ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* STEELE.

Opinion delivered February 22, 1932.

1. RAILROADS—PERSONAL INJURIES—EVIDENCE.—Evidence *held* sufficient to sustain a verdict for plaintiff in an action for injuries to one struck at a crossing.
2. AUTOMOBILE—NEGLIGENCE OF DRIVER—GUEST.—Negligence of the driver of an automobile, from which a guest jumped at a railroad crossing, fearing a collision with a train, cannot be imputed to the guest.
3. RAILROADS—DUTY OF GUEST TO USE CARE.—One fearing that the automobile in which he was riding as guest of the driver would be struck by the train was bound to exercise ordinary care for his own safety.
4. RAILROADS—INJURY AT CROSSING—PEREMPTORY INSTRUCTION.—An instruction that plaintiff's negligence, being hurt in jumping from an automobile in front of an approaching train, was the sole cause of his injury, barring recovery therefor, where the automobile passed over the track safely, *held* properly refused as virtually peremptory.
5. RAILROADS—CONTRIBUTORY NEGLIGENCE—ACT IN EMERGENCY.—A guest in an automobile was not guilty of contributory negligence as matter of law in jumping from the car in front of an approaching train where the jury might have found that a person of ordinary prudence might have so acted in the emergency.

6. TRIAL—CONFLICT IN INSTRUCTIONS.—An instruction upon the theory that one riding in another's automobile was engaged in a joint enterprise *held* not conflicting with another instruction upon the theory that he was merely a guest, leaving to the jury to determine which theory was applicable.
7. NEW TRIAL—IMPEACHMENT OF QUOTIENT VERDICT.—Testimony of jurors is not competent to impeach a verdict by proof that it was a quotient verdict; the only ground for impeachment by them being that it was made by lot.

Appeal from Crittenden Circuit Court; *G. E. Keck,* Judge; affirmed.

STATEMENT BY THE COURT.

This appeal is prosecuted from a judgment for damages for personal injuries to appellee, who was struck by appellant's train at a public crossing on its tracks.

Appellee was riding in an old Ford car with a negro at his own invitation, having asked to ride with the negro whom he knew, on the way to Turrel, and, when they reached the crossing of the railroad tracks leading to St. Louis, the car almost stopped running just at the crossing, and appellee, fearing it would be struck by the oncoming fast train, jumped out of the car, fell on the track and was struck by the passenger train known as the "Sunny Land," northbound to St. Louis.

It was alleged that the injury resulted from the negligence and carelessness of the employees of appellant in failing to keep a lookout and to give the signals required for railroad crossings, and in failing to stop the train when they discovered or could have discovered the dangerous situation of appellee before striking him.

The answer denied the allegations of the complaint, and alleged that, if plaintiff was injured, it was through his own fault in jumping out of the automobile on to the track so close to the train that it was impossible to stop and avoid the injury, and that, if plaintiff had remained in the car driven by its owner, he would not have been injured.

The testimony is in conflict as to whether the bell was rung and the whistle blown as required by law in approaching the crossing, and also as to the location of

the train on the other tracks that might have interfered with the appellee and the driver of the car seeing the train before it reached the crossing. Two witnesses, however, one who was looking at the train from the time it passed the depot where it was not scheduled to stop, testified that the signals were not given; and the appellee also stated that he could and would have heard the signals, had they been given, and that he did not hear any. Appellee stated also that upon approaching the track the car was moving very slowly, and that the train was so close that he thought it must inevitably strike the car, and that he jumped out and fell to the track and was struck by the train and injured. The car crossed the tracks in safety. Appellee's leg was broken, he suffered great pain from the injury, and was in the hospital several weeks on account of it, his leg having to be stretched by weights after it had been put into a plaster cast, and he spent about $250 for medical attention and doctor's bills.

The court instructed the jury, refusing to give appellant's requested instruction No. 2, giving over its objection certain other instructions. The jury returned a verdict for appellee, which is challenged by appellant as having been arrived at by lot, as shown by the affidavits of three jurors, and this appeal is prosecuted from the judgment thereon.

E. T. Miller, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

W. B. Scott and *A. B. Shafer,* for appellee.

KIRBY, J., (after stating the facts). Appellant contends that the verdict is not supported by the testimony, that the court erred in the giving and refusing of certain instructions, and especially in not setting the verdict aside as having been arrived at by lot.

The testimony is in conflict on certain points, but from it the jury could have found that appellee was the guest riding in the car with the negro, and also that the appellant was negligent in not keeping a proper lookout and giving the signals as required by law at the cross-

ing, notwithstanding the weight of the evidence supported its contention that the usual signals were given. There is no dispute as to the injury or damage, and the testimony is sufficient to support the verdict.

It is next contended that the court erred in not giving appellant's only requested instruction, which reads as follows:

"You are instructed that, if you find from the testimony in this case that the automobile, on the front seat of which the plaintiff was riding, passed over the track of the defendant ahead of the approaching train in safety, but that the plaintiff, John Steele, jumped out of the automobile on the track of the defendant in front of an approaching train and so near to it that the train could not have been stopped in time to avoid injuring him, the negligence of said Steele in so jumping out of said automobile in front of the moving train was such that it was the sole cause of his injury, and he cannot recover in this action, and your verdict will be for the defendant."

The testimony showed that appellee was riding in the car with the negro as a guest by his own invitation, it is true, but any negligence of the owner or driver of the car cannot be imputed to him, although he was bound to the exercise of ordinary care for his own safety under the circumstances, and a failure to exercise such care contributing to his injury would have constituted contributory negligence barring a recovery. *Graves* v. *Jewell Tea Co.*, 180 Ark. 981, 23 S. W. (2d) 972. The requested instruction was virtually a peremptory one, and the court did not err in refusing to give it.

Appellee was required to exercise ordinary care for his own safety under the circumstances, and, if it appeared to him, as it evidently did, that the car was going to be struck by the train, he had the right, of course, to make the effort to get out of the car and avoid the danger, and was not necessarily negligent in attempting to do so, and certainly not guilty of contributory negligence as a matter of law that would bar his recovery, or of negli-

gence at all, if the jury found, as they might have done, that a person of ordinary care and prudence might have made such an attempt in the emergency. No error was therefore committed in the giving of instruction No. 7.

No error was committed in instructing the jury as to comparative negligence, the instruction given being a correct declaration of the law. Section 8575, Crawford & Moses' Digest.

Instruction No. 10 is a correct declaration of the law that the negligence of the driver of the car in which appellee was riding as a guest, if the jury found him to be such, could not be imputed to appellee, nor was error committed in the giving of instruction No. 12, which is not in conflict with instruction No. 10, as contended by appellant. No. 10 was given on the theory that appellee was the guest of the driver of the car, as the jury could have found, while No. 12 was on the theory that he was engaged in a joint enterprise, leaving the jury to determine the question, and was as much bound to the exercise of ordinary care for his own safety as was the driver of the car to the use of such care.

The jury was directed not to take any one of the instructions as the law of the case, but to consider them all as such, etc.

Neither is there merit in the assignment that the verdict was arrived at by lot. Three of the jurors, who did not sign the verdict, which was made by nine of the jurors returning it, testified that each of them was unwilling to return a verdict for appellee, that the nine jurors who agreed to the verdict were in favor of returning a verdict for appellee in different amounts, and that said jurors set down the different amounts each was willing to allow the plaintiff and divided it by nine, and the result was the amount of the verdict returned into court by the nine jurors signing it, $1,737.50. A. C. Oliver, the foreman of the jury, testified that he had no recollection that each of the nine jurors favoring the verdict wrote down the amount he thought should be returned, the total of which amounts was divided by the number

of jurors returning the amount so reached as the verdict; said he did not hear the matter mentioned, but, if any such suggestion was made, it was not carried out. It was suggested but was not taken into consideration. He stated that, in the consideration of the matter, some of the jurors increased their estimate while others lowered theirs, and the verdict was finally reached. In any event, their testimony tends to show it was a quotient verdict, and it could not be impeached by the testimony of any of the jurors, whether they agreed to it or not, as having been reached by lot. *Speer* v. *State,* 130 Ark. 457, 198 S. W. 113; *Steed* v. *Wright,* 179 Ark. 812, 18 S. W. (2d) 340; *Chess & Wymond Co.* v. *Wallis,* 134 Ark. 136, 203 S. W. 274.

A juror cannot be examined to establish a ground for a new trial, except it be to establish as such ground that the verdict was made by lot, and, although the law has been changed allowing a verdict to be returned by nine jurors, the prohibition of the statute against its being impeached by a juror still applies, although the juror so attempting to impeach it did not sign the verdict. Section 3320, Crawford & Moses' Digest; *Southern Ry. Co.* v. *Simpson,* 140 Tenn. 458, 261 S. W. 677.

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