MISSOURI PACIFIC RAILROAD COMPANY *v.* WILLIAMS.

Opinion delivered November 25, 1929.

1. RAILROADS—FAILURE TO KEEP LOOKOUT—PROPERTY DAMAGE.—Under Crawford & Moses' Dig., § 8568, providing that, if any person or property shall be killed or injured by the neglect of railroad employee to keep a lookout, the company shall be responsible, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employee could have discovered the peril of the person injured in time to prevent the injury, *held* that the protection applies to property damage as well as to personal injury, and that the contributory negligence of the owner is not a bar to a recovery.
2. RAILROADS—FAILURE TO SIGNAL—JURY QUESTION.—In a suit for damages to an automobile in a collision with a train at a public crossing, evidence *held* to present a question for the jury whether the statutory signals for the crossing were given before the collision.
3. APPEAL AND ERROR—HARMLESS ERROR.—A judgment will not be reversed except for errors prejudicial to the rights of appellant.
4. TRIAL—INSTRUCTION—CONSTRUCTION AS A WHOLE.—In a suit for damages to an automobile when struck by a train at a public crossing, an instruction telling the jury that plaintiff was entitled to recover damages to his automobile if the railroad employees failed to keep a constant lookout, "notwithstanding the contributory negligence of the person injured," *held* not prejudicial, the instruction being read as a whole.

Appeal from White Circuit Court; *W. D. Davenport,* Judge; affirmed.

STATEMENT OF FACTS.

Appellee sued appellant for damage done to an automobile resulting from a collision between it and a train

of appellant. The accident happened on the 16th day of August, 1928, on a public crossing about 150 or 200 yards north of the station of McRae. Appellee was perfectly familiar with the crossing, having driven over it for a period of ten years. He was working in a store at Searcy, and was driving to and from his home at McRae to the store. He was returning from Searcy about one o'clock in the daytime, and it was a clear day, with no wind blowing and nothing to obstruct his vision. The railroad track ran north and south, and was perfectly straight for two miles north and two miles south of the crossing. There was a cut about one-half mile north of the crossing. There were also two toilets north of the crossing, situated about ten feet from the right-of-way fence. Weeds, six to eight feet in height, extended from the right-of-way fence to the track along where these closets were. The thickest weeds were between the toilets and the railroad track. Appellee looked up and down the track before starting over the crossing. He was traveling at the rate of from three to five miles an hour; and just as his front wheels went on the railroad track, he heard one long blast of the whistle, and, looking up, saw the train coming at a rapid rate of speed about fifty or sixty yards away. He did not hear the train approaching, and did not see it when he looked up and down the track. His sense of sight and his sense of hearing are both normal. When he saw the approaching train he jumped out of his automobile, and narrowly escaped being killed himself. His automobile was wholly demolished, and he suffered damages in an amount greater than the verdict found by the jury in consequence of the destruction of his automobile. At the rate he was driving he could have stopped within three or four feet as he started upon the crossing. He would have heard the whistle blown and the bell ringing if they had given the statutory warnings for the crossing.

Other persons who saw the accident testified that the train operators did not commence to blow the whistle

or ring the bell within eighty rods of the crossing. They never sounded the whistle at all until they gave the long blast just before striking appellee's automobile. The train was about fifty or seventy-five yards north of the crossing when the whistle was first blown. The bell was not ringing at the time the whistle was blown. They commenced ringing the bell just after a long blast of the whistle. The train was going south, and one of the witnesses testified that it went about 150 yards south of the crossing before the engineer began to check up. Another stated that it began to check up when it had got fifty or seventy-five yards south of the crossing where the accident occurred.

According to the testimony of both the engineer and the fireman, they gave the statutory signals for the public crossing by blowing the whistle and ringing the bell. After the whistle was blown for the crossing the statutory distance away from it, the bell was started ringing, and this was kept up until after the accident happened. The engineer did not see appellee and his automobile until he was within fifty or seventy-five yards of it. Appellee was driving very slowly, and the engineer and fireman thought that he was going to stop his car before going upon the crossing. Both the appellee and the train operatives testified that when his car got on the track and appellee saw the approaching train not far away, he killed his engine and could not start it again. Appellee then jumped out of the car in order to avoid being struck by the engine.

There was a verdict and judgment for appellee, and the case is here on appeal.

Thos. B. Pryor and *H. L. Ponder,* for appellant.

C. E. Yingling, for appellee.

HART, C. J., (after stating the facts). It is first earnestly insisted that a verdict should have been directed in favor of appellant. The suit was brought under the provisions of section 8568 of Crawford & Moses' Digest, commonly called the lookout statute. It was the

contention of appellee that the appellant was negligent in failing to keep an efficient lookout as required by the statute, and in failing to give the statutory warnings for the approach of the train to the public crossing. Under Crawford & Moses' Digest, section 8568, providing that, if any person or property shall be killed or injured by the neglect of any employee of any railroad to keep a lookout, the company shall be responsible, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employee could have discovered the peril of the person injured in time to have prevented the injury, it was held that the protection applies to property damage as well as to personal injury, and that, in the case of an injury to property, the contributory negligence of the owner is not a bar to a recovery. *Huff* v. *Mo. Pac. Rd. Co.,* 170 Ark. 665, 280 S. W. 684; *Blytheville, Leachville & Arkansas Southern Ry. Co.* v. *Gessell,* 158 Ark. 569, 250 S. W. 881; and *Kelly* v. *DeQueen & Eastern Rd. Co.,* 174 Ark. 1000, 298 S. W. 347.

Under the evidence, viewed in the light most favorable to appellee, the latter was traveling south along a public highway parallel with the railroad, and started to cross at a grade crossing in the town of McRae from west to east. On the west side of the track, some distance north of the crossing, there were two toilets on the right-of-way of the railroad. Weeds extended from these toilets nearly up to the rails of the track of the railroad company. The weeds were six or eight feet in height, and, together with the toilets, obstructed the view of an approaching train from the north so that he could not see an approaching train until he was nearly on the track. According to the testimony of appellee, he looked up and down the track for an approaching train before attempting to go on the crossing. His sense of hearing and his sense of sight were both normal. He was traveling at a very low rate of speed, of from three to five miles an hour, and did not see or hear any approaching train.

There was a cut about one-half mile north of the crossing which would prevent him seeing an approaching train until after it had run out of the cut on its way south. Appellee and two witnesses for him all testified that it was a clear, bright day, and that the statutory signals for the public crossing were not given. Two of the witnesses were looking at the approaching train, and said that the bell was not ringing, and that the whistle was not blown for the crossing until the train was within fifty or sixty yards of it. It is true that their testimony is contradicted by that of the engineer and that of the fireman, but it was within the province of the jury to find these disputed questions of fact in favor of the appellee. The jury might have found that the fireman and engineer were negligent in not giving the proper statutory signals for the crossing, and that, if they had been keeping an efficient lookout, they could have seen appellee in time to check the train, and thereby avoid demolishing the automobile.

It is next insisted that the court erred in giving instruction No. 2, which reads as follows:

"You are instructed that it is the duty of all persons running trains in this State, upon any railroad, to keep a constant lookout for persons or property upon the track of any and all railroads; and if any property shall be injured by the negligence of any employee of any railroad to keep such lookout, the company owning or operating any such railroad shall be liable and responsible for all damages resulting from negligence to keep such lookout, notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employee or employees in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury, by the exercise of reasonable care after the discovery of such peril, and the burden of proof shall devolve upon such railroad to establish the fact that this duty to keep such lookout has been performed."

It is claimed that the instruction was misleading and prejudicial in the use of the phrase, "notwithstanding the contributory negligence of the person injured," since appellee was not at all injured in his person. It is the settled rule of this court not to reverse a judgment except for errors prejudicial to the rights of the appellant. This suit was not brought to recover compensation for injuries to the person of appellee. It was founded entirely upon the destruction of his automobile. The whole instruction is to be read together, and it is perfectly plain that the use of the words just quoted refer to the contributory negligence of the person injured in his property. Under the statute the railroad may be liable for injury to persons or property, notwithstanding the contributory negligence of the person receiving bodily injury or being injured in his property. We do not think that this assignment of error is well taken, and cannot perceive how appellant could have been in any sense prejudiced by the giving of the instruction.

Other errors are assigned, both as to the giving of instructions at the request of appellee and the refusing of others asked by appellant. We do not deem it necessary to set out any of these instructions. The court fully and fairly submitted the issues arising from the conflict of evidence under the principles of law decided in the cases above cited and many others which might be cited. The instructions asked by appellant and refused by the court were either covered by other instructions requested by appellant or the instructions were misleading on account of the language used in them.

We have carefully considered the assignments of errors set out, and find nothing therein prejudicial to the rights of appellant. The judgment is therefore affirmed.