CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* LUSBY.

Opinion delivered February 3, 1930.

1. APPEAL AND ERROR—HARMLESS ERROR.—In an action against a railroad company for the death of plaintiff's intestate, the error, if any, in refusing to instruct the jury that deceased was a trespasser was not prejudicial where the case was tried throughout and the instructions were given on the theory that deceased was a trespasser.
2. RAILROADS—KILLING OF TRESPASSER ON TRACK—LIABILITY.—Evidence in an action for the killing of plaintiff's intestate while sitting on defendant's track, *held* sufficient to go to the jury, under Acts 1911, No. 284, making railroads liable for all damages resulting from failure of persons running trains to keep a proper lookout, and to give the statutory signals.
3. DEATH—AMOUNT OF DAMAGES.—A verdict of $2,000 to a father as next of kin for death of his son, 25 years old, unmarried, living with his father, earning 40 cents per hour and contributing one-half to his father, *held* not excessive.

Appeal from Yell Circuit Court, Danville District; *J. T. Bullock,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellee, as administrator, brought this suit for the benefit of himself as the next of kin for damages for the killing of his son, Durward Lusby, in the operation of one of its fast trains, and from the judgment for $2,000 damages the railroad company has appealed.

Durward Lusby, the deceased, son of appellee, was a young unmarried man 25 years of age, who lived with his father, a carpenter and contractor. The son had been working with him in his business, and at the time of his death was so skilled that the father intrusted to him the supervision of the work and handling of the men on his various contracting jobs. The money earned by the son was turned over to the father, except the amount necessary for incidental expenses retained for his personal use. The father testified that the boy earned at the rate of 40 cents an hour for his work, and at least one-half the earnings were turned over to his father, to whom the son had often said that his father need not worry about the future; that he would take care of him and keep him up. The decedent was run over and killed at Echo, a small station west of Booneville, at about 11 o'clock on the night of November 27, 1926. He had apparently come into the station on a freight train, which had taken a siding there to let the fast train pass, and was sitting down on the track at the time he was run over and killed.

The engineer who testified for the plaintiff, stated, that the track was straight for a mile or a little better with nothing to obstruct the view when the injury occurred. That the decedent was sitting on the south side of the track, the fireman's side of the track, that King Faucett was his fireman and was in court, and there was nothing to prevent Faucett from seeing him on his side of the track. The engine was equipped with a headlight, the kind the law requires, and its range was about 450 feet, and it was supposed to enable the engineer to see an object on the track far enough ahead to stop the train. He saw the young man when he came in range of the headlight sitting on the edge of the track, was unable to see whether he was sitting on the rail or the tie next to the rail, but right on the edge of the track. As soon as he discovered the man on the track about three telegraph poles away, a little over 450 feet, he immediately

blew the whistle, and alarmed him. "The minute I whistled he turned around and looked at me, and got up like this, and when he got up, well, he looked at me just an instant, and he proceeded to get up and looked as if his feet went out from under him, and he fell back over in the middle of the track." He thought of course the man would get off the track when he saw him get up, and the engine was closing in on him rapidly, and he could have done nothing; it was impossible to prevent the accident after he saw him fall. He stated he had whistled for the crossing east of Echo about a quarter of a mile from where the boy was killed, and he thought the bell was ringing at the time, "because when I blow for a station I always turn the bell on, and it probably was ringing. I don't think there was anything I could do after I discovered him there on the track, that I did not do to prevent the injury. I did all I could. The track is up on ballast, and it looked as if his feet slipped from under him, and he fell across the track." He blew several blasts of the whistle before the train struck him, and alarmed him, and he turned and saw the train and attempted to get up. He fell back on the track, and the train had run about one-half the distance from where he first discovered him. The moment he fell, the brakes were applied, and the whole train ran beyond the man about two coach lengths or more. When the train stopped, the engineer went to the rear where the body was, and, signaled to the brakeman to protect the train with one long and three short blasts of the whistle. Stated further: "In my long experience as engineer I frequently see men on the track, and when I whistle at them they get off, and I go on by without having to stop or slacken the speed of the train. This occurs many times each trip. It is an everyday occurrence. I see them sitting on the track and get up when I whistle, and get out of the way. When I see a man sitting on the track and whistle at him and he turns, I expect him to get out of the way. When I saw him fall is when I applied the

air to the brakes. Up to that time I thought he was going to get out of the way. I could see that I had attracted his attention; that he knew the train was coming."

Six witnesses, all of whom were in the vicinity of the place where the accident occurred, testified that they heard the train coming, watched its approach, could have heard the whistle blown or the bell rung if it had been done, that no whistle was blown or bell rung; they heard none until after the train stopped suddenly at the station when signals were given calling out the brakeman to protect the train.

The court instructed the jury giving certain instructions over appellant's objection, and refusing to give certain instructions requested which action is now complained of as error, and especially for refusing to direct a verdict in its favor, and its refusal to give requested instruction No. 3 telling the jury that if the intestate was on the railroad track at a place other than a regular road crossing he was a trespasser. The verdict is also complained of as excessive, and from the judgment of $2,000 damages the appeal is prosecuted.

Thos. S. Buzbee, H. T. Harrison and *Geo. B. Pugh,* for appellant.

Hays, Priddy, Rorex & Madole, for appellee.

KIRBY, J., (after stating the facts). The undisputed testimony discloses that the decedent was a trespasser upon the railroad company's track at the time and place where he was killed by the passing train, but the refusal of the court to tell the jury that he was a trespasser in requested instruction No. 3 was not prejudicial, if erroneous, since the case was tried throughout, and the instructions all given on the theory that the deceased was a trespasser and entitled only to consideration as such.

If the engineer's testimony had been believed by the jury or could be regarded as undisputed, appellant would have been entitled to a directed verdict. The engineer stated that he saw the decedent sitting on the

tie or rail of the track in the range of his headlight distant, that he immediately blew the warning blasts with the whistle, and that decedent turned and saw the train coming, and got up as if to get away from the track, which he expected him to do, and that his feet suddenly seemed to slip out from under him letting him fall back on the track. Nothing possible could have been done to prevent the injury thereafter. It was impossible to stop the train before it was stopped, two coach lengths beyond where he was struck. This testimony however, was not undisputed since six witnesses who lived or were in the vicinity of the station all of whom testified that they could have heard the signals, if any were given, saw the train coming in, watched its approach, and none of them heard any signals given until after the train stopped suddenly when the blasts of the whistle were made calling out the brakeman. No error was committed in refusing to direct a verdict.

The court discussing the liability of railroad companies for damages for injuries to persons trespassing upon the tracks and failing to keep a lookout under Act 284 of 1911, said in *Railroad* v. *Gibson,* 107 Ark. 431: "We think the construction there placed upon the act applies to persons alike, and that the railroad company now owes the same duty to keep a lookout to avoid injuring the trespasser upon its tracks, and that upon proof of injury to such person by the operation of its trains under such circumstances as to raise a reasonable inference that the danger might have been discovered, and the injury avoided if a lookout had been kept, that a *prima facie* case is made, and the burden of proof then devolves upon the railroad company to show that a proper lookout was kept as required by the statute, and that it used ordinary care to prevent the injury to the person after his discovery in a perilous position in order to escape liabilty for such injury." The engineer testified that a lookout was kept, and the perilous position of the decedent upon the track or ties was discovered as soon

as could have been done in the night with the headlight of the train, that he gave the warning and the trespasser looked toward the oncoming train, got up as if to get away from the track, and that suddenly his feet seemed to slip from under him, and he fell back upon the track, and it was thereafter impossible to stop the train or prevent the injury. A *prima facie* case of liability was made by the proof herein to go to the jury, and the case is different from the cases relied upon (*St. L. I. M. & S. R. Co.* v. *Coleman*, 97 Ark. 438, 135 S. W. 338; *Kelley* v. *DeQueen & E. R. Co.*, 174 Ark. 1000, 298 S. W. 347), and appellant was not entitled to a directed verdict as already said.

On the question of the excessiveness of the verdict the testimony is rather meager as to the disposition and ability of the deceased to continue to contribute to the support of his father, but it was shown that he had been contributing about one-half of his earnings to his father since his coming of age, and that he stated frequently that his father should not worry about the future, as he would take care of him when he could no longer work. The expectancy of the father and the decedent, his son, was shown, and the majority has concluded that the amount of damages, $2,000, awarded the father as the next of kin for pecuniary loss on account of the negligent killing of his son, is not excessive.

The judgment is accordingly affirmed.