me to go out to the west end, and I went out and cow trade and met them on the way back, page 39 } about three, two hundred yards of the County Road, going out as I came back into the farm.

Q. Going out to Calverton?

A. Yes.

Q. Toward the crossing?

A. Yes.

Q. Approximately how long after you passed or saw them was it before the accident took place?

A. Well, I judge about as near as I can come to it, about ten minutes it seemed to me like. Mr. Jacobs and Mr. Eustis had come in after me and said that the accident had happened.

Q. Will you tell the Jury, if you can recall, how they were situated with reference to each other as occupants of that car?

Mr. McCandlish: If he knows.

By Mr. Miller:

Q. Those who were sitting on the front seat and those who were sitting on the rear and those who were driving or who was driving.

Mr. McCandlish: If he knows.

By Mr. McCandlish:

Q. Did you see them and talk to them as they went out?

A. Yes, sir; I went and stopped and talked with them.

Mr. Miller: He could not state it unless he knows it.

The Witness: As I met them in the road going out, my daughter Catherine was seated on the right-hand side; the little baby was seated in between my son's wife, on the left, and as I just started to cutting wheat that day, we stopped them and asked them where they were going, be- page 40 } cause I had heard Norma say she was going out to order the child a little pair of shoes; and I said: "Where you all going?" And they said they were going out to the Post Office and I said: "Don't you all be gone long. You all hurry back. We will do the milking and won't have to stop the men folks out in the field cutting wheat," and she said: "All right. We will be back in fif-

teen minutes." So I turned on towards the field and they went on out to the station.

By Mr. Miller:

Q. All right. There were three occupants in the car at that time?

A. Yes.

Q. Your daughter that was killed, your daughter-in-law, and your grandchild, the baby?

A. Yes.

Q. Who was driving the car?

A. Norma.

Q. Your daughter-in-law, or your son's wife?

A. Yes.

Q. How old a woman was she?

A. She was nineteen, I think.

Q. Nineteen?

A. Nineteen, I think.

Q. And your daughter, Mary Catherine Ennis, could she drive the car?

A. No, sir. She could not drive.

Q. You do not own a car, do you?

A. Yes, I owned a car, but I never allowed any of the children ever to fool with it, any more than my
page 41 } oldest son.

Q. What kind of a car was it that they were riding in?

A. A Chevrolet coupe.

Q. A Chevrolet coupe?

A. Yes.

Q. Do you remember whether the windows were up or down?

A. They were down when I met them.

Q. They were all three on the front seat?

A. Yes.

Q. A baby and your daughter-in-law and your daughter?

A. Yes, sir.

Mr. McCandlish: Of course there is only one seat in a coupe.

Mr. Miller: I have three cars but I do not know either one of them.

By Mr. Miller:

Q. This is a coupe with only one seat, a one-seated coupe?

A. Yes.

Q. Now, you should have told me— Are you acquainted with that crossing in Calverton?

A. Yes, sir.

Q. Where the accident occurred?

A. Yes. I have crossed it a great many times.

Q. Do you know to what extent that crossing is traveled or that road over the crossing, we will say?

A. It is traveled a good bit, an awful lot.

Q. Where were you when you received the first information about your daughter's death?

A. I was about two hundred yards above the page 42 } house in the wheat. I had met them and walked from where I met them up above the house about two hundred or two hundred and fifty yards with a bolt to go in the binder. I had got one of them and I just walked in the field when Mr. Jacobs came up after me.

Q. What effect did it have on you?

A. It had bad enough.

Q. What do you mean by that? Explain it to the Jury.

Mr. McCandlish: I guess, if Your Honor please—

Mr. Miller (interposing): The object of that is—

Mr. McCandlish (continuing): It takes us—

Mr. Miller (interposing): In the most recent case decided we have that. We have to show the relation between the death, the decedent and the relative, to what extent the relative suffered mentally, how it affected them, what the relations were to the dead, in order to enable the Jury, if the Jury is of the opinion that the personal representative of the dead is entitled to recover damages, so they can say to what extent. Now, if Mr. Ennis was the father of the girl who was reckless and had a no-account reputation at home, and had no sense, and for whom he had no affection, it would be very difficult for a Jury to give damages in any considerable amount, while, if she was, if he was the father, as is the case here, of a daughter for whom he had attained the highest feelings of affection, as any other father should feel for a daughter who bore the characters of this young woman I understand did; then— Now, it is true that my friend can object to questions being propounded as leading, in which event the questions will be withdrawn because I do not want

any error printed on the face of the record here, page 43 } but this is one fact that I think we are entitled to show. Now, if my friend's objection is to the form of the question upon the ground it is leading, I am going to withdraw it and frame it another way, while if, on the other hand, he objects to the substance of the question, then

I will ask that be allowed to stand, but this, if Your Honor please,—

Mr. McCandlish (interposing): I have no objection to the record showing the relations existing between father and daughter as pleasant, kindly and affectionate. But that is a very different thing from showing how he was affected by the news and describing, in the presence of the Jury, all the sensations and feelings—

Mr. Miller (interposing): Now, if I put that question in the very language stated by you, Mr. McCandlish, what further objection would you have? You know you would object.

Mr. McCandlish: Go ahead and ask the question; do not spent a lot of time arguing about the objection I have not made.

Mr. Miller: But you did object—

Mr. McCandlish (interposing): You say that if you had done—

Mr. Miller (interposing): I say you did object to it, that you—

The Court (interposing): Well, I think Mr. McCandlish has a right to open and close his argument. He has the right to state what it is—

Mr. Miller (interposing): Do you consider there is any argument at the present time?
page 44 } The Court Yes; but we are getting a little backwards again.

Mr. Miller: If the other side chooses to proceed backward, I will proceed the other way.

Mr. McCandlish: Has your Honor passed on the objection?

The Court: Mr. McCandlish makes an objection, and he has a right to state it.

Mr. Miller: He has it, and he made his objection and he said—

Mr. McCandlish (interposing): Mr. Miller would not let me talk.

Mr. Miller: I do not know who I would rather hear talk.

The Court: Reframe your question.

Mr. McCandlish: Would it not satisfy you, Mr. Miller, to let the record show that we admit the relations between this witness and his daughter were pleasant, affectionate, and the usual relations obtaining between—

Mr. Miller (interposing): May the stenographer read the question?

The Reporter (reading):

"Q. What effect did it have on you?"

"A. It had bad enough."

"Q. What do you mean by that? Explain it to the Jury."

Mr. Miller: Now, go ahead.

The Court: Have you an objection?

Mr. McCandlish: Yes. I have stated the objection.

The Court: Do you want to answer him further?

Mr. Miller: No, I am ready for the Court to pass on it.

The Court: I think the objection is valid. You
page 45 } have the right to show the relations, but that is
an around about way to show it. Why don't you
ask him a question?

Mr. Miller: Have I not already asked him the question?

The Court: In an indirect way. You asked what the effects on him were.

Mr. Miller: That is what I am asking now. Don't you think I have a right to do that, although it may be an around about way?

The Court: I think it would be much better if you asked the witness what his relations with his daughter were.

Mr. Miller: I am coming to that in a minute. Well, we will get to it now.

By Mr. Miller:

Q. Mr. Ennis, what were the relations between you and your daughter that was killed, Mary Catherine Ennis?

A. How was that?

Q. What were the relations between you and your deceased daughter— I suppose I have to ask it in that way.

A. What was the relation?

Q. Yes. How did you feel to her?

A. Well, I just felt that she was just as near to me as any of the others I have got, and I do not think there is any other farmer that ever felt nearer to his children than I do to mine.

Q. What did this particular child, Mary Catherine Ennis, do around the house?

A. She was the cook.

Q. What?

page 46 } A. She was my cook.

Q. She was the cook?

A. She kept the house. My wife helped me to milk. When she was not at school she done the work at the house; she cooked breakfast and cooked supper and kept the house and she was the general housekeeper.

Q. She was the general housekeeper?

A. Yes, sir.

Q. Do you know what grade she was in at the public school at Calverton?

A. I think she was either in the fifth or the sixth; now, I won't be so sure; I won't say for sure which it was, the fifth or the sixth.

Mr. Miller: I think this is not damaging: I can ask what the condition of her health was at that time.

By Mr. Miller:

Q. What was the condition of your daughter's health at the time she was killed?

A. Fine. She had fine health.

Q. Was she well grown and well developed for her age?

A. I think, as well as I remember she weighed about a hundred and forty-five pounds; she was a right large girl for her age.

Q. Now, as to her God-given senses: what was the condition of her eyesight?

A. Good eyesight.

Q. What was the condition of her hearing?

A. Good.

Q. What would you say with reference to her page 47 } intelligence?

A. Well, she was a pretty intelligent girl; she was pretty apt with everything. I just say she was real intelligent.

Q. Now, what have you to say about her sight and hearing?

Mr. McCandlish: You have covered that.

The Court: Will you talk about it so that I can hear it?

Mr. Miller: I was talking about Mrs. Ennis.

By Mr. Miller:

Q. What was the condition of Mrs. Norma Ennis, your daughter-in-law's hearing and sight?

A. Good.

Q. Sir.

A. I never heard no complaints.

Q. Good so far as you knew?

A. Yes, sir.

Q. Do you know what, if any, experience she had had as a driver of cars before the day of this accident took place?

A. She had been driving cars ever since I knew her. I don't know how long, and—

Q. (interposing): Was—

Mr. McCandlish (interposing): Let him finish the answer.

By Mr. McCandlish:

Q. Do you know about how long?

A. About five or six years.

By Mr. Miller:

Q. You knew her about five or six years?

By Mr. McCandlish:

Q. She had been driving cars, has she been drive-
page 48 } cars for about five or six years?

A. Yes, sir.

By Mr. Miller:

Q. Had you ever known her before she married your son?

A. Yes, sir.

Q. Where did she live then?

A. Stafford.

Q. How long had she been united in marriage to your son?

A. About three years, I think.

Q. Three years?

A. Yes; I guess maybe a little longer.

Q. How far did your son and Mrs. Norma Ennis, his wife, live from you? How far were they living from you at the time of the accident, June 21, 1932?

A. They were living right in the house with me.

Q. Right in the house with you?

A. Yes, sir.

By Mr. Scott:

Q. Was she a careful driver or a careless driver? What kind of a driver was she? I mean: was she careless, reckless, or careful, or what?

A. No, sir—

Mr. McCandlish (interposing): I object to the question, if your Honor please.

The Court: What is your objection?

Mr. McCandlish: Sir?

The Court: I say what is your objection?

Mr. McCandlish: The question is how she drove
page 49 } on this particular day; not her usual reputation
for driving.

Mr. Scott: No.

Mr. McCandlish: The question is not as to her being careful or careless as a driver. I object to the question because it undertakes to go outside of the issue in the case and calls for an opinion.

The Court: I think I shall overrule the objection.

Mr. McCandlish: You hold that the question is good?

The Court: Yes.

Mr. McCandlish: We save the point.

By Mr. Miller:

Q. Now, answer the question.

A. Why, she was always a very careful driver. I rode with her a good many times, with her, and my son; she drove the cars awfully nice; she was an awful nice driver; I always thought that I always rather for her to drive the car when I was riding than my son.

Q. How long have you lived in that immediate neighborhood?

A. Five years this Christmas.

Q. Where did you live before you moved there?

A. Right on the edge of Fauquier County; right at Stafford.

Q. You do not know anything about the age of that road that crosses the railroad?

A. No. I know it has been there ever since I have been big enough to remember.

Q. How long have you been big enough to remember?

A. Well, I was born in Fauquier County and
page 50 } my father lived in Fauquier County when I was
a small boy. Then I came back after I was thirteen years years old to Fauquier County to work and I worked at Casanova Station five years so I have been traveling over that crossing, that road, a good bit ever since I was fourteen years old.

Mr. Miller: All right, gentlemen. You can take the witness.

CROSS EXAMINATION.

By Mr. McCandlish:

Q. When was your daughter, Mary Catherine Ennis, fourteen years of age?

A. I do not know exactly in what month.

Q. You don't remember that date, her birthday?

A. No, I do not.

Q. You say you were home that day when she went out?

A. I met her as I was coming back in. They were going out.

Q. How far?

A. I met them between my house and the County Road.

Q. You had not gotten out to the County Road when you met them?

A. No, they had not got to the County road.

Q. You say they were going out to buy a pair of shoes for the little child?

A. To send a money order for it, for a pair of shoes for the little baby.

Q. To send a money order?

A. Yes; at the Post Office.

Q. Who were the shoes for?

page 51 } A. For the little girl.

Q. For the little girl in the automobile?

A. Yes.

Q. What was her name?

A. I have to study a minute.

Q. That is all right. How old was she?

A. She was about three years old.

Q. Three years old?

A. Yes.

Q. She was the child of Mrs. Norma G. Ennis?

A. Yes.

Q. How did your daughter happen to be going along? Was she going to see about the shoes?

A. No, indeed; just going along for a drive, I guess.

Q. Well, are you sure they were going to the Post Office?

A. Yes.

Q. Why did they have to undertake to cross the track?

A. You cannot very well turn on this side of the track.

Q. They went up there to turn around?

A. They always went over on the other side; most every one does do it, go across the track to turn around to the garage there, to turn around.

Q. I see. Was it a clear, fair day?

A. Yes, sir.

Q. And the ground was dry and the surface of the ground, roads were dry?

A. Very dry.

Q. How long has Mrs. Norma G. Ennis lived at the place where she was living at the time of the accident?

page 52 } A. They have been there about two years.

Q. About two years?

A. Yes, sir.

Q. And before that she had lived some, lived how far away from the crossing?

A. Well, I judge about, around fifteen or eighteen miles.

Q. Fifteen or eighteen miles?

A. Yes; maybe not that far; maybe a little further than that. I do not know exactly. It was in that neighborhood.

Q. She was driving an automobile before she came to live where she was at the time of the accident?

A. Yes.

Q. And even before she came there to live she drove over the crossing?

A. Well, I don't know whether she had or not.

Q. Well, during the two years she had been living there she had been over that crossing on many occasions, had she not?

A. Not so much; probably a few times; not so much. She had never been across there very many times.

Q. She knew that was a railroad track there?

A. Oh, yes, she knew it was a railroad track, all right.

Q. I understand that your house, where she lived there, you can see the trains go by and down the track at that point?

A. There are some few views, some places below that that pass.

Q. But even at your house you could see the smoke of the trains going up and down the crossing?

A. Yes; you could see the smoke. You could see the smoke for miles, yes; you can see smoke for a long
page 53 } ways.

Mr. McCandlish: That is all.

(The witness thereupon was excused and retired from the witness stand.)

A Juror: What time was that wreck?

Mr. McCandlish: What time?

The Juror: What time did the accident happen?

Mr. McCandlish: It was three something.

The Juror: It was in the afternoon?

Mr. McCandlish: Yes; three something. We will get that later. The train men can give it to you.

Mr. Miller: We can do that. We expect to prove that.

The Court: Who is the next witness, gentlemen?

Mr. Miller: Mr. Sheriff, call Mrs. Everett M. Smith.

MRS. EVERETT M. SMITH,
was called as a witness for and on behalf of the Plaintiff,
and, having been previously duly sworn by the Clerk of the
Court, assumed the witness stand and, upon examination, tes-
tified as follows:

DIRECT EXAMINATION.

By Mr. Scott:

Q. Please state your full name and age.

A. Twenty-five.

Q. Your full name?

A. Mrs. Everett M. Smith.

Q. Talk a little louder so all of us can hear you.

A. Twenty-five.

Q. What did you say your name is?

A. Mrs. Everett M. Smith.

Q. Mrs. Everett Smith?

A. Yes.

Q. Do you remember the accident in which Mrs. Ennis
and Miss Ennis were injured and killed?

A. Yes.

Q. Where were you living at that time?

A. I was living in the little red house, right here, right
across the road.

Q. Shown on that photograph (indicating a photograph
marked "Exhibit 7-a" which had previously been received
in evidence.)?

A. (After examining the photograph in question.) That
little red house right there (indicating).

Q. Did you see the accident?

page 55 } A. Yes, I did.

Q. Where were you when you saw it and what
were you doing?

A. I was upstairs in the middle of the floor, looking out
of the window.

Q. Looking out of the window, down on the crossing?

A. Yes.

Q. And what did you see?

A. When I first looked, I saw the car on the cross-
ing. I knew it was time for the train. So about the time I
saw the car, I heard one short blow of the train out of the
woods and I stood and watched and it blew another short
blow, about the Tool House, and then came the crash.

Q. Then came the crash?

A. Then came the crash.

Q. Were you listening for the approaching train?

A. Yes, I was; because I knew it was train time.

Q. Yes. You saw the crash?

A. Yes, I did.

Q. Did you see how many people were in the automobile?

A. It looked to me two; I did not see the small child.

Q. You did not see the small child?

A. No.

Q. Did you see the driver?

A. Yes, I did.

Q. Did you see her turn her head at any time, or when?

A. Just before the train struck it, she was looking up toward the track toward us.

Q. Just before it struck?

A. Yes.

page 56 } Q. That is the first time she turned her head?

A. Yes.

Q. You have given the signals that you have mentioned. Were there any other signals given or any bells rung?

A. No, sir; I do not remember hearing any bells.

Q. You heard no bell?

A. No, sir.

Q. Heard no whistle except what you have testified to?

A. Two blasts.

Q. What?

A. Two blasts.

Q. One down the track and one above the Tool House?

A. At the Tool House.

Q. Is your hearing good?

A. Yes, sir.

Q. Had there been any bells ringing, had the bell been ringing—

A. (interposing) No, sir; I did not hear it.

Q. (continuing) Would you have heard it?

A. It looked like I should have, right there.

Q. Right there?

A. Yes.

Q. Had there been any other blasts of the whistle than those you have given would you have heard those?

A. It looked like I should.

Q. You were right there?

A. Yes.

Mr. Scott: Take the witness.

page 57 } CROSS EXAMINATION.

By Mr. McCandlish:

Q. The first thing that you saw or heard was the automobile standing on the track where it was struck.

A. Yes.

Mr. McCandlish: That is all, of your Honor please.

Mr. Scott: Stand aside.

(The witness thereupon was excused and retired from the witness stand.)

Mr. Scott: Will you call Hugh Beach?

Thereupon

HUGH BEACH,

was called as a witness for and on behalf of the Plaintiff, and having been previously duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. Scott:

Q. Please state to the Jury your full name and age.

A. Hugh Beach.

Q. And your age?

A. Age, thirty-one.

Q. Your occupation, and where do you live?

A. Calverton.

Q. How close to the railroad crossing do you live?

A. Oh, I guess seventy-five or a hundred yards.

Q. You live in a house on the left as you approach?

A. Yes.

Q. The house, is it not on a hill?

A. On a hill.

page 58 } Q. It is on a hill?

A. Yes, sir.

Q. Where were you on the day of this accident?

A. I was across the field there, going across the road, going toward Kennett, the road running from Calverton to Kennett.

Q. How far from the railroad track were you?

A. I guess a quarter of a mile.

Q. A quarter of a mile. Was the railroad track in full sight?

A. Part of it.

Q. Did you have occasion to, or did you watch that train that day?

A. I saw the train, and how come I come to notice it, we went over in the field for blackberries; we went in the car with my wife and my mother-in-law and the children, and we were wondering whether to bring the cows back, but it as too early, and I got out in the right, and I seen the train coming and I said to my mother-in-law, "I think"—

Mr. McCandlish (interposing): I don't see that that has anything to do with it. I don't think he should tell what he said to her.

The Witness: I said that the cows were—

Mr. Scott (interposing): You have a right to say what you said.

The Witness: Yes, sir. I said that. I said that to my wife, and I—

Mr. McCandlish (interposing): I object to what he said to his wife, and I ask that it be stricken out.

page 59 } The Court: The Jury will not regard that.

Mr. Scott: What is that, a privileged communication?

By Mr. Scott:

Q. Your attention was directed to the train as you saw the road?

A. Yes.

Q. Where was that?

A. At the edge of Mr. Shumate's woods.

Q. And how long did you watch it?

A. Until it got out of sight.

Q. Until it got out of sight?

A. Yes.

Q. When did it get out of sight?

A. Right somewhere back of the Tool House.

Q. Back of the Tool House?

A. Yes, back of it a little.

Q. So you watched it from the time it passed the Shumate's woods until it passed the Tool House?

A. Yes.

Q. Now, tell the Jury what signals did that train give, either by blowing the whistle or ringing a bell?

A. I did not hear any at all.

Q. You did not hear any at all?

A. No, sir.

Q. Heard no whistle? At all?

A. No, sir.

Q. You did not see it. You were — could you have heard it where you were?

A. I should think so; I always hear them.

page 60 } Q. Your hearing is good?

A. Yes, sir.

Q. And you were watching the train?

A. Yes, sir.

Q. And you were watching the train?

A. Yes, sir.

Q. And you heard no signals given from the time—

Mr. McCandlish (interposing): I object to Mr. Scott testifying.

The Court: Yes.

Mr. McCandlish: The question is extremely leading—

Mr. Scott (interposing): No, I think it is perfectly proper to repeat what the witness said.

Mr. McCandlish: I ask the Court to pass on it.

Mr. Scott: If you object, I won't give the Court the trouble to pass on it; I will withdraw it. Don't be quite so nervous. Take the witness.

CROSS EXAMINATION.

By Mr. McCandlish:

Q. Now, let's see, Mr. Beach. You live where, sir?

A. Up on the hill there from the railroad.

Q. That is just a little indefinite.

A. I live on the Rand place, Winfield Kann owns the place.

Q. Winfield Kann's place?

A. Yes.

Q. The house that is nearest to the postoffice?

A. Yes, sir.

page 61 } Q. And that would be west of the track and north of the highway?

A. Yes, sir.

Q. And you say that you, with your family, had gone out to pick blackberries?

A. We went over to see if there were any, not for them.

Q. And in what field did you go?

A. Back in the woods.

Q. What?

A. Back in the woods, to see if there were any blackberries, but I was on the way back to my house.

Q. Where were the woods that you went to?

A. In the same place; I went back to the woods, through the woods, to see if the blackberries were out, on the hill.

Q. Let me get this straight: How far were the woods from the house?

A. I judge a half-mile.

Q. About a half-mile?

A. Yes.

Q. Half a mile west from the track?

A. Yes, sir.

Q. So, when you got there, in the woods, you were something like a half a mile from the track?

A. About a half a mile.

Q. And you went over there in a car?

A. Yes.

Q. Did you find any blackberries?

A. No, sir.

Q. Then, as you were coming back, were you
page 62 } still in the car?

A. Yes, sir.

Q. Was anyone with you then?

A. Yes, sir.

Q. Who was with you?

A. My wife and children.

Q. Your wife and how many children?

A. Three.

Q. What were their ages?

A. They were in the car.

Q. What were their ages?

A. One was five and one was three and the other one was about a year old; maybe not quite a year old.

Q. And you were going back to the house?

A. Yes, I was going back to the house, yes, sir.

Q. And how far from the track were you or where were you on the highway when you noticed this train?

A. I was not on the highway at all. I was at the highway, just across about a quarter of a mile.

Q. Were you out of your car or in your car?

A. In my car.

Q. Coming across the field to the highway?

A. I was right at the highway, yes, sir; about a quarter of a mile.

Q. And which direction were you then headed in?

A. Straight towards the house; towards the station.

Q. Heading towards the station?

A. Yes, sir.

Q. What sort of a car was it? What kind of a
page 63 } car were you driving?

A. A Whippet.

Q. What year car was it?

A. '28.

Q. What type of car was it?

A. It was a coach.

Q. A coach?

A. Yes.

Q. A four-cylinder motor?

A. Yes, sir.

Q. Was it a noisy motor or a quiet motor?

A. Very quiet.

Q. About four years old, was it?

A. That would not stop it being quiet, so much; I have
seen lots older than that make less racket.

Q. Were you on the road that runs over the crossing?

A. No, sir.

Q. Were you going to the road that runs over the cross-
ing?

A. No, sir.

Q. Over what road were you to get to your house?

A. Well, it is across the road; the road comes around the
house the other way, above the west end, you call it. I had
to go down the road and I made another turn.

Q. Were you traveling on a private road or a public road?

A. No, sir; I just traveled around on the place.

Q. You traveled around on the place and not on the road
at all?

A. Not on the road except when I crossed it.

page 64 } Q. As I understand you, you were not on the
road except when you crossed it, and you were
just going across the field?

A. Yes, sir, just going across the field.

Q. Did you have to run in second some when you had that
much load in the car?

A. I didn't have so much of a load, no, sir.

Q. Did you run in second, some?

A. I may have, yes, sir.

Mr. McCandlish: That is all, thank you, sir.

(The witness thereupon was excused and retired from the
witness stand.)

Mr. Scott: Will you call Mr. McConchie?

Thereupon

JOHN A. McCONCHIE,
was called as a witness for and on behalf of the Plaintiff,
and having been previously duly sworn by the Clerk of the
Court, assumed the witness stand and, upon examination,
testified as follows:

DIRECT EXAMINATION.

By Mr. Scott:

Q. State, please, your name, your age and your occupation.

A. Thirty-six.

Q. That is your age?

A. Yes, sir.

By the Court:

Q. Thirty-six years old?

A. Yes, sir.

By Mr. Scott:

page 65 } Q. I did not hear it.

A. Thirty-six.

Q. And your name?

A. John A. McConchie.

Q. Where do you live?

A. Remington.

Q. Remington?

A. Yes.

Q. Do you remember the day of the accident in which Mrs. Ennis—

A. (interposing) I was down there, but I don't exactly remember the date.

Q. You were there?

A. Yes.

Q. Where were you on that occasion?

A. I was in Calverton; I happened to be in Calverton that day.

Q. You happened to be in Calverton that day?

A. Yes.

Q. Before the accident, where were you; just before?

A. Well, I was over to the depot and on my way back to Spicer's garage.

Q. At the depot, across the railroad track on the way to the—

A. (interposing) Spicer's garage.

Q. How far had you got toward Spicer's garage?

A. Well, I had crossed the railroad and was about half-way between the railroad and Spicer's garage.

Q. How far from the railroad would you say you were?

A. Well, I guess about seventy-five feet.

page 66 } Mr. McCandlish: That is shown according to the stipulations.

Mr. Scott: He said about half-way.

The Witness: I don't know how far. It was about fifty yards; somewhere around that.

By Mr. Scott:

Q. About fifty yards from the railroad crossing?

A. From the crossing, yes.

Q. Tell the Jury, please, what attracted your attention and what you heard?

A. Why, I was walking along. I did not pay, I was not paying attention to anything, but the train blew real sharp and I turned my head and happened to see the car standing on the track and I turned around and, a few seconds, I started to run straight toward the car and the crash came and hit the car.

Q. Between the blow of the train and the crash, how long was it?

A. It was just a few seconds it seemed like to me, yes.

Q. Just a few seconds?

A. Yes.

Q. Did you hear any other blows?

A. Well, I did not, but of course I did not pay much attention to the train. I live right beside a railroad track; I do not pay much attention to the trains, but I did pay attention to the steam blow.

Q. You did pay attention to the blow?

A. Yes.

Q. Did you hear any bell ringing?

page 67 } A. I cannot say. Someone asked me that day, but I could not say whether the bell rang or not. I did not pay attention to the bell.

Q. But you did not hear but one blow?

A. I heard the blow, yes, sir. That is what attracted my attention. I turned around.

Q. You heard the blow; that attracted your attention?

A. Yes, a keen blow.

Q. And there were a few seconds between the blow and the crash?

A. Yes.

Mr. Scott: That is all.

CROSS EXAMINATION.

By Mr. McCandlish:

Q. As I understand it, you were walking, Mr. McConchie?

A. Yes.

Q. You pronounce your name how?

A. McConchie.

Q. McConchie?

A. Yes.

Q. You were walking along the highway that passes over the railroad?

A. Yes, sir.

Q. That passes over the railroad?

A. That passes over the railroad, yes, sir.

Q. And going in an easterly direction?

A. In an easterly direction; yes, sir.

Q. And after passing over the railroad crossing, of course, the railroad was to your back?

page 68 } A. Yes.

Q. And you were going down toward Spicer's garage?

A. Yes.

Q. And you had gotten, as I understand it, about half-way down there?

A. Yes, about half-way down there, I guess; there is a kind of a little bend in the road it seemed like to me.

Q. When you heard some blasts from this whistle?

A. Yes, I heard a blast.

Q. That was the first thing—

A. (interposing) That was the first thing that attracted my attention.

Q. The first thing that attracted your attention was the blowing of the whistle?

A. Yes.

Q. Were there two sharp blasts at that time?

A. I do not recollect. It seemed like it was either one or two right together. I do not really remember. It was just before the crash, though.

Q. And at that time you turned; when you heard the blast of the whistle and you saw this automobile standing on the track?

A. I saw it standing on the track.

Q. Now, it had apparently stalled on the track?

A. It looked like to me, from the position it was in, it stalled; because it was struck right where I saw it.

Q. It did not move after you saw it?

A. The train moved—

Q. (interposing) After it was hit, it did not
page 69 } move of its own power?

A. No.

Q. You did not pay any attention as to whether a bell was ringing or not, and would not undertake to say?

A. No, I cannot say. I am so used to trains, living close to the track that I don't pay much attention to it.

Q. And if the whistle of the engine sounded before that—

A. (interposing) I would not pay any attention to it at all.

Q. And you cannot say whether it did or did not?

A. No, I cannot. But I did hear the keen blow, as I said before.

Q. You heard the keen blow?

A. Yes.

Q. A sharp blast?

A. Yes, a sharp blast. They did not give me any chance—I saw them hit it; I turned my head as it hit the car. I did not want to see it.

Q. You told Mr. Scott it may have been several seconds, but you do not undertake, in that situation, to say whether it was one second, two, or three, or a half a second?

A. It was pretty quick after it. I turned, and just as I turned, the crash came.

Mr. McCandlish: That is all.

(The witness thereupon was excused and retired from the witness stand.)

Mr. Miller: Please call Mr. Tyler, Elmer Tyler.

Thereupon

page 70 } ELMER TYLER,
was called as a witness for and on behalf of the Plaintiff, and having been previously duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. Miller:

Q. What is your name?

A. Elmer Tyler.

Q. How old are you?

A. Twenty-five.

Q. Where do you live?

A. Calverton.

Q. Where were you at the time Miss Ennis was killed at Calverton?

A. Back of Spicer's garage.

Q. Back of Spicer's garage?

A. Yes.

Q. About how far from the crossing where she was killed?

A. Well, the air line would be about 100 yards.

Q. About 100 yards?

A. Yes.

Q. What were you engaged in at the time of the accident?

A. I was getting ready to hook up a water hose to wash a car.

Q. Did you hear— or, state what signals you heard given by the train before, at the time of and before approaching that crossing?

A. Well, as close as I can get to it, there was toot, toot, and it struck.

page 71 } Q. Did you hear any signals given before then?

A. No, sir.

Q. Did you hear any bell ringing before approaching the crossing?

A. No, sir.

Q. Could you have heard other signals from the whistle or bell if they had been sounded?

A. Yes, sir.

Q. You did not hear them?

A. I did not hear them; no.

Q. So your attention— why did you hear those two sounds; why was your attention attracted to it?

A. Because it was a short blow.

Q. Short blows?

A. Yes.

Q. How long would you say about? I understood you to say immediately before the collision. Is that right?

A. Yes.

Mr. Miller: Take the witness, gentlemen.

CROSS EXAMINATION.

By Mr. Candlish:

Q. You say you were behind Spicer's garage?

A. Yes, sir.

Q. By that you mean you were on the far side of Spicer's garage from the railroad track?

A. Yes, sir.

Q. Then you could not see up there to the crossing?

A. No, sir.

Q. And you say you were getting ready to connect up a water hose?

A. Yes, sir.

Q. And you were not paying any attention about the train until you heard the train blow toot, toot; that attracted your attention?

A. That is the first thing that attracted my attention?

Q. That is the first thing; those sharp blasts of that whistle?

A. Yes.

Q. And you did not hear it go three times: toot, toot, toot?

A. I could not say.

Q. Well, now, you stated in response to a question by Mr. Miller that you heard it twice. I am asking now if you did not hear it three times?

A. No. I just said: toot, toot. More than that would be two instead of one.

Q. Might it not be just as apt to be three as well as two?

A. I would not say it would not be.

Q. You would not say it would not be. And that was the first thing you heard about it, and the first thing that attracted your attention?

A. Yes.

Q. And very shortly after that you heard the crash?

A. Yes.

Q. And the trains when they come in, they do not sound that little toot, toot, toot, unless there is some danger?

A. Not usually.

page 73 } Q. That was a kind of a different blast from what they generally sound?

A. Yes.

Q. Little short, quick toots?

A. Yes.

Q. That is a danger signal; on the railroad, is it?

A. Yes.

Q. And that is what you heard?

A. Yes, sir.

Q. And that is the first thing you did hear?

A. Yes.

Q. And before that you were not paying any attention one way or another?

A. No; I was not looking for a train; but I would have heard it if he had blown then.

Q. Who told you to say that?

A. Nobody told me.

Mr. Miller: He is our witness, Mr. McCandlish.

Mr. McCandlish: I understand that, Mr. Miller.

Mr. Miller: I know. We don't tell our witnesses what to say.

Mr. McCandlish: I understand that. I have a right to ask the question and, in asking the question, I do not think I have violated any proprieties.

Mr. Miller: No, we do not tell them, but you do.

Mr. McCandlish: I object to the intimation or insinuation.

Mr. Miller: You said it first.

Mr. Scott: You first started it.

Mr. McCandlish: I did not make any such insinuation.

Mr. Miller: Well, I don't think—

Mr. Scott (interposing): I don't think he made any insinuation either. I say—

The Court (interposing): Let us pass it by just now. We cannot gain anything by it.

Mr. McCandlish: I have no further questions.

The Court: Stand aside.

(The witness thereupon was excused and retired from the witness stand.)

(Thereupon at 3:09 o'clock p. m., Counsel for the Plaintiff engaged in an informal discussion among themselves which continued until 3:22 o'clock p. m., when the following occurred:)

The Court: All right, gentlemen, let us proceed.

Mr. Miller: Mr. Sheriff, call Mr. Stewart Eustis.

Thereupon

STEWART EUSTIS,
was called as a witness for and on behalf of the Plaintiff,
and having been previously duly sworn by the Clerk of the
Court, assumed the witness stand and, upon examination, tes-
tified as follows:

DIRECT EXAMINATION.

By Mr. Miller:

Q. State your full name.

A. Stewart Eustis.

Q. And your age.

A. Twenty-nine.

Q. Where do you live?

A. Calverton.

Q. Where were you the 21st of June, the time
page 75 } Miss Ennis was killed?

A. I was in the warehouse, just east of the main
line.

Q. How far from the spot where she was killed?

A. About 70 feet.

Q. Did you hear any whistle sound before reaching the
crossing where she was killed?

A. I did.

Q. What did you hear?

A. Well, I heard one long blast and several short ones.

Q. How long before the accident?

A. Almost instantly.

Q. Did you hear the bell ringing up to that time?

A. I did not.

Q. Or any blowing of the whistle other than what you have
mentioned?

A. No.

Q. Would you have heard such if there had been any sig-
nals?

A. I think so.

Mr. Scott: When did he say it happened after the blast?

Mr. Miller: Almost instantly.

By Mr. Miller:

Q. Almost instantly; was the time you said elapsed be-
tween the long blast and short—

A. (interposing) There was no time between the long
blast and the short blast worth mentioning.

Q. All right. And the crash took place immediately?

A. Yes.

page 76 } Mr. Miller: All right. Cross examine.

The Court: Is there any cross examination?

Mr. McCandlish: Yes.

CROSS EXAMINATION.

By Mr. McCandlish:

Q. Your name is Stewart D. Eustis?

A. Yes, sir.

Q. Where did you say you were when you heard the blast of the whistle?

A. I was in the warehouse, about seventy feet from the crossing.

Q. Seven or seventy?

A. Seventy.

Q. You were in the warehouse?

A. Yes.

Q. You mean that red building?

A. Between Mr. Jacobs' store and Mr. Spicer's garage.

Q. And on the opposite side of the highway from those buildings or on the same side of the highway?

A. On the same side as the store and garage.

Q. You were between Mr. Jacobs' store and Spicer's garage?

A. Yes.

Q. And inside this building?

A. Yes.

Q. What sort of a building was it?

A. Just a plain board building, a frame building.

Q. Now, whereabouts were you in that building, Mr. Eustis?

A. Just about the center, I guess it was.

Q. The center, you say?

page 77 } A. Yes.

By the Court:

Q. Is it just a one-room building; one room in that building?

A. One lower one and one above.

By Mr. McCandlish:

Q. And what was the size of that room, about? Could you give us any idea?

A. I would say it was about twenty by thirty, something like that.

Q. Twenty by thirty feet?

A. Something like that.

Q. And then from your position you could not see the train or the railroad track or the crossing, could you?

A. No.

Q. And what were you doing in there, Mr. Eustis?

A. Well, nothing in particular; I just happened to be in there.

Q. Were you talking to anyone?

A. I was alone.

Q. Did you have any particular business in there?

A. No.

Q. Do you remember what you went in there for?

A. Oh, I guess I—

Q. (interposing) And the first thing that attracted your attention was the sharp blasts of this whistle?

A. The long blast.

Q. Then that was followed by shorter toots?

A. Yes.

page 78 } Q. Well, those—that is not the regular way the train blows the whistle when it comes in. That is a danger signal?

A. Short blasts.

Q. Short blasts; and the long blasts were followed immediately by the short blasts?

A. No, the short blasts were followed immediately by—you are right. They all came along together; the long blast and then several short, to be exact.

Q. And before that time you had not been paying any particular attention, one way or another, until your attention was attracted that way?

A. No.

Q. And that was the very first thing you heard?

A. Yes.

Q. And you say that almost instantly the crash came?

A. Yes.

Q. Will you undertake to say whether one, two, three, four, or five seconds passed between the last blast of the whistle and the crash?

A. No.

Q. It just happened pretty quick?

A. Yes.

Q. And that is about all you mean to say: You could not undertake to say how long it was?

A. No.

Q. It was an unusual thing to have that signal given; that was very unusual?

A. I knew that was a distress signal.

Q. You knew that it was a danger or a distress
page 79 } signal?

A. Yes.

Q. How long had you been in the building? Have you any
idea?

A. About a minute.

Q. You had been in there about a minute or so?

A. Yes.

Mr. McCandlish: That is all, Mr. Miller.

Mr. Miller: Stand aside.

(The witness thereupon was excused and retired from the witness stand.)

The Court: What is the next witness, please? Let us have your next witness, please, gentlemen. Have you any witness?

Mr. Miller: We are considering whether we will stop or not. Mr. Arnold Grinnan; is he in the room? Mr. Sheriff, please call Mr. Grinnan.

Thereupon

ARNOLD GRINNAN,
was called as a witness for and on behalf of the Plaintiff, and having been previously duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. Scott:

Q. State to the Jury your name and age and residence.

A. Arnold Grinnan; twenty-one years of age; I live in Stafford County.

Q. Do you remember the time of the accident
page 80 } in which Mrs. Ennis and Miss Ennis were killed?

A. Yes, sir.

Q. Tell the Jury where you were at that time and what you were doing.

A. We were hauling wood for Charley Coakley up to Calverton.

Q. Speak up a little louder. You were hauling wood to where?

A. To Calverton, from White Ridge.

Q. You unload it at what point?

A. At Calverton station. That is where I was hauling to.

Q. I want to know where was your unloading point, on which side of the road?

A. It was on the side—we did not have to cross the track at all.

Q. You did not have to cross the track at all?

A. No, sir.

Q. And you were going about where, was it about where the freight depot is?

A. Yes.

Q. That is where you were bound for?

A. Yes.

Q. That siding?

A. Yes.

Q. Who was driving the truck?

A. Lon Burton.

Q. What were you doing?

A. Helping him on the truck.

page 81 } Q. Just sitting on the truck?

A. Yes.

Q. Not doing anything?

A. No.

Q. At the time of the accident, what point had you reached?

A. We were about two hundred yards or two hundred and fifty of the crossing up there.

Q. From the crossing?

A. Yes.

Q. On the east side?

A. Yes.

Q. Could you see the crossing?

A. Sir?

Q. Could you see the crossing?

A. No, sir.

Q. Why couldn't you see the crossing?

A. Well, there was some trees and houses there on the side and we couldn't see them from where we were at.

Q. Did you go to the crossing after the accident?

A. Yes, sir.

Q. Now, before you got to the crossing, when you were at the point you have referred to, could you see the train coming from the north?

A. Yes, sir; we could see it coming down the track above the crossing, up towards the edge of the woods, up there.

Q. You could look and see it towards the woods?

A. Yes, sir.

page 82 } Q. Did you see the train that day?
A. Yes, sir.

Q. Did you watch it?
A. No, sir. We didn't watch it, no, sir. We seen it coming down the track.

Q. You saw it coming down the track?

A. Yes, sir.

Q. Did you watch it until it got out of sight?

A. No; well, I know there were some houses and things there on the side. We seen it come on down and all of it was not out of sight.

Q. While the train was in your sight, did you hear any signals given?

A. No, sir.

Q. Did you hear any bell ringing?

A. No, sir.

Q. Were you in a position where you could have heard?

A. Yes.

Q. Had you previously heard from that point, before?

A. Yes, sir, we had.

Q. Your hearing is good or bad?

A. Good.

Mr. Scott: You may take the witness.

CROSS EXAMINATION.

By Mr. McCandlish:

Q. Now, as I understand it, you were approaching the crossing, traveling in a westerly direction?

A. Yes, sir.

Q. And you were some three-hundred yards from the crossing?

page 83 } A. Yes; I guess about that; just to guess it.
I don't know.

Q. And what did you— what sort of truck did you have?

A. 1929 Ford truck.

Q. Were you traveling on the public highway?

A. Yes, sir.

Q. What was it, was it a Model-T or a Model-A?

A. A Model-A truck.

Q. Were you loaded or unloaded?

A. Yes, sir, loaded.

Q. What did you have on it?

A. Excelsior wood.

Q. What?

A. Excelsior wood.

Q. You mean, by that, just ordinary cord wood stripped to make paper out of, or excelsior?

A. Yes, sir.

Q. How much did you have on?

A. I don't know exactly; I guess about a cord.

Q. Do you remember whether you were traveling in high gear or second, or what?

A. It was kind of downgrade there, just running down slow; not high speed; it was not pulling any.

Q. Were you in second speed or high speed?

A. High.

Q. High speed?

A. Yes.

Q. Now, you say that you could see the train down there at the woods?

page 84 } A. Yes, sir. We could see it coming down from up towards the woods. We had been making our regular loads in about that time of day, and we were talking about it when we seen the train come in, we were about on time that day.

Q. You were about on time that day?

A. Yes, sir. We made regular loads of wood each day at about that time —

Q. (interposing) The train was due at about that time?

A. Yes, sir.

Q. And the train was about on time, too?

A. Yes. The train was about on time too.

Q. The train always went down there about that time every day?

A. Yes, sir, about that time every day, and we would always be there pretty close.

Q. Now, you say from where you were looking over toward the direction of the woods, what woods are those? The Shumate woods?

A. I guess so, I don't know.

Mr. Miller: That is what they call it.

By Mr. McCandlish:

Q. You say your view over in that direction was obstructed by trees, bushes and houses to some extent?

A. Yes, sir; after it came on down the track farther and we went on down farther.

Q. Well, you were, of course, moving along yourself?

A. Yes, sir; moving along too.

Q. You looked up there, and was it about at
page 85 } the woods? Is that it?

A. Yes.

Q. And you did not watch it or pay any particular attention to it after that?

A. No, we did not; we did not watch it on down. We could not have seen it all the way down.

Q. You could not have seen it all the way down?

A. No, sir.

Q. Well, you did not see it either very far after it left the woods?

A. We never seen it so far after that; about the only time we saw it was up by the woods.

Q. About the only time you saw it was about up near the woods?

A. Yes.

Q. You glanced at it and saw it up there, and then paid no attention to it?

A. No, sir.

Q. Were you paying enough attention to hear it blow right there at the crossing just before this accident?

A. No, sir; we never heard it blow at all.

Q. You did not hear those blows?

A. No, sir, I did not.

Q. If it had blown at that time, could you have heard it?

A. I don't know whether I had been hearing it.

Mr. McCandlish: That is all.

Mr. Miller: Stand aside.

(The witness thereupon was excused and retired from the witness stand.)

Mr. Miller: We rest for the Plaintiff.

page 86 } Mr. McCandlish: All right.

(Thereupon at 4:45 o'clock a recess was had until 4:50 o'clock, p. m., when the following proceedings and transactions were had:)

The Court: Mr. Sheriff, take the Jury out to the Clerk's office. One of them, I think, wants to telephone and I want to keep them together.

(The Sheriff then escorted the Jury from the Court Room and, when the Jury had left, the following occurred:)

Mr. McCandlish: Has your Honor decided how long you will sit this afternoon?

The Court: We will run until about five o'clock.

Mr. McCandlish: If your honor please, we want to submit a motion to strike out all the Plaintiff's evidence in this case on the ground that Plaintiff's evidence shows no negligence on the part of the Railroad Company which resulted proximately in the death of the Decedent; on the ground that the evidence on behalf of the Plaintiff shows conclusively that the proximate cause of the accident was the stalling of the automobile on the track; and that the accident was due entirely to the negligence of the driver of the car; and the Decedent, unless it be considered as an unavoidable accident in view of the unexpected stalling of the car on the track, did not sustain her injuries or death as a result of negligence on the part of the Railroad Company. The evidence of the Plaintiff on the question of failure to give the statutory signals is entirely insufficient, in my judgment, under the Virginia decision, and is of a negative character and, page 87 } therefore, not sufficient to support a verdict, not being the quality of evidence that is required by the decisions of our Court of Appeals in decisions of this character.

(Counsel for the respective parties argued this motion at length following which the Court stated:)

The Court: I think the Jury ought to pass on the question.

Mr. McCandlish: We note an exception, if your Honor please, on the grounds stated in the motion.

The Court: Yes.

Mr. McCandlish: Call Mr. Price.

Thereupon

Y. P. PRICE,

was called as a witness for and on behalf of the Defendant, and having been previously duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Please state your full name.

A. Y. P. Price.

Q. Y. P. Price?

A. Yes.

Q. And your occupation—

A. (interposing) Draftsman with the C. & O.

Q. Did you make this plat we have introduced in evidence here? (Exhibiting the plat in question.)

A. (After examining the document in question)
page 88 } I did.

Q. This blueprint?

A. I did.

Q. And you made the measurements which are shown on the plat?

A. Yes.

Mr. Miller: We agree to that.

Mr. McCandlish: I understand that. I want the Jury to know that he is the same man and I want to ask him about just one or two or perhaps three measurements.

Mr. Miller: Yes.

By Mr. McCandlish:

Q. Now, will you take that blueprint or plat and say what is the distance between the northbound track and the southbound track?

A. That is fourteen feet.

Q. From center to center?

A. From center to center.

Q. From center to center is fourteen feet?

A. Fourteen feet.

By Mr. Miller:

Q. Fourteen feet, did you say?

A. Yes, sir.

By Mr. McCandlish:

Q. Now, what is the distance between the southbound track and the Warrenton Y track, measured along the— well, I don't know what this measurement is; measured along from center to center, track center to track center, on the crossing?

Mr. Scott: Southbound?

Mr. McCandlish: The Warrenton track.

page 89 } Mr. Scott: And what else?

Mr. McCandlish: The southbound main track.

The Witness: How long to the center of the crossing?

By Mr. McCandlish:

Q. Yes; just measure it along the center to the crossing.

A. That is twenty-three feet.

Q. Then measure it—

Mr. Miller (interposing): I did not get that figure.

Mr. McCandlish: Twenty-three feet.

By Mr. McCandlish:

Q. And, the distance measured along the north edge of the crossing? That is what?

A. Twenty feet.

Mr. Miller: What is that: from the north edge of the crossing?

Mr. McCandlish: Yes.

Mr. Scott: The distance from the north edge of the crossing?

Mr. McCandlish: Yes.

Mr. Scott: Between what two points?

Mr. McCandlish: Between the center—

Mr. Price (interposing): Between centers.

Mr. McCandlish: Between centers of the southbound main track and the Warrenton track.

Mr. Miller: Yes.

By Mr. McCandlish:

Q. Now, measure it along the south end of the crossing—

Mr. Scott (interposing): And what distance did he say?

Mr. McCandlish: Twenty feet.

page 90 } Mr. Scott: Twenty feet; and the other distance?

The Witness: Twenty-five feet.

Mr. Scott: I—

Mr. McCandlish (interposing): The south edge of the crossing.

Mr. Scott: From the south edge of the crossing?

Mr. McCandlish: Yes.

Mr. Scott: What was that figure?

Mr. McCandlish: Twenty-five feet.

Mr. Miller: All right.

By Mr McCandlish:

Q. What about the grade as you travel east along the highway toward the track just before you get to the Warrenton track?

A. Well, that grade along there is considerable; a five per cent grade.

Q. Up or down?

A. Ascending up.

Q. Ascending up?

A. Yes.

Mr. Miller: I cannot hear the witness to save my life.

Mr. McCandlish: He says it is a five per cent ascending grade.

Mr. Miller: A five per cent ascending grade?

Mr. McCandlish: Yes, sir.

By Mr. McCandlish:

Q. Is there any grade, upgrade, going in the same direction before you get to the Warrenton track? Is that five per cent; does that hold there too?

page 91 } A. Well, the five per cent grade holds within one hundred feet.

By Mr. Miller:

Q. How many feet?

A. Within one hundred feet.

Q. Within one hundred feet of what?

Mr. McCandlish: Of the Warrenton track.

The Witness: There is some little grade in the crossing there.

Mr. Miller: Can you gentlemen up here hear the witness? I cannot hear a word he says.

The Court: Talk up louder.

Mr. McCandlish: All he testified to—

Mr. Miller (interposing): Let the witness state what he said. You objected to my testifying for my witness.

The Court: Just raise your voice.

By Mr. Miller:

Q. Now, Mr. Witness, if you will repeat so that I can hear you: five per cent ascending grade from what point to what point?

A. Well, it is some grade back as far as one hundred feet,

but it is just a five-foot rise in the entire distance of the one hundred feet.

Q. You measured it one hundred feet from the Warrenton track?

A. No, not from the Warrenton track, but the grade along there. A five per cent grade means a five-foot rise in one hundred feet, but the grade would not be five feet page 92 } all the way back there. It would mean that much rise in the entire distance.

Q. A distance of one-hundred feet west of the Warrenton track?

A. Well, yes; west of the center of the southbound main line.

Q. West of the center of the southbound main line track?

A. Yes.

Q. Main track?

A. Yes.

Mr. Miller: Well, that is very much different from what I understood you to say.

Mr. McCandlish: All right, sir.

By Mr. McCandlish:

Q. Now, on this plat there is shown a certain hedge, marked with certain little circle markings on the plat marked "hedge". Tell the Jury whether or not that is on the railroad right-of-way.

A. The right-of-way line runs along that hedge.

Q. I am asking you now whether that hedge is on the right-of-way or off the right-of-way?

A. I would not be able to tell you that, to answer the question, because I have not got that on here.

Q. What—

Mr. Miller (interposing): Talk out so everyone can hear what you say.

The Witness: I have not the right-of-way line shown on the map.

page 93 } By Mr. McCandlish:

Q. You have been on the ground?

A. I have been on the ground but did not locate it.

Q. Do you know as a fact whether that hedge is on private property or railroad property?

A. I don't know.

Q. You don't know?

A. No.

Mr. McCandlish: All right, that is all.

CROSS EXAMINATION.

By Mr. Scott:

Q. You spoke of the five per cent grade for a distance of one hundred feet west of the center line of the southbound track, I think. Did I understand you correctly?

A. Yes.

Q. What?

A. Yes; that is correct.

Q. Now, is it not true that that is not a uniform five per cent grade?

A. It is not uniform.

Q. It is more than five per cent or more than a five per cent grade as you approach, but when you get to a point opposite to the postoffice building—

A. (interposing) You cannot say that because when you speak of the grade you have to speak of it as a whole one hundred feet.

Q. But, I am talking about it as a grade. Isn't page 94 } the grade more abrupt there than it is elsewhere?

A. I don't understand your question.

Q. Well, start at the point opposite the postoffice, pointing toward the track. You have it there sharply?

A. That is right.

Q. And after going a short distance, you hit the Warrenton track?

A. That is right.

Q. And from the Warrenton track to the south of the track is practically level?

A. Yes.

Q. Say you have taken here the average?

A. Yes.

Q. Then, as a matter of fact, then if that grade is fifty feet instead of one hundred feet, it would be one-tenth of a center grade, would it?

Mr. Miller: It would cut it.

By Mr. Scott:

Q. Before reaching the Warrenton track it is much more than a five per cent grade?

A. It is sharper at that point.

Q. Level on top and sharp to that point?

A. Yes.

Q. For the first fifty feet it is sharp and for the next it is practically level?

A. That is it.

Mr. Scott: That is all.

(The witness thereupon was excused and retired from the witness stand.)

page 95 } Mr. McCandlish: Call Mr. Turner.

Thereupon

U. G. TURNER,

was called as a witness for and on behalf of the Defendant, and having been previously duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Your name is U. G. Turner?

A. Yes, sir.

By Mr. Scott:

Q. What is the name? Turner?

A. Turner, yes. U. G. Turner.

By Mr. McCandlish:

Q. What is your employment, Mr. Turner?

A. Conductor on the C. & O., passenger conductor.

Q. Were you a passenger conductor on the Chesapeake & Ohio Railway train Number 5, June 21, 1932?

A. Yes.

Q. And you, as conductor, what were your duties?

A. Why, to look after the running of the train, collecting the transportation.

Mr. Scott: I will have to get the witness to talk louder.

The Witness: Looking after the running of the train; had full charge of the train, collecting transportation.

By Mr. McCandlish:

Q. You are the captain of the train?

A. Yes.

page 96 } Q. You had charge of it?

A. Yes, sir, I had charge of it.

Q. Now, how many cars did you have in that train?

A. Nine.

Q. Nine coaches?

A. No, sir.

Q. Cars?

A. Nine cars.

Q. Nine cars?

A. Yes.

Q. What was the length of those cars, approximately?

A. About seventy-two feet.

Q. They were all passenger cars, were they?

A. Express, mail and passenger.

Q. Express cars, mail and passenger cars?

A. Diner and sleeper.

Q. And your engine was approximately how long?

A. About eighty feet; eighty-six, I believe.

Q. Eighty or eighty-six feet?

A. Yes.

Q. Who was your engineer on that train?

A. Mr. Oliver.

Q. Name the other members of the crew. Mr. Oliver was the engineer?

A. Yes; Mr. Davis was the fireman; Mr. Lowry was a member of the crew and Mr. Lane.

Q. All right. Anyone else?

A. Mr. Johnson was the porter.

Q. Mr. Johnson was a colored man?

page 97 } A. Yes.

Q. On that particular day was there any traveling fireman on the train?

A. Yes, sir; Mr. Britton.

Q. Mr. Britton?

A. Yes.

Q. Tell the Jury, now, where were you, whereabouts were you in the train when you got to Calverton that afternoon?

A. I was on the rear end of the fifth car from the engine, on the west side.

Q. On the rear end of the fifth car from the engine?

A. Yes, on the west side.

Q. Why do you say the west side?

A. Because it was on the west side.

Q. Oh.

A. It was on the side, the same side that Warrenton is on; the same side of the track.

Q. What time did the accident occur?

A. We were due there at 3:22 and it occurred at 3:26.

Q. 3:26?

A. When we stopped it was 3:26.

Q. You were due there at 3:22 and stopped at 3:26?

A. Yes.

Q. Where was your train with reference to the crossing, when it stopped?

A. We were seven cars, the engine and seven cars and a half over the crossing, south of the crossing.

Q. And the eighth car was on the crossing?

A. The eighth car was on the crossing.

page 98 } Q. And ninth toward Washington?

A. The dining car was standing half across the crossing; that is the eighth car.

Q. Do you recall what you were doing as you went into the crossing, what you yourself were doing?

A. Yes, sir.

Q. What?

A. I always write all of my work in that car, in the passenger end of the car.

Q. Yes.

A. Going into the station there where they usually stop for passengers; it is a flag stop.

Q. Speak up louder.

A. Going into the station where we have a flag stop, we usually pick up passengers and there is a telegraph station and we always look out of the side of a telegraph station to see whether we receive passengers.

Q. Please talk up.

A. And to observe the signals, the condition of the signals, whether to proceed or stop, and that being the place to receive any passengers that may want to come on.

Q. You say Calverton is a flag stop for Number 5?

A. Yes, sir, a flag stop for Number 5. We pick up passengers for Charlottesville and points west.

Q. Now, just tell the Jury what you know about the accident. Before I get to that as you went in, please state whether or not you heard any signals blown or given.

A. Yes, sir. I always go out, going into the
page 99 } station, probably five or six hundred yards before reaching the station, and about the time I went out on the rear end and opened the side door, the engineer blew for the station, the station signal, one long blast of the whistle and—

Q. (interposing) Well, now, do you know where the station, how far the station signal post is from the crossing?

A. Why, about five or six hundred yards, or seven or eight. The station whistle—

Q. (interposing) All right.

A. And after he blew the station whistle, why he blew two long blasts, and then there was a little stop and he blew one short and blew two more, the last long blast just about the time he got to the switch that goes off up the Warrenton branch and the time he stopped the whistle, stopped blowing, the brakes went down. It was just about the switch that goes off up the Warrenton branch, at the signal.

Q. Leave out the station signal that you spoke of as having been blown five hundred or six hundred yards up the track. Where was the train when the next signal started blowing with reference to— Do you know whether— Do you know where the signal post, the station signal post is on the track, the road crossing signal?

A. Yes.

Q. Where was the train with reference to that when you heard the next signal, after the station signal?

A. Well, he was just at about that signal.

Q. Yes.

A. We were. The signal, the whistle had just
page 100 { stopped a very few seconds until the second whistle started, the station signal and the crossing signal.

Q. Yes.

A. Of course, running at a speed of thirty-five or thirty miles, a very few seconds elapsed between the two sounds.

Q. Yes.

A. The station signal and the crossing signal.

Q. You said there were two what?

A. Two long blasts of the signal after giving the station signal, which was one long blast. The next signal was the crossing signal which was two long blasts and a little interval and then one short and two long blasts which did not stop until the brakes went down. That was just about the point of the switch leading off to the Warrenton branch. I was right on that side all the time and never closed the door.

Q. From the whistle post which is 1,512 feet, 1,519 feet, north of the crossing from the road crossing whistle post to the crossing, what blast did the engine give?

A. Really it gave four distinctive blasts.

Q. Did you hear any short toots down near the crossing?

A. No, I did not.

Q. You did not hear that?

A. No. I was five cars away. He may have made those but it was practically the same whistle that he had been whistling all the time which was one continuous one; he may have made those little short ones before he applied the brakes.

Q. From where you were did you hear any page 101 } bell ringing or not?

A. No, sir. It is mighty hard to hear a bell five cars from the engine with the train running.

Q. You did not hear any bell?

A. No.

Q. How long was it, if you can say, between the last blast of the whistle that you heard and the brakes going on?

A. As one stopped, the other went on. The whistle stopped, the brakes went on. The indications are he let go the cord and applied the brakes.

Q. What sort of a braking was that?

A. What they call a—

Q. (interposing) I mean that, I did not mean that; what I meant was, how did he— Could you tell from where you were how the brakes had been applied?

A. Yes, sir.

Q. Well, how had he applied the brakes?

A. In emergency.

Q. How could you tell that?

A. By the way they took hold, the way the train jerked; it had a tendency to jerk the train like that. An ordinary service application, the train gradually slows down without any jerk about it, but the emergency brakes take hold on the front car before the rear and that causes a jerk.

Q. They put them on pretty hard for an emergency?

A. Yes, sir, when they go down.

Q. Is there any difference between that and the ordinary service application of brakes to slow up at a stop at a station?

A. Yes, sir. The ordinary service application, page 102 } you run in the station and you won't feel the train until it stops.

Q. Tell the Jury what you know about the accident, Mr. Turner.

A. Well, when the train stopped, of course I did not know but what there were passengers, and I ran back to the office and I did not see any passengers and I asked the operator what had happened and he said: "You hit somebody."

Q. You need not tell the Jury what you said, just what you did. You got off your train and went up?

A. Yes, sir.

Q. What did you do and see?

A. I got off the train and after— I did not see any obstructions; I went across on the opposite side and I found that we had crippled the people and I got right back and asked the operator if there was a doctor around and he said:

“No; the nearest doctor is at Warrenton.” and I said: “Call the doctor immediately and call an ambulance.”

By Mr. Scott:

Q. You said— and what?

A. I told him to call the doctor immediately and to order an ambulance from Warrenton. And after we found one of the patients was, or people was crippled, or alive, we got a stretcher and put her on the stretcher. Of course we could not move the other person because they were dead. We are not allowed to move any dead person.

By Mr. McCandlish:

Q. Did the Coroner come over there?

page 103 } A. Yes.

Q. Do you remember what the name of the Coroner was, or do you know his name?

A. Yes, sir, I have it down in the books, somewhere. Moseley.

By Mr. Scott:

Q. Dr. Davis, wasn't it?

By Mr. McCandlish:

Q. Was it Doctor Davis?

A. No, sir, no.

Q. You do not think Doctor Davis was the Coroner?

A. No, sir.

Q. These gentlemen here say that he is. I don't know who is right.

A. The Doctor said he was a Coroner. The Doctor came down and he was the Coroner and the Doctor too.

Q. Just one man came and he said that he was both Coroner and Doctor?

A. Yes, sir.

Q. You did not know him before?

A. No, sir.

Q. Did the Coroner make any investigation around there?

A. No; only he examined the lady who was crippled and took the other lady up and put her on a stretcher and carried her over on the postoffice platform.

Q. Now, when your train went into Calverton, was there any other train occupying other tracks there; any others? If so, please state.

A. Yes; there was a northbound freight train,
page 104 } north of the crossing, standing north of the crossing at Calverton.

Q. On what track?

A. On the passing track.

Q. On the passing track?

A. East of the northbound main line.

Q. Now, from a point or from the road-crossing signal post down to the crossing, can you tell the Jury at about what rate of speed your train was traveling?

A. Well, I figured we were traveling about thirty miles an hour when we passed the signal approach column.

By Mr. Scott

Q. The train was traveling how fast when you passed what?

Mr. McCandlish: About thirty miles an hour; I asked him.

Mr. Scott: When he passed what point?

The Witness: The signal that is just north of Calverton at the point the track comes into the Warrenton branch.

Q. Is that the point of the tracks where the brakes went down?

A. Yes.

Mr. McCandlish: He has not testified about anything as to where the brakes went down.

Mr. Scott: He has.

Mr. Miller: He said about the time that they reached the Warrenton branch. Is that right?

By Mr. Scott:

Q. I want to see if I understand you correctly. I understand you to say that the brakes went down where the Warrenton branch strikes the southbound tracks.

page 105 } A. Yes; right about that signal.

Q. And right there it was the train was traveling thirty miles an hour?

A. Yes, sir.

Mr. Scott: All right.

Mr. McCandlish: You can take the witness, Mr. Miller.

CROSS EXAMINATION.

By Mr. Scott:

Q. How often does a train of your size—

A. (interposing) Sir?

Q. How often does that Number 5 train in your charge pass Calverton during the week?

A. It passes every other day.

Q. Every other day?

A. Yes.

Q. And you are on it every other day?

A. Yes, sir.

Q. And do you remember where you were on the train on the 2nd of August as it went south?

Mr. McCandlish: Of what year?

Mr. Scott: 1932.

Mr. McCandlish: Just a moment—

The Witness (interposing): No, sir, I do not.

By Mr. Scott:

Q. You do not?

A. No.

Q. Well, did I understand you to state that the engineer always gives the proper signal in approaching that crossing?

A. Yes, sir.

page 106 } Q. Sir?

A. Yes, sir.

Q. Always?

A. I have never heard him fail yet.

Q. What?

A. I have never heard him fail yet.

Q. Well, if it appears he did fail, then you are mistaken?

A. If he failed, I am mistaken, but I am satisfied I am not mistaken.

Mr. Pickett: He has made the witness his own witness. He has not gone into direct examination. We did not go into that, as to giving the signals on other occasions.

The Court: It is all proper cross examination.

Mr. Pickett: If he puts this witness up to knock him down—

Mr. Miller (interposing): He said right in the start—

The Court (interposing): Go ahead. He has the right to testify—

The Witness (interposing): Yes, sir; I can prove that I did.

By Mr. Scott:

Q. What?

A. I can prove that I did.

The Court: One at a time, please. Mr. Scott is examining the witness now.

Mr. Miller: I was just talking to him about something.

The Court: That does not make it any better; that makes it worse.

Mr. Miller: What?

The Court: I said that makes it worse.

page 107 } Mr. Miller: I was talking to your Honor.

Mr. Scott: We are through with him.

Mr. McCandlish: That is all.

(The witness thereupon was excused and retired from the witness stand.)

The Court: Gentlemen of the Jury, I will let you go home now until ten o'clock tomorrow morning. I started to say the same warning I gave you at noontime about discussing the case with anyone or permitting anyone to talk to you still applies. I say that to you now. Be here promptly at ten o'clock tomorrow morning.

(Thereupon the further taking of testimony in this matter was continued until Thursday, April 6, 1933, at 10:00 a. m.)

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SECOND DAY.

(Pursuant to recess heretofore taken, the consideration of the above-entitled matter was resumed at 10 o'clock, a. m., Thursday, April 6, 1933, when the same parties as heretofore indicated were present, and the following proceedings and transactions were had and testimony was adduced:)

PROCEEDINGS, TRANSACTIONS AND TESTIMONY.

The Clerk of the Court: Do you gentlemen waive the poll of the Jury?

Mr. McCandlish: Yes. I think they are all here.

Mr. Miller: Yes. We waive the poll of the Jury.

Mr. McCandlish: Will you call Mr. Lane, M. E. Lane?

Thereupon

M. E. LANE,

was called as a witness for and on behalf of the defendant, and having been previously duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Please state your name.

A. M. E. Lane.

Q. And where you reside, Mr. Lane?

A. Charlottesville, Virginia.

Q. What is your occupation?

A. Engineer, B. & O. Railroad.

Q. And you have been an engineer how long?

A. I started on the Railroad thirty-one years ago and
have been an engineer about twenty-six years.
page 109 } Q. At the time of the accident in this case, June
21, 1932, where were you, Mr. Lane?

A. Our engine had broken down just south of Calverton,
about ten o'clock in the morning, and we had pulled up at
Calverton to make repairs on the engine. It was on the
north bound side track at Calverton.

Q. What was the number of your train?

A. No. 98.

Q. Is that a freight train?

A. Yes, sir.

Q. And you were headed toward Washington?

A. Yes, sir.

Q. Now, this accident occurred about three-thirty in the
afternoon?

A. Yes, sir.

Q. It has been so testified?

A. Yes.

Q. How long had you been there at Calverton before the
accident?

A. I think it was around about ten o'clock we pulled in
there.

Q. About ten o'clock?

A. In the morning.

Q. Ten o'clock in the morning?

A. Yes.

Q. So you had been there from that time through until—

A. (interposing) The accident occurred.

Q. Until the accident occurred?

A. Yes.

page 110 } Q. Five or six hours?

A. Yes.

Q. Now, on what track was your train standing?

A. On the north bound passing track.

Q. The north bound passing track?

A. Yes, sir.

Q. Can you take this plat and indicate which is the north bound passing track and on which the train was standing; the passing track.

A. Which way am I going? Is this north?

Q. Yes, sir; this would be north (indicating) in this direction; this direction is north toward Washington.

A. This (indicating) would be your north bound passing track.

Q. You indicate then, as the north bound passing track, the most easterly of all the tracks except one?

A. Yes.

Q. Being this track right here (indicating)?

A. Yes.

Q. What does that say up there (indicating on the plat); can you read that?

A. (After examining the plat) No, sir; that is beyond me.

Q. That says, up there: "Center line of side track"; this indicates the center line of the side track and right at that point where the lettering is both tracks seem to run into one, but the track that you have just indicated on which your train was standing, you say, the most easterly of all the tracks except one.

page 111 } A. Yes; that is right.

Q. Which is designated on the plat as the depot track?

A. This one (indicating).

Q. And the depot track—

A. (interposing) Was the most easterly.

Q. The depot track is the most easterly and yours is the one next to that?

A. Yes, sir.

Q. Now, how many cars were in your train?

A. We had nineteen cars and a caboose.

Q. Nineteen cars and a caboose?

A. Yes.

Q. That would make twenty, then?

A. Yes, sir.

Q. Now, what was the length of each of those cars?

A. Approximately about forty-five feet.

Q. About forty-five feet?

A. Yes.

Q. Then, that would make the length of your train, exclusive of the engine, nine hundred feet; twenty times forty-five?

A. Yes.

Q. And the engine is how long?

A. They run from seventy-five to about eighty-five feet.

Q. Take about eighty feet; that would be about right, then?

A. I guess it would.

Q. Now, where was the caboose of your train standing?

A. About two; probably three car lengths page 112 } over the crossing to the north.

Q. Three car lengths over the crossing to the north?

A. Yes.

Q. I am talking about with reference to the— do you see here a place marked “freight depot”?

A. The caboose and the rear end of the caboose was about even with the south end of the freight depot.

Q. About even with the south end of the freight depot?

A. Yes.

Mr. McCandlish: And it has been stipulated and agreed here in the record that the freight depot—

Mr. Miller (interposing): And is marked on there.

Mr. McCandlish: No, it is not. It is 224 feet from the south end of the freight depot to the crossing; 224 feet. So let me ask you this:

By Mr. McCandlish:

Q. If you had that 224 feet and add it to the eighty foot length of your engine, and nine hundred feet for your cars, that would give you a total of 1204 feet. That would make the engine about twelve hundred feet north of the crossing. Now, did you see No. 5 come in that afternoon?

A. Yes, sir.

Q. And where were you at that time?

A. At the time that No. 5 was approaching Calverton we were working on the engine and we had to observe all signals on the engine and watch trains as they passed by to see that there is nothing wrong with the passing trains and see that they have the rear which is noted by page 113 } markers on the rear end.

Q. What was that?

A. Markers on the rear end of the train; that is the rear end of the train.

Q. What sort of markers?

A. Lamps put on the rear end of every train to designate that he has his complete train, and we have to note that to know the whole train is passed by.

Mr. Miller: I think it would be advisable for the interest of the case, to state what he did.

By Mr. McCandlish:

Q. Where were you when No. 5 came in?

A. Standing in front of my engine, watching No. 5 go by.

Q. Standing in front of the engine?

A. Yes.

Q. Who else was up there with you?

A. Who was helping me?

Q. Was anyone with you at the time?

A. Yes, sir.

Q. All right. Who was it?

A. My fireman J. H. Roberts.

Q. And who else besides Mr. Roberts, the fireman?

A. Wilkinson, the brakeman.

Q. Yes, sir.

A. And two helpers from Charlottesville.

Q. When was your attention first attracted to train No. 5 coming in? I mean by that: Where was train No. 5 when your attention was first attracted to it?

A. Someone, I do not remember who, called page 114 } attention that No. 5 was coming in sight, pretty soon after he left Catlett.

Q. Do you know how far it is from Calverton to Catlett on the railroad?

A. About two and a half miles; I cannot say exactly.

Q. And that train came in your sight soon after it left Catlett?

A. It did.

Q. Now, do you know where that road crossing signal board is north of Calverton?

A. Yes, sir.

Q. It has been testified that that was, or agreed rather, 1,519 feet north of the crossing. Now, will you tell the Jury what if any signals train No. 5 gave?

A. The first signals I heard No. 5 give was two short blasts of the whistle, a pause followed by two more.

Q. Two blasts?

A. Yes.

Q. A pause?

A. Yes.

Q. Two more?

A. Which brought him down to about where we were standing.

Q. To about where you were standing?

A. Yes.

Q. All right, sir.

A. Followed by another blast of the whistle and a continuation and the rear, by that time, had passed page 115 } us and we resumed our work.

Q. So that about the time the train had gotten to you the engine of the train had given four blasts?

A. Yes, sir.

Q. Well, now, how many of those blasts were given at a point say eighteen hundred feet from the crossing?

A. Eighteen hundred feet?

Q. That would be some three hundred feet up the road from the whistle post. I mean— yes, just that.

A. How many had been given eighteen hundred feet away?

Q. No, I do not mean eighteen hundred feet from the crossing. Starting at a point eighteen hundred feet from the crossing how many blasts of the whistle were given in the next nine hundred feet?

A. Two, four, and probably starting on the fifth one.

Q. Four, and probably starting on the fifth?

A. Yes, sir.

Q. Was there anything that particularly attracted your attention to the character of the signals that were being given, to the number or quantity or kind of signals being given?

A. Yes, sir.

Q. What was that?

A. They were a new signal that had been installed in probably the last eighteen months or two years.

Q. "Installed" — how do you mean?

A. The Company had put in a new system of blowing for a road crossing and a new signal was being page 116 } blown.

Q. And what was the new signal?

A. That was two blasts of the whistle, followed by two, a pause followed by two more short and another one: in all six blasts of the whistle. It was a new signal that had been put in and I made a remark to my foreman and brakeman that Mr. Oliver was blowing the new whistle or the new signal.

Mr. McCandlish: Take the witness, Mr. Miller.

CROSS EXAMINATION.

By Mr. Miller:

Q. Did you see the accident?

A. No, sir.

Q. Neither did you see the train approach the accident?

A. How is that?

Q. I say: Neither did you see the train approach the accident, the train that collided with the car that caused the accident when the car was crossing?

A. The train was very near the crossing when the rear of it passed us.

Q. But you did not see it when it was coming up to the crossing?

A. No, I did not see the train at the crossing. I saw the rear of the train which would put the front of it pretty close to the crossing.

Q. Where did the engine stop, after the accident?

A. From— when I went down and saw the engine, the engine and two cars and a half were over the crossing.

Q. Yes.

A. I went down after the accident and the engine and two cars and a half were over the crossing.

Q. Don't you know as a matter of fact that the engine after it collided with the car, and the train went beyond the station?

A. It left two cars and a half below the crossing, the north end of the crossing.

Q. You do not know where the engine stopped immediately after the accident?

A. I know how many cars were in the train. I can tell you that way.

Q. You did not see the accident?

A. No, I did not see the accident.

Q. Your train was between you and the car or train that caused the accident, was it not?

A. I saw nothing in the world of the accident at all.

Q. Neither did you see the train that caused the accident approaching the crossing where the accident took place?

A. Yes, sir. I testified to that.

Q. Why was it then that you could not see the accident—

A. (interposing) When the rear of his train passed by us we turned and resumed work on our engine and paid no more attention to it.

Q. You did not know there had been an accident?

A. No, sir.

Q. The crossing was open for travel all the time your car was there, was it?

A. Yes, sir.

Q. How much space between your cars was left for the crossing if there was any?

page 118 } A. From the rear end of my train to the crossing—

Mr. McCandlish (interposing): He has testified.

Mr. Miller: I am talking about the crossing left open.

By Mr. Miller:

Q. A part of your train was on the south of the crossing?

A. No, sir.

Q. All of it was on the north?

A. All on the north.

Mr. Miller: Yes. I beg your pardon.

By Mr. Miller:

Q. And the caboose, of course, was on the rear of your train?

A. Yes, sir.

Q. Now, how far was your caboose then, the rear of your caboose, to the north of the crossing?

A. You can get the exact distance from the freight house to the crossing. The rear of my caboose was at the south end of the freight house.

Q. And, there is some distance from the rear end of your train, from your caboose up to the crossing?

A. Yes.

Q. Could you tell about that distance without a reference to anything that is there?

A. I know what has been said.

Q. Well, what has been said?

A. Around about three car lengths I think; 250 feet, maybe, or three hundred feet.

Q. Now, you have testified somewhat in detail, as I understand you, about the number of blasts that were
page 119 } given by No. 5 and approaching the crossing, and you have told what you were required to do when trains were approaching under the conditions you have mentioned. Can you name any other incident at any time that you can tell exactly the number of blasts of the whistle when passing you or approaching a crossing?

A. No, sir.

Q. Sir.

A. No, sir.

Q. This is the only case you can mention?

A. My attention has been called very strongly to this case and that is why it impressed me in that manner.

Q. Since the accident?

A. No, sir, I would hardly say since the accident. I was impressed that day on account of hearing him blow the whistle in the manner in which he did.

Q. You made no memorandum excepting mental memorandum?

A. That is all, sir.

Q. You just taxed your memory with it?

A. No, sir, I did not tax my memory at all.

Q. You did not?

A. No, sir. It did not take much to memorize anything like that.

Q. Well, you can remember with a degree of accuracy you have testified exactly about the number of blows?

A. Yes, sir.

Q. Now, you said the sound was continuous. What about the bell ringing?

A. The bell was ringing when it passed us.
page 120 } Q. It was?

A. Yes.

Q. How about the whistle? Was that continuous too, all the way?

A. The whistle was blowing when it passed us; yes, sir.

Q. Where was the part of the train when you first heard the whistle blow?

A. Where was what?

Q. The train that caused the accident?

A. No. 5?

Q. Yes.

A. He was just about the road crossing signal.

Q. How far from the woods? Do you know where the woods are?

A. I do not know what woods you are speaking of.

Q. There is only one piece of woods directly to the north where you were standing?

A. Yes.

Q. How close to this piece of woods would you recollect you were?

A. I could not say.

Q. Do you even remember any other time in the history of your life, as an engineer, seeing a train approaching the crossing when your duty required you to watch for the number of signals given?

A. No, sir, I cannot recall any one instance at all.

Q. Thirty-one years?

A. Yes, sir.

Q. This is the only one?

page 121 } A. The only one.

Q. And now, why would you state to the jury that you were so particular about this one?

A. On account of the accident impressing it very strongly on my mind, I suppose would be one of the reasons.

Q. And you do positively testify now with a degree of accuracy as to the number of blows of that whistle?

A. Yes.

Q. You did not see the accident?

A. No.

Mr. Miller: All right. You all take the witness.

RE-DIRECT EXAMINATION.

By Mr. McCandlish

Q. I neglected to ask you, Mr. Lane, if you can say what speed No. 5 was going when it passed you down there?

A. I would say No. 5 was running forty or maybe a little over forty miles an hour.

Q. At the time it passed you?

A. Yes, sir.

By Mr. Scott:

Q. Forty or forty-five miles?

Mr. McCandlish: Forty or a little over is what he says.

The Witness: That is just judging by his speed.

By Mr. McCandlish

Q. You do not undertake to be accurate about that? That is just your best judgment?

A. No, sir.

page 122 } Mr. McCandlish: That is all, thank you, sir.

(The witness thereupon was excused and retired from the witness stand.)

Mr. McCandlish: I will call Mr. Oliver. A. F. Oliver.

Thereupon

A. F. OLIVER,
was called as a witness for and on behalf of the defendant,
and having been previously duly sworn by the Clerk of the
Court, as is above indicated, assumed the witness stand and,
upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Mr. Oliver, where do you reside?

A. Charlottesville, Virginia.

Q. You were sworn?

A. Yes, sir.

Q. What is your occupation, Mr. Oliver?

A. Engineer; locomotive engineer.

Q. How long have you been an engineer?

A. Running a locomotive or being with the Company—
running an engine twenty-nine years.

By Mr. Pickett:

Q. Twenty-three years?

A. Twenty-nine years, running a locomotive.

By Mr. McCandlish:

Q. How long have you been working for the railroad?

A. Thirty-four.

Q. What is the condition of your health at this time, Mr.
Oliver?

A. Why, not very good. I just came out of
page 123 } the hospital about forty-two days ago.

Q. Did you have a pretty serious operation in
the hospital?

A. I beg your pardon?

Q. Did you have a very serious operation in the hos-
pital?

A. Yes, sir. Right serious.

Q. Are you in your accustomed weight and health at this
time?

A. No, I am a little shy of my weight; I guess my health
is getting a little good.

Q. On the occasion of this accident that we are talking
about, what was or how were you employed?

A. Engineer.

Q. Of what train?

A. No. 5.

Q. Talk to these gentlemen of the Jury over there.

A. Engineer on No. 5.

Q. And do you recall the accident?

A. Do I recall it?

Q. Yes, sir.

A. Yes, sir.

Q. Do you know where the road crossing signal post is along the road, the right of way there as you approach from the—

A. (interposing) Yes, sir.

Q. (continuing) North to Calverton?

A. Yes.

Q. Whose business is it on your engine to sound signals, sound the signals?

page 124 } A. It is my business.

Q. Who else was on the engine with you?

A. The fireman and a travelling fireman.

Q. What was the name of the fireman?

A. Mr. Roberts.

Q. And your travelling fireman?

A. Mr. Britton.

By Mr. McCandlish:

Q. Now, from a point along up there about the whistle post, until you got down to the crossing, tell the Jury what if any signals you gave.

A. I first gave one long blast for the station; that is about a mile away, and the whistling post about five hundred yards, is where I started with my whistle for my crossing.

Q. At the whistling post about five hundred yards?

A. Yes.

Q. What whistles did you give? What signals?

A. I gave two blasts of the whistle with intermission; then two more blasts; then two blasts short; then a long. The long you can blow, the last blow you can continue that until you get to the crossing.

Q. Did you actually blow that last long all the way to the crossing or not?

A. No, sir.

Q. What did you do?

A. I gave warning signals.

Q. What is a warning signal?

A. A short blast of the whistle.

Q. Do you recall how many of these you gave?

page 125 } A. No; I do not think over two, I do not think.

Q. You interrupted the last long blast to give a couple of short toots?

A. Yes.

Q. That is known as what sort of a signal?

A. A warning signal or danger signal.

Q. Why did you give the warning or danger signal?

A. I heard *saw* this car; giving notice to step on it a little bit. It was a little bit slow.

Q. What car are you talking about?

A. An automobile; the one that struck us. One of the passengers who was driving the car—

Q. (interposing) Where was the automobile when you first saw it?

A. Well, between the two tracks there; that Warrenton track and our main line south bound main line.

By a Juror:

Q. How far away were you from the car when you saw it?

A. I guess about three hundred and fifty yards.

By Mr. McCandlish:

Q. Well, at the time you saw it coming up to that track on which you were, did the automobile or not have ample time to cross if it kept on going?

A. Oh, yes; yes, sir.

Q. Well, you were on which side of the engine?

A. On the right side.

Q. On the side from which the car was coming?

A. Yes.

Q. And who was on the left side?

A. The fireman.

Q. Which one?

page 126 } A. Mr. Roberts.

Q. Mr. Roberts?

A. I mean Davis.

Q. Mr. Davis?

A. Yes.

Q. Now, did this automobile pass out of your sight?

A. Yes, sir.

Q. How did that happen? How did it get out of your sight?

A. Because it was moving all the time, you see; it had never stopped in my vision.

Q. It never stopped in your line of vision at all?

A. No, it never stopped in my line of vision at all.

Q. Was it going fast or slow?

A. No, going medium; about as fast as you could walk; about that fast.

Q. About as fast as you could walk?

A. Yes, about as fast as you could walk.

Q. How did you learn it had not gotten across?

A. A signal from my fireman, hollering "Hold them."

Q. What did you then do?

A. Fixed my brakes in emergency.

Q. And at the time the brakeman hollered to you, gave you the signal to "Hold them", what were you doing?

A. The fireman gave the signal.

Q. Well, at the time the fireman gave the signal to "Hold them", what were you doing?

A. I was blowing the whistle.

Q. Then, what did you do?

page 127 } A. Let go of the whistle and slapped my brakes
in emergency.

Q. And at the time the signal was given, can you tell the Jury, about where were you when you slapped your brakes on in emergency?

A. I was right at that switch leading into the branch line; I guess about one hundred yards from the crossing.

Q. Can you show the switch here to the Jury that you are talking about, looking at this plat here (indicating). Here (indicating) is the crossing and here (indicating) is the Warrenton Branch line going over the crossing.

A. (Indicating) Here is your switch right here.

Q. Right here (indicating)?

A. Yes.

Q. Designated on this plat as point number three?

A. Yes, sir.

Q. Right about where the Warrenton track comes in to the main line track on which he was?

By a Juror:

Q. What is the measured amount of it?

Mr. McCandlish The correct distance in the record is three hundred feet. It has been measured.

By Mr. McCandlish

Q. I will ask you this: What could you have done that you did not do to save the people in this automobile from being struck?

A. Nothing in the World that I know of; nothing.

Q. At the time you put on, put, threw your brakes in emergency up there at the Warrenton "Y", can
page 128 } you tell the Jury, Mr. Oliver, about what speed
you were making?

A. I was making about thirty miles an hour.

Mr. Scott: What did he say?

Mr. Miller: Thirty miles an hour.

By Mr. McCandlish:

Q. Take a point up there, about, say, up above the whistle post, a point about eighteen hundred feet or two thousand feet north of the crossing: At what speed were you going along there?

A. Why, about fifty miles an hour.

Q. About fifty miles an hour?

A. Yes.

Q. Why had you reduced your speed as you got—

A. (interposing) On account of Calverton being a flag stop for number five, I reduced the speed of my train so as to make a smooth stop.

Q. If you had to stop?

A. Yes, sir, if I had to stop.

Q. Now, I do not know whether the Jury understands Mr. Oliver.

Do you members of the Jury understand what he means?

(The members of the Jury indicated that they did understand the testimony of the witness.)

The Witness: All right, sir.

By Mr. McCandlish:

Q. Just why was it that this automobile went out of your line of vision: Can you explain that?

Do you gentlemen of the Jury understand that?

page 129 } (The members of the Jury indicated that they did understand the testimony.)

Mr McCandlish: That is all right. They say they understand it. You can take the witness, Mr. Miller.

CROSS EXAMINATION.

By Mr. Scott:

Q. Mr. Oliver, you are the engineer of number 5, in the employ of the Chesapeake & Ohio Railway Company?

A. Yes.

Q. And you are still in the employ of the Chesapeake & Ohio Railway Company?

A. Sir?

Q. You are still in the employ of the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. And you have been in the employ of that Railway Company for thirty-four years?

A. I beg your pardon?

Q. You have been with that Company for thirty-four years?

A. Yes, thirty-four years; yes, sir.

Q. You are the engineer on the C. & O. Railway train number 5 that made this collision with this automobile?

A. Yes, sir.

Q. How long had you been running on that track with number 5?

A. Why, I cannot tell exactly because, you see, we change about; I have been on the Richmond run from Richmond some; I guess I have been over here two years
page 130 } at this time.

Q. And you have been over that run past Calverton for two years?

A. At this time.

Q. How often did you have to pass Calverton during that time?

A. Why, I passed it nearly every day.

Q. Nearly every day, one way or the other?

A. Yes.

Q. One day you would go one way and the other day you would go the other way?

A. Yes, sir.

Q. So that you knew that Calverton was a flag station stop for that train?

A. Yes, it was.

Q. So you do know about that situation?

A. Yes, sir.

Q. And you did know about the situation?

A. Yes.

Q. You did know that that was a grade crossing?

A. Know what?

Q. Sir?

A. I beg your pardon?

Q. You did know that was a grade crossing?

A. Yes, sir.

Q. Now, your speed of that train, of your train, it is a fast passenger train, is it?

A. Yes, sir.

Q. And your customary rate of speed is fifty or sixty miles an hour?

page 131 } A. Fifty-seven is the schedule.

Q. Sir?

A. Fifty-seven is the schedule.

Q. Your schedule is fifty-seven miles an hour on that train?

A. Yes, sir.

Q. Now, as you approach this crossing at Calverton, you say Calverton was a flag station?

A. Yes, sir.

Q. No flag was out that day?

A. No, sir.

Q. And there was no occasion to stop?

A. No, sir.

Q. Now, then, let us come to what happened there, that day: You came along on your usual schedule of fifty-seven miles an hour and now I understand you to say you undertook to reduce your speed?

A. Yes, sir.

Q. When did you start that reduction?

A. Why, about the whistling post.

Q. At the whistling post?

A. Yes, sir.

Q. And Mr. McCandlish admits, I think you do,— Will you state to me how far the whistling post is from the crossing?

Mr. McCandlish: Fifteen hundred and nineteen feet.

Mr. Scott: How many?

Mr. McCandlish: Let me be sure. I think it
page 132 } is fifteen hundred and nineteen feet.

By Mr. Scott:

Q. Around fifteen hundred feet?

A. Yes, sir.

Q. And when you got to the whistling post—

Mr. McCandlish (interposing): Fifteen hundred and nineteen is right.

By Mr. Scott:

Q. And when you got to the whistling post, you sounded some whistle or signal, or did you sound any?

A. Yes, sir, the whistle.

Q. You sounded the customary signal at that point?

A. Yes, sir.

Q. Fifteen hundred feet?

A. I sounded it continually until the whistle signal was completed.

Q. You did what?

A. I say I sounded it continually until the whistle signal was completed.

Q. Until the signal was completed?

A. Yes.

Q. What was that signal and— What was it?

A. Two blasts of the whistle and a pause; then two blasts, and a pause; two blasts; then a short, then a long.

Q. Then a long?

A. Then a long.

Q. Is that your station signal?

A. No, sir.

Q. What is it?

page 133 } A. That is the crossing signal.

Q. The crossing signal?

A. Yes.

Q. Then, you went on and the crossing was in full view?

A. Yes, sir.

Q. Your duty was to keep a constant lookout from the righthand seat or—

A. (interposing) All the time.

Q. Always?

A. Yes.

Q. And, as you approached the crossing you could see the full length of the crossing from the edge there to the shack on which you were blowing?

A. Yes, sir.

Q. Which is shown by the map here?

A. Yes.

Q. I understood you to say that you saw this automobile moving along the crossing?

A. Yes, sir.

Q. You saw it?

A. Yes, sir.

Q. Was it along the crossing, going slowly— as fast as a man could walk, you said?

A. Yes.

Q. Without any intention, apparently, to stop?

A. I beg your pardon?

Q. Without any apparent intention to stop?

A. Yes; without any appearance at all.

Q. So that you say it was moving in front of
page 134 } your train without any indication of stopping?

A. Yes, sir.

Q. And then what did you do?

A. I blew a couple of short blasts of the whistle.

Q. You blew your whistle a couple of short blasts?

A. Yes, sir.

Q. That is all you did? You did not—

A. (Interposing) And—

Q. (interposing) You did not put on—When it was still moving towards you in front of your train?

A. Yes.

Q. Why did you keep on, why did you not put on the emergency brakes until the fireman on your left told you to do so?

A. What did you say?

Q. You kept on, didn't you, and you did not put on the emergency brakes until the fireman on your left told you to do so?

A. That is so.

Q. What?

A. Yes, sir.

Q. And the result of it was you ran into this automobile?

A. Yes, sir.

Q. And these two ladies that were in there were killed?

A. Yes, sir.

Q. How far away were you when you first saw the automobile moving in front of your train?

A. About three hundred yards, I guess.

Q. How many?

page 135 } A. About three hundred.

Q. Three hundred?

A. Yes.

Q. You first stated three hundred and fifty.

A. Sir?

Q. In answer to Mr. McCandlish's question, I understood you to say it was three hundred and fifty yards. Which is correct?

A. Some where around in that line. Of course, I can not tell.

Q. Somewhere about three hundred and fifty yards?

A. Yes. I could not measure it.

Q. And you did not apply the emergency brake until you were within three hundred feet of the crossing?

A. One hundred yards.

Q. That is three hundred feet.

A. Right on that switch there.

Q. Right at the switch?

A. Yes.

Q. And then the train, even after you put the emergency brakes on—

A. (interposing) Sir?

Q. Your engine ran how far after you put the emergency brakes on?

A. Well, I do not know how far it ran; about — I was seven cars and a half, I think, in length from that crossing to where I stopped.

Q. Seven cars and a half in length from that crossing until where you were stopped?
page 136 } A. Yes, sir.

Q. Your engine was down about the watering tank?

A. Yes, sir.

Q. Somewhere along in there?

A. Somewhere along in there.

Q. And that left a car and a half to the north of the crossing?

A. To the north of the crossing, yes.

Q. Mr. Oliver—

A. (Interposing) Yes, sir.

Q. Just after the accident, do you remember having a conversation with Mr. W. R. Ennis about this matter, the father of one, father-in-law of one of the ladies killed, Mr. W. R. Ennis?

A. Did I have any conversation?

Q. Talking about there at the station?

A. No, I do not remember any.

Q. You do not remember?

A. No.

Q. Did not you state at that time—

Mr. McCandlish (interposing): Now—

The Witness (interposing): No, I do not remember anything.

Mr. McCandlish: I just do not want you to put something in the record.

Mr. Scott: I am going to put this in the record with the Court's permission.

Mr. McCandlish: All right, sir.

page 137 } By Mr. Scott:

Q. Did not you state on that occasion, immediately after the accident, to Mr. W. R. Ennis, that you saw the automobile in the track in time to have stopped the train?

A. No, sir.

Q. What?

A. No, sir.

Q. Did not you state then further that you saw the automobile on the track in time to stop the train but you were afraid of wrecking the train?

A. No, sir.

Q. What?

A. No, sir. No, sir.

Q. You did not?

A. No, sir.

Q. Mr. Oliver—

A. (Interposing) Yes, sir.

Q. Did you go down to the station?

A. No, sir.

Q. What?

A. No, sir. I did not go down to the station.

Q. You did not go to the station?

A. No, sir.

Q. Where did you go?

A. I had to take my pilot off the engine.

Q. You had to do what?

A. I had to take my pilot off the engine where it bent; I had to work there on my engine.

Q. You were working on the engine?

A. Yes, sir.

page 138 } Q. Did you see the station agent there on that occasion, Mr. Sullivan?

A. I do not remember.

Q. Did you see Mr. Cheatwood, who was there?

A. Did I see Mr. Cheatwood?

Q. Yes; did you see Mr. Cheatwood, who was there?

A. I do not know him.

Q. You do not know him?

A. No, sir.

Mr. McCandlish: If your Honor please, I think Counsel ought to talk and confer among themselves with a little more circumspection so far as the Jury is concerned.

The Court: Yes; you are, gentlemen, very close to the Jury. I hope you will be guarded.

Mr. Miller: I did not object to your conferring with your Associate.

Mr. McCandlish: I only requested you to do it with what I have stated in mind.

Mr. Scott: I will try.

Mr. McCandlish: You have a right to confer.

Mr. Miller: I did not talk as loud as you did.

The Court: Well, let us proceed.

Mr. Scott: You can take the witness.

RE-DIRECT EXAMINATION.

By Mr. McCandlish:

Q. After Mr. Davis, your fireman, told you to "Hold them", could you have stopped the train any quicker than you did stop it?

A. No, sir.

page 139 } Mr. Miller: He has been asked that and has answered it. He asked a leading question as to that and I did not object.

Mr. McCandlish: If he could have anything done he did not do.

The Court: You asked if there was anything else he could have done. The question he asked before was whether he could have done anything else to avoid the accident.

Mr. Miller: Yes.

The Court: That is general. He can go into the detail.

Mr. Miller: Well, we do not object.

Mr. Scott: It is not in response to any cross examination and the question is not in response to any cross examination and it had already been covered on direct examination. It is simply repetition.

Mr. Miller: What is your question?

Mr. McCandlish: The Court has the question. The question has been asked and has been answered. The Court ruled that I have a right to—

Mr. Miller (interposing): What was that question?

Mr. McCandlish: I will leave it to the Court.

The Court: Suppose we have the Reporter read it.

The Reporter (reading):

"Q. After Mr. Davis, your fireman, told you to "Hold them", could you have stopped the train any quicker than you did stop it?"

Mr. Miller: I do not think it is anything but the former question you said you asked.

Mr. McCandlish: Well, if your Honor please—

The Court (interposing): I do not recall that page 140 } there was anything said on that subject on cross examination, Mr. McCandlish.

Mr. McCandlish: If your Honor please, he was, this witness was asked two questions which put that in my mind, and he was asked those questions on cross examination.

The Court: What were they?

Mr. McCandlish: One was he did not make a statement to

a certain person that he could have stopped the train quicker than he did, he denied. I wanted to get that clearly before the Jury.

Mr. Miller: That is certainly not in response to any cross examination.

The Court: I think it is. I will let it stay in.

By Mr. McCandlish:

Q. What kind of a stop was that that your train made? Was it a good stop or a bad stop?

Mr. Scott: I object.

The Court: I do not recall anything on that subject on cross examination.

Mr. McCandlish: Then I say that I omitted to ask the question on direct examination and I ask your Honor to allow me to ask the question, this question, now.

The Court: Is there any objection?

Mr. Miller: Yes. It is leading and calling for the opinion of the witness; and I state that in addition to the ground that Mr. Scott stated. Now, why ain't that true?

The Court: I do not think it is leading. He page 141 } asked whether it was a good or bad stop. I do not think it is leading. But—

Mr. Miller (interposing): I think the form of the question is objectionable.

Mr. McCandlish: I think I can prove that by another witness. I withdraw the question.

Mr. Miller: If you can prove it by another witness, you can prove it by this one.

Mr. McCandlish: If it is a fact, I can prove it by two or three witnesses.

Mr. Miller: When you asked your question in the proper way.

Mr. McCandlish: That is all, Mr. Oliver.

(The witness thereupon was excused and retired from the witness stand).

Mr. McCandlish: Call Mr. Britton.

Thereupon

J. L. BRITTON.

was called as a witness for and on behalf of the Defendant, and having been previously duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Your name is J. L. Britton?

A. Yes.

Q. Where do you reside?

A. Charlottesville, Virginia.

page 142 } Q. You were working for the Chesapeake & Ohio Railway Company at the time this accident occurred?

A. Yes, sir.

Q. In what capacity were you working?

A. Travelling fireman.

Q. And where were you at the time of the accident?

A. Well, the coal had gotten a little low in the stoker trough, and I was holding slack for the fireman.

Q. Then, you were up on the engine?

A. Yes, I was up on the engine.

Q. Do you recall the time that you were going in to Calverton?

A. Yes, sir.

Q. Do you recall this accident happening?

A. Yes, sir.

Q. Do you know about the accident, or did you know about it at the time it happened?

A. No, I did not know anything about it until I heard the fireman holler to the engineer to "Hold it". I was back in the tank. I could not see ahead. I was not looking ahead.

Q. And when you heard this man holler to "Hold them", what happened then?

A. I heard the crash. The engineer applied his brakes in emergency, dropped the whistle cord that was in his hand and threwed the brakes on, the emergency brake, the same time he dropped his hand.

Q. And you heard the crash?

A. Yes, sir.

page 143 } Q. At the time the brakes were thrown into emergency, can you tell the Jury what speed your train was making?

A. Probably around thirty miles an hour; not more than that.

Mr. McCandlish: I think you can take the witness. No—I do want to ask another question:

By Mr. McCandlish:

Q. This train that you were in stopped down there at the crossing?

A. Yes, sir. My part of the train stopped about half of the eighth car over the crossing.

Q. Half of the eighth car over the crossing? And the engine was on down south?

A. Yes.

Q. What sort of a stop was that, Mr. Britton?

A. That was an emergency stop.

Q. Well, I mean, would you say it was a bad stop or a good stop or a medium stop?

A. It was just about as rough as you could stop a train at any time in emergency. When you are stopping a train in emergency you have the slack of the cars and you pull your brakes on and you are bound to punch that slack; that is the emergency feature of the Westinghouse Air Brake, to take hold at the time you put it on there.

Q. Is there anything you can do to stop the train when you want to stop it, quicker than applying the emergency brake?

A. You can put a service heavy application on, bring it to a quick stop, but nowhere as quick as by throwing the emergency on, making the emergency application.

page 144 } Q. That is the quickest way?

A. Yes; that is why the emergency feature was put on the brake valve, to take care of that feature.

Q. Considering the engineer says he put the brakes on about, threw it in emergency, somewhere about three hundred feet from the crossing and stopped with the eighth car on the crossing, would that be a good stop?

A. Yes, that would be a good stop.

Mr. Miller: Just one minute. Now, ain't that objectionable?

The Court: I do not think the witness has qualified himself to state.

Mr. Miller: We feel he has not. He has not qualified himself to state. I let him go along and I didn't say a word about it.

The Court: He was the travelling fireman on the train, that is all.

By Mr. McCandlish:

Q. How long have you been riding on engines?

A. Twenty-four years.

Q. Have you at any time had occasion to see the brakes thrown in emergency before?

A. Quite a number of times, yes, sir.

Q. And to be able to determine about how quickly a train would stop after the brakes are thrown in emergency?

A. Yes.

Q. A train this length and size, and considering the weather conditions?

A. Yes.

page 145 } Q. And have you ever served in that capacity—

A. (Interposing) From 1917 to 1926.

Q. As an engineman?

A. Yes.

Mr. McCandlish: I think that qualifies him.

The Court: I think he can answer the question.

By Mr. McCandlish:

Q. Now, would your answer be to the question that it was a good or a bad stop?

A. It was a good stop with emergency application, yes, sir.

Mr. McCandlish: You can take the witness, Mr. Miller.

CROSS EXAMINATION.

By Mr. Miller:

Q. Did you ever undertake to operate an engine since you have been in the service of the railroad?

A. Yes, sir.

Q. You said as I understood it that when the notification was given by the fireman to the engineer who— What did you say, "Shut down" or "Slow down", or what?

A. I said "Hold it".

Q. To "Hold it". What were you doing at that time?

A. I was just, I had pulled the slide from the stoker trough as I stated there.

Q. You were interested in that?

A. When the fireman hollered "Hold it", I turned around right quick and about that time the engineer threw the brakes on in emergency.

page 146 } Q. How much time did you say elapsed between the time that notice was given by the fireman to the engineer before you saw the fireman pull the brake?

A. The fireman did not pull the brakes.

Q. I mean the engineer.

A. Just an instant. Just the time he said "Hold them", he worked right around there, right in the corner, as far as he could get the brake valve to go.

Q. How much time was there before the collision after that?

A. Some few seconds. I cannot exactly say.

Q. It ought to be guesswork; how much time?

A. Just a few seconds, yes; probably five or six seconds, maybe. Maybe not as long as that.

Q. Do you know where the train was?

A. Just about that switch that leads into the Warrenton Branch, when he threw the brakes in emergency.

Q. How do you know that?

A. I knew it by looking around at the—

Q. (Interposing) Were you looking at the switch?

A. No, but I can tell the location of the place. I had been going by it for twenty-four years. I could tell exactly where it was.

Q. You know there was something wrong when the fireman notified the engineer to "Hold them"?

A. Absolutely.

Q. You did?

A. Absolutely.

Q. But still you had presence of mind enough to know that the engineer pulled that emergency brake, to
page 147 } look around to see that you were at the end of the Warrenton switch, as you call it—

A. (Interposing) I knew exactly where I was, yes, sir.

Q. You knew exactly where you were, and that was about a hundred yards from the crossing?

A. Yes.

Q. And within practically a second after the emergency brake was worked or pulled, as you say, you heard the collision?

A. I did not say a second; five or six.

Q. Five or six seconds?

A. Yes.

Q. Now, could you tell with any degree of accuracy the lapse of time between—

A. (Interposing) I said a few seconds, probably five or six; probably not quite as long as that.

Q. Could not it have been probably ten or twelve?

A. It may have been just as much as five or six.

Q. No. Ten or twelve is about twice as much as five or six.

A. That is right, too.

Q. It may have been ten or twelve?

A. I said five or six. I still say five or six.

Q. I am asking now: could it have been ten or twelve?

A. No.

Q. What?

A. No.

Q. But it is all guesswork with you?

A. I said five or six.

page 148 } Q. I know you said five or six, but a want—

A. (Interposing) I will stick to it.

Q. I want to know whether you are correct or not.

The Court: The question is whether or not it is guesswork.

The Witness: Absolutely; it is all guesswork as to the amount of time there; absolutely so.

Mr. Miller: Then, you have answered the question that I have been trying to ask you and get an answer right along.

The Witness: No, the question you asked me the second time I have answered.

The Court: We will get along better if we do not argue with the witness.

By Mr. Miller:

Q. How many other people were in the engine, with the engineer, that had charge of it at that time besides you, the fireman and the engineer?

A. No one beside us three, the engineer, the fireman and myself.

Q. When you were engaged in what you said you were doing, just before you saw the engineer pull on the brake, was your back turned to the engineer?

A. No. I just had pulled the slide and turned around and I heard the fireman say "Hold them".

Q. On which side were you, the right or the left side?

A. The stoker extended exactly in the middle of the tank.

Q. The engineer was, of course, on the left hand side?

A. On the right hand side, sir.

page 149 } Q. On the right hand side, that is right. And the fireman was on the left hand side.

A. That is right.

Q. Both were looking out of the window at that time?

A. Yes, sir.

Mr. Miller: All right. I believe that is all. You all can take the witness. Let me ask another question:

By Mr. Miller:

Q. Until your attention was called to the fact that something was wrong, when that fireman told the engineer what he did about "Hold them", had you noticed, particularly, up to that time, at what rate of speed that train you were riding on was running?

A. Well, he put his service application on just after he passed the signal whistle, the road crossing signal whistle to slow his train down—Calverton is a flag stop, and approaching there he had to see if he had any passengers there or if a flag was out.

Q. Is that always done?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. Do you remember it being *down* there, on that occasion, or are you just saying so because it is always done?

A. It is always done and it was done on this occasion, too.

Q. How often do you run on that train?

A. I rode number 5 on, oh, I cannot recall exactly how many times I have been on number 5; probably
page 150 } four hundred or five hundred times. Maybe more than that.

Q. And in going over this crossing at Calverton, you remember at no other time at what rate of speed you were running?

A. Yes, sir. Yes, sir. I recall very often, practically always, the man draws the brakes down to reduce the speed of the train looking out for a flag at that point.

Q. Now, we are talking about the other time, the five or six seconds you mentioned. Is it not a fact that you are now guessing about the speed that that train was running?

A. I say thirty miles an hour.

Q. That is guesswork?

A. That is guesswork to a certain extent. Of course it is, but a man familiar with the track, familiar with the runs, familiar with the whole thing; he can practically judge the speed of the train.

Q. Can you tell the Jury with any degree of accuracy at what rate of speed you were running when approaching that crossing at any other time except you know the custom to be that you ran that length—

A. (Interposing) I cannot recall any other time, exact dates. I could if I had my note book with me. I did not bring my note book with me.

Q. You just know that was about always the rate of speed?

A. Practically the speed. He brings the train down to stop at Calverton; he just turns his brakes loose, and—

Q. (Interposing) And you think that was what it was?

A. That is the speed, about that speed, about page 151 } thirty miles an hour.

Q. It could have been forty or forty-five?

A. No, it was not that. It was about thirty miles an hour.

Q. You think it was exactly thirty miles an hour?

A. I did not say it was exactly thirty miles an hour. I said "about".

Q. Now, it could have been a little more than thirty miles an hour, couldn't it?

A. I said thirty miles an hour.

Q. You said thirty miles an hour and you are going to stick to thirty miles an hour?

A. Absolutely so.

Q. Now—Well, that is all.

(The witness thereupon was excused and retired from the witness stand).

Mr. McCandlish: Call Mr. Davis.

Thereupon

R. E. DAVIS,

was called as a witness for and on behalf of the Defendant, and having been previously duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. State your full name, please.

A. R. E. Davis.

Q. Where do you reside, Mr. Davis?

A. Charlottesville.

Q. How are you employed at this time?

page 152 } A. Pardon?

Q. How are you employed at his time?

A. Fireman.

Q. Well, what company?

A. The C. & O. Railway.

Q. How long have you been their fireman?

A. Since 1917.

Q. Do you recall the accident we are talking about here that happened in June, 1932, at Calverton?

A. Yes, sir.

Q. Where were you at that time?

A. I was on the engine.

Q. Where were you sitting, what position?

A. I was sitting on the fireman's seat, the big box on the left side.

Q. Who else was there with you, not on the seat box, but who else was on the engine?

A. The engineer was on the right side and the traveling fireman was working on the slide in the tank.

Q. Do you know where the road crossing whistle is as you go into Calverton from the north?

A. I know where it is.

Q. Can you find it out for the Jury on the plat, on that map there (indicating the plat heretofore received in evidence)?

A. (After examining the plat in question and indicating to the Jury) Right here.

Q. That has got, that signal you pointed out there, has got two little marks and two dots on it. Has it?
page 153 } A. Yes.

Q. And they are referred to on the plat as a whistle board?

A. Yes, sir.

Q. Those two little long marks and two dots underneath them on that plat, do you know what they mean?

A. Yes, long and short sounds.

Q. Two long?

A. Two long sounds and short sounds.

Q. The dots indicate the short sounds and the others the long sounds?

A. Yes, sir.

Q. Had that particular signal, two longs and two shorts, been changed before this accident?

A. Yes, sir.

Q. And what kind of a signal was to take the place of that, or did take the place of it?

A. It was supposed to be two longs and a pause; two longs, a short and a long.

Q. That is what you call the new signal?

A. That is the new signal on the Southern Railroad.

Q. Is that the one the C. & O. used at the time of the accident?

A. Yes, sir.

Q. And is using now?

A. Yes, sir.

Q. From the point up there about that whistle board on to the crossing, or nearly to the crossing, can you page 154 } tell the Jury where the engine whistle was blown?

A. Yes, sir.

Q. Can you tell to what extent or how much it was blown from that point down to the crossing?

A. How many times it was blown?

Q. Well, how many times or how frequently it was blown from the whistle board on down?

A. He started at the regular whistling point and gave two long ones.

Q. And how far did he blow; how far did he blow before he stopped blowing?

A. He blowed down to the time I hollered to hold the train.

Q. Down to the time you hollered to hold the train?

A. He had his hand on the whistle cord.

Q. Well, did he give one continuous blast all the way, or was it broken up by pauses?

A. No, sir; two longs, two longs he started off with.

Q. Yes; and from the point you have mentioned up there about the whistle board on down, what about the bell on the engine? Was that ringing or not ringing?

A. Yes.

Q. What? The bell was ringing?

A. Yes, sir.

Q. Whose business or duty was it to ring the bell?

A. The engineer's and fireman's. They have the automatic bell ringer and cord to the bell. The automatic bell ringer on each side of the boiler.

Q. Was this ringing by the cord or automatic page 155 } signal?

A. Ringing by the automatic.

Q. How do you recall that? How do you know?

A. I turned this bell ringer on myself before we approached this crossing.

Q. You did?

A. Yes.

Q. And it is operated by electricity?

A. By air.

Q. It is operated by air?

A. Yes; by air.

Q. Now, what was the condition of the bell after the train had been brought to a stop?

A. The bell was still ringing.

Q. It was still ringing?

A. Yes.

Q. Did it keep on ringing?

A. Until I shut it off.

Q. You are the man that shut it off?

A. Yes.

Q. Now, you spoke of the brake being applied in emergency by the engineer. What did you say or do, what did you say or do that caused him to apply the emergency brake?

A. I hollered at him "Hold them".

Q. Now, at that time, where was the automobile and what was it doing?

A. The automobile was going over to the rail on my side.

Q. On the same track your train was on?

A. Yes.

page 156 } Q. Was it moving?

A. It was coming across to my side.

Q. Was it moving?

A. It barely was moving, yes; barely moving.

Q. Well, did it or did it not stop?

A. It stopped. When the train struck this car it stopped.

Q. Yes, and—

The Court (interposing): What was that answer?

The Reporter (reading):

"A. It stopped. When the train struck this car it stopped."

By Mr. McCandlish:

Q. Well, do you mean by that it stopped at the minute the train struck it or it stopped before the train struck it?

A. It stopped before the train struck it.

Q. Can you tell the Jury in seconds?

A. No, sir, I cannot tell them in seconds.

Q. How many seconds it stopped, or how long it had stopped before the train struck it?

A. No, sir, I cannot tell.

Q. Well, was it a long or a short time?

A. Well, it was not a short time?

Q. Well, was it a long time?

A. No, sir, it was not a long time. I don't know. It was not very long, I know.

Q. It is pretty hard to say?

A. Yes, sir.

page 157 } Q. Well, can you tell the Jury about where your train was when you called to the conductor, called to the engineman to "Hold them"?

A. Just about, just before we got to the Warrenton Branch Y switch.

Q. You have had enough experience to be able to judge the speed of trains?

A. I never did any running; I never did no running. I am not a very good judge of speed.

Q. You never did any running yourself?

A. That is it. No, sir.

Q. Could you or not see the automobile from your position on the engine until it came on your side?

A. No, sir.

Q. Cleared the nose of the engine?

A. No, sir.

Q. If the automobile had not stopped when it did would have the train have hit, Mr.—

A. (Interposing) No, sir.

Q. How soon was it after you realized that the automobile had stopped before you hollered to the engineer?

A. As soon as I saw it stop I called to the engineer to "Hold them".

Q. What did the engineer do then?

A. Put the brake in the emergency.

Q. And how soon did you stop? Where was—

A. (Interposing) How far did it go before it stopped?

Q. Where was the train when it stopped?

A. I think it was seven and a half car lengths before the train stopped.

page 158 } Q. Seven and a half car lengths from what point?

A. The lower crossing. I think that was what it was. I never did go back there to see how many cars were on the other side of the crossing.

Q. Then, you do not know exactly about that, do you?

A. No, sir; I did not see those cars. No, sir.

Q. You just heard somebody else say that?

A. Yes. Of course, I could see back there. I could not say exactly whether one car was over or a half a car, but some of the trains were standing on the other side of the crossing.

Q. Was it a bright, clear day or a cloudy day?

A. It was a clear day.

Q. Do you know of anything that the engineer or yourself could have done on that train to keep from hitting the car that was not done?

A. There was not anything else to be done that I know of. He done all he could do.

Mr. McCandlish: Take the witness.

CROSS EXAMINATION.

By Mr. Scott:

Q. Mr. Oliver—Mr. Davis, you are a fireman on number 5?

A. Yes.

Q. In the employ of the Chesapeake & Ohio Railway Company?

A. Yes.

Q. Are you still in the employ of that Company?

A. I am cut off now.

Q. What?

page 159 } A. Furloughed now.

Q. But you expect to get back?

A. Sir?

Q. You expect to get back?

A. Yes, sir.

Q. And you had been running on that line on that run for how long?

A. Off and on since 1917.

Q. Since 1917?

A. Yes.

Q. And your position is on the left hand side of the engine?

A. Yes.

Q. Your duty is to keep a lookout ahead?

A. Yes.

Q. In keeping your lookout ahead that day were you, when did you first see the automobile?

A. When did I first see the automobile?

Q. Yes, when did you first see the automobile?

A. I saw the car when it came on to my side of the track.

Q. You did not see it until that time?

A. No.

Q. What was there to prevent your seeing it before?

A. I could not see in front of that boiler.

Q. The track is straight, is it?

A. Yes.

Q. You can see the crossing from practically the edge of the right-of-way, can't you?

page 160 } A. How long?

Q. From practically the edge of the right-of-way as you approach it?

A. Yes, you can see it.

Q. The crossing is in sight, is it not, for more than two thousand feet?

A. Yes, it is in sight.

Q. And you could have seen anything on the crossing when you approached it?

A. I could not see it until it got over on my side.

Q. What?

A. I say I could not see anything on the crossing until it got over on my side.

Q. You could not?

A. I could see the crossing if I was a mile off from it.

Q. Could not you see clear down to the crossing for half a mile?

A. No. I could see a car only when it got on my side.

Q. You could see the crossing and you could not see the car on it?

A. Yes.

Q. Now, if you will answer this as you approached that crossing, you never saw the automobile until it got on your side of the engine on this occasion?

A. Yes, sir.

Q. What you call passing over the engine, you mean passing the nose of the engine?

A. Yes.

Q. You were not keeping a good lookout that page 161 } day?

A. I had charge of the fire and the engine, too.

Q. You had charge of the fire and the engine?

A. Yes.

Q. You were engaged in a lot of things?

A. Yes, siree. I had to look after the signals and I had charge of firing the train, and—

Q. (Interposing) You were doing a lot of things: you were firing the engine, although you had a travelling fireman to help you. He was engaged—

A. (Interposing) He was not firing the engine.

Q. What was the other fireman doing?

A. What was he doing?

Q. Yes.

A. He was working on the sliding tank. He was not firing the engine.

Q. The sliding tank?

A. Working on the slide, the coal slide to the stoker. I was sitting on the seat box, firing the engine.

Q. Why did you get up on the engine?

A. There is a stoker on the engine.

Q. What?

A. A stoker on the engine.

Q. Take your hand down from your mouth and speak so I can understand you; will you?

A. There is a stoker on the engine; it is not hand-firing, not a hand affair.

Q. Can you operate the stoker on the engine from your seat on the left hand side?

A. Yes; we operate valves.

page 162 } Q. You operate valves?

A. Yes.

Q. You meant to tell us that you fire that engine sitting on the left hand side of the engine, looking out of the window?

A. Yes, sir.

Q. What?

A. Can I do it?

Q. Were you doing it?

A. Yes, I was doing it.

Q. And you were doing it that day?

A. Yes, sir.

Q. What else were you doing?

A. Looking out ahead.

Q. You were looking out ahead and still—

A. (Interposing) I have a lot of things to watch; I watch gauges; I see that the coal is coming in all right, and I have a lot of things to do.

Q. You have a lot of things to do, and another thing you were doing was ringing the bell?

A. I was not ringing the bell. The air was ringing the bell.

Q. You were not ringing the bell, but you were making the connection which made the bell ring?

A. Yes, sir.

Q. That was another thing you were doing?

A. Ringing it by air.

Q. And another thing also that you were doing was listening out for signals?

page 163 } A. Yes, sir.

Q. Looking out for signals?

A. Yes. I know where they are located without seeing them.

Q. And you were also watching the gauges?

A. Yes, sir, yes, sir.

Q. And you were not only listening to the signals, but you tell the Jury you heard them?

A. Yes, sir.

Q. All that you did; all that sort of business?

A. Yes.

Q. Now, when was it that you say—Let me ask you this: What was it that made you hear those signals on that day, particularly?

A. Which signals do you mean?

Q. Any signals.

A. A whistling blast?

Q. The one you have testified about.

A. Because I heard them.

Q. What?

A. I heard them.

Q. You say you heard them. What made you hear them that particular day? You hear them every day, don't you?

A. Yes.

Q. It is a matter of every day practice with you?

A. I was not going to sit up there and let a man approach a crossing without blowing the whistle.

Q. I am not talking about that.

Mr. McCandlish: I think that is an important page 164 } thing.

Mr. Scott: He said that he would not let a man approach the crossing without giving him the signal, yet he said he never saw the man until he got—

Mr. McCandlish: (interposing): It is in answer to your question.

Mr. Scott: I know. But if you would not be so nervous and would just let me alone.

Mr. McCandlish: I won't let you alone unless you proceed according to the rules of evidence.

Mr. Scott: I am proceeding according as I have a right to proceed.

By Mr. Scott:

Q. Go ahead and answer the question.

A. What was the question?

Q. I asked you how it came that you heard all these signals that day.

A. What kind of signals?

Q. The ones you testified about.

A. Which signals is this?

Mr. McCandlish: I think, if your Honor please, in fairness to the witness that he is entitled to have Mr. Scott answer his question. He has been talking about a good many questions and a good many signals, and he is trying, as best he can, to confuse the witness. He asked about signals and the witness says: "What signals are you referring to?" And

he says: "Those you testified about", and, as your Honor knows, the witness testified—

The Court (interposing): He testified to at page 165 } least two different kinds of signals. Tell him what you want, Mr. Scott.

Mr. Scott: Well, let's see if I can help you out a little.

By Mr. Scott:

Q. What was the first signal you heard that day?

A. What was the first signal given?

By Mr. McCandlish:

Q. That day.

The Court: He means at that time.

By Mr. Scott:

Q. I mean at that time, as you approached the crossing.

Mr. McCandlish: I suggest that you say what you mean.

The Witness: I do not know what signal you mean.

The Court: I think the witness understands it. Go ahead.

By Mr. Scott:

Q. In answer to questions put to you by Mr. McCandlish, you have testified that you heard certain signals?

A. The whistle signals.

Q. What was the first signal that you heard?

A. The first signal that I heard?

Q. As you approached that crossing at the time that has been referred to by Mr. McCandlish.

A. Two long blasts of the whistle.

Q. Why do you know all about that?

A. I was bound to hear it; I could not help from hearing it.

page 166 } Q. You hear it every day?

A. Yes, sir.

Q. Would you say that you — You said that you would not let the man approach the crossing with the automobile on it. When you said that you did not refer to that signal, did you?

A. Did not refer to it?

Q. Yes.

A. I know the signal was blown.

Mr. Pickett: The witness did not testify that he was not

going to let the automobile approach the crossing. He said that he would not let him approach a crossing without the signal being given, which is entirely different.

By Mr. Scott:

Q. What did you say?

A. I did not say that I would let him approach the crossing with the automobile on it. I did not say that.

Q. Tell us what you said.

A. I said I would not let him approach a crossing without blowing the whistle.

Q. You said you would not let him approach the crossing without blowing the whistle?

A. Yes.

Q. You would not let him do that— Did you control the engine?

A. Do I control him? I could have called his attention to blow for the crossing.

Q. Did you tell him to blow for the crossing?

A. No, sir. I heard him.

page 167 } Q. You heard him?

A. Yes.

Q. And you did not tell him to blow for the crossing?

A. No, sir. I did not have to tell him. He was blowing.

Q. You did not do it?

A. I did not have to tell him.

Q. You did not have to tell him?

A. No, sir.

Q. So, when you say you would not let him do that, you were talking about something else?

A. I said I would not let him approach any crossing without blowing the whistle. That is what I have reference to.

Q. That is your business?

A. Yes.

Q. And he blew it without your telling him?

A. Yes; usually he blows it.

Q. And, it is a matter of everyday practice?

A. Yes.

Q. And you say—

Mr. McCandlish (interposing): He asks so many questions in one, if your Honor please.

The Court: Let him get through.

Mr. McCandlish: He has at least two already. Go on with some more.

Mr. Scott: He answered them as I went along.

Mr. McCandlish: He did not have a chance. You were talking all the time.

Mr. Scott: I am trying to get some answers out of the witness.

page 168 } By Mr. Scott:

Q. Now, Mr. Davis, that we have gotten, with the assistance of my friend on the other side, to the crossing signals, which you said that you would not let him approach without blowing,—

A. (interposing) He was blowing.

Q. What was the next signal he gave?

A. What?

Q. Did you hear my question?

A. No, sir, I did not.

Q. What was the next signal he gave?

A. Two long blasts of the whistle.

Q. How do you remember that?

A. What?

Q. How do you remember that?

A. Because I heard it.

Q. Take your hand down from your mouth, please, sir. What did you say?

A. Because I heard it.

Q. You remember it because you heard it?

A. Yes.

Q. You remember now, very distinctly, having heard that particular whistle on that particular occasion?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. Then, when was the next signal and what was that?

A. One short blast, two longs; two long and one short.

Q. Why was that given?

page 169 } A. That is the regular whistle for the road crossings.

Q. The regular whistle for the road crossings.

A. Yes.

Q. Where was the train when the signal was given?

A. I do not know exactly how many feet it was from the crossing.

Q. You don't.

A. It was approaching the crossing all the time he was blowing for this crossing.

Q. What was the next signal after that? You say you do not remember how far the—

A. (interposing) One long and a short. That is when I

called his attention to the car being stopped on the track very near to the Warrenton Y switch.

Q. That is what I am asking you: When you called attention to the car stopped on the track near the Warrenton Y, you were at—

By Mr. McCandlish:

Q. Very near to it?

A. Very near to it.

Q. Yes.

By Mr. Scott:

Q. And you were on the left hand side?

A. Yes.

Q. Did you see the Warrenton Branch switch?

A. I could not see it. I knew where we were, that we were about to it.

Q. You are not testifying to the fact because someone else testified to the same thing?

page 170 } A. No; I am testifying to what I know.

Q. To what you know?

A. Yes.

Q. You tell the Jury that you were on the left hand side and you noticed when that happened you were at the Warrenton Branch switch?

A. Yes.

Q. Why did you have to have your attention directed to that?

A. I knew where I was.

Q. You are guessing about this, aren't you?

A. No, sir, I am not guessing. I knew where I was.

Q. And, you say you saw at that point, as you approached the Warrenton Branch switch, this automobile with these people in it moving along across the track. Is that right?

A. Yes, sir.

Q. Moving slowly?

A. Yes, sir.

Q. And then, as you approached, the thing stopped?

A. Yes.

Q. And as it stopped there was a collision. Is that true?

A. The car stopped.

Q. And as it stopped, there was a collision?

A. Yes.

Q. Is that right?

A. Not when the car stopped, no, sir. The car stopped before we got to it.

page 171 } Q. How long before?

A. I don't know exactly how long in minutes or seconds.

Q. Two minutes or one second or five?

A. Where I saw the car stop we were at about the Warrenton Branch Y switch. I hollered to the engineer to "Hold them".

Q. Three hundred yards away — three hundred feet away?

A. Yes.

Q. What caused it to stop?

A. What?

Q. What caused it to stop?

A. I do not know— You mean the automobile?

Q. Yes.

A. I do not know. I was not in it.

Q. If you do not know what caused the automobile to stop, how do you know so much about other things?

A. I knew the car stopped.

Mr. McCandlish: I submit that this examination is utterly absurd. It goes beyond the limits of all reasonable common sense and everything else: asking him why he did not know why the automobile stopped.

Mr. Scott: Whether it is beyond the limits, I submit to the Court and Jury. I have a right to test this witness in any way and in a dozen way.

The Court: Absolutely. Go ahead, sir.

Mr. Scott: And even when I am absurd in doing it.

Mr. McCandlish: I submit to the Jury whether it is absurd.

Mr. Scott: I am perfectly willing to submit
page 172 } it to the Jury and to anyone else, the propriety
of my questions. Stand aside.

RE-DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Just one moment. I have one or two more questions. Now, Mr. Scott was asking you about sitting on your seat and firing the engine. Is there any difficulty about doing that, Mr. Davis?

A. No difficulty at all. The valves are all there in front of you.

Q. That is the way you do it? You do it sitting right there?

A. Yes; you do it about as you are sitting there.

Q. You do not have to take a shovel and put coal on the fire with it any more?

A. Unless the stoker breaks down, then is the only time you fire by hand.

Q. You would just operate the stoker valve and the stoker would be in operation?

A. Yes, sir.

Q. Now, Mr. Davis, you said it was your duty, along with other things you had to do, you were also operating the bell. How long does it take to operate the bell? How much work is incident to that?

A. You just reach over and open that valve; that is all there is to it. It does not take a second, probably.

Q. And did you have— Something was said about watching water gauges.
page 173 } A. That is the engineer's job, watching the water.

Q. Do you have to watch the water gauges too?

A. I have to watch, too, but he is responsible for it.

Q. How often would you have to look at the water gauge? Did that take much time?

A. No; just glance ahead at the water gauge; there is a water gauge on each side of the boiler.

Q. You do not have to keep your eyes riveted on it all the time?

A. No, sir, no, sir.

Mr. Miller: Now, don't you think that is leading?

Mr. McCandlish: I think it may be.

Mr. Miller: What do you do it for, then?

Mr. McCandlish Just trying to save time is the only reason I do it, trying to get the truth of this situation before this Jury, without taking an undue length of time, as I think all know what the facts are here. It is important from the standpoint of this Defendant Company that the facts may be gotten clearly before the Jury. I have no further questions.

Mr. Scott: Not any?

Mr. McCandlish: You asked me a question; I answered.

Mr. Miller: No. I asked it and I am perfectly satisfied with your answer. It is very intelligent, or intelligible.

The Court: All right. Is there any other witness? We will recess for a few moments.

(Thereupon at 11:55 o'clock, a. m., a brief recess was had.)

page 174 } (Following the recess indicated, this occurred:)

Mr. McCandlish Will you call W. W. Johnson.

Thereupon

W. W. JOHNSON,
was called as a witness for and on behalf of the Defendant,
and having been duly sworn by the Clerk of the Court, as-
sumed the witness stand and, upon examination, testified as
follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Your name is W. W. Johnson?

A. Yes, sir.

Mr. Scott: Where is Mr. Miller? Is he here?

Mr. Miller: I am here.

Mr. Scott: What is the name of this witness?

The Court: W. W. Johnson.

Mr. Scott: All right, go ahead.

By Mr. McCandlish:

Q. Where do you reside, Mr. Johnson?

A. Charlottesville.

Q. How are you employed?

A. Conductor.

Q. By what company?

A. The C. & O.

Q. And you have been employed by the Chesapeake & Ohio
Railway Company for how long?

A. Since 1901 and promoted to conductor in 1909.

Q. Conductor since 1909?

A. Yes.

Q. What train was under your charge on the occasion of
this accident, June 21, 1932?

page 175 } A. The 98, C. & O. train.

Q. Freight or passenger?

A. Freight.

Q. How many cars did you have in that train?

A. I had twenty, including the caboose; and engine.

Q. Twenty including the caboose, and then you had the
engine?

A. Yes.

Q. Do you recall on what track your train was standing
at the time of this accident?

A. Yes; on the north passing track at Calverton.

Q. And you were on the most easterly track except one which was the depot track?

A. Yes.

Q. Do you recall where the rear end or tail of your train was as you stood on the track?

A. Yes. The caboose stood south, at the south end of the depot.

Mr. Scott: What is that?

Mr. McCandlish: The caboose was down at the south end of the depot.

Mr. Scott: The freight depot?

Mr. McCandlish: Yes.

The Witness: Right even with the south end of it; three or four car-lengths north of the crossing.

By Mr. McCandlish:

Q. About three or four car-lengths north of the crossing.

A. Yes; something like that.

Q. Now, your engine, of course, was heading
page 176 } north?

A. Yes, sir.

Q. Well, when did you go into that side track?

A. We pulled in there at ten-fifteen, I think it was.

Q. That morning?

A. Yes, sir, in the morning; ten-fifteen, a. m. We broke down about a mile south of Calverton. I had to get an engine—

Q. (interposing) Where were you, now, at the time of the accident? Where were you when the accident happened? Were you with the train or not?

A. Do you mean about the accident at the crossing?

Q. The accident at the crossing, yes.

A. I was in the depot.

Q. You were in the depot?

A. The freight—the passenger station; in the reception room waiting there at the telegraph office in the waiting room at Calverton.

Q. That is the part of the station nearest to the crossing?

A. Yes; the part right north.

Q. When the C. & O. train Number 5 came in there, tell the Jury whether you heard any signals given by it or not.

A. No, sir. When I looked at my watch at '20, I made a remark to myself that Number 5 was a little late. About that time, just an instant, why I looked out and I see the auto-

mobile moving along the crossing track and about that time Number 5 hit it.

Q. You had heard no signals from Number 5?

A. No, sir, no, sir; I was in the waiting room.
page 177 } Q. You had heard no signals from Number 5?

A. No, sir, no, sir.

Q. Were you paying any attention to the signals one way or another?

A. No, sir. I was in there waiting for orders for my train. When my train breaks down I am supposed to go to the telegraph office.

Q. Can you tell the jury whether or not, how long it was after you saw the car stopped on the track before the train hit it?

A. No, sir, I can't just say; just several instants.

Q. Just several instants?

A. Yes, from the time it stopped, the engine hit it. I can show the Jury right where I was standing at and all, looking through that north window. You see, when your train breaks down you are supposed to be at the telegraph office. We do not know what will happen and we have to be there so the operator can get in touch with you and you do not know what move you will make. Therefore, you have to get close to the office here you can get over it.

Q. Do you recall any exclamation or statement being made by anyone there in the room at that time about the automobile?

A. Mr. Sullivan was standing there; he was the operator.

Q. Mr. Sullivan was standing there, did I understand you to say?

A. Yes.

Q. But I was asking you if you recall any statement?

A. Yes, sir. I made the statement that Number 5 was going to hit that automobile.
page 178 }

Mr. Scott: You cannot make any statement of that sort. I do not know what it is, but I submit to the Court that the statement of the witness is not proper.

Mr. McCandlish: That is correct, Mr. Scott.

The Witness: I won't make it if—

Mr. McCandlish (interposing): Except as a part of the *res gestae*: any spontaneous outburst is proper, made at the time.

By Mr. McCandlish:

Q. I ask you now if, when the automobile got stopped on the

track, if any exclamation or statement was made with reference to the matter by anyone? I think that is proper.

Mr. Miller: Don't answer that question until the objection is decided.

The Court: What is the objection, Mr. Scott?

Mr. Scott: I do not think it is proper evidence, if your Honor please.

The Court: For what reasons?

Mr. Scott: Well, exclamations of strangers, not parties to the transaction, but merely a witness of what happened—if somebody else stated it, it is not evidence that can be testified to by this witness.

Mr. McCandlish: It was made in his presence and he heard it.

Mr. Scott: It is like any other hearsay declaration. That could not come in as part of the *res gestae*. That is another question.

page 179 } The Court: I do not think there is anything that a stranger might have said, that a stranger to the transaction might say, that would be good evidence. I will overrule you at this time, Mr. McCandlish. If I conclude it is proper, later, I will let you put that in.

Mr. McCandlish: And we would like to get an answer outside of the presence of the Jury and submit it to your Honor. It is part of the *res gestae*.

The Court: Go ahead and finish the questions, gentlemen.

Mr. McCandlish: I think that is all I want to ask the witness.

The Court: All right. Is there any further cross examination, gentlemen?

Mr. Scott: I don't know that I want to ask him anything.

Mr. McCandlish: All right. That suits us.

Mr. Miller: But I want to ask him a question.

RE-CROSS EXAMINATION.

By Mr. Miller:

Q. Who was in the station with you at the time?

A. Mr. Sullivan and two other gentlemen that were back in there in the waiting room.

Q. In the reception room?

A. Yes.

Q. Who was Mr. Sullivan? Do you know what position Mr. Sullivan held at that time?

A. He was the operator.

Q. The operator?

A. Yes.

page 180 } Mr. Scott: And the station agent?

By Mr. Miller:

Q. And was he the station agent, too?

A. I suppose so.

Q. Was Mr. Cheatwood there?

A. I don't know him.

Mr. Miller: He says he does not know the others.

The Witness: I don't know anyone by name except Mr. Sullivan.

By Mr. Miller:

Q. There were three in there and Mr. Sullivan was the only one you knew?

A. Yes, sir.

Mr. Scott: Stand aside, sir.

(The witness thereupon was excused and retired from the witness stand.)

Mr. McCandlish: Call Mr. Roberts.

Thereupon

J. H. ROBERTS,
was called as a witness for and on behalf of the Defendant,
and having been previously duly sworn by the Clerk of the
Court, assumed the witness stand and, upon examination,
testified as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Is your name J. H. Roberts or J. F. Roberts?

A. J. H. Roberts.

By Mr. Scott:

Q. J. H. Roberts?

page 181 } A. Yes, sir.

By Mr. McCandlish:

Q. And what is your occupation, Mr. Roberts?

A. Fireman, C. & O. Railroad.

Q. Residing where?

A. Charlottesville.

Mr. Scott: I can't hear what he says.

By Mr. McCandlish:

Q. Will you speak up louder?

A. Yes.

Q. How long have you been working with the Chesapeake & Ohio Railway Company?

A. Since 1913.

Q. Where were you at the time of this accident at the crossing in Calverton?

A. In the northward passing track at Calverton.

Q. At Calverton?

A. Yes, sir.

Q. That is where your train was?

A. That is where the train and engine was.

Q. And, as Number 5 came down you were going on down to the station, were you?

A. I was standing in front of the engine.

Q. Who else was out there with you?

A. Engineer Lane and Brakeman Wilkinson, and two helpers from Charlottesville.

Q. Is the name Wilkins or Wilkinson?

A. Wilkinson.

Q. Did you notice Number 5 when she came in?
page 182 } A. Yes, sir.

Q. Up there about the whistle post, the road-crossing whistle post, and from that point on down to the crossing, will you tell the Jury when Number 5 came in, if it came in with the bell sounding and the whistles?

A. Yes, sir. He was supposed to whistle crossing the signal: there was two blasts of the whistle given with a pause followed by two more which would be given as the train passed on to where we was standing, with a continuation of the signal on up to the crossing.

Q. What, if any, remark was made at the time about signals?

Mr. Scott: I object.

Mr. Miller: We object for the same reason that your Honor had in mind when, as I understood, you took the question under consideration.

The Court: Yes.

Mr. McCandlish: We say it is admissible as *res gestae*.

Mr. Pickett: And, if the court please, this evidence already went in on the part of the other witness, Mr. Lane.

Mr. McCandlish: Yes, without objection.

Mr. Miller: If I failed to object there is no reason why you should put it in now. Now, ain't that right? Very well, let it go on, if your Honor please.

The Witness: Yes; I remember Engineer Lane remarking to me that Engineer Oliver was blowing the new crossing signal set up by the Southern Railroads sometime previous to the accident. That is the reason I was impressed about these things, by the blowing.

page 183 } By Mr. McCandlish:

Q. When the train came down there, the Chesapeake & Ohio train came down there by the whistle post, can you tell the Jury, to the best of your knowledge and belief how fast it was running?

A. Why, just judging the speed, I judge he was running between forty-five and fifty miles an hour when he passed the signal there.

Q. Forty-five to fifty miles an hour?

A. Yes.

Q. Do you know whether when the train passed you did you notice or know whether the bell was ringing?

A. Yes, sir, the bell was ringing.

Q. The bell was ringing?

A. Yes, the bell was ringing.

Mr. McCandlish: You can take the witness.

CROSS EXAMINATION.

By Mr. Miller:

Q. You say the bell was ringing?

A. Yes.

Q. You said, as I understand, when Number 5 passed you and Mr. Lane, while you were down about the freight depot, there was a continuation of the signal all the way up to the crossing. What was the character of that signal?

A. We were not at the freight depot.

Q. Well, when you were down below the crossing, north of the crossing?

A. That was the continuation of the whistle.

page 184 } Q. Yes. You said a continuation of the signal. What was that signal?

A. The crossing signal, warning signal given by the engine whistle.

By Mr. McCandlish:

Q. Given all the way up to the crossing?

A. As he passed on by us, a continuation signal.

By Mr. Miller:

Q. I understood you to say, in response to the question propounded by Mr. McCandlish that there was a continuation signal up to the crossing?

A. A continuation as he passed by us.

Q. Do you not know how long after he passed you it continued?

A. No; after the rear of the train passed by we resumed work on the engine.

Q. You resumed your work?

A. Yes.

Q. You are speaking of this new whistle on that train that is spoken of. You heard that some distance down the road, didn't you, about a piece of woods that has been spoken of as evidence?

A. We heard it start down there; I don't know about the woods that you refer to.

Q. But you know, looking north from where you were, that there is a piece of woods down there?

A. I know there is woods down there. I would not say the whistle started at the woods.

Q. Where would you say you heard the first page 185 } of the new whistle; the first sound of the new whistle?

A. Somewhere near about the whistle signal board.

Q. Near the whistle signal board?

A. That is where the first whistle was blown.

Q. Do you know how far that is from the woods?

A. No, sir.

Q. How long had you and Mr. Lane been standing where you were when the train passed you?

A. Well, we had not been standing a great while when Number 5 came in sight. I mentioned to Mr. Lane that Number 5 was in between us and Calverton; I mentioned, "Number 5 is coming now," and we went out to the front of the engine and stood there until the rear of Number 5 passed.

Q. Could you tell the Jury with any degree of certainty, I mean, excluding guess, of the time any other train whistle that you ever heard approached the crossing, what signals were given?

A. They always blow for crossings.

Q. What?

A. They always blow approaching the crossing.

Q. That is the custom, is it?

A. Yes, the practice.

Q. Well, sometimes the signals are not exactly observed, are they, if there is no one on the crossing?

A. They usually are, yes sir.

Q. But sometimes they are not. Ain't that true?

A. We usually observe all signals when the train passes.

Q. I understand that. You can answer the page 186 } question. Have you not known instances in which they were not given because there was no occasion to give them?

A. I don't remember of any.

Q. What?

A. I don't remember any when no signal was given for a highway crossing.

Q. Well, you testified now that the signal was given at the crossing because it was the custom of the railroad to have its employees in charge of the engine to always give the signal. Do you know that of your own knowledge?

A. I know of my own knowledge that this signal was given at this particular occasion.

Q. But you would not say, of your own knowledge, that the like signals or the exact signals were ever given on any other occasion, under your observation?

A. Oh, yes. I have observed signals given on other occasions, the same signals.

Q. Exactly the same?

A. Exactly the same crossing signals.

Q. Practically the same crossing signals?

A. Yes.

Q. Now, "practically" is not "exactly". You do not mean exactly the same signals?

A. I don't know what the difference is. I don't know what difference it does make. They try to do it about the same way all the time.

Q. They try to do it the same way all the time?

A. Yes.

Q. So the day that this accident took place, page 187 } the day that you mentioned, the 21st of June, at Calverton, was that the first time that you had ever heard that signal?

A. No, sir.

Q. That new whistle?

A. No, sir. That ain't the first time.

Q. That was, as a matter of fact, a regulation of the Southern Railroad and not of the C. & O., was it?

A. Yes, sir. The—

Q. (interposing) The C. & O. never had adopted that signal so far as you knew?

A. No, sir.

Q. Is that right?

A. Yes, sir.

Q. How did you arrive at the conclusion in regard to the speed that that train was making when you testified in response to Mr. McCandlish's question and you said, as I understand you, well, how fast did you say it was running?

A. I said it was judging about between forty-five and fifty miles an hour.

Q. Between forty-five and fifty miles an hour?

A. Yes.

Q. That is merely a guess, is it?

A. Well, of course it could not be a certainty. It is mighty hard to judge the speed by a mile.

Mr. Miller: All right, sir.

Mr. Scott: Stand aside.

RE-DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Do you know anything about braking trains, page 188 } or how long it would take for the application of the brakes to reduce the speed of the train from forty-five miles an hour down to thirty miles? Have you ever run a train yourself?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. I will ask you this question: You say up at the whistle board the train was going forty-five to fifty miles an hour?

A. Yes.

Q. Would there have been any difficulty pulling the train down to thirty miles by the time it got down to the Warrenton Y?

A. No, sir, he could pull it down to thirty miles an hour or slower if he wanted to.

Mr. McCandlish: That is all.

Mr. Miller: That is all.

(The witness thereupon was excused and retired from the witness stand.)

Thereupon

R. W. WILKERSON,
was called as a witness for and on behalf of the Defendant,
and having been previously duly sworn by the Clerk of the
Court, assumed the witness stand and, upon examination,
testified as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Your name is R. W. Wilkinson?
page 189 } A. Yes, sir.

Q. Where do you reside?

A. Richmond.

Q. And you are employed by what company?

A. The Chesapeake & Ohio Railroad Company.

Q. In what capacity?

A. As brakeman.

Q. You have been a brakeman for the Chesapeake and
Ohio Railroad for how long?

A. About 1911.

Q. On the day of this accident, to what train were you
attached?

A. Train Number 98.

Q. Where was that train at the time of the accident?

A. In the northbound passing track at Calverton.

Q. Do you know about where the caboose of it was?

A. Just south of the depot, north, south from the, up there
by the freight depot, where the freight depot is at Calver-
ton.

Q. I see. Do you remember when Number 5 came in?

A. Yes, sir.

Q. Where were you at that time?

A. I was up there around the engine, standing around the
front of the engine.

Q. Did you notice that train when it came in?

A. Yes, sir, yes, sir. We were required to notice it, all
trains passing.

Q. You are required to notice them?

A. Yes, sir.

page 190 } Q. You are required by what; the rules of the
Company?

A. Yes, sir, the rules of the Company.

Mr. McCandlish: Can you gentlemen hear this witness
over there?

(The members of the Jury indicated that they could hear the witness.)

By Mr. McCandlish:

Q. When was your attention first attracted to Number 5? When did you first see Number 5 coming?

A. Our attention was called to Number 5 by someone, one of the men saying that Number 5 was coming and all of us came out and looked at it as it passed.

Q. Are you able to tell the Jury what, if any, signals were sounded by the whistle of Number 5 from a point up about the road-crossing signal board as it went on down to the crossing?

A. A signal was sounded.

Q. What was the whistle doing? Was the whistle sounded or not when it passed you?

A. It was blowing.

Q. Was any comment made about it at that time by anyone in your presence?

A. Yes, sir. Mr. Lane made a remark to me going down that he was blowing the same whistle signal.

Q. How long after that event did the accident happen?

A. The Flagman came down; that was the first I knew of it.

Q. You went on down to the crossing?

A. Yes.

Q. You mean after the train stopped on the
page 191 } crossing the Flagman came up to protect his
train?

A. Yes, sir.

Q. And you went down as he came up?

A. Yes, sir.

Mr. McCandlish: You can take the witness, Mr. Miller.

CROSS EXAMINATION.

By Mr. Scott:

Q. Mr. Wilkinson, I understand you to say that you are an employee of the Chesapeake & Ohio Railway Company as Brakeman of Number 98?

A. Yes.

Q. Were you on duty the day that this happened?

A. Yes.

Q. Do you remember what date it was?

A. June 21, during 1932.

Q. You say it was June 21, 1932?

A. Yes.

Q. How come it happens you remember the day of these things so well?

A. Well, anything like that showing up, anyone killed, anyone would certainly remember the date.

Q. Do you remember the date and do you remember everything that happened?

A. Sure. It stands out different when you have something to impress it on your mind like that.

Q. You remember after accident all these things did happen?

A. Yes, sir.

Q. One of the rules of your Company requires page 192 } you to notice trains?

A. Yes.

Q. If you say you did not notice it, you would be violating the rules?

A. Yes, sir.

Q. Now, you come and tell us you remember living up to the rules of your company and when Number 5 came in you all ran out to look at it?

A. All of us looked at the train.

Q. You all ran out and looked at it and to see what?

A. To see whether they had any signals; see whether he had all of his train there; see whether there was any dragging parts, and see if the signals were on the rear.

Q. That was your business to look at those things?

A. Yes.

Q. And while you were looking at these things you also heard all these signals?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. And you remember them now, after the accident, very clearly?

A. Sure.

Q. Did you make any note of it at the time?

A. No, sir.

Q. You did not?

A. No, sir.

Q. And it is only because of the accident that you can speak so plainly and positively?

page 193 } A. Not necessarily so.

Q. What?

A. Not necessarily so.

Q. Didn't you say so just now?

A. No, I don't think I said that.

Q. What did you say?

A. I didn't say that just because of the accident, but that would naturally make anyone say it.

Q. The accident impressed itself on your mind?

A. Yes, and it would on anyone's mind.

Q. And after the accident, you can tell all these things with great clearness?

A. Anyone could.

Q. What?

A. Anyone with average intelligence could.

Q. You heard all these other witnesses testify here for the Railroad Company?

A. I heard some of them. I have not heard them all.

Q. You heard Mr. Lane?

A. I don't think I was in the room when Mr. Lane testified.

Q. You were not in the room?

A. No.

Q. What?

A. No.

Q. Did you hear the other witnesses?

A. Yes, I heard the rest of them testify.

Q. And all of you, you followed along in the footsteps of each other—

page 194 } Mr. McCandlish (interposing): I object.

Mr. Scott: Just a minute. Wait a minute.

Mr. McCandlish: I object to his saying that they all followed along in the footsteps—

By Mr. Scott:

Q. (interposing) Didn't you follow along in the steps of the other witnesses?

Mr. McCandlish: Don't answer the question.

Mr. Scott: What is the objection?

Mr. McCandlish: The witness testified—

The Court (interposing): Did he conscientiously follow them along?

Mr. Scott: I just want to see if he heard the other witnesses testify and if he is testifying to the same thing.

Mr. McCandlish: He said he heard some.

The Court: The Jury knows what he testified to. If you want to ask whether he has conscientiously followed them, it is all right.

Mr. Scott: What?

The Court: I say if you want to ask if he conscientiously followed them, it is all right.

By Mr. Scott:

Q. I will ask you: Have you not conscientiously followed the same testimony that the others have given?

A. No, sir, I have not.

Q. You have not?

A. No.

Q. How did it happen, then, that your testimony dovetailed so accurately when you stated—

page 195 } The Court: (interposing): I think you are
arguing with the witness.

Mr. Scott: Stand aside.

Mr. McCandlish: That is all.

(The witness thereupon was excused and retired from the witness stand.)

Mr. McCandlish: Call Mr. Lane.

Thereupon

J. W. LANE,

was called as a witness for and on behalf of the Defendant, and having been previously duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. You are J. W. Lane?

A. Yes.

Q. Where do you live?

A. Clifton Forge, Virginia.

Q. You work for the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. What was your job at the time of the accident?

A. I was Flagman on Number 5?

Q. Flagman on Number 5?

A. Yes.

Q. How long did you work or have you worked for the Chesapeake & Ohio Railway Company?

A. Twenty-nine years.

Q. Twenty-nine years?

page 196 } A. Yes, twenty-nine years.

Q. Do you recall this accident up at Calverton on June 21, 1932?

A. Yes, sir.

Q. As your train went into Calverton where were you?

A. On the rear platform, north side— west side.

Q. On the rear platform of the train?

A. Yes.

Q. And did you see the engine hit the automobile?

A. No, sir.

Q. Did you, before the crash, before the crash came, hear the signals of the whistle?

A. I could hear the whistle blowing. I could not tell what they were; I was too far away from the engine, nine cars, you see, from the engine and that made quite a distance. I could not tell what they were.

Q. You heard this whistle blow?

A. Yes, but at that distance you could not tell just what it was. You are behind it and you have the noise of the train.

Q. How about the bell on the engine?

A. I could not hear that.

Q. You could not hear the bell?

A. No, sir.

Q. Did you notice, before the crash, any application of the brakes, emergency or otherwise?

A. Yes, sir. I felt the jar of the rear when the brakes went in emergency. It was very rough back there.

Q. It was very rough back there?

page 197 } A. With the slack running up.

Q. Where did your train come to a stop?

A. Well, the seven cars, the engine and seven cars and a half were over the crossing, over the crossing.

Q. When the train stopped, what did you do?

A. I went down to flag the rear of the train.

Q. You went on north?

A. Yes; I went back north.

Q. Do you remember this freight train standing on the siding?

A. Yes, sir.

Mr. McCandlish: Take the witness.

Mr. Miller: Stand aside.

(The witness thereupon was excused and retired from the witness stand.)

Mr. McCandlish: Will your Honor indulge us? I think we have almost completed our case.

The Court: Yes.

(A brief recess was then taken during which an informal conference was had between Counsel for the respective parties, following which this occurred:)

Mr. McCandlish: I have one more fact to show to the Jury. I had hoped that we might stipulate it to save time, but Counsel want it proven by the witness.

Call Mr. Lane.

Mr. Scott: He has already testified on that point.

Mr. McCandlish: He is being called on another point.

Thereupon

page 198 }

M. E. LANE,

a witness heretofore called for and on behalf of the Defendant, having been previously duly sworn by the Clerk of the Court as is hereinbefore indicated, and having been examined by Counsel for the respective parties and excused, was recalled to the witness stand by Counsel for the Defendant and, upon assuming the witness stand, testified upon further examination, as follows:

DIRECT EXAMINATION (resumed).

By Mr. McCandlish:

Q. Mr. Lane, when Chesapeake & Ohio trains are running on southbound tracks, when Chesapeake & Ohio railway trains are running on Southern Railway tracks, what rules do they follow with reference to the giving of the road crossing signal?

A. We have to blow the new regulation signal adopted by it.

Q. By whom?

A. The Southern Railway.

Q. Then you have to use the Southern Railway signals?

A. Yes.

Q. This particular track on which this train Number 5 was running at the time was a Southern Railway track?

A. Yes, sir.

Mr. McCandlish: That is all.

Mr. Miller: We don't want to ask him anything.

(The witness thereupon was excused and retired from the witness stand.)

Mr. McCandlish: That is our case, if your Honor pleases.

The Court: Is there any rebuttal testimony?

Mr. Miller: Yes, your Honor.

page 199 } The Court: All right. Let us get on.

Mr. Miller: Mr. Sheriff, will you please call Mr. Ennis to the stand, Mr. W. R. Ennis?

Thereupon

W. R. ENNIS,

a witness heretofore called for and on behalf of the Plaintiff, having been previously duly sworn by the Clerk of the Court as is hereinbefore indicated, and having been examined by Counsel for the respective parties and excused, was recalled to the witness stand by Counsel for the Plaintiff and, upon resuming the witness stand, testified, upon further examination, as follows:

DIRECT EXAMINATION (resumed).

By Mr. Scott:

Q. Now, Mr. Ennis, immediately after the accident which resulted in the death of your daughter and your daughter-in-law, did you go to the scene?

A. Yes, sir.

Q. Did you see there—

Mr. Pickett (interposing): "Who did you see"?

By Mr. Scott:

Q. Did you see there Mr. Oliver, the engineer?

Mr. Pickett: I object to that as leading.

The Witness: Yes.

The Court: That is perfectly all right. What is the use of covering the whole territory down there?

Mr. Pickett: He just suggests the answer.

By Mr. Scott:

Q. Did you see the man?

page 200 } The Court: I do not see that that suggests the answer.

By Mr. Scott:

Q. Did you hear him make any statement as to having seen the—

Mr. McCandlish (interposing): Will you permit me to interrupt?

Mr. Scott: Let me finish the question.

By Mr. Scott:

Q. Did you hear him make any statement?

A. Why—

Q. Did you hear him make any statement?

A. Yes, sir.

Q. With reference to having seen the automobile on the track?

Mr. McCandlish: One moment, before you answer that. There were two Mr. Olivers among the train crews who were there. One was Mr. W. E. Oliver and the other was Mr. A. F. Oliver.

By Mr. McCandlish:

Q. Do you know which of those gentlemen you saw?

A. That man right there (indicating an individual in the Court Room.)

Q. Which one?

A. That one (indicating).

By Mr. Scott:

Q. Was it the one who took the witness stand and testified?

A. Yes, sir; this little fellow right over there (indicating).

Q. Did you hear him—

page 201 } By Mr. McCandlish:

Q. (interposing) Will you point him out?

A. That little fellow sitting there with the glasses on.

Q. That is the man?

A Juror: Ask him to stand up.

Mr. Miller: One Juror asks him to stand up.

(An unnamed individual in the Court Room arose at this point.)

By Mr. Scott:

Q. Is that the gentleman?

A. Yes, sir.

Q. Is that the man?

A. Yes.

Q. The same man that was on the witness stand a while ago?

A. Yes.

Q. You heard his testimony?

A. Yes.

Q. Did he make any statement with reference to the matter? If so, please tell the Jury what it was.

A. Why, he denied of a-speaking to me at the scene at Calverton; that he came to me and said that he was sorry, sorry it happened, but he could have stopped the train, but he was afraid of wrecking it.

Q. He saw it in time to stop the train?

A. He remarked—

Mr. Pickett (interposing): I object.

The Court: I think the witness is talking about—

Mr. Scott: Take the witness.

Mr. McCandlish: Of course, you understand page 202 } we object to this, to the reception of this evidence and we ask that it be stricken out.

Mr. Scott: On what grounds?

The Court: On what grounds?

Mr. McCandlish: On the ground that Mr. Scott made Mr. Oliver his witness on that point and is bound by his answer.

The Court: The objection is overruled.

Mr. McCandlish: We save the point on that.

The Court: He laid the foundation.

Mr. McCandlish: I understand you have to lay the foundation, but when you ask a collateral question you are bound by the answer of the witness on that. That is my point.

The Court: Very well.

CROSS EXAMINATION.

By Mr. McCandlish:

Q. When you got to the scene of the accident, were you excited?

A. Not so much?

Q. You were not excited?

A. Of course I was excited to a certain extent, but not very much because they would not let me go up to the scene.

Q. You were down at the crossing?

A. I was between the passenger depot and the crossing.

Q. Between the passenger depot and crossing?

A. Yes.

Q. And it had been how long after the accident before you got there?

A. Oh, I should judge about fifteen, it seemed page 203 } to me about fifteen or twenty minutes.

Q. About fifteen or twenty minutes?

A. Before I got there.

Q. You were out in the field at home when you heard about the accident?

A. Yes.

Q. Somebody came up there and told you?

A. Yes, sir.

Q. Where did you say Mr. Oliver was when you heard him make this statement?

A. He was right there, somewhere about halfway between the passenger depot and the car, sir.

Q. Was anybody else present?

A. There were several, a good many around there, but I not knowing anyone but my son that was there. I did not look up in the faces.

Q. Did you ever see Mr. Oliver before?

A. No, sir.

Q. Did you ever see him since, until this time?

A. No, sir, except probably I might have seen him in the fast trains going through, but not knowing, I did not pay much attention to him.

Q. You say a good many people were there but you did not look in the faces of them?

A. No, sir, I did not. I know my son was standing right beside of me.

Q. You did not look in the faces of the people?

A. No.

Q. Then, how did you know who spoke?

page 204 } A. No more than when he came up and shook hands and he said he extended his sympathy to me and I did look at him.

Q. He extended his sympathy?

A. And I did look at him.

Mr. Scott: Are you through with the witness?

Mr. McCandlish: Yes. We have finished with him.

(The witness thereupon was excused and retired from the witness stand.)

Thereupon

RIX ENNIS,

was called as a witness for and on behalf of the Plaintiff, and having been previously duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION.

By Mr. Miller:

Q. Give the Jury your full name.

A. Rix Ennis.

Mr. McCandlish: I want to state my further objection, if your Honor please: This testimony should have gone in if at all, in chief, and the evidence of the witness who has just left the stand particularly should have gone in in chief as, I think, will apply to this witness. Further, it is shown that this alleged conversation occurred some fifteen or twenty minutes after the accident and was too far removed to be part of the *res gestae*.

The Court: The testimony is admissible for page 205 } the purpose of contradicting your witness.

Mr. Scott: That is why he is called.

Mr. Miller: And we laid the foundation.

The Court: The foundation is laid. That is what the testimony is in for.

Mr. Scott: That is all.

Mr. McCandlish: And not for the purpose of showing that such a statement was made; and the Jury cannot consider that fact either one way or another as having any probative value on the question whether the statement was made or not.

Mr. Scott: The Court of Appeals recently decided that a declaration made so shortly after that is part of the *res gestae*.

The Court: You are on rebuttal now.

Mr. Scott: This is all rebuttal.

The Court: And for the purpose of contradicting the witness of the Defendant and this is offered as attacking the creditability of that witness.

Mr. Miller: We said that.

Mr. McCandlish: And it has no probative value of showing or tending to show that that statement was made.

Mr. Miller: We concede that.

Mr. Scott: It does not prove the fact. Of course, the statement was made, but it does not prove the fact.

The Court: Yes.

Mr. Scott: That is true.

Mr. Miller: It is no proof of the fact that what he said could have been done, but proof that he made the statement.

By Mr. Miller:

Q. Mrs. Norma Ennis was your wife?
page 206 } A. Yes.

Q. Mary Catherine Ennis was related to you?

A. Yes.

Q. And how?

A. Sister.

Q. You are the son of W. R. Ennis?

A. Yes, sir.

Q. Were you present at Calverton a short time after the accident in which your wife and sister were killed?

A. Yes, sir.

Q. How long afterwards?

A. I judge it was twenty or twenty-five minutes.

Q. Did you get there before or after your father?

A. We both went there together.

Q. Did you hear Mr. Oliver, the gentleman who has been pointed out to you in the Court Room and who testified and said he was the engineer on that train, make any statement to your father when he went down there?

A. Yes, sir.

Q. To Calverton?

A. Yes.

Q. Where were you three gentlemen at the time the statement was made?

A. We were between the depot and the crossing.

Q. Was anyone else there, any others?

A. A number of others were standing around but no one I know.

Q. What was the statement, sir, that Mr. Oliver, the engineer, made to your father, as you recollect?
page 207 }

A. Well, he was making sympathy; he said he was sorry for it, he could have stopped the train but scared it would wreck it.

Mr. Miller: That is all, gentlemen. You all can take the witness.

CROSS EXAMINATION.

By Mr. McCandlish:

Q. You did not know this Mr. Oliver before?

A. No, sir; I did not know him.

Q. You never had seen him before?

A. No, sir.

Q. And you have never seen him since, until this trial today?

A. Yes, sir.

Q. What?

A. No, sir, I have never seen him until this trial.

Q. At that time you had learned of the death of your wife?

A. Sir?

Q. You had learned of the death of your wife at the time?

A. Yes, sir.

Q. And of your sister?

A. Yes, sir.

Q. You were laboring under a good deal of strain and excitement, were you, Mr. Ennis?

A. Not so much.

Q. Not so much?

A. No, sir.

Q. At that time did you know the condition of your child?

A. No, sir. I had not got the child. It was
page 208 } over at the postoffice.

Q. Do you know or did you know whether, as a matter of fact, your child was dead at that time or still alive?

A. I knew she was still alive.

Q. You knew she was still alive?

A. Yes.

Q. Under such circumstances you undertake to identify this gentleman as being, as having made this statement to you, this Mr. Oliver?

A. Yes, sir.

Q. You say there were a good many other people present?

A. Yes, plenty of other people were standing around the depot, and the other places.

Q. And no one else heard him make the statement?

A. I don't know. I guess someone heard him. They were standing around everywhere.

Q. Who was there?

A. I don't know all them that was there at the time, but I just saw them. There was people off the train who was standing around.

Q. People off the train were standing around?

A. Yes.

Q. Did you know at that time that there were two Mr. Olivers that were trainmen?

A. No, sir.

Q. Well, can you point out in the Court Room any other man who was present when this alleged statement was made?

(The witness surveyed the Court Room and then answered:) No, sir, I don't remember seeing any page 209 } of them.

Q. Well, the whole train crew, the crews of both trains are here. You can take your time and look around and see if you can recognize anybody else who was present there.

(The witness again surveyed the Court Room.)

The Witness: No, sir. I don't recognize any of them.

Q. You have seen a lot of them come here and testify on the witness stand during this trial?

A. Yes, sir.

Q. You have been in the Court Room while the trial has been going on?

A. I have not while some of them were; not all of them.

Q. You have not heard all of them?

A. No.

Q. How were you able to identify one particular man when you cannot identify the others?

A. Well, I don't see any of them that looks like him, and he was undoubtedly the fellow because I recognize him.

Q. You can identify him, you say, although you cannot identify other people who were present. Why is that?

A. Well, I was not paying particular notice to them. They were not saying anything to me.

Q. You were paying particular notice to the fact that your wife was killed and your daughter was seriously injured?

A. Yes, sir.

Q. And that your sister was killed?

A. Yes, sir. But I had not seen them. I was standing in the depot when this fellow came up and why I paid more attention to him than to anyone else was because page 210 } he was talking.

By Mr. Miller:

Q. Because what?

A. Because he was talking. Anyone pays more attention to somebody talking to you than to somebody standing off and not saying nothing.

By Mr. McCandlish:

Q. Did the man who was talking to you say that he was the engineer on the train?

A. Yes, sir.

Q. What did he say about that?

A. The way he said it, he said: "I could have stopped, but scared of wrecking the train."

Q. I know, but did he say he was the engineer on the train?

A. No, he did not say it, by that, he did not say it, but by that he must have been, when he could have stopped the train.

Q. By what he said you just judge he was the engineer?

A. Yes, sir. I did not ask him.

Q. Somebody made that statement to you and you judge he was the engineer?

A. Yes.

Q. Because you know the engineer is generally the man who stops and starts trains?

A. Yes, sir.

Q. And when you saw Mr. Oliver come and testify as the engineer you concluded, did you not, that he was the man who made the statement?

A. Yes, absolutely the same man.

page 211 } Q. Is not that right?

A. It is absolutely the same man.

Mr. McCandlish: All right, sir.

(The witness was thereupon excused and retired from the witness stand.)

The Court: We will take a recess until two o'clock. Gentlemen of the Jury, let no one discuss this case with you during the recess.

(Thereupon at one o'clock, p. m., recess was taken as indicated.)

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AFTER RECESS

(The consideration of the above-entitled matter was resumed, pursuant to recess heretofore taken, at 2:10 o'clock, p. m., when the following proceedings and transactions were had and testimony taken:)

PROCEEDINGS, TRANSACTIONS AND TESTIMONY.

The Clerk of the Court: Do you waive the poll of the Jury?

Mr. Miller: Yes, we waive it.

Mr. McCandlish: Yes.

The Court: Is there any further testimony?

Mr. Miller: Sir?

The Court: Is there any further testimony?

Mr. Miller: No, sir.

Mr. McCandlish: Oh, do you rest?

Mr. Miller: Yes.

Mr. McCandlish: Call Mr. A. F. Oliver.

Thereupon

A. F. OLIVER,

a witness heretofore called for and on behalf of the Defendant, and having been previously duly sworn by the Clerk of the Court, as is hereinbefore indicated, was recalled by Counsel for the Defendant as a witness in rebuttal and, upon resuming the witness stand, testified, upon further examination, as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Mr. Oliver—

Mr. Scott (interposing): Is this the same witness who has already testified?

page 213 } Mr. McCandlish: Yes.

Mr. Scott: All right.

By Mr. McCandlish:

Q. Mr. Oliver, were you in the Court Room when Mr. W. R. Ennis and his son R. E. Ennis testified, before lunch?

A. I beg your pardon?

Q. Were you in the Court Room when Mr. W. R. Ennis and his son R. E. Ennis testified; just before lunch?

A. Yes, sir.

Q. Did you hear Mr. W. R. Ennis state on the witness stand that at the scene of the accident and between the crossing and the station building on the Y formed by the tracks at that point you said to him: "I am sorry it happened", and that you could have stopped the train but was afraid it would wreck the train?

Mr. Scott: I object.

Mr. Miller: He has already been examined on that point and he testified.

Mr. McCandlish: I have the right—

Mr. Miller (interposing): You have not the right to recall him to reiterate a point.

The Court: He has testified on that.

Mr. Miller: You cannot reiterate the denial. There would be no end of it. I would call Mr. Ennis back and then you would call Mr. Oliver back and there is one rule that says that cannot be done.

The Court: I think your objection ought to be sustained.

Mr. McCandlish: We save the point, if your Honor please.

The Court: Yes.

page 214 } By Mr. McCandlish:

Q. As to the statement of Mr. Rixy Ennis that you made a statement to the same effect in slightly different language: "Sorry it happened", you said in his presence: "Sorry it happened", or, rather, "Sorry for it", and that you could have stopped the train but feared you would wreck the train—

Mr. Scott (interposing): I make the same objection.

Mr. Miller: Don't answer it.

The Witness: All right.

Mr. Scott: He already testified.

The Court: The correction is that that was a statement made to the father in his presence.

Mr. Oliver: Yes.

Mr. McCandlish: I want to get clearly before the Jury Mr. Oliver's position about the matter.

Mr. Miller: You have already got it.

Mr. McCandlish: That is all right. We save the point.

By Mr. McCandlish:

Q. Now, Mr. Oliver as to the train, after your engine stopped north of the crossing at Calverton, did you or did you not go up to the south of the crossing; I mean, did you or not go up to the station or crossing?

A. No, sir; I never left it.

Mr. Scott: He already testified to that.

Mr. Miller: Yes.

The Court: I do not recall that he did, Mr. Scott.

Mr. Scott: However, it is immaterial. Go on.

The Court: I think that should be clearly shown in the

foundation of the question, as to just where it
page 215 } occurred.

By Mr. McCandlish:

Q. From the time you got off your engine after it stopped, until the train started on again on its journey, where were you?

A. Working on my engine.

Mr. Scott: That matter was all gone into before; it was gone into in chief.

Mr. Miller: As far as this witness can go is that, Mr. McCandlish, if he adheres to the former opinion—

Mr. McCandlish (interposing): It is not a question of opinion. I am saying what is an absolute fact.

The Court: He testified something about that. He testified about working on his engine, but I do not recall whether he testified that was all he did.

Mr. Pickett: No, sir. He did not say he left.

The Court: What is the question?

The Reporter (reading):

“Q. From the time you got off your engine after it stopped, until the train started on again on its journey, where were you?”

By Mr. McCandlish:

Q. You were working on your engine?

A. Yes.

Q. What were you doing?

A. Taking my pilot down.

The Court: He testified to that.

Mr. Scott: He testified to that.

Mr. McCandlish: I just want to show—

Mr. Scott (interposing): I understand what
page 216 } you want.

The Court: He already testified to that.

Mr. McCandlish: Sir?

The Court: I say that he already testified to that. He already testified to that.

Mr. Miller: He already testified to that in chief.

By Mr. McCandlish:

Q. That is what you were doing?

A. Yes.

Mr. Miller: Of course. And certainly it is not in rebuttal.

Mr. McCandlish: All right, sir. I will ask you this question and I do not know whether the other side will object or not—

Mr. Miller (interposing): I will object to anything that is not proper.

By Mr. McCandlish:

Q. Did you, at any time, leave your engine?

A. No, sir.

Mr. Miller: Don't answer.

Mr. Scott: Ask the question. You have a right to ask the question.

Mr. McCandlish: I have asked the question.

The Court: He already asked the question on his present examination.

Mr. McCandlish: Just so it is in the record.

The Court: You have heard the answer.

Mr. McCandlish: Take the witness.

Mr. Scott: Stand aside, Mr. Oliver.

The Court: That is all, Mr. Oliver.

page 217 } (The witness thereupon was excused and retired from the witness stand.)

Mr. McCandlish: Call Mr. Davis.

Thereupon

R. E. DAVIS,
a witness heretofore called for and on behalf of the Defendant, and having been previously duly sworn by the Clerk of the Court, as is hereinbefore indicated, was recalled by Counsel for the Defendant as a witness in rebuttal and, upon resuming the witness stand, testified, upon further examination, as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Mr. Davis, you have testified you were the fireman on the train with Mr. Oliver?

A. Yes, sir.

Q. After the train stopped, following the accident, and from that time until the train started on its journey again, tell the Jury where Mr. Oliver was, if you know.

Mr. Scott: Is that in rebuttal, your Honor?

Mr. McCandlish: I think it is very strongly in rebuttal.

The Court: I think so. Your witness has testified—

Mr. Scott (interposing): All right, sir.

The Court: The circumstances, he testified to the circumstance that he was at a certain place at a certain time.

Mr. McCandlish: Shall I proceed?

Mr. Scott: Go ahead.

The Court: If he was not there it is rebutting that testimony.

page 218 } Mr. Scott: He already stated it in chief.

The Court: No, I do not think this witness did.

Mr. Scott: All right, go ahead. Read the question.

The Reporter (reading):

“Q. After the train stopped, following the accident, and from that time until the train started on its journey again, tell the Jury where Mr. Oliver was, if you know.”

The Witness: Mr. Oliver stayed at the engine all the time with me.

By Mr. McCandlish:

Q. What were you doing?

A. He did not leave the engine.

Q. What were you doing down there?

A. After the train stopped, I put some coal in the firebox with the shovel, and some water in the boiler. After that I got down on the ground and Mr. Oliver got down before I did on the ground and we stayed around the engine and took the pilot off. I did not leave the engine and Mr. Oliver did not, either.

Mr. McCandlish: That is all.

Mr. Scott: Stand aside.

(The witness thereupon was excused and retired from the witness stand.)

Thereupon

J. L. BRITTON,

a witness heretofore called for and on behalf of the Defendant,
and having been previously duly sworn by the
page 219 } Clerk of the Court, as is hereinbefore indicated,
was recalled by Counsel for the Defendant as a
witness in rebuttal and, upon resuming the witness stand,
testified, upon further examination, as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Mr. Britton, you were the travelling fireman on train number 5?

A. I was, yes.

Q. After the train stopped, following the accident, and until it started on its journey again, tell the Jury whether Mr. Oliver was at the engine, as far as you know?

A. He was at, on the engine, or around the engine, looking around, getting the pilot off. When the engine stopped, I went back to the scene of the accident to see if I could be of any assistance to the people or the car, you see, and after that I went to the engine and Mr. Oliver and Mr. Davis were working to get the pilot down, which I helped him to get it down, and we proceeded. As far as I remember, Mr. Oliver did not leave the engine at all. I told him to stay there, him and Mr. Davis both.

Mr. McCandlish: That is all.

CROSS EXAMINATION.

By Mr. Miller:

Q. Mr. Oliver and Mr. Davis both—

Mr. McCandlish (interposing): Just a minute. I would like to ask one more question.

Mr. Miller: Go ahead. Ask three or four or page 220 } six; it is all right with me.

DIRECT EXAMINATION (resumed):

By Mr. McCandlish:

Q. Do you know anything about the illness Mr. Oliver has had recently, an operation in the hospital?

A. Yes, he has been a very ill man.

Q. Can you tell the Jury how his appearance today compares with his appearance on the day of the accident?

A. Quite a difference. Probably twenty or thirty pounds in weight difference and right much difference in color and complexion.

Mr. McCandlish: You can take the witness.

CROSS EXAMINATION (resumed).

By Mr. Miller:

Q. He is the same Mr. Oliver today excepting a little lighter?

A. Yes.

Q. Did Mr. Oliver and Mr. Davis, the engineer and the fireman, take instructions from you?

A. When I am riding the engine, yes, sir; I have charge of the engine.

Q. You told them both to stay at the engine?

A. Yes.

Q. You do not know where Mr. Oliver went while you were away?

A. No, I do not. But when I went back, both were working on the engine.

Q. And you were the only one that went down to lend assistance to the injured people?

page 221 } A. I went down, yes, sir; and the conductor—

Q. (interposing) And you were—

Mr. McCandlish (interposing): Just a moment. Let him finish the answer.

Mr. Miller: Why talk to me about it. You interrupted him.

Mr. McCandlish: I simply want him to finish the answer to the question.

By Mr. Miller:

Q. Had you answered the question when Mr. McCandlish interrupted you? If not, please proceed and answer it.

By Mr. McCandlish:

Q. He asked you if you were the only man that went back. Were you?

A. No, the conductor and brakemen and several others went back to give assistance.

By Mr. Miller:

Q. But the engineer and the fireman did not go back?

A. No, the engineer and the fireman did not go back, to my knowledge.

Q. They stayed at the engine on instructions from you and—

A. (interposing) I told them to stay with the engine.

Q. And Mr. Oliver suffered his injury before or since that time, which?

A. Since.

Q. And it has affected his health since then?

A. Yes.

page 222 } Q. There is no reason he should not have gone to render assistance, as far as you know?

A. What is that?

Q. I say: there is no reason why he should not have gone down to render assistance, as far as you know, except you told him to stay at the engine?

A. I told him to stay at the engine, yes, sir.

Mr. Miller: That is all.

(The witness thereupon was excused and retired from the witness stand.)

Mr. McCandlish: Call Mr. Lane.

Thereupon

M. E. LANE,

a witness heretofore called for and on behalf of the Defendant, and having been previously duly sworn by the Clerk of the Court, as is hereinbefore indicated, was recalled by Counsel for the Defendant as a witness in rebuttal and, upon resuming the witness stand, testified upon further examination, as follows:

DIRECT EXAMINATION.

By Mr. McCandlish:

Q. Mr. Lane, I believe you were the engineer on freight train number 98, were you?

A. Yes, sir.

Q. I believe you testified that at the time of the accident you were up at your engine some twelve hundred feet north of the crossing?

A. Yes, sir.

Q. And then that you went on down to the
page 223 } scene of the accident?

A. Yes, sir; the brakeman on the passenger train, as soon as the engine started, immediately started back to protect his train. We saw his coming back with the wreck flag and asked what the trouble was and he said that there had been an accident at the crossing and I immediately went down and saw Mr. Britton and Mr. Lowry standing about where—

Q. (interposing) You need not go into all that. You went down to the crossing where the accident occurred?

A. Yes.

Q. And did you see Mr. W. R. Ennis down there?

A. Not on that side, no sir.

Q. What?

A. Not on that side; that was on the left hand side of the engine at that time, when I first went—

Q. (interposing) As you went down to the crossing, where else did you go?

A. I crossed over on the other side and talked to the conductor, U. G. Turner, and I noticed a gentleman wringing his hands and crying, standing in the road, and a young fellow had him by the hand, and someone made a remark: "There is the girl's father."

Q. Are you able to identify that man?

A. No. I cannot say who that was—the one that was crying?

Q. Yes, sir? Who is that?

A. He is sitting on the end of the bench there (indicating Mr. Ennis).

Q. Did he appear to be excited at the time?

page 224 } A. Very much excited, yes, sir.

Q. Did you, after that, go down to where the engine was, or did you go where the engine was?

A. No, sir, I didn't go down to the engine at all. I walked over to the young man and talked to him; he led him to the telegraph pole, about halfway to the station, and the crossing, and there was a milk can there and the old gentleman sat on the milk can and the boy sat by him and I went and put my hand on the boy's shoulder and asked him if there was anything I could do for him.

Q. Did you see Mr. Oliver, the engineer on the other train, up there at all?

A. No, sir, I did not see him the whole time.

Q. As near as you know, was he up there at all?

A. No, sir.

Mr. Scott: Now—

Mr. McCandlish (interposing): I say: as far as he knew.

Mr. Scott: Yes.

Mr. McCandlish: That is all.

Mr. Miller: Stand aside.

Mr. Scott: Are you through with him?

Mr. McCandlish: Yes, sir; we are through with him.

Mr. Scott: Stand aside.

(The witness thereupon was excused and retired from the witness stand.)

Thereupon

W. W. JOHNSON,
a witness heretofore called for and on behalf of the Defendant, and having been previously duly sworn by page 225 } the Clerk of the Court, as is hereinbefore indicated, was recalled by Counsel for the Defendant as a witness in rebuttal and, upon resuming the witness stand, testified, upon further examination, as follows:

DIRECT EXAMINATION (resumed).

By Mr. McCandlish:

Q. Mr. Johnson, you have testified before in this case?

A. Yes, sir.

Q. And your position was what?

A. Conductor on 98, C. & O.

Q. And where did you say you were when the accident occurred?

A. In the waiting room at Calverton.

Q. You saw the accident?

A. Yes, sir.

Q. After the accident did you go down to where the engine was?

A. Yes, sir.

Q. Tell just now what occurred.

A. After the accident the ballasting came up against the waiting room. I thought the engine was on the ground.

Q. What do you mean when you say you thought the engine was on the ground?

A. Off the rails; off on the ground; off the ties; there were so many rocks flying. I went down there and seen nothing dragging on the ground, but the pilot was broken on the engine and Mr. Oliver and Mr. Davis and a lot were around there working, and I came on back and stood there some little while, and came on back up there.

page 226 } Q. Up where?

A. Back to the station.

Q. Yes.

A. And I seen an old gentleman crying out there, and the boy, his son, was standing by him on the crossing, over on one side, and I went to the other side.

Q. Did you have any conversation with the gentleman who was crying?

A. No, sir.

Q. Did you hear anybody else have any conversation with him?

A. No, sir.

Q. Do you know how long Mr. Ennis stayed there?

A. No, sir. I cannot say. He was there when I crossed over, you see.

Q. Did you remain around there until the C. & O. train pulled out, C. & O. number 5?

A. Yes, sir.

Q. Did you at any time see Mr. Oliver up there around the station?

A. No, sir. No, sir. The only time I seen Mr. Oliver he was working on his engine.

Mr. McCandlish: That is all.

Mr. Miller: Stand aside.

(The witness thereupon was excused and retired from the witness stand.)

Mr. McCandlish: We rest, if your Honor please.

page 227 { The Court: Now, the instructions.
Mr. Scott: Shall we retire to your room to discuss the instructions or do you wish to instruct them here.

The Court: We can get along much faster in the office, I think.

(Thereupon Counsel for the respective parties, and the Court, retired to the Judge's Chambers at 2:30 o'clock, p. m., to discuss the instructions in the case.)

(At 4:00 o'clock, p. m., the Court directed the Sheriff to excuse the Jurors until Friday morning, April 7, 1933, at 10:00 o'clock.)

(The consideration of the instructions was continued in the Judge's Chambers until 6:00, p. m., whereupon the further consideration of the instant case was continued until 10:00 o'clock, a. m., Friday, April 7, 1933.)

page 228 { THIRD DAY.

(Pursuant to recess heretofore taken, the consideration of the above-entitled matter was resumed at 10 o'clock, a. m., Friday, April 7, 1933, when the same parties as heretofore

indicated were present, and the following proceedings and transactions were had and testimony was adduced:)

PROCEEDINGS, TRANSACTIONS AND TESTIMONY.

(The consideration of the Court's instructions was resumed, in the Judge's Chambers, out of the hearing of the Jury, at 10 o'clock, a. m., and continued until 11 o'clock, when the following proceedings were had in open Court in the presence of the Jury:)

The Court: Do you gentlemen waive the poll of the Jury?

Mr. McCandlish: Yes.

Mr. Miller: We waive the poll.

(Thereupon, at 11:07 o'clock, a. m., Mr. Scott commenced the closing argument to the Jury during which the following occurred:)

Mr. Scott * * *: Those were the eye witnesses to the accident, Mr. Sullivan and Mr. McConchie—

Mr. McCandlish (interposing): I object to that. There is no evidence to that effect.

Mr. Scott: Sir?

The Court: There is no evidence that Mr. Sullivan was an eye witness. The only testimony was that he was in the station.

Mr. Scott: Very good. My friend is a little bit nervous, but still I will bow to him. I will have—

Mr. McCandlish (interposing): I have no objection to you attributing any nervousness to your inaccuracy. 229 }

(Mr. Scott proceeded with his argument to the Jury.)

(The following also occurred during Mr. Scott's argument:)

Mr. Scott * * *: Mr. Sullivan was the agent of the Southern Railway Company. He was the summonsed witness of the Chesapeake & Ohio Railway Company. The Railway Company needed Mr. Sullivan in their business if he could testify in their favor. I did not need him and I say the reason he was not put on the stand is that his testimony would not put the gentleman on the other side.

Mr. McCandlish: I desire to except to the statement just made, for the record.

Mr. Scott: All right, sir, go to it. * * *

(Mr. Scott completed his argument to the Jury at 12 o'clock noon.)

(Mr. Pickett, on behalf of the Defendant, commenced his argument to the Jury at 12 o'clock noon and concluded at 12:23 o'clock.)

(Thereupon at 12:23 o'clock, p. m., recess was taken until 1:30 o'clock this date.)

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AFTER RECESS.

(The consideration of the above-entitled matter was resumed at 1:35 o'clock, p. m., when Mr. McCandlish, on behalf of the Defendant, made his closing argument to the Jury, which was concluded at 2:32 o'clock, p. m.)

(Mr. Miller, on behalf of the Plaintiff, commenced his closing argument to the Jury at 2:32 o'clock, p. m., during which the following occurred:)

Mr. Miller * * *: These great Railroad Companies, backed by unlimited resources—

Mr. McCandlish (interposing): If your Honor please, I want to except to the statement that has been made by Mr. Miller, "great railroads, backed by unlimited resources", and I want to save my point on the statement just made in arguing the case to the Jury.

The Court: It has nothing to do with the case, gentlemen of the Jury. I have never heard of any that had "unlimited resources", gentlemen.

(Mr. Miller proceeded at this point with his argument to the Jury and concluded at 3:15 o'clock, p. m.)

(At the conclusion of the argument, about 3:15, p. m., the Jury retired to their rooms to consider their verdict. About forty-five minutes later they sent a message by the Sheriff to his Honor Judge J. R. H. Alexander to the effect that they were divided and could not agree, and the Judge directed the Sheriff to say to the Jury he would not discharge them at that time, but desired them to consider the case further. About thirty minutes later the Jury again sent a similar mes-

sage to the Judge, who directed the Sheriff to tell
page 231 } them they should further consider the case, and
shortly thereafter the Sheriff reported to the
Judge that certain members of the Jury desired to know what
was the view of the engineer and fireman on the engine as it
approached the crossing, of objects on the crossing, that is to
say, to what extent the nose or front of the engine obstructed
their view, and the Judge directed the Sheriff to tell the
Jury he could add nothing to the evidence, and that they would
have to be guided by the evidence. Shortly thereafter, at 5:05
p. m., the Judge directed that the Jury be brought into the
Court Room, and told them that while no juror should agree
to a verdict which he did not think was right, proper and just,
it was nevertheless the duty of all the jurors to discuss the
case together and for each to give consideration to the views
of other members of the Jury, and suggested that the Jury
again return to their room and consider the case. Thereafter,
and at about 5:58 p. m., the Judge directed that the Jury be
again brought into the Court Room and asked what the pros-
pect was of reaching a verdict. The Jury asked that they be
given fifteen minutes longer. They returned to the Jury Room
and at 6:09 o'clock, p. m., the Jury returned to the Court Room
and reported their verdict. All conversations above referred
to on the part of the Judge were had in open Court in the
presence of Counsel for Plaintiff and Defendant, and neither
party made any objection to what was said by the Judge to
the Sheriff or Jury.

And thereupon the Defendant moved the Court to set aside
the verdict of the Jury and to enter final judgment in favor
of the Defendant upon the ground that the verdict is unsup-
ported by the evidence and is contrary to the evi-
page 232 } dence, and failing that, that the Court set aside
the verdict and grant it a new trial on the grounds
that the same is contrary to the law and the evidence and that
the same is excessive and that the Court was in error in ad-
mitting certain evidence over the objection of the Defendant
and in excluding certain evidence offered by the Defendant,
and in granting certain instructions to the Jury over the ob-
jection of the Defendant, and failing to grant certain instruc-
tions requested by the Defendant and amending certain in-
structions offered by the Defendant, and the Court fix a day
certain to hear argument on the motion. Whereupon, the
Court fixed April 19th.)

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APPENDIX A.

(The following is the material referred to at page two of this record as being contained in "Appendix A", by that reference made a part hereof:

Counsel for the respective parties having made their opening statements to the Jury, the following occurred:)

Mr. McCandlish: If your Honor please, subject to Mr. Miller's and Mr. Scott's approval, I state for the record that Counsel for the Plaintiff and for the Defendant have agreed to introduce in evidence a plat or blueprint—

Mr. Miller (interposing): Let me introduce it and I will read it.

Mr. McCandlish: I have it here.

Mr. Miller: First formally introduce it in evidence.

Mr. McCandlish: All right, sir.

Mr. Scott: I like to run my own case.

I now introduce a plat marked "Plat of Calverton, Virginia" for the consideration of the Jury which, it is agreed, is a correct plat and I offer it in evidence and, for the record, I say that these same distances—

The Court (interposing): Have you more than one copy of that?

Mr. Scott: Yes. Does your Honor want one?

There appears on that map a color light signal, somewhat to the north of the crossing which will be pointed out to you later, if you cannot see it, which is five hundred and ninety-three feet from the center of the crossing.

Then, on that map, you will see, also, a house there on this side (indicating), marked "tool house". From that tool house to the—

page 234 } Mr. Miller (interposing): "This side" is on the east side of the track?

The Jury don't know what you are talking about.

Mr. Scott: On the Warrenton side, on the east side.

Mr. McCandlish: It is shown—

The Court (interposing): Then it is on the west side?

Mr. Miller: One side is the west side and the other side is the east side. "This side" that he speaks of is the west side or the Warrenton side.

Mr. Scott: Five hundred and ten feet from the center of the crossing; then there is a mail post, forty-six; from that mail post to the center of the crossing is eleven hundred and fifty feet and then, further north, is the whistle post; from that whistle post to the crossing it is agreed it is fifteen hundred and nineteen feet.

There is, away off here to the far north (indicating), away up here to the far north is a body of woods known as Shumate's Woods. We have agreed that is about two thousand feet from the crossing. If it becomes material, we will get that actual measurement.

Mr. McCandlish: Yes. That has not been measured. That is assumed.

Mr. Scott: As near we can now measure it, it is about two hundred feet.

There is a red building there (indicating); there is a red building which is on the far side of the track from Warrenton, and that is one hundred and twenty feet from the center of the crossing.

page 235 } Then there is the Warrenton Station building which you will find on there, over there (indicating); the Warrenton Station building. The Station building is two hundred and twenty-four feet from the crossing.

From the center of the south bound track to the garage, which we call Spicer's Garage, you will hear about it in the course of the evidence, is three hundred feet. That garage is on the far side of the track from the Warrenton side.

The map shows some colored lines, yellow and black and red.

From a point forty-seven feet west of the south bound track the line of vision as shown by the red line as indicated by a photograph—Give me the photograph number one.

Mr. Miller: Here it is (handing the photograph to Mr. Scott).

Mr. McCandlish: Number one is a red line.

Mr. Scott: From a point forty-seven feet west of the south bound tracks in the highway, in the line of vision as shown by the red line that you have there, as indicated by photograph number one, to a point where it intersects the south bound track at a point north of the south bound track, is two hundred feet.

Mr. McCandlish: North of the crossing?

Mr. Scott: North of the crossing at two hundred feet.

Now, there is that photograph, gentlemen. Don't put all this in the record.

Mr. McCandlish: I think it should be in the record.

Mr. Miller: There is a crossing, gentlemen, which Judge Scott shows, speaking of photograph marked page 236 } number one.

Mr. Scott: That is all right.

I do not care to get this in the record. I am not testifying. I want to show the Jury the photograph, what can be seen at a point forty-seven feet from the south bound track

where this automobile was hit, right down the track, as you can see. You can see what obstruction there are, the hedges and the poles and things of that sort.

Now, from a point forty-four feet west of the south bound track, which is three feet closer than number one, this is shown on a photograph numbered two, and that is the yellow line, gentlemen, on that plat, that which can be seen looking north. We get a little closer to the track and the view becomes more extended and you can see further up the track actually, but that is what you can see as is shown by that photograph (exhibiting a photograph to the Jury).

Mr. McCandlish: Mention the distance, two hundred and fifty feet.

Mr. Scott: The distance is two hundred and what—

Mr. McCandlish (interposing): Two hundred and fifty feet. It is shown on the picture itself.

Mr. Scott: I do not see it.

Mr. McCandlish: Two hundred and fifty feet.

Mr. Scott: Two hundred and fifty feet. That is all right. It shows for itself.

Now, number three, please. And on the third point on that map there, point number three, which is forty and one-half feet west of the south bound track, you are still getting closer, you can see three hundred feet down the track. That (exhibiting the photograph) is what you can see.
page 237 } Then, three hundred feet—

Mr. Miller (interposing): On photograph number three?

Mr. McCandlish: Number three.

Mr. Scott: Yes, number three.

Mr. Miller: As I understand Judge Scott, these statements are going in the record. They are not going in as evidence, but what they have agreed on.

Mr. McCandlish: Will you object to passing these pictures to the Jury?

Mr. Miller: I will suggest, as soon as we get through, that they be handed all to the Jury.

Is that satisfactory, the ones you have and those that we have?

Mr. Scott: They will all get there in a minute.

Mr. Miller: I thought Judge Scott would want them, however, before they got to the Jury.

Mr. Scott: From point number four, the view of the track, looking north, is—

Mr. McCandlish (interposing): Thirty-five feet.

Mr. Scott: I do not get that distance.

Mr. McCandlish: Looking at the picture, it will give it to

you, Mr. Scott; look at it. Thirty-five feet from the center of the south bound track gives you a view fourteen hundred and nine feet of the track.

Mr. Scott: Fourteen hundred and nine feet looking north.

Mr. McCandlish: What color line is that, gentlemen?

Mr. Scott: I think that is probably the black line.

A Juror: No; the white line.

Another Juror: The white dotted line.

page 238 } Mr. Scott: Point number five, as shown on that map, in the center of the crossing there is an obstructed view north of the crossing which is one and one-tenth miles.

Mr. McCandlish: No, Mr. Scott; that number five—

Mr. Scott (interposing): That is point number five.

Mr. McCandlish: At that point the view is obstructed, sir.

Mr. Scott: I just stated that.

Mr. McCandlish: I thought you said one and one-tenth miles.

Mr. Scott: I said the unobstructed view from that point, for a distance, is one and one-tenth miles and is unobstructed.

Mr. McCandlish: That is not exactly what the picture says. The view is absolutely unobstructed for five miles and you can see that far.

Mr. Scott: It may be ten miles. It is an unobstructed view to the north.

Mr. McCandlish: An indefinite vision—

Mr. Pickett (interposing): Depending on your power of vision.

Mr. Miller: What does the picture show?

Mr. McCandlish: It just says: unobstructed view. At that point the camera was twenty-six feet west of the center of the south bound track.

Mr. Miller: I want to get the facts, that is all. I do not want anything in but the facts.

I will meet these facts squarely and honestly.

Mr. Scott: From the crossing to the railroad approach warning, there is a sign there, railroad approach
page 239 } warning, the distance is three hundred and sixty-seven feet.

I do not know whether that shows on that map.

Mr. McCandlish: Yes, sir, it does.

Mr. Scott: From the crossing, to the highway crossing sign in an airline, the distance is thirty-eight feet.

Those photographs were furnished to us by the Railroad Company.

We have some other photographs.

Mr. Miller: All of which speak for themselves by reason of the endorsements on the background.

Mr. McCandlish: May I say a word that will clarify the record?

It is agreed and understood that all the measurements that Mr. Scott has given you are taken from the center of the intersection of the highway, center of the intersection of the highway, to the south bound track; all taken from that point. That is the starting point.

Mr. Scott: That is my understanding. That is the only material point. We want to get those distances.

The accident occurred at the center of the south bound track where the automobile was on the highway.

Mr. Miller: I made a suggestion to Mr. McCandlish that these all be offered and we will let the stenographer mark them for identification as exhibits. That can be done, and what is on the back side of them can be treated as evidence.

Mr. Scott: I now introduce this photograph, which is a view that speaks for itself, supplementing the photographs that have already been referred to.

Mr. McCandlish: Mr. Scott, you did not page 240 } finish with those photographs. What ones do you want to put in?

Mr. Scott: I want to put them all in.

Mr. McCandlish: You have your own set there. You stopped at number five.

Mr. Scott: There are two photographs—

Mr. McCandlish (interposing): You have still got to get in number six, seven and eight.

Mr. Scott: The next photograph is the result of the camera in the center, thirty-six feet west of the south bound track, looking at the rear of the train going north, after the rear of the train had passed the man there who was on the point of the center, south of the, the center of the south bound track, thirteen hundred and six feet north of the center of the south bound track and pavement of the highway.

That is that picture.

Mr. McCandlish: Number six.

Mr. Scott: Which is number six.

Mr. McCandlish: That picture just happened to be snapped, as I understand it; the train was going through and the camera took the rear of the train going north. The camera was sitting at that point.

Mr. Scott: In connection with that photograph I will introduce this one which I will mark 6-A. That shows a view, the same view, practically, as number six. You will observe,

looking north, it just enlarges the situation and makes it a little more accurate and they supplement each other.

Mr. McCandlish: What is the next one?

Mr. Scott: Number seven.

Mr. McCandlish: That is right.

Mr. Scott: The camera was sitting just south page 241 } of the crossing on the Warrenton Branch of the track, three feet north, showing the crossing, and this train going north; it is an interesting view of the situation. It speaks for itself. We will comment on it at the proper time.

The next photograph—Have you any supplementing that? What difference is there in this and number 6-A?

Mr. Miller: You can see more of the Post Office here.

Mr. Scott: Then I will mark these two 6-A and 6-B.

Now, I have already got seven. I want to introduce in connection with that this photograph which I will mark 7-A. It shows a house on the far side of the track, known on the map as the red house, and that is the store (indicating) on that side, and that is the crossing over across (indicating).

Where is your number eight?

Mr. McCandlish: Right here (handing the photograph to Mr. Scott).

Mr. Scott: Now, here is number eight, which I think has already been shown to you. I read that out.

Number eight is the result of the camera sitting just south of the crossing on the Warrenton Branch track, looking north and showing the crossing.

There are three other photographs here which I will mark number nine, number ten and number eleven.

The number nine is the result of the camera on the Warrenton Road, looking east, as you come to the crossing, taken some distance down the road, coming in that direction (indicating).

Number ten is a picture of the crossing with page 242 } the camera in front of the Post Office looking south. The Post Office Building, that building (indicating), shows on this photograph.

Now, number eleven, the camera was in front of the Post Office, looking south, showing the crossing at the Warrenton Branch line.

Mr. Miller: That presents to the Jury a survey of the ground and all the photographs.

Mr. McCandlish: As I understand it, the record is to show the pictures I hold in my hand, all of which have just been presented to the Jury by Mr. Scott, and which have been marked by the Reporter "No. 1", "No. 2", "No. 3",

"No. 4", "No. 5", "No. 6", "No. 6-A", "No. 6-B", "No. 7", "No. 7-A", "No. 8", "No. 9", "No. 10", and "No. 11", are introduced in evidence and that the views and distances are as shown by slips attached to the photographs are admitted to be correct.

Mr. Miller: All true, and they are introduced by consent of the parties.

Mr. McCandlish: Yes; they are introduced by consent of the parties.

And also that the blueprint which I will now ask the Reporter to mark "Exhibit No. A", showing the track layout at Calverton, Virginia, is introduced in evidence.

(The document in question was marked by the Reporter as indicated by Mr. McCandlish).

Mr. McCandlish: It is understood that these pictures and the plat are admitted to be correct representations of what they show as of the date of the accident?

Mr. Miller: That is correct.

The Court: Are the other blueprints copies page 243 } of that one which has been marked?

Mr. McCandlish: Yes. They are all made from the same impression.

The Court: You are putting them all in?

Mr. McCandlish: We only want one in the record. The others are for the convenience of the Court and the Jury in looking at the situation.

We want only this one marked for the record and the photographs marked.

The Court: It is agreed that these other blueprints are all copies?

Mr. McCandlish: Yes, that is agreed.

Mr. Miller: We agree that what the Jury has is a copy of the original.

It is also agreed that the Plaintiff's decedent, young Mary Catherine Ennis, died as a result of a collision with a car in which she was riding as a passenger and this train No. 5, I believe it was?

Mr. McCandlish: On June 21, 1932.

Mr. Miller: And that a few hours after the accident, I think within two or three hours, she died.

They are the facts.

Mr. McCandlish: Yes; we agree to that.

Mr. Miller: If we agree to that that will save time and the necessity of having the physicians testify.

Mr. McCandlish: Yes, that is agreed to.

The Court: Is that all the agreed testimony, now?

Mr. McCandlish: I am sure it is.

Mr. Miller: I was thinking. Now, if we could
page 244 } save time by further stipulation—What other is
there?

Mr. McCandlish: Nothing else—That the engine that struck the decedent or the automobile was owned and operated by the Chesapeake and Ohio Railway Company and the accident occurred in Fauquier County.

Mr. Miller: In Fauquier County, at Calverton Station.

Mr. McCandlish: Yes.

The Court: If that is all the agreed testimony, I think we had better take a recess for lunch.

I want to caution you gentlemen of the Jury that while you are out you are not to discuss it with anybody; do not permit any outsiders to discuss it with you.

(Thereupon as appears at page three of this record, at 12:45 o'clock p. m., recess was taken until 1:45 o'clock p. m. this date).

page 245 } I, J. R. H. Alexander, Judge of the Circuit
Court of Fauquier County, Virginia, who presided over the foregoing trial of the case of Vincent O. Jacobs, Admr. of Mary Catherine Ennis, v. The Chesapeake and Ohio Railway Company, do certify that the foregoing copy or report of the testimony and other incidents of the said trial, tried in my said court on April 5th, 6th and 7th, 1933, in which a final order was entered March 26th, 1934, overruling the defendant's motions to set aside the verdict and granting judgment on the verdict of the jury, with the exception of certain exhibits introduced by the plaintiff and defendant, namely: A plat or blueprint marked "Exhibit A" and fourteen photographs marked Exhibits 1 to 14, inclusive, all of which are identified by my signature thereon, and with the further exception of Bills of Exceptions Nos. 1 and 2, this day signed by me, setting forth the instructions and action of the court thereon; and it is agreed by the plaintiff and defendant that in lieu of certifying copies of the exhibits referred to as a part of the foregoing copy or record, the originals shall be transmitted by the Clerk of this court to the Clerk of the Supreme Court of Appeals. And I further certify that the attorneys for the plaintiff had reasonable notice in writing, of the time and place when said report of the testimony and other incidents of the trial and the two Bills of Exceptions referred to would be tendered and presented to me for verification and signature.

Given under my hand this 18th day of May, 1934, within sixty days from the date on which the judgment complained of was rendered.

J. R. H. ALEXANDER,
Judge of the Circuit Court of Fauquier
County, Virginia.

page 246 } In the Circuit Court of Fauquier County, Vir-
ginia.

Vincent O. Jacobs, Admr. of Mary Catherine Ennis,
v.
The Chesapeake & Ohio Railway Company.

BILL OF EXCEPTIONS NO. 1.

Be it remembered that, after the jury was sworn to try the issue joined in this cause, the plaintiff, to prove and maintain the said issue on his part, introduced certain evidence as set forth in the stenographic report of the testimony and other incidents of the trial duly authenticated by Hon. J. R. H. Alexander, Judge, and the defendant to maintain the issue on its part, introduced certain evidence as set forth in said stenographic report.

Whereupon, at the request of plaintiff's counsel, the court granted and gave to the jury the following instructions:

(1)

The court instructs the jury that the law of this state as it was on the 21st day of June, 1932, required of, that is made it mandatory upon, every railroad company operating trains by steam on lines crossing a public highway at grade:

(a) To provide each locomotive engine passing upon its road with a bell or ordinary size and a steam whistle;

(b) To sharply sound said whistle outside of incorporated cities and town at least twice at a distance of not less than 300 yards nor more than 600 yards from the place where the said railroad crosses upon the same level a highway;

That such bell shall be rung or such whistle sounded continuously, or alternately, until the engine has reached such crossing.

page 247 } The Jury are further instructed in this con-
section that the signals described above in this
instruction required to be given by the bell and

whistle of the locomotive are by the statute mandatory, and no other signals, precautions or warnings, such as the station blow some distance from the station or the noise of the on-coming train, will relieve the railroad company from a failure to give these statutory signals.

And the failure to give such signals pursuant to the statute constitutes negligence on the part of the railroad company;

Therefore if the jury believe from the evidence that the persons in charge of the train referred to in these proceedings, to-wit: Chesapeake and Ohio Railway Company train No. 5, as it approached the highway crossing at Calverton, Virginia, failed to give such signals or failed continuously to ring the bell of said engine, or alternately sound the whistle thereof, then said defendant must be held to have been guilty of negligence in this case.

(2)

And the jury are further instructed that if they believe from the evidence, and the facts and circumstances in this case as disclosed by the evidence, that the death of the plaintiff's intestate, Mary Catherine Ennis, was proximately caused by the said negligence, as described in instruction next above, or that such negligence proximately contributed in any way to the death of Mary Catherine Ennis, they must find for the plaintiff and assess his damages in accordance with the principles of the instruction herein entitled 'the measure of damages'.

(3)

The Court further instructs the jury that the term "proximate cause" as used in these instructions means that there must be some causal connection between the alleged negligence of the defendant as proven by a preponderance of the evidence and the death complained of, and by the term *causal connection* nothing more is meant than that the evidence if believed by the jury must tend to establish such relation between such negligence, and the injury complained of, as according to the ordinary experience of mankind, warrants the conclusion that the injury would not have occurred if such negligence had not occurred.

In this connection the jury are told that the statute requiring the giving of the signals mentioned in instruction No. 1 was passed for the protection of human life and property.

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(4)

The Court further instructs the jury that if they believe from the evidence that Mrs. Norma Ennis, the driver of the car in which Mary Catherine Ennis was, at the time of the collision referred to in the evidence, as she drove towards and upon the southbound track, actually knew of the approaching train, and with such knowledge continued on in front of said train regardless of its approach, then her act in so doing should be considered the sole, proximate cause of the death of the said Mary Catherine Ennis:

But, on the other hand, if the jury believe from the evidence:

1. That the deceased Mary Catherine Ennis was on the afternoon of June 21st, 1932, a passenger in an automobile driven by her sister-in-law, Mrs. Norma Ennis, travelling on the highway approaching the railroad grade crossing at Calverton, Va.;

2. That the said Norma Ennis, in attempting to pass over said crossing drove her automobile so occupied across the southbound track in front of the approaching train, she then being ignorant of its approach, that the said automobile so occupied was run down by the said train and as a result thereof the said Mary Catherine Ennis was so injured that she died within a short time thereafter;

And if the jury further believes that the said Norma Ennis under all the facts and circumstances of this case would not have gone upon the track in front of the approaching train with knowledge of the approach thereof and if they believe from the evidence that the statutory signals were not given, and that because of the failure of give such signals she drove her automobile on the track in front of the approaching train and the collision resulted therefrom, then the jury should consider the failure to give such signals was the cause proximately contributing to the injury and death of said Mary Catherine Ennis.

(5)

The court instructs the jury:

1. That the negligence of the driver of an automobile cannot be imputed to a passenger therein;

Hence the recovery, if any, in this case cannot be affected

by the negligence, if any, of Mrs. Norma Ennis, the driver of the car in which Mary Catherine Ennis was at the time it was run into by the train of the defendant, unless the act of Mrs. Norma Ennis was the sole proximate cause of the injury as explained in instruction No. 4.

2. That if the jury find the plaintiff is entitled page 249 } to recover by reason of the alleged failure of the defendant to give the statutory signals, such recovery cannot be defeated by the negligence, that is want of ordinary care, on the part of the said Mary Catherine Ennis (plaintiff's decedent) in approaching said crossing. Her want of ordinary care, if any, it is true may be considered by the jury, but only in mitigation of damages, and even then only to the extent that the jury may find that her negligence contributed to the accident that caused the death in proportion that her negligence bears to that of the defendant company.

(7)

MEASURE OF DAMAGES:

The court instructs the jury that if they find for the plaintiff they should award such damages as to them may seem fair and just and not exceeding \$10,000.00, the amount claimed in the notice herein.

And the court further instructs the jury that in ascertaining such damages they should find the same with reference,

First: to the pecuniary loss sustained by the father and mother of the deceased and her brothers and sisters; and in determining such pecuniary loss the jury may take into consideration what would have been the probable earnings of the deceased child, having regard to her age, intelligence and health during what would have been her minority, if she had not been killed;

Second: by adding thereto compensation for the loss of her care and society to her father and mother and her brothers and sisters;

Third: by adding such further sum as they may deem fair and just by way of solace and comfort to her father and mother and her brothers and sisters for the sorrow, suffering and mental anguish occasioned to them by her death.

Provided, that if the jury find that the death of Mary Catherine Ennis was caused or contributed to by the failure of the defendant company to give the statutory crossing

signals mentioned in instruction No. 1, and the negligence of Mary Catherine Ennis herself contributed to her death, then in that event the jury shall consider such contributory negligence and reduce the damages in proportion to such negligence as directed by instruction No. 5.

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(8)

The court instructs the jury that if they believe from the evidence in this case that the servants and employees of the defendant company in charge of the engine in approaching the crossing, saw and knew of the position of peril of the occupants of the automobile in question, or by the exercise of reasonable care could and would have seen and known of such peril, and thereafter failed to use reasonable care to avoid the injury, and that by reason of such failure to use reasonable care to avoid the injury, the injury and death resulted, the defendant is liable and they must find for the plaintiff. But if they believe from the evidence that the plaintiff's intestate was guilty of contributory negligence, such negligence should be considered in mitigation of damages as set out in Instruction No. 5.

(9)

The court instructs the jury that, if the defendant in this case relies on the defense of contributory negligence of the plaintiff's intestate then the burden is upon the defendant to establish by a preponderance of the evidence such contributory negligence, unless such negligence is disclosed by the plaintiff's evidence or can fairly be inferred from all the facts and circumstances of the case; and further that such contributory negligence contributed to the death of the plaintiff's intestate. And, if the defendant fails to establish by a preponderance of the evidence such contributory negligence on the part of the plaintiff's intestate, unless such negligence is disclosed by the plaintiff's evidence or can fairly be inferred from all the facts and circumstances of the case, and further that such contributory negligence contributed to the death of the plaintiff's intestate, then the jury shall disregard and disallow such defense.

The defendant assigned the following objections to the action of the court in granting said instructions on behalf of the plaintiff:

Plaintiff's Instruction No. 2 is objected to because it is calculated to mislead the jury and fails to tell them that if Mary Catherine Ennis went upon the track with knowledge

that the train was approaching she could not recover; and because it assumes that there was certain negligence on the part of the defendant.

page 251 } Plaintiff's Instruction No. 3 is objected to on the ground that it does not correctly define the terms "proximate cause" and "causal connection", and tends to mislead and confuse the jury.

Plaintiff's Instruction No. 4 is objected to because it assumes that because the decedent went upon the track the failure to give the statutory signals, if such failure existed, was the proximate cause of her going upon the track. There is nothing to show that she was ignorant of the approaching train, and the evidence shows that she had plenty of time to cross in safety if the automobile had not stopped on the track. Such stalling was the proximate cause of the accident, and it cannot be said that her conduct in going upon the track was influenced by any failure to give signals. The instruction is a finding instruction and is based upon a partial view of the evidence.

Plaintiff's Instruction No. 5 is objected to because it is vague and calculated to mislead the jury; because the evidence does not show that the plaintiff is entitled to recover because the signals were not given, there being no presumption flowing from the non-giving of signals that the same was the proximate cause of the injury; because the negligence of Mary Catherine Ennis in approaching and going upon the crossing defeats any recovery on her behalf if the jury should believe that she herself had knowledge of the approaching train and failed to warn or admonish the driver not to cross in front of it; because the instruction tells the jury that the negligence of Mary Catherine Ennis may be considered by them only in mitigation of damages. If she had knowledge of the approach of the train, alleged failure to give signals would be unimportant, and her negligence in going upon the track would bar recovery.

Plaintiff's Instruction No. 7 is objected to because there is no evidence of pecuniary loss, and there is nothing in the evidence upon which the jury could base any finding as to the probable earnings of Mary Catherine Ennis during her minority, or her probable life time. This instruction is further objected to on the ground that it does not properly set forth the elements of damage and does not correctly state the doctrine of apportionment of damages under the crossing statute, nor does plaintiff's Instruction No. 5 correctly state the rule as to mitigation of damages in proportion to contributory negligence.

Plaintiff's Instruction No. 8 is objected to on the ground that the doctrine of the last clear chance is not applicable to the facts of this case; there is not sufficient evidence to support it. The doctrine of mitigation of damages is not applicable to a last clear chance case.

All of the objections made to each of the plaintiff's instructions are now made to all of them so far as applicable, and each of said instructions is objected to on the ground that they are not supported by the evidence and tend to mislead and confuse the jury.

To the action of the court in granting said instructions 1 to 9 inclusive, the defendant, by counsel, excepted and tendered this its Bill of Exceptions which it prays may be signed, sealed and made a part of the record in this page 253 } cause, and the same is accordingly done this 18th day of May, 1934.

J. R. H. ALEXANDER, Judge.

page 254 } BILL OF EXCEPTIONS NO. 2.

Be it remembered that at the conclusion of the evidence in this cause as set forth in the stenographic report of the testimony and other incidents of the trial, duly authenticated by Hon. J. R. H. Alexander, Judge, the defendant moved the court to grant and give to the jury the following instructions, upon which the court acted as here set forth.

Instructions A, B, C, D, F, G, H, I, K, L, M, O and P were granted and given to the jury as asked and are as follows:

A.

The court instructs the jury that the statute law of this state required that the engine whistle be sharply sounded at least twice at a distance of not less than 300 yards nor more than 600 yards from the crossing and that thereafter the engine bell be rung or whistle sounded continuously or alternately until the engine reached the crossing, and that if the jury believe from the evidence that the engine whistle sounded twice at or near the whistle post some 1,500 feet from the crossing and more than 300 yards from the crossing and continued to sound continuously, or alternately, until the crossing was reached, or until the engineer released the whistle cord and threw on the emergency brake to avoid striking the automobile, then all signals were given which the law required to be given and there was no negligence on the part of the defendant in failing to give the crossing signals.

B.

The Court instructs the Jury that one of the plaintiff's claims of negligence in this case is that the death resulted proximately from the failure of the defendant's employees to sound the signals required by statute to be sounded by every steam railway company when one of its trains approaches a grade crossing. But the court further instructs the jury that this negligence may not be presumed, and that the burden of proving such negligence is on the plaintiff, and that such proof must be by a preponderance of the evidence, and if not so established, or the evidence is evenly balanced, the finding in respect thereto must be for the defendant.

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C.

✓ The court instructs the jury that if they find from the evidence that the decedent's own negligence, or that of her companion in driving the automobile upon the track of the defendant company was the sole proximate cause of the death of the decedent, then their verdict should be for the defendant.

D.

✓ The court instructs the jury that the mere fact that the plaintiff was struck and killed on the crossing by the defendant's engine does not entitle the plaintiff to recover damages from the defendant. On the other hand, the jury are instructed that before the plaintiff can recover damages it must be shown to the satisfaction of the jury by a preponderance of the evidence that the defendant was guilty of negligence and that such negligence was a proximate cause of the accident.

F.

? The court instructs the jury that the only purpose of requiring signals to be given by a train as it approaches a crossing is to give travellers knowledge of the train's approach; therefore, if travelers about to cross a railroad track have knowledge that a train is approaching in time to stop short of the track and not go into a place of danger, it makes

no difference whether statutory signals were sounded or not. This is true because the giving of the signals would bring to the traveller no knowledge he did not possess. In such cases there is no causal connection between the giving or not giving signals and the accident, and a railroad company cannot be held responsible in damages for acts of negligence which have no causal relation to the injury.

G.

The court instructs the jury that while it is true that ordinarily the negligence of the driver of an automobile is not to be ascribed to another occupant of the same who is her guest, nevertheless this does not relieve such other occupant from exercising due care for her own safety while approaching a railroad crossing by keeping a lookout for approaching trains and listening for such approach from all directions in which the rails run and, if reasonably necessary in order to look and listen effectively, to exercise due care to procure the car to be stopped for that purpose, and to warn the driver of the train's approach when discovered; and if such occupant fails to take such precautions she is guilty of contributory negligence.

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H.

✓ The court instructs the jury that there can be no verdict for the plaintiff in this case unless the jury are convinced by the greater weight of the evidence that the defendant by reason of some negligence on its part charged in the notice of motion for judgment and proven to the satisfaction of the jury by a preponderance of the evidence, caused or contributed proximately to the death of the decedent.

I.

The court instructs the jury that a girl fourteen years of age, shown to be unusually intelligent and healthy, is capable of contributory negligence.

K.

✓ The court instructs the jury that if the engineman and other employees in charge of defendant's engine while giving

the highway signals required by law, observe a vehicle on a highway approach a grade crossing, they have the right to assume that all the occupants of such vehicle will observe such signals, have looked and listened to ascertain and have ascertained the approach of the train and will not attempt to cross the track in front of such train in dangerous proximity thereto, and conduct themselves accordingly; and are therefore under no obligation to give further warning or to attempt to slacken the speed of the train until and unless in the exercise of reasonable care it becomes apparent or should be apparent to such engineman or other employee in charge of the train that such travellers either cannot, or will not, take care for themselves, and if it is then too late to avoid injury to the travellers by the exercise of means then within the power of the engineman or other employees in charge of such locomotive, the railroad company cannot be held responsible for the result and the verdict should be for the defendant.

L.

✓ The court instructs the jury that a railroad company has the right of way at all highway crossings and the right to operate its trains over its tracks and across such public highway, without reducing the speed of its trains, and that persons using the public highway do so subject to this preferential right of the railroad company to so cross such highways; that the only duty a railroad company owes a traveller on a highway at or near a crossing it to give the statutory signals referred to in instruction A, keep a reasonable lookout for them and exercise reasonable care to detect their presence on such crossings and warn them
 page 257 } of the train's approach, and if after such warning, it appears that they are unheeded or that the traveller is unable to escape, to thereafter exercise reasonable care to slacken speed or stop the train, so as not to injure travellers thereafter unnecessarily; and if after doing these things injury still results, the company is not responsible; and the court further instructs the jury that a traveller on a highway owes a reciprocal duty to exercise reasonable care, on approaching a railroad crossing, to look and listen to discover the approach of trains from both directions before crossing such railroad tracks, and to reasonably assure herself before so doing that she can cross with safety to herself and to the employees and passengers on the train;

and if she cannot reasonably assure herself of such safety, otherwise, it is her duty to stop as well as look and listen for that purpose; and such looking, listening and stopping, if stopping be necessary, must be done at a time and place when such looking and listening and stopping will be effective; and a failure to seasonably discharge this duty which contributes to her injury constitutes negligence on her part.

M.

The court instructs the that if they believe from the evidence that the driver of the automobile was aware of the approaching train before driving to a place of danger on the southbound track and undertook to pass over the crossing ahead of the approaching train, then it is not important whether the statutory signals were given or not, and even if there were failure to give such signals there can be no recovery on that account.

O.

The Court instructs the jury that if they believe from the evidence that the collision was an unavoidable accident their verdict shall be for the defendant.

P.

The court instructs the jury that if they believe from the evidence that it is just as probable that the driver of the automobile before going on the track where she was struck was aware of the approaching train and felt that she had ample time to cross ahead of it in safety and that she could have so crossed had not automobile not stopped on the track, as it is that she was not aware of the approaching train before going on the track, then the plaintiff cannot recover in this case.

page 258 } The court amended defendant's Instruction B by adding after the word *that*, which is the sixth word in the instruction, the words *one of*, and by adding the letter *s* to the word *claim* which is the eighth word in said instruction as offered, thereby making the instruction to read "The court instructs the jury that one of the plaintiff's claims of negligence", etc., and to the action of the court

in making such amendments the defendant, by counsel, excepted on the ground that the instruction stated a correct proposition of law as originally offered.

Instructions E, J and N were refused, and are as follows:

E.

The jury are instructed that if, after considering and weighing all the evidence in the case as to the giving of statutory signals, or the failure to give such signals, they are of the opinion that the signals were given, their verdict should be for the defendant.

J.

The court instructs the jury that the question to be determined by them in respect to the sounding of the statutory signals by the engineman is not whether a given witness failed to hear them, but is whether or not the signals were given at the time and place required by the statute. The presumption is they were given. The burden of proving they were not given is on the plaintiff. This burden requires the greater weight of the evidence to support it. If the evidence is evenly balanced, it will not suffice. Many witnesses have testified that they heard the signals, while others testified either that they did not hear them or did not remember hearing them. In determining whether the signals were given you are instructed that you are the sole judges of the credibility of all the witnesses, but in weighing the testimony of equally credible witnesses it is your duty to reconcile conflicting statements, if possible, and under such circumstances more significance should be attached to the statement of a given witness that he recalls hearing a given warning on a given occasion than to a mere negative statement of another
page 259 } equally credible witness that he did not hear or
does not recall hearing. The reason for this is
that the statement of both sets of witnesses may
be true.

N.

✓ The court instructs the jury that if they believe from the evidence that had the automobile in which plaintiff was riding continued on across the southbound track it would have

cleared the track and reached a place of safety before the engine reached the crossing, and that the collision occurred by reason of the fact that the automobile stalled or stopped on the track, then such stalling or stopping was the proximate cause of the collision, and their verdict should be for the defendant, and this is true whether or not the statutory signals were given.

To the action of the court in refusing said Instruction E, J and N the defendant, by counsel, excepted on the grounds that the propositions of law asserted in each of said instructions are correct and supported by the evidence in this case.

After Instruction J had been refused, the defendant, by counsel, amended it by striking out the second sentence which reads as follows:

“The presumption is they were given”

and offered the instruction in its amended form, and it was refused, and the defendant, by counsel, excepted.

To the action of the court in refusing said Instructions E, J and N offered by the defendant, and Instruction J as amended, the defendant, by counsel, excepted as hereinbefore set out, and tendered this its Bill of Exceptions which it prays may be signed, sealed and made a part of the record in this cause, and the same is accordingly done this 18th day of May, 1934.

J. R. H. ALEXANDER, Judge.

page 260 } I, T. E. Bartenstein, Clerk of the Circuit Court of Fauquier County, Virginia, do certify that the foregoing report of the testimony and other incidents of the trial of the case of Vincent O. Jacobs, Admr. of Mary Catherine Ennis v. The Chesapeake and Ohio Railway Company, together with the original exhibits, being plat marked Exhibit A and photographs marked Exhibits 1 to 14, inclusive, and Bills of Exceptions Nos. 1 and 2, were filed and lodged with me as Clerk of said Court on the 21 day of May, 1934.

T. E. BARTENSTEIN,
Clerk of the Circuit Court of Fauquier
County, Virginia.

I, T. E. Bartenstein, Clerk of the Circuit Court of Fauquier County, Virginia, do hereby certify that the foregoing is a true and correct transcript of the record in the case of Vincent O. Jacobs, Admr. of Mary Catherine Ennis *v.* The Chesapeake and Ohio Railway Company, and that the attorneys for the plaintiff had due notice of the intention of counsel for the defendant to apply for said transcript before the same was made out and delivered.

Given under my hand this 29 day of May, 1934.

T. E. BARTENSTEIN,
Clerk of the Circuit Court of Fauquier
County, Virginia.

Fee for this Record, 10.00.

A Copy—Teste:

M. B. WATTS, C. C.

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