

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 car, then the judgment should stand; but, if it appears that there is evidence which would support such finding—that is, of ultimate negligence—then that question has not been answered, and the case ought to go back for trial. It, therefore, remains to examine the evidence upon this point. It is apparent from the judgment that the trial Judge took the view that there was evidence which could properly be submitted on the question of ultimate negligence; and, in my opinion, after a careful reading of the evidence, he was right in this view. I shall not quote all the evidence bearing upon this question, but sufficient as I think to shew that there was ample evidence to support a finding, had there been one, on the question of ultimate negligence; and, as pointed out by the learned Chief Justice, the strongest evidence supporting this view was given by some of the witnesses for the defendants. . . .

[Quotations from the evidence.]

From these extracts it appears that there is evidence by some of the witnesses that the east-bound and west-bound cars crossed each other east of Margueretta street; that, according to several of the witnesses, the plaintiff's horse and rig could be seen from two to three car lengths east of Margueretta street, when he was in the act of crossing to the north. According to the motorman's own evidence, he actually stopped the car within about a car length, although the mechanical engineer speaks of two car lengths as necessary to stop the car going 8 miles an hour, which was about the rate at which the car in question is said to have been moving.

If the jury believed this evidence, they could well find, as they did find, that the negligence of the motorman was in not applying the brakes when he first noticed the plaintiff heading across the tracks, and this was the answer which they brought in to question 7, "In waiting until too late before applying the brakes."