DICKERSON *v.* ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

Opinion delivered May 7, 1928.

1. TRIAL—RIGHT TO OPEN AND CLOSE.—Where, in a consolidated action for the killing of two boys and damage to a truck in which they were riding, the railroad admitted the injury and death of the boys and the damage to the truck, the plaintiffs were still entitled to open and close the argument unless the railroad admitted the amount of damage claimed.
2. RAILROAD—NEGLIGENCE—INSTRUCTION.—In an action against a railroad for negligently killing two boys while crossing the track, an instruction relieving the railroad of liability if the jury found that the train was operated at an ordinary rate of speed and that signals were given was erroneous in omitting to require that a lookout should have been kept.

Appeal from Sharp Circuit Court, Northern District; *John C. Ashley,* Judge; reversed.

STATEMENT OF FACTS.

In June, 1926, a northbound passenger train of the St. Louis-San Francisco Railway Company ran into a truck in which three boys were riding, at a public crossing in the village of Williford in the northern district of Sharp County, Arkansas, and killed the boys and demolished the truck. The crossing was a short distance north of the depot, and the view was unobstructed for a distance of about a mile south of the crossing, from which direction the passenger train approached. N. L. Dickerson, father of Lellis Dickerson, aged eleven, who was driving the truck, brought suit against the railway company for damages in the sum of $2,957. John Dickerson, father of Leo Dickerson, nineteen years old, brought suit against the railway company for damages for the death of his son, and asked for judgment in the sum of $2,990. H. K. McCaleb, father of J. T. McCaleb, aged eight, who was also riding in the truck at the time the accident occurred, brought suit against the railway company for the death of his son, and asked for damages in the sum of $2,800. S. O. Norris and Johnston Motor Company, the owners of the truck, brought suit for its destruction, and asked for judgment in the sum of $450. The

four suits, by agreement of the parties, were consolidated for trial.

The attorney for the railway company admitted the injury and death of the three boys and the loss and damages to the truck by being struck by the defendant's train at a public crossing in the town of Williford, Sharp County, Arkansas, and asked that the burden in the case be given to the defendant and that it should have the right to open and close the case. Over the objection of counsel for the plaintiffs, the court held that the burden of proof was on the defendant, and that it was entitled to open and close the case.

P. E. Bechtal, who was running the passenger engine of the defendant on June 30, 1926, the day the accident occurred, was the first witness for the defendant. According to his testimony, he whistled for the first time at the whistling board one mile south of the station. He whistled next for a road crossing a quarter of a mile south of the station, and next at the first whistling board south of the depot and about eighty rods from the crossing. There was an electric ringer to the bell, which was turned on a mile south of the depot, and the bell was left ringing until after the collision and after the train had been stopped. The engineer was keeping a lookout when he came to the south end of the depot. He started another crossing whistle, and saw the truck with the boys in it. The engineer caught his left hand on the whistle and turned the air on and set the brake in emergency with his right hand. He did all that he could do to stop the train as quickly as he could after he saw the truck. The engine was fifteen hundred feet north of the depot. He was making the usual speed, which was fifty miles per hour. The weather was clear, and the track was straight south of the depot at Williford. He could not see the boys in the truck sooner because of the depot. The testimony of the engineer was corroborated to some extent by the fireman. It was also corroborated to some extent by the conductor of the train, and by a former roadmaster

of the company who was riding on the train at the time of the accident.

According to the testimony of the latter witness, at a place thirty feet from the track, at the crossing where the accident occurred, he could see down the track for about half a mile. The depot was sixteen feet from the track and about two hundred feet south of the crossing where the boys were struck. On cross-examination, he was asked if he was on the train, how far north of the depot could he see a truck when it was thirty feet from the track, and the witness answered about a half a mile. He was then asked, if the truck was twenty feet from the crossing, approaching it, if the engineer had been looking out, could he have seen the truck six hundred to nine hundred feet; and he answered that he could if the depot had not been in the way. From his re-cross examination we quote the following:

"Q. You do say that the engineer could see a truck 20 feet off from the track half a mile away? A. I did not say the engineer could; I said I could. Q. The engineer could see down the track there a quarter of a mile? A. Yes sir."

Doctor H. B. Garner was a witness for the defendant, and corroborated the testimony of the engineer to some extent. We copy from his cross-examination, however, the following: "Q. If the engineer and fireman had been looking from down the track, they could have seen these boys fifteen to twenty feet from the track for half a mile or more? A. Yes sir."

Other witnesses also testified that the engineer kept the bell ringing and sounded the blast for the crossing as he approached the depot at Williford.

E. D. Ferguson, for the defendant, testified as follows:

"At a point ten feet east of the crossing where the boys were killed a man in an automobile could see a train coming from the south 4,400 feet, and 20 feet east of the crossing he could see it 4,000 feet; and 30 feet east

of the crossing he could see it 540 feet; 40 feet east, he could see it 450 feet; 50 feet east he could see it 400 feet; 60 feet east he could see the train 4,400 feet; at that point the depot does not obstruct; 70 feet east of the crossing he could see a train 4,400 feet, and 100 feet east of the crossing he could see it 4,400."

Simon Talbot was a witness for the plaintiffs. According to his testimony he heard the engineer whistle at the mile post south of the depot, but did not hear him whistle any more after that. He did not hear the bell ring as the train approached the depot. He saw the boys going towards the crossing in the truck, which was being driven at the rate of four or five miles per hour. We copy from his testimony the following: "Q. When the train was south of the crossing, looking up this way, and the truck was coming in on the crossing or was back 30 feet from the crossing, was there anything there to prevent the engineer from seeing it? A. No sir. I think they could have seen it."

The witness stated further that the train was running not less than fifty-five miles per hour, and that he saw no effort made to stop it before the accident occurred.

Andy McKinney was a witness for the plaintiffs. According to his testimony the train was going about fifty-five or sixty miles an hour, and did not slow up any that he could tell until after it struck the truck. The bell was not ringing, and he did not hear the engineer blow the whistle after the train had passed the whistling board south of the depot.

A. J. Gates, a witness for the plaintiff, says that from the time the train whistled down below the depot he did not hear any whistle blowing or bell ringing on the train. He said that if there was any attempt made to stop the train before it struck the truck, he could not tell it. He was looking at the engineer as the train came along, and could not see it if he made any effort to slow down the train.

Clois Dickerson, a sister of one of the boys killed and a cousin of another, testified that she was standing in

the front door of a restaurant in the town of Williford, and knew that the whistle was not blowing and the bell was not ringing as the train approached the depot at Williford. She stated further that the train was making no effort to slow up along there where the boys were struck.

N. L. Dickerson, the father of Lellis Dickerson, testified that it looked to him like the train was going faster than he had ever seen it go before. He stated that the man on the engine could have seen the boys in time to have stopped the train before striking the truck, if they had been looking. He stated that his son had been driving the truck two years before the accident occurred. He was watching the train as it approached the depot, and knew that the bell was not ringing and that the engineer did not blow the whistle.

A. J. Gates also testified that the engineer of the train told him that he was going a mile and a quarter a minute. This statement was made up at the wreck after the accident occurred.

The jury returned a verdict in favor of the defendant, and from the judgment rendered the plaintiffs have appealed.

David L. King, for appellant.

E. T. Miller, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellee.

HART, C. J., (after stating the facts.) The first assignment of error is that the court erred in holding that the defendant was entitled to open and close the case to the jury. In order to secure the opening and closing argument in the case before the jury, the defendant admitted the injury and death of the three boys and the loss and damage to the truck by being struck by one of the passenger trains of the defendant at a public crossing in the town of Williford, Sharp County, Arkansas. The admission of the defendant was insufficient to change the burden of proof in the whole case and to give it the right to open and conclude the argument. It was still necessary for the plaintiff to prove the amount of his

damages, and he had the right to open and close, unless the defendant admitted the whole amount of damages claimed by the plaintiff.

In Thompson on Trials (2d ed.) § 228, it is said that, where the plaintiff has anything to prove, in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and reply belongs to him. Continuing, the learned author said that the unfailing test of this rule is to consider what party would, in the state of the pleadings and of the record admissions, get a verdict for substantial damages if the cause were submitted to the jury without any evidence being offered by either. In § 230, the same author says that in all actions for unliquidated damages, except where the defendant, by his plea or answer, admits not only the cause of action but also the amount of damages claimed, the right is with the plaintiff; since he must introduce evidence showing the extent of his injury, as where, in any action sounding in damages, the cause of action is admitted, and a plea of confession and avoidance is filed, leaving the amount of damages claimed subject to affirmative proof. Our own case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Taylor,* 57 Ark. 136, 20 S. W. 1083, is cited.

In that case a railway company was sued for the killing of stock, and admitted the killing thereof by its train, but denied the value of the animal. The court held that the plaintiff was still entitled to begin and reply, because he was not entitled to a recovery in accordance with the prayer of his complaint if no evidence had been introduced.

In the case of *St. Louis & San Francisco Ry. Co.* v. *Thomason,* 59 Ark. 140, 26 S. W. 598, the railway company was sued for killing stock, and admitted the killing by its train and the value thereof. It was there held that the railway company was entitled to open and conclude the argument, because the plaintiff would have

been entitled to a recovery in accordance with his pleading if no evidence had been introduced.

In a well considered case by the Supreme Court of the State of Georgia, it was held that, to entitle the defendant to the opening and conclusion of the argument in the trial of a case arising *ex delicto,* when the act complained of was not one which, under the law, could be justified, it is necessary that the defendant, by proper pleadings, admit, not only the commission of the act which it is alleged was wrong, but also such other facts as would entitle the plaintiff to have a verdict, without proof, for the amount claimed in the petition. *Brunswick & W. R. Co.* v. *Wiggins,* 113 Ga. 842, 61 L. R. A. 513, 39 S. E. 551. That case was an action instituted by a widow for the killing of her husband by the negligent operation of a train of cars by a railroad company. Among the States cited as supporting this doctrine by adjudicated cases was Arkansas.

In the application of the rule, we are of the opinion that the plaintiff has the right to open and close unless the defendant admits the whole amount of damages claimed by the plaintiff.

It is next insisted that the judgment must be reversed because the court erred in giving instruction No. 6, which reads as follows:

"The court instructs you that, if you find from the evidence that the train was operated at an ordinary rate of speed and that the signals were given, then under the law there could be no liability, and your verdict should be for the defendant."

The vice of this instruction is that it did not submit to the jury the question of keeping a lookout or the question of comparative negligence. This is not like the case of *Davis* v. *Scott,* 151 Ark. 34, 235 S. W. 407, where it was held that it was not necessary to submit to the jury the question of keeping a lookout because the testimony of the engineer that he was keeping a lookout was undisputed and was reasonable and consistent in itself.

Such is not the case here. This case on this point is more like that of *Gregory* v. *Missouri Pacific Rd. Co.*, 168 Ark. 469, 270 S. W. 621. There it was said that, when all the attendant circumstances were considered, the testimony of the employees of the railroad company that they were keeping a lookout could not be said to be undisputed. The court recognized that it was the duty of the driver of the motor bus to look and listen for approaching trains and to stop if necessary to allow such trains to go over the crossing in advance of his motor bus. The court, however, said it was equally the duty of the operators of the train to keep a constant lookout for travelers along the highway, and if the appearance of the motor bus indicated that it was not going to stop for the crossing, the fireman, who saw it approaching, should have signaled the engineer to stop before the motor bus got too close to the crossing.

In the application of the rule to the facts in the present case, it cannot be said that the testimony of the engineer, to the effect that he did not see the truck with the boys in it until he was passing the depot, and that, after he did see it, he did all that he could to stop the train, is undisputed. It is fairly inferable from the evidence adduced in favor of the defendant that the engineer could not see the boys any sooner because his vision was obstructed by the depot, notwithstanding the fact that the track was straight south of the depot. It will be remembered that the engineer testified that he applied the brake in emergency as he was passing the depot and slowed the train down at least five miles an hour before striking the boys at the crossing, which was two hundred feet north of the depot. Witnesses for the plaintiffs, however, testified that they were watching the approach of the train, and that it did not seem to be checked in speed at all. They said that it was going at a rate of speed between fifty-five and sixty miles an hour. The father of one of the boys said that it was going faster than he had ever seen it go. Another witness testified that the engineer admitted to him that he was running the

train at the rate of a mile and a quarter a minute. The engineer admitted on the stand that he was eight minutes behind time and that he was trying to make up lost time. The jury might have inferred from the testimony of the witnesses for the plaintiffs that the engineer could have seen the approaching truck sooner than he did, notwithstanding the depot, if he had been keeping a lookout. The track was practically straight for a mile south of the depot, and there was no other obstruction to the vision of the engineer of the approaching truck except the depot. It was inferable to the jury, when the testimony of all the witnesses is considered in the light of the attendant circumstances, that the engineer could have seen the approaching truck with the boys in it sooner than he did and that he could have slacked the speed of the train so as to avoid striking it, if he had done so. Under these circumstances, it was the duty of the court to have submitted to the jury the question of whether the defendant's engineer was keeping a lookout.

We also call attention to the fact that this instruction closes with the stereotyped phrase "your verdict should be for the defendant," without submitting to it the doctrine of comparative negligence. In *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676, it was held that an instruction should be complete in itself when it undertakes to tell the jury when a verdict should be returned for one of the parties, and the court should not instruct the jury that it must find for the plaintiff or the defendant, as the case may be, upon a partial or incomplete statement of the law applicable to the material facts of the case.

We call attention to this question in view of the fact that the judgment must be reversed, and the cause remanded for a new trial, because the court erred in holding that the defendant was entitled to open and close the case in the argument before the jury, and because instruction No. 6 was erroneous in not submitting to the jury the question of keeping a lookout, without deciding whether

the instruction complained of would have been erroneous in leaving out of consideration the question of comparative negligence. In any view of the matter, it would have been better to have left out the concluding part of the instruction to the effect that "your verdict should be for the defendant" unless the question of comparative negligence was also referred to.

For the errors indicated the judgment must be reversed, and the cause will be remanded for a new trial.