v. FRENCH.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* FRENCH.

Opinion delivered May 12, 1930.

1. RAILROADS—NEGLIGENCE—JURY QUESTION.—Whether a railroad company was negligent in approaching a crossing without proper lookout and without giving the statutory signals, thereby causing plaintiff's automobile to be struck, *held* for the jury.
2. RAILROADS—COMPARATIVE NEGLIGENCE.—Whether the negligence of a motorist struck at a crossing was of a less degree than that of the railroad company, under Crawford & Moses' Dig., § 8575, *held* for the jury.

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

STATEMENT BY THE COURT.

Appellee brought this suit for damages for personal injuries and destruction of his automobile sustained at a public crossing near Hartford by being run over by a passenger train of appellant. The negligence alleged was a failure to give the statutory signals at a public crossing, and a failure to keep a lookout. Appellant denied any negligence on its part, and alleged contributory negligence of appellee as a defense. The injury occurred at a public crossing of the appellant railway about a mile from the town of Hartford. Appellee had left his home that morning in a Ford car going back to Seminole, Okla., where he was working in the oil fields, was driving on a public highway along the south side of the railroad track which turned north and crossed the railroad where the injury occurred. The view of the track was straight, and the train, going west in the same direction appellant was driving, could have been seen for one-half mile from the crossing. Appellee testified that, as he turned on the road going north to cross the track about 50 feet distant, he looked through the window of his car down the railroad track east, the direction from which the train was coming, and saw no train. That he drove up the incline slowly in low gear and heard no signals given by the train, although he

knew a train was due to pass there that morning. He was also watching the crossing which was narrow, only about wide enough for two vehicles to pass. While approaching the crossing, he could see down the track to the west that it was clear, and when in about 15 to 20 feet of the crossing he leaned out of the window and looked back towards the east, the direction from which the train came, and, not seeing it or hearing any signals, drove onto the crossing. His car had just got on the track when he heard the warning whistle given, and tried to stop his car and back off but was struck by the train, and he was injured, and his car was demolished. When he leaned out of the car to look east, his view was obstructed by a stop sign on the railroad right-of-way preventing his seeing the coming train. The sign only obstructed his view for about 6 feet, and, had he looked before driving this six feet or afterwards before he got on the track, he could have seen the approaching train.

The fireman testified that the usual crossing signals were given; that, as soon as he saw the car coming up on the crossing, although it was moving slowly and he didn't think the driver intended to cross, he immediately called to the engineer and the warning whistles were given, that it was too late to stop the train before the collision, and it ran almost 1,000 feet after it struck appellee, which was a good stop.

Other testimony on the part of appellee tended to show that the statutory signals were not given as the train approached the crossing, and the testimony on the part of the railroad company tended to show that they were given. There was also other testimony tending to show that appellee had time to stop his car and prevent the accident, had he been in the exercise of ordinary care for his own safety in listening for the signals and looking for the train after passing the obstruction to his view down the track east by the sign board.

The court instructed the jury, and from the judgment for damages against it the appeal is prosecuted by the railroad company.

Thos. S. Buzbee and *George B. Pugh,* for appellant.

W. L. Kincannon and *Evans & Evans,* for appellee.

KIRBY, J. (After stating the facts). Appellant insists that the court erred in not directing a verdict in its favor, contending that there was no negligence shown on its part approximately contributing to the injury, or, if so, that the contributory negligence of appellee was greater in degree than its negligence, preventing a recovery in the case. The testimony was in conflict as to whether the signals were given, and the proper lookout kept by the trainmen in approaching the crossing, and, there being substantial testimony that such was not the case, the question of appellant's negligence was one for the jury. Neither do we agree with appellant's contention that the undisputed testimony shows that appellee's contributory negligence was greater in degree than the negligence of appellant, and should have been declared so by the court, and a verdict directed against him. The facts of the case bring it within the provisions of the statute, § 8575, C. & M. Digest, commonly known as the comparative negligence statute, there being substantial evidence in the record tending to show negligence on the part of appellant and its employees, as well as contributory negligence on the part of appellee. Under that statute an injured party guilty of contributory negligence cannot recover damages for an injury, unless his negligence is of a less degree than the negligence of the railroad company. The facts in this case present this issue of whether the negligence of the injured person was of a less degree than that of the railroad company, and, since it cannot be said that the undisputed testimony shows such to have been the case, it was a question properly determinable by the jury. *Jemell* v. *St. L. Sw. Railway Co.,* 178 Ark. 578, 11 S. W. (2d) 449; *Chicago, R. I. & P. Ry. Co.* v. *McKamy,* 180 Ark. 1095, 25 S. W. (2d) 5.