reversed, and the cause remanded for a new trial.

Reversed.

STEELE, C. J., and GABBERT, J., concur.

HARTFORD FIRE INS. CO. v. HAMMOND.

LIVERPOOL & LONDON & GLOBE INS. CO. v. SAME.

(Supreme Court of Colorado. Nov. 4, 1907.)

1. CONTINUANCE — ABSENT WITNESSES — ADMISSION OF FACTS.

Under the express provisions of Code Civ. Proc. § 177, defendant's application for a continuance for absence of a witness was properly denied where plaintiff admitted that, if the witness was present, he would testify as stated in the affidavit for a continuance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, § 115.]

2. SAME—ABSENCE OF ATTORNEY.

Where defendants were represented by able counsel, and it was not shown that he did not fully present the matters on which defendants relied or that defendants were in any way prejudiced because they were not represented by other counsel, the denial of a continuance because defendant's main attorney was too ill to attend the trial was not an abuse of the trial court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, §§ 51–57.]

3. NEW TRIAL—GROUNDS—ABSENCE OF WITNESS—DILIGENCE OF PARTY.

Where a continuance for the absence of a witness was denied because plaintiff admitted that, if the witness was present, he would testify as stated in the affidavit for a continuance, defendant was not entitled to a new trial because the witness, if present, would have testified to matters in addition to those recited in the application for a continuance.

4. APPEAL—VERDICT—CONFLICTING EVIDENCE—REVIEW.

A verdict supported by competent testimony on an issue on which the evidence was conflicting, fairly submitted, will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

5. INSURANCE—PROOF OF LOSS—WAIVER.

Where defendant insurance companies refused to pay a loss, not because of the absence of a statement or proof of loss, but because they contended insured overestimated the amount, insured's failure to file proofs of loss as required by the policies was waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1367–1373.]

Appeal from District Court, Otero County; John H. Voorhees, Judge.

Actions by George Hammond against the Hartford Fire Insurance Company and against the Liverpool & London & Globe Insurance Company. From a judgment in favor of plaintiff in each case, defendants appeal. Affirmed.

Sylvester G. Williams, for appellants. O. G. Hess, for appellee.

BAILEY, J. The same questions are presented in each of these cases, and we will therefore dispose of them in one opinion. The first contention is that the court should have granted a continuance of the trial, asked for by defendants, appellants here. It appears that Charles F. Hawkins was a material witness on behalf of the defendants, and that he was ill and unable to attend the trial. Because of his absence defendants requested a postponement, and filed an affidavit wherein were stated the facts which Hawkins had been expected to testify to. Plaintiff objected to a continuance, and admitted that, if the witness Hawkins were present, he would testify as stated in the affidavit. When this was done, the application for a continuance upon that ground was properly overruled. Code of Civil Proc. § 177; Baldwin Coal Co. v. Davis, 15 Colo. App. 371, 62 Pac. 1041; Florence Oil Co. v. Oil Well Supply Co. (Colo.) 87 Pac. 1077. It also appeared by the application for the continuance that Sylvester G. Williams, attorney for defendants, was ill and unable to attend the trial. The defendants appear to have been represented by able counsel, and there, is no showing that the counsel who tried the cases did not fully present the matters, upon which defendants rely, to the court and the jury, or that the defendants were in any way prejudiced because of not being represented by other counsel at the trial. In the case of Reynolds v. Campling, 23 Colo. 105, 46 Pac. 639, it appears that the appellant at the time of the trial asked for a continuance because of the absence of Mr. Hughes. This court said: "Perhaps Mr. Hughes was more familiar with the controversy than Mr. Dines, and for this reason could have been of more assistance to the defendant, but this would not entitle defendant to a continuance as a matter of law. A large discretion is vested in the trial courts with reference to such matters, and this discretion should be exercised according to the circumstances of each case." Other authorities to the same effect are Byers v. McPhee, 4 Colo. 204; Roberts v. People, 9 Colo. 458, 13 Pac. 630. We cannot see that the defendants were prejudiced by the action of the court, or that there was any abuse of the discretion vested in the court in such cases. Defendants requested a new trial. This application was based upon several grounds, only two of which are argued in the brief, namely, that defendants were prejudiced because of the unavoidable absence of Mr. Williams the counsel, and it is contended that, however able the counsel might have been who represented defendants at the trial, he was not as well informed as to the particulars of the case as Mr. Williams. As has been seen in the case of Reynolds v. Campling, supra, this does not afford defendants the right to a continuance as a matter of law, and, of course, after the application for a continuance had been refused, it would not afford ground for a new trial. The defendants claim, also, in this application that, if the witness Hawkins had been there, he would have testified to some matters in addition to those set forth in the application for a continuance. This does not afford ground for a new trial, because the defendants should have set forth fully in their affidavit all that they expected to prove by the absent witness.

The insurance policies upon which these actions were brought contained a clause to the effect that, in the event of a disagreement as to the amount of loss, the same should be ascertained by two competent and disinterested appraisers, the insured and the company each to select one and those two to select a competent umpire, and, in the event of the disagreement of the two, the differences to be submitted to the umpire. This was not done. There is evidence tending to show that the defendants appointed an appraiser residing at Pueblo, and that the plaintiff appointed an appraiser residing at Rocky Ford, the city in which the loss by fire was sustained. For some reason which is not apparent, these two appraisers failed to meet, the defendant companies contending that they received no notice of the appointment of the plaintiff's appraiser, and plaintiff contending that he had notified them. After several weeks, the plaintiff repaired the damage to the property in order to avoid the vacating the the premises by his tenant, and then brought this action. Defendants contended that the plaintiff should not have been permitted to recover in this action, because the matter should have been submitted to the appraisers to determine the amount of the loss before the action was brought. The court's instructions to the jury were to the effect that, if the failure to have the damages appraised was the fault of the plaintiff, they should find for the defendants, and, if the fault was with the defendants, they should find for the plaintiff. These instructions were proper, the jury found for the plaintiff, and this finding is supported by competent testimony. The question having been fairly submitted to the jury, we will not disturb their findings.

The policies also contained a provision that, in case of loss by fire, the insured should within 60 days thereafter render a statement to the company, signed and sworn to by the insured, and containing a statement called the proof of loss. This was not furnished, and it is contended that they should not be held to pay the loss because of the absence of such statement. At the time of the fire the plaintiff immediately notified the local agents of the companies, and they by wire notified the companies themselves at their home offices. Shortly after that, efforts were made upon the part of the plaintiff and representatives of the defendants to determine the amount of the loss, adjust the same, and arrive at a settlement. This they were unable to do. The defendants then appointed their appraiser,, and the plaintiff appointed his as hereinbefore stated. It was held in Hartford Ins. Co. v. Smith, 3 Colo. 425: "There must be a substantial compliance with the terms of the policy in furnishing the preliminary proofs before the assured is entitled to any indemnity in the case of loss, unless the company waived the defects in the proofs or waived the proofs altogether by putting a refusal to pay on other grounds." The refusal to pay in this case was not because of the absence of this statement or proof of loss, but because it was contended that the insured overestimated the amount of his loss, and, having based the refusal upon grounds other than the absence of the preliminary proof, it is well settled that that objection was waived. Atlantic Ins. Co. v. Manning, 3 Colo. 224; Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040; Helvetia Ins. Co. v. Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242, and other authorities cited in cases herein referred to.

We are unable to find any error in the proceedings in these cases, and therefore are of the opinion that each of the judgments should be affirmed.

Affirmed.

STEELE, C. J., and GODDARD, J., concur.

WESTERKAMP v. CHICAGO, B. & Q. RY. CO.

(Supreme Court of Colorado. Nov. 4, 1907.)

1. Railroads—Crossing Accident—Contributory Negligence.

Plaintiff, with knowledge that a train was about due, approached a railroad crossing, in an inclosed milk wagon before daylight. He testified that, when 190 feet from the track, he commenced looking toward the east and when within 50 or 60 feet he stopped, looked, and listened, but neither heard nor saw a train, though he noticed the switch and other lights between one-quarter and one-half mile east of the crossing, that he continued to look and listen, but saw no train until just as his horses started to cross the track, when the headlight of the locomotive approaching from the east flashed on him, and he was struck. The railroad was on a fill, and the crossing was but a short distance west of a bridge over a river. From a point 25 feet before reaching the track, plaintiff's view was unobstructed for an indefinite distance toward the east, and a witness who was in advance of plaintiff between 100 and 200 feet noticed the train approaching as he crossed the track when it was then between a quarter and a half mile away. *Held* that, as plaintiff must have seen the train if he had looked as he testified, he was negligent as a matter of law, and could not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1026, 1080–1083.]

2. Same—Ordinances—Reliance.

Where, in an action for injuries to plaintiff at a railroad crossing, plaintiff testified that he did not see the train which collided with his wagon, he cannot be heard to claim that in passing over the crossing ahead of the train he relied on a city ordinance prohibiting the operation of trains within the city where the accident occurred at more than six miles per hour.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1074.]