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Othello Hickman v. Union Pacific Railroad Company : Brief of Appellant

Utah Supreme Court

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E. Nelson; Samuel J. Carter; Attorneys for Plaintiff and Appellant;

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Case No. 7303

IN THE SUPREME COURT OF THE STATE OF UTAH

OTHELLO HICKMAN,
Plaintiff and Appellant

vs.

UNION PACIFIC RAILROAD COMPANY
a Corporation,
Defendant and Respondent,

APPELLANT'S BRIEF

FILED

May 20 1935

L. E. NELSON,
SAMUEL J. CARTER,
Attorneys for Plaintiff
and Appellant.

CLERK, SUPREME COURT, UTAH

Appeal from the District Court of the Third Judicial
District of the State of Utah, in and for Salt Lake County.

IN THE SUPREME COURT OF THE STATE OF UTAH

OTHELLO HICKMAN,
Plaintiff and Appellant

vs.

UNION PACIFIC RAILROAD COMPANY
a Corporation,
Defendant and Respondent,

STATEMENT OF FACTS

Appellant, referred to hereafter as plaintiff, sued respondent, who will be referred to hereafter as defendant, to recover damages for injuries which he sustained in an automobile-train accident. The trial of the cause in the court below resulted in a verdict and judgment in defendant's favor, and plaintiff has brought this appeal to secure a reversal of said judgment.

The accident occurred on October 30th, 1947, at about 6:45 p. m. (Tr. 139), on U. S. Highway 91, at a point approximately two miles southwesterly from Logan, Utah, where a spur track of defendant crosses said highway. (Tr. 187, 227). The said highway at the scene of the accident runs in a general northeasterly direction toward Logan, and the spur track crosses the highway at grade and at near right angles. (Tr. 112). The highway is paved with concrete and is level; with two traffic lanes each 11 feet wide, (Tr. 112).

There is a railroad sign commonly referred to as cross-bucks, on the east side of the pavement and south of the tracks. The defendant did not maintain any wig-wag flashers at said crossing, nor were any flares or other lights placed on the highway to warn motorists that said crossing was being used. There was no light placed upon any of the railroad cars as they approached the crossing. (Tr. 192.)

The spur track extends southeasterly; from the highway for about a half-mile to the main line, and it is not in regular use. It is used principally during the fall of the year to transport sugar beets from a storage pile located on the sugar factory site on the west side of the highway. At the time of the accident the defendant was pushing about 8 empty sugar beet cars ahead of the engine which was operating in reverse.

On the date of accident, plaintiff and Melvin Squires, a business associate, were returning to Logan in the plaintiff's car. (Tr. 225, 226). As they approached a point on said highway about three-tenths of a mile south of the spur track they passed a highway patrolman's car parked on the west side of the highway facing south. Plaintiff and Squires both observed the insignia on the patrolman's car and the plaintiff then observed his speedometer to ascertain if he was within the speed limit, and found the indicator showed that plaintiff's car was then traveling between 45 and 50 miles per hour. (Tr. 227, 228).

After plaintiff's car passed the patrolman's car the latter turned around and proceeded northerly, following

about two-tenths of a mile behind plaintiff's car. (Tr. 153). The highway patrolman, Roland Reese, testified that the plaintiff's car was traveling at a normal rate of speed at the time it passed him and he estimated that the car was traveling between 45 and 50 miles per hour. (Tr. 154).

The plaintiff proceeded northerly along said highway at the same speed until he reached a point a short distance south of the spur track when Squires said, "There comes a train on the highway," and the plaintiff immediately applied the brakes, and, as he testified, "As I applied my brakes, then I saw the car coming on to the highway. I had not seen the car until Mr. Squires yelled at me; and I pushed my brake with all the force I could, and I could see we were going to hit something." (Tr. 228). All four wheels skidded for a distance of 85 feet before colliding with the train. (Tr. 166) The plaintiff's car collided with the first railroad car entering the highway at the rear of its front trucks, and before the train came to a complete stop the front end of plaintiff's car was pulled to the left and into the west lane on the highway, (See Plaintiff's Exhibit B.) The brakes and light on plaintiff's car were in good condition.

The first car approaching from the opposite direction was operated by Mrs. Afton Archibald of Wellsville, and as she reached the bridge over Blacksmith Fork River, which is about 500 feet North of the spur track crossing, (Tr. 188) she could see someone with what she took to be a flashlight, waving said light up and down in front of him. He was standing on the west side of the pavement facing in her direction. She then saw the plaintiff's car

coming from the opposite direction. She slowed down but didn't stop. When she approached to within about 40 feet of the crossing (Tr. 189) she observed the railroad car suddenly appear in front of her on the crossing, and she "slammed" on the brakes. She then heard the screeching of the brakes on the plaintiff's car and immediately thereafter the crash. There was no light on the train, and just before the impact the man with the flashlight turned and ran across to the south side of the spur track. (Tr. 190) She definitely heard the screeching of the brakes on plaintiff's car. (Tr. 190½) At the time of the impact the railroad car was not half-way across the concrete pavement, and it moved after the impact so that she had to drive off the pavement on the west side and momentarily stopped. (Tr. 191). Mrs. Archibald testified that she did not observe the engine, nor did she hear the engine whistle or the ringing of the bell. Neither did she observe any light on the train nor any flares or lights at any place on the highway. (Tr. 192).

Officer Reese testified — "There were no lights, that it was an awful dark night, and that the moon had not come up." As Reese drove up to the scene of the accident, he saw no lights on the railroad car nor on the highway at the crossing. (Tr. 157, 158) As he drove along behind plaintiff prior to the accident, and as he approached the crossing he did not hear the train whistle nor did he hear the bell ringing or hear any siren. (Tr. 158).

ASSIGNMENT OF ERRORS

Comes now the plaintiff and appellant, and assigns the following errors upon which he relies for a reversal of the verdict and judgment entered thereon:

1. The court erred in admitting, over plaintiff's objection, defendant's Exhibits 2, 3, 4, 5, and 6. (Tr. 132-134.)

2. The court erred in denying the following motion made by plaintiff: "MR. CARTER: If the Court please, I move that these photographs be stricken from the record. There is no showing as to when they were made, or the conditions under which they were taken. Conditions have changed. One of the witnesses testified that at the time of the accident the brush was high. Here it shows it ~~perfectly~~ ^{purposely} flat. THE COURT: The motion is denied." (Tr. 384).

3. The court erred in giving the last portion of instruction No. 7, viz.; "and the railroad company's employees have a right to presume that motorists on the highway will drive with their cars under such control as to be able to stop within the distance at which they can see objects ahead." (Tr. 23).

4. The court erred in giving the last sentence of instruction No 9, viz.; "After the cars of such a train are upon and occupying or passing over a highway the presence of such train or cars lawfully upon such highway is a sufficient warning to approaching travelers and such travelers on the highway are bound to see such train of cars on the highway in time to stop and to avoid colliding therewith." (Tr. 24).

5. The court erred in giving instruction No. 18. (Tr. 27, 28.)

6. The court erred in its refusal to give plaintiff's requested instruction No. 1. (Tr. 40).

7. The court erred in denying the plaintiff's motion for a new trial. (Tr. 99).

ARGUMENT AND AUTHORITIES

I

The court erred (Assignment No. 1), in admitting over plaintiff's objection defendant's Exhibits 2, 3, 4, 5, and 6. (Tr. 132-134.) And the court also erred, (Assignment No. 2) in denying plaintiff's motion to strike said exhibits (Tr. 384.) These exhibits were offered and admitted in evidence (Tr. 132-124) on the cross examination of plaintiff's witness Benny Degn, a photographer, who had been called by plaintiff to lay the foundation for the admission of plaintiff's Exhibits B. C. D., and E (Tr. 120-123.) Plaintiff's objection to the admission of defendants exhibits, 2, 3, 4, 5, and 6 was based upon the ground that no proper foundation had been laid and that it was not proper cross examination. (Tr. 134). And plaintiff's motion to strike said exhibits (Tr. 384) was made when it appeared that defendant had failed to offer any evidence to show when the pictures were taken, or whether the conditions and circumstances were the same when said pictures were taken as they were when the accident occurred.

The plaintiff submits that as a matter of orderly procedure a party should offer his evidence in his own time and not poach upon the rights of the party who is then introducing his side of the case. If a defendant may be permitted to offer his evidence upon the cross examination of plaintiff's witness, then the rule could be enlarged to

the point where defendant would be presenting his case simultaneously, and at the same time that plaintiff presents his case.

If defendant's Exhibits 2, 3, 4, 5, and 6 were taken in the spring of 1948, then the conditions would be changed to the extent that they would not present the true condition that existed on the date of the accident. If the individual who had taken these pictures had been produced, the plaintiff could have cross-examined him as to the time, weather conditions, etc., and if it had been determined that the pictures were taken the following spring, then they would be subject to the objection that they were taken at a time too remote and after conditions surrounding the scene of the accident had changed. In order for a picture to have any definite value as evidence, it must be taken so near the time of the accident that it will reproduce the actual condition prevailing at the time of the accident.

We earnestly submit that the court committed reversible error in admitting said exhibits on the showing made, under the following authorities and cases:

In Goldstein's Trial Technique, at page 328, section 396, under the heading of admissibility, the author states the rule, as follows:

"However, if the conditions between the conditions at the time of the accident and the time when the photograph was taken is of such a nature that the result of the trial would probably be different if the conditions as they formerly existed were shown,

the photograph is not admissible. Where the view at a railroad passing was obstructed by vegetation at the time of the injury and the vegetation had all been removed at the time of the photograph, it was held that the photograph was not a correct representation and was not admissible. (citing *Althoff vs. I. C. R. Co.*, 227 Ill. 417.)

In 30 Am. Jur. 611, Section 731, the rule is laid down:

The situation and surrounding circumstances of the taking of a picture are subject to change, a photograph to be admissible, must have been taken at the time of the transaction or before the situation and circumstances have undergone change. In many instances photographs have been held inadmissible on the ground that they were taken at a time too remote and when conditions had changed." (The following cases are cited to support the above rule.)

Chicago etc., R. R. Co., vs. Crose, 73 N. E. 865, where the Supreme Court of Illinois held:

"When the situation and surrounding circumstances are subject to change, photographs, to be of any value as evidence, must be shown to have been taken at the time or when the situation and surroundings are unchanged."

In *Surratt vs. Robinson*, (Md.) 135 Alt. 838, 50 A.L.R. 280, the court said:

"The second exception was taken to the action of the trial court in permitting a photograph of the place where the accident occurred to be offered in evi-

dence. As has been stated the accident occurred on October 15, 1925, between 8 and 9 o'clock in the morning, and the case was tried in the following March. The photograph was taken by counsel in the case, in the afternoon after the adjournment of court pending the trial. From the testimony it appeared that the conditions of the foliage, shrubbery, and lighting were different at the time of the accident than when the photograph was taken, and the photograph itself was obscure and indefinite in its details, and it should not have been admitted in evidence."

II

The court erred (Assignment of error No. 3) in giving the following instruction to the jury, "And the railroad company's employees have a right to presume that motorists on the highway will drive with their cars under such control as to be able to stop within the distance at which they can see objects ahead." (Instruction No. 7, Tr. 23).

The court also erred in giving the following instruction (Assignment of Error No. 4) "After the cars of such train are upon and occupying or passing over a highway the presence of such train or cars lawfully upon such highway is a sufficient warning to approaching travelers and such travelers on the highway are bound to see such train of cars on the highway in time to stop and to avoid colliding therewith." (Instruction No. 9, Tr. 24).

The foregoing instructions when read together, assume that the train was on the crossing all the time while the plaintiff was a sufficient distance away from the cross-

ing to have looked and stopped before colliding with the defendant's train. They also assume that the railroad cars were lawfully upon the highway. This is assuming the important fact that is in issue.

Plaintiff submits that it was prejudicial error to give these instruction since there is no evidence in the record that defendant's train was occupying or passing over the highway before plaintiff applied his brakes. The evidence of witnesses testifying for the plaintiff and defendant is, that when the plaintiff applied his brakes the first car of the train was then only entering upon the highway. (Tr. 228, 189, 319). The plaintiff testified that — "Just a little way before we got to the track, my companion, Mr. Squires, yelled to me: 'There comes a train on the highway.' xxx, I immediately applied my brakes, xxx. As I applied my brakes, then I saw the car coming on to the highway." (Tr. 228).

Mrs. Archibald testified that as she approached the crossing from the north, and when only about 40 feet from the same that — "Then it seemed like all of a sudden this railroad car loomed up in front of me. I slammed on my brakes and I heard the screeching of the brakes on the plaintiff's car and the crash." (Tr. 189, 190). She further testified that at the time of the collision the front end of the railroad car was not half-way across the highway. (Tr. 191.)

The defendant's witness Squires testified, (Tr. 319) that he observed a train of cars coming out onto the highway. He saw the cars in the field first, and then he

observed the first car entering the highway, "about eight feet over." At that time he hollered, "There is a train," (Tr. 320) and Plaintiff's Exhibit "B" plainly reveals the fact that plaintiff's car collided with the front end of the railroad car in the east lane of traffic, and the railroad car then moved forward until the front end thereof reached the west side of the pavement, dragging the front end of plaintiff's car with it. These facts are plainly illustrated by Plaintiff's Exhibits B, C, D, and E.

This evidence definitely shows that the train was approaching the highway when the plaintiff, Squires and Mrs. Archibald first saw it. At that instant the plaintiff's car was too close to the crossing to stop before colliding with the train. (Earle v. Salt Lake & Utah R. Corp. 165 P. 2d. 877.)

We earnestly submit that the Court invaded the province of the jury and also misled them by giving these erroneous instructions.

This court has held repeatedly that it is prejudicial error to give an instruction on an issue not supported by competent evidence. Davis v. Midvale City, 56 Utah 1, 189 Pac. 74; Shields v. Utah Light & Traction Company 105 P. 2d. 347; and Griffin v. Prudential Ins. Co. 133 P. 2d. 333.

In the case of Davis v. Midvale City, supra, this court relied upon and quoted the general rule as laid down in 38 Cyc. 1612, 1613, as follows:

"It is improper to give an instruction announcing a naked legal proposition, however correct it may be,

unless it bears upon and is connected with the issues involved; and unless, further, there has been received some competent evidence to which the jury may apply it. Such an instruction tends to distract the minds of the jury from the real question submitted to them for determination, and thereby mislead them, and, if requested, may be properly refused.”

The same rule is recognized and adhered to in *Shields v. Utah Light & Traction Company*, supra, where the judgment of the trial court was reversed and one of the grounds for reversal resulted because the trial court gave an instruction on an element of damage which was pleaded, but there was no evidence adduced at the trial to support it.

And in *Griffin v. Prudential Ins. Co.*, supra, the same rule is reiterated in the 8th head note which reads:

“It is error to give instructions on a state of facts which there is no evidence tending to prove, or which undisputed evidence shows did not exist, even should such instructions contain correct statements of law.”

The holding of this court in the foregoing cases is well supported by the courts in other jurisdictions. We take the liberty of citing some recent cases from other states:

Hancock et.al. v. Myers et.al. (Okla.) 176 P. 2d 820.

Magnolia Petroleum v. Galloway (Okla.) 83 P. 2d. 174.

Tosto v. City of Seattle et. al. (Wash.) 171 P. 2d. 194.

Lubliner v. Ruge (Wash.) 153 P. 2d. 694.

Garrison v. Trowbridge (Mont.) 177 P. 2d. 464.

Krupp v. Los Angeles Ry. Corporation (Cal.) 135 P. 2d. 424.

Clarke v. Volpa Bros. (Cal.) 124 P. 2d. 377.

Hyman v. Market Ry. Co. (Cal.) 107 P. 2d. 485.

Gregg v. McDonald (Cal.) 239 Pac. 373.

In the Oklahoma case of Hancock et.al. v. Myers. et.al. supra, the Court held:

“The second ground of error is well taken. No evidence was introduced touching the rental value of the premises or of damage suffered by plaintiffs by reason of defendants’ possession thereof. Such being true, the submission of such issue to the jury was error.”

In the case of Magnolia Petroleum v. Galloway, supra, the Supreme Court of Oklahoma held that it was prejudicial error for the trial court to give an instruction to the jury which was not supported by the evidence and, in arriving at this conclusion, the Court said:

Defendant contends that it was error for the court to submit to the jury instructions concerning gasoline which ‘had not been tested’ because the evidence does not show the defendant sold ‘untested’ gasoline. An examination of the record discloses that it is neither alleged in the pleadings nor shown by the evidence that the defendants sold gasoline to the plaintiffs which had not been tested. The above instructions would permit the jury to find for the plain-

tiffs because the defendants furnished untested gasoline. This was error. In *White v. Oliver*, 32 Okl. 479, 122 P. 156 par. 5, of the syllabus, reads: 'It is error to give an instruction, presenting to the jury a theory of the case, when there is no evidence to support the theory.' "

In the case of *Tosto v. City of Seattle*, *supra*, held that it was prejudicial error to give an instruction on the last clear chance doctrine — "Where the facts do not justify it."

And the Supreme Court of Washington, in *Lubliner v. Ruge*, *supra*, reversed a judgment in favor of defendant, because one of the instructions stated that the defendant had a right to assume certain rights in crossing the intersection where the accident occurred. In holding that the instruction was incorrect, the court said:

"This instruction was incorrect from two standpoints: It relieved the driver of the car of the duty to anticipate that the red light might turn against him and to so regulate his speed as to be able to avoid entering the intersection against it, and it cast upon the appellant the duty to look for the approach of the car and to give it the right of way even though he had the green light in his favor when he entered the intersection."

And in the Montana case, *Garrison v. Trowbridge*, 177 P. 2d. 464, at page 467, the Court said:

"Furthermore, the court erred in giving instruction No. 15 reading: 'You are instructed that all traffic, including pedestrians, must, when they approach

an intersection of a city street in the City of Great Falls, and Scond Avenue North, the same being a through street, stop and look before entering such intersection for the purpose of crossing the avenue.' To the giving of that instruction plaintiff objected upon the ground 'that there was a complete lack of any evidence in the case upon which the giving of such an instruction can be predicated.' The objection to the instruction should have been sustained. There was no evidence showing that deceased did not stop before entering the intersection. It is not proper to give an instruction on an issue concerning which there is no evidence. (53 Am. Jur. 455.)

In the case of *Krupp v. Los Angeles Ry. Corporation*, the appellate court reversed a judgment in defendant's favor and, in so holding, the court said:

"The prejudice suffered by plaintiffs by the failure to give such an instruction was emphasized when the court in another instruction told the jury that plaintiffs could not recover if their injuries were a 'result of the mutual fault and negligence of the defendant and of the plaintiffs.' The fact that this instruction was given in a paragraph dealing with the measure of damages does not destroy its effect, for the jury is presumed to have heard and heeded all of the instructions given by the court. In their answer defendants pleaded contributory negligence but no evidence was presented at the trial which gave the slightest support to these allegations. The instructions concerning the 'mutual fault' of the defendants and

of the plaintiffs should not have been given. Chapman v. Pacific Elec. Ry. Co., 85 Cal. App. 69, 74, 258 P. 1006.

In Clarke v. Volpa Bros., supra, the appellate court of California, reversed a judgment in favor of the defendant, because the lower court had given an instruction to the jury that —

“The plaintiff could not assume, or act or reply upon the assumption that he would not be injured by defendants’ truck or by any other truck passing by the place he was, but he was required to keep such lookout for the trucks as under similar circumstances an ordinary prudent person would have kept for his own safety and protection.” (Italics supplied).

In holding that the giving of the foregoing instruction was reversible error, the appellate court said:

“There was a conflict in the evidence as to whether appellant was in a position of danger. Appellant also adduced testimony showing that the truck struck him after working hours were over and at a time when the advent of a truck was not to be expected. It was a question, therefore, for the jury to determine whether the truck had a right to be wherever plaintiff was at the time of the accident and whether their rights were ‘equal in every respect.’ ”

In the case of ^{man}Hyrum v. Market St. Ry. Co. et.al, supra, the California Court reversed the judgment of the lower court for the principal reason that the trial court

gave an instruction on the question as to whether or not the accident was unavoidable, when there was no evidence to support it. In passing on this question, the court said:

“The trial court instructed the jury that the verdict should be for defendants if the jury believed the collision resulted from unavoidable accident. There was no direct or indirect evidence that the collision was the result of an ^{un}avoidable accident. The instruction, under the facts, was clearly misleading to the jury, and the giving of it was error prejudicial to appellant. *Scandalis v. Jenny*, 132 Cal. App. 307, 22 P. 2d. 545.

The District Court of Appeal in California in the case of *Gregg v. McDonald*, 239 Pac. 373, held that the trial court gave an instruction not warranted by the evidence, and the court said:

“We agree with appellant that it was calculated to mislead the jurors and to affect their conclusion on the amount of damages to be awarded by them. We are satisfied, therefore, that the giving of it was prejudicial error necessitating a reversal of the judgment. The rule deducible from the authorities is this: ‘Such instructions only should be given as are based upon legitimate evidence in the case.’ ”

III

The plaintiff contends that the trial court committed reversible error, (Assignment of Error No. 5) in giving its instruction No. 18, (Tr. 27, 28.) This instruction of-

fends against the general rule with respect to the form and sufficiency of an instruction on contributory negligence. From 45 C. J. 1315, Section 925, ~~we quote 925~~, we quote the general rule as follows:

“An instruction on contributory negligence must not be misleading, nor confusing, nor inconsistent with other instructions given, nor invade the province of the jury, nor assume the existence of an unproved fact, nor single out and give undue prominence to issues, theories, or evidence.”

We earnestly submit that instruction No. 18 is manifestly against the foregoing rule because it is suggestive, misleading and confusing. For instance, using the word “that” at the beginning of each paragraph is suggestive that what is stated in each paragraph is true even though there is no evidence in the record to support it. In paragraph (a) the language there used could easily mislead the jury into believing that an employee of the defendant was waving his lantern toward the plaintiff and that the plaintiff should have seen the light from said lantern in time to have stopped before arriving at the track. Yet, the evidence clearly showed from the testimony of Mrs. Archibald, (Tr. 190) and defendant’s witness, Squires, (Tr. 322) that the employee did not turn his light in the direction from which plaintiff was approaching until after plaintiff had applied his brakes, and then it was too late to serve any useful purpose.

Paragraphs (d) and (e) both suggest that plaintiff was exceeding the speed limit. Yet the evidence in the

record shows that he was driving between 45 and 50 miles per hour, a legal rate of speed. Plaintiff testified that he checked the speed when he passed Officer Reese's car and the speedometer read between 45 and 50 miles per hour, (Tr. 227-228) and Officer Reese testified that plaintiff was driving normally. (Tr. 154.)

The same thing might be said of paragraphs (g) and (h). Paragraph (g) assumes that the train was plainly visible to the plaintiff and that he failed to stop within 10 feet of the track, and paragraph (h) assumes that because plaintiff did not expect the train to be on the track that for that reason he "failed to keep a proper lookout." The suggestions and assumptions included in every paragraph of instruction No. 18, are clearly against the undisputed evidence in the case, but by their peculiar phraseology the jury could become confused and misled into believing that plaintiff was guilty of violating one or all of said paragraphs.

This instruction informed the jury that in order to find the plaintiff guilty of contributory negligence they need only find that one of the particulars listed in said instruction was true. It is submitted that there is no evidence to support some of the particulars mentioned. For instance, the jury may have been so far confused and misled by the instruction that they decided that plaintiff was guilty of negligence under paragraph No. (g). There is no manner of determining under which paragraph, if any, the jury found plaintiff had violated. But suppose that the jury found that plaintiff was guilty of negligence under paragraph (g), then we submit that there is no evidence

in the record to prove that the train was plainly visible to the plaintiff in sufficient time for him to have avoided a collision by the exercise of ordinary and reasonable care.

IV

It is respectfully submitted that the court erred (Assignment No. 6) in its refusal to give plaintiff's requested instruction No. 1 (Tr. 40).

It is earnestly contended by the appellant that the statute, section 77-0-14, as amended, applies particularly to public crossings on the main line, but does not afford sufficient protection on a seldom used spur track which crosses a public highway in a rural or country area, and without the benefit of urban lights. This track was used for switching cars from the main line across the public highway to and from a storage beet pile in the fall of the year. The testimony showed that on the night in question it was very dark. (Tr. 155, 187).

In a factual situation of this kind the courts have uniformly held that the railroad company is bound to exercise special precautions to avoid injuries to persons lawfully using the highway. It was plaintiff's theory throughout the trial of this case, that since the engine, operating in reverse, was backing the cars toward the crossing at night and after dark, and that there was no automatic lighting equipment installed at the crossing to warn the public, that it was the duty of the defendant, in the exercise of ordinary care, to maintain a look-out or give a signal or warning at the crossing to travelers using the highway of

the presence or approach of the train of cars toward said highway, so that the travelers would be able to stop in time to avoid a collision with said train.

We therefore submit that under the facts and circumstance in this case as outlined above, it was the duty of the trial court to instruct the jury on the common law duty of the defendant, as set forth in plaintiff's requested instruction No. 1. And it is earnestly contended that the court committed reversal error in its failure and refusal to give such instruction. It will be seen that the court's refusal was unqualifiedly made. (Tr. 40). In this connection, it will also be observed that the trial court was of the definite opinion that the defendant's duty was determined by the provisions of the statute, and that the common law duty did not apply to the factual situation as presented by the evidence in the case at bar. To show that the trial court was of the opinion that the statutory duty only applied to this case, we quote herein the first sentence of Instruction No. 9, as follows:

"You are instructed that where a train crew is engaged in a switching movement, such as is involved in this case, the laws of Utah do not require the train crew to put out flares on a highway when crossing such highway at night, nor do they require cars in such train to be lighted or carry any lights upon them."

We submit that while the foregoing instruction was a correct statement of the rule as provided by the statute respecting the duty of the defendant, yet, it should have

been followed by plaintiff's requested instruction No. 1, which embodied the common law rule. By giving the foregoing instruction and then refusing to give plaintiff's requested instruction, it had the effect of instructing the jury that no lights on the cars, or lights on the highway were required. This effectually precluded plaintiff from presenting his theory of the case to the jury as framed by his pleadings and the evidence adduced at the trial.

The common law rule is well stated in 52 C. J. 213, Section 1811, with respect to backing cars toward or over a public crossing as follows:

"But the fact that the company is engaged in switching does not relieve it from exercising care in crossing a public street, and since such acts are especially dangerous, it is bound to exercise special precautions to avoid injuries to persons lawfully on or approaching the track, *particularly where the crossing is infrequently used for switching purposes.* (Klotz v. Winona, Railroad Company, (Minn.) 71 N. W. 257.) It is negligent if it backs its engines or trains or runs unattended cars *without proper look-outs, or without proper lights, or other signals or warnings, and without taking such other precautions for the safety of travelers as the circumstance reasonably require.* xxx, *Such light should be of a kind calculated to attract the attention of travelers at or near the crossing, indicating to them the approach of the train toward the crossing.*" (Italics Supplied.)

And the common law rule is well stated in a note in 15 A.L.R. 1527, as follows:

“Ordinarily it is the duty of a railroad company to have after dark a conspicuous light on a forward car pushed by a locomotive, on a moving car disconnected from the locomotive, or on the tender of a locomotive backing without cars, when the car or locomotive is passing over a street or highway crossing; and the failure of the company to have a light so placed when the car or locomotive is passing over the crossing is negligence sufficient to hold the company liable for a consequent injury to or death of a person struck at the crossing while exercising reasonable care for his own safety.”

It must be remembered that although defendant's brakeman was on the highway, the evidence clearly shows that he was flagging only against traffic approaching on said highway from the northerly direction. The witness, Mrs. Archibald, definitely testified that the man flagging her did not turn toward the south until after she heard the brakes screeching on plaintiff's car. She thought that was what caused the man (the brakeman) to turn toward the south side of the track. That was just seconds before the impact. (Tr. 190, 190½). The defendant's witness, Squires, testified that he did not see the flagman until after plaintiff had applied the brakes and then it was too late. And that he did not see any light of any kind before then. (Tr. 322, 323). The plaintiff testified that he did not see the flagman at all. (Tr. 233). Thus it definitely appears that for some reason the brakeman entirely forgot about traffic approaching on the highway from the south. He was giving his entire attention to the traffic approaching from the north, until he heard the brakes on

plaintiff's car begin to screech, then for the first time he turned his attention in the direction from which plaintiff was approaching.

It will therefore be definitely seen that so far as plaintiff was concerned there was no flagman on the crossing, and the plaintiff, Squires, and Mrs. Archibald all testified that they did not hear the train whistle nor did they hear the engine bell ringing. (Tr. 192, 233, 322, 323). Thus, the statutory duty to ring the bell and sound the whistle was unavailing as a warning to travelers using the highway at the time the accident occurred. This was no doubt caused by the fact that the engine was facing away from the highway and was too far away to be heard by motorists traveling in either direction on the highway.

It is therefore submitted that under the facts and circumstances prevailing at the crossing that the only means by which the defendant could convey notice to motorists approaching the crossing was by a light or flares.

As the flagman failed to turn or show his light toward cars approaching from the south on said highway; and since the defendant had no lights or flares posted upon the cars or upon the highway at said crossing, it will therefore be seen that said crossing was completely in the dark, so far as concerned motorists approaching said crossing from the south. Thus the defendant utterly failed to give any warning of any kind to motorists, including the plaintiff, traveling along said highway in a northerly direction.

The rule applying to this factual situation is pertinently stated in 45 C. J. 951, section 510;

“But in order to be proper for consideration in this connection the *warning must be sufficiently definite to inform him of the danger and must be given in time for him to escape it.*” (Italics supplied).

When the trial court refused to give the jury an instruction on the common law rule (plaintiff's requested instruction No. 1) but on the contrary instructed the jury that it was not the duty of defendant to put out flares on a highway*** nor require lights upon the (railroad) cars, (first sentence instruction No. 9, Tr. 24), the jury was misled into believing that the defendant's duty merely required ringing the bell and sounding the whistle. In this connection it should also be remembered that on the date of the accident it was cold enough that car windows would be closed, and motorists would not be able to hear the bell or the whistle, but they could not fail to see a light ahead on the highway. Under these conditions prevailing at the time of the accident, it was the duty of the trial court to instruct the jury with respect to the common law duty of the defendant, and the plaintiff and appellant therefore submits that it was prejudicial and reversible error to refuse to submit to the jury the full duty of the defendant with respect to protecting travelers as they approached said crossing.

This court in a very early case, *English v. Southern Pac. Ry. Co.*, 13 Utah 407, held that the common law duty of a railroad company to provide warnings in addition to the statutory requirements are necessary if the exigencies and circumstances of the case require it. In this respect, the court said:

“ ‘The duty may exist outside the statute to provide flagmen or gates or other adequate warning appliances, if the situation of the crossing reasonably requires that — and of this you are to judge — and it depends upon the general rule that the *company must use its privilege of crossing the streets on its surface grade with due and reasonable care for the rights of other persons using the highway, with proper care and caution on their part.*’ ” (Italics Supplied).

To support the foregoing doctrine this court in the English case quoted the following excerpt from *Railway Co. v. Goetz*, 79 Ky. 442:

“ ‘It is also held in many of the States (in fact, the rule is well-nigh, if not quite universal,) that a railroad company, under certain circumstances, will not be held free from negligence, even though it may have complied literally with the terms of a statute prescribing certain signals to be given, and other precautions to be take by it, for the safety of the traveling public at crossings.’ ”

The facts in that case are similiar to the case at bar, as the defendant was engaged in switching cars backwards over one of the city streets which traversed the railroad yards in Ogden City.

~~A Missouri case, 187 S.W. 830, was appealed to the Supreme Court of the United States and reported in 248 U.S. 422, 61 L. ed 826.~~ In an annotation in 15 A. L. R. 1528, several cases are annotated, including the case of *Chicago R. I. & P. R. Co., vs. Sharp*, 63 Fed. 532, and the Court laid down the following rule which we earnestly contend applies to the facts in the case at bar:

“Independently of a statute requiring railroad companies to ring a bell or sound a whistle at all public crossings, a railroad company, in backing a train of flat cars over a public crossing after dark, without a brakeman or light or other signal on them to warn the public of their coming, is guilty of negligence. *Chicago R. I. & P. R. Co. v. Sharp* (Fed.) *supra*.”

In the case of *John Pokora v. Wabash Railway Co.*, decided by the United States Supreme Court and reported in 91 A.L.R. 1049, the fourth headnote relates to the railroads duty at a public crossing and reflects the opinion of the court. The headnote reads as follows:

“The giving of the *statutory signals* does *not exhaust* the *duty* of a *railroad company* at a highway crossing when to its knowledge, *there is special danger to the traveler through obstructions on the road-bed narrowing the field of vision.*” (Italics Supplied).

The Federal Circuit Court of Appeals, 6th Circuit, *Illinois Cent. R. Co., v. Davis*, 32 Fed. (2d) 232, had under consideration the question whether the statutory or common law rule was applicable to an accident occurring at a railroad crossing outside the city limits. In holding that the common law rule applied, the court said:

“The purpose, as we have said, of this provision of the statute, in view of subsections 1 and 2 which were enacted at the same time, and which comprehensively dealt with crossings outside of cities, was to protect those within the city and not those outside

it. Even, therefore, if there was a failure to comply with this statute, there was on that account no violation of duty to the decedent. *The liability as to him was determinable under the law applicable to the crossing where the accident occurred — the common law.*” (Italics Supplied).

In the California case of *Peri v. Los Angeles Junction Ry.* 137 Pac. (2d) 441, at page 444, in respect to the necessity for the use of lights on a freight train, the court said:

“There were no lights on the train except the headlight of the engine, the beam of which was obscured from Guida’s view after the engine passed the crossing by the buildings on the south side of the tracks. The wigwag signal was not operating by sounding, lighting or moving, while Guida was approaching the crossing. *There were no flares exhibited, watchman present, or any device to warn of the presence of the train moving on the crossing other than above mentioned.*” (Italics Supplied).

In *Chesapeake & Ohio Ry. Co. v. Folkes*, 18 S. E. 2d. 309, the Supreme court of Virginia said:

“It is well settled that aside from statutory requirements, a railroad is under a common law duty to warn motorists of the approach of a train at a crossing. A railroad is likewise under a similar duty to warn motorists of the proximity of a backing train. (citing *southern Railway Co. v. Campbell*, 1 S. E.

255). The evidence adduced by plaintiff here to the effect that the backing train had no lights, gave no signal, and that the brakeman flagged the automobile after it had stopped on the tracks and after it was too late for Mr. Entwisle to get out of the path of the approaching box cars is sufficient to spell negligence on the part of the defendant.”

We submit that the foregoing factual situation is almost identical with the facts in the case at bar.

The following cases were cited in the note in 15 A. L. R. 1527, *supra*, and they follow the rule therein stated:

“In *Pittsburg, C.C. & St. L.R. Co. v. Terrell* (Ind.) 95 N. E. 1109, it was held to be negligence at common law for a railroad company to fail to give any signals by whistle or bell, *or by having a light on the forward car*, while its train was backing in the dark and over a crossing.” (Italics Supplied).

“In *Di Grazio v. Pennsylvania R. Co.* (1918) 261 Pa. 364, 104 Atl. 596, an action for the wrongful death of the plaintiff’s husband, it was held that there was a case for the jury; it appearing that he was struck at a street crossing in the nighttime by a car pushed by a locomotive moving at the rate of 15 miles per hour, and there was no light on the car, and no bell rung or other warning given of the approach of the train.”

CONCLUSION

For the reason that the trial Court committed error as hereinbefore set forth, plaintiff respectfully submits that the judgment of the trial court should be reversed and plaintiff should be awarded a new trial.

Respectfully submitted,

L. E. NELSON,
SAMUEL J. CARTER,
Attorneys for Plaintiff
and Appellant.