

FORT SMITH, SUBIACO AND ROCK ISLAND RAILROAD
COMPANY *v.* HUMPHREY.

Opinion delivered October 19, 1931.

1. RAILROADS—DAMAGE BY FIRE—EVIDENCE.—Testimony *held* to warrant a jury in finding that a fire which damaged land was set out by employees of the railroad and was negligently allowed to spread.
2. RAILROAD—FIRE DAMAGE—ATTORNEY'S FEES.—In an action against a railroad company for damages to property by fire under Crawford & Moses' Dig., § 8569, it was proper to render judgment for a reasonable attorney's fee, on motion without the intervention of a jury, where none was asked.

Appeal from Logan Circuit Court, Northern District; *J. O. Kincannon*, Judge; affirmed.

James B. McDonough, for appellant.

Cochran & Arnett, for appellee.

KIRBY, J. This appeal is prosecuted by the railroad company from a judgment for damages against it for negligently permitting fire to spread from its right-of-way to the lands of appellee and destroy the trees, grass and fence post thereon.

The testimony on the part of appellant tends to show that its section crew was burning fireguard on the 13th of August, near the land of appellee, it being explained that a fireguard was the burning off of the grass on the right-of-way in order to prevent damage from fires extending to adjoining lands caused by the running of trains; that the fires were put out when the right-of-way was burned off; that they were burning fireguard on the particular day and quit in the afternoon when a rain came up and put out the fires.

Other testimony tended to show that a tree on the right-of-way began burning and was still burning that night. That after it had fallen, the fire was still burning on the stump, and that it spread and burned across the right-of-way to the lands of appellee and destroyed about 35 acres of pasture, some trees and some fence posts; some of the testimony showing that the land burned over was damaged at least \$5 per acre.

There was some testimony indicating that the fire might have originated at a place off the right-of-way where some women were washing during the day.

The jury returned a verdict for appellee for \$100 damages, and found against him on his complaint for personal injuries, resulting from fighting the fire, and the court also assessed an attorney's fee of \$50.

The testimony warranted the jury in finding that the fire that caused the damage was set out by the servants of appellant and negligently allowed to spread to and burn over appellee's land, causing the damages thereto. Section 8569, Crawford & Moses' Digest; *K. C. S. Ry. Co. v. Cecil*, 171 Ark. 34, 283 S. W. 1; *K. C. S. Ry. Co. v. Wilson*, 119 Ark. 147, 171 S. W. 484.

The court correctly instructed the jury as to the measure of damages for the destruction of the trees, etc. *St. L. I. M. & S. Ry. Co. v. Ayre*, 57 Ark. 371, 55 S. W. 159; *K. C. S. Ry. Co. v. Wilson*, *supra*.

Neither was error committed in the allowance of the attorney's fee provided by the statute, which was not shown to be excessive, nor in the court's fixing the fee after a hearing on the motion upon testimony adduced without the intervention of a jury, none being asked. *K. C. S. Ry. Co. v. Cecil*, *supra*.

We find no error in the record, and the judgment is affirmed.
