JEMELL v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

Opinion delivered December 10, 1928.

1. RAILROADS—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE. —The driver of an automobile is guilty of negligence in driving upon a public crossing without looking when he could have seen an approaching train if he had looked for it.
2. RAILROADS — CONTRIBUTORY NEGLIGENCE. — Where trainmen keeping a proper lookout and giving the statutory signals on approaching the crossing, saw plaintiff drive up to the crossing and then back down, they were justified in believing that he saw the approaching train, and where he started forward without looking to see the train, which he could have seen if he had looked, his contributory negligence, being greater than that of the trainmen, precluded any right of recovery.

Appeal from Lonoke Circuit Court; *W. J. Waggoner*, Judge; affirmed.

STATEMENT OF FACTS.

Jed O. Jemell sued the St. Louis Southwestern Railway Company for damages sustained by reason of personal injuries received by him at a public crossing by a passenger train which struck the automobile which he was driving. The defendant denied negligence on its part, and alleged contributory negligence on the part of the plaintiff.

The accident occurred at a public crossing over the defendant's line of railway at the town of Keevil, which is about half-way between Brinkley and Clarendon, all of which are stations on the line of the St. Louis Southwestern Railway Company in Monroe County, Arkansas. The plaintiff ran a grocery store about 50 or 60 feet from the railroad crossing in question, and had been living there at his store for about three years. He intended to go to Brinkley on the evening on which the accident occurred, and was driving an old Ford car. He stayed at the crossing until a fast freight train went by. He then went up to the crossing to go over the railroad track, and his engine stopped. There was a steep grade to the crossing, and he backed his car down the grade about 30 or 35 feet. He then started his car again up

the grade across the public crossing, and doesn't remember anything further. The train which struck him was a passenger train which was about three-fourths of a mile behind the freight train. The plaintiff started across the public crossing as soon as the freight train had passed. He did not hear any bell ring or whistle sound on the passenger train. He did not look to see whether any train was following the freight train or not. The plaintiff could have seen the passenger train if he had looked. He had never before seen the trains running so close together. Other witnesses for the plaintiff testified that the passenger train did not ring the bell or sound the whistle after it passed the station going towards the public crossing where the accident occurred.

According to the evidence for the defendant, the whistle was sounded and the bell was left ringing after the train passed the station of Keevil until the accident occurred at the public crossing in question. According to the testimony of the engineer of the passenger train, he lived at Pine Bluff, and had been in the employ of the railway company for 43 years at the time the accident occurred. There was a freight train running about three-quarters of a mile in front of the passenger train, and going about 35 or 40 miles an hour. He knew that the freight train did not expect to stop at Keevil, and he was expecting to be flagged, so he slowed down his train. He was running about 35 or 40 miles an hour, and he whistled for Keevil. He saw that he was not going to be flagged, and he began to reduce his speed so as not to crowd the freight train. He was on the right-hand side of his engine, and did not see the plaintiff, who approached the crossing from the other side of the track. The train was going north, and the fireman's position was on the left-hand side of the train. The first he knew that somebody was about to be hit was when the fireman holloed to him that a man was struck. The engineer applied the brakes in emergency, and stopped his train as quickly as he could. If he had stopped any quicker than he did, there was danger that

he would have turned his train over and injured the passengers in it. The train had not actually struck the car of the plaintiff when the fireman shouted, but was just about to strike it.

According to the testimony of the fireman, the passenger train was about three-fourths of a mile behind the freight train. The whistle was blown and the bell was being rung for the crossing. The fireman was keeping a watchout, and first saw the plaintiff when the train was about 200 feet from the crossing where the collision occurred. The plaintiff was coming towards the crossing in his car. He ran the front wheels of his car up even with the ties, and then rolled back down the grade of the crossing. He then drove back up the grade when the train was in about 50 feet of the crossing, and it looked as through the front wheel of the plaintiff's car hit the corner of the pilot of the engine. The pilot is the front end of the engine, and is commonly called the cow-catcher. When the plaintiff started up the grade at the crossing the second time, the engine of the train was about 50 feet from the crossing. The fireman notified the engineer that they were about to hit something. The engineer put on his brakes in emergency, and stopped the train as quickly as he could. The passenger train was making twenty miles an hour, and he did not know how fast the plaintiff was driving his car. When the fireman saw the plaintiff drive his car up to the end of the ties and then back down the grade, he had no idea that he would come up again. When the plaintiff rolled his car back down the grade, the fireman believed that he was going to stop until the train passed.

There was a rule of the railroad company which required that trains going in the same direction must keep at least ten minutes apart, except in closing up at a station.

There was a verdict and judgment for the defendant, and the plaintiff has appealed.

Trimble & Trimble and *Bogle & Sharp*, for appellant.

A. H. Kiskaddon, Carter, Jones & Turney, Charles A. Walls and *N. F. Lamb*, for appellee.

HART, C. J., (after stating the facts). We need not consider the alleged errors of the plaintiff with regard to the giving and refusing of instructions, for the reason that the court should have directed a verdict in favor of the defendant.

Counsel for the plaintiff seek a reversal of the judgment on the authority of *Adler* v. *St. Louis Southwestern Ry. Co.*, 171 Ark. 419, 284 S. W. 729; *Kelley* v. *De Queen & Eastern Ry. Co.*, 174 Ark. 1000, 298 S. W. 347, and other cases of like character which have construed § 8575 of Crawford & Moses' Digest, which provides, in all suits against railroads for personal injury caused by the running of trains in this State, contributory negligence shall not prevent a recovery where the negligence of the person so injured is of less degree than the negligence of the employees of the railroad company. We do not think the cases referred to have any application under the facts in the present case. In all of them there was a disputed question of fact as to whether the proper lookout required by the statute was kept, and whether or not the lack of keeping a proper lookout was the proximate cause of the accident, and therefore constituted negligence on the part of the company which could not bar a recovery notwithstanding the jury might also find that the injured person was guilty of contributory negligence.

In the case at bar the fireman, who was keeping a lookout on the engine of the passenger train, testified that he saw the plaintiff drive up to the edge of the ties at the public crossing where the accident occurred, and then back down the grade again. He then supposed that the plaintiff would not attempt to run up the grade again until after the train had passed. The plaintiff admitted that he did not look for the approach of the passenger train, and admitted that he could have seen it if he had looked. The track was straight at that point,

and the reason that the plaintiff did not see the approaching train was that he did not look. When he admits that he did not look, when, if he had looked, he could have stopped his car in time to have avoided the accident, he cannot recover, because his own negligence directly contributed to the happening of the accident, and there was no negligence whatever on the part of the defendant, because the fireman was justified, under the circumstances, in believing that the defendant, when he backed his car down the grade just before the accident, would not drive up the grade again in front of a rapidly approaching train. It was the duty of the plaintiff to use his sense of sight to avoid injury to himself when he was about to go upon the public crossing, which is admittedly a place of danger, where he could have seen an approaching train if he had looked for it. The time to look for his own protection was just before going up the grade upon the crossing. His own failure to observe this precaution was the proximate cause of the accident. As we have already seen, the fireman saw him approaching the crossing and then back down the grade just before the accident occurred. The fireman, under the circumstances, was justified in believing that the plaintiff would not again attempt to go upon the public crossing until after the train had passed.

The facts bring the case within the rule announced in *St. Louis-San Francisco Ry. Co.* v. *McClinton, ante,* p. 73, 9 S. W. (2d) 1060. As said in that case, while there is a presumption of negligence arising out of the fact that the plaintiff was injured by the operation of the train, where the undisputed evidence is such that it must necessarily appear that the plaintiff's negligence was greater than that of the operator of the train, a recovery is not authorized by § 8575 of Crawford & Moses' Digest.

It follows that, if the court should have directed a verdict for the defendant, no error prejudicial to the rights of the plaintiff was committed in giving or refusing instructions. Therefore the judgment will be affirmed.