under consideration was asked and refused. This refusal was approved by the supreme court which said:

"There was no evidence upon which to rest such an instruction. As already stated, no one personally witnessed the crossing of the track by the deceased, nor the running of the flat car over him. Whether he did or did not stop, and look and listen, for approaching trains, the jury could not tell from the evidence. The presumption is that he did; and, if the court had given the special instruction asked, it would have been necessary to accompany it with the statement that there was no evidence upon the point, and that the law presumed that the deceased did look and listen for coming trains before crossing the track. In Improvement Co. v. Stead, 95 U. S. 161–164, the court, speaking by Mr. Justice Bradley, upon the subject of the relative rights and duties of a railroad company and the owner of a vehicle crossing its track, said: 'Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care.' This principle was approved in Railroad Co. v. Griffith, 159 U. S. 603–609, 16 Sup. Ct. 105. Manifestly, it is not the duty of the court, when there was no evidence as to the deceased having or not having looked and listened for approaching trains before crossing the railroad track, to do more, touching the question of contributory negligence, than it did, namely, instruct the jury generally that the railroad company was not liable if the deceased, by his own negligent conduct, contributed to his death, and that they could not find for the plaintiffs unless the death of the deceased was directly caused by unsafe switching appliances used by the defendant, and without fault or negligence on his part."

It would have been improper to instruct the jury as requested without also instructing them as to the presumption that they had not only listened, but had stopped and listened. Concerning the conduct of the deceased, after they were seen by the locomotive engineer, the trial court in its charge said:

"Now, in regard to the duty which devolved upon the decedents at the time, I should say that they, in the emergency upon them, were not guilty of negligence, even although they did not adopt the plan and method of getting out of the impending danger which a cool, calm man, sitting calmly by, would have taken, but that you must consider, in considering contributory negligence, what a cautious man would probably have done under the circumstances which surrounded them."

To this no exception was taken, and, indeed, none could be well taken. If deceased were guilty of contributory negligence at all, it was in negligently driving into the position from which escape was most doubtful when warned of danger by seeing or hearing this train. The charge of the court upon the degree of care required from travelers approaching a grade railroad crossing, and upon the effect of contributory negligence, was clear and sound so far as it went, and has not been excepted to, save in the matters already discussed.

Where the undisputed facts of a case are such as that no other reasonable inference can be drawn than that of negligence, it is the plain duty of a trial court to so instruct. Under such a state of facts negligence becomes a question of law. Elliott v. Railway Co., 150 U. S. 245, 14 Sup. Ct. 85; Blount's Adm'x v. Grand Trunk Ry. Co., 22 U. S. App. 129, 9 C. C. A. 526, and 61 Fed. 375; McLeod v. Graven, 19 C. C. A. 616–622, 73 Fed. 627. The obstructions to sight and sound were so serious in approaching this crossing that

it was clearly the duty of decedents to have exercised a degree of care commensurate with its dangerous character. If, with reasonable prudence, the decedents could have stopped where they could both look and listen for an approaching train, they were bound by every consideration of self-preservation to do so. If, however, they could not, with reasonable safety, stop at a place where they could both see and hear, it was all the more imperative that they should stop and listen at the most favorable point near the crossing, and a failure to so stop and listen, under the circumstances of this case, would be inexcusable negligence, and an instruction to this effect might have been properly given. There is nothing in the cases of Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, or Railway Co. v. Farra, 31 U. S. App. 306, 13 C. C. A. 602, and 66 Fed. 496, which, under the remarkable character of this crossing, would have made such an instruction improper. But no request for such an instruction was made. The requests which included the subject of stopping included either a stopping at a particular place, or a proposition as to the burden of proof in conflict with the well-settled doctrine of this court concerning contributory negligence.

The error assigned because of the refusal to instruct the jury to find for the plaintiff in error must be overruled, for the reasons already indicated in this opinion. There is no error, and the judgment must be affirmed.

GITTINGS et al. v. LOPER.

(Circuit Court, E. D. Pennsylvania. November 27, 1897.)

No. 5.

1. PLEADING—STATEMENT OF CLAIM—DENIAL OF ANTICIPATED DEFENSE.
   It is not a legitimate function of a statement of claim to reply to an anticipated affirmative defense.

2. PLEADING—AFFIDAVIT OF DEFENSE—CONTENTS OF SAME.
   Where, in a suit brought upon two drafts, the plaintiffs' statement of claim avers that the drafts were purchased by the plaintiffs "prior to the date of the payment thereof, and for a valuable consideration, without notice," it is not incumbent upon the defendant to reply to such irregular and premature matter in his affidavit of defense.

This is a suit to recover the sum of $3,000 upon two drafts in the possession of the plaintiffs. The statement of claim alleged that the drafts had been purchased by the plaintiffs "prior to the date of payment thereof, and for a valuable consideration, without notice of any adverse claim or equity of the defendant." The affidavit of defense, after setting out that the acceptance by the defendant of the drafts had been procured by means of false and fraudulent representation, alleged that the defendant "is advised that the averment in the statement that the plaintiffs purchased the drafts for a valuable consideration, without notice, is an averment of a legal conclusion, and not a statement of fact requiring a denial, and, moreover, relates to matter of rebuttal, which need not be denied by the affidavit of defense." This was a rule upon the defendant to show cause why judgment