

latent, but the corporation is required to search for such defects, and to remove the snow from them, so that they will become patent again before the servant is called upon to notice them. I am unable to assent to this proposition. In my opinion, it is not the law. Nor can I bring myself to concur in the theory that because the court below, in another portion of the charge, stated the converse of this proposition,—stated the law correctly,—no prejudice could have resulted to the plaintiff in error from this erroneous declaration. The presumption is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error complained of neither did prejudice, nor could have prejudiced the party against whom it was made, that the rule that error without prejudice is no ground for reversal is justly applicable. *Deery v. Cray*, 5 Wall. 795, 808; *Gilmer v. Higley*, 110 U. S. 47, 50, 3 Sup. Ct. 471. The court below, in its charge, gave the jury a correct and an erroneous instruction upon the same subject. I am unable to discover from the record whether the jury were governed in their action by the former or the latter, and in my opinion, the judgment should be reversed, and a new trial ordered.

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NORTHERN PAC. R. CO. v. MORTENSON.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 419.

1. MASTER AND SERVANT—INJURIES TO RAILWAY BRAKEMAN — BRIDGES WITH OVERHEAD BEAMS—PROVINCE OF JURY.  
Where a brakeman, standing on the running board of a furniture car, which is higher than box cars, in the discharge of his duty, was struck by the overhead tie beams of a bridge which the train was crossing, *held*, that it was the province of the jury to say whether the company was negligent in maintaining a bridge having such low beams, without giving warning by telltales or otherwise.
2. SAME—CONTRIBUTORY NEGLIGENCE—PROVINCE OF JURY.  
The brakeman having crossed the bridge several times standing on top of box cars, *held*, further, that it was a question for the jury whether he was guilty of contributory negligence in not ascertaining, by measurement or accurate observation, that he could not safely pass while standing on the running board of a furniture car.
3. TRIAL—WITNESS FIXING DATE BY MEMORANDUM — RIGHT OF INSPECTION — ERROR WITHOUT PREJUDICE.  
Plaintiff, in testifying as to the length of time he was in defendant's employ, fixed the date of entering the service by a memorandum, but the court refused to permit defendant to inspect the memorandum. *Held*, that this was error, but, the length of his service being fully established by other evidence, the error was without prejudice.

In Error to the Circuit Court of the United States for the District of Minnesota.

This was an action by Andrew Mortenson against the Northern Pacific Railroad Company to recover damages for personal injuries. Verdict and judgment were given for plaintiff, and defendant sued out this writ of error.

C. D. O'Brien (J. H. Mitchell, Jr., Tilden R. Selmes, and T. D. O'Brien, on the brief), for plaintiff in error.

C. A. Severance (W. S. McClenahan, W. A. Fleming, C. K. Davis, and F. B. Kellogg, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges.

CALDWELL, Circuit Judge. The defendant in error was in the employ of the plaintiff in error as head brakeman on a freight train running between Brainerd, Minn., and Fargo, N. D. In making this trip the train crossed a bridge having overhead tie beams. This bridge was within the limits of the company's yards at Fargo. The duties of the defendant in error required him to be upon the top of his train while passing through the Fargo yards and over this bridge. His usual position was on top of the second or third car from the engine, and he had to stand on the running board of the car in a position that would enable him to receive the signals of the conductor and rear brakeman, and transmit them to the engineer. On the 22d of March, 1890, while standing on the running board of a furniture car in the proper position to receive and transmit the signals, and in the attitude of doing so, as the train passed over the bridge, he was struck on the head by one of the overhead timbers of the bridge, and received the injuries for which this suit was brought. Furniture and refrigerator cars, which are in common use on the defendant's road, are about 2½ feet higher than ordinary box cars. The defendant in error had crossed the bridge in safety a dozen times or more while standing on the top of the box cars.

The principal questions discussed by counsel are: (1) Was it negligence for the company to maintain a bridge having overhead tie beams too low to admit of the safe passage of a brakeman standing on the running board of a furniture car, in the discharge of his appropriate duties, when no warning of the dangerous character of the bridge was given by telltales or otherwise? (2) Was the brakeman guilty of contributory negligence in not ascertaining, by measurement or accurate observation, that he could not pass safely under the overhead beams of the bridge while standing on the running board of a furniture car? Under the evidence in this case, these were not questions of law, but questions of fact for the jury. Under proper instructions, the jury found both of these issues against the plaintiff in error, and we cannot disturb the finding. On the evidence, the case was plainly one for the jury. *Railway Co. v. Ellis*, 10 U. S. App. 640, 4 C. C. A. 454, and 54 Fed. 481; *Railroad Co. v. Foley*, 10 U. S. App. 537, 3 C. C. A. 589, and 53 Fed. 459; *Railroad Co. v. Carpenter*, 12 U. S. App. 392, 5 C. C. A. 551, and 56 Fed. 451; *Dorsey v. Construction Co.*, 42 Wis. 583.

It is claimed that the defendant in error had notice in fact that the tie beams across the top of the bridge were too low to admit the safe passage of a brakeman standing on the top of a furniture car; but the defendant in error denies this, and the jury found this issue in his favor.

The defendant in error was examined touching the length of time he had been in the service of the company, and, for the purpose of fixing the date he entered the service, he referred to a written memorandum in his possession. After testifying from this memorandum, the court refused to permit the plaintiff in error to inspect the same. This was error, but it was error without prejudice. The length of time the defendant in error had been in the service, if material, was fully established by all the evidence to be that stated by him.

The judgment of the circuit court is affirmed.

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CHICAGO, R. I. & P. RY. CO. v. SHARP.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 414.

1. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

In an action for personal injuries, the appellate court will not weigh conflicting evidence, pass upon the veracity of witnesses, and determine the case according to what it thinks to be the weight of the evidence appearing in the record, but will resolve all conflict in the evidence in favor of the party for whom the verdict was rendered.

2. RAILROAD COMPANIES—ACCIDENT AT CROSSING—NEGLIGENCE.

A railroad company is bound, independently of statute, to take reasonable and proper means of notifying the public of the approach of its trains to a public crossing after night; and it is a breach of this duty to back a train of flat cars over a crossing in the suburbs of a city, without having on it any brakeman, or any light or other signal of its approach.

3. SAME—DUTY OF TRAVELER—CONTRIBUTORY NEGLIGENCE.

One who, on approaching the crossing, looks and listens, but hears nothing except a locomotive, which is so far off that he can easily pass before it, is not negligent in failing to surmise that the company would attempt to back a train of flat cars, which makes little noise, over the crossing, on a dark night, without any lights or signal to warn the public.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Stephen S. Brown (J. E. Dolman, on the brief), for plaintiff in error.  
William Henry and W. H. Haynes, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. This is an action brought by James M. Sharp, the defendant in error, against the Chicago, Rock Island & Pacific Railway Company, the plaintiff in error, to recover damages for a personal injury received at a railroad crossing. The plaintiff recovered judgment below, and the defendant sued out this writ of error.

In this, as in most cases of this character, the first assignment of error is that the court erred in not directing a verdict for the defendant upon the whole evidence; and in this case, as has frequently occurred in other cases of like character, we are pressed

to weigh conflicting evidence, pass upon the veracity of the witnesses, and determine the case according to what we think is the weight of evidence appearing in the record. To do these things would be a flagrant invasion of the functions of the jury, and a denial to the plaintiff of his constitutional right to have the facts of his case tried by a jury. *Railroad Co. v. Teeter* (decided by this court at the present term) 63 Fed. 527; *Railroad Co. v. Mortenson* (decided by this court at the present term) Id. 530; *Railroad Co. v. Ellis*, 10 U. S. App. 640, 4 C. C. A. 454, and 54 Fed. 481; *Railroad Co. v. Kelley*, 10 U. S. App. 537, 3 C. C. A. 589, and 53 Fed. 459.

The following is a summary of the material facts which the plaintiff's testimony tended to establish: The defendant's road crosses on the level the public highway leading south from the city of Maysville, Mo., at its station near the city where there are three tracks, known as the "main track," the "passing track," and the "stock track," and two switches. At the point of crossing, the railroad runs east and west, and the highway north and south, and the station stands on the north side of the railroad track and west line of the highway. At 9 o'clock at night, on the 10th of November, 1892, the plaintiff, riding in a cart (which, on the smooth dirt road, made no noise) drawn by one horse, going south, approached this crossing. The night was very dark. When within 20 or 30 feet of the crossing, he looked and listened. Looking west, he saw a switch light 500 or 600 feet west of the crossing; and, looking east, he saw a switch light 364 feet east of the crossing, and a little way beyond this he saw the smoke of a locomotive, but could not tell certainly whether it was moving or not, or, if moving, in what direction, though he thought it might be moving towards the crossing. He heard no sound but the puffing of the locomotive. The bell was not ringing and the whistle was not blowing. There was no flagman at the station, and no light there or elsewhere between the two switch lights, and nothing could be seen on the track between the locomotive and the crossing, and, satisfied that he could cross the track in safety before the locomotive could reach the crossing, even if it was coming towards him, he started to do so. His horse crossed the track in safety, but the hind end of his cart was struck by a moving flat car, and he received the injuries complained of. It turned out that the locomotive was pushing three or more flat cars towards the crossing, which, owing to the darkness, the plaintiff could not see, and which he did not hear, and which had no light or flagman or other agency on them to give warning of their approach.

There was conflict in the testimony as to some of these facts, but, when an appellate court is asked to set aside the verdict of a jury in a common-law action upon the facts, all conflict in the evidence must be resolved in favor of the party in whose favor the verdict was rendered. In other words, if, by giving credit to the plaintiff's evidence, and discrediting that of the defendant, the plaintiff's case is made out, the verdict must stand. *Railroad Co. v. Conger*, 5 C. C. A. 411, 56 Fed. 20; *Railroad Co. v. Teeter*, 63 Fed. 527; *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281. The Missouri

statute (Rev. St. 1889, § 2608) requires the bell to be rung or the whistle to be sounded at all public crossings, and a failure to comply with the statute is negligence per se. *Crumpley v. Railroad Co.*, 98 Mo. 34, 11 S. W. 244. But the negligence of the company does not rest alone on the statute. Independently of the statute, in moving its cars and engines over the public crossing after dark, the company was bound to take reasonable and proper means to notify the public of the approach of its cars. In this case no precautions whatever were taken.

But, although the company may have been guilty of negligence, the plaintiff cannot recover unless that negligence was the proximate cause of the injury, and the plaintiff himself was free from negligence. The obligations, rights, and duties of railroad companies and travelers at highway crossings are mutual and reciprocal. No greater degree of care is required of the one than of the other. *Improvement Co. v. Stead*, 95 U. S. 161, 165. As was well said by Judge Thayer in delivering the opinion of the court in the case of *Railway Co. v. McClurg*, 8 C. C. A. 322, 59 Fed. 860: "A person may reasonably be expected and required to take as great precaution to avoid getting hurt as others are required to take to avoid injuring him." These rules were clearly and fully stated to the jury in the charge of the learned court that tried the cause. The jury were repeatedly told that, in approaching the track, it was the plaintiff's duty to use his senses, and to look and listen for approaching trains, and, if necessary, to stop for that purpose, and that, in approaching and crossing the track, he was required to exercise that degree of care that a prudent and careful man would exercise under like circumstances. Was there evidence from which the jury might infer the plaintiff did observe these requirements? He looked and listened as he approached the crossing, and saw and heard nothing but the locomotive. He estimated, and estimated correctly, that he could cross the track many feet ahead of that. The flat cars being pushed ahead of the locomotive he did not hear, and could not see on account of the darkness. We are unwilling to lay it down as a rule of law that the plaintiff was negligent in not anticipating the particular act of negligence of the defendant which occasioned the accident. *Hutchinson v. Railway Co.*, 32 Minn. 398, 21 N. W. 212; *Weller v. Railway Co.* (Mo. Sup.) 23 S. W. 1061, affirmed on rehearing 25 S. W. 532. The jury, by their verdict, have said that the plaintiff was not required to conjecture or surmise that the company would attempt to back a train of flat cars, which made little or no noise, over a public crossing, in the suburbs of a city, on a dark night, without a brakeman or light or other signal on them to warn the public of their coming; and we concur in that conclusion. Where the negligence of the railroad company, which is the proximate cause of the injury, is clearly established, in order to defeat a recovery, as a matter of law, on the ground of contributory negligence, the defense must be clearly made out. *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281. If inferences other than that of contributory negligence may be fairly drawn from all the evidence, and facts shown to exist, then the question is one

of fact for the jury, whose verdict must stand. *Bluedorn v. Railway Co.* (Mo. Sup.) 18 S. W. 1103; *Weller v. Railway Co.* (Mo. Sup.) 23 S. W. 1061. The charge of the court stated the law correctly applicable to the facts of the case. It was as favorable to the defendant as it had any right to ask. The judgment of the circuit court is affirmed.

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LICHTY et ux. v. LEWIS et ux.

(Circuit Court, D. Washington, N. D. August 31, 1894.)

JUDGMENT—RES JUDICATA—COMMUNITY PROPERTY.

A judgment in an action against a husband only, to determine adverse claims to land, is a bar to a subsequent action by such husband and his wife against the plaintiff in the former action, involving the same questions adjudicated in the first action, though the land is community property.

This was an action of ejectment by Harvey M. Lichty and wife against Joseph R. Lewis and wife. Heard on demurrer to answer. Demurrer overruled.

Parsons, Rudkin & Saylor, for plaintiffs.

Whitson & Parker, Harold Preston, and J. R. Lewis, for defendants.

HANFORD, District Judge (orally). This is an action of ejectment by Harvey M. Lichty and wife against the defendants, J. R. Lewis and wife, to determine adverse claims to real estate situated in Yakima county, in this state. Plaintiffs claim a community property interest, which the defendants dispute. On that ground they seek a judgment establishing against the defendants the validity of their title and rights as cotenants. The answer contains a plea setting forth that in a suit between Joseph R. Lewis and Harvey M. Lichty all the questions involved in this case were adjudicated by the superior court for Yakima county, and that decision has been affirmed by the supreme court of this state. *Lewis v. Lichty*, 3 Wash. 213, 28 Pac. 356. Plaintiffs demurred to said plea on the ground that a judgment between Harvey M. Lichty and Joseph R. Lewis is not binding as an estoppel against the same Harvey M. Lichty and his wife. The plaintiffs' position is that, the parties being different, and this being community property, no court would have jurisdiction to determine the questions involved without the presence as parties of the wives as well as the husbands interested. It is my opinion that, the state court having considered and passed upon the question as to whether Harvey M. Lichty had any title to the property, and having adjudged that his grantors had been divested of their title, so that their quitclaim deeds to him, constituting the basis of his claims, are for that reason invalid, its decision is determinative of the whole matter. I do not think that the same question can be again litigated without establishing a principle which would be pernicious. To allow a married man to come into a court of competent jurisdiction and submit a contro-