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Negligence -- Contributory -- Obstructions of View at Railroad Crossings

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Court to find a sufficiently "specific and perfected" lien under Revised Statutes, Section 3466, and now under Section 3670 of the Internal Revenue Code, indicates that amendments to these two sections are highly desirable. Such amendments should bring these sections into conformity with the federal priority philosophy Congress has expressed elsewhere,[58] thereby eliminating the remaining vestiges of the secret, unrecorded federal claim and achieving a greater degree of certainty as to creditors' rights. These goals appear impossible of attainment under the present state of the law.

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Negligence—Contributory—Obstructions of View at Railroad Crossings

The failure of a traveler crossing a railroad to obtain a clear view of the track from any point, when he may do so in safety, renders him contributorily negligent as a matter of law in North Carolina, and his case will not be allowed to go to the jury.[1] This rule was recently illustrated by the case of *Parker v. Atlantic Coast Line R.R.*[2] Plaintiff stopped at a farm crossing with the front of his truck eight or ten feet from the near rail, at a point where an embankment prevented his seeing more than seventy-five to eighty yards up the track. He then entered the crossing and collided with a train. The court held motion for nonsuit should have been granted since plaintiff's evidence disclosed that he could have stopped in safety at a point which afforded him clear vision. This rule has had sustained approval since *Harrison v. North Carolina R.R.*,[3] but its application has not always been certain.

The general principles of the duty of a traveler in crossing a railroad track have been many times repeated.[4] It is generally held that

tainty. For an excellent example of the effect on lower federal courts, see Bank of Wrangell v. Alaska Lumber Mills, 84 F. Supp. 1 (D. C. Alaska 1949) (admitting the impossibility of reconciling the decisions, and the dicta, the court held that a mortgage, in a lien jurisdiction, was superior to federal priority under Section 3466).

[58] The Bankruptcy Act §§64 and 67, 30 STAT. 563 (1898), as amended, 11 U. S. C. §104 (1946) and 30 STAT. 564 (1898), as amended, 11 U. S. C. §107 (1946).

[1] This rule, of course, assumes the existence of some negligence on the part of the defendant railroad, which will generally be a failure to give proper warning. This note does not attempt to deal with the problem of what constitutes negligence on the part of the railroad. For a general discussion of the problem of crossing accidents see Blair, *Automobile Accidents at Railroad Crossings in North Carolina*, 23 N. C. L. REV. 223 (1945).

[2] 232 N. C. 472, 61 S. E. 2d 370 (1950).

[3] 194 N. C. 656, 140 S. E. 598 (1927).

[4] The basic North Carolina cases on duties of both parties at a railroad crossing are probably Johnson v. Seaboard Air Line Ry., 163 N. C. 431, 79 S. E. 690 (1913); Coleman v. A. C. L. R.R., 153 N. C. 322, 69 S. E. 251 (1910); Cooper v. N. C. R.R., 140 N. C. 209, 52 S. E. 932 (1905).

the duty to stop, look, and listen is relative, depending on the situation in the particular case. A failure to exercise these precautions is a circumstance for the consideration of the jury in determining contributory negligence,[5] though in some states a failure to stop is contributory negligence as a matter of law.[6]

The duty to stop arises most frequently in cases where there is some obstruction to the view of the track immediately adjacent to the crossing. The greater the danger at a crossing, the greater is the care required of both the traveler and the railroad.[7] The increased duty of the railroad to give warning may be taken into account by the traveler in crossing and by the court in establishing the standard of care required of him.[8] The duty to look and listen is continuing and should be performed at a time and place when looking and listening will be effective.[9] The traveler must select a vantage point from which he can see the track, even though he may have stopped once already where the view was obstructed.[10] The precise number of feet from the track where observation should be made cannot be set down as a rule,[11] but the duty does not require that a traveler go beyond a place of safety into the zone of danger itself.[12]

If vision is completely obstructed by obstacles or obscured by weather conditions, or if a clear view may be obtained only in the area of danger itself, the traveler in going forward may ordinarily rely on his sense of hearing and on the increased duty of the railroad to give warning.[13] There is no absolute duty for the driver of a vehicle to alight and look up and down the track before proceeding across.[14]

[5] Pokora v. Wabash R.R., 292 U. S. 98 (1933); Elliot v. Chicago, M. & St. P. Ry., 150 U. S. 245 (1893); Harris v. Black Mountain Ry., 199 N. C. 798, 156 S. E. 102 (1930). N. C. GEN. STAT. §20-143 (1943) specifies that a failure to stop shall not be contributory negligence *per se*, and this is interpreted to mean that a failure to stop is a circumstance to be considered in determining contributory negligence, whether by the court or the jury. Conn v. Seaboard Air Line Ry., 201 N. C. 157, 159 S. E. 331 (1931).

[6] This is known as the "Pennsylvania Rule." Benner v. Philadelphia & R. R.R., 262 Pa. 307, 105 Atl. 283 (1918).

[7] Johnson v. Seaboard Air Line Ry., 163 N. C. 431, 79 S. E. 690 (1913).

[8] Pokora v. Wabash R.R., 292 U. S. 98 (1933).

[9] Kilmer v. Norfolk & Western R.R., 45 F. 2d 532 (5th Cir. 1930); Godwin v. A. C. L. R.R., 202 N. C. 1, 161 S. E. 541 (1941); Johnson v. Seaboard Air Line Ry., 163 N. C. 431, 79 S. E. 690 (1913).

[10] Pennsylvania Ry. v. Yingling, 158 Md. 169, 129 Atl. 36 (1925); Parker v. A. C. L. R.R., 232 N. C. 472, 61 S.E. 2d 370 (1950).

[11] N. C. GEN. STAT. §20-143 (1943) requires motorists to stop within 50 feet of the tracks.

[12] Parker v. A. C. L. R.R., 232 N. C. 472, 61 S. E. 2d 370 (1950); Pokora v. Wabash R.R., 292 U. S. 98 (1933).

[13] Pokora v. Wabash Ry., 292 U. S. 98 (1933); Cooper v. N. C. R.R., 140 N. C. 209, 52 S. E. 932 (1905).

[14] In a famous dictum, Justice Holmes once laid down the rule that the driver must get out if necessary in order to see the track. B. & O. R.R. v. Goodman,

The above-mentioned principles have fairly general acceptance. It is primarily in their application as a question of law for the court or of fact for the jury that the differences among the various jurisdictions appear. It is the general rule that where the view at a crossing is not obstructed or obscured in any way, and the traveler enters upon the crossing oblivious to his danger and is injured, he is guilty of contributory negligence which bars his recovery as a matter of law.[15] Of course, if the plaintiff saw the train coming and still attempted unsuccessfully to get across, nonsuit is proper.[16]

If the view of the tracks is in some way obstructed, the prevailing rule seems to be that whether the traveler selected the proper place for looking and listening is a question of fact for the jury, and the plaintiff will not be denied recovery as a matter of law.[17] Another line of authority has developed since the much-discussed case of *Baltimore & Ohio Ry. v. Goodman*,[18] in which the United States Supreme Court found contributory negligence as a matter of law where a motorist failed to obtain a clear view in safety after passing obstructions close to the track. As a part of this development, North Carolina, in the case of *Harrison v. North Carolina R.R.* (in which the court quoted extensively from the *Goodman* opinion), switched over from its earlier adherence to the general rule and held nonsuit proper in this situation.[19] Since the *Harrison* case, North Carolina has applied its rule in numerous other cases.

The practical application of the rule leaves questions in need of clarification. At what point does it become unsafe to approach closer to a crossing in order to look, and at what point does it become permissible to rely upon the sense of hearing and upon warnings by the railroad? The answer, of course, depends in large part upon the manner

275 U. S. 66 (1927). This rule was disavowed in Pokora v. Wabash Ry., 292 U. S. 98 (1933), in which the court said that "a driver may learn nothing by getting out about the perils which lurk beyond. By the time he regains his seat and sets the car in motion, the hidden train may be upon him."

[15] Pokora v. Wabash Ry., 292 U. S. 98 (1933); Bailey v. N. C. R.R., 223 N. C. 244, 25 S. E. 2d 833 (1943).

[16] McCrimmon v. Powell, 221 N. C. 216, 19 S. E. 2d 880 (1942); Lamm v. A. C. L. R.R., 213 N. C. 216, 195 S. E. 381 (1938).

[17] Morgan v. Detroit, J. & C. R.R., 234 Mich. 497, 208 N. W. 434 (1926); Newhard v. Pennsylvania R.R., 153 Pa. 417, 26 Atl. 106 (1893); Morrissey v. Chicago, M. & St. P. Ry., 55 S. D. 497, 226 N. W. 731 (1920). *Contra:* Pokora v. Wabash Ry., 292 U. S. 98 (1933); Pennsylvania R.R. v. Yingling, 148 Md. 169, 129 Atl. 136 (1925).

[18] 275 U. S. 66 (1927), where the obstructions were 18 feet from the track. Comment 6 N. C. L. REV. 212.

[19] 194 N. C. 656, 140 S. E. 598 (1927). The earlier North Carolina rule is expressed in Shepard v. Norfolk & Southern R.R., 166 N. C. 539, 82 S. E. 872 (1914), and Johnson v. Seaboard Air Line Ry., 163 N. C. 431, 79 S. E. 690 (1913).

of transportation and the degree of mobility which the traveler possesses.[20] In reckoning the limit of distance from the track to which a safe approach may be made with a vehicle, the overhang of the locomotive beyond the side of the track and the projection of the vehicle forward of the driver have to be considered.[21] Secondly, how far must the view of the track extend to be considered "clear"? In most of the cases where nonsuit is granted, the track is "straight," or clear as "far as you can see."[22] Where witnesses have given estimates of the distance for which the view was clear, nonsuit has been granted when the estimate was as low as seventy-five or eighty yards, but for the most part the estimates have been several hundred yards or more.[23] If the view is not completely obstructed by virtue of some obstacle immediately beside the crossing, but the lay of the track itself is such that an approaching train is hidden until it is almost upon the crossing, the chances of getting to the jury increase. This may occur where the track curves sharply[24] or is hidden from view by a deep cut or hollow.[25]

[20] Wehe v. Atchison, T. & S. F. R.R., 97 Kan. 794, 156 P. 742 (1916).

[21] Thus it would seem that the closest safe distance for a motor vehicle would be at a point where the driver would be in the neighborhood of 10 feet from the track, allowing 2 to 3 feet for the locomotive overhang, 6 or 7 feet for the projection of the vehicle in front of the driver, and clearance. Thus, where obstructions come to within 3 or 4 feet of the near rail, nonsuit is not granted. Lincoln v. A. C. L. R.R., 207 N. C. 787, 178 S. E. 601 (1935); Collett v. Southern Ry., 198 N. C. 760, 153 S. E. 405 (1930). The same decision was reached where the obstruction was 8 to 10 feet from the near rail. White v. N. C. R.R., 216 N. C. 79, 3 S. E. 2d 310 (1939). A survey of the cases shows that the closest point to which obstructions have extended with nonsuit resulting was 10 to 15 feet from the track. Godwin v. A. C. L. R.R., 202 N. C. 1, 161 S. E. 541 (1931); Harrison v. N. C. R.R., 194 N. C. 656, 140 S. E. 598 (1927). In Parker v. A. C. L. R.R., the driver stopped with the front end of his truck 8 to 10 feet from the track, and this placed him about 15 feet away. For obstructions occurring beyond this range, there have been numerous instances of nonsuit. Caruthers v. Southern Ry., 232 N. C. 183, 59 S. E. 2d 782 (1950) (24 feet); Hampton v. Hawkins, 219 N. C. 205, 13 S. E. 2d 227 (1941) (30 feet). Horsedrawn vehicles have a long projection forward of the driver and, in addition, probably would be allowed a greater area of danger because of the excitability of the animals. Bicyclists and pedestrians have a much greater degree of mobility and a shorter distance of danger, but even so, if a pedestrian has to look around a box car immediately beside the track to see, the case may be allowed to go to the jury. Riggsbee v. A. C. L. R.R., 190 N. C. 231, 129 S. E. 580 (1930). As a practical matter, it would seem unlikely that obstructions would come to within 10 feet of the tracks except in the case of other railway cars standing on a parallel track.

[22] Boyd v. A. C. L. R.R., 232 N. C. 171, 59 S. E. 2d 789 (1950); McCrimmon v. Powell, 221 N. C. 216, 19 S. E. 2d 880 (1942); Godwin v. A. C. L. R.R., 220 N. C. 281, 17 S. E. 2d 137 (1941).

[23] Parker v. A. C. L. R.R., 232 N. C. 472, 61 S. E. 2d 370 (1950); Penland v. Southern Ry., 228 N. C. 528, 46 S. E. 2d 303 (1948); Eller v. N. C. R.R., 200 N. C. 527, 157 S. E. 800 (1931). In Tart v. Southern Ry., 202 N. C. 52, 161 S. E. 720 (1931) the view was straight for three-quarters of a mile.

[24] Loflin v. N. C. R.R., 210 N. C. 404, 186 S. E. 493 (1936); Baker v. High Point, T. & D. R.R., 202 N. C. 478, 163 S. E. 452 (1932); Moseley v. A. C. L. R.R., 197 N. C. 628, 150 S. E. 184 (1929).

[25] Bundy v. Powell, 229 N. C. 707, 51 S. E. 2d 307 (1948).

The factors of decision are not so limited, however, as the foregoing discussion might seem to indicate. In determining whether a case of negligence and contributory negligence is one for the jury or one exclusively for the court, "the factors of decision are numerous and complicated, and practically every case must stand on its own bottom."[26] The fact that the traveler was familiar with the crossing or with the train schedule is an additional factor in establishing negligence; conversely, unfamiliarity with either is an aid in getting to the jury.[27] The type of road crossing the track is also important, as obviously the traveler has less reason to expect a warning and should use more care at a farm crossing than at a major highway.[28] Other factors which may have weight in carrying the case to the jury are fault of the railroad in causing the obstruction,[29] presence of weather or heavy traffic conditions increasing the difficulty of seeing,[30] and some degree of reliance by the traveler on the presence of a watchman or warning signals.[31] Although for some time after the *Harrison* case the application of its rule was somewhat uncertain, and although one case has suggested that there are two lines of cases on the subject,[32] it seems that the contradictions may be explained in part by the presence of some of the above factors and in part by an increasing tendency of the Court to decide more railroad crossing cases as questions of law.

Where the obstruction to the view is of a temporary or transient character the traveler must wait for it to cease or pass on, in order effectively to fulfill his duty to look and listen.[33] The prevailing rule is that failure to wait until the view clears is contributory negligence as a matter of law.[34] North Carolina in following this rule grants nonsuit where the traveler fails to wait long enough to get a clear view after

[26] Cole v. Koonce, 214 N. C. 188, 198 S. E. 637 (1938).

[27] Nonsuit was given in Riddle v. Southern Ry., 114 F. 2d 259 (M. D. N. C. 1940); Parker v. A. C. L. R.R., 232 N. C. 472, 61 S. E. 2d 370 (1950); Caruthers v. Southern Ry., 232 N. C. 183, 59 S. E. 2d 782 (1950); and several other cases in which familiarity was emphasized, and denied in Harper v. Seaboard Air Line Ry., 211 N. C. 398, 190 S. E. 750 (1937), where the driver was unfamiliar with the crossing.

[28] Parker v. A. C. L. R.R., 232 N. C. 472, 61 S. E. 2d 370 (1950).

[29] Hill v. Norfolk & Southern R.R., 195 N. C. 605, 143 S. E. 129 (1929); Blum v. Southern Ry., 187 N. C. 640, 122 S. E. 562 (1924).

[30] Harper v. Seaboard Air Line Ry., 211 N. C. 398, 190 S. E. 750 (1937).

[31] Finch v. N. C. R.R., 195 N. C. 190, 141 S. E. 550 (1928).

[32] Eller v. N. C. R.R., 200 N. C. 527, 157 S. E. 800 (1931).

[33] Pennsylvania R.R. v. Yingling, 148 Md. 169, 129 Atl. 36 (1925); Dickinson v. Erie R.R., 81 N. J. L. 464, 81 Atl. 104 (1911); Eller v. N. C. R.R., 200 N. C. 527, 157 S. E. 800 (1931)

[34] Fletcher v. Fitchburg R.R., 149 Mass. 127, 21 N. E. 302 (1889); Pennsylvania R.R. v. Rusynik, 117 Ohio St. 530, 159 N. E. 826 (1927). *Contra:* Cook v. A. C. L. R.R., 196 S. C. 230, 13 S. E. 2d 1 (1941).

another train[35] or automobile[36] passes, or until smoke and steam from another train lifts from the crossing.[37]

Where the view is obscured by adverse weather conditions, the traveler may rely on warnings by the railroad and on greater use of hearing. Thus, if there is fog[38] or snow,[39] or the night is dark and rainy,[40] the jury is allowed to pass on the question of whether plaintiff maintained a proper lookout. But the weather conditions must be such as to cut down visibility substantially: a cold and foggy morning with hazy atmosphere has been called a borderline case,[41] and a drizzling rain in the daytime has been held not enough to prevent nonsuit.[42]

Ordinarily the negligence of the driver of a vehicle will not be imputed to a passenger, but where the driver's negligence is so palpable and gross as to be the proximate cause of the accident, it "insulates" the first occurring negligence as a matter of law.[43] Negligence of the driver under the rule *Harrison* case in failing to obtain a clear view after passing obstructions may have this result. But because the negligence of the driver must be palpable and gross, the Court would probably be more reluctant to declare that the railroad's negligence was insulated as a matter of law in a suit by a guest, on the same showing of negligence. This relaxation of the rule would allow his case to go to the jury where the obstruction to view was farther from the track than would be allowed where the driver was suing.[44]

The doctrine of "last clear chance" has not been applied in the cases where the driver's failure to obtain a clear view before entering a railroad crossing has resulted in nonsuit. The Court gives the reason that "the doctrine of last clear chance does not apply where the contributory negligence of the injured party bars recovery as a matter of law."[45] It would seem, however, that the real reason for not applying

[35] Moore v. A. C. L. R.R., 203 N. C. 275, 165 S. E. 708 (1932).
[36] Eller v. N. C. R.R., 200 N. C. 527, 157 S. E. 800 (1931).
[37] Lee v. Southern Ry., 180 N. C. 413, 105 S. E. 15 (1920).
[38] Meacham v. Southern Ry., 213 N. C. 609, 197 S. E. 189 (1938); Dancy v. A. C. L. R.R., 204 N. C. 303, 168 S. E. 200 (1933).
[39] King v. Seaboard Air Line Ry., 200 N. C. 398, 157 S. E. 28 (1931).
[40] Collett v. Southern Ry., 198 N. C. 760, 153 S. E. 405 (1930).
[41] Harper v. Norfolk & Western R.R., 230 N. C. 179, 52 S. E. 2d 717 (1949).
[42] Rimmer v. Southern Ry., 208 N. C. 198, 179 S. E. 753 (1935).
[43] Hinnant v. A. C. L. R.R., 202 N. C. 489, 163 S. E. 555 (1932); Blair, *Automobile Accidents at Railroad Crossings in North Carolina*, 23 N. C. L. REV. 223 (1945). On the subject of the duty of an automobile passenger generally, see Note, 28 N. C. L. REV. 302 (1950).
[44] George v. Atlantic & C. R.R., 207 N. C. 457, 177 S. E. 324 (1934). In Jeffries v. Powell, 221 N. C. 415, 20 S. E. 2d 561 (1942), a nonsuit was granted against the passenger when there was nothing to obstruct the view of the driver past bushes 30 to 40 feet from the track.
[45] Rimmer v. Southern Ry., 208 N. C. 198, 179 S. E. 753 (1935); Redmon v. Southern Ry., 195 N. C. 764, 143 S. E. 829 (1928).

the doctrine in these cases is that the engineer does not have opportunity to stop in time to prevent the collision after the plaintiff comes from behind obstructions onto the track in front of the train.[46]

The present strict application of the rule that a traveler must, if possible, get a clear view of a railroad track which he is crossing may be a part of an increasing trend by the North Carolina Court to decide contributory negligence cases as questions of law.[47] At any rate, the acceptance of this rule is now settled. The conflicting cases on its application can probably be explained by the presence of modifying factors, rather than by reason of any doubt as to its acceptance.

DICKSON MCLEAN, JR.

Negotiable Instruments—Discharge of Prior Party by Statute of Limitations—Effect on Guarantor and Surety

If the statute of limitations has run in favor of the maker of a negotiable instrument, is a guarantor or surety on the instrument discharged under Negotiable Instruments Law §120(3),[1] which provides that "A person secondarily liable on the instrument is discharged by the discharge of a prior party?" This question gives rise to two fundamental problems: first, is a surety or guarantor secondarily liable under the Negotiable Instruments Law; second, does §120(3) include a discharge of a prior party by the statute of limitations?

Negotiable Instruments Law §192[2] stipulates that "The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable." Obviously, under this section, the liability of a guarantor of collection is secondary, as it is dependent upon the creditor pursuing the principal debtor with due diligence. Whether the liability of a guarantor of payment is primary or secondary, however, is subject to some dispute. One court has held that a guarantor of payment is primarily liable, but only after the maturity of the note, since after

[46] The rule of "last clear chance" is applied in some cases in which the plaintiff is guilty of contributory negligence as a matter of law, as where he goes to sleep on the tracks. Note, 16 N. C. L. REV. 50 (1938). In Miller v. Southern Ry., 205 N. C. 17, 169 S. E. 711 (1933), where the view was obstructed, the court said the doctrine would not be applied because there was no evidence that the engineer could have stopped after he discovered the driver was in a position of peril, and this seems the better justification for refusing the application of the rule in this situation.

[47] This trend may be reflected in the "insulation" of the railroad's negligence by the driver's negligence depriving a passenger of his right to recover, and finding contributory negligence as a matter of law where an automobile driver "outruns his headlights." Note, 27 N. C. L. REV. 153 (1948).

[1] N. C. GEN. STAT. §25-127(3) (1943).
[2] N. C. GEN. STAT. §25-2 (1943).