

morning; but not so misty as to prevent plaintiff from seeing the train pass, although he was about 25 yards away from it. The density of the mist is made pretty plain by his testimony that an object—apparently such an object as a telegraph pole—could be distinguished at the distance of about half of 75 yards. The mist was no excuse for not seeing, or hearing, the train when very much nearer than 75 yards, or one-half of 75 yards, only, away from it. Indeed it was a reason for approaching the crossing with more care, depending the more upon hearing, when sight was thus dimmed. The train was a little later than usual, and the youth was apparently under a mistaken impression that it must have passed. But his mistake was no excuse for any recklessness or for want of ordinary care; nor was the fact that on this morning—of a holiday—the train was a little later in passing this spot than usual. However the youth's action is looked at and accounted for, there is no escape from the fact that by the exercise of ordinary care, in going into this place of danger, he might have avoided his injury. It cannot be contended that he was not bound to take any care, and it seems like a parody of prudence to say that it was enough to inquire the time of day, and to be informed by his father that he thought the train must have passed, and to have imagined that he heard the whistle of a train which had passed; what need of all or any of these things if he kept his ears open when approaching the crossing? It is not as if he were even driving, and there were the sounds of the moving horses and vehicle, as well as the need for his mind being in some degree taken up in the management of them. Upon this question, in my opinion, the action failed, and should have been dismissed.

And I am of opinion that it failed on the third question also. Plaintiff can recover only for pecuniary loss. The action should have been dismissed if none were proved. It is not a case in which nominal damages may be awarded when no actual loss is proved. And plaintiff's evidence not only failed to prove any pecuniary loss, but shewed that none such had been, or shall be, sustained by him. The story is not merely that his son had been working for him and was a capable farmer, but was that there was a clearly understood agreement between them that the son was to have the 200-acre farm at the father's death, and that in the meantime they were to be partners, and that the son was to get what he needed out of the common fund. Such a bargain