would be original negligence, and on this the jury have made no finding against the defendants. "The third ground is that, even if the plaintiff was, as the defendants contend he was, guilty of negligence in the way he attempted to cross the track, the motorman saw him, or ought to have seen him in sufficient time to enable him, if he had used the appliances which he had at his command as he ought to have used them, to have stopped the car and to have avoided the collision." This is a charge of ultimate negligence, and it has not reference to the ringing of the gong which covered the first two points, but has reference exclusively to what the motorman ought to have done after the plaintiff had been guilty of his act of negligence in attempting to cross the track.

Having regard then to the manner in which these several questions were put and the answer to No. 2, it appears to me that that has reference to this third ground—to the ultimate negligence. If that be so, the effect of this answer would give the plaintiff the right to recover notwithstanding the negligence of the defendants.

By the answer to question 5, however, both plaintiff and defendants were guilty of negligence. If the answer to question 2 was not intended by the jury to refer to ultimate negligence, then the jury, have not dealt with that question, the answers to 6 and 7 having both been struck out on the second occasion when they retired, unless they have sufficiently answered that question on their return.

The jury during the course of conversation said clearly enough that the motorman could not have avoided the accident when he noticed it; that is, I take it, when he saw the plaintiff. But on their second return when the answers to questions 6 and 7 had been struck out, only this was said, "The only change is in taking out the answer to 7. What you say in effect is that both these people were to blame; that the motorman after he saw that the plaintiff was in danger could not have stopped his car." It does not say that the motorman could not, had he exercised reasonable diligence, have avoided the accident after it appeared quite clear that the plaintiff was about to cross in front of the car, but it only says that he could not have stopped the car after *he saw* (not might have seen) the plaintiff. Of course, if there is no evidence that ought to have been submitted to the jury that the motorman by the exercise of reasonable diligence ought to have seen the plaintiff's rig in time to stop the