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Howard F. Seybold v. Union Pacific Railroad Company : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

HOWARD F. SEYBOLD,
Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD COM-
PANY, a corporation,
Defendant and Respondent.

Case No.
7641

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

The parties will be referred to herein as they appeared in the lower court. Figures in parenthesis are the page number of the record.

The statement of facts in the plaintiff's brief is accepted by the defendant, except that it is incomplete. Actually, we believe that a full understanding of the evidence in this case can be arrived at only by reading the entire record. A brief statement of the facts is in this case of

questionable assistance and might be misleading. On page 8 of their brief counsel for the plaintiff state that the defendant introduced "the usual railroad evidence." Again on page 9 of their brief counsel state: "The railroad testimony here was just a little too good to be believed * * *." Counsel apparently infer that the defendant fabricated its defense. We can readily agree with them that no reasonable person could read the entire record and not conclude that one side or the other in this case presented testimony which was false. The discrepancies between the plaintiff's testimony and that of the six witnesses for the defendant are such that they just can't be explained on the basis of honest mistakes. It is true that the jury returned a verdict for the plaintiff and against the defendant; but we believe that an examination of the complete record will disclose to any reasonable person that the jury did so not because they believed or could have believed the plaintiff's testimony, but rather in spite of their disbelief of that testimony. It is true, also, that the law recognizes that the testimony of a single interested witness might be entitled to belief against the contrary testimony of a dozen or more disinterested witnesses. That rule has no application, however, where the testimony of the single witness is so unlikely and so contrary to the great weight of the evidence and the physical facts and the general experience of mankind as to be unworthy of belief. If the trial court granted the defendant's motion for judgment notwithstanding the jury's verdict because it concluded that no reasonable jury could possibly believe the defendant's testimony, such a conclusion would be jus-

tified. The rules of law concerning the conduct of a trial are neither so technical nor so strict as to leave the trial court helpless before an unjust verdict.

Counsel for the plaintiff in effect charge the defendant with permitting and encouraging, if not participating in, criminal conduct before the trial court. Such a charge cannot remain unchallenged. It emphasizes the need for a careful scrutiny of the entire record in order that the Supreme Court may itself evaluate the worth of the conflicting evidence. The following facts not adequately covered by counsel for the plaintiff in their brief are worthy of emphasis, although they, too, are insufficient to present a complete picture of the evidence.

The main portion of the town of Roberts, where the railroad crossing in question is located, is on Highway 91, which highway was parallel to and 79 feet distant from the defendant's Team Track and 122 feet from the Passing Track (37, 127). The flasher signal where the plaintiff claims he stopped his truck is 15 feet west from the center of the Team Track (127). There were several electric lights burning on the various stores fronting Highway 91 (38, 128-130). There was an arc light burning just south of the crossing (128). There was a second arc light burning east of Highway 91 between the highway and the Team Track and about 300 feet north of the crossing (129). The trackage area in defendant's yards at Roberts was visible from the sidewalk on the west side of Highway 91 (143, 130). The following witnesses testified there was a light on the front of the caboose which collided with the truck

plaintiff was driving: Enos Ray, Conductor, who was standing on the crossing and had a clear view of the caboose as it approached (63, 64); Gerald Sullivan, Engineer, who was in the cab of the defendant's engine and saw lights on the caboose when it was kicked down toward the crossing (101); Howard Kunze, Brakeman, who testified he was riding on the front or south end of the caboose, and who stated there were marker lights on the southwest corner thereof and that he himself carried an electric lantern which he was waving (112, 114, 121); George Dutson, who was working in a store on the west side of Highway 91 (136, 137); and Joe Tirre, who was standing on the sidewalk between a tavern and a hotel on the west side of Highway 91 (143). The plaintiff testified on direct examination that he approached the railroad crossing, saw the flasher lights operating, observed the engine north of the crossing on the main line track, concluded this engine was making the flasher signals operate and so proceeded over the crossing, keeping his eyes on the engine and the road ahead (20). He saw the caboose at a glance only for not more than a second before the collision and he did not notice any lights on it (21). On cross examination he testified he knew there were three tracks at this crossing; did not look north along the Team Track as he proceeded over this track; did look to the north along the Passing Track, but the locomotive headlight was flashing across the crossing and he did not see anything (39). He further testified there was no man on the caboose, although he did not have time to make proper observation since his first and only glance at the caboose was when it was 6 or 7 feet away and he had to look awfully fast (39, 40).

THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

The plaintiff's evidence with respect to the alleged negligence on the part of the defendant was so meager and speculative, and the defendant's evidence to the contrary was so overwhelming, that we feel the trial court would probably have been justified in granting the defendant's motion for judgment notwithstanding the verdict because of a failure of proof on this issue, alone. However, the defendant does not now rely upon the plaintiff's failure to prove that defendant was negligent, nor do we believe the trial court relied upon such a failure of proof in granting judgment to the defendant. The controlling issue in this case—the one which we believe prompted the court to grant its judgment notwithstanding the verdict, and the only issue that need be analyzed to demonstrate the correctness of the court's action—is the question of the plaintiff's contributory negligence. Therefore, without conceding the validity of the plaintiff's argument with respect to the defendant's negligence, we shall confine this brief to a consideration of the plaintiff's own negligence which was a contributing cause of this crossing accident, if not the sole cause thereof.

In our analysis of this issue we accept, of course, the fundamental rule asserted by counsel for the plaintiff that on this appeal the evidence must be viewed in the light most favorable to the plaintiff. However, to this rule must be added the equally elementary qualification that it is ap-

plicable only as to conflicting evidence which creates a question to be resolved by the jury.

The plaintiff's conduct must be analyzed in the light of all the circumstances. It appears to us there are only three possible views that anyone can take as to the facts revealed by the evidence in this case. The circumstances surrounding the accident might have been such as disclosed by the overwhelming evidence introduced by the defendant; the circumstances might have been such as disclosed by the plaintiff's evidence; or the circumstances might have been as related by the plaintiff, except only as to his testimony that there were no lights on the defendant's caboose. Analysis of the plaintiff's conduct separately in the light of each of these three possible views with respect to the circumstances of the accident will lead to the same conclusion—that the plaintiff was guilty of contributory negligence as a matter of law.

A. The Plaintiff was Guilty of Contributory Negligence as a Matter of Law if the Evidence of the Defendant was True.

Several witnesses testified that the crossing where this accident occurred was well lighted and the flasher warning signal was operating; that the defendant's engine was more than 400 feet north of the crossing; that there were lights on the caboose and one of defendant's employes was standing on the leading platform of the caboose waving a lighted lantern in his hand and yelling to warn the plaintiff; that another of defendant's employes was standing on the crossing with a lantern in his hand which he

was waving at the plaintiff; and finally, that the plaintiff failed to see or ignored all of these warnings but proceeded heedlessly over the crossing and into collision with the caboose. If plaintiff's conduct is measured in the light of such evidence, it is clear that he failed to satisfy the standard of care which the law imposed upon him. This is so clear as to obviate citation of authorities or further analysis.

In the event the court feels the defendant is not entitled to have its evidence considered to the exclusion of that presented by the plaintiff, it will be necessary to analyze the plaintiff's conduct in the light of the other two possible views of the evidence.

B. Plaintiff Was Guilty of Contributory Negligence as a Matter of Law if the Evidence of the Plaintiff is Accepted as True, Save Only as Plaintiff Testified there were No Lights on the Caboose.

We believe this view of the evidence, which is the third possibility mentioned above, was the one which was taken by the trial court. We believe that it is the view which should be taken by the Supreme Court on this appeal. The plaintiff testified there were no lights on the front end of the caboose. But even if all of the plaintiff's other testimony is accepted as true, this statement should be rejected because plaintiff's limited opportunity for observation and his mental attitude at the moment of observation render it insufficient to raise a conflict with the testimony of defendant's witnesses that the caboose was lighted.

This argument involves consideration of the law with respect to the sufficiency of negative testimony. Of course, negative testimony should not be disregarded merely because it is negative. Frequently, there is no way for a plaintiff in a negligence action to prove his case except by negative testimony, since proof of negligence often involves proof of a negative. It is nonetheless true that such evidence must be accepted with caution; that while the jury has the function of determining its weight, still it is for the court first to determine its sufficiency; and that rather definite standards have been established in this jurisdiction and elsewhere to test such sufficiency. It is the defendant's position that the trial court should have and did determine that the plaintiff's testimony failed to meet such standards and could not therefore be considered to raise a dispute as to the fact in this regard.

Most of the cases dealing with this subject involve the question as to whether or not audible signals were given. In principle, however, such cases are identical with the present one. Each involves the reliability of human sensory perception—in one case the reliability of the ear, and in the other, that of the eyes.

In *Russell v. Watkins*, 49 Utah 598, 164 P. 867, the Utah court, apparently for the first time, announced its position with respect to sufficiency of negative testimony. In this case, plaintiff, riding a motorcycle, approached a horse and wagon traveling in the opposite direction. The defendant was driving an automobile behind the wagon. He turned out to pass the wagon and collided head on with plaintiff's motorcycle. Both plaintiff and the driver of the

wagon testified defendant did not blow his horn. The court held that the defendant's positive testimony that he did blow his horn was uncontradicted. We quote what we believe to be the pertinent portion of the court's opinion:

“* * * When we take into consideration that the plaintiff, according to his own testimony, was at the time without thought and wholly unaware of the approach of defendant's automobile, that he was seated on a motorcycle moving at the rate of 15 to 20 miles per hour, that his view of the traveled road was obscured by Bryson's approaching wagon and horses, and of necessity had to cross immediately to the east side of the highway for safety and in passing the Bryson vehicle, and that the witness Bryson was, at the same time, apprehensively riveting his attention on the motorcycle approaching him, on account of his own safety, and through fear of the horse he was driving making him trouble, we may well believe these witnesses 'did not hear' the horn sounded by the defendant on his approach.

“The weight of negative testimony of witnesses, as to the giving of signals, ordinarily is for the jury to determine; but *when physical conditions and the attending circumstances are such as to render it highly improbable that they could hear, we think the rule should be and is otherwise.*” (Italics ours.)

In *Jensen v. Oregon Short Line R. Co.*, 59 Utah 367, 204 P. 101, there was negative testimony that no warning bell was rung by defendant's engine. This testimony was from a boy standing near the track, alongside the deceased. He and the deceased had their attention directed to another engine approaching from the opposite direction. The court held that this evidence did not present a conflict with posi-

tive evidence that the bell was ringing and the whistle blowing, and stated as follows:

“This is not a case in which the witness claims to have been listening for signals and failed to hear them. The witness in this case was not consciously listening at all. His attention was directed in another direction, and his mind was engrossed with other matters. Besides this, the freight train to which his attention was directed was pulling up-grade and making considerable noise. In view of all of these circumstances and conditions, it cannot be contended that the testimony of the witness Priest to the effect that he did not hear the bell rung or the whistle blow can be considered as evidence at all that the bell did not ring or that the whistle did not blow * * *.”

“In the face of such evidence as this, together with the conditions and circumstances heretofore enumerated, the writer is of the opinion that the statement of the witness Priest that he did not hear the whistle blow or the bell ring created no conflict in the evidence, and that therefore the testimony of defendant’s witnesses as to the warning given stands uncontradicted and unimpeached * * *.”

The subject is again treated by the Utah court in *Anderson v. Union Pacific R. Co.*, 76 Utah 324, 289 P. 146, wherein the court announced the following standard in measuring the sufficiency of negative testimony that no whistle was sounded or bell rung:

“* * * To entitle negative testimony such as that of Reddon and Thompson affecting the ringing of the bell and blowing of the whistle on the occasion in question to any probative value, it must be made to appear that they were paying some at-

tention to what actually occurred and that they were in a position where they could and did observe what was done or what was not done * * *."

And in *Clark, et al., v. Union Pacific, et al.*, 70 Utah 29, 257 P. 1050, the rule was announced in the following words:

"* * * Though a witness was not specially listening for the signals, or giving special attention to the occurrence, yet, if his attention was not engrossed or devoted to other things, *and it being made to appear that he was in position to hear, and in all likelihood would have heard them had they been given*, his testimony that he heard none is still of probative value and is not to be disregarded, though its weight be not regarded as great as the testimony of a witness who testified that he was specially watching and listening for signals, and heard none, or of a witness that they were or were not given * * *." (Italics ours.)

Finally, in *Hudson v. Union Pac. R. Co.* (not yet reported), the court concluded that the plaintiff's negative testimony that no bell was rung and no whistle blown was sufficient to create a conflict for the following reason, and we quote from the court's opinion:

"* * * *Mrs. Hudson was in a position where it is likely that she would have heard the whistle or at least the bell*, and, as there is no evidence that her attention was so absorbed in other matters that she would not have heard, a jury question is presented." (Italics ours.)

In *Bergman v. Northern Pac. Ry. Co.*, 14 F. 2d 580, which is an opinion from the Eighth Circuit Court of Ap-

peals, two witnesses to a fatal railroad crossing accident were in an automobile on the opposite side of the railroad crossing and came to a stop at the crossing just as the train passed. The weather was stormy, snow was falling, and the wind was blowing so that the sound of a whistle or bell would be carried away from these witnesses. The court, in holding that the testimony of these two witnesses presented no conflict with positive testimony that the crossing signals were given, stated as follows:

“* * * The applicable rule, well established by the authorities, is that, where the attention of those testifying to a negative was not attracted to the occurrence which they say they did not see or hear, and *where their situation was not such that they probably would have observed it*, their testimony is not inconsistent with that of credible witnesses who were in a situation favorable for observation and who testify affirmatively and positively to the occurrence * * *.” (Italics ours.)

To the same effect see *Pere Marquette Ry. Co. v. Anderson*, 29 F. 2d 479.

Miller v. Abel Construction Co., 140 Neb. 482, 300 N. W. 405, is a case in which the facts are quite similar to the case at bar. In that case, plaintiff was riding in an automobile being driven by her husband when it crashed into a road roller being operated by one of defendant's employes. Plaintiff and her husband testified that the defendant failed to have a red light displayed on the rear of the roller. As the automobile in which the plaintiff and her husband were riding approached the roller, at night-time, they passed another car traveling in the opposite

direction, and the driver of each automobile dimmed his headlights. Immediately on passing this automobile, plaintiff and her husband saw the roller for the first time, 10 or 15 feet in front of them. The court held that the testimony of plaintiff and her husband that there was no light on the roller raised no conflict with positive testimony that a red light was displayed. We quote from the court's decision in this case:

"The defendant's witnesses * * * testified positively that the red lantern on the roller was lighted prior to the collision. In the face of this positive testimony that the red light was displayed, the fact that there is testimony of one or more witnesses that they did not see it will not prevail against the positive testimony of several witnesses in making an issuable fact for the jury, *where the attention of the witnesses was not directed toward the red light at the time it is said to have been displayed, and where their position, mental condition, and the surroundings were not such as would raise a presumption that they would have seen it if it had been displayed* * * *." (Italics ours.)

In *Allison v. Boston & M. R.*, 88 N. H. 420, 190 A. 127, defendant produced no positive testimony that the crossing signals were given by its train crew. In this case, the accident occurred at a crossing on a foggy morning, and the plaintiff testified he did not hear any warning signal, nor did he see the defendant's train until an instant before the impact, when he saw a "black flash." The court held that, even though there was no positive evidence that the proper warning signals were given, the plaintiff's negative testimony was not sufficient to create a jury question on

the issue of warning signals because his testimony amounted to no more than a scintilla and provided no sufficient basis for a verdict. The court held that the burden of proving absence of warning signals rested upon the plaintiffs and that they had failed to adduce any legally sufficient evidence in support thereof.

Markusfeld v. Zahn (Tex.), 99 S. W. 2d 438, is also a case in which the facts are somewhat similar to the present one. Here the plaintiff and other witnesses, who were riding in plaintiff's automobile, testified that they did not see any clearance light on the defendant's truck as it approached them. It appeared, however, that plaintiff and his witnesses were blinded by the headlights of the defendant's truck as it approached. The court held their testimony that they saw no clearing light presented no jury question, in the face of positive testimony that there was such a light on the truck and that the finding of the jury that the defendant's truck did not have a front clearance light was so against the great weight and preponderance of the evidence as to be clearly wrong.

Wigmore states that before negative testimony can be accepted it must be made to appear that the witness was so situated that "in the ordinary course of events he would have heard or seen the fact had it occurred." *Wigmore on Evidence*, Third Edition, page 778.

If we measure plaintiff's testimony in this case by the standards set forth in the above cases, it becomes clear that it is insufficient to create a conflict with the defendant's positive evidence that the lights on the caboose were

burning. Plaintiff did not see the caboose at all at the time he claims to have stopped on the west side of the tracks. He testified the headlight of the locomotive flashed across the crossing, and he could not see anything down the Passing Track. He saw the caboose just momentarily, not more than a second before the collision. He wasn't looking for the caboose and wasn't expecting it. His eyes and his attention were directed to the stationary engine and the road ahead. He didn't have an opportunity to look for details. To him it was a large object, and nothing more, as he looked up and caught a fleeting momentary glance a second before the impact. One moment the plaintiff was proceeding over the crossing, not looking down the Passing Track, entirely unapprehensive as to any approaching object. The next moment he was rendered unconscious or dazed by the shock of the impact; and in the intervening second plaintiff had the fleeting glance upon which he bases his negative testimony. It was for the trial court to determine whether or not he had sustained the burden of showing that it was likely, or that it was probable, or that in the ordinary course of events he would see and remember that there were no lights on the front of the caboose. It would have been improper for the court to submit this question to the jury—just as improper as it would be for a trial court to submit to a jury the preliminary legal question as to the competency of offered testimony. If in granting the defendant's motion for judgment notwithstanding the verdict the court decided this question against the plaintiff, it cannot be said the trial court committed reversible error. This negative testimony offered by the plaintiff rests upon obser-

vation so nebulous as to preclude the possibility that plaintiff saw and remembered the details of the caboose so that he could speak authoritatively thereon. We submit that the plaintiff did not sustain the burden of establishing the sufficiency of his negative testimony and that there is therefore no evidence which conflicts with the positive testimony of defendant's several witnesses that lights were burning on the front end of the caboose.

We proceed, then, to consider the plaintiff's conduct from this view of the evidence. A brief review of plaintiff's testimony and of the defendant's undisputed evidence will be helpful in this analysis.

Plaintiff testified he knew there were three tracks at this crossing. He saw the flasher signal working and stopped at the signal. He did not look down the Team Track; he did look down the Passing Track but could see nothing. The locomotive headlight was flashing across the crossing. The only inference from this testimony is that he was trying to say and did say that he did not see the approaching caboose because the locomotive headlight obscured his vision. Nonetheless, he proceeded across the tracks, keeping his eyes on the stationary engine and the road ahead. The caboose and the trackage area were both visible to persons on the west side of Highway 91. The caboose was visible to the plaintiff as he proceeded down Highway 91 toward the crossing, had he but looked effectively then. It was visible to him as he turned at the approach to the crossing. Accepting the evidence most favorable to the plaintiff, it would have been visible to him

at the crossing except for the fact that the flashing locomotive headlights obscured his vision.

A motorist's duty when approaching a railroad crossing which he knows is there, and over which he knows trains operate, extends further than merely looking up and down the tracks and listening for approaching trains. It is his duty to look in such a manner and from such a position as to make his observation effective. In this case the plaintiff proceeded blindly over the crossing, not knowing whether it was safe to do so, or not. Unable to determine without further effort if a train was approaching along the Passing Track, the plaintiff took a chance and proceeded blindly across. After his first ineffective look down the Passing Track, he did not even look down that track again as he moved toward it but proceeded to and over the Team Track and across the 45 feet between the Team Track and the Passing Track, keeping his eyes on the engine and the road ahead. Plaintiff negligently took a chance and this chance resulted in the accident. He cannot hold the defendant for injuries thus sustained. As was simply and succinctly stated by an early New Jersey court in *Central R. Co. v. Smalley*, 61 N. J. L. 277, 39 A. 695:

“The duty of a person who is about to cross a railroad track is to be prudent, to look and to listen, and to do the things that will make looking and listening reasonably effective. If the vision or hearing of such a person is limited by permanent obstructions or disturbances, he should for that reason be cautious. If his vision or hearing is limited by transient obstructions or disturbances, under circumstances which oblige him to rely on the sense thus limited, he should wait until it has again become

efficient to warn him of peril * * * To go on a railroad crossing in the way of a train which can be neither seen or heard, but which would be either visible or audible except for some temporary hindrance to sight or hearing, is to be negligent."

In *Bates v. San Pedro, L. A. & S. L. R. Co.*, 38 Utah 568, 114 P. 527, the plaintiff drove a horse and buggy along a highway which paralleled the defendant's tracks for some distance, and then turned to the right at a crossing to pass over this track. He slowed up about 50 feet from the track and glanced in the direction from which the train approached but his view from that point was partially obstructed by an embankment. He then moved over the crossing without again looking in that direction and was struck by defendant's train. The court held that he was negligent as a matter of law, and in its opinion quotes Elliott on Railroads, Volume 3, Second Edition, paragraph 166, as follows:

"The duty to look and listen requires the traveler to exercise care to select a position from which an effective observation can be made. The mere fact of looking and listening is not always a performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective, and must usually continue to be on the lookout and exercise his faculties until he has crossed * * * He must look and listen for all trains, and not merely for some trains, for he has no right to proceed upon the assumption that trains will cross only at specified times. He has, indeed, no right in any case to omit to take precautions for his own safety upon the supposition or assumption that he may safely cross the track."

See, also, for an announcement and application of the rule that mere looking is not always sufficient, but that the observation must be from a position where vision is not obscured, *Drummond v. Union Pac. R. Co.*, 111 Utah 289, 177 P. 2d 903; and *Holmgren v. Union Pacific R. Co.*, . . . Utah . . . , 198 P. 2d 459.

Nabrotzky v. Salt Lake & Utah Ry. Co., 103 Utah 274, 135 P. 2d 115, was a case in which the facts were quite similar to those under consideration. The plaintiff Nabrotzky knew that there were flasher signals at a three-track crossing, and because they were not operating he assumed that no train was approaching. As he proceeded over the crossing his vision was temporarily obscured by the glare from a nearby arc light. After holding, in line with *Pippy v. Oregon Short Line R. Co.*, 79 Utah 439, 11 P. 2d 305, that the plaintiff could not rely solely upon the flasher signals, the court decided the plaintiff was guilty of contributory negligence as a matter of law. The following language from the court's opinion is particularly applicable in characterizing the plaintiff's conduct in our present case.

"He (the plaintiff) was conscious of the relative location of the tracks which were 37 feet apart. He still had a duty to look in the directions from which he knew the trains approached, and he could neither plunge nor edge forward blindly into a known danger zone. He had a duty to keep a proper lookout for his safety and to avoid contact with trains which he knew operated over such tracks at frequent intervals. His view was unobstructed, and he could have seen except for the fact he was blinded momentarily and the further fact he did not bother

to look to the right or to the left. He sought to excuse his admitted negligence in traveling forward onto the track of defendant in a temporarily blinded condition, by saying he heard no bell and no whistle. In view of the fact the windows of his car were up, the ordinary operation noise of a 1933 model automobile, and the fact he did not direct his attention to any signal after he observed the flasher signal was not working, he might very well not have heard any sound from defendant's train. However, even assuming such want of care on the part of defendant as claimed by plaintiff, it did not excuse plaintiff's palpable negligence."

To look when one's vision is obscured is no better than to fail to look at all. The plaintiff Seybold, after his first ineffective observation some 60 feet from the Passing Track, moved forward blindly into a known danger zone, without looking to right or to left. It is difficult to imagine a clearer case of negligence than for one to proceed blindly over a railroad crossing where a train might appear at any moment, without first ascertaining whether or not it is safe to do so. Assuming, as plaintiff in effect states, that the defendant temporarily obscured his vision with its locomotive headlight, still this did not excuse him from making effective observation along the Passing Track. Since he failed to look while traveling along Highway 91 at a time when the headlight would not interfere, it was his legal duty to choose a spot to make his observation along the Passing Track from which his observation could effectively be made. A motorist approaching a crossing is not required to choose the most advantageous position from which to make his observation, but if there is a position nearby

from which an effective observation can be made the fact that the view is obscured from the place where he chooses to look gives him no license to proceed blindly forward.

In *Ulrikson v. Chicago, M. St. P. & P. Ry. Co., et al.*, 64 S. D. 476, 268 N. W. 369, there were two tracks at the crossing where the accident occurred and these tracks were 15 feet apart. The plaintiff, who was familiar with the crossing, looked down the main track when he was about 75 to 80 feet from the passing track and 90 to 95 feet from the main line track. He observed no train approach at that time. When he was about 35 or 40 feet from the crossing, he again looked to the west, the direction from which the train approached, but a glare caused by the setting sun prevented an effective observation. Nonetheless, he proceeded forward and the train was first observed just a moment before the impact. In holding the driver of the automobile was guilty of contributory negligence as a matter of law, the court stated as follows:

“* * * So far as the driver is concerned, the general duty of care on approaching a railroad crossing has been rendered specific at least to the extent that it is definitely established as the law of this state that ‘it is the duty of an automobile driver approaching railroad tracks to look and listen where looking and listening will be effective, and that his failure to do so is contributory negligence as a matter of law.’ (Citing cases.)

“In the instant case the automobile driver was intimately acquainted with the crossing in question, having passed over it in the same direction, as he himself says, more than a thousand times. He knew that the view of the tracks to the west was obstructed

by buildings and that there was really very little vision to the west until the automobile reached a point about 100 feet north of the tracks and that from that point to the crossing visibility constantly increased. He knew that it was about the hour for the passage of a regular daily train from the west which did not stop at that crossing. He looked to the west at a time when he says he was protected from the glare of the sun by the Williams' house and at a point whence he estimated he could see along the track to the west about 130 feet. As a matter of fact, the visibility to the west from that point was probably nearer 190 feet. In any event, he did not see the train and in all probability it was not then within the range of his vision. From that point he continued on toward the track without any slackening of speed, and, while he states that he looked again to the west, he frankly concedes that when he did so the glare of the setting sun upon the windows of the automobile so blinded him that he could see nothing. That such looking to the west was not an effective looking within the meaning of our decisions is quite apparent. As stated by the Supreme Court of Washington in a case where the driver was blinded by an approaching headlight (*Jaquith v. Worden* (1913) 73 Wash. 349, 132 P. 33, 37, 48 L. R. A. (N. S.) 827), 'Had he been without eyes or had he closed them, he would have been in no worse position.' Nevertheless, with all the knowledge he had, knowing that his only view of the track to the west had been a short distance which he estimated at 130 feet, knowing that thereafter, although visibility to the west increased, yet he could not see at all when he looked to the west because of the blinding glare of the sun, this driver neither stopped his car nor slackened its speed, but proceeded blindly and heedlessly into the zone of danger. That he was contributorily negligent within the rule of former

decisions seems to us entirely clear. And such contributory negligence is not excused by the fact (which we assume) that appellant railway company negligently failed to maintain proper lookout when approaching the crossing and negligently omitted to sound proper signals therefor * * *."

In *Lamely v. Baltimore & O. S. W. R. Co.*, 298 F. 916, there were three tracks at the crossing. Plaintiff stopped his truck about 10 feet from the nearest track and looked to the east, the direction from which a train approached on the middle track, but his view was obscured by railroad cars on the nearest track and by ties piled alongside the right of way. Nonetheless, he proceeded over the crossing and was struck by the train. We quote the opinion of the court, as follows:

"* * * After attempting to make the observation, and being unable to do so, plaintiff 'took his chance' and drove across the track in front of an oncoming train. Giving full faith to plaintiff's explanation of the reasons which actuated him, we are unable to find any question for the jury. Respecting the situation there is no confusion or uncertainty due to conflicting testimony. Plaintiff's duty might well be said to have been an absolute duty. It was not one which might or might not have been recognized, due to the different views which different individuals might obtain from conflicting evidence. If plaintiff was under any obligation to ascertain at a highway crossing the coming of a train, we are satisfied he did not meet it. Not having looked when the view was unobstructed, he proceeded without ascertaining a fact essential to his safe passage.

"While he had a perfect right to travel the highway, the trains had the 'right of way' at the cross-

ing. Ordinary care required that he ascertain, by the use of his various senses, whether trains were coming; and if he neglected to look when the view was clear, he should have *ascertained* the fact—not merely ‘looked’ when the view was obscured or obstructed * * *.”

The plaintiff could have, without much inconvenience to him, backed his truck a short distance to where an effective observation could have been made. By thus performing the duty which the law imposes upon him, that is, the duty of choosing a place from which an effective observation can be made if one is available, this accident could have been avoided. If, then, we accept plaintiff’s testimony in all respects insofar as that testimony created a jury question, and if we analyze his conduct in the light of circumstances as thus revealed, we must conclude that the plaintiff was guilty of contributory negligence.

The major portion of this brief has been devoted to a consideration of this view of the facts because we believe it is the only one that can logically be considered. To complete this discussion, we now assume, however, that this view is not the proper one. We assume that the trial court was obligated to accept as true all of the plaintiff’s nebulous testimony and was further obligated to draw all reasonable inferences therefrom favorable to the plaintiff. This is the second possibility mentioned in the first portion of this brief.

C. Plaintiff was Guilty of Contributory Negligence as a Matter of Law if all of the Evidence Offered by the Plaintiff is Accepted as True.

The only difference between this view of the evidence and the one just considered is that it is assumed, contrary to the undisputed evidence, that there were no lights on the defendant's caboose. We assume also, of course, that the defendant's engine was about 75 feet from the crossing; that none of defendant's employes were on the caboose; and, further, that there was no employe guarding the crossing or warning the plaintiff by waving the lantern, or otherwise. A consideration of the plaintiff's conduct under this evidence will lead to the same conclusion.

The plaintiff testified he stopped his truck at the flasher signal; that he moved to the north up the Passing Track but the headlight was flashing across the crossing and he couldn't see anything; and he then drove his car to and over the Team Track over the 43 feet separating the Team Track and the Passing Track, and right up to and upon the Passing Track, keeping his eyes on the engine and the road ahead, and without making any further observation to determine if the Passing Track was clear. If the defendant's caboose was not lighted perhaps the plaintiff could not be expected to see it when he looked from a position 60 feet west of the Passing Track. The fact remains, however, that his own testimony discloses that his vision from that position was at least partially obscured by the engine headlight. Even though he could not be expected to see the caboose when he looked, the fact that he did not have a clear vision imposed upon him the duty of either moving back out of the glare of the headlight or of proceeding cautiously toward the Passing Track, keeping his automobile under proper control, and making a further ob-

servation near the track before moving onto it with his truck. The plaintiff testified he did not take any further precaution with respect to the Passing Track after his first observation from a position back by the flasher signal. If the plaintiff after his ineffective observation had moved his truck back out of the glare of the crossing, he would have seen an unlighted caboose moving south along the Passing Track. The plaintiff testified that it wasn't very easy to see at the crossing and that it was quite dark. This statement does not conflict with the testimony of the defendant's witness Anderson that the trackage area north of the crossing could be seen without difficulty from the town of Roberts at that time of night nor with the testimony of the defendant's witness Tirre that from his position on the west side of Highway 91 it was easy to see the Passing Track a moment before the collision. If the plaintiff did not want to move backward to a place where an unobscured observation could be made, he should at least have proceeded forward cautiously and made some observation when he was near the Passing Track.

“* * * where one enters the tracks of a railroad, having complied with a fixed duty before entering, he is not relieved of the obligation to continue to look, and, if there is intervening space between the tracks where the driver may better see and hear, he is bound to stop, look, and listen quite as much as he was before entering on the first track.” *Frank v. Reading Co.*, 297 Pa. 233, 146 A. 598.

We do not claim that the law in Utah required the plaintiff to stop before reaching the Passing Track, but it did require him to keep his automobile under control and, since

he could not be sure whether there was a train on that track or not, to make some further observation from a point near the track. See *Drummond v. Union Pac. R. Co.*, 111 Utah 289, 177 P. 2d 903. There are many cases which hold that a motorist must do more than merely look and listen as he approaches the crossing but must be vigilant every moment he is upon the crossing and that if the view of any one of the tracks at the crossing is obscured the motorist must approach that track cautiously and make observation from a point near the track before proceeding over it. See *Witkowski v. Lehigh Valley R. Co.*, 338 Pa. 510, 12 A. 2d 980; *Scott v. Kurn, et al.*, 343 Mo. 1210, 126 S. W. 2d 185; *Beckwith v. Spokane International Ry. Co.*, 120 Wash. 91, 206 P. 921; *Rule v. Atchison, T. & S. F. Ry. Co.*, 107 Kan. 479, 192 P. 729; *Grimsley v. Northern Pac. Ry. Co.*, 187 F. 587; *Ramsey v. Baltimore & O. R. Co.*, 336 Pa. 498, 9 A. 2d 348. There was a space of approximately 60 feet between the place where he made his ineffective observation and the point of the accident; there was a space of 43 feet after he passed over the Team Track within which he could have kept his truck under control and made some observation along the Passing Track. This he did not choose to do but relied, instead, upon a previous observation which he knew afforded him no reasonable assurance of safety. It is now plain that if the plaintiff had taken this ordinary, reasonable precaution he could have and would have seen the approaching caboose. This is absolutely demonstrated by the fact that he actually did see it, lighted or not, when he was at or near the Passing Track, even though he was neither looking for it nor pay-

ing any attention at all to the track. The conclusion is inescapable, even accepting all of the plaintiff's testimony, that he could have made an effective observation immediately before driving on to the Passing Track and that he failed to do so. All of the cases we have been able to find and which we cited herein define such conduct as negligence as a matter of law. Consequently, it matters not what view is taken of the facts of the accident as disclosed by the evidence. All paths lead to the same conclusion: Plaintiff was guilty of contributory negligence as a matter of law.

D. *There was no Excuse for the Plaintiff's Negligence.*

Counsel for the plaintiff seek to excuse plaintiff's heedless conduct by stating he was confused and apprehensive of danger from the stationary switch engine on the main track north of the crossing. In support of this position they cite *Newton v. Oregon Short Line R. Co.*, 43 Utah 219, 134 P. 567, and *Malizia v. Oregon Short Line R. Co.*, 53 Utah 122, 178 P. 756. The facts of this case do not bring it within the rule as announced in the *Newton* and *Malizia* cases. That rule is explained in *Jensen v. Oregon Short Line R. Co.*, *supra*, as follows:

“The controlling fact * * * is that the person attempting to cross or use the street was at the time of the accident apparently or actually confronted with a ‘multiplicity of dangers’ which tended to confuse, mislead or disconcert the mind to such an extent as to leave the matter of contributory negligence in doubt.”

The plaintiff was neither confused by nor reasonably apprehensive of personal danger from the stationary steam engine. He observed that this engine was not moving. While it is true he could not rely upon its not moving toward the crossing, still it did not interfere with or prevent a safe movement over either the Team Track or the Passing Track. The Main Track upon which the engine was standing was 60 feet from the Team Track and 17 feet from the Passing Track. Plaintiff testified that he knew the engine was on the Main Track, and he knew there were two other nearer tracks at the crossing. He knew that the engine was not a source of immediate danger to him while moving over either of the two nearer tracks. It was neither reasonable nor excusable that he should ignore the immediate potential danger from movements on the tracks he was approaching in order to concentrate on an immobile engine some distance north of the crossing on the last track he was to cross. The "multiplicity of dangers" rule is a good, humanitarian one when properly applied. It should be limited, however, to a situation where the plaintiff is actually and reasonably confused or apprehensive of immediate danger from other sources. It should not be used as a sanction for heedless conduct where no actual or apparent multiplicity of dangers exists. An overextension of the doctrine would destroy the balance which it creates. The words of the court in *Wilkinson v. Oregon Short Line R. Co.*, 35 Utah 110, 99 P. 466, are, we think, particularly appropriate.

** * * If it ordinarily constitutes negligence to disregard a duty imposed by law, there is no reason why the one who fails to discharge the

duty shall not bear the consequences of his own act in so far at least as those consequences affect him, unless the law affords him some excuse for omitting to perform the duty imposed. The rule was not conceived for the purpose of shielding either the traveler or the railroad company. The company must for its negligence respond to all who may be innocently injured by a collision at a crossing as well as bear the injury to its property. The only immunity it obtains is against the traveler who, by his own careless act, brought on or directly contributed to his own injuries, and the traveler is equally immune against the conduct by the company for any injury it may have sustained by a collision where the traveler and the company omitted an act required by law or failed to exercise due care. In such event, in the eye of the law, the parties are in equal fault, and hence will not be heard to complain of the concurring acts of negligence as against each other. Under the evidence in this case, no court would hesitate to pronounce the act of the railroad company in not giving any warning in approaching the crossing as constituting negligence as a matter of law. By the same token, the law ought not to shield the traveler who omitted to perform a duty imposed upon him for his own safety by the same law, and for which omission he tenders no legal excuse. If the case were one where the question was merely whether ordinary care was or was not exercised in view of all the circumstances, we would have no hesitancy in leaving the questions of both negligence and contributory negligence to the jury. This is not such a case, however. It is a case where the law itself declares that the omission to do a certain thing constitutes negligence. In such a case we have no right, whatever may be our desire, to cast the duty we ought to discharge upon others. In such a case the jury could, at most, excuse either the one or the

other of the negligent parties from the consequences of his concurring acts of negligence. This, in view of the great danger incident to collisions on public crossings, the law does not sanction, but requires the court to pronounce judgment when the facts are undisputed or conceded that the party complaining is himself in fault. If once the rule be relaxed so as to permit the traveler to say that there were other things which diverted his attention, and for that reason he did not look or listen when such things in no way were threatening his personal safety, then the rule may as well be abrogated, and the whole matter be left to the jury in all crossing accidents, as is done in other cases of injury through negligence. We think where the evidence is clear, as in this case, the rule is a wholesome one, and ought not to be weakened by unsubstantial distinctions * * *."

When all the distinctions and excuses raised by counsel for the plaintiff are viewed in the proper perspective, the fact remains free from substantial doubt that the plaintiff heedlessly drove his truck over the crossing. The only inferences that can be drawn from the evidence are that he failed to look down the Passing Track at all, or that he looked but failed to see what was to be seen, or, finally, that he looked but failed to see the approaching caboose because his vision was impaired and, yet, blindly took a chance. He claims to have looked but to have seen nothing because of the fact that the headlight obscured his view. If true, this gave no license to assume that all was clear. After such ineffective observation he should not have traveled the remaining 60 feet to the Passing Track without looking to the north or to the south along that track. In so doing, he breached the positive duty imposed upon him

by law and was guilty of negligent conduct which proximately contributed to cause this accident. The plaintiff cannot complain that the trial court refused to let the case rest with the jury because his own testimony demonstrated his contributory negligence and removed any substantial doubt as to the defendant's non-liability.

CONCLUSION

The judgment which the court rendered against the plaintiff was proper and should be affirmed.

Respectfully submitted,

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